ACTU

Senate Education, Employment and Workplace Relations Committee

Inquiry into the Fair Work Bill 2008

Submission by the Australian Council of Trade Unions (ACTU)

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INTRODUCTION

1. The ACTU is the peak body representing 47 unions and almost 2 million working Australians.

2. We are pleased to have this opportunity to contribute to the Committee's consideration of the Fair Work Bill 2008 (the Bill).

3. The ACTU welcomes this Bill. We believe it will go a long way in restoring rights to Australian workers and fairness to Australian workplaces.

4. Our submission is structured as follows. Part 1 provides a brief analysis of the impact of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*Work Choices*) and provides the context for why the reforms introduced by the Bill are so necessary. In Part 2 we lend specific support to six topics covered by the Bill. In Part 3 we set out a number of significant concerns with the Bill, including a number of criticisms of provisions which breach the government's election promises or which fail to properly implement those promises. Part 4 touches on transitional arrangements. A number of more technical suggestions for amendments are provided as Appendix 1.

PART 1 – THE IMPACT OF *WORK CHOICES*

5. The evidence on the impact of *Work Choices* on the Australian labour market is now overwhelming. This research shows unequivocally that *Work Choices* has had a significant and negative impact on working Australians and their families. The impact of the laws has been felt most acutely by the most vulnerable workers in the Australian labour market, including women, young workers and the low paid.

The Safety Net

6. *Work Choices* dramatically reduced the safety net for Australian workers by replacing the comprehensive wages and conditions of work in awards with just five minimum legislated standards (the Australian Fair Pay and Conditions Standard or AFPCS).

7. From 27 March 2006 until 6 May 2007, an employer could make a workplace agreement that stripped employees of their award safety net, so long as they provided their employees with the AFPCS.[1] Even after May 2007, an employer could make a workplace agreement that failed to compensate employees for the removal of significant award entitlements, such as redundancy pay,[2] and for non tangible benefits such as consultation and notice of change of roster.

8. *Work Choices* also shifted the responsibility for setting minimum wages from the Australian Industrial Relations Commission (AIRC) to the Australian Fair Pay Commission (AFPC). While the AIRC had been obliged to balance the considerations of a strong economy and fairness and reached its decisions through a public, participative process, the AFPC is a non-transparent administrative body with no obligation to consider the fairness of its decisions. In setting minimum wages, it was not required to consider whether such wages were fair, or relevant to community living standards.[3]

9. In the first two years of *Work Choices*, 62% of minimum wage workers suffered a decrease in their real wages as a result of the Australian Fair Pay Commission's determinations.[4] Employees in low paid industries, including retailing and hospitality, experienced a relative and real fall in earnings under *Work Choices*.[5] Research by the AFPC shows that wage increases for award-reliant employees have fallen significantly behind wage increases for the rest of the economy.[6]

Unfair Dismissals

10. Under *Work Choices*, over 4 million workers lost any protection against being dismissed arbitrarily or unfairly. The legislation removed protection from unfair

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[1] The *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* required all agreements lodged with the Workplace Authority from 6 May 2007 to pass the 'fairness test'.

[2] See C Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' (2007) 20(3) *Australian Journal of Labour Law* 245.

[3] *Workplace Relations Act 1996* (Cth) s 23.

[4] See ACTU, *Submission to the Australian Fair Pay Commission*, March 2008, 20.

[5] D Peetz, *Assessing the Impact of 'Work Choices' One Year On*, Report prepared for Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, March 2007, 48-50.

[6] Australian Fair Pay Commission, *Economic and Social Indicators – Monitoring Report: January to June 2008,* August 2008, 24.

dismissal for employees of businesses with 100 or fewer employees and employees dismissed for 'genuine operational reasons or reasons including genuine operational reasons'. The 100 employee exemption alone removed unfair dismissal protections for around 62% of the Australian workforce.[7]

11. *Work Choices* dramatically increased the level of job insecurity experienced by many workers. In its report on the impact of *Work Choices* on South Australian workplaces, the Industrial Relations Court of South Australia observed:

> *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.*[8]

12. In Victoria, analysis of calls made to the Victorian Workplace Rights Information Line in 2006 found job security and the growing risk of being dismissed to be the major issue of concern by a significant margin, with 1 in 5 calls concerning dismissal.[9]

13. The lack of job security experienced by millions of Australian workers has had far-reaching consequences. The Queensland Industrial Relations Commission concluded:

> *Emerging trends show that employees have become extremely apprehensive about job security in this new uncertain work environment. This in turn has led many employees to refrain from raising normal industrial relations issues, such as*

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[7] A Forsyth, *Freedom to Fire: Economic Dismissals under Work Choices,* Report prepared for the Office of the Victorian Workplace Rights Advocate, 26 August 2007, 6.

[8] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers,* 25 October 2007, 7-8

[9] P Gahan, *Work Choices and Workplace Rights in Victoria: Evidence from the Workplace Rights Information Line,* Report commissioned by the Victorian Workplace Rights Advocate, 25 September 2006, 2-3; Victorian Office of the 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,* November 2007, 50.

occupational health and safety and questionable terms and conditions of employment, with their employers for fear of jeopardising their jobs.[10]

14. Under *Work Choices*, many workers were fired with no recourse to challenge the unfairness of their dismissal. The following case studies are just a few examples.

- A single mother was sacked from a childcare centre because of a "personality clash'' with her employer, who gave her just 10 minutes notice to leave her job. Emily Connor, 23, was sacked and not allowed to say goodbye to the children and families she had looked after for almost five years. Ms Connor, a qualified childcare worker and mother of a two-year-old boy, said she was given no reason for her dismissal. "I arrived for work, my normal shift, and thought it was just another day,'' Ms Connor said. "I was called into the office for a quick meeting and I sat down and my employer said to me, 'this is just a quick meeting to let you know that your services are no longer required.' I was told I had 10 minutes to collect my personal belongings and leave the premises.''

- Rhonda Walke was handed a workplace agreement by the office manager who insisted she sign it immediately. Ms Walke declined, saying she wished to take it home to study it in depth. The following day she told the manager there were several points she needed to clarify before signing. At lunchtime she was served termination papers on the grounds that her reluctance to sign proved she did not wish to become part of a team.

- Andrew Cruickshank was sacked for 'operational reasons' from his job at Priceline only to find his position re-advertised within weeks for $25,000 less.

15. Qualitative evidence suggests that the removal of unfair dismissal protections has created an environment in which unscrupulous employers are able to treat their employees unfairly, secure in the knowledge that they will not be penalised for doing so.[11] Many workers have been reluctant to question their employer about

[10] Queensland Industrial Relations Commission, *Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers: Final Report,* 29 January 2007, 6.
[11] Queensland Industrial Relations Commission, *Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers: Final Report,* 29 January 2007, Chapter 4.

their pay or conditions of employment or to pursue claims relating to unlawful termination of employment.[12]

Workplace agreements

16. *Work Choices* removed the safeguards formerly in the WR Act that ensured that employees were not worse off under a statutory agreement than under any relevant award or law (the 'no disadvantage test').[13] From the introduction of *Work Choices* until the commencement of the so called "Fairness Test" on 7 May 2007, the terms and conditions of employment found in awards could be stripped from workers by the making of a workplace agreement, *without any compensation being paid*.[14] The effect of these changes was a dramatic deterioration in the wages and conditions of work for many employees, particularly those in low paid industries, who are especially reliant on the income they derive from penalty rates, allowances and other such payments under their award.[15]

17. Even after the Fairness Test was introduced, workers were still being disadvantaged by agreement-making. This is because, firstly, the Fairness Test did not cover every award entitlement: workers could still lose their redundancy benefits, without any compensation having to be paid. Secondly, the Fairness Test did not consider non-

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[12] See, e.g., Queensland Industrial Relations Commission, *Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers: Final Report,* 29 January 2007, 85-87; Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers,* 25 October 2007, 98-100; T Chase and D Harvey, *The Effects of the Unfair Dismissal Changes on Young (Women) Workers,* Young Workers Advisory Service, Paper presented to the National Conference on Women and Industrial Relations, July 2006.

[13] The introduction by the former Coalition Government in May 2007 of a 'fairness test' did not restore protections for employees: see C Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' (2007) 20(3) *Australian Journal of Labour Law* 245.

[14] "Protected" award conditions could be removed by express provision in workplace agreements. These "protected" award conditions were: rest breaks, incentive-based payments and bonuses, annual leave loadings; public holidays; overtime or shift loadings; some monetary allowances; and penalty rates.

[15] See Standing Committee on Social Issues, *Impact of the Work Choices Legislation,* Legislative Council, NSW Parliament, November 2006; Queensland Industrial Relations Commission, *Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers,* 29 January 2007; Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers,* 25 October 2007; Victorian Office of the 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,* November 2007; D Peetz and A Preston, AWAs, *Collective Agreements and Earnings: Beneath the Aggregate Data*, Report to Industrial Relations Victoria, March 2007.

monetary losses to employees, such as the loss of award rights to be consulted about changes to working conditions. These two flaws meant that the Fairness Test could never have operated as a true 'no-disadvantage test', and the failure of this Bill to introduce a mechanism that enables employees covered by industrial instruments that enshrine this unfairness to withdraw from them is a serious weakness of this Bill.

Australian Workplace Agreements

18. AWAs cover about four or five percent of the employed workforce.[16] The majority of AWAs in existence are found in low-paid sectors of the economy, where there have traditionally been a high proportion of employees reliant on awards to set their pay and conditions.[17] The retail, hospitality and personal services sectors account for 55% of all AWAs lodged prior to September 2007.[18]

19. The majority of AWAs are not the product of negotiation between an employer and an individual employee. Most AWAs are template agreements, unilaterally developed by employers and imposed upon thousands of employees with little labour market power.[19]

20. Employers have used AWAs to minimise labour costs by stripping away the award safety net. Analysis of AWAs lodged in 2006 by the Workplace Authority found that the vast majority of AWAs (89%) remove 'protected' award conditions, including:

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[16] ABS, *Employee Earnings and Hours Australia,* Cat 6306.0, May 2006. See also D Peetz, *Assessing the Impact of 'Work Choices' One Year On*, Report prepared for Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, March 2007.

