Minority Report

The Australian Greens

Introduction

The workplace has a central part to play in most people's lives. Many of us spend a large proportion of our time at work. The regulation of the workplace affects the life of millions of Australians and has a central role in shaping the type of society we live in and reflecting the values we hold.

The Australian Greens recognise that "labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work."[1]

The Greens are informed by the following values when considering workplace laws:

- that we can create a sustainable future where we can provide fair workplaces and sustainable communities, protect out environment and ensure a healthy economy;

- that all people have the right to pursue their well-being in conditions of freedom and dignity, economic security and equal opportunity.

- that working people have the right to be involved in decisions about their work.

- that free, independent and democratic unions are an essential pillar of a civil society.

In evaluating the Fair Work Bill, the Australian Greens are not limiting ourselves to comparing the Bill to Work Choices or comparing the Bill to the Government's pre-election policies and statements. Overall the Bill is an improvement on Work Choices. How could it not have been? The evidence about the Work Choices is clear. It ripped away people's rights, was used by employers to exploit workers by removing pay and conditions and was explicitly anti-union. However, this Bill needs to be independently assessed on its own merits not justified merely by the experience of the last few years.

We are also not interested in a debate about which parts of the Bill exactly match the Forward with Fairness Policy Implementation Plan and which do not. Mandates are tricky concepts. The ALP repeatedly said it would "rip up" Work Choices. It has done not so.

Instead, the Greens are evaluating the Bill on its merits, whether it provides a fair, just and sustainable industrial relations system for Australia now and into the future. We

[1] Australian Institute of Employment Rights, "Charter of Workplace Rights", 2007.

are informed by our own values and the submissions, both written and oral, received by the Committee in the course of the hearing.

There are some positive elements to the Bill, in particular the provisions supporting collective bargaining including good faith bargaining provisions and the low paid bargaining stream, as well as the general protections, new pay equity provisions and transfer of business provisions.

Unfortunately the Bill also keeps many elements of the Work Choices regime. It builds on the Work Choices architecture with the use of the corporations powers and by consigning the conciliation and arbitration power to the dustbin of history. It also retains the current severe restrictions on taking industrial action, provides for a downgraded award system, incorporates the idea that some workers should have more rights than others, and cannot quite shake off individual agreements.

In considering this Bill the Greens are mindful that, as expressed by UnionsWA in Perth:

> "….this legislation is not just about words on a page. It is about real people and what happens to and affects real people, their partners and their children. It is about restoring rights and dignity to working people who were battered by the imposition of the Work Choices legislation and who, in November of 2007, voted overwhelmingly for a change in the way they were treated at work. It is about restoring a way of life for working people that recognises that, in part, the reason they work is so that they can provide for and improve their quality of life and develop the relationships that are important to them in their families and their communities, rather than work itself being the sole purpose of their activity."[2]

Missed Opportunity?

In many ways the Fair Work Bill is a missed opportunity for the ALP Government to re-fashion industrial relations to meet the real workplace issues facing our community and the economy. Dr John Buchanan points to inequality, work overload, working time and the inadequate ways of defining 'standard' employment as key concerns.[3] The Fair Work Bill does not address these broader issues.

The Bill seems to have no underlying philosophy. All we have heard is the rhetoric of "fairness", flexibility" and "productivity" from governments of both persuasions. Rather the Bill is a patchwork of provisions some of which are to placate business and some of which are directed to unions. Hence we are presented with a set of provisions to encourage and facilitate collective bargaining while restricting the rights of workers to take industrial action in support of their bargaining.

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[2] Mr Dave Robinson, UnionsWA, *Committee Hansard*,29 January 2009, p.41.

[3] Dr John Buchanan, *Submission 150*, p. 3.

What the Bill also represents is an ALP government consolidating the shift made by the Howard Government to the corporations power and turning its back on 100 years of Australia's distinct approach to labour market regulation, including our conciliation and arbitration system.

We hold similar concerns with the Fair Work Bill being primarily on the corporations power as we did with Work Choices. We are concerned, in the words of Professor Ron McCallum, that "Australian labour law [will] become little more than a sub-set of corporations law, and this will inevitably lead to the corporatisation of Australian labour law" and that "if both major political parties enact their labour laws pursuant to the corporations power, in the fullness of time these laws will meet the needs of employing corporations and not those of their flesh-and-blood employees."[4]

Already the rhetoric from both the Government and business pays much more attention to the needs of corporations as employers than the interests of workers and the broader community.

The Australian Greens see no reason why we cannot build on our history in developing a new industrial relations system. This includes building on our historical acknowledgment of the inherent power imbalance in employment relationships and our traditions of conciliation and arbitration. As Justice Kirby said in his dissenting judgement in the High Court's decision on the constitutional validity of the Work Choices legislation:

> "As history has repeatedly shown, there are reasons of principle for preserving the approach of our predecessors. The requirement to decide industrial relations issues through the independent process of conciliation and arbitration had made a profound contribution to progress and fairness in Australian law on industrial disputes, particularly the relatively powerless and vulnerable. To move the constitutional goalposts now and to commit such issues to be resolved directly by federal laws with respect to corporations inevitably alters the focus and subject matter of such laws. The imperative to ensure a "fair go all round", which lay at the heart of federal industrial law (and the State systems that grew up by analogy), is destroyed in a single stroke. This change has the potential to effect a significant alteration to some of the core values that have shaped the evolution of the distinctive features of the Australian Commonwealth, its economy and its society."[5]

We believe Australia is giving up on something special in turning away from this legacy. We agree again with Justice Kirby in his comment that:

> “The applicable grant of power imported a safeguard, restriction or qualification protective of all those involved in collective industrial bargaining: employer and worker alike. It provided an ultimate

[4] Ron McCallum, "In defence of labour law", The Sir Richard Kirby Lecture, Industrial Relations Society of Victoria, 1 May 2007.

[5] Kirby J, *New South Wales v Commonwealth* [2006] HCA 52, [609]

> constitutional guarantee of fairness and reasonableness in the operation of any federal law with respect to industrial disputes, including for the economically weak and vulnerable. It afforded machinery that was specific to the concerns of the parties, relatively decentralised in operation and focused on the public interest in a way that laws with respect to constitutional corporations made in the Federal Parliament need not be. These values profoundly influenced the nature and aspirations of Australian society, deriving as they did from a deep-seated constitutional prescription."[6]

Justice Kirby also made another important point when he said:

> "Work value cases frequently ensured attention to the provision of fair wages and conditions to manual and other vulnerable workers which market forces and corporate decision alone would probably not have secured."[7][524]

Fair wages and conditions and dispute resolution cannot just be left to the market or employers. There are some workers for whom the market will provide but others whom the market will fail which is why we need robust protections in a new industrial relation system.

