SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

Inquiry
Fair Work Bill 2008

ACCI Submission Part II

Detailed Response

January 2009

LEADING AUSTRALIAN BUSINESS

THE ACCI SUBMISSION

This is Part II of the Australian Chamber of Commerce and Industry's (ACCI) submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Fair Work Bill 2008.

It provides a more detailed exposition of the Bill, and more specific recommendations (in a longer examination form).

We commend both parts of the submission to the Committee.

They represent ACCI's contribution to enabling the Senate to engage with both the principles and concepts of the new legislation and its detailed operation.

We also intend to communicate this submission directly to both the government and the departmental drafters of the legislation to ensure that constructive input and operational queries can be properly taken into account.

This submission made on behalf of the 36 employer organisations forming the ACCI network.

A number of these organisations are also participating in this inquiry process in their own right.

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CH.1 INTRODUCTION TO THE BILL

CH 1 – DIV 2: OBJECT

221. Section 3 of the Fair Work Act is the proposed new principal object of the statute.

222. The importance of statutory objects in the interpretation of legislation is well established in statute (*Acts Interpretation Act 1901*) and case law. Two further matters reinforce the importance of the object(s) in the current context:

a. Reliance on, and detailed examination of objects is often raised in workplace relations litigation, particularly in arbitration and test cases. This will continue.

b. The Fair Work Act will introduce a number of new concepts which will only be clarified and operationalised through litigation and testing. This will require rapid recourse to the principal object of the Act following commencement.

Specific Comments

223. "Balanced framework". It is not clear what the change in wording from a framework to a balanced framework in the preamble to s.3 means, or is supposed to mean in practice.

224. "Social inclusion". The meaning of this concept in legislative terms is ambiguous, and it is not clear what its inclusion in the object will mean in practice. Perhaps this could be further enlivened in revised explanatory information.

225. Economic Prosperity. The principal object of the existing *Workplace Relations Act 1996* emphasises economic prosperity, productivity and economic sustainability. These concepts could be usefully reintegrated into the new objects, not in place of the additional emphasis on fairness, but to ensure balanced approaches to contested interpretations.

226. Youth Employment. Existing s.39(k) of the Workplace Relations Act 1996 requires consideration of "*protecting the competitive position of young people in the labour market, promoting youth employment, youth skills*

and community standards and assisting in reducing youth unemployment". These remain vital priorities and should be retained in the principal object of the Fair Work Act .

Recommendation 1.1

The wording of the proposed s.3 be reviewed with a view to its clarity and capacity to assist interpretation of the new Act and the new concepts it will contain.

Recommendation 1.2

Existing elements of the principal object of the Workplace Relations Act 1996 be retained in the Fair Work Act , including in particular the focus on economic considerations and youth employment.

S.23 – MEANING OF SMALL BUSINESS EMPLOYER

227. The definition of small business employer controls important employer liabilities under the Fair Work Act for:

a. Severance payments of between 4 and 16 weeks.

b. Differential approaches to unfair dismissal claims (including different probationary periods and the application of the Fair Dismissal Code).

228. ACCI is concerned that the proposed definition of small business employer will send a very poor signal to employers – and will in fact unwittingly become an anti-work and family balance measure.

229. Consider for example two identical businesses, which offer an aggregate of 532 hours employment per week.

a. Business A employs solely full time and employs 14 persons for 38 hours.

b. Business B in contrast employs 10 full timers for 380 hours, and another 10 part time employees for an average of 15.2 hours per week.

230. Business B may be offering substantial part time employment opportunities in its local community, facilitating in particular the shift back into the workforce of many mothers of school aged children.

231. The proposed approach sends an inappropriate signal to such employers that they should not offer part time and casual work lest their overall headcount take them over the small business threshold. This is a problem with the existing Act and has previously been identified by ACCI.

Recommendation 1.3

The proposed meaning of a small business employer in s.23 be amended to calculate numbers of employees based on a Full Time Equivalent Measure, or based on some measure of aggregate hours rather than a simple headcount.

232. There is also a further change from the existing approach to defining a small business which should be reconsidered. Existing s.513(5)(b)(ii) provides that the headcount for defining a small business include casual employees only as follows:

> (ii) any casual employee who, at the relevant time, has been engaged by the employer on a regular and systematic basis for at least 12 months (but not including any other casual employee).

233. The proposed cl.23 of the Fair Work Act would include the concept of regular and systematic, but omit the concomitant requirement for 12 months service. Employers view the two as indivisible, 12 months is required to assess regular and systematic employment and also provides some reasonable measure of casual service such that some of the benefits of ongoing service could become available to casuals.

234. Without such a qualification, there will be an incentive to significant additional litigation and confusion, and complications on compliance and advice. Regular and systematic will become very hard to operationalise and interpret on period of less than 12 months service.

235. Employers are disappointed that this new proposition backtracks on a previous consent position with unions. 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.

236. A consent position has been changed fundamentally in its statutory application and this should not occur.

Recommendation 1.4

For the purposes of counting numbers of employees and providing access to substantive rights and obligations, casual employees only be taken into account where they have both (a) 12 months service, and (b) 12 months service on a regular and systematic basis.

Looking at the terms of the Bill as drafted, for the purposes of both counting and allocating substantive rights, the definition of a 'long term casual employee' on p.19 should be applied throughout the Act.

CL.27 STATE AND TERRITORY LAWS – NOT EXCLUDED

237. Section 27 of the Fair Work Act will set out a number of non excluded matters, which are matters where state and territory industrial laws can continue to apply and not be excluded by cl.26 of the Fair Work Act .

238. This is the equivalent to s.16(3) of the *Workplace Relations Act 1996*. Unfortunately, it does not redress the problems with that section, and cl.27(2) is substantially in the form of existing s.16(3) of the *Workplace Relations Act 1996*.

239. ACCI is concerned that the bald, single line exclusions allow State and Territory Governments excessive capacity to legislate hostile to the prevailing national statute – as was seen with the creation of the NSW Child Employment Act. The effect of which is to undermine the goal of a national industrial relations system applying to all employers and employees.

240. Of course the group primarily impacted on by competing federal and State Government agendas is employers who whilst generally considering themselves 'national system employers' can due to inexact clauses such as 16(3) find themselves also subject to state laws on what are generally understood to be national system matters.

241. By way of example, cl.127(2)(e) excludes laws relating to "child labour" generally from being excluded from the Fair Work Act . A superior approach could be in the form of "*child labour, being any mandatory requirements for school attendance and the ages at which children may enter into paid work under the state employment legislation listed in regulations made under this part*".

Recommendation 1.5

Section 27 be changed from excluding general legislative concepts to excluding state laws on a detailed basis.

242. There is also a danger that these provisions are an entreaty to states and territories to extend obligations on employers. For example, clause 27(2)(h) preserves all state legislation relating to victims of crime leave. The Explanatory Memorandum makes clear that the intended recipient of this exceptionalism is Part 4B of the *Industrial Relations Act 1996* (NSW).

243. A superior approach, picking up on the explanatory memorandum would be to solely exempt Part 4B of the *Industrial Relations Act 1996* (NSW) from the otherwise prevailing exclusion of state and territory laws, if that is the intended effect.

244. If this was undertaken, s.28 in whole or part may not be necessary as the sole exclusions, or the bulk of them would be through listing specific state legislation in whole and part in regulations.

Recommendation 1.6

Section 27 be changed from excluding general legislative concepts to excluding specifically listed state and territory legislation in whole or part. This might be by way, for example, exclusion by regulation.

INTERACTION WITH STATE AND TERRITORY LAWS

245. Clause 29(2) provides for the dual application of federal and state laws in a wide range of areas (where the non-excluded matters are taken into account).

246. This is potentially problematic for employers, who are to be asked to comply with two different sets of laws on the same topic, and potentially the threat of double jeopardy (actions both for award and agreement redress under the Fair Work Act and actions under state legislation).

247. Again a superior approach would be to specifically name particular parts of state legislation that it is intended to preserve in regulations and not rely on the concept of "non-excluded matters".

CH.2 TERMS & CONDITIONS

AWARD COVERAGE (CL 46, 47, 48, 49 ETC)

248. The Labour Hire industry may wish to address you on this issue directly, however it is important that there be an ongoing capacity for labour hiring across engagements and award coverage arrangements, and that labour hire continue to be able to make its important contribution to the labour market. This means that any coverage rules allow for changes in the award worked under when differing work is undertaken, save where an instrument may allow for cross engagement coverage of a labour hire company.

CL.55 INTERACTION OF NES, AWARDS AND AGREEMENTS

249. There is a statutory note to cl.55(2)[1] on the issue of prohibited terms for awards and agreements where s.127 has been exercised to make a regulation to that effect.

250. We are concerned that the statutory note leaves too much discretion and scope for uncertainty. Rather than requiring FWA to "take into account" the regulation, this should be more directive. The note should make clear that where a regulation expressly prohibits the inclusion of a particular term in awards or agreements:

    a. FWA must not include it in an award or agreement.

    b. To the extent it has been included, its is rendered unenforceable.

Recommendation 2-1.1

The statutory note to s.55(2) be amended (or a substantive provision added to s.55) to expressly provide that a modern award or enterprise agreement may not contain any provision regulations made for the purpose of section 127 expressly prohibit it from containing.

[1] Page 67 of the Bill

2-2 NATIONAL EMPLOYMENT STANDARDS

INTRODUCTION

251. ACCI lodged a detailed submission to the NES review in April 2008[2], and has had the opportunity to review the NES released in September 2008 against those included in Part 2-2 of the Fair Work Bill.

252. We reiterate and maintain our earlier concerns and alternative proposals, particularly regarding additional costs.

253. Redundancy Pay: ACCI will be making further submissions with regard to the NES when the Government releases the detail of its Transitional & Consequential Bill (T&C Bill), particularly with respect to how the NES will interact with existing and continuing industrial arrangements. Notwithstanding, there is one important issue that ACCI wishes to draw to the Committee's attention to at this early stage regarding redundancy pay under s.119 of the Bill.

254. The obligation to make severance payments to employees will impose significant cost imposts on employers if payments are calculated by reference to an employee's past service. For example, an employee with at least 9 years service on 1 January 2010 should not be entitled to 16 weeks of redundancy pay if made redundant on 2 January 2010. A general point is that service for the benefit of entitlements under this NES, such as redundancy pay, should start to accumulate on 1 January 2010. Therefore, the T&C Bill or this Bill should make this explicit.

255. At this point there are a limited set of matters to pursue regarding proposed Part 2-2, particularly where there have been changes from the 'final' NES issued in September 2008.

NES FLEXIBILITIES

Default rules for all employees

256. As the NES operate as minimum employment standards that will apply to all employees (from the mail clerk to the CEO), and which cannot be overridden by a common law contract, enterprise agreement or award

[2] ACCI Submission: National Employment Standards (NES) Exposure Draft/ Inquiry - 4th April 2008

(unless specifically allowed by the award), ACCI supports flexibility for all employers and employees, regardless of which industrial instrument applies to their employment.

257. The Government announced on 16 June 2008, upon the release of the "final" version of the NES the following:

> The NES provide employers with the flexibility and simplicity they need while also ensuring employees' key entitlements are protected.[3]

Issues

258. Currently, the following flexibility applies to NES matters, and unfortunately appears to not accord flexibility to all employers and employees as indicated by the Government.

259. Whilst ACCI members may have further input on specific issues that concern their industry or members, ACCI wishes to point out the following limitations by way of the table below summarising the current flexibilities where they appear in the Bill with specific recommendations that follow.

Flexibility	Hours	Annual Leave	Personal Leave
Cashing Out	n/a	Only if authorised by modern award and only if not less than 4 weeks balance remains. A separate agreement is required (s.93)	Only if authorised by modern award or enterprise agreement, and must allow balance of 15 days remaining (s.101).
Direction to take leave / taking leave	n/a	Modern award or enterprise agreement can only direct to take leave (s.93(3)). Award free/agreement free, employer can direct but only if requirement is reasonable (s.94(5)). Otherwise by agreement (s.95(6)).	n/a

[3] http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/NewNationalEmploymentStandardsReleased.htm

Flexibility	Hours	Annual Leave	Personal Leave
Evidence	n/a	n/a	Only modern award or enterprise agreement can specify level of evidence (s.107(5)). In all other cases, evidence that would satisfy a "reasonable person". (s.107(3)).
Averaging	Only modern awards and enterprise agreements can deal with averaging over a specified period. (s.63) Agreement free/Award free employees can only average over 26 weeks (s.64)	n/a	n/a

260. Clearly the situation paints a picture of limited flexibility for employers and depends on what type of industrial instrument is in place, and whether the AIRC will create flexibilities in modern awards, where the Bill specifically allows this.

261. Employers should expect that the NES have default flexible rules that will allow employers to effectively run their operations, whilst balancing the minimum employment rights employees will have under the NES.

262. The following recommendations will ensure that at least a minimum level of flexibility is available for agreement which should not depend on whether the AIRC has created flexibility in modern awards, or whether an enterprise agreement deals with the matter to the extent that it can.

Recommendation 2-2.1

The NES have the following default rules that apply across the board and do not depend on whether there is a modern award or enterprise agreement applying (ie. apply to all employees in Australia and their employers).

1. *Annual Leave (Cashing out): There should be an ability to cash out annual leave if the employee wants this to occur.*
2. *Annual Leave (Direction/Taking): There should be an ability for an employer to direct the employee to take leave, if there is a closedown period, or in any other circumstances that are reasonable. An employer should be able to agree with the employee on the taking of leave (ie. accrual, payment etc).*
3. *Hours of Work: There should be an ability for an employer and employee to average hours of work over a 52 week period.*
4. *Personal Leave (Evidence): There should be a requirement that employees provide a medical certificate or a statutory declaration if the employer provides advance notice to employees that this is the requirement in a workplace. Alternatively, this could be a requirement if leave is more than 2 days in a row.*
5. *Personal Leave (Cashing out): There should be an ability for an employer and employee to agree to cash out personal leave.*

Failing the adoption of the above, the AIRC should be directed to include the NES flexibilities in each modern award.

263. We also note the revised award modernisation request of 18 December 2008, and specifically the following additional paragraph:

"33 The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to include terms that:

- provide for loadings to be paid to school-based trainees and school-based apprentices in lieu of certain entitlements;
- enable the averaging of hours of work over a specified period;
- provide for the cashing out of paid annual leave by an employee, provided that such terms require:
  - the retention of a minimum balance of 4 weeks' leave after the leave is cashed out;
  - the cashing out of each amount be by separate agreement in writing; and
  - payment of cashed out leave be at at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone;
- require employees, or allow employees to be required, to take paid annual leave, but only if the requirement is reasonable;
- otherwise deal with the taking of paid annual leave;
- provide for the cashing out of paid personal/carer's leave, provided that such terms require:
  - the retention of a minimum balance of 15 days' leave after the leave is cashed out;

- the cashing out of each particular amount be by separate agreement in writing; and
- the payment of cashed out leave be at least at the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone;
  - relate to the kind of evidence required to be provided by an employee when taking paid personal/carer's leave, unpaid carer's leave or compassionate leave;
  - provide for the substitution of public holidays by agreement between an employer and employee; and
  - specify the period of notice an employee may be required to give when terminating their employment."

264. This is indicative of the types of flexibility which should be provided under the Act, and be available for agreement between employer and employee regardless of award or agreement coverage.

DIV 4 REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS

Casuals

265. Between the issuing of the NES in supposedly final form in September 2008 and the publication of the Bill there has been a change in access to this provision for casual employees.

266. Section 65(2)(a) would require 12 months service for full and part time employees, but (b) would not apply this requirement to casual employees, despite that being the approach in the supposedly final NES in September.

267. As maintained throughout this submission, removing the 12 months service rule for casuals will create confusion, exposure and litigation and is unbalanced. For the reasons set out throughout this submission, it should be restored in each instance.

268. We also note that under the terms of s.65, a part or full time employee will need 12 months service to access this NES, but a casual employee will not. This outright anomaly highlights that the Bill has taken a wrong turn in extending rights to casual employees, which should be reversed. Put simply, any employee should need 12 months service for access to the right to request flexible working arrangements for the same reason the government has required this for full time and part time employees.

269. We would additionally note in regard to this NES that a casual employee is paid an additional loading for the casual nature of their work, which is may vary from roster to roster, and day to day. The idea of injecting into this some permanent change or accommodation is going to be problematic enough in many instances without unnecessary confusion regarding when this becomes accessible.

Recommendation 2-2.2

Section 65(2)(b) be amended to apply this entitlement only to a long term casual employee as defined in s.12 (as applied in the September 2008 version of the NES).

Competing State Laws

270. ACCI and its members are very concerned about the conflict of laws which s.66 seems to both invite and perpetuate. To be clear, we believe that the creation of this NES completely removes the basis for laws such as the Victorian *Equal Opportunity Amendment (Family Responsibilities) Act 2008* and the supposed level of intergovernmental discussion in preparing this Bill should have led to the urgent repeal of the Victorian statute in favour of a genuinely national approach to this issue.

271. It needs to be one thing or the other – either the "superior" state law invalidates the NES, or the NES prevails in all cases. To do otherwise creates uncertainty, makes an employers compliance task almost impossible.

272. In particular, the tests of employer decision making in the Victorian law and s.65(5) appear different. This means a lawful treatment of a claim under the Fair Work Act may not be lawful under the amended Victorian Act.

273. The way this reads, an employer's single treatment of a single request could be simultaneously lawful under the NES and fall foul of the Victorian law. This is unacceptable, a regulatory failure and a potential injustice. Employers need more certainty lest they be exposed to double jeopardy.

274. There is also of course the prospect of this provision encouraging further confusion and inviting other jurisdictions to cut across the new NES using laws modelled on that in Victoria (which is conceptually and practically flawed).

275. Finally there is a policy dimension to this. The Forward With Fairness policies and statements could not have been clearer on how this was to work:

> "You've got a right to request flexible or part time work arrangements, your employer has got a duty to consider that."[4]

276. This is quite clear to employers. They have a duty to consider such requests and to address them in a particular manner, but ultimately an employer judgement that a request cannot be accommodated on reasonable business grounds, will stand.

277. With the last minute inclusion of s.66, this has not been delivered upon. The Bill itself contains another express provision under s.739 that disputes under s.65 cannot be dealt with by FWA.

278. Section 66 would allow employers to be required to make concessions precisely contrary to the assurances they received as to how this provision would work. ACCI understands the Victorian Act to contain a positive duty which is of a fundamentally different and more demanding character to the approach in the NES. However through s.66 it is the NES which will expose Victorian employers to this state provision.

279. Thus, it would be the passage of the Forward With Fairness which will deliver an outcome precisely opposed to that the government indicated it would deliver.

Recommendation 2-2.3

Section 66 be omitted in favour of a provision clarifying that the opposite situation applies and that a request under this NES will preclude access to a claim under state laws in relation to the same accommodation.

[4] The Hon Julia Gillard MP, Deputy Prime Minister, Minister for Employment and Workplace Relations, Transcript Radio Interview 2GB, 5.20pm Monday, 16 June 2008

DIV 6 ANNUAL LEAVE

Shift Workers

280. Section 87(3)(a)(ii) contains the same imprecise wording as the existing definition of 'shift worker' in s.228 of the existing *Workplace Relations Act 1996* post- *WorkChoices*. The problem is the reference to "those shifts" – and again this wording is not exact enough to avoid ambiguity and litigation. Precisely which shifts will trigger the additional weeks leave?

281. Which of the shifts referred to in s.87(3)(a)(i) does an employee need to work to gain the extra weeks leave. What if the operation is open 24 hours, 7 days a week, but the employee only works day shift? Compliance is simply not clear enough on the proposed wording.

Recommendation 2-2.4

Section 87(3)(a)(ii) better clarify which shift arrangements will and will not attract the additional, 5th weeks annual leave.

Cashing Out

282. We note the changes between s.36 of the September NES and s.93 of the Fair Work Bill. We understand that the proposed approach to cashing out will cause some difficulties in particular industries, including potentially the mining industry. Specific industry representatives will address the Committee on this issue.

DIV 8 COMMUNITY SERVICES LEAVE

Jury Leave – Employer Top Up

283. ACCI spent a great deal of time in our NES submissions illustrating the cost impact of the original proposals in this area. We welcome the announcement in September 2008 that there would be a 10 day cap on employer payments, and proposed s.11(5) giving effect to this.

284. However, up to 10 days pay is still a significant additional liability and amounts to over $2,000 based on average weekly earnings, plus additional on costs and costs of replacement labour.

285. For the reasons set out in our previous submission[5] we maintain that this should be an unpaid entitlement and that the states and territories be challenged to restore levels of jury service pay to their previous relationship to average weekly earnings.

286. Employers have no problem with supporting the operation of justice in their communities, but the effect of this NES remains the imposition of an employer subsidy for fundamental activities of the state.

Recommendation 2-2.5

Apply the entitlement to jury service leave (however described) as an unpaid rather than paid entitlement.

Jury Leave – Preservation of State Laws

287. Section 112 yet again attempts an inappropriately broad preservation of a state law – and we understand the reasons for this but we question the execution of these preservations.

288. Again, if NSW or Victorian jury legislation is somehow more beneficial, make a regulation specifically preserving the state or territory legislation by name, and do not create an at large and ongoing exposure to the NES to being overridden by state legislators.

Recommendation 2-2.6

Preserve the operation of more beneficial state laws on jury service specifically rather than through the at large approach in s.112.

DIV 9 LONG SERVICE LEAVE

Importance of Flexibility

289. Flexibility in the use of LSL can be very important to individual employees, particularly for the balancing of work and family life.

290. Employers support capacity to agree with their employees how the employee's LSL will be used, and to try to reach mutually agreeable approaches. Employees would like to be able to agree to more flexible uses of LSL, which are almost universally requested by employees.

[5] ACCI Submission: National Employment Standards (NES) Exposure Draft/ Inquiry - 4th April 2008

Holding Pattern

291. The effect of s.113 in the Bill is to create a holding pattern for employers and employees to deal with long service leave in agreements, until a national uniform long service leave standard is created.

292. However, long service leave remains a legitimate matter for bargaining and flexibility in applying long service leave still has a role to play in, for example, work family balance.

293. Employers and employees should be able to deal with this issue in collective agreements under the Better off Overall test, as there is no certainty as to when such a uniform standard will be created.

Recommendation 2-2.7

Long service leave should not conveniently be part of the NES, and should be allowed to be dealt with as part of collective agreement making under the better off overall test.

2-3 MODERN AWARDS

CL.134 OBJECTIVE

294. The objective for award making and for wage setting is very important. Former sections such as pre-*WorkChoices* s.88B were extensively raised in wage and other litigation and are often fundamental to resolving the meaning given to the statute and the determination of award terms.

"Likely"

295. Proposed cl.134(f) and (h) apply the qualifier of "*the likely impact of any exercise of modern award powers*" to economic and labour market considerations in the proposed objectives. The same qualifier is not applied to (a), (b), (c), (d), (e), or (g) of the proposed objectives, including in particular the equity, inclusion geared objectives of the system.

296. This qualified wording is quite inconsistent and unnecessary.

297. We would expect FWA's assessment of any of the considerations in this section to encompass consideration of the foreseeable and probable impacts on each of the matters raised. We are concerned that the construction of the clause may dictate a higher or differing evidentiary base for key economic considerations and a lower one for the living standards, social inclusion and equity matters.

298. There is simply no need to get into this problem. The clause makes greater sense with an identical sentence construction for each consideration, and this would be a far superior approach.

299. We also note that the Act generally errs on the side of empowering FWA to consider matters with a great deal of discretion in its considerations. If this principal were applied consistently, the following change would be made:

Recommendation 2-3.1

The qualifier "the likely impact of any exercise of modern award powers on" be removed from cl.134(f) and (h) of the objectives for modern awards. This would see the section therefore read:

FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

…

(f) productivity, employment costs and the regulatory burden on business;

…

(h) employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

DIV.3 TERMS OF MODERN AWARDS

Redundancy

300. Section 141 addresses industry specific redundancy schemes. Subsection (3)(a) refers to varying the level of redundancy payment, and (4) identifies the parameters for such a variation.

301. This could also usefully require specific consideration of the impact of any changes to an industry specific redundancy scheme.

302. For example, this might direct FWA to also consider the impact of any such changes on factors such as the sustainability of the industry or enterprises to be covered by the industry specific redundancy scheme, on the capacity to retain other employees in employment and on the capacity of the industry or enterprises to trade out of redundancy situations in which redundancy payments have been required.

Recommendation 2-3.2

Variation of industry specific redundancy schemes (cl.141(4)) require consideration of (at least) ongoing economic sustainability and impact on the wider capacity of employers encountering operational difficulties to continue to employ and to trade out of difficulties.

303. Consistent with clear government policy, restated in the priority stage of award modernisation, both s.141 and Subdivision D of Part 2-3 should make expressly clear that small business redundancy may not be included in modern awards.

Recommendation 2-3.3

Section141 and Subdivision D of Part 2-3 expressly make clear that small businesses cannot be made liable to redundancy payments through the award system.

Flexibility Terms

304. Section 145(3) is not particularly clear, and is not sufficiently clarified by the Explanatory Memorandum. This should be redrafted more clearly or additional clarification provided.

Recommendation 2-3.4

Reformulate cl.145(3) to more clearly set out its intended effect, or provide clarification through a revised Explanatory Memorandum or statutory note. .

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DIV.4 & 5 FOUR YEARLY REVIEWS & OTHER VARIATIONS

Conciliation and Conferences

305. Conciliation and conferences have proven quite useful over many years in convening test cases and wage cases. This has included capacity to agree parts of claims, narrow arbitration, and expedite the hearing and evidence process.

306. Presidential directions on the 4 yearly reviews should allow appropriate conferencing and discussions prior to the process formally commencing as set out in cl.156(1). The statutory notes to s.156(1) might usefully make this clear.

Recommendation 2-3.5

Clarify that FWA may commence discussions and conferences on the 4 yearly reviews prior to the anniversary date.

Notifying Relevant Organisations

307. There does not appear to be any positive duty on FWA to notify relevant peak employer and union councils, nor registered or unregistered bodies if an application has been made to vary a modern award.

308. Given that modern awards currently do not name organisations, and that they apply on a broad common rule basis nationally, there must be some requirement in the Bill for FWA to notify interested persons if it will list and hear such applications.

309. There should be at least the following notice requirements:

a. Peak employer and union councils;

b. Registered and non-registered employer/union organisations that are on FWA's list of "interested" parties.

c. Notification in national newspaper;

d. Notification on FWA's website.

Recommendation 2-3.6

That if an application is made to vary a modern award, FWA must notify all peak employer and union councils, and organisations that have an interest in the modern award. This could be achieved by a registration of interest process for all organisations (employer and unions).

Threshold Test

310. Minor Issues: Given that there will undoubtedly be some teething issues with the newly created modern awards ACCI supports a relatively straightforward mechanism for organisations to apply to vary the modern award on minor matters. However with respect to substantial changes or the creation of new rights there must be a more robust threshold test.

311. Substantive Changes: There must be some higher threshold test for any substantial variation to awards within the 4 year period, more so than on the basis that it would be consistent with the "modern award objective" as set out under s.157. This is particularly worrying to employers as a modern award can be varied by FWA without any application, or by a number of entities covered by the award.

312. The Government has previously stated that:

> 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.[6]

313. Clearly, this is not the case, as s.157 allows FWA to vary a modern award if it is "necessary to achieve the modern award objective". This is clearly an inadequate control, as there is no clear objective test as to whether a variation or the creation of a modern award is "necessary" to meet the objective in s.134.

