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Submission on the Fair Work Bill

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Summary

My submission argues:

1. The changed circumstances of the global capitalist financial crisis (GFC) means the Fair Work Bill (FWB) requires substantial amendments by the Parliament to better defend the economic, social and occupational interests of workers during a recession.

2. The FWB shortfalls for the protection and advancement of workers' rights with devils in the details are significant. While welcoming the genuine reforms, this is new *'1984 doublespeak spin'* that 'WorkChoices is dead' and the FWB establishes 'fair rights for workers' and a 'fair balance for all'.

3. The fair collective bargaining system has not been achieved as the FWB deliberately retains the repressive regime against industrial action. The Deputy Prime Minister DPM's 'clear rules for the right to strike' are but a cut and paste from WorkChoices. They bring shame on an ALP government. The failure to provide for the right to strike to enable workers to respond to the environmental crisis is but one example.

4. Is this fairness we can believe in? This Parliament can respond to the twin challenges of the GFC and the environmental crisis by recognising the legitimacy of the unions' *Your Rights at Work'* voice in the democratic elections by not selling out the justifiable political demands for workers' rights. I write from a union perspective. These are my own views.

One. The disastrous impact on workers in this global capitalist financial crisis requires changes to better protect workers' rights.

The government did not know about or develop this proposed labour law, the Fair Work Bill (FWB) as a response to this most severe global capitalist financial crisis since the great depression (GFC).

Continuing economic growth was envisaged at the time of the formation of ALP election policies in '*Forward with Fairness*'. The ALP policy instructions for the drafting of the FWB were given when the new government's fight was against inflation with the Reserve Bank raising interest rates. Although the warning signs in the US crisis of the egregious corporate financial practices and a world capitalist slow-down were evident from early 2008, the government maintained their stance in the consultations and the economic assumptions on which the FWB was developed without any understanding of the banking financial crisis to come.

In hindsight how bad the crisis is was not clear for all to experience until the October 2008 crash in share market values heralded world recession. This is a very severe capitalist crisis, but how deep and how long is unknown, with some economists fearing depression.

It is publicly acknowledged that the neo-liberal free market economic theories and policies are not working, and flawed in response to this GFC challenge. These dominant free-market ideological doctrines and for this submission those governing labour/capital relations and earlier workplace policy are now wrong.

The workings of government institutions, economic management and corporate policies throughout the world are not only under critical questioning but quite reasonably being reversed…and the Rudd government has prudently changed.

After years of going backwards on workers' rights, the tide may have turned for the right to bargain collectively, for protection from unfair dismissal, for the right to be represented by a union, for a safety net of pay and conditions and in the backing of an industrial umpire, but the GFC tsunami threatens the ability for these reforms to be successful…so the FWB requires re-evaluation.

The GFC must force critical questioning of fundamental premises of neo-liberal policies applying to the labour market and the capital and labour relationship that underpin both WorkChoices and the (slightly fairer) FWB. But the DPM in her consultations did not re-design let alone reverse the earlier *Forward with Fairness* plan designed for very different economic and social times.

The government now acknowledges the economic slowdown (and even in China that impacts adversely on the Australian resources sector) and has been forced to economically respond to the GFC with revised policies. Despite this, there is no major reworking in the FWB to afford greater protection for working families, despite the daily reports of the spread of the deeply troubling crisis from speculative financial markets into productive capital investment. There were no reasonable changes to the scope of the minimalist protections for workers to be

able to face the GFC. There was no changing of details providing greater legal ability for the lower paid and now even more precarious workforce to defend their conditions of employment, nor strengthening the rights of workers to exercise their freedom of association collectively in unions. The labour market position for employees has now reversed from any previous experiences of being tight in some areas and in demand that earlier may have enhanced the negotiating position of workers.

With consumer spending down, the government responded with a prudent $10 billion boost for families and pensioners. Many other policy changes are necessarily being put in place in 2009, as earlier minimalist reforms are clearly insufficient. Demand management is being pursued. Government 'Keynesian' intervention into the finance system and economy linked in internationally is necessary. But not yet in workplace relations. The corporate lobby, responsible for WorkChoices, it seems still gets their way for employers, as we shall see in the following FWB details.

Professor Keith Ewing (2008) observed:

'When the world was last in a recession on this scale, the British government of the day – a Conservative government - under the influence of the Liberal economist working in the Treasury - one J M Keynes - undertook to support the rebuilding of collective bargaining, so that within a period of 12 years, 85% of British workers were covered by collective agreements. This was presumably to create a virtuous cycle of (i) higher wages and greater spending power, (ii) to stimulate demand and production to meet the demand, (iii) to stimulate employment growth.'

'It is supreme irony that the challenge for the Labour government in Britain is to embrace the ideas of a Liberal economist and the politics of a Conservative government. But as we struggle to find a new economic paradigm in an uncertain world, there is not only an opportunity but also a responsibility on the part of national governments in many parts of the world to intervene much more actively in economic management. We must ensure that it is not only in America where 'labour is on the rise'.

Professor Keith Ewing, University of London 10.11.08 'Restoring rights at work Lessons from the UK.' 2008 meetings in Australia. Published by Catalyst http://www.catalyst.org.au I support Keith Ewing's lessons outlined. To date the government with the FWB has not adopted them.

I cite now a common economic position, this time from the US, and Obama politics: Christian Weller and Amanda Logan from the Centre for American

Progress 'A Strained Relationship: Worker Rights and Financial Crises' in International Union Rights ITURC vol 16 issue 1 2009:

'Many countries have seen rising income inequality amid slow income growth for low-income and moderate-income workers for several decades. Strengthening workers' income growth through better worker rights is an important ingredient to create strong and stable growth in the long-term. Policy makers also need to pay attention to worker rights during a time of crisis, when profits are under pressure, which can translate into pressure to reduce worker rights. Weaker worker rights however, would make it harder for income, demand and economic growth to resume. A resolution to a major economic crisis requires a sensible policy approach to strengthening worker rights, even though private sector pressures will emerge to weaken such rights.

…good worker protections limit the impact of an economic and financial crisis on people's incomes and thus on consumption and growth. …South Korea is cited….they refer to the US crisis and cite economic research. Academic research is cited showing stronger worker rights link to increased productivity. As productivity increases, so do profits and, if worker rights are strong, so does wage growth. With stronger domestic demand, incentives for speculative investing are reduced. This results in more stable income growth over the long-run and ultimately more stable and stronger economic growth – just what the financial doctor ordered for the troubled world economy.'

'Labour rights have a long-term stabilising effect. They tend to reduce one of the inherent long-term economic imbalances – more people having to borrow ever larger amounts.'

As you will see later with my criticisms of the FWB details, it is now necessary for workers' rights to be strengthened to ensure that not only do unions have the legal capacity for collective bargaining and its scope covering all workers, but also that wages are indeed raised in much broadened bargaining rounds to stimulate the economy. Under WorkChoices millions of low paid workers had their wages cut, and face this again with the GFC. Of course, individual employers will be enraged with any call for general higher wages; yet overall this is one essential way of stimulating demand.

I go further and argue for economic progress that includes working families as well as profitable and sustainable business, historically that the downward slide share of wages to profits has to be reversed and be increased.

I now reiterate what everyone knows as one flawed premise of right-wing ideology. The Howard claim of the power of the individual employee in the labour market to negotiate was always *'1984 spin'*. The obvious reality is,

whatever the labour law framework, employees under capitalism are economically and legally in a subordinate position to the power of employers. The employer and employee relationship is experienced as not one of free contracting equals, notwithstanding legal mythologies. 'It is not a partnership voluntarily entered into between equals to generate wealth for themselves and all others; it is a relationship between unequals; of superiors and inferiors. In a capitalist society, normal employment relations are class relations…

WorkChoices was an unacceptable measure to regulate capital/labour based relations on the assumption that, if left unchecked, employers will use their wealth to oppress workers, to exploit them as much as possible.' (Professor Harry Glasbeek 'Rudderless in a Sea of Choices: The Defeat of Your Rights At Work—Analysis and a Possible Response' 2008).

The same point as this submission argues applies to the FWB.

The global corporates in mining, finance, telecommunications, manufacturing and governments as employers particularly exercise their economic power as does any employer.

It cannot be denied that the most serious deterioration in the labour markets face the Australian workforce. All are at greater risk and disadvantage in protecting their economic, social and occupational interests. Workers' experience is a weakened negotiating position (except the most privileged elites, such as senior executives and MPs).

Despite the government's responsible spending initiatives, as Australia moves more slowly into recession, more job losses and higher unemployment are a reality into 2009 - look at the December 2008 loss of full-time jobs. Some industry sectors and regions are already in recession. Thousands of employees in the last six months have suddenly been made redundant, often dramatically with no notice or redundancy compensation to be able to adjust being unemployed and with no prospect of jobs. At workplaces into the future, uncertainty and doubt will prevail for employment conditions, with pressures for lower wages and worse conditions. Many working families face devastating lives in a recession.

Australia's workforce is in a demonstrably weaker bargaining position against the exercise of management power, both for negotiating collective agreements and responding to any unjust and capricious ruling by management. The threats of dismissal and the realities of lengthy unemployment make it more difficult for workers against corporations than through periods of economic stability and growth.

The question is does the FWB meet the challenge? Does the FWB protect workers from 'extreme capitalism' and those employers driven by 'greed'? I argue no.

I cover more details later but now give two illustrations of 'the devils in the FWB detail' in a GFC.

A Labor government supporting working families requires a labour law that provides strong job security provisions, looking after employees with long service, with family responsibilities, those close to retirement etc and when made redundant some compensation and new training. What is standard is at least some redundancy payment when made redundant to ease the problems of being unemployed through no fault of your own, such as in some union agreements, one month's pay for each year or service.

Paul Munro (2008 former Judge of the AIRC) commented: 'The proposed Strong and Simple Safety Net is too rigidly strung from the populist polls of direct Parliamentary and Executive legislation and regulation, and has big holes in it' (Australian Institute of Employment Rights launch of their new magazine www.aierights.com.au). Here are two holes (and there are others, see later).

First, it is a disgrace that the DPM can say that the Fair Work regime meets working families' needs in recessionary times, when over two million have no rights for redundancy payments at all.

Compensation in recognition of past service, to cope with unemployment and ease the transition is recognised as a standard. But in the (so-called) National Employment Standards and 'modern' minimum award safety nets, on instructions from the DPM, there are no rights for employees in small businesses of less than 15 employees to receive any notice of retrenchment, neither time to adjust such as not committing to mortgages etc nor any redundancy payments at all.

The SA Industrial Commission accepted some 20 years ago the principle that looking after the redundant individual employee was important to override management prerogative of making an employee with 20 year's service redundant at 5pm on a Friday night with no notice and no compensation. They accepted as a general principle that employees of small business ought not to be discriminated against. The shock and loss suffered with no wage income facing unemployment is the same as those employees in larger businesses.

Unions gained minimum award provisions in 2004 in the National Redundancy case and WorkChoices abolished this so many workers lost the safety net for severance pay. It returns in the NES – nothing under one year's service, 1 year and less than 2 years is 4 weeks' pay up to 9 years less than 10 years 16 weeks'

pay, at least 10 years 14 weeks – not much, but better than nothing at all under the exclusion for small business. It still has the right for an employer to claim incapacity to pay.

Many union collective agreements of course contain more reasonable notice such as three months and more adequate redundancy payments. I note in passing that the new Chinese labour law operative 1/1/2008 has severance rights of one month's pay for each year of service - fair, as western corporations and Chinese employers due to the GFC are now making thousands redundant.

The DPM ruled out any severance pay in the National Employment Standards for workers in small business and asserted that the award minimums for small business should not have redundancy pay in the AIRC award review.

The ACTU argued strongly for 'the inclusion in all modern awards of a redundancy standard which includes small business redundancy entitlements as the standard will play a critical role in maintaining the existing entitlements of many employees to redundancy pay and in restoring a degree of fairness and equity to the federal award safety net.'

The DPM rejected this, as 'an appropriate balance does not appear to have been struck between employee entitlements and employer costs when introducing a small business redundancy entitlement in all modern awards.' Such so-called balance, with nothing for employees! Her Department predicted redundancies and cost for small business of $58.8 million…but this is what redundant employees deserve to survive! And those redundant employees spend that money!

That redundancy provisions ought to be denied to employees in small business was hailed in the press as a victory. Powerful business associations welcomed in the coming recession this employer 'freedom'.