In an article published last year, Dr Buchanan argues convincingly that Australia should build on its distinct legacy saying:

> "Labour is a distinctive factor of production. The asymmetries of power and uncertainty associated with its use mean that differences are an ever-present possibility between workers and those hiring them. Ideally, and most of the time, differences can be managed by agreement. But some of the time and on the key issue of prevailing national standards, there will be a need for the independent resolution of differences. Australia is lucky in having a set of institutional arrangements for performing this function. This has kept most problems out of the courts and parliaments…..It remain to be seen whether Australia's leaders have the courage and imagination to build on the best of our past traditions, or whether they merely accommodate to the new employer ascendency that is now so overwhelming that it is just taken for granted."[8]

Unfortunately we believe the Fair Work Bill does not build on our past traditions, taking its cue more from Work Choices and overseas bargaining regimes. We need as a parliament to acknowledge this fundamental break with our history and acknowledge the potential consequences.

We also note that the Government has not resolved the jurisdictional grey areas inherent in relying on the corporations power. In particular, the Committee heard

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[6] *Ibid.* [530]

[7] *Ibid.*, [524]

[8] Buchanan, J., "Labour market efficiency and fariness", *Remaking Australian Industrial Relations,* Riley, J and Sheldon, P (eds), CCH, 2008, p. 185.

evidence of the confusion still existing in local government and social and community services.[9] There is no clear indication of the states' positions on referring powers, except from WA which has said it will not. It is a matter of urgency, if this Bill proceeds, that the Government move quickly to fix these jurisdictional problems.

Economic circumstances and workplace relations

The Fair Work Bill is being introduced at a time when our economy is facing unprecedented challenges. Employer organisations and employers who have made submissions and given evidence to the committee have all raised the current economic crisis as a reason for delaying this Bill or watering down the standards and protections the Bill does provide to employees.

There was also evidence presented to the committee, from both academics and the union movement, that the current economic conditions make it all the more important to protect workers' rights and conditions.

For example UnionsWA argued in evidence before the Committee that:

> "if there ever was a time for improved workplace laws, it is certainly now as the global economic crisis is felt across all nations, with working people suffering considerably from the fallout…The industrial landscape must change in a way that affords those millions of Australian workers the rights and protections that are necessary in such a global downturn."[10]

The AEU made the important point that "economy will not recover if the opportunity is given to employers to drive down wages and conditions with no minimum set of standards."[11]

The ACTU also challenged the employers' position, arguing that:

> "Workers deserve protections in good times and in bad times. Indeed, we believe that collective bargaining as the centre of the system is a fundamental tool where workers and employers can work out issues between them in the context of the economic and enterprise environment. Almost universally employer submissions have cautioned that the current economic conditions justify winding back parts of the bill, arguing that the introduction of the bill will cause increased costs for employers. This is disingenuous. First, the bill encourages the making of enterprise level agreements. In making agreements, employers, unions and employees will have regard to both the domestic economic environment, the specific circumstances of the employer's business and the desire of employees for secure, safe and satisfying jobs. If circumstances require, agreements can be varied, but it is entirely in the hands of the parties. This is the flexible

[9] See USU NSW *Submission 4*, and ASU, *Submission 56.*

[10] Mr Dave Robinson, UnionsWA, *Committee Hansard,*29 January 2009, p.41.

[11] Mr Robert Durbridge, AEU, *Committee Hansard*, 17 February 2009, p.59.

> environment that collective bargaining can deliver in a modern economy……
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> ……Second, this is not a return to centralised arbitration. On the few occasions where bargaining fails and Fair Work Australia makes a workplace determination, the bill requires Fair Work Australia have regard, amongst other things, to the productivity of that enterprise. If Fair Work Australia makes a special low-paid workplace determination, it must also have regard to the competitive position of the employers. Everybody's interests are taken into account.
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> Thirdly, the safety net of modern awards and the NES are derived from standards that have been part of the industrial relations framework for many years. Like employers, the ACTU has concerns about some inconsistent outcomes in modernisation and the detail in certain industries but, at the macro level, the modernisation of awards is certainly not leading to increases in wages or conditions that should be of concern. Fourth, the minimum wages criteria requires Fair Work Australia have regard to the prevailing economic conditions and, fifth and finally, as we have argued before this committee on many occasions, all the literature tells us that providing remedies for unfair dismissal does not affect the employment levels in an economy."[12]

Significantly, the unions have support from academics for their position. Dr Buchanan argues that there has been a change in thinking and that even organisation such as the IMF and OECD are now acknowledging the need for more humility in developing policy. For example he quotes the 2004 OECD Economic Outlook's assessment that:

> "overall earnings dispersion tends to fall as union density and bargaining coverage and centralisation/coordination increases. It follows that equity effects need to be considered carefully when assessing policy guidelines relating to wage setting institutions."[13]

Buchanan also argues strongly against employer calls for increased "flexibility" to meet the economic crisis:

> "There have been calls among some parts of the employer community for nothing to change with labour law and for employers to have as much flexibility as possible. As I note, this kind of mindset is one that has informed industrial relations policy for the last 15 years; it has informed public policy more generally; and, basically, it has got us into the mess we are in. Treat such calls with scepticism. I have listed all the references in my submission. My colleagues, both at my centre and beyond, and I have been contesting this area of policy for quite some time on the basis of data, and I have all the references there that show the importance of labour standards for orderly economic development."[14]

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[12] Ms Sharon Burrow, ACTU, *Committee Hansard*, 17 February 2009, p. 41.

[13] Buchanan, S*ubmission 150*, p. 2.

[14] Dr John Buchanan, *Committee Hansard*, 18 February 2009, p.39.

Professor Andrew Stewart is also sceptical about employer calls for increased "flexibility" to improve productivity in light of the current global economic crisis:

> "It seems to me right now that, likewise, the drivers of productivity in the current system are not going to be found predominantly in this legislation. They are going to be found in good management, in appropriate use of technology, in innovation—in various ways. There is a lot that governments can and should do to support greater productivity, and that includes through promoting better investment in training and skills. The issues that we are looking at in this bill do not seem to me to have a great deal to do, one way or the other, with productivity.
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> On the question of flexibility, there is no doubt that the bill does and will reduce flexibility for employers in certain respects. It means that many employers will have to think more carefully before they fire workers. It means that they will have less flexibility in the agreements they can make in terms of falling below what would otherwise be the safety net. The question will always be: is that the kind of flexibility that we want? I suppose it comes back to the old question of whether we want to take the high road or the low road to economic growth. The low road would say that you allow businesses greater profits by cutting employment conditions. The high road would say that you maintain a strong safety net of conditions and you try to encourage economic growth through more innovation, through greater productivity, through higher skills and training and so on."[15]

Like Professor Stewart the Greens do not want Australia to take the low road and we see no economic case that can support cutting employment conditions for low paid, vulnerable workers at any time.