[6] Deputy Prime Minister, Hon. Julia Gillard MP, Address to the Australian Labour Law Association, Melbourne, 14 November 2008.

314. New Awards: Under s.157, a single employee or union has the ability to require FWA to make a new modern award, anytime within a 4 year period.

315. There should be some stability built into the system and there should be an exceptional circumstances threshold test for FWA to have the ability to review or vary a modern award outside of the 4 year period.

316. Furthermore, FWA should not be able to create a new modern award outside of the 4 year period unless absolutely essential, and such a new modern award should only apply on an interim basis for 12 months and then be reviewed.

Recommendation 2-3.7

Section 157 should only be invoked where there are exceptional circumstances.

FWA should only be able to create new modern awards on an interim basis (which expire after 12 months),and only if it is satisfied that the NES is not adequate and is essential before the 4 year review. Apart from these circumstances, FWA should only create new modern awards during its 4 yearly review.

Work Value

317. Under cl.156(3) and cl.157 changes in award minimum wages can only be on work value grounds. What is missing from the treatment of the work value concept here is the notion of "change". A work value revision of minimum wages should only occur where there has been some substantial change in the work undertaken and in the factors in proposed cl.156(4).

Recommendation 2-3.8

Any work value provisions require a substantial and material change in work value before any revision of award minimum wages could be considered.

318. In addition, this provision needs to be closely monitored, against it becoming an avenue for unions to regularly and inappropriately inflate award wages, terms and conditions.

Omission From Awards / Changing Coverage

319. Cl.159(1)(b) sets out circumstances in which employers or organisations can be omitted from being named in awards. Section 163 sets out special rules for changing coverage.

320. These sections should incorporate scope to be removed from awards where:

a. An employer ceases to operate a business or section of a business which brought them under an award.

b. An organisation is demarked out of coverage and should therefore be omitted from the award.

321. Cl.159(c) partly captures this, however in some cases operations are shut outright or moved overseas and there should also be scope to vary awards in these circumstances. Cl.163(1) should also allow an employer to be removed from coverage where employment under the award has ceased and there is no reasonable prospect of it recommencing (for example where the employer has ceased that operation, or moved it off shore).

Recommendation 2-3.9

There be additional scope to vary awards to omit employer parties where the employer no longer employs under the award, or no longer retains the business or part of their business which would attract award coverage.

Sex Discrimination Commissioner Referrals

322. Cl.161 addresses referrals from the Human Rights Commission to review awards. ACCI is concerned that this not cut across the timing of other award reviews or the considerations. It would be appropriate if this not be able to be activated if there has been consideration of the same matter in a four yearly review or work value review in the preceding 4 years.

Recommendation 2-3.10

Clause 161 be amended to clarify that FWA must only review awards on referral from HREOC where it has not varied the award provision concerned, or declined to vary the award provision concerned in the preceding 4 year period under some other provision of Part 2-3 of the Act.

2-4 BARGAINING & ENTERPRISE AGREEMENTS

BARGAINING REPRESENTATIVES

323. Whilst ACCI accepts that employees should have the real choice of whether they should belong to a union or not, the Bill does not proper effect to that choice for many employers and employees. The policy considerations must be balanced and the Government is urged to re-consider this aspect of the Bill particularly.

324. Under s.173(4) of the Bill, an employee's union is deemed to be a bargaining representative for the entire process of bargaining. This appears to be consistent with the removal of the distinction between union and non-union collective agreements.

325. The choice for employees appears to be an empty one, whereby an employee must appoint an alternative representative in writing if they don't wish their union to be their bargaining representative. The other alternative is for an employee to resign from the union. This appears to be at odds with freedom of association as we have known it in Australia.

326. This will create a legal presumption of union involvement in any workplace that wishes to engage in bargaining (whether for the first time, or for the 15th time) that has only 1 union member out of potentially hundreds or thousands of employees at a workplace.

327. This is in contrast to the *Forward with Fairness Implementation Plan*, which states:

> "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".[7]

328. The Deputy Prime Minister in a pre-election speech also indicated:

> Under our system, a union does not have an automatic right to be involved in collective bargaining.
> …

[7] Forward with Fairness Implementation Policy, p.13

> 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.[8]

329. This has not been delivered on in the Bill. Consistent with the above, the Bill should be amended to ensure that true freedom of association is allowed, and that employers are able to negotiate with or without a union for an agreement. The current proposal will be perceived by many employers to be a back-door means to allow a union into a bargaining process, despite low levels of employee support.

330. 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 owe GFB obligations towards each one), including:

a. Multiple active unions;

b. Nominal bargaining representatives (who may or may not apply to be bound by any agreement);

c. Employees acting as bargaining representatives; or

d. Employees who elect third parties as a bargaining representative that is not their union.

331. The fact remains, that employees join unions for a variety of reasons (and will continue to do so upon this basis), and do not necessarily always want a union involved in a particular bargaining scenario. Union members under the Bill, have some very stark and difficult choices to make if they don't want a union involved in bargaining on their behalf.

332. Under s.176, an employee who is a union member and who does not want a union involved in bargaining on their behalf, does not have any other choice other than to: (a) appoint themselves, (b) appoint someone else (who could be another employee), or (c) resign from the union.

333. ACCI recommends the following to ensure that employees are given proper free choice in who should represent them in bargaining:

[8] Melbourne Press Club Speech, Melbourne, 25 June 2007.

Recommendation 2-4(4).1

The proposed concept should be replaced with the ability for an employee to appoint a bargaining representative, including a union or other person, when the employer initiates bargaining.

Consistent with the above recommendations, the distinction between union and non-union collective agreements should be retained to ensure certainty in the bargaining framework for employers, employees and unions.

UNION PARTIES

334. Another rather significant issue for employers is the concept that a bargaining representative for an employee can become covered by any subsequent agreement that is approved, by the mere notification to FWA that it wants to be covered.

335. Notwithstanding no involvement by the union at any stage of the agreement making process, s.201(2) appears to disbar an employer raising any objection and removes any discretion on FWA to not allow a union to be covered, so long as they have complied with the notice requirements.

336. Theoretically, a union could apply after an employer has lodged the agreement and FWA is still assessing it against the no-disadvantage test.

337. Furthermore, because a union is a bargaining representative by default, if an employee subsequently appoints another bargaining representative, this appears to still allow a union (that has had no involvement in bargaining) to become "covered" by the agreement. This is despite the employee clearly evincing a wish and desire that the union not be involved.

338. Section 183 needs a time limit on when unions that wish, post voting, to become parties to an agreement must do so. It is not clear from s.183(2) the time frame in which the union must notify FWA, and whether this could delay agreement approval and entry into force.

339. Consistent with Recommendation 2-4(1) a union should only be covered by an agreement if:

    a. A majority (51%) of employees, who cast a valid vote, are union members;

b. The union was actively involved in the agreement making process.

Recommendation 2-4(4).2

A union should only be covered by an agreement if a majority of employees, who cast a valid vote, are union members. FWA could determine this, if a union makes an application after the agreement is approved.

Recommendation 2-4(4).3

Section 183 set a time limit for unions to exercise their right to become party to an agreement, and that this be set to not delay the commencement of agreements.

There be some provision that allows FWA discretion to refuse a union's application to be covered by the agreement.

340. This is important. Allowing a free for all or open door will encourage demarcation disputes, and fishing expeditions by unions free riding on the efforts of other unions.

LEGAL COMPULSION TO BARGAIN MUST BE CLEAR

341. Given that employers, who do not wish to bargain, will be legally compelled to under the proposed provisions, it must be abundantly clear when this arises.

342. Section 179 of the Bill states:

> An employer that will be covered by a proposed enterprise agreement, or a bargaining representative of such an employer, must not refuse to recognise or bargain with another bargaining representative for the agreement.[9]

343. ACCI is concerned that s.179 of the Bill may create an apprehension that there is a positive duty on an employer to engage in bargaining, regardless of their intention to bargain, and despite no bargaining order being made by FWA (ie. no majority support determination). This is because of the words underlined above. The current Workplace Relations Act 1996 provisions do not contain those additional words.

344. The section should be amended to only state that an employer must ***recognise*** a properly appointed bargaining representative in any bargaining for an agreement and not "bargain with" a bargaining representative.

[9] Emphasis added.

Agreements Trigger Bargaining Inadvertently

345. ACCI is concerned that enterprise agreements may have provisions that state when an employer must bargain with a union. Prima facie, any such term should not then interact or trigger provisions in the Bill dealing with bargaining.

346. For example, under s.230(2)(a), FWA can make a bargaining order against the employer if the "employers have agreed to bargain, or have initiated bargaining, for the agreement". A clause in an agreement should not deem bargaining to have occurred for some or all purposes of the Bill - conceivably, this may occur if there is a clause that requires bargaining for the next agreement either before or after the nominal expiry of the existing agreement.

Civil Penalty

347. Under s.179, an employer "*must not refuse to recognise or bargain with another bargaining representative*". This is a civil penalty offence with substantial fines of up to $33,000.

348. ACCI opposes the creation of a new civil penalty offence for employers. The problem for employers is the ambiguity around the use of the expression "agrees to bargain or initiates bargaining".

349. What happens when:

a. A junior HR officer has a chat with an employee about the company thinking about making an enterprise agreement – is this "initiating bargaining"?

b. What active steps are needed to be involved by the employer for it to "agree" or "initiate" bargaining? How far back in time could a Court inquire, to ascertain an employer's conduct that they wanted an agreement. An employer could always change their mind, and decide that they don't want an agreement anymore for a variety of reasons, yet this provision appears to lock them into a mode of bargaining that entails serious consequences for the employer.

350. Based upon such concerns, ACCI recommends:

Recommendation 2-4(4).4

Section 179 should be omitted.

In the alternative, the word "…or bargain" should be omitted. It should not be a civil penalty offence.

AGREEMENTS – SEA, MEA, GREENFIELDS

351. ACCI has already commented on the preference for the current distinction between union collective agreements and employee collective agreements to be retained. We reiterate this point.

352. We also note that the use of the term "single enterprise agreement" (SEAs), which can actually involve multiple employers, versus the term "multiple enterprise agreement" (MEAs) is confusing in the Bill. The table in the Explanatory Memorandum at p.105 illustrates this confusion. Agreements involving more than one employer should be classed as multiple enterprise agreements.

Greenfield Agreements Vitally Important

353. ACCI notes that employee greenfield agreements are no longer allowed.

354. Despite this change, the importance of employers being able to utilise these specific types of agreements is absolutely essential to some sectors of the Australian economy – particularly in the mining and construction industry. It is essential that the Bill retain greenfields agreements in a manner that makes them as available as they are currently for employers.

355. ACCI is concerned that under s.182(3) each union is required to sign an agreement for an employer to make a greenfields agreement.

356. This appears to operate in circumstances that are despite the wishes of the employer and union(s) who have negotiated for the agreement. This requires urgent amendment.

Recommendation 2-4(4).5

Section 182(3) should be amended to ensure that employers do not need the consent of each and every union (which could be numerous in a large site with different categories of workers) each time a vital project is to be embarked upon by an employer. To do so, would threaten many projects that will be undertaken in the near and long term.

APPROVAL

357. Section 187(2) provides that FWA must be satisfied that approving an agreement will not undermine good faith bargaining, as follows:

> (2) FWA must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.

358. A concern arises in relation to bargaining where there is clear support for an agreement with a particular union, or for a non-union agreement, and an agreement is progressing on that basis. At some point an agreement must be made and the GFB obligations to minority interests must be extinguished (as the agreement is being voted on or imminent).

359. An employer should not be required to negotiate *ad infinitum* with a minority interest or representative where an agreement has been reached with a majority representative which is capable of being approved by the majority of employees.

360. Good faith bargaining is a remedial or facilitative concept. It should apply only in relation to the process of making an agreement, and once an agreement is reached and proceeding to approval, GFB obligations should come to an end. They are in ACCI's most benign reading to be facilitative, and having facilitated the outcome of an agreement, they should terminate.

361. We note in support of this, s.183 will allow a minority bargaining representative(s) to become party to an agreement post approval. Thus, there appears no need for an ongoing GFB obligation to these organisations once an agreement is to proceed to finalisation.

362. We also note an aggrieved union or other representative could raise concerns under s.188(c).

Recommendation 2-4(4).6

187(2) either be removed, or amended to clarify that when an agreement is made under s.182, the GFB obligations come to an end.

UNDERTAKINGS

363. Section 190(4) requires FWA to seek the views of bargaining representatives prior to accepting proposed undertakings. What of a situation where a vote has proceeded for a non-union agreement or an agreement with one union and not others with the support of the majority of employees?

364. We cannot see why a bargaining representative which has not attracted sufficient support to become a 'party principal' to the agreement should have any say in undertakings.

365. Consider the practicality of a situation where an employer strikes an agreement with Union A and has it voted on. Union A and the employer are happy with a requested undertaking. Why would Union B have a legitimate role in the operation of an undertaking having not been party to the vote or being named in the agreement in the first instance.

Recommendation 2-4(4).7

Section 190(4) only require FWA to seek the views of a bargaining representative on proposed undertakings where that representative is the applicant, or a named party to the agreement at the time it was voted on.

Recommendation 2-4(4).8

Alternatively, s.190(4) only require FWA to seek the views of a bargaining representative on proposed undertakings only where it has a reasonable belief that the undertakings will impact on or apply to a member of that organisation.

366. The alternative proposal above would preclude a situation for example where undertakings affecting operational and blue collar staff had to be notified to a professional or white collar union.

367. For example, bargaining in a hospital for orderlies could proceed with the HSUA, and not require notification of representatives of medical specialists who may be within the scope of the agreement, but not be subject to the undertakings.

AGREEMENT APPROVAL TEST

368. Employers have very significant concerns at the delays in agreement approval over recent years and that the system has gone backwards across the past three years in its capacity to rapidly translate terms agreed at the workplace level into a duly accepted, operative and enforceable instrument.

369. Put simply, employers are looking to the new Act and the new test to do much better than the situation administered by the Workplace Authority under the post-*WorkChoices* and post 2008-transitional amendments *Workplace Relations Act 1996*.

370. Employers, employees and unions are entitled to a system capable of providing a rapid, reliable and consistent answer on whether particular agreement terms can be approved, and one which turns agreements around rapidly and reliably. These are the standards against which the operation of agreement making under the Fair Work Act will be assessed.

371. It is welcome that the Explanatory Memorandum[10] provides the following clarification:

> 818. Although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that FWA will generally be able to apply the better off overall test to classes of employees. In the context of the approval of enterprise agreements, the better off overall test does not require FWA to enquire into each employee's individual circumstances.

372. Despite the assurances of the Explanatory Memorandum that FWA could apply the test to "classes of employees", the words of s.193, require FWA to be assured that "*each award covered employee, and each prospective award covered employee … would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee*". (emphasis added).

[10] Para 818, p128

373. ACCI prefers the position adopted between 1993 and 2005, whereby the AIRC approved agreements on the basis of a global NDT. Unfortunately, neither the current Act nor the Bill achieves that.

374. The Bill uses different wording under former s.170XA of the pre-*WorkChoices* Act, which stated: "*An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment*".

375. As such, the AIRC did not inquire into each and every individual employee to determine whether they were disadvantaged. The potential consequence of the *Fair Work Act* is that agreement making and approval will take more time, become more uncertain and fewer agreements will pass the test.

376. As this is an area where there is a level of suspicion and fear that agreements will not be approved without satisfying the test for each individual employee. This may be assisted by the following.

Recommendation 2-4(4).9

Paragraph 818 of the Explanatory Memorandum be incorporated into the Act as a statutory note to s.193.

PERMITTED TERMS

Important Area of Regulation

377. Section 172 deals with terms which may be included in an agreement.

378. ACCI has specific recommendations below, but would like to state at the outset this is a significant area of regulation that will have serious consequences for the industrial activities of employers, employees and unions.

379. This is an area that has the potential to create disputation where none currently exists under the existing framework. The recommendations made by ACCI and its members, should be carefully considered by the Senate and the Government before removing current provisions that govern agreement content, and by implication, industrial action.

380. The Government should consider balancing the objectives of allowing parties to agree on terms that suit their circumstances, but also providing protection against:

a. Industrial action that concerns matters outside of the employment relationship and enterprise, or

b. That would create imposts on a business to effectively manager their commercial operations and decisions.

Matters Pertaining Between Employers and Employees

381. Matters pertaining to the relationship between employers and employees is a familiar concept, which has been around at least 100 years, and which has received much judicial attention, culminating in the High Court case of *Electrolux* case.

382. However, the Explanatory Memorandum appears to overturn existing and settled High Court and Federal Court law and expand the general law on what pertains to the relationship between employers and employees[11]. This is extremely important, as a Court would have regard to the Explanatory Memorandum if they needed to refer to extraneous materials under the *Acts Interpretation Act.*

383. An extension to the concept of 'matters pertaining' or addition to the matters permitted in bargaining claims is not a mere debating point. It represents a broadening of the right to strike in Australia. This is because government has maintained the approach of linking bargaining content to the breadth of the right to strike (protected industrial action).

384. In this sense, the right to strike in Australia, would be expanded under the terms of the Bill. This would occur in the context of the current approach generating sustained record low industrial action.

385. ACCI does not agree that these matters pertain to the relationship between employers and employees (they should be omitted from the Explanatory Memorandum as being of that character):

[11] (see para 673, dot points 4 and 5, p.108).

a. Terms that would require an employer to source only products from a particular supplier or Australian made products if a term was directly related to the employees' job security[12].

b. Terms that would require an employer to engage or not engage particular clients, customers or suppliers who had agreed to commit to certain employment environmental or ethical standards if it was directly related to employees health and safety[13].

c. Terms related to independent contractors (see below).

Independent Contractors

386. The Government has previously indicated in clear terms that it supports independent contracting to be regulated outside of the employment relationship and its corresponding laws.

387. It has stated the following (emphasis added):

> **Role of contractors**
> Labor understands the growing importance of contractors to the Australian economy.
>
> Labor's policy is that independent contractors are small businesses that should be regulated by commercial law and not industrial law.
>
> Labor believes that the use of contractors should be supported and facilitated, and that contractors should be given fair opportunity to access work.
>
> **Freedom of contractors**
>
> Labor recognises that employers, particular small business employers, need an industrial relations regime that does not permit inappropriate interference from third parties.
>
> Under Labor, employers and employees will be free to bargain the terms of workplace agreements about matters which suit them.
>
> However, the terms of an agreement must be lawful and cannot breach discrimination laws, OHS laws or Labor's principles to guarantee freedom of association.
>
> This means clauses which involve matters such as union preferences or union bargaining fees cannot be included in an agreement, nor can agreements prescribe that contractors be engaged or not engaged on the basis of their industrial arrangements.

[12] Explanatory Memorandum, Para 673, p.108.
[13] Explanatory Memorandum, Para 673, p.108.

> Labor agrees that unions should not be permitted to interfere in commercial arrangements. Under Labor, there will be no closed shops and no return to a 'no ticket no start' culture.
>
> Under Labor, unions will not be able to interfere in the negotiation of commercial contracts for independent contractors unless with specific and individual authorisation from each individual contractor.[14]

388. There clearly needs to be tightening of the Bill, in order to preserve these commitments for the following reasons:

389. The Explanatory Memorandum states that the following matters would pertain to the employment relationship and could therefore be included in an agreement and the subject of protected industrial action:

> terms related to conditions or requirements about employing … or engaging labour hire or contractors if those terms sufficiently relate to employees' job security – eg. a term that provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement

390. This is unacceptable, in that union could demand the employer to engage in a particular way with a third party who has nothing to do with the union or employees. This is an unnecessary widening of the matters that will be subject to industrial disputation.

391. There is already the Independent Contractors Act that the Government supports and to allow industrial relations agreements to deal with this subject matter cuts across the principles in the Independent Contractors Act.

392. ACCI recommends that matters about independent contracting be specifically deemed to not pertain, or be included in unlawful content provisions.

Recommendation 2-4(4).10

Matters about independent contracting be specifically deemed to not pertain, or be included in unlawful content provisions.

[14] http://www.contractworld.com.au/reloaded/ica-alppolicyconsolidated2007.php

Matters Pertaining to Union

393. As a result of s.172(b), agreements will be able to deal with a broader range of matters, beyond the employment relationship. This is new area of law and will lead to litigation in the future as employers and unions seek to test what pertains to the relationship between themselves.

394. A major consequence of expanding the range of matters that are allowed to be included in agreements, is that unions will also be able to take protected industrial action over such matters.

395. The Bill should restrict matters that can be subject to industrial action and agreement making to matters pertaining to the employer and unions only in the context of the workplace (ie. must be about industrial relations), and not wider socio-political or environmental matters.

396. There is no clear policy rationale for allowing matters outside of the employment context to be allowed in agreements. This will not improve productivity or deliver flexible workplace arrangements and will only lead to ambit claims made against the employer which will be tested in the Courts over time. We recognise though that some aspects of the current statute are unduly restrictive, such as matters traditionally and well established as industrial matters concerning employer and union dealings.

397. ACCI recommends that the Bill also codify the list of matters provided in the Explanatory Memorandum under paragraph 676. This is to ensure that disputation and uncertainty does not arise in the future over what does or does not pertain to the relationship between employers and unions.

Recommendation 2-4(4).11

Matters pertaining between the employer and union should be linked to the workplace / industrial relations and not wider socio-political or environmental issues.

Matters pertaining between the employer and union should be codified and listed in the Bill.

Matters dealing with independent contractors should be deemed to be "not permitted" or part of unlawful terms, consistent with the Government's commitments that these matters are outside of the employment relationship and that it supports the Independent Contractors Act.

The Explanatory Memorandum should be reviewed to only include examples that have been upheld by Courts or Tribunals in the past and not extend the general law.

UNLAWFUL TERMS

398. Section 194 deals with Unlawful Terms which may be included in an agreement.

399. ACCI agrees with restricting the capacity of agreements to address unfair dismissal and right of entry. However, the provisions do not go far enough – unfair dismissal and right of entry under the Act should become a code of general and standard application, and agreements should not be able to address these issues at all.

400. Once again, this will open up the possibility to industrial disputation where none currently exists with respect to these two important subject matters.

401. Regulations 8.5(1)(g) and 8.5(5) under Chapter 2, Part 8, Division 7.1 of the *Workplace Relations Act 1996* should be retained and inserted into s.194.

Recommendation 2-4(4).12

Section 194 be amended to not allow matters dealing with unfair dismissal and right of entry as this is dealt with in the Bill.

PUBLICATION

402. A limited set of concerns arise from Division 4 of Part 2-4 in regard to publishing agreements and decisions on agreement approval. These include:

a. Commercially sensitive information given in relation to undertakings.

b. Commercially sensitive information given in relation to s.189.

403. Another example ACCI is aware of are enterprises where name and address details can be very sensitive, including potentially women's refuges, crisis housing, and some defence support and security activities.

404. Ultimately there needs to be some discretion for FWA to omit from publication some or all details of an agreement or undertakings, just as there remains a need for FWA to be able to 'close files' on the request of parties.

Recommendation 2-4(4).13

FWA be provided with scope to omit from publication, agreements in whole or part on application from parties, including in relation to commercially or personally sensitive information, or information relating to security or public order.

In particular, provisions such as s.201(3) should provide discretion to not publish undertakings on request and where FWA exercises its discretion not to do so.

VARIATION (S.210)

405. Section 210(2) details the materials that must accompany an application to vary an agreement. It does not include details of the vote outlined in s.208, which would appear germane to approving the variation.

Recommendation 2-4(4).14

Section 210(2) also require an applicant for a variation to provide the details of any vote under s.208.

406. ACCI cannot see any basis for a variation not to be approved that enjoys majority support of the employees concerned. We query whether s.211(1)(c) could see a situation in which an application which enjoyed majority support under s.208 was not accepted based on a union veto.

407. This should be dealt as follows:

Recommendation 2-4(4).15

Section 211 be amended to provide that:

FWA must approve a variation which enjoys majority support under s.208, unless there are serious public interest grounds not to do so.

Serious public interest grounds are not be able to be raised where a union party to the agreement agrees to the variation and it enjoys majority support (i.e. a second competing union cannot veto an agreed variation).

Consideration of not approving a variation, which enjoys majority support under 208, can only be undertaken by a Full Bench of FWA.

408. The same concern arises in relation to s.223(d) relating to the termination of an agreement.

2-4 (DIV 8) GOOD FAITH BARGAINING ORDERS

INTRODUCTION

409. The Bill creates a new area of law that will create serious regulatory obligations for employers. The good faith bargaining requirements of the Bill are the trigger for "bargaining related orders" to be made against an employer with arbitration as an ultimate outcome for some employers that refuse or do not want to bargain for an agreement.

410. This is antithetical to the notion that employers and employees can be free to collectively bargain for an agreement. Up until now, the only threat or economic pressure that unions could apply to employers is the possibility of industrial action. This will now change with the introduction of the good faith bargaining requirements and serious breach declarations (that lead to arbitration).

411. Whilst the Government has indicated that good faith bargaining was part of previous incarnations of our industrial laws, the possibility of forcing employers to the bargaining table for over award agreements with arbitration hanging over their heads represents a complete and fundamental policy change and extension of the regulatory system.

412. Furthermore, the good faith bargaining provisions will also operate within the context of other new provisions including:

    a. Unions being an automatic **"bargaining representative"** if they have just 1 employee member in the workplace – with the only alternative options being for the employee to resign or appoint someone else in writing.

    b. Unions being able to get a **"majority support determination"** from FWA upon the basis of petitions or statements that a majority of employees want to bargain – regardless of whether the "majority" want the union involved or not.

    c. Unions being able to obtain **"scope orders"** that can force employers to negotiate and make an agreement with a proportion of its workforce that it does not wish to make with.

d. Unions being able to obtain a **"bargaining order"** if it has concerns bargaining is not proceeding in the manner it wishes or if the employer is not meeting good faith bargaining requirements – despite the fact that the employer does not wish to bargain at all for an agreement.

e. Unions being able to obtain a **"serious breach declaration"** that enables FWA to impose an arbitrated agreement on the enterprise, despite the enterprise not wishing to bargain with the union or make an agreement at all.

f. Even if an employer wants to initiate bargaining with its employees, the union will be able to intervene, at every step of the way, right up to the time FWA approves the agreement.

413. This is a litany of pro union / union leg up provisions in the Bill. In isolation, the new provisions may appear benign, but when looked at in totality they paint a more concerning picture for those businesses that must now engage with unions in bargaining, when they have never had to before in the history of industrial relations in Australia. These laws will not just apply to "big business" which may have firm relationships with unions and agreement making, but also apply to the smaller firms that make up the bulk of Australia's economy – with as few as just one union member.

414. There is no evidence to conclude that this range of support to unions in bargaining will deliver any additional productivity, efficiency, competitiveness or job security.

GOOD FAITH BARGAINING REQUIREMENTS

Issues

415. Whilst ACCI understands the Government's policy on good faith bargaining requirements is not intended to require an employer to sign up to an agreement or make concessions, ACCI is concerned that the requirements imposed on employers under s.228 of the Bill will prejudice employers unnecessarily, and require just such an outcome.