Two, in the FWB is a requirement to notify redundancies to Centrelink and the union, already practiced by reasonable employers. Employers dismissing workers 'for reasons of an economic, technological, structural or similar nature' have to consult with the union to avert or mitigate the redundancies and adverse effects on employees who through no fault of their own face unemployment in a period of world recession. The FWA can make orders against employers not consulting with unions.

But these rights inexplicitly only apply to dismissals of more than 15. Why not to every individual made redundant? Why allow employers this legal loophole to do a series of dismissals under 15 denying union negotiations and notice to Centrelink?

Orwellian labour laws and *1984*

I digress. It is indisputable that under WorkChoices we lived in an Orwellian *1984* workplace world, where opposites of what politicians said apply. The endless chanting of one Liberal party slogan was 'More jobs, better pay.' 'Doublethink' was one device. 'Doublethink' is the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them. 'Doublethink' involves the forgetting of any fact that has become inconvenient, and then, when it becomes necessary again, drawing it back from oblivion for just so long as it is needed. This denies the existence of objective reality and all the while taking account of that reality which one denies. MPs perhaps will be familiar with this experience.

One use of 'doublethink' is to label union organising which is not unlawful, or to be more specific, which is lawful, to be deemed by opponents as 'inappropriate'. Legislative changes are pushed which transforms that which is 'inappropriate' into that which is 'unlawful'. Through the interplay of 'unlawful' and 'inappropriate' the vice of doublethink is played out. That which is lawful is unlawful. Or at other times the interplay of 'permissible and not permissible' and applies to 'protected/unprotected' action and so on. I contend this 'doublethink' applies again with the FWB – albeit in a different form, a new *'1984 spin'*.

But back to this main narrative. In a recession many workers are often kept on but face pressures. ACTU Sharan Burrow warns that 'employers must not use the uncertain jobs market to pressure workers into accepting cuts to their pay and conditions. Using the threat of job losses to force workers into poor deals is unconscionable behaviour, especially since the crisis has been caused by unrestrained greed and a short-term drive for profits. Employers need to take a look at themselves and begin by cutting back on the excessive salaries and lavish perks they have enjoyed in recent years.'

On this last point, the FWB could under the Corporations power have a provision on executives pay, restricting the obscene millions in CEO salaries and golden handshakes, as they depart after bankrupting a company.

The corporation's normal more powerful market position and HRM control over the workforce ought not to be enhanced legally in the FWB, as it was under WorkChoices to exploit vulnerable workers. Some of the most powerful global companies in all sectors did use the law for exploitative and repressive ends.

The changed global economy means that enterprise bargaining occurs with the threat of unemployment. The discipline of the fear of being made redundant is used in negotiations. Workers are less able to have the confidence to have

discussions with an employer, to organise in a union and exercise union rights in bargaining. When an issue of power between management and their workforce or resolving workplace conflict is at issue, more effective counter-balancing rights for employees are needed. The workforce during a recession is less likely to be able to organise effective industrial action to achieve a fair go, unless the labour law mandates a 'firewall' right to strike (see later).

Notwithstanding Australian citizens voted against the corporate WorkChoices agenda, their powerful associations are maintaining a deceitful pushback on Senators, backed by the mass media, against the minimalist FWB reforms pleading special instances for watering down provisions. Unfortunately, *new 1984 double-speak* mythologies are promoted that the FWB is 'too fair for employees' or 'unfair for management in the GFC' or 'give union bosses too much power.'

Using an argument from Professor Ewing: 'Unequivocal government support is especially important to resist the political power of employers who seek to use the political and parliamentary stages to lobby to dilute the legislation, to secure concessions of three kinds: to carve out exclusions from the coverage of the legislation; to make it easier for employers to resist it; and to make it harder for unions to use it.'

'In the UK we failed also to confront the problem of union busting US consultants, who advise employers on how to remain union free, whose activities were completely under-estimated…'

This Senate Review can acknowledge the changed GFC realities and re-design the FWB to more appropriately defend the interests of employees by significantly strengthening workers' rights; by adopting ACTU and union policy. The following issues are to be considered with the GFC.

Two: The 'devils in the details' for workers.

1. Beware the juridification of industrial relations
or 'First hang the lawyers!' (Shakespeare)

The Howard government's *' 1984 spin'* had many believing WorkChoices was de-regulation - where the opposite was the case. Employers' interests had previous labour law social justice rules removed. But rather than no regulation to allow the free-market and corporate power to reign as in the Conservative New Zealand model, Australia had a unique world legal model. This was excessive legal micro-managing of employers, employees, unions, the AIRC and all those players in workplace relations; over the State's industrial relations systems; with command and control legal directions in thousands of pages of complex

directions allowing the intervention of corporate lawyers (and labour lawyers for unions). This legalism was criticised by all parties, labour lawyers and industrial relations academics and even the H R Nichol's society.

Juridification of industrial relations, often complained about under the arbitration system, was raised to new heights. This juridification, rather than workers and employers negotiating and solving workplace grievances and claims, required lawyers to be dominant - and privileged corporate legal firms to undermine workers' rights and penalise unions. Judges applied narrow legal formalism and 'black letter law' determinations. 'Fair play' was removed.

Good industrial relations' systems and proper labour law for justice requires bargaining between the parties that values fair play, merit arguments and equity, not lawyers and judges ruling.

I give one example here that dates back to initially to the Workplace Relations Act 1996 that contained process requirements for protected action. Without compliance by unions, industrial action could be found to be unlawful and was able to be legally stopped and unions penalised. Initially, the AIRC interpreted in a common-sense straightforward manner one requirement for employers to be given written notice of 'the' intention to take 'the' action, together with 'the nature of the industrial action'. I researched the case law over eight years and saw how counsel for employers successfully pursued legal technicalities over each of these individual words, such as 'the'. The Federal Court gave a range of differing opinions that means the law was not really clear. In cases, after the event, the 'protected action' considered to be lawful was found subsequently to be deficient in the notice (irrespective of the practical knowledge of the employer knowing 'the nature of *the* action'). Judges narrowed the meaning of *'the'* industrial action and *'the nature'*. This was important for some corporations wanting to penalise unions rather than negotiating.

WorkChoices contained the same phrases, but added them into the new process requirements for the notice of the ballot process and the questions to be posed to the workforce who are to vote. Although some unions were able to comply, or rather the employer did not take the technical points, there was still legal uncertainty. The issue is that the process rules gave employers unnecessary and unfair scope for arguing legalisms to frustrate legitimate industrial action. The FWB retains such phrase.

This example on one phrase was repeated many times over in other clauses.

One critical issue is over the contested complex legal issue of what are 'matters pertaining to the employment relationship' with differing AIRC and judicial opinions. The Electrolux cases ending in the High Court 2004 is the most

prominent recent example. There are many cases, as it is a similar issue to what is or is not an 'industrial matter.'

Predicting what 'pertains' for a lawful strike for example was and still is uncertain. The AIRC and a single judge gave their versions in Electrolux. The Full Federal Court argued for a pragmatic response as enterprise bargaining claims backed with protected industrial action require a high degree of certainty. But the High Court reversed the practical industrial relations outcome, and applied a 'black-letter law' interpretation.

In the *Electrolux* case, the claim for a bargaining agent fee was held as not 'pertaining' and therefore the protected action became (years after the event) unlawful. In dissent, Kirby J said that the capacity of the parties to freely negotiate was the purpose of the 1996 enterprise bargaining regime, noting that protected action by unions was not subject to common law liability. He called for legal realism, since it would be 'odd in the extreme' if one clause later found technically not to be 'pertaining to the employment relationship' made the action unlawful…'a technical legal matter that may take years, as in this case, to resolve through the courts should not remove the immunity for industrial action.' To allow, Kirby continued,

'a grave, even crippling, civil liability for industrial action, determined years later to have been unprotected, is to introduce a serious chilling effect into the negotiations that such organisations can undertake on behalf of their members. It would be a chilling effect inimical to the process of collective bargaining.'

WorkChoices compounded the peril, adding 'matters pertaining' to 'prohibited content' to overrule AIRC decisions. The FWB retains 'matters pertaining' so parties are still uncertain about the legal status of industrial action. As the Federal Court said:

'If the parties are to make rational and confident decisions about the courses of conduct, they need to know where they stand. It would be inimical to the intended operation of the *Workplace Relations Act* to interpret it in such a way as to make the question whether particular industrial action is 'protected action', and therefore immune from legal liability, depend upon a conclusion concerning a technical matter of law ... As this case demonstrates, that may be a matter about which well informed people have different views.'

Industrial relations practitioners do not want to revert to confusion with corporate lawyers arguing that claims are deemed not permissible because they 'did not pertain'. Collective bargaining must come with the freedom to determine claims, and to bargain with the right, if necessary, to take industrial action as a last resort, or in reality to have a lawful strike in reserve, even if not

used. The FWB as we shall see later retains the notion of 'matters pertaining to the employment relationship.'

I do say that the FWB style is considerably easier to follow, streamlined, cross-referenced and not as mind-numbingly convoluted as in WorkChoices. Although not in all respects as excessively prescriptively micromanaging employers and unions and the industrial umpire, there are FWB sections again, e.g. where WorkChoices is retained on industrial action and on bargaining, where the charge can be made, of course with new provisions, of a new form of juridification. I mention these as my narrative moves to substantive problems.

2. Fair collective bargaining rights?

While there are undoubted advances, I have major concerns.

a. Agreement content: deliberate breach of promise by the government.

One of the worst outrages of the WorkChoices regime, unique in the OECD world, was the 'prohibited content' regulation. Without listing them, they deprived unions and employees of the freedom to negotiate over a range of normal (and arbitrated) clauses and penalised employers who chose to agree with their workforce on union rights, such as trade union training leave. The 'prohibited content' regulation is to be repealed, but major issues remain.

Despite the *'Forward with Fairness'* promise to 'remove the Howard Government's onerous, complex and legalistic restrictions on agreement content' and that bargaining participants should be 'free to reach agreement on whatever matters suit them', subject only to the requirement that the terms be 'lawful', the FWB does not deliver on this promise. This is an undeniable breach by the ALP.

The FWB still restricts the matters on which industrial parties can reach agreement. In an unnecessary complex legality, the FWB makes a distinction between 'unlawful' and 'non-permitted' terms. One WorkChoices prohibition still in the FWB is an agreement for bargaining agent fees, that non-unionists gaining the benefits of collective bargaining contribute a fee to the union. This is supported by unionists as a fair contribution and seen as obviously relating to the employment relationship and available in other countries. It is not up to MPs to determine such matters, but the industrial parties. To prohibit such claims is simply to frustrate unions.

'Unlawful terms' are not just unenforceable, but if in an agreement will prevent Fair Work Australia FWA (the Orwellian name given to the AIRC) approval. What is 'unlawful' is a major concern.

The FWB's 'non-permitted' terms especially in relation to unfair dismissal, right of entry and reserving subject matters in future agreements effectively re-introduces (deceptively) 'prohibited content' matters. Despite consent arrangements, enterprise agreements will not be able to provide better conditions than what the FWB provides as a minimum on right of entry, unfair dismissal and to reserve matters in agreements. This denies the parties rights to bargain fairly and in good faith on any matter they like and breaches ILO rights to collectively bargain and undermines reasonable industrial relations.

That which later is held by a judge to be not permitted, prevents a union from obtaining FWA orders, is most risky for organising protected industrial action, or having the agreement approved and will lead again into time wasting 'common law side agreements' that do not give parties certainty that their rights are enforceable.

One advance is that now an agreement can have deduction of wages for any purposes authorised by the employee, such as salary sacrifice and pay roll deductions and can include union training leave (arbitrated in SA 20 years ago.)

I cannot see any justification for the notion of 'non-permitted' content in agreements. Parties should be free to negotiate their own agreements. Employers and employees should not be told by MPs that, even if they freely agree on a matter that they regard as important to their relationship e.g. as argued later, a commitment to address environmental issues, they cannot include it in their agreement, despite what they have agreed is in no way illegal.

There is no obligation for FWA to do anything about 'non-permitted' content, no penalty for having a 'non-permitted' in an agreement, but it will have no effect, and thankfully not affecting the validity of the agreement as a whole.

