Chapter 4

Bargaining Framework

4.1 The focus of the new system is to encourage employees and employers to bargain together in good faith and reach agreement voluntarily. This chapter examines the changes to the collective bargaining framework. These include: a single stream of agreement making, the introduction of good faith bargaining, less regulation regarding the content of agreements, a streamlined process for the approval of agreements and the introduction of facilitated bargaining for the low-paid.

Current arrangements

4.2 The current system allows for multiple streams of agreement making, including Individual Transitional Employment Agreements (ITEAs), union collective agreements, employee collective agreements, union greenfields agreements, employee collective greenfields agreements, and multi-employer agreements.[1]

4.3 Having multiple streams of agreement making has the potential to create disputes over which industrial instrument to use. Prior to the Transition Act, Australian Workplace Agreements (AWAs) could be presented on a 'take it or leave it' basis which undercut the safety net and collective bargaining processes.[2]

The benefits of collective bargaining

4.4 There is a considerable weight of informed opinion and empirical evidence to substantiate claims that collective agreements produce more harmonious and productive workplaces. Critics of the bill spent much time questioning its economic rationale, and comparing its provisions unfavourably with WorkChoices. During the period when the WRA was operative, collective bargaining could not be abandoned across the majority of workplaces, contrary to the hopes of the government of the day, because it satisfied both employees and employers. Individual agreements (AWAs) found acceptance only among highly-paid workers and in occupations where labour was in high demand. 'Take it or leave it' AWAs drove down the wages of employees in service industries where individual agreement making generally equated with exploitation. As *Forward with Fairness* notes:

> Collective agreements deliver benefits to employees above and beyond the safety net and are the most efficient and productive from of workplace arrangements for business.[3]

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1 EM, p. xxxi.

2 EM, p. xxxi.

3 Forward with Fairness, p. 13.

4.5 There remains no evidence to support the basis of WorkChoices, that individual statutory contracts delivered higher productivity.[4] Research has shown collective agreements are significantly more likely to include provisions that enhance productivity, and that collective bargaining improves morale, lowers staff turnover and helps employers tap the knowledge of their workforce.[5]

4.6 The 10 year track record of Mobil's Altona refinery and International Power's Loy Yang B power station are cases which highlight the fact that collective arrangements and the presence of a union can co-exist, and, in fact, support high levels of direct employee engagement and high operating performance. Both also highlight the fact that strategic engagement can be sustained during periods of regulatory reform, and work for the benefit of employers, employees and unions.[6]

4.7 The committee was heartened to hear employers including ACCI acknowledge that enterprise bargaining is a route to productivity improvement.[7]

Agreement types

4.8 The new system will create a single stream of collective, enterprise agreements. Individual statutory agreements will cease to exist. Part 2-4 of the bill provides for the making of enterprise agreements through collective bargaining primarily at the enterprise level. It provides for two types, single-enterprise agreements (subclause 172 (2)) and multi-enterprise agreements (subclause 172(3)).[8]

Single-enterprise agreements

4.9 Under the new system a single-enterprise agreement, the most common form of enterprise bargaining, will be made between a single employer and some or all of its employees. There is no requirement to seek authorisation or notify FWA when an employer and employees wish to bargain for an agreement on this basis.[9]

4.10 Some employers will be able to bargain together as a single interest employer where FWA authorises them to do so. Single interest employers are two or more employers who operate similarly or share a common interest that may be best served by a single-enterprise agreement.[10] This would include, for instance, franchisees

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4 ACTU, *Submission 13*, pp. 15-16

5 Ms Sharan Burrow, *Australian Financial Review*, 3 Dec 2008, p., 71.

6 Thomas Schneider and Chris Ralph, 'Ditch the blame game and let real IR reform begin', *Australian Financial Review*, 3 May 2008, p. 63.

7 Mr Peter Anderson and Mr Scott Barklamb, ACCI, *Committee Hansard*, 17 February 2009, p. 13.

8 EM, 103.

9 DEEWR, *Submission 63*, p.19.

10 Ibid, p.20.

carrying out similar business activities under the same franchise or employers operating within a common regulatory framework, or who rely on public funding such as schools in a common education system and public hospitals. Such employers need to obtain a declaration from the Minister before they can bargain this way.[11]

Multi-enterprise agreements

4.11 The bill removes the current requirement that approval be obtained from the Workplace Authority for the making of a multi-enterprise agreement (MEAs), subject to a strict test. Instead, multi-employer agreements will be able to be made between two or more unrelated employers and their employees where this is the preference of those parties. However, this stream is entirely voluntary and protected action is not available where a multi-employer agreement is sought, and FWA must not approve such an agreement unless it is satisfied it was genuinely agreed to by each employer. The ACTU has criticised the non-availability of protected action, submitting that it should be available in pursuit of a multi-employer agreement and where FWA determines that it would be in the public interest. It also advocated that a collective multi-employer agreement covering a site or project involving multiple employers engaged in the same undertaking should be available without limitation. While disappointed with the restrictions, the ACTU welcomed a number of provisions in the bill that go part way to meeting their policy objectives. [12]

