Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

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This submission is made in my capacity as an academic, and the views expressed are mine alone. As previously disclosed to the Committee, I have provided advice to the Department of Education, Employment and Workplace Relations on the drafting and structure of this legislation. I was not, however, engaged to advise on policy issues.

General Observations

The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (TPCA Bill) deals with the transition from the current workplace relations system to the new Fair Work regime. Among other things, it provides for the repeal of the *Workplace Relations Act* 1996 (WR Act) and outlines what will happen to 'old' awards and agreements when the new *Fair Work Act* 2009 (FW Act) takes effect.

It is always a major exercise to replace one regulatory system with another, especially when the changes are substantial as they are in this case. But there are three particular features of the current process that complicate the design of transitional arrangements, and that explain just why the TPCA Bill is as long and complex as it is.

The first is the plethora of industrial instruments still in operation that were created under earlier versions of the WR Act, each with their own rules that have been preserved by earlier transitional arrangements.

This can be illustrated by considering the most common form of agreement (in terms of number of employees covered), a collective agreement made under federal law between an employer and one or more trade unions. The WR Act currently makes separate provision for:

- 'old IR agreements' made under the *Industrial Relations Act* 1988, prior to the 1996 amendments that saw that Act renamed as the WR Act;
- 'pre-reform certified agreements' made between 1 January 1997 and 2 September 2004, the date of the High Court's decision in the *Electrolux* case;
- pre-reform certified agreements made between 2 September 2004 and 27 March 2006, the date the Work Choices amendments took effect;

- 'pre-transition collective agreements' made between 27 March 2006 and 7 May 2007, the date from which the (since repealed) 'fairness test' was introduced;

- pre-transition collective agreements made between 7 May 2007 and 28 March 2008, the date the amendments made by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008 took effect; and

- collective agreements made under the WR Act since 28 March 2008.

And that is not taking account of the separate rules that currently exist for preserved State agreements (PSAs), pre-reform and pre-transition Australian Workplace Agreements (AWAs), Individual Transitional Employment Agreements (ITEAs), pre-reform federal awards, notional agreements preserving State awards (NAPSAs), Australian Pay and Classification Scales (pay scales), transitional awards, old s 170MX awards, and so on.

The second complicating factor is the government's decision to exempt enterprise awards from the initial award modernisation process. That means that there are a large number of old federal and State awards that will continue to operate even after the commencement of the modern award system, together with the pay scales that were notionally (if not physically) removed from those awards by the Work Choices reforms. These 'enterprise instruments', as they are termed in the TPCA Bill, thus require detailed transitional arrangements that would not otherwise have been necessary.

Thirdly, there is the decision to have the Fair Work legislation commence in two stages. Because neither the National Employment Standards (NES) nor modern awards are to take effect until January 2010, it is necessary to provide for what is to happen during the 'bridging period' in the second half of 2009 while the rest of the FW Act is already operational.

Despite the size and complexity of the Bill, my general view is that the transitional arrangements are soundly designed and sensibly drafted. In particular, I support:

- the adoption of rules for transitional instruments that as far as possible operate generically, covering either all such instruments or instruments of a general type, rather than retaining different rules for each different instrument;

- the decision to allow some agencies that will ultimately be replaced by the new Fair Work Australia (FWA) to continue in operation while selected tasks are completed — such as the approval of ITEAs by the Workplace Authority, and the finalisation of award modernisation by the Australian Industrial Relations Commission (AIRC);

- the clear cut-off date for bargaining and industrial action under the old system, so that any bargaining not brought to a conclusion before 1 July 2009 must be recommenced under the new FW Act rules and processes;

- the retention during the bridging period of both the Australian Fair Pay and Conditions Standard and the current no-disadvantage test as benchmarks for enterprise bargaining;

- the principle that from 1 January 2010 the NES will apply to *all* national system employees, regardless of any existing agreements or arrangements;

- the treatment of pre-2010 service and entitlements, in determining entitlements under the new NES; and

- the decision not to include provisions on the registration and regulation of trade unions and employer associations in the FW Act itself, but instead to retain the current WR Act provisions as part of a renamed statute, the *Fair Work (Registered Organisations) Act* 2009.

There is one major aspect of the transitional arrangements with which I disagree, that being the lack of a 'drop-dead' date for old instruments. I explain the reasons for that in the next section, following which I outline a number of other suggestions concerning particular provisions in the Bill.

The Problem of Old Instruments

The TPCA Bill does provide (in clause 20 of Schedule 3, and in Schedule 20) that transitional instruments binding on non-national system employers will cease to operate no later than 27 March 2011, the same date on which some of them were already scheduled to end under the WR Act.