[17] D Peetz and R Price, 'Australian Workplace Agreements and Awards in Retail and Hospitality Industries' in D Peetz, *Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008,* March 2008, 42.

[18] Workplace Authority, 'Lodgement Data: 27 March 2006–30 September 2007' (2007) 5.

[19] Workplace Authority, 'Lodgement Data: 27 March 2006–30 September 2007' (2007) 5. B van Wanrooy et al, *Australia@Work: The Benchmark Report,* Workplace Relations Centre, The University of Sydney, September 2007, 50; B Pocock et al, 'The Impact of "*Work Choices*" on Women in Low Paid Employment in Australia: a Qualitative Analysis' (2008) 50(3) *Journal of Industrial Relations*, 475, 481. See also B Ellem, R Cooper and R Lansbury, '*Work Choices*: Myth Making at Work' (2005) 56 *Journal of Australian Political Economy* 13, 17.

- 65% of AWAs reduced or removed penalty rates
- 70% removed shift work loadings
- 68% removed annual leave loadings
- 65% removed penalty rates
- 63% removed incentive based payments and bonuses
- 61% removed days to be substituted for public holidays
- 56% removed monetary allowances
- 50% removed public holidays payment
- 49% removed overtime loadings
- 31% removed rest breaks
- 25% removed public holidays.[20]

21. The Workplace Authority data also indicates that more than one quarter (28%) of AWAs go so far as to undercut legally protected minimum conditions of employment, including about six percent of AWAs that pay less than the legal minimum wage.[21] In the Victorian retail and hospitality industries, many AWAs fail to provide employees with their full sick leave entitlements (45% of agreements) or parental leave rights (20%).[22]

22. Most AWAs increase hours of work. The average AWA employee works a 13% longer week than their peers employed under collective arrangements.23 Often, they work longer hours for less pay. In New South Wales, for example, female

[20] Julia Gillard, 'AWA Data the Liberals Claimed never Existed', Media Release, 20 February 2008.
[21] Davis article
[22] VWRA, 62–3.
[23] ABS, *Employee Earnings and Hours Australia,* Cat 6306.0, May 2006, 33.

AWA employees work 4.4% longer hours than their counterparts engaged under collective agreements, but earn 11.2% less.[24]

23. Workers on AWAs have significantly lower wages than workers on collective agreements. Nationally, the median AWA worker earns 16.3% less per hour than the comparable worker on a collective agreement.[25]

24. In low-paid industries, where AWAs have been the vehicle through which employers have reduced the costs of labour, AWAs have resulted in even lower wages. In the hospitality industry, average AWA earnings in 2006 were 1.6% below average earnings of workers reliant on the minimum wage.[26]

Employee Collective Agreements and Employer Greenfield Agreements

25. AWAs have not been the only type of agreement used under *Work Choices* to reduce wages and strip away award conditions. Employers have also used employer greenfield agreements and employee collective agreements to strip away the award safety net.27

26. A study by the University of Sydney's Workplace Research Centre, of all collective agreements lodged in the retail and hospitality industries between March and October 2006, found that non-union collective agreements were 'overwhelmingly' used to reduce award conditions.[28] More than half of all non-union agreements (employer greenfield or employee collective agreements) removed at least five

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[24] ABS, *Employee Earnings and Hours Australia,* Cat 6306.0, May 2006, Table 10.
[25] D Peetz and A Preston, AWAs, *Collective Agreements and Earnings: Beneath the Aggregate Data*, Report to Industrial Relations Victoria, March 2007, 13.
[26] D Peetz, *Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008,* March 2008.
[27] Employer greenfield agreements, introduced by *Work Choices* enable which employers establishing a 'new businesses, project or undertaking' to unilaterally set the terms and conditions of work for new employees for up to 12 months: WR Act, s 330.
[28] J Evesson et al, *Lowering the Standards: From Awards to Work Choices in Retail and Hospitality Collective Agreements,* Synthesis Report prepared for the Queensland, New South Wales and Victorian Governments, September 2007, ii.

‘protected’ award provisions.[29] ‘Protected’ award conditions removed through the non-union agreements include:

- Annual leave loading (not provided in 83% of agreements)
- Paid breaks (not provided in 61% of agreements)
- Allowances: meal allowances (not provided in 81% of agreements); uniform allowances (not provided in 83% of agreements); laundry allowances (not provided in 95% of agreements)
- Saturday penalty rates (not provided in 89% of agreements)
- Sunday penalty rates (not provided in 82% of agreements)
- Overtime rates (not provided in 78% of agreements)
- Public holiday penalty rates (not provided in 79% of agreements)
- Paid breaks (not provided in 55% of agreements).

27. The vast majority of non-union agreements also reduced or removed non-protected award conditions, including severance pay (75%) and consultation with employees (90%).[30]

28. Approximately half of the non-union agreements studied were based on six template agreements that simply reiterated the statutory minima, demonstrating the lack of bargaining occurring at the workplace level. Almost a quarter (24%) of all agreements were based on one agreement template.[31]

29. The researchers further found that employees in the hospitality and retail industries experienced a loss of up to 10–30% in earnings under *Work Choices* collective agreements. This calculation is likely to be an underestimation of the true losses

[29] Ibid, vi. In contrast, 90 percent of union agreements retained the protected award matters.
[30] Ibid; ibid 23–4.
[31] Ibid, ii and v.

experienced by employees as it does not take account of the impact of losses of allowances, paid breaks, annual leave loading, and overtime. Sub-sectors with losses greater than 10% included:

- Liquor stores: losses of between 11.9 and 31.1%
- Fast food: losses of between 12.5 and 21.3%
- Bakeries: losses of between 17.9 and 24.5%
- Restaurants: losses of between 10 and 12.8%
- Cafés: losses of between 10 and 15.7%. [32]

30. An analysis of employer greenfield agreements undertaken by the Workplace Research Centre in 2006 found that 'a significant function of employer greenfields agreements appears to be the eradication of protected award provisions' and that these agreements had, on average, a longer span of ordinary hours than other current agreements.[33] A study of all employer greenfield agreements made in the first year of *Work Choices* found that 79.3% of agreements sought to exclude all protected award conditions, and 86.4% of the agreements sought to exclude at least one protected award conditions.[34]

Bargaining practices

31. Employers who wished to do so could easily impose individual contracts on their employees. Examples of unfair bargaining practices lawfully used by employers to reduce their employees' terms and conditions of employment under *Work Choices* include: offering 'take it or leave it' AWAs; refusing to grant pay rises to employees until they enter AWAs; and, making misleading statements in

[32] Ibid, iv.
[33] Workplace Research Centre, 'Employer greenfields agreements', *ADAM Report*, vol. 51, December 2006.
[34] P Gahan, *Employer Greenfields Agreements in Queensland*, Research Report prepared for the Queensland Department of Employment and Industrial Relations, 17 August 2007, 48.

agreements or in information provided to employees prior to the employee signing an AWA.[35]

32. Under *Work Choices*, there is no requirement for employers to collectively bargain with their employees, even when a majority of workers have expressed a preference for a union collective agreement.

33. At Cochlear, hundreds of manufacturing workers have been trying for more than a year to get their employer to recognise their right to be represented by their union in negotiations. Cochlear workers have voted in favour of a union collective agreement in 5 separate ballots, twice rejecting a non-union agreement, but the company continues to refuse to negotiate with the union.

34. For months, employees at Maxitrans Australia in Ballarat sought to be represented by the Australian Manufacturing Workers Union in negotiations with the company. The union has been issued with certification as a bargaining agent on behalf of its members, but the company has still refused to negotiate. Instead, Maxitrans put a non-negotiated deal on the table which sought to strip away many employment conditions.

35. Australia's largest telecommunications provider Telstra continues to ignore the wishes of its employees by refusing to negotiate with unions concerning a new enterprise agreement, despite criticism of their stance from both the AIRC and the Federal Court. Instead, it has insisted on offering very small groups of its workers non-union agreements (and refusing to detail to those workers who exactly is covered by them). These agreements are designed to undermine wages and conditions and deny workers their right to representation (in particular to by establishing a new “Part B” of lesser wages and conditions to apply to new hires and ex-AWA employees). Telstra's repeated refusal to bargain with its workers'

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[35] C Sutherland, *Agreement Making under Work Choices: the Impact of the Legal Framework on Bargaining Practices and Outcomes,* Report prepared for the Office of the Victorian Workplace Rights Advocate, October 2007, 37-8.

representatives has compelled the workers and their unions to take protected industrial action.

Gender and social inequalities

36. The gender pay gap has widened under *Work Choices*. While women in 2004 earned 87 cents for every dollar earned by men, this had decreased to 84 cents in 2007.[36] Seventy percent of the gains achieved in the decade 1996 to 2006 were wiped off in the first nine months of *Work Choices*.[37] Full time women workers now earn on average 16% less than men.[38]

37. As noted above, industries which employ large numbers of women (such as retail and hospitality) have suffered stagnant real wages growth or even real wage declines under Work Choices.[39] Within industries, women have also fallen behind their male counterparts. In the transport and storage industry, for example, full-time non-managerial women earned 84% as much as men in 1994. But by 2006, female earnings had dropped to 75% of male earnings.[40]

38. The pay gap for women is much greater for those on AWAs than on collective agreements. Female non-managerial employees on AWAs earn 18.7% less than their male counterparts, compared to 10% for collective agreements.[41] Women on AWAs earned on average $2.90 an hour (or $100.20 per week) less than women on registered collective agreements.[42] Women in lower skilled jobs are particularly

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[36] ABS, *Average Weekly Ordinary Time Earning*s, Cat No. 6302, May 2008.
[37] D Peetz, *Assessing the Impact of 'Work Choices' One Year On*, Report prepared for Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, March 2007.
[38] ABS, Average Weekly Ordinary Time Earnings, Cat No. 6302.0 May 2008.
[38] ABS, *Employee Earnings and Hours Australia,* Cat 6306.0, February 2007.
[39] See, eg, Victorian Office of the 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,* November 2007, 35–7; 41–2.
[40] ABS, *Employee Earnings and Hours Australia,* Cat 6306.0 (May 1994) 44; (May 2006) 20.
[41] D Peetz and A Preston, AWAs, *Collective Agreements and Earnings: Beneath the Aggregate Data*, Report to Industrial Relations Victoria, March 2007, ii.
[42] Based on a 38 hour week, ABS, *Employee Earnings and Hours Australia,* Cat 6306.0, February 2007.

disadvantaged: in 2006 those on AWAs were paid 26% less than women on collective agreements and 20% less than women on the award rate.[43]

39. In 2007, the Victorian Workplace Rights Advocate found that the gender pay gap for workers on AWAs in the Victorian hospitality industry was 17.7% (the difference is 7.7% in retail) while the wage gap is only 2.6% for workers employed under the award in hospitality (and only 0.6% in retail).[44]

40. The effect of *Work Choices* on women has not been limited to earnings. *Work Choices* undermined the position of women in the labour market by stripping away the safety net, restricting the capacity of unions to represent employees, promoting individual contracts, removing unfair dismissal protections and restricting women's access to equal remuneration remedies.