416. ACCI has problems with the following provisions:

a. Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner (s.228(1)(b)). This should be extended to include *any material the disclosure of which would be contrary to the genuine interests of employers,* because:

i) "Confidential" material is a legal concept and an employer would have the burden of proof to say why material attracts the doctrine of confidentiality.

ii) "Commercially sensitive information" does not cover material that is highly sensitive to the interests of the employer or employees, the disclosure of which could prejudice employers' interests. This could include information on how much senior executives or the CEO is paid, high sensitive personal employee information.

b. Giving reasons to the bargaining representative's proposals (s.228(1)(d). This will undoubtedly used as a tactic by unions to require employers to detail in writing every single demand and proposal. There is no limitation on how many times a union can require an employer provide a response to its proposals and will be used as a harassing tactic in future.

i) As one law firm has commented on this provision:

> … FWA will have at its disposal the power to issue orders that could in our view have an effect on an employer's resilience to hold a firm position in negotiations. For instance, the requirement that an employer give genuine consideration to a union's proposals and to provide reasons for its responses, is a matter that may result in protracted disputes before the FWA. A union may tender an employer a detailed set of submissions on its enterprise bargaining proposals. If the employer flatly reject the submission or addresses only parts of the submission, the union may be able to sue the absence of any answers or any comprehensive answer to obtain bargaining orders (on the basis that the employer has not met the good faith bargaining requirements).[15]

ii) This should be omitted, and the employer should just have to give genuine consideration to proposals.

[15] DLA Philips Fox, The Workplace – Special Report, Unwrapping the *Fair Work Bill* 2008, December 2008, p.10.

417. Therefore the following is recommended:

Recommendation 2-4(8).1

Section 228(1)(b) be amended to add that any material that would be contrary to the genuine interests of employers should not be disclosed.

Recommendation 2-4(8).2

Section 228(1)(d) omit the words "…and giving reasons for the bargaining representative's responses to those proposals".

TIMING

90 Days Before Nominal Expiry Date (NED)

418. Under 229(3) a union could apply for a bargaining order that could lead to arbitration, up to **90 days before the agreement has actually passed its nominal expiry date (NED). ACCI cannot see any policy rationale that would allow FWA to intervene in an employer's industrial relations arrangements before its lawful and continuing agreement reaches its NED.**

419. What benefit is there for either the employer or employees if the union is able to compel good faith bargaining 3 months before an agreement has expired?

420. There is no reason employers and unions cannot start negotiations before an agreement expires, but to allow FWA to make orders that have the potential to lead to arbitration will not be conducive to industrial harmony on a worksite. It would be at odds with the general commitment to preclude agitation during the life of an agreement.

Recommendation 2-4(8).3

Section 229(3) be amended to only allow an application for a bargaining order to be made after the nominal expiry date of any agreement.

Minimum Period

421. Some minimum period must have elapsed before it could validly be concluded that bargaining is not proceeding in good faith. On that basis, provisions such as s.229(4)(b) and (c) are positive and at least require some attempt at bargaining prior to a conclusion that some remedial order is required.

422. We are therefore concerned about the proposed s.229(5), and the discretion it would provide for the making of orders where there has not been a due time and opportunity for bargaining and interaction.

423. The examples in the Explanatory Memorandum appear to be able to be redressed using other protections in the Act, or alternatively there should be more detail on the circumstances in which an order can be made without an employer having an opportunity to respond.

Recommendation 2-4(8).4

Section 229(5) either be removed from the Act, or be amended to require an appropriate test of seriousness or imminence of particular undesirable behaviours prior to an order becoming accessible contrary to s. 229(4)(b) or (c).

424. Section 229(5) also appears a little oddly expressed. Should it regulate when a bargaining representative may apply for a bargaining order, or should it more properly regulate when FWA may make such an order in contravention of 229(4)(b) or (c)? The later appears the key issue.

INITIATION

425. GFB orders can become available after a party has initiated bargaining (s.230(2)(a)). However, it is not always clear when this occurs. When has a party initiated or not initiated bargaining? Is a mere conversation enough or must claims have been served or detailed? Must some exchange or negotiation have occurred?

426. The concepts of an agreement to bargain and the initiation of bargaining under s.230(2)(a) are very important to triggering access to GFB orders and ultimately to a route that may end in arbitration.

427. However it is foreseeable that there will be great uncertainty as to when they occur, particularly in the context of informal, ongoing or contentious day to day industrial relations. Again, during the course of dozens of conversations with a union official, when could bargaining be said to have commenced?

428. Must an employer be aware they have agreed to bargain under this part prior to this being deemed to have occurred? Can a union party unilaterally initiate bargaining, or (more properly) is bargaining only initiated when there has been some exchange or discussion with the employer?

    a. Consider in this regard the obverse proposition. Could an employer be deemed to start a process 'against' a union merely by compiling a bargaining agenda internally, and prior to any communication with the union or employees?

429. The Act, a statutory note or extraneous materials should usefully further define these concepts and provide greater certainty on when these circumstances will and will not be triggered.

Recommendation 2-4(8).5

Section 230(2)(a) better clarify the circumstances in which an employer has agreed to bargain, and when bargaining has been initiated.

430. The above point stands equally in relation to s.173, and a nexus should be created between them (either through a note or a revised Explanatory Memorandum) to ensure that the initiation of bargaining in one situation is identical the initiation of bargaining in the other.

MULTIPLE BARGAINING REPRESENTATIVES

431. Various sub-provisions of s.230 and s.231 address situations in which there are multiple bargaining representatives and this is impacting on the conduct of bargaining.

432. ACCI is concerned at the prospect of this being used by one union to exclude another competing union from workplace bargaining. This will allow workplaces to become the battlegrounds for re-emergent demarcation disputes.

433. The solution to this is to only allow an application seeking the outcome in s.231(2)(a) from the employer, and directing FWA to take into account the views and levels of support for, each of the bargaining representatives.

Recommendation 2-4(8).6

An order excluding a bargaining representative under s.231(2)(a) only be able to be sought by the employer, and only be able to be made having consulted with all bargaining representatives.

434. There is also a logical problem with this section. It reads as though an employer could be excluded from bargaining for an agreement which would cover them. This isn't logical or realistic and this has to be an asymmetrical provision (not applying equally to employers and unions).

Recommendation 2-4(8).7

Orders under s.231(2)(a) not be available against the employer.

SCOPE OF ORDERS

435. Employers are concerned that the scope of GFB orders is not defined and that the concept of bargaining in good faith is treated too amorphously under the Act as introduced.

436. ACCI does not support FWA having the ability to make orders that would:

a. Exclude a bargaining representative for the agreement from bargaining under s.231(2)(a) – this has the potential for FWA excluding a union that the employer genuinely wishes to negotiate with, or excluding an employee who is the bargaining representative for themselves and other employees.

b. Reinstate an employee whose employment has been terminated under ss.231(2)(c) and (d). There are adequate remedies in the General Protection and unfair dismissal framework that would address this. **There is also a question as to whether this is an exercise of judicial power, contrary to the Constitution.**

437. This can be redressed:

Recommendation 2-4(8).8

Section 231 define the kinds of bargaining orders which FWA can make exhaustively, rather than indicatively (replacing the indicative list in s.231(2) with an exhaustive list, which is restricted in scope to meeting the GFB requirements in s.228).

Recommendation 2-4(8).9

Section 231 include a regulation making power allowing government to identify particular orders FWA is able and not able to make under this part into the future.

SERIOUS BREACH DECLARATIONS

438. ACCI does not agree that there should be a trigger for arbitration when a bargaining representative does not comply with an order of FWA, as proposed by Subdivision B, ss.234-235.

439. This cuts across multiple Government commitments that stated that arbitration would not be allowed in these circumstances.

440. As recently as a few weeks before the introduction of the Bill, the Government's fact sheet (number 6) on its proposed laws clearly states:

> Compulsory arbitration will not be a feature of good faith bargaining.

441. However, a policy change has occurred and these provisions would now allow FWA the discretion to order a "serious breach declaration" that has the potential to trigger arbitration (under s.269). It is the antithesis of s.228(2)(a) and (b) which state:

> (2) The good faith bargaining requirement does not require:
>
> (a) a bargaining representative to make concessions during bargaining for the agreement; or
>
> (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

442. On the one hand, the Government is saying to employers that they do not have to make any concessions or sign up to an agreement if they don't want to, yet on the other, it is creating a situation whereby the union can exact continuous pressure on an employer by threats of obtaining a serious breach declaration if they don't sign up.

443. Unions will be quite capable of engineering situations whereby the employer has a bargaining related order made against them (for not bargaining in good faith) and the employer does not wish to make an agreement.

444. ACCI considers this to not only be a breach of prior commitments, these provisions are also unnecessary, as employers who have already had a bargaining related order made against them are liable to enforcement proceedings in the Federal Court. Employers would not breach a Court order lightly, and there can be terms of imprisonment for officers who breach an order.

445. Therefore, these declarations are not necessary and will be used by unions quite inappropriately as a back-door way to trigger arbitration.

446. Furthermore, and despite the Government stating this would only be in circumstances *"for the very unusual case where a party flouts the law, arbitration will be possible … The threshold to trigger arbitration will be high."*[16], the actual provisions in the Bill under s. 235 only require FWA be satisfied that:

a. Contravention of an order is "serious and sustained"; and

b. Have significantly undermined bargaining for the agreement; and

c. All attempts to reach agreement has (in FWA's view) been exhausted, including in the future.

447. The test is therefore quite capable of being satisfied on relatively subjective criteria, and there is no definition of a serious and sustained contravention of an order. It is possible that an employer that does not comply with a single order would be a target for arbitration, if that is what the union wanted.

448. The Government's vision is that the unions would not use this in other than exceptional circumstances, however, the possibility of arbitration will force many employers into acceding to union requests for agreements. This will become a very real and non-exceptional feature of the system if these provisions stand.

449. Compulsory good faith bargaining coupled with compulsory arbitration of this type adds to the risk of "go away" bargaining money being paid by employers in settlement of bargaining disputes.

[16] Deputy Prime Minster, Hon. Julia Gillard MP, Address to the Australian Labour Law Association, Melbourne, 14 November 2008.

Recommendation 2-4(8).10

Subdivision B of Div 8 of Part 2-4 be omitted and FWA not have the ability to make any declaration or order that may lead to an arbitrated outcome.

Self Harm / Self Activation

450. Section 237(3) allows FWA to determine whether a majority of employees want to bargain using "any method FWA considers appropriate".

Recommendation 2-4(8).11

Subdivision B of Div 8 of Part 2-4 be amended to clarify that a bargaining representative cannot apply for a serious breach declaration in relation to its own conduct (i.e. the considerations in s.235(2) cannot relate to conduct by the applicant organisation).

MAJORITY SUPPORT DETERMINATIONS

Mechanism for Determining Majority Support

451. Section 236 is important, in that it enables a union or employee who is the bargaining representative for himself/herself (or other employees) to trigger legal obligations on an employer that would compel them to bargain. This is due to the fact that once a majority support determination is made, FWA can then make a bargaining order under s.229.

452. As one law firm has commented:

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

453. Furthermore, it appears that even if the employer has agreed to bargain with its workforce or indeed a union, another group of employees/union will be able to apply for a majority support order, requiring the employer to bargain with an additional group of employees.

454. As paragraph 978 of the Explanatory Memorandum states:

[17] DLA Philips Fox, The Workplace – Special Report, Unwrapping the *Fair Work Bill* 2008, December 2008, p.11.

> The employer has not yet agreed to bargain, or initiated bargaining, for the agreement (paragraph 237(2)(b)). If bargaining has commenced in relation to a proposed enterprise agreement, the appropriate tool to resolve issues surrounding coverage are scope orders (or bargaining orders) and not majority support determinations. This does not prevent employees of the employer who are not covered by the proposed agreement from applying for a majority support determination in relation to an agreement that will cover them; (emphasis added)

455. Therefore the mechanism by which such a majority support determination is made needs to be robust.

456. Section 237(3) allows FWA to determine whether a majority of employees want to bargain using *"any method FWA considers appropriate"*.

457. The Explanatory Memorandum identifies that:

> 979. It is at the discretion of FWA what method it uses to work out whether a majority of the employees want to bargain (subclause 237(3)). Methods might include a secret ballot, survey, written statements or a petition. A majority support determination comes into operation on the day on which it is made (subclause 237(4)).

458. Employers are very concerned about the prospect of any informal and potentially risky assessments of majority support. Informal or at large processes raise the prospect of:

a. Union and co-worker coercion to support a majority support determination (indications of support for an agreement).

b. Employer coercion to oppose a majority support determination (indications against the making of an agreement).

459. Such concerns do not arise in relation to industrial action, as a rigorous and controlled secret ballot process protects against precisely these risks.

460. Employers object in particular to the notion of using a petition. Petitions are not signed in secret or with an inalienable discretion to not sign. We are concerned that employees may be coerced to support a petition, or not to sign a petition.

461. **ACCI would only support this provision if it was supported by a process of secret ballots, as outlined in Part 3-3, Division 8 of the Bill that applies to industrial action.**

462. **Employee freedom of association through secret ballots is wholly consistent with Australia's international obligations under relevant ILO Conventions 87 and 98 (so long as secret ballot processes do not unduly impede the exercise of that choice). Other lesser measures that increase scope for duress or coercion in the exercise of employee choice raise progressively increasing doubts about compliance with the relevant Conventions.**

463. These concerns could be addressed as follows:

Recommendation 2-4(8).12

Require secret ballot processes, akin to the industrial action provisions, for majority support determinations.

Recommendation 2-4(8).13

Amend s.237(3) to additionally require FWA to be satisfied that the method for assessing majority support protects and reflects freedom of association, the freedom of choice of employees to agree or not agree, and the confidentiality of employee choices on this matter.

SCOPE ORDERS

464. Section 238 sets arrangements for scope orders which may be sought where a party has concerns bargaining is not proceeding fairly on the basis of the scope of employees the agreement is proposed to cover.

465. These provisions are very important to employers, because they have the potential to allow a union to alter the scope of an agreement that an employer may wish to make.

466. As one law firm has commented:

> 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.[18]

467. Paragraph 986 of the Explanatory Memorandum states:

[18] DLA Philips Fox, The Workplace – Special Report, Unwrapping the *Fair Work Bill* 2008, December 2008, p.11.

> A scope order must specify the employer(s) and the employees or classes or group of employees that will be covered by the proposed enterprise agreement. For example, a scope order may require an employer to include a class of employees in bargaining for a proposed agreement or exclude a class of employees from bargaining for an agreement. Alternatively, a scope order may require an employer to bargain collectively with different classes of employees in relation to separate agreements.

468. Furthermore, once a scope order is made FWA will have a wide discretion to vary other orders or instruments or create new rights. Paragraph 986 of the Explanatory Memorandum explains this power as follows:

> Subclause 238(7) provides that when FWA makes a scope order, it may also amend existing bargaining orders and make or vary other orders, determinations or other instruments made by FWA, or take other actions as it considers appropriate. This ensures that FWA may vary a majority support determination rather than allow it to be inconsistent with a scope order. Equally, FWA may extend the application of earlier bargaining orders issued in relation to bargaining for a proposed enterprise agreement, so that they continue to apply to the new proposed enterprise agreements as detailed in the scope orders.

469. **ACCI does not support these orders and considers them prejudicial to agreement making process. In essence, the question that must be asked is why FWA should have the discretion to alter the application of a proposed agreement to cover employees that the employer does not wish to cover?**

470. It is important that FWA be satisfied not only that bringing employees into / excluding them from bargaining will ease the bargaining process, it should also be satisfied that doing so will actually make an agreement more likely (and that is a genuinely agreed agreement, not an imposed one or one that is going to rely on the making of other orders under the Act).

471. Prima facie a scope order should not be made unless it is going to make entry into a consensual agreement more likely.

Recommendation 2-4(8).14

Sections 238-239 should be omitted, and FWA should not have the capacity to make scope orders of any kind.

Recommendation 2-4(8).15

Alternatively, section 238(4)(b) be amended to further require that the making of a scope order will make it more probable that an agreement be reached.

472. Where there is an application to include employees in the scope of an agreement, this should only be capable of being brought by a union eligible to have those employees as members. A union unrelated to those employees should not control their fate or coverage, even though it may otherwise be bargaining with the employer.

Recommendation 2-4(8).16

Section 238 be amended to clarify that a union can only apply to draw employees into the scope of an agreement to the extent that it is eligible to enrol those employees as members.

BARGAINING DISPUTES

473. Section 240 is both a consent arbitration provision and another catch all provision on bargaining disputes.

474. ACCI is concerned to ensure that the agreement in s.240(4) be genuine and that there be adequate protection from coercion and duress to exercise this form of arbitration.

Recommendation 2-4(8).17

Section 240(4) be amended to require FWA to be satisfied that agreement to arbitration be genuine, and that there has been no coercion or duress on any party to seek consent arbitration under this provision.

475. In support of this, we note s.249(1)(b)(ii) which provides just such a protection in relation to single interest bargaining. It is appropriate that it also be applied to ensure consent arbitration is actually consented to.

2-4 (DIV 9) LOW PAID BARGAINING

INTRODUCTION

476. Sections 241 – 246.

477. This is a first order concern for the employers of Australia who employ persons on or around the rates of pay prescribed by the tens of thousands of regulated award classifications. The so called (and misnamed) low paid bargaining stream will translate into additional costs and the elimination of scope for future agreement making and productivity improvement across highly competitive, often marginal and highly trade exposed sectors of the Australian economy.

478. The Government's fact sheet (number 7) prior to the release of the Bill clearly states:

> Compulsory arbitration will not be a feature of the low-paid bargaining stream.

479. In a pre-election speech to the Committee for Economic Development of Australian in Adelaide in 2007, the Deputy Prime Minister stated emphatically:

> 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.[19]

480. However arbitration is precisely the final outcome of this process as included under the Bill. This is not consistent with the Government's pre-election commitments on this issue and will be extremely risky especially in the current economic climate.

481. Employers acknowledge that some industries have bargained faster and more comprehensively than others, indeed we have cited this with concern in previous minimum wage proceedings. However, we do not consider the proposed low paid bargaining authorisations and determinations to be the right way to further promote bargaining.

482. In taking a black letter law regulatory approach to this issue, the proposal goes a step (or probably more than one) too far in adding what is effectively another (third) tier to the safety net, beyond the

[19] Deputy Prime Minister, Hon. Julia Gillard MP, 1 May 2007.

legislative safety net and the award safety net, and creating which is neither an agreement nor an award.

483. Rather than stimulate future bargaining (as is apparently intended) arbitration in this area is more likely to have the effect of reducing the incentive to freely bargain and achieve mutually beneficial interests.

484. Arbitrating above award outcomes in low margin, highly competitive industries will effectively 'use up' any room for bargaining in these industries.

485. We also have serious concerns about the capacity of industries and multiple employers dragged into this stream to generate sufficient productivity and sustainable job security bargaining from bargaining. In particular, employers consider the effect of introducing this additional stream or avenue to the system will yield precisely the opposite outcomes to those sought in s.241.

This is not bargaining

486. Proposed 241(b) unwittingly identifies the key and fundamental contradiction inherent in this proposal. This isn't about bargaining at all:

a. It is all about arbitration, which is what happens either when bargaining fails (exceptional arbitration) or to displace bargaining in favour of centralisation (Australia prior to the 1980s and 1990s).

b. This will not assist employers and employees in identifying improvements in productivity and service delivery (s.241(b)) or in making an enterprise agreement that meets their needs (s.241(a)) – that can only occur through actual, ordinary, genuinely consensual bargaining.

c. An imposed outcome, applying across employers is not bargaining. It is the opposite and whether through additional labour costs or a clearly foreseeable dependence on it in some sectors (or sub-sectors) by some unions, relying on the artificial crutch of these imposed "agreements" could lock these workplaces out of actual agreement making.

d. Further to this, the effective 'space' for bargaining in the industries targeted will be removed by imposing an arbitrated outcome above the award. Taking for example the often very narrow operating margin for additional labour cost outlays, this will have been used up by additional wage obligations through the low paid determinations.

487. This will not address constraints on the capacity to bargain (241(c)), it will enshrine and perpetuate them. Why would a union undertake enterprise by enterprise bargaining when they can claim credit for arbitrated outcomes under this fast track?

488. Why would an employer negotiate with a union to actually enter a real agreement, when their margins remain too low to secure any actual operational reward for doing so, and the orders under Div 9 or Part 2-4 are nicely ensuring their competitors have the same labour cost structures they do?

489. Ultimately, this appears somewhat of a lazy route to make up for isolated areas of limited bargaining, which are long standing and we believe quite complex in their causes.

Unions haven't made out a case

490. The premise behind Division 9 could only ever stand if there had been a concerted and wide ranging attempt to secure bargaining in these industries, a concerted or negative approach from employers and some atypical structural failure such that a specialist approach fundamentally at odds the key tenets of the system should be imposed.

491. This is just not the case. Bargaining may have been comparatively slower in some industries, but there has also been an insufficient effort to promote bargaining in these industries – not only by unions, but also by the government. There has not been an actual bargaining failure in the industries which are going to be most exposed to these orders, and there is no proof that other efforts will not unlock bargaining without taking the extraordinary steps envisaged in Dev 9 of Part 2-4.

492. ACCI and its members consider there is scope for unions and employers, with appropriate and effective support from the government, to try harder to spread bargaining in these industries

prior to a heavy handed over-ride. **Employers agree there is a challenge in unlocking bargaining in the non-bargaining industries, however we consider there are better ways to address this, which will lead to genuine and sustainable bargaining without recourse to imposed outcomes.**

This is going back 80 years and ignoring history

493. Properly viewed, the operation of Div 9 of Part 2-4 of the Act would also be at odds with over 80 years of Australia's arbitral history. Australia has for decades maintained a system of wage fixation principles which have ensured that the wages and conditions safety net is varied consistently. These principles have tightly controlled and 'exceptionalised' any outcomes which seek to exceed the generally prevailing level of wages and wage increases[20].

494. This is of course an exercise of arbitral discipline. It has ensured that the system if regulated and arbitrated wages 'holds', and that there is not an ever escalating (and inherently inflationary) ratcheting up of minimum rates of pay and conditions based on spiralling comparative arbitrated claims.

495. In the age of bargaining and the safety net, this principle has been retained. It now ensues not that all actual rates remain equal or restrained, but that the underpinning safety net remains consistent, and that the safety remains stable and preserves scope to actually make agreements. Above and beyond this, wage increases are negotiated and relate to productivity.

496. This fundamental tenet of the system stands to be reversed by the proposed low paid bargaining stream.

497. It would effectively create a third, higher level of "safety net" which both displaces the role of the general award and NES safety net, and simultaneously robs an industry of scope to actually enterprise bargain or operate on a lawful basis, without being compelled to operate under regulated over award pay rates.

[20] And the same point would apply to non-wage conditions.

498. In doing so, it would reverse one of the fundamental principles which has underpinned the operation of the Australian system for decades – and which has proven its ongoing relevance even as the system has changed around it quite fundamentally towards bargaining.

Is there actually a problem with staying on the safety net?

It also should be acknowledged that some employers are quite satisfied with employing people under the award only on an ongoing basis, and that their employees are satisfied with award employment (which might be local, flexible and convenient).

Notwithstanding the preceding and the acknowledgement that there is scope to further extend bargaining, in considering the final shape and operation of these provisions, legislators need to consider why some employers couldn't viability continue to have primarily award based employment (recalling that we are about to get an extended, two part, safety net).

Allied to this is the fundamental question of whether some industries don't bargain as extensively as others simply because they can't, or given their margins and operating conditions, there is no scope to absorb additional labour costs. If these new rules are included in the system, the operation of the low paid stream needs to take into account why industries haven't bargained to date and the ongoing relevance of these constraints. Redress under these sections should not have the effect of endangering business viability or capacity to employ.

There is a better way

499. Employers agree that some industries bargain more than others, and that some have entered into bargaining *en masse* quicker and more comprehensively than others. The judgement to be made at this point lies between:

a. Properly supporting lesser bargaining industries towards genuinely bargained outcomes; or in contrast

b. Imposing outcomes in a way which is both not bargaining and actually removes virtually all scope for genuine bargaining in the future.

500. Employers consider there is clearly a better way to extend and further promote bargaining into non-bargaining industries, without recourse to the quite extreme step of abandoning any possibility of bargaining in favour of arbitrated outcomes.

501. This lies in government support rather than imposing outcomes in this area. Governments of both stripes have never sufficiently worked with (for example) the LHMU and hospitality industry employers to encourage, promote and facilitate agreement making in the hospitality industry.

502. No publications or model agreements have been disseminated, no small business oriented grants have been provided, no funded officers have been placed with unions and employer associations with the express purpose of kick starting bargaining in these areas. These are simple ideas, but an active process of industry targeted, small business oriented facilitation and support should lead to genuine cultural change in this area, and capacity building in relation to bargaining and negotiation.

503. There is a clear model for this, particularly in the promotional and case study work of the former DIR in the early 1990s under the Keating/Brereton regime. This seems to have been abandoned. It should be resuscitated and revived at this point rather than (as the Bill would have it) effectively throwing up the system's hands and resorting to imposing non-bargained (above the two level safety net) arbitrated outcomes.

504. The premise behind the proposal in Division 9 of Part 2-4 does not stand – the non-bargaining, lower paying industries haven't been given a fair go, with proper support, to make the shift into bargaining. They deserve this prior to being cast into the non-bargaining, even anti-bargaining model of low paid arbitration.

505. There is also an alternative within the broad architecture of what is in the Bill, and that is directing FWA to provide active and expert assistance to such employers and industries to secure precisely the outcomes in s.260 through genuinely bargained outcomes. Div 9 of Part 2-4 could be redrafted on such a basis (and the low paid determinations omitted).

Recommendation 2-4(9).1

The Low Paid Bargaining Division and Low Paid Workplace Determinations not be proceeded with in favour of (a) greater government assistance to work with industry parties to encourage greater bargaining in lower bargaining industries, or (b) at most a direction to and empowerment of FWA to provide active assistance and intervention (short of an arbitrated outcome) to assist, facilitate and promote genuine bargaining in lower paying and lower bargaining industries.

506. Alternatively, if the target of these efforts is the sectors identified in the Explanatory Memorandum (e.g. community services, cleaning and childcare) then provide an avenue purely for these sectors.

Recommendation 2-4(9).2

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 specifically prescribed workplaces (or if the recommendations that follow are not accepted, industries) gazetted by the Minister.

THIS IS PATTERN BARGAINING

507. A great deal has been said, and will continue to be said, in regard to the extent that the Fair Work Act will allow, or be complicit in allowing, pattern bargaining.

508. Whilst the Government is adamant that its Bill outlaws pattern bargaining, the reality is that this is only the case for taking protected industrial action. This low-paid arbitration stream is by definition pattern bargaining across an industry.[21]

509. Such pattern bargaining should only be authorised in very narrow circumstances if this is to indeed occur. Given that single interest employers who wish to bargain together require the Ministerial authorisation, the same threshold should apply in this instance, whereby the Minister should authorise such cases before FWA has any jurisdiction under Division 9, Part 2-4 or Division 2, Part 2-5.

[21] As reported on Wednesday 3 December 2008 on ABC online "Gillard guarantees ban on pattern bargaining". *But Ms Gillard says the laws do not allow for it. 'There are sections of the bill that specifically and directly outlaw pattern bargaining,' she told Sabra Lane on ABC's AM program. 'It is not part of Labor's system.'* http://www.abc.net.au/news/stories/2008/12/03/2436256.htm

Recommendation 2-4(9).3

If the low-paid authorisations stream is to remain, unions should obtain a Ministerial authorisation, akin to the Single Interest Authorisations under Division 10, Part 2-4 before FWA has any jurisdiction.

