SUBMISSIONS TO THE SENATE EDUCATION EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

FAIR WORK BILL 2008

1. Telstra is Australia's leading telecommunications and information services company. Telstra employs approximately 34,000 employees Australia wide.

2. Telstra provides services to individuals and businesses in Australia. Telstra's main activities include the following services:

   (a) local and long distance telephone calls in Australia and international calls to and from Australia by fixed lines (including the 'Enhanced 000 Call centres' emergency service);

   (b) mobile telecommunication services;

   (c) internet access and content;

   (d) wholesale services to other carriers, carriage service providers and internet service providers;

   (e) advertising, search and information services (through Sensis and Telstra's other directory services);

   (f) cable distribution services;

   (g) installation and operation of payphones (including teletypewriter payphones);

   (h) provision of Telstra goods through call centres and retail stores; and

   (i) maintenance and ownership of the infrastructure that allow Telstra's goods and services to be provided.

3. Telstra wishes to make submissions concerning particular features of the *Fair Work Bill* 2008 (**Bill**) where, in its view, the operation of important aspects of the Bill can be clarified or improved so as to ensure that the Bill:

   (a) operates in a way which is consistent with its stated objects;

   (b) will, in practice, operate in the manner intended; and

(c) will establish a fair, efficient and workable industrial relations system.

4. In this submission, Telstra addresses the following topics:

A Enterprise agreements

B Industrial action

C Unfair dismissal

D Transfer of instruments

E Rights and responsibilities

F Right of entry

G Transitional arrangements

A. Enterprise agreements

The bargaining regime

5. The bargaining regime proposed by the Bill suffers from a lack of clarity about the interaction of the various obligations and processes fundamental to the proposed good faith bargaining regime.

6. Under Division 3 of Part 2-4 of Chapter 2 of the Bill, an employer must provide notification to employees and relevant employee organisations about the matters set out in clause 174. The "notification time" is defined as the time when:

(a) the employer agrees to bargain, or initiates bargaining; or

(b) a majority support determination, scope order or low-paid authorisation comes into operation in relation to the proposed agreement.

7. Division 3 does not expressly limit the appointment of a bargaining representative or representatives to the time after this notice is given by the employer. Once appointed, clause 179 requires that an employer must not refuse to recognise the bargaining representative or bargain with another bargaining representative for the proposed agreement.

8. There may be many circumstances where an employer has cogent reasons for declining to initiate or agree to bargaining; for example, where an instrument is already in place with a nominal expiry date a year or more in the future. In such a situation, it is not reasonable for an employer to be required to participate in the good faith bargaining process. I In Telstra's submission, Division 3 does not deal adequately with the rights and obligations of the respective parties in these circumstances and the interaction of the good faith bargaining obligations with the availability of applications under Division 8.

9. Clause 229(3)(a)(i) provides that where an enterprise agreement applies to an employee or employees who will be covered by the proposed enterprise agreement, an application for a bargaining order cannot be made more than 90 days before the nominal expiry date of any applicable enterprise agreement. There is no time restriction in relation to an application for a majority scope declaration, a scope order or a low-paid authorisation, or on the requirement in clause 179.

10. Telstra submits that the preferred and logical position is that where one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed agreement, bargaining with its attendant obligations can commence at any time the bargaining representatives agree to commence bargaining, but otherwise not sooner than, 180 days prior to the nominal expiry date of those existing enterprise agreements. Clarification of this issue will be important in respect of future fair work agreements as well as pre-reform agreements currently within their nominal terms.

Employee organisations as default bargaining representatives

11. Pursuant to clause 176 of the Bill an employee organisation will be the default bargaining representative for each member of the organisation unless the employee has appointed another person under clause 176(c). This is problematic given that:

    (a) in many circumstances an employee may be intimidated or feel a form of workplace peer pressure not to appoint a different representative of his or her choice, in circumstances where an organisation is the *default* bargaining representative;

    (b) there is no requirement in the Bill that the employee be a financial member of the employee organisation concerned, nor is there a requirement in the Bill (or the *Workplace Relations Act* 1996 (**Act**)) that employees who have not paid their union subscription fees (perhaps for many years) cannot be considered by an employee organisation to be members;

    (c) in some circumstances employees may be a member of more than one employee organisation.