4.12 Jobs Australia welcomed the multi-enterprise agreements as an attractive option for some non-profit community service organisations which share similar funding and are not competing. It stated that MEAs offer significant efficiencies in the negotiation of agreements where employers would be likely to offer very similar pay and conditions to what would be bargained individually.[13]

Greenfields agreements

4.13 The bill will allow employers to make greenfields agreements (subclause 172(4)), but they must be made with one of more unions eligible to represent the employees.[14]

4.14 Employer groups feared that a greenfields agreement must be made with every relevant union which may allow one union to frustrate bargaining and lead to demarcation disputes.[15] Unions told the committee the current legislation for

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11 Ibid.

12 ACTU, *Submission 13*, pp 33-34.

13 Jobs Australia, *Submission 50*, p. 2.

14 EM, p. xxxiv.

15 See AMMA, S*ubmission 96*, p. 34; Australian Constructors Association, *Submission 128*, p. 1; Rio Tinto, *Submission 54*, p. 5; Telstra, *Submission 97*, p. 7; ACCI, *Submission 58*, Part 2, p. 94; Stooke Consulting Group, *Submission 153*, pp. 2-3.

greenfields agreements allows 'union shopping' where employers choose a union to deal with regardless of likely representation.[16]

4.15 DEEWR noted the previous legislation allowed the employer to choose which union they dealt with, resulting sometimes in negotiation with a union covering a minority of the employees, while other unions were unaware of the negotiations. The bill requires an employer to notify all relevant unions and advise FWA and it is then up to unions to approach employers if they wish to be involved. Good faith bargaining requirements will apply. The agreement is made when it has been signed by each employer and each relevant union that will be covered by the agreement. Employers are not required to make an agreement with every union.[17]

4.16 Professor Stewart told the committee he believed the clause would be interpreted by a court to mean that it is only those unions who are prepared to actually make the agreement who need to be involved in the process, but he felt it would be helpful to clarify this. However, he cautioned against an amendment allowing an employer to pick a union regardless of how representative it is likely to be of the employees to be covered by the agreement.[18]

4.17 To clarify the intent, in a supplementary submission Professor Stewart suggested that a requirement should be added to the relevant clause to stipulate that a greenfields agreement can only be made with one or more relevant employee organisations that 'between them are eligible to represent the interests of a majority of employees likely to be covered by the agreement.' This would avoid the extreme situation of an agreement being negotiated with a ‘minority’ union alone. He added that where a greenfields agreement is submitted for approval, and it is signed by some but not all of the relevant employee organisations, FWA should have the power to either approve the agreement as it stood, or any variation to it resulting from further negotiation, or to make orders resolving demarcation disputes, which might involve exclusion of a particular union from the agreement.[19]

Committee view

4.18 The bill provides for multi-party greenfields agreements. An employer is required to notify relevant unions and FWA which can check that all relevant unions have been advised. It is then up to the unions to approach the employer to bargain. The committee majority believes that with good faith bargaining, all unions that genuinely seek to be part of the agreement will be. An employer must bargain in good faith but is not required to make an agreement with all those unions. If they wish to strike a deal with one of the unions, they can ask to have the agreement approved by

16 Mr Anthony Tighe, National Secretary, CEPU, *Committee Hansard*, 19 February 2009, p. 27

17 DEEWR, *Submission 63*, p. 22.

18 Professor Stewart, Committee Hansard, 28 January 2009, p. 11.

19 Professor Stewart, *Supplementary Submission*, pp. 2-5.

[20] The committee majority believes that this arrangement is entirely workable, and that employer objections are based on speculation and are otherwise groundless.

Representation

4.19 There are no longer union or non-union agreements. Agreements will be made directly with employees, who have the right to be represented in the bargaining process by a union or by another person they nominate.[21]

4.20 In line with the government's commitment, the bill provides a more significant formal role for bargaining representatives in the process compared to bargaining agents under the WRA.[22] The effort to achieve greater balance in this area does not appear to be accepted by organisations such as Telstra who stated 'The justification for giving employee organisations special status is not clear'.[23] This was commented on by the CPSU which stated:

> Quite simply, the bill, as we read it, does not provide a special provision for unions to represent employees in bargaining. What it does is acknowledge that when an employee joins a union they do that knowing that they are joining a union to get collective representation in bargaining. That is why people join unions. They do not join unions to pay their $10 a week and get a bit of cardboard in their wallet. They join a union to get collective representation, and the legislation acknowledges that. For Telstra to submit otherwise is really ingenuous in our submission.[24]

4.21 Employers and employees are entitled to appoint any person as their bargaining representative for a proposed enterprise agreement. A bargaining representative must meet the good faith bargaining requirements (see below) and may apply to FWA for an order to ensure good faith bargaining requirements are being met. They may also apply to FWA for a majority support determination. FWA has the power to make scope orders where there is a dispute about which classes or groups of employees will be covered by the proposed enterprise agreement. FWA will also assist in dealing with a dispute about a proposed enterprise agreement.[25]

4.22 Employer groups raised concerns about the likelihood of increased demarcation disputes. The committee was advised that union demarcation disputes can be dealt with by making representation orders which will continue to be available

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20 See Mr John Kovacic, DEEWR, *Committee Hansard*, 19 February 2009, p. 62.

