The Senate

# Standing Committee on Education, Employment and Workplace Relations

## Fair Work Bill 2008 [Provisions]

February 2009

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# Chapter 1

# Introduction

1.1 This chapter provides a policy context to the bill, its purpose and background. As in all its major reports, the committee takes the opportunity to make broad observations about policy trends and details which have been observed over a number of years.

## Reference

1.2 On 25 November 2008, the Senate referred the provisions of the Fair Work Bill 2008 (the bill) to the Senate Standing Committee on Education, Employment and Workplace Relations for report by 27 February 2009. The bill was passed by the House of Representatives on 4 December 2008.

## Conduct of the inquiry

1.3 Notice of the inquiry was posted on the committee's website and advertised in *The Australian* newspaper, calling for submissions by 9 January 2009. The committee also directly contacted a number of interested parties, organisations and individuals to notify them of the inquiry and to invite submissions. 154 submissions were received as listed in Appendix 1.

1.4 The committee conducted public hearings in:

- Brisbane on 27 January 2009;
- Adelaide on 28 January 2009;
- Perth on 29 January 2009;
- Melbourne on 16 and 17 February 2009;
- Sydney on 18 February 2009; and
- Canberra on 11 December 2008 and 19 February 2009.

1.5 Witnesses who appeared before the committee are listed at Appendix 2.

1.6 Copies of the Hansard transcript from the hearings are tabled for the information of the Senate. They can be accessed on the internet at http://aph/gov.au/hansard.

## Acknowledgements

1.7 The committee thanks those who assisted with the inquiry.

## Purpose of the bill and its context

1.8 The Fair Work Bill is the second of four pieces of legislation which, taken together, will ultimately replace the current *Workplace Relations Act 1996* (WRA) and provide for a new workplace relations system to commence on 1 January 2010.

1.9 The first piece of legislation, considered by the committee in its report tabled on 17 March 2008, was the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, which changed the framework for making workplace agreements, abolishing Australian Workplace Agreements (AWAs) and initiating award modernisation.

1.10 Key features of this second piece of legislation include: a safety net of National Employment Standards (NES) and modern awards; reaffirmation of the principle of collective bargaining at the enterprise level; restoration of unfair dismissal appeal rights; an independent umpire, Fair Work Australia (FWA); and strong compliance measures including rules on industrial action and right of entry.

1.11 Eventually the bill may also facilitate the referral of powers from the states to the Commonwealth regarding private sector workplace relations which would enable a national workplace relations system for the private sector.

1.12 The legislation dealing with transitional and consequential arrangements will be presented to parliament in two separate bills, the first expected to be introduced shortly. The Minister has stated that the transitional bill will: ensure maintenance of take-home pay levels during the transition to agreements made under the new bargaining framework; ensure that the NES and minimum wages apply to all employees from 1 January 2010, including those covered by existing agreements; and, allow parties to modernise enterprise awards to continue in the new system and treat NAPSAs derived from the state enterprise awards in the same way.[1]

1.13 The approach of legislating transitional arrangements separately has been criticised by some organisations for its failure to allow for a proper assessment of its effects.[2] It appears that the government has sought to keep the focus on the system rather than on the complex transitional matters.[3] Some of the transitional issues raised with the committee are listed at the end of chapter eleven for consideration by the government as the transitional bills are drafted.

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1 Hon Julia Gillard MP. Minister for Workplace Relations, Second Reading Speech, *House of Representative Hansard*, 25 November 2008, p. 11196.

2 See AMMA, *Submission 96*, p. 18; NSW Office of Industrial Relations, *Submission 102*, p. 8.

3 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 14.

## Background

1.14 As noted earlier, the Fair Work Bill builds on the Transition to Forward with Fairness amendments to the WRA to give effect to the remainder of the government's substantive workplace relations election commitments which are detailed in the policy documents released in 2007, *Forward with Fairness* and the *Forward with Fairness Implementation Plan*. In particular, the bill gives effect to the government's election commitment to implement a new workplace relations system. While retaining some of the features of the current WRA, the bill aims to restore balance and fairness.

### *Striking the right balance between employee and employer needs*

1.15 Fairness and balance are concerns of long-standing in industrial relations legislation. The proponents of the Workplace Relations Bill in 1996 claimed that the new legislation was based on the need to restore 'balance'. It was argued that business, especially small business, was much hampered by the 'privileged' access of employees to collective agreements, backed by coercive union power. AWAs would restore 'balance'. While the introduction of AWAs more than shifted that balance, the WorkChoices amendments to the WRA in 2005 drastically tilted it. Over time, it became apparent to the electorate that AWAs, especially after WorkChoices, were simply a device to strip employee entitlements to the bone and to maintain the existence of a low-paid casually-employed underclass.

1.16 This bill implements *Forward with Fairness* and reverses the trend evident in the WRA, especially in its later amendments, of elevating individual agreements above collective agreements, especially where such agreements were negotiated by unions. It restores union participation in industrial relations because without it there is no effective way of ensuring the right of employees to freedom of association and the maintenance of fair minimum conditions of employment. Yet this is also the first time that industrial legislation has facilitated the move toward a truly national system of industrial relations. While WorkChoices was grounded on the use of the corporations power, this appeared to be more of an expedient and did not achieve a truly national system for the private sector as it did not extend to many employers who are not constitutional corporations, leaving those employers and their employees covered by state systems. Instead Forward with Fairness embodied a consultative process with the states in relation to a proposed workplace relations system that has wide electoral support. This legislation is intended to restore fairness and balance across the entire workforce. As one employee representative submission recognised: 'The Government understands that the needs of a 21st century global economy cannot be met by tinkering around at the edges of the existing industrial relations system.[4]

1.17 This legislation further advances this commitment and continues the reversal of the imbalances in WorkChoices. As expressed by the Minister for Education, Employment and Workplace Relations:

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4 Australian Hotels Association, *Submission 100*, p. 5.

> We have presented to this parliament a bill that puts workplace relations right where is should be – in the dead centre, where the pendulum should be, between the interests of employers and employees.[5]

1.18 This balance has been recognised by employer groups. On the day the bill was released, the Australian Industry Group (AiG) described it as 'by and large a workable compromise'.[6] This recognition is in no small way due to the unprecedented level of consultation that was undertaken by the government.

### *Consultation process*

1.19 In *Forward with Fairness* the government committed itself to consult on the development of the legislation. Since the passage of the Transition Forward to Fairness Bill the government has consulted widely with interest groups as part of the legislative drafting process, particularly in regard to identifying ways of improving the practical operation of the laws and identifying unintended consequences. The consultation process included stakeholders such as peak union and employer bodies and state and territory officials and workplace relations ministers. The government formed two new groups; the Business Advisory group and the Small Business Working Group, and kept the main two former government groups, the National Workplace Relations Consultative Committee and its subcommittee, the Committee on Industrial Legislation (COIL).[7]

1.20 The stakeholder groups have acknowledged the government's consultation process as being genuine, comprehensive and thorough.[8]

1.21 This contrasts with the lack of consultation undertaken by the former government on the WorkChoices legislation. For instance, consultation with COIL involved over 60 people for two weeks in Canberra in October 2008 to work through the detail of the draft legislation.[9] This may be compared with the few short hours they were given to review the complex and lengthy WorkChoices Bill.[10]

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5 Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, p. 12646.

6 Media Release, Australian Industry Group, 'Fair Work Bill – by and large a workable compromise', 25 November 2008.

7 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 2.

8 See Recruitment and Consulting Services Australia, *Submission 94*, p. 6; Master Builders Australia, *Submission 64*, p. 5; AiG, *Submission 118*, p. 5; Business Council of Australia, *Submission 116*, p. 1; Australian Hotels Association, *Submission 100*, p. 4; WA Government , *Submission 16*, p.2.

9 Ibid.

10 Hon. Julia Gillard MP, Minister for Employment and Industrial Relations, Address to the Australian Labour Law Association, 14 November 2008.

1.22 In addition, this Senate inquiry process has taken three months, with hearings in six locations, compared to the three week process undertaken for WorkChoices which held hearings in Canberra only.

### *Simpler legislation*

1.23 The government pointed to the exposure draft of the National Employment Standards (NES) released on 14 February 2008 as evidence of its commitment to greater simplicity. Employer and employee stakeholders expressed approval on the simpler approach.[11]

1.24 This approach has been continued with this bill where the government has aimed at drafting workplace legislation that is simpler and more workable for employers and employees. The government commissioned University of Adelaide law professor Andrew Stewart to assist this process. Professor Stewart had criticised former coalition and Labor governments for allowing the industrial legislation to rival the income tax laws for complexity. Although he listed some areas where further improvements could be made, Professor Stewart expressed satisfaction that every manager, union official and industrial practitioner who needs to consult this legislation regularly would find their work much easier.[12] The Workplace and Corporate Law Research Group, Monash University also agreed that the bill provides simpler legislation:

> There is no doubt that the Fair Work Bill is simpler to understand and apply than its predecessors and that the new national workplace relations system as a whole will be less complex than the system established by Work Choices.[13]

1.25 The committee majority notes that the WRA totalled some 1,500 pages. This bill is significantly shorter at fewer than 600 pages. It notes the general agreement that the bill is easier to read and comprehend, which will assist those who need to consult it regularly. This improvement has been noted more than once by Opposition participating committee member Senator Abetz.[14]

## Economic context

1.26 The debate about the relative importance of industrial relations as a determinant of productivity has continued over the life of the WRA and continues still. The government has been criticised for its timing of the new legislation given the

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11 Mark Davis, 'Push to make workplace laws simpler', *Sydney Morning Herald*, 18 June 2008, p. 7.

12 Professor Andrew Stewart, *Submission 98*, p. 2.

13 Workplace and Corporate Law Research Group, Monash University, *Submission 8*, p. 2.

14 Senator the Hon Eric Abetz, *Committee Hansard*, 28 January 2009, p. 9; *Committee Hansard*, 18 February 2009, p. 46; *Committee Hansard*, 19 February 2009, p. 68.

unfavourable economic cycle the country now finds itself in.[15] The Minister has stated that the government takes a long term view:

> Labor in opposition deliberately designed these laws so that they could be the workplace relations laws of this country in good times and in difficult times. We designed a workplace relations system that was ready to meet the challenges this nation could face in the future; a workplace relations system that would be fair to employees, flexible and productive no matter what was going on in the economy. Consequently, our Fair Work Bill is there to set the workplace relations laws for this country for the long term.[16]

1.27 The Minister added that the priority was to achieve balance in meeting the needs of the economy, and advised:

> …we believe we've got the balance right and that the Bill is good for employees, good for employers and good for the economy and future productivity and prosperity.[17]

1.28 The government has responded to the current global financial crisis through its $10.4 billion Economic Security Strategy to strengthen the economy and create 75,000 jobs.[18] In addition, on 3 February 2009 the government announced a $42 billion Nation Building and Jobs Plan to support long term economic growth, and up to 90,000 jobs in 2008-09 and 2009-10.[19]

1.29 In current economic conditions the government believes it is all the more important to deliver certainty and stability regarding workplace relations laws.[20] In the committee's mind, employment confidence underpins consumer confidence. The committee majority particularly deplores statements made by some employers that the legislation is ill-timed, given the current threat of world recession. This is not defensible. No economic justification has been put forward to support it. It reflects only a fear of change, and an opportunistic tactic to delay it. The prevailing wisdom is that the workforce must be protected so as to be ready for recovery.

1.30 Critics of the bill have claimed that the proposed changes add to industry costs, implicitly through the 'inevitably' increased cost of labour. This is also an implicit admission that they remain trapped in the low-wage time-warp in linking prosperity with the driving down of wages. They appear to believe that if the IR

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15 See ACCI, *Submission 58*, Part 1, p. 3.

16 Hon Julia Gillard MP, Transcript of E&OE Transcript Press Conference, 15 January 2009.

17 Hon Julia Gillard MP, Transcript of ABC AM interview with Hayden Cooper, 16 January 2009.

18 DEEWR, *Submission 63*, p. 7.

19 Media release, Prime Minister of Australia,' $42 billion nation building and jobs plan', 3 February 2009.

20 Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, p. 12646.

system is skewed, or 'balanced' toward a 'take-it-or-leave-it' system of wage negotiation, economic growth will automatically follow. As evidence from the Department of Education, Employment and Workplace Relations (DEEWR) noted:

> …drivers of national economic growth and performance come from a far wider range of sources than the type of workplace relations system that a country adopts. [21]

1.31 Professor Andrew Stewart agreed that 'job creation responds predominantly to forces other than the conditions that are set by labour law'. He added that he did not see the legislation leading to any higher levels of unemployment than will be due to the economic downturn.[22]

1.32 In summary, the committee majority regards external forces, principally the decline in foreign demand for goods and services, and the limited availability of investment funding, as the likely drivers of unemployment. The new National Employment Standards have no significance in the employment equation, compared, for instance, with the decline in China's economic growth from 9 to 6.8 per cent in the final quarter of last year[23] which is already having a direct effect on jobs in sectors such as the mining industry.[24] As well, the general downturn in the domestic economy is affecting retail and other jobs. Protecting jobs in this economic climate is a key goal for the government, but not one that would be assisted by allowing industrial relations reform to falter.

1.33 In response to criticism from the Coalition that the government has not relied on any economic forecasts or impact statement before introducing the bill into parliament, the Minister has pointed out that 77 pages of regulatory and economic effects are included in the explanatory memorandum. The Minister added that the Office of Best Practice Regulation agreed that this analysis has effectively documented the regulatory implications of the bill.[25]

1.34 The government has pointed to evidence that identifies a clear link between enterprise bargaining and increased productivity.[26] DEEWR noted that the bill is broadly consistent with the recommendations to maintain a flexible labour market made in the OECD Economic Survey of Australia, released on 10 October 2008. In particular, the OECD recommended that collective bargaining be preserved at the

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

22 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 7.

23 Michael Stutchbury, 'Growth near zero, says IMF, as China slowdown hangs over Australian economy, *The Australian*, 23 January 2008. available at: http://www.theaustralian.news.com.au/story/0,25197,24950554-5018001,00.html.

24 Mr Christopher Platt, AMMA, *Committee Hansard*, 27 January 2009, p. 2.

25 Hon Julia Gillard MP, Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, p. 12646.

26 EM, p. xli.

enterprise level; that industrial relations systems be harmonised across states; and that awards be modernised.[27]

1.35 Government senators recall that over many years the committee has been given economic modelling data which purported to show the certainty of increased productivity as a consequence of the operation of AWAs. The WRA was supposed to usher in an era of increased productivity. In fact, the early years of its operation coincided with the coming to fruition of micro-economic reforms commenced earlier, together with enterprise bargaining which was part of pre-WRA industrial reform.

1.36 There is evidence for this in data relating to trends in productivity growth which report that: based on ABS figures from 1988-99 to 2003-04 annual growth in labour productivity averaged 2.2 per cent which is 1.1 percentage points below the average of 3.3 per cent over the previous growth cycle of 1993-94 to 1998-99. DEEWR noted that this was the highest growth rate on record and coincided with the formal introduction and spread of enterprise bargaining. More recently, since 2003-04, productivity growth has averaged 1.1 per cent which suggests growth over the current cycle will be down on the longer term average.[28]

1.37 The Explanatory Memorandum mentions research by the Productivity Commission and the Melbourne Institute which linked productivity gains to collective bargaining. It also mentioned work by Tseng and Wooden which found a correlation between collective bargaining and higher productivity. Specifically they found that firms with employees on collective agreements had a nine per cent increase in productivity levels compared to employees on awards. In addition, work from Fry, Jarvis and Loundes was cited which found that organisations entering into collective agreements reported higher levels of self-assessed labour productivity relative to their competitors.[29]

1.38 In response to the claims that wage claims will spiral out of control, DEEWR noted the close tie between productivity and wage increases, which, together with the continued prohibition on pattern bargaining, place limits of the possibility of unsustainable wage increases.[30]

### *Flexibility*

1.39 While Coalition senators and employer groups have raised questions about the sufficiency of flexibility of the system, the committee majority is mindful that flexibility has to be balanced with fairness. It is clear from some of the evidence to be discussed later that 'flexibility' often has different meanings for employees and employers. Measures to achieve genuine flexibility to meet the needs of individual

27 DEEWR, *Submission 63*, pp. 8-9.

28 Ibid., p. 11.

29 EM, pp. xli-xlii.

30 DEEWR, *Submission 63*, p. 13.

employees and employers – without sacrificing minimum standards – is inherent in the framework of the bill. The bill ensures that employees are better able to balance work and family life.[31] There are individual flexibility arrangements in awards, and flexibility terms must be contained in enterprise agreements. These arrangements are subject to protections to ensure they are genuinely agreed and do not undermine the safety net of employment standards.

1.40 Further the legislation recognises that award protections are of less relevance to employees on high incomes. The bill therefore provides that employees earning a guaranteed annual salary of more than $100,000 per annum (indexed) are not subject to modern awards.

1.41 In contrast, the WRA gave employees the 'flexibility' to offer AWAs that removed basic employment entitlements such as leave, penalty rates, public holidays, redundancy pay and overtime. These could be offered on a 'take it or leave it' basis as a condition of getting a job or a promotion. AWAs were often entered into as result of such pressure and significantly disadvantaged employees by providing minimal (if any) wage compensation for employees foregoing such basic work entitlements. Such 'flexibility' may have been appealing for employers, but much less so for most workers.

1.42 Professor Stewart had some relevant remarks to make about flexibility in the bill in response to questions from Senator Cameron:

> I would also say that of course there is flexibility built into the system in a whole lot of ways anyway…. There is still ample scope for many parties to engage in workplace bargaining that could indeed, in some instances, see some employment conditions being negotiated away. We are starting to see some of that happen already in the current economic climate and I would expect that will continue. The question is: do we want to move to a situation where you can bargain below the safety net?
>
> For a very large number of workers in industries like retail, hospitality, cleaning, child care and community services, there is not a lot of scope there to bargain downwards. Until and unless there is a convincing economic case which says that society as a whole benefits massively by cutting employment conditions of some of our lowest paid, most vulnerable workers, then I for one would not support that.[32]

### *Committee view*

1.43 The committee majority believes that there is sufficient provision in the legislation to allow wide scope for negotiation of flexible working arrangements. Current arrangements and enterprise awards, as well as current enterprise Notional

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31 Hon Julia Gillard MP, Minister for Workplace Relations, *House of Representative Hansard*, 25 November 2008, p. 11190.

32 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 6.

Agreements Preserving State Awards (NAPSAs) will be a part of the new system. The bill provides for common law contracts and individual flexibility arrangements on top of an award or an enterprise agreement which will enable employers to attract and retain staff.

1.44 As noted earlier, the WRA allowed an imbalance to occur in the bargaining power of employers and employees. While the majority of businesses treated their employees well, the WorkChoices laws removed the previously accepted notions of obligation which employers owed to employees, notably that of fairness. In some cases, it led to unscrupulous employers exploiting vulnerable workers, but more serious was the encouragement it gave to treat employees as expendable commodities, especially at the low-paid casual end of the market. The committee majority believes that the general condition of employees would have been considerably worse had not skills shortages over recent years given employees in some areas more bargaining power. It is important to consider this fact at a time when the demand for labour is likely to fall, and when the protections afforded by Fair Work legislation will be even more necessary. In this regard the committee notes evidence given by Ms Janet Giles from SA Unions who told the committee:

> We believe that there was an overwhelming call for the reinstatement of balance and fairness at work by the Australian people at the last election. We believe we now need that more than ever because of the economic times that we are in. Work Choices was bad in good times; it is going to be horrific for vulnerable people in difficult times and where individual workers have far less bargaining power. It is the role of industrial relations to not only provide a collective voice for workers but also to protect the vulnerable and the young, and that is why we think that right now it is crucial to have this strong safety net based legislation.[33]

1.45 In summary, the Fair Work Bill promises certainty and stability in workplace relations laws. It has been drafted to stand for the long-term, providing flexibility and fairness through changing economic cycles. Above all, it provides a genuine balance between the interests of employees and employers, in the pursuit of national economic growth.

## Key issues raised with the committee

1.46 This section of the chapter summarises the key issues most frequently raised in submissions and discussed at hearings. They are subject to more detailed examination later in the report. The committee majority notes that much of the commentary and criticism made in submissions appears to be based either on a lack of understanding of crucial provisions of the bill, or on speculation about worst-case outcomes which have no basis in fact.

33 Ms Janet Giles, SA Unions, *Committee Hansard*, 28 January 2009, p. 13.

1.47 This attitude is most evident in the apparent reluctance by some employer groups to let go of their attachment to individual agreements. The committee experienced several exchanges with employer organisation witnesses where such concepts as negotiating above the award were unimaginable. There were similar exchanges about workplace flexibility**.**

### *The bargaining process*

1.48 *Forward with Fairness* should by now have been absorbed by all employer organisations, but the committee has found that an attachment to individual agreements is still strong. The Minerals Council of Australia, for instance, expressed strong opposition to the making of collective agreements negotiated with unions under any circumstances. The CEO told the committee that 'We do not accept the premise that fairness in working arrangements can only be determined on a collective platform under the guise of a third party external to the business.'[34] According to the Minerals Council, this bill impinged on freedom of association rights.

1.49 Not all employer organisations took this view. The Australian Hotels Association stated that it believed that the government had made a sincere attempt to try and build an industrial relations system that is suitable for a service-based economy. It was a 'total re-write' of the legislation and that, like a quilt, if you start unravelling different strands of this legislation the whole thing starts to unravel.[35] The AHA was generally pleased with the bargaining arrangements in the bill, saying the system had a safety net of conditions above which it was up to individual businesses to take advantage of the bargaining arrangements to derive productivity offsets and then to share those productivity offsets.[36]

### *The Mandate*

1.50 Opposition senators asked witnesses their view on the government's mandate to introduce the bill in the form that it has, and whether it passes some kind of 'mandate test'. Employer organisations have responded by declaring that certain provisions of the bill appear to contradict declarations made by Labor leaders during the course of the election campaign.

1.51 Such details as were discussed did not extend to the core of Labor policy or intentions. When asked about the mandate, the National Secretary of the SDA stated:

> It does have a mandate to legislate, and in broad terms that is what this bill does. It does away with Work Choices. It does away with a number of things which were part of the legislation that Work Choices had introduced, and clearly it had a mandate to do that. What we are now talking about are very much things at the margin and very much at the detail of the

34 Mr Mitchell Hooke, *Committee Hansard* , 19 February 2009, p. 12.

35 Mr William Healey, *Committee Hansard* , 16 February 2009, p. 42.

36 Ibid., p.43.

> implementation of the mandate. We are not talking about the fundamentals of the mandate that the government has.[37]

1.52 Mr de Bruyn made a related point:

> Well, if the government limited itself to its mandate and ignored suggestions which perhaps everybody might agree would make the bill better, that is not something that is going to improve governance. So obviously at the time when people are running an election campaign they put forward policies, but it is always possible, and in practice it happens frequently, that people come up with improvements subsequently, and so a government should not be limited only to what it says in its platform in the period before the election.[38]

1.53 The committee majority makes the point that questions asked about the mandate by the Opposition appear odd in view of their recent experience in government, and in view of a general understanding about the way governments must operate. The 'mandate' is widely understood to be based on a broad understanding of the thrust of policy presented in *Forward with Fairness*. No election manifesto can be expected to extend to legislative detail that could not be anticipated, or which may be required by the exigencies that will later arise.

### *Right of entry*

1.54 The committee majority note that employer groups appear not to have understood that the bill changes the basis for a union's right of entry. It removes the current requirement for a union to be bound to an award or agreement as a condition of entry. Right of entry to a site is now linked to the union's right to represent employees as is set out in detail in the *Forward with Fairness Policy Implementation Plan*. It is a fundamental principle that employers must respect an employee's right to join and be represented by a union. Under the bill the right of entry to hold discussions with members and potential members is no longer displaced by non-union agreements and AWAs. It was the extreme, anti-union WorkChoices laws that in 2005 provided for the first time that non-union agreements and AWAs removed the right of entry for unions to enter to hold discussions with employees who were their members or potential members. In the view of the committee majority, this was a blatant breach of a person's fundamental right to join and be represented by a union if that is their wish.

1.55 The argument by employers was that this policy would lead to demarcation disputes. The committee majority believes this fear is unfounded The provisions are not intended to displace existing union coverage boundaries and a mechanism to handle demarcation disputes will continue to be available under provisions regulating registered organisations.

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37 Mr Joe de Bruyn, SDA, *Committee Hansard*, 17 February 2009, p. 4.

38 Mr Joe de Bruyn, SDA, *Committee Hansard*, 17 February 2009, p. 3.

1.56 The most persistent concern of employer groups was the right of entry provisions and the 'considerably expanded' rights of unions. This fear is unfounded. The changes to the right of entry regime: to allow union access to non-union employee records where this is necessary to investigate a contravention, and allowing all employees to meet with their union in the workplace regardless of the form of agreement applying, are not new and existed in the pre-WorkChoices WRA (and for very many years before that) without the kinds of consequences that some employers have suggested to the committee would occur. They are balanced with appropriate obligations placed on unions and sanctions apply for misuse. It is worth noting that under the anti-coercion provisions, no employees can be forced to attend discussions with unions. See chapter seven for more detail.

***Access to employee records***

1.57 Another concern for employer groups was in relation to union access to employee records. Once again the protections in the bill seem to have been overlooked. The committee majority emphasises that permit holders cannot copy anything they wish and fears about open slather access to employee records are groundless. Access is allowed only to the extent that it is relevant to a suspected breach. Privacy protections apply. The committee heard of no instance of misuse or abuse of employee records by a union and the department was not aware of any such allegation. The committee majority also notes that the protections for personal information are stronger and more comprehensive under the Fair Work Bill than under WorkChoices and there are also heavier penalties for the unauthorised use or disclosure of employee records.

1.58 As will be noted in more detail in chapter seven, the committee has received assurances from DEEWR officials about the operation of the legislation in regard to privacy safeguards, 24 hour notice served on employers responsible for producing the documents, and generally ensuring a balance between privacy and the rights of employers.

***Greenfield agreements***

1.59 Employer groups were particularly concerned about greenfield agreements which must be made with one or more unions eligible to represent employees. Employer groups have read this clause to mean that these agreements must be made with every relevant union, and fear that even just one union may frustrate bargaining. The committee majority believes these fears are unfounded, particularly in the light of advice which has been received about the operation of the legislation. There is an element of fear-mongering in some statements made by opposition members and by certain press commentators. Employer organisations appear to have feared the worst in speculating on the disruption that this is likely to cause. It is clear, however, that the provisions for good-faith bargaining would not permit a single union to hold a multi-union greenfield agreement to ransom.

1.60 The government has made it clear that an employer must notify all relevant unions and advise FWA but it is then up to those unions to approach the employer if they wish to be involved. An employer is not required to make an agreement with every union that was notified or that was involved in bargaining although it may choose to do so. If the employer strikes a deal with one of the relevant unions, the employer can ask to have the agreement approved by FWA. See chapter four for more detail.

### *Agreement content*

1.61 Employer groups and unions expressed concern about what can and cannnot be included in agreements. Government policy is that agreements should include matters pertaining to the relationship between the employer and the employees and the employers and any union to be covered by the agreement. Matters irrelevant to the employment relationship cannot be the subject of protected industrial action. The bill will allow matters that are long-standing, basic features of workplace relations agreements but which were prohibited under WorkChoices to be included in enterprise agreements, such as union consultation clauses or leave to attend union training. This will allow parties to cover these issues in their agreements and make the current practice of 'side' agreements between employers and unions largely unnecessary.

1.62 Bargaining fees cannot be included in an agreement as bargaining agent fee clauses are objectionable provisions. The committee majority also notes there is no blanket prohibition on right of entry terms in agreements but certain terms about right of entry are unlawful if it provides an entitlement that is inconsistent with the right of entry part of the bill. A particular concern was whether environmental issues could be included in agreements. The committee majority notes that environmental issues are able to be dealt with in enterprise agreements where the issue has the necessary connection to the employment relationship between an employer and the employees covered by the agreement. Also see chapter four.

### *Transfer of business*

1.63 Employer groups criticised the new definition of a transfer of business and the requirement to continue to provide the entitlements in the transferring employees' existing industrial instruments. The committee majority notes that this concern should be allayed by the provision allowing an employer to apply to FWA to rationalise the instruments of employment that apply and that such a request may be considered before or after the transfer. This issue is dealt with in more detail in chapter nine.

### *Restoration of unfair dismissal rights*

1.64 Employer groups have raised concerns that extending the unfair dismissal protections in the current economic circumstances will discourage employers from hiring staff. The committee majority notes advice from DEEWR that there is no direct or conclusive evidence to support the claim that unfair dismissal laws influence recruitment of employees. DEEWR cited the May 2008 Sensis Small Business Index,

surveying 75 per cent of small to medium enterprises, which reported that reinstatement of the previous unfair dismissal laws would have no real effect on their business.

1.65 While welcoming the restoration of unfair dismissal rights to most employees, the ACTU expressed the view that the protections should be extended to all workers, subject to a three-month probation period. The new scheme recognises that employees should have protections from unfair treatment while recognising that small business owners do not have the support of expert human resources advisers in managing under-performance. Unfair dismissal issues are covered in detail in chapter five.

***Submission of unfair dismissal claims***

1.66 A common criticism of the bill was that the seven day timeframe to lodge unfair dismissal claims is too short, and would disadvantage certain parties such as those in remote areas; employees who may not be aware of their rights; those from a non-English speaking background; and those who may be distressed. Most advocated a 14 or 21 day timeframe. Employer groups were also concerned that the timeframe might encourage claims that would otherwise not have been lodged and that the timeframe may result in the substitution of general protection claims for unfair dismissal claims. See chapter five for the committee's recommendations in this area.

***Arbitration***

1.67 The committee heard opposing views on access to arbitration. As might be expected, many employee organisations wanted wider access to arbitration and employers wanted less. The bill requires a modern award to include a term for settling disputes about any award or NES matter and enterprise agreements must contain a dispute settlement clause. In addition, FWA has broad powers to mediate or conciliate, make recommendations and make workplace determinations. For more detail see chapter eight.

***Right to request flexible working arrangements***

1.68 Although welcoming the right to request flexible working arrangements for those with pre-school age children, organisations wanted more clarity about what constitutes 'reasonable business grounds' for the refusal of such a request. The committee notes that FWA will provide further guidance on this issue. There were also concerns about an employee's ability to challenge a refusal. The committee majority notes that it is open to the employer or employee to suggest modifications which might be able to be more easily accommodated. An employee may also have remedies under relevant discrimination legislation if they feel they have been discriminated against by the handling of their request.

Individuals may request work arrangements in order to remain at workplaces as their family circumstances change, which will also enable employers to retain the human capital investment made in the employee. This is covered in chapter two.

### *Pattern bargaining*

1.69 The committee heard opposing views on this issue. Some witnesses did not support the restrictions on pattern bargaining, arguing that it limits the employee's freedom of association and pointed out that some employers are quite happy with a pattern approach to bargaining as it ensures consistency in wages and conditions. In contrast, some employers expressed concern that the low-paid bargaining stream is a form of pattern bargaining. This was despite the explanation that apart from some language changes for simplification, the description of pattern bargaining is in substance the same as what is in the current act.

1.70 The prohibition on pattern bargaining is achieved by the combined operations of various provisions and clauses. The committee majority notes the assurances provided by the Minister to employers that there will be no return to pattern bargaining by unions. Industrial action in support of pattern bargaining is specifically prohibited and an injunction can be sought from the court to restrain any such industrial action. The committee notes that these assurances have been recognised by employer groups such as AiG which believes the ban on industrial action will prevent a return to pattern bargaining. See chapter four.

## Structure of the report

1.71 Chapter two of the report will cover the first part of the legislated minimum employment standards, the NES. Chapter three will look at the second part, modern awards. Chapter four details the new bargaining framework. Chapter five examines unfair dismissal rights. Chapter six details industrial action and chapter seven, the rules around right of entry. Chapter eight examines the establishment of FWA. Chapter nine covers transfer of business. Chapter ten deals with outworkers and chapter eleven covers the development of a national system and coverage issues as well as issues to be covered by the transitional bill. The start of each chapter provides further details on the issues contained in each.

# Chapter 2

# National Employment Standards

2.1 This chapter details the first part of the safety net of employment conditions which provide enforceable minimum protections that cannot be stripped away, the National Employment Standards (NES). The safety net consists of the NES and modern awards which both come into operation on 1 January 2010. Modern awards are discussed in chapter three.

## Current arrangements

2.2 WorkChoices pared back rights to five minimum entitlements for employees: annual leave; personal/carer's leave; parental leave; maximum ordinary hours of work; and basic rates of pay and casual loadings.

2.3 Under WorkChoices some award conditions could be removed or modified by a workplace agreement without compensation including overtime, redundancy payments and penalty rates. Under the new system, the five minimum entitlements will be replaced by comprehensive and enforceable minimum protections that cannot be undercut.

2.4 To illustrate what occurred under WorkChoices, in February 2008 the Workplace Authority provided data from a sample of over 1,700 AWAs lodged between April and October 2006 which found that 89 per cent removed at least one of the protected award conditions. Over half excluded six or more of the eleven so-called protected award conditions, and two per cent even excluded all eleven conditions. The analysis found that 75 per cent of the AWAs which were sampled failed to provide for a guaranteed wage increase, and the award conditions that were most frequently removed were shift work loadings and annual leave loadings (around 70 per cent), annual leave loadings and penalty rates (68 and 65 per cent respectively) and incentive based payments and bonuses (63 per cent). Thirty one per cent removed rest breaks and 25 per cent removed declared public holidays.[1]

2.5 In addition, research cited by the ACTU found that in the first two years of WorkChoices, 62 per cent of minimum wage workers had been subjected to reductions in real wages and that wage increases for award-reliant employees had fallen significantly behind wage increases for the rest of the economy.[2] It also noted that workers on AWAs had lower wages than workers on collective agreements, and that, in low paid industries, AWAs had provided the means by which employers were

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1 Media Release, The Hon Julia Gillard, Minister for Workplace Relations, 'AWA data the Liberals claimed never existed', 20 February 2008.

