



# **SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE**

**Inquiry  
*Fair Work Bill 2008***

**ACCI SUBMISSION  
PART I**

**KEY ISSUES**

**January 2009**



**LEADING AUSTRALIAN BUSINESS**

## THE ACCI SUBMISSION

This Australian Chamber of Commerce and Industry (ACCI) submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the *Fair Work Bill 2008* is in two parts:

- Part I            Key concerns and recommendations (short summary).
- Part II           More detailed exposition of the Bill, and more specific recommendations (longer examination, including on the issues raised in Part I).

We commend both parts of the submission to the Committee. Both represent ACCI's contribution to enabling the Senate to engage with both the principles and key concepts of the new legislation, and with its detailed operation.

We also intend to communicate this submission directly to both the Minister for Employment and Industrial Relations and departmental drafters to ensure that constructive input and operational queries can be properly taken into account.

This submission made on behalf of the 36 employer organisations which form the ACCI network. A number of these organisations are also participating in this inquiry process in their own right.

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# INTRODUCTION

## CONTEXT

1. 2009 is set to see the most significant year of changes in more than 104 years of Australia's federal industrial relations laws.
2. In the space of just 365 days, the entire workplace relations statute is to be replaced, a new arbitral, court, inspection and advisory body is to be established, new mandatory national employment laws are to be introduced, over 4,000 awards and 100,000 wages rates are to be replaced by a new body of occupational or industry "modern" awards, compulsory collective "good faith" bargaining is to be legislated, some forms of arbitration beyond the safety net are to be imposed, and for smaller and medium employers, unfair dismissal laws are to be re-introduced.
3. It will be for history (and in reality the economy and labour market) to judge the ultimate policy validity for these changes. However the level of change being wrought is clearly unprecedented for all users and stakeholders of the system. Few in industry will be welcoming the fact of another widespread regulatory change to workplace arrangements, irrespective of ones views on the substance of changes. Each change itself brings compliance costs on business<sup>1</sup>.
4. It is beholden on all in the industrial relations policy community, from this Committee to the wider Senate, to government, employers and unions to do all we can to get this as right and effective as possible.
5. Regardless of any particular policy proposition or particular beliefs about the optimal structure of the system, the challenge in early 2009 is to get the *Fair Work Act* right, and to ensure the Bill leaves Parliament and commences as the best possible system of workplace laws within the framework of government policy, and the best and most effective

<sup>1</sup> In the space of six years (2004-2010), Australian employers would have faced 6 significant regulatory systems or changes to systems – the pre WorkChoices system (to March 2005), the WorkChoices Mark 1 system (March 2005-May 2007), the WorkChoices Mark 2 system (May 2007-March 2008), the Forward with Fairness Stage 1 system (March 2008-July 2009), the Forward with Fairness Stage 2 system (July 2009-January 2010), and the Forward with Fairness Stage 3 system (from January 2010). At each point, employers need to take advice on and determine what has changed, if it is applicable to their business, and calibrate workplace arrangements to achieve regulatory compliance. This chronology does not include an even more complex picture for employers moving from State to the national system, or those exposed to State laws that still have (or may have) legal application to national system employers.

execution of the *Forward With Fairness* policies for all users of the system.

## IN SUMMARY

6. ACCI recognises the case for some changes to be made to the existing industrial relations system, but not of the magnitude nor the overall form proposed by the government.
7. The thrust of the government's Bill is regulatory and collectivist in character. It would implement a rights-based model for regulating industrial relations with a heavy emphasis on new employee and trade union rights, a more regulated safety net, and with even collective bargaining subject to compulsion in process and (in some cases) outcomes.
8. While freedom of association and enterprise bargaining *per se* is supported by ACCI and should be supported by industry, the government's framework is structurally unbalanced in that a number of proposals assume a level of collectivism or a desire for collectivism that does not exist in the modern Australian economy.
9. Other structural problems with the Bill also arise. In some cases it is the aggregation of multiple regulatory proposals and their interaction that presents problems for businesses, rather than each individual proposition. In other respects the spirit or intent of a proposal is not an issue, but its legislative form is. These are discussed in our submission.
10. Our assessment is that the downside risk of the proposals in their current form (to business costs, to inflexibility in the economy and to jobs) outweighs the upside opportunities (of collective bargaining delivering productivity trade-offs that fund higher wages or employment conditions).
11. The risks from a such an approach arise because:
  - a. The Bill is the first occasion in the past 20 years when national laws have altered the overall direction of policy (which was away from for one-size-fits-all approaches, by devolving the setting of wages and conditions to local workplace considerations, as in 1993, 1996,

2005), towards a reactivation of some greater forms of central and collective regulation.

- b. The Bill does not just restore the safety net (of employee and union rights in legislation and industrial awards), but in some cases adds to it in ways not previously provided for in Australian law.
- c. The Bill would have Australian law not just perform its traditional role of regulating minimum standards and the safety net, but would also regulate conduct and outcomes beyond the safety net and those minimum standards.
- d. The Bill's emphasis on collectivism is unbalanced in that only a minority of Australian workplaces operate industrial relationships on collectivist approaches.
- e. The Bill places a high level of faith in the collective bargaining system to operate across the economy and to deliver productivity gains, in Fair Work Australia to arbitrate only selectively and judiciously, in the trade union movement to use new institutional powers responsibly, and in the unfair dismissal system to not reactivate the discredited notion of 'go-away' money;
- f. The Bill would add a significant body of labour market regulation at a time of severe economic stress (the likes of which most employers have never experienced before in their business-life), and in economic circumstances which threaten the historically low levels of employment that Australia has only recently achieved;
- g. The Bill is based on policy developed when the economy was at the height of its growth cycle, and has not been re-calibrated to cater for conditions now applying.

12. Having said that, it is also recognised that:

- a. The government has made it clear to business and the wider community for some time that it intends to make changes of this character (though not all of the proposed changes are consistent with or spelt out in the government's 2007 policy).
- b. Industry itself has sought changes (of a different nature) to the 2005 laws.

- c. The government is legislating a new hybrid system, one that takes some aspects of the current system, the 1997-2005 system and the 1993-1997 system, and combines them with a range of new concepts and institutions.
  - d. The government is retaining some aspects of current laws, particularly those dealing with unlawful industrial action and a desire to complete a national system using the corporations power of the Constitution, and that is welcomed by ACCI.
  - e. The adverse impacts that arise from the government's proposals are likely to have non uniform impacts across the economy, and be impacts which are spread over time, to different employers, sub sectors and industries.
  - f. The government has consulted in the development of the Bill (though making it clear that consultation would not alter government views on stated policy or frameworks, and noting that consultation has not necessarily led to adoption of industry views).
13. Thus, as a whole, the Bill presents significant risks to business and the economy, especially in lowly or non-unionised workplaces and in those businesses unable to fund, absorb or pass-on increased business and labour costs. This is particularly the case in small and medium business, but not exclusively so.
14. Accordingly, ACCI strongly advocates that the Bill be amended in a number of significant areas, and that the Bill not be passed unless and until that occurs.

## **APPROACHING THE FAIR WORK BILL**

15. Employers (who will be charged with operationalising much of the new system) have a particular interest in focussing on practicalities, the impact of changes to the system, and their future capacity for effective, productive and fair workplace relations. Regardless of the party in power and the policy being implemented employers need to be able to manage industrial relations, and navigate the system for productive, stable, efficient work.



16. ACCI is approaching the *Fair Work Bill 2008* by asking some quite simple and fundamental questions:
  - a. Will each of the proposed approaches, and the new system as a whole, provide an effective and workable method of regulation of workplace relationships in Australia, both from 2010 and into the future?
  - b. Within the headline commitments of government, how will the Act operate in practice, and how will it compare to the operation of the existing system and what employers know works and doesn't work?
  - c. What constructive suggestions and input can employers provide at the point of the passage of this new legislation to ensure it operates as effectively as possible?
17. These are the type of questions ACCI has sought to engage with in this submission. This is the type of input employers have made during 2008, and will continue to do so, recognising the government's stated policy intention and the need to moderate specific policy proposals.
18. Thus, this submission does not debate alternative macro-level frameworks or policy models. ACCI believes the proposed framework has a number of structural weaknesses, and is not the preferred model for the system of industrial relations as a whole. However, we also consider the current model to be deficient in a number of respects, and in this context our key focus is to secure a range of significant amendments to government legislation as identified in this submission.

### **Diverse Business Circumstances**

19. It is important that the Committee and Government fully appreciate that this Bill must work across a range of diverse business arrangements and economic circumstances.
20. That diversity has direct relevance to the framing of legislation of this type. Inflexible labour laws do not cater for diverse circumstances, or changing circumstances. They add to cost, and economic inefficiency. In the worst of cases, they contribute to less than optimum performance of the labour market and the economy. In particular, the move towards

mandated employment conditions in legislation or in reactivated industrial awards, or the application of collective bargaining, need to be assessed with these considerations in mind.

21. Ultimately labour laws that do not cater for the diversity of circumstances or are unable to adapt to changing conditions are not durable laws, and subject to regular amendment.
22. That diversity of circumstances include:
  - a. Small businesses (with just one employee), as well as medium and large enterprises.
  - b. Enterprises with a mix of employees, contract labour, and other work arrangements.
  - c. Enterprises with little or no expert human resource support.
  - d. Enterprises with a history of collective bargaining, and those with no collective bargaining.
  - e. Enterprises with union presence and those without union presence (indeed, no history of any union involvement).
  - f. Businesses that operate on a for and non-for-profit basis.
  - g. Businesses that operate on very low margins.
  - h. Businesses that operate in regional and remote areas and city areas of Australia.
  - i. Businesses that are deeply trade-exposed, or compete with labour intensive businesses in the Asian region, or elsewhere.
  - j. Businesses that have had no formal involvement with the industrial relations system.
  - k. In prosperous economic times and times in the economic cycle of recession, high and low inflationary environments and periods of growing or receding unemployment. These concerns have been brought into the sharpest possible relief in relation to this Bill, its practical operation, and planned implementation.

