

AUSTRALIAN EDUCATION UNION
SUBMISSION TO SENATE ECONOMICS
REFERENCES COMMITTEE

Workplace Relations and Other Legislation
Amendment Bill 1996

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Introduction

1. The Australian Education Union (AEU) is a federally registered organisation and has in excess of 160,000 members in all States and Territories. The AEU's membership primarily consists of teachers and allied staff employed in government primary and secondary schools and pre-schools and kindergartens, Aboriginal and Torres Strait Islander education workers, employees in the central and regional offices of the various State and Territory departments of education, teachers, tutors and other employees in TAFE colleges or similar institutions, teachers and supervisors in the disability services area and employees in Adult Migration Education Services. The majority (in excess of 60%) of the AEU's membership are women. Over 85% of government school teachers are members of the AEU.

Terms and conditions of employment

2. Historically, the terms and conditions of employment of our government school members in the States have been regulated through State legislation, awards and agreements. The absence of federal award coverage was partly due to the inability of the AEU to gain registration under the federal Industrial Relations Act until 1987. A High Court decision in 1983¹ opened the door to registration and a markedly increased participation in the federal system.
3. In the early 1990s, the AEU determined that changes to some State industrial systems posed a real and immediate threat to the working conditions of its members. The removal of the

¹ *R v Coldham; ex parte ASWU* (1983) 153 CLR 297

Commission's arbitral powers in Victoria and the abolition of awards in favour of individual agreements from March 1993 was the first, and most drastic, step in a trend which manifested itself to lesser, but still significant, degrees in other States in rapid succession. A particular concern of the AEU was that the governments that were responsible for the legislative changes were also the employers of its members.

4. The AEU's move to the federal system has been strenuously opposed by all State governments at virtually every step in the process which began in 1993. Appeals have been taken to Full Benches of the Commission, and a number of matters have ended in the High Court as the governments seek to pursue every possible legal avenue to prevent the AEU obtaining protection for its members in the Federal Commission. Despite the number of these challenges and the seemingly limitless financial resources of the governments ploughed into them, almost without exception they have failed. The most recent of these failures occurred in relation to Western Australia and South Australia when the Federal Commission determined that it should continue to deal with the AEU's application for federal awards, rejecting arguments that the interests of employees were adequately dealt with by the respective State systems. As usual, this decision has been appealed to a Full Bench.
5. The result of these developments is that federal award and agreement coverage of AEU members has been greatly expanded.

In Victoria, a number of federal awards govern the terms and conditions of government school teachers. There are also separate federal awards governing kindergarten teachers, TAFE teachers and employees in disability services.

In Western Australia, an agreement registered in both the Federal and State Commission applies to government school teachers. Further award proceedings are awaiting the outcome of the appeal referred to in the preceding paragraph. Teachers in TAFE Colleges and Community Colleges are covered by separate federal awards.

In Tasmania, consent federal awards apply to school teachers and TAFE teachers.

In South Australia, the AEU is vigorously pursuing federal award coverage for its members in the schools and TAFE sectors. As with WA, a federal award application in the schools sector has been stalled by an appeal.

Federal awards apply to the AEU's members in the Northern Territory and the ACT in the schools and TAFE sectors.

In Queensland and NSW terms and conditions of AEU members are regulated by State agreements and awards. The AEU has obtained dispute findings in the Federal Commission in both the schools and TAFE sectors in each State.

Enterprise bargaining

6. The shift in emphasis towards enterprise bargaining in the 1990s has clearly been to the detriment of education workers in the government sector. The government employers' insistence on demonstrable productivity trade-offs for salary increases and other improvements in an industry whose productivity is defined by social needs and benefits, and where outcomes cannot be quantified, has limited the scope for obtaining improvements to working conditions. Bargaining in the education industry is thus characterised by employer demands for cost neutrality or savings through negative cost cutting, demands for substantial changes to work organisation and the teaching and learning process without payment and the general tactics of delaying and obstructing negotiations. The tendency for the employer demands to erode the quality of education provided to students has meant that those demands have often been unacceptable to our members. The result of all of this has been a decline in the real value of salaries and conditions.
7. Despite the rhetoric about the need for terms and conditions to be determined at the enterprise level between the employer and employees, it is apparent that access to arbitration powers for

government education workers as an alternative is vital if their working conditions are to be protected. Since the advent of the Kennett government in Victoria in 1992 and the Brown government in South Australia in 1993, in neither State have salary increases been obtained through an enterprise agreement. Employees have been forced to rely on safety net increases, and, in the case of Victoria, a recent arbitrated increase obtained through a special case application. Current negotiations in the ACT, the Northern Territory and NSW have so far failed to achieve a result. In the case of the Northern Territory, the last agreement expired over a year ago and the government has resorted to offering individual agreements and the unprecedented action of locking teachers out of schools.

