ACTU Submission to

PC Review of Automotive Assistance

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CONTENTS

ATTACHMENTS

1. ILO *International Labour Conventions and Recommendations 1919-1991* Vol 1, ILO, Geneva 1992 pp 435-7; 524-5

2. ILO *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th edition Geneva 1996 p.101

3. ILO *Report of the Committee of Experts on the Application of Conventions and Recommendations* Report 111 (Part 1A) ILO Geneva 1999 pp 204-5

4. *Workplace Relations Amendment (Genuine Bargaining) Bill 2002*

5. Print T1982, 16 October 2000, Munro J

6. ILO *Report of the Committee of Experts on the Application of Conventions and Recommendations* Report 111 (Part 1A) ILO Geneva 1998 p 224

7. ILO *Application: International Labour Conventions* ILO Geneva 2001 p222

8. *Basic Documents of Human Rights* Third Edition, pp 243-5

9. D Gruen *Australia's Strong Productivity Growth: Will it be Sustained* Reserve Bank of Australia February 2001

10. M Wooden, J Loundes, and Y-P Tseng *Industrial Relations Reform and Business Performance* Melbourne Institute Working paper No 2/02

11. *"How to Compete: The Impact of Workplace Practices and Information Technology on Productivity"* by Sandra E Black and Lisa M Lynch, *The Review of Economics and Statistics,* August 2001, 83(3), 434-445

12. *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002*

13. *Code of Practice Industrial Action Ballots and Notice to Employers* Department of Trade and Industry 1995

14. *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002*

ACTU Submission to PC Review of Automotive Assistance

1 Introduction and Main Points

1. The Australian Council of Trade Unions [ACTU] is the peak council of the Australian union movement.

2. Federal and state unions affiliated to the ACTU represent some 1.9 million union members. The triennial ACTU Congress involving delegates from all sectors of the workforce determines ACTU policy.

3. From time to time, the ACTU makes submissions on behalf of all affiliated unions to Inquiries of various sorts.

4. This submission to the Review of Automotive Assistance [RAA] being conducted by the Productivity Commission, supports the submissions put to the Review by the Australian Manufacturing Workers Union [AMWU]. Our submissions are direct to the **Review of Automotive Assistance Position Paper** [PC RAA, June 2002] and the 'preliminary findings' set out therein.

5. Crucial sections of the Position Paper [PP] and its associated 'preliminary findings' are highly tendentious. These sections essentially concern 'workplace' or industrial relations issues, and consist in political assertions with little supporting evidence or analysis.

6. The ACTU believes the PP description of the economic structure of the Australian car industry is broadly accurate. However, its understanding of industrial relations generally and in the automotive sector specifically, is deficient and unbalanced.

7. As far as it goes, the PC account of the global automotive industry is broadly accurate. Wholly deficient in the PP is any account or analysis of industrial relations practices in the automotive industry in other countries.

8. The Terms of Reference for this Review call for identification of policy options that are consistent with the Government's international obligations. Particular such obligations instanced include APEC, the WTO, international harmonisation of Australian Design Rules, and 'environmental requirements'.

9. Australia's international obligations under ILO Conventions are relevant in this respect and are not specifically excluded from the Terms of Reference. The relevance of our ILO obligations arises directly from the requirement that the Inquiry identify and analyse 'impediments to the long term viability of the sector, including … industrial relations issues; and other hindrances on both the demand and supply sides of the economy'.

10. Australia's car industry *has* transformed itself over the past decade. It has become a major exporter and innovator. Productivity and product quality are greatly improved. This transformation has been *influenced* by reductions in tariffs, as the PP prominently notes. However, the PP gives no prominence to its having been *delivered* by workers – most of whom are strong union members – on the regulatory foundations of Award Restructuring and Collective Bargaining achieved by their unions. The role of the Button Car Plan, which was about much more than simply tariff cuts, which required cooperation and commitment from all parties in the industry, and which established the platform for the sector's present-day successes, is similarly suppressed in the PP.

11. Failing to acknowledge the role of the industry's workers and unions in delivering today's Australian car industry, the PP asserts that 'a serious weakness is the adversarial culture that continues to pervade its workplaces'. The PP says that this has impeded the industry's efforts to efficiently implement just-in-time and other best practices.

12. Here the PP is quite wrong, and plainly naive. Our submissions below establish this, as does the AMWU submission. Unions and car industry workers have been delivering workplace change in spades for a decade. The industry employers and employer associations have applauded these efforts. Across the industry there is recognition that the pressures for change are here to stay and can not be ignored.

13. The PP calls for 'a decade of policy certainty', and the PC says its options 'have been designed to minimise the potential for disruptive change'. The PC applauds the IR legislation presently before the Senate. Should they become law these changes would implement a decade of industrial uncertainty and raise greatly the potential for disruption.

14. Australia's car industry has a strong future if the commitment to and momentum for change that has accumulated over the past decade can be sustained and built upon. Essential to this is a standing council for industry wide dialogue and negotiation, as exists internationally in the world's leading car manufacturing regions and countries. Antithetical to it is legislation in the nature of that now before the Senate. That proposed legislation contravenes Australia's international labour obligations.

15. The ACTU notes the PC acknowledgment that tariffs are now a second order issue, and that the impact on costs and final prices of further tariff cuts are likely to be lost in Australia's exchange rate wash. Accordingly, and recognising the breadth and depth of auto industry specific measures adopted in other countries, the ACTU believes tariffs should be paused at current levels until 2010 and be subject to further review in 5 years time. Pending that further review there should be no change in government fleet preferences and tariffs on used cars. Similarly, ACIS should be maintained in its present form until 2010.

16. It is our submission that, in reaching and presenting as 'preliminary findings' its doctrinal views on the desirable path for future labour market 'reform', the PC has diminished its already poor reputation for independence and impartiality. It has entered the ring of partisan politics and shed all pretence of objective professionalism. And it has revealed its claims to analytical rigour and excellence in applied economic research to be wholly without credibility or foundation in the field of labour relations and labour law.

17. The PC should withdraw its preliminary findings on industrial relations generally and its support for the Genuine Bargaining Bill in particular. It should acknowledge and applaud the industry's workers and unions and employers for their achievements over the past decade and recommend formation of an automotive industry standing committee to auspice dialogue over all relevant issues including industrial relations and bargaining concerns, to meet the continuing challenge of change.

18. In view of the prominence accorded the issue in the PP, the next section of this submission addresses industrial relations issues in detail. The third section deals with other aspects of the Position Paper's 'preliminary findings'.

2 Industrial Relations

19. The ACTU agrees with the Productivity Commission (PC) that a "stable industrial relations environment with minimal stoppages" is important to the automotive industry.

20. However, the ACTU rejects the overwhelming thrust of the PC's report to the effect that this is best achieved through further legislative restriction of employees' ability to take industrial action. This appears to be no more than a wholesale adoption by the PC of the political agenda of the Government and employer organisations, without any consideration of the part which the current restrictions on bargaining play in creating difficulties for the industry, particularly in its focus on the single enterprise.

21. This PC report advocates the importance of Australia being "seen to act in a manner consistent with its international commitments". Yet it pays no attention whatsoever to our obligations under International Labour Organisation (ILO) Conventions. This deficiency is deplorable and from any other government funded agency would be astonishing.

22. The ILO has, on a number of occasions, found that Australia's current law is in breach of our commitments in relation to collective bargaining. Each of the Government's current proposals for legislative change, supported by the AiG and set out in detail in the PC's report, would further restrict unions' ability to bargain effectively and exacerbate Australia's existing breaches of ILO Conventions.

23. While legislative change of the type that is being proposed would add additional sanctions to the taking of industrial action, it would not assist in resolving disputes. Effective dispute resolution requires genuine bargaining on both sides, together with access by the parties to conciliation/mediation and, in some circumstances, arbitration. Employer reliance on litigation as a means of managing disputes means that attention is not being given to the type of co-operative workplace relations which is required if disputes are to be avoided altogether.

Australia's International Obligations

24. Australia has ratified ILO Conventions No. 87 (Freedom of Association and Protection of the Right to Organise) and No. 98 (The Right to Organise and to Bargain Collectively).[1]

25. Although not directly specified in these instruments, the ILO has always regarded the right to strike as a fundamental right of workers and their organisations as one of the essential means through which they may

[1] ILO *International Labour Conventions and Recommendations 1919-1991* Vol 1, ILO, Geneva 1992 pp435-7; 524-5

promote and defend their economic and social interests.[2]

26. On a number of occasions the ILO has criticised Australian law as being inconsistent with the requirement of Convention No. 87 in relation to the right to strike. In 1999 the ILO's Committee of Experts on the Application of Conventions and Recommendations published an "Observation" about Australia, noting that:

> *"…where a strike is 'unprotected' under the Act it can give rise to an injunction, civil liabilities and dismissal of the striking workers……..even if these consequences are not automatic, for all practical purposes, the legitimate exercise of strike action can be made the subject of sanctions."*[3]

27. The Committee then considered a number of specific limitations on strike action and concluded that Australian law restricts the right to strike, contrary to the requirements of the Convention, in the following respects:

(i) Protected action must be in relation to claims for a single business enterprise agreement (not multi-employer or industry wide) dealing with issues pertaining to the employer-employee relationship. This unacceptably limits the right of workers to strike in support of their economic and social interests (eg strikes about workers' compensation or industrial relations legislation, which require wider action than on a single enterprise level). The Committee also said that the prohibition on strikes about demarcation "excessively limit the subject matter of a strike".

(ii) The prohibition on "sympathy action" through both the *Workplace Relations Act* (WRA) and the *Trade Practices Act* is in breach of the Convention. The Committee says that such a general prohibition "could lead to abuse" and that sympathy strikes in support of legal (ie protected) action should also be legal.

(iii) Under the WRA, the AIRC can terminate a bargaining period on grounds including, that the action is, or is threatening to cause significant damage to the Australian economy or an important part of it. The Committee also noted that a union's registration can be cancelled because it engaged in industrial action interfering with trade or commerce or provision of public services. This goes beyond the Convention's definition of essential services, in respect of which industrial action may be prohibited (ie where the action interrupts services which would endanger the life, personal safety or health or the whole or part

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[2] ILO *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th edition Geneva 1996 p101

[3] ILO *Report of the Committee of Experts on the Application of Conventions and Recommendations* Report 111 (Part 1A) ILO Geneva 1999 pp204-5

of the population).

(iv) The Committee also notes that ss45D and DB of the *Trade Practices Act* prohibit a wide range of sympathy actions. See comment above.

28. The Committee calls for amendment of Australian legislation to bring it into conformity with the Convention's requirements.[4]

29. That these and similar findings by the ILO have been suppressed by the PC in this Review is extraordinary. The failure to recognise the issue cannot be through ignorance, as a recent PC Staff Working Paper commented that:

> *"Australia is one of the 51 countries, including 11 other OECD nations, which the recent observations of an ILO committee suggest are in breach of core labour standards."*[5]

30. The PC appears to be blithely accepting of the Government and employer organisations' analysis of industrial relations and proposals for change, without any consideration of, first, their conformity with international obligations or, second, their likely efficacy. In commenting on the AiG's proposals, most of which are included in legislation currently before the Parliament, the PC concluded:

> *"…….changes of this nature would appear to have merit. In particular, they would seemingly provide for a better balance between the rights of workers to take industrial action and the rights of firms and those in the community who suffer considerable harm from the disputes that continue to plague this industry."*

31. Nothing could be further from the truth. The proposed changes would tilt an already unbalanced system further towards employer interests, making it even more difficult for workers and their unions to take legitimate industrial action. It is a diversion from the real issues facing the automotive industry.