## **Transitional Issues**

23. This submission is also made in the context of employers not knowing what transitional and consequential issues may arise in the future. Employers, and this Committee, are being asked to sign up to a system before seeing important Transitional and Consequential legislation that may impact upon employers and the operation of the system as a whole.
24. It will be important to employers that any issues with the implementation provisions (which may go to the finalisation of the Fair Work Act itself) are identified as soon as possible, with amendments able to be made to the ongoing Bill, and the transitional legislation.
25. It would not be unreasonable for the Committee to decline to recommend passage of the legislation prior to the entire package coming before you to consider as a whole, including vital transitional arrangements.
26. On some of these transitional issues the government has opened dialogue with ACCI and employers. That is ongoing, and welcomed.

## **Aggregation of Issues and Employer Costs**

27. ACCI's analysis of the Bill reveals that it is not solely the individual issues ACCI has identified in this submission that are of concern, but the aggregate and totality of issues and the overall regulatory burden to be imposed that creates significant concern for employers. There are complex inter-relationships between provisions which need to be properly understood to engage with the legislation and assess proposed new legal avenues and benefits.
28. In addition, the aggregation of issues flows into employer cost increases consequent on the Bill as a whole. Those increased costs include direct costs (for example, costs arising from higher legislated standards, more costly provisions in "modern awards", costs associated with making bargaining concessions, costs of participating in mandated bargaining, costs imposed by arbitration, costs of defending unfair dismissal litigation, costs of inefficient work practices being passed-on to new purchasers on the sale of business or part of business), as well as indirect costs (for example, costs of responding to

collective bargaining demands and participating in good faith bargaining, costs of representation in arbitral proceedings on awards or collective bargaining, costs of assessing regulatory compliance and implementing compliance measures, costs of taking advice on regulatory and system changes).

## **Collectivism**

29. The Bill assumes a level of collectivism that is not in existence within Australian business. The truth of the matter is that most businesses are generally small to medium in size, with employers preferring to deal with employment issues between the employer and employee, on an employment contract basis within the framework of a simple safety net of minimum wages and conditions. There is no or very little union involvement in the vast majority of Australian businesses.
30. Informal collectivism, without union involvement is not common in contemporary Australian workplaces. Whilst there are a significant number of businesses with informal/formal collective bargaining structures firmly entrenched, this is not the norm. ACCI makes recommendations throughout this submission to provide a level of balance that would more approximate working arrangements in the majority of Australian' firms.

## **Corporations Power**

31. The shift away from the Conciliation and Arbitration power to a system predominantly based on the Corporation's power is formal recognition that employment and industrial relation laws concerns the regulation of business and its affairs.
32. In this context, the High Court decision upholding the validity of the *WorkChoices* amendments was instrumental in allowing the Government the opportunity to essentially "start from scratch" in building a new industrial relations system for Australia. It also indicates a further shift away from artificial disputes being created by the system so a third party can solve them by arbitration.

33. Unfortunately, this shift has not been reflected in the Bill, with the emphasis on collective, interventionist mechanisms that in some places “creates” an industrial issue, in order for a Tribunal to then “fix” it for the parties and create an ongoing set of arbitrated employment rules. This is reflected in provisions concerning collective bargaining and workplace determinations (arbitration) beyond the safety net.
34. ACCI has always maintained that the role of law-makers and the state in this area is to set a safety net of minimum standards and not to impose additional areas of regulation that will have the effect of creating issues between employers and employees.

### **“Go-Away” Bargaining Money**

35. ACCI and its members have long brought attention to the unfortunate situation of employers having to pay “go away” money in the unfair dismissal system for many years.
36. Whilst the Government has indicated its distain for such practice by attempting to introduce provisions in the Bill to ameliorate this, there are now new concerns that bargaining under the Bill will encourage the payment of further monies solely to avoid litigation and arbitration.
37. The Bill will create a situation where some employers, who do not want to bargain for an agreement, will now be pressured into paying “go away bargaining money” in order to avoid union activity, or Fair Work Australia making bargaining orders and imposing an arbitrated outcome. In many or most cases, this would take the form of working from a pattern union claim on a commercial cost-benefit assessment.
38. Despite Government assurances that employers cannot be forced to make an agreement with employees or a union, there will be employers who simply accede to union demands by agreeing to make agreements or entering into some side deal with the union so unions don’t pursue the employer through Fair Work Australia.
39. It would be a shame to see unfair dismissal go away money reduces whilst, on another front, a new problem is created, and we see the emergence of ‘go away bargaining’ money being paid.

## **ILO Conventions**

40. Australia has a number of fundamental obligations under international law as a function of having ratified ILO conventions on freedom of association and collective bargaining, and (for example) relating to termination of employment.
41. In some respects the amendments address issues of concern regarding Australia's compliance with ILO obligations, as they have come to be interpreted within forums of the ILO (noting though that some of those interpretations are contested in ILO forums by Australian employers and employers generally).
42. However, ACCI is concerned at a number of points that the terms of the Bill threaten to transgress Australia's international obligations and give rise to potential action in the ILO questioning the consistency of Australia's new industrial relations laws with ILO obligations (something which has plagued each generation of major industrial changes since the early 1990s, under both Labor and the Coalition).
43. In particular, processes of imposing default bargaining representation by a union or unions on employees that have not chosen to associate with those unions or compelling a unionised employer to bargain with multiple unions rather than an established union, potentially threatens some quite fundamental rights which have previously been complained of at an international level in relation to previous generations of very different legislation.
44. ACCI and its members are of course able to pursue ILO complaints against this legislation if required to. However a far superior approach is to draw concerns to the Government and Parliament's attention at this point of the process and identify options to legislate consistent with, rather than contrary to, ILO treaty obligations.

## **National IR System?**

45. ACCI welcomes the continuing commitment expressed by the Australian government to the completion of a national industrial relations system, though the terms of that completion are matters that require separate attention and consideration beyond this submission.

46. Given the unwillingness of the States to embrace a 'new federalism' and refer remaining industrial relations powers to the Commonwealth (as Victoria has successfully done under governments of different political persuasions), the Bill unfortunately, does not further Australia in the direction of a genuinely national industrial relations system as promised under *Forward with Fairness*.
47. More work needs to be done in this regard; ideally with the States referring their industrial relations powers before the Bill is enacted, and to clarify the expanded scope of a truly national industrial relations system.
48. If the States refer their powers on a partial/conditional basis, with the result being that the Bill undergoes consequential amendments, ACCI reserves its position and will need to make further submissions.

### **Education Campaign**

49. Given the multiplicity of recent changes to industrial relations frameworks (see footnote 1) and the Bill's emphasis is on collective bargaining (which is not the dominant mode of working arrangements in the overwhelming majority of Australian businesses), it is essential that the Government provides funding to employer representatives to undertake an extensive education/information campaign.
50. Ideally, there should be a period of funding before and after the implementation of the Bill and the new system, and beyond 1 January 2010. The importance of education and support to business cannot be overemphasised. The Bill will deliver an unprecedented level of change in the industrial relations system, with new provisions that will require employers to bargain with unions and employees where they have never before had any need or desire to.
51. There is also a level of regulation by way of modern awards covering all national system employers that will require extensive supporting information campaigns. Such a measure will also aid compliance with the new system, which is in the interests of employers, employees and Government.

## **This submission**

52. These are the considerations ACCI has sought to engage with throughout this submission.
53. We also believe these are vital issues for the Senate to engage with. Australia's principal industrial relations statute, however named, has long been one of the most important areas of Australian legislation not only for the economy and jobs, but also for living standards and the capacity of enterprise to prosper, grow and play its ever evolving economic and social role.
54. When something so fundamental as a complete rewrite of Australia's principal employment law is attempted; the broad principles, the new concepts and the detailed operation all need to be properly considered.
55. This two part ACCI submission has been prepared on this basis.
56. Where alternative approaches are proposed we have sought in both parts of this ACCI submission to identify options to remediate concerns within government policy wherever possible. In all cases, we have sought to identify the basis for employer concerns and the alternative approaches we recommend.

## **WorkChoices**

57. The key changes in the previous *WorkChoices* package have either already been undone or stand to be undone via this Bill. It is now for history to judge *WorkChoices* and the changes it introduced.
58. The *WorkChoices* changes and their operation do not (with a limited set of exceptions where the government has expressly undertaken that it will maintain the 2005 approaches) provide the correct perspective from which to assess the *Fair Work Bill*, and the next evolution of laws regulating bargaining, industrial action, minimum standards, agreement making etc.
59. The instant questions for the Parliament and for the industrial relations policy community, are what the law should be in the future, and what (within the implementation of stated government policy), will deliver the best possible industrial relations system into the future.



60. As noted in this submission, it is also necessary to recognise that the present Bill does much more than ‘undo’ *WorkChoices*, through its provisions which add to, alter and in some cases retain aspects of the laws that have applied since 1993.

### **Getting this right has never been more important**

61. The *Fair Work Bill* attempts the most significant rewrite of Australia’s principal industrial relations statute in over 104 years. In scope and concept it dwarfs the changes of 1988, 1996 and 2005, and is set to recast almost every provision affecting the rights, obligations and benefits of employers, employees, organisations and associations.
62. These legislative changes are set to commence as we grapple with an arguably unparalleled economic downturn, and the most adverse economy and labour market most working Australians have experienced. Fresh indications are emerging on a daily basis of the extent of the economic downturn and declines in the performance of, and confidence in, the economy. This process is not going to have reversed back into positive territory prior to the middle of 2009, or in all likelihood, by early 2010.
63. If the most comprehensive package of changes ever to the Australian industrial relations system is to commence during the height of an economic downturn (or most optimistically as an opportunity to trade out appears on the horizon) then it will be more critical than ever that policy change be executed as well as possible.
64. This will be achieved by listening to, and acting on, sensible, balanced and constructive input from organisations working with the system on a daily basis. This is the input ACCI and its members have strived to provide.