2 ACTU, *Submission 13*, p. 2.

able to reduce the costs of labour.[3] WorkChoices was a success in the terms expected of the Coalition government by its business constituency.

2.6 On the other hand, WorkChoices adversely affected the living standards of many employees but particularly young workers, the low paid and women. Young workers are particularly vulnerable to exploitation by employers, as can be seen in the results of a report by the Workplace Ombudsman. Following a national education campaign of workplace rights, random audits of 400 employers found that 41 per cent of 15-24 year olds were being underpaid, resulting in reimbursement of $540,300 or $360 each. 80 per cent of the breaches identified by inspectors related to underpayment of wages and penalty rates and the majority of breaches were found in the retail trade and accommodation and food services sectors.[4]

2.7 SA Unions cited research which showed that employees in low paid industries, including retail and hospitality, experienced stagnant or declining wages under WorkChoices. In addition, research by the Australian Fair Pay Commission showed the wage increases for employees reliant on awards fell behind wage increases for the rest of the economy.[5] Research has also shown the adverse effect on women with the wage gap for women on AWAs being much wider than those on collective agreements; non-managerial employees earning 18.7 per cent less than their male counterparts, compared to 10 per cent for agreements.[6]

## Proposed changes

2.8 The Fair Work Bill will guarantee a safety net of enforceable minimum terms and conditions for all workers in the federal system.

## National Employment Standards

2.9 Chapter 2, Part 2-2 of the bill details the ten National Employment Standards which were announced on 16 June 2008.[7] The NES are the minimum terms and conditions that apply to all national system employees. Clause 44 prevents an employer contravening the NES.

2.10 The NES cover:

- maximum weekly hours of work;
- requests for flexible working arrangements;

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3 ACTU, *Submission 13*, p. 8.

4 National Young Workers Campaign, Workplace Ombudsman Report released 19 January 2009.

5 SA Unions, *Submission 121*, p. 6 and pp. 12-13.

6 SA Unions, *Submission 121*, p. 14.

7 Media Release, The Hon Julia Gillard MP, Minister for Employment and Workplace Relations, 'New National Employment Standards Released', 16 June 2008.

- parental leave and related entitlements;
- annual leave;
- personal/carer's leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- provision of a Fair Work Information Statement.[8]

2.11 The bill retains the substance of the NES announced in June 2008 with some amendments, which are:

- employees not covered by a modern award or enterprise agreement may cash out annual leave in certain circumstances, by written agreement, but the employee must retain at least four weeks annual leave after cashing out;
- employees with less than six months service are not entitled to the minimum notice of termination in the NES. For small businesses this exclusion applies if the employee has worked for less than 12 months (see clarification below); and
- a section has been added dealing with various other matters such as leave entitlements while on workers compensation.[9]

## Issues raised with the committee

### *Maximum weekly hours*

2.12 Clause 62 details maximum weekly hours. An employer may request reasonable additional hours in addition to the 38 hour week for full time employees. What may be determined as reasonable can depend on safety risks, personal circumstances, enterprise needs, the usual pattern of work, and notice given by the employer. The fact that additional hours are worked in accordance with an averaging arrangement does not necessarily mean that those hours are reasonable. Clause 62(2) makes it clear that an employee may refuse to work additional hours if they are unreasonable.[10]

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8 Explanatory Memorandum pp. x-xii.

9 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 23.

10 EM, p. 43.

2.13 The Law Council of Australia has advocated the NES clarify what ordinary hours per day are for personal leave purposes by setting them as 7.6 hours per day, accepting that a modern award may deal with the issues differently; or express the personal leave entitlement as an entitlement to a certain number of hours rather than days. It noted the similar difficulties regarding annual leave (see below).[11]

### *Averaging of hours*

2.14 The NES do not provide rules for the averaging of hours, but this issue can be dealt with in modern awards. Clause 64 provides averaging of hours over 26 weeks for award/agreement free employees.

2.15 Concerns about averaging of hours were raised by the mining, maritime and construction industries. AMMA complained that the Mining Industry Award released in December 2008 only allows hours of work to be averaged over 26 weeks. AMMA contends that this does not provide the flexibility required by the resources sector to enable them to continue existing rosters. AMMA claims that this is contrary to assurances provided that current patterns of work in the industry would be able to continue under the bill.[12] Mr Christopher Platt, Director Workplace Policy, AMMA, explained to the committee:

> Our concern is that the NES, taken together with what we know of the modern awards—and the hard-rock mining industry modern award was handed down on 19 December—caps averaging of hours at six months and prevents the working of 12-hour shifts without majority approval. The direct impact of that is that any current business that works 12-hour shifts that does not have an industrial agreement in place which provides for 12-hour shifts will not be able to continue to work its current arrangements on 1 January 2010. That will be a major headache for an industry that almost exclusively works 12-hour shifts in its operations and relies on even-time rostering to make most efficient use of fly-in fly-out arrangements at remote sites.[13]

2.16 Mr Platt told the committee that if the resource sector could average its hours over 52 weeks of the year and continue to work 12-hour shifts and annual leave could be taken in accordance with the roster that this would satisfy their concerns.[14]

2.17 Award modernisation is a distinct and separate process being undertaken by the AIRC. However, the committee notes that in determining the modern award for the mining industry, the AIRC rejected AMMA's initial position of averaging hours over 52 weeks in its decision of 19 December 2008, deciding instead hours to be averaged over six months is appropriate.

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11 Law Council of Australia, *Submission 59*, p. 8.

12 AMMA, *Submission 96*, p. 8 and pp. 44-45.

13 AMMA, *Committee Hansard*, 27 January 2009, p. 8.

14 Ibid., p. 8.

2.18 Employer organisations, including the Chamber of Commerce and Industry, Queensland, and the National Aquaculture Council, told the committee how the particular circumstances of some industries favoured the averaging of hours over 52 weeks, particularly for sea-going employment.[15] The National Aquaculture Council emphasised that flexibility of hours underpinned the growth and international competitiveness of the industry.[16]

2.19 In the construction industry, Master Builders Australia explained to the committee that it believed the new averaging provisions in the bill would result in higher costs for a project:

> A lot of projects go beyond 26 weeks and construction is governed by periods of frenzied activity in respect of the management of projects. Certainly our project managers, in one week, may be required to work 60 to 80 hours, given the peak of the activity of that construction work, and then there would be a quiet time, so where the project extends over more than 26 weeks you need to average out those hours, particularly for project managers and people in critical roles, so that they can efficiently supervise the particular project. That is the current law. I think that other sectors—for example, the mining sector—also want 52 weeks for the same reason.[17]

2.20 In response to concerns by the committee that 52 weeks may disadvantage some employees, the MBA responded that they would be happy to see a mechanism included where by such abuse was prevented.[18]

2.21 Unions were less enthusiastic about yearly and half-yearly averaging. Unions WA told the committee that in their view averaging over 26 weeks is too long and added:

> There should be no reason in an industry like the resource sector why you cannot establish a six-week—in fact, they are often six-week—or two-month roster or whatever it might be and manage the hours accordingly. We have had stories from workers who have been on 12-hour shifts for up to 24 to 30 days in a row. This is not an uncommon story. Apart from what that does to family life and all the rest of it, there are serious health and safety considerations and some employers in the resource sector are saying that maybe they need to do things a bit differently; that maybe that is not the way to go any longer.[19]

2.22 As requested by the committee, Professor David Peetz provided further information on the averaging issue for the mining sector. In his view the 26 week averaging period would not prevent a company from running a 28 week roster. 'It

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15 Chamber of Commerce and Industry, QLD, *Committee Hansard*, 27 January 2009, p. 19.

16 Mr Brian Jeffries, National Aquaculture Council, *Committee Hansard*, 29 January 2009, p. 33.

17 Mr Richard Calver, MBA, *Committee Hansard*, 28 January 2009, p. 29.

18 *Committee Hansard*, 28 January, 2009, pp. 36-37.

19 Mr David Robinson, Unions WA, *Committee Hansard*, 29 January 2009, p. 47.

would just mean, in effect, that they have to pay appropriate penalty rates, or an equivalent allowance, to the extent that hours exceeded the average'.[20]

2.23 In addition, regarding employers being able to set a standard 12 hour day, he noted this would remove the component of compensation for overtime or penalty rates from workers on 12 hour rosters. He concluded that the current provisions mean that employers would have to pay the appropriate shift premiums and:

> Those that were able to reduce pay and conditions through the provisions of Work Choices that removed the 'no disadvantage' test from agreements would find that they lost that temporary advantage. If an employer wants to have employees work 12 hour shifts it is only appropriate that employees be asked to give their consent…[21]

***Committee view***

2.24 The committee majority supports the reintroduction of an independent umpire on these matters. It notes the determination made by the AIRC and that they are best placed to decide.

2.25 The committee majority also notes that the award clause does allow for 12 hour shifts to be worked where a majority of employees agree. It is not accurate to state that this agreement needs to be contained in an enterprise agreement as it can be by way of a simple workplace vote.

***Requests for flexible working arrangements***

2.26 Clause 65 creates a new right for employees with 12 months' service to apply for a change in working arrangements to assist with the care of a pre-school child. However, employers may refuse requests on 'reasonable business grounds'. The bill does not define flexible working hours as this could limit the scope or types of arrangements.[22] It also does not identify what may or may not comprise 'reasonable business grounds' for the refusal of such a request. Decisions must be made according to the circumstances that apply and may be summarised as follows:

- the effect on the workplace, including costs, efficiency, productivity and customer service;
- the capacity to organise work among current staff; and
- the capacity to find replacement staff.[23]

2.27 Professor Peetz described the exclusion of casuals or employees with short job tenure from eligibility as unjustified. Employers should have the discretion to

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20 Professor David Peetz, Supplementary submission, tabled papers.

21 Ibid.

22 DEEWR, *Submission 63*, p. 61.

23 EM, p. 45.

consider a request from a short term or casual employee with less than 12 months' service.[24] This was supported by the Australian Human Rights Commission. [25] DEEWR advised that employees who do not meet the eligibility requirements such as 12 months' service are still able to make requests but the request will not be subject to the procedures contained in the bill.[26]

2.28 Professor Peetz also pointed out that British legislation provides a model for clarifying what constitutes 'reasonable business grounds'. He suggested that these be inserted in subclause 65(5), and in clause 76 or as an amendment to clause 12, to include: the additional cost burden; ability to meet customer demand; difficulties in reorganising work among current staff or in recruiting additional staff; effects on quality, performance and efficiency, and on planned structural changes.[27]

2.29 Professor Stewart told the committee that in his view such concerns about what constitutes 'reasonable business grounds' were best addressed through guidelines to employers by FWA rather than in the legislation:

> It seems to me that a more extensive guide that not only sets out the relevant factors but provides examples of situations where there would be reasonable business grounds or there would not be reasonable business grounds would be more helpful. In line with the goal of trying to keep the legislation expressed at a general level—uncluttered, understandable—it is better done at that sub-legislative level. I understand that the government has said that it would expect Fair Work Australia to produce guidelines. I suppose it would not do any harm to amend the legislation to make that a requirement, but I would confidently expect it is something that would happen anyway and it would be better dealt with in that way.[28]

2.30 Submissions raised concerns about employees being unable to challenge a refusal.[29] Professor Stewart noted that clause 44(2) ensures no court order can be made and clauses 739(2) and 740(2) ensure no dispute resolution process in an award, enterprise agreement or contract can authorise arbitration over the issue. He argued that it is necessary to provide some basis for an employee to dispute an employers assertion of 'reasonable business grounds' when refusing a request. He referred to the UK experience showing the benefits of encouraging employers and employees to discuss flexible working arrangements. UK legislation permits employees to challenge

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24 Professor David Peetz, *Submission 132*, p. 3. Dr John Buchanan also noted the increase in casual employment which he argued employers have used as a loophole to get around labour standards. See Dr Buchanan, *Committee Hansard*, 18 February 2009, p. 44.

25 Australian Human Rights Commission, *Submission 137*, p. 4.

26 DEEWR, *Submission 63*, p. 61.

27 Professor David Peetz, *Submission 132*, p. 5.

28 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 5.

29 See for example JobWatch, *Submission 87*, p. 14-15; CPSU-SPSF, *Submission 77*, p. 9; Australian Human Rights Commission, *Submission 137*, p. 6.

an employer's response, and at the very least he advocated that employees should be able to ask FWA to review an employer's decision.[30] Professor Peetz also felt employees should be able to apply to FWA for resolution of a dispute where an employer had not followed proper procedures, or where the decision to reject the application was based on incorrect facts and advocated that clause 65 be amended to allow an employee 14 days to appeal in writing to the employer after the date of notification of the employer's decision.[31]

2.31 DEEWR advised that state and territory laws providing more beneficial entitlements than the bill are not excluded (clause 66).[32] Professor Stewart questioned that if the government accepts it is appropriate for Victorian workers, for example, to have an enforceable right to insist on a reasonable change to their working arrangements as outlined in the EM, why should this not be extended to other jurisdictions?[33]

2.32 While supporting the intent of Part 2-2, Division 4, the United Firefighters Union told the committee of the roster that firefighters are deployed on which is not just an employment but a community entitlement and has been before the AIRC. It asked for their particular situation to be reviewed and clarified.[34]

2.33 The EM points out that it is open to the employer or employee to suggest modifications which might be able to be more easily accommodated. It also notes that an employee may have remedies under relevant discrimination legislation if they feel they have been discriminated against by the handling of their request.[35]

2.34 DEEWR noted that the right to request flexible working arrangements would encourage employees to remain at workplaces as their family circumstances change which will in turn benefit the employer as they retain the human capital investment made in the employee.[36]

2.35 While supporting the flexible working arrangements, the Electrical and Communications Union (Queensland) questioned the eligibility limitation to employees with pre-school age children and advised that many employees without pre-school age children may have a valid reason for requesting flexible working hours.[37] This was also supported by the Australian Human Rights Commission.[38]

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30 Professor Andrew Stewart, *Submission 98*, pp. 3-4.

31 Professor David Peetz, *Submission 132*, p. 6.

32 DEEWR, *Submission 63*, p. 61.

33 Professor Andrew Stewart, *Submission 98*, p. 4.

34 Mr Peter Marshall, National Secretary, United Firefighters Union, *Committee Hansard*, 17 February 2009, p. 69.

35 EM, p. 45.

36 DEEWR, *Submission 63*, p. 12.

37 ECA, *Submission 52*, p. 13.

2.36 Supporting this view, Professor Peetz suggested that the restriction on the right to request flexible working arrangements to parents with children under school age is very narrow. He pointed out that in the UK, the right to request flexible working arrangements is available to 'parents of young children under six years of age, or disabled children up to 18 years of age, and carers of adults in need of care'.[39] The Australian Human Rights Commission particularly supported this suggested extension.[40]

2.37 Responding to questions by Senator Abetz on extending the right to request flexible working hours to parents of children with a disability, Professor Peetz concluded that the simplest approach and one that would maintain consistency across legislation would be to provide in section 12 that a disabled child would be as defined in section 4 of the *Disability Discrimination Act 1992*.[41]

***Committee view***

2.38 While noting the suggestions for clarification, the committee majority understands that Fair Work Australia will provide further guidance on what constitutes 'reasonable business grounds' for the refusal of a request for flexible working arrangements. See chapter eight for further discussion of this area of dispute resolution by FWA.

2.39 The committee majority notes that the House Standing Committee on Family, Community, Housing and Youth is currently conducting an inquiry into better support for carers. The terms of reference of that committee include inquiry into the challenges facing carers and their support needs and the barriers to social and economic participation for carers, with a particular focus on helping carers to find and/or retain employment. The Committee is due to report this session.

2.40 The committee majority also notes that in relation to carers under the NES, leave is no longer capped at 10 days per year (see below). The bill also provides employees with improved protections from discrimination and there is a new protection from discrimination on the grounds of an employee's status as a carer. The committee believes that extending the right to request flexible working arrangements to all forms of family and caring responsibilities is a worthy aspiration over the longer term and in recognition of this, makes the following recommendation.

**Recommendation 1**

2.41 **The committee majority recommends that the government gives careful consideration to any recommendations of the inquiry into better support for**

38 Australian Human Rights Commission, *Submission 137*, p. 4.

39 Professor David Peetz, *Submission 132*, p. 21.

40 Australian Human Rights Commission, *Submission 137*, p. 4.

41 Professor Peetz, Supplementary information, tabled papers.

**carers being conducted by the House Standing Committee on Family, Community, Housing and Youth on additional measures that should be taken within the workplace relations framework to assist carers.**

2.42 **In particular, the government should carefully consider any recommendation that the NES be amended to extend the right to request flexible working arrangements for employees caring for a child with a disability and carers of adults in need of care.**

2.43 **The committee majority also considers that employers and employees should be able to provide in their enterprise agreement that the agreement's dispute resolution clause can deal with disputes over the right to request flexible working arrangements.**

***Compassionate leave***

2.44 In the context of thinking more broadly about balancing work and family, the committee notes the submission by the Chamber of Commerce NT which pointed out that the compassionate leave provisions under existing and proposed legislation do not serve the needs of organisations that are major employers of Indigenous employees, especially Indigenous organisations in remote areas. Specifically, the compassionate leave provision does not take in to account:

- the extended family arrangements of Indigenous employees;
- the extended household arrangements of Indigenous employees;
- the broader Indigenous response to death known as "sorry business"; and
- the incidence of death and serious illness amongst Indigenous Australians

2.45 The Chamber does not offer a single prescriptive response to the issue, noting the factors to be considered vary widely across Australia and are exacerbated in remote communities where distance plays an additional role. It suggested an answer may lie in the capacity of FWA to grant exemptions to the compassionate leave standard where it is clearly not in the interests of an Indigenous organisation and its employees to have such a provision imposed upon them. It would be up to the employer (and the union if a party) through the agreement making process to seek leave to include a provision in an agreement that departs from the standard while at the same time providing a sensitive, respectful, workable and productive alternative.[42]

***Committee view***

2.46 The committee majority notes that the NES entitlement to compassionate leave is able to be enhanced through modern awards or through enterprise bargaining agreements. It also notes that FWA has the ability to enhance the compassionate leave

42 Chamber of Commerce NT, *Submission 20*, pp. 1-2.

standard or to provide for additional forms of leave to allow for the situation of remote and Indigenous employees.

### *Parental leave and related entitlements*

2.47 This standard continues the Australian Fair Pay and Conditions Standard (AFPCS) provision for the granting of parental leave provided by the WRA. Clause 67 requires, as a general rule, an employee to have 12 months' continuous service to be entitled to leave. A casual employee, employed regularly over a 12 month period before the expected birth date, is also entitled to unpaid parental leave. The NES standard provides an extra 12 months' unpaid parental leave from the birth or adoption of their child.[43] This effectively doubles the current entitlement to unpaid parental leave.[44] While welcoming the extended unpaid parental leave entitlements, the Australian Human Rights Commission was concerned about the qualifications. It agreed with a reasonable period of employment for eligibility but advocated recognition of the concept of portability and short breaks to better reflect the reality of women's employment.[45] Professor Peetz noted again that the bill provides no criteria for determining 'reasonable business grounds' for refusing a request for an extension of unpaid parental leave and has recommended that this be clarified. In addition, there should be internal appeal rights, and the right to appeal to FWA in particular circumstances.[46] The committee majority is assured that further guidance will be provided by FWA on what constitutes 'reasonable business grounds'.

### *Cashing out of leave*

2.48 To date, the AIRC has not included a term permitting cashing out of leave in any of the priority awards, including the Mining Industry Award. On 19 December 2008, the AIRC announced that:

> Should cashing out of annual leave become widespread it would undermine the purpose of annual leave and give rise to questions about the amount of annual leave to be prescribed. We think some caution is appropriate when dealing with this issue at the safety net level. We do not intend to adopt a model provision. Consistent with our approach to annual leave provisions generally we shall be influenced mainly by prevailing industry standards, and the views of the parties, in addressing this issue.
>
> It has also been suggested that if awards do not provide for cashing out of annual leave it will not be legally permissible to make workplace agreements which provide for cashing out. In our opinion cashing out arrangements are an appropriate matter for bargaining. If, when the

43 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 25.

44 DEEWR, *Submission 63*, p. 60.

45 Australian Human Rights Commission, *Submission 137*, p. 7.

46 Professor Peetz, *Submission 132*, p. 7.

> legislative regime is settled, it is apparent that workplace agreements cannot provide for cashing out of annual leave unless there is a relevant provision in a modern award it may be necessary to revisit the question.[47]

2.49 AMMA noted the requirement to retain a minimum of four weeks' leave when cashing out annual leave for award and award free employees. It claimed that this caused problems for some areas of the resources sector where employees work on even-time rosters providing 26 weeks of the year off, having cashed out their annual leave in a pre-determined even time roster.[48] AMMA advised that annual leave taken at odds with an established roster cycle will adversely affect resources sector employees and non-standard absences can cause employers difficulty in finding replacement employees for short periods.[49]

2.50 At the request of the committee, Professor Peetz provided further advice on this issue. He advised that 'for workers under a conventional even time roster, enabling resource sector employers to require employees to take their annual leave during their time off would be the same as removing their annual leave entitlement altogether'. Employees on asymmetric rosters would fare even worse 'because they would lose their annual leave entitlement despite working considerably more than the average 44 hour week'. He concluded that:

> Employees on even time rosters – many of which only provide for maximum breaks of four or five days – are entitled to annual leave as much as anyone else and should not be forced in effect to cash out their leave because the employer wants them to work on days that would otherwise be their holidays.[50]

### *Committee view*

2.51 The committee majority notes that between the positions expressed to the committee – from only allowing an employee to cash out a maximum of one week's annual leave each year to having no limit - obliging an employee to retain at least four weeks leave appears to be an appropriate compromise. The committee majority also notes opposition to the principle of cashing out annual leave and believes the capacity for this should be limited. It supports the need for a leave entitlement that will enable employees to recuperate and spend time with family or relaxing personally. The committee majority notes the position of the AIRC that it is an appropriate matter for bargaining between parties.

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47 AIRC Decision 19 December 2008..

48 AMMA, *Submission 94*, pp. 46-47.

49 AMMA, *Submission 94*, pp. 46-47.

50 Professor David Peetz, Supplementary submission, tabled papers.

### *Community service leave*

2.52 The bill elevates this form of leave to a national standard[51] and will provide employees engaged in 'prescribed eligible community service activity' the right to unpaid leave for a reasonable period, which includes reasonable travel time. Jury service comes under this leave and clause 111 provides that an employee is entitled to be paid by their employer for the first 10 days' service which may be reduced by the amount of any jury service pay received by the employee.[52]

### *Public holidays*

2.53 Clause 114 provides that an employee is entitled to leave on a public holiday but that an employer may request an employee to work if the request is reasonable. Employees may refuse the request if it is not reasonable or a refusal is reasonable. Clause 115 names eight common days as public holidays. Other days or part-days declared under a law of a state or territory to be observed generally, are also considered public holidasy.[53]

2.54 Professor Peetz noted with concern loopholes in the bill regarding public holidays, and submitted that the entitlement to compensation for working on a public holiday should be set out in the relevant modern award, and in the bill.[54] Unless this occurred, the entitlement could to be removed by an agreement.[55]

2.55 The SDA proposed that the words 'other than a day or part-day, or a kind of a day or part-day, that is excluded by the regulations from counting as a public holiday' in section 115(1)(b) be deleted. This is because it could allow the Commonwealth to remove any public holiday by regulation even if it has been legislated by a state or territory parliament.[56]

2.56 The committee majority is opposed to the legislation giving power to the Commonwealth to override state public holidays and draws this matter to the Minister's attention.

### *Notice of termination and redundancy pay*

2.57 Clause 117 provides that an employer must not terminate an employee's employment without prior written notice in accordance with a schedule that extends

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51 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 26.

52 EM, pp. 70-71.

53 EM, p. 75.

54 This view was supported by the Women's Electoral Lobby Australia, *Submission 86*, p. 14.

55 Professor David Peetz, *Submission 132*, p. 9.

56 SDA, Victoria Branch, *Submission 61*, pp. 1-3.

the period of notice according to length of service ranging from one week's notice for less than a year's service, to four week's notice for more than five years' service.

2.58 The government has recognised that the entitlement to one weeks notice of termination for all ongoing employees with less than 12 months' service was inadvertently removed by drafters in an endeavour to streamline entitlements under the bill.[57] The Minister wrote to the chair of the committee to clarify that the government intends to amend the bill to make clear that all ongoing employees with less than 12 months' service are entitled to one week's notice of termination.[58] The committee welcomed the Minister's letter and the decision.

***Fair work information statement***

2.59 Clause 124 makes it obligatory for employers to provide employees with a Fair Work Information Statement before or when they commence work. It will contain information about the NES, modern awards, agreement making, the right to freedom of association; and the role of FWA.

2.60 The Workplace & Corporate Law Research Group, Monash University, suggested that employers be required to include in the statement the industrial instruments which apply to the employees in the workplace to assist their awareness of the source of their entitlements. It argued that this requirement would not be onerous for employers as the information is to their benefit as well.[59]

2.61 Ms Anna Chapman from the Centre for Employment and Labour Relations Law, Melbourne University suggested that unfair dismissal rights and particularly the seven day time frame to lodge a claim, if retained, should be included in the Fair Work Information Statement.[60]

**Recommendation 2**

2.62 **The committee majority recommends that the Fair Work Information Statement include information on individual flexibility agreements (what they are, employee rights and where to go for independent advice), the rights to unfair dismissal claims and how employees may undertake that process. It should also be made available in community languages to assist employees from non-English speaking backgrounds.**

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57 Media release, Hon Julia Gillard MP, 'Government welcomes submissions to Fair Work Bill Inquiry', 2 February 2009.

58 Minister for Employment and Workplace Relations, correspondence with committee chair, tabled papers.

59 The Workplace & Corporate Law Research Group, Monash University, *Submission 8*, p. 1.

60 Ms Anna Chapman, Centre for Employment and Labour Relations Law, Melbourne University, *Submission 48*, pp. 2-3.

## Conclusion

2.63 The National Employment Standards provide the bedrock of the Fair Work Bill. In expanding the previous narrow and inadequate allowable matters provisions of WorkChoices, they institute principles of fairness and restore standards which had hitherto been lost by many employees. The committee majority has given support to claims in some submissions for additional support to carers and to parents of children with disabilities. It notes concerns about public holiday entitlements, and gives strong support to the principle that leave entitlements should not be sacrificed beyond a certain limit. Overall it believes that the government has maintained the balance between acknowledging the need for more family-friendly work rights and limiting the impost on business. Chapter 3 will cover the second part of the safety net, modern awards.

# Chapter 3

# Modern awards

3.1 This chapter covers modern awards which together with the NES make up the safety net of minimum enforceable standards.

## Modern awards

3.2 Part 2-3 deals with the second element of the safety net for those earning under $100,000, the creation of modern awards by the Australian Industrial Relations Commission (AIRC). Modern awards may be industry or occupation based and will provide additional minimum terms and conditions. Modern awards build on the NES and may include an additional 10 minimum conditions of employment which are tailored to the needs of a particular industry.

3.3 Despite previous attempts at simplification, awards have remained lengthy, prescriptive and unwieldy documents that have been amended and reviewed a number of times. The Minister noted that for awards to be an effective safety net, they need to be relevant to today's workplace needs and able to accommodate the flexibility that businesses and their employees expect. New awards are not to be regarded as simplification of old awards.

## Proposed changes

3.4 Clause 139 provides that modern awards will cover the following ten matters:

- minimum wages and classifications;
- types of employment;
- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- annualised wage or salary arrangements;
- allowances;
- leave related matters;
- superannuation; and
- procedures for consultation, representation and dispute settlement.

## Award modernisation process underway

3.5 The award modernisation process was initiated by the Minister for Employment and Workplace Relations on 28 March 2008 pursuant to s576C(1) of the *Workplace Relations Act 1996* (the Act). This request was amended on 16 June 2008.

The process has required the AIRC to review all of the multiple-employer federal awards as well as many state awards operating in the national industrial system as Notional Agreements Preserving State Awards (NAPSAs). The AIRC completed its review at the end of 2008 with the stage one draft awards for priority industries.[1] These 17 modern awards will replace some 500 awards that currently cover those industries and occupations.[2] It expects to complete the award modernisation process by 31 December 2009[3] when the new industrial relations system will be fully operational.[4] The award modernisation process ensures that awards are simple to understand, easy to apply and reduce the regulatory burden of business. Another objective is that modern awards be economically sustainable and promote flexible modern work practices. In creating modern awards the AIRC must have regard to the need to assist employees to balance their work and family responsibilities effectively and to improve retention and participation of employees in the workforce.[5]

3.6 The award modernisation request requires that the AIRC include the following matters in modern awards:

- an award flexibility term (section 144);
- a dispute resolution term (section 146);
- terms providing ordinary hours of work (section 147);
- terms about rates of pay for pieceworkers (where necessary) (section 148);
- terms identifying shift workers eligible for five weeks' of annual leave under the NES; and
- terms facilitating the automatic variation of allowances (section 149).[6]

3.7 Some organisations were concerned that the award modernisation process might reduce wages and conditions, particularly for many award-dependent workers.[7] In contrast, many employer organisations have warned of higher costs leading to the

1 AIRC, Award Modernisation Stage 1 Decision, 19 December 2008.

2 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 31.

3 Information available from AIRC website: http://www.airc.gov.au/awardmod/about.htm accessed 1 December 2008.

4 Hon Julia Gillard MP, Minister For Workplace Relations, Speech to Fair Work Australia Summit, Sydney, 29 April 2008.

5 Hon Julia Gillard MP, Minister For Workplace Relations, Speech to Fair Work Australia Summit, Sydney, 29 April 2008.

6 EM, p. xxviii.

7 See ACTU, *Submission 13*, p. 27; Women's Electoral Lobby Australia, *Submission 86*, p. 9.

need to let staff go. This concern overlooks the phasing out of state-based differences over five years and the award not coming into effect until January 2010.[8]

3.8 The committee majority notes the intention to create modern awards to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards. In this regard it notes the submission from the National Aquaculture Council which expressed the preference for their industry not to be included in the award modernisation process and to remain award free as they already meet the standards in the NES. Mr Brian Jeffries explained:

> The large majority of the industry is currently non-award, and we regard that as another layer of regulation which is not required when the safety net and sometimes associated enterprise agreements are the framework in which it is necessary to operate. [9]

3.9 Mr Jeffries added that they have written to the AIRC and the Minister and are awaiting their responses.[10]

***Committee view***

3.10 The committee majority believes that employees in emerging industries where employees would traditionally be regulated by the award system should continue to be covered by an award as a matter of principle, as currently amicable arrangements can never be guaranteed. Given the intention of the government to extend awards to areas not previously covered, the committee majority's position is that this industry should not be award free.

3.11 The committee majority notes that the Minister issued an award modernisation request to the President of the Australian Industrial Relations Commission (AIRC) on 28 March 2008. The request outlines the principles the AIRC must take into account when undertaking the modernisation process. In the request, the Minister made clear that award modernisation is not intended to extend award coverage to classes of employees who, because of the nature or seniority of their role, have traditionally been award free. However, this does not preclude the extension of modern award coverage to new industries or occupations where the work performed by employees is of a similar nature to work that has historically been regulated by awards (including state awards). As with all stages of the process, parties will have the opportunity to make submissions and consult with the AIRC in cases where the AIRC extends award coverage to new areas.

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8 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 35.

9 Mr Brian Jeffries, National Aquaculture Council, *Committee Hansard*, 29 January 2009, p. 33.

10 Ibid, p. 33.

***Flexibility term***

3.12 To address flexibility, clause 144 requires the inclusion of a flexibility term to vary the award according to the genuine needs of the employer and employee. Clause 144(4) requires the employer and employee to reach a genuine agreement and ensure the arrangement results in the employee being 'better off overall'. The model flexibility clause released by the AIRC in June 2008 creates a template for individual deals under the new workplace laws from January 2010. Protections ensure that flexibility arrangements do not disadvantage an employee.[11]

3.13 Employers and employees may agree to vary arrangements for when work is performed; overtime rates; penalty rates; allowances and leave loadings.[12] These arrangements are subject to protections to ensure that employees receive the full benefits of the safety net.[13] This flexibility to negotiate mutually beneficial employment arrangements should facilitate productivity growth. To illustrate this, the DEEWR submission cited a study conducted by Bradford University for British Telecommunications which found that the company's flexible working arrangements increased self-reported productivity by an average 20 percentage points.[14]

3.14 Unions have some concerns. The ACTU expressed concern that the bill does not mandate the protections developed by the AIRC during the award modernisation process and suggested that clause 144 should require:

- the agreement to detail each term of the award that has been varied, how it has been varied and how it makes the employee better off; and
- the employer to provide a written proposal to the employee and where their understanding of English is limited, to take steps to ensure the employee understand the proposal.[15]

3.15 The ASU pointed out that the model flexibility clause developed by the AIRC allows flexibility agreements to be terminated by either party with four weeks' notice and advocated that this should be mandated by the bill. It suggested that clause 144(4) be amended to include the terms contained in clause 203 (6).[16]

3.16 The Australian Services Union was concerned that flexibility arrangements have the potential to undermine collective outcomes and create individual statutory agreements by another name. It welcomed protections in the form of discouraging

11 Factsheet 3 'A strong and simple safety net'.

12 DEEWR, *Submission 63*, p. 62.

13 Ibid.

14 Ibid., p. 13.

15 ACTU, *Submission 13*, p. 30.

16 ASU, *Submission 56*, p. 45.

adverse action (clauses 340 to 342), coercion (clause 343), undue influence or pressure (clause 344) and misrepresentations (clause 345).[17]

3.17 The Textile, Clothing and Footwear Union of Australia (TCFUA) were troubled that individual flexibility arrangements could operate to undermine collective bargaining as well as workers' entitlements. Like the ASU, it was also concerned that these may become AWAs by another name. It argued that this situation could be worse than AWAs or Individual Transitional Employment Agreements (ITEAs) as such arrangements will not be monitored and urged greater safeguards.[18] Asian Women at Work also raised specific concerns for workers from a non-English speaking background.[19]

3.18 Advice to the committee from DEEWR was that flexibility terms will be subject to certain requirements, including protections for employees. For instance, the arrangements must be in writing and signed by both parties and a copy must be provided to the employee.[20] In addition the award flexibility term must provide for how a flexibility arrangement can be terminated. The AIRC has determined that the model flexibility term will provide that Individual Flexibility Agreements (IFAs) can be terminated by either party with four weeks notice.

