SENATE INQUIRY

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

FAIR WORK BILL 2008

SUBMISSION

Summary

This submission by AMIC incorporates comments about the Fair Work Bill 2008 on the following matters:

- Commencement date and the need for uniformity.
- Why 'tallies in the meat industry' need to be excluded as a matter that may be incorporated into a modern award.
- Why, in relation to enterprise agreements, the test of 'matters pertaining' needs to be revisited and why the scope for good bargaining and possible orders is too wide.
- Some right of entry matters.
- Why there needs, in relation to stand downs, to be a specific mention for 'stoppages caused by shortage of stock in the meat industry in, or in connection with, the slaughter of livestock'.
- The lack of transitional provisions at this point.

Introduction

1. This brief submission to the Senate Inquiry is made by the Australian Meat Industry Council ('AMIC'). AMIC welcomes the opportunity to participate in the Inquiry into the Fair Work Bill ('the Bill').

2. The Bill represents the sixth major legislative upheaval in federal industrial relations legislation in two decades compared to the relatively stable and docile legislative period 1904 to 1988.

3. The latest proposed legislative changes are perhaps the most profound of all the changes over the past two decades. Having said that however, the Bill builds upon WorkChoices. The reason that WorkChoices is built upon is threefold:

    (i) The corporations power is again being utilized;

    (ii) The Bill extends the legislative minimum conditions of employment under WorkChoices that are applicable to the relevant national system employer/employee as defined;

    (iii) Substantial sections of WorkChoices are retained, albeit in a somewhat different form.

<u>About AMIC</u>

4. AMIC is registered as an organization of employers pursuant to the Workplace Relations Act 1996 ('the Act'). The eligibility coverage of AMIC extends to employers 'in or in connection with the meat industry'.

5. AMIC:

    - is the peak employer body in the meat industry in Australia;
    - represents nearly 3000 members nationwide;
    - is the only employer body party bound to all meat industry industrial awards throughout Australia;
    - has been registered as an organization of employers in the federal arena since 1928;
    - is the major meat industry player on industry bodies throughout Australia and sits on numerous federal and state bodies dealing with the meat industry.

6. AMIC members value add and contribute heavily to all aspects of the Australian economy.

AMIC, WorkChoices and prior legislation

7. For over a century, AMIC and/or its related state counterpart bodies have been involved in relation to the industrial interests of members. The volumes of the industrial reports over that period echo that representation.

8. AMIC representation of its membership in the federal arena culminated in the AIRC handing down three (3) meat industry awards in 2000/2001 following long and detailed hearings before the AIRC. Over 50 other meat industry awards were cancelled in the process. The aforesaid three (3) awards were substantially simplified documents and modernized for the meat industry – the first time in nearly fifty years.

9. One of the three awards was the Federal Meat Industry (Processing) Award. In this award, prescriptive tallies were abolished by a Full bench the Australian Industrial Relations Commission ('AIRC'). We will return to this critical subject later in the submission.

10. When 'WorkChoices was introduced it substantially changed the direction and structure of federal workplace laws. It was based upon the corporations power and not on the dispute settling power of the Constitution.

11. Following WorkChoices, AMIC remained named as a party bound to the three (3) main federal pre-reform awards of the meat industry and these awards covered only 'Constitutional Corporations'. AMIC also remained named as a party bound to the three similar Transitional awards – those applying to entities such as sole traders and partnerships.

12. As would be well known to members of the Committee, the minimum employment conditions contained in WorkChoices only applied to Consitutional Corporations per the Constitution. Further, it was only Constitutional Corporations that could seek a Workplace Agreement under WorkChoices – not entities trading sole traders or partnerships. That unhealthy distinction continues under the Bill.

13. For the period 1996 to present, a substantial body of AMIC membership availed itself of the opportunity to enter into flexible arrangements under the Act. Other members have simply operated under the relevant awards. As a consequence we now find that the membership of AMIC are trading and underpinned by anyone of a number of industrial instruments as follows:

    - *Pre-reform Certified Agreements – both employer/employees or union/ employer;*
    - *AWA's (pre-reform);*
    - *AWA's (WorkChoices – made prior to Fairness Test);*
    - *AWA's (Fairness test);*

- *Collective Workplace Agreements (employer/employees – made prior to the Fairness test);*
- *Collective Workplace Agreements (union/employer - made prior to the Fairness Test union/employer)*
- *Collective Workplace Agreements (employer/employees – Fairness test);*
- *Collective Workplace Agreements (union/employer - Fairness Test union/employer)*
- *NAPSA's;*
- *Forward with Fairness Agreements including ITEA's;*
- *Transitional State Agreements;*
- *Transitional federal awards;*
- *State awards.*

14. AMIC is still involved, on behalf of members, in the approval of agreements lodged six or eight months ago with the Workplace Authority.

15. Over the last three years or so, at various points, there have been four different 'no disadvantage tests' applying to agreements under the Act. The same document, approved under one test, was disapproved under the next. Business cannot and should not have to operate under these circumstances.