41. Qualitative research has shown that *Work Choices* has had a significant and overwhelmingly negative impact on working women.[45] Elton et al summarise:

> *Significant changes have occurred in the workplaces of these women and in their employment relationships. For the most part, these changes have been negative and deleterious. Changes have included reductions in pay for already low paid workers, less certainty about wage rates and pay rises, intensification of work, less job security, less financial independence, less money for children and basic household costs, less representation and say at work and in the community, and poorer health and wellbeing. All of these outcomes weaken the capacity of these workers to participate in the workforce and in their communities. This is not their choices and it is not a desirable outcome for society at large. These are women*

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[43] D Peetz and A Preston, AWAs, *Collective Agreements and Earnings: Beneath the Aggregate Data*, Report to Industrial Relations Victoria, March 2007, ii.

[44] Ibid, 39.

[45] J Elton et al, *Women and Work Choices: Impacts on the Low Pay Sector - Summary Report*, Centre for Work and Life, University of South Australia, August 2007; B Pocock et al, 'The Impact of "*Work Choices*" on Women in Low Paid Employment in Australia: a Qualitative Analysis' (2008) 50(3) *Journal of Industrial Relations*, 475; F MacDonald, G Whitehouse and J Bailey, *Tipping the Scales: A Qualitative Study of the Impact of Work Choices on Women in Low Paid Employment in Queensland,* Report to the Queensland Department of Employment and Industrial Relations, June 2007; M Baird, R Cooper and D Oliver, *Down and Out with Work Choices: The Impact of Work Choices on the Work and Lives of Women in Low Paid Employment,* Report to the Office of Industrial Relations, Department of Commerce, New South Wales Government, June 2007.

> *who have pride in work and have been loyal and committed employees, many for extended periods.*[46]

42. *Work Choices* has also exacerbated social inequalities. The laws put downward pressure on the wages and conditions of all working Australians at the same time as company profits soared. In September 2008, the wages share of total factor income was the lowest it has been since 1965, while profit share has increased to the highest it has been since national accounts have been kept (49 years).[47]

Work/family balance

43. *Work Choices* has undermined the capacity of many workers to balance work and family responsibilities. AWAs have had a particularly negative effect on work/ life balance. First, AWAs are associated with longer working hours, which take away from family time. AWAs tend to remove award-based restrictions over the employer's power to dictate the pattern of working time, and the probable result is that there is less 'flexibility' over working time for workers.[48] Data from the Department of Employment and Workplace Relations, for example, shows that more than one third of AWAs analysed (34%) had no restrictions on days to perform ordinary hours, compared to 25% for collective agreements. Similarly, eleven percent of AWAs contained provisions allowing management to alter hours, compared to 4% of collective agreements.[49] Finally, AWAs generally do not contain express 'family friendly provisions' (such as the right to request additional parental leave) which have become a feature of awards and collective agreements in recent years.[50]

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[46] J Elton et al, *Women and Work Choices: Impacts on the Low Pay Sector - Summary Report*, Centre for Work and Life, University of South Australia, August 2007, 8.
[47] ABS, *Australian National Accounts: National Income, Expenditure and Product*, September Quarter 2008, Cat. 5206, December 2008.
[48] See, eg, R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.
[49] Reported in T Jefferson and A Preston, '*Work Choices* and Family-Friendly Working Hours: An Assessment of Data Sources' (2007) 18(1) *Labor & Industry* 47, 59.
[50] R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.

44. Qualitative evidence further suggests that AWAs have led to increased employer flexibility at the expense of the capacity of workers to balance work and family life.[51] The negative effects of *Work Choices* – higher levels of job insecurity and stress, and lower, less stable incomes - have been felt not only by individual workers but by the workers' children, parents, and partners.[52]

Productivity

45. In introducing *Work Choices*, the former Coalition Government argued that the laws would increase productivity. But there remains no evidence to suggest that the laws have had any positive effect on economic outcomes, including on productivity.

Productivity and individual agreements

46. Work Choices was premised on the basis that individual statutory contracts delivered higher productivity but there remains no evidence to support this proposition. In 2005, the Committee found in its Inquiry into Workplace Agreements that there is no evidence of any link between AWAs and broader economic measures, such as employment levels or inflation.[53] This is not surprising, given that AWAs cover less than 5% of the workforce. In 2008, the Committee examined the economic effects of statutory individual contracts and productivity, concluding that the available evidence did not indicate that the use of AWAs has led to productivity gains.[54]

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[51] H Masterman-Smith and J Elton, 'Cheap labour – the Australian Way', Paper presented at the AIRAANZ Conference 2007, Association of Industrial Relations Academics of Australia and New Zealand, Auckland, 7–9 February 2007.

[52] See B Pocock et al, 'The Impact of "*Work Choices*" on Women in Low Paid Employment in Australia: a Qualitative Analysis' (2008) 50(3) *Journal of Industrial Relations*, 475, 485. See also S Charlesworth and F MacDonald, *Going Too Far: Work Choices and the Experience of 30 Victorian Workers in Minimum Wage Sector,* Report prepared for Industrial Relations Victoria, July 2007; and J Elton and B Pocock, *Not Fair No Choice: The Impact of Work Choices on Twenty South Australian Workers and their Households,* Report prepared for SafeWork SA and the Office for Women, July 2007.

[53] Senate Employment, Workplace Relations and Education References Committee, *Workplace Agreements,* October 2005, Chapter 3.

[54] Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, 17 March 2008.

47. There is no empirical link between statutory individual contracts and higher productivity. If anything, AWAs may be associated with lower levels of productivity. A comparison of productivity growth in the mining sector in the decade 1996-2006 has found that coal mining (dominated by collective agreements) has achieved productivity growth substantially exceeding that of iron ore and gold mining (dominated by AWAs).[55]

48. The relationship between AWAs and low productivity is explained by studies that have examined the content of AWAs and have found that they do not generally promote 'high productivity' employment systems, but instead simply increase management's power to set longer working hours at lower rates of pay.[56] The true source of long-term productivity growth (apart from greater capital investment) is 'working smarter'. This goal cannot be pursued by slashing wages and conditions, but requires employers and employees to work together in atmosphere of mutual trust, mutual flexibility and mutual reward. AWAs did not promote this type of working culture, which is why they could not have had any long-term positive effect on productivity.

PART 2 –WELCOME REFORMS

49. In light of the history of the unfair *Work Choices* legislation, we welcome many of the reforms contained in the Bill. Six items deserve particular mention.

Good faith bargaining

50. The good faith bargaining regime ensures that workers have the right to bargain collectively, and that bargaining occurs in a fair and efficient manner. Although the rules do not require parties to reach agreement, the mere fact that the parties are required to consider and engage with each other's position may well lead to more agreements being reached, with better outcomes for both workers and employers.

[55] CFMEU Mining and Energy Union, *The Myth of Productivity Growth in Metal Mining v Coal: AWAs v Collective Agreements,* 22 March 2007.
[56] R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.

If, after the Bill becomes law and is applied by FWA and interpreted by the Courts, it emerges that employers with no genuine desire to reach agreement can simply avoid the obligation to bargain in good faith by 'going through the motions' of good faith bargaining, the Government will need to reconsider whether the Bill goes far enough in ensuring that good faith bargaining actually occurs.

51. We also welcome the proposal that parties who persistently flout FWA orders may have their bargaining dispute arbitrated. Without this provision, rogue employers could simply ignore FWA orders in order to avoid their good faith bargaining obligations. A fine of $30,000 would not deter large, well-funded employers. The provision will greatly assist in ensuring that bargaining representatives – both unions and employers – behave properly in bargaining.

Low paid stream

52. We welcome facilitated bargaining, and last resort arbitration, for the low paid. Low paid employees, and their employers, are caught in a low-wage, low-margin trap. A single employer cannot grant its workers higher wages because of low margins and competitive pressures from other businesses. Knowing this, workers have little incentive to volunteer productivity improvements. The result is that wages and profits stagnate, as do levels of customer service and productivity. Workers, employers and customers are all worse off.

53. This situation will continue indefinitely without some intervention. The solution is to encourage workers and employers to bargain for higher wages in return for better productivity. In many businesses, this can *only* occur on a multi-employer basis, where employers do not have to fear that paying higher wages will drive them out of business. We think that the government has taken the right approach in first encouraging the parties to negotiate their own wages–productivity arrangements. Only as a very last resort will FWA step in and arbitrate the working arrangements that balance the interests of workers, employers and customers. Once an arbitrated decision has been made, the parties will be expected to bargain on their own in future bargaining rounds. The role of the state is thus to help the parties to

overcome the structural obstacles that have prevented them from bargaining, with the expectation that once they have received this one-off boost they will be able to bargain on their own in future. We hope that this expectation is matched in reality. If it is not, the operation of the low paid stream will need to be reviewed. The ACTU believes that Committee should recommend that the government closely monitor the operation of the low paid bargaining stream, and the incidence and quality of bargaining at a single business level in low paid sectors of the economy.

Unfair dismissal

54. We welcome the restoration of unfair dismissal rights to most employees in the federal system. While we have some serious reservations about the design of the unfair dismissal regime (detailed in section 3), these rights are important not only to ensure that people are not mistreated when their employment ends but also to give them the confidence to deal with their employer during the period of their employment, without fear of retribution. For these reasons, we maintain our position that these protections should be extended to *all* workers.