21 The Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, pp. 88-89.

22 EM, p. 104.

23 Telstra, *Submission 97*, p. 3.

24 Mr Stephen Jones, National Secretary, CPSU, *Committee Hansard*, 16 February 2009, p. 21.

25 Ibid.

under provisions regulating registered organisations.[26] This was confirmed by the Minister who, in response to concerns over this issue, stated:

> Representation orders that can prevent a union from representing employees in a particular business or industry will be available in the new system…If unions are competing for members and this is causing any kind of concern or disruption in the workplace, an employer will be able to apply for an order excluding one or other of those unions.[27]

4.23 DEEWR confirmed that these provisions will be located in a separate act dealing with organisations and these changes will be made in the transitional legislation.[28]

Bargaining representatives

4.24 Professor Stewart raised an issue in relation to clause 176(1)(b) where unions are automatically treated as bargaining representatives for the members except where a member appoints someone else. In most cases employers will accept the claim at face value but, proof may be required and the union may be unwilling to reveal the identity of its members. To overcome this, he suggested the union apply to the FWA for confidential confirmation of the union's *bona fides*.[29]

4.25 Employer groups were concerned that under clause 174, unions are the default representatives unless an employee appoints someone else in writing.[30] The committee majority notes that employees are entitled to appoint any person as their bargaining representative for a proposed enterprise agreement and there is nothing in the bill forcing non-members of a union to accept a bargaining agent. Further, the committee majority notes that where the employer commences bargaining or where a majority support determination is made, each employer will receive a notice of representation rights. Clause 174 of the bill sets out the required content of that notice, which must explain that if the employee is a member of an organisation and does not choose to appoint a different representative (which may be him or herself) the organisation will be entitled to represent them.

4.26 The committee majority notes that the bill fulfils the government's commitment that the legislation will provide the right for employees to be represented in the bargaining process if they wish by the representative of their choice. In response to employer concerns, the committee emphasises that an employer may make an agreement without union involvement if employees choose not to be represented by a

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26 DEEWR, *Submission 63*, p. 22. Also see chapter seven.

27 Patricia Karvelas, 'IR Laws spark union turf war', *The Australian*, 28 January 2009, p. 1.

28 Mr John Kovacic, DEEWR, *Committee Hansard*, 19 February, 2009, p. 63.

29 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 3.

30 ACCI, *Submission 58*, Part 2, p. 89.

union. The process ensures that employees actively make an informed choice about who will represent them in bargaining.

Obligation to bargain

4.27 An employer or a bargaining representative must not refuse to recognise or bargain with another bargaining representative for a proposed agreement. Professor Stewart identified some apparent anomalies and unintended consequences in relation to good faith bargaining, as contained in clause 179.[31]

> The bill has fairly elaborate provisions which indicate when there is or is not an enforceable obligation to bargain in good faith. It seems to me that part of that is the notion that, if an employer does not want to bargain, it cannot be forced to bargain unless Fair Work Australia makes a determination that a majority of employees want an enterprise agreement. Yet clause 179 as it is drafted appears to have the effect that if a single bargaining representative approaches an employer and says, 'I want to bargain and make an enterprise agreement,' the employer must accede to that request, no matter how little support that bargaining representative has. I suspect that is just a drafting error, or at least an uncertainty in the drafting, which could be corrected.[32]

Access to proposed agreement

4.28 Clause 180(4) provides that employee access to a proposed agreement before voting on it, is seven days. The committee was told that this was not long enough. The ACTU provided the example of Emirates Airline which:

> …distributed a proposed agreement to employees and conducted a ballot via email over the Easter break. Many employees who were on leave did not receive the agreement or voting instructions in time to adequately consider the agreement or even to vote. The agreement, which significantly reduced important conditions of employment such as penalty loadings, was approved by an extremely narrow margin.[33]

4.29 The TCFUA, among other unions, was concerned that the access period of seven days, prescribed in clause 180, is too short to ensure genuine agreement has been reached with employees, particularly where employees are from a non-English speaking background, or where the workplace has multiple shifts. It advocated a 14 day access period to ensure employees have sufficient time to consider the content of a proposed agreement.[34]

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31 Professor Stewart, *Submission 98*, pp. 7-8.