Agreements can only contain 'matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement'. As argued earlier, the definition of what are 'matters pertaining' is still uncertain legally for parties and the courts to grapple with whether a matter does or does not 'pertain'. If this is not another form of juridification, then I do not know what it is. See Mark Irving's arguments 'The freedom to agree should not be restricted to matters pertaining.' AIER The debate 2008. www.aierights.com.au

What will inevitably occur again is the ridiculous time consuming farce forced by WorkChoices on parties to have 'side common law' agreements, with all the legal uncertainties. Companies and their employees may want commitments on many issues relevant to that enterprise but designated 'non-permitted' matters. Why do we have to go down this *1984 path* again!

Most unreasonably, like WorkChoices, the inclusion of 'non-permitted' content in a proposed agreement means any industrial action taken is unlawful: but we have a rider, unless those concerned reasonably but mistakenly think the content is permitted. Now that is an improvement, but will surely be legally contested.

New practices will emerge if the union wants to reach agreement that it suspects is 'non-permitted', such as an environmental claim (that others may see as outside of the employment relationship) or over what for other employers may be seen as a management prerogative (employment of contractors say), but also wants to have the option of taking industrial action during the negotiations.

The DPM had the nerve to say that this will do away with the legal complexities and the 'tortured logic' and 'doctrines' of the arbitration system. Yet the DPM knows full well the concept that awards and agreements can only be made about 'matters pertaining to employment' is just such a 'doctrine', contested from 1904 about the definition of 'industrial matters' in the Conciliation and Arbitration Act. The DPM is right that there is a 'substantial jurisprudence' as to the meaning of 'matters pertaining' phrase, and knows that it is 'a confusing, uncertain and downright inconsistent jurisprudence' to cite one reference amongst many labour law books and articles, B Creighton and A Stewart, *Labour Law*, 4th ed, Federation Press Sydney, 2005, pp 97–104.

I believe that the 'matters pertaining' device is indeed an ancient judicial doctrine arising out of master and servant status law centuries ago. Judges assigned legal rights by status, not workplace reality or social justice. The master's status carried the assigned right of total dominance while the servant was assigned the status of total obedience. Any hint of conflict from the servant was automatically as an issue of status severely punished. Over many years, this status doctrine was imported into capitalism's 'freedom of contract' law. Today, this status reasoning is applied by the device of 'matters pertaining', converted to the status of the employer and employee. Unless centuries of fictional legal doctrine are to be still allowed, judges must be relieved of using the status device to declare that white is black.

The DPM is pleased to assert that industrial parties will not be able to make agreements on 'managerial prerogative', again a highly contested notion, much litigated with many differing legal positions pronounced. It is extremely difficult for employers and unions in trying to determine what is 'permissible in an agreement and what is not'.

There should not be any notion of 'matters pertaining to employment' or 'permitted matters'. Or if so, at least in the broadest of terms such as covering the occupational and economic and social interests of the parties, but then to be sure, add in 'environmental'.

b. Majority support orders

The FWB does assist workers in bargaining. Where an employer refuses to bargain with its employees a union can ask FWA to determine if majority support exists for negotiating an enterprise agreement. If so, the employer will be required to bargain collectively with its employees in good faith. There is no doubt that there will be litigation on this as employers try to avoid what should be a straightforward practice of negotiating with their workforce in the manner that their workforce wants.

I hope that the Work Choices era of no legal requirement for employers to collectively bargain with their employees, even when a majority of workers have expressed a preference for a union collective agreement is over, such as the Cochlear dispute where workers have in five ballots for a year voted to get their employer to recognise their right to be represented by their union in negotiations. I add the same for many giant corporations, Telstra, the global mining and metals corporations and others.

The FWA need not be satisfied by a vote. They can be satisfied as to the majority opinion of the employees in any number of ways, including accepting union statements. It is important that the FWA can be satisfied by means necessarily beyond the power and influence of any employer using whatever legal union-busting device available. Whether the FWB drafting ends the automatic employer power of veto, where under the former regime employers could get away legally by just refusing to discuss a collective agreement, is yet to be seen. No doubt there will be legal determination.

This may diminish the American style voting system that allows employers to adopt aggressive coercion and bribery leading up to the vote. (But under President Obama US unions may have the check-off system instead, under the proposed Free Choice Act. Arbitration will also be strengthened, not reduced.)

c. Good faith bargaining orders

A bargaining representative will be compelled to bargain in good faith. The requirements include attending and participating in meetings, disclosing relevant information, responding to proposals, giving genuine consideration to and giving reasons for responses to those proposals. An employer will be in breach of the obligation to bargain in good faith when engaging in conduct that is capricious or is unfair conduct and which undermines freedom of association or collective bargaining.

This is but common sense and normal industrial relations practice and does not mean much change in unionised workplaces with respectful IR practices. But as

we have experienced for years many powerful corporates do not bargain in good faith. I hope there is a shift to a better practice as a result of these provisions. But many won't. So these FWA orders are critical and I support them.

But they may not be as suitable as they sound. What is experienced as bad faith from an employer (or a union) may not be so seen so readily by the FWA. The arguments can really go around and around without much progress, as I am informed in other jurisdictions such as the US. What is definitely not good faith from the workers' viewpoint may well be interpreted by the FWA arbitrator as not so. And how far do these orders go? Good faith bargaining obligations are process obligations. They compel the horse to come to the water but do not compel the horse to drink. FWA expressly cannot force an employer to make concessions or reach agreements on proposals. A failure to bargain is not penalised: there are no civil remedies. But there are these FWA orders that can be used when an employer refuses to turn up to meetings etc. and to assist the low-paid in being able to bargain. FWA can conciliate and the has power to facilitate bargaining, especially where the employer is rorting the process. But unlike the 100-year-old arbitration system, there is no reality at the end of the process either against a recalcitrant employer or union for arbitration and settlement of the dispute. I disagree with this, but that is the new FWB.

There are hard-line HRM (and lawyers) in governments, and in powerful corporations still with an anti-union agenda who will be able to show they are legally bargaining with unions in good faith, even though they turn up and say 'no' over and over. You would have to experience such meetings that stretch over months and years with only minimalist advances.

I fear in practice this US style system may not be of much greater benefit for workers. I have no doubt this will be a fertile juridification field where lawyers can repeatedly contest the meaning of all of the words. One huge loophole is the exception for 'confidential or commercially sensitive' information. This is extremely wide and corporate lawyers will use this to refuse discussion of the essential information for union representatives' bargaining. This will make the obligation on an employer to exchange information of no use at all.

The good faith bargaining regime does not apply to the variation or termination of enterprise agreements, that has no rationale and could lead to unfairness.

d. Scope orders

Under WorkChoices, employers would gerrymander voting on agreements by selecting the work group that would return the result they wanted. The FWA can make 'scope orders' if it is satisfied that bargaining for a proposed enterprise agreement is not proceeding efficiently and fairly because the group of

employees to whom a proposed agreement will apply has not been fairly chosen. No doubt this will be litigated, but is an improvement. The principle is freedom of workers to associate with other workers, of their choosing. Workers should not be forced to bargain with others with whom they do not wish to associate for industrial purposes.

I argue that the Senate should address the above issues.

3. Downgrading legally the status of unions.

I adopt the argument of Professor Harry Glasbeek (2008):

'During the long reign of compulsory conciliation and arbitration, trade unions had become legitimate political participants. They had won the right to represent workers in an industry or occupation before a formally and functionally independent tribunal (the AIRC and its predecessors). The AIRC took the public welfare into account when settling disputes between employers and their workers. It had a political role as its tasks had a legislative character: it set market rates for categories of occupations and industries below which no worker, whether unionised or not, could be employed. The unions played a pivotal role in these polycentric award-making exercises. The regime of dispute settlement depended completely on them. They were allowed to represent the claims of all workers who potentially fell inside the sphere of occupational categories set out in the Registrar's documentation. Hence, once a dispute could be said to be interstate and to affect industrial matters, criteria that became easier and easier to satisfy, in respect of the determination of work conditions the identity or nature of the employer named as a respondent by to the union's demands did not matter. It was the union identity and occupational coverage that counted.

Over time, the AIRC also came to lay down floors in respect of national rules that established standards (often subsequently legislatively enshrined) in respect of such fundamental conditions as a minimum family wage, gender parity, redundancy, termination and severance pay, work and family life balance, and the like. To do so, the AIRC heard evidence and submissions from governments, employers, the public at large and, of course, from unions. It was a scheme that blunted the impacts of unfettered labour markets and treated trade unions as senior political partners in the design and operation of a would-be social democratic political economy. The unions were seen as pivotal political agents in the system. And their role as political participants arose out of, and was coupled to, their direct representation of workers as a class in their everyday struggles (symbolized by the unions' uncontested right of entry into workplaces) with their employers. Workers had a democratic say over trade unions, while unions had a legitimated role at the policy tables in respect of macro-economic and

social issues. The political and economic roles of unions were dynamically integrated.

The trade unions' position as a linchpin in this elaborate mechanism of adjustment of capital/labour relations was reflected in the grant of legal personality to them, giving them the same legal standing as market capitalism's flag ship, the for-profit corporation.'

I argue that unions in the FWB do not have the same legal status as earlier, and will be down-graded to only 'bargaining representatives', and to make them in effect a subsidiary under corporations.

I advocate a stronger legal scheme in labour law by mandating the role of union organisations, such to intervene where they have to play the role in bargaining and solving workplace conflict, and have to be able to enter workplaces to ensure compliance and be the effective voice of the workforce at work but also in the community on social and public issues. This meets the oft researched and known experience that too many employees do not see union organisers at all because of employers' restrictions and failure to grant recognition. If in a union, employees see them as not being able to be successful, again because of legal restrictions.

But of course unions in reality are much more than mere bargaining representatives. Look at the ACTU and any union website to see the realities. Consequently, unions have to be able legally to be the social and political voice for workers on any issues whether in the business, in the industry or in the community. Australian unions are a good example of 'social unionism.' and the FWB ought not to restrict lawful organising and action in enterprises only on narrowly cast employment issues. Senators know the successful political and social campaign of the ACTU's *Your Rights at Work*. In order to implement freedom of association principles workers ought not be restricted over what and how they organise.

Ewing 2008: 'Compare the position of Barack Obama who on 2 April 2008 spoke to the AFL-CIO of 'building an America where labor is on the rise'. In the same speech, he said 'We're ready to play offense for organized labor. It's time we had a President who didn't choke saying the word 'union.' A President who knows it's the Department of Labor and not the Department of Management. And a President who strengthens our unions by letting them do what they do best - organize our workers. If a majority of workers want a union, they should get a union. It's that simple. Let's stand up to the business lobby that's been getting their friends in Washington to block card check. I've fought to pass the Employee Free Choice Act in the Senate. And I will make it the law of the land when I'm President of the United States of America.'

A loop-hole in the bargaining representative

The FWB says employees are entitled to have their union represent them in bargaining and employers have to give written notice to all employees of their right to be represented in bargaining. The presence of one union member in a workplace entitles the union to be represented at the bargaining table. This is an advance.

I am most concerned on the legal loophole in the FWB's definition of bargaining representatives. Notwithstanding copies of instruments of appointment, the FWB needs to correct a flaw to make it clear that employers or others cannot establish a front organisation that is not a union. That is, the organisation as a bargaining representative must be a genuine employee organisation and not a deceit. I know of one example in some public hospitals where the powerful Australian Medical Association AMA, that is a company and professional organisation and is not legally a union, nevertheless in practice holds itself out to salaried doctors as being a union and in practice undermines the legal union for salaried doctors, the Australian Salaried Medical Officers' Association. It is a question of ensuring legally that organisations that are not unions cannot be a union under the FWB. It is an important issue of principle for employees

4. The FWB based on the Corporations power is the dominance of corporate law over labour law.

The High Court in the 'WorkChoices' decision held the Australian Constitution's Corporations power allowed the Howard government legally the power to reduce the role of unions and to effectively extinguish workers rights and the IR systems created by State governments. The Rudd government has used the Corporations power for the FWB.

What has not been done is to use as well the traditional Constitutional Labour power section 51 (xxxv) to settle and prevent industrial disputes used for over 100 years for the conciliation and arbitration system and the making of federal awards. I add also the foreign affairs power to implement UN and ILO Conventions. The government did not have a mandate to reject reliance on the Labour power and not include all of the powers formerly with the AIRC for Fair Work Australia FWA.