55. We do not accept the claims that unfair dismissal laws will create unemployment, or impose excessive costs on business. In 2005, the Senate Employment, Workplace Relations and Education References Committee concluded from its inquiry into unfair dismissal policy in the small business sector that:

> *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...* [57]
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> *…Evidence to this inquiry showed conclusively that the decision of small business operators to hire and fire is influenced by a range of factors other than unfair dismissal, including the state and profitability of the business, taxation arrangements and general economic conditions. The committee believes strongly*

[57] Senate Employment, Workplace Relations and Education References Committee, *Inquiry into Unfair Dismissal Policy in the Small Business Sector,* 21 June 2005, 4.1

that the Government's legislation is not an appropriate response to the problems facing small businesses…[58]

56. International studies confirm that removing unfair dismissal protections will not have a significant positive economic impact. In 2006, the OECD found there to be no link between unfair dismissal laws and unemployment, concluding that "the overall impact of EPL [employment protection legislation] on aggregate unemployment is unclear, both in economic theory and in the empirical evidence."[59]

57. Statistics show that only 3.7% of workers who are dismissed (and who are within the scope of the federal unfair dismissal laws) bring an unfair dismissal claim.[60] The remaining 96.3% either accept that their dismissal was fair, or do not bring a claim for their own reasons (such as the costs involved, fear of confronting their former employer, etc). Of the claims lodged with the AIRC, approximately 90% are settled before hearing. Although employers complain that these matters are often settled by the payment of 'go-away money', there is no evidence that this is the case. The only major study to examine this issue found that most unfair dismissal claims that were settled at conciliation resulted in either no payment to the employee, or a 'small payment' of less than $2,500.[61] Even in the cases where settlement money was paid, one cannot be certain whether the payment was in truth a debt due to the employee (e.g. in respect of unpaid entitlements) or a bona fide compensation payment (in respect of a dismissal that the employer acknowledges was unfair), rather than a true 'go away' payment in respect of a completely unmeritorious claim.

58. Of the very small number of substantive claims (69 last year) that reach a hearing in the AIRC, half are found to be fair dismissals, and the other half are held to be unfair. Where the dismissal is held to be unfair, reinstatement is ordered in about

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[58] Ibid, 4.3.
[59] OECD, *Employment Protection: The Costs and Benefits of Greater Job Security,* Policy Brief, September 2004.
[60] Appendix 2.
[61] B Freyens and P Oslington, 'Dismissal Costs and their Impact on Employment: Evidence from Australian Small and Medium Sized Enterprises' (2007) 83 *Economic Record* 1, 8.

half of all cases, and compensation (on average 16 weeks' pay) awarded the other half of cases.

59. Considering these modest figures, it is no surprise that unfair dismissal laws are not regarded as having any major impact on decisions to hire, and hence on employment levels. Economists estimate, for example, that the exclusion of workers in small and medium sized businesses from protection against unfair dismissal, under *Work Choices*, only created 6,000 extra jobs in Australia.[62] This represents a miniscule 0.08% increase in the total employed labour force.[63]

Transfer of business

60. We welcome (though again with some reservations) the provisions of the Bill that are designed to ensure that a worker's entitlements under an enterprise agreement are not lost when their legal employer changes.

61. *Work Choices* has proven entirely inadequate in protecting the legitimate interests of employees when company ownership changes. Under *Work Choices,* employers can simply avoid the application of industrial instruments by way of simple corporate restructuring. Using methods such as assignment or contracting out of functions, employers can avoid their liabilities under awards and agreements and reduce the wages and conditions of their current or future employees. For example, under *Work Choices,* an employee loses all of their entitlements if their employer's business is sold to a new employer that ran a different 'kind' of business, even if the employee keeps on doing exactly the same work. Worse still, even if the workplace agreement does 'transmit' to the new employer, this only lasts for 12 months, after which time workers loses all of their entitlements.

62. Under *Work Choices,* parties are compelled to rely heavily upon the case law to determine basic questions such as whether a transmission of business had occurred. This case law – in particular a number of High Court decisions which have taken a

[62] Ibid, 2.
[63] ABS cat 6359.0 (Nov 04), 3.

very technical approach to the statutory provisions - is extremely complex, confusing and unwieldy. It is remarkably difficult to determine if a transmission of business has occurred and, if so, what is the effect of this transmission on the employment of employees who have transferred.[64] In addition, based on the current statutory regime, the High Court has adopted a very narrow definition of transmission, which has the effect of disadvantaging employees who are affected by changes in company ownership.

63. The basic principle should be that where parties have genuinely reached an agreement, the agreement should be respected.[65] The transmission of a business involves the transfer of liabilities. If a company purchases an office building and there is a sitting tenant, the lease that the tenant made with the former landlord must be respected by the new owner. Why should the situation be any different in the employment sphere? If one business wishes to acquire another business, and its employees, they should respect the agreements that were made between the old employer and its workers, for the term of those agreements.

General protections

64. We are pleased that the Bill expands the general protections to ensure that nobody may take adverse action to deny workers their workplace rights, or to frustrate the enjoyment or exercise of these rights. For the first time, the Bill recognises that workplace rights include the full range of rights to stand up for one's self and one's colleagues, including making a complaint to the boss on behalf of co-workers, or making a complaint to a union. Also for the first time, employers will not be permitted to deceive workers about their rights, or to use undue pressure to influence how employees exercise their rights. A third new feature is that freedom

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[64] See, e.g., T Hardy, 'Protection of Employees in a Transmission of Business: What is Left in the Wake of Work Choices and Subsequent Statutory Amendments?', *Working Paper No 42*, Centre for Employment and Labour Relations Law, November 2007.

[65] The ACTU notes that this principle that does not apply to agreements that have not been genuinely agreed to by the parties at the time they were made. The principle is based on 'the notion that industrial participants should bargain in good faith, and the corollary of that proposition, that they should be bound by the outcomes of that process': Labor Senators' Report, Senate Employment Workplace Relations, Small Business and Education Committee, Workplace Relations Amendment (Transmission of Business) Bill 2001, Parliament of Australia, Canberra, June 2001, 9.

from discrimination is recognised as a workplace right and can be directly enforced by employees, unions, and inspectors.

65. The Bill provides more comprehensive protections for workers participating in collective activities such as representing other employees or bargaining. Recognition of these important protections – such as protection against being offered inducements not to join a union or not to take part in union activities - brings Australian law closer in line with European and international human right standards.[66]

66. The general protections reforms in the Bill are significant reforms that will go a long way to ensuring that employees are able to stand up for their rights at work, and to join and participate in union activities without fear of retribution from their employer.

Right of entry

67. Rights to organise, be represented by a trade union and to engage in collective bargaining are rendered meaningless if workers do not have access to advice, information and representation by trade unions in their workplace.

68. The right of workers to have access to their representatives is recognised by the International Labour Organisation (ILO) as an integral element of the right of workers to freedom of association and collective bargaining. This fundamental human right is recognised in the ILO's *Freedom of Association and the Right to Organise Convention No 87* and the *Right to Organise and Collective Bargaining Convention No 98*, both of which have been ratified by Australia.

69. Right of entry has also long been recognised in Australia and internationally as an important mechanism for monitoring compliance with industrial instruments. A proper system of entry plays a key role in supplementing state efforts to monitor

[66] See, e.g., *Wilson v Palmer* [2002] I.R.L.R. 568 and the subsequent legislative amendments in the UK's *Employment Relations Act 2004*.

and enforce labour laws and is critical for ensuring that the rights of workers are not abused.

70. Under Work Choices, employers could lock unions out of their workplaces (by making AWAs with staff or entering into non-union collective deals), thereby depriving employees of their right to be represented. The right of entry regime under *Work Choices* was condemned by the ILO as being in fundamental breach of Australia's international obligations.

71. The ACTU is pleased that the government has restored the position that (apart from the *Work Choices* years) has subsisted for decades in Australia, namely that:

- Unions can enter any workplace where its members work if they suspect that the employer has breached employment or safety laws relating to those members.

- Unions can inspect the employment records of non-members if this is necessary (for instance, if the union suspects that non-members have been treated more favourably than members). We note that privacy provisions in the Bill are stronger that was previously the case, due to the existence today of the Privacy Act, as well as the retention in the Bill of the system of permits that means the misuse of information risks the loss of permit, and most likely loss of livelihood.

- Unions can also enter workplaces to hear complaints from workers (but only those who are eligible to join the union). Although the employer has the right to choose where these discussions take place, the Bill confirms that the location must be appropriate, and must not be selected to frustrate employees' rights to speak with their union.

72. We note, however, that the Bill continues the Howard Government's requirements that:

- Unions can only enter workplaces by giving 24 hours' notice (except in cases of breach of safety laws).

- Unions can only enter during working hours, and can only hold discussions with employees during breaks.

- The union official entering must have a permit, which can only be given to a 'fit and proper person' and which can be suspended or revoked if the official is behaving inappropriately.

- There are penalties (up to $6,600 for the official, $33,000 for the union) for officials who act improperly in a workplace.

73. While we are disappointed that the Government has not taken the opportunity to overhaul the right of entry provisions so that they better achieve their goal, we welcome the express recognition in the Bill that the purpose of right of entry laws is to facilitate the 'right of employees to receive, at work, information and representation from [union] officials', and also to facilitate the right of unions to 'represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of [relevant laws]'. These are important purposes which the law failed to achieve under *Work Choices*.

PART 3 – CONCERNS WITH THE BILL

74. In this section we set out some of our major concerns with the Bill. We raise our concerns on a topic by topic basis.

Application of the Bill

Construction workers

75. While the Bill is expressed to cover all national system employees, in practice the *Building and Construction Industry Improvement Act 2005* (Cth) regulates the employment of employees in the building and construction industry. We have repeatedly argued that there should be only one federal law for employees in Australia, and that the discrimination against building workers should end immediately. We submit that the BCII Act should be repealed immediately.