Furthermore, a separate Ministerial authorisation should be obtained if FWA is to arbitrate in any case.

WHO ARE THE LOW PAID?

510. Another fundamental question begged by this proposal is who the low paid are and precisely which cohorts of employees should have access to any special treatment or remediation of award outcomes.

511. A guide to the different thinking on this question is provided by the safety net review (wages) cases between 1997 and 2005. In these cases:

a. Employers sought to confine or target the application of wage increases to the comparatively lower paid, generally treating as a benchmark for those purposes, the tradespersons rate under the former metal industry award.

b. In contrast, unions effectively argued that all employees in receipt of award rates and not bargaining were low paid. In arguing that wage increases had to apply to all award employees, unions were effectively arguing that highly skilled, professional and managerial employees, often earning well in excess of average weekly earnings, were low paid.

512. If this thinking does not change, and if this avenue offers scope for widespread opportunism from unions, then there is a very serious risk of this not being restricted to persons the community would properly consider low paid. There is a very real risk of (a) unions using this avenue in relation to higher paid, skilled employees who are not low paid (b) unions claiming <u>all</u> employees in receipt of award rates without an agreement are low paid.

513. The operation of Div 9 or Part 2-4, whether amended or operating as introduced, may be assisted by some additional guidance on who will and will not constitute the low paid – alternatively if the preceding recommendation to only act on ministerial directions were accepted this could be refined and properly operationalised on a case by case basis.

514. *The remainder of this subsection addresses the proposed operation of Div 9 of Part 2-4 in detail, proceeding on the basis that (a) this idea shouldn't be given effect to, but (b) that if it is, the relevant parts of the Bill can be improved upon significantly.*

WORKPLACE SPECIFIC RATHER THAN MULTI-WORKPLACE

Failure to bargain

515. ACCI understands the premise of Div 9 of Part 2-4 to be to assist those with a proven failure to bargain. However to properly understand the facts behind this, and the actual bargaining experience, this threshold consideration needs to be undertaken in relation to each specific workplace or employer, not assumed to apply across whole industries or industry cohorts.

516. The circumstances and experiences of employers and workplaces differ, as do their previous attempts to bargain and dealings with trade unions, even within industries that may be classified together for statistical or other purposes.

Recommendation 2-4(9).4

The threshold requirement for arbitration in this area be a proper investigation of each workplace against criteria requiring (for example):

(a) an incapacity to bargain,

(b) a proven failure to bargain or secure an agreement having attempted to do so with that employer in that workplace,

(c) FWA to be satisfied that there is no prospect of genuine or consensual bargaining in the workplace concerned, including through the active assistance of FWA.

(d) A prima facie or preliminary assessment that the operational and financial viability of the enterprise is sufficient to be able to accommodate some increase in operating and labour costs.

Only if each of these requirements are met could an application proceed to arbitration, which should be separate for each enterprise.

Arbitration

517. If these orders were ever to begin to achieve the objects in s.241, or properly take account of the factors in s.243(2) and (3), the assessment of terms and conditions also needs to be workplace specific rather than multi employer or industry wide.

518. Only by a detailed focus on the needs and circumstances of a particular workplace and its employees could FWA ever hope to secure the type of balanced outcomes purportedly sought. A properly detailed focus on the enterprises concerned, enterprise by enterprise, would allow an essential focus on the productivity and capacity considerations involved, as well as not assuming a homogeneity of employee priorities. A focus on the specific enterprise also offers the only hope of properly assessing business finance and sustainability considerations.

519. One of the lessons of enterprise bargaining is that it is the focus on the enterprise which yields productivity and operating gains, and which allows agreements to be win-win and advance wages and job security.

520. Whilst arbitration will always be an unacceptable alternative to genuine bargaining, and inherently unable to secure the gains of actual bargaining, if these arbitrated outcomes are to even begin to be positive for productivity and service delivery[22] they need to be sufficiently focused on each particular enterprise. Homogeneity across an industry or region cannot be assumed, and there are real dangers in allowing or relying on such an assumption.

521. Only by a detailed, properly evidenced examination of a specific enterprise could FWA ever hope to minimise harm in imposing outcomes, let alone reaching an understanding of the complex operational and productivity matters supposedly required for the making of such orders.

522. Returning to the point made earlier, if this is imposed on an industry wide basis, it will be pattern bargaining in another guise, and a pattern or common measure which rewards unions with a consistent outcome for pursuing common claims and pursuing not genuine workplace agreement, but industry or sub-industry wide outcomes and strategies.

Recommendation 2-4(9).5

If there are to be Low Paid Authorisations and Low Paid Workplace Determinations they should only apply to single enterprises. There should be a specific prohibition on authorisations or arbitrations for multiple employers and provisions such as s.242(2)(a) should be amended to this effect.

[22] The goal identified in s.243(3)(a).

Where arbitration occurs this should require a specific focus on (and a consideration of evidence regarding) each specific enterprise. Not only should applications be made on a specific workplace basis, but arbitration should also be undertaken on a single enterprise basis.

PRE-REQUESITES FOR AUTHORISATIONS

523. Section 242 seeks to set out who may apply for such orders.

524. A union should need members in each of the workplaces to be covered by any order or authorisation, or if the preceding is accepted, from the single enterprise concerned. It is not appropriate that this proceed where a union does not actually have membership or support for such a radical change to the way a workplace operates.

Recommendation 2-4(9).6

An employee organisation only be able to apply for an authorisation under this part if it is both eligible to represent employees to be covered, and where it has such employees as members (section 242).

Recommendation 2-4(9).7

FWA be required to satisfy itself that a majority or substantial plurality of the employees in the enterprise to be covered by an order agree to the pursuit of such an order.

525. Unions should have at least tried to bargain before the system throws up its hands and arbitrates. An authorisation should only be capable of being brought against a single employer where there has been a previous attempt to bargain (which has failed and is not simply part complete).

Recommendation 2-4(9).8

Section 243 be amended to provide that an authorisation may only be sought where there has been a previous, unsuccessful attempt to bargain with the employer or some preceding bargaining failure.

526. An authorisation should only be capable of being brought against a single employer where FWA is satisfied that an agreement could not be reached, and that its assistance, including the calling together of parties in conference or other active support to bargaining, will not result in a

negotiated agreement. Put another way, there should be a presumption in s.243 that FWA try to lend its assistance or further assistance towards a genuinely negotiated agreement prior to there being any access to an imposed order.

Recommendation 2-4(9).9

Section 243 be amended to provide that an authorisation may only be made where FWA does not believe its assistance or further discussions would lead to the making of a negotiated agreement.

527. Thus, s.246 should not be a merely consequent capacity for FWA (as drafted) , but should be a first order obligation or pre-requisite on FWA prior to the making of any orders or arbitration in relation to the workplace concerned. FWA should be required to render assistance, convene conferences etc, prior to imposing arbitration.

528. Section 243(1)(b) requires that FWA take into account the public interest. This needs to be unpacked and properly targeted. The public interest is one consideration, however there needs to be a proper focus on the enterprise(s) concerned and the employees concerned. This is not so much an issue for the public at large; arbitration in this context will be of sharp and direct relevance to the people concerned and their interests must be paramount.

Recommendation 2-4(9).10

Section 243(1) be amended to require FWA to take into account when considering whether to make a low paid authorisation or determination:

(a) the likely impact of the making such an order on of the operational and financial viability of the workplace.

(b) the likely impact of making such an order on employees in the workplace concerned, and on the security of their ongoing employment.

(c) the public interest.

529. Employers should also have the legal right to withdraw from the multi-employer group in particular circumstances, including where (a) the employer is or seeks to bargain; or (b) other grounds by leave as considered appropriate by FWA.

Recommendation 2-4(9).11

Employers should legally entitled to withdraw from the multi-employer group if they (a) seek to bargain for an enterprise agreement or (b) by leave of FWA.

DISCRETIONARY NOT MANDATORY

530. Section 243(1) requires that FWA must make a order in particular circumstances. This is too directive, and FWA needs greater discretion to make or not make such orders, particularly where its judgment may be that other efforts could secure a genuinely bargained or more sustainable outcomes.

531. The overall construction of s.243 is also a little odd, as it reads as non-discretionary in (1) and then discretionary in (2) – this needs to be clarified.

Recommendation 2-4(9).12

Re-express s.243 to make clear that the making of orders and determinations are discretionary rather than mandatory.

CONSIDERATIONS - SECTION.243

532. ACCI has above recommended that the authorisations only be available against a single employer or workplace in pursuit of orders to operate for single rather than multiple employers. Section 243 should be amended on that basis, and the complexity of it should change in the context of a more appropriate and warranted approach to these arbitrations.

533. Generally this section may need to be fundamentally recast for the very different approach to the low paid / lesser bargaining sector which should be adapted.

s.243(2) Historical and current matters

534. General comment: The matters in s.243(2) need to be reviewed generally in light of the ACCI recommendation that these orders and authorisations be applied experientially to single employers rather than as multi employer instruments (with only broad brush, superficial evidence of capacity to bargain and the impact of any orders).

535. s.243(2)(a): What does "assist" mean in this context? This is very unclear. Is it a reference to extending the outcomes of bargaining to those who don't bargain? Is it about providing the financial outcomes of bargaining without entering an ordinary agreement under the Act? This needs to be clearer.

536. Do you assist lower paid employees if you raise their wages but thereby make their jobs less secure? This is completely unclear.

537. If this is considered, then both financial and other benefits also need to be taken into account. If for example an enterprise does pay award rates, in considering wage outcomes, FWA should take into account flexibility and accommodations of work and family etc which provide non-financial benefits to employees (and often some costs to employers).

538. Looking at the proposed wording, how have you had "difficulty" in bargaining unless you have actually tried in relation to a particular workplace? This reinforces the need to have as a prerequisite some previous efforts towards a genuinely agreed agreement, such as for example a union having attempted to bargain with an employer prior to pursuing such an order against them.

539. s.243(2)(b): This needs to be a consideration of the history of bargaining experience within the single enterprise to be covered by the order, and should include consideration of any previous claims by the trade union applicant for an agreement with the employer concerned. A mere recitation of the history of bargaining across an industry, or of the ABS Employee, Earnings and Hours survey data on agreement making across industries very broadly defined, will tell FWA nothing about a particular enterprise and its capacities and experiences.

540. Without being trite – all people have a right to be more than their history. History will not tell the arbitrator anything about the capacity for orders in specific enterprises, nor of the consequences for specific enterprises.

Recommendation 2-4(9).13

Re-express s.243(2)(b) to require an examination of the history of bargaining and the capacity to bargain in the workplace to be covered by a proposed order or authorisation, not of the industry concerned.

541. s.243(2)(c): The notion of "bargaining strength" is a fairly academic and amorphous one, and it is far from clear it will actually assist the consideration at hand. Again, this has to be enterprise specific rather than at large across an entire industry. A concomitant consideration also needs to be the relative strength, representation and expertise of a union against that of an employer paying award rates.

Recommendation 2-4(9).14

Where a union is seeking, or seeking to become party to, an instrument under this Part, its bargaining strength also be taken into account.

542. s.243(2)(d): This is a potentially relevant consideration, however the comparison needs to be to comparable workplaces in the industry concerned, and there needs to be an avoidance of looking at outcomes inflated by (for example) larger enterprises or particular locations. By way of example, the legitimate comparator for a small shop in regional South Australia is not going to be the SDA/Myer agreement in Sydney.

543. The reference to community standards is also confusing. The only real community standards ACCI can see in the proposed system are the NES and the operation of the Fair Work Act – both of which will apply regardless of this part of the Act.

544. If this is an entrée or invitation to comparativism, significant care needs to be exercised that the comparisons are valid ones and applicable to the work and the enterprise concerned.

545. s.243(2)(e): This is relevant, but not as presently framed. This should be reframed as a qualifier to s.243(2)(d), and ensure that any comparators for assessing current terms and conditions are the right ones. Again, ACCI calls on the Parliament to ensure, if this concept is to become part of the system, that it operate on an enterprise specific rather than multi-employer basis.

s.243(3) Likely success of bargaining

546. S.243(3)(a): If this is not about identifying productivity and service delivery improvements, what is it about delivering?. If it not going to deliver improved productivity and service delivery then FWA shouldn't make the order. Bargaining is not exploratory or a test, it is

substantive and it either delivers or not. This needs to be revised to require actual productivity and service outcomes.

547. Section 243(3)(b): There is a great deal of confusion in the operation of the low paid authorisations and orders, and in the operation of Div 9 or Part 2-4 generally. Is this bargaining or is this arbitration?

548. Consistent with the points made elsewhere in this submission, employers need a Single Bargaining Unit, and there is a very real threat in a number of areas of multiple unions using the employer and the workplace as an arena to fight out coverage, and fight each other as they fight the employer.

549. This is therefore a relevant consideration, albeit one which may not so much provide a solution as point to an intractable problem for the Act as a whole and the notion of 'bargaining representatives' as included in the Act at various points.

Recommendation 2-4(9).15

(Building on), any orders only be able to be made where there will be bargaining with a single union / a single bargaining unit.

If this is not accepted, employers be able to apply for a single bargaining unit, or to exclude minority bargaining representatives from bargaining where their participation will not assist (or detract from) the capacity to secure an agreement

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550. Section 243(3)(e): needs to be made more absolute and a threshold proposition for this entire new area of regulation. If trade unions are not willing to bargain in good faith towards an enterprise, in a specific enterprise, or are unwilling to depart from their pattern or model in negotiations, then they should not be granted the additional privilege or reward of arbitration.

Recommendation 2-4(9).16

Section 243(3)(e) should be elevated to become a pre-requisite for any low paid authorisations or orders. A union should need to make an enforceable undertaking to substantively negotiate and be willing to depart from its initial claims prior to there being any orders made against employers (whether process orders or arbitration).

s.243(4) Specifications

551. Again, this needs to relate to a single employer not a group of employers. Any order should be made against a specified employer and specified employees, having properly considered specific circumstances.

s.244 Variations

552. If the orders are single-employer rather than multi-employer in character, then these provisions appear unnecessary. There may however need to scope to vary orders if they were substantive ones to genuinely assist bargaining for a specific workplace.

553. If this is not accepted, the capacities for unions to act in this area should be conditional upon them having a member, not mere eligibility to have a member. Section 244(3)(c) needs to be amended in this regard.

DELETION OF ORDERS

554. Section 245 should be amended on the basis that such orders will apply only to single employers rather than multiple employers (as presently drafted). Thus, this should not be about the variation of orders, but rather the termination or cancellation of orders where an agreement (properly made not imposed) comes into operation.

THE OPERATION OF THE AUTHORISATIONS

555. There is a fundamental confusion in all this. Some sections of this read as though the outcome will be a genuinely negotiated agreement, but others lead to the imposition of arbitration.

556. ACCI's view of this is crystal clear. Any efforts to extend bargaining or bring non-bargaining workplaces into agreement making must start with assistance and facilitation, and any role for arbitration should only come into play where FWA has itself actively tried and failed to facilitate and encourage negotiation and consensual agreement.

557. Thus, Part 2-4 needs to be strengthened to require active assistance from FWA and a genuine failure of bargaining prior to any orders or arbitration coming into play.

558. There is also perhaps greater scope for escalation in all this. Perhaps there should be a three stage process:

a. Authorisations and an initial level of FWA assistance and encouragement for non-bargaining enterprises to bargain.

b. A final pre-arbitration step of a compulsory conference prior to arbitration.

c. Arbitration through determinations.

LOW PAID WORKPLACE DETERMINATIONS

559. Sections 260-265 are the teeth of this proposition, and provide for the arbitration of terms and conditions above the award safety net for workplaces unable to bargain.

560. As set out in the preceding, it appears fundamental that if this is to be proceeded with, that it be properly focussed on single-employers rather than operating on a multi-employer basis as included in the Bill as introduced. This will require consequential amendment of s.260-265.

561. This said, there are various comments and responses which can be made to the low paid workplace determination provisions as drafted.

Consent Determinations

562. In regard to the applications (s.260(4) and (5)) a union should only be capable of triggering this redress if they have members in the workplace concerned, and a level of support from the employees in the workplace.

563. The Australian system has recognised for decades that consent at odds with the prevailing level of the safety net can be very dangerous, and can invite wages breakouts and a fundamental attack on the legitimacy and sustainability of the safety net. Whilst of course a bargaining based system relies on comparatively open ended consent, the safety net still relies for its part on consistency and not being varied too rapidly or in place of genuinely bargained outcomes.

564. In addition to the matters in s.261, FWA should only be able to make these orders where:

a. FWA's active assistance and intervention has not yielded an agreement or reasonable prospect of an agreement being reached.

b. It is in the public interest that there be a workplace determination.

565. Consent must be also genuine and there must be protections against coercion and duress to ensure this occurs. The fear with consent arbitration is always that stronger parties will be able to force the so called consent on weaker, and this needs to guarded against in this area.

Recommendation 2-5.1

Section 261 be amended to additionally require FWA to ensure consent is genuine and that there has been no coercion or duress for the making of a Consent Low Paid Workplace Determination. Existing coercion and duress provisions of the Workplace Relations Act 1996 could be adapted for this purpose.

Special Low-Paid Workplace Determinations

566. Again this needs to be recast on a single employer rather than multi-employer basis. Section 264(4), for example, needs to refer solely to coverage of a single employer.

567. It is not enough that the formalities have been met and there is no reasonable prospect of agreement, there needs to be some consideration of the conduct of parties. On its face, s.262(2) could be satisfied by an intransigent union not negotiating in good faith at any point.

568. Consideration should also be given to time limiting the operation of special low paid workplace determinations. If these are remedial instruments designed to secure actual bargaining, they should have a period to do their work, after which time the determination should end. If necessary there could be a savings clause for wages of existing employees, however in principle these instruments need some additional spur to encourage actual bargaining in the future.

2-4 (DIV 10) SINGLE INTEREST AUTHORISATIONS

Ministerial Declarations

569. On the issue of Ministerial declarations authorising multi-employer bargaining, what appears to be missing from the considerations of the Minister, under s.247 are the views of the specific employers, where the application may be made by one group of employers and would later be applied beyond the applicant group (if that is how this will operate).

570. For example if a franchising company wishes to use this route and has the support of some of its franchisees, will this be able to applied to all franchisees – some of which may wish to bargain separately?

Recommendation 2-4(10).1

Section 247 clarify that a Ministerial declaration only apply to those employers who have applied for it under s.247(1), and not more widely.

There should be additional scope for future employers to sign up to the outcomes of this process where they wish to participate, free of coercion.

Recommendation 2-4(10).2

Alternatively, if s.247 can apply beyond the applicant employers to a wider class or cohort of employers, s.247(4) be amended to require the Minister to be satisfied that the employers to be covered by the declaration agree to that course, and that orders only be made having provided all affected employers an opportunity to be heard.

Recommendation 2-4(10).3

A new enterprise or new franchisee not be bound by a declaration previously sought or agreed to by another group of employers.

Authorisations

571. Again, is it sufficiently clear that each of the employers to be covered by the single interest bargaining will need to support that course, or might a minority jointly apply for a wider coverage of authorisation? ACCI would support the authorisations strictly applying only to employers that support such a course.

572. Clarity is also sought on the following; taking into account that some employer representatives are represented by unregistered industrial associations as defined in the Act.

Recommendation 2-4(10).4

Person for the purposes of s.248(2)(c) this should read person, organisation or industrial association.

573. There are various references in Div 10 of Part 2-4 to an authorisation needing to specify the employees to be covered by the agreement. This would be very arduous if it required names and addresses of employees who are to be covered by collective instruments (and would quickly go out of date). A more sensible approach would be a general description of the scope of coverage of the agreement in regard to employees.

Recommendation 2-4(10).5

Either by amendment or further explanation, it be clarified that an employer not need to provide the details of each individual employee to be covered by a single interest authorisation.

Extension

574. The extensions envisaged in s.252 should not be possible unless an employer affected has been notified and had an opportunity to be heard.

Recommendation 2-4(10).6

Section 252(2) be amended to require FWA to take into account the views of the employers who are bound by the authorisation proposed to be extended.

2-5 WORKPLACE DETERMINATIONS

LOW PAID DETERMINATIONS

575. This is addressed in the preceding section on Low Paid Bargaining.

INDUSTRIAL ACTION RELATED DETERMINATIONS

576. s.266 – 268. We have addressed the general operation of when industrial action may or must be terminated in relation to Part 3-3.

577. Going to the need for discretion, there should be scope for FWA to extend the post industrial action negotiating period (s.266(3) and (4)) by a further 21 days on the application of one party (or on its own motion) where it concludes this may offer a prospect of settling the matters concerned by agreement.

Recommendation 2-5(4).1

Section 266(4) be retained requiring an extension of the post declaration negotiating period where jointly agreed. However, there be an additional provision allowing the 21 day extension on the application of any single party or on FWA's own motion where FWA considers there is a prospect of settlement of the matters at issue.

578. We also set out below our concern with the practicality of the notion of 'agreed terms' for part completed negotiations in anything other than consent determinations/ arbitrations.

BARGAINING RELATED DETERMINATIONS

Not Necessary

579. ACCI does not accept that breaching good faith bargaining orders is evidence of intractability or of bargaining of such damaging consequence that arbitration should be undertaken.

580. Further, employers do not accept the blurring of a compliance issue (non-compliance with orders) and the arbitration of ongoing substantive rights. The two are fundamentally different and there is no reason to conclude that in the absence of finalised bargaining (for example) that the ordinary two part safety net, or previous agreement, could not validly continue to apply.

581. Employers are very concerned that this is one of the strategic fault points in the proposed system which unions will seek to exploit for the reward of arbitration. Unions may for example seek to load up so many complex GFB orders and obligations that the employer is set up to fail and it will become probable that the union can secure the arbitrated or bargained outcome it seeks.

582. Employers are concerned that this will encourage bargaining gamesmanship not towards a genuine agreement, but for the pursuit of arbitration or that of immanent arbitration.

Recommendation 2-5(4).2

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

583. Failing this:

Recommendation 2-5(4).3

The union must obtain a Ministerial authorisation allowing arbitration, akin to the Single Interest Employers authorisation.

There be an additional requirement in s.269(1) requiring that FWA be satisfied that there is no realistic prospect of an agreement being reached in further negotiations, including through the use of orders and interventions under the Act.

When Determinations May Be Made

584. We have a particular concern with s.269(1)(c) which requires that all matters at issue be settled. This appears at odds with how bargaining actually proceeds in practice, with contested negotiations often ending with no party getting everything it wanted. Quite often agreements are settled without an express or final settlement of the full range of matters claimed or canvassed in discussions. When key wages on productivity issues are finalised other, non-core, issues often drop off.

585. It appears quite possible under s.269 that (a) the circumstances in 1(a) could be met, (b) 21 days could have elapsed, and (c) no party got everything it wanted – but there is however an agreement which is negotiated or imminent.

586. There is a risk this could be derailed or made less likely if a party could hold out for arbitration. Therefore if this model is proceeded with we seek the following changes:

Recommendation 2-5(4).4

Proposed s.269(c) be deleted and replaced with the following tests:

A bargaining related workplace determination may not be made unless:

No actual or proposed agreement has been reached between the parties, whether in full or partial settlement of the matters at issue during bargaining for the agreement.

There is no reasonable prospect of an agreement being reached, nor of finalisation of the matters at issue at the enterprise level.

It is in the public interest to make the determination.

FWA is satisfied that unless the bargaining related workplace determination is made, there would be a danger to the life, the personal safety or health, or the welfare, of the population or of part of it; or significant damage to the Australian economy or an important part of it. (i.e. the tests from s.424).

Discretion

587. These provisions are too directive and inflexible. There should be discretion for FWA to not make an order based on its assessment of the situation at hand. These situations are not comparable to intractable industrial action under s.424. FWA will have substantial industrial relations experience, and it should be able to exercise this experience and judgement to 'let matters run' or 'play on the line' a little further if it considers this would ultimately aid genuinely agreed settlement.

Recommendation 2-5(4).5

The references to "must" in s.269 should be replaced and provide FWA with more discretion.

Extensions

588. Again going to the need for discretion, there should be scope for FWA to extend the post declaration negotiating period (s.269(2) and (3)) by a further 21 days on the application of one party (or on its own motion) where it considers this may offer a prospect of settling the matter by agreement.

Recommendation 2-5(4).6

Section 269(3) be retained requiring an extension of the post declaration negotiating period where jointly agreed. However, there be an additional provision allowing the 21 day extension on the application of any single party or on FWA's own motion where FWA considers there is a prospect of settlement of the matters at issue.

Recommendation 2-5(4).7

Section 269(3)(b) be deleted – where parties agree to not have a matter arbitrated, this should be sufficient without a further paternalistic consideration of whether this will actually lead to an agreement. Leave it to the parties to work out at this point.

If this is not accepted, again the reference to all the matters being settled is inaccurate, as all matters in contest during bargaining are rarely settled in any negotiations. The test should be that there has not been a settlement of claims generally or the reasonable prospect of one.

TERMS OF WORKPLACE DETERMINATIONS

Fundamental Problem

589. Division 5 of Part 2-5. Section 270(3) requires that the determination must include the terms that FWA considers deal with the matters that were still at issue at the end of the post-declaration negotiating period.

590. This rests on a false assumption – namely that a part completed negotiation and set of compromises can be maintained or assumed to be maintained absent of fully agreed settlement of the matter. An employer or union may only have dealt with a number of claims on the basis that they were working towards a whole package. It would be unfair to either or both for FWA to take 'without prejudice' discussions during part completed negotiations and to use those to generate an arbitrated settlement.

591. It is quite legitimate in bargaining for either party to have a sticking point and non-negotiable items. It would be illegitimate to have bargaining proceed on such a basis, resolving all other matters first, to then have one party seek arbitration of a quarantined item which would have been an outright deal breaker for the other party.

592. This is a problem for s.274(1). How will FWA know that a term had been agreed between the parties in an intractable and contested bargaining situation. Often bargaining proceeds "speculatively' or

"pragmatically" putting to one side the really hard matters and proceeding to deal with the easier issues on a without prejudice basis. In other words, parties often start on the basis of "lets look at what we could agree on".

593. This provision threatens to prejudice what are to date without prejudice negotiations. An employer does not agree to an agreement until the agreement is final, even if they have fleshed out a framework of what might be possible.

594. It also threatens to generate very complex litigation on what has and has not been agreed in discussions, and to make agreement negotiations legally prejudicial rather than proceeding on a without prejudice basis. We are far from certain that having more lawyers present in more agreement negotiations at an earlier stage will actually do that much for bargaining or productivity improvement. The taking of rigorous, legally discoverable minutes is also far from a high trust measure benefitting the culture of the workplace.

595. The premise of s.274 will only stand where parties agree to partial settlement of agreed matters and to outstanding issues remaining quarantined for separate resolution. This then begs the question of why s.240(4) is not sufficient in this regard.

596. This further reinforces ACCI's overall view that Bargaining Related Workplace Determinations need not be introduced into the system.

Factors for Deciding Terms

597. We have compared proposed s.275 to existing s.504(5) of the *Workplace Relations Act 1996*. There is a glaring omission – which is existing s.504(5)(g) "the employer's capacity to pay". This must be inadvertent and we cannot believe arbitration could proceed without this express consideration.

Recommendation 2-5(5).1

Existing s.504(5)(g) be added to the requirements for all workplace determinations in s.275.