12. Telstra submits that it is unwarranted for an employee organisation to be the default bargaining representative for all members of the organisation. In Telstra's submission, clauses 174 and 176 should be amended so that an employee organisation is the bargaining representative for any member who appoints, in writing, the employee organisation as his or her bargaining representative for the agreement, but is not the default representative. Such amendment would place employee organisations on an equal footing with other bargaining representatives. The justification for giving employee organisations special status is not clear. An amendment along the lines suggested would, it is submitted, be consistent with the object of protecting freedom of association by

ensuring that persons are free to be represented, or not be represented, by industrial associations, employee organisations, or whomever they see fit – see clause 336(b)(ii).

Coverage of agreements

13. Telstra submits that the rights of employee organisations under the Bill permit them to do everything necessary to protect and advance the rights of their members once an agreement is in place. It is not necessary that the employee organisation, in its capacity as a bargaining representative, should also be entitled to be covered by the agreement. Coverage, of itself, does not confer any additional right. Clause 183 should be removed from the Bill.

Bargaining orders – good faith bargaining requirements

14. Clause 228(2) makes it clear that the good faith bargaining requirements do not require a bargaining representative to make concessions or reach agreement on terms. However, Telstra believes there is considerable room for uncertainty about the relationship between this provision and clause 228(1)(e) of the Bill. As this provision currently stands, it is unclear what kind of conduct could be said to "undermine collective bargaining". For example, a lawful strategy of entering into individual flexibility agreements or common law contracts which meet and exceed the requirements of a modern award and the National Employment Standards could be said to undermine collective bargaining. It is also unclear what clause 228(1)(e) is intended to add to other provisions, such as the freedom of association provisions, contained in the Bill, and what criteria or considerations are to be relevant in considering whether conduct is "unfair" or "capricious".

15. Telstra is also concerned that the provisions could result in open-ended or indefinite bargaining, potentially leading to protracted disputation, in circumstances where there is no prospect of reaching agreement because the parties have maintained genuine bargaining positions. If a party has engaged in good faith bargaining but has been unable to reach agreement with other bargaining parties, it should be entitled to end the bargaining. Otherwise, protracted bargaining and associated disputation could be used to undermine a party's bargaining position and/or refusal to make substantive concessions on issues of importance.

16. Clause 228(1)(b) of the Bill requires that bargaining representatives disclose relevant information in a timely manner, but that confidential or commercially sensitive information is not required to be disclosed. The entitlement to withhold confidential or commercially sensitive information is sensible. It is submitted, however, that further legislative guidance is required as to:

(a) who decides whether information is confidential or commercially sensitive? It is submitted that whether information is commercially sensitive will, in most cases, be so for reasons particularly known only by the party who holds the information;

(b) whether 'confidential information' is intended to cover a broader range of information than 'commercially sensitive information"? This might include, for example, business information that has not been publicly disclosed;

(c) whether a bargaining employer would be entitled to withhold confidential information relating to employees not directly involved in the relevant bargaining? This appears consistent with National Privacy Principle 2 which, generally, provides that an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection;

(d) what process will be applied in determining whether information is confidential or commercially sensitive so as to ensure that, when disputes about the confidentiality or sensitive nature of information are being dealt with, the confidential or sensitive nature of the information is preserved.

17. If, for example, Fair Work Australia is to decide what is confidential or commercially sensitive when considering an application for a bargaining order, provision could be made for a Registrar or other party to decide, in a closed hearing and in the absence of the party seeking the information, whether information is confidential or commercially sensitive. This is not unlike the situation where, for example, a Judge or Registrar inspects documents to determine whether a claim of legal professional privilege should be upheld, which inspection necessarily occurs in the absence of the party seeking discovery of potentially privileged documents. It is submitted that consideration should be given to introducing some level of effective protection in the legislation such that the entitlement to withhold confidential or commercially sensitive information is not merely theoretical.

Single-enterprise agreements

18. The Bill makes provision for an employer, or 2 or more employers, that are single interest employers, to make a single enterprise agreement. Two employers are *single interest employers* where, amongst other things, the employers are "engaged … in a common enterprise".