8. It is in this climate that the Federal government introduces industrial legislation designed to reduce the Commission's arbitral powers, remove hard-won entitlements from federal awards, introduce individual contracts and return workers to the discredited State industrial systems. Attempts to justify these changes are based on the constantly expressed desire for "flexibility", although it is never explained what is meant by this term. More importantly, no indication is given of what can't be done in the current system that needs to be done. In these circumstances, the only conclusion that can be drawn is that the desire for increased "flexibility" is nothing more than a desire for the flexibility to reduce terms and conditions of employment. That the Bill in its current guise will facilitate this outcome is beyond argument.

Workplace Relations Bill

9. There are a number of provisions in the Bill which entail a direct attack on the working conditions of employees:
 - (a) The stripping back of awards to 18 allowable matters, and the prohibition on the Commission arbitrating outside those matters.

- (b) The abolition of the paid rates award provisions and the conversion of paid rates to minimum rates.
 - (c) The predominance of State employment agreements over federal awards.
 - (d) The ability of an employer to terminate a certified agreement unilaterally after its expiry date, thus returning employees to award rates and conditions.
 - (e) The introduction of individual contracts through the mechanism of Australian Workplace Agreements (AWAs), and their ability to displace awards.
 - (f) The absence of a “no disadvantage” test for certified agreements and AWAs, which will now only need to satisfy a short list of miserly minimum standards.
 - (g) The restriction on an employee’s right to take protected industrial action.
 - (h) The restriction on an employee’s right to have her/his union representative enter the workplace.
10. The Bill also seeks to undermine the position of existing registered organisations by:
- (a) removing or lowering the hurdles for new unions seeking registration, or for existing unions seeking to expand their eligibility;
 - (b) allowing for the establishment of autonomous enterprise branches;
 - (c) allowing for the “disamalgamation” of unions;
 - (d) reducing right of entry provisions;

- (e) restricting a union's right of intervention in certain certified agreement proceedings;
- (f) preserving s.118A in a form which can effectively only be used by employers.

How employees will be “worse off”

Allowable award matters

11. A feature of the Bill is the most significant rewriting of the definition of industrial disputes since the inception of the Industrial Relations Act in 1904. The Bill limits the arbitration powers of the Commission to 18 core matters, defined as “allowable award matters”. Matters not included in the list can only be dealt with if an employer is prepared to agree to include them in a certified agreement. Some of the matters which will be under threat should the list become law are as follows:

Redundancy procedures, including notification, consultation and redeployment

Teacher workload (eg. face-to-face teaching hours, class sizes)

Study leave

Personal, travelling and removal expenses

Promotion and transfer

Accident make-up pay

Trade union training leave

Selection and appointment

Professional development

Leave for court attendance

Military leave

Qualification prerequisites

Meal breaks

Infectious diseases leave

Examination leave

Protective clothing
Right of entry
Superannuation
Occupational health and safety
Lifting

12. The above list is not a hypothetical catalogue of industrial matters. The matters are actually drawn from a quick perusal of the AEU's federal awards in Victoria covering school teachers, early childhood, TAFE and disability services. No doubt there are other matters contained in AEU federal awards in other States and Territories which are not included in the allowable award matters. The purpose of the list is not, of course, to indicate that all of the matters should be included in every award. The point is that it is possible that the Commission will no longer be able to include *any* of them in awards. If a dispute arises in relation to one or a number of the above matters, the Commission will not be permitted to resort to arbitration should the parties be unable to settle their differences. The desire for "flexibility" would not appear to extend to the Commission's dispute settling procedures. The problems that this will create are set out below in the paragraphs relating to the AEU's recent experiences in Victoria.
13. Even more objectionable are the transitional provisions (Items 41-47 of Part 5) which will result in most, if not all, of the matters set out in paragraph 11 being removed from awards. This could occur straight away on the application of an employer, or will occur automatically at the end of the 18 month transitional period. In many cases, the entitlements have been hard-won after extensive industrial campaigns and lengthy Commission proceedings, and their forced removal makes a mockery of the Coalition's claim before the election that no worker would be "worse off" under their industrial relations reforms.
14. A secondary attack on award conditions is envisaged by the transitional provisions and an amendment to existing s.143. The Commission is to ensure that awards do not prescribe matters in detail or process "that are more appropriately dealt with by agreement at the workplace or enterprise level" or prescribe practices or procedures "that hinder the efficient

performance of work”. These provisions are notable for their potentially wide ranging nature, and, in the absence of any detail, pose a threat to even the allowable award matters.

15. The AEU submits that the Commission should retain its full arbitral powers over all matters which currently can be the subject of industrial disputes. It is not necessary to restrict the Commission’s power to achieve the Coalition’s stated aims, particularly given the thrust of other changes which are intended to promote the settling of disputes by way of agreements. The Commission should retain its flexibility to resolve all types of industrial disputes should that be necessary, and thus be able to properly carry out the Constitutional power to “prevent and settle industrial disputes”.