32 Professor Stewart, *Committee Hansard*, 28 January 2009, p. 3.

33 ACTU, *Submission 13*, pp. 32-33.

34 TCFUA, *Submission 11*, p. 20.

4.30 These concerns were supported by Professor Peetz who agreed with the ACTU call for the period to be extended to 14 days[35] but suggested that where the bargaining representatives of the majority of employees and employer agree, the period be reduced to seven days.[36]

Recommendation 4

4.31 **The committee majority recommends that the period to access a proposed agreement be extended to 14 days but, where bargaining agents agree, the period be reduced to seven days.**

Good faith bargaining

4.32 Bargaining will be largely unregulated where parties voluntarily bargain together and successfully reach agreement. Good faith bargaining provides ways to deal with bargaining break-downs and situations which arose under WorkChoices where protracted and damaging disputes resulted because there was no requirement to bargain in good faith.[37] Even where a majority of workers wished to have a collective agreement, the employer was not obliged to bargain with them.[38]

4.33 As noted in *Forward with Fairness*, the good faith bargaining obligations will include willing participation in meetings; disclosure of information in a timely manner; timely response to proposals; giving genuine consideration to the proposals of the other parties; and, refraining from capricious or unfair conduct.[39]

4.34 The committee majority notes clause 228(2) which states that good faith bargaining will not require parties to make concessions or sign up to an agreement where they do not agree to the terms. They will have the option of walking away from negotiations. The obligations are for parties to focus on the matters about which agreement must be reached for the good of the workplace. Employees can either be represented or may represent themselves directly with their employer, as they choose.

4.35 The ACTU welcomed the good faith bargaining provisions and stated:

> …the mere fact that the parties are required to consider and engage with each other's position may well lead to more agreements being reached, with better outcome for both workers and employers.[40]

35 Ibid, p. 33.

36 Professor Peetz, *Submission 132*, p. 15.

37 DEEWR, *Submission 63*, p. 23.

38 Factsheet 6, 'Bargaining in good faith'.

39 Ibid.

40 ACTU, *Submission 13*, p. 16.

4.36 However, regarding the obligations to exchange relevant information, the ACTU raised the exception for 'confidential or commercially sensitive' information and argued that this exception is very wide and could potentially cover relevant information that a bargaining representative would wish to see. This was also supported by the SDA.[41] The ACTU suggested this exclusion be narrowed to 'genuinely confidential' material.[42] The ACTU also expressed that some employers could avoid the obligation to bargain in good faith by 'going through the motions', and urged the government to amend the act if this became apparent.[43]

Recommendation 5

4.37 **The committee recommends the area of confidential or commercially sensitive information as an area for future review on how good faith bargaining provisions are working.**

Bargaining orders

4.38 In cases where bargaining is not being conducted in good faith, FWA can make orders to ensure the integrity and fairness of bargaining. Such orders can be enforced by the courts. Instances of such bargaining orders might include:

- the refusal of employees to respond to an employer's proposal about new work methods to increase productivity;
- pursuit of a claim that cannot be legally included in an agreement approved by FWA;
- unfair conduct towards a workplace bargaining representative;
- refusal by an employer to meet the employees' bargaining representative or to respond to correspondence or telephone calls; or
- unfairly selecting the group of people to whom the agreement would apply and who would get to vote on the agreement.[44]

4.39 Under clause 229, FWA will not be able to make good faith bargaining orders until 90 days before the nominal expiry date of a current collective agreement if the employer has not offered employees a new agreement.

4.40 In response to concerns that unions will be able to frustrate the bargaining process by seeking good faith bargaining orders, DEEWR advised that:

- good faith bargaining requirements apply equally to both sides;

41 Mr John Ryan, National Industrial Officer, SDA, *Committee Hansard*, 17 February 2009, p. 5.

42 Ibid, p. 32.

43 Ibid, p. 17.

44 Factsheet 6, 'Bargaining in good faith'.

- bargaining orders are intended to help representatives overcome problems they have been unable to resolve. Disputes about whether bargaining is being done in good faith must be argued through with time to respond to mutual concerns. Only then can application be made for an order from FWA;
- an order issued by FWA will be procedural in nature, and will not give direction in regard to the substance of the agreement; and
- FWA may dismiss an application that is frivolous or vexatious.[45]

Workplace determinations

4.41 Determinations are limited to exceptional circumstances only. If one or more bargaining orders are contravened by one of more bargaining representatives, they may apply to FWA for a serious breach declaration under clause 234. The consequence of a serious breach declaration is that FWA will have the power to make a bargaining related workplace determination under clause 269.

4.42 DEEWR noted that workplace determinations will only be available in the following limited circumstances:

- where protected action is threatening to cause significant damage to the wider economy or safety and welfare of the community;
- where protracted industrial action has been causing significant economic harm to the bargaining participants, or where it imminently threatens to cause such harm; and
- where there have been serious and sustained breaches of good faith bargaining orders that have significantly undermined bargaining; and where parties in the low-paid stream are genuinely unable to reach agreement and there is no reasonable prospect of agreement being reached (see below).[46]

4.43 DEEWR noted that before FWA can make a workplace determination, the bill provides for a further negotiating period of 21 days, which may be extended to 42, to give the parties a final opportunity to meet and come to an agreement on matters in dispute.[47]

4.44 In response to concerns raised, the Minister has emphasised that compulsory arbitration will not be a feature of bargaining:

> The new system is not about delivering access to arbitration any time parties get into a disagreement during the bargaining process. Far from it.