Independent contractors

76. The Bill does not cover independent contractors. We have long argued that independent contractors need greater protections. If the Bill is not to be amended to cover 'workers' rather than 'employees', then we submit that the beneficial provisions of the Bill should be extended to independent contractors through separate legislation. While the Bill provides some redress for sham contracting, it does not provide an effective and low cost remedy for unfair contracts. The *Independent Contractors Act* should be reviewed to ensure that all workers in Australia have decent working arrangements, access to low cost remedies against unfairness, and are able to bargain collectively.

Foreign ships

77. The Bill does not cover foreign-flagged ships that are engaged in the Coasting Trade. If foreign ships participate in the Australian Coasting Trade (whether facilitated by Permits or Licence's granted under Part VI of the Navigation Act 1912), they should be regulated by our laws. We include several proposed amendments to the Bill that will address this deficiency in Appendix 1.

Public/community sector employees

78. It is difficult to establish at a glance (and indeed even with detailed analysis) whether some employers (public sector corporations, charities, schools, local government corporations, etc) are 'trading' corporations, within the meaning of the *Constitution*. Under *Work Choices,* many employers and employees in these "borderline" sectors of the economy were uncertain as to their rights and obligations, and these could change based on the activities of the entity from time to time. The federal and State governments must negotiate sensible boundaries between State and federal laws. We note that Forward with Fairness promises that *"State Governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their*

own employees and local government employees."[67] Forward with Fairness also promises that "*transitional arrangements [will be] put in place so that those currently covered by State industrial relations systems will not be disadvantaged as a result of the creation of Labor's national industrial relations system*".[68] In the event that the State governments refer their powers, the ACTU urges the Federal Government to ensure that its commitments to employees in State industrial relations systems are delivered. This includes ensuring arrangements for employees covered by State industrial relations systems to opt into the federal system and for participation by State registered unions. In the absence of State government referrals that enable a "bright line" between Commonwealth and State responsibility, the Commonwealth should amend the Bill and withdraw from covering "borderline" entities.

The National Employment Standards

Right to request

79. The Bill gives employees a right to request flexible working conditions, and/or extended parental leave. However, this right is rendered nugatory by the fact that the employer may deny the request on 'reasonable business grounds' and the refusal cannot be reviewed in any forum. This is absurd, and leaves employees worse off that they were under *Work Choices*.

80. The right to request family friendly arrangements was inserted into federal awards as a result of the Family Provisions Test Case in 2005, and was adopted in the various State jurisdictions. As a federal award provision, refusal to agree to a request could be dealt with using the award dispute settlement procedures, which at that time included binding arbitration. With *Work Choices*, disputes about the application of awards could be subject to mediation, or to consent arbitration.

[67] Kevin Rudd MP and Julia Gillard MP, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces,* April 2007, 6.
[68] Ibid.

Where the right to request was reflected in agreements, the agreement dispute settlement procedure could be activated.

81. We understand this provision gives effect to pre-election commitments that such decisions would not be the subject of review. We oppose this position. However, the government can fulfil this promise by barring a review of the decision only in circumstances where the employer does not wish to have their decision reviewed. It is completely unnecessary, and indeed in conflict with other election commitments related to free bargaining, to prevent FWA reviewing an employer's decision where the employer consents to the exercise of that power, either at the time or as part of an enterprise agreement.

Modern awards

Award modernisation

82. While the ACTU welcomes those aspects of the Bill that strengthen the award safety net for employees, we remain very concerned that the process of award modernisation currently underway in the Australian Industrial Relations Commission (AIRC) has the capacity to reduce wages and conditions, particularly for many award-dependent workers, and to undermine the effectiveness of awards as a fair and effective safety net. This outcome would be inconsistent with the objectives of modern awards as identified in the Bill. Although the Government has promised that no worker will lose take-home pay as a result of the process,[69] other forms of potential disadvantage remain: including loss of non-monetary conditions, reduction of contingent entitlements (e.g. redundancy entitlements) and a lowering of the benchmark for agreement-making (e.g. reduction of the 'better off overall' hurdle).

83. In modernising awards, the AIRC is required to proceed according to an award modernisation request issued by the Minister for Workplace Relations prior to the

[69] Second Reading Speech, Fair Work Bill, 10.

final draft of the Fair Work Bill.[70] As a result, the AIRC lacks sufficient guidance as to the statutory basis of modern awards or the way in which modern awards are intended to interact with other aspects of the statutory scheme, including the NES and agreement making. Key areas of ongoing concern include:

- the decision by the Full Bench of the AIRC not to supplement the NES entitlements to parental leave and jury service leave in all modern awards because they believe this would in effect be creating a new minimum standard, *even though these standards form part of the existing safety net for many employees*.[71]

- the absence within the final modern awards of a right to representation. While each modern award must contain a dispute settlement clause, there is no requirement that the clause confer a right to be represented. Moreover, the AIRC has not included in its modern awards any general right to representation at work.[72] Including a general right to representation at work in modern awards would allow consultation and representation arrangements to be tailored to each industry or occupation and give effect to the objects of the Bill. In order to give effect to this right to representation, modern awards should also include a right to access dispute resolution training leave.

- the AIRC's decision to limit the operation of district allowances and accident make up pay clauses within modern awards to five years, despite there being no clear reason for doing so; and

- the emergence of inconsistencies in regard to exemptions from award coverage as a result of the failure of the Award Modernisation Request to require that the AIRC have appropriate regard to relevant exemptions within the Bill. The *Clerks – Private Sector Award 2010*, for example, exempts employees earning more

[70] The ACTU notes that this Request has since been revised twice, but these revisions do not address the concerns outlined below.
[71] [2008] AIRCFB 1000 (19 December 2008), [94] and [103].
[72] [2008] AIRCFB 1000 (19 December 2008).

than 15 percent above the level 5 wage rate from the majority of award provisions. This is inconsistent with the award safety net established in the Bill.

Modern award reviews – grounds

84. Modern award wages can only be reviewed on 'work value' grounds. This does not allow FWA to adjust wages on other grounds, such as where adjustments are necessary to ensure that the modern awards objective is met. In particular, FWA does not have the capacity under the Bill to ensure that wages in awards continue to operate as a relevant and fair safety net against which to apply the 'better off overall test' in collective agreements. We note that this is a requirement in a both Queensland and WA industrial relations statutes. We further note that the absence of such a provision in the Bill is inconsistent with the Government's *Forward with Fairness* policy, which noted that awards would operate as 'an effective floor for collective bargaining'.[73]

Modern award reviews – timing

85. Award wages have not been reviewed for their 'relevance' to market wages since 1989 and award conditions have not been able to be reviewed since 2005. Award modernisation is focused on rationalising and simplifying awards. No genuinely new terms and conditions that will benefit award covered employees will emerge from award modernisation. Yet it appears that the first review of modern awards will occur in 2014. This is too long an interval, particular in relation to wages. We submit that the Bill should provide for an interim review of modern awards in 2010.

Exceptional matters

86. The award system will not deal with many 'safety net' entitlements that are currently available under State systems, such as the safe rates for transport workers in New South Wales. We submit that there should be capacity for modern awards to

[73] Kevin Rudd MP and Julia Gillard MP, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces,* April 2007, 10.

include additional matters on an 'exceptional' basis, as was the case before *Work Choices*.

Individual flexibility arrangements

87. The Bill does not mandate all of the protections that the AIRC has developed in the award modernisation process. In particular, clause 144 of the Bill does not require:

- the written flexibility agreement to detail each term of the award that the employer and the individual employee have agreed to vary; how the application of each term has been varied by agreement; and how the agreement makes the individual employee better off overall in relation to the individual employee's terms and conditions of employment; and
- an employer seeking to enter into an individual flexibility arrangement to provide a written proposal to the employee and, where that employee's understanding of written English is limited, to take measures, including translation into an appropriate language, to ensure the employee understands the proposal.[74]

88. These important protections developed by the AIRC should be included in clause 144 of the Bill.

The high income threshold

89. The ACTU opposes the exemption from award coverage of 'high income earners' who have traditionally been entitled to award protection. The effect of this exemption is not only to remove the application of award conditions of employment but also to suspend important rights deriving from award coverage, such as the right to be represented at work, to be consulted about significant change and to access the dispute settlement procedure in the award.

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[74] See [2008] AIRCFB 1000 (19 December 2008) and the award flexibility clause included in the first set of modern awards.

90. In light of the serious consequences of the high income threshold on workers' rights and entitlements, we believe that the Bill should be amended so as to remove the capacity of the Minister to reduce this threshold through regulation.

Bargaining process

Permitted matters

91. The government has broken its election promise to allow 'free bargaining', particularly by prohibiting bargaining for better unfair dismissal rights, better union entry rights, and by prohibiting parties from agreeing to 'reserve' certain matters for future bargaining. In particular, the restriction on bargaining better union entry rights:

- undermines employees' fundamental right to representation;
- is uncertain (since it is not clear which 'purposes' a union can enter a workplace for);
- will undermine genuine bargaining (since making a claim that is honestly thought to be lawful, but which turns out not to be so, will prevent a party from obtaining FWA orders, taking protected industrial action, or having an agreement approved); and
- will force parties to enter into 'side deals' (which are inefficient, and do not give parties sufficient certainty that their rights are enforceable).

92. We also oppose the designation of agreements that confer unfair dismissal entitlements on employees who have not served the statutory minimum qualifying period as unlawful. The provision will 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.

93. These restrictions should be abolished or, at the very least, redefined as non-permitted rather than 'unlawful' matters.

Confidential information

94. The good faith bargaining obligations include obligations to exchange relevant information. However, there is an exception for 'confidential or commercially sensitive' information. This exception is extremely wide. It potentially covers many of the most relevant pieces of information that a bargaining representative would wish to see as part of bargaining, and so threatens to make the obligation to exchange information completely redundant. We submit that the exclusion should be narrowed to 'genuinely confidential' material.

Scope orders

95. The Bill provides FWA with a list of criteria for making a scope order (clause 238(4)). We think that the fundamental consideration should be the 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. The Bill should be amended to reflect this.

Access period

96. The Bill provides a 7 day access period to a proposed agreement. This period is too short for a worker to consider the proposal and make contact with an adviser or representative. In our experience, in workplaces that are not organised, employees are most likely to respond to an employer offer to bargain only after a concrete proposal has been presented to them.