I adopt the arguments of Professor Ron McCallum that 'industrial relations laws based on upon the corporations power alone will be centred around corporations to the detriment of flesh and blood persons who interact with corporations'. They 'could not for long maintain the balance between employers and employees' because 'inevitably they will fasten upon the economic needs of

corporations and their employees will be viewed as but one aspect of the productive process in our globalised society'.

Instead of using 'all the powers' available as ALP policy traditionally supports, the government relies almost exclusively on the Corporations Power which deals with the rights and obligations of trading corporations.

Undue reliance upon the Corporations Power puts both employment rights and equitable workplace outcomes subordinate to the interests of corporations. This is not a balanced approach to labour law legislation.

This is an historical departure from the creation of independent tribunals to resolve industrial disputes through conciliation and arbitration, which provide rights to unions as representatives of workers, in recognition of inequality of power in the workplace. The award system created by these tribunals did, said former High Court Justice Michael Kirby, 'profoundly affect the conditions of employment, and hence of ordinary life, of millions of Australians'. In his dissenting judgement in the 'WorkChoices' case, he found that the Howard Government's laws were unconstitutional and with great insight said that would lead to unfairness.

'If the Federal Parliament can directly enact provisions that generically fall within the description of laws with respect to the subject of industrial disputes, such issues are likely to be decided by unilateral determination according to political, sectional or exclusively economic factors focused on the propounded subject of the power, namely the corporation, that is, the employer in the posited industrial dispute. '

The risk is that FWA, unlike the AIRC that had discretion to solve disputes, is not as an independent tribunal that has the power to provide a guarantee of a fair hearing and the charter to balance the power of the employer in the workplace.

I do not make a submission about but support union and ACTU concerns over the creation of the 'modern' safety-net. The consequences of political direction by the DPM under the Corporations power are clear, as the AIRC (and Fair Work Australia in 2010) has not determined the National Employment Standards (NES) or the award modernisation process. They have been politically determined without recourse to normal AIRC processes on merit.

The NES were legislated following an enquiry by a committee of the DPM's Department that took submissions on a draft prepared by the Department. No significant changes were made to the draft despite submissions by unions that some of the standards were inadequate in content and unenforceable and could by no means be described as rights. The same complaint can be levelled about

award modernisation, as the AIRC explained, because it was acting on the basis of a Ministerial Request, its task was to apply the request, not to determine the issue independently.

I support union concern over the deregulation of awards by political decree.

5. National take-over: no choice.

A clear example where WorkChoices is not repealed is the centralised national take-over of the State's industrial relations systems covering all trading corporations. There was no choice for businesses or unions to be able to use or remain in the State jurisdictions. Many companies had good reasons in their own interests to use a State jurisdiction. Ever since the earlier paper for centralised IR power by then Minister Reith did not proceed, no detailed policy examination of the merits pro and con of the compulsion for the National system has been produced either by the Howard or Rudd government. There is no substantial criticisms of the role or practices of the industrial umpires in the State systems. There is just the chant of 'uniformity'.

There was always the ability for employers to go national. The ACCC paper recommending against the national system arguing for competitiveness between the systems was ignored.

I am opposed to more power in Sydney and Melbourne for national employer and union leaders. A centralised system in practice ignores employers and unions in the States.

Senators who represent their States should not easily accept the continuation of the centralised WorkChoices takeover.

Why not with the FWB at least give employers and unions a choice of which system they want? This is particularly the case where both parties want to use arbitration that is denied in the FWB.

Furthermore, although I am not familiar with the negotiations, I question the extent of the co-operation with the States over the FWB. The DPM, I am told, promised but did not deliver an intergovernmental agreement with the States and produce a draft of the FWB to them. This means that those corporate entities (including some State Owned Corporations) involuntarily taken up into the National system from the State systems will remain there. This will lead to legal uncertainty.

The Rudd government is working on the assumption that the States will hand over their remaining jurisdiction in the private sector, which is employees

employed by sole traders and partnerships. This will destroy the viability of the State systems long term and the end of federalism. So be it, but I advocate that a strong national IR system is strong in the regions as well.

The FWB does not resolve the legal complexities of what is a 'trading corporation', especially for some government and community organisations. I know one case where a lawyer was dismissed unfairly from an Aboriginal Legal Rights Centre and it has taken four years of legal arguments and expense to arrive at the common sense view that such community organisations are not trading corporations and the individual is entitled to the State unfair dismissal hearing.

6. End of arbitration as we know it

FWA sees the demise of the arbitration system. Much has been written in the labour law and industrial relations literature on arbitration. Isaac J and Macintyre S (2004) *The New Province for Law and Order 100 Years of Australian Industrial Conciliation and Arbitration (*Cambridge University Press, Melbourne.) Hancock K 2004 'Reflections on a Century of Arbitration' 'One Hundred Years of the Higgins Legacy: Treasured Inheritance or Debilitating Folly?' http://www.hrnicholls.com.au/nicholls/nichvo25/hancock2004.pdf 'At the end of the day: The challenges facing those engaged in shaping the future tribunal system,' speech by Sydney University Dean of Law, Professor Ron McCallum to the Centenary Convention: the Conciliation and Arbitration Journey, Melbourne. Some recent references are Graham Smith partner Clayton Utz 'Reviving the Commission bring back the Umpire' 2008 NT Industrial Relations Society. Jolene Riley 'The case for the umpire' AIER The debate 2008:

'If the US considers compulsory arbitration for disputes, Australia should not abandon its industrial umpire.' The Australian Institute for Employment Rights. I add that China has a new arbitration system from 1/6/2008.

FWA can only review the 'modern' awards once every four years in very limited circumstances, not when required on merit. So any improved job security measures would not be able to be assessed until 2014, well into the GFC.

Despite the press reports, the capacity for the FWA to impose itself and arbitrate an outcome in place of an agreement is very limited.

- By agreement: if both parties agree to submit the remaining matters for determination by the FWA through arbitration then that is permitted.
- Where industrial action is or is threatening to endanger life, personal safety, health or welfare, to the population or part of it or causing significant damage to the economy (this exists now).
- Where a party is in persistent breach of good faith bargaining orders made by FWA.

- Where protracted industrial action is causing significant economic harm to the bargaining participants or such harm is imminent and where there is no prospect of the parties reaching agreement. This is new and designed to deal with a Boeing dispute. It does not mean that it favours employees, as arbitration sees a return to work but later with no gains for the employees.

The lack of access to arbitration presents problems to unions in the public sector in the Federal system. Governments have money and resources to resist claims and to engage in union busting campaigns. In these circumstances unions need access to arbitration as the knowledge assists the employer to settle the dispute because the employer wants to avoid a situation where the outcome is put into the hands of the arbitrator. It recognises the reality of the virtually unlimited resources of the various States in industrial bargaining and disputes. The same applies with the most powerful global corporations.

FWA will not have a capacity to arbitrate issues in relation to the NES or modern awards but will be limited to making recommendations and conciliating. Any contest as to entitlements will have to be carried out in the courts - juridification.

Every agreement must also contain a Dispute Settlement Procedure (DSP) that involves FWA or some other dispute settlement provider and must provide for representation of employees. One objection is the wording should be that suiting the parties and not by legislative decree.

But it will not be compulsory for the DSP to end in arbitration without the parties' consent. This is a serious flaw. Provision for parties to go to court where there is a breach of an agreement will not effectively address many workplace conflicts that arise. Unions will have to rely on bargaining to ensure access to arbitration as the ultimate step, but this is not easy.

Employers in the past have shown unwillingness to accept recommendations made by the AIRC in dispute resolution proceedings. In enterprise bargaining unions can press the employer to include in the DSP clause that all parties will accept and implement any FWA recommendation as a result of arbitration. Some will agree to this, as they will see it as tying the unions' hands as much as their own. But some will not, as they want to retain the option of refusing to accept recommendations they do not like. Employers are able to deny a dispute being dealt with on its merits by arguing that the steps required were still being followed. It is important, therefore, to make sure those DSP procedures are not too elaborate and that they can be taken to FWA when required.

7. A standard that is not enforceable is not a right. The family friendly fraud.

The 'parental leave' NES entitlement is a new right for employees with at least twelve months' service to request 'a change in working arrangements' to assist them in caring for pre-school age children, but gives no more than a right to request the leave. So long as an employer provides a written response to an employee's request, there is to be no challenge to any refusal. An employee can ask, but the employer can refuse on 'reasonable business grounds' a provision very wide, such as costs to the employer, the employer's ability to reorganise and anything that a corporate lawyer could design for avoidance. No court order can be made against the employer for a failure to specify reasonable grounds nor can any dispute resolution process in an award, enterprise agreement or contract authorise arbitration over that issue. This is an employer right to refuse a request.

Even the DPM had difficulty rationalising this saying she wants the employee to be able to have a conversation about family issues! The issue of work/life collision has been one of the key agendas from working families, from unions, in academic research and books, in ALP policy,,,but we get this deliberate '*family friendly 1984 spin*. This is not a minimalist reform but a fraud. The SMH front page Mark Davis says: 'New law fails families' 27/12/2008.

The NES Discussion Paper claimed it 'has demonstrated that simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both'. But this is not the UK union experience, except minimally with good employers. The UK allows employees to lodge a complaint challenging an employer's response. At least FWA should review an employer's decision, such as, an unfair response, or it was based on incorrect facts. If the employee grievance is valid, then FWA orders the employer to reconsider or compensate the employee.

I urge the Senate to correct this with clear enforcement orders and penalties. Even with change, I fear in practice in a recession there may not be significant widespread family friendly reforms.

8. Equal remuneration?

ACTU and academic research show that women workers were worse off under WorkChoices. I doubt whether the FWB is able to deliver on equal remuneration. Systemic discrimination in pay by reason of gender across classifications cannot be remedied if the focus is only on the individual workplace. There is a capacity to make 'equal remuneration orders' to ensure 'equal remuneration for work of equal or comparable value' which will override enterprise agreements, awards or other orders of FWA, but in practice it is difficult to see, in a system based on enterprise bargaining, how the orders can be effective long term on a national or industry or sector basis.

See: 'Forward with Gender Pay Fairness?' by Anne Junor, University of New South Wales, Suzanne Hammond, Community and Public Service Union.

9. Skill based classification structures

With the decision of the government to continue to lessen the importance of awards, I query whether there is scope for the necessary improvement of skilled-based career paths and classification structures, critical in a GFC.

10. Unfair dismissals…still no remedy for millions

The Fair Work Bill has reforms for unfair dismissal…but there is still no reinstatement remedy for millions.

The FWB abolishes the 100-employer threshold for taking unfair dismissal proceedings that under WorkChoices meant over 4 million employees could be dismissed at will - harshly and unreasonably. But millions could still miss out.

The unfair dismissal remedy is a human right.

In their Industrial Relations Court report on the impact of WorkChoices on South Australian workplaces, they said:

'We consider there is cause for concern at the serious implications the lack of recourse to an unfair dismissal remedy has for many in the workforce, resulting as it does in a loss of self esteem, a sense of disempowerment, and anger and resentment at an inability to seek redress or to have grievances heard. We conclude also that there is a pervasive sense of job insecurity as a result of Work Choices, particularly in lesser skilled and lower wage areas of employment. A substantial cause of this insecurity is the exclusion of many employees from any access to an unfair dismissal remedy.'

The principle of allowing an individual human right for an employee to apply for unfair dismissal to be heard in a tribunal (not necessarily to win or be reinstated, but to be heard) was enacted in South Australia in 1972, first to go to the Industrial Court and later to the Industrial Commission. This was an individual unfair dismissal remedy, irrespective of the size of the employer.

But in FWB the wrong principles of WorkChoices are continued where millions of individuals are denied such a right.

In the FWB employees of employers who employ fifteen or less will only be able to take unfair dismissal proceedings after twelve months employment and in larger business after a period of six months.

And of course, corporate lawyers will use this.

The 12-month qualifying period for workers excludes 22% of small business employees from claiming unfair dismissal; 41% of all hospitality sector workers; and 64% of young people. It is almost as harsh as the total ban under WorkChoices!

There should be as a question of principle no qualifying period - the length of service an issue only on the merits of the unfairness or not. In other areas of law, small businesses are not exempt.

Particularly, in a recession, any worker deserves the right to be reinstated if dismissed harshly or unfairly.