Paid rates awards

16. Most awards (federal and state) applicable in government schools have traditionally provided for the actual rate of pay applicable to employees, and up until very recent times this has been the agreed position of all parties. Provision of actual rates of pay has been seen as appropriate in an industry which is subject to predetermined budgets, rather than the level of expenditure being the result of a productive enterprise. In such an environment, it would be contrary to the public interest to encourage and facilitate competitive and incompatible wage and salary outcomes which would inevitably lead to chaos and resentment between education workers and create divisions for no real purpose. Uniform pay levels for teachers at the same level of experience doing the same work has been agreed as far more appropriate in circumstances where it is virtually impossible to measure differences in productivity.
17. The actual rates set traditionally have taken into account a number of factors, not the least of which is the fact that teachers do not normally receive paid overtime. A Full Bench of the Federal Commission dealing with teacher workload recently held that:

“The uncontradicted evidence in these proceedings is that the standard working week

of 38 hours is no more than a formality with some teachers spending in the order of 50 hours per week or more at their work in order to discharge their duties in an adequate and acceptable manner”.²

Teachers also do not receive many allowances available in other fields, such as site and protective clothing allowances. The rate of pay set is essentially the proper rate for the job and this has been the case for teacher salaries for many, many years.

18. The abolition of paid rates awards and the conversion of existing paid rates to minimum rates are strenuously opposed by the AEU on the basis that they amount to a serious threat to salary levels and are another unnecessary fetter on the Commission’s discretion to settle industrial disputes in the appropriate manner. The Act as it currently exists provides for objects for the paid rates awards sections to ensure that:

- “(a) in appropriate cases, employees are protected by paid rates awards that set fair and enforceable wages and conditions of employment that are maintained at a relevant level; and
- (b) paid rates awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, while employees’ interests are also properly taken into account.”³

The Commission is required to maintain and vary existing paid rates awards taking these objects into account, although it need not do so if it would be contrary to the public interest.⁴

19. These and other provisions in relation to paid rates awards entail sufficient flexibility and envisage paid rates awards where “appropriate”. The provisions in Part VIC should be retained, and there should be no conversion to minimum rates as envisaged by the transitional provisions in Schedule 5 to the Bill.

² *AEU and Minister for Education for the State of Victoria*, Print L8274 at p.15

³ s.170SA of the *Industrial Relations Act 1988*

⁴ s.170UC

State employment agreements

20. The Bill proposes that State employment agreements will effectively displace federal award coverage. This will serve to seriously undermine federal award protection by allowing employers to offer new employees employment only on the basis that they sign a State individual agreement (as exist under the Victorian, WA and Tasmanian systems) or pressure existing employees into entering into such agreements (where, for instance, a promotion is made dependent on doing so). An agreement under the Victorian system could be limited to the five or six minimum conditions contained in the Employee Relations Act. In these circumstances, the employee could not rely on federal award conditions where the State agreement was silent on a particular issue.
21. As noted above, the AEU has expended a great deal of time and effort in seeking to protect its members' conditions of employment through the federal system. The legislative changes made by incoming State governments to the prevailing industrial relations systems, the effect of which has been to remove many protections for employees, makes those systems distinctly unattractive as a means of maintaining and enhancing our members' terms and conditions of employment. These same governments are also the employers of our members and tend to be the first employers to take advantage of the new provisions to drive down working conditions, tear up existing agreements and weaken the position of the employees' chosen representatives, the unions. It is simply not acceptable for a government that has guaranteed that workers will not be worse off to allow the discredited State systems to creep back through the back door by way of individual agreements. It is not relevant to claim that employees have the choice to remain under their federal award. New employees do not have this choice, neither will employees seeking a promotion or those seeking to renew fixed term contracts. In Victoria and WA all teachers engaged since the State systems were redesigned in the early 1990s have been employed on contracts with a specified period. Further, the encouragement of individual bargaining will no doubt result in offers of pay increases being tied to individual contracts.
22. Despite the comments in the explanatory memorandum, the proposed changes to s.152 may

well revive the outdated employment agreements that were entered into in Victoria, Tasmania and WA before federal awards were obtained. The clause would need to be amended if this is not the intention, but, in any case, the entire amendment should be scrapped as it is one of the most draconian and unnecessary provisions of the Bill.

Unilateral termination of certified agreements

23. Under the current Act, a certified agreement continues in operation after its expiry date in ordinary circumstances, unless and until a new agreement is made or both parties apply to have it terminated.⁵ The Bill will allow the employer to terminate the agreement after its expiry date on 28 days notice. Once notice is given, the termination is automatic once the notice expires. There is no involvement for the Commission. Presumably, once the agreement is terminated, employees will revert to award conditions. In some cases, this may occur where there have been a series of certified agreements over a number of years. The award conditions may well be markedly out of date, particularly insofar as salary rates are concerned. It is not difficult to imagine the imbalance in bargaining power that would result in discussions for a new agreement where employees are suddenly thrust back onto greatly reduced conditions of employment.
24. This is another example where employees will be clearly disadvantaged under the new provisions. It would greatly undermine the confidence of employees in a system encouraging certified agreements if those agreements could suddenly cease to be relevant at the behest of the employer. The current system in this regard functions reasonably well, and the AEU strongly submits that it should be retained.