The Australian Greens reject the argument that legislation designed to enhance and protect the rights of workers to a robust safety net, access to collective bargaining, job security protections and union representation should be delayed or rejected due to our current economic situation.

We also note that the same organisations that are arguing against the expanded employee rights in this Bill on the basis we are facing difficult economic times, are the same groups that supported the extreme "flexibility" of Work Choices in the good economic times. It seems that for some employers there is never a good time to accord workers decent labour standards.

We also note the arguments made by the previous government in support of Work Choices, which continue to attract support from some employers, that if an employee does not like their wages or conditions they can leave and find another job. This argument is based on the assumption that good economic times will prevail, which is patently false. It was never the case that all employees were able to exercise that

[15] Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p.6.

"choice" in the good times and even less so now. Employees need robust protections in good times and bad.
We agree with the conclusion of Professor Buchanan that

> "labour standards primarily impact upon the quality rather than the quantity of jobs. As the economic crisis unfolds the need for strong labour standards rises, it does not subside as some luxury to be take up in 'better times'."[16]

ILO Conventions

A key means of measuring whether an industrial relations system actually provides for fairness is whether it complies with International Labour Organisation's core labour standards and Conventions. The ILO is a tripartite body with its standards and policies developed by representatives of government, employers and workers.

A number of submissions have questioned whether the provisions of the Fair Work Bill comply with Australia's international obligations under ILO conventions and standards.[17] The Victorian Branch of the Electrical Trades Union provided an opinion from barrister Adam Bandt as to the provisions of the Fair Work Bill which may breach ILO conventions. [18]
The opinion is very useful in that it refers to concerns raised by the ILO in relation to Work Choices and assesses whether the Fair Work Bill has adequately addressed these concerns or ignored them.

The key international conventions are:

- ILO Convention No 87 Freedom of Association and the Right to Organise Convention 1948;
- ILO Convention No 98 Right to Organise and Collective Bargaining Convention 1949; and
- UN International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.

The key rights that flow from these instruments include the right of workers to join and be represented by trade unions, to organise and to collectively bargain. The right to strike is also considered an integral part of the principle of freedom of association.

The areas of likely non-compliance identified by submissions include:

- provisions which give primacy to enterprise level agreements and which restrict the level at which bargaining can occur, including the ban on pattern bargaining;
- provisions which limit the contents of agreements;
- provisions which give insufficient protection to unionised workers who take industrial action in support of their rights under the conventions;

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[16] Buchanan, *Submission 150*, p. 6.

[17] See for example TCFUA, *Submission 11*; AEU, *Submission 95;* AMWU, *Submission 53;* CPSU SPSF, S*ubmission 77*; AEU, *Submission 95*, CEPU, *Submission109*.

[18] ETU Victoria, *Submission 117*, Attachment A.

- provisions imposing limits on unions' right to organise; and
- provisions which restrict the right to strike beyond the limits permitted by the conventions, including provisions relating to secret ballots, termination of industrial action by the Minister, the suspension of industrial action due to harm caused to third parties and bans on industrial action in support of multi-employer agreements.[19]

We also note our continued opposition to the *Building and Construction Industry Improvement Act 2005* and the ABCC which has also been held by the ILO to breach fundamental labour standards in restricting freedom of association and collective bargaining rights.

Despite the ACTU's evidence to the Committee's hearing that they believe the Bill "largely complies" with international jurisprudence[20], we remain unconvinced. It would be have preferable for the ALP government to submit its draft Bill to the ILO for urgent advice as to its compliance and for any areas that fall foul of international standards to be addressed prior to or during the parliamentary debate. We urge the Government to nonetheless submit the legislation, if it passes the parliament, to the ILO within 3 months for advice as to compliance with the advice to then be tabled in the parliament.

It is also significant to note that the objects to the Fair Work Bill water down the reference to our international labour obligations. The object in paragraph 3(a) refers to the Act providing workplace laws that "take into account" Australia's international labour obligations. The *Workplace Relations Act 1996* in contrast had as an object "assisting to give effect to" our obligations and the *Industrial Relations Act 1988* included the object of "providing the means for....ensuring that labour standards meet Australia's international obligations.[21] A Bill which purports to be about fairness in the workplace should have as an object an intention to comply with our international obligations.

Recommendation 1:
That the Government submits the Bill to the ILO for urgent advice as to its compliance with ILO conventions.

Recommendation 2:
That the Bill be amended to comply with Australia's International labour obligations.

Recommendation 3:

[19] See ETU Victoria, *Submission 117*, Attachment A.

[20] Ms Sharon Burrow, ACTU, *Committee Hansard*, 17 February 2009, p.44.

[21] *Workplace Relations Act* 1996, section 3(n); *Industrial Relations Act 1988*, 3(b).

That the objects of the Bill be amended so that clause 3 (a) reads "…and comply with Australia's international labour obligations."

Key concerns

The Fair Work Bill is a large and complex Bill. This report is focused on some of the key issues that have arisen in the course of the Inquiry and does not cover all concerns the Greens have with the Bill nor does it indicate all amendments the Greens may be pursuing in the forthcoming parliamentary debate.

Dispute Resolution

One the major flaws with the Bill is the lack of independent dispute resolution processes that can result in a determination of the dispute. While it is laudable that the ALP has introduced last resort arbitration into the collective bargaining provisions and also importantly into the low paid bargaining stream, there remains no means of effectively resolving workplace disputes unrelated to bargaining. In particular disputes about the application of the National Employment Standards, award or agreement provisions are unable to be finally determined by an independent arbitrator unless there is consent by both parties.

We support the call made by many submissions for the Bill to provide Fair Work Australia with the ability to reach a final determination on workplace disputes that arise from the application of the safety net or other matters outside of bargaining.[22] We also note that many of the strongest calls for FWA to retain a broad arbitration power have come from representatives of workers from low paid industries, often women, who have historically been less able to exert industrial muscle to achieve fair outcomes.

