**AUSTRALIAN COUNCIL OF TRADE UNIONS**

**SUBMISSION TO THE SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS**

**INQUIRY INTO THE PROVISIONS OF THE FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2009**


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## Introduction

This submission is made on behalf of the Australian Council of Trade Unions ('ACTU').

We thank the Committee for the opportunity to make a submission to the inquiry into the provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 ('Bill').

We applaud the Bill in repealing the unfair *Work Choices* legislation and putting in place arrangements for the smooth and orderly transition to the new Fair Work industrial relations system.

However, we have concerns that some of the provisions of the Bill are inadequate. We deal with these issues in the order in which they appear in the Bill.

## 1. Transitional agreements

### *1.1 Substandard agreements*

We are disappointed that the Bill allows substandard transitional agreements (made under the WR Act) to continue indefinitely, potentially.

Many of these agreements significantly disadvantage employees compared to the safety net that the Fair Work Act establishes. The problem is particularly acute for agreements made under *Work Choices*, without the involvement of unions, in the period before the Fairness Test was introduced. During this period, 343,769 AWAs were made; 3,280 (non-union) employee collective agreements were entered into, covering 137,697 employees; and 545 'employer greenfield agreements' were made, covering perhaps 30,000 employees.[1] In total, more than 510,000 employees became covered by these *Work Choices* agreements, representing 6% of the current workforce.[2]

All of the available evidence suggests that *most* of these agreements seriously disadvantage employees compared to the underlying award and default legislative minimum standards, for example by removing entitlements to penalty rates, loadings, allowances, long service leave, meal breaks, up to 2 weeks' annual leave, redundancy pay, and so forth.[3] The problem is particularly acute in sectors of the economy like retail and hospitality, where employees have limited bargaining power. We note that one third of the AWAs, and 22% of the employee collective agreements, were made in these two sectors alone.

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[1] If one assumes just over 50 employees per greenfield site. See Workplace Authority, Workplace Agreement Statistics (26 March 2006 – 6 May 2007).
[2] ABS cat 6310.0 (Aug 07) Table 17.
[3] Victorian Workplace Rights Advocate, *Report of the Inquiry into the Impact of the Federal Government's Work Choices Legislation on Workers and Employers in the Victorian Retail and Hospitality Industries* (2007) 62.

Research into post-*Work Choices* agreements in the retail and hospitality industries show that award-based entitlements were removed or reduced to the following extent:[4]

| **Entitlement** | **Removed/reduced: AWAs** | **Removed/reduced: non-union collective agreements** |
|---|---|---|
| **Award-based entitlements** | | |
| Weekend and evening penalty rates | 65 | 82–89 |
| Overtime penalty rates | 70 | 78 |
| Control over working time (restrictions on averaging hours, varying part-time workers' hours, etc) | – | 62 |
| Casual loadings | 63 | 75 |
| Redundancy pay | 63 | 75 |
| Annual leave loading | 45 | 83 |
| Public holiday penalty rates | 45 | 79 |
| Paid rest breaks | 25 | 61 |
| Allowances (meal, uniform, laundry) | – | 81–95 |
| **Minimum statutory entitlements** | | |
| Consultation in the event of redundancy | – | 90 |
| 10 days' paid sick leave | 45 | – |
| Public holidays off | 40 | 12 |
| 12 months' unpaid parental leave | 20 | – |
| APCS minimum rates of pay | 6 | – |
| 2 weeks' annual leave | 6 | – |

The same research shows that in many cases employees received either nothing in return for these reductions, or else an 'insignificant' increase in their base rate of pay. Indeed, in the case of Employer Greenfields Agreements made in the Victorian retail and hospitality sector, a 'significant' wages trade-off was only found in 7% of agreements examined.[5]

Many, if not most, of these substandard agreements would have a nominal life of five years, meaning that the last batch of pre-Fairness Test agreements will not be able to be terminated unilaterally by employees until 6 May 2012. Even after that date, many employees on these instruments will not be aware of their right to terminate the agreement and return to the safety net conditions provided by modern awards.

We note that, apart from the question of disadvantage to employees, it is unfair for the competitors of a business that uses substandard agreements that those agreements can

[4] Sources: J Evesson et al, Lowering the Standards: From Awards to Work Choices in Retail and Hospitality Collective Agreements: Synthesis Report (2007); Victorian Workplace Rights Advocate, Report of the Inquiry into the Impact of the Federal Government's Work Choices Legislation on Workers and Employers in the Victorian Retail and Hospitality Industries (2007).
[5] VRWA report, 79–80.

continue forever, and give the employer a permanent competitive advantage on labour costs.

The government's first response to this problem has been to ensure that the NES (and certain other entitlements including minimum wages) override any transitional agreements from 1 January 2010. We acknowledge the good sense in this. However, the proposal does not go far enough. Even with NES entitlements restored, employees on *Work Choices* agreements may still be significantly worse off compared to what they would receive if a modern award applied to their employment.