45 DEEWR, *Submission 63*, p. 24.

46 Ibid, p. 32.

47 Ibid, p. 33.

> Parties can take a tough stance in negotiations. Workplace determinations can only be made in clearly defined circumstances.[48]

4.45 Professor Stewart has also argued that employer fears that unions may try to force arbitration to get an employer to pay a wage claim that it would never have settled in normal negotiations are overblown. 'The reality in relation to bargaining is that unions are not going to be able to take over a workplace by simply having one member in it. It is true they will have more rights under this system than present. Their practical ability to negotiate will be (dependent on) the level of support in a workplace'.[49] See chapter eight for more detail on dispute resolution and arbitration.

Approval process

4.46 All enterprise agreements must be lodged with FWA for approval before they commence operation. An enterprise agreement can only take effect seven days after being approved by FWA or a later date if one is specified in the agreement. FWA will ensure, among other things, that there is genuine agreement; the agreement passes the 'better off overall test'; and that it does not contain terms that contravene the NES.[50]

4.47 This process is in stark contrast to the approval formerly given to AWAs by the Employment Advocate under the WRA, the details of which have been given earlier.

Better Off Overall Test

4.48 The Fairness Test that existed under the WRA as amended by the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* only required that an employee be compensated for the modification or removal of a limited range of protected award conditions.[51] FWA will apply the 'better off overall test' (BOOT) to ensure that each employee covered by the agreement is better off overall in comparison to the modern award.[52] Clause 186(2) requires FWA to be satisfied that the terms of the agreement do not contravene the NES.

4.49 In response to questions by Senator Collins, the department noted that there will be further clarification around Section 193 (3) in the Explanatory Memorandum, when a greenfields agreement passes the better off overall test. Officials explained:

> ...The intention is that the test will apply the same, to the extent that it can when you are talking about prospective employees as opposed to actually employees...clearly there is some ambiguity...so we will look at the issue.

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48 The Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard,* 4 December 2008, p. 88.

49 Ben Schneiders, 'The state of the unions', *The Age*, 29 November 2008, p. 4.

50 EM, p. xxxvi.

51 DEEWR, *Submission 63*, p. 25.

52 EM, p. xxxvii.

> We think that we have achieved the policy objective here, but we are concerned about people questioning that, so we will look at the language and we will speak to the drafters about the best way to clarify that.[53]

4.50 Employer organisations were concerned that there may be a rigid interpretation of the test which might mean an agreement would not be accepted if one employee is not better off. They requested practicality be taken into consideration.[54]

4.51 Regarding these concerns about FWA having to assess the circumstances of each employee, DEEWR noted that as an agreement will generally apply the same conditions to a class of employees, FWA will generally be able to apply the BOOT to such groups of employees, rather than investigating the circumstances of every individual employee.[55] It explained:

> …each employee under the agreement must be better off overall. While the explanatory memorandum makes it quite clear, I think that the AHA noted in its evidence that it is envisaged Fair Work Australia will be able to look at classes of employees. They do not need to consider the personal circumstances of every single employee when they are doing the better off overall test, but they do need to be happy that each employee is better off overall. [56]

Committee view

4.52 The BOOT is against the award and NES and should ensure an employee is not disadvantaged against the minimum enforceable standard. The committee majority believes that no worker should be worse off against this standard. It does not want the test used an excuse for employers not to provide full entitlements to workers. The committee majority notes that clause 193 of the Explanatory Memorandum indicates that, in approving agreements it is intended that FWA will be able to apply the better off overall test to classes of employees rather than inquiring into each and every individual employee's circumstances.

Content of agreements

4.53 The content rule refers to what matters are able to be included in workplace agreements and be regulated by the workplace relations system, as opposed to being regulated by other areas of the law. The current system extensively regulates the content of enterprise agreements. The concept of 'prohibited content' under WorkChoices will be removed. Under clause 172 agreements will now include matters pertaining to the relationship between the employer and the employees, and the employers and any union to be covered by the agreement.

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53 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 15.