OPERATION

598. It is welcome that at a number of points in Division 6 there is clarity on when a workplace determination will and will not apply. However, this may be further clarified by making clear that a replacement determination (s.278(2)) will always oust an earlier determination entirely, even if it does not deal with every matter in the earlier determination.

Recommendation 2-5(6).1

Section 278(2) clarify that any later determination always ousts an earlier determination in its entirety, even if it does not deal with all matters in the earlier determination.

599. There should be an express prohibition on an award or workplace determination ever incorporating or relying on the terms of an earlier expired, or dead determination. Consistent with s.276(3) and s.278(1) these should be one off instruments only.

Recommendation 2-5(6).2

Division 6 of Part 2-5 incorporate an express prohibition on incorporating previous workplace determinations in whole or part, or seeking to continue them either though determinations or agreements. Where determined matters become agreed matters, these should be drafted as the terms of a stand alone agreement rather than perpetuating the determination decision.

2-6 MINIMUM WAGES

600. Part 2-6, clauses 282 - 299.

OBJECTIVE

601. Why is the minimum wages objective (s.284) any different from the modern awards objective (s.134)?

602. In addition to the earlier points made regarding s.134, s.284 omits key concepts which are relevant to the consideration of minimum wage setting. These include:

a. Omitting the vital consideration of setting minimum wages based on a consideration of encouraging bargaining (see proposed s.134(b) – which is not reflected in s.286).

b. Omitting consideration of "*the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden*" (see proposed s.134(f) – which is not reflected in s.286)

603. One of the effects of the proposed terms appears to be that different considerations inform the setting of minimum wages to their subsequent variation under the award provisions. Section 284(2) may address this, but it will create arbitral confusion – what about considerations which are included in s.134, but not in s.284, are they relevant? This should be clarified.

604. In addition, the following should be included in s.284 objectives:

a. Recognition that minimum wage increases have a significant disproportionate impact upon smaller businesses (particularly low margin businesses). FWA should consider the impact of minimum wage increases on the competitiveness and financial viability of businesses generally, particularly smaller and medium sized enterprises.

b. Require FWA to take into account the capacity of the unemployed and low paid to obtain and remain in employment.

c. Require FWA to take into account the tax and transfer systems.

d. Add to the end of s.284(1)(e) "… that ensures those employees are competitive in the labour market".

Recommendation 2-6.1

Make the minimum wages and modern awards objectives identical (or the same provision) and adopt the recommended changes in this submission, including specific reference to small and medium sized businesses.

OUTCOMES

605. Minimum wage setting occurs in good times and bad. There may be times during the life of this Act when serious consideration will need to be given to a delayed increase or no increase outcome, and the legislation needs to at least allow this to occur/be considered.

606. s.285(2)(b) appears to provide scope for a review to not yield an increase in award rates, and for a delayed decision or second review as economic circumstances become clearer. s.285(3) is different however and requires the issuing of a national minimum wage order. This may rob FWA of an important discretion in times of economic crisis (that of a delay in finalising minimum wages, or a second review after some months have elapsed).

607. Consideration of very bad economic circumstances also requires reconsideration of s.286(2). It is welcome that exceptional circumstances can occur, but this may not be enterprise specific. Exceptional problems may plague the whole economy.

Recommendation 2-6.2

Sections 285 and 286 be amended to ensure FWA has the full rage of options available to it to meet challenging economic circumstances, including:

Reserving its decision, and not issuing an order pending further developments, more information or a prudent delay.

Delaying a wage review for some period pending economic developments becoming clearer.

Delaying a minimum wage increase as a matter of industrial merit.

CONDUCT OF ANNUAL WAGE REVIEWS

Publication (s.289)

608. ACCI generally agrees with the principle that submissions should be published, however there may be a few exceptions:

a. An employer may want to provide a closed submission or submission attachment providing sensitive financial information.

b. Many employees raise quite sensitive issues with such reviews which, whilst often not relevant to the determination at hand[23], are important to them and often very personal and emotional. If this safety valve involves sensitive information, FWA should be able to publish submissions with details omitted.

c. The AFPC has previously undertaken focus group and qualitative research without personal attribution. Whilst employers are generally concerned about the probative relevance and value of such material, some people again may wish to make submissions which are not published.

d. ACCI also understands that the AFPC has to date had legitimate cause to not publish some very lengthy submissions in full on its website. There should be some discretion for this to occur again in future where warranted, particularly if some submissions were to stray into the territory of irrelevance, or vexatious representations.

Recommendation 2-6.3

Retain s.289(2)(a) but provide FWA with some discretion to not publish submissions on request or where they are of a sensitive or potentially irrelevant nature.

Meetings

609. Section 289 is solely about written submissions. This is not appropriate. There should be some obligation on FWA when reviewing minimum wages to actually meet with key stakeholders and potentially for some kind of non-adversarial public hearing (such as those the Productivity Commission convenes).

[23] An allegation of underpayment or harassment is a very serious one, and can be raised in a number of contexts, without actually being germane to the determination at hand.

Recommendation 2-6.4

Subdivision 2-6 B be amended to oblige FWA to meet with (at least) key representatives of employers and employees making submissions to a minimum wage review prior to any decision being issued, as well as providing express direction for public hearings of some form.

Research

610. Employers welcome s.291. It goes some way to addressing a concern with the operation of the AFPC and its reliance on research which employers and unions have not had an opportunity to respond to.

611. Section 291 could be amended however.

Recommendation 2-6.5

Amend s.291(1) as follows:

(1) If FWA undertakes or commissions research for the purposes of an annual wage review, FWA must publish the research prior to inviting submissions so that submissions can be made addressing issues covered by the research.

Publication

612. Section 292 requires the publication of minimum wage rates prior to their coming into effect. This is a substantial improvement on the present system and the situation following the *WorkChoices* amendments.

613. However, there are key issues for employers that need to be taken into account in the operation of the orders:

a. Employers need proper time to be formally notified of new wage rate obligations, and to adjust payroll prior to the increases coming into effect. A failure to provide this renders nominally prospective increases retrospective, with all the attendant additional costs and complications.

b. Employers and unions must be able to properly check "draft orders" from FWA prior to their finalisation. This is very important for accuracy, with the corporate knowledge of how awards work residing with employer organisations and trade unions. If this is not provided there will be significant errors and problems for minimum wage compliance and enforcement which could be avoided.

Recommendation 2-6.6

Add a new provision prior to s.292 providing that an annual wage review decision must be issued by 1 April, allowing the finalisation of detailed award wage rates during April and May.

Recommendation 2-6.7

Amend s.292 to provide that varied wage rates be published by 1 June each year to allow employers to be properly informed of new obligations which come into effect from 1 July.

NATIONAL MINIMUM WAGE ORDERS

Persons With A Disability

614. A technical, but important issue arises with respect to proposed s.294(1)(b)(iii) and s.294(3)(c).

615. Put simply, not all award or agreement free persons with a disability require an adjusted wage. Most persons with a disability work at full capacity and full rates, and can and should have a full minimum wage.

616. Only a subset of employees with a disability need access to the supported wage system, not all as one might conclude from the clause as drafted.

617. In contrast, the proposal for training wages and junior rates for award free employment is appropriate (although with the creation of the modern and miscellaneous awards it may have little or no application).

Recommendation 2-6.8

Section 294 be amended to provide award and agreement free employees with a disability with access to supported wage arrangements where appropriate, but to also provide access to full default rates where reduced capacity is not germane to wages or a basis for employment.

Retrospectivity

618. ACCI can see no basis for any retrospective application of national minimum wage orders (s.297(2) and 2.298). These are general orders applying in the rare circumstances where there is no award coverage and lower levels of pay. They differ fundamentally from the industry specific awards which may conceivably have cause to address pressing industry matters.

Recommendation 2-6.9

Omit the exceptional circumstances provision (retrospectivity) from s.297(2) and therefore omit entirely s.298.

2-7 EQUAL REMUNERATION

WORKPLACE SPECIFIC

619. The assessment of equal remuneration required under this provision should be workplace specific, and the Division should require that these are workplace by workplace cases, and not cross award or cross industry matters. This is essential to properly assessing any comparisons/and in particular the impact and consequences of any minimum wage orders.

Recommendation 2-7.1

Part 2-7 be amended to clarify that equal remuneration orders are available only for application to specific, single workplaces, and that consideration of each specific workplace is required prior to such orders being made.

APPLICATIONS

620. ACCI is concerned that there be some employee support for any application for an equal remuneration order. Under s.302(3), an application should only be capable of being brought by a union where it can satisfy FWA that it has both membership within the enterprise to be covered and employee support for seeking such an order.

Recommendation 2-7.2

Section 302(3) be amended to only allow unions to make application for an equal remuneration order where they have membership at the workplace to be covered by the order, and there is support from the employees concerned.

THRESHOLD / TEST

621. Section 302(1) indicates that FWA may make an equal remuneration order it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

622. This should not be the sole test. Under a bargaining based system, FWA should also be satisfied that bargaining will not occur, and that wages for the employees concerned cannot be increased through agreement making. In other words, in a bargaining based system there

needs to be a consideration of whether bargaining can deliver equal pay without recourse to remedial orders.

Recommendation 2-7.3

Section 302(1) be amended to require FWA to be satisfied that employees under consideration for an equal remuneration order cannot bargain or viably enter into an agreement.

623. FWA should also be required to consider any previous efforts to fix the problem prior to pursuing orders. Arguably there should have been some approach or attempt to fix pay inequity using the ordinary operation of the Act prior to this special remedial measure coming into play.

CONSIDERATIONS

624. The considerations taken into account in making an order (which are not particularly clear but appear to include those in s.302(4)) need to be expanded.

Recommendation 2-7.4

FWA be directed to take into account the impact of making orders under Part 2-7 prior to doing so. Section 243(2)[24] is something of a model for a more balanced consideration.

Recommendation 2-7.5

There be an express direction that the objectives for award making generally (s.134) be taken into account in considering any equal remuneration orders under Part 2-7.

PHASING

625. Section 304 is on the right track, allowing for the phasing or staging of increases. However, the criteria are wrong, it is not solely feasibility which should be the criteria for phasing in.

626. It may be the proper balance of considerations and the impact on the employer and its operations warrants phasing in.

[24] Considerations for the low pay authorisations under Div 9 of Part 2-4.

Recommendation 2-7.6

Section 304 be amended to allow implementation of an equal remuneration order in stages where FWA deems it appropriate to do so having taken into account all the circumstances of the case, including the parameters for award making generally.

2-8 TRANSFER OF BUSINESS

INTRODUCTION

627. This is an area of significant concern to ACCI, as industrial relations rules applying to the sale or purchase of a business have such significant affects on commercial transactions and not just industrial activity. In particular, what is of most concern is that settled case law is being overturned, rights displaced and uncertainty if not unfairness is being added to the law by the proposed changes.

628. Transfer or transmission of business provisions are important in industrial legislation; an importance which is sharpened considerably in the current economic climate. Such provisions attempt to balance circumstances in which instruments should be maintained across transfers of ownership with also allowing businesses to be bought and sold, and allowing incoming owners to recast businesses in pursuit of more effective and sustainable operations.

629. This second point is a fundamental priority. The economy, in particular in the current climate, requires businesses to innovate and for ineffective business models to be replaced by more effective ones (of course operating within the overall safety net and the *Fair Work Act*).

630. Forcing stasis on industrial relations settings, or worse still unduly perpetuating failed labour cost and operating models will do nothing to assist Australia in successfully trading out of the current GFC. Indeed, forcing perpetuation of failed business models will increase Australia's exposure to future downturns. (Within the bounds of workplace relations laws) some Darwinism needs to apply in weeding out uneconomic and unsustainable business models, and incoming operators need to be able to reverse and improve on the approaches of the previous owners.

631. The necessary balance in this area is recognised in the Object in s.309, however this does not appear to be reflected in the substantive provisions of the Part. A small number of targeted changes would improve the operation of the part, and the role of transmission regulation in the system generally.

Principal Concerns

632. There are three principal issues of concern with the Transfer of Business provisions of the *Fair Work Act* (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*):

a. Extension of the definition of transfer / transmission.

b. Transfer in perpetuity.

c. Extension of transferred obligations to non-transferring employees (new starters)

EXTENDED DEFINITION

633. According to the Explanatory Memorandum, three things will trigger transfer under the *Fair Work Act*:

a. There is a particular type of connection between two employers (the old employer and new employer). This now no longer requires a consideration of whether assets are transferred or whether the business has the same character as the business which is acquired – a quite fundamental change.

b. The new employer agrees to employ some or all employees of the old employer.

c. There has been no significant change to the work performed by those employees.

634. ACCI understands that the intention of the new provisions and the expression of in particular, are to reverse the High Court decisions of *PP Consultants*[25], *Gribbles Radiation*[26] and the Full Federal Court decision of *Stellar Call Centres*[27] and to widen the circumstances in which a transfer will occur and be caught by the Part.

[25] *PP Consultants Pty Ltd v Finance Sector Union of Australia* [2000] HCA 59
[26] *Gribbles Radiation Pty Ltd v HSU* [2005] HCA 9.
[27] *Stellar Call Centres P/L v CPSU* [2001] 103 IR 220

635. The effect of the Bill is to radically depart from the High Court's "character of the business test" and opt for approaches pursued by the unions in the above cases (which ultimately failed). There is no policy reason give to overturn longstanding principles of determining when industrial instruments should travel with employees to another employer.

636. This is also antithetical to the premise that the Bill should encourage enterprise agreements tailored to the specific enterprise.

637. Why would an incoming employer take on employees if that meant also acquiring an agreement that had costs well and above what their business could absorb? Particularly if this meant that any new (non transferring) employee would also be under the same agreement?

638. The provisions also overturn current law that instruments travel for only 12 months. This is appropriate and balanced because a new employer may have their own industrial instruments in place, or wish to bargain for an agreement tailored to their workplace.

639. As one law firm has commented:

> The Bill proposes expanding existing protections for employees which will create broader obligations for employers. In addition, the new Transfer of Business provisions will apply to a greater range of business situations such that they will create broader obligations for employers.
>
> For employers providing outsourcing services and for those contemplating restructures, these provisions make fundamental changes to the current regime. They will affect the management of outsourcing and the options available. When read with the changes to employee protections that remove the 'sole or dominant' reason test when interpreting the freedom of association provisions relating to an employee's entitlement to the benefit of an industrial instrument, there appears to be much scope for uncertainty. Under the WR Act, the confusion that had plagued outsourcing and the issue of the extent to which the current employees' terms and conditions influenced the decision to outsource was largely fixed by the WorkChoices amendments. The WorkChoices amendments allowed labour costs to be one of the reasons - but not the dominant reason - for outsourcing.
>
> The proposed changes to the transmission of business rules and freedom of association provisions will demand that employers carefully consider their options when making decisions about the structure of their workplaces.[28]

[28] DLA Philips Fox, The Workplace – Special Report, Unwrapping the *Fair Work Bill* 2008, December 2008, p.12.

640. The effect of these provisions are as follows:

a. Businesses will be sold to overseas operations.

b. New employer will not take on employees of previous owner.

c. A transferred instrument could apply indefinitely to a new employer.

d. A new employer may have to deal with another union on their site or a union where previously they have not had any agreements.

e. A transmitted agreement will not be tailored to the new enterprise. This appears to be in direct opposition to the objects under s.171 in the agreement making provisions, which encourages enterprise agreements at the enterprise level.

Recommendation 2-8.1

The current provisions of the Workplace Relations Act concerning transmission of business should be retained in favour of the Bill's provisions.

TRANSFER IN PERPETUITY

641. The existing transmission provisions (s.580(4)) provide for a 12 month transmission of employment. The new transfer provisions provide no such time limit, and as set out below, it is unclear what capacity there is to ever cease transmission and to change or replace transmitted terms in the future.

642. The proposed provisions lack balance. There needs to be a proper policy balance between transmitting some terms in appropriate circumstances, and also allowing businesses to aggregate, replace, refresh and renew. As set out in the introduction, business needs some Darwinism, and failed and uneconomic business models need to be able to be weeded out.

643. There is a longer term practical concern here. At some point a purchasing employer will want to treat their employees equally, drawing no distinctions between them based on their provenance.

644. The balance of interests lies in protecting legacy conditions for some appropriate period, but in time also allowing practical ongoing capacity for an incoming or purchasing enterprise to revert to a single set of terms and conditions which suit its wider needs and priorities (and those of all of the employees of the purchasing enterprise). Over time, employers are likely to want to be able to treat employees as one whole, without an undue preservation of legacy terms and conditions for minorities from formerly purchased companies.

645. There is a risk in the proposed approach of transmission becoming both viral and intractable, and becoming a permanent block on optimum or desired human resource structures of often larger purchasing companies. As drafted, this may retard scope for future human resource improvement in purchasing companies.

646. This is also a clear disincentive to transfer business at all and to not sever employment entirely on purchasing a failed or underperforming business.

647. It needs to be clear that a transmitted agreement can be terminated in the usual manner under other provisions of the Bill before and after its nominal expiry date. This does not appear clear on the face of the EM or Bill.

Recommendation 2-8.2

There continue to be some transmission period, ideally 12 months, after which the transmission obligations cease. Alternatively, there be some capacity for a party to end transmission with the provision of due notice after some appropriate period.

Recommendation 2-8.3

Failing this, there should be scope to apply to FWA to end the transmission in whole or part.

Can transferred entitlements be extinguished?

648. We are unclear what the ongoing status of a transmitted instrument is.

a. If it is intended that a transmitted instrument be treated as an agreement under Part 2-4, this should be clarified in Part 2-8, whether through a provision or a statutory note/cross-reference. This would clarify the capacity to vary or terminate the transmitted instrument over time.

b. If this is not the case, then a greater range of options needs to be inserted into Part 2-8 to allow the appropriate range of options in regard to transmitted instruments (termination, variation etc).

649. Something we are not clear about from the overall effect of Part 2-8, is at what point the transferring entitlements are extinguished or replaced. In particular, it is not clear that the making of a new CA with the majority of employees of the ongoing employer will (as it should) extinguish the transmitted obligations of the incoming minority.

a. Again this may be a function of the extent to which a transmitted instrument may be treated as an agreement under Part 2-4 of the Act.

b. However, this is absolutely essential. There must be clear scope to replace and extinguish transmission through the making of a subsequent collective agreement.

650. It is not clear that s.318(1) allows for the making of an order extinguishing a transmission of business. This would appear to also be essential, in addition to an automatic extinguishment by the making of a subsequent CA. FWA should also be able to be convinced to bring a transmission to an end in appropriate circumstances.

Recommendation 2-8.4

Part 2-8 be amended to clarify that the making of a subsequent agreement under the Fair Work Act will, or can according to its terms, extinguish the transfer in whole or part.

Recommendation 2-8.5

Amend s.318 to clarify that FWA may order that a transfer under Part 2-8 cease on application from the employer, employees or organisation covered by the transferring instrument.

Variation of Transferred Instruments

651. Section 320 appears provide some scope to vary transferred instruments, although it does not appear on its face to address the issues raised above. The test in s.320(2)(a) appears the wrong one. What is "meaningful operation"?

652. A vastly inflated provision or atypical hours clause may be perfectly capable of operation and perfectly clearly expressed, but may be totally inappropriate, atypical and damaging in the context of the purchasing employers operation. The test needs to be different.

Recommendation 2-8.6

Section 320 be amended to expand the grounds on which FWA may vary a transferable instrument to include considerations relating to the viability and prevailing employment arrangements of the new employer.

EXTENSION TO NEW STARTERS

653. Section 314 provides that what are termed 'non-transferring employees' of the new employer are to be covered by a transferable instrument. The explanatory memorandum makes clear[29] that this applies to entirely new employees, who may have been employed 'off the street' with no previous relationship to the work or workplace.

654. ACCI can see no policy reason for this extension, particularly not in equity terms. There is no maintenance or continuity argument for these employees as they have never worked under the transferring instrument. There is no loss and such employees should be free to accept lawful, contracted terms from their new employer, unrelated to those of an entity they have never worked for and which may no longer exist.

655. To not do so risks pricing the creation of some new jobs out of the practical reach of some employers and potential employees.

[29] Explanatory Memorandum, [1237]

656. A superior approach would be for any transferred instrument to have its transferred application to transferring employees, and for new starters to be able to be employed at the employers discretion under:

a. Any CA made with the ongoing employing entity.

b. The transferring instrument, albeit with flexibility to change or replace such an arrangement.

c. Contracted terms consistent with the Act, NES and modern award.

657. As drafted, this provision provides a further incentive for purchasing employers to ensure there is no transmission of business at all, and to organise purchase arrangements such that the business will make a clean break and start afresh with employment.

658. There is also an incentive for avoidance and attempting to shift employment into differing entities to avoid a viral transmission of transferred entitlements from often very small incoming purchased entities to the larger whole.

Recommendation 2-8.7

Omit s.314 and solely apply transmitted instruments to transmitting employees and not to subsequent starters.

GUARANTEE OF ANNUAL EARNINGS

659. ACCI can see no policy reason for the guarantee of annual earnings to also travel to the new employer under s.316. This will be a complicated scenario whereby an incoming employer will need to honour the commitments given by the previous employer for a period of time.

660. The incoming employer and employee should agree on whether the guarantee continues to apply. This again will threaten the employment opportunities of these potential transferring employees.

Recommendation 2-8.8

A guarantee should only continue with the new employer if both the new employer and employee agree.

2-9 WAGES, DEDUCTIONS AND GUARANTEES

661. Part 2-9, 'Other Terms and Conditions of Employment', ss.321 to 333.

PAYMENT OF WAGES

662. ACCI would be concerned if these provisions prohibited award free employees, professionals etc., from being feely able to include in their common law contracts specific terms dealing with deductions from wages or benefits (monetary or otherwise). These employees should be able to deal with any aspect of their remuneration package (method of payment, deductions, salary sacrifice etc) without any additional regulatory burdens. This may require monitoring and amendment in the future should this be present a problem.

663. A clarification is required in this area as follows:

a. That an employer and employees may agree to a payment method in an agreement, or otherwise, which will apply provided it is consistent with the Act.

b. The employer may not be compelled to pay an employee in a particular manner from the list of acceptable methods, and that employees do not have a right to demand to be paid by a particular method.

664. Section 323(3) provides that a modern award or agreement may override the four payment methods in 323(2)(d). This is unnecessary, and all that needs to be clarified is that from the pallet of options under the Act, the employer may apply a particular or prevailing approach.

Recommendation 2-9.1

That the provisions be revised if there are problems with award free employees being able to freely agree in their contracts any aspect of their remuneration.

Recommendation 2-9.2

Proposed sections 323(2)(d) and 323(3) be omitted.

DEDUCTIONS

665. Regulations made under s.325 should clarify, amongst other things, that deductions for board and lodging in relation to remote work, tourism and hospitality can be reasonable.

Recommendation 2-9.3

Regulations made under s.325 clarify that deductions for board and lodging in relation to remote work, tourism and hospitality are reasonable.

666. Section 326 should clarify that matched superannuation contributions under an agreement do not contravene this part. For example, if an employer offered 15% super on the basis of 9% SGA + 3% employer + 3% employee (matched), such a 'mandatory' deduction from the employees wages should be allowed to be agreed and operative.

Recommendation 2-9.4

Section 326 clarify that matched superannuation contributions under an agreement do not contravene this Part 2-9.

667. Section 327 uses the words 'required to spend' – why not just 'spent'? A deduction in contravention of the Division should only be reversed (s.327) where it is actually made, not where it has for accidental or even nefarious purposes been included in an agreement. For example, a disproportionate deduction for breakages or shortfalls in the till should only activate s.327(b) where it is actually made.

Recommendation 2-9.5

Amend s.327(b) or the Explanatory Memorandum to clarify that the money actually needs to have been expended by / deducted from an employee.

GUARANTEE OF ANNUAL EARNINGS

Undertaking is Complicated

668. ACCI supports the exclusion of high income earners from awards. We note in this regard that the commitments in the pre-election *Forward With Fairness* policy statements clearly indicated there would be an automatic, outright exclusion without the need for the complexity embodied in the final Bill.

669. The proposed guarantee of annual earnings is directly contrary to stated government policy. The policy commitment prior to the election could not have been clearer:

> The award system will not apply when employees are on pay arrangements above $100,000.[30]

670. This is a unambiguous commitment to an outright exemption of employees earning over $100,000 per year from coverage by modern awards. This is a commitment which ACCI supports and calls for the government to now implement.

671. However the Fair Work Bill unfortunately proposes a materially different approach in Div 3 of Part 2-9, which is inconsistent with the election commitment and the proper treatment of high income earners. It is also unnecessarily complex and will encourage disputation and compliance problems:

a. Somehow $100,000 in the policy has become a higher figure despite the system not having commenced yet.

b. It has replaced a policy commitment to a simple exemption, with a complex system of guarantees and employee election as to whether to be covered by an award or not. This is simply not what was promised.

c. Employers have been exposed to additional compliance liabilities in the implementation of a proposition originally designed to simplify the system, reduce unnecessary award compliance, and better focus awards as a genuine safety net.

672. With respect to all concerned – this is *WorkChoices*-esque. A simple and entirely valid policy proposition has been departed from for some unknown reason, and in doing so an unnecessarily complex guarantee and reconciliation process has been imposed. The forest has been lost for the trees in regard to implementing what was a quite straightforward policy commitment.

[30] Forward with Fairness Policy Implementation Plan,. August 2007, p.1

Recommendation 2-9.6

Replace the complex guarantee of annual earnings with a straightforward, direct exemption of high income employees from modern award coverage, as per stated policy prior to the 2007 election.

673. The government aspires to execute policy better than the WorkChoices amendments. In this area they fall into precisely the same complexity and compromise, and in doing so depart from the best interests of the system and all users.

674. Thus, the notion of guaranteed earnings under s.328 of the Bill is unnecessary and contrary to stated policy. Exclusion should as promised be straightforward and automatic based on the level of earnings and contracted terms.

675. The proposed provisions mean that employees and employers will need to take positive steps to step off the modern award, by the employer entering into an undertaking that is yet another (statutory) contract, but which attaches significant civil penalties of up to $33,000 if an employer breaches it.

676. Why should employers be subject to such risk if the Government has simply promised high income employee's will not be on the award?

677. Why should employees who are earning above the threshold in a modern award, then have to take further steps with their employers to enter into undertaking?

Recommendation 2-9.7

There should not be any requirement to enter into a written undertaking to step off the modern award. There should be a prescribed threshold amount in the Bill and/or the Regulations.

There should not be any civil penalty provisions attached to s.328 if they are to remain.

Superannuation

678. ACCI also supports superannuation being part of the calculation. This is important not only in this area, but also with unfair dismissal exemptions, as the guarantee of annual earnings is the same test.

Further Issues

679. This said, there are some more specific implementation issues within the overall approach adopted in the proposed *Fair Work Act*.

680. There is a clear difficulty in relation to the notion of guaranteed earnings for commission based employment which is typified by, but not restricted to, the car sales, real estate and financial services industries.

681. Employers are very concerned that they be able to maintain incentive based employment where appropriate, and that those industries long using commission based arrangements and incentive pay continue to be able to do so. This plays an important role in our economy and often underpins the high reward pay arrangements which the Government intends be capable of being excluded from award regulation.