### **Benchmarking**

65. The Deputy Prime Minister in a recent speech to the Australian Labour Law Association (14 November 2008), stated that the Government believed it “got the balance in the new system right”, because:
- *it will be fair to employers and to employees;*
  - *it will promote economic productivity; and*

- *it will lead to much needed long-term stability in our workplace relations system.*
66. ACCI will be benchmarking the Bill during its life against the above criteria, but also against industry's own benchmarks. On 14 October 2008, ACCI outlined measures against which Australian employers will assess the Australian Government's proposed changes to our industrial relations system.<sup>2</sup>
67. The criteria against which the new system will be assessed by Australia's employers, both initially and during its implementation, include:
- a. Generating productivity and employment;
  - b. Providing industrial relations stability and certainty;
  - c. Working under diverse economic and business conditions;
  - d. Working in diverse employment and union contexts; and
  - e. Respecting employer body / union representation.
68. Analysis against these five criteria has also led the recommendations which appear in Parts I and II of this ACCI submission and to proposals to improve the operation of the *Fair Work Act*. We urge the Committee to adopt just such a frame of reference as it approaches the Bill, and thereby to address the considerations and recommendations we raise in this submission.

## GOVERNMENT COMMITMENTS

69. The Government made a number of key policy commitments in the lead up to the 2007 federal election and throughout 2007-2008.
70. It is worth recalling some of these announcements against the current legislation package, as ACCI understands the effect of the Bill:

<sup>2</sup> ACCI Media Release, *Business Expectations For IR Changes Outlined*  
<http://www.acci.asn.au/MediaReleasesMain.htm>

Government Commitment	What the Bill does ...
Fair Work Australia will commence operation on 1 January 2010. <sup>3</sup>	FWA will commence on 1 July 2009 <sup>4</sup>
<p><i>Labor has also made it clear that under our proposed system, a union does not have an automatic right to be involved in collective enterprise bargaining.</i><sup>5</sup></p> <p><i>Under our system, a union does not have an automatic right to be involved in collective bargaining.</i></p> <p>...</p> <p><i>In line with respecting that choice, an employer and its employees will be free to collectively bargain together where they chose to do so and this will give rise to a genuine non-union collective agreement that has no union input at all</i><sup>6</sup></p>	<p>Unions are the automatic default bargaining representative – an employee must effectively resign if they don't want their union involved to bargain on their behalf.</p> <p>An employer must not "refuse to recognise or bargain" with a union, or they may be liable of up to fines in the order of \$33,000.</p> <p>A union that has no involvement in the agreement making process (but has at least one member on site) is able to be covered by the agreement, with no discretion on FWA to stop this from happening.</p>
<p><i>Compulsory arbitration will not be a feature of good faith bargaining.</i><sup>7</sup></p> <p><i>Compulsory arbitration will not be a feature of the low-paid bargaining stream.</i><sup>8</sup></p> <p><i>And let me make this absolutely clear, there will [be] no compulsory last resort arbitration for collective agreements, as is desired by the ACTU, under Labor.</i><sup>9</sup></p> <p><i>Labor's workplace relations system is a fair one and a balanced one with the emphasis of working at an enterprise level. Our system is a flexible one. It says people should negotiate in the enterprise in which they work for the best circumstances for that enterprise.</i><sup>10</sup></p>	<p>FWA can impose an arbitrated outcome on employers in 3 new circumstances: low-paid bargaining, economic harm to the bargaining parties, breaches of good faith bargaining orders.</p> <p>FWA is able to make scope orders which would effectively mandate the employer to change the scope of their agreement to include or exclude categories of employees against the interests of the employer and employees concerned.</p> <p>The Bill changes longstanding transmission of business rules, so that an employer buying a business and taking on only 1 of its employees, inherits inflexible and costly agreements of another enterprise.</p>
<i>Existing right of entry laws will be retained.</i> <sup>11</sup>	The Bill allows unions eligible to represent an employee access to any worksite, regardless of whether they are covered by an award or an agreement for recruiting purposes.

<sup>3</sup> *Forward with Fairness – Policy Implementation Plan*, p.8.<sup>4</sup> Second Reading Speech.<sup>5</sup> *Forward with Fairness – Policy Implementation Plan*, p.13<sup>6</sup> Melbourne Press Club Speech, Melbourne, 25 June 2007.<sup>7</sup> Government's fact sheet (number 6) on new workplace relation's system, 2008.<sup>8</sup> Government's fact sheet (number 7) on new workplace relation's system, 2008.<sup>9</sup> Deputy Prime Minister, Hon. Julia Gillard MP, Speech to the Committee for Economic Development of Australian, Adelaide, 1 May 2007.<sup>10</sup> Deputy Prime Minister, Hon. Julia Gillard MP, door stop interview, 8 January 2008.<sup>11</sup> *Forward with Fairness – Policy Implementation Plan*, p.2.

Government Commitment	What the Bill does ...
	<p>The Bill allows unions to access the records of non-union employees, without order of FWA, or consent of employee.</p> <p>There is no civil offence for unions if they misuse the information obtained.</p>
<p><i>Outside these four yearly reviews, awards will be able to be varied in limited circumstances, such as work value cases, to remove ambiguity, uncertainty or discriminatory terms.</i><sup>12</sup></p>	<p>FWA can vary and even make new modern awards within a 4 year period on its own motion or upon application by a union, without a test case, adding to the number of modern awards.<sup>13</sup></p>

## TEN KEY ISSUES

71. Having reviewed by the Bill as introduced, the ACCI network has a range of concerns, perspectives and input. These are offered in an effort to ensure the system works effectively and appropriately and plays its part in delivering productivity and prosperity. Our concerns appear across Parts I and II of this submission.
72. The ten (10) key concerns summarised in Part I of this submission are:
  - a. Regulation beyond minimum standards and the safety net through compulsory good faith bargaining orders
  - b. Compulsory arbitration beyond minimum standards and the safety net in lower paying / low agreement industries
  - c. Compulsory arbitration beyond minimum standards and the safety net through Workplace Determinations
  - d. Unbalanced trade union right of entry and inspection rights
  - e. Unions being designated as default (automatic) bargaining representative
  - f. Micromanaging the approval of agreements
  - g. Increased business costs under Modern Awards and legislated employment standards (the NES).

<sup>12</sup> Deputy Prime Minister, Hon. Julia Gillard MP, Address to the Australian Labour Law Association, Melbourne, 14 November 2008.

<sup>13</sup> Section 157.

- h. Reactivated unfair dismissal systems especially on small business
  - i. Excessive, ambiguous and new general employment laws (designated as ‘the General Protections’).
  - j. Inflexible Employment Rules on Transfer of Business
73. These are also expanded upon in Part II of the ACCI submission, including more detailed recommendations on the practical operation of the system (including where ACCI’s headline recommendations may not be accepted).

## HOW THE SENATE SHOULD PROCEED

74. This Committee should recommend passage of the legislation only if significant amendments are made to address both the key issues raised in Part I of this ACCI submission, and the more detailed considerations in Part II of this submission. The Committee should recommend that the government adopt the recommended amendments. The Committee should also recommend that the Senate insist on its amendments throughout the legislative process.
75. Swift action to address these concerns will facilitate the introduction of a system which will have an opportunity to operate as intended and do least damage to an already endangered economy and labour market. Addressing these concerns will deliver a more sustainable system.

We note in support of our call for a limited number of targeted changes to the Bill as introduced that no comparable workplace relations package has proceeded without significant amendments, either by government or in the Senate, which change the final form the amending legislation from that initially sought.

- There were 337 amending items in the revision of the *Workplace Relations Amendment (Work Choices) Bill 2005* from the initially introduced text.
- There were 171 amending items agreed between the Australian Democrats and the then Australian Government for the passage of the *Workplace Relations and Other Legislation Amending Act 1996*.

- ACCI also recalls significant numbers of amendments to the initial version of the *Industrial Relations Act 1988* and *Industrial Relations Reform Act 1993*.

It would be quite extraordinary if the present Bill (which attempts even more ambitious and wide ranging set of changes) passed without a number of amendments to ensure its proper operation based on feedback through this inquiry process and directly to government.

We note in this regard the comments of former Senator Andrew Murray on the value of this committee process:

Whether there is cross-party support for legislation or not, the committee process has always been valuable in identifying mistakes, identifying unintended consequences, and improving flawed legislation<sup>14</sup>.

This reflects precisely the basis on which ACCI is contributing to the work of this inquiry, and we commend this two part ACCI submission to the Committee on this basis.

## TIMING

76. There has been an adjustment to the planned commencement of the bulk of the changes in the *Fair Work* package. Indications in the lead up to the 2007 election were for the commencement of the system in full from the start of 2010. This was certainly the impression created in 2007 and early 2008. However, this has been brought forward in the implementation of policy in recent months.
77. Having taken into account:
  - a. The magnitude of the changes to the system proposed in the Fair Work Bill.
  - b. The task of creating an entirely new determinative, administrative etc body of an unparalleled scale to administer the system (FWA).
  - c. The impact of the proposed modern awards and the challenge of concluding the award modernisation process without detriment to employers, employees and economy and labour market.

<sup>14</sup> Australian Democrats Minority Report, p.91, Senate Education, Employment and Workplace Relations Committee report into the Provisions of the *Workplace Relations Amendment (Work Choices) Bill 2005*, 22 November 2005.

78. As a minimum...the employers of Australian believe there should be a return to the original timing of these changes to the system, and for the complete system, including the operation and creation of Fair Work Australia, to commence from a date or dates in 2010.
79. In particular, we request there be reconsideration of the timing of reintroducing unfair dismissal claims against small business. Given the unprecedented vulnerabilities and operational adversity facing smaller businesses in Australia, there should be a reconsideration of the impact of exposing them to such significant liabilities and the effects of doing so, and at very least some extended introduction period for exposure to new claims (this is further outlined below).





## GOOD FAITH BARGAINING ORDERS

80. The Fair Work Bill seeks to introduce new measures to address protracted or problematic bargaining, through the making of various bargaining orders.
81. This means the industrial relations system is moving beyond its traditional role of regulating minimum standards and a “safety net”, and into the sphere of regulating matters beyond the safety net, such as market rates of pay and conditions.
82. 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.
83. 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.
84. ACCI has sought to engage with the detail of how these orders will work and provide constructive input towards a system of orders which could genuinely contribute to bargained outcomes (Part II of this submission).