The Bill

16. We now turn to the Bill. Our comments, as stated, are very brief and only on some specific matters. Some are of extreme importance to the meat industry. Our silence with all the remaining contents of the Bill does not mean we necessarily agree. AMIC has voiced its disapproval during 2008 on various aspects of the upcoming Bill.

<u>Overall thrust of the Bill</u>

17. The main thrust of the Bill consists of:

    - making of new industry modern awards to replace the thousands of current federal pre-reform awards and NAPSA's (notional agreements preserving state awards);
    - the ten (10) legislated National Employment Standards ('NES');
    - Agreement making and bargaining in good faith;
    - Right of entry for unions;
    - New unfair dismissal laws and employee rights;
    - New transmission of business provisions;
    - Compliance/enforcement provisions and a new overseeing body.

18. It is somewhat surprising and frustrating that the transitional provisions have not been introduced into parliament at this point of time and incorporated into the

Bill. The surprise lies in the extreme range of present industrial instruments (paragraph 13 above) that need to be catered for in transitional arrangements and the need to know this information quickly. Without knowledge of the transitional arrangements interested parties are left in the dark to make assumptions.

Commencement date of the Bill

19. AMIC comments about this matter as the Minister has publicly stated that the changes to the WorkChoices bargaining rules and unfair dismissal laws should take effect from 1 July 2009.

20. There is no justifiable reason why the Bill, when enacted, should not commence on 1 January 2010 in its entirety.

21. If the new bargaining rules commence 1 July 2009 they relate to relevant legislative provisions which six (6) months later may be repealed. Any number of hypothetical examples for negotiations, tentative agreements, lodging of agreements for ratification, the different legislative tests and the unknown transitional arrangements tell us that 1 January 2010 should be the commencement date at the earliest. It is just too confusing otherwise.

22. Much the same logic applies to the new proposed unfair dismissal laws. AMIC understands why the changes have been introduced and generally is neither completely opposed nor completely in favour of the changes to the unfair dismissal laws. However, any new laws and procedures need to be explained and understood by employers across the country – especially to employers the subject of the proposed new Code to be found in Division 3 of Part 3-2 of the Bill.

Modern awards

23. We could make numerous comments about this subject but it is not the Parliament making the modern industry awards. That power has been bestowed upon the AIRC following a written request to the President of the AIRC by the Minister.

24. Consistent with section 576C of Part 10A of the Workplace Relations act 1996 (Cth) the AIRC is currently developing modern industry awards – in all probability about 70 to 80 in total to replace the thousands of present federal awards and NAPSA's that apply. The process, undertaken by the AIRC, began in March 2008 and will continue until the end of 2009.

25. Our one important comment under this head concerns clause 136 of the Bill as to what may be included in modern awards. We would like to think there has been an oversight in drafting the Bill.

26. One of the items that may be included in a modern award includes 'incentive-based payments, piece rates and bonuses': see clause 139(a). In section 513 of the

Act the equivalent item that is an allowable award matter appears as 'incentive-based payments and bonuses'. 'Piece rates' is not included in section 513. We do not take issue with piece rates being reinserted.

27. If one goes to section 515 of the Act it prescribes 'tallies in the meat industry' as a non-allowable award matter. There are strong reasons why the exclusion appears in the Act. We should point out that tallies in the meat industry have not been interpreted in accordance with the long case history as piece rates. They could, perhaps, be best described as an incentive based payment system as they are based on inputs.

28. We provide the following recent history relevant to 'tallies in the meat industry' being first excluded from federal awards and then the Act:

    - When the Workplace Relations Act was enacted in 1996, one of the allowable matters concerned 'piece rates, tallies and bonuses' – see then section 89A(2)(d);
    - In 2001 a Full Bench of the AIRC handed down a decision known as 'the meat industry tallies case': (Print R9075).
    - The Full Bench was headed by the current President of the AIRC and decided to delete the prescriptive and outmoded tallies from the parent federal award and replace them with a standard/simplified 'payment by result' clause. This decision was handed down despite 'tallies' being an allowable award matter at that point;
    - Thereafter, in about March 2002, 'tallies' were deleted as an allowable matter under the then section 89A by Parliament – the Act was amended such that the words 'incentive based payments' were included and 'tallies in the meat industry' specifically excluded;
    - The prohibition on tallies as an allowable award matter continued under WorkChoices: section 515.

29. For some reason, the prohibition on tallies being included in a modern meat award is not to be found in clause 136 of the Bill.

30. The prohibition on meat industry tallies in modern awards must continue for all the reasons contained in the 1999 decision of the Full Bench decision and the reasoning behind Parliament amending the 1996 legislation in about March 2002.

31. AMIC is not seeking a prohibition on 'tallies' from Enterprise Agreements under the Bill nor have they ever been prohibited from agreements made under the Act. They are, however, a hindrance to modern award arrangements and conflict with the matters to be considered in the Minister's Request under section 576 of the Act.

32. While we are confident of any outcome before the AIRC in keeping prescriptive tallies from a modern industry award we think Parliament should continue to

express this view in the legislation by excluding 'tallies in the meat industry'. For near half a century tallies were a nightmare in federal awards.