For example, in evidence in Brisbane Ms Julie Bignell from the Queensland Australian Services Union (ASU) eloquently argued for the retention of independent dispute resolution:

> "Arbitration is in our view the epitome of the Australian value that we all aspire to, and that is a fair go. It is a feature of our country for a hundred years and it was a unique feature that was very much the envy of other countries because it preserved employment relationships, not destroyed them. The value of an independent umpire is that disputes can be settled and both workers and employers can move on without a loss of face having had their views heard and considered. For workers to be better off, they need to have a system that provides natural justice, and that is what arbitration does. We say that in the current economic environment this legislation should above all preserve jobs. Frankly, we believe that without access to immediate and binding arbitration for workplace disputes employees will be forced either to endure unfair treatment or to leave their job.

[22] See for example ACTU, *Submission* 13, pp 50-52; SDA, *Submission 12*, pp.10-15, Mr Joe de Bruyn, SDA, *Committee Hansard*, 17 February 2009, pp.2 and 10; TCFUA, *Submission* 11, pp. 47-48.

> This will affect more women than men, in our view, because of the segmentation of the labour market. The clerical occupation, for example, employs between 70 and 80 per cent of women and many of them, particularly in Queensland, are employed in small to medium sized businesses, many still under the state jurisdiction, a jurisdiction which is contemplated to be moved into the federal jurisdiction. Because union density is low in that sector, they are at a distinct disadvantage and are most unlikely to be able to gain agreement from their employer for arbitration within an employment agreement at their workplace. It is likely that they will not even know that they have to do that until it is too late and it is likely that these primarily low-paid workers will be forced to pay for legal representation, something they are most unlikely to be able to afford.
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> The current bill's provisions do not create an environment where differences can be settled and the parties get back to work quickly. Instead, they create a legalistic framework where workers will have to pay lawyers to represent them in court, probably many months after the dispute arose, and the focus of the litigation will not be on preserving the employment relationship but will be on assigning blame and ordering penalties against one of the parties. We say this is not in the spirit of a fair go and we say that justice needs to be accessible to everyone and in order to work, not just those who can afford a lawyer."[23]

Her comments reflect the remarks of Justice Kirby on the value of our historic legacy of independent decision-makers who:

> "were obliged to take into account not only economic considerations but also considerations of fairness and reasonableness to all concerned and the consistent application of principles of industrial relations in Australia. [This] … imposed a 'guarantee' for employer and employee alike that their respective arguments would be considered and given due weight in a just and transparent process, decided in a public procedure that could be subjected to appeal and review, reasoned criticism and continuous evolution."[24]

The ability to effectively resolve workplace disputes is crucial to a fair industrial relations system. Leaving dispute resolution in the hands of the parties by only providing for consent arbitration essentially leaves the resolution in the hands of the stronger party.

Sue Hammond from the CPSU in Victoria reflected on their experience of consent arbitration under the Kennett Government in evidence before the Melbourne hearing:

> "Australia has long held a principle of fairness in industrial relations, and it was built on the notion of the social consensus that the work and labour relation was not equal and that fairness was achieved through a strong

[23] Ms Julie Bignell, Qld ASU, *Committee Hansard,* 27 January 2008, p. 31.

[24] Kirby J, *New South Wales v Commonwealth* [2006] HCA 52, [525].

> award system with a right to collectively bargain and a right to arbitration….
> …..Our experience with the lack of a right to arbitration during the Kennett period tells us that arbitration by consent and claims of good faith bargaining do not deliver a fair system of work and economic efficiency. We also refer the senators to good faith bargaining processes in North America. In Canada there is a right to request arbitration, and settlement is much more likely to be achieved than in the US, where that right is not provided. In the USA more than one-third of negotiations fail to reach agreement compared to less than 10 per cent in Canada….
> ….particularly, over the years, have been involved in pay equity and I know that every case that we ran on equal pay would never have happened if we had to rely on consent and arbitration. And if we look at particularly the issue of maternity leave, paid maternity leave, throughout the system we see that it has been slow to appear by bargaining and through consent."[25]

The Greens are convinced that a fair industrial relations system must include the means for workplace disputes to be resolved by an independent tribunal. We do not believe such a system will mean a return to centralised wage fixing or the "inflexibility" of decades ago, but it will provide a means for the effective and fair resolution of disputes. It will protect vulnerable workers from capricious conduct by employers where the employers may not have actually breached the NES, award or agreement. Such protection is particularly important given the severe restrictions on industrial action, whereby any industrial action taken by employees in support of their interests in such a dispute would be unlawful.

Recommendation 4:
That the Bill be amended to provide Fair Work Australia with the power to finally determine workplace disputes over the application of the NES, modern awards or agreements and other workplace disputes that arise outside of agreements.

Safety net

The safety net under the Bill is constituted by the National Employment Standards and "modern" awards. While the safety net is more robust than Work Choices, we continue to have concerns about the role of parliament in setting core workplace standards and the limitations in the award system.

The move of labour standards from the award system determined by an independent tribunal to legislative standards will have implications in the future. We are concerned that the core labour standards will be politicised and by virtue of the political process not keep up with changes in community standards.

We note our concerns are shared by the Australian Institute of Employment Rights:

[25] Ms Sue Hammond, CSPU PSF Vic, *Committee Hansard*, 17 February 2009, pp. 67-68.

> ""Minimum standards will not be maintained by an impartial tribunal independent of government. This means there is no independent mechanism that updates and reviews the standards in light of movements in community standards, or in order to encourage good practice and fair behaviour. The role of minimum standards is particularly significant for women. The pattern of minimum standards needs to keep pace with gender composition and care responsibilities of the evolving workforce. Such standards cannot be frozen in time but must lead and respond to change."[26]

Australian Education Union also commented in hearings before the Committee:

> "When we had a system which relied on an independent tribunal setting those sorts of standards under the conciliation and arbitration power, it lasted an extraordinarily long time in terms of national history. I think it was a system which produced, as Justice Kirby said, a high degree of equity and fairness across the workforce compared to systems in other countries. Where we will end up, who knows. In America the minimum wage is set by politicians, and we know the consequence of that. It never gets adjusted—or so rarely that it has become quite unrealistic."[27] AEU Hansard p61

The potential for static and stagnant workplace standards are a real possibility as is the possibility of standards being eroded over time. Professor David Peetz points to the NES providing for the cashing out of annual leave as an example of how quickly standards can be eroded.[28] He makes an important point about the significance of maintaining annual leave as a genuine standard given "high levels of work intensity, long working hours, high levels of stress and ongoing tensions work and personal lives with consequent adverse impacts on children." Peetz recommends additional protections on cashing out annual leave, limiting it to one week per year and only once every 3 years.

Specifically on the content of the NES we have problems with the right to request flexible working arrangements, the denial of redundancy pay for small business employees and the averaging of hours of work.