Australian Workplace Agreements

25. The AEU is opposed to the introduction of individual contracts. It has been our experience that resort to individual bargaining by employers is usually not for any perceived need for flexibility,

⁵ s.170MI of the *Industrial Relations Act 1988*

but to undermine collective negotiations with unions. This can be manifested by direct approaches to individual employees with an offer that has already been legitimately and collectively rejected by the workforce through the union. Another and more extreme tactic is to extend improved offers to individuals in an effort to entice them to give up their union membership, as occurred in the recent CRA dispute.

26. The AEU has faced these tactics in Victoria, WA and the NT in recent times. The government in Victoria has consistently refused to negotiate with the AEU, preferring to deal with employees on an individual basis where possible. Its most recent salary offer was linked to acceptance of its Professional Recognition Program (PRP), which was not negotiated with the AEU. The government offered individual teachers a long overdue pay increase on the basis that they accept the PRP. The government's refusal to negotiate over terms of the PRP meant that the Commission was eventually compelled to arbitrate for a new career structure and pay increase which incorporated some elements of the PRP and some elements of the AEU's claims. The availability of award arbitration prevented a potentially divisive situation developing in schools in which employees could have ended up on different rates and career structures.
27. In WA, the Commission was forced to intervene in a situation where the government was making individual salary increase offers to employees which were tied to productivity trade-offs for which it had not been able to secure the agreement of the union representing over 80% of the teachers. The Commission ordered that an interim increase be paid to all employees without the trade-offs sought by the employer. The Commission was then able to bring the parties together and the result was a certified agreement covering all teachers to which the union was a party.
28. In the NT, the government has written letters to all teachers putting an offer which again was rejected by the employees collectively. They have also threatened to lock teachers out of schools indefinitely if they take further industrial action.

29. A feature of this activity is the limited or often misleading information that is supplied to employees when individual offers are made. Employees are often told that the offer is “final” and will be withdrawn if not accepted by a certain date. The impression is created that if the offer is not accepted, there will be no pay increase available. The result is confusion and uncertainty, even where a majority of the employees are union members. The introduction of AWAs will serve only to legitimise this divisive and confusing approach to negotiation. It will also foster the de-unionisation strategies adopted in the CRA case which were circumvented by the Commission.
30. There are many problems with facets of the proposed AWA system, the most significant being the predominance of AWAs over federal and State awards, the absence of a proper “no disadvantage” test which is determined by reference to existing conditions and the inability of the Commission to scrutinise the agreements before they are filed. No doubt other submissions will deal with these obvious shortcomings and suggest amendments to deal with them. The AEU’s position is that it opposes the introduction of a system of individual agreements in any form, as such systems inevitably fail to rectify the imbalance of bargaining power between employer and employee and are contrary to the collective approach to industrial relations that, despite the rhetoric of some politicians and the media, has served this country extremely well over 90 years.

Absence of “no disadvantage” test

31. The Coalition claims that an award safety net will underpin enterprise bargaining. It then reduces that award safety net to a maximum of 18 core matters, and finally removes the safety net altogether as a basis for certified agreements and AWAs. What the Coalition actually means is that if you don’t want to enter into a substandard agreement you can remain on your (now) substandard award.
32. The minimum standards set out in the Bill are in truth no better than the standards introduced by the Victorian government in 1992. They offer little protection to Australian workers, and,

to make matters worse, even the minimum conditions can be undercut as part of a strategy to save an ailing business. Interestingly, there is no provision which would result in any shortfall to the employees being made up by the business in times of prosperity.

33. This aspect of the Bill is a classic example of “flexibility” actually meaning “flexibility to reduce conditions”. The current “no disadvantage” test allows a global approach in comparing existing conditions to those in the proposed agreement and does not limit the matters that can be included in agreements nor how they are expressed. The intention behind the proposals must therefore be to allow reductions in overall entitlements. They would be unnecessary otherwise.
34. The existing “no disadvantage” test has often prevented the certification of agreements which provide the employer with some ability to alter terms and conditions during the course of the agreement. For example, agreements including a clause which permits a term to be determined “pursuant to the company policy manual” have been held to fall foul of the no disadvantage test on the basis that it is impossible to determine whether the test is satisfied. This is because the company could vary the particular policy manual without the involvement of the Commission, in effect allowing for unilateral variations of existing terms during the life of the agreement. Under the proposed sections, such agreements will no doubt be possible as long as the terms which could be subject to variation are not included in the short list of minimum standards.
35. Even within the minimum standards there are serious flaws. The minimum salary rate is that contained in an award (State or federal). The definition of award will no longer include a certified agreement, which means that salary rates in a certified agreement will not be the benchmark for new agreements. The Commission has not been inclined to automatically increase award rates on the expiry of certified agreements. The award rate will therefore often be out of date and an inappropriate benchmark for new agreements.
36. The existing “no disadvantage” test should be maintained to provide realistic protection for Australian employees.

