Submission

to

Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the Fair Work Bill 2008

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INTRODUCTION

1. Australian Services Union Victorian Private Sector Branch ("ASU Victorian Private Sector Branch") members work in a wide variety of industries and occupations including:

    - Transport, including passenger air, road, and air freight;
    - Clerical and administrative employees in commerce and industry generally;
    - Community, not-for-profit services;
    - Legal Services;
    - Wagering and
    - Call centres.

2. The *Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ("Work Choices") swept away many protections for ASU Victorian Private Sector Branch members by ripping apart the safety net that helped maintain fair employment standards.

3. For ASU Victorian Private Sector Branch members working in lower paid industries, in precarious types of employment on a casual or part time basis, Work Choices further entrenched their disadvantage because the laws tipped the scales in favour of employers.

4. Most workers were denied the right to access justice if they were unfairly dismissed. Sub-standard individual employment agreements were promoted at the expense of collective agreements and collective bargaining. Workplace representation was an optional extra for a few, but not many workers.

5. The introduction of the *Fair Work Bill 2008* ("the Bill") into the Commonwealth Parliament has continued the process that began at the

last Federal election, to build a more inclusive and fairer Australian society.

6. A touchstone of this more inclusive and fairer community is an industrial landscape no longer marred by the former Howard Government's Work Choices laws.

7. The ASU Victorian Private Sector Branch welcomes the introduction of the Bill to create a fairer bargaining and industrial environment and submits that the Bill will tip the scales back towards an equilibrium by:

- Guaranteeing that workers are free to choose to collectively bargain and to be represented and supported by their union;
- Restoring decency to the workplace by requiring employers to negotiate in good faith;
- Creating democracy at work so that when a majority of workers support collective bargaining they will be able to bargain collectively;
- Repairing the safety net of awards and national employment standards and
- Establishing a new industrial umpire that can, in some cases, issue binding orders.

8. The ASU Victorian Private Sector Branch welcomes the reforms introduced in the Bill with some reservations, because some aspects of the Bill should be improved to better protect employment standards and workers rights. Accordingly, the ASU Victorian Private Sector Branch submission addresses the following matters that remain of concern: award modernisation and the new safety net; flexibility clauses and arrangements; industrial action ballots; the $100,000 cut-off for awards (shift penalties and the proposed exemption rate clause in modern awards); resolution of disputes; binding workplace determinations (arbitration); occupational health and safety (OHS) terms and un-

permitted content; and unfair dismissal protections. The submission also briefly addresses proposed transitional arrangements, foreshadowed by the Hon. Julia Gillard MP, the Minister for Employment and Workplace Relations in her Second Reading Speech.

1. AWARD MODERNISATION

(a) Award coverage terms and the safety net

9. Award modernisation must not disturb existing coverage arrangements and terms.

10. Clerical occupational awards and industry awards should sit side by side, within, or across, industries.

11. Specifically, clerical occupational awards should apply within all industries, even if an industry award refers to clerical classifications.

12. The Bill provides that a modern award must include coverage terms that expressly set out the workers and employers who are covered by the award (clauses 143 (1) and (2) of the Bill). Coverage terms *may* also be expressed to cover one or more unions, and may cover all workers, or a sub group of workers and employers who are to be covered by the award (clauses 143 (1) and (3) of the Bill). The Bill also provides that a sub group of workers can be described by reference to *a particular kind of work* or particular part of an industry (clause 143(6) of the Bill).

13. The ASU Victorian Private Sector Branch is concerned that award modernisation will disadvantage employees despite Federal Government assurances to the contrary. If the Australian Industrial Relations Commission ("AIRC") disturbs award coverage terms when modernising awards there will be significant implications for the entitlements of award dependent employees and for enterprise agreement bargaining.

14. This is because a proposed enterprise agreement (non greenfields) must be assessed against a relevant modern award to pass the better off

15. The Full Bench of the AIRC has indicated in its Award Modernisation Decision [2008] AIRCCFB 1000 (18 December 2008 at par 23) that the clerical occupational award would only cover workers where there is no relevant industry award. Further, the AIRC indicated in this decision that the precise scope of the award would not be finalised until the completion of the award modernisation process.

16. If the AIRC modifies clerical award coverage terms to implement this decision, the capacity of the ASU Victorian Private Sector Branch and our members to bargain will be impeded. The ASU Victorian Private Sector Branch may end up being a bargaining representative for an employee (pursuant to clause 176(1)(b) of the Bill) but not listed as a union with an interest in the applicable industry award, and the modern clerical award would not cover that employee. The ASU is concerned that existing coverage arrangements would be disturbed where the coverage terms of the modern clerical award would not apply to the industry in which that employee works.