The right to request flexible working hours is a good initiative poorly implemented. Without the ability for the right to be enforced it cannot be justified as a genuine employment standard. The Government has indicated it has based these provisions on similar provisions in the UK and point to the success of the UK provisions in promoting flexible work arrangements. However, there are significant differences between the UK legislation and the provisions in the Bill. The right to request provisions in the NES are limited to carers of children under school age whereas in the UK they extend more broadly to parents of disabled children up to the age of 18 and carers of adults. The UK government has also announced it will extend the provision to cover parents of children up to 16 years old.

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[26] AIER, "Industrial Fairness: the essentials", *The Debate: Regulating Work Relationships in Australia*, 2008, p.iv.

[27] Mr Rob Durbridge, *Committee Hansard*, 17 February 2009, p. 61.

[28] Professor David Peetz, *Submission 132*, p. 8.

The UK provisions also importantly require employers to hold a meeting to discuss a request within 28 days and provide for the independent review of an employer's decision on the basis that the employer has not given an adequate response or that the response was based on incorrect facts. Under the provisions in the Bill an employer need merely assert a "reasonable business ground" for denying the request. The ACTU point out that without the ability to enforce this "right" workers are worse off than under the federal award provisions inserted by the Family Provisions Test case in 2005.[29] Alexandra Heron , in a submission focused on these provisions, argues that the provisions are so weak that they are "unlikely to be the catalyst for a serious move to substantial change in the workplace towards 'caring friendly' working hours and practices".[30] If we as a nation are serious about address the significant barriers many workers face to a healthy work/life balance, these provisions must be amended to include a process for reviewing employer decisions.

The Australian Greens are also dismayed that the ALP Government is continuing on from Work Choices in discriminating against employees of small business by denying them redundancy pay. Five years after the AIRC found no evidence to support the contention that small business employees should be denied redundancy pay we have an ALP Government, for what we can only assume are political reasons, denying thousands of workers a right made all the more significant by the current economic circumstances.

We note the remarks of the Full Bench of the AIRC in its 2004 Termination and Redundancy decision:

> "Having considered all of the material and submissions with respect to this issue we have concluded that we should partially remove the small business exemption. As a general proposition the employees of small businesses are entitled to some level of severance pay. The evidence establishes that the nature and extent of losses suffered by small business employees upon being made redundant is broadly the same as those employed by medium and larger businesses. It is also clear that the level of the exemption is to some extent arbitrary and can give rise to inequities in circumstances where a business reduces employment levels over time.
> While some small businesses lack financial resilience and have less ability to bear the costs of severance pay than larger businesses, the available evidence does not support the general proposition that small business does not have the capacity to pay severance pay."[31]

We also support the calls from Professor Peetz for redundancy pay to be extended to long term casual employees.[32]

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[29] ACTU, *Submission 31*, p. 26.

[30] Alexandra Heron, *Submission 34*, p.1.

[31] *AIRC, Termination and Redundancy case, PR032004, 24 March 2004, [272]-[272].*

[32] Peetz, *Submission 132*, pp. 9-11.

The issue of working hours remains a significant concern for many workers. The Australian Greens are concerned the Bill does not adequately address the working hours challenges facing many workers. We are particularly concerned by the submissions from industry groups to extend the averaging provisions for ordinary working hours back out to 52 weeks rather than 26. We believe 26 is too long and continues to allow for abuse and are adamantly opposed to any moves to move the averaging period back to 52 weeks.

Recommendation 5:
That the right to request flexible working arrangements provisions are amended to reflect the UK provisions, notably to require the employer to meet with the employee to discuss the request, and to provide for independent dispute resolution of procedural rights.

Recommendation 6:
That clause 119 is amended to incorporate the AIRC Redundancy decision 2004 providing redundancy pay for employees of small businesses.

Award modernisation

The Australian Greens expressed our reservations about the award modernisation process when the Forward with Fairness Transitional Bill was being debated. We recognise that a significant section of the Australian workforce is award reliant or have their wages and conditions set by reference to an award. We also recognise that award reliant workers are more likely to be women and working in low paid jobs. A strong award system is vital to ensuring these workers are treated fairly.

Our vision for the award system is a comprehensive safety net for workers on an industry or occupational level that is flexible enough to allow for industry-specific conditions but secure enough to provide appropriate protections. Awards must be living documents that can adapt to the changes in community standards.

There can be no doubt that awards need to be updated. Many awards do not reflect contemporary work practices or standards. However we remain concerned with the limited number of matters to be considered, with the limited process for variations and with the underlying change in the nature of the award system. We believe a four yearly review of all awards is unsatisfactory. The fact that awards can be reviewed outside these timeframes for work values reasons is a positive provision. We would like to see award reviewed for pay equity as a separate process. We are not convinced the four yearly reviews are the appropriate mechanism for ensuring awards keep up to date with future community standards.

The evidence before the Committee indicates a deep dissatisfaction with the process and result of award modernisation. The evidence presented by the ASU in relation to the Clerk – Private Sector award is particularly stark. The evidence is that many workers employed under this award will lose conditions and have a lower safety net. Of particular concern is the provision that exempts persons from the award if they earn more than $44, 250 per annum. This is in direct contrast to the intention to set a

high income threshold for awards of $100 000 where the employee agree to not be covered by the award.[33]

These sorts of decisions also have pay equity implications. The workers under the Clerks's award for example are predominately women who are now losing important conditions and can be excluded form the award for less then half the annual salary of other workers. We will be closely watching the way pay equity is taken into account under the legislation, and in particular the operation of the new pay equity provisions.

We also note the submissions from the ACTU in relation to the decision of the AIRC to not supplement the NES in awards. This is resulting in workers losing conditions that they previously enjoyed. We urge the Minister to consider these decisions and whether they match the intent of award modernisation and to direct the AIRC where appropriate to address these concerns.

The Australian Greens are also concerned about the safety net is being undermined by the $100 000 high income threshold exemption from awards. There were a number of submissions commenting that there are workers that have historically had and should continue to enjoy award coverage and who will lose important award conditions and protections.[34] We would prefer no exemption to award coverage, but if the provision remains we believe the threshold should be a matter contained in the legislation, not regulation, and there should be no opportunity for Governments to lower the threshold.