682. Clearly, to take the car salesperson example, an employer cannot guarantee an employee will sell a particular number of cars in a particular year so as to take them over the threshold. Conversely, the employer can know:

a. That a reasonable or acceptable number of annual car sales by a typical employee will clearly take them over the threshold. This is the case because the retail motor industry sets a selected target range for volume of sales by product type (i.e., model and make of the vehicle).

b. The level of car sales and commissions by comparable employees, and their relationship to the threshold.

c. (For ongoing employees) their previous annual performance and annual levels of earnings in relationship to the threshold. For example:

i) Can I guarantee Steve will sell 50 cars in 2009, taking his income over the threshold? – No.

ii) Do I know that Steve has sold an average of more than 65 cars in each of the past 5 years, and is it reasonable to project that he will exceed the threshold this year as well? – Yes.

iii) Do I know that each of Steve's peers at the same level and experience also consistently exceed the 50 car quota - also Yes.

Proposed Approach

683. Consideration could be given to adding an additional concept for commission based sales, that of 'Reasonably Projected Earnings'. This should rely on, not a guarantee of earnings, but an agreed projection that the employee should be able to earn over the threshold amount. Based on such a projection, the award coverage should be able to be displaced by agreement as otherwise provided for under the Fair Work Act.

Recommendation 2-9.8

Superannuation become included in the calculation of the threshold figure.

Recommendation 2-9.9

A suitable arrangement for commission based employment be introduced into Div 3 of Part 2-9, to also allow agreed exclusion of these high earning employees from award coverage.

684. Where the projected amount does not come to pass? For example where Steve fails to sell 50 cars?

685. The employee should have scope to chose to revert to award coverage, or the arrangement should be able to be maintained on the basis the annual outcome was aberrant (perhaps if the employee became ill for an extended period of time during a particular year, which is not going to happen during the next period) and it is quite reasonable to again project earnings over the threshold.

3-1 EXPANDED EXPOSURE TO LITIGATION

686. This section addresses proposed Part 3-1, ss.334 – 378.

SIGNIFICANT NEW AREA OF LAW

687. The general protection (GP) provisions are an entirely new suite of laws which will enable many actions that are currently considered lawful, to be rendered potentially unlawful in the future. This was not anticipated in any policy announcements, and in employers' view exceeds the implementation of the *Forward with Fairness* policy statements.

688. What needs to be reconsidered is that creating statutory provisions of this type opens the door to litigation through new causes of action. It also opens the door to new litigation or the threat of litigation used as an industrial relations tool to alter stable industrial relations environments based simply on one person or party, dissatisfied with a management decision or human resource practice.

689. Not only does it expand the existing provisions of the *Workplace Relations Act 1996*, but does so in a manner that will allow extensive opportunity for parties to litigate against employers under new categories that appear wide and without appropriate limitations.

690. Furthermore, there doesn't appear to be any other area of law which provides for remedies on the basis of unlawful/discriminatory conduct, whereby an enforcement agency can stand in the shoes of the litigant. This is inconsistent with current anti-discrimination laws and unlawful / unfair termination proceedings.

691. For example, areas which are new or have been widened include:

a. Under s.341(1)(c)(ii) an employee does not need to make a complaint to a "competent administrative authority" (such as the ombudsman), but can simply make an "inquiry" to their employer. Potentially, an employee can subsequently claim that any adverse action against them was the result of past complaints or inquiries to their employer about their "workplace rights". The explanato5ry Memorandum also indicates that even if an employee makes a complaint to the wrong body (that does not deal with employment matters generally) such as the

Australian Competition and Consumer Commission (ACCC), they still have the ability to take action against their employer.[31]

b. Under s.343(1), coercion is expanded upon from not just agreement making (as currently is the case under s.400 of the Workplace Relations Act) but to cover all "workplace rights" and includes action against a "third person" to coerce a person to either exercise or not exercise a "workplace right".

c. The creation of any entirely new area of anti-discrimination legislation that is not based on known concepts of direct and indirect discrimination, but applies more broadly on the basis of "adverse action". This is yet another layer of regulation that will allow employees to forum shop between various federal and state/territory anti-discrimination legislation. Employers will now need to comply with all of these laws, because an employee has the choice as to which law it will bring an application against an employer. An employer cannot predict the future and so will need to ensure that it is complying with whole gamut of anti-discrimination laws.

d. Under s.345, an employer who recklessly makes a false or misleading representation about a "workplace right" may be liable to a civil penalty of up to $33,000. This provision may result in many employers becoming liable to large civil penalties for providing misleading advice to employees on their legal entitlements. Despite the qualifier of knowingly or recklessly making misleading representations, many employers are not familiar with complex areas of the law and they will be penalised for attempting to provide advice. There doesn't appear to be any other area of the law where a person in good faith is liable to such fines. There should be a requirement of gross recklessness, which would be a higher threshold. Courts are more likely to hold the employer reckless because they appear to have the means to obtain independent advice from third party. There is not even a defence of reliance on third party advice obtained in good faith.

[31] EM, p.218, paragraph 1316.

e. In cases of termination, there is now no compensation cap, which potentially exposes employers to unlimited amounts of compensation. Currently, unlawful terminations are subject to the same compensation cap as applies to unfair dismissals under s.665 of the Workplace Relations Act 1996.

Exclude Redundancies

692. The general protection (GP) provisions have the potential to be used in a variety of situations, whereby the employer wishes to legitimately restructure a business or terminate contracts of employment in a downturn of business (a redundancy decision). ACCI is concerned that unions or an employee will frustrate such a process, by making an adverse action claim, particularly given that the sole and dominant purpose test is to be removed.

693. It will be easier to claim that some bona fide action, breached s.340 because the employee was entitled to a "workplace right". This is because all employees have a workplace right of some type under s.341 of the Bill. It would not be difficult for a Court to apply a "but for" test in a situation which would render an employer's conduct illegal – despite the actual intentions of the employer.

694. Therefore, the General Protections provisions should exclude decisions concerning redundancies (as defined under s.119 – NES redundancy pay) or introduce the sole and dominant purpose test for redundancies (see below for further ACCI recommendations on the sole and dominant test generally).

Recommendation 3-1.1

Part 3-1 should exclude "redundancy decisions" from the General Protection framework by either deeming such action to not be adverse action under s.342 or from the definition of "workplace right" under s.341.

INSPECTORS TO RUN CASE FOR EMPLOYEE

695. The general protection provisions also allow an employee to have their case fully funded by the Commonwealth (via complaints to the FW Ombudsman), whereas an employer will always have to defend any action out of their own pockets.

696. This overturns current practice whereby all applications for unlawful termination (which includes discriminatory grounds) must be brought by the applicant employee against an employee within 21 days of termination and which goes through the same process as unfair dismissals (conciliation then, if that fails to resolve the matter, an application to the Federal Magistrates Court or Federal Court). These matters must be fully funded by both the employee and employer. It is unfair for an employer to face the larger resources of the Ombudsman to defend these claims.

697. Coercive Powers: Secondly, inspectors have a number of coercive powers at their disposal which employer do not have to obtain information. There is no reason why inspectors cannot undertake a audit of the employer's premises to obtain records and documentation which can be used against them subsequently in such general protection proceedings.

698. Conflicts of Interest: A further problem is that some employers may not be able to use their usual legal service provider because the firm may sit on the Ombudsman's law panel. This currently does not cause a major problem because employee's must chose their own legal service provider to run a case in the Courts.

LEE V HILLS

699. There is an important and extant problem with the operation of the unlawful termination system which the Fair Work Act should fix.

700. The decision in *Lee v Hills*[32] has effectively created a situation in which an employee unable to continue work due to a workplace injury cannot have their employment effectively terminated.

701. As expressed in one commentary from a major law firm:

> Such an employee will be regarded as being temporarily absent from work due to illness or injury, even if this absence extends beyond 3 months. This is because their workers compensation benefits are "paid sick leave" for purposes of the unlawful termination provisions of the Act. In those circumstances, the employee cannot be dismissed because of, or for reasons that include, the injury-related absence.[33]

[32] Lee v Hills Before and After School Care (2007) Federal Magistrates' Court (15 January 2007)
[33] Malleson Stephen Jaques – Update, http://www.mallesons.com/publications/update-combine.cfm?id=816290

702. This decision is at odds with many years of employment practice and indeed one of the key tenets of workers compensation. At some point, where absence is extended and return to work highly unlikely or impossible, there needs to be scope to terminate employment.

703. This is what has occurred for decades. The decision in *Lee v Hills* has cast long standing practice into utter doubt and created confusion and paralysis in the capacity of companies to effectively manage protracted workers compensation matters.

704. It is in the interests of both employers and injured workers for persons with long standing workers compensation claims, and no prospect of a return to work, to move into the next phase of their lives and to have the employment relationship severed. This was the status quo for decades prior to the decision in *Lee v Hills,* and it should be restored.

705. The passage of the Fair Work Act thereby offers an opportunity to remediate a problem which has emerged in the operation of the *Workplace Relations Act 1996* post *WorkChoices* and return to the long standing status quo.

706. Proposed s.352 appears the platform to fix this problem.

Recommendation 3-1.2

Part 3-1 remediate the problem caused by the decision of the Federal Magistrate's Court in Lee v Hills Before and After School Care, and clarify that dismissal of an employee in receipt of workers compensation payments is not "because the employee is temporarily absent because of illness or injury of a kind prescribed by the regulations".

Section 352 be amended to restore the status quo situation prior to this decision

STAND DOWN

707. Section 342(4) could usefully be framed more widely, and exempt from the definition of adverse action any stand down which is consistent with/taken under Part 3-5 of the Act. As presently framed this may cause confusion and invite general protection based litigation in legitimate stand down situations.

Recommendation 3-1.3

Section 342(4) exempt all stand downs under Part 3-5 from the definition of adverse actions.

BAGAINING SERVICES FEES

708. Section 353 seeks to prohibit bargaining services fees.

709. ACCI supports this policy intent. An issue arises concerning the definition of these fees. The issue at hand is unions charging some form of membership fee or defacto membership fee indirectly to non members based on a collective agreement agreed to by the employer and a majority of employees (who may be union members).

710. This may be framed in terms of a fee for bargaining services, but it could also be creatively framed some other way to get around the narrow construction of s.353(2). This could be fixed by creating an additional regulation making power which could be used to extend the definition of a bargaining services fee in response to any unacceptable developments in the field.

Recommendation 3-1.4

Add a regulation making power to s.353 to allow changes to the definition of a bargaining services fee in response to developments in bargaining following the passage of the Bill.

SHAM ARRANGEMENTS

711. Consideration should be given to an additional defence in s.347(2) where an employer can prove they acted in good faith on advice they could reasonably be expected to rely on, and on the belief that their actions would be lawful.

Recommendation 3-1.5

Add an additional defence 347(2) relating to acting in good faith on external advice.

SOLE OR DOMINANT REASON TEST

712. Various provisions of the existing *Workplace Relations Act 1996* allow access to unlawful termination claims where the prohibited reason for termination, detriment or prejudice was the sole or dominant reason for the employers adverse action against the employee.

713. Paragraph 1458 of the Explanatory Memorandum makes clear that this test will no longer apply under Part 3-1 of the new Act. On its face s.360 abandons any notion of primacy of purpose determining liability for an action in this regard.

714. ACCI can see the merit in gathering the unlawful provisions scattered through the existing *Workplace Relations Act 1996* into a single part of the new Act. However, we see no detriment or failing in the operation of the existing protections such that there needs to be so fundamental a change to abolish the sole and dominant purpose test.

Recommendation 3-1.6

In new Part 3-1, retain the sole and dominant purpose test in relation to the range of conduct to which it is currently applied.

715. We note paragraph 1458 of the Explanatory Memorandum. If the preceding recommendation is not accepted, then the welcome clarification in this paragraph and the cross reference to the MUA decision cited should be moved into the Act either as:

a. An additional clarification as s.360(b), or failing that

b. A statutory note, equivalent to that appended to s.381.

716. This would provide some clarity, and would hopefully ensure that proposed s.360 not operate as baldly and at large as it would appear to on a plain reading.

Recommendation 3-1.7

If the sole and dominant purpose test is not retained, a new s.360(b) be added to the effect that "for the purposes this section and this part, the reason must be an operative or immediate reason for the action".

Recommendation 3-1.8

Alternatively, a statutory note be added to s.360 to the effect that "This phrase has been interpreted to mean that the reason must be an operative or immediate reason for the action (see Maritime Union of Australia v CSL Australia Pty Limited [2002] FCA 513; 113 IR 326 at [54]–[55])".[34]

[34] Explanatory Memorandum, paragraph 1458, p.234.

TIME LIMIT FOR DISMISSAL CLAIMS

717. ACCI is concerned at the vast difference between the time limit for unlawful termination claims (60 days, s.366(1)(a)) and unfair dismissal claims (7 days, s.394(2)(a)).

718. Employers fear that the time limit for the unfair claims, and the comparatively short time to apply may result (among a range of potential reactions) in the substitution of general protection claims for unfair dismissal claims.

719. Furthermore, an employer may have already put in place alternative arrangements to replace the employee or restructure the area of work. A lot can happen in 60 days, and the fact that an employee has the ability to lodge an application which potentially allows for their job back after 2 months (and in circumstances where the employer does not know it may have done anything wrong) does not properly balance the potential inconvenience to the employer.

720. It is already well understood that single terminations of employment can blur the lines between the unlawful and the unfair, and that applicants and their representatives often have a strategic choice to make in how to pursue a claim.

721. Employers are concerned that the short timeline for unfair claims may see more claims pursued as unlawful under the general protections. When for example faced with a claim that is out of time as an unfair, a union, lawyer or agent may simply advise pursuing it as a general protection claim.

722. We are reinforced in this view by the approach in s.587(2) which means that there is little risk in transplanting one form of claim for another. On this basis, employers consider this needs to be revisited as follows:

Recommendation 3-1.9

Consideration be given to greater consistency in the time limits for the lodgement of unfair and unlawful termination claims. The period of 60 days should be reduced to either 14 or 21 days.

6 YEAR LIMITATION PERIOD

723. Applications can be brought within 6 years under the general protection framework, apart from matters that result with a dismissal. Whilst this may be consistent with other areas of law, it appears to be an excessive time by which an employer would be able to gather any reliable evidence. This should be revised to a shorter period.

3-2 UNFAIR DISMISSAL

724. Part 3-2 (ss.379-405) addresses unfair dismissal. Part I of this submission (separate document) addresses key overall questions regarding the unfair dismissal system. This section addresses:

a. Practical considerations for the operation of the proposed unfair dismissal provisions.

b. Necessary changes to make the overall intentions of the Act as introduced work effectively.

SMALL BUSINESS

725. Small businesses are to 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.

726. The magnitude of the economic challenge facing small business at the should trigger a reconsideration of the proposal to re-impose unfair dismissal claims on small business.

727. 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.

728. Small businesses will also be at the forefront of exposure to additional costs flowing from award modernisation.

729. 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 Exemptions

730. 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

731. 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. However (as set out in Part I), 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).

b. The Code still allows intervention in the employer's decision by a regulator 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 compliance with the code.

Recommendation 3-2.1

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[35] 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.

CASUALS

732. Section 384(2)(a) again removes the requirement for 12 months casual service (existing s.638(4)), in favour of a test solely about regular and systematic work.

733. As set out earlier in this submission, this is confusing, will create additional litigation and argument, and is not balanced. Some would argue it is possible to work on a regular and systematic basis after a week, others would argue a period of some months – and the key statute is now going to fail to provide adequate guidance. This will create confusion, retard compliance and generate unnecessary additional litigation.

[35] Under s.388(2)

734. This is a double consideration in relation to this part, it not only controls who may take an unfair claim, but also the definition of a small business employer.

Recommendation 3-2.2

Retain the existing requirement for periods of service of 12 months or more for casual employees to have access to unfair dismissal.

ABANDONMENT AND MISCONDUCT

735. The meaning of dismissed under s.386 appears to discount situations in which an employer would argue the employee has terminated or frustrated his or her own employment, or abandoned it. If it is intended that claims cannot be brought in these instances – well and good – however we know that many such instances are contested as unfair termination claims, and we don't see evidence of an intention to exclude them.

736. Therefore, s.386 may need to be re-examined to better and more clearly cover these situations.

Recommendation 3-2.3

Review the meaning of dismissal (s.386) to ensure situations of abandonment, frustration and repudiation are adequately and unambiguously covered or not covered.

HARSHNESS CRITERIA

Support Person

737. Section 387(d) addresses any unreasonable refusal by the employer to allow an employee to have a support person present.

Background

738. Presently an employee may request to have a support person present at a termination or performance discussion and a failure to allow this may make a termination, harsh or unfair.

Key Problems

739. Employers have little difficulty with one of the considerations for a fair dismissal being access to a support person where this is reasonable. However proposed s.387 goes a step further and describes the role of the support person as extending to assisting at any discussions.

740. This is at odds with existing precedent, and the established rights in relation to support persons, many of which will be union officials. The role of a support person is presence, support and advice to the employee, and perhaps some clarification of outcomes. Their role does not intrude on what remains essentially a conversation between employer and employee regarding ongoing employment relations.

741. The way the Act has been framed would create something quite different, and create this ambiguous notion of the support person "assisting" discussions relating to dismissal. This is quite ambiguous, and it is not clear what this will mean in practice and how it could add to or improve dismissal discussions (given the employers general exposure to requirements to act fairly).

742. This will create disputation and unnecessary friction in dismissal discussions, and potential ambiguity as to whether a dismissal has occurred. We fear arguments between employers and union officials taking the place of reasoned explanations of dismissal action to the employee, and in turn employers becoming exposed to unnecessary claims of unfair dismissal through not being able to properly explain termination to employees.

743. By way of analogy to the role of a lawyer in a police interview, the role is not to begin to speak for the person being interviewed, or somehow to seek to manage or control the discussion. It is to advise the client, potentially clarify the matters raised and to be in a position to advise the client of the position going forward. This should be the model in this case and does not require any notion of "assisting" dismissal discussions.

744. Ultimately the capacity of an employer to make a dismissal must stand, and the employee then has a right to contest this dismissal through what will be a very rapid process via FWA. The right to dismiss should

not be complicated or retarded by ambiguous regulation of potentially over zealous, vexatious or frustrating support persons.

Recommendation 3-2.4

Re-express s.387(d) to omit the words 'to assist'.

GENUINE REDUNDANCY

Insolvency / Bankruptcy

745. Section 389 should also include as a class of "genuine redundancy" terminations of employment on the basis of insolvency or bankruptcy. This would be consistent with the definition of redundancy pay in the NES (under s.119).

Consultation

746. ACCI is concerned that the Bill imposes unfair process requirements on employers that would turn a legitimate and bona fide redundancy into an illegitimate one. Process should not override substance in unfair dismissal matters.

747. Section 389(1)(b) deals with the application of consultative provisions of modern awards. Complying with consultation provisions does not require at large consultation, it requires quite specific and confined notification and discussions.

748. Additionally, the reference to enterprise agreements is not appropriate. Unions will be at large to seek provisions in agreements which will completely abrogate the principle behind s.389 and see FWA potentially dragged into a range of considerations in redundancy cases which are not relevant to the fairness of a termination (levels of severance pay, selection of positions to be made redundant, decisions to cease operating etc).

749. Therefore, this should be amended as follows:

Recommendation 3-2.5

Omit s.389(1)(b) from the Bill.

Alternatively, remove any reference to "agreements" so that it only refers to compliance with a modern award.

Small Business

750. ACCI is concerned that smaller businesses not be subject to models of consultation which were developed for larger, highly unionised enterprises.

751. Smaller businesses generally do not have union members, and lack the capacity to comply with highly complex consultation clauses which were developed for the unionised sector of the workplace in the early 1980s (which is what the proposed modern awards contain).

752. Simply put, they should not be forced to comply with alien and inapplicable consultation obligations to make a genuine redundancy which would otherwise stand on commercial and operational grounds.

753. We request consideration of the following:

Recommendation 3-2.6

Small businesses be exempted from s.389(1)(b). This is on the basis that the provision is not reconstructed entirely as proposed in Part I.

Redeployment

754. A second concern ACCI has with the redundancy provisions is contained in 389(2) regarding redeployment. ACCI is concerned once again that process arguments appear to outweigh substantive issues. It will be argued by employees that they should have been redeployed within a business or business "group" (ie. associated entity under s.389(2(b)) involving other distinct operational businesses – why should an employee who works as a night packer for a supermarket, then argue they should be redeployed in a completely different area within another business, such sales etc?

755. Employers have the expertise and are best placed to make the commercial and operational judgements this assessment would require.

756. Therefore ACCI recommends:

Recommendation 3-2.7

Omit s.389(2) from the Bill.

Alternatively (and this is not our first preference), amend s.389(2) to:

Clarify that this does not require disclosure to FWA and in particular to an applicant or their representative, of commercial or operational information.

Add a regulation making power to s.389(2) to allow some check on what are and are not considered reasonable grounds for redeployment.

Redundancy Dismissal Remedies

757. What should an appropriate remedy be for a redundancy based dismissal? ACCI considers the general emphasis on reinstatement to not be appropriate to dismissals where redundancy is the cause.

Recommendation 3-2.8

Provide a qualification from the general emphasis on reinstatement for cases of redundancy (s.390(3)), indicating that where there is an unfair termination in a redundancy situation there be a presumption in favour of solely compensation based remedy, and that the level of severance payment be taken into account in considering any remedy in this regard.

Recommendation 3-2.9

Provide an absolute qualification that in cases of multiple-redundancies there be no access to reinstatement.

EXEMPTIONS

High Income Exemption

758. Under s.382, a person who earns over the prescribed amount will be exempt from brining an unfair dismissal matter, unless covered by an industrial instrument. The effect of this provision is that an employee who may be earning over $100,000 per annum (or as indexed), will still be entitled to unfair dismissal if they are covered by a modern award or an enterprise agreement.

759. There is no good policy reason why a high income threshold should not apply to all employees equally, notwithstanding what type of instrument applies to their employment.

760. Secondly, the Bill states that compulsory superannuation is not included in the calculation of the threshold. This reverses the current situation and has the effect of widening the unfair dismissal jurisdiction

extensively beyond pre-*WorkChoices* concepts. The status quo that has operated pre-*WorkChoices* should be retained.

Recommendation 3-2.10

The high income threshold exemption should apply to all employees irrespective of what industrial instrument applies to them.

Superannuation should be included in the calculation of the high income threshold.

Specified Term, Task, Season

761. Whilst s.386(2)(a) and (b) provision appears to extend the concept under the current provisions, by allowing unfair dismissal claims to proceed where an employee was not terminated before the expiry of a fixed term, specified task, season or training arrangement. Currently, employers are able to terminate an employment arrangement within a specified period or during a specified task, and not wait until the end of that time. Section 386 will narrow this ability and the current wording in s.638 of the *Workplace Relations Act 1996* should be retained.

762. If it is to remain, any order for reinstatement or compensation should be limited the end of the period and should not require an employer to re-engage the employee for longer than what was originally intended.

Recommendation 3-2.11

The current wording of the Workplace Relations Act should be retained in relation to exemptions of these categories of employees.

Recommendation 3-2.12

Reinstatement and compensation should only be limited to the period of time the employee was originally intended to be employed.

REMEDIES - REINSTATEMENT

Presumption

763. Part 3-2 fails to recognise that reinstatement is often not appropriate and is often not sought by employees.

764. However there is one specific recommendation which we ask be considered:

Recommendation 3-2.13

An additional consideration be added to the general assumption in favour of reinstatement, overturning that presumption where reinstatement may potentially lead to outcomes contrary to an employer's ongoing compliance with other areas of law, including OHS, anti-discrimination or sexual harassment laws.

Demotion

765. Whilst not often supported by employers, some termination cases have ended up with a "balanced" approach of reinstating an employee to a lesser position (for example removing supervisory responsibilities, or ceasing to have responsibility for OHS on a site, but being reinstated to employment with the employer).

766. Section 391 would not allow FWA this discretion. This cuts both ways. Where an employer does raise serious concerns about conduct or performance a partial or discounted reinstatement would not be possible, and an outright termination would need to stand.

Recommendation 3-2.14

Consideration be given to amending s.391 to allow reinstatement to a lesser position where merited.

Replacement

767. Section 391 should provide that where an employee has been replaced, this create a prima facie assumption against reinstatement.

Recommendation 3-2.15

There be a prima facie presumption against reinstatement where a replacement employee has been engaged on an ongoing, non-casual, basis.

Redundancy

768. Section 391 needs to be amended to clarify in relation to s.391(1)(a) that it cannot require an employer to reopen a closed operation or operational part of an enterprise, or to trade in a market no longer engaged by the employer.

Recommendation 3-2.16

Section 391 be amended to expressly clarify in relation to s.391(1)(a) that it cannot require an employer to reopen a closed operation or operational part of an enterprise, or to trade in a market no longer engaged by the employer.

Job Creation

769. Section 391(b) needs to be amended to clarify that an employer cannot be compelled to create a position which does not exist or is not functionally required within an enterprise. The scenario envisaged in s.391(b) should only apply where such a position or positions exist within the enterprise.

Recommendation 3-2.17

Section 391(1)(b) be amended to clarify that an employer cannot be compelled to create a position which does not exist or is not functionally required within an enterprise.

770. There should also usefully be some different or exempted treatment of small business in this instance. Small businesses do not generally have functional overlap or articulation of the type this concept is predicated on. Generally one person does one thing and there is little or no functional hierarchy.

REMEDIES – COMPENSATION

771. Section 392(2)(a) is welcome. However, it should be amended to also include reference to the effect of any order of compensation on the employers capacity to continue to employ other staff, including maintaining the availability of existing rosters and hours of work.

Recommendation 3-2.18

Section 392(2)(a) incorporate additional consideration of the effect of any order of compensation on the employers capacity to continue to employ other staff, including maintaining the availability of existing rosters and hours of work.

HEARINGS ON CONTESTED FACTS

NO ABILITY FOR A PROPER HEARING

772. Under s.397 or 399, there is no ability for either the employer or employee to have a formal hearing on any aspect of the dismissal. This is problematic for a number of reasons:

a. Natural Justice: Employers must be guaranteed that natural justice will be maintained under this new system and that they must be able to produce and rebut cogent evidence in an open and transparent manner. Employers must also have the opportunity to ensure they have an ability to respond to any allegations made against them that would go to the merits of any decision made by FWA. Without the ability of an employer to elect to have the matter brought on more formally, they run the risk that FWA may elect to deal with the matter informally by way of telephone, site visit or on the papers and make adverse orders against an employer. How will an employer know that what they said to a member of FWA informally, will not then be used against them subsequently?

b. There doesn't appear to be any clear delineation between a conciliation conference (which is on a without prejudice basis) and an arbitration (which is conducted by another member of FWA).

c. High Appeal Threshold: The inability for an employer to elevate a matter to a proper arbitration will potentially prejudice employers who only have the ability to appeal the matter on public interest grounds. Under s.400, appeals are not as of right, and will need to be in the public interest (and if they involve errors of fact, they must be significant) – a very high threshold test indeed. Remedies of reinstatement and compensation orders are serious matters and without an easier appeal mechanism, decisions will not be overturned unless employers take the expense to apply for a prerogative writ in the High Court.

d. Sworn Evidence?: How will FWA obtain sworn evidence from either the employer or employee in an "informal" manner, whether by way of phone or at the actual workplace? There is a very good reason why employers would want an employee to

provide evidence from the witness box and many employees would be reluctant to bring an application that was without merit, if they knew they had to provide sworn evidence.

e. Coffee Table Arbitration: Unfortunately, there is the potential for informal determinations to be made and labelled pejoratively as "coffee table arbitration" if employers are hit with reinstatement and compensation orders over a telephone call with a member of FWA. There does not appear to be any other area of public regulation that allows such orders to be made without a proper hearing being conducted.