19. It is similarly possible under the Act, as it now stands, for two employers to be party to one agreement where the two employers "carry on a business, project or undertaking… as a common enterprise". A number of decisions which considered this composite phrase have placed emphasis on the fact that for the provision to have application to two or more employers, more is required than having a commonality of interest concerning some project or undertaking. For example, in *Qantas Airways Limited v AMWU* Print S5768 Munro J considered whether Qantas was engaged in a common enterprise with Forstaff

Aviation, to whom it had outsourced certain functions. His Honour held that they were not. In the course of his decision Munro J stated:

> I consider that the words "carry on a business as a common enterprise" imply that some weight, or at least some consideration, must be given to the declared collective intent of the relevant employers. In the circumstances of this matter the commonality of interest, or closeness of connection or sharing of operations, in the absence of a declared intent to carry on a common enterprise, is not made out to a degree that establishes a common enterprise.

20. The Bill removes the qualification that the employers *carry on a business* as a common enterprise. This different wording is likely to have the effect of relaxing the requirements needed to be shown before two or more employers can be treated for agreement making purposes as one employer. It is submitted that this is contrary to the intention of the Bill to provide a framework that enables collective bargaining in good faith, *particularly at the enterprise level*, for enterprise agreements that deliver productivity benefits (see clause 171 of the Bill), and inconsistent with the policy which has resulted in a prohibition on pattern bargaining in clause 412.

21. The legislation should promote a position whereby each employer can make its own agreement with employees, and that two or more employers can only be roped in to one agreement by a bargaining representative when, in substance, they are "in business" together. Telstra would be opposed to a situation where, for example, two or more employers, including Telstra, who operate different but complementary functions at a call centre (and who would have different types of labour, overheads, etc) would qualify as being engaged in a common enterprise such that an employee organisation could make one agreement, perhaps facilitated by industrial action, with all of them.

Greenfields agreements

22. Clause 175 of the *Fair Work* Bill requires an employer to take all reasonable steps to give notice of its intention to make a greenfields agreement to each employee organisation that is a relevant employee organisation in relation to the agreement. A relevant employee organisation is defined as an employee organisation which is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement in relation to work to be performed under the agreement. Clause 177(c) then provides that each relevant employee organisation will be a bargaining representative for the agreement. The employer then has the full range of obligations in respect of a bargaining representative under the Bill, including the requirement to recognise that bargaining representative and to bargain in good faith.

23. Under the current provisions of the Act, there is an ability to make an employer greenfields agreement (which can operate for up to one year) and a union greenfields agreement. A

union greenfields agreement could be made with one or more organisations entitled to represent the industrial interests of one or more of the persons whose employment is likely to be subject to the agreement, in relation to work that will be subject to the agreement.

24. Greenfields agreements have, for many years, allowed employers to innovate and to find new and better ways of doing things. They are a form of agreement that encourages and promotes flexibility and productivity, and by extension, economic prosperity. These are all objects to which the *Fair Work* Bill is directed.

25. Telstra is concerned that the Bill removes the option for an employer to negotiate with a particular employee organisation for a greenfields agreement and requires it to bargain with every employee organisation with a single member who may be covered by such an agreement. This will add unnecessary complexity to the process of establishing a greenfields agreement and will act as a significant disincentive where there are limited resources available to a new undertaking to dedicate to workplace negotiations during a start-up phase. As a result, it is likely that greenfields employers will abandon innovation and agree to existing or historical arrangements that apply elsewhere simply being shifted across to a new site, even though they may be unsuitable.

26. Further, Telstra is concerned that it is not possible, even for a short time (such as the one year under the Act) for an employer to introduce, without employee organisation involvement, industrial arrangements at a new site or workplace. Given the protections which will be available under the Bill to ensure conditions meet the "better off overall" test, there is nothing intrinsically unfair about agreements of this type.

27. Telstra submits that consideration should be given to amending the greenfields provisions in the Bill to permit a greenfields agreement to be made:

    (a) for a short interim period of one year (as under the Act) without the involvement of any employee registered organisation; and/or

    (b) between an employer and one of a number of possibly relevant employee organisations entitled to represent the industrial interests of one or more of the persons whose employment is likely to be subject to the agreement, in relation to work that will be subject to the agreement. Such a change would require amendment to, for example, clause 179 of the Bill, so that an employer could refuse to bargain or recognise employee organisations other than the organisation with which it has decided to make a greenfields agreement. There might also be a facility for other relevant employee organisations to become covered by the agreement once made but not to have influence over the terms the agreement. This type of agreement should have a maximum nominal expiry date of four years.