97. The current Act provides an identical 7 day access period and there are many examples which demonstrate why this is too short a period for employees and their representatives to genuinely consider the proposed agreement. Emirates Airline, for example, distributed a proposed agreement to employees and conducted a ballot via email over the Easter break. Many employees who were on leave did not receive

the agreement or voting instructions in time to adequately consider the agreement or even to vote. The agreement, which significantly reduced important conditions of employment such as penalty loadings, was approved by an extremely narrow margin.

98. In circumstances where these workers contact a union and express concerns about the offer, the union's first response will be to make application for good faith orders to delay consideration of the agreement, in order to preserve the status quo. If the access period were longer, the parties would have time to explore options for agreement first, without recourse to FWA. We submit that the period should be extended to 14 days.

Variation and termination

99. The good faith bargaining regime (including the role for representatives) does not apply to the variation or termination of enterprise agreements. The variation or termination of an agreement may alter a worker's rights and entitlements as much as the making of an agreement in the first place. As such, there is no rationale for excluding the good faith bargaining obligations.

Multi employer bargaining

100. The ACTU believes that multi employer bargaining should be available both by consent and where FWA determines it is in the public interest, having regard to:

- ILO conventions and jurisprudence, and the freedom of the parties to determine the level at which they bargain;
- The community of interest of the employees;
- The community of interest of the employers;
- The desirability of promoting collective bargaining, particularly where the employees or the employers lack the capacity to bargain at the single business

level, or the size or number of workplaces in a particular industry or industry sector militates against collective bargaining at the single business level;

- The needs of lower paid workers and the desirability of promoting bargaining and lifting living standards;
- The history of bargaining; or
- Any potential, demonstrable and long-term negative impact on the viability of a single business.

101. We also believe that a collective multi employer agreement covering a site or project involving multiple employers engaged in the same undertaking (e.g. a construction site) should be available without limitation.

102. The ACTU welcomes the provisions within the Bill that go part way in meeting our policy objectives:

- The definition of a single business acknowledges that related corporations and common undertakings should be treated as a single business. Consistent with this, the government should immediately abandon the provisions of its procurement code that effectively prohibit project agreements in the building and construction industry;
- The removal of the current requirement that a multi employer agreement must also meet a public interest test. This requirement has been the subject of criticism by the ILO and has frustrated the making of agreements that all parties desired to formalize;
- Provision for FWA to facilitate bargaining for low paid employees (subject to some technical amendments, see Appendix 1); and
- The notion of single interest authorisations. This mechanism partially recognises the fact that enterprise level bargaining is not appropriate in all cases, particularly where the employer does not have ultimate control over the outcome

in bargaining. This is commonly the case where an organisation is reliant upon government funding, or on another dominant purchaser of services.

103. However we are disappointed that access to multi employer bargaining is so restricted in the Bill. Multi employer bargaining should be available more broadly and not be limited to so called 'single interest' employers. This is consistent with international labour standards.

104. The ACTU recognises that government policy is that industrial action in pursuit of industry wide agreements should not be available. However, FWA should be given the power to authorise multi employer bargaining where the applicant can demonstrate it is in the public interest. Employees (and their unions) should also be able to make applications to the Minister for a declaration or to FWA for authorisation for multi employer bargaining and/ or a single interest employer authorisation.

105. These amendments are essential to ensure that the relevant provisions within the Bill are not devoid of meaning. As noted above, the Bill provides for voluntary multi employer bargaining without authorisation. The difference between voluntary multi employer agreements and bargaining under a single interest employer authorisation is that parties cannot be the subject of bargaining orders or take protected industrial action. It seems improbable that many employers will make an application to FWA for the authority to make an agreement with the risk of protected industrial action in circumstances where they can make the same agreement without the possibility of being subject to protected industrial action.

106. Once made, employers should be able to agree to be bound to a multi employer agreement. Variation to the agreement to add a new party should be available where the employer and the employees of the joining employer have agreed to be bound by the multi employer agreement.

107. We note that parties to a multi employer agreement can make a new single business enterprise agreement which will take precedence over a multi business agreement.

We support the notion that a subsequent agreement displaces a prior one. But, consistent with the principle of freedom to bargain, the Bill should not favour one form of agreement over another. We note that the ILO has consistently criticised *Work Choices* for prioritizing one form of agreement over another. The rule that a later agreement displaces an earlier one should apply consistently so that a subsequent multi employer agreement prevails over any prior single business agreement.

Industrial action

'Unlawful' industrial action

108. The Bill makes industrial action during the life of an agreement 'unlawful'. Labeling such action unlawful is inappropriate in light of the fact that the right to strike is an internationally recognised fundamental right. It suffices that unprotected action may be stopped by FWA, and workers may be sacked or sued for engaging in it. Even these remedies are oppressive, given that workers tend only to take industrial action during the life of an agreement to protest unfair unilateral decisions that are made by management, or unforeseen circumstances (and which they have no other capacity to challenge, in the absence of a robust dispute resolution procedure in the agreement).

109. In Canada, the federal Labour Code permits the parties to re-open negotiations in the event of significant change at the workplace, for the purpose of ameliorating the effect of the change on workers. This would allow industrial action over unexpected restructuring or redundancies that were not contemplated at the time of the agreement.

Secret ballots

110. The purpose of a secret action ballot is to determine whether workers authorise the union (or other person) to organise industrial action on their behalf. It is a matter between the workers and the person organising the action. The procedures should ensure a timely and efficient process that does not frustrate or delay the taking of

authorised action. The role of FWA should be supervisory, covering the approval of ballot agents; the maintenance and publication of records; and the settlement of any disputes over the process.

111. The ACTU welcomes the Object of Division 8 – 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.' We do not, however, believe that the protected action ballot provisions achieve this objective. The process for obtaining and implementing an order for a secret ballot set out in the Bill is complex and inefficient. These prescriptive rules are inappropriate and unnecessary and may frustrate or delay the taking of authorised protected industrial action.

112. Before granting approval for a ballot, FWA must be satisfied that the bargaining representative is 'genuinely trying to reach agreement' (cl 443). This provision gives employers considerable scope to frustrate and delay a protected action ballot. In the experience of our affiliates, employers readily invent a range of reasons for opposing the approval of a protected action ballot. Even where baseless, these employer claims have the intended effect of prolonging the approval process for weeks or even months.[75]

113. The ACTU does not believe there should be any requirement for approval to hold a ballot. Nor should there be any capacity for employers to intervene in the ballot process. The authorisation of protected industrial action is a matter for employees and their representatives. The requirement for FWA to be satisfied that the bargaining representative is genuinely trying to reach agreement is irrelevant to the question of whether the workers authorise the bargaining representative to organise industrial action. This question may properly be asked at the point when workers are about to take industrial action.

[75] See, e.g., *AMWU v Mayfield Engineering P/L t/as Metlabs* [2006] AIRC 734, where the application (ultimately successfully) was drawn out for 2 months.

114. The Bill proposes that in order to authorise industrial action, a quorum of at least 50 per cent of eligible voters must cast a vote, of which more than 50 per cent must approve the action. The ACTU submits that it is inequitable to require a quorum. We note that the ILO Freedom of Association Committee 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.*[76]

115. Two examples should be considered, both involving workplaces of 100 employees. In the first, 49 employees in the ballot vote, all in favour of strike action. In the second, 50 employees vote, 26 of them in favour of strike action. In the first example, strike action would not be authorised, while in the second it would, even though it would appear that there was substantially greater active support for the strike in the first example.

116. The ACTU believes the quorum requirement should be removed. Action should be approved by the simple majority of those voting.

117. The ACTU believes that the secret action ballot provisions in the Bill require significant amendments.

Pattern bargaining

118. Pattern bargaining occurs where a bargaining representative makes settlement of a claim with one party contingent on other parties accepting a similar claim. The ACTU does not support the prohibition on pattern bargaining. This limits employees' freedom of association by dictating that the only common interests that they may protect are those shared by employees at the workplace in which they work. The restrictions on the negotiating parties to choose their own level of bargaining under Australian law has been strongly criticised by the ILO's Committee of Experts on the Application of Conventions and Recommendations.

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[76] ILO, *Freedom of Association Digest*, 4th (revised) edition, paras 507 and 510.

119. In single enterprise bargaining, pattern bargaining is a species of bad faith conduct. As such, if there is to be a legislative prohibition against pattern bargaining it should be within the context of the good faith bargaining regime. The Bill already provides a range of sanctions for bad faith bargaining, including loss of protection for industrial action (which exposes persons taking or organising the action to penalties and damages). There is no need to elevate pattern bargaining above all other forms of bad faith bargaining. The provision allowing an aggrieved party to apply directly to a court for injunctions against the conduct (cl 442) should be removed.

120. Pattern bargaining is to be distinguished from making common claims. These are claims which are made, across several businesses, but where the claim is pursued independently against each employer.

121. Neither unions nor employers approach enterprise bargaining with blank minds and blank pieces of paper. Neither group has the resources to do this. The enterprise bargaining process is based on sharing collective knowledge and experience, and using this in a cumulative way.

122. It is impossible for unions to campaign for improved conditions unless such campaigning can occur throughout an industry, the wider workforce, and even the community. This does not mean that unwanted conditions can be imposed upon employers and their employees against their wishes. Finally, the employer must agree and the employees must vote.

123. All the major workplace gains of the past decades, including parental leave, superannuation, redundancy pay, training and skill recognition, and family leave, were initiated by industry campaigns which resulted in a number of enterprise-based agreements which were later adopted by the AIRC for the award system, in whole or in part.

124. Campaigning around common issues is integral to union functioning. Although industrial action does not invariably or even commonly accompany bargaining,

without the ability to take action the process is unacceptably weighted towards the employer.