17. As a result, so that existing employment standards are not eroded, and so that existing coverage arrangements are not disturbed, occupational awards should apply either within or across industries.

Case Study 1: Armaguard

The ASU and Armaguard have a long history of bargaining underpinned by the Clerical and Administrative Employees (Victoria) Award 1999 (Clerical and Admin Award).

Neither the ASU nor the employer support clerical occupational classifications contained in the applicable clerical award, in the cash transport industry, being subsumed within a general Transport Award.

As a result, occupational and industry awards should sit side by side, within, or across industries.

Armaguard has developed a constructive relationship with the ASU and our members that is based on mutual respect, understanding and collective bargaining measured against a strong safety net.

Case Study 2: Toll Dnata

Westaff Australia Pty Ltd (Westaff) (labour hire firm providing labour for Toll Dnata) and Toll Dnata Airport Services Pty Ltd (Toll Dnata) (the direct employer) applied different awards to the same industry and for the same work performed by employees who perform check-in work for passengers traveling with Emirates Airlines.

Westaff applied the Airlines Operations (Transport Workers') Award 1998 to assess the AWAs against the fairness test.

Toll Dnata applied the Airline Operations Clerical and Administrative Award 1999 to assess the Individual Transitional Employment Agreements (ITEA) against the no disadvantage test.

The ASU assessed both the AWAs and ITEAs and determined that staff would be up to $5,000 a year worse off, when compared to the relevant Award. The AWAs and ITEAs included no penalty rates or shift allowances and overtime would only be paid when a worker completed 1,786 hours a year. Due to flight scheduling, workers start their shifts at 3.45am, 4.00pm or 11.30pm - a decent wage and penalty rates are important when you trade off sleep and time with family and friends.

Putting aside the fact that different tests were applied to the AWAs and the ITEAs, different minimum standards were also applied when assessing these agreements, because the terms and conditions of employment contained in each of the awards differs greatly.

In September this year, more than eight months after the first AWA was signed and six months after the first ITEAs were signed, the Workplace Authority notified staff that the employment contracts had not passed the relevant tests.

Now staff must wait again as the process to calculate under-payments occurs. To add to the complexity of this case, underpayment anomalies have resulted because Westaff and Toll Dnata have applied different awards.

While it is important to clarify the type of work that is to be covered by modern awards, this task must be completed in a manner that does not disturb coverage provisions, except to the extent that anomalies such as the Westaff and Toll Dnata cases are satisfactorily resolved.

(b) Modern Awards must not erode the safety net

18. Award modernisation must not result in a reduction of existing entitlements and conditions that make up the employment safety net.

19. In finalising the content of modern awards, if the AIRC creates modern awards that are not made up of the *highest* common denominator, both award based and non-award based employees will be disadvantaged. The arbitrary averaging of terms and conditions of employment, for example to remove interstate differentials, is resulting in workers losing entitlements without compensation.

20. The initial signs are worrying. The AIRC has proposed that casual loadings for Victorian workers will be cut from 33.3% to 25%. For example, this may mean a cut for a casual clerical worker in Victoria working 30 hours per week of $45 each week or $2300 per year (Award Modernisation Decision [2008] AIRCCFB 1000 (18 December 2008), clause 12 of the Clerks Private Sector Award 2010 (MA000002)).

21. In these circumstances, the unintended consequence of award modernisation will be to reduce the safety net of minimum entitlements for both award based, and non-award based workers.

22. In the case of award based workers, if clerical occupational awards do not protect workers in industries where an industry award may include clerical classifications, the ultimate outcome will be a reduction of award conditions for clerical employees. This is because in many industries clerical employees, who are often predominantly female, are overlooked and undervalued by employers and other groups of employees. This usually occurs where the majority of workers in an industry fall within a trade or professional classification, and they do not perform clerical or administrative work. The ASU Victorian Private Sector Branch has worked hard to ensure that the skills of clerical and administrative employees are valued, and the attendant conditions are rewarded, through the establishment and maintenance of clerical awards.

23. In the case of non-award based workers, a reduction in the award safety net would also lead to a reduction of employment conditions because modern awards are to be used to determine whether new enterprise

agreements provide for an overall benefit to employees when the agreement is measured against the applicable modern award.

24. If the conditions of employment contained in modern awards are reduced as a result of award modernisation, this will result in agreements being measured against a lower safety net, and ultimately result in a reduction of wages and conditions of employment.