Unlawful terms – right of entry

28. Clause 194(f) makes unlawful a term in an agreement which provides for right of entry entitlements such as those contained in Part 3-4 of the Bill and which permit entry other than in accordance with that Part. It is not clear whether the intention behind this provision is to ensure that any entry onto premises occurs in accordance with Part 3 – 4, such that any additional or inconsistent provision in an agreement is unlawful; or alternatively, whether the intention behind the provision is that any entry for the specified purposes set out in Part 3 – 4 must be in accordance with that Part, but that additional or inconsistent provision can be made in agreements for entry onto premises for purposes other than those set out in Part 3 – 4.

29. If the intention of Parliament is the former, then it is submitted that it is necessary to amend clause 194(f) to clarify this aspect. This could be achieved, for example, by deleting clause 194(f) and substituting:

> a term that provides for any entitlement to enter premises other than in accordance with Part 3 -4 (which deals with right of entry).

B. Industrial action

Suspension or termination of industrial action

30. The current provisions of the Act provide that the Australian Industrial Relations Commission *must*, in certain circumstances, suspend or terminate a bargaining period. A similar power is afforded to Fair Work Australia but it is expressed differently to take account of the conceptual shift away from the establishment and termination of bargaining periods. In each circumstance in which a bargaining period may be suspended or terminated under the current Act, the Commission *must* do so where the preconditions for an application have been satisfied. The same is true where Fair Work Australia is requested to suspend or terminate protected industrial action, except under clause 423(1) – which relates to significant economic harm to the employer or employees who will be covered by the agreement. It is submitted that consideration should be given to removing the discretion in clause 423(1). Such amendment would bring clause 423(1) into line with other associated provisions.

C. Unfair dismissal

Genuine redundancy

31. Clause 385(d) provides that a person has been unfairly dismissed if Fair Work Australia is satisfied that that dismissal was not a case of genuine redundancy. Clause 389 provides

that a person's dismissal was not a case of genuine redundancy *if it would have been reasonable in all the circumstances* for the person to be redeployed within:

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer.

32. Telstra submits that the redeployment requirement in order to satisfy Fair Work Australia that a redundancy is genuine should be removed. It is, of course, appropriate for parties to make provision for redundancy, including redeployment, in agreements. In such circumstances (which apply to Telstra) the consequence of making an offer of suitable alternative employment is that the employer is relieved of the obligation to make severance payments. This is a logical and meritorious situation. There should not be, however, a general obligation to redeploy persons in order to satisfy a requirement that a dismissal be fair. In circumstances where the primary remedy for unfair dismissal is reinstatement (with back pay), this could result in additional financial pressures on a business where a redundancy is for genuine reasons.

Associated entity

33. The definition of an "associated entity" is complicated, and includes the situation where two corporations are related bodies corporate, which effectively means that for the purposes of clause 389 all holding companies and subsidiaries are to be treated as though they are in a position to control or influence each other's operations. This does not accord, however, with the common circumstance of companies which are technically related bodies corporate within the meaning of that phrase in the *Corporations Act* 2001 but which in reality operate at arm's length and have little or no influence over each other. Why should a dismissal by company A be considered unfair because there may be a position open at Company B, where Company A has little or no practical influence over the operations of Company B, including its hiring decisions? Whilst arguably it would not be "reasonable", within the meaning of clause 389(2), for the person to be redeployed by Company B, that is not clear on the face of the clause.

34. Other parts of the definition of "associated entity" in section 50AAA of the *Corporations Act 2001* (other than 50AAA(2) which concerns related bodies corporate) require that a principal company has "control" or "significant influence" over a subsidiary, and vice versa. "Control" itself requires that one company has the capacity to determine the outcome of the second company's financial and operating policies. No such practical requirement is, however, necessary to be shown where two companies are related bodies corporate. It is submitted that if the redeployment obligation is to be retained, the definition of "associated entity" should be set out in the Bill and exclude "related bodies corporate" from the definition, except where the requisite control or influence exists.

Reasonable

35. If clause 389 is to be retained, legislative guidance is required as to the meaning of what is "reasonable" in a redeployment situation. The current provisions do not make clear the position in relation to some fundamental and threshold issues, for example:

    (a) whether it is reasonable for a company not to redeploy an employee into a related body corporate in circumstances where two companies operate at arm's length and have little or no control over each other although they may technically fall within the definition of related bodies corporate within the meaning of the *Corporations Act*;

    (b) whether the redeployment opportunity must be on terms and conditions that are the same or substantially similar in order to be reasonable and, if so, what can be taken into account in determining whether terms and conditions are substantially similar; and

    (c) whether the locality at which the redeployment opportunity exists must be the same as the redundant position – this is particularly relevant for companies, such as Telstra, that have diversified operations all around Australia.