32. There are several key elements of the AiG/Government legislative agenda that demand careful and detailed scrutiny.

33. The *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* is currently before the parliament. In line with the AiG proposal to the PC, it outlaws protected industrial action in pursuit of pattern bargaining.

34. The ACTU recently made a submission about the Genuine Bargaining Bill to the Senate Employment, Workplace Relations and Education Legislation Committee, from which much of the following material is drawn. We provide this detailed account of the Bill because the ACTU

[4] Ibid pp204-7
[5] T Nankivell *Living, labour and environmental standards and the WTO* Staff Working Paper, Productivity Commission, Canberra, 2002

believes that the PC ought not recommend the passage of legislation without a close analysis and understanding of its content.

Campaign 2000

35. In 2000 the Government introduced legislation prohibiting industrial action in support of pattern bargaining. That legislation was not passed by the Senate, and lapsed with the calling of the federal election in late 2001. The 2000 Bill was introduced as the Government's response to what it claimed would be industrial Armageddon in Victoria resulting from enterprise bargaining claims being pursued against a large number of manufacturing companies.

36. The reality was quite different. There was no significant industry-wide industrial action, in spite of agitated predictions to the contrary, and agreements were concluded on an enterprise-by-enterprise basis, with most industrial action occurring at the enterprise level.

37. To the extent that it was alleged that unions had failed to genuinely try to reach agreement, this was found to be capable of being dealt with by the AIRC.

38. In *Australian Industry Group - and - Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (Metals *Case)*[6] the AIRC terminated a number of bargaining periods, as permitted by subsection 170MW(1) of the WRA, on the grounds that the union did not genuinely try to reach an agreement with the other negotiating parties before organising or taking industrial action. The AIRC found the union was not genuinely trying to reach an agreement at the time of taking the action, as provided for in paragraphs 170MW(2)(a) and (b).

39. In coming to that decision, the AIRC made a number of findings.

    (i) The AIRC has the authority to terminate a bargaining period, even where that bargaining period had been terminated by the union, and another period initiated (para 32).

    (ii) The test for whether a party is genuinely trying to reach agreement is whether its conduct evidences a genuine trying to reach an agreement with *the* opposing negotiating party to whom the industrial action or bargaining period is specific (para 43).

    (iii) A party which is trying to secure agreement with all, or an entire class of negotiating parties in an industry - *all or none* - is not genuinely trying to reach agreement with any individual negotiating party (para 44).

[6] Print T1982, 16 October 2000, Munro J

(iv) A common set of demands for conditions of employment or for timing of negotiating rounds and outcomes is not sufficient in itself to establish that a negotiating party is not genuinely trying to reach agreement with the counterpart party (para 46).

(v) However, advancement of such claims in a way that denies individual negotiating parties the opportunity to concede, or to modify by agreement, does not meet the test of genuinely trying to reach agreement (para 49).

(vi) Industrial action taken in relation to separate bargaining periods but at a common time in support of common claims is an issue for subsection 170MW(3) of the Act, and is not required to be dealt with in relation to whether or not the parties are genuinely trying to reach an agreement (para 56).

(vii) Orders can be made under section 170MW in relation to protected or unprotected industrial action (para 58).

40. Munro J also made it clear that common claims and outcomes have a place in the industrial relations system, are not outside the scheme of the Act, and may be pursued by employers as well as unions:

> *"Industrial negotiation is usually directed to achieving benefits and rights through some form of agreement about a provision to which the parties are bound. It is not unusual for major corporate employers to attempt to achieve a consistency and sometimes a relative uniformity of outcomes in negotiations affecting workers. For that purpose, benchmark common outcomes, wage increase levels, flexibilities, and freedom from award restrictions may be energetically pursued against union and employee negotiating parties. There is no good reason to doubt that such bargaining agendas will often form part of a corporate plan or strategy pursued across all the corporation's manifestations, or selectively at key sites. Those familiar with the industrial profiles of employer groups would recognise another group of employers who have negotiation objectives more or less imposed upon them. For that group negotiation objectives are effectively controlled by ostensibly external corporations to whom product or services are supplied, or by a parent company, often off-shore. A uniform cost price reduction for goods supplied under contract is one example of a practice in vogue in the vehicle components industry some years ago. It had some characteristics of a direct enforcement effect on enterprise level negotiation objectives. Another set of employer negotiating parties are suppliers of labour as a product or resource. For that group, labour is product in relation to which work can be converted from an employment into a series of contractual propositions about providing a resource, divorced more or less from collective bargaining or even some statutory standards. And finally in this profile, there are government agencies as employers. Such entities are able to assume configurations not relevantly distinguishable from any, or all of the types of private sector employer negotiating parties outlined.*

> *"It would be industrially naive to equate all such employer entities with the stereotypical small business entity which most people would identify with the notion of single business. Under the definition given by the Act to a single business or part of a single business, relatively arbitrary arrangements of workforces may be identified by an initiating negotiating party as the field for a bargaining period. That flexibility may give employers a capacity to select the field of employees to be engaged in collective bargaining. Moreover, for the reasons I have discussed in an earlier decision Re Joy Manufacturing section 170MH Application, some employers may also select their preferred employee negotiating party. <u>It appears that some of the more loudly voiced and caustic criticisms of " pattern bargaining", as practised by unions, are muted or tolerant of corporate practices intended to achieve similar uniformities of negotiating outcome across different workplaces.</u>*
>
> *" Industry-wide demands are often made by unions and sometimes pursued at national level. It is not that character of the demand that may cause offence to the policy embodied in section 170MP and paragraphs 170MW (2)(a) and (b). I see no reason why such claims may not be advanced in a way that involves a genuine effort to have each employer concede the benefit sought. In such cases, the "pattern" character of the benefit demanded, its source, and even the uniform content of it, may be a cogent demonstration that the negotiation conduct is genuinely directed to securing agreement from the other party."* (paras 47-49) (emphasis added)

41. The ACTU believes that competent investigation of bargaining practices in the Australian car industry will show that 'cost downs' – uniform cost price reductions for goods supplied under contract [see also pages10 and 94 of the PP] – continue to be pursued by the vehicle builders and to flow through the components industry. This sets the template or pattern for employer bargaining in enterprise-level collective negotiations across the sector, to which unions must and do respond.

42. Munro J concluded his decision by stating:

> *" I explain the order and declaration in that way because no part of my reasoning should be taken to mean or imply that it is not lawful or industrially proper for the unions to pursue the core conditions objectives of Campaign 2000. However, the Act operates to inhibit the ways in which common conditions can lawfully be collectively bargained for. If the relevant unions are to continue to pursue the core conditions now associated with Campaign 2000, the necessity of doing so in a manner that complies with the single business bargaining focus of the Act must be adequately heeded."* (para 84)

43. The clear conclusion to be drawn from this decision in that the AIRC has the power to exercise its discretion in relation to whether or not a particular set of facts and circumstances in a particular case meet the test of genuinely trying to negotiate an agreement. The 2002 Bill, rather

than confirming that discretion, would have the effect of fettering it. As Munro J put it:

> *"…The meaning of the words of paragraphs 170MW(2)(a) and (b) is clear for the reasons I have stated. It is the application of that meaning to the facts of particular cases that may be complex. For reasons that relate to the character of different sets of employer negotiating parties, it is undesirable in my view to elevate construction of these provisions into a policy dogma that compels a lopsided application of the associated powers. The overall object of the Act to providing a framework for co-operative workplace relations which supports fair and effective agreement making should not be taken out of play."* (para 51)

44. The decision makes it clear that there is no need for further legislation, as Munro J found that he had sufficient powers to deal with the circumstances before him. It is quite inappropriate to steer the AIRC "into a policy dogma" which may or may not meet the requirements of another set of circumstances, when there is no question of a lack of jurisdiction or discretion.

Pattern bargaining and common claims

45. The 2000 Bill required the AIRC to terminate a bargaining period if the initiating party had engaged in pattern bargaining and/or industry-wide campaigns involving the pursuit of common claims.

46. In determining to reject the 2002 Bill, the then Leader of the Australian Democrats stated:

> *"….the pattern bargaining bill proposed by the Government went too far by denying legal protection for industrial action for regular enterprise bargaining that commenced with common claims". (*Senator Meg Lees Media Release 00/34, 6 June 2000)

47. Further, Senator Lees drew attention to the existing powers of the AIRC under the Act to prevent the taking of protected industrial action where a union was not genuinely trying to reach agreement at the enterprise level, and, in light of concerns raised about the potential problems arising from Campaign 2000 (which had not yet commenced) said:

> *"We will monitor Campaign 2000 very closely. If the AIRC's powers prove to be inadequate, we will revisit the issue."*

48. As was demonstrated by Munro J in the *Metals Case*, the AIRC's discretion to determine whether or not a party is genuinely trying to reach an agreement is available to be used in a wide range of circumstances.

49. Contrary to the Minister's claim in his Second Reading Speech that "(t)*he bill would not prevent unions from making the same claims over a number of employers,"* the 2002 Bill would have the effect of placing an onus on unions to demonstrate to the AIRC that the making and pursuit of such claims did not evidence *"an intention to reach agreement with persons in an industry who are, or could become, negotiating parties to another agreement with the first party, rather than to reach agreement with just the other negotiating parties."* [s170MW(2A)(a)]

50. It is simply false to say, as the Minister did in the Second Reading Speech, that this is drawn from the *Metals Case* decision. In fact, Munro J found the opposite, holding that pursuing an industry-wide campaign was not evidence of a failure to try to reach agreement at the enterprise level, so long as the union was prepared to negotiate with individual employers.

51. The criterion in proposed paragraph 170MW(2A)(b) to the effect that negotiating on an "all or nothing" basis applying to all employers in an industry is consistent with Munro J's finding that this would not constitute genuinely trying to reach an agreement. This leads to two conclusions. First, given the decision shows the AIRC can and did consider this factor in exercising its discretion, it is unnecessary to legislate for it. Second, in referring to this "all or none" factor, Munro J made it clear that it needs to be considered in light of particular cases:

> *"Does it follow that, if in truth, the respondent negotiator is trying to secure agreement with all, or an entire class of negotiating parties in an industry - all or none - the respondent negotiating party is not genuinely trying to reach agreement with any individual negotiating party in the industry or class? In my view, it does. But in a particular case, a finding to that effect is dependent upon matters of fact and degree."* (para 44)

52. The situation envisaged by proposed paragraph 170MW(2A)(c), where a party's conduct shows an intention primarily to reach agreement with a person other than the other negotiating parties, was not a circumstance dealt with in the *Metals Case*.

Negotiating in good faith

53. On their face, proposed paragraphs 170MW(2A)(d) and (e) do no more than state the obvious, being criteria generally found in illustrations of the meaning of an obligation to negotiate in good faith. However, on further examination, the criteria of <u>conduct showing a refusal</u> to meet, confer, etc is likely to have a meaning going well beyond a simple refusal to do these things.