773. Section 395 allows for a hearing of FWA in instances where facts are contested. This is welcome, although it is not clear what a hearing would constitute, what level of formality would apply, and how examination would be undertaken.

Recommendation 3-2.19

On the application of either the employer or employee, a hearing must be convened on contested matters of fact.

Recommendation 3-2.20

Appeals should be of right and not on public interest grounds.

774. Another general comment, this is not going to be the exception, but the rule. Dismissal cases generally involve some contest on facts.

775. Section 399(3) needs to be amended in relation to the concept that FWA can turn a conference into a hearing. Parties are prejudiced in not having time to prepare for a hearing, additional evidence may have been prepared had an employer known an informal conference would turn into a hearing etc.

Recommendation 3-2.21

Amend s.399(3) to remove the notion that FWA can convene a hearing during a conference.

Recommendation 3-2.22

Additionally require that no FWA hearing can be convened without due notice and an opportunity to prepare for both parties.

AGREEMENTS

776. ACCI reiterates that agreements should not be able to deal at all with unfair dismissal matters. They should be unlawful terms as they are now under Regulation 8.5(5), Part 8, Division 7.1 of the *Workplace Relations Regulations 2006.*

3-3 INDUSTRIAL ACTION

INTRODUCTION

777. ACCI understands the commitment of government to have been for the retention of the existing industrial action provisions, including but not restricted to secret ballots. We welcome that the government has translated this commitment into the Bill.

778. This is very important, not only because minimising industrial action has always been an important goal of the industrial relations system, but also because there are various elements of the new system which will re-embolden trade unions and could see some unions test the system as it comes into operation. There are a number of risk points in the new system that make responding to and controlling industrial action more important than ever.

779. Employers require (and have been promised) a system which will:

a. Continue to generate historically low levels of industrial action.

b. Continue to see the overwhelming majority of agreements concluded without any industrial action.

c. Continue to provide tough remedies for damaging industrial action, albeit within a system still based on protected action.

780. These are the frames of reference from which the operation of the new Act as a whole, and Part 3-3 in particular, should be addressed.

LOCKOUTS

781. Section 408 sets out a sequential framework for agreement making. This appears to have some logic, and to reflect the flow of the bargaining process in many instances.

782. However, there is an open question as to why an employer cannot pursue an agreement in the terms it desires (claim action) and seek to lock employees out in support of that agreement.

783. Lockouts will always be rarer than strikes, and can be damaging to employers commercially and operationally (not to mention potential longer term human resource and industrial relations implications).

784. However, they are a recognised part of the system, and a mutuality or reciprocity in scope to take industrial action is recognised internationally as an implicit part of the protection of freedom of association and collective bargaining.

785. ACCI can see some potential concerns regarding Australia's compliance with our international obligations through ILO conventions in restricting the rights and capacities of employers in regard to industrial action and not imposing the same restrictions on unions.

786. Thus, there may be room to reframe s.408 (and various parts of Part 3-3) simply in terms of "claim action" generally in this first instance, without a qualifier by who the initiating party is. This is not going to unleash a mass of lockouts, but it would ensure proper and necessary reciprocity in the Australian system.

INDUSTRIAL ACTION

CL.19 MEANING OF INDUSTRIAL ACTION – LOCK OUTS

787. This may be addressed by cl.19(1) and the accompanying statutory note, however there is an apparent concern with cl.19(3) and the definition of lock outs.

788. There are a number of situations in which employers prevent employees from performing work which are in no way industrial action, or any form of lock out. A clear example is where an employee is stood down (with or without pay) pending an investigation of alleged misconduct or prior to termination. On its face such a situation may unwittingly become caught up in s.19(3), despite not being any form of lockout for a bargaining purpose.

Recommendation 3-3.1

Cl.19 be modified to more clearly exclude from the definition of a lockout ordinary changes of contracted duties, and situations in which employees are stood down in a disciplinary or investigative context .

789. There is a further concern with the notion that a lockout can be triggered by an employer "preventing employees from performing work under their contracts of employment without terminating those contracts".

790. There are a number of situations where tasks change over time, and where work is not available strictly to contracted terms. This is customary and common, and should not inadvertently trigger a lock out.

Recommendation 3-3.2

Cl.19(3) be modified to require (at least) that a lockout be within the industrial context of bargaining and not triggered by ordinary and customary employment law arrangements.

OHS Concerns

791. Section 19(2) of the Bill overturns the current provisions in s.420(4) which relate to proving that action taken was based on a reasonable concern to employee's imminent risk to their health or safety.

792. This has been used by unions in the past when they claimed they were not taking industrial action, but were acting on OHS grounds. The omission of this provision means that the employer potentially has the burden of proof now to show that the employee's action was not related to OHS concerns.

793. ACCI recommends that the current provisions be retained to ensure that unions do no use this as a back-door way to getting around unlawful industrial action provisions.

Taken in concern with other persons

794. The Bill omits the current provisions under s.438 of the *Workplace Relations Act 1996* that render industrial action unlawful if it is taken in concert with one or more persons who are not protected persons. This should be retained in the Bill.

Recommendation 3-3.3

Section 420(4) and 438 should be inserted into the Bill.

EMPLOYEE CLAIM ACTION

Demarcation Disputes

795. Section 309(5) contains something odd – it (rightly) seeks to exclude demarcation based action from protection, but then qualifies this by only doing so where the demarcation dispute is somehow less than the significant basis for the dispute.

796. The test of significance in s. 309(5) seems ambiguous, and likely to cause not only litigation but encourage active testing by trade unions. If the principle behind this provision is to stand, it should not be qualified. The disincentive to such action will be much stronger without the "significant extent" qualifier.

Recommendation 3-3.4

Amend s.409(4) 'demarcation disputes' to remove the qualifier requiring action to relate 'to a significant extent' to demarcation.

797. Various consequential amendments are required throughout the part consistent with this.

COMMON REQUIREMENTS FOR PROTECTED ACTION

Notification of Response Action

798. Three days notice is required for claim action in the first instance, but with no apparent corresponding period of notice in s.414(4) or (5) for the response actions.

799. It is not clear why there should not be the same minimum period of notice of action in each instance. The practical ramification of not applying s.414(2) to each of the types of industrial action could be ambiguity, and disputation on whether the Act has been complied with.

Recommendation 3-3.5

Apply the three days notice of action in s.414(2) to each of the types of action listed in s.408.

800. Various consequential amendments are required throughout the part consistent with this.

SUSPENSION OR TERMINATION OF PROTECTED ACTION

801. The operation of these provisions is vitally important to the extent to which the system does or does not encourage and reward the taking of industrial action. Having a bargaining period terminated is the avenue which gains unions access to industrial action related workplace determinations under Part 2-5, which are in reality arbitration of their bargaining claims.

802. Therefore the operation of this Part needs to be tightly controlled and constrained. This is an area of the system which has operated reasonably well for some years and in which policy approaches have appropriately constrained arbitration to exceptional circumstances and employers will be looking to see this is continued.

803. **However ACCI does not agree that a new category of arbitration should be created under s.423. There should only be arbitration in the most limited of circumstances and that is where there is serious threat to the Australian economy or population thereof.**

804. **If any arbitration is to occur in this circumstance, it should only be upon authorisation of the Minister and Government of the day. Such arbitrated outcomes should be reviewed after 6 months.**

Recommendation 3-3.6

Delete Division 6, s.423.

Failing that, the Minster should have to authorise any arbitration before FWA has jurisdiction in the matter, and only where all other reasonable attempts at settling the matter have been exhausted. Such arbitrated outcomes should only be on an interim basis of 6 months and must be reviewed.

Self Harm

805. Section 423(3) would allow unions and employees to engineer significant economic harm to themselves for the reward of an industrial action workplace determination under Part 2-5. As drafted, employee response action could be terminated on the basis that "*is causing, or is threatening to cause, significant economic harm to any of the employees who will be covered by the agreement*".

806. This is an unwitting incentive for self harm which needs to be redressed in the finalisation of the Act.

807. Furthermore, there should be actual, and not threatened harm.

Recommendation 3-3.7

Amend s.423(3) to ensure that a union cannot cause harm to employees through self initiated response actions, and thereby secure access to an arbitrated outcome.

Omit the word "threatened" from s.423(3) to ensure that actual harm has occurred.

808. It almost goes without saying, but if this is not addressed it will render the notion of employer response action a nullity. Employers would not risk making a response lest things escalate to a third stage (employee response action) in which employees could harm themselves into an arbitrated outcome.

Capacity to bear harm

809. We note s.423(4)(c) with concern. We hope this does not compel an assumption that employers have inherently deeper pockets and should sustain more harm prior to being able to secure termination of industrial action than employees.

810. We would be concerned about models or precedents being developed in regard to this for one business which could not legitimately be extrapolated across the system to other employers.

811. This could also unwittingly be used against employees perhaps with independent sources of income or nearing retirement age.

812. In the end this complication does not appear necessary, the notion of 'harm' in subsections (2) and (3) would appear sufficient to take such considerations into account.

Recommendation 3-3.8

Delete proposed s.423(4)(c).

PROTECTED ACTION BALLOTS

813. Div 8 of Part 3-3, sections 435-469.

814. Employers support the use of secret ballots to determine support for protected industrial action. However, there are a number of recommendations proposed by ACCI which may improve the operation of these provisions.

30 Days Before NED

815. Under s.438, a protected action ballot order can be made 30 days before the nominal expiry date of an agreement. There is no sound reason why industrial action should commence on day 1 of an agreement reaching the end of the nominal expiry date, and this will encourage unions to take industrial action at a premature stage.

Recommendation 3-3.9

Section 438 should be omitted. Protected action ballot should only be made once the agreement has passed its nominal expiry date.

Pattern Bargaining

816. There should be cross-reference to s.409(4) of the Bill which refers to the prohibition on pattern bargaining in Division 8.

Recommendation 3-3.10

There should be a cross note to s.409(4) of the Bill which refers to the prohibition on pattern bargaining in Division 8.

PAYMENTS FOR INDUSTRIAL ACTION

817. Div 9 of Part 3-3, sections 470-476.

818. Employers will be interested to utilise the new provisions allowing for proportionate partial payment for partial work, and to in time liaise with government on their effectiveness. We do have preliminary comments in response to the provisions as drafted.

Time limit on reviews

819. There needs to be some time limit for an employee or union seeking to vary or dispute an assessment of proportionate work value under these provisions. There needs to be some statutory period of working days after a notice is provided under s.471.

820. A failure to provide certainty in this area will lead to a complex reopening of payrolls, tax adjustments etc, some of which could result in the employee owing rather than being owed money. A superior situation would be to provide a suitable prescribed period to make application, which will clarify the situation for employers and employees.

Recommendation 3-3.11

Provide that where an employee or bargaining representative seeks a variation order under s.472, this must be lodged within 7 days of the day of the notice under s.471, or within 7 days of the day on which the ban occurred.

Employers seeking orders

821. Under s.472(4) an employee or union can seek a review of the employer's apportionment of work value in cases of partial industrial action. Why couldn't an employer also do this proactively, and themselves seek some security in their assessment of partial work value. An employer might do this where they know the union will do so anyway, or as a gesture of good will – to have the 'umpire' adjudge a fair value of work in the context of bans.

Recommendation 3-3.12

Amend s.472 to also allow employers to seek to have FWA issue orders confirming or varying the proportion by which payments are reduced in cases of partial work bans.

3-4 RIGHT OF ENTRY

822. The commitment of the government could not have been clearer in regard to right of entry:

> That means there will be tough, clear rules on industrial action, secondary boycotts will remain regulated by the Trade Practices Act and the current approach to right of entry will be retained.[36]
>
> Labor will maintain the existing right of entry rules.[37]

823. We believe the commitment of the government was unambiguously to maintain the status quo in regard to right of entry.

824. This means that essentially the existing right of entry provisions of the *Workplace Relations Act 1996*[38] should not have been touched, or that any changes should have been minor and consequential only. Therefore, the primary recommendation must be:

Recommendation 3-4.1

Consistent with policy commitments prior to the 2007 election, replace proposed Part 3-4 with provisions directly replicating existing Part 15 of the Workplace Relations Act 1996.

825. Employers look to government to maintain the status quo on right of entry, and to restore these provisions to the Fair Work Bill. If this means taking a different approach to that proposed in some other areas, such as modern awards, then so be it.

826. What follows is an examination of some detailed matters if proposed Part 3-4 is progressed.

KEY PROBLEM – PROVING MEMBERSHIP

827. A key problem for employers is asymmetrical information. Employees know whether they are a union member or not – it doesn't necessarily follow that employers know. Employers don't ask such questions (mainly out of fear of breaching freedom of association provisions).

[36] Deputy Prime Minister, Hon. Julia Gillard MP, Speech to The Australian Mines And Metals Association Annual Conference, Melbourne, 2 April 2008.
[37] Forward with Fairness – Policy Implementation Plan, p.23
[38] Part 15.

828. Will an employer be able to ask and demand that the union indicate which member they are seeking right of entry? How will employers know that the right of entry permit is being used for a legitimate purpose?

Affected Member Certificates

829. Furthermore, s.520 creates a new order that unions can obtain called "affected member certificates" that allows a union to enter a worksites but cannot tell the employer which member they are relying on for entry purposes. S.520(3) states:

> An affected member certificate must not reveal the identity of the member or members to whom it relates.

830. **Given that unions will be able to inspect non-member records without any authorisation by the employee or FWA, the only option for employers presented with the s.520 certificate would be to allow the union to inspect every record and file. How else would s.520 not be breached by both the union or employer?**

831. Therefore, ACCI recommends:

Recommendation 3-4.2

Section 520 should be omitted or revisited to provide a more practical approach.

KEY PROBLEM – USE OF UNION RULES

832. Under the proposed right of entry provisions of Part 3-4, entry can be undertaken to investigate breaches relating to a person whose interests a union is entitled to represent[39].

833. This is in direct contrast to the status quo in which right of entry is conditional upon unions being named parties to an award covering the work.

834. The proposed approach would unduly open up right of entry, complicate employers capacity to control who can and cannot enter the workplace.

[39] For example, proposed s.481.

Union Rules

835. At various points the Bill seeks to rely on trade union eligibility rules to define rights, responsibilities and capacities. With respect, this approach cannot have been settled upon by someone with experience actually working with these rules.

836. Union eligibility rules are highly legalistic constructions and descriptions of work which are near unrecognisable and indecipherable to persons working in the industries concerned for decades. They contain genuinely highly technical wording, which has been amended and re-amended based on complex inter-union litigation and consequential correction in union rules cases.

837. The key problems with the principle underpinning right of entry under the Bill are:

    a. Employers are not going to be able to know whether someone seeking entry is legitimately able to do so. Union rules represent the ultimate in insider knowledge, which is arcane, labyrinthine and inaccessible to non-experts. Employers will not be able to apply these rules successfully.

    b. The people who advise them, employer associations and FWA, are also not going to be able to provide advice on the entitlement of particular unions to represent employees. These are highly complex documents, subject to decades of word by word litigation. They cannot always be read on their face, and the wording of union rules often has no consistency with or relevance to the way an industry refers to itself the equipment it uses etc.

838. A panel of Australia's most eminent labour lawyers and jurists probably couldn't accurately and consistently apply highly complicated union rules consistently to particular fields of work. Asking employers to do so, on the fly when faced with an official demanding entry is farcical.

Impact

839. So what will an employer do when faced with someone seeking entry, and purporting to have an entitlement to represent employees? Given the threat of prosecution, there is a very real threat either of paralysis,

or being forced to simply allow entry which may be illegitimate or specious. The proposed approach creates asymmetrical knowledge in which unions will purport to have rights of entry and employers will be incapable of validating or invalidating such a claim.

Existing Agreement

840. What of an employer with a long history of working with Union A, with Union A delegates on site, and generations of agreements with Union A. The employer may have an established approach to entry by officials of Union A. What would they do when Union B arrives claiming a right of entry under its rules? Why would it further sound industrial relations to allow entry of a union with a minority or near non-existent membership into the workplace?

Recommendations

841. Having considered this issue, and returning to what was actually included in policy prior to the election, the status quo will be a superior approach to that proposed. Thus, the primary recommendation must be:

Recommendation 3-4.3

Unions again be named in modern awards, and right of entry continue to be conditional upon award coverage, and the union being named in the award covering the work.

Recommendation 3-4.4

Where an employer has an agreement with a union party (being a party that was a bargaining representative for the making of the agreement and not merely a post agreement sign on) that union only have rights of entry in relation to any suspected contravention of the agreement, award, NES or Fair Work Act.

842. Failing that, then perhaps if modern awards are to be created, then employers need to be able to apply for orders clarifying entry under the award.

Recommendation 3-4.5

Employers, through their representative organisations and associations, be able to apply for Modern Award Right of Entry Orders, which will list which unions have which rights of entry to which workplaces covered by the modern award.

These orders will set out in plain English how entry will work in relation to enforcement.

Where a union seeks entry not provided for under such an order (for example in relation to atypical employment), this could only occur following a further specific order of FWA (with the employer having an opportunity to be heard).

INSPECTION OF NON-MEMBER RECORDS

Introduction

843. The existing *Workplace Relations Act 1996* provides for the inspection of the employment records of non-union members in relation to entry to investigate a suspected breach, only on application to the Australian Industrial Relations Commission[40]. The AIRC may order entry for the purposes of inspecting and copying non-member records, and an employer to produce such records.

844. However, proposed s.482 of the Fair Work Act would allow inspection and copying of any record "relevant to the suspected contravention".

Concerns

845. **Privacy and freedom to not associate**: Union officials are not government officials, are not independent and are not agents of the state. They are employees of private, voluntary organisations. Whilst they have and should have rights and protections under law, there must be limits.

846. There is also an important point of principle, human rights and rights of non-association here. There any many in our community who don't associate with unions – just as there are for all forms of organisation.

847. Many would be concerned at the prospect of such an organisation having access to their private information.

848. **Fishing Expeditions**: ACCI can see little or nothing in the provisions proposed to stop a union seeking to inspect managerial, supervisory or CEO employment records, with many employers maintaining a single, central set of employment records.

[40] Workplace Relations Act 1996, s.748(9).

849. Linked to the proceeding, we cannot see sufficient protection against unions fishing in the records for additional claims, or for a basis to proselytise for union membership.

850. **Imprecision**: The reference to inspecting records or documents which are 'relevant' to the suspected contravention is so vague as to offer no solace or clarity on the limits on the inspection of non-member records. Greater clarity and protection is needed.

851. **Dangers**: The dangers and exposures here are clear. A union official will have seen a record containing significant personal information (date of birth, home address, tax file number etc). There are personal security and other risks from any communication or usage of that information. This might include for example communicating someone's home address or suburb to others in the workplace, which could have serious consequences.

852. **Responsibility**: Employers assume significant responsibilities in holding personal information about individuals, and a duty to maintain the confidentiality of such information. This is not a duty which unions can of should assume in relation to persons who chose not to join them.

Privacy

853. ACCI has general concerns about the proposed interaction between the *Fair Work Act* and privacy legislation.

854. The proposed cross reference to the privacy act is going to do nothing to stop a union communicating the contents of an employment record to the employee concerned. What is for example to stop a union communicating to a non member employee:

a. The contents of internal managerial communication raising performance, counselling and discipline issues for the non-member employee.

b. That the employee is under investigation for fraud, theft, or any other form of misconduct. This could be on the basis of "*we notice they are questioning your performance or going to sack you for X, well if you join our union we can stop the employer doing that*…".

c. That the employee is under police or other external investigation evidenced through the employment records.

d. Health details which are extremely sensitive and personal information (such as drug testing or HIV status).

855. Finally, as set out in the introduction to this submission, employers believe there are still relevant exemptions from privacy law for employment records which obviate the need for the proposed statutory note to s.482. These notes are prejudicial to the government's consideration of the ALRC's latest report and to the position employers will pursue with government, and they should be omitted.

Recommendations

856. As a matter of general principle, employers cannot see any basis for a trade union to have access to the records of employees who choose not to join that union.

857. There is now a very well resourced and active inspectorate quite capable of inspecting non-member records where trade unions consider there may have been additional breaches beyond their membership, or providing inspection necessary to secure information germane to a union investigation on behalf of a union member.

858. A protocol could be developed for unions to request the assistance of FWA where they believe they require information relating to non-members, and FWA could provide such information on a controlled basis omitting irrelevant, personal and confidential information.

Recommendation 3-4.6

There be no capacity for trade unions to inspect records of non-members, nor to exercise entry for that purpose. Section 482(1)(c) should be amended to clarify that unions have rights only in relation to records or documents maintained in relation to the employment of a union member, and containing information about that union member only.

859. Failing this, and in consideration of the preceding, if it is determined that unions should have access to non-member records, then the status quo is more balanced and effective than the proposed approach.

Recommendation 3-4.7

Maintain the approach in existing s.748(9) and require a union to apply to FWA for orders allowing access to non-member records.

860. If the status quo is not accepted, then the views of the individual concerned should become paramount.

Recommendation 3-4.8

Unions be able to access to non-member records only with the permission of each person whose records are to be accessed, and that unions only be able to inspect records of persons their rules could allow them to represent as members .

Recommendation 3-4.9

An individual employee (whether union member or non-member) be able to elect to have their employment records open or closed inspection by anyone other than Fair Work Australia. Where an employee has elected that a union not be able to inspect their records in relation to a compliance inspection, the union would be barred from doing so.

Recommendation 3-4.10

A new civil penalty offence be created of misusing or communicating information gathered when exercising right of entry.

THE ACT SHOULD BE A CODE

861. As set out elsewhere in this submission, the Act should be a code and agreements should not be able to contain provisions on right of entry which operate inconsistent with Part 3-4 (nor should protected action be sought in relation to such a claim).

Recommendation 3-4.11

The making of an agreement with a union (as a substantive party, not a post agreement sign on party) provide during its life right of entry solely to that union and automatically extinguish any rights of entry of any otherwise eligible organisations.

Recommendation 3-4.12

Agreements not be allowed to contain detailed provisions on right of entry, or if they are, the provisions be invalid to the extent that they restrict or facilitate entry beyond the terms of Part 3-4.

862. The interaction between bargained and statutory right of entry needs to be considered. What of an agreement with Union A that addresses rights of entry and provide Union A with additional rights etc – how will this operate when Union B arrives wanting to exercise a rules based right of entry.

3-5 STAND DOWN

863. Employers consider stand-down provisions to be an essential part of the industrial relations system, and indeed a key safety net element of the system for employers facing highly damaging situations. Recent events in Western Australia regarding gas supplies, and natural disasters in Queensland underscore the importance of this fundamental protection of both employer viability and employee jobs being included in the Act. The Government is to be congratulated for retaining this essential provision.

864. We do however have some comments on the form and operation of Part 3-5.

NES MATTER

865. Stand down is a key and fundamental employment protection of universal relevance. There is no reason why the stand down provision should not be moved into the NES provisions – as it operates generally to all employers and employees and appears to be an appropriate place.

Recommendation 3-5.1

Part 3-5 should be moved into the NES section and become an NES matter.

BREAKDOWN OF MACHINERY OR EQUIPMENT

866. There is a change between existing s.691A(1)(b)(ii) of the *Workplace Relations Act 1996* and proposed s.524(1)(b), namely that the breakdown of machinery or equipment is qualified by "*if the employer cannot reasonably be held responsible for the breakdown*".

867. We ask the government to reconsider this. It will quite simply create costly debate and litigation for employers facing serious operating adversity and threats to viability. The fact is that the machinery has broken down and there is serious operational adversity and no trade – that the machinery may have been maintained on a schedule someone wishes to debate (for example) is irrelevant at that point to the capacity of the employer to remain operating and maintain employment once machinery is fixed.

Recommendation 3-5.2

Section 524(1)(b) be in the form of the comparable existing provision.

868. In the WA gas example, no one could seriously expect an employer to chose their gas supplier based on its maintenance record. It would be inherently inappropriate to seek to hold an employer responsible for the breakdown of a supplier's infrastructure. In the case of gas or electricity, there is often no choice of final suppliers.

Recommendation 3-5.3

If not changed as per Recommendation 3-5.1, section 524(1)(b) make clear that this can only apply to machinery and equipment directly owned and operated by the employer.

AGREEMENT MAKING

869. It is appropriate that parties be able to address stand-down in collective agreements, and that (consistent with proposed s.524(2)) these arrangements be able to apply to stand-down circumstances.

870. However, the effect of an agreement should not be to ever render stand-down a nullity, or to ensure that it operate in name only. Just as employers can only bargain "above" the NES, there should be some protection to ensure unions cannot seek or secure stand-down terms which will be inoperative or unduly costly when they are needed.

Recommendation 3-5.4

Section 524(2) be amended to provide that an agreement provision on stand-down is in applicable and has no effect to the extent it would not allow an employer to stand down an employee in circumstances encompassed by s.524(1).

DISPUTES

871. (Sections 526-527).

Recommendation 3-5.5

Section 526(3)(c) be qualified to require a union to actually have a member.

Recommendation 3-5.6

Section 526(3)(d) be qualified to require an inspector to be acting on the complaint of a stood down employee and to not initiate action without such a request.

Recommendation 3-5.7

Section 526(4) be qualified to require the assessment to still be consistent with the provisions of s.524(1) and to still allow stand-down in appropriate circumstances.

3-6 ADDITIONAL REDUNDANCY OBLIGATIONS

872. Part 3-6, 'Other Rights and Responsibilities', ss.528-536.

NOTIFYING CENTRELINK

873. As a general comment this is a very archaic concept dating from very different times, and at odds with the changed role of Centrelink. This is not necessary in contemporary Australia, and indeed given the media's interest in redundancies, a decent media monitoring programme by Centrelink would achieve this anyway.

874. Employers appreciate however that this may be considered necessary under ILO Convention 158.

875. The effect of s.530(5) is contradictory. Section 530(5)(b) seems to quite properly accept that redundancies need to stand based on the employer's judgement, but s.530(5)(a) then allows for this to be caught up on a mere matter of paperwork.

Recommendation 3-6.1

Redress for contravention of Div 1 of Part 3-6 be restricted to fines, with no capacity for a failure to inform Centrelink to allow a stop on, or reversal of, a redundancy situation covered by the Division. There should in particular be no injunctive relief.

Failing that, allow FWA to inform Centrelink on the employer's behalf at the same time as fining them for not observing this section.

876. Failing the proceeding, there should be either a statutory note or an addition to s.530(5) to clarify that the main point is that Centrelink be informed, and that the Court has the power (and a presumption in favour of) to order that this occur as a matter of urgency, and which do not halt or reverse proposed redundancies. The option in s.530(5)(a) needs to be rendered truly exceptional.

877. As previously indicated, where there is a redundancy of the scale which triggers this section, there should be no access to unfair dismissal claims under Part 3-2.

CONSULTING UNIONS

878. Subdivision B of Part 3-6 requires notification of unions in situations of the redundancy of 15 or more positions.

879. Again as a general comment this is unnecessary in black letter law, and a step back in time industrially. Where union members are affected by proposed redundancies, they have the capacity to contact the union and invite it into the situation. It is far from clear why an automatic right of notification is required in 2010.

Knowledge of membership

880. Section 531(c) requires notification where the employer could reasonably have known an employee was a union member. We have elsewhere explored practical difficulties behind this assumption, but can for the purposes of proceeding acknowledge that this might be legitimate where:

a. The employer has a CA with the union.

b. The union was the bargaining representative for the majority of persons under the CA, and engaged with the making of and voting on the agreement.

c. There is a day to day delegate structure in the workplace.