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36. In Telstra's submission, the redeployment obligation should either be removed or, in the alternative, further legislative guidance as to what is "reasonable in all the circumstances" be given. Whilst it is possible that, over time, these questions will be answered by the gradual development of the common law, given the piecemeal way in which this can develop, and the lack of clarity that exists for employers, employees, and employee organisations in the interim, Telstra urges that consideration be given, and further guidance provided, concerning these matters.

Failure to consult in accordance with an award or agreement

37. Clause 389(1)(b) links the concept of genuine redundancy with the employer having complied with any obligation in an applicable award or enterprise agreement concerning consultation in relation to redundancy.

38. Telstra considers that it is very important to comply in full with all consultation obligations. Where an employer has not complied with such obligations, Courts have a wide variety of powers available to them to redress any injustices caused, including the powers of ordering reinstatement and compensation. Telstra submits, however, that Courts are best able to consider what remedy should be ordered on a case by case basis, and it is not necessary or appropriate to provide that where some, perhaps incidental aspect of a consultation obligation has been overlooked, the automatic outcome is that a redundancy cannot otherwise be held to be genuine. This position is neither meritorious nor logical, and

Telstra urges that consideration be given to removing this requirement or, in the alternative, providing that whether such consultation obligations have been complied with is a matter to be taken into account in determining whether, in all the circumstances, a dismissal was harsh, unjust or unreasonable.

Failure to notify or consult registered employee associations

39. Clause 533 sets out who may make an application in respect of an order to Fair Work Australia for a failure to comply with the notification and consultation obligations concerning dismissals set out in clause 531 of the Bill. Clause 533(c) should, in Telstra's submission, be removed. A registered employee association should have no standing to make an application because it has a theoretical eligibility to represent the industrial interests of employees affected, particularly in circumstances where the employer's obligation to notify and consult in clause 531 relates to registered employee associations of which the employee was *a member*. Clause 533(a) and (b) are adequate and appropriate without (c).

D. Transfer of instruments

40. The changes proposed by the Bill in the area of transfer of business were not foreshadowed in ALP policy and go significantly beyond what is required to provide reasonable protection to transferring employees.

41. First, it appears that the Bill does not allow for the application of a transferable instrument to cease after a predetermined period, such as the 12 month transmission period in the Act. It is submitted that a predetermined period such as the transmission period is both necessary and desirable. The transfer of instruments for a short period is practical and effective to ensure that there is a balance struck between ensuring that transferring employees are not disadvantaged in a transfer situation, whilst permitting the new or incoming employer to have a reasonable period of time in which to make its own industrial arrangements suited to that employer's particular enterprise.

42. Administering multiple sets of workplace arrangements within a business or part of a business, where those arrangements are not suited to the needs of the business, creates an additional cost for employers. The extension of the transfer provisions to insourcing arrangements, irrespective of whether there is a transfer of assets from the old to the new employer, and in the absence of a time limit on the application of the transferring instrument, means that there will be a serious disincentive to bringing outsourced functions back in-house.

43. Conversely, the extension to all outsourcing arrangements means that labour hire and other providers will no longer be able to offer efficiencies and flexibilities which may be currently available to them under existing workplace arrangements, but will be bound to apply the customer's instruments to transferring workers, whether or not they are more

favourable to those workers. This is likely to act as a disincentive to new employers offering roles to employees of the old employer in the event of an outsourcing, so that those employees must be redeployed or made redundant. In both instances, the provisions of the Bill have the potential to impact on employment/recruitment decisions and employment opportunities.

44. The Bill further extends the transfer of business provisions to transfers between associated entities. Telstra submits that this will impose a restriction on redeployment within a corporate group and create unnecessary complexity.

45. Clause 318 of the Bill makes provision for Fair Work Australia to make orders concerning the applicability of transferable instruments to the new employer. This provision appears limited, however, to making orders stating that a transferable instrument will or will not apply to a transferring employee. In Telstra's submission, a provision such as that contained in section 590 of the Act, which contains a broad discretion to make orders limiting the applicability of transferring instruments where justified in the circumstances, is required. Such a provision would enable Fair Work Australia to consider existing arrangements at the enterprise of the incoming employer and to fashion appropriate orders as to the applicability, including the extent of the applicability, of transferring instruments.