54. First, it needs to be understood that in the most usual situation, where it is the union which initiates a bargaining period, there is no obligation on the employer to meet and confer with the union. Nor is the employer obliged to consider or respond to proposals made by the

union, although the union must be able to demonstrate that it has genuinely tried to reach agreement. As the *BHP Case*[7] showed, an employer is quite free to refuse to negotiate a certified agreement with a union which has initiated a bargaining period.

55. In these circumstances, the union might take protected industrial action against the employer, in which case it is still obliged to genuinely try to reach agreement. It should also be noted that industrial action is overwhelmingly taken by unions against employers, not *vice versa.* Two potential difficulties then arise in relation to the proposed paragraphs, both of which show how the 2002 Bill is slanted against unions and their members.

56. First, although the union would be required to meet with the employer and to consider and respond to any of the employer's proposals, there is still no obligation on the employer to consider any proposals from the union.

57. Second, questions arise about the meaning of "conduct (which) shows an intention". Does this mean that unions which do meet with the employer, and consider, but reject the employer's proposals, could be alleged to be constructively refusing by their conduct? Could a union which had repeatedly met with an employer, but received no response to its claims, take industrial action on the basis that it would not meet with the employer unless it was prepared to consider and respond to the union's proposals?

58. Proposed subsection 170MW(2A) ignores the reality that the taking of industrial action, in itself, is evidence of a union and its members genuinely trying to reach an agreement. Workers do not lightly take action by which they forfeit their wages. In many cases, such as with BHP, it is the union which wants an agreement and the employer which does not.

Onus

59. The 2002 Bill is not about giving the AIRC a discretion. The AIRC already has an unfettered discretion in relation to determining whether or not a party taking industrial action is genuinely trying to reach an agreement.

60. The effect of proposed subsection 170MW(2A) is to direct the AIRC to consider a number of matters, and, where it is established that one or more of the circumstances set out exists, to find that this tends to indicate that the first party is not genuinely trying to reach an agreement with the other negotiating parties.

61. The meaning of "tends to indicate" will no doubt be the subject of considerable litigation, should the 2002 Bill become law. The ACTU

[7] *Australian Workers' Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3 10 January 2001

submits that the provision creates an onus or presumption, which it would then be up to the union to displace with countervailing circumstances.

62. For this reason, the provision cannot be seen as other than a limitation of the AIRC's current uncircumscribed discretion, and as directing a presumption against unions seeking to continue take industrial action.

Why pattern bargaining is part of the process

63. Neither unions nor employers approach enterprise bargaining with blank minds and clean sheets of paper. Neither group has the resources to do this. The enterprise bargaining process is based on sharing of collective knowledge and experience, and using this in a cumulative way, rather than re-inventing the wheel on each occasion.

64. Unions are not merely a collection of groups of workers who relate only to their own workplace. In Australia as in other countries, workers come together in unions because of concerns which they have in common as employees in particular industries, and as participants in the workforce as a whole.

65. Unions are also democratic organisations. Their job is to reflect their members' concerns and aspirations and to assist them to achieve these. As a result, unions will normally approach the bargaining process by calling meetings of delegates to draw up lists of issues which they wish to pursue in enterprise bargaining. The unions' job is then to assist members in bargaining by providing information about the issues through kits, seminars, etc. In order to assist delegates to negotiate agreements, many unions provide model agreements; while these will generally be varied as a result of negotiations at the enterprise, the model or template provides a useful basis for a starting point for the union and for the employer.

66. Employer organisations, of course, use similar measures to assist their members. Meetings to plan and adopt enterprise bargaining strategies are common, as is production of model agreements and draft clauses.

67. Employers also adopt and campaign around common issues of concern and attempt to pursue these through bargaining; for example, the introduction of performance pay in the mining industry, the abolition of penalty rates in the finance industry or reductions of pay in the meat industry.

68. Australian Workplace Agreements (AWAs) are another example of pattern bargaining, encouraged by the Employment Advocate with his promotion of an AWA "template" . The general practice of employers offering identical AWAs on a "take it or leave it" basis has been well-established, with genuine negotiation in the AWA context virtually unknown.

69. Some unions hold meetings with employers collectively, or with their organisations, to explain the claims and to explore industry views on the issues.

70. Such assistance is particularly valued by employers and employees in industries characterised by a large number of employers with a small number of employees, such as transport, live entertainment, building and construction, and the components sector of the automotive industry. These employers and employees are simply not in a position to approach enterprise bargaining with a blank slate. Most of these employers have neither the skills nor the time, and want nothing more than agreements which put the industry on more or less an equal footing in respect to labour costs, and be left to get on with it. Industry level bargaining does not deliver a state of 'perfect knowledge' but does provide a cost effective and more complete information set for workplace decision makers than fragmented and exclusively firm-level negotiations.

71. In many industries, the core issues will be determined in agreements concluded with one or more employers, with other employers and their employees satisfied to then adopt these conditions. Employers are as quick to say, "you agreed to that with him, I want the same conditions" as employees are to say "we won't accept less than what she is paying her employees", and will sometimes back these claims with industrial action.

72. This approach is not inconsistent with enterprise bargaining; the reality is that agreements with each enterprise may or may not contain some or all of the common claims, invariably with other issues relevant to the particular enterprise. Even where common claims are accepted, they will frequently be implemented differently in relation to timing, "offsets" and so on. This was the case, for example, with some of the 36 hour week agreements in the building industry.

73. It is simply impossible for unions to campaign for improved conditions unless such campaigning can occur throughout an industry, the wider workforce and even the community. This does not mean that unwanted conditions can be imposed on employers and their employees against their wishes. Finally, the employer must agree and the employees must vote; if the union refuses to agree under those circumstances, an agreement can be concluded without union consent.

74. Paid maternity leave, for example, has been a goal of the women's movement for many years. The ACTU and a number of unions have campaigned around this issue, which has been included in many claims for enterprise agreements in a wide range of industries. It is this campaigning which assisted the Finance Sector Union and the vehicle industry unions to achieve paid leave in many of their enterprise agreements. At the end of the day, each agreement was negotiated with each employer, and with some variations, including in the length of the paid leave, but the campaigning was crucial in order for employers to understand the importance of the issue to their employees. The

current campaign by the SDA for an extension of unpaid parental leave is another example of the need for unions to be able to pursue common claims in a co-ordinated manner.

75. All the major workplace gains of the last 20 years, including parental leave, superannuation, redundancy pay, training and skill recognition and family leave, were initiated by industry campaigns which resulted in a number of enterprise-based agreements. Later, these were adopted by the AIRC for the award system, in whole or in part. History shows that in Australia, this is how progress is achieved.

76. Occupational health and safety is another issue which is frequently not adequately addressed at the enterprise level. In its submission to the Inquiry into the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999,* the ACTU pointed to the adverse effects on occupational health and safety which have stemmed from the flexible enterprise focus. Adequate health and safety standards should not be available to be bargained away at the enterprise level, but should be based on proper industry-level agreements, as well as legislation.

77. Campaigning around common issues is integral to union functioning; to remove that ability would be to make it unacceptably difficult for unions to carry out their most basic role. Although industrial action does not always, or even usually accompany bargaining, without the *ability* to take action the process is unacceptably weighted towards the employer.

Industry-wide bargaining internationally

78. Prohibiting pattern bargaining has not been an issue internationally simply because no other comparable country imposes the types of restrictions on industry-wide and multi-employer bargaining and agreement-making as apply in Australia.

79. These restrictions have been the subject of ILO criticism on a number of occasions.

80. On 6 August 1997 the ACTU wrote to the ILO, setting out a number of concerns about the conformity of the Act with Convention No. 98 on the Right to Organise and to Bargain Collectively.

81. Australia is a signatory to the Convention, which requires the encouragement and promotion of collective bargaining between employers or their organisations and workers' organisations. The reference to bargaining with employer organisations clearly reflects a presumption that collective bargaining may be on a multi-employer basis, and that this mode of bargaining should also be encouraged and promoted.

82. The ILO's Committee of Experts, a group of internationally eminent independent jurists, found that the Act was inconsistent, in a number of respects, with the requirements of the Convention.

83. The ACTU submitted that the Act gives clear preference to single-enterprise bargaining, as evidenced by the restrictions on multi-business agreements, and the fact that protected industrial action cannot be taken in relation to these agreements. The Committee was concerned at the level of discretion afforded to the AIRC by section 170LC to determine the appropriate level of bargaining and concluded:

> *"The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining."*

The Committee continued:

> *".....the choice of bargaining level should normally be made by the parties themselves, and the parties 'are in the best position to decide the most appropriate bargaining level' (see General Survey on freedom of association and collective bargaining, 1994, paragraph 249). The Committee requests the Government to review and amend these provisions to ensure conformity with the Convention."*[8]

84. ILO jurisprudence has conclusively established that the right to strike, although not explicitly referred to in the ILO Constitution, or in Conventions 87 or 98, is implicit in these instruments.

85. In March 1999 the ILO Committee of Experts published an observation in response to an ACTU complaint about Australia's breaches of Convention No. 87 regarding Freedom of Association and Protection of the Right to Organise. The Committee found, in relation to multi-employer agreements*:*

> *"The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests."*[9]

86. In considering the Government's response to its 1999 observation, the Committee of Experts stated in its 2000 observation:

> *"With respect to the right to strike in support of a multi-employer, industry-wide or national-level agreement, the Government states that the Act does not expressly limit or restrict the scope of the subject*

[8] ILO *Report of the Committee of Experts on the Application of Conventions and Rewcommendations* Rep[ort 111 (Part 1A) ILO Geneva 1998 p224
[9] ILO 1999 op cit

> *matter pertaining to the relationship between an employer and employee, but does provide immunities in respect of a proposed single-business agreement. The Committee recalls that where strike action is 'unprotected' and therefore potentially subject to a wide range of sanctions, as in the case of action in support of multi-employer, industry-wide and national-level agreements, it is for all practical purposes prohibited."*[10]

The Committee concluded by once again requesting the Government to amend the provisions of the Act to bring the legislation into conformity with the Convention.

87. Although the Government has repeatedly claimed that it is in "dialogue" with the Committee of Experts, it would appear that its representations have not succeeded in altering the ILO's consistent finding that Australia is in breach of its obligations under the Convention.

88. Nowhere else in the developed, industrialised world are there restrictions on industry-wide agreement-making as exist in Australia.

89. Industry-wide bargaining is the general model in most European countries, at least on key issues concerning the whole sector, including wages and hours of work.

90. In the UK and the US bargaining is more often at an enterprise level (although in the UK it may cover groups of employees from the same craft or occupation). However, in neither of these countries is there a prohibition on multi-employer bargaining or on industrial action associated with it.

91. In the UK multi-employer industrial action has occurred in a number of industries. The Blair Government has legislated to make it easier to organise pre-strike ballots for multi-workplace action.

92. In the US construction industry, bargaining occurs at the local and regional as well as the industry level. Enterprise bargaining coverage is greatest where there is industry-wide bargaining.[11]

93. In New Zealand legislation allows multi-employer bargaining, if union members employed by each employer agree to go into the multi-employer negotiations. The New Zealand Department of Labour reports that seven per cent of employees in its contract data base are covered by multi-employer contracts.[12] The same issue of *ERA Info* also reports the first determination of the Employment Relations Authority defining the duties of good faith bargaining and ordering the parties to resume bargaining. In *Independent Newspapers Ltd (INL) v Amalgamated Engineering Printing & Manufacturing Union*, INL, a

[10] ILO *Application: International Labour Conventions* ILO Geneva 2001 p222

[11] G Bamber *et al* "Collective Bargaining" in R Blanpain & C Engels *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* Kluwer Law International 1998

[12] *ERA Info* Vol 5, October 2001

newspaper group, had refused to bargain for a multi-employer agreement, other than for the purpose of defining the scope of bargaining. The Authority held that the fact that INL refused to bargain on any issue until the matter of coverage was settled, made it clear that it intended to bargain in a very limited way only. INL was ordered to meet with the union for the purpose of bargaining for a multi-employer agreement and properly consider the union's claim for this type of agreement.