## GENERAL COMMENTS

85. These orders need to be subject to some minimum period of attempted bargaining. Unions should be required to have at least given bargaining a go, and genuinely attempted to secure an agreement (for some minimum period) before securing the assistance of FWA, and recourse to arbitration.
86. There also needs to be greater clarity on when bargaining is initiated and an exposure to these orders commences. We are concerned that the Act as drafted will apply formal obligations and requirements to what employers may understand to be informal or preliminary discussions only. Far greater clarity is needed.

87. There also needs to be greater clarity on what good faith bargaining orders can and cannot contain and require of parties (in particular employers). The Act needs to make this clearer, and the Senate needs to be able to see in black and white what these orders may and may not involve to properly consider the proposal to add these orders to the system.

## **COMPLIANCE AND DISPUTATION**

88. As we set out under “Arbitration”, there are serious problems with the planned blurring of compliance with bargaining orders, and arbitration under the Bill. Making arbitration the sanction for non-compliance with bargaining orders will send inappropriate signals to unions, and do little or nothing to encourage genuinely bargained outcomes.
89. Any orders should be properly enforceable and sanctions can help secure this (e.g. fines or further orders). However, sanctions should not extend to substantive arbitration of union claims, which is an entirely separate, non-compliance based, concept.

## **MAJORITY SUPPORT DETERMINATIONS / SCOPE ORDERS**

90. FWA would be able to make two new forms of orders in relation to the bargaining process: a majority support determination<sup>15</sup> and a scope order.<sup>16</sup> These determinations would trigger access to numerous other orders under the Fair Work Act and effectively distort the bargaining process and in some cases compel agreement making with unions.

### **Key problems – Majority Support**

91. One law firm has assessed the impact of these orders:

This represents a significant change to the bargaining dynamic. It arguably opens up the circumstances for arbitrated wage outcomes.<sup>17</sup>

92. These orders are the first step in unions requiring an employer to bargain with them, with arbitration the ultimate consequence for employers opposing union claims.

<sup>15</sup> Sections 236-237.

<sup>16</sup> Sections 238-239.

<sup>17</sup> DLA Philips Fox, *The Workplace – Special Report, Unwrapping the Fair Work Bill 2008*, December 2008, p.11.

93. One key problem (beyond the notion of forcing a particular scope of agreement on an employer) lies in s.237(3) allowing FWA to determine whether a majority of employees want to bargain using “*any method FWA considers appropriate*”.
94. Employers are very concerned at the prospect of unsafe assessments of majority support. There is little or no protection against coercion or duress in the proposed approach. Employers object in particular to the notion of using a petition. Petitions are not signed in secret and employees may be coerced to sign or not sign a petition.
95. The use of petitions in this context is not the most desirable way to reflect freedom of association, and may give rise to some problems with establishing compliance with Australia’s obligations under ILO Conventions 87 (freedom of association) and 98 (collective bargaining).
96. These concerns do not arise in relation to industrial action, as a rigorous and controlled secret ballot process protects against precisely these risks. A secret ballot should also apply to majority support determination.

### **Key problems – Scope Orders**

97. These orders<sup>18</sup> will allow unions to force an employer to redesign their agreement to cover or not cover particular sections of their workforce. This is antithetical to the notion that enterprise agreements should be tailored to suite the needs and requirements of the enterprise.
98. Law firms have also analysed the potential effect of these orders:

Potentially, employers will need to brace for the possibility that the coverage of their agreements may be broader or narrower than they anticipate. As a result, majority support determinations and scope orders could affect the way employers structure their workforces organisationally, operationally and geographically.<sup>19</sup>
99. The potential harm outweighs any perceived benefit of such orders. The consequences are serious, and these orders will lead to protracted and unnecessary litigation. They should be removed from the Bill.

<sup>18</sup> Sections 238-239.

<sup>19</sup> DLA Philips Fox, *The Workplace – Special Report, Unwrapping the Fair Work Bill 2008*, December 2008, p.11.

## ACCI Proposal

**For the same reason that secret ballots are applied for the taking of protected action, a secret ballot should be required for a majority support determination.**

**Scope orders should be removed from the Bill as they will lead to litigation and disputation where this does not currently exist in the bargaining system.**

Employers' concerns with the proposed bargaining provisions are expanded upon from pp.107-120 of Part II of this ACCI submission, including more detailed analysis and recommendations.

## LOW PAID BARGAINING<sup>20</sup>

100. Any bargaining system is going to be more successful and comprehensive in some areas than others. In 2009, the question is what the system should do (if anything) to further promote and encourage the spread of bargaining to the extent it would or could be mutually beneficial.
101. The government intends to introduce a system of low paid bargaining authorisations and determinations (arbitration) to address this issue. Government has given various indications of how this is to work, which centre on very limited concerns in relation to (essentially) the funded sector and some unique areas of lower paying work.
102. However, this is not reflected in Div 9 of Part 2-4 of the *Fair Work Bill*, which introduces a further at-large capacity for arbitration. This approach is not the right way to unlock further bargaining.
103. Unless rethought, the proposals for low paid authorisations and determinations will have a completely counterproductive and detrimental impact, and will have dangerous long term consequences for highly vulnerable industries and smaller employers.

## KEY PROBLEMS

104. Notwithstanding that there may be opportunities for greater bargaining in some key industries and sectors, there are significant problems with the proposed approach in the *Fair Work Bill* through low paid authorisations<sup>21</sup> and low paid determinations<sup>22</sup>.
105. **No financial capacity / damage to industry:** Most of the industries which pay award rates and have a lower incidence of bargaining are characterised by:
  - a. Small business, ‘mum and dad’ employment in local communities.
  - b. Low margins, tight operating conditions, little or no capacity to secure beneficial trading terms or bulk discounts from suppliers.

<sup>20</sup> Div 9, Part 2-4, ss.241-246

<sup>21</sup> Div 9, Part 2-4, ss.241-246

<sup>22</sup> Div 2, Part 2-5, ss.260-265

- c. Labour costs constituting a very high proportion of overall costs.
106. Industries such as the retail and hospitality industries are also at the very forefront of exposure to the current economic downturn.
107. There are often quite fundamental financial and operating impediments to imposing above award labour outlays to such employers. Many would argue that if they had the financial and operational capacity to exchange increased outlays for operational gains, they would already have done so.
108. Labour reliant service industries may inherently have less scope to secure gains through bargaining than industries such as manufacturing, construction, mining etc. It is not appropriate to treat them as laggards and impose additional labour costs, without a proper understanding of each workplace, and the impact of any increases in labour costs at the specific workplace level.
109. **Attack on the safety net:** We have for many years had a system consisting of an award safety net, and a second tier of bargaining above the safety net. The proposed approach in the Fair Work Bill threatens to introduce an additional, intermediate (third) level of obligation, which is neither set at the safety net level, nor properly bargained for. This would be a quite fundamental change the system developed under both Labor and the Coalition. It raises significant concerns about inflation and the ongoing viability and availability of services.
110. **Confusion on who is low paid:** An instant concern is that there is no clear guidance on who the low paid and are and are not, and who will have access to orders and arbitration. There appears a very real risk of these orders being used by strong and well resourced unions on behalf of highly skilled, highly paid, and industrially strong employees whom no one in the community would characterise as low paid.
111. **Reward for lazy behaviours:** There is also a danger of sending the wrong signal to both unions and employers. The system shouldn't give up on genuine bargaining and simply impose arbitrated increases, and it should not send incentives to union officials to substitute pursuing arbitration for trying to secure a genuine workplace agreement.

- a. Linked to this it is not sufficiently clear that a union actually has to have tried to bargain with an employer at an enterprise basis prior to seeking an arbitrated order on the basis of a bargaining failure! This is a clear anomaly which needs to be redressed.
112. **Incentive for pattern bargaining:** Despite retaining some expressly anti-pattern bargaining provisions in the Bill, the low paid stream threatens to encourage and reward otherwise unacceptable pattern behaviours. Viewed as a whole, the provisions offer unions the reward of arbitrated outcomes for coordinated and concerted actions across an industry / multiple employers.
113. This is precisely the opposite of the stated intention of the government. The Deputy Prime Minister indicated in November 2008 that:
- What a relief that the law students of tomorrow will never have to endure the tortured logic of doctrines such like...."the creation of inter-state industrial disputes by serving paper logs of claims. Remember the junior union employees whose job it was to comb through the new Yellow Pages each year and lick the stamps on the thousands of envelopes".<sup>23</sup>
114. With respect, this appears precisely how the new low paid bargaining stream will be operationalised if implemented as introduced. This will be back to the future for Australian industrial relations practice.
115. If cross employer, pattern bargaining style applications are encouraged under the low paid banner then junior union officials will again be combing through lists of employers, licking the stamps on thousands of envelopes and serving common claims in pursuit of the reward of common arbitration. This threatens to become log of claims *redux*.
116. **Is not bargaining:** And of course this will not be bargaining. Despite some confusing wording in the Bill, the low paid stream will not lead to any form of agreed or bargained outcome. Terms and conditions will be imposed, not agreed.
- a. Imposed terms and conditions will not increase productivity or efficiency – despite some decorative wording to the contrary.

<sup>23</sup> The Hon Julia Gillard MP, Deputy Prime Minister and Minister for Employment and Workplace Relations, Address to the Australian Labour Law Association, 17 November 2008.

- b. Beneficial outcomes can only flow from proper enterprise by enterprise bargaining, and the Bill should be amended in favour of this (and requiring FWA to assist not arbitrate).
117. **Will kill off any scope for future bargaining:** Not only will imposed outcomes not be any form of agreement, they will kill off future capacity to enter into proper, genuinely negotiated agreements. Far from being a measure to facilitate or kick start bargaining, arbitration will impose such additional costs that it rob an enterprise of capacity to enter into a genuine agreement in the future.
118. **This will be inflationary and cost jobs:** These provisions appear set to deliver higher labour costs, without any exchange for greater productivity and efficiency.