We submit that the appropriate response is to allow FWA to terminate transitional instruments, in the public interest, in cases where they disadvantage employees compared to the modern award.

The government's second response to the problem of the continuation of transitional agreements has been to permit an employee on a substandard AWA or ITEA to seek to have the agreement replaced by an enterprise agreement. However, the employee must first convince their employer to allow them to participate in collective bargaining, either by agreeing to terminate the AWA or by making a 'conditional termination agreement' with them. This is not an adequate solution. Employers who benefit from the fact that their employees are receiving substandard conditions are unlikely to agree to terminate the AWA early, or release the employee into collective bargaining. This proposal will only be of benefit to employees who have individual statutory arrangements that are superior to the new safety net.

We also note the potential for employers to strategically use conditional termination agreements to frustrate collective bargaining. This may be done, for example, by seeking to flood a vote on a collective agreement with AWA/ ITEA-based employees with the intention that those employees will vote in a particular way. The Federal Court has already indicated that this strategy is unjust, even though it is lawful.[6] Although we are confident that FWA would, in these cases, have the discretion to exclude the AWA/ITEA employees from the scope of the agreement, we think it would be prudent to add a note below section 238(4) of the Fair Work Act to clarify that this is the case.

### *1.2 Outworkers*

The Bill provides that certain agreement-based transitional instruments override the underlying modern award (clause 28). This allows a WR Act agreement to override the 'designated outworker provisions' in the modern Textile Clothing and Footwear Industry Award. This is contrary to the government's policy that outworker provisions should not be able to be excluded in an agreement. An amendment is necessary to rectify this problem.

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[6] *CPSU v Victoria* [1998] FCA 1582.

### *1.3 Non-federal system employers*

Sch 3 cl 20 of the Bill provides for the sunsetting of transitional instruments based on section 51(xxxv) of the *Constitution* (old IR agreements, pre-reform certified agreements, and NAPSAs) to the extent that the employers are not federal system employers on 27 March 2011. Transitional awards based on s 51(xxxv) of the *Constitution* will also lapse on this day.

The result of this decision is that, on that date, many employees will lose important rights, entitlements and protections that they enjoy under the federal system. This is an extremely unfair outcome. It especially affects employees in areas that have traditionally been regulated by the federal system and for whom there is no alternative State-based safety net. One example of this is employees in Aboriginal hostels. If the federal award lapses on 27 March 2011, there will be no corresponding State award for those workers to fall back upon. The policy also creates uncertainty for employees working in businesses which are not clearly in one system or the other, such as those working in the social and community services sector; on 27 March 2011 it will not be what their employment rights are.

It appears that the rationale for this decision is the government's desire for 'certainty' and stability in the coverage of the Fair Work Act. However, this measure does not achieve this goal, and may even undermine it. First of all, even if the Fair Work Act is restricted in its application to constitutional corporations, it is often extremely uncertain whether a particular entity (such as a charity, community sector organisation or local government body) satisfies this description. Second, the measure increases uncertainty for employees, since their employer can switch jurisdictions simply by altering its corporate status. Employees do not have access to this mechanism. Finally, the provision creates extreme uncertainty for public sector workers, who face the prospect of having their employment conditions regulated by their own employer, with no refuge from unfair employment laws.

We submit that, in the interests of fairness and certainty, the Bill should allow parties to an interstate industrial dispute to participate in the federal industrial relations system. We do not see any constitutional impediment to allowing these parties to have recourse to the federal system to help settle their dispute 'by conciliation or arbitration' (in the words of the *Constitution*), whether through the making of a modern award (provided it is within the ambit of the parties' dispute) or through the lodgement and enforcement of an enterprise agreement. The remaining provisions of the Fair Work Act (dealing with the NES, general protections, industrial action, right of entry, etc) can also be safely extended to these parties, as furthering the settlement of the original dispute and preventing future disputation.

## 2. National Employment Standards

Sch 4 item 5(4) of the Bill provides than an employee's service prior to 1 January 2010 does not count for the purposes of accruing an entitlement to redundancy pay if, immediately before that date, they were covered by a contract, award or workplace agreement that did not provide for redundancy pay. This provision essentially ratifies the effect of workplace agreements that purport to stop the employee accruing redundancy pay entitlements for the period up to 31 December 2009.

If those workplace agreements had fully compensated employees for the loss of redundancy rights, then this provision would merely operate to prevent 'double dipping', and would be uncontroversial. However, the reality is that most of the agreements made in the post-*Work Choices* period removed employees' redundancy rights without compensation. For example, as outlined above, in the retail and hospitality sectors, 75% of non-union Employee Workplace Agreements and 64% of AWAs excluded the employee's entitlement to redundancy pay – with no, or no significant, compensation.

Indeed, the problem of employers avoiding their redundancy obligations by making workplace agreements that simply excluded those obligations was so bad that the Coalition government was forced to rush through Parliament (tacked onto a Bill on a different topic) new provisions to curb some of the worst abuses.[7]

Accordingly, our principal concern is that by ratifying the effect of *all* workplace agreements that deprive employees of redundancy pay – whether or not the employee received fair compensation for that deprivation – the Parliament is proposing to ratify thousands and thousands of unfair workplace agreements, in which employees' redundancy rights were taken from them without adequate compensation.