E. Rights and responsibilities of employees, employers, organisations, etc. – General Protections

46. Part 3-1 of the Bill makes provision for a discrimination regime which has a significantly wider reach than current provisions. In making such provision for legitimate workplace rights, careful attention needs to be given to ensuring that legitimate business decisions are able to be made without an employer contravening the discrimination provisions, and also that legitimate business decisions are not impeded where it is contended that workplace rights are being contravened. In this respect, Telstra submits that the "sole or dominant reason" test should remain part of the law (as set out below), and also that, consistent with long standing public policy, it should not be possible for interlocutory injunctions to be granted where it is alleged that workplace rights (including, most notably, an employee being entitled to the benefit of a workplace law or workplace instrument) are being contravened.

The sole or dominant reason test

47. The changes proposed by the Bill in the area of the ‘sole or dominant reason test’ were not set out in ALP policy. For example, the Forward with Fairness policy simply provided that: ‘Labor’s national industrial relations legislation will also ensure that working people are not discriminated against because of the nature of the industrial instrument that covers their employment.’ Together with the proposed changes to the transmission of business

provisions, the provisions make fundamental changes to the current law for employers contemplating business restructures.

48. Under the Act as it now stands, an employer does not contravene the freedom of association provisions by engaging in conduct motivated by the fact that an employee is entitled to the benefit of an industrial instrument where that entitlement is not the sole or dominant reason for the conduct. The sole or dominant reason test applies in a myriad of circumstances in a commercial context; for example, where an employer decides to outsource some of its operations or activities in order to provide better services to customers at more competitive prices.

49. The Bill should not permit adverse action that occurs so as to avoid the operation of workplace laws and instruments. However, it is important to introduce a measure of balance and practicability so that legitimate business decisions, including outsourcing, where labour costs underpinned by a workplace law or instrument are not the sole or dominant reason for the decision, are still able to be made. In the absence of this test, the law will revert to reliance on judicial rulings which interpreted provisions similar those contained in Part 3-1, where the Courts would consider whether the conduct (or adverse action) is the "operative or immediate" reason for the business decision (in which case a contravention is established) or the "cause, or proximate reason" (in which case there is no contravention). This is a difficult and uncertain test to apply in a practical business context. In Telstra's submission, retaining the sole or dominant reason test will aid the object of providing for a balanced framework for productive workplace relations (here, balancing an employee's right not to be discriminated against and the ability of business to make reasonable business decisions).

50. The Bill will, for the first time, give prospective employees all of the workplace rights to be afforded to current employees. This may have an unintended effect where, for example, an employer engages a contractor or labour hire company instead of directly employing employees who would have the benefit of an industrial instrument if so employed, where the application of the industrial instrument is not the sole or dominant reason for the decision. It mirrors the problem of contravening the discrimination provisions when outsourcing, but in reverse. This confirms, in Telstra's submission, the necessity and desirability of retaining the sole or dominant reason test in the new legislation.

Interlocutory injunctions

51. It has been a matter of long standing public policy that no party to an industrial instrument is able to obtain an interlocutory injunction to restrain a breach of an industrial instrument (now workplace instrument) nor, in most cases, to restrain the dismissal of employees.

52. The ability to obtain an interlocutory injunction for an anticipated breach of a workplace law or instrument has the potential to be used in a manner which will unduly prevent or impede the making of normal business decisions. This is particularly so given:

(a) the conceptual introduction of the broad notion of adverse action, which includes dismissal, injury in employment or prejudicial alteration of an employee's position; and

(b) the low threshold applied by Courts in granting interlocutory injunctions (including that it is only necessary to show a serious question to be tried) and the difficulty in testing the evidence of an applicant (for example, because ordinarily cross-examination is not permitted but hearsay evidence is permitted).

53. There is, of course, no reason why the Bill should not make provision (as it does) for compliance with industrial instruments such as prosecutions for breach of such an instrument, claims for back pay, or any other orders that are relevant and appropriate and which a Court may make after a hearing on contested issues. The relevant Courts have always enjoyed very broad powers to redress any prejudice occasioned by breaches of an industrial instrument[1]. These provisions are, in Telstra's submission, adequate (as they have been for many years) to ensure that industrial instruments are complied with whilst balancing the need for employers such as Telstra to make normal business decisions without undue interference.