Restriction on industrial action

37. The only real bargaining power in the hands of workers is the right to take industrial action. The Bill proposes to prevent the taking of lawful industrial action during the course of a certified agreement or AWA even if the action relates to a matter not dealt with by the agreement. In fact, the Bill not only limits the taking of industrial action, it also proposes fines on individuals and unions that engage in “unprotected” action. Such fines would be in addition to the wide range of common law remedies that employers could avail themselves of, given the action is not protected.
38. In addition to this limitation, the Bill will make it easier for a bargaining period (which enables the taking of lawful industrial action) to be terminated. If a bargaining period is terminated, the Commission will also be able to order that a party may not initiate a new bargaining period within a specified period (which does not appear to be limited).
39. These amendments are an example of the Coalition’s inconsistency in its move to a deregulated environment. It proposes to shift the responsibility of regulating conditions of employment away from the Commission and into the hands of employers and employees, the emphasis resting with enterprise bargaining, arbitration “a last resort”. At the same time, employees are to have one hand tied behind their backs by taking away their only trump card for a substantial part of the time. It is an accepted principle in industrial relations that the more power that is removed from a central arbitral authority, the more power should be accorded to employees and unions to engage in industrial action. This Bill goes the other way, and also imposes new fines to add to the employers’ common law armoury.
40. The restrictions on taking industrial action during the course of an agreement and the new fines for taking unprotected action should be removed from the Bill. Existing s.170PO, which allows for the termination or suspension of a bargaining period, should be retained.

Right of entry

41. The restriction on right of entry to situations where employees have issued written invitations to the union representative is totally unnecessary, given that award provisions and the current s.286 are framed to ensure that employees are not hindered or obstructed in their performance of work. The AEU is not aware of any outcry or concern about the exercising by union representatives of this right.
42. The restriction on the holding of discussions under proposed s.286A (Item 26, Schedule 15) to employees' meal-times or other breaks is notable, given that such breaks are not included in the list of allowable award matters.

Registered unions

43. The Bill includes a number of provisions which are clearly aimed at weakening the position of the employees' recognised representatives, which will inevitably impact on the employees themselves. While these attacks are hardly surprising, they are nonetheless disappointing in light of the responsible actions of registered unions over a lengthy period which have contributed to the economic well-being of the country. In a deregulated environment, the importance to employees of effective representation cannot be understated. The amendments are transparent in their intention to create confusion and disharmony, weaken the position of existing unions and encourage the formation of "employer friendly" organisations.

New "unions"

44. The provisions will enable as few as 20 employees to seek registration as an organisation of employees. They will not face the restrictions that have faced other unions since 1904. The AEU for instance was prevented from seeking registration until the 1980s because of a provision which requires that the association be capable of engaging in an industrial dispute. This requirement will be removed (which in itself raises constitutional questions), as will the

requirement that there be no other registered union to which the employees could conveniently belong. This last restriction, which also prevents existing unions from expanding their coverage, has resulted in very few new unions achieving registration in recent times. The stability that has resulted in workplaces has been appreciated as much by employers as by the unions and their members. The fact that neither of the major industrial relations players are calling for this change indicates that it is driven by ideology and a desire to create problems where none exist. The amendments should be removed.

Autonomous enterprise branches

45. Once again, it is difficult to see from where the impetus for this proposal emanates. In the absence of a clear rationale, it can only be concluded that this is another attempt to drive a wedge between groups of employees. The matters over which the branches are to exercise “autonomy” are left to be prescribed in regulations, which itself is a cause for concern.
46. It is reasonable to expect that unions should be able to determine their own internal structures. Union rules are required to ensure that democratic practices prevail. The ultimate sanction for a union which does not satisfy members in this regard is loss of membership, and it is difficult to imagine this being a concern for the Coalition. Of course, if the hurdles for the registration of new unions are removed as outlined above, disgruntled employees will have other options. There must also be doubts about the constitutionality of these provisions, particularly given the subject matter which is to be determined by regulations.

“Disamalgamation”

47. These provisions fall into the same category as the matters discussed in the previous paragraphs. They amount to nothing more than a cynical attempt to increase the number of unions and create disharmony through division.

Right of entry

48. This item has been dealt with above.

Intervention

49. The Bill proposes an amendment to s.43 which will limit the Commission's general power to grant leave to a person or body to intervene in applications for certified agreements. The new certified agreement provisions allow for two types of agreements, one made directly with employees (Division 2) and the other negotiated directly with unions (Division 3). In the case of Division 2 agreements the Commission would appear to be prevented from granting intervention rights to a relevant union (ie. one that has members covered by the agreement). This is so even though the union may have participated in negotiations over the agreement on the invitation of one or more members. A union that has participated in negotiations should be accorded a right to appear. At the very least, flexibility dictates that the Commission should retain its general powers over intervention.