54 Mr Williasm Healey, AHA, *Committee Hansard*, 16 February 2009, p. 44.

55 DEEWR, *Submission 63*, p. 26.

56 Ms James, *Committee Hansard*, 19 February 2009, p. 80.

4.54 Some submissions expressed the view that the bill does not give effect to the government's commitment to remove the restrictions on agreement content.[57]

Restrictions

4.55 Professor Stewart noted with disappointment that in his view the bill does not give effect to the government's commitment to remove the restrictions on agreement content.[58] In particular he was concerned about allowing non-permitted terms to be included in enterprise agreements which are unenforceable. He argued that this offends the principle that parties should be free to negotiate their own agreements, and that it will perpetuate 'side' agreements (the practice of employers and unions negotiating parallel agreements: the formal; and 'side' agreements, to deal with provisions that might involve prohibited content), which is an inefficient and unproductive practice.[59]

4.56 He also submitted that the definition of permitted matters will make it necessary for parties, their advisers and potentially the courts to work out when a matter does or does not pertain to the employment relationship. He explained that while 'matters pertaining to employment' has 'substantial jurisprudence' as noted in the EM, it is 'confusing, uncertain and downright inconsistent jurisprudence' and provided the following example:

> Let us suppose that an employer and its employees decide that they want to make an agreement about childcare facilities that the employer will provide to the workforce. One would have thought that is a matter that has a lot to do with the employment relationship. Is it technically a matter pertaining to the relationship of employer and employee? If I were assisting the law firm to which I consult to give advice on that matter, I could write an opinion which persuasively argued that it was a matter pertaining and another opinion which equally persuasively argued that it was not. The two opinions would rely on different High Court authorities at different times. The issue is one to which, as I have indicated, there simply is no definitive answer. It seems to me to be ridiculous to perpetuate that kind of uncertainty.[60]

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57 See Professor Stewart, *Submission 98*, pp. 4-7; ACTU, *Submission 13*, p. 31; Professor Peetz, Submission 132, p. 13; Unions WA, *Submission 70*, p. 11; TCFUA, *Submission 11*, pp. 16-17; Dr John Buchanan, *Submission 150*, p. 4.

58 These views were also expressed in other submissions such as the ACTU, Submission 13, p. 31; Professor Peetz, Submission 132, p. 13; Unions WA, *Submission 70*, p. 11; TCFUA, *Submission 11*, pp. 16-17.

59 Ibid, p. 4.

60 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 3.

4.57 Professor Stewart concluded that the concern behind non-permitted matters is industrial action over claims that do not relate to the employment relationship. To address this, he suggested modifying the rules on protected industrial action.[61]

> If there has to be some kind of formula for 'permitted matters' (and as I have argued, I do not see the need), it should be expressed in far broader terms.[62]

4.58 In particular he proposed that the permitted matters requirement be omitted from clause 172 and clause 409(1) and, to address concern about industrial action on any 'extraneous' matters, a new subclause 3(a) along the following lines should be inserted into clause 409:

> The industrial action must not relate to a significant extent to an employer's failure to agree to an incidental claim. An incidental claim is a claim concerning the agreement that does not relate either to terms and conditions of employment, or to the relationship between that employer and an employee organisation that will be covered by the proposed agreement.[63]

4.59 These suggestions were supported by Dr John Buchanan, Director of the Workplace Research Centre at the University of Sydney, who submitted that there is nothing in research literature to show any benefits from preventing parties reaching agreement on matters of importance to them. He also raised concerns over the terminology and offered the view that:

> The history of Australian case law on 'industrial matter' and 'pertaining to the employment relationship' shows the only real winner where such provisions exist are lawyers'.[64]

4.60 The committee majority notes the following clarifications regarding particular areas that were raised in relation to content of agreements.

Bargaining services fees

4.61 Nothing in the bill allows a union to impose bargaining fees. To clarify issues surrounding bargaining agent fees, departmental officials explained bargaining agent fee clauses are objectionable provisions and cannot be included in an agreement.[65] DEEWR further clarified:

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61 Ibid.

62 Ibid, p. 6.

63 Ibid, p. 7.

64 Dr John Buchanan, *Submission 150*, p. 4. See also Dr Buchanan, *Committee Hansard*, 18 February 2009, p. 40 and 44.

65 Ms James, *Committee Hansard*, 11 December 2008, p. 14.

> There will be no capacity under the Bill for employees, employers or unions to bargain for or include bargaining services fees in an enterprise agreement. [66]

4.62 However, as with the WRA, the prohibition on bargaining fees does not prevent a person from freely entering into genuine fee for service arrangement. Clause 353 enables industrial associations to offer bargaining services on a fee for service basis. Many employer associations provide services on this basis. DEEWR noted that clause 347(b)(vi) and clause 348 contain protections to ensure that a person is free to decide whether they wish to pay a bargaining fee to an industrial association. These provisions are similar to existing provisions and will ensure existing protections are retained.[67]

Right of entry terms in agreements

4.63 There is no blanket prohibition on right of entry terms in agreements but certain terms about right of entry are unlawful. DEEWR clarified that:

> The term of an agreement is unlawful if it provides an entitlement that is inconsistent with the right of entry part of the bill in relation to:
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> - entry to premises to investigate suspected breaches of the Bill or an industrial instrument; or
> - entry to premises to hold discussions with employees who are eligible to be union members.[68]

4.64 DEEWR noted that enterprise agreements could provide an entitlement to enter the employer's premises for specific reasons connected to the terms of the agreement such as to represent an employee in workplace disputes or for consultation over workplace change. These are terms which have historically fallen within the 'matters pertaining' rule.[69] See chapter seven for a detailed discussion on right of entry provisions.