#### ACCI PROPOSAL

**Assistance not arbitration:** The Low Paid Bargaining Division and Low Paid Workplace Determinations should not be proceeded with in favour of:

- a) Greater government assistance to better encourage bargaining in lower bargaining industries. This might include targeted assistance and advice, funded project officers in organisations, active bargaining promotion programs etc; or
- b) At most, empowering FWA to intervene (short of arbitration) to assist, facilitate and promote genuine bargaining in particular industries and workplaces.

**Only on ministerial reference:** Omit the Low Paid Bargaining Division and Low Paid Workplace Determinations in favour of a ministerial reference power to direct FWA to examine and facilitate bargaining in prescribed workplaces (or industries) specifically gazetted by the Minister.

**Require bargaining to have actually failed:** Unions should be required to prove not industry wide or at large propositions, but that bargaining has been attempted and failed with each particular employer, and that there is no prospect of bargaining proceeding successfully with each employer (even with more active assistance from FWA).

**Workplace specific not industry wide:** Only allow low paid authorisations on a single, rather than multi employer basis. This will allow FWA to properly consider evidence on the failure of bargaining, why bargaining has not proceeded, and whether further efforts could yield genuine bargaining. A single workplace focus is also required to properly assess the impact of labour cost increases, and of imposing above award obligations.

**Properly assess impact on employers:** Better require FWA to properly take into account the impact of arbitrated outcomes on the operation of the employer and its capacity to continue to trade and employ.

**Discretionary not mandatory:** Do not impose a mandatory requirement to make orders. Allow FWA to exercise its expertise, judgement and experience on whether any orders or remedial actions are needed to further bargaining.



**Require a union to have members and support from employees: Unions should not be able to seek cost increases and potentially endanger jobs using these provisions without both:**

- a) Some level of actual membership in any and all workplaces to be covered by any low paid authorisation or arbitration.**
- b) A level of actual employee support in the workplace concerned for an application under this part of the Act. FWA should be required to satisfy itself that a majority or substantial plurality of employees to be covered by an order agree to pursuing such a course.**

Employers' concerns with the proposed new low paid stream are expanded upon from pp.121-148 of Part II of this ACCI submission, including more detailed analysis and recommendations.



## ARBITRATION (WORKPLACE DETERMINATIONS)<sup>24</sup>

119. Part 2-5 of the Bill introduces the new concept of “bargaining related workplace determinations”. Where good faith bargaining orders are breached, a union can apply using this avenue for arbitration of its claims. Secondly, an entirely new form of arbitration is introduced into the system, which will be triggered when economic harm against employees is threatened as a result of industrial action.<sup>25</sup>

### KEY PROBLEMS – GOOD FAITH BARGAINING

120. Breaching good faith bargaining orders is not evidence of intractability or of such damaging and threatening outcomes that the ultimate measure of arbitrating should be activated and entirely displace bargaining.
121. There is also no evidence that resorting to arbitration at this point will lead to better outcomes than (a) continuing to make and enforce good faith bargaining orders, or (b) providing an escalating option of harsher or more demanding orders.
122. There is no evidence that the long term negative consequences of derailing bargaining in favour of arbitration do not outweigh the circumstances on which this is predicted. Arbitration threatens to cause far greater problems in this context than isolated non-compliance with orders in the heat of bargaining.
123. Employers do not accept that the system should throw its hands in the air when bargaining becomes difficult and resort to crudely imposing outcomes where there is some robustness in negotiations.
124. Employers do not accept the proposed blurring of a compliance issue (non-compliance with good faith bargaining orders) and the arbitration of ongoing substantive rights. The two are fundamentally different concepts and there is no reason to conclude that in the absence of finalised bargaining (for example), the ordinary two part safety net, or previous agreement, could not continue to apply.

<sup>24</sup> Part 2-5, ss.258-281

<sup>25</sup> Avenues to arbitration are addressed in the preceding section and in Part II of the ACCI Submission.

125. This is a repetition of one of the problems the old discredited unfair dismissal system had – that process was equated to or put above substance – that the real reason for dismissal was diminished in the search to criticise the employer for not having done this or that in one way or another. The Senate should, at a minimum not enact legislation that repeats mistakes of the past.
126. There appears little loss or threat to employees of letting bargaining run its course, even where orders may be debated.
127. Employers are very concerned that this will become one of the vulnerable fault points in the system which unions will strategically exploit for the reward of arbitration. Employers are also concerned that this will encourage calculated behaviours, not towards a genuinely bargained agreement, but in pursuit of the reward of arbitration.
128. Unions may for example seek to load up so many complex good faith bargaining orders and obligations that an employer is set up to fail and the union can secure arbitrated outcomes.

## **KEY PROBLEMS – ECONOMIC HARM**

129. This is yet another new possible trigger for FWA to arbitrate. It will arbitrate in circumstances where economic harm is threatened or has occurred against one or more employees involved in industrial action.<sup>26</sup> As the Bill has been drafted, this could be artificially induced by the unions own conduct (providing an incentive and arbitral reward for self harm).
130. Such arbitrated outcomes should not be part of the industrial relations system, and the only form of arbitration which involves economic harm, should be existing notions of harm to the safety, welfare of the Australian population or economy.<sup>27</sup> Under the proposals the bar for arbitration is set too low, and this threatens to replace the current safety net concept for exceptional arbitration with a potentially far more regular part of daily industrial relations practice.

<sup>26</sup> Section 423.

<sup>27</sup> Section 424 which largely replicates s.430(3) of the *Workplace Relations Act 1996*.

## ACCI Proposal

**There be no bargaining related workplace determinations and above award arbitration remain available only in genuinely exceptional circumstances as set out in the current *Workplace Relations Act 1996*.**

**Failing this, there be:**

- a) an additional requirement requiring that FWA be satisfied that there is no realistic prospect of an agreement being reached in further negotiations, including through the use of the full range of orders and interventions under the Act, prior to arbitration becoming an available option.**
- b) Ministerial authorisation obtained for before FWA has jurisdiction to conduct any form of arbitration.**

**There also needs to be discretion in the making of such orders (if they are to become part of the system) and FWA needs to be directed to take all actions to deliver a negotiated rather than imposed outcome.**

**For each of the forms of arbitration (workplace determination) FWA needs greater scope to extend periods for negotiated outcomes prior to arbitration.**

**Arbitrated outcomes should only operate on a very limited period and subject to review.**

**Expanded scope for arbitration / workplace determinations is expanded upon from pp.143-148 and 197-204 of Part II of this ACCI submission.**



## RIGHT OF ENTRY

131. Rights for union officials to enter workplaces either to promote trade unionism or inspect time and wages records are sensitive issues in a largely non-unionised private sector economy, and represent a very important concern both for employers and for unions.
132. Unions believe they need to enter workplaces to inspect records, investigate complaints, and also to hold discussions proselytising union membership. There is an international acceptance of union right of entry, albeit founded decades prior to unions having current avenues to promote membership outside the workplace.
133. Employers on the other hand rightly have concerns about access to the workplace they occupy, and in particular to their employees and sensitive personal information retained on their behalf.
134. As with most parts of the industrial relations system, balance is the key, and any capacity for union entry must be balanced against individual rights and promoting peaceful and sustainable relations in workplaces.

## RETAIN THE STATUS QUO

135. The current system gets the balance pretty right. It provides right of entry to unions for both inspection and membership, but also provides some sensible controls on access and conduct to avoid mischief, disputes, inconvenience and disruption.
136. Retention of the status quo, unaltered, was the unambiguous intention of the Government on right of entry.

...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.<sup>28</sup>
137. This could not be clearer. Users of the system are entitled to expect that the existing (2005) rules on right of entry will be retained in the *Fair Work Act*, essentially unchanged.

<sup>28</sup> Deputy Prime Minister and Minister for Workplace Relations, Jon Julia Gillard MP, 29 April 2008, Speech - Fair Work Australia Summit

## Key Problems

138. Part 3-4 of the Bill is not consistent with this intention and would materially change the right of entry system. Problems the new approach include:
- a. Abandoning the existing, proven award based approach in favour of the amorphous, uncertain and open ended notion of determining entry based on union eligibility rules<sup>29</sup>.
  - b. This will create uncertainty and encourage disputation between employers and unions seeking entry, and between competing unions.
  - c. Advising on entry rights will become extremely difficult, and employers will be exposed to significant compliance liabilities as a function of the quite unnecessary uncertainty the new Act will generate.
  - d. Greater uncertainty scaring employers into simply providing an open door to union entry.
139. Proposed Part 3-4 does not meet the government commitment that *“Labor’s new system builds certainty and stability into our workplaces by ensuring that...existing right of entry laws will be retained”*<sup>30</sup>.
140. It would deliver a right of entry system vastly inferior to the existing approach.

## ACCI Proposal

**The status quo should be maintained, including requiring modern awards to list named union parties who can exercise right of entry in relation to the coverage of that award. If this is not the case, new, separate right of entry orders for each modern award should clarify entry rights.**

**Entering into a collective agreement with a union should give that union right of entry to the exclusion of its competitors. However, certified agreements should not be able to regulate or extend right of entry inconsistent with the Act.**

<sup>29</sup> Section 481.

<sup>30</sup> *Forward With Fairness Implementation Plan*, August 2007, p.2.



## INSPECTION OF NON-MEMBER RECORDS

141. Unions argue that they need access to the records of non-member employees to properly investigate member complaints. The current system provides unions with capacities to inspect the records of non-members, but only with the specific permission of the Australian Industrial Relations Commission (AIRC).<sup>31</sup>
142. The proposed approach to this issue in Part 3-4 significantly departs from the effective and proven status quo. It would provide unions with an essentially untrammelled right (without prior independent authorisation) to inspect the records of non-members.<sup>32</sup>
143. This raises significant concerns for individuals' freedom of association, and in relation to what a union may do with private information of non-members. There are dangers of fishing expeditions and an unacceptably dangerous exposure of personal information to third parties.