For small business employers the government will have a Small Business Dismissal Code that if followed means that the dismissal cannot be 'unfair'. The Code requires the giving of one warning based on a reason that validly relates to the employee's performance or capacity to do the job, and a reasonable opportunity for the employee to improve his or her performance.

Apart from legal technicalities about how this will apply, it is doubtful whether such codification will lead to greater justice for employees in small firms. How can we be sure that a dismissal, although procedurally fair, is not actuated by malice or caprice? When an employer dismisses an employee e.g. for theft, there is no requirement for the employer's suspicion to be correct, or for the employer to provide the employee the opportunity to put forward any relevant mitigating circumstances. The Code is a fraud for workers rights, but bolsters the harsh practice of allowing small business dismissal at will and during recession makes any promise of job security more illusory.

I strongly object to the legal rule requiring only 7 days to file an application. This is worse than in State jurisdictions of 21 days and for 'unlawful dismissal' 60 days.

The DPM is into *' 1984 spin'* saying that unfair dismissal rights are restored. In practice this 7 days limitation will defeat many chances of a fair hearing and possible reinstatement. Just imagine how corporate lawyers will enforce this.

Furthermore, it is outrageous that the FWB makes collective agreements unlawful where the parties want to agree to have unfair dismissal entitlements for employees who have not served the statutory minimum qualifying period. The FWB prevents an employer not only from waiving or shortening the qualifying period for access to statutory unfair dismissal provisions including

where the employer is the prospective employer in a transfer of business, but also from conferring any private remedies or entitlements upon their employees... if they so choose.

So much for the DPM's election promise that workers and employers would be free to agree bargain over whatever they want, a basic workers' right!

On the issue of 'unlawful dismissal', I question the unfair process limitation of 60 days when the usual time limit for civil claims is 6 years.

Your Rights at Work deserve better.

I repeat that it has been for a decade simply '*Reith 1984 spin'* that denying a right to go to the umpire over unfair dismissal somehow creates jobs.

I remember former Minister Reith grinning at me when he proudly said his press secretary made it all up. What a joke, he said: sacking people unfairly without a remedy creates jobs!

Since then academic studies and reports including this Senate quote, say that it is not the case that unfair dismissal laws create unemployment:

'there is no empirical evidence or research to support the Government's claim that exempting small business from unfair dismissal laws will create 77,000 jobs. The proposition at the heart of this argument is breathtaking for its lack of logic and empirical support. A review of the evidence shows conclusively that the claims made by the Government and employer groups are fuelled by misinformation and wishful thinking rather than objective appraisal of the facts...'

So let's not accept the Liberal party Reith spin still being pushed in the press.

11. Right of Entry

Employees say that a difficulty is not being able to have their union organiser have right of entry. But the WorkChoices limitations stricter than earlier awards and what was in agreements remains in that the organiser must still have a valid permit to obtain a right of entry; must still give a minimum of twenty four hours notice before exercising the right of entry; must still abide by the route and room specified by the employer in exercising the right. I see this has been slightly ameliorated in that the employer cannot exercise this power unreasonably and the union can go to FWA in case of dispute, meaning more litigation.

The union has a right to enter premises to hold discussions or to investigate breaches of workplace obligations that affect a member or members of a union and that a union is able to get access to non-member records to investigate breaches of workplace obligations, a most reasonable measure of compliance, but still with the uses of that information strictly limited. It should be that the parties can agree for whatever right of entry suits the parties, such as whenever needed, showing the courtesies reasonably expected, that I have experienced as a union official for 27 years.

The FWB requires the union to first establish that there are one or more eligible persons at the workplace who 'wish to participate' in discussions. It is not clear which 'purposes' a union can enter a workplace. There is no doubt that anti-union employers will have their corporate lawyers frustrate the rights of employees by litigating this point.

What is worse is that the employer and employees cannot agree on right of entry provisions that suit them.

There is legal complexity on whether the union honestly thought a claim to be lawful, but which turns out not to be so. This may prevent a party from obtaining FWA orders, taking protected industrial action, or having an agreement approved; and will force parties to enter into frustrating 'side deals'.

12. General protections good, but…

The FWB does ensure protections for workers engaging in union activity such as representing other employees or bargaining. It provides sanctions including the power to obtain injunctions to restrain the conduct. It seeks to protect unionists who suffer adverse treatment because they have or will exercise a 'workplace right' such as being entitled to an award or agreement or making a complaint or inquiry. These are an important part of the freedom of association.

Where the continuation of WorkChoices is kept is the false notion of freedom of non-association. This is a non-sense in practice, but a major feature of right-wing corporate anti-unionism supporting the 'right' of workers not to combine, to be individuals, for a non-unionist not to join in with union activities.

This is not in conformity with ILO freedom of association provisions. Corporate lawyers, as in the past, will focus on freedom of non-association, ensuring an anti-union regime.

A FWB omission is that there is no legal recognition of workplace employees (union) delegates to organise and represent their workmates, nor to support their work with resources such as paid time to perform their roles, union training and

access to facilities. These are normal in good industrial relations agreements (at the moment forced into side agreements). Why not as a NES standard? What about those who are just joining a union? Other countries have legislation that provides for statutory employee rights. The FWB makes a union strictly liable for the actions of its delegates, even if the union took reasonable steps to prevent the delegate from acting in an unlawful fashion. But there is no minimum Charter of Delegate Rights.

13. The unfair $100,000 rule

I am strongly opposed to MPs arbitrarily taking away existing hard won award rights, built up over fair arbitral processes and accepted by employers. I refer to the unfair, arbitrary removal of existing legal award rights for all employees over $100,000.

Despite reasonable arguments presented by professional and high skilled workers, the DPM continues to assert this injustice without good reason, other than a tactical political move to appease powerful anti-union mining companies during the election.

The dismantling of their awards is not even argued in the AIRC, but by legislative political decree. Also, the DPM should not be able to reduce this threshold through regulation. Important rights deriving from award coverage, such as the right to be represented, to be consulted about significant change and to access the dispute settlement procedure is for no good reason denied. This has serious consequences for high-income workers' rights. It should be deleted.

The DPM says these are high paid employees and can negotiate agreements, and some can, but many cannot. These employees ought to be free to have an award. They do not like being disadvantaged.

The FWB may preserve their unfair dismissal rights. But litigation is predictable.

In the alternative, there could be an amendment that if the employer agrees that employees over $100,000 have award rights, then they remain.

14. National Employment Standards. Right to information?

Rights to information and consultation about work and employer decision-making are a vital industrial relations issue. The ACTU found in a survey of 8,000 workers 70% were 'very concerned or concerned' about the lack of information and consultation in their workplace.

So what is the DPM's response? In the NES, legally employees can receive the Fair Work Information Statement. This is only a right to receive a description of the industrial relations legislation in the government Gazette! That is all! This is pathetic! It is *1984 double-speak* to be described as an advance for workers' rights.

The Howard government abolished award rights for consultation. Except where organised by unions with forms of joint consultative committees and with State based Occupational Health and Safety rights, workers do not have legal workplace democracy rights to information or consultation or to elect a workplace representative structure.

Australian citizens have a right to vote democratically, but not at work for their representatives. Inequalities in the workplace are difficult to solve unless employees have some rights to information and consultation. Where employers do not agree, employees deserve a minimum entitlement to have a say over their employment status, their unreasonable hours and working conditions and over harsh management prerogative and a voice.

In the FWB there is no attempt at minimum workers democracy rights that are legislated for elsewhere, e.g. the European Works Council Directives where the giant corporations are able to prosper with worker democracy entitlements. In Europe information and consultative obligations also cover small businesses. There is much literature on industrial democracy and Works' Councils. One reference is 'Works Councils in Australia Future Prospects and Possibilities', eds Paul Gollan, Ray Markey and Iain Ross, Federation Press, 2002.

The Senate ought to insist as a National Employment Standard minimum rights for employees to information about their enterprise and industry. There ought to be on request legal rights for employees to have information and be consulted about and participate in management decision-making and the ability for union and employee representatives to have some democratic structure, a voice.

15. Flexibility for whom?

Another worry is that every collective agreement must allow individual flexibility arrangements subject to specified protections. If individuals can get personal variations to the agreement that suits them it may be beneficial. But when individuals do not have much bargaining power or in the un-unionised sector such arrangements are de facto AWAs, contracting out of the terms of the collective agreements. In the real workplace world with employer dominance, individuals will continue to be induced by employers to sign these flexibility agreements. No-disadvantage undertakings and the ability to terminate are inadequate protections.

16. Workplace rights enforceable in the Courts.

New Fair Work Divisions in the Federal Court and the Federal Magistrates Court are to hear matters in relation to the new workplace laws. I disagree with the name Fair, but so be it. It is an 'each party bears their own costs' jurisdiction, unfair to the employee and union with less resources than governments' and giant corporations unlimited legal resources.

The Courts can make 'any order they consider appropriate' to remedy a breach of a workplace right, such as to make injunctions. It would be an advance if the 'equity' notions were included, namely decided on the merits, fairness and without regard to legal technicalities. There is a small claims jurisdiction that is not bound by the rules of evidence and may act in an informal manner.

Disputes about the application of the safety net will be conciliated by the FWA. Claims of a breach of a safety net entitlement or related contractual provision can go to the court. What is not in the FWB is for FWA to arbitrate disputes over the NES entitlements. There is no remedy where the employer is exercising discretion that according to the NES they lawfully possess, but which they exercise in an unfair manner. Court remedies are not an adequate substitute. If a safety net instrument confers a discretionary power upon an employer, and the discretion is used lawfully but unfairly, employees will have no effective remedy. FWA should have power to arbitrate about the unfair exercise of employer discretions conferred by safety net instruments. This should include disputes about the application of agreements.

17. Three month rule unfair

The three-month rule will lead to corporate lawyers to avoid transfer of business by withholding offers of employment for over 3 months. Further, the FWB allows a new employer to offer employment to a transferring employee on terms that they lose their accrued annual leave entitlements, but if employees refuse, they most unfairly will not be entitled to a severance payment from the old employer (except some litigation can occur on this). Also, the FWB allows a new employer

to require a transferring employee to reserve a qualifying period for accessing unfair dismissal remedies that again is unfair.

18. Contractors

I am not sure what is to happen with the Independent Contractors Act, but I have concerns that the FWB, although it may deal with sham independent contracting, does not clearly cover millions of workers who are in dependent power relationships but labelled as contractors and who deserve better protections in a GFC, like those in the FWB.

So the FWB has new rights, yes…but

Since UK New Labour came to office in 1997 Ewing says 'many, many more rights' have been created, but they are 'limited, porous and leak badly'. This is what I fear under the FWB with some of devils in the details.

'But what the British approach conceals behind its alluring synthesis of regulation and de-regulation is the changing nature of labour law, which is now principally a tool of economic policy, and as such less concerned with its historic mission of promoting social justice. Labour law is thus increasingly concerned principally with the re-commodification of labour, rather than the protection of workers; with promoting the flexibility of labour, rather than the security of citizens; and with controlling rather than encouraging labour organisation as an instrument of industrial democracy (a term about which little is now heard).'

The consequence for British society has been growing inequality. Ewing:

'…This clearly cannot all be blamed on the model of labour law now being pursued, with a number of other regulatory failures also being responsible. These and other equally depressing headline statistics are, however, a symptom of low labour standards, low levels of regulation, and contained labour power. Welcome to the New Labour Law, and prepare to be disappointed.'

There is no doubt existing inequalities in Australia will increase in a recession. The FWB is unlikely to reverse such inequalities. I fear this labour law will still be a sub-set of corporate or commercial law, with property rights prevailing over human rights and social and workplace justice for the employee second place.

The DPM rather than engaging in debate just chants the fundamentalist mantras of 'restoring the balance', as if the state is neutral in the middle the parties. We shall now see with this next section that it is really a '*new 1984 balance spin'*.

Section Three

The FWB is not a fair collective bargaining system when the repressive WorkChoices restrictions on the right to strike remain.

1. Repression of the right to strike remains

If ever the accusation is true that the FWB is 'Workchoices lite' it is in the regime repressing industrial action. The COIL process was watertight in Canberra with no leaks. But after the FWB was public, a senior member confirmed the DPM's 'clear rules for industrial action' were a 'cut and paste' from WorkChoices, as instructed. Retaining the WorkChoices (almost) denial of the right to strike is not a fair collective bargaining system.

The FWB should be amended to repeal the WorkChoices sections unfairly limiting the right for protected industrial action and making so-called unprotected action unlawful.

