australian nursing federation

Inquiry into the Fair Work Bill 2008

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Australian Nursing Federation

Level 1, 365 Queen Street
Melbourne | Victoria | 3000

T: 03 9602 8500

T: 03 9602 8567

E: industrial@anf.org.au

http://www.anf.org.au

Introduction

The Australian Nursing Federation (ANF) is the national union for nurses and midwives with Branches in each state and territory in Australia. The ANF is also the largest professional nursing organisation in Australia. The ANF's core business is the industrial and professional representation of nurses and midwives in Australia.

The ANF's 170,000 members are employed in a wide range of enterprises in urban, rural and remote locations in the public, private and aged care sectors, including hospitals, health services, schools, universities, the armed forces, statutory authorities, local government, offshore territories and industries.

The ANF participates in the development of policy in nursing, nursing regulation, health, community services, veteran's affairs, education, training, occupational health and safety, industrial relations, immigration and law reform.

The ANF thanks the committee for the opportunity to make comments in relation to the *Fair Work Bill 2008.*

General Comments

The ANF supports the general approach of the Bill. The Bill improves on *WorkChoices* in many respects, particularly in relation to bargaining and unfair dismissal, however there are still several aspects which the ANF would like to see improved.

The ANF has had the benefit of reading the submissions of the Queensland Nurses Union (QNU) and the Australian Council of Trade Unions (ACTU). We support and endorse those submissions.

The ANF would welcome the opportunity to appear before the inquiry to give evidence.

Specific Comments

Enterprise Agreements

The ANF welcomes the changes to the bargaining regime, in particular the introduction of good faith bargaining provisions and the provision for low-paid bargaining.

The ANF considers the new provisions will assist in negotiating on behalf of members, especially in relation to employers who would participate in unfair bargaining practices. Unfortunately, some employers have persisted in extracting the most value out of *WorkChoices,* even after the 2007 election. For example, the ANF spent much of 2008 trying to negotiate a union collective agreement to cover nursing employees of McKesson Asia-Pacific Pty Ltd (McKesson), a health call centre operator that employs hundreds of employees around Australia and is a subsidiary of a large American health corporation. McKesson proceeded to develop a new non-union collective agreement, ignoring the wishes of their nurse employees for it to negotiate with the ANF and the fact that nurses in Victoria were already covered by an existing union collective agreement.

The presence of good faith bargaining provisions in the legislation would have required McKesson to recognise, and bargain with, the ANF as the bargaining representative of our members (proposed clause 179). Further McKesson would have been required to, among other things, attend meetings with the ANF, provide the ANF with relevant information and give genuine consideration to, and reasons for responses to, proposals made by the ANF (cl.228). These provisions would have assisted the ANF in achieving a fair outcome for members.

Better off overall test

The ANF also welcomes the improved test which enterprise agreements are required to meet to be approved.

Under *WorkChoices*, several medical clinics in the Northern Territory made template non-union collective agreements that removed employees' rights to overtime rates; penalty rates for working on weekends, on evening and night shifts and on public holidays; various allowances; annual leave loading; rights to redundancy pay; and other entitlements. The agreements did not provide for any pay rise to compensate employees for losing award protections. Instead, employees remained on minimum award rates only. See, for example, *Cavenagh Medical Centre Collective Agreement.* Such agreements would not be able to be made under the new better off overall test.

Forward with Fairness provides for agreements such as these to continue to operate at least until their nominal expiry date, unless both parties agree to terminate them. The ANF believes that the Bill (or the transitional bill) should provide that employees can apply to Fair Work Australia to terminate or amend unfair *WorkChoices* agreements before their nominal expiry date, ie. those that would not meet the new test, to avoid continuing unfairness.

Pattern bargaining

The ANF opposes the continued restrictions on engaging in pattern bargaining, including the provisions that industrial action is not protected (and is subject to penalties) if it is taken in support of pattern bargaining (proposed clauses 409(4), 412, 413(2)).

Pattern, industry or sector wide bargaining is important in many industries, including the health industry, on sound industrial, commercial and public interest grounds.

Prohibiting pattern bargaining ignores consideration of the needs of the health industry. Pattern or industry wide industrial standards are often preferable to enterprise differences because they benefit employers, employees and the community generally. There are benefits in consistent wages and working conditions or in other words pattern outcomes.

Nursing and midwifery is an essential service provided to the Australian community and the quality of nursing care provided affects people from all walks of life. Nurses and midwives, wherever they work, need adequate resources to enable the provision of best quality care.

Nurses and midwives need a secure and stable working environment to provide quality care and this is ensured by the ongoing recognition of the professions of nursing and midwifery. The value of the nurse or midwife is not determined by the setting in which they are employed, but by the consistent application of standards, including industrial standards.