It is also provided (again in clause 20 of Schedule 3) that NAPSAs that are not based on an enterprise award will come to an end by 1 January 2014, if not superseded before that date by modern awards made by the AIRC. Unmodernised enterprise instruments will also cease by the end of 2013 (Sch 6 cl 9(4)).

Otherwise, however, the scheme of the Bill is to let old instruments live on indefinitely, no matter how long ago they were made.

There are at least three practical problems with the failure to set an end date for these instruments. The first is that, because of the provisions in clauses 4 and 5 of Schedule 3, it will be necessary for an indefinite period into the future to refer back to the 'content rules' or 'interaction rules' that applied to such instruments under the WR Act. In many cases — and I return to this point in the next section — those rules are not presently accessible in any simple form.

The second problem is a larger version of the first. Some of the old instruments that will be allowed to live on under the TPCA Bill do not exist in any authorised form. PSAs and pay scales are 'notional' rather than actual instruments that depend for their existence on complex (and not always clear) transitional provisions in the WR Act.

Thirdly, from 1 January 2010 all transitional instruments will be subject to the NES. Any provision in such an instrument that is 'detrimental' to an employee in any respect will be unenforceable (Sch 3 cl 23). But there is no requirement for such an instrument to be amended so that it reflects the NES. Potentially, therefore, employers and/or employees may be misled into thinking that certain terms of an old instrument have an effect they do not actually have.

Given that one of the objectives of the Fair Work legislation is to create a new, simpler and more practical system of regulation, it is hard to understand why these remnants of the WR Act should be able to operate for any longer than a sensible transitional period.

What I recommend is that:

- *all* transitional instruments cease to have effect after 31 December 2013, or their nominal expiry date, whichever is the later; and

- FWA be empowered, on application by a party to any agreement-based instrument, to convert it to a workplace determination with effect under the FW Act.

This last option would allow either employers or employees to argue that it would not be in the public interest for them to be thrown back on to the minimum conditions set by the relevant modern award(s). Importantly, if successful they would then have a new instrument whose terms would be fully accessible and fully compliant with the NES.

Publishing Content and Interaction Rules for Transitional Instruments

As mentioned above, the permissible content of any transitional instrument is generally determined by whatever 'content rules' applied immediately before the commencement of the FW Act (TPCA Bill Sch 3 cl 4). Hence, for example, any workplace agreement made between 27 March 2006 and 30 June 2009 will remain subject to the 'prohibited content' rules in s 356 of the WR Act.

Similarly, an old instrument will generally be subject to whatever 'interaction rules' applied before the commencement of the FW Act, in determining whether it prevails or has priority over some other transitional instrument (Sch 3 cl 5).

This approach is fair enough as far it goes, but it does create practical problems in locating the rules in question.

In the case of 'pre-reform' (ie, pre-Work Choices) agreements, for example, it is necessary to refer to the transitional provisions in Schedule 7 of the WR Act. These in some cases preserve the effect of selected provisions from the pre-Work Choices version of the Act, but in other instances (as with clause 3) substitute slightly different versions. The net effect is that there is no one place where it is possible to find the content or interaction rules for these instruments. They can only be identified by

piecing together provisions from two different versions of the WR Act — a challenging task for anyone not thoroughly familiar with this legislation.

The challenge is even greater with pre-reform federal awards. Some of the provisions governing those instruments are to be found in Schedule 4 of the *Workplace Relations Amendment (Work Choices) Act* 2005. This Schedule is notable for referring to section numbers in the amended WR Act that were subsequently changed when the whole Act was renumbered. The references are impossible to decipher without recourse to a comparison table.

I strongly recommend that the Office of the Fair Work Ombudsman be required, as part of its education and advice role, to publish factsheets that set out (in a readily accessible form) information as to the content and interaction rules for each of the different types of transitional instrument preserved by the TPCA Bill.

Effect of Transitional Instruments on State and Territory Laws

Division 2 of Part 1-3 of the FW Act contains provisions that explain how modern awards and (new) enterprise agreements interact with State and Territory laws. But I cannot find an equivalent provision in the TPCA Bill that deals with the same issue in relation to transitional instruments.

There are various 'interaction rules' in Schedule 3 of the Bill, but none of these seem to cover State or Territory laws. By contrast, there is a specific provision (clause 8) which deals with the relationship between certain transitional instruments and *Commonwealth* laws. It is possible that the reference to 'content rules' in clause 4 is meant to preserve the effect of old WR Act provisions on the subject, but that seems an unlikely interpretation.