Section 118A

50. The proposed amendments to s.118A will effectively make it another tool in the hands of employers. The section will only be activated where the conduct of a union is "preventing, obstructing or restricting the performance of work or is harming the business of an employer", or where such consequences are "likely to recur" or are "imminent" (Item 5, Schedule 4). Where the employer supports a particular union's application, it will argue that these preconditions are met. It may even instigate the application itself. Where the employer does not support an applicant union, it will argue that there is no conduct of the required severity, and such arguments will be difficult to counter. The only option for a union in this situation would be to escalate any workplace disturbance, in which case it would be likely to face compelling arguments that it should not profit from its own misconduct. The union which enjoys employer support in this case would be careful to keep its hands clean.

51. This amendment is another example of the Coalition adopting an inconsistent position. For years they have preached about the merits of open competition between unions and advocated that employees should be free to join the union of their choice. When it comes to the crunch however they are not prepared to risk the wrath of the employers. The watered down version of s.118A is a direct result of employer concerns that it retain some control over union representation. Union coverage is not a matter that should be influenced by employers. The Coalition should stick to their guns (in this matter at least!) and abolish s.118A.

Teachers' experience in Victoria

52. The benefits of access to a Commission possessing full arbitral powers is glaring when consideration is had to the plight of Victorian government school teachers since October 1992.

Redundancy

53. On 20 November 1992, declarations were made under the newly enacted Public Sector Management Act (Vic), the effect of which was to override provisions of the Teaching Service Act and terminate key provisions of existing agreements which had been registered in the abolished Industrial Relations Commission. The effect was to remove teachers' permanency and make them much more susceptible to termination, including by way of redundancy. On the same day, the government announced its intention to reduce the teaching service by 4,000 and made available Voluntary Separation Packages (VSPs).
54. Teachers were given until 30 November 1992 to accept a VSP or express interest in obtaining a VSP. Not surprisingly, the immediate reaction was one of confusion and distress, as the information provided by the government was not sufficient for many employees to make a considered decision. The current Victorian Treasurer, Mr. Stockdale, admitted before a Full Bench of the Federal Commission that "the communication hasn't been as good as we would

have liked it to have been”.⁶ That Full Bench ultimately made a finding that:

“for a considerable number of potentially excess teachers in Victoria there was a relatively high level of pressure, stress, tension, and confusion”.⁷

The Full Bench also determined that there had been:

“a real element of unfairness in the VSP excess declaration, and transfer system adopted. This arose because teachers were called upon to declare their interest for what was ostensibly a potential benefit, without being clearly informed that a direct consequence may be their detachment from the standing workforce and deployment if they chose not to accept any offer which eventuated, or if they were not made an offer”.⁸

55. The AEU notified a dispute with respect to redundancy in Victoria and Tasmania in the Federal Commission on 23 November 1992. The arbitral powers of the tribunal in Victoria had been abolished by the Employee Relations Act. Given the urgency of the matter, the Commission was able to list it for hearing on 30 November 1992 before Senior Deputy President Riordan. On that day, the AEU sought and obtained an interim award, the effect of which was to require the employer to take no further steps to process the VSPs offered on 20 November 1992.⁹ Riordan SDP felt an order was justified on the basis that:

“If an order is not made to preserve the status quo pending either a proper consideration of all of the facts and circumstances by the Commission, or alternatively, and hopefully, by a conciliation proceeding involving both parties, then the issue will be resolved by circumstances rather than by the principles of reason and justice”.¹⁰

⁶ *ATU and Minister for Education of Victoria*, Print K6049 at p.14

⁷ *Ibid* at pp.17-18

⁸ *Ibid* at pp.19-20

⁹ *ATU and Minister for Education of Victoria*, Print K5741

¹⁰ Print K5742 at p.2

56. Further proceedings followed immediately. The award was varied on the application of the AEU to require the Minister and the officers of his Ministry to abide by the terms of the award.¹¹ The award was then quashed on appeal on 14 December 1992 on technical grounds, but the matter came back before a Full Bench on 17 and 18 December 1992 with the AEU seeking a new interim award. The Full Bench decided to make an interim award on Christmas Eve, although not entirely in the terms sought by the AEU. The award allowed an employee who had accepted a VSP to reconsider and withdraw such acceptance in writing before 31 December 1992. It also prevented the government from terminating employees (who had not accepted a VSP) other than by way of the disciplinary or efficiency provisions in the Teaching Service Act. In other words, compulsory redundancy, which had arisen as a concern, was prevented.¹²
57. A final redundancy award was eventually made by a Full Bench on 27 October 1994.¹³ That award contained extensive provisions and protections for employees. It deals with introduction of change, redeployment, retraining and redundancy, voluntary separation, salary maintenance payments, leave and expenses to seek alternative employment and moving household expenses. On 24 February 1995 the award was further amended to provide for redundancy payments and to allow for compulsory redundancy in limited circumstances and only after lengthy negotiations and consultations.¹⁴ The result is an award which provides for redundancy procedures and benefits which are far superior to those which have arisen from the standard Termination, Change and Redundancy case in 1984.
58. The AEU did not achieve all of its claims in this matter, either at the end of 1992 or later. This is however not the point. The speed with which the Commission was able to deal with these urgent matters at least enabled employees to better consider their options. The 1992 Full