*Checking mechanism*

3.19 Senators were advised that there is a mechanism in the legislation for supervising the use of flexibility arrangements. The Fair Work Ombudsman (FWO) as part of its compliance role would have the right to see and check the agreements.[21] Subject to the right of entry requirements, union officials concerned that an IFA was made in breach of the Act could inspect the relevant documents. Dr John Buchanan suggested that FWA be authorised to call in such agreements for spot audits – ideally on a sectoral or regional labour market basis – and that they should be made available for independent scrutiny by researchers. He suggested further that a worker disadvantaged by a flexibility agreement should be entitled to 10 times the amount of the breach in compensation. Penalties should also apply to consultants propagating template IFAs. This would provide an incentive to employees to notify FWA of such breaches and make employers think twice before promoting agreements of marginal legality.[22]

3.20 In responding to senators' concerns DEEWR emphasised that in the development of the model flexibility clause the AIRC was conscious of safeguards,

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17 ASU, *Submission 56*, p. 46.

18 TCFUA, *Submission 11*, pp. 17-18.

19 Ms Angela Zhang, Asian Women at Work, Tabled papers.

20 DEEWR, *Submission 63*, p. 62.

21 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 11.

22 Dr John Buchanan, *Submission 150*, pp. 5-6.

and noted the requirements for the IFA to be in writing and ability to terminate the IFA in 28 days. They also advised that no party suggested to the AIRC that the IFA should be subject to a more formal approval process.[23]

### *Committee view*

3.21 Employers appear confused over the use of IFAs with some suggesting they should be a condition of employment. IFAs provide additional flexibility on top of the award or a collective agreement to meet the genuine needs of employees and employers where such arrangements are genuinely agreed to. The IFA is not intended as an instrument to address conditions that apply across the entire workforce which should be included in workplace agreements.[24]

3.22 The committee notes that a more formal lodgement process for IFAs would create its own framework, and add processes, delays and additional compliance burden. It recognises the need for IFAs to be in writing and a copy kept and the role of the FWO in this area if employees have concerns. It does not wish to add more formality to the process but it is concerned to ensure that there is no abuse, particularly of vulnerable workers.

3.23 Please see Recommendation 2 in chapter 2.

### Recommendation 3

3.24 **The committee majority recommends that FWA conduct regular and targeted investigations and analysis to ensure that individual flexibility arrangements are being used in accordance with the Act and are being used to provide genuine individual flexibility.**

## Coverage of modern awards

### *Employees not traditionally covered by awards*

3.25 Professor Peetz noted that as subclause 143(7) is presently expressed it could exclude occupations that are newly emerging or that do not currently exist from being covered by future modern awards. He recommended that the subclause be amended to avoid this ambiguity.[25]

### *High income threshold*

3.26 In the interests of flexibility, clause 47(2) provides that modern awards will not apply to employees earning over $100,000 (indexed annually from 27 August 2007, and pro-rata for part time employees). The amount of the high income threshold

23 See AIRC decision 20 June 2008 [177].

24 For further detail please see the AIRC decisions 20 June 2008 and 19 December 2008.

25 Professor Peetz, *Submission 132*, pp. 11-12.

will be prescribed by regulations.[26] Departmental officials clarified that the indexation occurs at a fixed point ever year, and is a fixed formula linked to average weekly ordinary time earnings based on historical data of the previous year.[27]

3.27 These employees will still be covered by the NES but will be free to agree on terms to supplement the NES without reference to an award. They may still be covered by an enterprise agreement, an exemption applying if annual earnings are guaranteed in writing by the employer, and agreed with the employee in advance. Earnings not guaranteed in advance, such as performance bonuses, are not included. Non-monetary benefits may be included where their value can be calculated and is guaranteed in advance.[28]

3.28 Some organisations were concerned that these high income employees will be award free.[29] For example, the Media, Entertainment and Arts Alliance were concerned about the exclusion of high income employees from the award, explaining that a number of their members would fall into this category and would not be covered by an award.[30] This was also mentioned by the Australian Education Union.[31]

3.29 Unions WA expressed the view that the threshold has been set too low and will unfairly capture a wide range of employees who do not fit the criteria of being 'historically award free' or 'managerial employees'. In particular they noted the resources sector in WA where ordinary workers covered traditionally by the award system regularly earn more than $100,000 in direct wages alone.[32]

3.30 While noting that payment amounts which cannot be determined in advance are not included, the bill does not specifically exclude shift penalties that may result in employees in 24 hour industries, such as airlines or cash transport, earning more than $100,000. The ASU requested that the bill should be amended to reflect this or it should be clarified in the regulations.[33] Shift penalties were also discussed by the Victorian Private Sector Branch of the ASU which advocated that these employees should not be treated as high income employees as they stand to lose modern award protections.[34]

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26 EM, p. 208.

27 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 47.

28 Factsheet 3 'A strong and simple safety net'.

29 See Unions NSW, *Submission 46*, p. 23.

30 The Media, Entertainment and Arts Alliance, *Submission 85*, p. 2.

31 Mr Robert Durbridge, AEU, Committee Hansard, 17 February 2009, p. 59.

32 Unions WA, *Submission 70*, p. 15.

33 ASU, *Submission 56*, pp. 48-49.

34 Australian Services Unions, Victorian Private Sector branch, *Submission 79*, p. 10.

3.31 The ACTU also criticised this exemption because it not only removes the application of award conditions of employment but suspends rights deriving from award coverage such as the rights to be represented at work, to be consulted about significant change and to access the dispute settlement procedure in the award. It requested the bill be amended to remove the power of the Minister to lower this threshold through regulation.[35] DEEWR explained that the award exemption will provide increased scope for flexible common law agreements which previously had to comply with all award provisions. Its submission assured the committee that the bill contains appropriate safeguards for employees entering into such an exemption.[36]

3.32 Professor Peetz submitted that setting out the high income threshold in the regulations rather than in the legislation raises the possibility that a future government could destroy the award system by setting the high income threshold at a low level. He recommended changes to the wording of the bill to rule out this possibility.[37] The NTEU made a similar suggestion.[38]

3.33 Dr John Buchanan shared these concerns, noting from his research that 'over one in four employees earning $100,000 per annum report that awards play a role in setting their wages and conditions and these people are set to suffer a reduction in their enforceable rights at work'. He agreed with the proposals put forward by Professor Peetz. In addition, he suggested that the rate should be adjusted not simply by reference to the CPI or Average Weekly Earnings but:

> …given that only about 5 per cent of employees earn more than $100,000 per year – the cap should be adjusted to ensure that no more than the top 5 per cent of employees are excluded from award coverage with the passing of time.[39]

### *Review of awards*

3.34 FWA will review each modern award every four years to maintain a relevant and fair minimum safety net.[40] The bill also provides for more frequent and limited reviews, such as to remove ambiguity, uncertainty or discriminatory terms. The Minister noted that for the first time employers will be able to know and plan for revisions of the safety net.[41]

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35 ACTU, *Submission 13*, pp. 30-31.

36 DEEWR, *Submission 63*, pp. 62-63.

37 Professor David Peetz, *Submission 132*, p. 15.

38 NTEU, *Submission 105*, p. 3.

39 Dr John Buchanan, *Submission 150*, p. 5. See also Dr Buchanan, *Committee Hansard*, 18 February 2009, p. 41.

40 Factsheet 3 'A strong and simple safety net'.

41 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.

3.35 The ACTU was concerned that modern award wages can only be reviewed on 'work value' grounds which does not allow FWA to adjust wages on other grounds. In particular it noted that FWA does not have the power to ensure that wages in awards continue to operate 'as a relevant and fair safety net against which to apply the better off overall test'. The ACTU also submitted that the timing of the first review should be 2010 as no genuine new terms and conditions that will benefit award covered employees will emerge from the award modernisation process.[42]

3.36 The Women's Electoral Lobby Australia suggested that, to make conditions for modern award variation consistent with the equal remuneration principles of the modern award objective and the minimum wages objective, an additional 'work value' reason be included as follows:

> (d) evidence that the work, skill and responsibility required or the conditions under which the work is done have been historically undervalued on a gender basis.[43]

## Other issues

### *Superannuation*

3.37 In its award modernisation decision of 19 December 2008, the AIRC decided to allow the continuation of any superannuation contribution to which the employer was making contributions on behalf of employees as on 12 September 2008. This was in order to minimise inconvenience for employers. Funds other than those provided for would not qualify as default funds, but employees were free to exercise their right to choose in favour of these funds.[44] The effect, as seen by corporate funds, was to lock them out of the default 'market', and to give traditional industry funds a significant commercial advantage.

3.38 Submissions from the sector have made the following arguments:

- default superannuation funds create a significant barrier to competition by creating mandated monopolies in three industries which are major employers: retail, textile clothing and footwear and higher education. Oligopolies are created in other industries such as manufacturing and hospitality;
- reducing competition will reduce services and competitive pressure on fees and prevent competition between industry funds;
- default funds will lock employers(and employees) in to contributing to funds which may be experiencing poor investment returns, increased fees, liquidity constraints or governance issues;

42 ACTU, *Submission 13*, p. 29.

43 Women's Electoral Lobby, *Submission 86*, p. 10.

44 AIRC, Award Modernisation Stage 1 Decision, 19 December 2008.

- the nomination of default funds is at odds with the international approach where for example employers in the UK and New Zealand able to choose from 46 and 36 schemes respectively.[45]

3.39 In addition to the issues listed above, Colonial First State cited increased cost and regulatory burdens for employers as an outcome of default funds and emphasised that competition continues to put downward pressure on fees. It also expressed concerns about the lack of transparency around the process of choosing the default funds.[46] Concerns about reducing competitive price pressures which reduce management fees were also raised by MLC. It argued that many companies actively choose particular default funds, sometimes engaging independent consultants to assist them select the most suitable by undertaking due diligence of the fund under consideration.[47]

3.40 Investment and Financial Services Association (IFSA), Colonial First State and MLC have recommended that employers should be free to select their own default fund. Alternatively, in addition to naming a default fund, modern awards should allow an alternative complying fund to be named as the default fund, or that employers be required to choose a default fund that is consistent with a list of criteria.[48]

3.41 ING Australia feared that a proportion of contributions would go to underperforming funds. Its submission claimed that Fair Work Australia, no less than its predecessor, the AIRC, had insufficient expertise in the field of investment to assess the adequacy of default fund arrangements. In commenting on the AIRC (and presumably on FWA) ING submitted that:

> …the Commission is not geared to provide guidance to the parties on the financial performance of funds. We also understand the Commission may not have information to compare other aspects of fund offerings – such as insurance, investment choice, access to financial advice, member education and member services – that are also important factors to assess when judging the suitability of a fund for default status.[49]

### *Committee View*

3.42 The committee majority notes that a large percentage of employees on awards fail to make a choice of super fund when they start a new job. Therefore a default option must exist to ensure employees can receive their super guarantee. The view that default funds are anti-competitive is incorrect. Default funds do not remove employee

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45 See IFSA, *Submission 55*, pp. 2-3. See also Mr Richard Gilbert, IFSA, *Committee Hansard*, 18 February 2009, pp. 50-51; AMP, *Submission 145.*

46 Colonial First State, *Submission 51*, p. 1-3.

47 MLC, *Submission 108*, p. 3.

48 See IFSA, *Submission 55*, pp. 3-4; Colonial First State, *Submission 51*, p. 3, MLC, *Submission 108*, p. 3.

49 ING Australia, *Submission 93*, p.3.

choice. Since 1 July 2005 'choice of fund' laws have required employers to allow staff to choose their own fund if they wish. This will continue to apply. Further it will be open to employers and their employees to include their own choice of default fund when they make an enterprise agreement. The essence of the concerns raised by the corporate funds is that they are not eligible for their 'fair share' of default contributions. The marketing challenge for them is to compete for the custom of the great majority of employees who do not nominate a fund but who are entitled to do so. Also, employers and employees can agree to alternative default arrangements in employee bargaining agreements. The committee majority does not believe that arrangements should be established, outside of the protections of the bargaining stream.

3.43 In making its decision as to the inclusion of default funds, the AIRC has considered the submission of the industry. It is open to Fair Work Australia in its future award reviews to consider changes to the default funds and to have regard to the performance of funds in making that decision. In this regard, it is noted that APRA data shows that taken as a whole, the long term investment performance of retail funds is around 2% a year below that of industry funds.

3.44 As to whether the Fair Work Authority is unqualified to make judgements about the selection of funds, based on their financial performance, it is noted that the alternative suggested by the retail superannuation industry is that it is the employer who should make this decision on behalf of its employees, rather than the AIRC. Individual employers are in a worse position than the AIRC to make such a judgment. The committee majority also notes that submissions to the AIRC from employer associations supported the inclusion of default funds in awards and indicated that employers did not want to be responsible for making the choice of a default fund. The committee majority also observes that the current world financial crisis has shown that leading investment experts have made such ruinous decisions and this rules out any assumptions about who is best qualified to make sound investment decisions. The committee majority supports current arrangements because they meet, with least complexity, the aim of ensuring the maximisation of retirement incomes for Australian employees.

## Conclusion

3.45 Modern awards are, together with the NES, fundamental to ensuring a fair, simple and enduring safety net for all employees which cannot be stripped away. Unlike individual statutory agreements, individual flexibility agreements must build on the safety net, not reduce it. Flexibility for individual arrangements is ensured by employers and employees using the flexibility clause in each award to meet the genuine individual needs of the employer and the employee.

# 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:
>
> - 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.

# Chapter 5

# Fair treatment in the workplace

5.1 This chapter details the changes to the unfair dismissal system and briefly covers general protections.

## Unfair Dismissal

5.2 In regulations and bills prior to 2001, the exclusion from unfair dismissal claims referred to new employees of businesses of 15 or less. From 2001, the exclusion was broadened to employees of businesses of less than 20. From 27 March 2006 under WorkChoices, it became an actual exclusion from unfair dismissal claims for businesses with 100 employees or less.[1]

5.3 Under WorkChoices the right of employees to bring an action for unfair dismissal was severely curtailed. The exclusion for businesses with 100 employees or less removed unfair dismissal protection from 4.6 million (or 56 per cent) of employees.[2] Even large employers were able to avoid unfair dismissal claims where they could establish that at least one of the grounds for the dismissal was a 'genuine operational reason'.[3] In addition, the dismissal provisions in the current act 'are among the most difficult to navigate'.[4]

## Proposed changes

5.4 The bill will restore to employees the important right of unfair dismissal – the right to challenge harsh, unjust or unreasonable treatment in the workplace. Part 3-2 details that the new system will remove the 100 employee exemption. Instead it will introduce new minimum employment periods before a claim can be made. This will be 12 months for employees of businesses with fewer than 15 employees, and six months for employees in businesses with 15 or more employees. This will ensure a balance in the system by providing employers with an extended period where they can make sure that they have hired the right person for the job, while ensuring that existing employees are protected from harsh, unfair or unreasonable dismissal.

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1 Parliamentary Library Background Note 'Unfair dismissal and the small business exemption', Steve O'Neill, 11 March 2008.

2 EM, p. xlv.

3 Richard Hall, 'Australian Industrial Relations in 2005 – The WorkChoices Revolution', Industrial relations A current review, The Industrial relations Society of Australia, 2006, Chapter 1.

4 Ms James, *Committee Hansard*, 11 December 2008, p. 39.

5.5 Employees earning over $100,000 will only be able to make an unfair dismissal claim if their employment is covered by a modern award, or if their employment conditions are set by an enterprise agreement.[5]

5.6 While supporting the broader definition of small business included in the bill, Jobwatch pointed out that it does not appear to cover the situation where 'there is a common director among a number of otherwise unrelated companies or where the employer company is part of a larger franchise arrangement'. It called for the government to look at such situations where employees do not have access to unfair dismissal protection due to the nature of their employer's corporate structure. Specifically, in addition to the definition of 'associated entities', that a reference to franchising arrangements and common directors be included.[6]

### *Qualifying periods of employment*

5.7 Clause 383 defines the minimum employment period as 12 months for employees employed by a small business, and six months for other employees. Casual employees will have the same qualifying periods as permanent employees, depending on the size of their employer. However, they must have been employed on a regular or systematic basis for the period.[7]

5.8 The NTEU were concerned about the requirement for continuous service and suggested that this could be addressed by inserting a provision into clause 384 along the lines of 'the requirement is 6 months continuous service or 12 of the previous 24 months'.[8]

5.9 A number of submissions have been critical of the qualifying periods in the bill. The Employment Law Centre of WA told the committee that the extension of the qualification period to 12 months for small business seems counter-intuitive 'given that it should take less rather than more time to assess the suitability of an employee in a small business environment'.[9] Unions WA also did not support the 12 month exclusion period for small business employees and advocated that these employees should also be subject to the six month period.[10] The AWU argued that the Small Business Dismissal Code (see below) negates the need for a distinction between small and large businesses with regard to minimum employment periods.[11]

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5 DEEWR, *Submission 63*, p. 43.

6 Jobwatch, *Submission 87*, p. 40.

7 EM, p. xlvi.

8 NTEU, *Submission 105*, p. 4.

9 Mr Michael Geelhoed, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 2.

10 Unions WA, *Submission 70*, p. 8. See also TCFUA, *Submission 11*, p. 26.

11 AWU, *Submission 81*, p. 6.

5.10 The ACTU pointed out that the qualifying period has traditionally been three months, or a lesser period of probation. It submitted that the qualifying period in the bill excludes 22 per cent of small business employees from claiming unfair dismissal, 41 per cent of all hospitality workers, and 64 per cent of young people aged 20-24. As a result the ACTU recommended that the qualifying period should be returned to three months, or a lesser agreed period of probation.[12] This recommendation was supported by the ETU (Qld), the ASU, the AWU and the National Association of Community Legal Centres Employment Network, among others.[13]

5.11 The AWU submitted that clause 384(2)(b) should be deleted as it allows an employer to evade the unfair dismissal provisions by informing employees that their previous service will not be recognised. It argued:

> This provision could allow an employer to unfairly dismiss an employee who has performed the same job at the same business premises for 15 years and leave the unfairly-dismissed employee with no recourse.[14]

5.12 The ACTU was also concerned that clause 384(2)(b) allows a new employer to require a transferring employee to re-serve a qualifying period for accessing unfair dismissal remedies.[15] The ACTU also noted that the bill exempts employers from the obligation to give notice of dismissal during the qualifying period. It submitted that as the provision is unfair and inconsistent with international obligations it should be removed.[16]

5.13 DEEWR clarified that the minimum employment period will include the previous service of an employee involved in a transfer of business, unless the new employer expressly informs transferring employees in writing of a requirement for a new minimum employment period. The bill also provides that where an employee takes up new employment within a three month period with an employer that is an associated entity of the previous employer, the employee's service with the previous employer will be taken to be continuous for the purposes of the unfair dismissal minimum employment period.[17]

### *Exemptions*

5.14 Employees excluded from making an unfair dismissal claim are those not covered by a modern award or employed under collective agreements whose

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12 ACTU, *Submission 13*, p. 48. Also supported by the Australian Human Rights Commission, *Submission 137*, pp. 15-16.

13 ETU(Qld), *Submission 141*, p. 8; ASU, *Submission 56*, p. 44.; National Association of Community Legal Centres Employment Network, *Submission 106*, p. 2.

14 AWU, *Submission 81*, p. 7.

15 ACTU, *Submission 13*, p. 53.

16 Ibid, p. 49.

17 DEEWR, *Submission 63*, pp. 43-44.

remuneration exceeds the high income threshold of $100,000; and those who are dismissed due to genuine redundancy.[18] Other exclusions from unfair dismissal remedies include seasonal employment and specified-task employment at the end of which an employee's work is no longer required. The ending of employment that was for a fixed period or task is not considered to be a dismissal.[19]

## The process

5.15 The process for dealing with unfair dismissal claims will be streamlined with many matters to be determined by a conference rather than a hearing. FWA will be flexible in gathering information, making inquiries and discussing issues with employers and employees, with a view to achieving a mediated resolution.

### *Time to lodge application*

5.16 Unfair dismissal claims must normally be lodged with FWA within seven days (subclause 394(2)). A common criticism of the bill was that the seven day timeframe is too short, and would disadvantage employees in remote areas, those from a non-English speaking background, those who may be distressed and employees who may not be aware of their rights.[20] The Employment Law Centre of Western Australia claimed that lack of knowledge of unfair dismissal rights is unlikely to satisfy the definition of 'exceptional circumstances' required for late applications.[21] Ms Toni Emmanuel, Principal Solicitor of the Centre told the committee that the Centre, which represents non-unionised and disadvantaged employees in WA, would be unlikely to meet the need to provide legal advice in the seven day timeframe.[22]

5.17 The ACTU argued that a dismissed worker needs more time to seek advice and the timeframe may encourage dismissed employees to lodge claims to preserve their legal position while they seek advice. It suggested reinstating the application

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18 Explanatory Memorandum, p. xlvi.

19 Factsheet 9,'A simple, fair dismissal system for small business', 17 September 2008.

20 See USU, *Submission 4*, p. 6; Professor Peetz, *Submission 132*, p. 16; ACTU, Submission 13, pp. 47-48; ETU(Qld), *Submission 141*, p. 8; Law Institute of Victoria, *Submission 101*, p. 5; The NSW Office of Industrial Relations, *Submission 102*, pp.10-11; National Association of Community Legal Centres Employment Network, Submission 106, p. 2; CEPU, *Submission 109*, p. 13, Asian Women at Work, *Submission 110*, p. 3; Ms Anna Chapman, Centre for Employment and Labour Relations Law, Melbourne University, *Submission 48*, pp. 1-2; ASU, *Submission 56*, pp. 42-43; ANF, *Submission 61*, p. 4.; Unions WA, *Submission 70*, pp. 8-9; ASU, Victorian Private Sector Branch, *Submission 79*, p. 19; AWU, Submission 81, p. 6; TCFUA, Submission 11, p. 29; CPSU-SPSF, *Submission 77*, p. 11; Australian Human Rights Commission, *Submission 137*, pp. 15-16. .

21 Mr Michael Geelhoed, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 2.

22 Ms Toni Emmanuel, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 8.

deadline of 21 days.[23] This suggestion was supported by the Law Institute of Victoria among others.[24] FairWear Victoria advised that the proposed seven day time limit would disadvantage Textile, Clothing and Footwear (TCF) workers, 'who are predominantly migrant women workers, or workers with a lower level of formal education'.[25]

5.18 ACCI was also concerned about the short timeframe and told the committee it may result in the substitution of general protection claims for unfair dismissal claims. More consistency was needed between unfair and unlawful termination (60 days) claims and ACCI advocated a timeframe of 14 or 21 days.[26]

5.19 Professor Andrew Stewart believed the basis for the policy of a seven day period to lodge claims was well-founded. It encouraged quick resolutions of disputes and maximised the chances of an enforceable reinstatement. However, he agreed with other submitters that there is potential for injustice if the time limit is applied too rigorously. He proposed that employers be encouraged to give written notification to an employee at the time they are dismissed telling them that they have a right to an unfair dismissal claim and making them aware of the time limit.[27]

5.20 In a supplementary submission to the inquiry, Professor Stewart emphasised that, if the 21 day time limit is not retained, employees needed to have knowledge of the seven day time frame at the time of dismissal. He suggested that this take the form of a standard factsheet prepared by FWA to be given to a dismissed employee. This could be recognised in clause 394(3) as a factor to be taken into account by FWA in determining whether to allow a late application. He added:

> Under this proposal, it would still be up to each employer to decide whether they wanted to provide the statement. Some might take the view that they did not want to 'encourage' unfair dismissal claims. But if so, they would have to accept the risk of having a weaker case for resisting an otherwise late application. Hopefully, over time, most employers would see the value in issuing the statement as part of their standard processes for terminating employment. [28]

5.21 Professor Peetz suggested providing FWA with additional guidance on what would be considered valid reasons for delay beyond the seven day period such as where the employee was not (or could not reasonably be expected to be) aware of the

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23 ACTU, *Submission 13*, pp. 47-48.

24 Law Institute of Victoria, *Submission 101*, p. 5.

25 FairWear, Victoria, *Submission 90*, p. 10. See also Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, pp. 3-4 and Hanh Le, Asian Women at Work, *Tabled papers*.

26 ACCI, *Submission 58*, Part 2, p. 180.

27 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, pp. 4-5.

28 Professor Stewart, *Supplementary Submission*, pp. 2-3.

seven day requirement, and where the employee is traumatised to the extent that they cannot properly consider making an application in the timeframe.[29]

5.22 The Australian Human Rights Commission suggested a slight change of language to ensure the discretion by FWA is sufficiently wide – that FWA 'needs only to be satisfied that it is appropriate to allow for a further period in all the circumstances of the case'.[30]

### *Committee view*

5.23 In considering all the evidence, and the widespread view among both employer and employee organisations that the time limit of seven days is too short, as well as taking into account the varying conditions of employment and circumstances of employees, the committee majority believes that the strict seven day limit on making a claim for unfair dismissal is unsatisfactory. There will be many circumstances in which employees placed in this position will not be able to come to terms with the fact of the dismissal and take the appropriate advice within the currently proposed timeframe. The committee majority notes that section 394 (3) allows FWA the discretion to accept late applications, and that the FWA is likely to exercise this discretion appropriately. Nonetheless it believes that a statutory provision of 14 days is more likely to provide employees with time to seek advice and will prevent the practice of unmeritorious claims being lodged as a 'holding position' because there has been insufficient time for proper consideration and advice. A set time limit of 14 days will also provide the certainty that allows employers to then move forward to fill the vacant position without the risk of a subsequent challenge.

### Recommendation 6

5.24 **The committee recommends that the bill be amended to provide for a fourteen day time limit within which time appeals against unfair dismissals must be lodged with Fair Work Australia.**

5.25 See also recommendation 2 in chapter 2 where the committee recommends the inclusion of unfair dismissal rights in the Fair Work Information Statement.

### *Hearings*

5.26 The focus on informality has already been noted. ACCI suggests that employers be guaranteed the opportunity to respond to any allegations made against them, by the matter being taken up more formally. It doubted that employers could be assured that what they may tell FWA informally may not be subsequently used against

29 Professor Peetz, *Submission 132*, p. 16.

30 Australian Human Rights Commission, *Submission 137*, p. 17.

them.[31] The right for an employer to require a full hearing in the event of contested facts was supported by AiG.[32]

5.27 DEEWR admitted a slight bias against formal hearings, for the purpose of putting discretion in the hands of FWA. Officials pointed out that procedural fairness would apply in that:

> ...the tribunal member would have to be satisfied that, if he or she were not holding a hearing and were instead relying on other information or perhaps conferences, that would ensure that both sides had a say.[33]

### *Remedies*

5.28 Remedies remain as they are. Reinstatement will be the preferred remedy unless it is not in the interests of either party. Where reinstatement is not feasible, compensation will apply, capped at the lesser of six months' pay or half the amount of the high income threshold. Factors for determining compensation within the maximum amount will be specified.[34]

### *Warnings*

5.29 In response to questions by Senator Siewert regarding warnings, the department responded that warnings in writing are preferred but this is not mandatory. Officials explained that the FWA must satisfy itself that the warnings were provided and that, in cases of poor performance, employees are given reasonable opportunity to improve their performance. A checklist attached to the Small Business Fair Dismissal Code assists small business to provide appropriate evidence.[35]

5.30 FairWear Victoria advised that for TCF workers, particularly migrant workers, a written warning is essential and the employer should be required to take steps to ensure that workers understand those warnings. It also recommended a formal meeting where a worker can bring a support person to help ensure the worker has understood the warning.[36] These views were supported by the TCFUA.[37] Asian Women at Work suggested the government assist employers to provide written warnings by the development of templates or guidelines.[38]

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31 ACCI, *Submission 58*, Part 2, p. 194.

32 AiG, *Submission 118*, p. 91.

33 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 39.

34 DEEWR, *Submission 63*, p. 44.

35 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 39.

36 FairWear, Victoria, *Submission 90*, pp. 10-11 and Asian Women at work, *Submission 110*, p. 3 and p.6.

37 TCFUA, *Submission 11*, p, 26.

38 Asian Women at Work, *Submission 110*, pp. 4-8.

***Committee view***

5.31 The committee supports these concerns. Employers should be required to take reasonable steps to ensure that warnings are provided in an appropriate format which can be understood by workers.

**Recommendation 7**

5.32 **The committee majority recommends that the Fair Dismissal Code be amended to provide that employers be required to provide a warning in writing, taking into consideration the needs of employees from a non-English speaking background.**

## Small Business Fair Dismissal Code

5.33 Clause 388(1) enables the Minister to declare a Small Business Fair Dismissal Code (the code) by legislative instrument. The code, for businesses with fewer than 15 employees, will set out the steps a small business employer must take to ensure the dismissal is fair.[39] These arrangements recognise the special circumstances of small business owners who are without human resource management personnel.

5.34 A draft code was developed in consultation with representatives from employer organisations, the ACTU and some of its affiliates.[40] Among other things, the code provides that:

- a dismissal will be deemed to be fair whenever the employer has reasonable grounds to believe that the employee was guilty of serious misconduct (such as theft, fraud, violence or serious breaches of OHS requirements) and reports the allegation to the police or some other relevant authority. By implication, a dismissal cannot be challenged in such as case, even if the allegation turns out to be unfounded;
- in other cases, employees should receive a warning (which need not be in writing) about their performance or conduct, and be given a reasonable opportunity to improve, before being dismissed; and
- employees are entitled to have another person present to assist them in any 'circumstances where dismissal is possible'. However, that person cannot be a lawyer acting in a professional capacity.

5.35 The code was supported by AiG.[41] ACCI 'welcomed the effort to create' the code but feared that litigation on fairness of dismissal would be replaced by litigation on compliance with the code.[42]

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39 Explanatory Memorandum, p. xlvi.

40 Mr John Kovacic, *Committee Hansard*, 11 December 2008, pp. 39-40.

41 AiG, *Submission 118*, p. 90.

42 ACCI, *Submission 58*, Part 2, pp. 184-185.

5.36 The ACTU stated its view that all employees should be entitled to protection against unfair dismissal regardless of the size of the business.[43] It was concerned that employees could be summarily dismissed in the event of a suspicion that a worker has engaged in theft, fraud or violence. The ACTU argued that there is no requirement for the employer's suspicion to be correct or for procedural fairness to be followed. In addition, the ACTU noted that the code encourages employers to report their suspicions to the police.[44] It suggested that, if not abolished, the code should be redrafted to better reflect the jurisprudence of the courts and the AIRC. The ACTU also suggested that the Senate should be able to view the final version of the code before it approves the bill.[45]

5.37 The Australian Human Rights Commission suggested additional protections. Namely, that the employer must clearly particularise the allegation of serious misconduct against the employee, and provide the employee with the opportunity to respond to the allegation.[46]

5.38 The committee majority notes that the Code requires that an employee be given an opportunity to respond to allegations put against that employee - to present his or her side of the story – and must be given a reasonable opportunity to rectify the problem.

5.39 Ms Anna Chapman from the Centre for Employment and Labour Relations Law, Melbourne University, expressed disappointment as the code required only low standards from small business employers. She submitted that at the very least the warning should be in writing, the employee should be able to respond to allegations and the code should require employers to establish they have complied with the code.[47] The Australian Human Rights commission also supported the need for the warning to be in writing to assist understanding.[48]

5.40 Other organisations were also concerned about the reduction in formality in the code as well as the limited appeal process. The Employment Law Centre of WA noted the lack of definitions in regard to serious misconduct and what constituted reasonable periods of time. It also had concerns with the automatic legitimation of the summary dismissal in a situation where a police report is made, and in the elevation of the Code checklist to the status of evidence.[49]

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43 This was also supported by the Australian Human Rights Commission, *Submission 137*, p. 17.

44 These concerns were supported by Jobwatch, *Submission 87*, p. 40.

45 ACTU, *Submission 13*, p.48.

46 Australian Human Rights Commission, *Submission 137*, p. 18.

47 Ms Anna Chapman, Centre for Employment and Labour Relations Law, Melbourne University, *Submission 48*, p. 4.

48 Australian Human Rights Commission, *Submission 137*, p. 18.

49 Mr Michael Geelhoed, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 3.

5.41 In response to employer concerns about the code, DEEWR officials advised that the code should ensure less complexity and enable a small business employer to avoid a lengthy unfair dismissal process by following the code.[50] DEEWR also informed the committee that the code is still in draft form and will be made a legislative instrument once the bill is passed.[51]

## Conclusion

5.42 The committee majority notes the removal of unfair dismissal rights resulted in clear hardship for many, and of feelings of insecurity which affected morale and efficiency in the workplace. The Small Business Unfair Dismissal Code was developed with small business to meet their needs for flexibility. It takes account of the particular needs of small business and provides clear guidelines for employers and employees to manage underperformance and minimise claims.

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

51 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 39.

# Chapter 6

# Industrial action

6.1 This chapter will discuss streamlined provisions covering industrial action by national system employees and employers. The current Workplace Relations Act regulates industrial action and allows for protected action to be taken during a bargaining period when certain requirements are met.

## Proposed changes

6.2 Part 3-3 deals with industrial action and clause 406 provides an overview. The system for regulating industrial action will be broadly similar to that which currently applies. The dichotomy between protected and unprotected industrial action will be retained.