2. FLEXIBILITY CLAUSES – DE-FACTO INDIVIDUAL AGREEMENTS

25. Individual flexibility agreements must not be used to undermine the conditions of employment in an enterprise agreement, or modern award.

26. The Bill provides that an enterprise agreement must contain a flexibility term that enables an employer and an employee to agree to an arrangement that varies the agreement that applies to the employee and employer (clause 202 of the Bill). Further, a modern award must also contain a flexibility term that enables an employer and an employee to agree to an arrangement that varies the award that applies to the employee and employer (clause 144 of the Bill).

27. The Bill provides that a flexibility term in an agreement or award must: set out the specific term(s) of the applicable agreement that may be varied; be genuinely agreed to by the employer and employee; ensure that the employee is better off overall; and that the employee is able to terminate the flexibility term within twenty eight days, or at any time if both the employer and employee agree.

28. The flexibility term in an agreement must also be about permitted matters and not be about unlawful terms (clause 203 of the Bill).

29. A welcome safeguard in the Bill requires that terms of an enterprise agreement that may be varied by an individual flexibility arrangement *must* be negotiated between the bargaining parties. In the case of modern awards a flexibility arrangement must be genuinely agreed to.

30. It remains of concern however that individual flexibility arrangements have the potential to undermine collective outcomes. This is because employers will be able to negotiate flexibility arrangements with employees who are more vulnerable and less able to assert their rights.

31. Individual flexibility arrangements create statutory individual contracts by another name. As a result, the proposed Bill fails to render statutory individual contacts to the Work Choices dustbin.

32. The ASU Victorian Private Sector Branch welcomes workplace rights provisions of the Bill that discourage adverse action (clauses 340 to 342), coercion (clause 343), undue influence or pressure (clause 344) and misrepresentations (clause 345) against employees in connection with the making of individual flexibility arrangements.

33. In each of these circumstances, a breach of one or more of these safeguards would enable the union (or the individual employee) to seek a civil remedy through either the Federal Court or Federal Magistrates Court, or for the court to grant an injunction or interim injunction to prevent or stop a breach of one of these provisions of the Bill.

34. The opportunity to obtain an injunction in order to prevent a breach of these provisions strengthens workplace rights. In practice, measures that aim to prevent coercive or adverse conduct may force parties to *respectfully* make individual flexibility arrangements.

35. On the other hand, the Bill should be amended so that FWA can arbitrate disputes concerning issues of fairness involving adverse action, coercion, undue influence or pressure and misrepresentations against employees in connection with making individual flexibility arrangements, so that the reforms facilitate greater access to justice. Enforcing rights through courts is prohibitive and more costly than pursing a dispute over issues of fair conduct through FWA.

3. INDUSTRIAL ACTION BALLOTS

36. Work Choices laws to approve the taking of protected industrial action for a proposed enterprise agreement must be reformed.

37. Procedures should be streamlined so that workers can democratically and simply approve the taking of protected industrial action without unnecessary delay. The complicated Work Choices laws for holding a ballot frustrate workers ability to exercise industrial democracy at work. The Government must uphold its election commitment, namely, that "the ballot process will be fair and simple…" (*Forward with Fairness, Labor's plan for fairer and more productive Australian workplaces*, April 2007, p16).

38. Continuing to require the Australian Electoral Commission, or an agent (if an agent is used, any costs must be paid for by the union) to conduct a ballot to approve taking protected industrial action, is an unnecessarily bureaucratic process.

39. Compiling a roll of voters to be balloted, adding and removing names from the roll, or varying the roll of voters is time consuming and open to abuse by a party that works the system to slow the process down.

40. The Bill should be amended to simplify procedures to approve the taking of protected industrial action. The industrial action ballot procedures should be akin to those that existed in the pre-Work Choices *Workplace Relations Act 1996*.

4. $100,000 CUT-OFF FOR AWARDS

(a) Shift Penalties

41. Workers who are paid shift penalties, and as a result earn more than $100,000 per annum, should not be treated as high-income employees who stand to lose modern award protections.

42. Clause 47(2) of the Bill provides that a modern award does not apply to an employee when an employee is a high-income employee.

43. A high-income employee is defined at clause 329 of the Bill as an employee whose *guaranteed* annual earnings are greater than the amount prescribed in the regulations.

44. The regulations are yet to be released, however the Explanatory Memorandum to the Bill (para 1332) provides that the high-income threshold will be $100,000 per annum for full time employees, indexed from 27 August 2007 (the date that the policy was announced) and then indexed from 1 July every year there after.