Environmental issues

4.65 In response to concerns raised about whether environmental issues could be included in agreements, DEEWR clarified that environmental issues may be included in enterprise agreements if they pertain to the employment relationship between an employer and the employees covered by the agreement. For example:

> The matters pertaining formulation means that a term of an agreement that for example, required an employer to reduce their CO2 emissions would not be a permitted term in an agreement. Such a term sets an obligation on an

66 DEEWR, *Submission 63*, p. 26.

67 Ibid, pp. 26-27.

68 Ibid, p. 27.

69 Ibid.

> employer but does not pertain to the relations between the employer and their employees. However, it is likely that an enterprise agreement could contain a term that required employees to participate in recycling strategies in the workplace, or to take all reasonable steps to comply with an employers; CO2 reduction target of X%, or that makes a bonus payable to employees conditional upon meeting a reduction target.[70]

Committee view

4.66 The committee majority notes the proposed framework expands the range of matters which make up an enterprise agreement. It will allow for a range of matters which were historically included in agreements (which cover the relationship between an employer and a union) which were prohibited under WorkChoices. This capacity to include more issues in agreements will make 'side' agreements between employers and unions largely unnecessary. The committee majority notes that matters that do not relate to the employment relationship can be included in agreements but will not be legally enforceable and are not able to be subject of protected industrial action.

Facilitated bargaining for the low-paid

4.67 WorkChoices had no provisions to assist the low-paid beyond the five minimum entitlements of the Fair Pay and Conditions Standard and an annual minimum wage review.

4.68 Enterprise level bargaining has been a central feature of workplace relations since the early 1990s. However, over that time, not all employers and employees have enjoyed the benefits of enterprise bargaining. This is partly because employees in low-paid sectors lack the skills or representation to bargain for improved wages and conditions at the single enterprise level. Some of these employees are unable to negotiate above minimum award rates and conditions because a third party (such as a head-contractor) sets their pay and conditions, not their direct employer. To assist vulnerable employees, the new system will give them access to a separate multi-employer bargaining stream.[71]

Proposed changes

4.69 FWA will assist employees working in areas like child care, aged care, community services, security and cleaning, which typically employ women, part-time employees, casuals or recent migrants who often find it difficult to bargain with their employers and who are often paid the basic award rate.[72]

4.70 Such employees often remain stuck on award rates and with unfavourable conditions. The new legislation will empower low-paid workers like these to bargain

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70 DEEWR, *Submission 63*, p. 27.

71 Factsheet 7, 'Assisting low paid employees and those without access to collective bargaining'.

72 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 3.

on a multi-employer basis. Employer concerns about a return to industry-wide or pattern bargaining have been allayed by denying such employees the right to undertake protected industrial action. However, they will be able to use FWA's good faith bargaining rules and powers of mediation and conciliation. FWA will only be able to make a binding determination if the parties agree.[73]

4.71 The ACTU welcomed facilitated bargaining for the low-paid and explained the issue being addressed as follows:

> Low paid employees, and their employers, are caught in a low-wage low-margin trap. A single employer cannot grant its workers higher wages because of low margins and competitive pressure from other businesses. Knowing this, workers have little incentive to volunteer productivity improvements. The result is that wages and profits stagnate, as do levels of customer service and productivity. Worker, employers and customers are all worse off.[74]

4.72 The ACTU submitted that the solution is to 'encourage workers and employers to bargain for higher wages in return for better productivity', and noted that for many businesses this can only occur on a multi-employer basis.[75]

4.73 Mr Tim Ferrari from the LHMU was also supportive of low-paid bargaining telling the committee that women, young workers and culturally and linguistically diverse employees have generally been excluded from its benefits. He stated:

> …It will be a good thing for industry to get around the table and focus on the real issues…This does not occur in industry generally, as far as industrial matters are concerned. The big companies might have a big meeting like this where they sit around the table with the unions and try to thrash something out, but, in industry generally, it does not happen so we are unable to sit around the table and talk about the real issues and come up with some good solutions.[76]

4.74 While welcoming the intent of the low-paid bargaining stream, Jobs Australia sounded a caution that it may not be sufficient to address structural barriers to bargaining such as reliance on third party funding but acknowledged:

> The low paid bargaining stream provides a mechanism for bringing relevant external third parties, such as funding agencies, to the table through the FWA's powers to deal with disputes. Jobs Australia welcomes this as a

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73 Hon Julia Gillard MP, Minister for Employment and Workplace relations, 'Introducing Australia's New Workplace Relations System', Speech to the National Press Club, 17 September 2008.