### ACCI Proposals

**The status quo be retained – as the government promised – and inspection of non-member records continue to only be possible on application on a case by case basis to FWA.**

**Failing that, unions be able to access to non-member records only with the permission of each individual, and only be able to inspect records of persons their rules would allow them to represent as members.**

**There should also be:**

- a. Scope for an employee to elect to close their employment records to trade unions.**
- b. A new civil penalty offence for communication or misuse of information gathered in relation to non-members.**

Right of Entry is expanded upon from pp.205-214 of Part II of this ACCI submission, including more detailed analysis and recommendations.

<sup>31</sup> *Workplace Relations Act 1996*, Section 748.

<sup>32</sup> Section 482(1)(c).



## UNION AS AUTOMATIC BARGAINING REPRESENTATIVE

144. The Bill removes the distinction between employee collective agreements and union collective agreements. In addition, the Bill introduces a significant new concept (the automatic bargaining representative) that appears to raise serious considerations as to whether Australia will be in compliance with its ILO convention obligations. The Bill mandates that the union is the employees' bargaining representative, unless the employee resigns from the union or appoints a third person.
145. ACCI supports employees having real choice as to whether they belong to a union or not; however, the Bill equates membership to bargaining representation, thus eroding choice. This element of the Bill needs to be re-considered.

### KEY PROBLEMS

146. Under the Bill, a union will always be the automatic bargaining representative for an employee with a nominal union membership, unless the employee takes active steps to opt-out.<sup>33</sup> This has serious consequences for both employers and individual employees:
- a. In a workplace of 1000, where only 1 employee is a union member, the union will be able to obtain orders from FWA requiring the employer to bargain in good faith with that union.
  - b. A union will be able to obtain "majority determination orders" from FWA, on the basis of petitions, statements or a show of hands. This does not provide adequate protections (as a secret ballot does) and exposes employees to potential coercion and duress to support a determination.
  - c. This requires only be a majority of employees the union is able to obtain signatures from and not an actual majority of the workforce (which may be mostly non-union employees). These orders will effectively require the employer to bargain with the union in a particular manner. An employer can also face fines of

<sup>33</sup> Section 176.

up to \$33,000 if they do not then “recognise or bargain with” the union.

- d. FWA will be able to (or in some cases compelled to) arbitrate, where an employer has breached good faith obligations. The expert judgment of the “independent umpire” is to be closed off and ignored.
- e. Unions will be able to become covered by an enterprise agreement that has had no union involvement in the bargaining process and where the majority of employees do not want the union party to the agreement. FWA does not have any discretion to deny the union’s request, including where the union has little or no support from employees in the workplace.

## **ACCI PROPOSAL**

**Unions should not be the automatic bargaining representative.**

**The concept of employee collective agreements and union collective agreements should be retained in order to reflect the true desire of employers, employees and unions in agreement making.**

**Unions should not have the right to be covered by an enterprise agreement unless a valid majority of employees who voted for the agreement are union members and the union was actually involved in bargaining.**

## **IMPACT OF MULTIPLE UNIONS IN THE ONE BARGAINING PROCESS**

147. A further problem in the future under this new framework is the possibility of messy bargaining scenarios involving multiple bargaining representatives (recalling that an employer will in future owe good faith bargaining obligations towards each bargaining representative), potentially including:

- a. Multiple active unions.
- b. Nominal bargaining representatives (who may or may not apply to be bound by any agreement).
- c. Employees who elect themselves as the bargaining representatives.

- d. Employees who elect third parties as a bargaining representative that is not their union.
- 148. The problem arises because employers will owe bargaining representative obligations to each union their employees may be eligible to join / have joined and each person employees appoint.
- 149. This is a recipe for a more complicated and less productive bargaining system into the future, which is less efficient at both representation and generating agreements.

**This reverses one of the key tenets of the system**

- 150. Throwing the bargaining process open to not a single established union or one with a plurality of support in the workplace, but to any union with potential eligibility for coverage, reverses a key element of the way bargaining has worked in Australia.
- 151. One of the most talked about developments during the first generation of agreement making, by the AIRC and under the initial generations of statutory agreements, was the creation of Single Bargaining Units (SBUs). A single bargaining unit ensured that an employer did not have to reach an agreement with each union with membership, or eligibility for membership at the workplace (which could be legion in those days), but only with a single negotiator.
- 152. During the 1990s the creation and operation of SBUs was hailed as an important evolution, if not revolution, in an Australian system previously characterised by union splintering and competition. An SBU offered just that, a single bargaining representative in place of a veritable alphabet soup of competing unions in many workplaces. It was a recognition, 15 or more years ago, that bargaining in Australia needed to see an employer sit down not with a legion of unions, but with single, powerful, representative negotiators.
- 153. And crucially, employers paid handsomely for the creation of SBUs. One of the early achievements of enterprise bargaining was actually getting Australian unions ready to participate in the bargaining process and this cost employers money in the first generation of agreements. During a recession, employers paid for the creation of an efficient bargaining structure for the future.

154. This proved very important, as the process of creating SBUs, of enterprise bargaining generally, and the finalisation of union amalgamations, has ultimately led to the rationalisation of unions in workplaces, and a significant fall in demarcation disputes. SBU's led over time not so much to further union teamwork and cooperative maturity, but a rationalisation of actual numbers of unions covering employees in workplaces and seeking to represent employees in negotiations with the employer.
155. In the 2000s, employers successfully reach agreements with single unions that would have been unthinkable for their counterparts 20 and 30 years before. Far fewer unions populate any larger, unionised workplace.
156. The current proposal that any union be able to participate in bargaining, or include itself in an agreement and gain substantial rights, merely on the basis of membership eligibility threatens to reverse one of the key tenets of the system, and one of the key factors which has driven the successful growth of enterprise bargaining in this country.
157. Throwing bargaining open the mere eligibility for membership threatens to compromise the efficiency of bargaining, and the practicality with which it is conducted.
158. The model proposed in the Act for bargaining representatives also:
  - a. Threatens to have a knock on effect, and restart long latent demarcation and union competition within workplaces, which can do nothing other than damage employees and workplaces. Given generational change in union officials, we now face the threat of unions fighting the long latent battles and enmities of previous generations in contemporary workplaces.
  - b. Reneges and reverses something employers have paid for in bargaining, and threatens to reverse modernisation and modern human practice at the workplace level.

- c. The prospect of infighting shop stewards, divided workplaces, imaginary lines on the shop floor, and duelling, well thumbed books of union rules at 20 paces is not something Australian workplaces need to return to, and the consequences of doing so will do nothing for job creation or productivity.

Employers' concerns with the proposed bargaining provisions are expanded upon from pp.89-106 of Part II of this ACCI submission, including more detailed analysis and recommendations.





## THE AGREEMENT-MAKING AND APPROVAL TEST

159. Employers have very significant concerns at delays in agreement approval over recent years. The system has gone backwards in its capacity to rapidly translate terms agreed at the workplace level into a properly accepted, operative and enforceable legal instrument.
160. Employers are looking to the new Act and the new test, to perform significantly better than the situation following *WorkChoices*. The delays of the past three years are not acceptable, are at odds with sound administration and effective compliance, and need to be fixed.
161. Employers, employees and unions are entitled to a system capable of providing rapid, reliable and consistent answers on whether particular agreement terms can be approved, and one which turns agreements around rapidly and reliably. These are the standards against which agreement making under the *Fair Work Act* will be assessed.

### Key Problems

162. The key problem is any test that requires an unduly detailed assessment for each individual employee to be covered by an agreement, which may be thousands.
163. An unduly detailed and prescriptive test, required to be applied on an individual basis, slows agreement approval to a trickle, leading to a backlog of agreements, uncertainty for employers and employees, and significant compliance and enforcement problems.
164. Section 193 of the Bill appears to raise just such a concern, notwithstanding the Explanatory Memorandum stating an intention to the contrary<sup>34</sup>.

### ACCI Proposal

**Include appropriate clarification in the Act that the test will be applied to classes of employees or indicative rosters in preference to requiring a detailed examination of any agreement against each and every award covered employee.**

**Amend the Act to provide that where an agreement is not approved within a prescribed period (e.g. 28 days), it will enter into force automatically with a process of backpay if the agreement is not ultimately approved (the existing approach for some agreements following the 2006 and early 2008 transitional amendments).**

<sup>34</sup> Explanatory Memorandum, para 818.

**Alternatively, an employer and majority bargaining representatives could agree to have the agreement commence immediately for later approval.**

This concern, along with detailed issues relating to the agreement making provisions, is expanded upon from pp.89-106 of Part II of this ACCI submission.

## BUSINESS COSTS UNDER MODERN AWARDS<sup>35</sup> AND MANDATORY LEGISLATED STANDARDS<sup>36</sup>

165. Government has assured employers and employees that the system will have built in flexibilities to deal with individual needs of the employer and employees. In a system that has at its heart collective instruments, the so-called flexibilities will need to deliver just that.
166. A key issue for employers will be how flexible arrangements can be lasting in an environment of new awards and collective instruments that can deal with a wider range of matters.

### KEY PROBLEMS

167. **NES Flexibilities:** Capacity for flexibility in applying the NES is not consistent. Rules for cashing out annual leave, personal leave, use of annual leave, averaging of hours and evidence requirement for personal leave, depend on whether the employee is award/agreement free, or whether an award or agreement applies and the award actually contains flexibility. Unfortunately, the AIRC has not included the flexibilities which it has the power to do so in the priority modern awards – so a flexibility avenue conceived of and allowed by government has not been delivered. This needs to be fixed in the Act and access to NES made universal, subject to appropriate protections.
168. **Modern Awards – Increased Costs:** Modern awards will significantly increase costs for many businesses. This is unacceptable, and directly contrary to the stated intentions of Government. This needs to be fixed through the new Act.
169. **New Awards:** Despite Government assurances that the award system will be stable for at least 4 years and awards only varied in limited circumstances within that period, the Bill allows FWA on its own motion to vary and make new modern awards, without any threshold test being satisfied, nor a test case being conducted.

<sup>35</sup> Part 2-3, ss.132-168.

<sup>36</sup> Part 2-2, ss.59-131.

## ACCI PROPOSALS

**Awards:** The Government should hold an urgent roundtable of peak interests to audit the outcome of the priority modern awards and consider amending the award modernisation request to ensure employers will not be exposed to greater costs in 2010 or lesser flexibilities than they currently have.