### *Protected industrial action*

6.3 The new laws will distinguish between protected industrial action which may legitimately occur during bargaining and unprotected industrial action taken outside bargaining. Defined in clause 408, protected industrial action will be allowed in the course of bargaining in accordance with strict rules including a secret ballot of employees and three days' notice of intention to take action.[1] Clause 413 sets out the requirements for industrial action to be protected industrial action.

6.4 Subclause 413(3) stipulates a pre-condition for taking protected industrial action that the participants are genuinely trying to reach agreement and are complying with any good faith bargaining orders in place. Protected action is not available to pursue matters that do not pertain to the employment relationship.

6.5 Clause 414 provides that employees and/or their bargaining representatives will be required to provide the employer with three days' written notice of their intention to take the protected industrial action.

### *Ballot process*

6.6 Clause 409 retains the requirement to hold a mandatory secret ballot authorising industrial action by a majority of employees. Bargaining representatives or eligible employees will be able to apply to FWA for a secret ballot order. All protected action secret ballots will be conducted by the Australian Electoral

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1 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.

Commission (AEC) except where FWA may decide that a person other than the AEC is to be the protected action ballot agent (clause 444).

6.7 Departmental officials told the committee that there are matters which will now be left to the discretion of the AEC when it runs a ballot, including the timetable and how it will be carried out.[2] Officials also explained that as part of the streamlining process, previously 80 per cent of the cost was met by the AEC and now the full cost of the ballot will be met by the AEC or the Commonwealth.[3]

6.8 The Office of the Privacy Commissioner (OPC) noted that there is insufficient information in the bill and EM to be able to determine whether all non-AEC agents will be covered by the Privacy Act. It is also unclear whether the agents would be contracted to the AEC or the FWA which would make them Commonwealth contractors and subject to the provisions of section 95B of the Privacy Act. This situation may create inadequate privacy protection for individuals participating in a protected action ballot. The Office of the Privacy Commissioner preferred agents to deal with any potential gap in privacy protections through either contractual arrangements or the preparation of guidance material on best practice in consultation with the Privacy Commissioner.[4]

6.9 The committee majority notes that the government will review advice from the Office of the Privacy Commissioner, and consider amendments to clarify and improve privacy protections on information collected under the protected ballot provisions.

6.10 The TCFUA explained that in view of its preponderance of members from non-English speaking backgrounds, it would engage a ballot agent able to deal with their needs. It is concerned that in these circumstances the union may be liable for the costs of the protected action ballot and recommend that this be clarified.[5]

6.11 Despite assurances from DEEWR that the provisions establish a simpler and more streamlined process[6], some submissions suggested that procedures could be further simplified. Professor David Peetz contrasted the intent in *Forward with Fairness*, which outlined a fair and simple secret ballot process, with the 22 pages and 36 clauses in the bill which is 'only fives pages less than the WorkChoices provisions'. He advocated that these provisions be shortened and simplified to achieve the stated objective in clause 436 of a simple process. This request for simpler procedures,

2 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 47.

3 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 49.

4 Australian Government Office of the Privacy Commissioner, *Submission 138*, p. 4.

5 TCFUA, *Submission 11*, pp. 35-36.

6 DEEWR, *Submission 63*, p. 58.

particularly in relation to ballot procedures, was supported by others including the ASU and the Victorian Private Sector Branch of the ASU.[7]

6.12 Professor Peetz particularly noted subclause 443(1)(b) which requires FWA to be satisfied that the applicant has been genuinely trying to reach agreement with the employer. He argued that this requirement is an unnecessary impediment to determine whether employees wish to engage in protected action and would be more appropriately dealt with if industrial action takes place.[8]

6.13 These concerns were supported by Professor Andrew Stewart, who submitted that FWA would not be satisfied on this account without hearing from the employer, who might drag out the process by having an argument at a preliminary stage.[9]

6.14 The ACTU also described the process as 'complex and inefficient'. It noted the potential for employers to frustrate and delay a protected action ballot[10] because FWA must be satisfied that the bargaining representative is genuinely trying to reach agreement. It explained that:

> In the experience of our affiliates, employers readily invent a range of reasons for opposing the approval of a protected action ballot. Even where baseless, these employer claims have the intended effect of prolonging the approval process for weeks or even months.[11]

6.15 The ACTU recommended that there should not be any requirements for approval to hold a ballot. In addition, there should not be any capacity for employers to intervene in the ballot process as:

> The requirement for FWA to be satisfied that the bargaining representative is genuinely trying to reach agreement is irrelevant to the question of whether the workers authorise the bargaining representative to organise industrial action. This question may properly be asked at the point when workers are about to take industrial action.[12]

6.16 The TCFUA added that the complicated provisions impose additional difficulties for workers from non-English speaking backgrounds and are likely to discourage such workers from voting.[13]

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7 ASU, *Submission 56*, p. 47; ASU, Victorian Private Sector Branch, *Submission 79*, p. 10.

8 Professor David Peetz, *Submission 132*, pp. 17-18.

9 Professor Andrew Stewart, *Submission 98*, pp. 8-9.

10 This attempt to manipulate the process by employers to frustrate and delay bargaining was also noted by the ETU(Qld), Submission 141, p.5.

11 ACTU, *Submission 13*, p. 37.

12 Ibid.

13 TCFUA, *Submission 11*, p. 35.

6.17 DEEWR explained that in order to reduce attempts to frustrate industrial action, a ballot order cannot be stayed if a challenge to the ballot order is made. This was in line with the suggestion put forward by Senior Deputy President Watson of the AIRC to change current provisions to address this issue. DEEWR added that employers will still be able to apply to FWA if they believe the industrial action is unprotected.[14]

### *Payments for a period of industrial action*

6.18 Part 3-3, Division 9 outlines payments relating to a period of industrial action. Under WorkChoices there was a requirement to withhold a mandatory four hours pay irrespective of the type of industrial action taken. Departmental officials explained that the current strike pay provisions prohibit the employer from paying wages effectively while a person is on strike. In particular the four hour rule continues to apply to unprotected action which means that if employees are on strike for 30 mins their pay is docked a minimum of four hours. However, it does not apply for protected action where it is a matter of deducting the amount of pay that reflects the time not at work.[15]

6.19 Clause 471 provides the employer with a choice of action in relation to protected action involving partial work bans or restrictions, either to accept the performance as full performance and pay the full amount of wages or to issue a partial work ban notice.[16] Officials explained that there will be a power in the regulations to prescribe how the proportion is to be worked out.[17]

6.20 The ACTU, in noting the requirement for an employer to deduct four hours pay during unprotected action regardless of whether poor management contributed to the stoppage, claimed that this requirement would have the perverse effect of encouraging stoppages of a minimum of four hours duration.[18] This view was supported by Professor Peetz who argued that while it is appropriate for employees to lose pay for the time they are absent from the job, it is inequitable to require that they are not paid for the hours that they do work. He offered the following examples to illustrate his point:

> …employees who stopped work for 20 minutes to collect money for the widow of a colleague killed at work were, technically engaged in unprotected industrial action. These employees lost, and would continue to lose under this provision, four hours pay for being off work for 20 minutes.

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14 DEEWR, *Submission 63*, p. 58-59.

15 Ms Natalie James, *Committee Hansard*, 11 December 2008, pp. 45-46.

16 Ibid, p. 46.

17 Ms Perdikogiannis, *Committee Hansard*, 11 December 2008, p. 47.

18 ACTU, *Submission 13*, pp. 44-45. See also Mr John Ryan, SDA, *Committee Hansard*, 17 February 2009, p. 7, Mr Anthony Tighe, National Secretary CEPU, *Committee Hansard*, 19 Febryary 2009, p. 23.

> Another group of workers were two minutes late back to work after a meeting with a Member of Parliament and had four hours pay deducted from their pay packets, while yet others lost four hours after a safety meeting started late and ran 30 minutes into work time.[19]

6.21 While welcoming the reforms to partial work bans, Professor Stewart also questioned why they were confined to protected action. He argued that such action is becoming rare and can be halted by FWA or the courts. He submitted that employers would welcome the flexibility to make a proportionate deduction with unprotected action as well because:

> …in many cases it is not clear until after the event whether action was protected or not.[20]

6.22 In a supplementary submission made at the request of the committee, Professor Stewart described the practical difficulties that can arise in distinguishing between protected and unprotected industrial action. He outlined the following instance: supposing industrial action lasted for an hour and the employer, believing it was protected, deducted an hour's pay from the employee's wages. If the action turns out to be unprotected, the employer would have breached clause 474(1) and the employees clause 475(1). While he acknowledged prosecution of either party is unlikely, he suggested it would be better to close this loophole by abandoning the protected or unprotected distinction and:

> …apply the rules set out in clauses 470–473 of the Bill to all forms of action, whether protected or not. But if that approach were rejected, clauses 474 and 475 could still be amended so as to provide a defence where the party concerned reasonably believed that the action was protected, in circumstances where the conduct in question would have been lawful had that belief been correct.[21]

6.23 The NTEU sought clarification regarding the following issue: 'when an employer stands down without pay an employee taking a protected partial ban, the employees are not required to continue working with no wages, and if they do not continue working, they are not taking unprotected action'.[22]

### *Committee view*

6.24 The committee majority notes that while the bill may attract some criticisms as recorded above, the new system allows for a fairer and more proportional response than under the current arrangements. In addition, the provisions provide clarity and flexibility for employers to respond. It notes the process for apportioning pay will be detailed in the regulations.

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19 Professor David Peetz, *Submission 132*, p. 18.

20 Professor Andrew Stewart, *Submission 98*, pp. 9-10.

21 Professor Andrew Stewart, *Supplementary Submission*, pp. 5-6.

22 NTEU, *Submission 105*, p. 6.

***Suspending or terminating protected industrial action by FWA***

6.25 Where protected action is causing or is threatening to cause significant harm to the economy or part of it, clause 423 authorises FWA to order the suspension or termination of the industrial action. Clause 424 provides that where the protected industrial action threatens the safety, health or welfare of the community or part of it, FWA must make an order to suspend or terminate it. Clause 426 provides that FWA may suspend protected industrial action if the action is causing significant harm to the relevant employer and employees.[23]

6.26 Senator Cameron raised questions about Australia's international obligations in relation to the suspension of protected action and DEEWR advised:

> The Department considers that the provisions of clauses 423, 424 and 426 are consistent with Australia's international obligations under the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention 87), the Right to Organise and Collective Bargaining Convention, 1949 (Convention 98) and the principles adopted by the ILO Governing Body Committee on Freedom of Association (CFA).[24]

6.27 Clause 426 of the bill permits FWA to suspend industrial action for a period if, among other requirements, it is satisfied that the protected industrial action occurring is causing, or threatening to cause, significant harm to any person other than a bargaining representative for the agreement or an employee who will be covered by the agreement. Sub-clause (4) sets out certain matters to be taken into account. The committee majority notes that the provisions dealing with significant harm to the bargaining participants use the concepts of significant economic harm and also require that where the industrial action is threatening to cause such harm, that the threat is imminent. The committee majority considers that it would be desirable to ensure consistency of the drafting and concepts between these two provisions, to avoid any unintended consequences in the interpretation of the provisions.

**Recommendation 8**

6.28 **The committee majority recommends that it would be desirable to ensure consistency of the drafting between these two provisions by providing that where industrial action threatens harm, the threat should be imminent, and the harm to the third party should be economic harm.**

## Conclusion

6.29 The committee majority notes the high threshold for FWA to order the suspension or termination of industrial action. It notes the likelihood that this power

23 Factsheet 10, 'clear, tough rules for industrial action'.

24 DEEWR, Supplementary information, tabled papers.

would be exercised only rarely in recognition of the right for employees to take protected action.

# Chapter 7

# Right of entry

7.1 Right of entry provisions in the bill have become a point of contention because of the view by some employers that a union's capacity to speak with members and potential members is potentially disruptive. Many employer organisations are fundamentally opposed to any change to the law which might assist employees to obtain advice and assistance from their union. In addition, employers see increased potential for disruption resulting from unions competing for membership in the workplace. The committee heard no information from employees which substantiates this line of speculation.

7.2 WorkChoices radically restricted union entry and inspection rights. The provisions were used by employers to frustrate and deny a union's access to its members and prospective members. A key change in the WorkChoices regime was to permanently remove the right of employees to meet with the union in the workplace where AWAs or a 'non-union' agreement was made. The TCFUA submission instanced the following:

> …at Feltex Carpets, in mid-2008, a union organiser was directed to meet with workers in the women's toilets area. The organiser was forced to stand in the doorway to the toilet, with female workers in the toilet area, and the male workers just outside.[1]

7.3 Yet it is clear that union access to workplaces is essential if the basic rights and entitlements of employees are to be protected. The role of unions in exercising this function has been an accepted feature of industrial relations for a hundred years. As Dr John Buchanan told the committee:

> The thing you have to remember when you are dealing with the evolution of labour law is Australia has had a bargain basement industrial relations system because our big space has been the vision of unions enforcing labour standards. If you go back to the classic labour law cases of Jumbunna, I think that was 1908, and the streamlined authority that came out of that the argument was unions were given the privileged position—it was recognised as a privilege position in the economy—because they enforced labour standards.[2]

7.4 Evidence of what happens when this tradition is threatened by deliberate attempts to weaken unionism was given to the committee at its hearing in Adelaide. SA Unions referred to the report by the Workplace Ombudsman which found 41 per

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1 TCFUA, *Submission 11*, p. 37. See also Ms Qi Fen, Asian Women at Work, *Committee Hansard*, 18 February 2009, p. 32 and tabled papers.

2 Dr John Buchanan, *Committee Hansard*, 18 February 2007, p. 42.

cent of 400 employers randomly audited were underpaying their staff. Mr Story advised the committee:

> …that this is what it has come to as a consequence of Work Choices and as a consequence of keeping unions out of workplaces, keeping them from doing their regular business of assisting with compliance with law. Now it is almost at the stage where it is as common to find a breach of employment rights, if you go around and audit them, as it is to find that someone is doing the right thing. There can be a lot of kerfuffle about whether someone's esoteric right is offended by someone going into a workplace and looking at records, but the truth is, by letting people go in there and look at those records, what is really found out is the day-to-day massive abuse of people's employment rights through underpayment of wages, lack of holiday pay, lack of penalty rates—all of those sorts of things. That is the issue. Never lose sight of what this legislation is trying to do. That is the bigger purpose, not these other factors.[3]

7.5 Ms Olivia Guarna from the Young Workers Legal Service supported this view, and stated that in the five years of operation it has recovered just over $500,000 in unpaid wages, entitlements and also in damages in sexual harassment and discrimination claims for young people.[4]

7.6 The CEPU described the current right of entry rules as being designed to 'have as many technicalities available to employers as possible to frustrate the union being able to get in and access its members.' Mr Dave Oliver, National Secretary of the AMWU told the committee:

> If an employer wants advice–any legal advice, advice on health and safety or advice on an industry issue–they can pick up the phone and get it. A representative from the Australian Industry Group can walk into the workplace unimpeded. Yet when an employee wants to get the same kind of access it is denied and it is hampered. So we see this legislation as going some way to open up, which will assist employees getting access to unions and advice in much the same way that employers do.[5]

7.7 In *Forward with Fairness*, the government promised to strike a balance between the right of employees to be represented by unions and the right of employers to run their businesses. The *Forward with Fairness Policy Implementation Plan* sets out the policy in detail. It states the policy position that right of entry laws will maintain the permit system, maintain requirements to give notice and comply with conduct requirements on site; and allow officials who have a right of entry permit to visit employees to hold discussions with them and with employees who are eligible to

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3 Mr Angas Story, SA Unions, *Committee Hansard*, 28 January 2009, p. 17.

4 Ms Olivia Guarna, Young Workers Legal Service, *Committee Hansard*, 28 January 2009, p. 18.

5 Mr Dave Oliver, AMWU, *Committee Hansard*, 19 February 2009, p. 34.

be members of the union. The bill facilitates these visits as well as entry by officials to investigate breaches of the law.[6]

## Proposed changes

7.8 Part 3-4 establishes a framework for officials of organisations to enter premises for the purposes related to their representative role under the act and under state and territory OHS laws. A key difference is that right of entry will be based on a union's right to represent the industrial interests of the employees who work on the premises rather than whether the union is bound by an award or agreement applying at the workplace.[7]

7.9 Employer organisations maintained concerns about the basis for the right of entry, expressing the view that only permit holders or employee organisations covered by an award or workplace agreement should have that right. They fear the provisions will lead to demarcation disputes.[8]

7.10 DEEWR explained that right of entry will apply for the purposes of investigating breaches of the Act or a fair work instrument, as well as for the purpose of holding discussions on workplace issues. The department pointed out that this is consistent with current arrangements.[9]

## Conditions of entry

7.11 Unions must comply with very strict conditions of entry as follows:

- they must hold a valid right of entry permit;
- the permit holder must give at least 24 hours' notice;
- the permit holder must set out the basis on which they have entry rights; and
- the permit holder must comply with any reasonable request from an employer that discussion take place in a particular place and that they take a particular route to get there.[10]

7.12 Sanctions will apply to a permit holder who misuses entry rights or acts inappropriately.[11]

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6 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 23.

7 DEEWR, *Submission 63*, p. 40.

8 See for example ACCI, *Submission 58*, Part 2, p. 206; AiG, *Submission 118*, p. 102-103; Stooke Consulting Group, *Submission 153*, p. 4.

9 Ibid.

10 Ibid, p. 41.

11 The Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, p. 89.

## Union entry to hold discussions

7.13 Clause 484 allows a permit holder to enter a workplace for discussions when there are one or more employees whose industrial interests the union is entitled to represent. A union official can hold discussions only with workers who want to participate. The committee majority notes that this provision restores balance and existed in the pre-WorkChoices WRA.

## Issues raised with the committee

7.14 Coalition senators and employer groups made much of a view that the right of entry scheme goes further than the election commitment.[12] The committee majority notes that they have ignored the details of the policy reproduced below which makes clear there is a right to meet with the union in non-working hours:

**8. RIGHT OF ENTRY**

**Labor will maintain the existing right of entry rules.**

Labor therefore will ensure that only fit and proper persons hold a right of entry permit and that permit holders understand the right to enter another's premises comes with significant responsibilities.

Under Labor, Fair Work Australia will ensure there are appropriate arrangements in place to enable duly authorised permit holders to meet with those workers who are eligible and who want to meet with them, in accordance with right of entry laws.

Right of entry laws balance the right of employees to be represented by their union with the right of employers to get on with running their business.

Right of entry laws allow union officials who have a right of entry permit from the Australian Industrial Registry to visit employees in three circumstances:

- To investigate breaches of industrial law, awards or agreements;
- To hold discussions with employees who are members or who are eligible to be members of the union; or
- To investigate breaches of occupational health and safety law.

Officials cannot enter an employer's premises without giving proper notice. They must follow reasonable directions from an employer when they are on an employer's site and comply with any occupational health and safety requirements that may apply to the site.

12 See ACCI, *Submission 58*, Part 2, p. 205; AiG, *Submission 118*, p. 98; Mr Mitchell Hooke, Minerals Council of Australia, *Committee Hansard*, 19 February 2009, p. 13.

An employer must not hinder a union official who holds a valid right of entry permit and who has entered their premises in accordance with right of entry law.

However a union official cannot abuse the rights and privileges that accompany a right of entry permit. A right of entry permit may be revoked where the Australian Industrial Registry determines that they are no longer a fit and proper person to hold a permit.[13]

7.15 This was evident to Professor Stewart who told the committee that critics were taking no account of the policy as a whole:

> It was never going to be possible to retain, word for word, the existing laws absolutely in their entirety. That was never going to be possible because the right of entry provisions were always going to be affected by other changes to the legislation. It is a matter of interpretation as to whether or not you think that is a significant departure. As I say, I understand why some employer groups, in particular, have claimed that it is a significant departure and I believe there is good reason for that if you look at the heading alone—not if you look at the policy as a whole.[14]

***Committee view***

7.16 The committee majority notes that under Work Choices (and the previous Act), a union had to be bound to an award or collective agreement, or have a member employed at the workplace who was bound to an agreement, if it was to enter a workplace to investigate a suspected breach. Similarly, the system restricted union entry to hold discussions with 'eligible' employees – that is, employees covered by an award or collective agreement that is binding on the union, and who are, or are eligible to become, members of the union.

7.17 Under the bill, right of entry will be linked to the right of the union to represent the industrial interests of the employee, rather than the union being party to or covered by the award or agreement. This decision is necessary because of the fundamentally different nature of awards under the Fair Work Bill.

7.18 Award modernisation brings together many awards into a single modern instrument. Modern awards generally bring together the scope of many (typically upwards of ten) old State awards (NAPSAs) as well as federal awards and enterprise awards.

7.19 Awards no longer have 'parties', as they are no longer made in settlement of a dispute. They can 'cover' unions, and this gives the union a right to enforce the award and to apply to vary it. Right of entry is instead linked to the union's right to represent

13 Forward with Fairness Policy Implementation Plan, p. 23.

14 Professor Andrew Stewart, *Committee Hansard,* 28 January 2009, p. 8.

the industrial interests of the relevant employees. (That is, its rules coverage, subject to any demarcation/representation orders that apply).

7.20 This change was necessary to ensure that the award modernisation process was not distracted or delayed (or completely derailed) by arguments over right of entry being linked to award coverage. This was a deliberate decision to ensure that modern awards were simple, 'stand-alone' instruments that dealt with minimum employment standards, and were not de facto complex and unnecessary demarcation orders. If right of entry had stayed linked to award coverage in the modern award framework, there would have been extensive debate and the creation of complex schedules replicating the extensive and complex union coverage clauses (in some cases dozens of clauses) from the original state and federal awards, including enterprise awards.

***Demarcation disputes***

7.21 As noted previously, the demarcation dispute issue has no basis in fact. It is speculation based on dredging of old memories, consistent with other fears held by employers, although it is difficult to know how seriously they are held across industry. When asked specifically about the potential for demarcation disputes, the AMWU responded:

> …I think the main demarcation issues have been done and dusted. There are clear understandings in industries, and where agreements cover at the moment, and we understand where the coverage boundaries are. There are areas here we cohabitate with other unions, if I could put it like that…[15]

7.22 This was supported by the LHMU which stated:

> …We have been fairly meticulous about working with other unions both by way of agreements and actual rule changes to each union's rules, to ensure that, rather than the overlaps—which, on paper, in rules, might seem to give a picture of confusion—both by way of agreements—there is complementary coverage rather than overlap. That is the way in which we have been working for probably the last 20 years. Maybe 15 to 18 years ago there was a bit of a spate of demarcations between unions that we were involved in. But we are confident that that can be minimised.[16]

7.23 The committee heard evidence that union demarcation disputes will be dealt with through the making of representation orders which will continue to be available under provisions regulating registered organisations. DEEWR advised that these provisions will be located in a separate Act dealing with organisations provided for in the forthcoming Transitional Bill. It indicated that representation orders will be available in a wider range of circumstances than at present.[17]

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15 Mr Dave Oliver, AMWU, *Committee Hansard*, 19 February 2009, p. 36.

16 Mr Tim Ferrari, LHMU, *Committee Hansard*, 19 February 2009, p. 53.

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

***Committee view***

7.24 The committee majority notes that any union demarcation issues will be addressed effectively using representation orders. The capacity of the AIRC to make these orders is in the Organisations Schedule (Schedule 1A) to the WR Act and is being retained (with the power to go to FWA). The intention is to retain that schedule and rename the Act through the transitional bill.

7.25 The Deputy Prime Minister has written to the COIL participants (including AMMA, AiG, ACCI HIA and others) in early January 2009 advising of this intention and seeking their views on any changes that should be made to those provisions to ensure certainty of existing union demarcation settlements and to ensure that the provisions are effective within the framework of the new Act. Consistent with its approach to consultation, the Government is consulting industry bodies and the ACTU.

7.26 A further protection in the bill is that permit holders must declare their eligibility to represent employees in their entry notice, including by referring to the relevant parts of the union's rules that give the union the right to represent employees. These rules clarify the industry scope and parameters around the employees that a union is entitled to represent.

***Access to employee records***

7.27 Employer submissions objected to provisions which they quite wrongly claimed to give unions carte blanche access to employee records. Union submissions supported the right for unions to inspect non-member records.[18]

7.28 Unions WA also told the committee that in their experience non-members may be underpaid as much as a union member and non-members gain the benefit of an inspection of time and wages records. Mr Robinson added that:

> In my 23 years in the union movement, I have never had nor ever heard of a complaint from a non-member – and non-members do complain to union secretaries, let me tell you – with respect to the inspection of records. In most cases they recognise the indirect benefit to them and I would refer you to submission no 7 from Mr Alex Falconer, in fact he highlights this very point in that brief submission.[19]

7.29 On the other hand a number of submissions raised particular concerns about inspection and copying of records.[20] The Minister has confirmed that right of entry and access to employee records will be the same as those that applied from 1988 to

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18 See CPSU-SPSF, *Submission 77*, p. 19.

19 Mr David Robinson, Secretary Unions WA, *Committee Hansard*, 29 January 2009, pp. 41-42.

20 See AMMA, *Submission 96*, pp.30-32; ACCI, *Submission 58*, Part 1, p. 37; ACCI *Submission 58*, Part 2, p. 209-211; Stooke Consulting Group, *Submission 153*, pp. 5-6.

2005 before WorkChoices. To further clarify concerns raised around access to member records, departmental officials detailed the change for the committee as follows:

> At the moment, post Work Choices, a permit holder is only allowed to inspect records that relate to their members when they go on site to investigate a breach. The bill proposes changing that to the pre Work Choices situation and there are a range or parameters and protections around that. They include, firstly, that fact that the records that are being inspected must be documents relevant to the breach; that is clause 482(1)(c). And, secondly, the clause I mentioned before about the need to identify the particulars of the breach, which is clause 518(2)(b).[21]

7.30 The department explained that the Privacy Act will apply to protect personal information of employees in records obtained by the union where the union is covered by the Privacy Act.[22] Where it applies, it prohibits the disclosure of personal information outside the primary purpose for which the information is obtained. Clause 504 provides another layer of compliance in relation to misuse of records and the permit holder risks the revocation of their permit in the event information is misused under section 510(1)(c).[23] DEEWR explained:

> New provisions in the Bill also allow for fines to be imposed against a person who uses or discloses employee records obtained while investigating a suspected breach in a way that contravenes the Privacy Act. These fines can be up to $6, 600 for individuals and $33, 000 for unions. The Bill also requires FWA to revoke or suspend all entry permits held by a permit holder who has breached these new provisions or has a Privacy Act complaint substantiated against them by the Privacy Commissioner.[24]

7.31 In response to concerns raised by Coalition senators about the protection of documents other than employee records about to be copied under 482(1)(c), officials stressed the wider protections (including sections 505, 508, 510, Division 4) available for the misuse of the right of entry powers in terms of accessing information which include revocation of a permit and other penalties.[25] The committee also notes that a person affected by a breach of the Privacy Act may complain to the Privacy Commissioner and a further penalty would be imposed via clause 510.[26]

7.32 The department further stated that they had difficulty envisaging a circumstance where commercially sensitive documents would be necessary for the

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21 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 22.

22 DEEWR, *Submission 63*, p. 42.

23 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 22

24 DEEWR, *Submission 63*, p. 42.

25 Mr Mark Cully, *Committee Hansard*, 11 December 2008, pp. 27-28.

26 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 66.

purposes of investigating a suspected breach of the act or instrument. Again they highlighted that these provisions have been in the act since 1996 and have not been an issue of misuse or abuse.[27] The DEEWR submission added:

> The department is not aware of any proceedings related to the alleged abuse of those provisions. However, the privacy protections contained in the Bill are stronger than those which existed prior to Work Choices Amendments.[28]

7.33 Since the bill was tabled the Minister has assured critics:

> We are allowing a right of entry permit holder to inspect only those documents that are directly relevant to investigating a breach of an award or the Act that affects a member of the union. Any claim this can be used to copy lists of names and addresses of employees is unfounded. Remember that this was the framework used for very many years, all the way to 2005. Privacy Act requirements apply and any misuse results in a significant fine and the cancellation of the permit.[29]

*Privacy Act protections*

7.34 The OPC welcomed the civil remedies included in the bill regarding the misuse of personal information by permit holders. It provided the following suggestions to clarify and enhance the privacy protections applying to information collected and handled under the 'right of entry' provisions on the bill:

- clarify that all organisations with permits to enter workplaces under the 'right of entry' provisions and collect employees' personal information are subject to the Privacy Act for that collection and handling of personal information;
- clarify that the collection of personal information under the 'right of entry' provisions is subject to the Privacy Act and not part of the current private sector 'employee records exemption' of the Privacy Act;
- the development of guidance material on good privacy practice for those organisations brought under Privacy Act coverage for the 'right of entry' provisions; and
- further consideration be given to clauses 504 and 510 to ensure they meet their objective to provide additional remedies for the misuse of employees' personal information obtained through the 'right of entry' provisions.

7.35 In addition the OPC advised that the purpose of the collection of personal information through the 'right of entry' provisions should more clearly reflect the

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27 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 29.

28 DEEWR, *Submission 63*, p. 42.

29 Hon Julia Gillard MP. Minister for Workplace Relations, Speech to the Australian Industry Group, 8 December 2008.

stated intention that the information be 'directly' related to the potential breach.[30] It explained:

> The Office encourages organisations to take a narrow view of what information is necessary. Reducing the amount of information that is collected also benefits organisations in reducing the compliance costs of handling personal information and assists in meeting the obligation to keep information secure from loss or misuse.[31]

7.36 The government has already acknowledged the valuable advice from the OPC and the technical and practical suggestions for amendments to the bill. These clarify and improve the privacy protections applying to information collected and handled under the right of entry and protected action ballot provisions of the bill. The government has stated that it will carefully consider these recommendations.[32]

***Committee view***

7.37 The committee majority believes the fears expressed by employer groups in relation to right of entry and access to employee records are unfounded. It notes that changes to the right of entry regime: to allow union access to non-union employee records, where this is necessary to investigate a contravention, and allowing all employees to meet with their union in the workplace regardless of the form of agreement applying, are not new and existed in the pre-WorkChoices WRA (and for very many years before that) without the kinds of consequences that some employers have suggested to the committee would occur. These are also balanced with appropriate obligations and sanctions apply for misuse.

7.38 In relation to access to employee records, the committee majority emphasises that permit holders cannot copy anything they wish. They can only inspect documents relevant to a suspected breach. Privacy protections apply. Despite this issue being well canvassed in the submissions and hearings, the committee heard of no instance of misuse or abuse of employee records by a union and the department was not aware of any such allegation. It notes that the protections for personal information are stronger and more comprehensive under the Fair Work bill than WorkChoices and there are also heavier penalties for the unauthorised use or disclosure of employee records.

30 Ibid, pp. 3-4.

31 Ibid, p. 8.

32 Media release, Hon Julia Gillard MP, 'Government welcomes submissions to Fair Work Bill Inquiry', 2 February 2009.

# Chapter 8

# Fair Work Australia

8.1 This chapter examines the establishment of Fair Work Australia (FWA), its structure, functions and powers and the establishment of the Fair Work Ombudsman which will form part of FWA.

8.2 From 1 February 2010, FWA will replace seven existing agencies:

- Australian Industrial Relations Commission;
- Australian Industrial Registry;
- Australian Fair Pay Commission;
- Australian Fair Pay Commission Secretariat;
- Workplace Authority;
- Workplace Ombudsman; and
- Australian Building and Construction Commission.

8.3 However, FWA will need to commence work early as the new bargaining framework and unfair dismissal changes will commence from 1 July 2009.[1]

8.4 It is intended that FWA will be a 'one stop shop' which provides employees and employers with information, advice and assistance on workplace relations issues. The work will be complemented by the new specialist Fair Work Divisions in the Federal Court and the Federal Magistrates Court.

***Jurisdiction and powers of courts***

8.5 Part 4-2 details the jurisdiction and powers of the Federal Court and Federal Magistrates Court in relation to matters arising under the Act. As under the current legislation, the Federal Court and Federal Magistrates Court have jurisdiction in most matters arising under the legislation but some matters can be brought before state and territory courts. Clause 570 deals with costs. Clause 569 allows the Minister to intervene on behalf of the Commonwealth if the Minister believes it is in the public

1 Media Release, Hon Julia Gillard MP, Minister for Employment and Workplace Relations, 'President of Fair Work Australia', 13 February 2009.

interest. The EM notes that the transitional and consequential bill will establish the Fair Work Divisions of the Federal Court and the Federal Magistrates Court.[2]

### *Small claims procedure*

8.6 Clause 548 details the small claims procedure which replicates what is currently in the WRA with two changes. It extends to the Federal Magistrates Court for the first time (from the state magistrates court), and it increases the amount for which an application can be brought before the courts from $10,000 to $20,000.[3]

8.7 While welcoming the increase in the monetary limit for small claims from $10,000 to $20,000, the Workplace & Corporate Law Research Group, Monash University, suggested clause 548(5) be amended to allow an employee to be represented by a lawyer as a matter of course and that funds be made available to engage duty lawyers on site at the relevant courts to assist employees with the small claims procedure.[4]

8.8 DEEWR explained that this procedure is intended to provide 'a simple and quick mechanism for dealing with claims of a relatively small amount'. Except where leave of the court is granted, lawyers are excluded from proceedings except where a lawyer is an employee or officer of a party to proceedings.[5] (see further discission below).

## Structure of FWA

8.9 Part 5-1 deals with the institutional aspects of FWA. Clause 575 establishes FWA which will replace the AIRC. FWA will consist of a President[6], a Deputy President, Commissioners and between four and six specialist Minimum Wage Panel members[7] as well as a general manager and administrative staff. All current AIRC members have been invited to become FWA members.[8] Appointments to FWA will be via a merit-based, consultative and bipartisan process which is outlined in the *Forward with Fairness – Policy Implementation Plan*.[9]

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2 EM, p. 335.

3 Mr De Silva, *Committee Hansard*, 11 December 2008, p. 48.

4 The Workplace & Corporate Law Research Group, Monash University, *Submission 8*, p. 1.

5 DEEWR, *Submission 63*, p. 54.

6 As FWA is to operate as an independent statutory agency, clause 583 specifies that the President is not subject to direction by or on behalf of the Commonwealth.