A second concern is that the ratification will have a disproportionate impact on vulnerable employees, including employees who are not union members. This is mainly due to the fact that Union Collective Agreements almost universally preserve employees' redundancy entitlements, while non-union agreements tend to remove them. By way of example, research shows that in the retail and hospitality industries, redundancy pay entitlements is preserved in 97% of union agreements, but in only 25% of non-union collective agreements,[8] and 37% of AWAs.[9]

We submit that it would be better to delete sch 4 item 5(4) and instead provide employers with the right to apply to FWA for an order that time served by an employee under a workplace agreement not count towards the calculation of redundancy entitlements under section 119(2) of the Fair Work Act, in cases where the agreement removed the right to redundancy pay *and where the employer can show that the employee was fully compensated for that loss*.

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[7] *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) sch 3.
[8] Evesson et al, above, n 4, 26.
[9] VWRA report, above, n 4, 62.

## 3. Modern awards

### *3.1 Take-home pay orders*

While we welcome the provision of compensation for employees who lose pay as a result of the award modernisation process, we have a number of concerns about the proposal.

First, we are concerned that the availability of take-home pay orders will affect the award modernisation process. Employers are already submitting to the AIRC that, in making modern awards, it ought not be overly concerned with any disadvantage caused to employees, since any loss of take-home pay can later be remedied by FWA. Of course, we do not think that it is open to the AIRC to heed this advice, because the Award Modernisation Request requires it to avoid disadvantaging employees, and the WR Act requires it to set a 'fair minimum' safety net. However, we submit that it would assist the AIRC if a further Award Modernisation Request were made, specifically directing the AIRC to ignore the availability of take-home pay orders when performing its task of making modern awards.

Our second concern is that the take-home pay orders only remedy financial forms of disadvantage. They do not compensate employees for non-financial forms of disadvantage, such as a loss of control over rosters and working hours. We submit that FWA should be able, in appropriate cases, to make orders remedying these forms of disadvantage.

A third concern is that take-home pay orders are only available if the employee remains in the same or comparable position after 1 January 2010. If the employee's position changes after 1 January 2010 they will not be entitled to a take-home pay order. This is especially problematic given that the award modernisation reforms are to be phased in over a period of 5 years; many employees' jobs are likely to change, through natural processes of promotion and job restructure over that time. Under the Bill, as drafted, an award-dependent employee may actually be worse off as a result of a promotion. This is an absurd result.

A fourth and related concern is that the Bill does not make it clear that it is unlawful for an employer to demote or dismiss an employee because of award modernisation, or because they seek and/or obtain a take-home pay order. Although it seems clear that this would be a breach of the 'General Protections' provisions of the Fair Work Act, the Bill should contain a note to this effect. We are concerned that some unscrupulous employers will dismiss employees who enjoy the benefit of a take-home pay order and will replace them with new hires that are cheaper to employ.

Our final concern is that the causal link between award modernisation and a loss of take-home pay will be difficult to prove in many instances. This is particularly case if the loss of pay is associated with a change to the job that occurs a long time after 1 January 2010, or if the change to the job is attributable to multiple causes. We note that the law usually reverses the onus of proof in circumstances where questions of the defendant's motive

arise (as it does in the General Protections provisions). We submit that burden of proof should fall on the employer to show that any loss of pay was *not* attributable to award modernisation. Similarly, we think that the Bill should clarify that an employer may still be liable to a take-home pay order if there are multiple reasons for acting, so long as award modernisation was one of the actuating reasons for their actions (see section 360 in the General Protections provisions).

### *3.2 Enterprise instrument modernisation*

The Bill allows FWA to replace existing enterprise instruments with a 'modern' enterprise instrument. We support the use of enterprise instruments (including enterprise NAPSAs and PSCAs) to 'build on' the safety net to reflect tailored arrangements in particular enterprises; however, we oppose the use of enterprise awards to undercut the safety net. We have two specific concerns with the Bill's provisions in this regard.

First, the Bill does not prohibit substandard enterprise awards. While FWA does have the discretion to terminate inferior enterprise awards, and/or to refuse to make a new modern enterprise award on substandard terms, it is not mandatory for it to do so. In particular, we submit that FWA should be directed to terminate substandard enterprise agreements and should be prohibited from making modern enterprise instruments that are inferior to the modern award that would otherwise apply. It should also be mandatory for FWA to retain the terms of an enterprise award that is more favourable to employees than the safety net.

Second, we are concerned that in modernising enterprise instruments, FWA may vary the terms of existing instruments in a way that disadvantages employees. The basic principle in modernising enterprise instruments (which, after all, form the safety net for those employees it covers) must be that no employee must be disadvantaged by the process. The Bill should make this rule binding on FWA. The availability of take-home pay orders simply does not suffice to deal with the potential for disadvantage, as explained above.