**FWA** should not have discretion to create any new awards within a 4 year period, unless genuinely exceptional circumstances exist and there is a proper “test case”.

**NES:** Default flexibility rules for all NES should apply to all employees and should not depend on whether they are or are not covered by an industrial instrument. Averaging of hours should be over a 52 week period.

This concern, along with detailed issues relating to the agreement making provisions, is expanded upon from pp.73-88 of Part II of this ACCI submission.

## RE-INTRODUCING UNFAIR DISMISSAL LAWS

170. Unfair dismissal litigation is a first order concern as it can expose employers to highly damaging, costly and time consuming litigation, and can either facilitate or retard performance management and employer confidence to create jobs. Exposure to being sued for unfair dismissal is a particular concern for smaller enterprises, who feel at greatest threat from litigation, compensation or reinstatement.
171. Access to unfair dismissal is to be expanded under the *Fair Work Bill*<sup>37</sup>. Various exemptions and the way claims are to be heard are to change. ACCI has a range of concerns regarding to these proposals and has identified clearer and superior alternatives.

## REIMPOSITION ON SMALL BUSINESS

172. Despite the intentions of government being clear, something need be said about the validity and impact of re-exposing small business to unfair dismissal claims, particularly in the current economic climate.

### Key Problems

173. Reams of submissions have been made on the impact of unfair dismissal on smaller businesses during the past 15 years, many of them to this Committee.
174. What we do know is in early 2009 is that:
- a. The circumstances in which small businesses are operating are more challenging than at any time in the past 15 years.
  - b. Small businesses will be re-exposed to being sued for alleged unfair dismissal (including a re-exposure to redundancy based claims) in the context of an unprecedented economic downturn.
  - c. The magnitude of the economic challenge facing small business at the point this is currently scheduled to commence (mid-2009) should trigger a reconsideration of the proposal to re-impose unfair dismissal claims on small business.

<sup>37</sup> Part 3-2 (ss.379-405).

- d. Small business confidence and willingness to employ is already taking a battering from the performance of the global and domestic economy. Piling new unfair dismissal obligations on top of this may be a further blow to the confidence and viability of many smaller businesses.
  - e. During an economic downturn, tightening trading climate, and period of persistent higher interest rates for small business, they have even less capacity to become enmeshed in litigation and to pay up six months pay in compensation.
  - f. Small businesses will be at the forefront of exposure to additional costs flowing from award modernisation.
175. There is already recognition in that a different approach is required for small business through the proposed fair dismissal code. The question is not whether small businesses need be treated differently, but how and to what extent.

## **RECONSIDER SMALL BUSINESS EXEMPTION**

176. The Parliament should re-consider the validity of exposing small business employers to being sued for unfair dismissal. Consideration be given to amending the Bill to provide that:
- a. A more limited exemption, such as that applying to employers with 15 or fewer full time equivalent employees.
  - b. In the alternative, not exposing small business employers to the full force of the unfair dismissal jurisdiction; this could be achieved by mandating compulsory mediation but not mandating compulsory arbitration in small business cases.
  - c. In the further alternative, unfair dismissal provisions for small business not commence until at least 1 January 2010 (retaining the existing exemption for an additional 6 months to properly assess the current operating climate for small business and the consequences of reimposing unfair dismissal obligations upon them).

- d. An urgent Productivity Commission (PC) inquiry to assess the impact of re-exposing small business employers to dismissal litigation, in the current and forecast economic climate .
- e. Any new obligations upon small businesses only commence by proclamation where Government:
  - i) Has received a fresh report from this Committee on the consequences of reimposing unfair dismissal exposure for small businesses in the current economic climate, again having reviewed the Productivity Commission's findings.
  - ii) Is satisfied that there will not be an adverse economic and employment impact from doing so, in consideration of the Productivity Commission's findings.

## **FAIR DISMISSAL CODE**

- 177. Whilst not agreeing with the merits of re-introducing the full force of the unfair dismissal system against small businesses, employers welcome the effort to create the Fair Dismissal Code and the attempt to have it generate some level of security and navigability for small business.
- 178. ACCI believes that the Fair Dismissal Code ought to be given a go on the condition that a limited exemption or other ameliorating measures could be introduced should the problems with the old system re-emerge, though past experiences will make small and medium sized employers wary even of the Code.
- 179. Employers fear that:
  - a. Small businesses inherently don't have the financial, time and other resources to comply with the complexity of unfair dismissal litigation (or compliance to attempt to avoid litigation). Thus, all the dedicated codes in the world couldn't overcome the fundamental inapplicability of the unfair dismissal concept to smaller businesses, and its disproportionate impact upon them.
  - b. The Code still requires intervention in the employer's decision by a regulator or decision-maker of some type and thus may not deliver the intended security and certainty for employers, even

where an employer acts in good faith and seeks to comply with the code in full.

- c. Litigation on the fairness of dismissal will be replaced with litigation on whether there has or has not been compliance with the code.

## ACCI Proposal

Putting to one side the option of retaining the outright exemption or modifying the scope of the exemption, considerations may include:

**Onus of proof with the applicant:** Where an employer fills out a declaration indicating that they have made a dismissal consistent with the Small Business Fair Dismissal Code<sup>38</sup> there be a rebuttable presumption that the application will be dismissed on the papers unless there is an appeal or further detail lodged within a (short) prescribed period.

Where there is a contested proposition on compliance with the code, the party alleging non-compliance should bear the onus of proof at all times, and face an urgent threshold hearing as to why the application should not be dismissed.

**A later commencement date** for the operation of the unfair dismissal provisions as they impact on small and medium employers.

**Sunset provision and code review:** This provision should be subject to a sunset provision and a review and report to Parliament (as was the case in the mid-1990s in relation to junior rates of pay). Unless an independent review reports that the Fair Dismissal Code is working effectively against prescribed terms of reference and is not operating contrary to the interests of small businesses and their capacity to employ, it should automatically cease in favour of a return to the outright exemption.

## CLAIMS FROM CASUAL EMPLOYEES

- 180. Casual employees are currently required to have 12 months service and be employed on a regular basis to bring an unfair dismissal claim.

### Key Problems

- 181. The unfair dismissal provisions have been drafted to allow claims from employees with less than 12 months service<sup>39</sup>. The period of service requirement has been removed entirely for casual employees. This will extend unfair dismissal litigation to employment which has not been exposed to such claims to date.

<sup>38</sup> Under s.388(2)

<sup>39</sup> Div 2, Part 3-2, ss.383-384.



182. It will significantly complicate the status quo (which requires a minimum of 12 months casual service prior to being able to bring a claim), which is well understood by users of the system.
183. This will create confusion, and encourage and complicate litigation. The shorter the period of employment which triggers a right to make a claim, the less clear the status of the casual employment, and the more threshold / protracted litigation there will be. It will be very difficult to assess (or reach an agreed approach to) what constitutes regular and systematic casual employment for periods of service of less than 12 months.
184. *Forward With Fairness* was silent on extending the unfair dismissal system in this way. This is an 11<sup>th</sup> hour change which does not form part of published government policy. This is a clear example of legislative overreach in the *Fair Work Bill 2008*.
185. This reflects a wider concern about the treatment of casual employment under the Act and a weakening of the essential requirement for 12 months service prior to either rights accruing or casual employees being treated as a regular part of an employers' workforce. This is a problem across a number of parts of the legislation.
186. This also backtracks on the approach negotiated with the ACTU in the early 2000s in the Parental Leave for Casuals case. ACCI was able to agree to extend some benefits to longer term casuals on the basis that they had 12 months service or more (as a proxy for a legitimate expectation of ongoing employment, and a practical measure for enforceability and compliance). To now have the minimum service requirement reversed represents a change to the agreed approach and the basis on which employers agreed to extend the system.

## ACCI Proposal

<b>Retain the existing requirement for periods of service of 12 months or more for casual employees to have access to unfair dismissal.</b>
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## REDUNDANCY

187. Currently, an applicant cannot contest the fairness of a termination if the employment was terminated for genuine operational reasons<sup>40</sup>. The *Fair Work Bill 2008* seeks to re-expose employers to unfair termination claims in cases of redundancy.<sup>41</sup>
188. More particularly, the proposal to add process issues (redeployment assessments, consultations) to the definition of redundancy will mean that a dismissal which is in substance justified as a genuine redundancy will not be so regarded by Australian law because of a failure of process. This is completely unacceptable to employers.

### Key Problems

189. Employers make redundancies based on experience and knowledge of the requirements of the enterprise. The way the provisions are drafted raises the prospect of complex threshold examination of redeployment (or the failure thereof) and the scope of consultation, prior to exposure to unfair dismissal consideration. This will trigger a complex and costly sequence of litigation where jobs no longer exist.
190. The concept of mandatory redeployment as a legal concept<sup>42</sup> is highly problematic and impractical and will to cause additional, unnecessary litigation and complication.
191. Meeting requirements for consultation are an award compliance issue not an issue going to the genuineness of the redundancy. The proposed provision confuses this process and the rights that should accrue where consultation is not followed.
192. If there are concerns with the operation of the existing exemptions, further detail could be provided for the concept of a genuine redundancy without recourse to introducing the complicating considerations of redeployment and compliance with award consultation clauses (this is expanded on in Part II).

<sup>40</sup> *Workplace Relations Act 1996*, s.643(8).

<sup>41</sup> Section 389.

<sup>42</sup> Section 389(2).