7 EM, p. 341.

8 On 13 February 2009 the Minister announced that the Hon. Justice Giudice has accepted the invitation to be the President of FWA.

9 Kevin Rudd, MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial relations, *Forward with Fairness- Policy Implementation Plan*, p. 25.

8.10 Clause 627 details the qualification for the appointment of FWA members. The President should be or have been a judge of a court or have knowledge of, or be experienced in: workplace relations, law business, industry or commerce. AiG believed the qualification requirements for the President are 'less onerous' than for the Deputy President. It submitted that the President should be required to have high levels skills and experience in workplace relations.[10]

8.11 The Women's Electoral Lobby Australia suggested the appointment of a specialist Commissioner for Equal Remuneration to deal with the applications for equal remuneration orders under clause 302 and that this person would be a member of any Minimum Wage panel. It also submitted that gender composition of the appointments should be a consideration to ensure it is representative of the general workforce.[11] Professor David Peetz agreed 'that the extent to which FWA is able to effectively deal with equal remuneration issues will depend on the expertise of members of FWA and its structure' and suggested equal remuneration be added to the fields of expertise required.[12]

## Functions, powers and organisation of FWA

8.12 Clause 576 details the functions of FWA. FWA will have the power to vary awards, make minimum wage orders, approve agreements, determine unfair dismissal claims and make orders on such things as good faith bargaining and industrial action, and to assist employees and employers to resolve disputes at the workplace.[13] Clause 576(2) limits dispute resolution functions to those covered under clause 595. Clause 577 requires FWA to exercise its functions and powers in a manner that is fair, just, quick and informal, and that avoids unnecessary technicalities and promotes harmonious and cooperative workplace relations.

8.13 DEEWR explained that informal processes will be encouraged to promote faster resolution. While being required to observe the rules of natural justice, FWA:

> …will also be able to deal with matters through a wide range of less technical, inquisitorial processes, including informal conferences, or by determining matters 'on the papers' without a requirement for parties to attend formal hearings in person.[14]

8.14 Clauses 612 to 625 deal with the organisation of FWA. AiG suggested that FWA should be granted a similar power to section 117 of the WRA. It provides for a full bench of the AIRC to issue an order restraining a state industrial authority from dealing with a matter that is the subject of a proceeding before the AIRC. AiG

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10 AiG, *Submission 118*, p. 111.

11 Women's Electoral Lobby Australia, *Submission 86*, p. 18.

12 Professor Peetz, Supplementary Submission, Tabled papers.

13 Factsheet 2 Fair Work Australia institutions – A one stop shop.

14 DEEWR, *Submission 63*, p. 57.

submitted that, while this provision has not been commonly used, it has been important.[15]

## Issues raised with the committee

### *Equal remuneration*

8.15 The Women's Electoral Lobby (WEL) Australia welcomed the inclusion of the principle of equal remuneration for work of equal or comparable value in the modern awards objective (clause 134) and the minimum wages objective (clause 284) of the bill. It suggested that the award modernisation process is an opportunity to include a requirement to include equal remuneration provisions in modern awards (Chapter 2, Part 2-3, Division 3, Subdivision C).[16]

8.16 Clause 302 provides for FWA to make an equal remuneration order when appropriate to ensure equal remuneration for men and women performing work of equal or comparable value. An application can be made by an employee, an employee organisation or the Sex Discrimination Commissioner. Clause 303 details that the order may increase but not reduce rates of remuneration. Clause 304 provides that the order may be implemented in stages.

8.17 The introduction of equal remuneration orders was welcomed in submissions. However, WEL claimed that equal remuneration has not been adequately defined, and suggested that the definition identify what is included in 'remuneration'. WEL noted that ILO Equal Remuneration Convention No. 100 contains a specific definition of 'remuneration' for the purposes of defining equal remuneration.[17] Also WEL argued that the drafting of the bill should recognise that work may be dissimilar but has equal or comparable value. It noted that this factor of undervalued feminised work has been recognised and applied in New South Wales and Queensland legislation.[18]

8.18 The committee majority draws the matter to the Minister's attention. The committee also notes that a wide range of issues relating to pay equity are being investigated by the House Standing Committee on Employment and Workplace Relations Inquiry into Pay Equity and associated issues related to increasing female participation in the workforce.

### *Legal representation*

8.19 The new system will be non-legalistic, the aim being to keep lawyers and contingency fee agents out of the process. Under clause 596, legal representation will

15 AiG, *Submission 118*, p. 111.

16 Women's Electoral Lobby, *Submission 86*, p. 9.

17 Ibid., p. 11.

18 Ibid.

only be allowed in exceptional circumstances where FWA determines that a party is unable to represent themselves.

8.20 Concerns over restrictions on legal representation have been expressed in some submissions.[19] Submissions questioned the need to alter the existing provision on representation without a proper analysis and data to indicate unfairness or inefficiency. While noting the intention to move away from formal processes, the Law Institute of Victoria questioned:

> …why legal representation is seen a synonymous with formality. Lawyers are at the forefront of alternative dispute resolution in all areas of the law.[20]

8.21 The Law Council of Australia raised issues including the retention of a flexible 'consent' model for legal representation, and the definition of 'lawyer' for the purposes of legal representation. It was concerned that 'a lawyer who makes a written submission under Parts 2-3 or 2-6 might yet be denied leave to appear before FWA even if they needed no permission to make those submission in the first place'. The Law Council of Australia also suggested the inclusion of an equivalent provision to 100(12) of the WRA enabling automatic representation for the Minister in certain circumstances.[21]

8.22 The status of Community Legal Centres (CLCs) was also raised with the committee. They provide assistance to vulnerable workers. The Employment Law Centre of Western Australia told the committee that an exemption from the requirement to seek leave to appear before FWA is currently granted to representative organisations and peak councils and argued that this should be extended to include practitioners at community legal centres.[22] CLC clients are often non-unionised workers, people from non-English speaking backgrounds, those with a disability and those with dependents.[23] The committee was told that the requirement to seek leave would add to the burden already faced by these organisations.[24]

8.23 The National Association of Community Legal Centres Employment Network submitted that Community Legal Centres (CLCs) should have an automatic right to appear along with unions and employer groups as:

> It is the policy of most CLCs working in this area to represent only clients who do not have access to other legal assistance. These people will have

19 See Jobwatch, *Submission 87*, p. 50; Law Council of Australia, *Submission 59*.

20 The Law Institute of Victoria, *Submission 101*, p. 7.

21 Law Council of Australia, *Submission 59*, pp. 5-6.

22 Mr Michael Geelhoed, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 2.

23 Ms Sara Kane, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 5.

24 Ms Toni Emmanuel, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 6.

> such disadvantage compounded if they are excluded from representation in their application to FWA.[25]

8.24 Evidence from DEEWR suggested that, in drawing up rules of representation before FWA, the government was concerned about costs and efficiency, and the degree of complexity of particular cases.[26] Legal and other professional representation would be limited to make the system quicker and more informal and to reduce costs. Clause 596 provided for representation by a lawyer or a paid agent with the permission of FWA. The intention is for people to represent themselves but they would 'be able to be represented by their bargaining representative or an employee, member or official of a registered organisation of which they are a member'. Subclause 596(2) recognises that some people are not able to effectively represent themselves.[27] The ACTU pointed out that it has always been the case that lawyers appear before the AIRC by leave and that leave has been rarely denied.[28]

### *Committee view*

8.25 Given the client base of vulnerable workers, the committee majority accepts the arguments put forward for Community Legal Centres to be exempt from the requirement to seek leave to appear before FWA.

### Recommendation 9

8.26 **The committee majority recommends that Community Legal Centres be exempt from being required to seek leave to appear before FWA.**

### *Arbitration and dispute resolution*

8.27 While welcoming the increased powers of arbitration, some submissions expressed disappointment over the limited scope of the FWA's discretion.[29] Unions Tasmania called for a general dispute settling power of arbitration in the bill and was concerned that some matters may only be arbitrated with the consent of the employer. It argued that powers of conciliation are strengthened by a reserve power of arbitration in the event that resolution cannot be reached.[30] Such a protection for employees was available under the Tasmanian Industrial Relations Act 1984 but was not part of this bill.[31]

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25 National Association of Community Legal Centres Employment Network, *Submission 106*, p. 4.

26 DEEWR, *Submission 63*, p. 44.

27 Ibid., p. 57-58.

28 Ms Cath Bowtell, ACTU, *Committee Hansard*, 17 February 2009, p. 45.

29 See CPSU-SPSF, *Submission 77*, pp. 12-15.

30 Unions Tasmania, *Submission 14*, p. 20.

31 Ibid., p. 22.

8.28 Submissions questioned whether the bill could resolve disputes regarding the application of the safety net. The ACTU noted that disputes will be conciliated but not arbitrated by FWA and claims of a breach can be pursued in court. It submitted that court remedies are not adequate and cited the following example:

> If a safety net confers a discretionary power upon an employer (such as a power to set rosters), and the discretion is used lawfully but unfairly, employees will have no effective remedy.[32]

8.29 The ACTU suggested that at the very least, FWA should have the power to arbitrate a limited range of disputes about the unfair exercise of employer discretions conferred by safety net instruments.[33]

8.30 The ASU submitted that FWA should have the power of binding arbitration with regard to resolution of award entitlement related disputes, NES entitlement related disputes, and disputes arising under enterprise agreements.[34]

8.31 The Shop, Distributive and Allied Union (SDA) argued that parties need to access arbitration in cases where there is an intractable dispute as there will invariably be disputes about the practical implementation of the employee rights guaranteed by the NES. SDA cited areas such as work on public holidays and rosters:

> An employer who requests an employee to work on a public holiday will always insist that their request is reasonable and the employee's refusal of the request is unreasonable.[35]

8.32 SDA noted that recourse to a court in such disputes was a costly process for both employee and employer when a resolution could more easily be made through the FWA.[36] SDA recommended including the right for employees to access arbitration when a dispute arose about the operation of the NES, an award or an enterprise agreement. This was supported by other organisations including the ASU.[37]

8.33 The Australian Nursing Federation also advocated that FWA should have the widest powers possible, including arbitration.[38] The TCFUA believed that arbitration will in many instances be very difficult to achieve and argued that access to arbitration should be available to settle all types of disputes, unencumbered by onerous

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32 ACTU, *Submission 13*, p. 50.

33 ACTU, *Submission 13*, p. 50.

34 See ASU, *Submission 56*, p. 53; ASU Victorian Private Sector Branch, *Submission 79*, pp. 13-14.

35 SDA, *Submission 12*, p. 12.

36 Ibid., p. 13.

37 ASU, *Submission 56*, p. 19.

38 ANF, *Submission 61*, p.5.

requirements. It feared that the court processes will not be conducive to the settlement of disputes and will inhibit employees from bringing actions.[39]

8.34 The ACTU welcomed the increased range of options open to a court to deal with breaches. It regretted that there is no provision for FWA to resolve interest-based disputes arising over the application of the agreement without the parties' consent. Nor could disputes be settled by arbitration.[40] It added that there is no constitutional impediment to FWA exercising non-judicial dispute settlement functions as the FWA had already been given powers to settle interest-based disputes arising during bargaining. It submitted that FWA should be able to arbitrate a limited range of disputes that arise during the life of the agreement.[41]

8.35 Dr John Buchanan suggested tribunal members be provided with clear guidelines for parties to reach agreement, and if this did not occur, members be given a 'free hand' in settling disputes. He pointed out that arbitration has worked well at the state level without 'stifling bargaining'.[42]

***Committee view***

8.36 The bill provides new powers to the independent industrial umpire, now FWA, which had been left largely powerless by WorkChoices. FWA will be given broad powers to assist in resolving workplace issues at the request of one party, and can mediate, conciliate, call compulsory conferences, make orders and (in defined situations) issue workplace determinations.

8.37 Apart from limited exceptions where public interest concerns warrant intervention, FWA will not have power to arbitrate the outcome of a dispute. It is up to the parties to bargain to achieve a resolution. The new good faith bargaining rules will ensure that all parties conduct themselves properly at the bargaining table. The ability for one party to request FWA to guide and conduct conciliation will allow parties who are having difficulty in achieving constructive negotiations with the other party to seek FWA's assistance. Currently, for the AIRC to be involved in any way, all parties must agree and this effectively rewards recalcitrant parties (be they (employers or unions) who are not prepared to engage in a reasonable way. It is important to note however that it is inherent in all aspects of the bill that parties are entitled to take a tough stance in negotiations.

8.38 The committee majority notes, however, that FWA will be able to amend an award at any time in order to resolve ambiguities or uncertainties and it will undertake

39 TCFUA, *Submission 11*, pp. 47-48.

40 ACTU, *Submission 13*, p. 50.

41 Ibid., pp. 51-52.

42 Dr John Buchanan, *Submission 150*, pp. 4-5. See alsp Dr Buchanan, *Committee Hansard*, 18 February 2009, p. 40.

four-yearly reviews to ensure the award remains relevant and reflects community standards.

8.39 FWA will not be able to settle disputes about the application of the NES or a modern award by arbitrating. This is because settling a dispute about the application of the NES or modern award would involve determining existing rights and the exercise of judicial power. It is important to note that there have always been constraints on the AIRC and its predecessors exercising judicial powers given that they also exercise arbitral functions. Parties can enforce their rights under the Act, the NES, a modern award or an enterprise agreement in a court.

8.40 Submissions have raised the concern that a court when enforcing a provision of an award or agreement does not have regard to issues of general fairness. A court's role is to enforce a provision of the instrument or the Act as it is drafted, and a court cannot create a new or varied right. However, courts are able to examine whether conduct is reasonable or fair as part of an enforcement task where those concepts are included in the instrument being enforced. It is open to the legislature when drafting the Act, to those drafting agreements and to FWA when establishing award terms to set out the matters to be considered in the exercise of a particular right.

8.41 There are a significant number of NES and award entitlements that include concepts such as fairness or reasonableness. For instance, a person's entitlements under the NES to be absent and to be paid on a public holiday would depend on whether the:

- employee is a national system employee;
- day is/was a public holiday within the meaning of the NES;
- day is/was a public holiday in the place where the employee is/was based for work purposes;
- employer requested that the employee work; and
- employer's request was unreasonable or the employee's refusal to work was unreasonable.

8.42 In deciding whether an employer contravened this provision, a court would make an assessment of these elements, and would consider all of the relevant circumstances in deciding whether the employer's request was unreasonable or the employee's refusal to work was reasonable.

8.43 Examples of award clauses that include concepts of fairness or reasonableness include those relating to the working of overtime, casual conversion, reasonable deductions from salary, probation periods and transport home after working overtime. Similarly, the concept of reasonableness is used in a number of the NES and in other provisions of the bill.

8.44 The bill includes significant improvements in the enforcement regime that will make it more effective and less formal. The Federal Court and the Federal

Magistrates Court and any state court exercising powers under the bill will be able to make any order they consider appropriate to remedy a contravention. This may include injunctions and the courts will not be restricted to just imposing a penalty or ordering payment of an unpaid amount.

8.45 The bill encourages parties to use FWA mediation or other dispute resolution processes before taking the step of going to the court. When considering whether to make a costs order, the courts will be able to take into account whether or not a party has genuinely participated in FWA mediation or a dispute resolution process.

8.46 The courts will continue to use mediation where appropriate and FWA will be able to pursue arrangements with courts to provide mediation services on their behalf in some circumstances. The current small claims mechanism will be extended to the Federal Magistrates Court. The monetary limit under the small claims procedure will be increased to $20,000.

8.47 When dealing with a matter under the small claims procedure, the Federal Magistrates Court (or a state or territory magistrates court) may act in an informal manner. It will not be bound by formal rules of evidence and it may act without regard to legal form and technicality. These changes will make the process of enforcing entitlements simpler and easier to access and the remedies available will be better able to remedy the effect of a contravention.

8.48 It is also worth noting that the department is committed to a post-implementation review of the workplace relations system under the government's best practice regulation requirements. This review will be undertaken in consultation with the Office for Best Practice Regulation. The effectiveness of the enforcement and dispute resolution regime would form part of that review.

***Review of enterprise agreements***

8.49 Clause 653 directs the General Manager of FWA to review the developments in making enterprise agreements every three years on the following persons:

- women;
- part-time employees;
- persons from non-English speaking backgrounds;
- mature age persons;
- young persons; and
- any other persons prescribed by the regulations.

8.50 Professor Peetz submitted that three year reporting is too infrequent for initial analysis of how the new system is operating. He recommended reporting every two years, perhaps then reverting to three years once the system is bedded down. He also recommended further guidance be provided to the General Manager on the breadth of

information to draw on in undertaking the reviews. Examples include data collected by FWA and surveys commissioned or published.[43]

## Fair Work Ombudsman

8.51 Part 5-2 establishes the Office of the Fair Work Ombudsman (FWO) which will replace the current Workplace Ombudsman. It will form part of FWA and will be responsible for compliance and education activities together with inspection and enforcement functions.[44] FWA will ensure compliance with new laws, with a new Inspectorate to investigate and enforce breaches, including where necessary through the courts.[45] Clause 683 allows the FWO to delegate their functions to a staff member or an inspector. Several submissions were critical of the organisation of the Office.

8.52 Professor Peetz offered the view that the education function would be best separated from the enforcement function to ensure it does not gradually take precedence. In a supplementary submission he explained that the function in clause 682 to promote compliance is appropriate but he questioned promoting ' harmonious and cooperative workplace relations'. Undertaking both functions would, in his view, create role ambiguity and this contributed to the decline of effective inspection in the 1990s.[46]

8.53 He agreed with the view put forward by the Workplace & Corporate Law Research Group, Monash University which told the committee:

> …this type of role would be more appropriately located within FWA, rather than within the Fair Work Ombudsman. The promotion of harmonious and cooperative workplace relations sits uncomfortably with a body such as the Fair Work Ombudsman that is likely to be predominantly compliance-focused…[47]

8.54 The Workplace & Corporate Law Research Group also offered the view that that the establishment of FWA is an opportunity for it to take on a more expansive dispute prevention capability modelled on the Advisory Services Division of Ireland's Labour Relations Commission and/or, the information, advisory and training services provided by the Advisory, Conciliation and Arbitration Service in the UK.[48]

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43 Professor David Peetz, *Submission 132*, p. 20.

44 Ms Sandra Parker, *Committee Hansard*, 11 December 2008, p. 49.

45 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.

46 Professor David Peetz, Supplementary Submission, Tabled papers.

47 The Workplace & Corporate Law Research Group, Monash University, *Submission 8*, p. 2.

48 Ibid.

8.55 DEEWR stated that the intention of the FWO will be to encourage voluntary compliance through educational activities but would take more formal steps through court proceedings, enforceable undertakings or compliance notices. It explained that these new compliance mechanisms would provide more options to resolve contraventions at the workplace level.[49]

8.56 The Commonwealth Ombudsman raised questions about the use of the term 'ombudsman' and the 'proliferation' of the use of this term. He noted that in one sense the increasing number of offices described as ombudsman has become a 'mark of public respect associated with fair and independent resolution of grievances'. On the other hand there has been 'unconstrained and unsystemic use of the term'. In the case of the Fair Work Bill, the Commonwealth Ombudsman acknowledged the typical ombudsman functions such as investigating complaints and monitoring compliance as well as 'less typical functions' such as promoting harmonious and cooperative workplace relations, commencing legal proceedings to ensure legislation and issuing compliance notices. He also pointed out a 'marked departure' from the classic ombudsman model in two provisions that authorise the Minister to give written direction 'of a general nature' to the Fair Work Ombudsman, and to direct the Ombudsman to provide a specified report relating to the functions of the office (cl 684, 685). The Fair Work Ombudsman must comply with both kinds of direction.[50]

***Fair work inspectors***

8.57 The powers of workplace inspectors will be largely retained by clause 709 and include the ability to:

- enter premises where work is performed, or where documents relating to the business are kept;
- inspect any work, process or object;
- require the production of documents; and
- interview a person (with their consent).

8.58 In addition, inspectors will have new powers to:

- copy relevant documents and records on premises (clause 709);
- require a person suspected of breaching a civil remedy provision to give their name and address (clause 711); and
- take an assistant on to premises to assist in an investigation (clause 710).[51]

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49 DEEWR, *Submission 63*, p. 53.

50 Professor John McMillan, Commonwealth Ombudsman, 'What's in a name? Use of the term 'ombudsman',Tabled papers.

51 DEEWR, *Submission 63*, p. 53.

8.59 DEEWR advised that these new powers are consistent with inspector powers in other state and Commonwealth legislation.[52]

8.60 For the first time, inspectors will be able to investigate and enforce common law safety net entitlements.[53] DEEWR explained:

> Fair Work Inspectors would not be able to investigate or enforce the safety net contractual entitlements unless they reasonably believe there is also a breach of a statutory safety net entitlement. Inspectors can only enforce such contractual entitlements on behalf of an employee if they [are] also enforcing a statutory safety net entitlement. This ensures that Fair Work Inspectors do not intrude into purely contractual matters. [54]

### *Committee view*

8.61 The committee notes that inspectors will have a wide range of enforcement powers including the new enforcement tools of accepting enforceable undertakings, improvement notices and issuing 'on the spot' penalties. These new tools will allow a significantly increased amount of effective enforcement activity to be conducted and a wider range of options short of a full prosecution to deal with contraventions in an appropriate and effective way.

52 Ibid., p. 54.

53 Factsheet 2 Fair Work Australia institutions – A one stop shop

54 DEEWR, *Submission 63*, p. 54.

# Chapter 9

# Transfer of business

9.1 Chapter 2, Part 2-8 establishes new transfer of business provisions to ensure agreements cannot be evaded and that transferring employees are not disadvantaged. WorkChoices provided that instruments transferred only in the event that employees were taken on by the new employer and instruments only transferred for 12 months. After that employees reverted to whatever applied in the workplace.[1]

9.2 The WRA does not define 'transmission of business'. This resulted in a number of tests being developed by the courts to determine whether a transmission has occurred.[2] Nor did the WRA adequately protect the conditions and entitlements of employees resulting from corporate restructuring.

***Proposed changes***

9.3 To remedy this, clause 311 of the bill introduces a specific test for transfer of business which occurs when:

- the employment of an employee of the old employer is terminated;
- former employees are retained by the new employer within three months;
- the work performed is the same, or substantially the same; and
- there is a connection between the old and new employer.[3]

9.4 Thus, the bill broadens the circumstances in which a transfer of business occurs and defines the focus of the work being performed rather than the character of the business.[4] It retains the provision that instruments transfer only in the event that employees transfer. There is no 12 month limitation. Instruments move permanently unless and until the employees and employer decide to make a new bargain.[5]

9.5 The creation of modern awards means that the transfer of awards will be less relevant in the future and the main issues is whether enterprise agreements will transfer.[6]

9.6 Part 2-8, Division 3 provides that FWA has a role in determining the application of agreements of the new employer to transferring employees, and

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1 Ms Natalie James, *Committee Hansard*, 11 December 2008, p 19.

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

3 EM, p. 269.

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

5 Ms Natalie James, *Committee Hansard*, 11 December 2008, p 19.

6 DEEWR, *Submission 63*, p. 56.

transferred instruments to non-transferring employees. The department described these powers as 'remedial orders' where, subject to a number of criteria such as views of the employees and employer, questions of disadvantage and public interest, FWA has the ability to change the default rule.[7]

9.7 While welcoming the intention of the transfer of business provisions, the ACTU noted that a transfer of business only occurs if an employee goes to work for the new employer within three months. It argued that this allowed new employers to avoid the provisions by withholding offers of employment for three months or more and advocated that this period be extended.[8]

9.8 Employer groups were concerned about the new definition of a transfer of business and argued it may force incoming employers to take on existing enterprise agreements and to continue to run operations in ways which have not been efficient, and this may affect whether transferring employees are taken on.[9]

9.9 DEEWR responded to concerns raised by employer groups by stating:

> …there is no greater disincentive as a result of the provisions of this bill for a purchaser of a business to bring across the employees than there is under the existing framework. In essence, that incentive remains the same as it is at the moment. It ultimately is a business decision in terms of the skill set of the employees and a whole range of factors that the business will take into account. In those terms, we do not see any significant change in this bill.[10]

***Minimum employment period***

9.10 The TCFUA objected to clause 384(b) (iii) which may allow an employer to require an employee to serve another minimum employment period to access unfair dismissal when they may have already worked for the old employer for decades. It argued that this provision will:

> …only encourage sham transferring arrangements, which are in fact, already a feature of the TCF industry. It is not uncommon, for example, for a business to close one day and re-open the next under a different name but operating out of the same premises, with the same directors and performing the same work[11]

9.11 DEEWR officials explained that in relation to the NES, the employer will have a choice to recognise service in relation to annual leave and redundancy pay. If the new employer does not agree to recognise service, these entitlements must be paid

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7 Ibid.; see also DEEWR, *Submission 63*, p. 18.

8 ACTU, *Submission 13*, p. 52.

9 See ACCI, *Submission 58*, p. 60; AiG, *Submission 118*, p. 78-82; Stooke Consulting Group, *Submission 153*, pp. 7-8.

10 Mr John Kovacic, DEEWR, *Committee Hansard*, 19 February 2009, p. 76.

11 TCFUA, *Submission 11*, p. 27.

out. There will also be a choice in relation to the minimum employment period for unfair dismissal protection. Previous service will be recognised unless the employer informs transferring employees in writing of a requirement for a new minimum employment period.[12]

***Entitlements***

9.12 The ACTU pointed out that the bill appears to allow a new employer to offer employment to a transferring employee on terms that they lose their accrued leave entitlements. It added that if the employee refuses this offer, it appears they will not be entitled to a severance payment from the old employer.[13]

9.13 DEEWR explained that the provisions deal with different entitlements in different ways, reflecting the current approach to termination change and redundancy clauses in awards as developed by the AIRC. For example with annual leave there are two options where the transaction occurs:

> …The options are that the old employer pays everyone out with their annual leave or the new employer makes a decision to take on the accrued entitlements of any transferring employees.[14]

9.14 For other entitlements where this is not such a choice, the department reassured the committee that the entitlement moves over.[15]

9.15 The committee was concerned to hear the following example from the Australian Nursing Federation (ANF):

> Our experience in Victoria, certainly in late 2007, after the introduction of the legislation, and in early 2008, is that there were some six facilities where nurses who had been long-term employees of the facility, which was then purchased by another private aged-care employer, were dismissed during the probationary period. Despite the fact that their employer had received funds from the previous owner to cover the entitlements, those nurses were excluded under the probationary period. We attempted to fight that in the Australian Industrial Relations Commission. We got a favourable decision, which was then unfortunately overturned by a full bench. We are very keen on that provision being amended in the Fair Work Bill.[16]

9.16 This example was raised with the department because it intersected with the NES and unfair dismissal provisions (see chapter 5). The department advised that terminating employment unfairly to avoid LSL provisions would be a breach of the

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12 DEEWR, *Submission 63*, p. 56.

13 ACTU, *Submission 13*, p. 53.

14 Ms Natalie James, *Committee Hansard*, 11 December 2008, p 20.

15 Ibid.

16 Ms Lisa Fitzpatrick, Australian Nursing Federation, *Committee Hansard*, 16 February 2009, p. 52.

general protections.[17] In response to a Question on Notice[18] concerning the ANF example set out above, the Department advised:

> Under the Fair Work Bill a transferring employees' previous service for the purposes of the minimum employment period for unfair dismissal will be recognised unless the new employer expressly informs transferring employees, in writing, of a requirement for a new minimum employment period. This is in contrast to the existing position, where the Australian Industrial Relations Commission has held that a new qualifying period applies unless it is expressly waived.
>
> If the new employer is an associated entity of the previous employer, the employee's service with the previous employer will be taken to be continuous for the purposes of the unfair dismissal minimum employment period.
>
> These provisions were established to reflect a balance between protecting employees who have already served a minimum employment period for unfair dismissal and the needs of the new employer.
>
> In relation to the specific question about long service leave, the General Protections provisions in the Bill provide that an employee cannot be dismissed in order to prevent the employee from exercising a workplace right. A workplace right includes a benefit (for example long service leave) under a workplace law or workplace instrument.

9.17 The committee majority is concerned that this protection will not be adequate against employers evading their responsibilities in a situation such as the one described by the ANF.

**Recommendation 10**

9.18 **The committee majority recommends that a probationary period after a transfer of business should not be required to recommence and they should be treated as existing employees.**

***Transfer of instruments***

9.19 Employers were concerned about the requirement to take on the full 'contractual' obligations (that is, their obligations under an enterprise agreement) of a business which has been taken over.[19] There are significant disincentives to purchasing businesses if they are not doing well financially.

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17 Ms Natalie James, DEEWR, *Committee Hansard*, 19 February 2009, p. 77.

18 Senator Marshall, 16 February 2009, Hansard p. 77.

19 Telstra, *Submission 97*, p. 11.

9.20 In response to these concerns, DEEWR explained that although a business will come with contractual obligations, under Division 3, Part 2-8 , FWA will have the capacity to rationalise the instruments of employment that apply and such a request may be considered before or after the transfer.[20]

9.21 Employers were also concerned about whether they will be obliged to take on the employees of the business. DEEWR explained that the bill does not impose an obligation on a new employer to employ the employees of the old employer.[21]

9.22 The CPSU supported the new provisions and stated:

> …the issue is about balancing the legitimate interests of the business and those employees to have their conditions protected and that that is the question for the legislation. We think that the provisions that are proposed in the bill do that fairly.[22]

## Conclusion

9.23 The bill contains anti-avoidance provisions. It provides a simple test for when a transfer of business occurs to ensure agreements cannot be evaded and that transferring employees are not disadvantaged. The committee has heard of many employees disadvantaged in this way. The bill includes protections for a transferred employee's accrued NES entitlements. The bill also provides for greater flexibility and certainty for employers and employees in dealing with transfer situations. FWA will be able to determine the application of agreements and named employer awards of the new employer to transferring employees and transferred instruments to non-transferring employees, including prior to the business transfer occurring.

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20 DEEWR, *Submission 63*, p. 55-56.

21 Ibid, p. 56.

22 Ms Melissa Donnelly, Senior Legal Officer, CPSU, *Committee Hansard*, 16 February 2009, p. 24.

# Chapter 10

# Outworkers

10.1 The government recognises that outworkers are a vulnerable sector of the workforce requiring special protection. In the second reading speech the Minister stated:

> The government is aware that outworkers are an acutely at-risk sector of the Australian workforce and require special protections, so the bill ensures that awards may include special provisions dealing with outworkers…[1]

10.2 While recognising that the government is committed to protection for outworkers and welcoming the provisions to protect these workers from exploitation, submissions raised a number of issues which require clarification.

## Deeming provisions

10.3 Regarding the constitutional issues that outwork raises, the TCFUA noted the government's commitment to introduce legislation that deems all outworkers as employees and urged the government to include these deeming provisions in the bill.[2] It was suggested that some of the issues raised around the definition of outwork and lack of clarity could be resolved by deeming outworkers to be employees.[3]

10.4 FairWear Victoria told the committee that outworkers were subject to continued exploitation:

> …often starting with OH&S or Award breaches in a small or large factory, and continuing further down the supply chain, with the abuses and pay often becoming worse as the chain lengthens.[4]

10.5 Drawing the committee's attention to clauses 12, 57 and 200, FairWear Victoria pointed out that the wording will undermine supply chain transparency, providing cover for exploitation. Opting out of the outworker terms of the award was opposed.[5]

10.6 It was pointed out that the term 'outworker entity' may be used to limit application of outworker terms of awards to those entities which directly employ

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1 Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 25 November 2008, p. 11191.

2 TCFUA, *Submission 11*, p.11. Also advocated by FairWear Qld, *Submission 49*, p. 2.

3 FairWear Victoria, *Submission 90*, p. 6.

4 Ibid.

5 Ibid.

outworkers, or where work given out 'is reasonably likely to be performed by outworkers'. FairWear Victoria and Queensland argued that TCF Award obligations apply whenever work is given out regardless of whether an outworker is engaged and suggested the use of the term 'entity giving out work'.[6]

10.7 The TCFUA also suggested the term ‘outworker entity' in section 12 is misleading because it suggests that outworkers need to be engaged by the entity. They recommended amending the term ‘outworker entity’ to ‘TCF entity’ to clarify that an entity operating in the TCF sector will attract obligations.[7]

## Non-TCF outworkers

10.8 The TCFUA noted the definition of outworker in section 12 and asked whether this included all types of outworker arrangements for all purposes.[8] FairWear Queensland regarded the definition in clause 12 as including those defined as independent contractors in the TCF industry, but not workers outside the industry. It submitted that the definition should reflect the breadth of activity recognised in the ILO convention on Home Work.[9]

10.9 Submissions sought clarity about whether clause 27 may inadvertently remove current protections in state law from non-TCF outworkers.[10] The TCFUA explained that clause 27 preserves state and territory laws relating to outworkers but has the effect, because of the definition of outworker in section 12, of displacing the operation of the *Industrial Relations Act 1999* (Qld) and the *Fair Work Act 1994* (SA) as they apply to non-TCF outworkers. This means that state laws in relation to TCF outworkers are preserved but those relating to non-TCF outworkers will be extinguished by the operation of the bill.[11] It was recommended that clause 27 be amended to ensure these state protections for non-TCF outworkers are maintained. Alternatively FairWear Queensland suggested that the definition of outworkers be equal to the broadest currently used in any state or territory.[12]

10.10 DEEWR told the committee that their current discussions with the TCFUA are focussed on TCF outworkers as they are particularly vulnerable and regulated differently. The regulation of other outworkers is a newer area, reflecting an emerging area of work.[13]

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6 Ibid.