881. In these situations it may be reasonable to conclude the employer should have known that there is a union presence in the workplace.

882. However, there are practical problems. How would an employer know the particular employees affected by a redundancy are or are not members of the union? They may know the union is in the workplace and broad numbers, but not a matching to individual employees affected by a proposed redundancy.

Eligibility for membership too broad

883. There is a bigger problem with proposed s.531(2)(a). Consider a situation where an employer has an agreement with Union A, has dealt with Union A for decades, has Union A delegates onsite and the

employer deducts dues for Union A. The employer would quite naturally notify Union A in seeking to comply with this provision.

884. How would the employer reasonably be reasonably expected to have known that one or more of the employees affected had recently joined Union B (which despite having no industrial history or engagement with the workplace, may have a dual, overlapping or ambiguous entitlement to represent the employees)?

885. Section 531(2)(a) is too broad and does not match the practical engagement with unions in workplaces.

Recommendation 3-6.2

Section 531(2)(a) be amended to only require an employer to notify a registered organisation of employees to the extent that it was reasonable for the employer to have known that the employee(s) effected were members of that organisation. Subsection (3) will also need to be amended in the same terms.

886. Section 532(b) clearly implies that there will be multiple unions notified. However workplace realities mean that an employer will rarely if ever have any notion of dealing with multiple unions in relation to a single cohort of employees.

a. If for example an entire operation is shut down, an employer may know that multiple unions are affected (one for the production employees, one for the drivers, one for the clerks etc).

b. However, an employer making only one type of employee's position redundant (e.g. shutting a single assembly line) is not going to conceive of dealing with a union other than the one they know of and deal with over time for the employees effected.

887. The way Division 2 of Part 3-6 is drafted, it will cause inter-union disputation and demarcation actions as opportunist unions seek to swoop on potential members in potential redundancy situations. This threatens to significantly complicate redundancy, cause collateral damage to non-redundant employees, and cause disputes. The Act should not yield such outcomes and this needs to be revisited.

CH.4 COMPLIANCE & ENFORCEMENT

INJUNCTIONS

888. Section s.545(2)(a) appears to specifically reverse one of the long standing tenets of Australian labour law, being the quarantining of employment matters from injunctive relief, other than where third party or public rights are affected.

889. Courts have long had the power to act on employment decisions once made and specific avenues of relief have been offered, however one of these has not been capacity freeze or stop major operational business changes in 11th hour court actions.

890. Also important to understanding the responsiveness of our system to urgent and disputed matters has been the capacity of the arbitral tribunal to convene urgent dispute hearings and conferences. It is not the case that there are not avenues to address urgent developments in restructuring or workplace change, merely that court injunction has not, and need not, be one of them.

891. Employers are very concerned at the prospect of becoming embroiled in very costly and complex injunctive litigation in instances of (but not restricted to) redundancies and restructuring. We are concerned that an industrial relations system which has for many years consciously eschewed and avoided legalism and court litigation may, following this Bill, specifically invite and encourage such litigation.

892. We are concerned that introducing injunctive matters into the system will see courts attempting to micro manage employment in the context of what is supposed (at least nominally) to remain an essentially decentralised, bargaining based system.

893. We note in support of this, existing s.665(9) which specifically (and correctly) prohibits the courts from granting injunctive relief in relation to a termination of employment or proposed contravention of the unlawful termination provisions. This should remain the approach.

Recommendation 4-1.1

Section 545(2)(a) allowing for the making of injunctions not be proceeded with, and instead existing s.665(9) of the Workplace Relations Act 1996 be retained.

894. It is worth recalling in this regard how expensive it will be to deal with 11th hour injunction applications seeking to halt (for example) an operational closure. This appears a recipe for the introduction of a highly litigious and costly avenue into the system. Flying squads of union lawyers injecting themselves into workplace changes is not going to reflect well on the system or advance consensual workplace relations. Employers consider such an outcome to be at odds with Government intentions.

Proposed Contraventions

895. Linked to the concerns regarding injunctions, there are various avenues under Part 4-1 to pursue an order in relation to "proposed contraventions" of civil remedy provisions.

896. Employers consider that employment law actions should lie once an action is committed and not be able to be used prophylactic-ly to prevent an action which may or may not constitute a breach.

Recommendation 4-1.2

Part 4-1 only provide for actions in relation to contraventions of civil remedy provisions, and not in relation to "proposed contraventions".

Redundancies and Restructuring

897. In particular, employers are concerned that injunctive relief and actions based on proposed contraventions may be able to be used hostilely to retard and complicate essential business restructuring.

Recommendation 4-1.3

Redundancies of multiple positions in cases of restructuring or operational closures be precluded from injunctive or retarding actions under Part 4-1. Any orders under this part be precluded from having the effect of stopping or delaying planned or notified redundancies in such situations.

898. In support of this, we note the new obligations for consultation in the proposed modern awards, and the obligations on employers to consult unions in significant change situations. This should not become simply the trigger for an urgent injunction.

899. There will also be dispute based redress in relation to these provisions. There is no legitimate basis for additional recourse to Court injunctions in such situations.

Practical Ramifications

900. There are serious practical and commercial ramifications to what is proposed here. If a significant business restructuring is injuncted, this can have ramifications for share prices, for financing, for ratings and interest rates etc.

Recommendation 4-1.4

If there are to be any injunctive avenues under Part 4-1; where an injunction is granted there should be an obligation on the court to hear (and finalise) the substantive matter as a matter of utmost urgency.

EQUAL TREATMENT OF ORGANISATIONS

901. Various subsections of s.540 addresses the capacity of organisations of employers and employees to apply for orders regarding compliance and enforcement.

902. ACCI queries why the various sub-sections allow the making of applications merely where there is eligibility for membership, and an inconsistency in regard to employer associations.

903. It appears from the wording of the various subsections of s.540 that:

a. Under s.540(2) mere eligibility for membership rather than actual membership is enough for the making of a claim by a union.

b. In contrast, s.540(5) enables an employer organisation to make an application only where the organisation has a member affected by the proposed contravention.

904. This appears inconsistent and employers cannot see any legitimate basis for that inconsistency. Paragraph 2133 of the Explanatory Memorandum fails to recognise that employers and their representatives have a role to play in enforcement, and that there should not be additional restrictions on employer associations/ organisations compared to those for unions.

Recommendation 4-1.5

Section 540 be amended to treat unions and employer organisations equally in regard to their capacity to apply for orders under Part 4-1. Both should be required to have a member affected by the contravention to bring an action. Failing this s.540(5) should be framed based on eligibility only as is the case for s.540(2). An industrial association should also be able to apply.

905. There is also a potential ILO concern in this regard. ACCI understands one of the tenets of compliance with ILO Convention 98 on Freedom of Association is mutuality and equality of treatment between employer and worker representatives wherever possible. There may be a concern if the capacity for employers to effectively pursue compliance orders is subject to an additional hurdle not imposed on organisations of employees.

PERMISSION OF THE EFFECTED PERSON

906. For both s.540 and 541, the person affected should need to give their permission for an action to be pursued on their behalf. A member of an organisation should need to permit or authorise a union or employer association to pursue a matter on their behalf.

907. Similarly (for s.541), there should not be autonomous actions by FWA to prosecute a matter on an employee's behalf without that employee's express permission.

Recommendation 4-1.6

Orders not be able to be brought in relation to conduct against a person without the permission or agreement of that person.

SMALL CLAIMS PROCEDURE

908. Small employers will not view $20,000 as a small claim, and will be concerned at the imposition of a penalty of this magnitude without the protection of proper legal form and process.

909. This said there is a concern about the treatment of legal representation under Div 3 of Part 4-1.

910. In support of this concern, we note that FWA may be legally represented in pursuing a matter, and that the employer respondent may not be.

Recommendation 4-1.7

Section 458(6) be amended to extend to situations where an employee is represented by Fair Work Australia, and in particular where the FWA officer is legally qualified.

911. If this avenue is to be less formal and legalistic, then this has implications for costs actions. It appears logical that the type of considerations which give rise to costs actions (e.g. s.570(2)) not be able to be applied to 'amateurs' solving matters themselves without formality or training.

Recommendation 4-1.8

There be no avenue for costs where a claim is pursued under Div 3, of Part 4-1 (the small claims procedure).

ADVICE AND COUNSEL

912. ACCI members, like trade unions, provide advice on the application of the *Workplace Relations Act 1996*, and will do so on the *Fair Work Act*. In doing so, they counsel employers on their rights, capacities and obligations under the Act.

913. Given the ambiguity and uncertain nature of many of the new legal rights proposed, as well as the uncertain way in which they may be applied to facts of different cases, there is serious risk that advice given in good faith could render the giver of advice liable to an offence. This would be a very poor policy outcome.

914. The objective of policy should be for employers and employees to be encouraged to take advice on employment and industrial relations rights and responsibilities. Exposing advisors, especially those working on day to day industrial relations to legal sanction for doing their work in good faith will only discourage the giving of advice and assistance.

915. On this basis, ACCI is somewhat concerned by proposed s.550(2)(a). Where an active contravention or avoidance is counselled, or the counsellor advises a course of action which they knew to be contrary to the Act, such a remedy provision may be warranted.

916. However, errors are also made from time to time, or counsel is provided where the law is not clear (and this will be frequent after this Act commences). There needs to be some recognition that there can be counsel in good faith which may trigger a contravention of a remedy provision, but which should not expose the counsellor to action.

917. In regard to counselling, section 550(2)(a) should only be triggered where there is some knowledge or intention to contravene a civil remedy provision or where it would have been reasonable to have known that the action counselled would trigger such an action.

Recommendation 4-1.9

Section 550(2)(a) be amended to clarify that unwitting or erroneous counsel, counsel provided in good faith, or counsel provided where the law is not clear or established, not trigger a civil remedy against the counsellor.

CH.5 ADMIN & FAIR WORK AUSTRALIA

FRIVOLOUS AND VEXATIOUS CLAIMS

> A vexatious litigant is a person who frequently and persistently seeks to commence litigation without any reasonable grounds. Such people can repeat arguments which have already been rejected by the court, disregard the court's rulings, or generally attempt to abuse the court process… Not only do these people waste public resources by taking up the court's time, they also cause harassment, annoyance and expense to those who are forced to defend matters which lack a reasonable basis.[41]

918. ACCI cannot see the purpose or basis for proposed s.587(2). It does not appear to accord with Division 12 of the existing Act, nor to be included in the otherwise comparable s.646 of the existing *Workplace Relations Act 1996*.

919. Why would FWA not be able to dismiss <u>any</u> application which is brought before it which is <u>found to be</u> frivolous, vexatious or without reasonable prospect of success?

920. ACCI understands that such a capacity is generally open to courts in dealing with the full range of comparable matters, including sanctioned prohibitions analogous to the 'unlawful dismissal' matters covered here. Matters can be struck out in appropriate circumstances based on developed approaches and precedents in relation to all manner of matters.

921. In support of the proposition that a capacity to dismiss in these circumstances needs to be at large and at the open discretion of the tribunal or court concerned, we note:

    a. The comments of Lord Herschell in *Lawrance v Norreys* (1888) 39 ChD 213, 15 App Cas 210 at 219 `*It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases*'"[42]. A range of cases flow from such principles through to the present. Clearly, our courts have proven themselves well capable of exercising an at large

[41] Second Reading Speech, *Vexatious Proceedings Bill 2006* (NT), 15 June 2006, Dr Toyne
[42] Cited in *Burton v Shire of Bairnsdale* [1908] HCA 57; (1908) 7 CLR 76 at page 92

capacity to dismiss matters sparingly and only in appropriate circumstances.

b. Frivolous and vexatious proceedings are an accepted problem for the administration of justice in Australia, as has been recognised by the Standing Committee of Attorneys General (SCAG). SCAG has developed model legislation to address this problem. State and Territory application of this model contains checks and balances, but does not appear to contain exclusions comparable to s.587(2).

c. Section 31A of the *Federal Court of Australia Act 1976* provides for a process of summary judgements, which we understand is not limited to particular claims:

> **Summary judgment**
>
> (1) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
>
> (a) the first party is prosecuting the proceeding or that part of the proceeding; and
>
> (b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.
>
> (2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
>
> (a) the first party is defending the proceeding or that part of the proceeding; and
>
> (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.
>
> (3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:
>
> (a) hopeless; or
>
> (b) bound to fail;
>
> for it to have no reasonable prospect of success.
>
> (4) This section does not limit any powers that the Court has apart from this section.

d. There are also provisions to dismiss proceedings on these grounds in the rules of Federal, State and Territory Courts, which we understand are also generally at large, such as the following from the Rules of the Supreme Court of Victoria:

23.01 Stay or judgment in proceeding[43]

(1) Where a proceeding generally or any claim in a proceeding—

(a) does not disclose a cause of action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the Court—

the Court may stay the proceeding generally or in relation to any claim or give judgment in the proceeding generally or in relation to any claim.

e. There are numerous comparable provisions in Commonwealth law providing agencies and tribunals with discretion to not action matters where they are frivolous and or vexatious, in areas as diverse as:

i) The *Privacy Act 1988*, s.41(1)(d).

ii) The *Child Support (Registration And Collection) Act 1988,* s.100

iii) The *Native Title Act 1993* – s.147.

922. [2271] to [2272] of the Explanatory Memorandum, do not indicate why the approach in s.587(2) has been taken. No basis has been articulated for robbing this decision maker of an option open to comparable courts and tribunals for the full range of comparable proceedings and for the sound and effective administration of justice.

Recommendation 5-1.1

Section 587(2) be omitted from the Act.

LEGAL REPRESENTATION

923. Section 596 addresses representation by lawyers and paid agents. Section 596(4) is welcome in recognising that unions and employer associations employ legally trained staff as industrial officers, and that representation rights, as of right, should apply.

[43] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) S.R. No. 148/2005 123, Order 23

924. It is appropriate in particular that there is a recognition of the role of peak councils such as the ACTU and ACCI and their legally qualified staff.

925. However, there are circumstances in which an employer association (and potentially a trade union) may not be a registered organisation under the definition in s.12 of the Act. This includes both state registered and recognised bodies (including most state chambers of commerce) and associations which are not registered (which includes both industry associations and chambers of commerce). State branches of trade unions may also employ legally qualified staff.

926. If the guiding principle is that legally qualified staff of unions and employer associations be able to represent their members as of right, then there is no basis to distinguish between associations based purely on their federal registration – particularly when the expansion of the federal system is taken into account.

927. This is elsewhere recognised in the Bill. Section 12 contains a definition of an "industrial association" which draws precisely these bodies into the scope of the Act.

Recommendation 5-1.2

Section 596(4) be amended to additionally not treat as a lawyer or paid agent, someone working for an "industrial association" (as defined in s.12) not registered under the Workplace Relations Act 1996.

PUBLICATION

Agreements

928. Section 601(4)(b). There should be scope for FWA to publish agreements omitting (for example) commercially sensitive rostering arrangements, or sophisticated (and often expensive and commercially sensitive) performance related pay models. Employers and bargaining representatives should be able to apply to have agreements published with suitable omissions and strikeouts, albeit with a presumption towards full publication.

929. Another issue are enterprises where the address or other agreement details should not enter the public arena – such as women's shelters, defence contractors or others involved with safety and security.

Recommendation 5-1.3

Section 601(4)(b) allow for the partial publication of CAs, and for parties to apply to omit commercially or personally sensitive details from the published versions of agreements.

Right of Entry Documents

930. Section 601(5) outlines various exemptions from the requirements to publish FWA decisions. This is said to be on the basis that "*the volume of these decisions would impose a significant burden of FWA that is not justified given that these decisions will be routine and uncontroversial*."

931. We cannot agree with this in relation to s.601(5)(d) regarding imposing conditions on right of entry permits. This is not going to be a routine occurrence, and it certainly is not going to be uncontroversial. Where a capacity of an individual is found to be required to be curtailed, it is a matter of the public interest that the reasons be published. Employers subject to right of entry clearly have an interest in knowing (a) that conditions have been imposed, (b) what the conditions are, and (c) the circumstances leading to those conditions.

932. As an example, without publication of any conditions imposed on a permit, how is the employer community going know when any conditions expire or come off. An absence of publication would simply cause additional, unnecessary complexity and disputation.

Recommendation 5-1.4

Section 601(5)(d) be omitted, which would see FWA publish decisions where it imposes conditions on a right of entry permit.

Confidential Documents

933. Sections 601(5)(g) and 594(1)(d) have the effect of not requiring publication of decisions or orders making evidence confidential. In the interests of open and transparent operation, this should be reconsidered. The main point is that personal, security, or commercial confidentiality be protected and not published. However, there would appear to be a prima facie requirement for the public to know that a sealed file has been created even if there is a valid basis to seal its contents.

Recommendation 5-1.5

Section 601(5)(g) be reconsidered, and there be the publication of orders and decisions to maintain confidential information (albeit where the information itself is not open to publication).

CORECTING ERRORS

934. Employers welcome s.602 and the capacity to correct errors in decisions. However, we are unclear on the relationship between ss.602 and 603(3). Employers consider that the range of decisions listed in s.603(3) need to be capable of being varied to correct errors but also to clarify and improve their operation, including by revocation or variation.

935. By way of example:

a. After the modern awards commence, problems or uncertainties may emerge regarding scope and coverage which could be corrected via a rapid variation.

b. Minimum wages may be misapplied or miscalculated, such that an order needs to be revoked and replaced (something which happened semi-regularly under the pre-*WorkChoices* award system and gave rise to correction orders).

Recommendation 5-1.6

Replace s.603(3) with a capacity to restrict the right to vary or revoke specific decisions through regulations (i.e. retain s.603(3)(h), but omit ss. s.603(3)(a)-(g)).

STAYING DECISIONS PENDING REVIEW

936. Section 607(1) provides a limited capacity to appeal a matter without a hearing. This appears appropriate, but employers are concerned that the interaction of s.606 and 607 not have the effect of retarding or precluding the urgent staying of decisions where it is impractical to convene a rapid hearing.

Recommendation 5-1.7

Sections 606 and 607 be reviewed to clarify that it is possible to stay a decision pending appeal without a hearing (or pending a later hearing) where the urgency of doing so warrants such a course.

COSTS

937. Employers agree with the principle behind s.611(1) regarding persons bearing their own costs in relation to matters. However, both employer associations and unions act for individual members in relation to matters litigated in the member's names. We would be concerned if the expression of this section had the effect of complicating or limiting this relationship or creating scope for disputes between associations and their members over costs.

Recommendation 5-1.8

There be a statutory clarification or note to s.611 clarify that associations can act for persons on a non-costs basis.

MINIMUM WAGE ORDERS

938. ACCI is concerned at the scope for errors and technicalities to emerge in the application of a headline decision increasing minimum wages, to specific modern awards. Awards often involve complex ratios, calculations and the like during which errors can and do occur. Section 617 should not have the effect of requiring a hearing to address these and a single member of a full bench, or simply a single member should be capable of addressing any errors in applying minimum wage increases to specific awards.

Recommendation 5-1.9

Section 617 allow the making of corrective orders correcting the application of minimum wage increases to specific awards, and allow this by means other than Full Bench hearings by the Minimum Wage Panel.

FAIR WORK OMBUDSMAN

Not An Ombudsman

939. ACCI takes issue with the use of the term "ombudsman" both for the existing body, and the proposed Fair Work Ombudsman.

940. An ombudsman is an independent government official appointed to monitor government activity in the interests of the wider community, and to investigate complaints of improper government activity. There can also be ombudsmen appointed to provide the same functions for an industry or NGO sector.

941. The key characteristics are that:

a. An ombudsman is appointed by government to monitor and investigate complaints about the government and how it exercises its functions and powers.

b. Once appointed, the ombudsman operates with a high degree of independence from the government, and as a stand alone genuinely independent agency.

942. The creation of ombudsmen functions at the federal and state level is one of the most important advances in the operation of the Australian state across the past 30 years. These appointees have a vital role to play in our polity and this role should not be compromised by inaccurately and inappropriately extending and watering the ombudsman function and improperly applying such an important term to fundamentally different agencies.

943. The proposed appointee is not an ombudsman at all. This part of FWA is simply an inspectorate or compliance body and should be accurately named as such.

a. It will not investigate the government that appoints it or the exercise of government powers in any way.

b. It is simply a government agency exercising the powers of government against those regulated (employers, organisations, employees etc).

944. A proper Fair Work Ombudsman would in fact be entirely independent of FWA and investigate that body in the discharge of its responsibilities. This isn't necessary and the general Commonwealth Ombudsman (who is a real ombudsman) is quote capable of performing this function external to FWA.

Recommendation 5-1.10

The Fair Work Ombudsman be renamed to more accurately reflect its functions in enforcing the Fair Work Act against non-government employers, organisations and employees.

Persons Assisting

945. Under s.710, a new provision would allow a person, who does not have to be a public servant or statutory officer to perform actions that are deemed to have been done by the inspector.

946. ACCI questions the need for such a provision. However, if it is to remain, there must be appropriate checks and balances on persons who's conduct would be deemed to be that of a statutory appointed officer.

Recommendation 5-1.11

Section 710 should be omitted.

Building and Construction Industry

947. As ACCI has made clear in its submissions to the Wilcox Inquiry, and as we shall in due course submit to Government, any specialist division of FWA for the building and construction industry should not report to the Fair Work Ombudsman, and should be based on independent statutory and ministerial appointees (as is the case for the existing ABCC).

948. There needs to be a provision equivalent to s.697(2)(b) for any new specialist division, its head, and senior officers as appropriate.

Recommendation 5-1.12

A new Part 5-3 establish the specialist division of Fair Work Australia for the building and construction industry as an independent statutory function within FWA, headed by independent statutory and ministerial appointees (as is the case for the existing ABCC).

ABOUT ACCI – LEADING AUSTRALIAN BUSINESS

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

Our Activities

ACCI takes a leading role in representing the views of Australian business to Government.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.

- Business representation on a range of statutory and business boards, committees and other fora.

- Representing business in national and international fora including the Australian Fair Pay Commission, Australian Industrial Relations Commission, Australian Safety and Compensation Council, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers.

- Research and policy development on issues concerning Australian business.

- The publication of leading business surveys and other information products.

- Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

Publications

A range of publications are available from ACCI, with details of our activities and policies including:

- The *ACCI Policy Review*; a analysis of major policy issues affecting the Australian economy and business.

- Issue papers commenting on business' views of contemporary policy issues.

- *Policies of the Australian Chamber of Commerce and Industry* – the annual bound compendium of ACCI's policy platforms.

- The *Westpac-ACCI Survey of Industrial Trends* - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia.

- The *ACCI Survey of Investor Confidence* – which gives an analysis of the direction of investment by business in Australia.

- The *Commonwealth-ACCI Business Expectations Survey* - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories.

- The *ACCI Small Business Survey* – which is a survey of small business derived from the *Business Expectations Survey* data.

- Workplace relations reports and discussion papers, including the ACCI *Modern Workplace: Modern Future 2002-2010* Policy Blueprint and *Functioning Federalism and the Case for a National Workplace Relations System*.

- Occupational health and safety guides and updates, including the *National OHS Strategy* and the *Modern Workplace: Safer Workplace* Policy Blueprint.

- Trade reports and discussion papers including the *Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World* Position Paper.

- Education and training reports and discussion papers.

- The ACCI *Annual Report* providing a summary of major activities and achievements for the previous year.

- The ACCI Taxation Reform Blueprint: *A Strategy for the Australian Taxation System 2004–2014*.

- The ACCI Manufacturing Sector Position Paper: *The Future of Australia's Manufacturing Sector: A Blueprint for Success*.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports, is available on our website – www.acci.asn.au.

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607 Bourke Street
MELBOURNE VIC 3000
Telephone: 03 9614 4777
Facsimile: 03 9614 3970
Email: vicamma@amma.org.au
Website: www.amma.org.au

Australian Newsagents' Federation
Level 3
33-35 Atchison Street
ST LEONARDS NSW 2065
Telephone: 02 8425 9600
Facsimile: 02 8425 9699
Website: www.anf.net.au

Australian Paint Manufacturers' Federation Inc
Suite 1201, Level 12
275 Alfred Street
NORTH SYDNEY NSW 2060
Telephone: 02 9922 3955
Facsimile: 02 9929 9743
Email: office@apmf.asn.au
Website: www.apmf.asn.au

Australian Retailers' Association
Level 10
136 Exhibition Street
MELBOURNE VIC 3000
Telephone: 1300 368 041
Facsimile: 03 8660 3399
Email: info@vic.ara.com.au
Website: www.ara.com.au

Live Performance Australia
Level 1 - 15-17 Queen Street
MELBOURNE VIC 3000
Telephone: 03 9614 1111
Facsimile: 03 9614 1166
Email: info@liveperformance.com.au
Website: www.liveperformance.com.au

Master Builders Australia Inc.
16 Bentham Street
YARRALUMLA ACT 2600
Telephone: 02 6202 8888
Facsimile: 02 6202 8877
Email: enquiries@masterbuilders.com.au
Website: www.masterbuilders.com.au

Master Plumbers' and Mechanical Services Association Australia (The)
525 King Street
WEST MELBOURNE VIC 3003
Telephone: 03 9329 9622
Facsimile: 03 9329 5060
Email: info@mpmsaa.org.au
Website: www.plumber.com.au

National Baking Industry Association
Bread House, 49 Gregory Terrace
SPRING HILL QLD 4000
Telephone: 1300 557 022
Email: nbia@nbia.org.au
Website: www.nbia.org.au

National Electrical and Communications Association
Level 4
30 Atchison Street
ST LEONARDS NSW 2065
Telephone: 02 9439 8523
Facsimile: 02 9439 8525
Email: necanat@neca.asn.au
Website: www.neca.asn.au

National Fire Industry Association
PO Box 6825
ST KILDA CENTRAL VIC 8008
Telephone: 03 9865 8611
Facsimile: 03 9865 8615
Website: www.nfia.com.au

National Retail Association Ltd
PO Box 91
FORTITUDE VALLEY QLD 4006
Telephone: 07 3251 3000
Facsimile: 07 3251 3030
Email: info@nra.net.au
Website: www.nra.net.au

Oil Industry Industrial Association
c/- Shell Australia
GPO Box 872K
MELBOURNE VIC 3001
Telephone: 03 9666 5444
Facsimile: 03 9666 5008

Pharmacy Guild of Australia
PO Box 7036
CANBERRA BC ACT 2610
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Facsimile: 02 6270 1800
Email: guild.nat@guild.org.au
Website: www.guild.org.au

Plastics and Chemicals Industries Association Inc
Level 1
651 Victoria Street
ABBOTSFORD VIC 3067
Telephone: 03 9429 0670
Facsimile: 03 9429 0690
Email: info@pacia.org.au
Website: www.pacia.org.au

Printing Industries Association of Australia
25 South Parade
AUBURN NSW 2144
Telephone: 02 8789 7300
Facsimile: 02 8789 7387
Email: info@printnet.com.au
Website: www.printnet.com.au

Restaurant & Catering Australia
Suite 17
401 Pacific Highway
ARTARMON NSW 2604
Telephone: 02 9966 0055
Facsimile: 02 9966 9915
Email: restncat@restaurantcater.asn.au
Website: www.restaurantcater.asn.au

Standards Australia Limited
Level 10
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Website: www.standards.org.au

Victorian Automobile Chamber of Commerce
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Facsimile: 03 9820 3401
Email: vacc@vacc.asn.au
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