I add that this is in an era of the lowest strikes on record. So why the repression and why not an effective right that would put downward pressure on strikes?

I asked some HRM who use their lawyers to challenge strikes their reaction to FWB. They were pleased WorkChoices was retained. They expected Labor rewriting.

Nearly all of the employer legal opportunities to challenge unions' ability to take protected action and then the many ways to stop such lawful industrial action remain. The restriction that protected action is unlawful if inadvertently a non-unionist is involved has been repealed, meaning one practical barrier is removed.

I have published on the right to strike. My criticisms of the Howard government's policies on this critical last resort means for workers to be effective in the relations of power between capital and labour remains with the Rudd government's FWB. I request Senators to examine the arguments in:

Chris White 'The right to strike' in Sheil, C (ed) 'The State of Industrial Relations' Evatt papers, Vol. 5, No. 1, Evatt Foundation, Sydney, 2008, pp. 91-102.

My arguments are more pressing with the GFC for 'firewalling' the right to strike. In a recession employers attempt to cut wages and conditions. So workers and their unions need to be able to resist and to have legal protection against corporate lawyers getting orders for industrial action to cease.

Workers under the FWB still run considerable risks to be dismissed or their unions fined for the last resort withdrawal of their labour power. For a fair and effective collective bargaining system, there must be the lawful strike.
When the WorkChoices Bill 2005 passed, the *Journal of Australian Political Economy* No 56, 66 published a chapter: White, C. (2005) 'WorkChoices: Removing the Choice to Strike'. www.jape.org. My criticisms apply to the FWB.

Indeed, my 2005 Senate Submission 'Not much choice if the right to strike goes'. on the WorkChoices Bill still (almost) applies to the FWB, No. 129 www.aph.gov

2. Parliamentary report

I cite the analysis from the Parliamentary Library, J Romeyn's (2008) 'Striking a balance: the need for further reform of the law relating to industrial action' http://parlinfoweb.aph.gov.au/piweb//view_document.aspx?TABLE=PRSPUB&ID=2789. Her Executive summary is:

• Since the introduction in Australia of the concept of 'protected' industrial action by the Keating Government in 1993, successive waves of reform by the Howard Government in 1996 and 2005 severely constrained the right to take industrial action. They did this by limiting the scope for protected action, imposing difficult procedural requirements on its access and ensuring that all unprotected action is regarded as unlawful and subject to an array of remedies.

• The ILO and a number of Australian academic and other commentators have criticised the Work Choices reforms for tipping the balance of power too far towards employer interests—undermining the important role of the right to strike as a fundamental element of stable collective bargaining.

• despite suggestions that further reform of the right to strike will be limited, this paper argues that a thorough review of relevant legislative provisions is required. It suggests that if such a review is undertaken it must give prime consideration to: the requirements of stable and voluntary collective bargaining; the need to strike a fair balance between the interests of workers, employers and the public; and the need to avoid unnecessary regulatory burden and complexity with its associated costs for organisations and the community. Consideration should also be given to Australia's obligations under international conventions and the guidance provided by the principles and decisions of the ILO's supervisory bodies.

• The paper notes concerns that any reduction of constraints on industrial action will see an 'explosion' of such action, but suggests that these concerns require critical consideration in light of the range of economic, social, cultural and

structural changes which have seen industrial action fall to historically low levels.'

She further points out:

'Strikes and other forms of industrial action represent the further expression of collective voice by employees and may help to balance their bargaining power vis a vis the employer. Indeed, strike action has been recognised as playing such an indispensable role in resolving deadlocks in collective bargaining relationships as to be regarded as an essential ingredient of free collective bargaining.

Paul Weiler 'Reconcilable differences: New directions in Canadian labour law', Carswell, 1980, p. 66.) explains:... the stoppage of work affects both sides, inflicting harm and putting pressure not only on the employer, but also on the union as a lever towards settlement. Even more important, it is the prospect of impending strike action (especially if the parties have previously had real life experience of it) which is a powerful prod to agreement as negotiations reach the critical point ...

The ability to compromise simply would not be there unless the parties were both striving mightily to avoid the harmful consequences of a failure to settle. In the larger system it is the credible threat of the strike to both sides, even more than its actual occurrence, which plays the major role in our system of collective bargaining. For these reasons, Weiler suggests that banning strikes would effectively end collective bargaining.

Similarly, Jacobs agues that in the absence of a right to strike 'collective bargaining would amount to collective begging'. A. Jacobs cited in T. Novitz, International and European protection of the right to strike, Oxford University Press, Oxford, 2003, p. 50.'

The arguments in her paper were rejected by the government and ought not be. The pendulum of 'balance' under the FWB has barely moved at all towards reform for the rights of employees to withdraw their labour.

Even when a union goes through the challenges to win a secret ballot and commences protected action, it can be stopped by many means. One example is if a third party is harmed, that by definition is likely to be the case as some business may be affected or e.g. students with teacher unions (as used recently by the NT ALP government). The point is that there is no right to strike with such provisions.

Outrageously, the DPM keeps a Ministerial power to stop strikes…not even going to a court, but determined politically!

And unprotected action has to be automatically ordered to cease by FWA, not even having the discretion as under the notorious s127 of the 1996 Act.

3. The flaw is the 'protected industrial action/unprotected industrial action' dichotomy

One way to view industrial action and the legal response is along a spectrum from repression to rights. At one end of the spectrum, strikes are suppressed with no protection (the 19th century, police states, *WorkChoices* and the *Building and Construction Act*). Toward the centre, strikes may not be protected but are tolerated and/or repressed (arbitration system). At the other end of the spectrum, a legal right to strike, a limited form in 1993 under Keating. Historically, industrial action provoked varying degrees of repressive tolerance. Legitimate industrial action was settled, if necessary, by arbitration. When penal powers in the 1960s were used unions campaigned against them, culminating in mass strikes in 1969 over the jailing of the union leader, Clarrie O'Shea, which rendered the penal clauses 'dead letters.'

The Howard government's 1996 regime re-determined the boundaries on strikes. A feature of this bargaining structure was a dichotomy imposed on workers and their unions; namely, enterprise-based industrial action was 'protected' but other industrial action was 'not protected'. The latter was consequently liable to be found unlawful and subject to penalties. Over the 11 years of the Howard government, the scope of the protected action narrowed, while the scope to make action 'not protected' widened. The 'protected/unprotected' divide shifted against the interests of workers. Section 127 of the *Workplace Relations Act* became the employers' penal weapon of choice to stop a strike. Initially, the AIRC had discretion to recognise that strike action was legitimate on its merits and to resolve a dispute without issuing an order for the workers to cease. Under *WorkChoices*, this discretion was removed, compelling the AIRC to make the order to cease action and allowing the Federal Court to impose fines. This regime remains under the FWB.

The ILO held this 'protected/not protected' regime was in breach of international jurisprudence to protect the right to strike.

While the right for workers to take lawful action narrowed severely under *WorkChoices*, the scope for all other illegal industrial action widened. The processes for taking protected action under *WorkChoices* are among the most prescriptive in the OECD. Effectively, the AIRC and soon FWA and the courts police strike-breaking rather than solving the grievances. Judges have accepted

legal technicalities and narrow legal formalism, while ignoring industrial fair play for workers by increasing the risk in exercising what is by international standards a democratic freedom.

However, the FWB continues the protected/unprotected action regime and should be reconfigured.

It is fundamentalist to make all industrial action outside of protected action unlawful. To give but one example, that of effectively resolving disputes that arise during the life of the agreement (which may be 4 years). Normally when industrial peace is wanted during the life of an agreement, access to arbitration in respect to interest based disputes was essential. This FWB requires employees to deliver industrial peace, without imposing the countervailing obligation on employers to submit to binding arbitration. Without a mechanism for resolving disputes, employees may be forced to take unprotected action to pursue legitimate grievances against harsh and unfair decisions by management.

4. ILO minimums breached…again

I argue that the FWB like WorkChoices breaches minimum ILO standards:

'The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.' ILO 1983

This was supported by ALP governments and ALP MPs. Kevin Rudd in 2005 made this point (http://parlinofoweb.aph.gov.au) criticising the WorkChoices Bill (citing my 2005 paper 'Inside the ILO Tent' Evatt Foundation http://evatt.org.au/news/336.html. and in his AWU Sydney speech 'John Howard's Radical Industrial Relations Regime and its Incompatibility with ILO Standards' 25/11/2005. But not so for the FWB!

See Novitz T (2003) *International and European Protection of the Right to Strike A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (Oxford University Press). She concludes p 368:

'…there remains scope for the endorsement of ILO principles, based on an appreciation of the right to strike as a civil, political, and socio-economic entitlement.'

For Australia see the International Centre for Trade Union Rights ICTUR (1999, 2002-2007) Senate Submissions into WR Act and WorkChoices submission no. 185. http://parlinofoweb.aph.gov.au ILO 1983, 1998, 1999 - 2003 Reports of the Committee of Experts on the Application of Conventions and Recommendations ILO www.ilo.org

5. Outlawing pattern and industry bargaining is still unfair

The right of workers for industrial action includes pattern and industry bargaining. The incessant media beat-ups and *'1984 spin'* to punish unions in pattern bargaining has to be rejected. Parliament should not continue Australia as one of the few countries to make pattern bargaining unlawful, worse than the in the US, a serious breach of workers' rights in the FWB. The ACTU has strong opposition that should be respected.

The ILO criticised Australia's *Workplace Relations Act* (1996):

'Provisions which prohibit strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer are contrary to the principles of freedom of association on the right to strike.' ILO (1996).

The ILO Committee of Experts was concerned at the discretion afforded to the Industrial Commission to determine the appropriate level of bargaining:

'The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining. ...the choice of bargaining level should normally be made by the parties themselves, and the parties 'are in the best position to decide the most appropriate bargaining level' (General Survey on Freedom of Association and Collective Bargaining, 1994, paragraph 249). ILO (1998).

In March 1999, the Committee found, in relation to multi-employer agreements:

'The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests.' ILO (1999). In considering the government's response, the CEAC stated ILO (2001): 'With respect to the right to strike in support of a multi-employer, industry-wide agreement for all practical purposes is prohibited.'

I argue that the FWB is similarly in breach.

Some additional points. Employers engage in industry and pattern bargaining; they seek common claims with other employers in their industry or at Reserve Bank national constraints of about 4%. Employers support the reality of the 'level playing field'. Employers may not want to be forced into competition on the price of labour, whether through forcing it down as low as possible, or engaging in leapfrogging increases, either to attract and retain labour or in response to union claims. Why not a choice for core issues determined in agreements concluded with one or more employers, with other employers and their employees satisfied to then adopt these conditions.

Employer industry associations bring together employers to work out a common strategy to oppose union claims that are as much pattern bargaining as a common union claim.

Industry and national bargaining throughout the world is not inconsistent with enterprise bargaining. Even where common wages are accepted, they are often implemented differently as to timing, 'offsets' and site-specific productivity.

A combination of enterprise/industry bargaining in industrial relations practice has to be determined by the parties, without artificial legal restrictions imposed by the state. One of the right wing cries is somehow industry bargaining does not mean productivity. Again, this flies in the face of industrial relations experience not to know that industry bargaining agreements with multi-industry employers does mean productivity advances.

152 IR and Labour Law academics in their Senate critique of the *WorkChoices* Bill condemned the outlawing of industry strikes and continue to do so.

A reform is in the FWB for multi-employer bargaining should employers and unions genuinely wish to do so. But again most unfairly protected action and good faith bargaining orders are not available, giving the upper-hand to employers. Furthermore, it is unlawful to coerce an employer to make a multi-employer agreement or to discriminate against the employer if they have not entered into a multi-employer agreement.

The FWB provides for the establishment of a 'low paid bargaining' stream that entitles low paid workers involved to make application to FWA for them to convene and chair conferences, help identify productivity improvement to underpin an agreement and assist the parties through the bargaining process. But protected action is most unfairly not allowed.

However, the low paid stream workers have access to final arbitration should employers and unions fail to reach agreement. This arbitration is limited to a

'first contract' style arbitration, meaning it is practically only available in those areas where no enterprise bargaining has been entered into by the parties before.