45. While the Bill provides that 'earnings' for the purpose of determining whether an employee is a high-income employee do not include payment amounts which cannot be determined in advance (clause 332(2)(a) of the Bill), it does not specifically exclude shift penalties, which if counted, may result in a full time employee's earnings amounting to more than $100,000 per annum. This is ambiguous and the either the Bill should be amended, or this matter should be clarified in the regulations, so that shift penalties are excluded when calculating the $100,000 earnings cap.

46. This ambiguity poses significant problems in industries that are twenty-four hour operations such as in airlines or cash transport, and where employees are required to work shifts that attract shift penalties, often earning more than $100,000 per annum depending on their classification under the relevant award. The ASU Victorian Private Sector Branch submits that the Bill should be amended to address this anomaly and implement Labor's election commitment that the "calculation of the $100,000 threshold will be employee's guaranteed ordinary earnings" (*Forward with Fairness, Policy Implementation Plan*, August 2007, p9).

47. As a result, if shift penalties are treated as 'earnings' for the purpose of clause 332(1) of the Bill, many ASU Victorian Private Sector Branch employees working in industries with twenty four hour operations will be classified as high-income employees earning more than $100,000 per

annum, with the result that modern awards may not apply to these employees.

(b) Clerical Private Sector Modern Award

48. As a general rule, modern awards must fully apply to employees earning less than $100,000 of guaranteed earnings per annum.

49. The AIRC in its recent full bench decision (Award Modernisation Decision [2008] AIRCCFB 1000 (18 December 2008)) and in clause 17 of the Clerks Private Sector Award 2010 (MA000002) ("modern clerical award"), created an exemption rate clause that will undermine the Federal Government's proposed new stronger safety net.

50. Clause 17 of the modern clerical award provides that many of the provisions contained in the award (except for National Employment Standard redundancy entitlements, superannuation, annual leave, personal/carer's leave and compassionate leave, public holidays and community service leave) will not apply to employees who are in receipt of a weekly wage 15% in excess of $740 per week (the proposed level 5 award wage rate in the modern clerical award). That is, the modern clerical award would not apply to an employee earning just in excess of $851 per week (excluding overtime and shift allowances).

51. As a result, the modern clerical award would not fully apply to employees earning as little as $44,252 per annum.

52. Thus a clerical worker earning only $851 per week stands to lose basic award conditions such as:

- Hours of work clauses, including spread of ordinary hours clauses and weekend penalty rate clauses;
- Access to a dispute resolution procedure;
- Overtime pay clauses;
- Minimum engagement periods;

- Redundancy entitlements that are above the NES;
- Part-time work arrangements;
- All allowances including accident make up pay;
- Shift penalties and hours arrangements; and
- Rest breaks and meal breaks.

53. Clause 17 of the modern clerical award is at odds with, and contradicts the intention of the Bill, to apply modern awards to employees earning less than $100,000 guaranteed earnings per annum. Further, this award exemption clause undermines the election commitment that "Labor in Government will legislate to confine the application of Labor's new award system to employees who earn less than $100,000 per year when the new award system commences on 1 January 2010" (*Forward with Fairness, Policy Implementation Plan*, August 2007, p9).

54. This proposed exemption rate clause, severely limits the application of the modern clerical award. It is inconsistent with Labor's promise, to re-establish a strong safety net so that workers earning less than $100,000 of guaranteed earnings per annum, would be protected by modern awards.

55. Workers paid $44,252 per annum are not high-income employees, and they should not lose modern award protections.

56. The Bill must be amended to clarify that modern awards are to apply, in full, to employees earning less than $100,000 guaranteed ordinary earnings per annum.

5. FWA – RESOLUTION OF DISPUTES AND ARBITRATION.

(a) Resolution of Disputes:

57. FWA must be able to hear and determine any dispute regarding a modern award, a national employment standard, an enterprise agreement, a

common law contract of employment concerning the NES or an award, or any other employment related matter.

58. FWA ideally should function as a one-stop shop for the resolution of disputes, which would assist workers to enforce their rights and significantly enhance access to justice.

59. It is of significant concern that potential disputes about the application of NES or award safety net entitlements can only be conciliated by FWA and may not be arbitrated. It is wholly inadequate for workers to pursue disputes about basic safety net entitlements through the courts, a costly avenue, that will result in many workers abandoning claims.

60. FWA should be permitted to deal with disputes about whether, or not, an employer had a "reasonable business ground" for refusing a flexible work hours arrangement, or for refusing to extend parental leave for a further period of 12 months under the NES (clause 739 (2) of the Bill read with clause 65(5) and clause 76 (5) of the Bill).