Third, we are concerned that the Bill contains a double standard when it comes to the treatment of franchises. On the one hand, for the purposes of bargaining, the presumption is that franchises are <u>not</u> running a single 'enterprise' – franchisees must apply to be treated as a single business by applying for a 'single interest employer declaration'. On the other hand, for the purposes of the safety net, franchises <u>are</u> treated as a single enterprise, and may be covered by a single enterprise award.

The double standard is not merely problematic conceptually, but creates real difficulties in practice, because of the large reach of major franchises. For instance, the major fast food chains (McDonalds,[10] KFC, [11] Pizza Hut,[12] Hungry Jacks[13] and Domino's Pizzas[14])

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[10] McDonalds Australia and its 300 franchisees employ 56,000 people in Australia: McDonalds Australia, About Us: www.mcdonalds.com.au/careers/about_us/overview.asp; http://www.mcdonalds.com.au/careers/about_us/talk_from_the_top.asp.

[11] Yum! Restaurants and its franchises employ 12,000 people in KFC stores: KFC, About KFC: www.kfc.com.au/Default.asp?page=/about+kfc.

have hundreds of franchises who together employ approximately one third of the sector: about 94,000 employees out of approximately 277,000 employees.[15]

Most of these employees are covered by enterprise awards that are inferior to the general award. For example, the basic wage at McDonalds in Victoria is only $14.18 per hour,[16] compared to $15.86 under the general award[17] – a discount of 11%. On Sundays, the minimum adult wage at a McDonalds restaurant is $15.50, compared to $27.76 at other fast food establishments – a discount of 44%.

Apart from the unfairness to employees of these businesses, this wage differential is unfair for the competitors of these large franchises. Many of those competitors are small businesses that are already in a vulnerable position, as they lack many of the advantages that franchisees of large brands possess, such as established brand recognition and customer goodwill, access to centralised marketing and management assistance, and so forth. It is therefore a double disadvantage for them that they must compete with chain stores that are entitled to pay wages that are 11-44% lower than their own.

Moreover, the competitive wage gap is a further disincentive for those small employers to participate in enterprise bargaining with their employees, including participation in the low paid bargaining stream. This undermines the objective of the Fair Work Act to promote collective bargaining. For these reasons we submit that enterprise awards should be restricted to closely linked employers.

## 4. Bargaining and industrial action

We are concerned about the double standard in the Bill in the transition of industrial processes and proceedings into the new system. On the one hand, orders and processes that favour employers (such as orders stopping industrial action) will continue past 1 July 2009. On the other hand, orders and processes that are generally instigated by employees (such as bargaining and industrial action) are guillotined on 30 June 2009. This double standard must be removed. Either the Bill should guillotine all WR Act orders and processes or, preferably, should allow all orders and proceedings commenced under the WR Act to continue.

The guillotining of protected action ballot processes means that time and money spent on bargaining by unions, their members, and the Commonwealth, will have to be thrown away. The largest bargaining dispute affected is the Telstra dispute. The CEPU and

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[12]Yum! Restaurants and its franchises employ 10,000 people in Pizza Hut stores: IBISworld Company Profile, Yum! Restaurants Australia Pty Ltd (2009), 1

[13] Competitive Foods Australia and its franchises employ 12,193 employees in Hungry Jacks stores: IBISworld Premium Company Report, Competitive Foods Australia Pty Ltd (2009).

[14] Domino's employs 3,700 people in Australia: Dominos Pizzas Enterprises Ltd, *Annual Report* (2007-08), 13.

[15] IBISworld Industry Report, Takeaway Food Retailing in Australia (2009) 4.

[16] The adult ordinary time hourly rate for a grade 1 worker: McDonald's - Shop, Distributive and Allied Employees Association - Victoria - Award 2004 (AP834864).

[17] National Fast Food Retail Award 2000 (AT806313CRV).

CPSU balloted more than 17,000 employees in December 2008. The AEC's fee for holding the ballots was approximately $12,000 (split 80:20 between the Commonwealth and the unions), and the cost of running a voting campaign (paid entirely by the unions) was approximately $50,000. This money will be wasted in the event that the bargaining dispute is not resolved by June 30.

The Telstra ballot is not the only ballot affected. Each year, the AEC holds more than 300 protected action ballots.[18] On these figures, a further 75 ballots might be expected to be held between now and the end of June. If the Bill is passed, and these ballots are proceeded with, unions and employees run the risk of having their protection for taking industrial action cut off, half-way through an industrial campaign. This will be particularly unfair for employees seeking to implement time-sensitive forms of industrial action, such as bans on processing data at the end of the financial year.

Alternatively, passage of the Bill might have a 'chilling effect' of bargaining between now and July. Unions will be reluctant to commence bargaining, or take protected industrial action, knowing that any industrial action must be completed before 30 June 2009. This threatens to delay the manufacturing industry bargaining round for 2009: hundreds of collective agreements in the Victorian manufacturing industry pass their nominal expiry date between March 31 and June 30 this year.[19] Employers, as much as unions and employees, are anxious to see bargaining proceed quickly and smoothly, and to lock in employment arrangements before economic conditions deteriorate further. By delaying bargaining, the Bill delays certainty for business and for workers.