94. A 2000 dispute in the US involving 100,000 cleaners, members of the Service Employees International Union (SEIU), demonstrates that the ability to campaign on an industry level can be crucial for workers in precarious and fragmented employment.

95. Prior to the dispute, Los Angeles cleaners, mainly Hispanic immigrants, had been employed for around half the rate of unionised workers since they replaced union members sacked in the 1980s. Growing concentration of contractors has led to a relatively small number of companies employing most of the cleaners.

96. As a result of a union strategy for common expiry dates of contracts, not only in Los Angeles, but also in many other cities, it was possible for lawful industrial action to be taken by cleaners across the state.

97. In Los Angeles, a three-week strike led to the cleaners increasing their wages by 26 per cent, the biggest rise ever. The campaign was supported by political and civic leaders, and marchers were joined by Cardinal Mahoney, the head of the Roman Catholic archdiocese.

98. The nationally co-ordinated campaign resulted in gains such as family health insurance and home computers and training, as well as significant wage increases for precarious workers recognised as amongst the most exploited in the US.

99. In addition to Australia and New Zealand (discussed above) a small number of countries were cited in the International Confederation of Free Trade Union's 2000 *Annual Survey of Violations of Trade Union Rights* in relation to industry-wide bargaining.

100. In Swaziland, industry level bargaining can take place only if the Minister of Labour considers this to be "desirable or practicable". The parliament has passed a new labour bill, drafted with ILO assistance, but the King has not yet assented to it.

101. In Zimbabwe, 1992 amendments to labour law gave joint management-worker committees the right to override industry-wide agreements negotiated by unions.

102. In Argentina a number of legislative changes were introduced by decree, including limiting the scope of collective bargaining to the company or enterprise level. The changes were a response to IMF demands for restructuring as part of a loan package. The decrees were

then declared unconstitutional by the courts and suspended. A new reform bill was negotiated with trade unions, but opposed by employers and the IMF. The law was finally passed in September 1998 and confirmed the priority of industry-wide collective bargaining, although news laws introduced in 1999 provide that the Ministry of Labour must approve collective agreements which extend beyond enterprise level.

103. In Chile, where most labour law dates from the Pinochet era, the ICFTU reports:

> *"...the majority of workers are covered by individual employment contracts. Collective bargaining usually takes place at enterprise level. Industry-wide bargaining is rare and is at the discretion of the employer."*

A bill which would have made bargaining at industry level the norm was voted down by the Senate in December 1999.

104. Turkey has a ban on industry-wide bargaining.

105. None of these countries is at the cutting edge of competitiveness in the international automotive industry.

Labour market competition and pattern bargaining

106. It is a universally recognised principle that the labour market should not be open to free competition in the manner of other markets for goods and services. An important reason for this is the unfairness which would result from the exercise of the greater bargaining power of the employer over the employee. The enduring truth that 'labour is not a commodity' is embodied in the ILO's Declaration of Philadelphia[13].

107. This principle is reflected in paragraph 51(2)(a) of the *Trade Practices Act,* which has the effect of excluding from the reach of the TPA agreements and arrangements between employers and employees that relate to employment conditions.

108. In 1998 the National Competition Council reviewed the exemption provisions of the TPA, including paragraph 51(2)(a). In recommending that the exemption be retained, the Council rejected a Government submission to the effect that the exemption be revocable where the anti-competitive detriment to the community of the particular arrangements in question outweigh labour law policy objectives. The revocation would only be applicable for agreements or arrangements outside the formal industrial relations system.

109. The reasons given by the Council for recommending retention of the exemption were:

[13] "Declaration Concerning the Aims and Purposes of the International Labour Organization, 1944", in *Basic Documents of Human Rights* Third Edition, I Brownlie (ed), Clarendon Press 1992, pp243-5

(i) maintaining the primacy of the industrial relations framework in labour market relations;

(ii) compliance with Australia's ILO treaty obligations;

(iii) the certainty provided by the exemption in relation to the application of the TPA to employment agreements and arrangements.

110. The effect of prohibiting the pursuit of common claims, as provided for in the Bill, would be to reduce enterprise bargaining to a series of completely isolated negotiations, where workers would be unable to use the collectively-gained knowledge and experience which comes from participation in their union. Employers would, of course, not be so inhibited, and would be free to pursue approaches in common with other employers in the industry.

111. In his submission to the Inquiry into the 1999 Bill, Professor Joe Isaac submitted that multi-employer bargaining was not only fairer and more efficient, but did not necessarily result in higher outcomes:

> *"It is difficult to understand the in-principle objection to multi-employer agreements. There may be situations where a number of employers in the same industry prefer to deal collectively with the union and to have, as far as possible, uniform wages and conditions within the industry, while allowing certain variations to meet the circumstances of particular firms. Competition and profitability would then be based on managerial performance.*
>
> *"There is much to be said for such a situation, both on equity and economic grounds. It is an accepted labour market convention of fairness that similar work (particularly in the same industry) should be remunerated in similar terms. Perception of fairness encourages better workplace relations. On economic grounds, uniformity in pay and conditions ensures greater efficiency in the allocation of resources. Under free market rules, the less efficient firms would be expected to earn lower profits, which should spur them to greater efficiency; or fall by the wayside and release resources for more productive uses. There is no sound reason, except where substantial unemployment and hardship could fall on employees, why employees should subsidise the less efficient firms. In a competitive market, the efficient and less efficient firms pay the same price for their raw materials, fuel, power, transport, etc. Apart from the special circumstances noted, is there a case why the price of labour should be treated differently?*
>
> *"Further, many would see multi-employer bargaining as avoiding a situation in which the least resistant firm gives way to a standard of settlement that others would be opposed to. It is arguable that the bargaining power of a union facing a single employer may be greater than if it faced many employers at the same time in an industry bargaining situation. Picking on one employer at a time may be strategically a more effective way for the union to exact the best terms*

from all."[14]

112. Professor Isaac's view is widely shared throughout the industrialised world. In criticising the lack of explicit encouragement of industry-wide bargaining in the US, one legal commentator has written:

> *"Another fundamental issue for a labour relations system is the structure of bargaining. In most countries, industry-wide (sectoral) bargaining is preferred for it is believed it produces greater stability, a virtue both governments and employees recognize. From unions' viewpoint, industry-wide bargaining means that the cost of labor is taken out of competition within the industry."*[15]

113. In Australia, although multi-employer agreements are rare, and sectoral agreements virtually non-existent, a number of industries are characterised by similar bargaining outcomes. Building and construction and transport, for example, are characterised by a large number of employers in a very competitive environment.

114. If employers are forced to compete on labour costs, the effect is simply to keep driving these down until they reach a floor below which people will not work effectively if they will accept work at all. The 'efficiency wage hypothesis' is one formalisation of this constraint. The effect of labour cost competition is also to put stress on safety, of key importance in both building and transport. Recent cases of accidents involving long-distance drivers working for excessive hours demonstrates a result of downwards pressure on labour costs.

115. With little individual market power themselves, employers in this kind of industry are finding themselves forced to attempt to compete by driving down wages and conditions if they can. Employers of unionised labour find themselves at a disadvantage over those operators who are not bound by collective agreements or industry standards. This is a serious concern to many employers and their organisations, as well as to unions and their members.

116. The disparity is exacerbated by the growing gap between award rates of pay and the market in industries such as building, manufacturing and transport. This means that there is no relevant or effective floor for bargaining, leaving employees open to exploitation and to growing disparity between the wages of unionists and non-unionists.

117. The award system operates as a form of industry-wide wage setting for small employers in industries such as hospitality and retail, where there is a low incidence of certified agreements. These employers do not want to compete on wages; they want to know that they have a level

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[14] Submission 377, Vol 12, pp2692-3

[15] JR Bellace "Breaking the New Deal Model in the USA" in JR Bellace & MG Rood *Labour Law at the Crossroads: Changing Employment Relationships* Kluwer Law International 1997

playing field in relation to wages, taxes and other costs, and can compete on the quality of the goods and services they offer, and their entrepreneurial skills.

118. In industries such as these the award system remains as the most appropriate means of regulation. However, in the context of the current Act, with its limitations on the jurisdiction of the Australian Industrial Relations Commission [AIRC], and its emphasis on minimum wages and conditions, awards are rapidly falling behind community standards of fairness.

Productivity and employment

119. Productivity growth is a measure of the extent to which more output can be produced with the same inputs. Labour productivity specifically relates output to hours worked.

120. Productivity growth is highly cyclical, typically accelerating sharply in the early stages of economic recovery (when output picks up ahead of employment) and slowing as the recovery matures (when employment catches up and output growth slows). In the long run, productivity growth is driven by scientific knowledge and technological advance.

121. By any measure, Australian productivity growth has been strong and sustained over the past decade.[16]

122. Labour productivity growth dipped (in line with output growth) in early 1995 and late 2000; nonetheless, the average annual growth rate of 2.3 per cent for 1995-2001 is the highest for any comparable period in history. Similarly, the growth rate over the year to December 2001 is the highest since quarterly National Accounts have been taken.[17]

123. Australia's productivity growth over the past decade has exceeded most other industrial countries including the USA and UK. Our rapid productivity growth performance over the past decade is widely attributed to technological change (including the "new economy") and microeconomic reform, including the lowering of tariffs and increasing exposure of local industry to the international economy.[18]

124. It has been asserted that Australia's improved productivity growth reflects the introduction of enterprise bargaining. The ACTU has consistently argued that award restructuring from the late 1980s provided the essential platform for collective bargaining to build upon, and that that reform process explains much of the nation's sound economic performance over the past decade.

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[16] D Gruen *Australia's Strong Productivity Growth: Will it be Sustained* Reserve Bank of Australia February 2001

[17] Treasurer Paul Costello, Press Conference – National Accounts, 7 March 2002

[18] Ibid

125. The ACTU has always rejected the view that enterprise bargaining *simpliciter* is a magic elixir for boosting productivity growth. Recent academic assessments provide support for that view.[19]

126. Over the past decade, the making and pursuing of common claims, by unions and employers, including wage claims, has been a general feature of enterprise bargaining in Australia – as it has long been in most industrial economies. The argument that pattern bargaining is a threat to productivity growth is unsustainable.

127. Moreover, in seeking to identify the causes of the pick-up in Australian productivity growth in the nineties relative to the eighties, Gruen [2001] finds that:

> "*The sectors which made the largest contribution to this pick-up were the non-traded sectors of wholesale trade, retail trade and construction. Together these sectors accounted for more than 100 per cent of the pick-up in market sector productivity growth between the two decades, despite contributing only 40 per cent of the hours worked in the market sector.*"

128. Pursuit of common claims, by employers and unions, in the construction sector is widespread and appropriate to the nature of the industry. In the retail sector, agreement coverage reflects the industry structure; the few major employers are party to collective bargains but the vast numbers of small retail employers rely on award provisions. In wholesale trade, individual agreements (overwhelmingly traditional overaward pay arrangements) account for three quarters of total employment.[20]

129. Gruen points to increased use of computers and related technology in these sectors as one powerful potential explanation of their faster productivity growth in the nineties, and suggests that this beneficial influence will continue for some years yet.