61. The ASU Victorian Private Sector Branch receives numerous requests from its members who are award dependent employees for assistance with requests to extend periods of parental leave, and to negotiate flexible work arrangements when returning to work from parental leave.

62. FWA could assist workers to manage the challenges presented by balancing work and family obligations by independently assisting with the resolution of disputes involving flexible work arrangements, or a request to extend parental leave where the employer and an employee are at an impasse.

(b) Arbitration - Binding Workplace Determinations

63. FWA should be able to arbitrate any dispute in all circumstances without exception.

64. The ASU Victorian Private Sector Branch welcomes the introduction of new provisions in the Bill that enable arbitration where parties have not had access to arbitration under Work Choices.

65. Arbitration avenues, available under the Bill, and supported by the ASU Victorian Private Sector Branch include:

- Access to arbitration resulting in a "*serious breach declaration*" where there are serious and sustained breaches of bargaining orders that have seriously undermined bargaining for an agreement (clause 235 of the Bill);
- Bargaining related workplace arbitration in general (for instance Part 2-4, Division 8, and Part 2-5, Division 4 of the Bill);
- Arbitration where a low paid authorisation is in operation, but the parties are unable to reach agreement over the multi-enterprise agreement (clause 262 and clause 263 of the Bill);
- Arbitration where there is a low paid workplace determination (clause 261 of the Bill); and
- Arbitration by consent (with some reservations) (clause 595 and clause 739 of the Bill).

66. The ASU Victorian Private Sector Branch submits that the Bill should enable FWA to arbitrate all workplace disputes.

67. For example, FWA should be able to arbitrate disputes in the same way that the AIRC was able to do so when a section 99, pre-Work Choices *Workplace Relations Act 1996* dispute had been notified. This would establish a simpler and fairer process because all employees would be conferred with the same rights to access arbitration.

68. Provisions of the Bill that enable FWA to arbitrate a bargaining dispute where the bargaining representatives have *agreed* that FWA may arbitrate a dispute (see for example clause 240(4) of the Bill, clause 595 (3) of the Bill, or clause 739(4) of the Bill) will result in workers with less bargaining

power, such as women workers in low paid industries, having a limited ability to win access to arbitration than workers with more bargaining power. For example, many ASU Victorian Private Sector Branch members employed under non–union collective agreements do not have access to arbitration. If the Bill is not amended, they will continue to be denied the ability to access just outcomes and have no recourse to an independent umpire.

69. It is also disconcerting that dispute resolution procedures in modern awards would only provide for access to arbitration where there is consent *(Award Modernisation Decision [2008] AIRCFB 1000*, 19 December 2008, read with clause 9.3 of the modern clerical award and clause 739(4) of the Bill). As a result, award dependent workers, often with less bargaining power, will have a limited ability to win access to arbitration than workers with significant bargaining power.

70. As a result, arbitration would be accessed by the strong and denied to those in need who are equally deserving of arbitrated outcomes.

Case Study 3: Emirates Airlines

Prior to the introduction of Work Choices the ASU was always a party to enterprise agreements that applied at Emirates and covered customer service airport, head office, call centre and reservations staff.

However, after the introduction of Work Choices, the company offered a non-union collective agreement to ASU members working at Emirates in March 2006. This first non-union collective agreement was comprised of conditions taken from the previous collective agreement and conditions taken from the Overseas Airlines Award.

Several award clauses were altered or omitted from the new agreement leaving workers worse off in many respects under the non-union collective agreement. In particular, the dispute resolution procedure was altered. As a result, workers did not have access to either conciliation or arbitration under the non-union collective agreement.

Emirates subsequently renegotiated a new non-union collective agreement with its staff nationally in 2008. The new dispute resolution procedure contains access to conciliation but it does not provide for access to arbitration.

Workers at Emirates would have benefited from having access to an independent umpire for the following types of workplace issues:

- Assistance with renegotiation of the agreement – staff were not given adequate time to consider the agreement;
- Relocation of the Emirates Melbourne call centre from the city to Brampton Park. In this case the company told workers that they would not been entitled to a redundancy if they did not move to Brampton Park;
- Mandatory Saturday overtime for full time staff;
- Unilateral changes to part time hours and rosters;
- Enforcement of the family leave test case. ASU members have struggled to return to work on a part time basis, or to extend maternity leave for more than 12 months;
- Access to sick leave and disputes about workers being disciplined for taking sick leave entitlements.

Under the proposed Bill, workers at Emirates would not be able to ask an independent umpire to arbitrate these types of workplace disputes.