We also note that, if the Bill causes bargaining to be delayed until after 1 July, statistics will show a lull in industrial disputation in the first half of 2009, followed by a spike in the second half. Critics of the Fair Work Act will misuse these figures to claim that the Act has increased levels of disputation. The government should be mindful to ensure this does not occur.

The Bill should be amended to preserve bargaining and industrial action processes that are on foot on 30 June 2009.

[18] AEC, Annual Reports 2007–2008, 70.
[19]

## 5. Workplace determinations

The Fair Work Act allows FWA to make a special low paid determination if a number of criteria are met. These include that the requirement that no employer covered by the determination has ever been covered by an 'enterprise agreement' under the FW Act.[20] It appears that sch 7 cl 22 of the Bill extends this to include employers who have ever been covered by a collective agreement-based transitional instrument made under the WR Act.[21]

While we understand that special low paid determinations are designed for workplaces where enterprise-level bargaining has historically been unsuccessful, clause 22 goes too far.

First of all, it excludes employers who might have been covered by a collective agreement 15 years ago, but who have not bargained since, perhaps because the structure of the industry has changed so as to make enterprise-based bargaining unworkable.

Secondly, it includes employers who negotiated single-issue agreements, but have never been party to a comprehensive workplace agreement. Just one example is the Oroton group. In 1992, the employer was facing financial difficulties. The award required the employer to negotiate a shorter working week with the LHMU, in order to avoid redundancies.[22] The result was the *Oroton Leather Goods Pty Ltd Industrial (Hours of Work) Agreement 1992*,[23] which commenced on 29 October 1992 and ceased operating on 18 December 1992 – a period of six weeks. The employer has never been a party to a subsequent comprehensive collective agreement.[24] We submit that an employer in this situation should not be excluded from the scope of a special low paid determination.

Thirdly, clause 22 ignores the fact that many prior agreements are unfair. As discussed above, thousands of employers made substandard Employee Collective Agreements (and hundreds of Employer Greenfields Agreements) with their employees under *Work Choices*, in the period before the Fairness Test. These agreements seriously disadvantaged the workers covered by them. It is unfair to reward those employers who instigated the making of such agreements by exempting them from special low paid bargaining determinations. We submit that FWA should have the power to ignore the effect of unfair workplace agreements.

Finally, we are concerned that in the period from now to 30 June, unscrupulous employers will rush to make Employee Collective Agreements, under the WR Act, with their low paid employees, in order to ensure they cannot ever be subject to a special low

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[20] Section 263(2).
[21] Although there is a technical argument that it only excludes employers who were covered by a transitional agreement that was in operation immediately before the WR Act repeal day: see sch 3 cl 2(3)(a).
[22] Saddlery, Leather, Canvas and Plastic Material Workers Award 1985, cl 49.
[23] AG791889 Print K1633.
[24] Although it appears that a further short-term agreement to avoid redundancies was made in 1996: *Oroton Pty Limited Industrial (Hours of Work) Agreement 1996* (AG792027).

paid bargaining determination. These agreements need not be comprehensive to have this effect, indeed it suffices if they deal with only one or two issues relevant to the employment relationship. Employees will not necessarily know that by making these agreements they are losing their rights, for all times, to be covered by a special low paid bargaining determination. In order to deal with this problem, we submit that FWA should have a discretion to ignore the effect of agreements initiated by employers with the intention of avoiding the low paid bargaining stream.

## 6. Registered organisations

### *6.1 The Fair Work (Registered Organisations) Act 2009*

The Bill preserves Schedules 1 and 10 of the WR Act and converts them into the *Fair Work (Registered Organisations) Act 2009*.

We note that since 1904 the regulation of trade unions has been considered part of 'federal industrial relations law' and so has been included in the main workplace law statute; we have some concern that locating the rights and responsibilities of trade unions in a separate Act weakens the fundamental nexus between organisations and workplace law and also weakens the nexus between the incorporation and regulation of unions and the regulation of corporations.

Accordingly, we submit that Schedules 1 and 10 should be attached to the *Fair Work Act*.

### *6.2 State and federal organisations*

The ACTU supports the proposal for transitional recognition of State-registered unions in the federal system, subject to the following caveats.

First, the concept of a federal counterpart (as defined in sch 22 cl 55) is too narrow. This is illustrated by two examples. The union movement views the Australian Workers' Union of Employees, Queensland ('AWUEQ') as the counterpart of the Australian Workers' Union ('AWU'). However, close scrutiny of the rules of both organisations reveals many differences in coverage: for example, the AWUEQ can cover bakers, forklift drivers and boat builders, while the AWU cannot. The differences may well be enough so that the rules of the two organisations will not be characterised as 'substantially the same'. The second example is the case of the National Union of Workers Industrial Union of Employees Queensland ('NUWIUEQ'), which the union movement regards as the counterpart of the National Union of Workers ('NUW'). The two unions currently have identical officers, but a proposed restructure of the federal union will see a change in the identity of the federal officers who are responsible for the union's affairs in Queensland.[25] In our view, this alteration should not result in the NUW losing its status as the federal counterpart of the NUWIUEQ.