33. We would seek that the following words be added after 'incentive-based payments, piece rates and bonuses,' in clause 136 of the Bill:

'(excepting tallies in the meat industry)'

34. The government has already seen fit to retain other matters concerning the meat industry in the Bill: see sub-clause 3 of section 123.

National Employment Standards

35. There will be 10 minimum conditions under NES. These minimum standards apply to all national system employees regardless of whether they are covered by the modern awards.

36. In April 2008 AMIC made submissions concerning the then released Discussion Paper into the proposed NES. Some submissions appear to have been accepted and others impliedly rejected. We don't intend to revisit the rejections.

Enterprise Agreements (EA's)

37. Others making submissions will detail many objections. AMIC only makes three points. .

Better overall test

38. The system was remarkably simpler when pre-assessment of agreements was possible in the early years of the Act. The parties to the agreement knew with much greater certainty their rights and obligations. The last three years has been anything certain for federal employers.

39. Until employers begin to experience what is meant by the 'better overall' test, no one really knows for certain the extent of the test.

Permitted matters

40. Concerning clause 172 of the Bill AMIC is of the view that the 'matters pertaining' test is a backward step and will lead to confusion and uncertainty and disputation. Case law exemplifies how complex the issue has been.

41. Further, there is little reason for including sub-clause (1)(b) and (c) of 172.

Good faith bargaining and possible FWA Bargaining orders

42. We refer to clause 228 of the Bill.

43. The Bill substantially extends the present requirements under the Act and even the pre-WorkChoices provisions. If clause 228 is to remain, there is a substantial case to be made for deleting (1)(b) and (e) of clause 228. They are draconian and unknown in any previous legislation.

Right of entry of union officials onto the workplace

44. The Bill contains some substantial changes in relation to right of entry. The changes have attracted much public comment from interested parties and with some good reason.

45. AMIC, on behalf of members, has been involved in numerous 'right of entry' disputes since 1996 and many were the subject of arbitration by the AIRC. Many of the disputes centered on the width of the statutory rights relating to 'right of entry' of permit holders.

46. AMIC is not opposed to right of entry provisions. It understands that industrial instruments need policing from time to time. However, abuses have occurred in relation to the privileges afforded to permit holders under the Act and the legislative provisions concerning right of entry must be absolutely clear and not be left open to potential disputation.

47. Clause 481 of the Bill relates to right of entry for a permit holder:

'…for the purpose of investigating a suspected contravention of this Act, or a term of a fair work instrument, that relates to, or affects, a member of the permit holder's organization:

(a) whose industrial interests the organization is entitled to represent, and
(b) who performs work on the premises…'

48. Clearly, 'member' of a union could mean an unfinancial member on the books. Does it also mean a person must be a valid member i.e. the person must come within the organisation's eligibility rule?

49. From the employer's view, how is an employer able to ascertain whether a person a member of an organization? Surely the employer is entitled to know for certain if this is a condition precedent to the right to enter.

50. ‘Industrial interests’ of the relevant organization is left open to interpretation. Does it mean having an interest in a modern award or some other industrial interest?

51. Because of the lack of precision in the words, these matters will definitely be the subject of litigation sooner rather than later.

52. The other matter for some concern is clause 482 of the Bill. Sub-clause (1)(a) provides that the permit holder, while on the premises, is able to ‘..inspect any work, process, or object relevant to the suspected contravention..’. AMIC understands that an equivalent right was contained in the Act for the period 1996 – 2005 but that was substantially in the context of the organization of the permit holder being bound to an award or certified agreement.

53. Sub-clause (1)(c) of 482 is also a matter for concern because of potential disputes and privacy issues. The permit holder will be able to ‘…make copies of, any record or document relevant to the to the suspected breach that:

    (a) is kept on the premises; or
    (b) is accessible from a computer that is kept on the premises…’.

54. Our concerns flow through Part 3-4 of Chapter 3 of the Bill.

Stand down provisions – Part 3-5 of Chapter 3

55. Stand down provisions are contained in this Part of the Bill. Stand down provisions are not a term, it appears, that will or may be included in a modern award. Stand down provisions are contained in the present federal meat awards and meat industry notional agreements preserving state awards (‘NAPSA’s’).

56. The provisions contained in many of the aforementioned awards give, explicitly or impliedly, employers the right to stand down for shortage of stock in the meat industry. The way the Bill is structured means employers will be deprived of this right in many circumstances. Many employers in the industry do not operate to agreements and rely upon the award.

57. For abundant caution the following words should be added to clause 524(1)(c) of the Bill:

    ‘..including a stoppage caused by shortage of stock in the meat industry in, or in connection with, the slaughter of livestock.’

58. This amendment is necessary so as to make it abundantly clear of this continuing right.

59. Should the view be expressed that clause 524(1)(c) does cover the words of paragraph 56 that will need to be stated for clarification.

60. There is ample precedent for such statutory exclusions. For example, in the early 1990's daily hire meat industry employees were excluded from particular provisions of the then unfair dismissal laws.

Transitional provisions

61. We commented about the lack of transitional provisions earlier on in the submission.

Oral evidence

62. AMIC is available to give oral evidence should it be deemed necessary.

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