F. Right of entry

54. Division 2 of the Bill will give a statutory right of entry to union officials who are permit holders:

(a) to investigate suspected contraventions of the Act, or a term of a fair work instrument which relates to, or affects, a member of the permit holder's organisation whose industrial interests the organisation is entitled to represent and who performs work on the premises to be entered; or

(b) to hold discussions with one or more persons who perform work on the premises to be entered, whose industrial interests the permit holder's organisation is entitled to represent, and who wish to participate in the discussions.

55. A common criterion for a union official to exercise rights under Division 2 is that the permit holder's organisation is entitled, under its eligibility rules, to represent the industrial interests of the employee concerned (although, in relation to suspected contraventions, the employee must also be a "member" of the organisation). Under Part 15 of the Act, a

[1] See, for example, section 23 of the *Federal Court Act*

permit holder may only enter premises to investigate suspected breaches of an industrial instrument where the instrument is *binding* upon the permit holder's organisation.

56. In Telstra's submission, it is inappropriate, and does not serve the objects of the Bill or the right of entry provisions, to permit union right of entry where the relevant union may theoretically represent employees under its eligibility rules, but does not actually represent them in practice. In particular, the right of occupiers of premises and employers to go about their business without undue inconvenience is likely to be seriously compromised.

57. Telstra requests that consideration be given to amending the right of entry provisions in a way which links the power of the union to enter the workplace to actual representation of members. As the Bill now stands, it will aid unions in furthering their own industrial objectives without needing to establish that they are serving the interests of their members. Given that relevant unions will, under the Bill, be the default bargaining representatives for members who have not appointed anyone else and will then be able to be covered by any agreement made by giving Fair Work Australia a notice as such, it may not be an adequate criterion to require that the union is bound by the relevant industrial instrument. An alternative requirement that would assist in achieving balance in the right of entry provisions may be, for example, that a union only enter premises to investigate a suspected contravention of a fair work instrument, etc, where requested to do so by a member of the organisation.

58. A second aspect of the right of entry provisions which is of concern to Telstra is the right contained in clause 482(1)(c) of the Bill allowing permit holders to inspect and make copies of records of non members which are relevant to a suspected contravention of a fair work instrument, etc.

59. An organisation should have a legitimate right, for example, to inspect and copy the pay records of a member in order to check, where there is suspicion of breach, that the member is being paid correctly under an applicable award or agreement. To do so, the organisation would require access to pay records and some other documents relating to the member such as documents which demonstrate the hours that the member has worked and the days worked. In Telstra's submission, clause 482 should be amended so that the legitimate interests of members of organisations can be protected – but the powers given to permit holders should go no further than is reasonably necessary to attain that objective.

60. Whilst clause 504 is presumably an attempt to deal with the anticipated problem of misuse of information obtained under the right of entry provisions, it is unlikely that such a provision would, in practice and on its own, provide an effective protection. Clause 482 should, in Telstra's submission, be amended to allow permit holders to inspect and copy only the records of members of the relevant organisation, and only where the member agrees. This would make clause 482(1)(c) consistent with clause 482(1)(b), which does

not allow a permit holder to interview a person unless that person agrees to be interviewed. Further, clause 482(1)(b) and (c) should be amended so that an organisation can interview an employee who is a member of the organisation, as opposed to only being eligible to be a member.

G. Transitional arrangements

61. Telstra appreciates that the operation of some aspects of the Bill will be clarified at the time a transitional Bill is introduced. There are a number of matters which transitional arrangements should deal with, including:

(a) what will happen to enterprise awards, including if and when they will be subject to a modernisation process, or the availability of other review and variation mechanisms to ensure that enterprise awards remain an appropriate and competitive safety net. In this respect, Telstra refers to and relies on its submissions in relation to the National Employment Standards Exposure Draft Discussion Paper (Award Modernisation) which are attached as Annexure 1;

(b) the operation of pre-reform instruments before and after expiry of their nominal term, including their interaction with the National Employment Standards and fair work instruments;

(c) whether the provisions that alter the operation of the discrimination and freedom of association provisions in the Act, including the removal of the 'sole or dominant reason' test, will operate prospectively from 1 July 2009 and, as such, will not apply to decisions made prior to that date. Telstra is unaware of any indication that the changes are intended to have retrospective operation. It is submitted that, having regard to considerations of business certainty and fairness, these changes to the Act should operate prospectively, as is the usual position concerning legislative amendments; and

(d) the application of the right of entry and transfer of business provisions where pre-reform instruments are in place.