I conclude with a quote from Ewing (2008): '…an effective collective bargaining strategy requires a strong commitment to sectoral or industry wide bargaining, as well as initiatives addressed to the enterprise. No major economy with decentralised collective bargaining at enterprise level underpinned by recognition laws has a collective bargaining density of more than 50%. This would be true of the United States, Canada, and Japan, as well as the UK. In contrast, countries with higher levels of bargaining have higher levels of collective bargaining coverage. There is no major economy that has sectoral bargaining where there is collective bargaining coverage of less than 70%. Collective bargaining density is tied closely to the level at which it is conducted. Enterprise bargaining and the organising model by which it is underpinned is extraordinarily resource intensive and difficult to sustain and maintain in hostile conditions.' (See later Glasbeek).

On the **outlawing of pattern bargaining,** I repeat what I wrote in 2008.

'MPs pattern bargain but not workers

In the Financial Review, DPM Gillard remains tough in Labor's crack-down on pattern bargaining. Pattern bargaining – industry-wide industrial action in pursuit of an industry agreement or identical enterprise agreements – is like WorkChoices specifically prohibited by her Bill (sections 412 and 422).

Her Fair Work Bill retains the entire WorkChoices repressive regime against this legitimate form of collective bargaining. The ban of the right to withdraw your labour for industry or pattern bargaining is still in breach of ILO obligations.

Yet the DPM and all MPs throughout Australia set their own wages by their own exclusive way of pattern bargaining.

The political elites running the state, Ministers and MPs and senior public servants and the judiciary work out how to refine their system of making common claims and then pattern bargain. They have their own arbitration system, their own remuneration tribunal. Increases not based on productivity but on the fair principle of comparative wage justice are granted and then more or less (subject to the politics) automatically passed on to MHRs and Senators and senior bureaucrats and then the increase further 'flows-on' to other State's MPs, CEOs and judges etc.

Corporate CEOs pattern bargain with comparisons in the international market.

Such a fair system is denied to wage earners.

The DPM's election promise for working families to be free to choose how to collectively bargain is 'loose with the truth'.

Pattern or industry or national bargaining has been ACTU policy for years. The ACTU rightly attacked it being made unlawful under WorkChoices.

The Fair Work Bill cements the serious fragmentation of workers organising in their unions across industries.

So much for WorkChoices being abolished; another case of being loose with the truth!

As well, flowing on modest wage increases on an industry basis with comparative wage justice would stimulate the economy in these recessionary times.'

I know that ALP and Green Senators previously are on record supporting pattern or industry bargaining and supported the ACTU position.

6. Secret ballot processes still flawed

As in WorkChoices, the FWB requires employees to approve industrial action through a secret ballot, which is now paid for by the AEC. My main issue is not the democratic vote that in case does occur, i.e. any accusation that strikes are not democratic is unfounded.

The problem is the process for an order for a secret ballot is still complex and inefficient like WorkChoices and allows an employer to take technical objections. I covered one point on 'the nature of *the* action' to delay and frustrate the industrial action. The principle of freedom of association is that workers are legally able to administer their democratic vote without interference from the employer and/or the state.

Another way for the employer to frustrate protected action is that the FWA as in WorkChoices must be satisfied that the union is 'genuinely trying to reach agreement'. This may sound all right, but earlier corporate lawyers in many cases had scope to challenge and delay unions protected action.

With WorkChoices any number of baseless reasons why a ballot not proceed were allowed, such as by objecting to the questions that the union puts to its members or that it is pursuing prohibited content claims. The FWB still allows this. It specifically requires a copy of any application to be given to the employer,

so it is difficult to see how FWA could be satisfied as to the genuineness of the union's attempts to reach agreement without hearing from the employer.

Why the DPM continues to allow the employer to so challenge is inexplicable. It is not reasonable at all but particularly prior to the ballot. In any case, when protected action is underway the employer still has many ways to stop it.

The real industrial relations challenge is for the employer to negotiate the claims and grievances, not to have corporate lawyers defeat the workforce.

As in WorkChoices, a majority of union members bound by the proposed agreement will be required to vote in favour of the industrial action before it can be authorised, and a simple majority of people who vote is not enough continuing the perverse tradition of WorkChoices where employees can vote to bind themselves to the terms and conditions by a simple majority of voters but in order to authorise industrial action a higher standard is in place.

The ILO has held that while: 'the obligation to observe a certain quorum...may be acceptable...The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises.'

The Object of Protected action ballots: 'to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement' are not achieved. Again there is no merit argument presented by the DPM to deny this freedom of association. The ILO allows process requirements such as notice so long as they do not prevent the effective determination of industrial action.

7. No strike pay provisions still unfair

A minor reform is that with protected action the employer deducts pay for the actual period of time the workers stopped work, so the fundamentalist four-hour deduction under WorkChoices goes. If partial work bans are implemented employers will be able to issue a notice and deduct a portion of pay, with disputes resolved by FWA. However, for unprotected action the four-hour minimum remains, continuing the unfairness. This is a disincentive for people to return to work. There are many examples of half hour stop-work meetings where workers would return to work and then be docked a further three and a half hours. Really there ought to be paid meetings for employees to meet collectively for short periods to hear report backs etc without any threats at all. There should be scope for FWA to determine in exceptional circumstances on the merits, e.g. extreme provocation, that strike pay is warranted.

8. No Lock Outs and employer industrial action

The FWB expressly prohibits employers from performing offensive lockouts, which is an advance. However, unlike the previous 1993 Workplace Relations Act, anything short of a lock-out by an employer is not unprotected industrial action. A unilateral change in the usual performance of work can be unprotected industrial action for an employee but not an employer. So an employer is free to cancel all overtime during bargaining without that conduct being regarded as unprotected industrial action. But an overtime ban by employees would be, unless it had been authorised by a protected action ballot.

9. The common law against strikes remains

Workers and unions engaged in legitimate industrial action held to be unprotected are at great risk against the common law weapon of tort used by employers. There is the strength of protected action against unions being sued in tort at common law, but limited only to enterprise bargaining.

While the common law doctrine against strikes was rarely used in Australia for 70 years due to our conciliation and arbitration system preventing and settling strikes, was a resurgence of this ancient employer's weapon, with greater use in the last 20 years. This contrasts with the immunity for industrial action gained by unions in the UK from common law tort action as early as 1906.

The ILO in 1991 criticised the Hawke government and company use of the common law with damages of $6.5 million against the Pilots engaged in a controversial enterprise bargaining dispute for higher wages but outside of the Accord. Although the Committee on Freedom of Association did not uphold the Federation's complaint, it said it could not view with equanimity a set of legal rules which:

1. appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein;
2. makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequences of their actions;
3. enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct.

The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests. 277th report of the ILO Committee of Freedom of Association, Geneva, ILO, 1991, 60.

The ILO continues to stress that an unacceptable outcome of unprotected industrial action is the use or threat of the common law against the unions' industrial action: 'in Australia, unlike in England, ... in all but some limited circumstances an employee is not regarded as having a "right" to withdraw his or her labour.' Furthermore, where unions counsel their members to take strike action, they may be exposed to actions for the so-called 'industrial torts' of inducement to breach of contract, interference with contractual performance, intimidation, and conspiracy, among other things. Employers may also seek common law injunctions to prevent threatened strike action. Case No 1511, CFA Cases, 1991, [263].

But in this era, employers take tort actions against unions. Consequently, the policy of immunity from tort law as we saw in the *WR Act* (1996) section 166A had some significance, although limited, but removed by *WC* Act (2006).

The common law makes much union picketing unlawful. Protection is not afforded to effective picketing. Disorderly conduct, trespass, and the ancient common law of 'watching and besetting' are common law tort weapons against the picketers. Picketing may be held to be a civil wrong and tortious. Such restrictions are contrary to ILO standards.

10. Repeal the 30-day rule.

The requirement to commence protected action within 30 days or go back to FWA is an unnecessary restriction and does not allow the freedom necessary for any dynamic industrial relations negotiations and indeed it again is hard to follow any merit in this.

11. No individual right to strike

My 2008 Senate submission on the Transitionary Provisions pointed out the limitations on individual contract bargaining. Before WorkChoices there was an AWA right to strike. By maintaining the WorkChoices' no right to withdraw labour in individual contract agreement negotiating, the FWB affords no protection for thousands of employees negotiating personal 'common law' agreements. The FWB is not respecting the need of the individual negotiating to have a clear enforceable right, if necessary as a threat to do the work in a different manner nor any other form of individual response to the employer's negotiating position.

12. Right not to be penalised for short-term political protests

I am opposed to unfair penalties still available under WorkChoices to employers to legally use against reasonable but now designated 'unprotected industrial action', such as the dismissal or victimisation of workers who join short-term political protests about their interests, such as the ACTU community campaign rallies against WorkChoices, that originally were lawful, but made unlawful by WorkChoices and retained by the FWB. In a democracy, some freedom to protest must allow a limited form of lawful political strike action. See my paper about lawful political protest action in 'The Right to Politically Strike?' AIRAANZ 2005 Conference Sydney University http://airaanz.econ.usyd.edu.au/papers.html and the Evatt Foundation 13/4/2005: 'The right to politically strike? The case for re-evaluation'. http://evatt.labor.net.au/publications/papers/139.html

As a human right, the right to strike responds to attacks on workers' industrial rights and promotes other human rights.

'If the right to strike is a human right workers must be free to determine the causes they will promote by using it, just in the same way that we do not censor the purposes that may be promoted by the exercise of the right to freedom of assembly. People are free to exercise their human right to peacefully assembly by marching through the streets to demonstrate their opposition to the invasion of another country or anti trade union legislation. Why should they not also be free to exercise their human right to strike to promote the same ends by staying at home, or in order to reinforce the protest? It is not for the State to determine the causes which may be promoted in this way.' (Ewing 2004)

13.The democratic right to strike

The right to strike is also justified on principles of democratic rights, civil liberties, and freedom of speech and conscience.

Today, employees surely warrant their individual dignity and deserve to be treated fairly. No one should be at risk of being abused for participating in legitimate industrial action.

The collective bargaining system that we take into the 21st century should be based on secure rights for workers, including firewalling the right to strike.

The disappointment is that the Labor government retains the current imbalance. Such 'repressive tolerance' will disadvantage working families facing the substantially increased power of corporations in the GFC. To really go *Forward with Fairness*, Australia needs a regime where the right to strike is as a last resort available to defend and advance their occupational, social and economic interests, and is recognised as a democratic right for workers and their unions.

Today, employees do not want to be used as virtually corporate wage-servants, to do whatever unreasonable demands corporate managers want, but have the realities of some freedoms. The era of no right to strike should be over, but with only minimalist changes to industrial action, the FWB promises are illusory.

'The right of workers to leave their jobs is a test of freedom. Hitler suppressed strikes. Stalin suppressed strikes. But each also suppressed freedom. There are some things worse than strikes, much worse than strikes – one of them is the loss of freedom.' US President Eisenhower.

'Eisenhower was correct in pointing out that the hallmark of the Police State is the loss of the right to strike. A worker's right to strike is surely a basic human right. The right to withdraw labour is the one thing that distinguishes a free worker from the slave. This is a fundamental freedom.' Clyde Cameron, former Labour Minister (1970) 'Industrial protest: the Right to Strike' University of Adelaide, WEA 27/11/1970. (Australian Parliamentary Library).

It is *'1984 doublespeak'* to say under the FWB 'the right to strike remains'.

Further references in Appendix. I now focus on a vital challenge.

14. The right to strike to save the environment

Should there be a right to strike to save the environment in the FWB?

Why should workers and their unions be penalised when involved in bargaining on environmental protection claims?

Why should workers be not legally allowed to attend legitimate protests such as community rallies against corporate and government failure to address global warming?

Why should employees be able to be victimised by employers or the state for expressing their voice on climate change?

Why should it be unlawful to impose legitimate green bans supported by the community?

You know my answers to these questions. According to the FWB such workplace rights are to be denied, unless the Parliament reconsiders the issues.

I do not want to repeat the scientific evidence explaining the global warming and environmental breakdown. It is worse than I thought – the human race faces an environmental emergency. The challenge of solving the environmental crisis is

together with the GFC, the major dual challenges of this century. This submission does not assess the government's recent policy announcements in the green paper but I find them most disappointing.

This world environmental crisis is being tackled at different levels with good policies. One example is the ACTU and the Australian Conservation Foundation policy for 'green jobs' in sectors like renewable energy, energy efficiency, sustainable water systems, biomaterials, green materials, green buildings and waste recycling, with up to half a million jobs to be created.