7 TCFUA, *Submission 11*, p. 12.

8 Ibid.

9 FairWear Qld, *Submission 49*, p. 2.

10 FairWear Victoria, *Submission 90*, p. 4.

11 TCFUA, *Submission 11*, p. 12.

12 FairWear Qld, *Submission 49*, p. 3.

13 Ms Natalie James, DEEWR, *Committee Hansard*, 19 February 2009, p. 65.

## NES

10.11 The TCFUA noted that the NES are expressed to apply only to national system employees, not outworkers. It suggested an amendment to provide that non-employee outworkers may be covered by the NES.[14]

## Award issues

10.12 The Textile, Clothing and Footwear Union of Australia was concerned about the exclusion of outworker terms of the TCF award, specifically that clause 57 of the bill does not compare well with section 349 of the WRA. The TCFUA pointed out that the clause appears to exclude the TCF Award where an enterprise agreement exists, representing a diminution in the protection of outworkers. It recommended an amendment of clause 57 to provide that outworker terms of a modern award will be included in all circumstances.[15]

10.13 The TCFUA also recommended the removal of clause 200 of the bill and argued:

> If the union is not a party to the enterprise agreement, we have grave concerns about the enforcement of the enterprise agreement outworker terms. It is also consistent with the amendments suggested to section 57 of the Bill…In circumstances where an outworker is covered by an enterprise agreement, the outworker terms of the modern award will continue to apply, therefore section 200 of the Bill is not necessary.[16]

10.14 TCFU also suggested redrafting clause 140, which details what a modern award may include, to ensure that an employer is bound in respect of both its employee and its contracting arrangements.[17] An additional concern was the reference in clause 140(1)9B) to 'reasonably likely'. This would permit the argument that it is not reasonably likely to engage outworkers and therefore the outworker provisions in the TCF Award do not apply. The TCFUA pointed out that:

> If a business is able to deny the applicability of the TCF Award on the basis of what it is 'reasonably' likely to do, this would require the TCFUA to first find the outworker and then trace the work back up along the supply chain in order to enforce the TCF Award. This would be a near impossible task given the invisible nature of much of the work performed by outworkers and the fact that companies in the industry very rarely admit to using outworkers. [18]

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14 TCFUA, *Submission 11*, p. 16.

15 TCFUA, *Submission 11*, pp. 13-14.

16 Ibid.

17 Ibid., pp. 14-15.

18 Ibid.

10.15 As provisions for the establishment of Boards of Reference have not been allowed for in modern awards, the TCFUA also suggested the bill state that modern awards may include terms establishing Boards of Reference. It argued that:

> …the system of outworker protection rests upon the registration of companies with the Boards of Reference, and the Boards of Reference are a crucial part of ensuring the transparency of the supply chain through the registration system.[19]

10.16 The committee majority notes that clause 140 allows a modern award to include pay and conditions that apply specifically to outworkers. It is intended to give FWA scope to include terms in modern awards dealing with outworkers, in particular terms dealing with the chain of contract arrangements, registration of employers, employer records keeping and inspection.[20]

## Agreements

10.17 FairWear wanted to ensure that there is no scope for employers to opt out of outworker provisions. It feared that the legislation may allow enterprise agreements to displace outworker terms as outwork is not a discrete section of the TCF workforce. It believed it may be too easy for employers to just say the provisions do not apply to them as they have no outworkers. [21]

## Right of entry - 24 hour notice and the special circumstances of the TFC industry

10.18 The TCFUA argued that the 24 hour notice requirement undermines current protection for workers in NSW and QLD where no notice is required to investigate suspected breaches of OHS legislation. It submitted that the TCF industry should receive an exemption from this requirement.

> The notice requirement is frequently used by employers in the sector to frustrate the purposes of right of entry – records or evidence are frequently removed or the workforce is dramatically reduced in 24 hours so that we are unable to speak to the majority of workers.[22]

10.19 This claim was supported by Associate Professor Lucy Taska and Dr Anne Juror from the School of Organisation and Management at UNSW who agreed that right of entry without notice is necessary to protect workers in the TCF industry.[23] Citing cases where the notice period has been used to frustrate the purpose of the right

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19 Ibid.

20 EM, p. 91.

21 Ms Liz Thompson, Victoria FairWear, *Committee Hansard*, 16 February 2009, pp. 4-6.

22 TCFUA, *Submission 11*, pp. 44-45. See also Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, p. 3.

23 School of Organisation and Management, UNSW, *Submission 143*, p.2.

of entry, FairWear Qld advocated the removal of the requirement for 24 hours' notice of entry for the TCF sector.[24]

10.20 The committee majority notes the intention for the Minister to provide specific amendments to deal with the right of entry provisions as they apply to outworkers.

### *Access to employee records*

10.21 TCFUA and FairWear Victoria said that access to employee records is essential to trace work in a complex supply chain for outworkers. FairWear Victoria explained:

> A majority of the work in TCF takes place in the informal sector, and it is often the case that only through complex calculations of the value and volume of work produced by a particularly label can the hidden workers – often outworkers or small scale sweatshop workers – actually be uncovered. This painstaking work is undertaken in most jurisdictions by the Textile, Clothing and Footwear Union, given the lack of any other inspectorate with the necessary powers.[25]

## Multi-purpose premises

10.22 The right of entry provisions specify that permit holders may not enter any part of premises used mainly for residential purposes but will allow permit holders to enter premises used for mixed purposes, where appropriate.[26]

10.23 FairWear Victoria claimed there is a lack of clarity in clause 481 in the reference to 'premises'. Outworkers are often not on the premises where the records of employment/outsourcing/supply chain are kept. It was submitted that access to all levels of the work chain is essential. It also noted that the requirement to have a member of the permit holder's organisation on the premises also creates difficulties. Outworkers are often unaware that they are allowed to be union members. It argued that for the TCF industry, right of entry and access to records should not be conditional on the requirement to have a union member in the workplace. FairWear Victoria also advocated an amendment to clause 493 to ensure there are no barriers to access premises where work is being performed,[27] which was supported by the TCFUA.[28]

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24 FairWear Qld, *Submission 49*, p. 6.

25 FairWear Victoria, *Submission 90*, pp. 9-10. See also Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, p. 2-3.

26 DEEWR, *Submission 63*, p. 41.

27 FairWear Victoria, *Submission 90*, p. 8. See also Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, p. 3.

28 TCFUA, *Submission 11*, p. 44.

10.24 The TCFUA claimed to be the only body regularly investigating compliance with legal minimums, regardless of whether it had members. If the TCFUA was unable to investigate breaches, despite the absence of members, then nobody else would.[29] In summary, the TCFUA submitted that in the TCF sector there should be:

- no requirement for a member of the TCFUA to be present in the workplace;
- no requirement for a worker to be present at the premises;
- no requirement of 24 hours' notice of entry; and
- no prohibition on entry to residential premises.[30]

10.25 Ms Liz Thompson, Campaign Coordinator, Victoria FairWear told the committee of the mandatory code in NSW which binds retailers to:

> …actually knowing what is going on in their supply chain. It provides the incentive for them to be honest and transparent about where the work is going, to track exactly where the work is going, because if something is going wrong at the very bottom end that can be held liable at the top.[31]

10.26 The committee has a long-standing interest in the condition of workers employed in the TCF industry. Even in the acrimonious circumstances of the WorkChoices inquiry, when the committee was sharply divided on nearly all issues, there was agreement that the conditions of workers in the TCF industry required special consideration, including remedial action against exploitation. The problem continues, despite the good intentions of successive governments. There is now more confidence that the matters will be seriously addressed through amendments to this bill.

10.27 The committee notes the Minister's second reading speech:

> I also flag the government's intention to carefully examine the provisions of the bill concerning the right of entry to investigate breaches of entitlements to ensure the bill provides an effective compliance regime for at-risk workers in the textile, clothing and footwear industry. The government will seek necessary refinements to the bill concerning this matter through the Senate process.[32]

10.28 The committee supports the government's commitment to ensure an effective right of entry regime for workers in the TCF industry. It notes that work is underway to develop draft provisions to address these issues and others raised with the

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29 Ms Michele O'Neil, National Secretary, TCFUA, *Committee Hansard*, 16 February 2009, pp. 57-58.

30 Ibid., p. 46.

31 Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, p. 5.

32 The Hon Julia Gillard MP. Minister for Workplace Relations, Second Reading Speech, *House of Representative Hansard*, 25 November 2008, p. 11191.

committee as well.[33] It looks forward to these amendments being debated in the Senate concurrently with the bill.

***Committee view***

10.29 The committee majority notes that the outworkers in the textile, clothing and footwear trade are a particularly vulnerable category of workers. Many are female, from non-English speaking backgrounds, working long hours on low piece rates. The committee heard stories of intimidation and harassment of these employees by employers. There is also a low rate of union membership among these workers. The committee majority is concerned to see that the particular needs of the workers in this industry are addressed.

**Recommendation 11**

10.30 **The committee majority recommends the government accepts the suggestions in this chapter regarding outworkers and implements them as amendments to ensure appropriate protections are in place that recognise the special vulnerability of these workers.**

33 Ms Natalie James, DEEWR, *Committee Hansard*, 19 February 2009, p. 64.

# Chapter 11

# Toward a national system and transitional issues

11.1 This chapter covers issues raised regarding the development of a national industrial relations system and matters that are required to be covered by the transitional bill currently being drafted.

## National system and coverage issues

11.2 The Fair Work Bill anticipates the eventual evolution of a national industrial relations system through referrals of power and other forms of harmonisation. At the Australian State, Territory and New Zealand Workplace Relations Ministers Council meeting on 5 November 2008, it was agreed in principle that draft legislation to provide the foundation for a national workplace relations system for the private sector would be based on *Forward with Fairness*.[1] Like the later amendments to the WRA, the provisions of this bill are based on the corporations power[2] of the Constitution (s 51(xx)), which has seen at least 70 percent of employers move into the national system of workplace relations.[3] Pending the development of a national system, DEEWR estimated that up to approximately 85 per cent of private sector employees will be covered, while noting some variance in levels of coverage between the states. Despite achieving 85 per cent coverage of employees, the bill will not provide a comprehensive national system for all private sector employers and employees and this can only be achieved through clear referral of powers by the states.[4]

11.3 The committee has not concerned itself with a national industrial relations system, apart from considering issues which relate directly to this bill. It notes that the government has said it will engage in further discussion with the state governments concerning their approaches to the development of a national system. In the meantime a number of provisions in this bill, which are relevant to any consideration of a national IR system, were raised with the committee.

### *Coverage of local government and public sector employees*

11.4 While expanding the reach of the Commonwealth system, WorkChoices legislation led to significant confusion over coverage, particularly for local government and not-for-profit sectors. An employer can be covered only by the

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1 Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers Council, 5 November 2008.

2 Some parts have extended application through reliance in the external affairs power.

3 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 16.

4 Ibid., p. 19.

federal system if it is a 'constitutional corporation', that is, a trading, financial or foreign corporation.[5]

11.5 Uncertainty remains about whether local government is engaged in trading or financial activities that meet the criteria for being a constitutional corporation. The NSW Office of Industrial Relations noted:

> While there can be no doubt about a proprietary limited company that trades for profit, there is considerable doubt about the status of a not-for-profit organisation that has chosen to incorporate to provide stability and certainty for tax and funding and other purposes, and also it seems municipal, charitable and educational corporations, to name but a few. It seems unlikely that the High Court will be in a position to make any authoritative ruling or rulings in the short to medium term, and so the uncertainty for such organisations lingers.[6]

11.6 Nonetheless, the New South Wales Government has legislated to ensure that local government employees, by virtue of the fact that local government is maintained under state legislation, do not come under the corporations law. The states and territories retain control of their public sector employees (including local government) in accord with federalist principles. Currently there are no provisions in the bill for state referral into the national system, but should referral of powers result from discussions with some states, the legislation can be amended at that time to ensure certainty of coverage for local government.

### *Trading corporations*

11.7 The United Services Union (USU)[7] and the ACTU have noted the difficulties in establishing whether some employers are trading corporations. In the event that state governments refer their powers, the ACTU also urged the government to ensure its commitments to state employees are delivered. In the absence of referrals it argued the government should amend the bill and withdraw from covering 'borderline' entities.[8]

11.8 SA Unions supported a national system, noting that about 60 per cent of the South Australian workforce would be affected by the new legislation.[9] This would be best achieved through a 'text-based' referral of powers but which retained within a state industrial system state public sector employees and those employees not covered by FWA.[10] The committee notes that already QLD and NSW have passed legislation

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5 NSW Office of Industrial Relations, *Submission 102*, p. 14.

6 Ibid.

7 USU, *Submission 4*, pp. 2-3.

8 ACTU, *Submission 13*, pp. 25-26.

9 SA Unions, *Submission 121*, p. 3.

10 Ibid., pp. 2-3.

de-corporatising local councils which removed them from the potential application of the federal system.[11] It also notes that at the hearing on 29 January 2009, Mr Troy Buswell MLA, Minister for Industrial Relations in Western Australia, announced to the committee that the WA government had decided not to refer the state's industrial relations powers to the Commonwealth but would instead reform its own state industrial relations system.[12]

11.9 Clauses 24 to 30 address how the act affects the operation of certain state and territory laws. Clause 26 (1) states that the act is intended to exclude all state and territory industrial laws so far as they would otherwise apply in relation to a national system employee or national system employer. The Bills Digest advised that the intention is for the proposed Act to cover the field in relation to industrial relations to the extent that it is constitutionally possible. It further explained:

> Where the Commonwealth successfully covers the field the states and territories are precluded from legislating in the area and their existing laws which regulated this area become inoperable.[13]

11.10 Clause 26(2) defines a 'State and Territory industrial law' to clarify which laws are excluded. Clause 27 details the areas in which states and territories will still retain some powers to legislate. The more significant non-excluded matters set out in 27(2) include superannuation, workers compensation, occupational health and safety, outworkers, child labour, long service leave (except for those with entitlements under the NES), and regulation of employer and employee organisations and their members.[14]

11.11 While acknowledging that clause 26 is better drafted than its equivalent in the WRA, the NSW Office of Industrial Relations argued that it is unlikely to do away with the continuing uncertainty about which aspects of which state and territory laws operate with respect to national system employers and employees. It noted that again, cooperation between jurisdictions is the preferred method for achieving outcomes in this area.[15]

### *Agricultural sector*

11.12 The agricultural sector laments the absence of a national industrial relations system. The great majority of farm businesses are not constitutional corporations, operating through unincorporated trusts or partnerships. The National Farmers

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11 DEEWR, *Submission 63*, p. 65.

12 Hon Troy Buswell MLA, Minister for Industrial Relations, WA, *Committee Hansard*, 29 January 2009, p. 13.

13 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, pp. 19-20.

14 Ibid., pp. 20-21.

15 NSW Office of Industrial Relations, Submission 102, p. 15.

Federation (NFF) believes that it is against the commercial interests of farm businesses to become incorporated entities. The previous government legislated for the Federal Transitional Award System which continued five years of federal award coverage of unincorporated entities. The NFF wishes to see this arrangement maintained for a lengthy, if not indefinite, period. It has doubts that a referral of powers will be given by all states. If referral or maintenance does not occur, the NFF claims that a majority of agricultural employers will have to remain within an 'inflexible' state award system adding up to 30 per cent in labour costs to farming businesses.[16]

11.13 The NFF told the committee that since lodging its submission they have had discussions with the Minister's office and been given an undertaking that if referral does not occur then the transitional system will be in place until its expiry in March 2011. The committee majority notes that this issue will be addressed in the transitional bill.[17]

### *The special case of Victoria*

11.14 The bill does not include provisions relying on a referral of power from Victoria.[18] The Bills Digest notes that the transitional bill may provide for the Victorian referral.[19] In its recent Annual Statement of Government Intentions (February 2009) the Victorian Government announced its intention to refer powers to the Commonwealth:

> The Victorian Government believes in a unitary industrial relations system that has fairness at its core. The Commonwealth Government has introduced its Fair Work Bill to replace WorkChoices and restore fairness to the Commonwealth industrial framework.
>
> Once this legislation is passed through the Senate, the Victorian Government will work to amend its existing referral of industrial relations powers to the Commonwealth to ensure that the improved unitary system will apply comprehensively in Victoria.
>
> The proposed Victorian Fair Work (Commonwealth Powers) Bill will mean that, for the first time, Victorian businesses and workers will have access to a fair national industrial relations system.[20]

16 NFF, *Submission 10*, pp. 5-8.

17 Ms Denita Wawn, NFF, *Committee Hansard*, 19 February 2009, p. 2.

18 Local Government Association of Queensland, *Submission 39*, p. 2.

19 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 19.

20 www.premier.vic.gov.au Annual Statement of Government Intentions 2009, section 9.3

### *Foreign ships on the coasting trade*

11.15 The application of the bill to seafarers engaged in the coasting trade was a matter of particular interest to the committee. Submissions were received from shipping companies and from the Maritime Union of Australia. Shipping associations were concerned about ships operating under a coasting trade permit granted under s286 of the *Navigation Act 1912*, and which have not been subject to Australian workplace laws. Currently the *Workplace Relations Act 1996* and the Workplace Relations Regulations 2006 do not apply to foreign employers and foreign crew on a permit ship. Shipping associations note that this approach has been endorsed by the AIRC[21] and recommended that this exclusion continue.

11.16 A submission from the Maritime Union of Australia (MUA) pointed out that the bill has the effect of depriving the AIRC or Fair Work Australia from extending award coverage to foreign-owned or foreign-operated ships competing with Australian ships in the coasting trade. The MUA stated that all it wanted was to have the AIRC apply the appropriate award to all crews, foreign as well as Australian, manning ships engaged in the coasting trade.

11.17 The National Bulk Commodities Group noted that clause 32 of the bill contains a similar exclusion to section 21(1) of the Workplace Relations Act but that the regulations to support the bill are yet to be released. It and CSL Australia recommended that a similar regulation to the current 2.1.1 (which ensures that current arrangements under the Navigation Act continue in regard to issuing Coastal Voyage Permits) should be included to ensure continuation of cost effective and flexible operations.[22]

11.18 Inco Ships also submitted that the current exclusion should remain until and unless:

> …informed policy debate and consideration has been applied to the question of whether it is appropriate or desirable that non-citizen crew on foreign flagged vessels be subject to the WRA or the Bill or some other statutory requirements and if so, the extent of such coverage.[23]

11.19 The Australian Shipowners Association (ASA) pointed out that while the language is open to interpretation, it believed clause 34(1)(b) extends coverage of the Act to an Australian company involved in the operation or chartering of foreign-flagged, international trading ships. In calling for deletion of this clause, it argued that Australian workplace relations law had no relevance to industrial arrangements applicable to the international shipping industry.[24]

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21 CSL Australia, *Submission 112*, p. 2.

22 National Bulk Commodities Group, *Submission 139*, p. 2.

23 Inco Ships, *Submission 142*, pp. 6-7.

24 Australian Shipowners Association, *Submission 144*, pp. 6-7.

11.20 Clarification of clause 33 was supported by the MUA so that an Australian owned company, based in Australia but operating in the international trade with a foreign crew is free of the jurisdiction of the AIRC. Mr Crumlin from the MUA added 'We are not seeking to cover foreign ships trading in foreign trade, unless they have an Australian crew aboard'.[25]

11.21 The ASA also noted that clause 33(1)(d) could be interpreted as providing coverage of the bill to some permit ships and noted the phrase 'uses Australia as a base' is open to interpretation and called for guidance. [26] The ACTU submitted that when foreign ships participate in the coasting trade they should be regulated by Australian law and proposed several amendments to address this issue.[27]

11.22 DEEWR clarified this issue for the committee and explained how the provisions would operate. The Bill applies generally in Australia, the coastal sea and the territories of Christmas Island and the Cocos (Keeling) Islands. As the explanatory memorandum to the bill notes, an express statement to this effect in the bill is not necessary because the *Acts Interpretation Act 1901* makes this clear. In the context of shipping, a foreign ship staffed by foreign crew would be within coverage of the bill when traversing the coastal sea. The bill will also apply to the following ships, wherever they are located in the world:

- ships that have Australian nationality under the *Shipping Registration Act 1981*; and

- ships that are operated or chartered by an Australian employer and using Australia as a base. This means, for example, that a foreign ship staffed by foreign crew would be within coverage when traversing the waters of the exclusive economic zone (EEZ), the continental shelf, or beyond, if the ship is operated or chartered by an Australian employer and the ship uses Australia as a base.

11.23 The department advised that as is currently the case with the Workplace Relations Act, regulations can be made to modify the bill's application in all of these areas. The Government is currently considering the recommendations made by the House of Representatives Standing Committee on Infrastructure, Transport, Regional Development and Local Government following its inquiry into Australian coastal shipping policy and regulation. In the area of shipping, the Fair Work Bill and any modifications made to its coverage made by the regulations will reflect the Government's response to this inquiry.[28]

25 Mr Crumlin, National Secretary MUA, *Committee Hansard*, 16 February 2009, pp. 17-18.

26 Ibid., pp. 9-10.

27 ACTU, *Submission 13*, p. 25.

28 Mr John Kovacic, DEEWR, *Committee Hansard*, 19 February 2009, p. 64.

### *Committee view*

11.24 The committee majority accepts the assurances of the government that the Fair Work Act will have application to all ships and crews engaged in the coasting trade, but it sees no reason why this should not be stipulated in the bill. It notes that the explanation given by the department relates mainly to legislative drafting conventions than with the principle of award entitlements. Members of this committee are familiar with the status and limitations of delegated legislation as instruments of policy. Important principles should be enshrined in acts. Nor is it recognised that this principle stands apart from broader policy issues relating to the coasting trade.

**Recommendation 12**

11.25 **The committee majority recommends that the government give careful consideration to the issues raised in the submissions to the committee concerning the coasting trade and has regard to the desirability of ensuring the provision of a decent safety net of employment conditions to workers engaged in that trade.**

## Transitional issues

11.26 As mentioned in chapter one the transitional and consequential bills are yet to be introduced into Parliament. Nevertheless a number of submissions included issues for consideration by the government and these are outlined below.

11.27 The Minister for Employment and Workplace Relations the Hon Julia Gillard MP has written to the Chair of the committee advising of the government's intentions for dealing with transitional and consequential provisions. A copy of that letter is Appendix 3 to this report. The letter makes clear that there will be further opportunity provided to the Senate to examine closely the transitional provisions.

### *Termination of WorkChoices instruments*

11.28 While noting that labour turnover will see the use of old AWAs, employer greenfields and employee collective agreements decline, the ACTU pointed out that there will be a number of employees who will remain caught on the instruments. It argued that although the government has stated that the NES will apply to these employees from 1 January 2010, including the entitlement to the applicable minimum wage rate, the terms and conditions that were lost from AWAs, employer greenfields and employee collective agreements are overwhelmingly found in awards and not the NES. The ACTU advocated that the transitional bill must provide a means for employees to initiate early termination of these instruments.[29] This was supported by numerous organisations including Unions WA.[30]

29 ACTU, *Submission 13*, pp 54-55.

30 Unions WA, *Submission 70*, p. 3.

11.29 As an example, Unions Tasmania outlined a case where service stations were taken over and the employer used provisions in WorkChoices to write an Employer Greenfields Agreement which excluded a long list of basic award entitlements. It pointed out that although the bill removes the Employer Greenfields Agreement as an employment mechanism, it provides no detail about how employees who were removed from awards could transition back to being covered by an award. Unions Tasmania acknowledges that such issues will be dealt with in the transitional legislation and requested that the legislation take into account that some employees were removed from awards by Employer Greenfields Agreements and other mechanisms under WorkChoices and the legislation should include a mechanism to ensure these employees have their award conditions restored.[31]

11.30 Unions Tasmania also outlined a case where a group of workers signed an AWA that took away their penalty rates. According to Unions Tasmania these employees are anxious to go back on the award as soon as possible but believe that whoever terminates the AWA may be singled out for less work. Unions Tasmania suggested the only way this unfair AWA can be terminated while protecting the employees is for FWA to be able to terminate it unilaterally without an individual having to make an application. It submitted that where existing AWAs are retained, that FWA should be able to terminate unfair AWAs prior to their expiry if they would not pass the new BOOT.[32] This suggestion was supported by the ACTU which also suggested an audit of all agreements and contacting parties where an agreement fails to meet the BOOT.[33]

11.31 Jobwatch was concerned that employees may not be aware of their entitlement to unilaterally terminate AWAs or ITEAs after the nominal expiry date has passed and recommended that FWA be able to take action to advise employees of this right.[34]

11.32 The ASU also voiced concern over the continued operation of some AWAs and argued that it would be unreasonable to expect employees to be bound by agreements that would not meet the requirements of the new system. It submitted that all employees should have the benefit of the minimum standards provided by the new system.[35] It suggested that all individual statutory agreements continuing beyond 1 January 2010 should be deemed to include all minimum protections afforded by the NES and the applicable modern award. Where an employee believes that a continuing agreement would fail the BOOT if made on 1 January 20210, the employee should be

31 Unions Tasmania, *Submission 14*, pp. 4-5.

32 Ibid., p. 6.

33 ACTU, *Submission 13*, p. 55.

34 Jobwatch, *Submission 87*, p. 49.

35 ASU, *Submission 56*, pp. 26-30.

able to make an application to FWA to have the BOOT applied to the agreement. If it fails the BOOT, the employee may make an application to terminate the agreement.[36]

### *State and federal system issues*

11.33 The ACTU suggested that the transitional bill should provide an avenue for employees to opt into the federal system, where a state government does not refer the employees, despite the wishes of the workforce.[37]

### *Police*

11.34 The Police Federation of Australia told the committee of the jurisdictional, constitutional and policy issues facing them which result from the definition of 'employees' and the complicating factor of the referral of workplace relations powers by the states. It advised that the current position of the PFA is that all state police jurisdictions remain within their respective IR systems and that a specialist tribunal be created for the AFP. It has made its issues known to the government and suggested ways to move forward which include a research project to investigate the most effective way to structure a system for the police.[38]

### *Construction industry and long service leave*

11.35 TasBuild told the committee about the state and territory portable long service schemes in the construction industry which have been established to take into account the nature of employment in that industry. It supported clause 29 and Division 9 of the bill as they relate to long service leave and asked for clarity and certainty on this issue for the future. TasBuild argued that clause 20 and Division 9 should be allowed to stand and not be overridden by any provisions in the upcoming transitional bill.[39]

### *State based registered organisations*

11.36 The National Union of Workers raised the issue of transitional registered organisations (TROs) which arose under WorkChoices when the corporations power was introduced. It noted that these TROs are state entities which have the right to operate in the state and federal system for a specified period. It was seeking clarity to resolve issues around assets and finances.[40] DEEWR told the committee that consultations on the implications for registered organisations are underway with the ACTU and state and territory governments and will be dealt with in a separate piece

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36 Ibid., p. 54.

37 ACTU, *Submission 13*, p. 56.

38 Mr Mark Burgess, CEO Police Federation of Australia, *Committee Hansard*, 19 February 2009, p. 55.

39 TasBuild, *Submission 154*, pp. 1-4.

40 Mr Derrick Belan, NUW NSW, Mr Criag Shannon, NUW NSW, Mr John Cosgrove, NUW, QLD and MS Kim Sattler, NUW, ACT, *Committee Hansard*, 19 February 2009, pp.38-47.

of legislation dealing with organisations. These changes will be included in the transitional bill.[41]

### *Legacy instruments*

11.37 The ACTU pointed out that the transitional bill will need to address how a complex range of legacy instruments and institutions will interact with the new system as they are phased out. It offered support for certain legacy instruments to have a sun-setting arrangement, subject to the ability of a party that relies upon an instrument to make an application to preserve it. It also supported the notion of conversion of certain preserved state instruments such as enterprise Notional Agreement Preserving a State Award and Preserved Collective State Agreements to permanent federal instruments.[42]

11.38 Yum! Restaurants which cover KFC and Pizza Hut told the committee of their unique industrial instruments which have been negotiated with SDA and approved by the AIRC. The enterprise awards are used to underpin collective agreements and the representative asked for reassurance that enterprise awards could continue as outlined in *Forward with Fairness*.[43]

11.39 The CEPU were concerned to ensure 'old IR agreements' such as the Telstra Redundancy Agreement were protected until the new laws come into effect. This particular agreement provides protections about how employees were selected for redundancy and accountability measures. Currently it can be replaced by another agreement which could allow for weakened conditions on redundancy.[44]

### *Committee view*

11.40 The committee notes that the Minister has said that existing enterprise awards, as well as existing enterprise NAPSAs, will be a part of the new system as many businesses were keen to retain their current arrangements.

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41 Mr John Kovacic, DEEWR, *Committee Hansard*, 19 February 2009, p. 63 and 66.

42 Ibid, p. 57.

43 Mr Richard Wallis and Mr Tim McDonald, Yum! Restaurants Australia, *Committee Hansard*, 28 January 2009, pp 38-41.

44 Mr Ed Husic, National President, CEPU, *Committee Hansard*, 19 February 2009, p. 25 and p. 28.

11.41 The committee majority also notes that to go some way to addressing the issue of existing unfair agreements, the Minister has stated that the NES will come into effect on 1 January 2010 for all employees and will override any inferior conditions. This would ensure that employees on substandard AWAs made under WorkChoices will receive the full benefit of the NES.

11.42 The committee notes that the issue of the interaction of transitional instruments with provisions of the bill will be dealt with in the transitional bill.

## Conclusion

11.43 In conclusion the committee majority notes that the bill is about fairness and balance. It is the result of an unprecedented level of consultation and genuine engagement with small and large businesses, employee representatives and state and territory governments. No one side has achieved every outcome it wanted. The bill is even-handed in its treatment of employers, employees and their unions, seeking to accommodate the legitimate and reasonable needs of all.

11.44 The bill is a far simpler and less complex law than WorkChoices and is easier to read and apply. It will bring much-needed stability to workplace relations legislation for employees and employers over the long term. It provides for a comprehensive and fair safety net of employment conditions that cannot be stripped away. It allows flexibility in the forms of agreement-making available to meet different needs. It provides for individual arrangements that meet the genuine needs of employers and employees including to assist employees to balance work and family life, but without stripping away safety net entitlements. The bill ensures employees have access to transparent, clear and simple information about their rights and responsibilities. It provides a simple, fair dismissal system that enables employers to manage with confidence and protects employees from harsh and unjust treatment. The bill has at its centre bargaining at the level of the enterprise, with improvements to employment conditions underpinned by productivity. It helps low-paid employees to gain access to the benefits of enterprise bargaining.

11.45 The bill provides a framework that will achieve the appropriate balance between employee fairness, business flexibility and economic competitiveness which is consistent with continuing economic reform and meets the needs of the nation at all stages of the economic cycle. Regardless of requests for amendments, employers recognise the government's mandate for this bill and have stated that they can work with or cope with its provisions.

11.46 The committee looks forward to the presentation of the transitional and consequential bills to Parliament which will further detail and clarify the operation of some aspects of this bill. It will complete the detail of the transition to the new system.

**Recommendation 13**

11.47 **The committee majority recommends that the bill be passed without delay.**

**Senator Gavin Marshall**

**Chair**

# Coalition Senators' Minority Report

## Introduction & Summary of Coalition Senators' Position

The *Fair Work Bill 2008* represents the latest iteration in a succession of evolutionary changes to Australia's workplace environment. Though sharp distinctions are drawn by the Rudd Government between this bill and the workplace relations legislation of the Howard Government, in reality one draws heavily on the other, including in particular the concept of a *national* industrial relations system. This concept, hitherto so vigorously resisted by the union movement and state Labor governments in the High Court, is now embraced as sound public policy by both sides of politics.

The right of the Government to abandon much of the *WorkChoices* architecture, based on its commitments in the lead up to the 2007 Federal election, is clear and beyond challenge. **Coalition senators acknowledge that *WorkChoices* is dead;** only the makeup of its successor remains to be determined.

While acknowledging the Rudd Government's mandate to determine that makeup, Coalition senators believe that the universal verdict of witnesses that the Bill is flawed needs to be responded to. To ignore these concerns, emanating from every corner of the stakeholder community, would make a mockery of the Senate committee's inquiry.

Accordingly Coalition senators have laid out in this report aspects of the legislation which appear to be unfair, which may destroy jobs and which are at odds with the Rudd Government's promises as to what the legislation would do.

We are also conscious that these changes are under contemplation at a time of serious economic uncertainty. These reforms must contribute to a stronger, more secure economic outlook. Coalition senators affirm that the Bill must indeed fulfil the goals it sets for itself of creating flexibility and certainty for the businesses on whom Australians will depend for job creation.

## Background

In April 2007, the Australian Labor Party released “Forward with Fairness” representing the industrial relations policy upon which it would contest the 2007 Federal election. This initial policy was followed by a further document representing an ‘implementation plan’ released in August 2007.

Further details about the proposed new system were detailed after the election in two speeches delivered by the Minister for Employment and Workplace Relations, Hon Julia Gillard, on 17 September 2008 and 14 November 2008, and via the release of various fact sheets.

On 25 November 2008, the Minister introduced the *Fair Work Bill 2008* into the House of Representatives. The Bill sought to represent the legislative implementation of the commitments contained within Forward with Fairness.

When introducing the Fair Work Bill, the Minister stated:

> The bill being introduced today is based on the enduring principle of fairness while meeting the needs of the modern age. It balances the interests of employers and employees and balances the granting of rights with the imposition of responsibilities. The bill delivers:
>
> - a fair and comprehensive safety net of minimum employment conditions that cannot be stripped away;
> - a system that has at its heart bargaining in good faith at the enterprise level, as this is essential to maximise workplace cooperation, improve productivity and create rising national prosperity;
> - protections from unfair dismissal for all employees;
> - protection and hope for a better future for the low paid;
> - a balance between work and family life; and
> - the right to be represented in the workplace.

To achieve the above intentions, the Bill introduced a number of key elements of the proposed new workplace relations system. These include:

- A safety net of modern awards, National Employment Standards, and National Minimum Wage orders;
- A new industrial tribunal called Fair Work Australia and enforcement arm called the Fair Work Ombudsman;
- The positioning of enterprise collective bargaining as a central tenet underpinning the operation of Bill;
- Frameworks for dealing with transfer of business, general employee protections, limitations on industrial action, unfair dismissal protections, and right of entry; and
- Various compliance and enforcement provisions.