125. The fact that bargaining and the taking of protected action may be co-ordinated or organised across more than one employer does not mean that there is a lack of preparedness to negotiate different outcomes with each employer. In the *Metals Case,* Munro J emphasised that common claims and outcomes have a place in our industrial relations system and that they are pursued by employers as well as unions:

> *Industrial negotiation is usually directed at achieving benefits and rights through some form of agreement about a provision to which the parties are bound. It is not unusual for major corporate employers to attempt to achieve a consistency and sometimes a relative uniformity of outcomes in negotiations affecting workers. For that purpose, benchmark common outcomes, wage increase levels, flexibilities, and freedom from award restrictions may be energetically pursued against union and employee negotiating parties. There is no good reason to doubt that such bargaining agendas will often form part of a corporate plan or strategy pursued across all the corporation's manifestations, or selectively at key sites. Those familiar with the industrial profiles of employer groups would recognise another group of employers who have negotiation objectives more or less imposed upon them. For that group negotiation objectives are effectively controlled by ostensibly external corporations to whom product or services are supplied, or by a parent company, often off-shore. A uniform cost price reduction for goods supplied under contract is one example of a practice in vogue in the vehicle components industry some years ago. It had some characteristics of a direct enforcement effect on enterprise level negotiation objectives…*
>
> *It would be industrially naïve to equate all such employer entities with the stereotypical small business entity which most people would identify with the notion of single business… It appears that some of the more loudly voiced and caustic criticisms of "pattern bargaining", as practiced by unions, are muted or tolerant of corporate practices intended to achieve similar uniformities of negotiating outcomes across different workplaces.*
>
> *Industry-wide demands are often made by unions and sometimes pursued at national level. It is not that character of the demand that may cause offence to the policy embodied in section 170MP and paragraphs 170MW(2)(a) and (b). I see no reason why such claims may not be advanced in a way that involves a genuine effort to have each employer concede the benefit sought. In such cases, the "pattern" character of the benefit demanded, its source, and even the uniform content of it, may be a cogent*

> *demonstration that the negotiation conduct is genuinely directed to securing agreement from the other party.* [77]

Harm to parties

126. The intention behind the government's proposal to allow FWA to stop protracted action that was causing 'significant harm' to the parties was to allow FWA to resolve bargaining deadlocks where both parties were locked into futile action which had no prospect of being resolved through negotiation or capitulation by one side. We are concerned that the proposed provisions will not be applied to these situations, but will be used to stop effective industrial action on the part of workers, where capitulation by the employer is imminent. We submit that the provisions should be redrafted to better achieve the government's original intention.

Cooling off

127. This provision was introduced by *Work Choices*. The effect of the provision is for bargaining periods to be suspended even when the party taking the action has behaved within the law.

128. The ACTU opposes the introduction of cooling off periods. Industrial action is, by its nature, disruptive. The provision has the effect of removing the employee's bargaining strength while leaving the employer free to continue to refuse to negotiate genuinely.

129. The provision is unnecessary given that FWA has the power to order the parties to meet and confer during a period of industrial action, in order to promote settlement of the bargaining dispute.

130. This provision undermines the fundamental right of workers to take industrial action and is in breach of our international legal obligations to respect the right to strike. It should be removed.

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[77] *Australian Industry Group and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union,* Print T1982, 16 October 2000, [47-49].

Harm to third parties

131. This provision, introduced by *Work Choices*, allows a third party employer to seek to have protected industrial action stopped on the grounds that the action is adversely affecting their business.

132. This provision has the potential to apply to a significant proportion of industrial action. The very nature of industrial action is that there will be some harm to third parties, including proprietors of businesses who are reliant on the business involved in the industrial action. As Cooper J of the Federal Court has observed:

> *It is inevitable, in my view, that action engaged in directly by unions against very many kinds of employers will, by disrupting the business operations of those employers, also have a direct or indirect impact on the business and other activities of third parties.*[78]

133. The ACTU notes that, in 2004, the Labor Senators of this Committee were highly critical of a similar provision in the *Workplace Relations Amendment (Better Bargaining) Bill 2003*:

> *Labor senators find that while the Government's claim about protecting third party employers appears on the surface to be reasonable, it is at best a disingenuous proposal. As the ACTU pointed out at a public hearing, it is another example of Orwellian language being used to reduce the power of employees. The suspension of a bargaining period if the industrial action is threatening to cause significant harm to a third party has the potential to apply to most, if not all, types of industrial action...*[79]

134. The threshold for granting the application in the Bill is so low that the provision effectively amounts to an automatic right for third parties to stop protected industrial action – especially manufacturers who have chosen to implement 'just in time' production systems, and who have chosen not to protect themselves from the disruptions to supply (e.g. by stockpiling parts).

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[78] *FH Transport Pty Ltd v TWU* [1997] 567 FCA.

[79] Labor Senators' Report, Employment, Workplace Relations and Education Legislation Committee, *Inquiry into the Workplace Relations Amendment (Better Bargaining) Bill 2003,* June 2004, [2.26].

135. To permit any party claiming to be affected by protected industrial action to apply to FWA for suspension of industrial action risks facilitating involvement in industrial disputes of all kinds of persons, including ideologues and mischief makers, while doing nothing to assist in resolving the actual dispute.

136. The ACTU believes that this provision should be repealed or, at the very least, the criteria should be made consistent with those which apply where protected action is causing private harm to the parties (clause 423). In other words, it should only apply where:

- industrial action has been occurring for a protracted period of time, with no prospect of stopping in the reasonably foreseeable future; and
- the economic harm caused to the third party must be objectively significant, having regard to the capacity of the party to bear it; and
- the third party did not cause or contribute to its own loss (eg by failing to take reasonable steps to prevent or mitigate any harm suffered).

Harm to corporations

137. The Bill requires FWA to stop industrial action (whether or not it is 'protected' by State law) by workers outside the national system, where the action causes or threatens to cause 'substantial damage' to a corporation. This is another *Work Choices* provision. Its effect is to give third parties the right to stop industrial action, even where they have no right to do so under State law. This is objectionable in itself. Moreover, the threshold for FWA action is too low. The provision should be repealed, or at least should be made consistent with the rules for third party intervention in bargaining disputes in the federal system, as proposed immediately above.

Secret ballots for protected industrial action

138. The Bill retains the requirement introduced by *Work Choices* that industrial action must be authorised by secret ballot. The ACTU supports the democratic

endorsement of industrial action, but remains concerned that the provisions are complex and allow employers to frustrate and delay industrial action. As a matter of policy, the decision to ballot members belongs with their union. We acknowledge there is a public interest in ensuring ballots are properly conducted, but beyond that it should be for the union to determine how and when the ballot is held.

139. We note that protected industrial action must start within 30 days of a ballot. This rule is counterproductive (to the object of reducing industrial disputation) as it effectively forces workers to take industrial action a month after a ballot has been held, even if negotiations are proceeding well and a settlement is imminent. The provision should be deleted, or alternatively made consistent with single interest employer authorisations which are valid for 12 months

Ministerial powers

140. The Bill confers power on the Minister to make a declaration terminating protected industrial action on certain grounds. This power is unwarranted since FWA already has power to terminate protected industrial action on its own initiative. It is a power that is open to abuse and should be deleted.

Strike pay

141. The Bill retains the prohibition on payment of wages during periods of industrial action, including the requirement that an employer deduct a minimum of four hours pay during a period of unprotected action. This provision, which acts to impose a penalty upon employees (by parliament and not a Court), penalises employees for stopping work, regardless of whether poor management contributed to the stoppage. The provision is rendered more objectionable given that employees covered by an enterprise agreement cannot take protected action, yet are not guaranteed access to a binding dispute resolution procedure to resolve issues that arise during the life of the agreement. And, at a practical level the requirement to

deduct four hours pay for a short stoppage has the perverse effect of encouraging stoppages of minimum four hours duration.

142. We recognise that amendments are proposed in respect to protected action, but consider these do not go far enough to restore balance. Nor do they deal adequately with overtime bans, in that they continue to allow an employer to deduct for a full day where an employee has refused to work overtime.

General protections

Consultation, information, and representation

143. The objects of the Bill include enabling representation at work, and providing access to effective grievance and disputes procedures. Yet the Bill falls short of delivering these objects.

144. The Bill will significantly improve the protections offered to employees who are disadvantaged because they assert their workplace rights, including their rights to freely associate and be represented. However the Bill does not enact general rights to be represented in discussions with employers, to access information, and to be consulted about decisions that affect them.

145. The general protections protected employees from misinformation, but the obligation upon employers to inform employees about their workplace are limited to the information statement provided on hiring under the NES and the requirement to disclose non confidential information during bargaining.

146. While agreements must contain a consultation clause and include a provision for employee representation in dispute settlement, these terms are not required in modern awards. As noted above, while modern awards may deal with representation, consultation and dispute settlement, the AIRC has not so far chosen to ensure all modern awards contain such clauses.

147. The Committee should recommend that the government amend the general protections to describe positive rights for employee (and corresponding obligations

on employers) to information, consultation and representation, which would supplement the proposed protections against misinformation and detriment. This approach would allow parties to supplement, but not derogate from these obligations in their enterprise agreements, and would ensure all employees (including those who have signed a high income guarantee) retain these rights. Alternatively the National Employment Standards could be amended to guarantee universal access to these entitlements. A more complex and less attractive option would be to require all awards, agreements and workplace determinations to include clauses conferring rights to representation and consultation, and to preserve the award terms where an employee accepts a high income guarantee.

Right to award conditions

148. A person covered by an award should have the right to enjoy award conditions. The Bill allows an employer to insist on an award-covered worker signing a high income guarantee as a condition of their employment. Workers who anticipate variable working hours (and so variable take-home pay under the award) may not be willing to sign a guarantee of a fixed weekly income. They should have the right to start work on award conditions and determine after a trial period whether they would prefer to sign a high income guarantee. The provision should be repealed.

Role of and responsibility for delegates

149. The Bill's emphasis on enterprise level bargaining as the driver of workplace change is not matched by any support for the development of the infrastructure to support bargaining at the enterprise level, particularly recognition of delegates to organise and represent their colleagues. While the Bill does confer certain rights upon employees to be accompanied and supported at work (for example in pre-dismissal discussions) there is no acknowledgment of the need for employers to recognise delegates, nor to support their work with resources (such as access to delegate education, paid time to perform their roles, and access to facilities). As noted above, only a small minority of modern awards will include leave to attend dispute resolution training leave. In contrast, the New Zealand legislation provides

for statutory trade union training leave, with the number of days determined by the size of the business.