## ACCI Proposal

**The definition of genuine redundancy be as set out in clause 385(1)(a) only. The other factors may be relevant in an overall assessment of the circumstances of a redundancy, but not as part of a legal definition.**

**Smaller businesses be exempted from requirements for both compliance with consultation provisions<sup>43</sup> and redeployment<sup>44</sup> when they make genuine redundancies.**

**Require compliance with consultation provisions only of awards, and not of agreements which may be deliberately contorted by unions to restrict scope for legitimate redundancies.**

**Where multiple redundancies are to be made (for example through the closure of an entire operation or part) there should be a bar on unfair dismissal litigation.**

**Exempt redundancy based terminations from any presumption towards reinstatement, and in the case of multiple simultaneous redundancies (i.e. the closure of a part or operation) from reinstatement outright.**

**For redundancy based dismissals, explicitly exempt from any consideration of fairness under Div 3 of Part 3-2 the level of severance or redundancy payment, the selection of positions to be made redundant, and the timing of redundancies.**

## HEARINGS AND PROCESSES

193. The established system (putting to one side small business exposure to claims) contains some balance between the need for effective conferencing and dispute settlement, and legal rigour and due legal process where unfair dismissal claims proceed.
194. This evolved over some years based on experience with the system as it matured, and experience in state tribunals. Despite employers having fundamental problems with the conduct and operation of unfair dismissal litigation in previous years, at least the system was known, transparent and rigorous.
195. There is a general concern regarding the proposed informality for determining unfair dismissal claims. This is not consistent with the potential outcomes of litigation (the level of damages and reinstatement). These are not small matters for either party and the consequences of making or not making orders can be significant and very damaging.
196. It is quite uncertain how these proceedings are going to work in practice, and the Bill needs to better address this.

<sup>43</sup> Section 389(1)(b).

<sup>44</sup> Section 389(2).

## **ACCI Proposal**

**On the application of either the employer or employee, a formal and properly legal hearing must be convened on contested matters of fact.**

These concerns, along with further detailed analysis and identification of alternative options for the unfair dismissal system, are expanded upon from pp.183-196 of Part II of this ACCI submission.

## EXPANDED EXPOSURE TO LITIGATION<sup>45</sup>

197. The Bill entirely re-writes the current provisions dealing with unlawful termination and Freedom of Association, under the banner of ‘General Protections’.
198. The general protection provisions of the Fair Work Bill are not a simply a “streamlining” of the existing provisions, they propose a significant and unprecedented increase in the regulation of employment with concerning consequences.

### Key Problems

199. The General Protections framework in the Bill is cast in a very wide and amorphous manner and will lead to litigation against employers where currently this would not occur.
200. **New anti-discrimination framework:** The Bill creates an entirely new and additional layer of anti-discrimination laws, based on different concepts and hence, new case law exposure for employers, lawyers and practitioners in the future. This appears to be an easier avenue for employees to make claims as there is no requirement to prove indirect or direct discrimination, and the sole and dominant purpose test has been removed, which will make it easier for employees to take action against employers. This exposes employers to claims in circumstances which should not trigger anti-discrimination redress.
201. **Increased inspectors jurisdiction:** Significantly, it appears that government inspectors will now be able to run cases on behalf of employees, including where an employee has been terminated. This represents a major policy change, whereby employees will not need to fund their own cases, but employers will still be required to do so at their own expense. This is asymmetrical and prejudicial to employers, including small employers lacking sufficient legal resources.
202. **Unlawful termination:** Employees will have 60 days to make an application if they are terminated (compared to 7 days for unfair dismissals), and the cap on compensation has also been removed. There is nothing in Government policies foreshadowing such changes.

<sup>45</sup> Part 3-1, ss.334-378.

203. **Injunctions:** Another significant change is the ability for inspectors and unions to obtain injunctions against employers, including in situations where an employer is making redundancies/restructuring. This is a very unwelcome direction for the system and will introduce lawyers and litigation where has to date been is little or no such involvement. It will unnecessarily and inappropriately complicate and potentially paralyse significant commercial and governance matters.
204. **Frivolous and Vexatious Claims:** The Bill also allows genuinely frivolous and vexatious dismissal applications to proceed unchallenged. This will add to the number of applications that are brought without merit, will decrease the efficiency of FWA's operations, and will disproportionately threaten the interests of employers.

### ACCI Proposal

The existing framework contained in the *Workplace Relations Act 1996* dealing with Freedom of Association and Unlawful Termination matters be retained, and any simplification or consolidation not extend or alter rights, exposures, liabilities or litigation.

These concerns, along with further detailed analysis and identification of alternative options for the general protections, are expanded upon from pp.173-182 of Part II of this ACCI submission.

## INFLEXIBLE RULES ON TRANSFER OF BUSINESS

205. Transfer (transmission) of business provisions are important in industrial legislation; an importance which is sharpened considerably in the current economic climate.
206. They should seek to both maintain some terms and conditions across transfers of ownership and also allow businesses to be bought and sold and incoming owners to reform businesses into more effective and sustainable operations. There are three principal concerns with the transfer provisions of the *Fair Work Bill 2008*<sup>46</sup>.
207. The effect of these changes will be to:
- a. Diminish the likelihood of a purchaser keeping on existing employees.
  - b. Make it difficult for a purchaser to undertake changes to stabilise or restructure the business,, or alter inefficient work practices.
  - c. Increase the chances of industrial disputes on the sale of a business.
  - d. Reduce the purchase price of commercial arrangements for the sale of business if inefficient work practices have to be inherited.

## EXTENDED DEFINITION

208. A succession of key cases developed various tests in relation to transmission, and the transfer of employment entitlements. Employers, unions, inspectors and courts have been able to successfully and transparently apply this character based test over some years, and this existing test has successfully balanced the interests of employers and employees in transmission cases.
209. The *Fair Work Bill* proposes a radical departure from the existing approach to transmission of business. It would overturn the character based test for transfers of business in favour of approaches previously argued by unions but consistently rejected by the High Court.

<sup>46</sup> Part 2-8, sections 310 to 320, which replace the existing transmission provisions (Part 11 (ss.577 to 606) of the *Workplace Relations Act 1996*.

- 210. The new test would be complex, and more importantly deem transfers of business in situations which would not commercially or realistically be viewed as such by the general community.
- 211. Transfers would become unavoidable where any assets are taken on, and the new provisions would have the effect of discouraging employers from allowing any transfer to occur and from taking on former employees of the outgoing employer.
- 212. The transfer provisions would have the effect of not so much protecting employees' existing terms and conditions for some appropriate period, but of forcing incoming employers into operational models which are not their own and which may have failed in the market or they will be discouraged from retaining staff or assets.
- 213. There is also a clear impact on any capacity to change ownership, and to outsource or insource work. Outsourcing is not a dirty word, it is a legitimate business requirement which benefits employers and employees every day in Australia. It needs to remain viable in future.
- 214. In addition, it does not appear that these changes were foreshadowed in the various substantive policy announcements. It appears that the Bill may be the first the community has heard about proposals for such significant changes to the established approach.

## ACCI Proposal

<p><b>The current provisions of the <i>Workplace Relations Act 1996</i> concerning transmission of business should be retained in place of proposed Part 3-4 of the <i>Fair Work Bill 2008</i>.</b></p>
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## TRANSFER IN PERPETUITY

- 215. Given that there will be transmission how long should it operate for? The current Act limits transferred obligations to a 12 month period<sup>47</sup>.
- 216. In contrast, the Bill appears to provide for open ended transmission. It is not clear that:
  - a. The incoming employer can ever change or replace the terms and conditions applied by their predecessor.

<sup>47</sup> *Workplace Relations Act 1996*, s.580(4).



- b. A future collective agreement can extinguish transferred obligations, or that an employer has the capacity, over time, to move to a single set of conditions to cover all its employees.

### ACCI Proposal

**Continue to set a transmission period, using perhaps the current 12 months or some other specified period.**

**Clarify that transferred obligations can (or will automatically) be extinguished by a collective agreement.**

**Allow applications to FWA to bring transferred obligations to an end.**

### EXTENSION TO NEW STARTERS

217. Transferred obligations have always applied solely in relation to transferring employees, on the basis of protecting their existing rights and benefits when their employer changes. New employees of the incoming employer have been able to be engaged under agreed or prevailing terms and conditions (consistent with the safety net).
218. The Fair Work Bill proposes something radically different<sup>48</sup>. It would make non-transferring employees subject to the transferred instrument (award, agreement etc).
219. There is no policy or equity basis for this. It would have the effect of applying terms and conditions not agreed to by either the employer or new employee to the ongoing working relationship.
220. The employee would have conditions not preserved, but imposed. The employer would see an extension of terms and conditions they have never agreed to and which may reflect a clearly failed business model. Again, there is no basis in previous government policy statements for such a change.

### ACCI Proposal

**Continue to apply transmission obligations to transferring employees only and do not include cl.314 in the *Fair Work Act*.**

**If this were to be proceeded with, clearly provide scope to:**

- a) Enter into an agreement which will displace the application of the transmitted instrument to both established employees and new starters;**

<sup>48</sup> Section 314.

**b) Bring a transmission to an end, for new starters or for all employees, on application to FWA.**

ACCI's analysis of the proposed approach to transfers is expanded upon in pp.159-166 of Part II of this ACCI submission.



## ACCI MEMBERS

**ACT and Region Chamber of Commerce & Industry  
Business SA  
Chamber of Commerce & Industry Western Australia (Inc)  
Chamber of Commerce Northern Territory  
Chamber of Commerce and Industry Queensland  
Employers First™  
New South Wales Business Chamber  
Tasmanian Chamber of Commerce and Industry Ltd  
Victorian Employers' Chamber of Commerce & Industry**

### **ACCORD**

**Agribusiness Employers' Federation  
Air Conditioning and Mechanical Contractors' Association  
Association of Consulting Engineers Australia (The)  
Australian Beverages Council Ltd  
Australian Hotels Association  
Australian International Airlines Operations Group  
Australian Made Campaign Limited  
Australian Mines and Metals Association  
Australian Newsagents' Federation  
Australian Paint Manufacturers' Federation Inc  
Australian Retailers' Association  
Live Performance Australia  
Master Builders Australia Inc.  
Master Plumbers' and Mechanical Services Association Australia (The)  
National Baking Industry Association  
National Electrical and Communications Association  
National Fire Industry Association  
National Retail Association Ltd  
Oil Industry Industrial Association  
Pharmacy Guild of Australia  
Plastics and Chemicals Industries Association Inc  
Printing Industries Association of Australia  
Restaurant & Catering Australia  
Standards Australia Limited  
Victorian Automobile Chamber of Commerce**