Individual flexibility arrangements

The Australian Greens oppose the mandatory requirement that awards and agreement contain provisions for individual flexibility arrangements (IFAs). We are very concerned these individual agreements will have the ability to undermine awards and collective agreements. While we appreciate there are greater protections in the Bill than there were for AWAs and in particular it will be difficult for employers to use these arrangements as an anti union mechanism, there still a real prospect workers will be exploited by these arrangements.[35]

We note the experience, particularly in WA, with pre-Work Choices AWAs. These AWAs had to pass a no-disadvantage test as compared to the relevant award and yet there is evidence that employees were exploited under these instruments. With individual flexibility arrangements there is no requirement they be checked by anyone. This leaves even greater potential for labour standards to decline.[36] The evidence of Ms Yuan Zhang from Asian Women at Work indicates the type of circumstances where these arrangements may be abused:

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[33] ASU, S*ubmission 56*, paras 18-59.

[34] ACTU, *Submission 13*, p.28.

[35] Peetz, *Submission 132*, p.15, Buchanan, *Submission 150*, p.5.

[36] Buchanan, *Submission 150*, p.5.

> "We are very concerned about what will happen when an employer asks a migrant woman worker to sign an individual flexibility agreement. They may say yes and sign the agreement out of fear, without a real understanding or without wanting to change their working arrangement. Our members have told us stories about being given a bunch of material in English and being asked to sign immediately, which they have done because they did not want to lose their job. They have very little idea of the content of all papers."[37]

We also note the submission of the United Firefighters Union as to the potential harmful consequences such a provision could have on firefighters and the community.[38] The submission provides an important example of the problems with mandating such clauses rather than allowing them to be inserted where appropriate to the industry or enterprise.

If the Government is wedded to the idea of individual agreements, at the very least we need to know how they are being used. Presently because there is no requirement to lodge the IFAs with FWA there is no way of knowing how they are operating in practice except where workers take their employers to court for breaches. The Greens are supportive of the approach recommended by Dr Buchanan for IFAs to be lodged with FWA, not assessed but lodged, and be available for researchers. We believe this approach keeps the integrity of the Government's provisions, that is, allowing flexibility arrangements but not the formal processes of AWAs, but will also allow a proper examination of how these arrangements are actually being experienced. We are not convinced that the new Fair Work Ombudsman will have the resources to adequately monitor the effect of IFAs without some requirement for them to be lodged.

Recommendation 7:
That employers are required to lodge all individual flexibility agreements with Fair Work Australia with FWA is to make all IFAs freely available, without identifying the parties to the agreements.

Collective bargaining

The Australian Greens are very supportive of the collective bargaining provisions in the Bill including the requirement to bargain in good faith. These provisions encourage and ultimately require employers to negotiate with employees and their representatives. The Committee heard enough evidence to convince the Greens that there must be a requirement to bring employers to the bargaining table. The experience of workers at Telstra, Toll Dnata and Cochlear amongst others

[37] Ms Zhang, Asian Women at Work, *Committee Hansard*, 18 February 2009, p.31.

[38] UFU, *Submission146* and Mr Peter Marshall, UFU, *Committee Hansard*, 17 February 2009, pp 69 and 75.

demonstrates how employers can frustrate the rights of workers to access genuine bargaining and freedom of association. [39]

We support the low paid bargaining stream as assisting in bringing collective bargaining to sectors in the economy where there are particular barriers to such bargaining. We accept "low paid" is a relative concept and believe FWA is best to adjudicate the application of these provisions on a case by case basis. We accept the submissions of a variety of unions as the importance of these provisions in enabling bargaining for fair wages and conditions in sectors such as aged care, social and community services, cleaning etc.[40]

The Shop Distributive and Allied Employees' Association (SDA) made a couple of practical suggestions to improve the low paid provisions that we believe should be adopted by the Government. The suggestions are to allow the identification of employers by their trading names and to make explicit in clause 262(4) that in making a low paid workplace determination FWA is to be satisfied that the determination will improve the employees' terms and conditions of employment.[41]

We also strongly support the provisions for unions to be the default bargaining representatives for their members and for unions to become covered by agreements where they have members subject to the agreement. These provisions do nothing more than recognise the proper role of unions as representatives of their members.

The primary objection we have to the agreement-making provisions is the limitations the Bill places on the content of agreements. The Australian Greens strongly believe parties should be free to agree on the matters they wish to include in agreements. We agree with Professor Peetz when he says that the limitations are:

> "an unnecessary intrusion into the relationship between employers and employees, in effect telling employers what is best for them. If employers and employees want to reach an agreement that deals in part with a social, environmental or community issue that is not directly pertaining to the employment relationship, they should be free to do so. Indeed in many cases it would be socially or environmentally desirable for them to do so"[42]

In particular we believe parties should be free to agree on matters such as climate change initiatives, sourcing non-sweatshop items and the hiring of contractors and labour hire workers.

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[39] See Ms Maria Scarfidi, *Committee Hansard,* 17 February 2009, pp.34-35, Mr Steven Jones, CPSU, *Committee Hansard*, 16 February 2009, pp. 20-23, Ms Lily Yin, *Committee* Hansard, 19 February 2008, p*p.31-32.*

[40] Ms Lisa Fitzpatrick, ANF, *Committee* Hansard, 16 February 2009, p.51; Ms Linda White, ASU, *Committee* Hansard, 17 February 2009, p. 37; LHMU, *Submission 71*.

[41] Mr John Ryan, SDA, *Committee Hansard*, 17 February 2009, pp. 8- 9.

[42] Peetz, *Submission 132*, p. 14.

There has been widespread concern expressed with the government reverting back to the formula of "matters pertaining to the employment relationship". The very fact that the Bill also has to explicitly allow matters relating to unions and pay deductions demonstrates its limitations. Professor Stewart argues the jurisprudence surrounding the concept is "confusing, uncertain and downright inconsistent" and declares it is "high time that the 'matters pertaining' concept is given a decent burial."[43]

We also concur with Dr Buchanan's comment that:

> "As we move to an increasingly carbon constrained future it is unclear why our labour law is clinging to nineteenth century notions of managerial prerogative and thereby limiting the ability of the parties to enforceable agreements to reach innovative solutions to the problems they encounter."[44]

Our position for not limiting enforceable agreement content also finds support in these comments by Mark Irving in a publication from the Australian Institute of Employment Rights:

> "Issues that are now commonplace in agreements were once considered impermissible. Unions, employees and employers now regularly commit to continuous improvement of methods of production and consult about steps to retain clients and gain new business. These matters were once considered the exclusive domain of an employer as they were within the prerogative of management. But times change. Industrial laws should not be drafted to prevent the parties agreeing to change with the times."[45]

We can see no justification for legislating limitations on parties reaching an enforceable agreement on any matter the parties can agree on. We understand much of the reasoning behind these limitation relate to wanting to further limit protected industrial action. We comment on industrial action below.