Case Study 4: Foxtel

ASU members working at Foxtel are employed under an enterprise award. ASU members at Foxtel perform sales, accounts, customer service, promotion and marketing roles.

Workers at Foxtel only have access to the dispute resolution procedure provided in the Foxtel Award, which does not provide access to arbitration.

On many occasions workers have needed access to an independent umpire to resolve disputes over:

- Unfair warnings;
- Harsh performance management techniques;
- Dramatic changes to sales targets and bonus structures;
- Changes to rosters;
- Interpretation of award clauses;
- Bullying and harassment; and
- Access to sick leave and disputes about workers being disciplined for taking sick leave entitlements.

Under the proposed Bill, workers at Foxtel would not be able to request the assistance of an independent umpire to arbitrate disputes over important workplace matters. Recourse to an impartial third party would assist with the resolution of disputes over important workplace matters where workers and management are at an impasse.

6. OHS TERMS ARE NOT PERMITTED CONTENT - IMPLICATIONS FOR RIGHT OF ENTRY

71. All terms of a proposed enterprise agreement that pertain to the employer and union relationship must be enforceable.

72. The Bill provides that agreement terms about matters that pertain to the employer and union relationship are permitted content (clause 172(1)(b) of the Bill). If a term is about permitted content it is enforceable where there is a breach of the term.

73. The Bill also provides that terms that are not about a permitted matter, or that are unlawful (within the meaning of clause 194 of the Bill) are unenforceable where there is a breach of the term. For example, terms of an agreement that provide for right of entry for the purpose of either discussing, or investigating a breach of occupational health and safety matters are treated as unlawful content (clause 194 of the Bill).

74. The ASU Victorian Private Sector Branch submits that the interaction of clause 172(1)(b) of the Bill with clause 194(f) and (g) of the Bill may result in terms of a proposed agreement that pertain to the employer and union relationship being unenforceable where a term deals with some 'subjects', such as paid union meetings where health and safety issues are raised.

75. Further, while a non-permitted term that is not otherwise unlawful may not prevent an agreement from being registered, an agreement containing an unlawful term may prevent an agreement being registered.

76. As a result, if terms about union meetings (that relate to the employer and union relationship) are taken to be terms about right of entry that are unlawful because occupational health and safety issues may be raised at a union meeting, some agreements may not be approved by FWA, or if they are approved these terms may not be enforceable.

77. The explanatory memorandum to the Bill states that "terms that provide for employees to have paid time off to attend union meetings or participate in union activities" (Explanatory Memorandum to the Bill, para 675 to 678) is intended to fall within the scope of permitted matters as defined in clause 172(1)(b) of the Bill.

78. On the other hand, the explanatory memorandum to the Bill (Explanatory Memorandum to the Bill, para 834 – 838), in explaining the application of clause 194 (f) and (g) of the Bill states that terms that deal with union officials entering the employer's premises for purposes such as: assisting an employee in a dispute resolution procedure, or attending an induction meeting, or to meet with the employer to bargain about a replacement agreement, may not offend the exclusions provided in clause 194(f) and (g) of the Bill. Terms permitting the union to enter an employer's workplace may only be enforceable for meetings or purposes that deal with these listed matters.

79. An unintended consequence of the interaction of these provisions is to create greater complexity, ambiguity and uncertainty, and perhaps to limit the meaning and application of terms that enable employees to have paid time off to attend union meetings. The Bill should be amended to address this ambiguity.

7. UNFAIR DISMISSALS

(a) 7 day cut off:

80. The existing time limit of twenty-one days, a time limit contained in both the pre and post Work Choices Act, is a reasonable period of time within which it is feasible to lodge an unfair dismissal claim.

81. A twenty-one day time frame makes it possible for a worker to seek advice, and make an informed decision about whether they wish to lodge an unfair dismissal application.

82. Under the proposed Bill, a worker must lodge an unfair dismissal claim within seven days of the dismissal (clause 394 2(a) of the Bill).

83. The ASU Victorian Private Sector Branch believes that this seven-day time frame is too short. This is particularly the case in circumstances where an employee is not aware of their right to pursue a claim or where a worker is unable to obtain support or advice immediately.

84. The ASU Victorian Private Sector Branch submits that an increase to the seven-day time frame is likely to increase a worker's access to justice.

85. It is useful that FWA can, in some circumstances, exercise its discretion to allow a worker to lodge an unfair dismissal application more than seven days after the dismissal if there are exceptional circumstances. This discretion however is likely to result in an increased number of disputes about whether there are exceptional circumstances, creating further delays and costs for both parties.