But under the FWB unions cannot without legal risk campaign for these issues with industrial action in reserve, as employers would legally contest that such action does 'not pertain to the employment relation' or if during the life of the agreement is outlawed. Workers can talk to employers but not promise any lawful pressure.

In a modern democracy, accepted principles of freedom of association enable workers to freely join unions and be active over whatever issues are democratically decided, including global warming issues.

Green bans backed by citizens' support, in a democracy must not have workers or unions penalised.

In the 1970s, the NSW Builders Labourers Federation embarked upon 'Green bans' industrial action to protect the environment by refusing to take jobs constructing a luxury complex on undeveloped bushland, on the Greenbelt in Sydney, respecting community opposition to this project. The environmental and community positive value of the 'green ban' backed by citizens' action has been widely accepted over the last 20 years. Environmental union action, although unlawful at common law and technically breaching competition law, the Trade Practices Act, was not always penalised. Books and articles now celebrate the belief in green bans.

An important grounding of the right to strike grounds reasoning is in democratic principles that may be wider than collective bargaining, here environmental concerns. Novitz argues:

'…considerations of a social character should be permitted to influence the market-led considerations often taken by employers… to extend the concept of 'workers' 'self-interest', so to accommodate industrial action taken on a principled stance. This is an attempt to relate the right strike back to the socio-economic interests of workers. Such strikes could be considered justifiable on the grounds of individual conscience and moral autonomy or as an extension of free

speech. Indeed a strike may be viewed as an aspect of acting as a responsible citizen, a role which cannot simply be suspended during working hours.'

Further, the green ban form of industrial action is a means:

'…allow the values of the 'life world' Habermas (1997) to permeate the capitalist system. The Sydney 'green bans', were where constitutional democratic procedures have not decided how to develop Sydney before the labourers stepped in; profit making builders had. The green bans may be understood as taking one step further a union goal traditionally applied to setting wages and conditions of employment; substituting a conscious group decision for a market determination.'

Arguably the FWB should be amended to ensure a lawful green ban.

Senator Bob Brown: 'Green Bans are going to become increasingly important as we head into an era of climate change over the next 10 years . . . and the Greens policy is to allow workers to make climate change not just a household issue, which they already are, but a workplace issue. The Greens have a very clear policy on this that allows workers to have the internationally recognised right to strike for whatever matter they choose, if that's an environment matter, so be it.

Furthermore, the Building and Construction Industry Act (2005) outlaws industrial action and green bans by the CFMEU and other unions. The Australian Building and Construction Commission, the ABCC, investigates, interrogates in breach of fundamental civil liberties and prosecutes workers and unions for legitimate industrial action, such as on the environment.

Senators should see the film 'Constructing Fear' and the 'Rights On Site' website www.rightsonsite.org and www.cfmeu.asn.au/construction See my paper Australian Institute of Employment Rights at www.aierights.com.au

I call again for the repeal of the BCII 2005 and the ABCC immediately.

There should be only one federal law for employees. It would be cruel and Orwellian to repeal the BCII Act but keep building and construction industrial action unlawful by retaining in the FWB the WorkChoices restrictions on the right to strike.

Part four

Respect for *Your Rights at Work*?

I recommend reading the new book 'Worth Fighting For Inside the *Your Rights at Work Campaign'* by Kathie Muir (UNSW Press 2008) about the unprecedented labour movement campaign analysing the political communication and

mobilising strategies that were very influential in the defeat of the Howard government.

Here I am arguing that the FWB does not entirely successfully the delivery of new rights at work in the GFC.

In determining legislation the Parliament has to be careful to respect the democratic realities, i.e. citizens voted for the repeal of WorkChoices; that *YRAW* was a genuine union and community political campaign and the resulting FWB to have political and democratic legitimacy has to respect those claims.

Professor Harry Glasbeek wrote a perceptive argument as to the sell-out of the *Your Rights at Work.*

'Regardless of the details, in essence the proposed scheme limits workers' collective bargaining with strike rights attached to firm by firm bargaining. While it will be possible to bargain with more than one employer at a time, this will only be permitted where the employers are commercially related, engaged in a joint venture and/or common enterprise. That is, where functionally they are but one enterprise. Multi-employer bargaining may also be authorized where the employers are connected via a franchise agreement or are funded by a common source and are not in competition with one another, as say in the case of public hospitals. In brief, competitive firm by competitive firm is the essence of model. There is to be no occupation-wide, industry-wide adversarial bargaining, although agreements may be reached on that basis provided the workers do not use their strike powers to obtain a deal. That is, they have been empowered to talk and, if it suits employers, to make a deal. Stability of production in a fragmented competitive market is the core of the ALP's vision.

The ALP understands how employer-favouring and worker-enfeebling this approach is. It has elected to permit, multi-employer- and related employer-negotiation where workers are truly vulnerable, as in the childcare, community work, security and cleaning spheres, where contingent employment, disproportionately exploiting women, is rampant. This proffered protection is an acknowledgment that it is known that employers organize themselves to avoid responsibilities and that this causes hardship. Of course, this kind of strategy is true in all sectors of employment and commercial activities, as the MUA and the James Hardie affairs exemplified. The employing class is a responsibility challenged one and can be counted on to use its legal manipulative powers to the fullest extent possible in all sorts of circumstances. The ALP implicitly is acknowledging these truths by providing an exception to firm-by-firm bargaining where the workers most obviously vulnerable to this kind of scheme are to be found. It is holding out to the public that it is more compassionate than its predecessors. Of course, not that much more compassionate: the vulnerable

workers will be given a means to pierce byzantine employment arrangements to enable them to negotiate with the relevant parties, but the emphasis is on negotiation. Again, they are not allowed to strike to enforce their demands.

This solicitude for the easily oppressed only serves to draw attention to how little the ALP is offering to workers in general. Worker power is mistrusted, even as the government demonstrates that it knows that employers use their powers to oppress workers to the fullest extent permitted by law (and often beyond). For those workers who can back up their demands by striking, they are to be constrained in their use of the only real weapon they have. They may only strike during a protected period, after giving appropriate notice, holding a vote. Their demands are not to be as restricted as they were under the No Choices legislation, but they are not to be open-ended. Vital issues, such as decisions as to whether an employer may determine that a plant is too unprofitable to maintain, or that a particular supplier be preferred regardless of the workers' views, and other such managerial matters, are not to be subjected to the good faith bargaining requirements imposed on employers. They are not to be protected strike issues. The ALP believes that the prerogative of management is to be left unhampered when it comes to ultimate control over its capital. All that may be put in issue is the extent of the right of workers to do things in the firm, not to exercise rights over the firm. It believes in fairness at work, but not if it impedes what it envisions to be wealth owners' ability to function competitively in a market economy. This was emphasized in Minister Gillard's speech to the National Press Club on 17 September, 2008. She argued that an arbitrator would be allowed to impose a solution where protected bargaining is posing a threat to the economy or of significant harm to the parties. Obviously, such intervention only applies to situations where workers are party to harm-causing conduct; mere removal by employers of capital is not to be subjected, as a matter of law, to government intervention to avert harm, even if it leads to economic disaster, to wage cuts or unemployment. The reluctance to give workers' collectives real economic strength is palpable.

This brief account explains why the ALP has retained some of the more anti-union provisions devised by Howard and his associates. While they no longer will face mandatory pay deductions for a specified minimum of time for any work stoppage, workers will have pay deducted for the actual period of stoppage of work during a protected strike. More, an employer may not be asked to pay strike pay for a protected strike, an entitlement possessed by Canadian and American workers. If workers use their power to strike during an unprotected period, they will face a standard minimum 4 hour pay deduction, just as they did under No Choices. That is, the penalty is automatic, unlike the North American situation. In some instances, then, the Rudd/Gillard proposals are less worker friendly than the North Americans they are imitating.

While unions may bargain for dues check-off provisions, these are not automatic upon conclusion of a collective agreement as they are in many Canadian jurisdictions. This makes it more difficult to organize and to plan for unions. The exceptionalism, the aberrant nature of union in a firm by firm, market-oriented, scheme colours the ALP legislation, if not as obviously as it did under the No Choices statute. All this is underscored by the current unwillingness of the ALP to get rid of the vicious provisions that treat construction and building workers as incipient criminal conspirators. This sends a strong message.

In sum, even if some of the more obvious warts are burnt off as the union movement intensifies its representations during the legislative battles, the structural nature of the ALP proposals will not change. They represent a sell-out of the underlying thrust of the *Your Rights At Work*. Specifically,

(i) Bargaining is to be fragmented. Unions are to design their operational organization on the basis of the way in which profit-driven employers determine they should organize themselves.

(ii) Unions are no longer the linchpin of the system. What counts is who the employer is, not whether or not there is a union.

The corporation, not the trade union, not workers, are the central actors in the Fair Work regime, just as was the case under the Howard No Choices scheme. The corporation is capitalists' preferred institution by which to wage class war. The underlying political message is not that subtle. It is underscored by the fact that the registration of unions under the proposals appears to be contingent on having half their members employed by corporations or by being training or financial corporations in their own right. The old idea that unions should have a place as social and political actors in their own right has no salience in the ALP's anti-Choices regime.

(iii) Unions will no longer be able to organize themselves to take wages out of competition.

(iv) Unions will have no say in how a sector of industry ought to develop as they have no place at the industrial table. They may be invited to sit at the table but will be required to play by the hosts' rules and be well-mannered.

(v) There will be no direct participation in the setting of national standards, except as another lobby group when national employment standards are revisited

The social and political potential of trade unions as a social movement, exploited during, and hoped to be furthered by, the Your Rights A Work campaign has been seriously undermined.

(vi) Unions cannot make anything but narrow economic demands of their employers.

(vii) Unions will be representing only those workers covered by their good faith bargaining sphere. However that is to be determined, it places a limit on coverage. Unions become exclusive, rather than inclusive. The proof is in the North American pudding. There collective bargaining coverage has never extended beyond 50% of the working population as only a small number of non-unionists got the benefit of agreements obtained by unions. Non-unionists, always a majority and to-day a whopping majority, never had the benefit of this exclusionary regime of industrial relations. Australia, a polity in which nearly everyone was covered by the determinations won by unions, underscoring its claim of being a fair-minded nation (an achievement celebrated by the ALP as it moved away from the compulsory arbitration scheme that had given the claim some resonance), should be leery of such an institutionalized change in coverage of collective agreement-making.

The Rudd/Gillard team are establishing a collective bargaining regime that is as close to the individual contract scheme as it is possible to be while paying lip service to collectivism. The restrictions on the extent of collective bargaining, both in terms of subject-matter and reach, and the tight constraints on the only real power workers have, the strike, ensure that the ALP furthers the goals of No Choices when it set out to advance the cause of a market political economy in which a distorted form of voluntarism and competition was to reign. This is a negation of the principles that impelled the Your Rights At Work campaign.

The *Your Rights At Work* campaign deserved better; workers deserved better.

…This presentation's concern has not been whether or not workers, all other things going well, could possibly obtain better terms of employment under the Fair Work bill. To repeat: the new minimum standards ought to be a boon, at least until they fall below what changed economic circumstances demand. That said, it would be foolish to expect too much by way of protection from an industrial relations system aimed squarely at bargaining about a share of the pie baked within existing market conditions. Everything depends on existing conditions exogenous to the industrial relations system. As this is being written, the downturn in corporate profits and the failures of financial institutions, threatens to wreak havoc on the working class. The ability bestowed on the few by the ALP's new industrial relations system to bargain locally in respect of

narrow bread and butter issues will not provide the safeguard needed by workers. This on-set of a crisis makes clearer what has been true for some time: the accepted way of creating overall welfare is to be rejected if workers are to do better economically and, even more significantly, democratically. What is needed is a different way to bake the pie and to share it. There is a need for a politics that reshapes the political economy, for a politics, in other words, that underlay *Your Rights At Work* campaign.'

The FWB is not fairness we can believe in.

This Parliament can respond by recognising the legitimacy of the unions' *Your Rights at Work* voice in the democratic elections by not selling out the legitimate political demands for workers' rights.

Appendix

I have not above included all of the references that are available.

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I have been a union official for 30 years, including Secretary of the UTLC of SA.
Further references from whitecd@velocitynet.com.au
My blog http://chriswhiteonline.org argues much of what is in this submission.