Recommendation 8:
That the Bill be amended to remove the restrictions on agreement content.

We also have concerns in the way the Bill seeks to limit the level at which bargaining takes place. We do not support the limitations on pattern bargaining or multi-employer bargaining. These limitations are likely to breach ILO conventions on the right to collectively bargain. Multi-employer or pattern bargaining can have the benefit of achieving consistent outcomes for workers with similar skills and responsibilities. We note support for these types of bargaining has come from unions as varied as the Australian Nurses Union and the AMWU.

The ANF describes their support for pattern bargaining in this way

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[43] Stewart, S*ubmission 98*, p. 6.

[44] Buchanan, *Submission 150*, p. 4.

[45] Mark Irving, "The Freedom to Agree", *The Debate: Regulating Work Relationships in Australia,* AIER, 2008, p.8.

> "We do not think you would find many employers of nurses that would not support consistent outcomes in terms of agreements for their nurses. We think it makes common sense and good industrial sense to have consistent outcomes for employees who have the same skill and responsibility. We do not think it should be determined on the basis of where they work. So, yes, we support pattern bargaining."[46]

The AMWU describes the importance of pattern bargaining in these terms:

> "Our union is proud to have been a leading advocate for the fundamental rights that have been won at an industry level, such as annual leave, the 38 hour week, superannuation and long service leave, to name but a few. We do not support the avenue being closed to working people. We also note that, particularly at this time of global financial crisis, many employers are actually looking for solutions at an industry level. Certainly we want that option to be still available."[47]

Industrial action

The Australian Greens support the fundamental right of workers to withdraw their labour in the pursuit or protection of the economic or social interests. The right of workers to withdraw their labour is fundamentally linked to the freedoms of association and of expression and the right to peaceful assembly. We believe recognising such rights are an integral part of a democratic system and must not be prohibited, or so heavily regulated that its role is illusory. The ILO considers the right to strike an intrinsic corollary of the right to organise and its Committee of exports has said that:

> "the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.[48]

This is not to say there should be an absolute right to strike and the ILO recognises a number of limitations.[49] However, the Fair Work Bill (like Work Choices before it) restricts industrial action, including the right to strike, to such an extent that it breaches the ILO standards. It is important to note that the definition of industrial action is extremely broad and is not limited to strike action but can encompass, stop work meetings, overtime bans, wearing T-shirts[50] and generally performing work in a manner different from that in which it is customarily performed.

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46 Ms Lisa Fitzpatrick, ANF, Committee Hansard, 16 February 2009, p.53.

47 Mr Dave Oliver, AMWU, Committee Hansard, 19 February 2009, p.30.

48 Jane Romeyn, "Striking a balance: the need for further reform of the law relating to industrial action", Research Paper, Parliamentary Library, 2008, p.9.

49 Ibid p.10

50 Ms Lisa Fitzpatrick, ANF, *Committee Hansard,* 16 February 2009, p. 55.

The Fair Work Bill is closest in its terms to Work Choices in the extreme limitations it places on the rights of workers to withdraw their labour. These restrictions include:

- the distinction between protected and unprotected industrial action , with unprotected industrial action being subject to civil penalties;
- action taken in support of multi-employer agreements or pattern bargaining being unprotected;
- the broad circumstances in which protected industrial action can be suspended or terminated including the ability of third parties to seek a suspension of industrial action and the right of the Minister to terminate industrial action;
- prohibitions accompanied by civil penalties for payment during unprotected action; and
- the secret ballot process.

It is clear that from previous ILO observations that the measures in the Fair Work Bill that replicate the Work Choices regime will be in breach of ILO conventions. We are deeply concerned that the ALP Government has not taken heed of the requests from the ILO to ensure our laws relating to industrial action are compliant with international conventions. Instead it seems the Government was more than happy to placate certain sections of our society with a "tough on unions" stance to the detriment of the fundamental human rights of Australian employees.

We believe the right to take industrial action free from civil penalties should not be limited merely to the bargaining process. Our laws should also recognise a right to take industrial action in response to harsh or unfair management and as regards economic and social matters. Such a protection is even more important given the lack of arbitration in the Bill.

We note the discussion in Jane Romeyn's paper "Striking a balance: the need for further reform of the law relating to industrial action" on the history of the right to strike in Australia and its relationship with arbitration. Ms Romeyn notes that historically Australian workers did not enjoy a legislative protection of the right to strike but that the ILO did not criticise Australia because employers rarely used the legal sanctions available " but also because impartial and speedy conciliation and arbitration processes compensated for the absence of protection for the right to strike."[51] What we have in this Bill is an unsatisfactory half way house where only some limited forms of industrial action are protected yet access to speedy conciliation and arbitration is removed.

Recommendation 9:
That the provisions in the Bill relating to industrial action are amended to comply with ILO obligations.

51 Jane Romeyn, "Striking a balance: the need for further reform of the law relating to industrial action", Research Paper, Parliamentary Library, 2008, p. 12.

There are two further issues of concern with the provisions relating to industrial action: payment relating to periods of industrial action and the secret ballot process. Both these areas are also dealt with in the Bill in a way that is likely to breach ILO conventions but also have the potential to be counter-productive.

The provisions in the Bill that require employers to deduct at least 4 hours pay for unprotected industrial action were introduced by Work Choices. The Committee heard persuasive evidence that this measure is counter-productive in that it could lead to workers who would otherwise take 20 minutes for a stop work meeting to take 4 hours.[52] The Greens agree with the submissions that argue the employees should be paid for the work they perform and the Bill should not encourage lengthier periods of industrial action.[53] There is also the issue of this provision not applying to protected action and the difficulties of employers determining whether industrial action is protected or not.

The Australian Greens also continue to have reservations about the need for secret ballots prior to taking protected industrial action. The process is an unnecessary bureaucratic hurdle and majority support for such action can be determined by other means. The Queensland Electrical Trades Union explained the problem:

> "The protected action ballot process has been manipulated by employers to frustrate and delay bargaining. Employers defend protected action ballot applications with lawyers and barristers who come armed with technical legal arguments aimed at delaying the issuing of an order. If an order is issued and is subsequently appealed, the potential for delay is significantly greater…….
>
> Protected action ballots are costly to run: legal costs on the part of employers, more often than not; taxpayer and union costs to fund the ballot; and Australian Industrial Relations Commission time spent perusing the usually quite substantial documentation and then hearing and determining the application. They are pointless, as they do no more than a simple union ballot process was able to achieve previously, and they stand in the way of employees taking lawful industrial action in support of their claim."[54]

Professor Stewart also comments on the way applications for secret ballot orders are challenged by employers, particularly in relation to the requirement that the union has shown a genuine attempt to reach agreement. We agree with him that if the provisions are to remain, the requirement for demonstrating a genuine attempt to reach agreement should be discarded.[55]

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[52] See for example, ACTU, submission 13, p. 45; Ms Lisa Fitzpatrick, ANF, Committee Hansard, 16 February 2009, p. 55.