[25] Workplace Express, 'NUW votes in favour of restructure' (25 March 2009).

We submit that the test of whether a State-registered union has a federal counterpart should be altered so that the central criteria are:

(a) whether the two organisations share a substantially similar membership; and

(b) whether the two organisations have a history of integrated operations.

The other factors, related to the eligibility rules and office-bearers of the organisations, can perhaps be retained as secondary criteria.

Secondly, the ACTU supports federal unions being able to expand their eligibility rules to reflect the broader coverage of a counterpart State-registered union. We also support the government's intention that such expansion should not be available where the State counterpart 'has never used that wider coverage'.[26] However, as drafted, the Bill does not achieve this objective in that it appears to require the federal union to demonstrate active representation in every case; this would potentially deprive employees in certain sectors of representation by any union at all. Further consultation is required on this issue.

A third concern is that the Bill allows the recognition of State-registered unions to be cancelled or withdrawn in a very wide range of circumstances, including cases where a substantial number of the union's members take unprotected industrial action (whether or not authorised by the union) which hinders the activities of their employer, or another corporation. This is concerning in two respects. First, taking unprotected industrial action is generally *not* unlawful.[27] It is unfair, and contrary to the rule of law, to penalise members and their union for taking action which is lawful. Secondly, in imputing the actions of 'a substantial numbers of members' to the organisation itself, the Bill imposes a form of absolute vicarious liability on unions. This liability is inappropriate, and inconsistent with the usual rules of liability of associations. In the Fair Work Act itself, unions are not held responsible for the acts of members where the union took 'all reasonable steps' to prevent those acts (section 363(2)). We submit that a similar defence should apply to the criteria for de-recognising unions on the basis of the activities of its members.

Fourth, we note that the Bill contains provisions facilitating the participation of branches of federally-registered unions in State industrial relations systems. We welcome moves by federal and State governments to harmonise the regulation of trade unions, with a view to eliminating the duplication of legal personalities, and reducing the burden faced by national unions in complying with accountability requirements in multiple jurisdictions.

Finally, the Bill provides that the recognition of transitionally recognised State associations will lapse after 5 years (although it can be extended by regulation). We support a longer period of recognition in order to allow counterpart State and federal unions to harmonise their operations.

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[26] Explanatory Memorandum, paragraph 752.

[27] Unless it occurs during before the nominal expiry date of an enterprise agreement.

### *6.3 Representation orders*

The Bill proposes that employers, the Minister, or a union, may apply to FWA for an order that one union is to represent a workplace group to the exclusion of all others. We are completely opposed to this provision, for the following reasons.

First of all, the provisions are entirely unnecessary, since there is unlikely to be a significant increase in demarcation disputes under the new legislation. In 1996, the new enterprise bargaining rules allowed one union to bargain in a workplace where another union was present, even if the first union was not a party to any award or agreement that covered the workplace. This did not lead to an outbreak of demarcation disputes, since unions generally respected the de facto demarcations that have built up over a long period of time. Indeed, since the year 2000, there have been only two substantive demarcation disputes that have led to the making of representation orders by the AIRC.[28] There is no reason to think that the minor changes to the right of entry rules made by the Fair Work Act will prompt unions to ignore longstanding informal demarcation arrangements and undermine the current period of harmony in inter-union relations.

Second, even if inter-union competition were to increase, the Fair Work Act contains a range of very effective remedies (many of them new) to control this activity, including good faith bargaining orders (excluding one or more unions from bargaining); representation orders under sch 1 s 133; and orders in relation to right of entry. These remedies are powerful and their availability has an important preventative and deterrent effect on the activities of trade unions.

Third, the Fair Work Act is explicitly based on 'enabling … representation at work … by recognising the right to freedom of association and the right to be represented' (section 3(e)). The provisions proposed in the Bill completely undermine this right. They may have the effect of depriving employees who have joined a particular union the right to be represented by that union.

Fourth, the legislative note beneath proposed clause 137A suggests that the purpose of the provision is to deal with demarcation disputes between federal unions and State-registered unions that are recognised in the federal system. However, the terms of the provision are not so confined. They allow representation orders to be made between two federal unions, or two recognised State unions. However, Federal law already provides mechanisms for dealing with the former type of dispute (see WR Act sch 1 cl 133), and State industrial law deals with the latter. If the true object of the provisions is to deal with disputes between federal and State unions then it fails to achieve this goal.