While the Bill represents a comprehensive overhaul of the existing workplace relations system, it retains and builds upon a number of key elements of the current Workplace Relations Act 1996. Such elements include a continued reliance upon the Corporations power to sustain a "national" industrial relations system (a matter that Labor vigorously opposed), the establishment of key national minimum conditions of employment, and the promotion of bargaining as an alternative to the safety net.

## Structure of the Bill

Coalition senators congratulate those who drafted the Bill on both its layout and clear nature. The Bill is easy to read and understand, and uses language and terminology that is clear and simple. It is envisaged that this will ultimately make the Bill more readily accessible and useful to those to whom it applies, namely employers and employees within a workplace.

The Bill contains a framework usefully separated into six chapters. These are:

**Chapter One**: Outlines the structure and aims of the Bill. It also contains a dictionary of key definitions and phrases used throughout the Bill.

**Chapter Two**: Concerns terms and conditions of employment, modern awards, National Employment Standards, bargaining architecture and transmission of business.

**Chapter Three**: Deals with the rights and responsibilities of employers, employers and organisations.

**Chapter Four**: Concerns compliance and enforcement matters.

**Chapter Five**: Provides the basis for administrative functions, such as the establishment of Fair Work Australia.

**Chapter Six**: Deals with miscellaneous issues.

## A Mandate?

A key consideration for Coalition senators is the extent to which the Government has a mandate to implement the changes contained within the *Fair Work Bill*. When introducing the Bill, the Minister noted:

> They [the voters] chose to reject Work Choices and all it stood for, and to put in its place the promises Labor made in its policy statement Forward with Fairness. They gave the Rudd government the strongest possible popular mandate for the introduction of this bill.[1]

The existence of a mandate and the extent to which that mandate should be honoured was an issue that occupied much of the Committee's attention. The issue was thrown into sharp relief by the fact that *all* witnesses who appeared before the inquiry called for changes to the Bill. Many of these witnesses were asked: what right does the Senate have to change a bill for which the government of the day has a mandate? The responses varied. Mr Dave Oliver, from the AMWU, gave the following evidence:

1 Julia Gillard, 25 November 2008

> There are mandates and there are mandates. I would simply say that if we went to the Australian public now and said, 'What was a clear mandate you had given the government with regards to IR legislation?' I do not think, with respect, that we would have too many people in the general public rattling off about all the specifics.[2]

Mr Joe de Bruyn from the SDA stated that:

> The parliament is master of its own situation. It is entitled to pass whatever legislation it believes is appropriate, and it is not limited to what the government promised prior to the election. If there are ways of improving the legislation, then the parliament should do so.[3]

Mr Jeff Lawrence, Secretary of the ACTU, on the question of mandate observed:

> Well, I think it is really a question of the major thrust of the legislation.[4]

If a consensus emerged, it was that a mandate exists only with respect to the central elements or "major thrust" of Forward with Fairness. The right of parliament to amend non-core provisions that were flawed or unfair was acknowledged by several witnesses. Coalition Senators concur with this view. A loose interpretation of the notion of a mandate could undermine the architecture of the Government's Bill, while a strict or narrow interpretation will unduly restrict the Parliament from responding to valid concerns raised by the community during this inquiry. Accordingly, this dissenting report accepts that the Government has a mandate to implement the key elements of the *Fair Work Bill* consistent with the commitments laid out in Forward with Fairness.

Specifically, Coalition senators recognise the Rudd Government's entitlement to dismantle the former government's WorkChoices legislation of 2005 pursuant to this mandate.

There are several areas however where the Bill ought to be amended to improve its operation, technical matters, broker true or real fairness and ensure that the system so implemented is appropriate for all economic conditions. There are many areas where the Bill seeks to implement changes on which Forward with Fairness was silent. The areas of concern Coalition senators identify in this report are, in our view, either consistent with the broad mandate held by the Government or deal with matters on which Forward with Fairness was silent.

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[2] Mr D Oliver, Committee Hansard, 19 February 2009, p.36

[3] Mr J de Bruyn, Committee Hansard, 17 February 2009, p.4

[4] Mr J Lawrence, Committee Hansard, 17 February 2009, p47

## Transfer of Business

The Bill contains substantially new provisions dealing with what has traditionally been known as 'transmission of business'. In the industrial relations context, such provisions deal with employee entitlements and employment generally when a business (or part thereof) is sold or transferred to a differing legal entity. Commonly, this occurs in circumstances involving a traditional business sale, however business structures are becoming increasingly complex. High Court and other similar authority exists and has kept pace with the changing business environment, most notably in the *PP Consultants*[5] and *Gribbles*[6]cases.

The Bill as drafted proposes a radical new approach to established transmission of business principles. It replaces the accepted approach of 'asset transfer/business character' with a broader concept of 'transfer of work'. This has the practical effect of overturning the High Court authorities noted above.

In addition, the Bill widens the circumstances in which an industrial instrument transfers with the relevant employees affected by a business sale or restructure. The potential also exists for such industrial instrument to form the basis of employment for any new employee that commences after the business has been transferred.

The reason for such a fundamental shift from universally accepted and well settled principle is unclear. The proposed clauses are (at best) problematic and economically restrictive, and (at worst) a disincentive to achieve ongoing employment for affected employees. The evidence of the Australian Chamber of Commerce and Industry was particularly relevant in this regard:

> I am talking about models of organising a business. So if I take over a business that is uneconomic, that is failing, I need to be able to go to that business's business model and all parts of it, renew them, replace them, take them over, and move them onto a sound footing, onto my footing, as the incoming employer. And that is one of the things we are very concerned about: stasis paralysis, or indeed—and a number of witnesses have come before you to say this—a clear disincentive to take over the new employees.[7]

The evidence of Australian Business Industrial was:

> In my career I have been involved in the transfer of businesses, the acquisition of businesses, both in a HR sense and as a line manager, and I can assure you that one of the things that is always done as part of the due

[5] PP Consultants Pty Ltd v Finance Sector Union [2000] HCA 59; 201 CLR 648; 75 ALJR 191; 101 IR 103; 176 ALR 205 (16 November 2000)

[6] Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd [2005] HCA 9; (2005) 222 CLR 194; (2005) 214 ALR 24; (2005) 79 ALJR 679; (2005) 138 IR 252 (9 March 2005)

[7] Mr S Barklamb, Committee Hansard, 17 February 2009, p. 21.

> diligence is to look at the consequences of bringing those people in. If the consequences of bringing those people in strike at the heart or potentially undermine the business objective that you are pursuing, then you would look for ways in which to make sure that that did not happen. So I think the assertions that the bill as it stands will act or could act as a disincentive in certain circumstances, in my experience, will hold true. [8]

The Australian Industry Group was unequivocal about the effect of the new provisions:

> The provisions are antiemployment and would create a huge incentive for companies not to employ workers of businesses they take over.[9]

Evidence direct from business was:

> The way the bill is structured, what it fundamentally will do is put businesses such as ours in the position that we will say that, unless there are very good, compelling reasons to take on existing employees from the client, frankly we will not do that. It will be less convoluted for us to simply employ fresh people and then not be burdened with the transfer of business provisions. We say that is not good public policy.[10]

It is clear that the proposed transfer of work provisions create a disincentive for an incoming employer to retain employees engaged within a business. Secondly, they encourage the retention of business practices that may be uneconomic or failing.

The current challenging circumstances facing the Australian economy are already manifesting themselves in many ways, most relevantly in the form of increased levels of unemployment. The Government's own predictions see this trend continuing. At this time, it is crucial to ensure that every arm of government policy is aimed at ensuring that Australian workers have a job. The proposed alterations to transfer of business do not achieve this aim, and may in fact contribute to worsening unemployment levels.

The Coalition senators appreciate that the transmission of business provisions are intended to be 'anti-avoidance' in nature, and reflect evidence highlighting some inappropriate practices of some businesses. However, such evidence must be balanced against a need to ensure that workplace relations laws do not negatively impact upon a normal business transactions or operate in a manner that costs jobs. The existence of expanded general protections for employees, combined with a stronger safety net, expanded enforcement powers and the removal of AWA/ITEA's suggest that the incidence of and scope for inappropriate activities will be substantially reduced, if not eliminated, by the Bill. The jettisoning of existing and well settled transmission of business provisions do not, in our

[8] Mr G Pattison, Committee Hansard, 17 February 2009, p. 25.

[9] Ms H Ridout, Committee Hansard, 18 February 2009, p. 3

[10] Mr B Blythe, Committee Hansard, 29 January 2009, p 27.

opinion, contribute to addressing the type of inappropriate business practices given during evidence.

The provisions of the existing Workplace Relations Act 1996 strike an appropriate balance. Currently, when an employee is transmitted with a business the underpinning instrument also transmits for a 12 month period. Within this period there exists scope for negotiation of a new agreement and, if this does not occur, the instrument ceases and conditions become set by an industrial award. The new 'good faith' bargaining provisions, a strong safety net of awards, and other bolstered protections within the Bill will ensure appropriate protections for transmitted employees whilst not impeding a business sale or costing jobs.

To this end, Coalition Senators have grave and serious concerns about both the rationale behind, and the effect of, the proposed transfer of business provisions. They can only be considered as unnecessary, unwarranted, and anti-jobs.

## Right of Entry / Access to Records

The issue of union right of entry and access to records is important to both employers and unions. That so much of the evidence before the Committee was on this point is testament to the importance it holds for both employer and employee representatives. There is a universally accepted right for a union to enter a workplace where it has members; however there are also important historical limitations and rules defining such a right.

Forward with Fairness contained an express commitment to retain existing right of entry provisions. This
commitment was unambiguous. In a speech delivered in April 2008, the Minister stated:

> *…the current rules in relation to right of entry will remain. With the right to enter another's workplace comes the responsibility to ensure that it is done only in accordance with the law.*[11]

This could not be clearer. Other examples of such intention follow:

> We will make sure that **current right of entry provisions stay**. We understand that entering on the premises of an employer needs to happen in an orderly way. **We will keep the right of entry provisions**.[12]

and

> We promised to **retain the current right of entry framework** and this promise too will be kept.[13](our emphasis)

[11] Julia Gillard, 29 April 2008, Speech - Fair Work Australia Summit

[12] Julia Gillard, 28 August 2007, Press Conference

Based on these promises, it was rightly expected by all stakeholders that existing right of entry provisions would be maintained. However this is simply not the case. The overwhelming evidence confirms that there have been a number of breaches of this unambiguous concept.

By and large, such breaches arise from abandoning the concept of 'parties' to industrial awards and instruments. The evidence of DEWR confirmed that

> …the bill removes the existing requirement for a union to be bound to an award or agreement applying in the workplace as a condition of entry.[14]

This arises as an outcome of the award modernisation process currently before the Australian Industrial Relations Commission. The existing concepts have been replaced with provisions that allow union entry based on union organisational 'rules' that determine what workplaces and what type of work a union can 'cover'. It is clear that such an approach requires an employer to be familiar with the 'rules' maintained by a particular union as opposed to simple reference to an award. This can cause significant problems for an employer faced with such a circumstance. Evidence before the Committee, from an experienced industrial advocate, highlighted this point:

> I am an industrial relations practitioner, and I cannot look at a set of union rules and say, 'Well, this type of employee is covered and this type is not.'—particularly our small medium members, and we are predominantly an organisation of SMEs—they are going to have no hope. Someone will say, 'Look, I want to come in and meet with your members.' And they say, 'Well, I don't actually know if you have right of entry.' 'Well, I have got a permit.' 'Well, I am not sure whether your organisation laws would cover my staff.'[15]

The provisions also give rise to the potential for demarcation disputes between competing unions, described by some as 'union turf wars'. This concern is due to the proposed ability for a union to seek penetration within a workplace where another union already has significant presence, flowing from the removal of the traditional 'party' concept.

> In addition, there are a range of changes to the legislation which, on the face of it, look to be very minor but when put together represent substantial changes in focus. An example is the right of entry provisions. The government went to the election saying that it would not change the right of entry provisions, but the fact that it has stepped away from agreements and awards regulating right of entry now means that in our sector there will be overlapping coverage between unions. There will be unions who are not party to an agreement who will

[13] Julia Gillard, 28 May 2008, Speech to Master Builders Australia

[14] Mr J Kovacic, Committee Hansard, 19 February 2009 p. 62

[15] Ms L Brown, Committee Hansard, 17 February 2009 p.26

now have a right of access, and those provisions have the potential to result in union turf wars.16

Evidence from the Australian Workers Union was:

> "As you will understand, the nature of union rules coverage is vastly different to the nature of demarcated coverage. Under our rules, for example, we could argue that we cover New South Wales public firefighters, security guards and the entirety of the coverage of the AMWU, for example, and so on. There are other rules that are allowed for under our eligibility rules. What we are concerned about is the potential for disputes to arise that have never happened in the history of industrial relations in this country." Mr P Howes, Committee Hansard, 18 February 2009, p.16

and later:

> **Senator ABETZ**—I think that is a very good segue for me to ask a bracket of questions in relation to the right of entry, because it appears in the proposed legislation that right of entry will be provided to permit holders of trade unions if the organisation has employees that are eligible to be members of that particular union. Given the width of particularly the AWU's rules, we could have a situation where, should they so desire, permit holders from the AWU could walk into a huge number of workplaces in Australia. Indeed, we could have a situation where one day the AMWU walks in for a suspected breach and the very next day, for exactly the same suspected breach, the AWU could walk in. Isn't that right?
> **Mr Herbert**—In many cases, yes, that is correct. There is a massive overlap in eligibility rules throughout Australia, particularly as a result of the amalgamation of unions that occurred 10 or 15 years ago. There is a very large overlap, as Mr Howes has just pointed out.
> **Senator ABETZ**—And in fact the rules of the various unions as to eligibility are quite complex.
> **Mr Herbert**—Yes, and, one would have to say, in many cases beyond the wit and wisdom of a security guard at a gate who is being confronted with a union official with a 27-page eligibility rule and an explanation by the union official as to why it is they are entitled to be there. The argument might be quite right, but—
> **Senator CAMERON**—Security guards act much more decisively now.
> **Mr Herbert**—Security guards do act decisively on occasions. Without being too flippant about it, I have made a living out of the eligibility rules of unions for a number of years, and they can be extremely complex. You are quite right about that.[17]

[16] Mr C Platt, Committee Hansard, 27 January 200, p. 3.

[17] Committee Hansard, 18 February 2009, p.16

The Government promised that:

> Under Labor, all workers will be free to decide whether or not to join and be represented by a union, or participate in collective activities[18]

The proposed provisions repudiate that promise. Employees at every workplace have to be able to choose who represents them and the extent they want the involvement of a union. Employees have a right to a genuine choice and their rights and decisions should be respected.

In addition, the Bill allows a union official who is a permit holder to inspect the records of workers who are not members of a union in certain circumstances. This is a significant deviation from the existing provisions that, in the absence of authorisation from the Australian Industrial Relations Commission, restrict access only to records of union members. This raises significant concerns about the right to privacy for records involving non-union members. Many witnesses appearing before the committee gave evidence on this aspect of the proposed legislation.

> ...the bill substantially increases union entry rights, giving each union access to a much wider range of workplaces and giving union officials access to wage records of non-union members. We believe that existing entry rights are appropriate and should not be expanded.[19]

Evidence from the mining sector was:

> Our concern in relation to the Fair Work Bill is, firstly, that the protections in relation to union access to employee information have been removed. It is not just a question of unions being able to access non-member records. Unions will be able to access any record of any employee in the business, and all they have to do is put together an argument to say that that is valid in respect of an alleged breach of the act or an industrial instrument. There is no fetter on that access; there is no person in Fair Work Australia checking that the access is reasonable. Once the access is given, it includes everything that is contained in a personnel record. That may well be your application for the position. It may well be the preliminary drug testing, and that might show that at some point in time you had some drugs present in your system. It may show the employee's disciplinary outcomes or performance outcomes. It could show that your wages have been garnisheed because you have an outstanding obligation under family law or a taxation problem. There are myriad issues which are unrelated to any breach of an award or industrial instrument that could be accessed. The

[18] Forward with Fairness, April 2007 p.12

[19] Ms H Ridout, Committee Hansard, 18 February 2009, p. 2

> problem has arisen because the Fair Work Bill has removed the definition of record, has expanded access to record keeping and has removed the protections. Whilst there is a provision in there concerning the privacy laws, those privacy laws essentially have an exemption for marketing purposes. We are aware that the ACTU and its affiliates have been using member information or employee information for canvassing as part of their political processes.[20]

and

> We are strongly opposed to unions having the capacity to inspect nonmembers' records under the bill and propose that nonmembers' consent be required as a condition of inspection. Again, I make the point that union coverage amongst our private sector workforce is very low, and it is our view that you are subjugating the 86 per cent of employees who are not union members to a level of intrusion on their rights that is neither fair nor appropriate.
>
> We also have concerns that the proposed Fair Work Act significantly increases union rights to bypass the law of trespass and get access to workplaces and private employee information of nonmembers. This is, and represents, a significant change to the status quo, which effectively, we believe, expands union rights in a way that is not appropriate.[21]

There is no "public good" policy reason for the shift in right of entry or access to non-union member records. However, it is undeniably designed to increase union power.

It is clear that there are a number of concerns arising from proposed changes to right of entry. These are:

- Significantly increased potential for a return to disruptive union demarcation disputes;
- An increase in complexity associated with determining who has entry rights arising from the abandonment of the traditional 'party' concept; and
- The widened access given to a permit holder to view non-union member records.

The express and unequivocal commitments made by the now Deputy Prime Minister in 2007 (and many times since) have been breached by the proposed changes.

All employees have the right to privacy of information specific to them, such as their own employee records. These records often contain personal and sensitive information. Except where required by public authorities under statute, an employee should give permission

[20] Mr C Platt, Committee Hansard, 27 January 2009, p. 5-6.

[21] Hon. Mr T Buswell, Treasurer, Minister for Industrial Relations, Western Australian Government, Committee Hansard, 29 January 2009, pp 12-13.

before their own records are divulged to a third party. The Bill as proposed gives a right to a union boss to inspect employees' personal records. Coalition senators see no basis for unions to be given such huge and special powers. The appropriate checks and balances are absent in this proposal.

## Bargaining Architecture

The Bill creates a system that, at its heart, relies heavily on the use and promotion of collective agreements and enterprise bargaining. There are two aspects that feature within the bargaining stream, being a new concept of 'good faith' bargaining and distinct set of requirements for 'low paid' bargaining.

As these aspects are new to the industrial relations framework in Australia, they were the subject of many submissions before the Committee and unsurprisingly a number of concerns were identified with this new approach to bargaining.

### *(a) Bargaining Orders*

The legislation provides Fair Work Australia with a suite of options that, upon application, can be issued as orders to parties who are engaging within the bargaining process. In general, these orders are designed to ensure that the bargaining parties engage in a process that is genuine, efficient and free from capricious or unfair conduct. However, there are a number of relevant concerns that arise from the examination of bargaining orders on a practical level. In general terms, there exists a concern that the orders may be used in a manner that was not intended, or to achieve bargaining outcomes that are not genuinely negotiated. The ACCI submission observes:

> No longer will it be possible for an employer or a small business to simply employ persons in full compliance with the myriad of wages and employment conditions set out by legislation and industrial awards applying in their industry, and get on with business.
> Each employer will be exposed to a regulatory system which can, in one form or another and subject to certain criteria, require that employer to answer to its employees, a union or industrial regulator as to why the employer should not pay more or provide different (higher) conditions of employment.[22]

It is well known that the workplace relations history within Australia has generally relied upon a 'safety net' of minimum conditions of employment, contained within industrial awards, legislation, and various minimum standards. This safety net was important as, for many employers and employees, it set a floor upon or above which many employment relationships were based.

[22] ACCI Submission p. 21

The move toward enterprise bargaining arose from a recognition that the 'one size fits all' approach of the safety net was not appropriate for every business, in every location, in every sector of the economy. Various systems have developed that allowed for flexibility by way of negotiation at the enterprise level and were specific to the needs of a particular enterprise. However, a feature of the move towards enterprise bargaining was the 'voluntary' nature thereof. In simple terms, employer and employees could negotiate for an enterprise agreement of sorts knowing that if negotiations failed and agreement could not be reached, the safety net existed as the fall back position.

The Fair Work Bill seeks to expand and strengthens the safety net within the Australian workplace relations system. In general terms, the proposed system of National Employment Standards and modernised awards is perhaps the strongest safety net that has existed. It is with this in mind that concerns arise regarding what is a significant watering down of the 'voluntary' aspect of enterprise bargaining. Evidence before the Committee expressed significant concerns about one party being forced to bargain with another and, potentially, being the subject of orders that would forcibly implement terms and conditions that extend beyond the safety net. In other words the vital ability of one party or the other to 'walk away' from the negotiation process when agreement cannot be found is removed.

***(b) Low Paid Bargaining Stream***

The 'low paid' stream of bargaining is one such example of this as it creates a system whereby orders (in the form of 'workplace determinations') must be issued in certain circumstances. These circumstances, in deviation from the general good faith stream, allow for a workplace determination to be made where the parties are simply unable to agree on a negotiated outcome. There are potentially serious and negative consequences of such a system.

First, the 'low paid' stream is focussed on industries that have a lower incidence of workplace bargaining and higher incidence of safety net reliance. This is often as a result of limited economic capacity and marginal trading conditions, and where labour costs form a high percentage of business expense. It is inappropriate for this type of business to face a higher likelihood of arbitrated outcome given the conditions within which they operate. This is particularly the case given the current economic challenges and the reduced capacity for 'low paid' business to survive such circumstances.

Secondly, the Bill does not provide a clear definition of who is considered to be within the 'low paid' stream. This creates uncertainty for both employers and employees, and unnecessarily opens the door for misleading or coercive conduct. Coalition senators believe the inclusion of a succinct definition of 'low paid' will provide much needed certainty to ensure that those who fall within that definition know within which system of bargaining they operate.

Thirdly, the 'low paid' stream seems premised on an assumption that the safety net is not an appropriate standard of employment conditions. Coalition senators question this assumption. Those workplaces that abide by the law, providing the conditions set out in the National Employment Standards and modern awards, are effectively being sent a

message that the minimum conditions safety net is not sufficient and higher conditions should be imposed. This a perplexing position given our previous comments about the strength of the safety net provided by the Bill. The safety net should not be considered a spring board. The evidence of the Australian Industry Group supported this view:

> …the low-paid bargaining stream, in our view, would undermine Australia's enterprise bargaining system and add a further layer of arbitrated employment conditions above the safety net. In our view, it should be scrapped.[23]

Fourthly, the 'low paid' stream opens the door for circumstances that are akin to pattern bargaining. The Government has been very emphatic in its view that the Bill continues to prohibit pattern bargaining, and in this respect relies upon the inability for protected industrial action to occur in support thereof.[24] However, the pursuit of industrial action is not the only major concern associated with pattern bargaining – it is also the prospect of standardised outcomes, lack of genuine 'enterprise' level discussion, and reduced (or no) linkage to productivity gains. Such features of pattern bargaining are not conducive to encouraging future enterprise agreement negotiations, and may have the potential to cost jobs or lead to artificial wage outcomes. The spectre of pattern bargaining, no matter how remote, exists under the guise of the 'low paid' stream. Evidence of this was found in the comments of the LHMU who, on the day the Bill was introduced, stated that the 'low paid' stream would:

> give us the facility to try to get some sector-wide solutions…There is a very compelling logic as to why you want an industry-wide settlement (in industries such as childcare, cleaning, hotels, and security)[25].

Lastly, 'low paid' stream bargaining has the potential to reward a negotiation that is not genuine or has been half-hearted. It is very easy to envisage circumstances where a negotiation is one that simply 'goes through the motions' knowing that the prospect of compulsory arbitration looms large should agreement not be reached voluntarily.

Coalition Senators have serious misgivings about the low paid steam of bargaining. While the stated intention of this stream is commendable, in reality it is nothing more than a covert attempt to promote pattern bargaining in direct breach of numerous promises whilst hiding behind the rhetoric of assisting low paid workers.

In addition, we see it as a deliberate attempt to undermine the effectiveness and historical relevance of the safety net, by seeking to alter the expectations of workers within the low-wage sectors, those who are the most vulnerable.

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[23] Ms H Ridout, Committee Hansard, 18 February 2009, p2

[24] Julia Gillard, House of Representatives Hansard, 4 December 2008, p. 12646

[25] The Australian, 27 November 2008

There is absolutely no evidence that the safety net, either proposed or current, is not an effective provider of fair and reasonable conditions of employment.

### *(c) Good Faith Bargaining*

Although the prospect of compulsory arbitration is reduced outside of the 'low paid' stream, the new bargaining architecture nevertheless creates a number of circumstances where parties to the bargaining process may experience the forced intervention of a third party, being Fair Work Australia.

The existence of majority support orders, scope orders and general good faith bargaining orders all create circumstances where one party or another will be the subject of a direction to bargain in a particular manner, provide particular information or bargain with a particular set of employees. While the stated rationale behind such orders is not without merit, it is feared that such intentions may be statements of aspiration and that bargaining orders be used for other purposes in real life bargaining situations. There are, therefore, a number of concerns identified with the processes available to parties requiring them to bargain in good faith.

### *(d) Majority Support Determinations*

The creation of 'Majority Support Determinations' is intended to provide an avenue where Fair Work Australia can establish the extent of employee support to engage in bargaining, in circumstances where that support is contested. However, the discretion given to Fair Work Australia is broad and can contemplate matters such as petitions or the outcome of a 'show of hands'.

Such discretion has the unintended consequence of opening the door for inappropriate workplace conduct such as coercion or intimidation. Notwithstanding the protections against such conduct elsewhere in the Bill, a better approach would be to avoid the problem in the first instance by creating a method of determining majority support that is democratic and genuine.

There are likely to be very few circumstances where a business contests the legitimacy of its employees desire to bargain. However, common sense also tells us that where such a contest does arise, it would be for very good reason and in particular circumstances. Therefore the need for a transparent and genuinely democratic method of determining support is paramount, and preferable to the tabling of a petition or an affidavit describing a show of hands.

### *(e) Default Bargaining Agents*

The Bill provides that where an employee is a member of the union, their bargaining agent automatically becomes that particular employee's union, unless that employee 'opts out' and elects an alternative agent. This means that if a workplace of 1000 employees contains one union member, then that union must be recognised as a bargaining representative during enterprise bargaining. This is without any positive or proactive

action on the part of the single union member. There is a requirement that, when bargaining commences, the employer must provide a document to all employees giving them information about the right to be represented by a bargaining agent and, if they are union members, that the bargaining agent is automatically the union unless they 'opt out'.

Such a provision will operate in practice to limit an employee's choice of bargaining agent. It assumes, as a default, that the union will be the agent and requires a positive step from an employee to elect otherwise. Such an approach encourages laziness and mandates the involvement of a union unless employees take positive steps to say otherwise.

It would be preferable to require a union member to confirm in writing who their bargaining agent will be. This is an 'opt in' situation for union involvement. It gives employees the opportunity for genuine choice as to need for, and nature of, representation during the bargaining process. It would require an employee to genuinely think about the bargaining process and the extent to which they require assistance.

### *(f) Voting on Agreements*

The process of voting for or against an agreement is also of concern. The Bill provides that an agreement will be approved by employees when it is supported by the majority of those who vote. Such a provision could result in a situation where a minority of employees decide the outcome for the majority. For example, if an agreement is to cover 100 employees, and only 50 of those employees are present to vote, then only 26 people need to vote in favour of the agreement for it to be made. In principle a binding agreement should be supported by a majority of those who will be bound by it, not just by a majority of those who are present to vote.

### *(g) Better Off Overall Test*

The Bill creates an alternative to the existing "no disadvantage" test in the form of a Better Off Overall Test (or BOOT). The BOOT is conducted by Fair Work Australia when approving an agreement that has been accepted by parties within a particular workplace.

Certain evidence put to the Committee expressed concern about the nature of the BOOT when compared to existing tests. The BOOT appears to require that *every* employee who would be covered by a proposed agreement (and also future employees) must be 'better off' when compared to the terms of an underpinning modern award. In contrast, existing tests appear to have been more 'global' in nature, meaning that some employees may benefit and while others may simply be no worse off.

The intended operation of the BOOT was eventually clarified during proceedings on 19 February where the following exchange occurred:

> **Senator HUMPHRIES**—Just to clarify how the test is applied, assuming you have a benefit you can quantify and factor in, if there is a an agreement that is offered which in a workplace of, say, 50 members makes 49 of them

better off but one employee is neither better nor worse off, does it satisfy the BOOT test or not?
**Ms James**—Each employee has to be better off overall. It can be a marginal better off but I think the test would require that each employee be better off.
**Senator HUMPHRIES**—In that case, the agreement would fail because one employee would not be better off? Is that a 'yes'?
**Mr Kovacic**—That is certainly the way the Industrial Relations Commission has previously applied the no disadvantage test.
**Senator HUMPHRIES**—So you are saying yes to that question?
**Mr Kovacic**—Yes.
**Ms James**—Yes.
**CHAIR**—Just to clarify, the test is against the award only though, isn't it? It is not against—
**Mr Kovacic**—And it also needs to comply with the National Employment Standards once they come into effect as well.
**CHAIR**—That is right. So it is not better off against an existing instrument.
**Mr Kovacic**—It is the award and the NES[26]

This exchange creates two concerns for Coalition senators, being the practicability of compliance with the BOOT and the potential for its operation to act as a disincentive to voluntary collective bargaining.

It appears to be a clearly more difficult exercise to ensure that an agreement provides conditions that are "better" for each and every existing (and prospective) employee. In the example above, an agreement that benefits 98% of a workforce and leaves 2% on conditions that are no worse or unchanged, would fail. The bar set for the BOOT is therefore higher than the existing tests. While a higher bar may in one sense be appropriate, such a bar should not act as a disincentive for parties to collectively bargain and deliver benefits to the overwhelming majority of the workplace.

Coalition senators are concerned that the proposed application of BOOT is inconsistent with the stated aim of the Bill, being the encouragement of parties to collectively bargain.

### *(h) Greenfield Agreements*

The conceptual retention of Greenfield agreements is welcomed by Coalition senators. It is recognised that such agreements are crucial to the establishment of new workplaces, sites and projects.

A focus of concern to many witnesses before the Committee is the new requirement obliging the maker of a Greenfield agreement to notify each relevant employee organisation of the intention to make such an agreement. Further, there is a requirement that each relevant employee organisation that will be covered by the agreement must

[26] Committee Hansard, 19 February 2009, p81

execute the agreement as a precondition of it being made. A relevant employee organisation is defined as one that is entitled to represent the industrial interests of employees whom the agreement will cover.

A number of problems immediately arise, the first of which is the practical difficulty associated with determining who is a relevant employee organisation. This question must be determined by the maker of the agreement, the employer. Evidence before the Committee suggested that answering this question is not easy, and has in fact been significantly complicated by the abandonment of the traditional 'party' concept to industrial awards. CCI WA, said

> One of our concerns is the process in terms of notifying all relevant unions, and committee members will probably be aware of the complexity of union rules and constitutional coverage, overlapping coverage, and what I would call blurry coverage, particularly in the construction industry, so that you potentially have to notify and negotiate with a large number of unions in a relatively short period of time.[27]

This evidence was further to other evidence given by experienced stakeholders highlighting the difficulties in interpreting complex and unclear union coverage rules. [28] Evidence from the mining sector was:

> So you need to go back to all of the union rules and take into account the demarcation decisions, and you would probably have to look at the transitional provisions for state unions that have come into the system. That would take me a few days, and I have been in the game for 20 or 30 years. It would be difficult for an HR manager in a construction company to do it and make sure that they got it right.[29]

Concerns remain about the capacity of a small or medium business to comply with the proposed requirements.

A second problem arises in relation to the potential for conflict between unions that may arise as a result of the mandatory notification provisions. The evidence of Master Builders Australia conveyed concerns raised by others:

> Master Builders does not believe that unions, which have traditionally been in bitter conflict, should be advised of the intention to make a greenfields agreement with their rivals. In addition, the bill is unclear concerning whether or not an employer is required to make a greenfields agreement with all unions who are entitled to represent employees who will be covered by the agreement or, as appears to be the government's position, whether

[27] Mr D Lee, Committee Hansard, 29 January 2009, p28

[28] Ms L Brown, Committee Hansard, 17 February 2009 p.26

[29] Mr C Platt, Committee Hansard, 27 January 2009, page 7

> making an agreement with one union is sufficient. Whilst we understood that government policy is that greenfields agreements are able to be made only with one union, we believe that this matter should be put beyond doubt and that the bill be amended to make that point clear, as well as to change the notification requirements, which could be like throwing petrol on fire.[30]

Mr Harnisch explained the actual impact of the proposed provision on project costs:

> A member, who wants to remain anonymous, has informed us of their experience with making a current union greenfields agreement. That company has informed us that making a greenfields agreement with one union rather than with the union's rival organisation was estimated to have saved up to $80 million on one project and around $15 million to $20 million on another project. If you were to extrapolate that to the government's proposed well-founded reinvestment in Australia's infrastructure, you can see the economic and, obviously, the budget consequences of escalating those costs. That member has indicated to Master Builders that it would be prepared to provide substantiating evidence to this committee, but only in camera. These are savings which relate to infrastructure projects and moneys that are better spent on that purpose than on escalating the cost of those projects. We cannot emphasise enough that confidentiality in making a greenfields agreement with one union is an outcome from the bill that would be a great boost to productivity when compared with the proposed scheme— or, at least, the ambiguities that we believe are the case.[31]

The close association of this witness with the realities of the building and construction, and its use of Greenfield agreements, makes this evidence particularly compelling for Coalition senators.