(b) Small Business Fair Dismissal Code

86. Defining a small business, as a business with less than 15 employees (clause 23 of the Bill) is a welcome improvement in the Bill. This definition is more accurate than the less than 100 definition used to limit workers access to unfair dismissal protections under Work Choices.

87. The ASU Victorian Private Sector Branch submits that all employees, regardless of the size of their employer, should be entitled to the same unfair dismissal protections under the law. This is consistent with Australia's international human rights obligations provided in Article 26 of the *International Covenant on Civil and Political Rights* ("ICCPR") (ratified by Australia in August 1980), that all persons are to be treated equally before the law and are entitled without any discrimination to the equal protection of the law.

88. Treating the dismissal of a worker employed by a small business as fair, if the dismissal is consistent with the Small Business Fair Dismissal Code ("the Code") (clause 385 (c) of the Bill), is problematic for a number of reasons.

89. Firstly, the ASU Victorian Private Sector Branch is concerned that the code itself is inherently unfair. The Code suggests that a worker employed by a small business may be summarily dismissed without notice, or warning, if the employer believes that a worker's misconduct is serious because it

may have involved theft, fraud, or violence. As a result, under the Code it will be open to an employer to terminate workers in small businesses for serious misconduct that may be based on nothing more than a police report about a mere allegation.

90. The Code imposes greater obstacles for workers in small businesses that are unfair and that contradict one of the oldest held common law presumptions, that a person is presumed innocent until proven guilty. When job security is at stake, the injustice is compounded.

91. The ASU Victorian Private Sector Branch submits that any actions taken by an employer in accordance with the Code must be subject to scrutiny, and FWA, at the initiation of either party, must be able to conduct a conference or hold a hearing in relation to a dispute over the application of the Code in accordance with clause 397 of the Bill.

(c) Twelve Month Qualifying Period For Employees Of Small Businesses:

92. All employees, regardless of the size of their employer, should be entitled to qualify for unfair dismissal protections after completing the same qualifying period.

93. The twelve - month qualifying period that must be met, before an employee of small business can pursue an unfair dismissal claim creates an arbitrary distinction between the rights of employees working in small businesses and those of employees working for larger sized employers (clause 383 (b) of the Bill).

94. The ASU Victorian Private Sector Branch submits that as Australia has ratified the ILO *Termination of Employment Convention*, 1982 *(C158)* the Federal Government should fully comply with both the spirit and intent of this convention.

95. This convention provides that unfair dismissal qualifying periods that are of a *reasonable duration* are appropriate limitations on international law

obligations that require Australia to provide workers with access to fair dismissal processes. Requiring employees of a small business to complete a twelve-month qualifying period before they can access unfair dismissal protections, is *prima facie*, inconsistent with Article 2(2)(b) of the *Termination of Employment Convention*, 1982 *(C158)* (ratified by Australia in February 1993) because this qualifying period is arguably not of a reasonable duration.

96. Unfair dismissal qualifying periods must be of a 'reasonable duration'.

(d) Unfair Dismissal Provisions And Transmission Of Business:

97. If a worker's period of employment is treated as being 'continuous' in a transfer of non-associated businesses, there is no sound reason why a worker should not be able to benefit from unfair dismissal protections without the need to complete a new qualifying period.

98. The unfair dismissal provisions of the Bill that apply to a transfer of non-associated businesses are unfair.

99. Under clause 384(2)(b) of the Bill, if a transfer of business occurs between non associated businesses, the new employer may choose not to recognise prior service of a worker with the old employer for the purpose of that worker immediately qualifying for unfair dismissal protections.

100. This means that in a transmission of business a transferring employee is required to serve, with the new employer, the statutory qualifying period necessary to qualify for unfair dismissal protections (clause 384(2)(b) of the Bill).

101. In a transfer of non-associated businesses, a worker's period of employment should be treated as continuous for all purposes, including for the purpose of accessing unfair dismissal protections.

Case Study 5 - QANTAS Valet Parking

Former QANTAS Valet Parking workers would not have immediately qualified for unfair dismissal protections when a new contractor took over the valet

service if Labors new transfer of business rules applied at the time of the transmission. This is despite the fact that many employees would have served more than 10 years of continuous service with their former employer at the time of the transfer.

About 30 ASU members at Melbourne's Tullamarine airport were offered Australian Workplace Agreements (AWAs) on a 'take it or leave it' basis when a new contractor took over the QANTAS valet service.

ASU members were loyal employees who had worked at QANTAS Valet Parking for an average of ten years.