Fifth, the provisions allow orders to be made even in the absence of any harm caused to a party. While FWA can only intervene in a dispute between two federal unions where the dispute is actually harming the employer's business, or affecting the work of employees,

[28] One giving the ALAEA rights to represent heavy maintenance workers at Avalon airport, rather than the AMWU (PR900045), and one giving the ASU the right to cover employees in SingTel Optus call centres in South Australia, rather than the CPSU or CEPU (PR973661).

it appears that FWA can intervene under these provisions simply on the basis of a 'paper' dispute between unions, or between an employer and one or more unions. This ease of access to orders will surely only attract parties to their use on a pre-emptive and strategic basis, rather than seeking them only as a means of resolving real disputes. Rather than preventing demarcation disputes, this provision will facilitate them.

In particular, there is a real risk that the provisions will be used by employers to 'pick' which union it prefers to deal with, and thereby to undermine the interests of employees who are, or would prefer to be, members of another union that is eligible to represent them. This is completely offensive to the principle of freedom of association.

Sixth, the provisions seem to give preference to the union which has been 'dominant' in the workplace, at the expense of a union which has an equally valid right to represent employees in that workplace, but which has traditionally played a lesser role. Consider the following hypothetical. The MHR Union represents members of the federal House of Representatives, while the Senators' Union represents Senators. The MHR Union (having more members) has traditionally taken a dominant role at Parliament House, negotiating both the Politicians Award and the Parliament House Workplace Agreement. During this time the Senators' Union has had a good relationship with the MHR Union, and has been happy to sit on the sidelines and let the MHR Union do most of the work. However, in 2011, the MHR Union changes its attitude towards the Senators' Union and 'disputes' the latter union's role at Parliament House. On our reading of the Bill, it appears that the MHR Union will satisfy the criteria for obtaining a representation order to exclude the Senators' Union from Parliament House. From then on, Senators will have their interests 'represented' by the MHR Union – even though Senators are ineligible to join that union, elect its officials and influence its policies. This is absurd and undemocratic.

We submit that there is no need to create an additional representation orders regime.

### *6.4 Rights of appearance*

Registered organisations have traditionally had express rights to appear before tribunals and courts in industrial matters.[29] The Fair Work Act does not confer such a positive right. First, it says nothing about rights of appearance in court. Second, in relation to proceedings in FWA, all it says is that the requirement that lawyers and paid agents obtain leave to appear does not apply to lawyers and paid agents that happen to be officials or employees of trade unions. However, it does not *entitle* a person to be represented by an organisation (in the same way that the Minister is *entitled* to make submissions).[30] An amendment needs to be made to ensure that every employee can be represented by a trade union if they so choose.

[29] See, eg, WR Act s 854.
[30] Section 597.

## 7. Unfair dismissal

The government has announced that, as a result of an arrangement with Senator Fielding, amendments will be moved to introduce a transitional definition of a small business for the purpose of the unfair dismissal provisions. Until 1 January 2011, a small business will be defined as one employing fewer than 15 full-time equivalent employees (calculated by reference to the average ordinary hours worked by employees in the month preceding the dismissal).[31]

We note that the original definition of a small business (15 employees) already covers 26% of employees.[32] This represents perhaps 1.7 million employees in the federal system.[33] The transitional definition will cover even more people, particularly those working in industries that rely heavily on casual and part-time labour. For example, in the hospitality industry, the average employee only works 25.5 ordinary hours per week. Twenty seven percent of employees in the sector work less than 15 hours per week, and a further 31% work less than 35 hours per week.[34] These figures suggest that there are many hospitality businesses that must employ 30, 50 or even 100 casual or part-time workers but who still fall within the transitional definition of a small business.

We also note that the evidence suggests that it is women and young people who, disproportionately, work in small businesses that rely on casual and part-time labour. Therefore the transitional definition is likely to have a discriminatory impact on those groups of workers. This outcome violates Australia's international obligation to avoid discrimination in the application of employment law.[35]

Finally, we note that under the transitional definition it will be extremely difficult for some employers to know whether they are regarded as a small business at any point in time. First of all, many businesses employ staff on variable rosters, under which the quantum of employees' ordinary rostered hours change from period to period. For example, statistics show that, each year, 29% of long-term employees in the hospitality industry have their job changed (most commonly a change to their usual hours of work).[36] If rosters are constantly changing it can be difficult to ascertain how many full-time equivalent employees are on the books at any one time.

Similarly, many businesses have a high turnover of labour. This also makes it difficult to know, averaged over a month, how many full-time equivalent staff the business employs. For example, in the hospitality industry, 28% of new starters are replaced within 3 months, and 60% are replaced within one year.[37] With so much labour turnover, it will be difficult for employers (and FWA) to determine if, and when, a business becomes a 'large business'.

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[31] Senate Hansard, 19 March 2009, 212.
[32] ABS cat 6310.0 (Aug 07), Table 10.
[33] Assuming 80% of employees are in the federal system.
[34] ABS cat 6291.0.55.003 (Feb 09) datacube E10
[35] ILO, Discrimination (Employment and Occupation) Convention (1958).
[36] ABS cat 6209.0 (Feb 08) table 5.
[37] ABS cat 6209.0 (Feb 08) table 4.