¹¹ see reasons for decision in Print K5886 at pp.8-9

¹² Print K6050

¹³ Print L6164

¹⁴ Print L9672

Bench of the Commission itself noted that its decision “may also contribute to an overall understanding”.¹⁵ Two points are worth extracting from this dispute. The first is that the Commission’s power to act quickly and make an interim award were crucial to providing protection to employees who were clearly stressed and confused. The second point is that the proposed allowable award matters provide for “redundancy pay” only. This raises clear doubts about the ability of the Commission to arbitrate on issues of notification, consultation, redeployment, expenses and a raft of other provisions included in the AEU’s award and many other federal awards. The next time a State or Territory government decides that there is an urgent need to reduce its workforce, there may be nothing that can be done to ensure that fairness and dignity prevail. The Full Bench noted that:

“There are social values which underly the insistence in industrial principle upon adequate consultative processes being associated with terminations of employment.”¹⁶

Such social values may amount to nothing under this Bill.

Teacher workload

59. The declarations made under the Public Sector Management Act on 20 November 1992 also removed from existing registered agreements a number of provisions dealing with teacher workload, including the regulation of class sizes, face-to-face teaching hours and staffing ratios for schools. The substantial increase in workload which eventuated resulted in the AEU seeking the exercise of the Federal Commission’s arbitration powers and on 24 February 1995

¹⁵ Print K6049 at p.18

¹⁶ Print K6049 at p.22

a Full Bench determined to vary an existing award to deal with workload issues.¹⁷

60. The decision deals with the long history of teacher unions pursuing and achieving the regulation of the workload required of teachers for over 50 years, either by determinations of the relevant tribunals, or by agreement. From 1983 to 1992, regulation of Victorian teachers' workload was achieved through successive agreements with the government.
61. The Commission referred to the prevailing situation following the abolition of the relevant sections from the agreements. It identified its role in the following passage:

“The essential or fundamental issue for resolution with respect to this aspect of the industrial dispute is whether the employer is to be able to continue to fix the work load of teachers in a unilateral and unregulated manner or whether the Commission should intervene in order to ensure that the workload demands on teachers are fair, just and reasonable in the circumstances.

The current situation, whereby the employer has reserved to itself the unequivocal and unlimited right to determine the size of the required work load, is a dramatic and spectacular alteration to past practice and represents a substantial reduction in the rights of the teachers employed in the Victorian Government school system.

In the resolution of this aspect of the dispute the Commission must decide if the alterations that have occurred are reasonable or unreasonable and whether the facts and circumstances require some form of award regulation of the work load of the relevant teachers.

There is nothing unique in this regard. Indeed the regulation of work load, or the determination of appropriate staffing levels, is a common occurrence in the resolution of industrial disputes.”(p.8)

62. The decision should be read in its entirety to appreciate the work load now facing teachers in Victoria. The Commission concluded that:

“The evidence given in these proceedings is strongly in favour of the submissions that

¹⁷ Print L8274

teachers in Victoria generally work long hours which include substantial working time outside of school hours and that their work load has increased significantly over recent years.” (p.14)

It then went on to consider two fundamental aspects relevant to the issue of a reasonable work load:

“Firstly, the uncontradicted evidence in these proceedings is that the standard working week of 38 hours is no more than a formality with some teachers spending in the order of 50 hours per week or more at their work in order to discharge their duties in an adequate and acceptable manner. Certain of the witnesses called by the AEU said that their weekly hours, which includes time well in excess of the time actually spent in the classroom, exceeded 50 hours per week. There appears to be no issue that normal hours required of teachers during the 200 working day school year are well in excess of 38 hours per week.

Secondly, class room instruction is but one aspect of a teacher’s duties. There are several other duties including administrative and planning time, correction of examination papers, projects and like activity, accompanying students on school excursions, attendance at sporting, recreation and cultural activities and increased playground supervision.” (p.15)

Further on, the Commission noted that:

“The evidence given is that teachers in Victoria are working extended hours and there is clearly a capacity for some teachers to be exploited unfairly by way of the imposition of unreasonable workloads.” (p.28)

63. The Commission ultimately determined to vary the award by prescribing maximum face-to-face teaching hours for primary and secondary teachers. In relation to class sizes, a dispute resolution procedure was set up which culminates in a Board of Reference hearing. A general direction was given that no teacher is to be required to perform an unreasonable or excessive workload. The Commission was also keen to emphasise the resolution of disputes where possible at the workplace level.
64. Once again, the AEU did not achieve everything it hoped for in this matter. Once again, this is not the point. The Commission was not prepared to leave the regulation of work load to the

whim of the employer. At the same time, it allowed for school level flexibility in its decision. Work load is not clearly specified as an allowable award matter, and the award variations must therefore be under threat. The result would be a return to the clearly unsatisfactory and unfair situation which prevailed before the Commission's intervention. This decision demonstrates that the Coalition's proposals to limit the Commission's arbitral powers are unfair, and, perhaps more importantly in this context, unnecessary. The Commission felt the need to, and was able to, reconcile the need to protect employees from unfair practices with the need for flexibility at the workplace level. A copy of the decision is attached.