A third problem arises in relation to the potential delays to project commencement due to the new Greenfield notification requirements. Evidence presented to the Committee express concern that a union or unions may exploit notification requirements and associated good faith bargaining requirements and deliberately delay the period it takes for agreement to be reached. This was likened to a union being given the power of 'veto' over the timing or commencement of a new site or project. Evidence to this effect was given by the Australian Industry Group:

> …we regard the greenfields agreement provisions of the bill as unworkable and likely to result in substantial delays in the commencement of construction projects and increased construction costs.[32]

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[30] Mr W Harnisch, Committee Hansard, 28 January 2009, page 28

[31] Mr W Harnisch, Committee Hansard, 28 January 2009, page 28-29

[32] Ms H Ridout, Committee Hansard, 18 February 2009, p2

The mining sector described the situation as follows:

> Essentially that will ensure that any new project where an agreement cannot be reached will have very little chance of proceeding. Nobody in their right mind will start a significant investment infrastructure project without having agreements in order to prevent industrial action occurring on site. So, out of that $67 billion worth of future agreements, I suspect that any single union which would be covered by those agreements can essentially veto the project.[33]

The evidence of the Western Australian experience from the WA Treasurer was:

> Our view is that the changes to greenfields agreements and the requirement now whereby employers will be required to notify all relevant employee organisations has the capacity to significantly—and I highlight significantly—frustrate negotiations where unions have overlapping coverage of employees. Why is that particularly important in Western Australia? I talked about our economic growth earlier and the stellar economic performance of our state's economy in this century—well, over the last seven or eight years. That has been primarily driven by investment in capacity building in the resources sector; in other words, by construction activity building capacity in the resources sector. In our state, there is a well-documented history of issues dealing with certain unions in the construction sector, and we do not want to allow a situation to arise, for example, where unions like the CFMEU have the opportunity to frustrate the development of projects which are of significance to Western Australia. We will not sit by and let that pass unchallenged because that particular organisation—and I most certainly do not apply my views of that organisation across all industrial organisations; that is not the case—has a particular history in this state, and we do not encourage any changes to legislation which would let that organisation in particular frustrate the economic development of Western Australia. So we are gravely concerned about the encumbrance upon employers to have to notify all relevant organisations; and that is based on memories which are not pleasant of having to deal with certain unions in the construction sector in the past and given the significance of the construction industry to this state. You have to remember that large components of our economic growth are project based. These are significant projects, often the type that fit the category of greenfields agreements, and we are very concerned about the impacts on those.[34]

[33] Mr C Platt, Committee Hansard, 27 January 2009, p.7

[34] Hon. Mr T Buswell, Committee Hansard, 29 January 2009, p 15-16

Whether or not the Bill adequately addresses concerns about 'union veto' within the good faith bargaining requirements remains to be seen. However, Coalition senators are concerned that this would be akin to 'letting the cat out of the bag' and then waiting to see if the system hauled it back in. The problem that supposedly the Bill is designed to fix is in fact created by that system and need not exist in the first instance.

There was minimal evidence to suggest that unions had hitherto been excluded from negotiating Greenfield agreements when they wanted involvement. There was significant evidence that employers in sectors utilising Greenfield agreements normally sought constructive negotiations with a union. This, combined with the higher threshold required by the BOOT and strengthened safety net of modern awards and NES, suggest there is little or no reason to mandate the notification of a union or unions.

## Unfair Dismissal

A common criticism of amendments made to the *Workplace Relations Act 1996* by the former government related to the perceived removal of an employee's capacity to seek legal recourse in the event of losing their job.

The *Fair Work Bill* proposes to address the perception that rights of redress for sacked employees had been swept away by removing a number of current jurisdictional bars preventing claims for alleged unfair dismissal. This includes reducing the small business exemption figure from 100 to 15, and removing the notion of 'genuine operational reasons'. Other substantive changes to alleged unfair dismissal provisions include new procedural requirements to be followed by Fair Work Australia and the development of the Fair Dismissal Code.

The evidence before the Committee was that, in general terms, the alleged unfair dismissal provisions within the Fair Work Bill are consistent with the policy thrust of Forward with Fairness. Although certain organisations noted their disappointment with the removal of current exemptions and expressed concern about the practical operation of the provisions, general acceptance of the mandate to make these changes was evident.

There are, however, a number of matters that came to the attention of the Committee which warrant comment.

### *(a) Right to Appear*

The Bill provides an automatic right for employees of particular organisations to appear before Fair Work Australia without the need to seek leave or 'permission'. Other types of representatives, such as legal practitioners or agents, do not enjoy such a right. They are required to obtain the leave of the tribunal before making an appearance on behalf of a party involved in a proceeding.

Although the intention of this provision is to replicate the existing provisions within the *Workplace Relations Act 1996*, it appears that the bar has been raised. This was confirmed during proceedings on 19 February where Departmental evidence was:

> The drafting is a little bit different and I think it is probably fair to say the thresholds are a little bit higher in terms of having to demonstrate a need for legal representation. So, again, a person may only be represented by a lawyer or paid agent with permission of Fair Work Australia—we use the term 'permission' instead of 'leave'. And, again, criteria apply, including criteria that relate to the complexity of the matter, whether it would be unfair not to allow the person to be represented because they are unable to represent themselves or whether it would be unfair taking into account the relativities between the parties. The framework then says that if you are being represented by an employer or employee organisation you can be represented by their employee, and it makes it clear that if an employee of your union or your employer organisation happens to be legally qualified they do not need to meet those criteria.[35]

The practical effect of such a provision is that membership of an industrial organisation (employee and employer) provides a right to representation not afforded to those who choose not take up such a membership.

### *(b) Time Limit for Making Applications*

The Bill replicates the commitments within Forward with Fairness by reducing the statutory time limit for commencing proceedings for alleged unfair dismissal from the existing 21 days to a proposed 7 days. It is also noted that the statutory time period for commencing an alleged unlawful dismissal has increased from the current 21 days to 60 days.

Although witnesses acknowledged that this time limit adjustment was consistent with Forward with Fairness, there were strong arguments from both business and unions that the change was inappropriate.

### *(c) Small Business Exemption*

The Bill recognises the long accepted fact that termination of employment is a concept viewed differently depending upon the size and nature of a business enterprise. The impact of a financial penalty (in the form of compensation) and the potential ramifications of a reinstatement order are more salient to many small business employers. In this regard, it is generally accepted that unfair dismissal laws are a disincentive to employment with the small business sector.

[35] Ms N James, Committee Hansard, 19 February 2009, p72.

The Bill's recognition of this view manifests itself in specific provisions for small business, which are defined as a business that engages 15 or fewer employees. These provisions provide two key distinctions.

The first is an extended period of 'qualifying' service that an employee of a small business must serve before being eligible to bring a claim for alleged unfair dismissal. This period is 12 months for an employee of a small business, whereas for all other employees the period is 6 months. The second is the development of the 'Fair Dismissal Code' for small business employers "which, if followed by a small business, will ensure that a dismissal is not found to be unfair."[36] These two distinctions for small business employers are welcomed by Coalition senators.

Less reassuring is the method by which the exemption applies. In simple terms, the 15 or less figure is established with reference to a straight 'head count'. The obvious problem this presents is the potential for inequality when distinguishing between full time, part time and casual employees.

A business may employ, say, 15 full-time workers, representing a total of 570 hours worked in a one week period. A comparable business may employ 25 workers, being 5 full-time (38 hours), 5 part-time (15 hours) and 10 casuals (5 hours). This would represent a total of 315 hours worked in a one week period. The second business, notwithstanding it engages employees for slightly more than half the number of hours when compared to the first business, is subject to claims for alleged unfair dismissal. The first business is not. Such a circumstance has the ability to result in perverse consequences, as one witness observed:

> … my understanding of 15 is 15 bodies, not 15 FTEs, or full-time equivalents. I think that that will act in a number of negative ways, and one of the most negative ways is that I think it will discourage small medium employers or smaller employers from engaging part-time staff with caring responsibilities because the difference between a 14 and below and a 15 and above is a six-month or a 12-month exemption. If a smaller employer employs staff for the available work, if you have a choice between employing one full-time—dare I say it—male with no caring responsibilities, as opposed to three part-time women with caring responsibilities, then I think that the choice becomes a lot easier for that employer to engage the fulltime male. And, as we know, we are in labour shortages and skill shortages despite the economic downturn, and one of the few available labour pools where we can increase employment is of women in particular, and women with caring responsibilities, so I do see this as a problem.[37]

[36] Julia Gillard – Second Reading Speech – 25 November 2008

[37] Committee Hansard, 17 February 2009, p. 28

Utilising the 'head count' approach to the question of 15 or fewer employees creates circumstances that, in our view, are unequal and open potential for unintended consequences. To avoid such outcomes, an alternative measure should be considered.

There are many alternative measures available, such as business turnover, profitability, and the existence of a dedicated employee with the responsibility for human resource management. However, these measures also have the potential for unintended consequences and manipulation.

A logical, clear and simple measure is that of full-time equivalency. This is an accepted practice that is capable of being easily understood by all stakeholders subject to the system. It represents a fair middle point between the need to provide fairness for employees and the legislative recognition of circumstances facing small business.

## Superannuation as an allowable matter

The *Fair Work Bill* reinstates superannuation as an allowable matter in the award system.

In parallel with this proposed legislative change, the Government has directed the AIRC to develop a series of Modern Awards with the aim of reducing the current 4300 awards to around 70. In the lead up to the commencement of the Fair Work legislation, the AIRC has already released a number of modern awards which specify particular industry funds as default funds. For example, the new retail award specifies REST as the sole default fund.

The Committee received many submissions from industry associations [38] and financial services companies [39] flagging their concerns with both the reinstatement of superannuation as an allowable matter and the AIRC decisions in relation to the modern awards.

IFSA, in its submission, said that the combination of the reinstatement of superannuation as an allowable matter with the decisions of the AIRC, which in some cases specify only one industry fund as the default fund, would result in reduced competition in the selection of superannuation default funds. IFSA also argued there will be less flexibility for employers. It also argued that the lessening of competition would result in higher fees. IFSA considered that the *Fair Work Bill* should include a provision that gave guidance to the AIRC in relation to default funds to enable competition.

The Financial Planning Association (FPA) was similarly concerned about reduced competition in the sector. In its submission it argued that the Modern Awards effectively created mandated monopolies, duopolies or oligopolies for the default funds. The FPA recommended that the AIRC should not specify default funds but rather allow

[38] Investment and Financial Services Association, Submission 55; and Financial Planning Association, NSW Submission 76

[39] ING Australia Submission 93 ; MLC and NAB Submission 108; and AMP Financial Services Submission 145

competition between funds. Submissions from individual companies mirrored the concerns identified by the industry associations.

AMP noted that the award modernisation process eliminated the flexibilities that were present in many existing awards. An AMP analysis indicated that in around 30 per cent of existing awards funds that were not specifically included in the awards had the capability of competing for business. AMP said that this flexibility had been eliminated in the modern awards as well as removing the ability of the employer to review the appropriateness of a fund to ensure it matches the needs of its employees.

In evidence given before the Committee, IFSA stated that the mandating of a few, and in some cases, only one superannuation fund would have deleterious effects for employers. IFSA also indicated that if an employer wished to align its business philosophy with its default fund, for example, a church group might wish to appoint a social responsible investment fund as the default fund, it would be prevented from doing so in many situations under the new arrangements.

There is little doubt that the new arrangements will reduce competition, which might lead to an increase in fees and charges. There will be reduced flexibility for employers and in many instances it might prohibit businesses from aligning their default fund with the values of their business. This would be particularly true of church/religious agencies, and those employed in the environmental sector or social welfare agencies.

Coalition senators note that far from enhancing flexibility (which is one of the key objectives of the Bill), the Government's decision to reinstate superannuation as an allowable matter will limit flexibility, impede choice for employers and in all likelihood increase in costs.

The *Fair Work Bill* should be amended to mandate that "any complying superannuation fund" be included in all awards in addition to any specific funds specifically nominated by the AIRC.

## Conclusion

The issues addressed above constitute significant and unresolved flaws in the framework of the *Fair Work Bill.* Coalition senators strongly urge the Government to embrace the constructive spirit in which these issues were raised by witnesses before the inquiry, witnesses who accept the tenor of the new workplace relations scenario but who are concerned that their ability to sustain jobs in that scenario will be undermined without some changes to the Bill.

Coalition senators believe the Government should honour commitments made to Australian business in Forward with Fairness.

**Senator Gary Humphries**
**Deputy Chair**

**On behalf of**
**Senator the Hon Eric Abetz**
**Senator Michaelia Cash**
**Senator Mary Jo Fisher**

# 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……
>
> ……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.
>
> 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.
>
> 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.
>
> 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**

# Appendix 1

## Submissions received

| Sub no. | Submitter |
|---|---|
| 1 | Mr Paul Meyers |
| 2 | Sex Workers Union, NSW |
| 3 | Payroll Matters Pty Ltd |
| 4 | United Services Union, NSW |
| 5 | Victorian Trades Hall Council |
| 6 | Mr Martin Willoughby-Thomas, VIC |
| 7 | Alex Falconer, WA |
| 8 | Workplace and Corporate Law Research Group, Monash University, VIC |
| 9 | Motor Trades Association of Australia, ACT |
| 10 | National Farmers' Federation, ACT |
| 11 | Textile, Clothing and Footwear Union of Australia |
| 12 | Shop, Distributive and Allied Employees' Association (National Office), VIC |
| 13 | Australian Council of Trade Unions (ACTU) |
| 14 | Unions Tasmania, TAS |
| 15 | The Western Australian Farmers Federation Industrial Association, WA |
| 16 | Government of Western Australia, WA |
| 17 | Adjunct Senior Lecturer Richard B Sappey, NSW |
| 18 | Institute for Private Enterprise, VIC |
| 19 | Name Withheld |
| 20 | Chamber of Commerce NT, NT |
| 21 | Yum! Restaurants Australia Pty Ltd, NSW |

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| 22 | Business SA, SA |
| 23 | Queensland Nurses' Union, QLD |
| 24 | Employment Law Centre of Western Australia, WA |
| 25 | Australasian Convenience and Petroleum Marketers Association |
| 26 | Australian Retailers Association, VIC |
| 27 | UnionsACT, ACT |
| 28 | BHP Billiton Ltd, VIC |
| 29 | The Hon. Neil Brown QC, VIC |
| 30 | Enterprise Initiatives |
| 31 | Queensland Working Women's Service Inc, QLD |
| 32 | Dr Michael Lyons and Dr Meg Smith, NSW |
| 33 | Housing Industry Association (HIA) |
| 34 | Ms Alexandra Heron, NSW |
| 35 | Federation of Ethnic Communities' Council of Australia, ACT |
| 36 | Law Society of NSW, NSW |
| 37 | Australian Higher Education Industrial Association (AHEIA), VIC |
| 38 | Australian Services Union (QLD), QLD |
| 39 | Local Government Association of Queensland, QLD |
| 40 | Stella Maris Seafarers Centre Melbourne, VIC |
| 41 | Australian Catholic Council for Employment Relations, VIC |
| 42 | Australian Meat Industry Council, NSW |
| 43 | Queensland Council of Unions, QLD |
| 44 | Carers Australia, ACT |
| 45 | Communication Workers' Union, VIC |
| 46 | Unions NSW, NSW |
| 47 | Fairwear SA, SA |

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| 48 | Ms Anna Chapman, Centre for Employment and Labour Relations Law, Melbourne University, VIC |
| 49 | Fairwear QLD |
| 50 | Jobs Australia |
| 51 | Colonial First State, NSW |
| 52 | Electrical and Communications Association, QLD |
| 53 | Australian Manufacturing Workers' Union, NSW |
| 54 | Rio Tinto |
| 55 | Investment and Financial Services Association, NSW |
| 56 | Australian Services Union (National), VIC |
| 57 | National Electrical and Communications Association, NSW |
| 58 | Australian Chamber of Commerce and Industry, VIC |
| 59 | Law Council of Australia, ACT |
| 60 | Australian Business Industrial, NSW |
| 61 | Australian Nursing Federation, VIC |
| 62 | Institute of Public Affairs, VIC |
| 63 | Department of Education, Employment and Workplace Relations, ACT |
| 64 | Master Builders Australia Inc, ACT |
| 65 | Students' Representative Council, University of Sydney, NSW |
| 66 | Chamber of Commerce and Industry Western Australia, WA |
| 67 | Victorian Automobile Chamber of Commerce, VIC |
| 68 | Independent Contractors of Australia, VIC |
| 69 | Shop, Distributive and Allied Employees' Association (VIC), VIC |
| 70 | Unions WA, WA |
| 71 | Liquor, Hospitality and Miscellaneous Union (National Office), NSW |
| 72 | Restaurant and Catering Australia, NSW |

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| 73 | Maritime Union of Australia, NSW |
| 74 | Liquor, Hospitality and Miscellaneous Union (QLD), QLD |
| 75 | IRIQ, QLD |
| 76 | Financial Planning Association, NSW |
| 77 | CPSU- State Public Services Federation Group, NSW |
| 78 | South Australian Wine Industry Association Inc, SA |
| 79 | Australian Services Union (VIC Private Sector Branch), VIC |
| 80 | Mr Dan Dwyer, NSW |
| 81 | Australian Workers' Union, NSW |
| 82 | Chamber of Commerce and Industry (QLD), QLD |
| 83 | Community and Public Sector Union (CPSU-PSU Group), NSW |
| 84 | The Association of Professional Engineers, Scientists and Managers Australia, VIC |
| 85 | Media, Entertainment and Arts Alliance, NSW |
| 86 | National Pay Equity Coalition and Women's Electoral Lobby Australia, VIC |
| 87 | Job Watch, VIC |
| 88 | Transport Workers Union, NSW |
| 89 | The Independent Education Union of Australia (the IEUA), ACT |
| 90 | Fair Wear VIC, VIC |
| 91 | Queensland Workplace Rights Ombudsman, QLD |
| 92 | Justice and International Mission Unit, VIC |
| 93 | ING Australia |
| 94 | Recruitment and Consulting Services Association |
| 95 | Australian Education Union, VIC |
| 96 | Australian Mines and Metals Association, VIC |
| 97 | Telstra, VIC |

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| 98 | Professor Andrew Stewart, SA |
| 99 | Michael Rawling, College of Law, Australian National University, ACT |
| 100 | Australian Hotels Association (AHA), ACT |
| 101 | Law Institute of Victoria, VIC |
| 102 | NSW Office of Industrial Relations |
| 103 | Australian Services Union of NSW |
| 104 | The Chamber of Minerals and Energy of Western Australia |
| 105 | National Tertiary Education Union, VIC |
| 106 | National Association of Community Legal Centres Employment Network, NSW |
| 107 | Police Federation of Australia, ACT |
| 108 | MLC and NAB |
| 109 | Communications, Electrical and Plumbing Union |
| 110 | Asian Women at Work, NSW |
| 111 | National Union of Workers Combined NSW, WA, QLD, SA Branch |
| 112 | CSL Australia, NSW |
| 113 | Cochlear, VIC |
| 114 | Rail, Tram and Bus Union, NSW |
| 115 | Combined Small Business Alliance of WA Inc |
| 116 | Business Council of Australia, VIC |
| 117 | Electrical Trades Union (ETU) (Vic Branch) |
| 118 | Australian Industry Group |
| 119 | Minerals Council of Australia, ACT |
| 120 | National Aquaculture Council, ACT |
| 121 | SA Unions, SA |
| 122 | Mr Chris White |

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| 123 | Seaborne Clothing Manufacturers Pty Ltd |
| 124 | Post Office Agents Association Limited (POAAL) |
| 125 | News Limited, NSW |
| 126 | Mercer Pty Ltd, VIC |
| 127 | Civil Contractors Federation, VIC |
| 128 | Australian Constructors Association, NSW |
| 129 | Professor Emeritas Harry Glasbeek |
| 130 | Construction, Forestry, Mining and Energy Union (CFMEU), NSW |
| 131 | Associate Professor Beth Gaze, Melbourne Law School, University of Melbourne, VIC |
| 132 | Professor David Peetz, QLD |
| 133 | Vietnamese Community in Australia, NSW |
| 134 | Tasmanian Chamber of Commerce and Industry, TAS |
| 135 | Ms Anna Chapman, Centre for Employment and Labour Relations Law, Melbourne Law School |
| 136 | Centre for Employment and Labour Relations Law, Melbourne University, VIC |
| 137 | Australian Human Rights Commission, NSW |
| 138 | Australian Government Office of the Privacy Commissioner |
| 139 | National Bulk Commodities Group, NSW |
| 140 | Shipping Australia, NSW |
| 141 | Electrical Trades Union of Employees Queensland |
| 142 | Inco Ships, NSW |
| 143 | The Industrial Relations Research Centre, University of New South Wales, NSW |
| 144 | Australian Ship Owners Association, VIC |
| 145 | AMP Financial Services |
| 146 | United Fire Fighters Union of Australia |

147 Australian Institute of Marine and Power Engineers

148 Australian Institute of Employment Rights

149 Mr Peter Whitelaw, WA

150 Dr John Buchanan, Director, Workplace Research Centre, Faculty of Economics and Business, University of Sydney

151 The Group of Eight, VIC

152 Australian Privacy Foundation, NSW

153 Stooke Consulting Group

154 TasBuild Limited, TAS

# Appendix 2

## Hearings and Witnesses

***Brisbane Convention Centre, Brisbane, 27 January 2009***

**Australian Mines and Metals Association**

Mr Christopher Platt, *General Manager, Workplace Policy*

Ms Minna Knight, *Director, Membership, Communications and Media*

**Chamber of Commerce and Industry - Queensland**

Mr Stephen Nance, *State Manager, WR Services*

Ms Margaret Darwin, *Senior WR Advisor*

**Australian Local Government Association, QLD Branch**

Mr Steve Cooney, *CEO*

Mr Anthony Goode, *Director, Workforce and Organisational Service*

**Queensland Council of Unions**

Mr Ron Monaghan, *General Secretary*

Ms Deborah Ralston, *Advocate*

Ms Julie Bignell, ASU;

Mr Phillip Hodge, LHMU

**Electrical Trades Union (Queensland)**

Mr Peter Simpson, *Assistant Secretary*

Ms Kerry Inglis, *Industrial Officer*

*Ms Patricia Carol, Industrial Officer, Communications, Electrical and Plumbing Union*

**Queensland Workplace Rights Ombudsman**

Commissioner Don Brown

Ms Wendy Ussher, Investigating Officer

**Professor David Peetz**

Griffith University Business School

***Adelaide Convention Centre, Adelaide, 28 January 2009***

**Professor Andrew Stewart**

University of Adelaide

**Business SA**

Mr David Frith, *Director of Policy*

Mr Michael Sheehan, *Senior Consultant*

Mr Henrik Wallgren, *Business Advisor*

**Master Builders Australia**

Mr Wilhelm Harnisch, *CEO*

Mr Richard Calver, *National Director Industrial Relations*

**Yum! Restaurants Australia**

Mr Richard Wallis, *Employee Relations Director*

Mr Tim McDonald, *Partner, Sparke Helmore*

***Perth Convention and Exhibition Centre, Perth, 29 January 2009***

**Employment Law Centre of WA**

Ms Toni Emmanuel, *Principal Solicitor*

Ms Sara Kane, *Manager*

Mr Michael Geelhoed , *Paralegal & Volunteer*

**WA Government**

Hon Troy Buswell MLA, *Minister for Commerce*

Ms Cara Breuder, *Manager – Legal and Legislation*

Mr Robert Horstman, *Acting Executive Director, Labour Relations Division, Department of Commerce, Western Australian Government*

**Chamber of Commerce and Industry, WA**

Ms Marcia Kuhne, *Manager, Workplace Relations Policy*

Mr Daniel Lee, *General Manager, Employee Relations*

Mr Geoff Blyth, *Group Workplace Relations Manager, Compass Group (Australia) Pty Ltd*

Mr Michael Borlase, *Group Industrial Relations Manager, Clough*

**National Aquaculture Council**

Mr Brian Jeffriess, *CEO, Australian Southern Bluefish Tuna Industry Association*

Mr Brett McCallum, *Pearl Producers Association*

**Unions WA**

Mr Dave Robinson, *Secretary*

Ms Simone McGurk, *Assistant Secretary*

Ms Lolita Lamberto, *Member*

***Melbourne Town Hall, Melbourne, 16 February 2009***

**FairWear**

Ms Liz Thompson, *Co-ordinator*

Ms Shelley Marshall, *Committee Member*

Ms Nguyet Nguyen, *Clothing Outworker*

**Maritime Union of Australia (MUA)**

Mr Paddy Crumlin, *National Secretary*

Mr Rod Pickette, *Policy Executive Officer*
Mr Bill McNally, *Partner - W. G. McNally Jones Staff, Lawyers*

**CPSU**

Mr Stephen Jones, *National Secretary*

Ms Melissa Donnelly, *Senior Legal Officer*

**Australian Retailers Association**

Mr Richard Evans, *Executive Director*

Mr Toby Halls, *Employment Relations Specialist*

**Australian Hotels Association**

Mr Bill Healey, *Chief Executive Officer*

Mr Ross Clarke, *Director, Industrial Relations*

**Australian Nurses Federation**

Mr Nick Blake, *National Industrial Officer*

Mr Steve Ross, *Industrial officer, Queensland Branch*

Ms Lisa Fitzpatrick, *Member*

**Textile, Clothing and Footwear Union**

Ms Michele O'Neil, *National Secretary*

Ms Bev Myers, *National Industrial Officer*

Ms Beth Macpherson, *Officer*

**Stooke Consulting Group**

Mr Warren Stooke

***Melbourne Town Hall, Melbourne, 17 February 2009***

**Shop, Distributive and Allied Employee's Association**

Mr Joe DeBruyn, *National Secretary*

Mr Ian Blandthorn, *National Assistant Secretary*

Mr John Ryan, *National Industrial Officer*

**Australian Chamber of Commerce and Industry**

Mr Peter Anderson, *CEO*

Mr Scott Barklamb, *Acting Director Workplace Policy*

Mr Daniel Mammone, *Manager, Workplace Relations and Legal Affairs*

**Australian Business Industrial - NSW Business Chamber**

Ms Leah Brown, S*enior Workplace Policy Advisor*

Mr Greg Pattison, *GM, Workplace Solutions*

**Australian Services Union**

Ms Linda White, *Assistant National Secretary*

Ms Ingrid Stitt, *Secretary, Victorian Branch*

Ms Lisa Darmanin, Assistant Secretary, Victorian Authorities and Services Branch

Ms Clair Corbett, Association of Neighbourhood Houses and Learning Centres

**Australian Council of Trade Unions**

Ms Sharan Burrow, *President*

Ms Cath Bowtell, *Senior Industrial Officer*

Mr Joel Fetter, *Industrial Officer*

Mr Jeff Lawrence, *Secretary*

**Civil Contractors Federation**

Mr Phil Marsh, *President*

Mr Rob Batchelor, *Chair, WR Committee*

Mr Chris White, *Chief executive Officer*

Ms Julie Abramson, *National Policy Director*

**Australian Education Union**

Mr Rob Durbridge, *Federal Industrial Officer*

Mr David Colley, *Industrial Officer, Victorian Branch*

**Victorian Trades Hall Council**

Mr Brian Boyd, *Secretary*

Mr Adam Bandt, *Barrister*

Mr Geoff Borenstein, *In-House lawyer, Electrical Trades Union*

Mr Peter Marshall, N*ational Secretary, United Firefighters Union*

Ms Suzanne Hammond, *Representative, Victorian Branch, Community & Public Sector Union- State Public Services Federation*

Ms Bronwyn Halfpenny

Mr Dinh Nguyen, *Australian Manufacturing Workers Union*

Ms Maria Scarfi, *Toll Dnata*

***Cliftons Conference and Training Facilities, Sydney, 18 February 2009***

**Australian Industry Group (AiG)**

Ms Heather Ridout, *Chief Executive Officer*

Mr Stephen Smith, *Director - National Workplace Relations*

**Australian Workers' Union (AWU)**

Mr Paul Howes, *National Secretary*

Mr Ben Swan, *Assistant National Secretary*

Mr Andrew Herbert, *Counsel*

Mr Marc De Carne, *AWU National Legal Officer*

**Cochlear Australia**

Dr Chris Roberts, *CEO*

Mr Dig Howitt, *Senior Vice-President, Manufacturing and Logistics*

Mr Joydeep Hor, *Counsel, Harmers Lawyers*

**Asian Women at Work**

Ms Lucy Fu - *Member of Asian Women at Work Action Group*

Ms Angela Zhang - *Chinese Community Worker*

Ms Hanh Le - *Vietnamese Community Worker*

Ms Qi Fen Huang - *Chinese Community Worker*

Ms Debbie Carstens - *Development Officer*

**Dr John Buchanan***

*Director, Workplace Research Centre, University of Sydney*

**Investment and Financial Services Association**

Mr Richard Gilbert, *CEO*

Mr Daniel Caruso, *Senior Policy Manager*

Mr Nicolette Rubinsztein, *Convener of the IFSA Fees and Charges WG*

**Financial Planning Association of Australia**

Ms Jo-Anne Bloch, *CEO*

**United Services Union**

Mr Ben Kruse, *General Secretary*

**Unions NSW**

Mr Mark Lennon, *Secretary*

Ms Alisha Wilde, *Industrial Officer*

Ms Sally McManus, Secretary, Australian Services Union of NSW

***Parliament House, Canberra, 19 February 2009***

**National Farmers Federation**

Ms Denita Wawn, *General Manager Workplace and Corporate Relations*

**Minerals Council of Australia**

Mr Mitchell Hooke, *Chief Executive Officer*

**CEPU**

Mr Peter Tighe**,** *National Secretary*

Mr Ed Husic, *National President*

Mr Lindsay Benfell, *Senior National Industrial Officer*

**Australian Manufacturing Workers Union (AMWU)**

Mr Dave Oliver, *National Secretary*

Ms Lily Yin, *NSW Branch*

Mr Tim Chapman, NSW Branch

**National Union of Workers**

Mr Craig Shannon, *Industrial Officer*

Mr Derek Belan, *NSW Branch Secretary*

Mr John Cosgrove, *QLD Branch Secretary*

Mr Nick Threadgold, *SA Branch Secretary*

**Liquor, Hospitality and Miscellaneous Union**

Mr Tim Ferrari, Assistant National Secretary

**Police Federation of Australia**

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Mr Chris Steele, *AFPA*

Mr Chris Kennedy, *VPA*

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**Department of Education, Employment and Workplace Relations**

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Ms Louise McDonough, *Branch Manager, Workplace Relations Policy Group*

Mr Mark Roddam, *Branch Manager, Workplace Relations Policy Group*

Mr Peter Cully, *Branch Manager, Workplace Relations Legal Group*

Mr David Bohn, *Branch Manager, Workplace Relations Legal Group*

Mr David De Silva, *Branch Manager, Workplace Relations Legal Group*

Ms Elen Perdikogiannis , *Branch Manager, Workplace Relations Legal Group*

Mr Henry Lis, *Branch Manager, Workplace Relations Legal Group*

THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

26 FEB 2009

Senator Gavin Marshall
Chair
Senate Education, Employment and Workplace Relations Committee
Parliament House
Canberra ACT 2600

Dear Senator Gavin Marshall

I am writing to advise the Committee about the arrangements for transitional and consequential legislation that will operate with the Fair Work Bill once enacted to transition employers and employees into the new workplace relations system. This information may further inform the Committee's current inquiry into the Fair Work Bill 2008.

Key elements of this legislation will include:

- provisions to repeal the current Workplace Relations Act 1996 with Schedule 1 (organisations) to be retained and re-named as a separate piece of legislation;
- the application of the National Employment Standards and minimum wages to all national system employees from 1 January 2010 including those covered by instruments made before commencement of the new system, with scope to 'phase in' certain entitlements;
- provisions to ensure that an employee's take home pay is not reduced as a result of the employee's transition onto a modern award by allowing for Fair Work Australia to make orders to deal with any such matter;
- rules in relation to the treatment of existing instruments in the new system, including the operation of agreements until terminated or replaced, the cessation of pre-modernised awards when replaced by modern awards, a process for integration of enterprise awards and enterprise NAPSAs into the new system and a process to allow employees on individual statutory agreements to participate in and benefit from collective bargaining;
- the abolition of the Workplace Ombudsman and the Australian Fair Pay Commission from commencement (with these functions to be taken over by the Fair Work Ombudsman and Fair Work Australia), and the continued operation of the Workplace Authority and the Australian Industrial Relations Commission (AIRC) and the Australian Industrial Registry (AIR) for a limited time to finalise existing matters;
- provisions to appoint all existing full-time AIRC members to Fair Work Australia while retaining their current appointments as members of the AIRC for a transitional period;

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- the creation of the Fair Work Divisions of the Federal Court and the Federal Magistrates' Court;
- rules to enable state-registered organisations to participate in the new federal system; and
- a process to enable Fair Work Australia to make representation orders dealing with union demarcation issues in a wider range of circumstances than at present, including where this is necessary to preserve demarcations derived from state or federal award coverage.

Consistent with the Governments commitment to undertake extensive consultation on the new workplace relations system, the proposed transitional and consequential arrangements will be considered by the Committee on Industrial Legislation (COIL), and officials from the State and Territory governments at a two day meeting to be held on 26-27 February 2009.

My intention is then to present two separate Bills to the Parliament.

The first Bill will be introduced in the week beginning 16 March 2009. This Bill will include:

- transitional provisions;
- consequential amendments to other Commonwealth legislation considered essential to the operation of the Fair Work Bill (i.e. the creation of the Fair Work Divisions of the Federal Court and the Federal Magistrates' Court); and
- consequential amendments related to the workplace relations portfolio (e.g. the Workplace Relations Act 1996, the Building and Construction Industry Improvement Act 2005).

A second Bill would then deal with remaining consequential amendments to all other legislation (which is likely to involve amendments to over 70 Commonwealth Acts) and amendments consequential on any State referrals of power. This Bill would be introduced in the week commencing 23 May 2009. It is then anticipated that both these Bills will be dealt with together in the Senate.

I believe the timeframes I am proposing for both Bills will allow sufficient time for the Parliament, including your Committee, to fully examine their provisions.

I trust this additional information will assist the Committee.

Yours sincerely

**Julia Gillard**
**Minister for Employment and Workplace Relations**