In the absence of any specific provision, transitional instruments would necessarily prevail over any otherwise applicable State or Territory law. In the case of State laws, that is a function of s 109 of the Constitution. But that would include *all* State or Territory laws, regardless of subject. By contrast, both the WR Act and the FW Act (for new federal instruments) have provisions that specifically seek to preserve the operation of State laws on matters such as occupational health and safety, workers compensation and child labour.

I recommend that the Department be asked to rectify what appears to be an omission in the Bill by drafting an appropriate amendment. The simplest approach would be to treat transitional instruments as if they were modern awards or enterprise agreements for the purpose of Division 2 of Part 1-3 of the FW Act.

Replacing Individual Agreements

The TPCA Bill provides that where an employee is covered by an old AWA or ITEA that has passed its nominal expiry date but remains in operation, that employee is entitled to participate in bargaining for a new enterprise agreement, including taking

industrial action and voting on the new agreement (Sch 13 cl 2). But if the new enterprise agreement is made, it will not apply to the employer while the old individual agreement remains (Sch 3 cl 30(1)), unless a 'conditional termination' has been lodged with FWA (Sch 3 cl 18).

As I have previously submitted to the Committee, it would be more straightforward — and more consistent with the priority accorded to collective bargaining under the FW Act — to provide that an enterprise agreement *automatically* supersedes any expired AWAs or ITEAs, unless the enterprise agreement itself specifies otherwise. This would avoid the need for either the employer or the employee to go to the time and trouble of lodging a conditional termination.

If the conditional termination mechanism is to be retained, it could usefully be limited to employees who are covered by unexpired AWAs or ITEAs.

Representation Orders and the Need for a Dispute

Part 3 of Schedule 22 of the TPCA Bill proposes to insert a new provision, s 137A, in what will become the *Fair Work (Registered Organisations) Act* 2009.

This will empower FWA to make a new form of 'representation order', in this case to specify that a union has the exclusive right to represent the employees in a particular 'workplace group', or conversely that a particular union does not have that right. 'Workplace group' is to be defined in s 6 of the new Act to mean a class or group of employees, all of whom perform work for the same employer, or at the same workplace, or both.

The making of such an order will, among other things, affect a union's capacity under the FW Act to be a bargaining representative, to organise protected industrial action, to make greenfields agreements, or to exercise a right of entry.

I see no particular objection to the conferral of such a power on FWA. But there is one important aspect of the new process that arguably requires clarification.

As the Bill stands, the new power can only be exercised 'in relation to a *dispute* about the entitlement of an organisation of employees to represent … the industrial interests of employees' (emphasis added). On the face of it, therefore, there must be some actual disagreement or difference of opinion between identified parties over representation issues at a workplace. Unlike the legislation as it stood prior to Work Choices, there is nothing to suggest that the term 'dispute' here includes a 'threatened, impending or probable dispute'.

Now if the new power can only be exercised once a dispute has actually arisen, it is hard to see that it adds much to the existing (and more general) power under what is currently s 133 of Schedule 1 to the WR Act to make representation orders in relation to 'demarcation disputes'. That power could on the face of it be exercised in relation to a 'workplace group'. The only extent to which the proposed s 137A might go

further is that it would not be necessary to show that the conduct of a particular union was preventing, obstructing or restricting the performance of work, or harming an employer's business, or threatening to do either of those things.

It is interesting, however, to consider what the Explanatory Memorandum for the TPCA Bill says about the new provision.

On page 4, it is said that FWA will be empowered to make 'a new and additional form of representation order that does not require the existence of a dispute which threatens to disrupt or harm an employer's business or actually disrupts or harms the business'.

In paragraph 767, the power is described as being intended to address '*potential* demarcation disputes that may arise as a result of the removal of the requirement that a union be bound to an award or agreement to exercise a right of entry or changes to the bargaining framework' (emphasis added).

Finally, and most tellingly, there is the 'Spokey Dokes' example that appears in a box on page 129 of the Explanatory Memorandum. It speaks of the business owner being 'aware that there is a longstanding enmity' between two particular unions, and not wishing 'any conflict between the two unions' to disrupt the operation of her business. Of the two, one already has members and delegates at the business, while the other has 'indicated that it now wishes to take a more active role at the workplace'. On that basis alone, the business owner is said to be entitled to apply to FWA for a representation order under proposed s 137A.

What all this suggests is that the new power is able to be exercised where there is merely the *potential* for a demarcation dispute to arise. If so, then I suggest that the new provision be amended to make that clear.