130. Wooden *et al* also document the faster productivity growth in the nineties, and note the sectoral concentration of the pick-up identified by Gruen. Wooden *et al* acknowledge that work intensification in these sectors may account for some of the apparent rise in labour productivity; that is, the higher output may be attributable to higher unmeasured labour input, thus falsely inflating apparent productivity growth.

131. Wooden *et al* review the available evidence regarding the alleged impact of bargaining ("industrial relations reform") on economic

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[19] M Wooden, J Loundes, and Y-P Tseng *Industrial Relations Reform and Business Performance* Melbourne Institute Working Paper No 2/02

[20] Commonwealth Submission to the Safety Net Review – Wages 2001-02, Appendix A

performance generally and productivity in particular, and present some new econometric evidence of their own. They conclude:

> *"But what has enterprise bargaining actually achieved? As demonstrated in this paper, the case for enterprise-based bargaining systems hinges in large part on its potential to enhance the productive capacity of business. Nevertheless, the available evidence is far from supportive. While it is true that Australia experienced a marked resurgence in productivity growth during the 1990s, the available evidence from workplace- and enterprise-level studies does not enable any strong conclusions to be reached about possible links between enterprise bargaining and productivity."*

132. The latest data show Australia's labour productivity growth rate (five year moving average growth from previous year) exceeds all industrialised OECD countries except Finland and Ireland.[21]

133. A recent study of US businesses by Black and Lynch finds strong evidence that union presence in firms that pursue 'high performance' strategies is associated with higher productivity growth than similar firms without union presence[22]. Using a large, nationally representative sample of manufacturing businesses, the study finds that:

> *"... it is not whether an employer adopts a particular work practice but rather how that work practice is actually implemented within the establishment that is associated with higher productivity. Unionised establishments that have adopted human resource practices that promote joint decision making coupled with incentive-based compensation have higher productivity than other similar non-union plants, whereas unionized businesses that maintain more traditional labor management relations have lower productivity."*

134. Black and Lynch observe:

> *"Workplace practices have interesting effects on labor productivity. In particular, we find that simply introducing high-performance workplace practices is not enough to increase establishment productivity. As shown in equation two in table 1, the increased employee voice that is associated with these practices seems to be a necessary condition to making these practices effective."*

135. They state further:

> *"Our regression coefficients ... imply that a unionised plant with no benchmarking, no TQM, no profit sharing for nonmanagerial workers, and no employee involvement programs will have 10% lower productivity than an otherwise similar plant that is nonunion. A*

[21] OECD *Main Economic Indicators* February 2002, Basic Structural Statistics, pp268-271

[22] "*How to Compete: The Impact of Workplace Practices and Information Technology on Productivity*" by Sandra E Black and Lisa M Lynch, **The Review of Economics and Statistics,** August 2001, 83(3), 434-445

nonunion plant that uses benchmarking, TQM, has 50% of its workers meeting on a regular basis, and profit sharing for non-managerial employees will have 4.5% higher productivity than an otherwise similar nonunion plant that has not adopted any of these "high-performance workplace" practices. However, a unionized plant with benchmarking, TQM, 50% of its workers meeting on a regular basis, and profit sharing for nonmanagerial workers will have 13.5% higher productivity than an otherwise similar nonunion plant with none of these high-performance workplace practices."

136. In concluding their paper, Black and Lynch say:

> *"... what seems to matter most for productivity is how HR systems are implemented. Adopting a TQM system per se does not raise productivity. Rather, allowing greater employee voice in decision making is what seems to matter most for productivity. Instituting a profit-sharing system has a positive effect on productivity, but only when it is extended to non-managerial employees. Finally, those unionised establishments that have adopted what have been called new or "transformed" industrial relations practices that promote joint decision making coupled with incentive based compensation have higher productivity than other similar nonunion plants, and those businesses that are unionised but maintain more traditional labor-management relations have lower productivity."*

137. This applied study in a prestigious professional journal analysed real workplaces with real unions where 'pattern bargaining' is a standard feature of the industrial landscape. Though conducted with US data, its general findings about 'employee voice' are highly germane to this Inquiry, yet the PC seems entirely ignorant about it and the related literature in the field. There is no magic legislative bullet for achieving higher workplace productivity.

138. In terms of unemployment, at end 2001 Australia's unemployment rate was broadly in line with the OECD average. Several European countries including Sweden, Switzerland, Norway, The Netherlands, Ireland, Denmark, and Austria had lower unemployment rates than Australia, as did the UK, USA, and Japan. Canada, France, Germany, Italy, Finland and Spain continue to struggle with unemployment rates in the order of 8-9 per cent or more.

139. There is no evidence to suggest any concordance between the presence of pattern bargaining and the level of unemployment or the productivity growth rate across OECD countries.

Relevance to the automotive industry

140. The case for an industry approach to bargaining is particularly strong in the automotive industry. It is precisely because of the existence of "Just in Time" and other "lean production" methods, which leave assemblers and component suppliers highly mutually dependent, that

an industrial relations system is required which is similarly integrated.

141. It would seem obvious that the best way to bring industrial stability to the automotive industry would be to ensure that major issues are resolved periodically (say, every three years) through industry-wide bargaining. This is recognised by the PC itself, where it stated about the workers' entitlements issue, the subject of two of the three disputes complained about by the AiG:

> *"The workers' entitlement issue highlights a general principle that should underpin the resolution of workplace issues in this and other industries - namely, that one size does not fit all. While many workforce issues are most effectively resolved at the enterprise level, some are best addressed at either an industry-wide or even national level. The Commission considers that the workers entitlements issue is one in this latter category.*
>
> *"In this context, a summit involving representatives of automotive firms and the unions has been organised to discuss industrial relations matters and other workplace issues confronting the industry. This summit could provide a circuit breaker to the entitlements issue and a possible means of minimising the extent of disruption in the industry as solutions to the issue are developed."*

142. It is intriguing that the PC does not see the contradiction between its support for an industry-wide approach on the issue seen as the primary cause of disruption of the industry, while also indicating unreasoned support for an approach based, not on discussion and negotiation, but on blaming the industry's unions and seeking to force them into submission through increased use of legal sanctions.

143. While employee entitlements were the subject of two of the three highlighted disputes, the subject of the third was job security and use of contractors. The ACTU submits that these issues equally require an industry wide approach, and could be resolved most effectively through the type of negotiations envisaged in respect of employee entitlements.

144. The existence of common expiry dates in a number of automotive industry agreements has been portrayed as a terrifying portent of industrial chaos. The ACTU submits that it should be seen, instead, as an opportunity to conduct negotiations in a way which enables a stable approach to bargaining to be brought to the industry.

Cooling Off Periods

145. The Genuine Bargaining Bill also contains a proposal to give the AIRC a discretion to suspend a bargaining period, if protected action is being taken, and the AIRC believes suspension is appropriate, having regard to whether it would be beneficial to the parties by assisting in resolving the matters in dispute.

146. The ACTU made submissions on this proposal to the Senate Committee referred to above.

147. Although the Bill purports to do no more than give a discretion to the AIRC, the reality is that it can have no effect other than to restrict further the taking of industrial action in the context of a legislative regime which already falls short of international standards.

148. The Government's obsession with industrial action is completely unwarranted. The necessity for such a provision, given that most strikes in Australia are of short duration, should also be questioned. In 2001 there were 665 industrial disputes involving 225,700 employees. Of these, 512 disputes involving 86 per cent of employees were for two days or less. Only 72 disputes, involving 12,100 or 5.5 per cent of the employees, lasted for five or more days. The decline in working days lost from industrial disputes has continued, with 16 per cent fewer days lost in 2001 compared to the previous year.[23]

149. The effect of the proposed amendment would be for bargaining periods to be suspended even when the party taking the action has behaved within the law. It should be noted that the AIRC already has the power to suspend the bargaining period where a party has not tried or is not genuinely trying to reach an agreement.

150. To the extent that there is an issue of protracted industrial disputes, it reflects the lack of power in the AIRC to deal with the underlying causes. Restoration of the arbitral power of the AIRC would provide a means of dealing with such disputes, as submitted by the AiG to the Inquiry into the 1999 Bill:

> *"There have been a number of disputes where the option of arbitration might have had an advantage for the parties."*[24]

151. As submitted above, the key to effective industrial relations in the automotive industry is the ability to resolve, as efficiently as possible, the issues in dispute. Simply removing the right to take protected industrial action would not help to resolve the dispute, other than by removing the workers' leverage and forcing them to settle on the employer's terms.

152. Suspension of industrial action, absent any other mechanisms for resolving the issues, is no more than an attack on the right to strike, bringing Australian law even further from meeting international norms.

Secret Ballots

153. The AiG's submission to the PC included support for the *Workplace Relations Amendment (Secret Ballots for Protected Action) 2002*, a

[23] ABS *Industrial Disputes* Cat 6321.0
[24] Transcript, 1/10/99, p45

proposal seemingly endorsed by the PC's general support for measures to "constrain the scope of 'protected action'".

154. The PC's support, in these terms, is consistent with the ACTU's view that the Bill reflects the Government's desire to force an intrusive secret ballot procedure as a precondition to taking protected industrial action, not to encourage democratic decision making but to constrain the ability to take industrial action.

155. In the absence of any suggestion that the industrial action which has recently affected the automotive industry did not have the wholehearted support of the employees involved, there is no basis whatsoever for the PC's support of legislation for secret ballots.

156. The process for obtaining and implementing an order for a secret ballot set out in the Bill adds additional time-consuming complexity to the taking of protected industrial action, reflected in the approximately 35 pages which would be added to the Act if the Bill was to be passed. The ACTU submits that the process would be of such complexity that it would nullify any practical right to take protected action.

157. Following the failure of the 2000 Bill to receive sufficient support to ensure passage through the Senate, the Government submitted an outline of new proposals, largely reflected in the 2002 Bill, to the ILO's Freedom of Association Branch. In a letter to the Department dated 9 October 2000, the Chief of the Branch wrote:

> *"As requested, I am able to confirm that the 'elements underpinning possible Australian legislation on pre-industrial action secret ballots', which you submitted to us on 29 September 2000, do not, standing alone, appear to contravene existing ILO principles and standards on freedom of association. The supervisory bodies have accepted secret ballots as a pre-requisite to taking strike action, on the condition that the procedures, the quorum and the majority required are not such that in practice the exercise of the right to strike becomes very difficult.*
>
> *"As we discussed during your visit, any legislation that is finally adopted on compulsory strike ballots will need to be considered in the context of the industrial relations legislation as a whole, in particular all the legislative requirements in order to call a lawful strike, to ensure that the cumulative effect of such legislation, by virtue of its complexity and extent, is not such as to make it very difficult from a practical point of view to declare a legal strike, or to declare a strike in a timely manner. Our opinion concerning the pre-strike ballots must also be viewed in the light of the comments of the Committee of Experts concerning the legislation regulating strikes in Australia, in particular the concerns expressed regarding the restrictions on the subject-manner of strikes, the prohibition of sympathy action, and the restrictions extending beyond essential services."*

158. If the Government were to claim ILO endorsement of its scheme it would be a level of hypocrisy which would be unbelievable if it was not

consistent with its general pattern of behaviour. The Government will not ask the ILO to examine the 2002 Secret Ballots Bill "in the context of the industrial relations legislation as a whole", while it continues to ignore its previous findings and observations on the right to strike. Showing complete contempt for these findings, the Government has introduced the Genuine Bargaining Bill, which further restricts the right to strike.