Under the proposed Bill, in a transfer of business such as that which occurred at QANTAS Valet Parking, the new company would be able to unfairly dismiss workers within the first six months of it running the valet service.

(e) Compensation for shock, distress or humiliation

102. If an employee is unfairly sacked, in circumstances where they have experienced psychological distress, they ought to be compensated for such hurt.

103. The Bill (refer to clause 392(4) of the Bill) does not enable a worker who has been unfairly dismissed to obtain compensation for "shock, distress or humiliation or other analogous hurt caused to the employee" as a result of the termination (Work Choices removed this type of compensation: section 654(9) of the *Workplace Relations Act 1996*).

104. Workers who have been unfairly dismissed often experience shock and humiliation and are required to pick up the pieces of their life with little support. The Bill should be amended, so that if a worker was subjected to psychological trauma or hurt, they could be compensated for this wrong.

8. TRANSITIONAL ARRANGEMENTS

105. Employees who have been locked into substandard Work Choices AWA's, or transitional ITEA's should be able to get out of these industrial instruments as soon as the new bargaining framework is operative.

106. The Minister for Employment and Workplace Relations, the Hon. Julia Gillard MP, foreshadowed in her second reading speech that the transitional bill will:

> …provide that existing agreements will continue to apply until terminated, or replaced by a new agreement made under the new bargaining framework.

107. The Minister's statement is not inconsistent with the provision of laws that enable an employee to terminate an industrial agreement if it is in the public interest to do so.

108. Where an agreement provides for conditions of employment that are less favourable than conditions of employment contained in a modern award, or the NES, an employee ought to be able to terminate the agreement, as it is in the public interest that the agreement is terminated.

109. If an employee cannot terminate a sub-safety net AWA, the integrity of the new bargaining framework will be undermined. It would ultimately result in a class of employees working on industrial instruments below the appropriate safety net, alongside employees working on industrial instruments that are above the safety net.

Case Study 6: Qantas Valet Parking

About 30 ASU members at Melbourne's Tullamarine airport were offered Australian Workplace Agreements (AWAs) on a 'take it or leave it' basis when a new contractor took over the valet service.

Because of the Work Choices laws the company failed to act on many of the workers and union's concerns about employees' pay and conditions.

The workers asked the new company, for a union negotiated collective agreement – just as they had before under the previous contractor. Instead they were offered AWAs that would not expire until 2013 and that took away important employment conditions, such as, overtime, shift loadings and paid meal breaks.

Without fair transitional arrangements, Qantas Valet Parking workers will continue to be employed on AWAs that are not considered fair by contemporary safety net standards until 2013.

Case study 7 – Global Tele Sales

The ability to terminate a sub-safety net agreement is critical for workers at Global Telesales Pty Ltd (GTS).

In June 2006 ASU members working at GTS were offered AWAs that severely cut their wages and conditions of employment.

Many of the ASU members were students, migrants and women who found that shift work suited home and family life.

The workers and the union asked the company to remove discriminatory terms from the AWA. But the company refused to respond to the concerns raised by the workers and their union.

Instead workers were offered three year AWAs on a take it or leave basis. The AWAs cut base wages by up to 10%. Penalty rates for work performed before 7am or after 7pm were cut (15% of the ordinary rate of pay), and penalty rates for work performed on public holidays and Sundays were reduced. The company estimated, overall, that these changes would reduce an employee's salary by 4.9% per annum.

At the time that the AWAs were offered to workers, neither the 'fairness test' nor the no disadvantage test applied. The AWAs do not provide fair monetary or non-monetary compensation in exchange for the removal of protected award conditions. The AWAs do not leave employees better off.

Most workers had no choice but to sign the AWA that was offered to them. These workers will continue to be employed under these AWAs unless the transitional arrangements enable these workers to terminate these sub standard AWAs. Without fair transitional arrangements, some GTS workers will be working on AWAs that fail contemporary safety net standards, alongside workers employed on agreements that must meet new fair standards.

CONCLUSION

110. Subject to the analysis and commentary of the Bill outlined above, the terms of the ACTU submission, and the ASU National Office Submission to the Committee, the ASU Victorian Private Sector Branch supports the immediate passage of the Bill.

111. The ASU Victorian Private Sector Branch looks forward to continuing to act collectively on behalf of its members to establish fair and reasonable employment conditions. The union looks forward to continuing to work with its members to strive for decent wages and

conditions of employment that benefit members, help build fairer workplaces, and stimulate the economy.

112. These objectives can be achieved in an industrial environment that supports collective action by employees actively participating in decisions affecting their wages and conditions of employment against a backdrop of a fair safety net that respects workers rights.