74 ACTU, *Submission 13*, p. 17.

75 Ibid.

76 Mr Tim Ferrari, Assistant National Secretary , LHMU, *Committee Hansard*, 19 February 2009, p. 50.

necessary option to help making bargaining a realistic prospect in the non-profit services sector.[77]

How will parties enter the low-paid bargaining stream

4.75 Under clause 242, unions with relevant coverage may apply to FWA for entry into the low-paid stream to bargain with a specific list of employers. FWA will consider the public interest of the proposal, including the questions of whether it would assist low-paid employees and the history of bargaining in the industry in which the employees work. FWA will also consider whether the applicant union recognises the needs of individual employers. Individual employers will be able to seek exemption from the process. FWA will be required to consider the extent to which a union is prepared to respond to an employer who wishes to bargain for its own single enterprise agreement. FWA is also required to consider the extent to which the number of bargaining representatives for a proposed agreement would be consistent with a manageable collective bargaining process. Industry wide agreements would not be consistent with a manageable collective bargaining process.

4.76 Decisions by FWA that allow multi-employer bargaining will be subject to appeal.[78]

How will the low-paid bargaining stream operate

4.77 Once in the low-paid stream, parties will benefit from having access to FWA to help them negotiate the making of a multi-employer agreement. The types of assistance available include compulsory conferences, good faith bargaining orders, dispute resolution, and binding determinations.[79]

Issues raised with the committee

Definition of low-paid

4.78 Some submissions have expressed concern regarding the lack of definition of a low-paid worker.[80] The EM notes that whether employers are 'low-paid' will be a matter for FWA to consider.[81] The LHMU was supportive of this situation saying that 'it is far too early for that issue to be definitively dealt with'.[82] However Mr Ferrari

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77 Jobs Australia, *Submission 50*, pp. 2-3.

78 Factsheet 7, 'Assisting low paid employees and those without access to collective bargaining', 17 September 2008.

79 Ibid.

80 See Institute of Public Affairs, *Submission 62*, p. 3; Restaurant & Catering Australia, *Submission 72*, p. 20; ACCI, *Submission 58*, Part 2, p. 128; AiG, *Submission 118*, p. 64; AHA, *Submission 100*, p. 14.

81 EM, p. 157.

82 Mr Tim Ferrari, Assistant National Secretary, LHMU, *Committee Hansard*, 19 February 2009, p. 49.

told the committee that he believed parties would receive a clear indication from FWA in a reasonably short period of time.[83]

4.79 DEEWR advised that this will be a matter for FWA to determine on the facts of each application for low-paid authorisation. It is consistent with the intention for simpler and less prescriptive statute and reflects the approach in the current legislation. DEEWR noted that the bill provides direction for FWA in determining when it must make a low-paid authorisation, for example taking into account the current wages and conditions of the employees compared with relevant industry and community standards.[84]

Availability of arbitration in the low paid stream

4.80 The committee majority notes that FWA will be available and ready to play a hands-on role to assist the parties and facilitate the bargaining process. Depending on the circumstances, this could mean that FWA carries out some conciliation or mediation, calls a compulsory conference to bring the parties together, or makes recommendations to the parties. With this type of assistance from FWA, the committee majority is confident that in most cases the parties will be able to come to an agreement that meets their needs.

4.81 Where parties in the low-paid stream have gone through a facilitated bargaining process and there is still no reasonable prospect of agreement being reached, the committee majority considers there should be some scope for FWA to make a determination to assist the low-paid, either by consent of some or all of the parties, or, subject to constraints set out in the bill, on application by a bargaining representative. This is appropriate given the difficulties that these parties have had with bargaining in the past.

4.82 The committee majority notes there will be tight criteria for access to a low-paid workplace determination. A workplace determination will only be available where the relevant employees are substantially reliant on the safety net and have not had the benefit of a collective agreement. Further, FWA must be satisfied that a determination will promote productivity and efficiency, as well as encouraging the parties to bargain in the future and must also take into account the ability of the employer to remain competitive.

Conclusion

4.83 The committee majority welcomes the introduction of facilitated bargaining to assist low-paid employees and their employers gain access to enterprise bargaining and its benefits. It notes the intention for FWA to assist parties to overcome obstacles

83 Mr Tim Ferrari, Assistant National Secretary, LHMU, *Committee Hansard*, 19 February 2009, p. 53.

84 DEEWR, *Submission 63*, p. 31.

to bargaining, with the expectation that they will be able to bargain on their own. The committee majority notes that the bill does not forbid common claims or standards but it does prohibit bargaining across an industry as a whole. The prohibition on pattern bargaining is achieved by the combined operations of various provisions and clauses. The Minister has assured employers on numerous occasions that there will be no return to pattern bargaining. Industrial action in support of pattern bargaining is prohibited and a court injunction can restrain any industrial action.[85] AiG acknowledged that the ban on industrial action will prevent a return to pattern bargaining.[86]

85 Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, p. 88.

86 Media Release, AiG, 'Fair Work Bill – by and large a workable compromise', 25 November 2008.