159. The ACTU supports the right of union members to vote on whether or not to take industrial action, and believes such votes are generally taken. It should be noted that a number of unions routinely use secret ballots prior to taking industrial action. No evidence has been adduced showing that unionists are being forced or required to take industrial action against their will, or without their consent. The fact that in many disputes not all union members participate, is evidence of the lack of coercion, which would, in any event, be unlawful.

160. The ACTU notes that secret pre-strike ballots are available when requested by employees under section 136 of the WRA.

161. It is also possible under section 135 for the AIRC to order that a secret ballot be conducted if it considers that this would be helpful in resolving a dispute, if industrial action is pending, or to ascertain whether an agreement has been genuinely made.

162. Although there is no specific provision for an application for a secret ballot to be made by an employer party to the dispute, another affected party or the Minister, there is no bar on any of these persons making submissions to the AIRC that a ballot should be ordered.

163. In the Ministerial Discussion Paper *Pre-industrial action secret ballots* published in August 1998, the authors found that very few secret ballots had been ordered by the AIRC, and that where these had occurred they had generally been to ascertain employees' attitudes to particular issues, rather than their views in relation to industrial action. The report concludes:

> "*The Commission appears to be using ballots strategically to progress dispute resolution, particularly where the parties have reached a stand-off in negotiations."* (p3)

164. There is no evidence in the Discussion Paper of the AIRC refusing applications by employers, or anybody else, for ballots to be conducted in relation to the question of taking industrial action.

165. Western Australia has legislation for compulsory secret pre-strike ballots, although its repeal is currently before the WA Parliament. There had not been one application for a ballot from 1 January 1998, when the legislation came into effect. This is in spite of applications being able to be made by an employer or employer organisation, as well as by a union or union member. The Minister also has the power to issue a certificate that a ballot would be in the public interest,

whereupon the Industrial Relations Commission was required to order it to be held. The Ministerial Discussion Paper notes, in relation to WA:

> *"There have already been a number of apparent breaches of the Act."* (p15)

166. The ACTU submits that existing provisions are generally unutilised, not because they are difficult to access, but because in the face of an actual dispute, parties and other affected persons have not taken the view that a ballot would be effective in preventing industrial action or resolving the dispute.

167. It is interesting to note that the Bill proposes to remove the AIRC's discretion under section 135(2B) to order a secret ballot in the case of unprotected action; this is part of a general thrust by the Government to create a legislative framework in which legal action is the only possible response by employers to unprotected industrial action, rather than encouraging the use of AIRC processes to resolve the dispute which has given rise to the industrial action.

168. In this context, the Government's proposals for a system of compulsory secret ballots cannot be seen as anything other than an attempt to further restrict the ability of Australian unionists to take protected industrial action. This right is already more restricted in Australia than in most other developed countries. The incidence of industrial action is falling in Australia, demonstrating that there is no industrial crisis that requires action.

169. The Government's refusal to consider secret ballot requirements to call off a strike is conclusive evidence that this proposal has nothing to do with democratic functioning, and everything to do with restricting the right to strike. Further evidence is provided by the lack of any support for proposals such as compulsory secret postal shareholder votes on issues such as takeovers, or whether or not a company should lock-out its employees.

170. While the 2002 Bill contains some improvements over its predecessors, these are relatively minor, and do not change the essentially restrictive and intrusive nature of the scheme.

Ballot applications

171. Proposed subsection 170NBB(1A) provides that an application for a ballot may be made up to 30 days before the expiry of an existing agreement. Under the 2000 Bill the only requirement was that an application be made during a bargaining period.

172. This change, if anything, imposes an additional restriction, as the 2000 Bill allowed applications to be made at any time after a bargaining period had commenced. It reflects the new provision in proposed

subsection 170NBDD that industrial action authorised by a ballot must commence within 30 days of the declaration of the ballot results.

Applications to be dealt with quickly

173. Proposed section 170NBCA provides that the AIRC must act as quickly as is practicable and must, as far as is reasonably practicable, deal with a ballot application in two days. This has been changed from four days in the 2000 Bill.

174. The ACTU submits that as the provision is merely aspirational, the reduction in time is of no material significance. The AIRC's ability to deal with applications quickly can be quite outside its control.

175. Employers and others wishing to delay the action will be able to argue a number of issues before the AIRC, such as the validity of the bargaining period and whether or not the union has genuinely tried to reach agreement. In addition, procedural issues, such as who should conduct the ballot, the roll and the timetable are all issues for debate which can be used for delay.

176. The new proposal allowing the AIRC to decline to consider a submission if satisfied that it is vexatious, frivolous, misconceived or lacking in substance [s170NBCB(2)] is unlikely to prevent delays, given that the AIRC is bound by the rules of natural justice, and would need to listen to a submission before being able to make the relevant determination.

177. Similarly, the proposed privative clause [s170NBGBA], while limiting appeals against ballot orders, will not affect the length of the initial proceedings.

178. The AIRC is also limited by its own resources and by the need to deal with competing priorities created by applications under other provisions of the Act which are seen by parties as requiring urgent attention.

179. To an uncertain period for the hearing and determination of an application for a ballot order must be added a period of around three weeks for the Electoral AIRC or private ballot agent (which may include the union) to conduct a postal ballot, which is the favoured method in the Bill. This is followed by three days notice to the employer before the action can take place, with the AIRC able to extend the period to a maximum of seven days if there are "exceptional circumstances". [s170NBCI(5)]

180. It should be noted that the UK pre-strike ballot provisions do not require an application to a tribunal for approval of the proposed ballot. In the UK, if a union believes that a ballot is appropriate, it simply organises one in accordance with a Department of Trade and Industry Code of Practice.

The ballot question

181. Proposed subsection 170NBDA requires the question or questions to be put to the relevant employees to include the nature of the proposed industrial action. Under the 2000 Bill the ballot question was required to include the precise nature and form of the proposed action, the day or days on which it is proposed to take place and its duration.

182. "The nature of the intended action" is the term used in subsection 170MO(5) of the Act in relation to notifying the employer of the intended taking of protected action. It is a principle of statutory interpretation that words and phrases used on more than one occasion in a statutory instrument have the same meaning.

183. In considering the meaning of the notification requirement in subsection 170MO(5), a Full Court of the Federal Court has held that a certain degree of specificity is required:

> "*Parliament did not indicate what degree of specificity it intended by the term "nature of the intended action". To interpret this term, on the one extreme, as requiring no more than an indication of industrial action, as argued by NUW, would be significantly to devalue s170MO(5); the notice would provide little information. To interpret it, on the other extreme, as requiring precise details of every future act or omission would be to impose on the giver of a notice an obligation almost impossible to fulfil. 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. An unduly demanding interpretation of s170MO(5) would seriously compromise the scheme of Division 8 of Part VIB of the Act; it would be difficult for a party to an industrial dispute to obtain the protection contemplated by the Division……..*
>
> "*We think s170MO(5) was designed to ensure that industrial disputants who are to become affected by protected action, in relation to which their usual legal rights are significantly diminished, are at least able to take appropriate defensive action. For example, an employer may operate a sophisticated item of equipment that will be damaged if precipitately shut down. If warned in advance of a ban that might affect the continued operation of that plant, the employer might choose a controlled shut down during the period of the notice. More commonly, perhaps, an employer might use the notice time to communicate with suppliers and customers, and thereby reduce the consequences for them of the notified industrial action. Very often, the recipient of the notice will respond in a way that has a legal dimension. For example, a union might react to a notice by an employer of intent to lockout some employees by giving notice that all employees will strike indefinitely as from the commencement of the*

lockout. Similarly, an employer might respond to an employees' notice of bans by giving notice of a lockout of some or all employees.

"It will be apparent we think it necessary, and sufficient, for parties to describe the intended action in ordinary industrial English; for example, 'an indefinite strike of all employees', 'a lockout of all employees employed in the AB fabrication plant', 'a ban on overtime', 'a ban on the use of the MN equipment', 'rolling stoppages throughout the mine', 'a ban on the servicing of delivery vehicles'." [25]

184. In light of this, the ACTU believes that a new ballot would be required should the union and its members wish to change the type of action being taken.

185. The proposed requirement that the ballot question specify the nature of the action should be contrasted with the equivalent provisions of UK law, to which the Minister referred approvingly in his Second Reading Speech.

186. The requirements of the UK system are set out in a Code of Practice *Industrial Action Ballots and Notice to Employers* issued by the Secretary of State for Trade and Industry pursuant to section 203 of the *Trade Union and Labour Relations (Consolidation) Act* 1992, with the authority of Parliament. Under the UK system of pre-strike ballots, the ballot paper must include one of these two questions:

Are you prepared to take part in a strike?

Are you prepared to take part in industrial action short of a strike?

Both questions can be asked and, if both are carried, this allows for a later decision to be made about the form of action to be taken.

187. It should be noted that there is no requirement for the ballot question to provide any more detail about the type of action. The ballot operates as a general authority to one or more persons, who may be union officials or workplace delegates, to make a call for industrial action at some time after the ballot. The first call for industrial action must be made not less than four weeks from the date of the ballot, and this can be increased to eight weeks with the consent of the employer.

188. Once a ballot agreeing to industrial action has been carried, the union may decide to authorise or endorse industrial action, which may be continuous or discontinuous. Employers must be given seven days notice of the date or dates on which action is intended to commence.

189. While the UK system is unacceptably complex and technical (and is not, incidentally, supported by UK unions, as alleged by the Minister) and does lead to a great deal of litigation, it is not as rigid or restrictive

[25] *Davids Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108 paras 84, 87-88

as that proposed in the Bill presently before the Australian parliament.

190. In particular, unions are not tied to a type of action specified in the ballot paper, but are able to make decisions about action subsequent to a ballot, on an ongoing basis, so long as notice is given to the employer.

Quorum

191. Proposed section 170NBDD sets the quorum for the vote as 40 per cent of voters on the roll, although this can be reduced further by the AIRC in "exceptional circumstances". [s170NBCI(4)] The quorum under the 2000 Bill was 50 per cent, with no ability for reduction.

192. The ACTU submits that it is inequitable to require a quorum, and asks the Committee to note that no quorum for voters is required under the UK legislation.[26]

193. The ILO Freedom of Association Committee has held that while:

> *"the obligation to observe a certain quorum.....may be acceptable.....The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises".* [27]

169. The June 1999 report of the non-Government members of the Public Administration Committee of the Western Australian Legislative Council into the *Labour Relations Legislation Amendment Act* 1997, which, until its expected repeal, provides for compulsory secret ballots, says in relation to quorum requirements in a voluntary system of voting:

> "*....each failure to exercise the capacity to vote has the effect of an arbitrary determination of that failure to vote as a 'no' vote.*
>
> *"The right to abstain from a voluntary vote is a democratic right which is widely practiced in Australian society.....*
>
> *"The broad purpose of section 97C of the Act is to provide a mechanism to determine whether union members wish to engage in a form of industrial action or not. It is inevitable that in most cases some members will want to strike, others will not, and others will not want to make a decision either way. A ballot should be able to reflect that range of opinions, and our administrative processes should facilitate a fair expression of those views."* (p47)

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[26] *Pre-industrial action secret ballots* Ministerial Discussion Paper, August 1998, p17

[27] Freedom of Association Digest, 4th (revised) edition, paras 507&510

194. Although the Western Australian legislation to which these comments are addressed required a higher quorum than the Bill, the principles are the same. There is simply no justification to require more than a simple majority of valid votes cast, the system which applies, not only in the UK system of pre-strike ballots, but in the election of UK politicians, and the President of the United States. If the quorum requirements in the Bill were to operate in the US, there would not have been a validly elected President.