65. These two examples have been included to demonstrate the very real potential for unfairness that the provisions of the Bill create. They are both related to Victorian school teachers, but they are just as relevant to other States and Territories, and to other sectors such as TAFE, early childhood and the disability services area. It has been the AEU's experience that "initiatives" of the Victorian government are quick to surface in other States and Territories. In WA, for instance, matters dealing with recruitment, selection, appointment, transfer, secondment, redeployment, termination and discipline have recently been prescribed in public sector standards made under the Public Sector Management Act (WA). The effect is to remove these matters from the State Commission's jurisdiction, and effectively into the hands of the employer. Teacher and allied staff work load across Australia will be significantly affected by the policies of devolution which are gathering pace in all States and Territories, policies which involve

the transfer of responsibilities and functions to the school level and away from central and regional offices.

Part-time and casual employment

66. The proposed deregulation of the use of part-time and casual employment is a major concern for the AEU, particularly in the TAFE area where a large proportion of the workforce are not

permanent full-time. The removal of requirements that part time workers have set hours of work would result in part time teachers having no certainty of work hours or days. For example, the Victorian Teachers (Government Schools- Interim) Award 1994 provides for a maximum number of days attendance required for part time teachers. This provides an important stability for part time teachers, particularly women who are likely to be juggling work around child care and school hours.

67. The proposed prohibition on the Commission including clauses on proportions of part time or casual employees will also have a detrimental impact on education workers. In the TAFE sector a number of awards include provisions stating a maximum number of hours that can be worked on a casual basis beyond which the teacher must be employed on a fixed term or permanent basis. Such employment provides for access to sick leave, annual leave and other entitlements not available to casual teachers. The loss of this will provide less security of employment, and reduce conditions of employment through loss of entitlements and salary for many employees in the education sector.
68. The Commission should retain its full arbitral powers in relation to the regulation of part-time, fixed-term and casual employment.

Women workers

69. The limits to be placed on the Commission's arbitral power will detrimentally affect women, who have traditionally suffered under enterprise bargaining, particularly in the area of over award payments. The abolition of paid rates awards will encourage over award arrangements in the education industry.
70. Provisions which currently exist in the agreement sections of the Act to protect employees in the bargaining process will be removed. For instance, s.170NG requires the Commission to take into account the interests of women in approving enterprise flexibility agreements. This section will not be replicated under the new non-union agreements in Division 2. In addition,

the general consultation provisions for certified agreements are of particular benefit to women. They will not exist to the same degree under the new provisions.

71. The removal from awards of clauses relating to promotion, affirmative action and equal employment opportunities will have a negative impact on women education workers. In the past, discriminatory employment practices have resulted in an under representation of women in promotion positions in schools. For example the proportion of women principals is far below their representation in the teaching force as a whole. Affirmative action provisions and selection procedures which include requirements to meet EEO principles have been important inclusions in education awards and have assisted in redressing the impact of the past discrimination and providing a fair and equitable process. Without regulation in this area the progress made in this area will be lost.
72. The restriction on arbitral powers in relation to part-time, casual and fixed-term employment referred to above will have a particular impact on women workers who make up a large percentage of these categories.

Aboriginal and Torres Strait Islander employees

73. The emphasis on workplace level negotiation will similarly have an adverse impact on Aboriginal and Torres Strait Islander employees, who have traditionally not fared well in this environment. The removal of provisions giving protection in the bargaining processes will also be a detriment, as will the deregulation of non-permanent employment. It is also notable that the allowable award matters do not include cultural leave, which is an important and valued entitlement for Aboriginal and Islander workers.
74. The individual negotiation approach fostered by the Bill is also not appropriate for Aboriginal and Torres Strait Islander workers, who prefer to work, act and think collectively. These employees in the education industry are currently engaged in a long struggle for recognition of their status and input to the education of Australian students. The Bill will do nothing to assist

this process, and the weakening of workers' collective power is likely to hamper progress in this area. Problems of institutionalised racism are also not dealt with.

Conclusion

75. The Bill represents a fundamental attack on the rights of Australian workers and their unions. Each matter dealt with in this submission when considered alone is serious enough. Considered together, they will allow for an environment in which workers are exploited through a combination of factors. The removal of arbitral powers including paid rates provisions and the resurrection of state employment agreements are the major concerns, but there are many others. The Bill proceeds on the premise that employers are always willing to negotiate in good faith and agreements are always achievable. Unfortunately, the AEU's experience is that this is not always the case, particularly in a sector which is increasingly subject to blinkered budget-driven policies.
76. The AEU asks that the Senate Committee recommend substantial changes to the Workplace Relations Bill to ensure that Australian workers have access to a fair and effective industrial relations system.

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