For all of these reasons, we submit that the Senate should abandon the proposal to introduce a transitional definition for small business.

**Conclusion**

The ACTU supports the Bill, subject to the reservations expressed above. We welcome the opportunity to provide additional information to the Senate and to the government during the course of this inquiry.

**Appendix – Technical amendments**

| Clause | Proposed change | Reason |
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| Sch 3, cl 6 | Add new provision | There should be a provision to the effect that a reference in an agreement to an Act should be taken to be read as a reference to the Act as it exists from time to time, subject to any express or implied intention to the contrary.<br><br>There should also be a provision to the effect that a reference in an agreement to an 'award' should be taken as a reference to a transitional award (or, if the transitional award has been set aside, to the transitional award as it stood immediately before its repeal), but subject to any express or implied intention to the contrary. |
| Sch 3, cl 17-19 | Add new provision | Unions should be specified as the default bargaining representative for termination of individual agreement-based transitional arrangements and conditional terminations. This is consistent with the default bargaining representative rules in the FW Act. |
| Sch 5, cl 5(1) | Amend so not so restrictive. | This clause only enables FWA to make a determination varying the modern award where there is a minor or technical problem with a modern award that is attributable to the Part 10A award modernisation process. If specific problems are identified that require fixing (e.g. a modern award is missing a specific clause), the modern award should be able to be varied without having to meet the requirement that the mistake is directly attributable to award modernisation starting before the enactment of the FW Act. |
| Sch 6, cl 4 | Amend | The enterprise award modernisation process should begin as soon as possible. A party covered by the enterprise instrument should be able an application under this clause during the bridging period (July – December 2009). |
| Sch 6, cl 4 and cl 5 | Requires additional explanation | These clauses make repeated references to persons 'covered'. It presumes that people understand the term 'covered' is referring to parties bound/ parties with an interest etc (however this concept has been expressed in |

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| | | earlier Acts). This needs to be explicitly clarified. |
| Sch 6, cl l43A(7) | Amend | The bill should require enterprise awards to specify the employer by name. It is not appropriate for an enterprise award to apply to 'classes' of employers – this is not an enterprise award. |
| Sch 6, cl 28 | Amend | If FWA makes a determination varying modern award minimum wages in an annual wage review, it should be required to publish those rates as so varied at the same time for both wages in modern awards and wages in modern enterprise awards. There is no justification for having differing requirements for the two types of awards. |
| Sch 8, 4 | Amend | For union collective agreements, which are made before they are voted upon by the workforce, the cut off period should be 14 days from the date the agreement was approved by the workers. |
| Sch 8, cl 21 | Remove | ITEAs should not be permitted to be made during the bridging period. This is inconsistent with the policy of creating a new bargaining system from 1 July 2009. |
| Schedule 11 | Include additional provision | The provisions on transmission of business have the effect of encouraging businesses to transfer employees/ engage in restructuring prior to 1 July 2009. This could be prevented by the inclusion of a general anti-avoidance provision with the effect of preventing employers from doing anything after the passage of the bill which is designed to avoid obligations under the FW Act. |
| Sch 13, cl 2(3) | Amend | To be effective, the notice that the employer is required to provide to employees under this clause should also include the following:<br>(i) explain the consequences of being on an individual statutory contract;<br>(ii) how the individual statutory contract can be terminated; and<br>(iii) the right of the employee to approach their employer for a conditional termination (and the right to be represented in this process). |
| Sch 13, cl 15 | Remove | It is inconsistent and objectionable that a party cannot rely upon a ballot order after the |

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| | | WR Act repeal day (cl 13), but that they continue to be liable for the cost of the ballot. |
| Sch 13, cl 18 | Amend | This clause should include a presumption that a party seeking a protected action ballot has been genuinely trying to reach agreement. |
| Sch 13, cl 18 | Amend | This clause allows FWA to take into account bargaining conduct that occurred before 1 July 2009. However, because the Schedule only applies to 'national system' parties, this provision does not assist parties that are currently not in the national system, but later enter it (for example, through incorporation or State referral). |
| Sch 14, cl 5 | Remove | Conscientious objection certificates – remove as FW Act does not provide for conscientious objection certificates? |
| Sch 18, cl 7 | Note | If the Workplace Authority is to continue in existence until 31 January 2010, its role should be expressly limited to dealing with the existing backlog of agreements. Other functions (provision of advice etc) should be assumed by FWA from 1 July 2009. |
| Sch 22, cl 89 (proposed clause 137A) | Amend | It is not clear that clause 137A can only be used in the context of multiple unions that have coverage of a workplace group. Read literally, the clause seems to allow FWA to make an order declaring that no unions can represent the workplace group. This provisions needs clarification. |
| Sch 22, cl 84 (proposed sch 2, cl 3(1) and 3(5)(b) of the *Fair Work (Registered Organisations) Act 2009*. | Amend | Change 'persons interested' to 'persons aggrieved'. |