195. Two examples should be considered, both involving workplaces of 100 employees. In the first, 39 employees in the ballot vote, all in favour of strike action. In the second, 40 employees vote, 21 of them in favour of strike action. In the first example, strike action would not be authorised, while in the second it would, even though it would appear that there was substantially greater active support for the strike in the first example.

Conduct of the ballot

196. The 2002 Bill provides for a union to be permitted to run the ballot if it has an "independent adviser", subject to AIRC approval and authorisation of the adviser. The AIRC must not name a person as the authorised independent adviser for the ballot unless satisfied that the person is sufficiently independent of the union and is capable of giving the union advice and recommendations directed towards ensuring that the ballot will be fair and democratic. [s170NBEA(2)] Under the 2000 Bill, the ballot was required to be run by the Australian Electoral AIRC or a person approved by the Registrar and entered on a register of ballot agents.

197. While this change is a minor improvement, it does not deal with the inevitable delays which will result from the process required under the proposed legislation.

198. The 2002 Bill allows the AIRC to agree to an attendance vote rather than a postal ballot, if the former is more "efficient and expeditious", although the presumption in favour of the latter is retained. [ss170NBCI(2)-(3)]

199. It is difficult to see how the aspiration expressed in subsection 170NBCC(3) for ballot results being available to the parties within 10 days after the ballot order is made could possibly be adhered to if a postal ballot is required by the AIRC.

Cost of the ballot

200. The 2000 Bill provided for the Commonwealth to reimburse the union for 80 per cent of costs "reasonably and genuinely incurred" in the holding of the ballot. The 2002 Bill provides for the 80 per cent to be paid directly to the ballot agent by the Commonwealth.

201. The ACTU submits that this difference is not significant. The long-standing principle in Australia is that where the Government determines who shall run a ballot, it pays the costs, as is the case with union elections. It is completely unfair to impose requirements on private organisations to have ballots run by a government body, and then require the organisation to pay the costs. In this case, although the AIRC may approve a ballot agent other than the Australian Electoral Commission, this is clearly the exception. Even if the AEC is not used, the alternative must be approved by the AIRC pursuant to legislation.

202. The Western Australian regulations provide that costs associated with the ballot are reimbursed by the Registrar to the entity conducting the ballot.

203. The 2002 Bill, on the other hand, proposes that unions would be reimbursed only 80 per cent of costs, which the ACTU believes is totally unacceptable.

Section 127 Orders

204. The PC's support is also extended to the AiG's proposal to require the AIRC to hear and determine an application to stop unprotected action with 24 hours of lodgement.

205. This position goes further than that taken by the Government, which has, presumably in response to a request from the AiG, reintroduced legislation in relation to section 127 orders, based on similar legislation in 1999, 2000 and 2001.

206. The *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002* would require the AIRC to determine section 127 applications within 48 hours and, where this cannot be done, to give it the power to issue interim orders preventing the union from taking industrial action until the application has been determined.

207. The Bill sets out a number of matters to which the AIRC must have regard in determining whether or not to make an interim order, including:

(i) the damage to industry that will be caused by the industrial action;

(ii) the time needed to determine the application;

(iii) whether the industrial action has escalated or forms part of a sequence of actions which may not be protected;

(iv) the undesirability of the occurrence of industrial action that is not protected action.

208. The PC should note that the very limited scope for taking protected action has been strongly criticised by the ILO, the body responsible for overseeing member nations' compliance with relevant Conventions. In particular, the ILO believes that the scope of protected action should be extended to include action in support of multi-employer or industry-wide agreements, and in some circumstances, for "sympathy" strikes or actions around social or economic (as opposed to merely political) concerns of workers.

209. The proposal to tighten the legal noose around protected action takes Australia even further away from meeting its international legal obligations and will do nothing to assist with the equitable resolution of disputes.

210. The Bill, if enacted, would be used against protected as well as unprotected action. Merely by asserting that action is unprotected, employers will be able to create the circumstances whereby the AIRC will face the presumption that it issue an interim order to stop any industrial action.

211. In cases where the application for a section 127 order is lodged on a Friday afternoon, for example, the AIRC would inevitably be unable to determine the matter within the 48 hours prescribed in the Bill. In any event, once it is asserted that the action (or proposed action, as an application for a section 127 order can be made after the required notification has been given but before the action commences) is unprotected, the AIRC will require further information and submissions before it can determine whether or not the action is protected.

212. When this issue was last before the Senate Committee referred to above, the minority report by Senator Murray on behalf of the Australian Democrats said:

> *"In my view it is difficult for the Government to advocate a much greater tightening up of this area of industrial disputes, when it is simultaneously boasting that Australia has the lowest level of industrial disputation in eighty years.*
>
> *"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.*
>
> *"This schedule is about seeking to restrict access to industrial action and to increase access to penalties in respect of such action. As such, it seeks to respond to what, in an objective sense, is a non-existent*

problem. Section 127 does not need to be changed. The existing section 127 provides a strong deterrent to disruptive industrial action, and the Government has failed to make out a case that the provisions are not working and need these reforms."[28]

213. Underlying the Bill is the Government and employer view that the AIRC is too soft on unions in dealing with applications under section 127. However, there is no evidence to support this proposition, or that there has been a surge in unprotected action since that report was written.

214. In the overwhelming majority of applications for orders under section 127 which have been determined by the AIRC in respect of industrial action which is not protected, the orders have either been granted, or a recommendation or direction to cease the action made, with a clear indication that orders would be made if the direction was not complied with.

215. The AIRC has granted most applications for orders under section 127 in spite of the fact that it has a discretion as to whether or not to issue an order on the basis that section 127 is not a prohibition on unprotected action.[29] In *Coal and Allied*, the Full Bench distinguished illegitimate action as a sub-class of unprotected action, and referred to "the international recognition of rights to take some forms of industrial action not covered by the immunity conferred by s.170MT…".

216. In general the AIRC has refused applications only where the action is protected, or in exceptional circumstances, such as where the action is related to health and safety.[30]

217. Section 127 has been utilised in relation to alleged secondary boycotts[31] and in relation to stoppages linked to protests on matters such as Workcover legislation in Victoria,[32] the failure of the Victorian Government to proclaim a substitute day for Anzac Day,[33]changes to accident make-up pay provisions[34] and the Bill currently before the Committee, in relation to which some applications were granted, and one refused.[35]

218. The AIRC has also accepted the principle that section 127 could be used to issue orders against employers who engage in industrial action as defined in section 4 of the Act, although applications by unions for orders against employers have most often been rejected.[36] The

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[28]Senate Employment, Workplace Relations, Small Business and Education Committee *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* Commonwealth of Australia, November 1999 p397

[29] .*Coal and Allied Case* (Print P2071)

[30] Print R5276

[31] Print P5227

[32] Prints P7080, P7129, P7329

[33] Prints P7080, P7129, P7329

[34] Prints P7080, P7129, P7329

[35] Prints P7080, P7129, P7329

[36] Applications rejected in Prints P4460, P4498, P5229, P8953, P2953, Q8448, R0365, R3466, R6299, and granted in Prints P3454, Q4688

Federal Court, in a 2000 decision, found three union officials guilty of contempt for breaching an injunction granted to enforce an order under section 127.[37] It should be noted that those proceedings were not in relation to any protracted industrial action but merely the unions' convening of stop-work meetings of members to discuss and made decisions about their bargaining campaign, which, in the ACTU's view, should be permitted without loss of pay.

219. Figures supplied by DEWRSB to the Inquiry into the 1999 Bill showed that only nine per cent of section 127 applications were refused, with a proportion of these being union applications against employers, almost all of which were refused.

220. Given Australia's already excessive restrictions on the right to strike, there can be no justification for a measure which is designed to and will have the effect of making most industrial action a contempt of court.

Conclusion on Industrial Relations

221. The ACTU submissions are based, primarily, on the general effect the proposed industrial relations changes would have, rather than focussing in particular on the automotive industry. A detailed industry perspective will be given by the AMWU in its submission.

222. The PC acknowledges in its report that:

> *"Such legislative changes would, of course, have implications extending well beyond the automotive industry."*

223. In advocating a significant amount of legislative change, seemingly on the basis of three disputes, the PC has adopted a highly partisan position with little supportive evidence or reasoning, and no apparent recourse to the relevant professional literature on bargaining and productivity growth.

224. While the extent of industrial relations difficulties in the automotive industry has been greatly exaggerated, there are some real issues. The ACTU's submission is that these can be best addressed through greater industry-wide consultation and co-ordination.

225. The PC's preliminary findings are deeply flawed. They would further violate Australia's international obligations, and engender uncertainty and instability in the car industry and beyond.

226. Issues of union coverage are matters dealt with under Australian labour law. They raise issues concerning freedom of association and collective bargaining rights, on which Australia is party to international obligations. The PC's preliminary findings on union coverage are

[37] *AIG v AMWU* [2000] FCA 629 (12 May 2000).

politically slanted, and not supported by research or evidence.

227. Long-term industry growth will not be delivered through workplace coercion and the imposition of further legislative constraints on workers.

228. The PC attempts to quantify the impact of further cuts to tariffs and abolition of ACIS, and finding the 'gains' are small and marginal and associated with substantial transition costs opts for a 'slow ahead' approach on assistance measures. In contrast, the PC makes no attempt whatever to quantify the economic impact of the IR legislative changes it supports, and advocates reckless pursuit of legislative measures about which it is patently ill-informed.

229. The PC believes that the legislative changes would assist growth, but has made no attempt to test this belief and to satisfy itself that there is little prospect of the opposite outcome over the medium term.

230. The ACTU remains strongly of the view that the car industry should institute standing arrangements for employer / union consultation and negotiation at the industry level, to supplement and reinforce existing consultative arrangements at enterprise and plant level.

3 Other Issues

Australia's Car Industry in the Global Context

231. The car industry fills a critical place in the manufacturing sector in Australia as in other countries. It is large in terms of output and employment, and provides substantial upstream demand for basic and sophisticated inputs to production. It develops and uses cutting edge technologies with associated high skill needs. It has a vital presence in the nation's regional economies.

232. Spillovers, clusters and other externalities associated with the car industry are recognised internationally. This is reflected in deep and pervasive Government support for the automotive industry worldwide.

233. Technological change, environmental issues, and shifts in the composition of market demand present continuing challenges to the industry.

234. Competition has resulted in high concentration of the global industry, with six producers controlling more than 60% of global production. Similar competitive pressures have cut the number of component suppliers worldwide by three quarters over the past decade. Strategic production decisions with respect to the four Australian vehicle builders are taken in head offices located in the northern hemisphere.