The industrial and professional history of nursing and midwifery is founded on a recognition that the professions work across a range of settings in the health and welfare sectors. Nurses and midwives are a highly mobile workforce where staff shortages remain entrenched and ever growing. The impact of these characteristics on the nursing labour market has in part resulted in federal and state tribunals favouring consistent safety net wage and employment conditions in awards. As professions nurses and midwives strongly identify with each other regardless of the sector in which they work. This also serves to make them a clearly identifiable group by employers and the public. Common issues across the sectors such as labour shortages, workload management and wages and conditions bond us professionally and assist in maintaining standards of care. Further, common national training and registration requirements facilitate labour mobility and further strengthen the justification to bargain on a multi-employer or industry basis, and take industrial action in support of bargaining.

Unfair dismissal

The ANF welcomes the improvements in unfair dismissal rights.

One issue that still remains of concern to the ANF however, is the situation of loss of recognition of prior service for unfair dismissal purposes in a transfer of business situation.

Proposed clause 382 of the Bill would provide that an employee is protected from unfair dismissal if they have completed six months (or 12 months if a small business employer) of employment with their employer. Clauses 384 and 22 effectively provide that continuous service with a previous employer is counted for the purposes of the minimum employment period. However cl384(2)(b) provides an exception to this situation, allowing an employer to refuse to recognise an employee's prior service for unfair dismissal purposes provided the employer informs the employee in writing of this before the employee starts work with the new employer.

The ANF considers the new employer should not be able to unilaterally decide that a transferring employee, often with years of prior service, should have no unfair dismissal rights during their first six or 12 months with the new employer. If the old employer would have been required to dismiss the employee fairly, the new employer should be required to do the same.

What makes this situation worse is the provision could actually, and perversely, encourage employers to terminate transferring employees during the minimum period of employment. As an example of this, Aged Care Services Australia Group Pty Ltd (the company) is a company that is purchasing Commonwealth funded residential aged care facilities, at

the rate of four or five a month, all over Victoria. The company typically enters into a commercial contract with the seller whereby it commits to employing all the employees of the old employer on the same or similar conditions, thus overcoming any obligation on the old employer to pay severance pay (via the Nurses (Victorian Health Services) Award 2000). In return, the old employer compensates the company for the accrued or contingent liabilities of the transferring employees. In practice this means the purchase price of the nursing home is reduced by the amount of employee entitlements for which the company becomes responsible for.

The ANF was in the Australian Industrial Relations Commission with Mirboo North Aged Care in March 2008, who was selling the business to the company. They advised that they pay ACSAG (via the reduced sale cost of the nursing home) pro-rata long service leave for each transferring employee. This equates to 1.7333 weeks pay per year of service, per employee.

As long service leave is not a legal entitlement until 10 years of service, this provision creates a perverse encouragement for a new employer to take employees on as transferring employees, collect compensation from the old employer for contingent long service leave, advise the employee that prior service will not be recognised, and then terminate the employee during the minimum period of employment before any entitlement to take leave arises. Thus the new employer can simply pocket the equivalent of 1.7333 weeks pay per year of service, per terminated employee. The worst example to date was one ANF member who was terminated on the first day following a transmission of business.

The ANF considers the new employer should be required to recognise continuous service with previous employers. At the most, only Fair Work Australia should be able to decide that prior service should not be recognised (not the employer unilaterally).

The ANF also considers that the seven day time period to make an unfair dismissal claim is too short.

Payments relating to periods of industrial action

Division 9 of Part 3-3 of the Bill (proposed clauses 470 and following) would provide that an employer must not pay an employee in certain circumstances where industrial action occurs, and not at all if the action is unprotected. Where *partial work bans* occur, the employer can choose either to pay, to not pay at all, or to pay a reduced amount to employees undertaking the action. An employee can challenge a reduction as unreasonable at Fair Work Australia (FWA), but not a refusal by an employer to pay anything at all (clause 471).

The ANF considers that an employer should not be able to deduct pay in cases of partial work bans. Employees are still performing full hours of work and therefore should be recompensed accordingly.

If the ability of employers to deduct pay is retained in the Bill, the ANF considers that an outright refusal to pay should also be able to be challenged at FWA. There is no justification for distinguishing between situations where an employer pays something and where an employer pays nothing. The ANF believes this will only encourage employers to pay nothing as their decision cannot be challenged!

Finally, clause 474(1) would provide that in the case of *unprotected* action a minimum of four hours pay must be deducted and otherwise for the total duration of the industrial action. This clause is unnecessarily draconian, and even more so in relation to partial work bans, where an employer would appear to be required to withhold all pay, even if an employee is at work. An employer should, at the very minimum, be able to choose to pay an employee for periods of unprotected industrial action.

Role of Fair Work Australia (FWA)

FWA should have the widest powers possible to resolve disputes, including arbitration. While court remedies exist, they are not quick or effective remedies for resolving disputes over employees' rights. The ANF also endorses the ACTU submission on this issue.