[53] Peetz, *Submission 132*, p.18.

[54] Ms Kerry Inglis, ETU Qld, *Committee* Hansard, 27 January 2009, p.40.

[55] Stewart, *Submission 98*, p. 9.

Unfair dismissal and redundancy

Unfair dismissal laws have a vital role in providing job security for employees. They capture a relatively simple proposition that workers should not have their employment terminated without valid reason and without being afforded due process. It is about treating workers with dignity. Marilyn Pitard also makes the case for the social reasoning for such laws:

> "Once employees are employed, they have income, community involvement, social interaction and perhaps standing and status in the community. They may also have dependents. At stake, then, is not just their economic and social wellbeing but also that of others. The price of preserving that economic and social wellbeing – in terms of unfair dismissal – is small….Safeguarding employees from unfair dismissal protects families and dependents. Whilst I have earlier acknowledged that an employee does not have a right to a job, developed countries recognise that there should be some job security for employees. Employees are not commodities to be dispensed with on command or demand."[56]

We acknowledge the Bill brings back unfair dismissal protection for a great many workers although the provisions have some significant flaws. One of the most fundamental flaws is the reduction in time to lodge an application to 7 days. The Committee heard evidence that this timeframe was so ridiculously short that it would operate as a significant barrier in people accessing this protection at all and lead to considerable injustice.

The Employment Law Centre of Western Australia summed up the effect this way:

> "We estimate that the majority of our clients make contact with us in the latter third of the current 21-day limitation period. The reasons for this delay include geographical limitations, a lack of knowledge of dismissal rights generally, an inability to contact us immediately due to our service limitations, and an inability to recover swiftly from the emotional consequences of losing one's job.
>
> From a global perspective, the current 21-day limitation period is already at the briefer end of the scale when looked at in relation to comparable jurisdictions. The three most directly comparable jurisdictions—the UK, Canada and New Zealand—all currently provide 90-day limitation periods for unfair dismissal.
>
> This issue will also not be properly addressed by the provision for out of time applications. The most common reason we see for delay—that an individual simply was not aware of his or her unfair dismissal rights—is highly unlikely to satisfy the bill's definition of the exceptional circumstances required for out of time applications. The number of clients who are unable to contact us within a week of their dismissal leads us to believe that a seven-day limitation period may operate to exclude a similar

[56] Marilyn Pitard, "A compelling argument for fair dismissal", *The Debate: Regulating Work Relationships in Australia,* AIER, 2008, p. 12.

> proportion of dismissed employees from unfair dismissal rights as does the current '100 employees or under' exemption."[57]

It is unconscionable for the Government to retain these time limits. They must be amended upwards to at least the 21 days that existed previously. We do not agree with the Majority that 14 days is sufficient.

Another key flaw with the unfair dismissal provisions is the insistence of the Government on treating workers differently depending on who they work for. We see no justification for different provisions to apply to employees of small business. All workers have the right to be treated with dignity and respect. Submissions also pointed out flaws in the Small Business Code, in particular that only one warning need be given and that warnings may be given verbally. Asian Women at Work forcefully make the point that verbal warnings are open to dispute and yet if the employer thinks they have complied with the Code, the worker has no further rights. We support the recommendation of the Majority report for the checklist to be amended to require warnings to be given in writing.

We also have concerns that FWA is unable to consider the genuineness of redundancies and believe FWA should be given the jurisdiction to determine whether a redundancy is fair taking into account factors such as whether the employer has explored all reasonable alternatives and whether there is a valid reason for the selection of the particular employees made redundant.

The Employment Law Centre of WA and other community legal centres also raised the issue of the need to seek leave as lawyers in representing their clients. They noted that lawyers in the employ of unions or employer organisation need not seek leave and argued they should also be exempt given the circumstances of their clients. We support the recommendation in the Majority report that community legal centres be exempt form the need to seek leave.

Recommendation 10:
That employees have 21 days to lodge an unfair dismissal claim.

Recommendation 11:
That the unfair dismissal provisions are amended to remove the discriminatory provisions relating to small business employees.

Right of Entry

Much has been made of the changes to right of entry laws. The Australian Greens are mystified at the amount of time that has been given to these provisions. Right of entry is a fundamental part of freedom of association. It is essential for an effective collective bargaining regime and vital for enforcement purposes. The provisions in the Bill impose greater regulation than at any time prior to Work Choices. We agree with

[57] Mr Michael Geelhoed, ELCWA, *Committee Hansard*, 29 January 2009, p. 2.

the comments in the Majority report dealing with the issues raised by employers about access to records and the potential for demarcation disputes.

One issue we do have is the continuation of the ability for some employers to obtain contentious objection certificates effectively prohibiting unions exercising their rights of entry. There is little justification for continuing these provisions and allowing employers to place themselves outside the laws of the land on the basis of their religion.

Transfer of business

The Australian Greens support the broader transfer of business provisions in the Bill. Without these provisions it is too easy for employees to be exploited by restructures or out sourcing and in sourcing arrangements. We broadly agree with the comments in the Majority report on the transfer of business provisions and support the recommendation that a probationary period after a transfer of business should not be required to recommence and transferring mployees should be treated as existing employees.

Textile, Clothing and Footwear industry and outworkers

Parliament must use the opportunity presented by this Bill to get the regulation of the TCF industry and outworkers right. The Majority report has adequately summarised the areas of concern raised by those with involvement in the industry, notably the TCFUA, Fair Wear and Asian Women at Work.

The Australian Greens will be keeping a close watch on the Government's response to the issues raised in relation to the TCF industry and outworkers and we will move amendments to address the concerns if the Government does not act.

Transitional Issues

The Australian Greens are on record with our strong view that unfair agreements made under Work Choices should not be able to continue indefinitely. We appreciate this is an issue for the upcoming Transition Bill but we make it clear now that we will move amendments to provide workers with the option of terminating unfair agreements.

Conclusion

In summary, the Fair Work Bill provides for fairer regulation of workplaces than Work Choices. However, the Bill also contains too much of the Work Choices regime. It is the Australian Greens' view the Bill also represents a missed opportunity to cement a truly fair and progressive industrial relations system, building on the best of our traditions while acknowledging the contemporary challenges facing Australian workplaces.

Senator Rachel Siewert