235. The Position Paper's description of the economic structure of today's Australian car industry is broadly accurate. However the PP account of how this has come to be [pages 24-26] is seriously deficient.

Consultation and cooperation

236. The story of the Australian automotive industry from the early 1980s to the mid 1990s is really the story of how cooperation between management, labour and government reconstructed an industry vital to the future of Australia.

237. The car industry in the early 1980s looked very much like it could have ended up like other Australian industries such as agricultural implements confined to the dust bin of history as multi-nationals closed down Australian production capability and imported product for the domestic market.

238. In many respects it began with the 1983 election where one of the commitments Bob Hawke made was to end the mass retrenchments that were occurring in both the steel industry and auto industry and to formulate a new industry plan for the car industry. This was really the beginning of the first car industry plan (the Button Plan) in the early 1980s that helped to transform the industry.

239. These plans were based on consultation and cooperation between employers and workers through the car industry unions. They appear, broadly, to have worked.

240. There were different forms of cooperation that had to be put in place to make the industry survive.

241. First, there had to be cooperation between government and industry and unions in understanding that if the global economy opened it would be unsustainable for Australia to maintain effective rates of protection of over 100%.

242. To address this the plan instituted gradual rates of reductions in tariffs, gradual removal of the local content plan, and gradual removal of quotas. In their place the plan provided assistance to auto and other industries to encourage research and development. For the automotive industry a special export plan and other initiatives which helped to cushion the reductions of assistance were implemented, including labour adjustment assistance for those workers who were displaced.

243. Today's Australian automotive industry operates with government assistance in line with world standards.

244. Another important form of cooperation was between the component suppliers and the car companies themselves. The car companies used to say to the component suppliers 'we want our brake system (or our exhaust system or our car seats) unique to our company'. Of course this cost the component companies a huge amount of money because they had to tool up with very short production runs, making something different for each company. What was needed was some component commonisation so that the component producers could get the economies of scale to lower their unit costs by producing the same component for the different companies and that required a lot of cooperation.

245. In addition, and while it was controversial at the time, it was seen that Australia had too many plants producing too many products that weren't getting the economies of scale. Much of the Button Plan was cutting down the number of models and types of vehicles the car companies were making. This delivered synergies with the component commonisation objective.

246. Today's Australian automotive industry has four vehicle builders producing five models.

247. A third dimension of cooperation was to make the industry understand that there was life beyond the domestic market. It had to do something about exporting. The rest of the world was exporting cars and components and today this is one of the fastest growing areas of world trade. More than 10 percent of world trade today is car and components.

248. In the second half of the 1980s Australia was making 350,000 cars and exporting less than 5,000 of those cars to the rest of the world. Today we are still making 350,000 cars, and more than 100,000 of those cars are for export markets.

249. To get that sort of achievement you've got to get quality right, you've got to get the delivery schedules right, you've got to get the price right, you've got to get your productivity up. These things can not be achieved without cooperation with the workforce. That cooperation took some time to achieve and spread, and is now challenged by federal government policy and legislation. Working days lost per 1000 workers employed in the last half of the 1980s at around 450 were high, but in the following six years that fell to less than 200. Something of a cooperation norm between capital and labour began to develop despite the inherent differences that these parties have in a mixed-market capitalist economy.

250. Productivity was substantially increased, and industrial relations in the transition from the 80s to the first half of 90s improved.

251. One of the important things which helped in that process was a memorandum of understanding between the companies and the unions concerning a disputes resolution procedure. It was negotiated at the industry level. Subsequently, this would be incorporated within individual enterprise bargaining agreements and awards as to how disputes would be resolved in the industry.

252. Award restructuring fundamentally changed the basic workplace regulations in place, and this largely set the practical agenda for enterprise bargaining in the industry. The process of change was well underway prior to the October 1991 industry statement that set the tariff reduction schedule which has cut general tariffs to present levels.

253. The PP account essentially cuts unions out of the change process over the past decade and a half. In spite of the demonstrable achievements (well beyond the PC's expectations in the late-eighties) labour institutions and workplace culture are not listed in the PP under section 4.2 "Industry strengths in realising opportunities".

254. Rather, all references to the role of unions in delivering the industry's contemporary successes are grudging and immediately subject to qualification. For example, in section 4.3 under the heading "The Industry's weaknesses: Labour institutions and workplace culture still cause significant problems" the PP states:

> "Improvements in workplace arrangements have made a significant contribution to productivity improvements in the automotive industry over the last decade or so.
>
> However, significant weaknesses remain."

255. The PP then indulges in a whinge about alleged difficulties in industrial relations at workplace level in this industry, on the basis of no research and no understanding of the real issues at hand.

256. The plain fact is that productivity increased substantially as a result of many of these changes that were put in place. For example between 1989-1990 to 1999-2000 wages salaries and supplements per person employed (ie including management) increased by 4% per annum. Over the same period productivity measured as real output per worker employed increased by almost 5% per annum. It is not often that one finds the nominal wage outcome is actually lower than the nominal labour productivity increase. Further, during this ten year period prices increased by 2% per annum, suggesting that over a decade the sector recorded a very substantial reduction in real unit labour costs, something in the order of a third.

257. There were downsides to this. The system that was put in, such as the so-called lean production system pioneered at Toyota, is often applauded by industry analysts as the basis for moving Australian industry to higher productivity. It also created what the unions called the high stress low trust workplace culture, because there was a lot more stress in the job. It was multi-tasking rather than multi-skilling. There was still very poor communication from management with the workforce. Increasingly workers felt that their job security was under threat. More work was being contracted out, more casual workers were being brought in, fewer apprentices were being trained and with the lean production system this did mean a high stress low trust workplace culture.

258. In this light it is not surprising that working days lost per thousand employees rose in the next six years. This was not just because of the lean production system, but also because of the changes that the Coalition Government brought to industrial relations. The drafters of the new law just did not seem to understand that discussion and negotiation is needed at both the industry level and the enterprise level as well as having a strong award system. More likely, the new laws were drafted to create industrial trouble.

259. In 1986 when Australia's terms of trade fell and we embarked on the two tier wages system, negotiations under the Metal Industry Award (which included all of Australia's auto component producers, the AI Group / MTIA, and the AMWU) resulted in strategies being pursued at the industry level, the enterprise level, and at the plant level.

260. This was also a time when Australian management was worried about cooperation. One only has to remember Australia's heavy engineering plan which, for firms to get assistance, was conditional on the set-up of a consultative committee. At the time the chief executives of the heavy engineering companies thought this was socialism gone mad. Seven years later when interviewed they said it was the most important innovation that was accomplished under the Plan because finally

workers unions and management were talking about the things that had to be done.

261. Another signs of that cooperation was during the Inquiry into the industry in 1990. Greg Harrison and Wayne Blair negotiated with 15 companies to let some 40 shop stewards go off the job on full pay for 4-6 weeks to help their unions examine the efficiency of the auto plants and the future of the industry. It was the time of the Massachusetts Institute of Technology (MIT) study "The Machine that Changed the World".

262. The workers invited the executives of all the companies to a seminar to discuss the findings from their reports. Amongst the workers, union officials and senior management there was a sense of pride and recognition of the spirit of what had been done.

263. The point is, you can still have tough bargaining and all the inherent differences in power between capital and labour and yet find a cooperation norm over the shared goals of ensuring the industry's future. Unions in the Australian car industry are familiar with this road, having travelled it many times.

264. What the AI Group, the Government and the Productivity Commission are now proposing is against the heritage of cooperation that the Australian car industry has built on to be where it is today. Only management, workers and unions can restore that cooperative norm.

265. The tensions and contradictions between the demands of capital and the demands of labour are forever. It is naïve to think they can be wished away. Yet these developments - in heavy engineering, in auto, and in other industries - also set up an arrangement whereby both parties understood what had to be done to make their industry competitive on world markets.

266. Unfortunately, instead of growing further, most of that cooperation began to disappear with the election of a Coalition Government. The new Government has attempted to outlaw pattern bargaining, to outlaw agreements at the industry level, to force agreements down to the individual enterprise. Such arrangements are totally inappropriate in the auto industry with its just-in-time systems and vertically integrated supply systems where it is absolutely necessary to have an industry wide cooperation norm and regular consultation and dialogue on a number of issues.

267. Further, until the late 1990s there had long been a tripartite auto industry council where government, CEO's and union leaders could get together to plan and discuss the future of the industry. However, the coalition Government reflecting its hatred of unions retrenched the four union representatives including two from the Vehicle Division, Ian Jones and Paul Noack, and made the Council a thing only for CEO's and the government.

268. With its adversarial industrial relations system, the government's refusal to establish a cooperation norm it is hardly surprising. Given this, and in an era of job insecurity, with workers worried about their entitlements, there has been confrontation in the field of industrial relations. As always that confrontation will be best dealt with by good will on all sides, by mutual trust and respect and negotiations at all levels - at industry, enterprise and plant level.

269. The Australian car industry *has* made the changes that were required, but there were many heavy costs. The industry employed around 77,000 people at the late end of the 1980s. Today it employs less than 55,000. Many plants were closed down. Many activities were transferred overseas.

270. But in some respects one can see the results of what was achieved from that cooperative period from the early 1980s to the mid 1990s by what happened at companies like Pacific Brake and Clutch. There, instead of making different brake and clutch systems for all different companies and models with all the costs that that involved, it slimmed down and rationalised its product line. It implemented the team system with the cooperation of its workforce. It went from exporting less than 10 percent of its production to exporting more than 60 percent of its production and increasingly became a leader with the example that it set for how the industry could proceed.

271. There are many examples of what cooperation could achieve in this industry so vital to technology, new management techniques and all the other things that spin off this industry into other industries. An industry that could so easily have closed down - there are not that many countries that can produce 350,000 motor vehicles and still maintain a world class automotive industry – has survived and flourished instead.

The challenge ahead

272. The challenge now is to build on that growth and success, to secure for Australia a robust car industry well into the future. This is important for the economy as a whole, and for the regions where the sector's presence is a pillar of the local community as well as the local economy.

273. The ACTU agrees that a decade of policy certainty is needed. Growing norms of cooperation and consultation for the industry, the enterprises and the workplaces is needed too.

274. The Australian car industry operates with government assistance at 'worlds best practice' levels – our overall assistance is in line with or below that provided in other vehicle manufacturing countries. In Australia that assistance is delivered through a 15% tariff on some imports, ACIS, government fleet preferences, and some other measures.

275. The allocative gains from further assistance reductions are small, and likely to be swamped by exchange rate changes. However, the costs of shutdown are substantial and forever and concentrated in specific regions.

276. The ACTU believes industry assistance measures should be paused at present levels until 2010, and be reviewed in five years time to determine changes to be made beyond 2010. This will provide a certain base for continued growth in R&D, investment, output and exports.

277. The PC sees a case for abolishing luxury car tax, saying 'it is not clear why luxury vehicles should continue to be singled out in this way'. The obvious answer is that the luxury car tax is a broadly progressive tax instrument.

278. The luxury car tax should be retained.

Market access

279. Access to foreign markets for Australian cars is severely restricted by tariffs and non-tariffs measures. Investment incentives in other countries are commonplace and substantial. 'Head office' realities also constrain our exports.

280. The ACTU supports all endeavours to increase market access for Australian product.

Regional dimension

281. The ACTU rejects the 'dog whistle' suggestion in the PP that Mitsubishi will cease operations in Australia and that this is no great price to be paid for policy consistency.