150. The Bill's failure to positively recognise delegates can be contrasted with its recognition of the responsibility that organisations have for the conduct of their delegates. The Bill 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. This 'reasonable steps' defence applies to a union's responsibility for the actions of its members and should also apply to delegates. The Bill should be amended to preclude the possible occurrence of finding a delegate to be an agent of a union acting with authority (apparent or otherwise), even though the acts were expressly contrary to the directions of the unions' officials.[80]

Unlawful dismissal

151. The Bill requires claims of unlawful dismissal to be lodged within 60 days. The usual time limit for civil claims is 6 years. The proposed timeframe is too short, particularly given that many workers may not be aware of the motive for the dismissal until well after the event. The time limit should be abolished, or at least time should run from the date on which the worker became aware that they might have a valid claim.

Unfair dismissal

Application timelines

152. The Bill requires unfair dismissal applications to be lodged within 7 days, compared to 21 days under previous legislation. One week is too short a period for a dismissed worker (who may be emotionally distraught immediately following an unfair dismissal) to seek and obtain advice about whether they should make a claim. Moreover, the short deadline will be counterproductive in that it will encourage dismissed employees to lodge claims simply to preserve their legal

[80] See, e.g., *Alfred v Wakelin (No. 2)* [2008] FCA 1543 and *Stuart-Mahoney v CFMEU & Anor (No. 3)* [2008] FMCA 1435.

position while they obtain advice as to whether to proceed, and increase the number of applications for extension of time. This will increase work for FWA, and increase costs for employers. The application deadline of 21 days should be reinstated.

Qualifying periods

153. The qualifying period has traditionally been 3 months, or a lesser period of probation. The standard qualifying period of 6 months proposed in the Bill is excessive. The 12 month qualifying period for workers in small businesses is worse. It excludes 22% of small business employees from claiming unfair dismissal; 41% of all hospitality sector workers; and 64% of young people aged 20-24.[81] As such, it operates almost as harshly as the total ban on unfair dismissal claims that workers in small businesses faced under *Work Choices*. The qualifying period should be returned to 3 months, or a lesser agreed period of probation.

Fair Dismissal Code

154. The ACTU believes that all employees should be entitled to protection against unfair dismissal, regardless of the size of the business at which they work. We do not believe that the proposed Code ensures that employees in small businesses are treated fairly. For example, the proposed Code suggests that an employer may summarily dismiss an employee if they believe that the employee has engaged in a single act of theft, fraud, or violence. There is no requirement for the employer's suspicion to be correct, or for the employer to provide the employee with procedural fairness, such as the opportunity to put forward any mitigating circumstances that might be relevant. Worse still, the Code encourages employer to report their suspicions to the police. We submit that the Code should be abolished. At the very least, the Code should be redrafted so as to better reflect the jurisprudence of the courts and the AIRC. We also submit that the Code should be incorporated into the Bill or, at a minimum, that the Senate should view the final version of the Code before it approves the Bill.

[81] ABS cat 6209.0 (Feb 2008) Tables 2, 4.

Genuine redundancy

155. In assessing whether a redundancy is genuine or not, the AIRC has held that it is necessary to consider not only whether there is a valid reason for the redundancy, but also whether there is a valid reason for the selection of the particular employees made redundant.[82] The Bill does not require FWA to be satisfied that the individuals selected for redundancy are fairly chosen. There is a risk that employers will be able to unfairly select individuals for redundancy: for example, so as to escape liability for unfair dismissal. The Bill should be amended to better reflect AIRC jurisprudence, and to clearly specify that a redundancy is only genuine if the workers retrenched were fairly chosen.

Notice periods

156. The Bill exempts employers from the obligation to give notice of dismissal during the qualifying period (6 months for regular businesses and 12 months for small businesses). Not even *Work Choices* had such an exemption. The provision is unfair, inconsistent with our international obligations, and should be removed.

Other rights

Stand down

157. The Bill provides a statutory right for employers to stand workers down in certain circumstances. Workers and their employers cannot contract out of this provision. As such, this is another breach of the Government's promise to allow free bargaining. As it is inconsistent with the policy, it should be deleted. The parties should be able to contract out of any default statutory stand down provision in an enterprise agreement or common law contract.

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[82] *Pacific Coal Pty Ltd v Robert David Smith & Ors* (2004) 54 AILR 100; *Corneille v Hawker De Havilland Aerospace Pty Limited* (2005) 57 AILR 100; *Smith and Ors v Moore Paragon Australia Ltd* (2002) PR 926979.

Dispute resolution

Safety net

158. Disputes about the application of the safety net (the NES and awards) will be conciliated (but not arbitrated) by FWA. Claims of a breach of a safety net entitlement (or related contractual provision) can be pursued in court. We submit that court remedies are not an adequate substitute for the lack of arbitration by FWA. If a safety net instrument confers a discretionary power upon an employer (such as a power to set rosters), and the discretion is used *lawfully but unfairly***,** employees will have no effective remedy. We submit that at the very least, FWA should have power to arbitrate a limited range of disputes about the unfair exercise of employer discretions conferred by safety net instruments. This is perfectly consistent with the separation of powers under the *Constitution*, since FWA will be considering issues of fairness, not questions of whether the law has been breached.

Enterprise agreements

159. The dispute settlement arrangements applicable to enterprise agreements under the Bill are similar to those applying to the safety net (see above). Claims of a breach of an agreement may be pursued in court, and we welcome the increased range of options open to a court in dealing with a breach of agreement. However there is no capacity for FWA to resolve interest-based disputes arising over the application of the agreement without the parties' consent.

160. The Bill requires all enterprise agreements to include a dispute settlement clause but this clause need not provide for disputes to be resolved by arbitration. This is a major and very serious flaw in the Bill.

161. Provision within the Bill for parties to go to court where there is a breach of an agreement will not effectively address many disputes that arise under agreements. Agreements often contain clauses which confer a large degree of discretion on employers: for example, 'the employee will perform all duties as directed' or 'the employee will work all hours directed by the employer at any time'. Disputes that

arise under such provisions tend not to concern whether the employer can legally exercise powers under such clauses but whether an employer has exercised this power reasonably and fairly. Parties cannot take these types of disputes to court.

162. It is imperative that there is some way to effectively resolve such disputes that arise during the life of the agreement (which may go for up to 4 years). Typically, industrial relations jurisprudence provides that the trade off for industrial peace is access to arbitration in respect to interest based disputes during the period of the agreement. This Bill requires employees to deliver industrial peace, without imposing the countervailing obligation on employers to submit to binding arbitration.

163. Without a mechanism for resolving disputes, employees will be forced to take unprotected action to pursue legitimate grievances (e.g., to respond to *lawful but unfair* decisions by management).

164. The ACTU understands that the government's reluctance to confer powers on the FWA to arbitrate disputes arising during the life of an enterprise agreement stem in part from concerns over the constitutional implications of such arrangements. More specifically, it is contended that FWA cannot arbitrate disputes arising from agreements without the consent of both parties as this would essentially require FWA to exercise judicial-type functions. Exercise of these judicial-type functions (such as giving authoritative determinations of existing law or whether parties have breached existing law) would breach the doctrine of separation of powers.

165. It is clear that there is no constitutional impediment to FWA exercising 'non-judicial' dispute settlement functions, including:

- Making orders that are prospective not retrospective; and
- Prescribing fair rules for the future conduct of the parties.

166. Indeed, we note that FWA is already given the capacity to settle interest-based disputes that arise during bargaining, including: by making compulsory orders to

define the scope of bargaining; by making compulsory good faith bargaining orders; and, by making a workplace determination where there is industrial action causing significant harm to the parties, or a serious risk to the economy/ population. FWA can also resolve a range of interest-based disputes outside bargaining, including in the areas of transfer of business, right of entry, equal remuneration, and stand down.

167. The ACTU submits that the Bill should provide that FWA may arbitrate a limited range of disputes that arise during the life of the agreement, namely:

- disputes about the unfair exercise of the employer's lawful powers (whether those powers are derived from the agreement or otherwise); and

- disputes about matters that are *not* dealt with in the enterprise agreement.

168. This proposal is entirely consistent with the separation of powers doctrine. Moreover, it strikes a balance between, on the one hand, the policy of ensuring that collective agreements are a final settlement between the parties in relation to the matters contained in them, and, on the other hand, the policy that there ought to be some way to resolve *new* disputes that arise between the parties in relation to matters that were not contemplated at the time they made the agreement.

Transfer of business

Three month rule

169. Under the Bill, a transfer of business will only occur if an employee goes to work for the new employer within three months. We are concerned that this will encourage new employers to avoid the provisions by withholding offers of employment for 3 months or more. We submit that the 3 month period should be extended to discourage avoidance.

Accrued leave entitlements

170. The Bill allows a new employer to offer employment to a transferring employee on terms that they lose their accrued annual leave entitlements. If the employee refuses this offer, it appears they will not be entitled to a severance payment from the old employer. This is unfair. Although FWA will have the power to reverse this conclusion in individual cases, we submit that it would be better to make it clear that in every case an employee is entitled to reject an offer of employment with a new employer which does not recognise his or her accrued entitlements, and to instead accept a severance payment from the old employer.

Unfair dismissal

171. The Bill allows a new employer to require a transferring employee to re-serve a qualifying period for accessing unfair dismissal remedies (clause 384(2)(b)). This is unfair, particularly to longstanding employees. It is also unwarranted, given that the new employer can conduct its own 'due diligence' to ascertain which employees should be taken on. This provision should be removed.

Right of Entry

172. The Bill has reworded the existing provision on right of entry for discussion purposes in a way which makes it seem necessary for the union to first establish that there are one or more eligible persons at the workplace who 'wish to participate' in discussions. This was never the intention of the provision and there is the real risk that this wording will be used by unscrupulous employers to frustrate the rights of employees and trade unions. The former wording should be retained or else the new wording rectified.

Administrative Arrangements

Minimum Wage Panel

173. The Bill provides that at least three Minimum Wage Panel Members must hear minimum wage cases. However, it does not specify that the other three members of

the panel (apart from the President) are to be regular members of FWA. We think this amendment is necessary. Furthermore, the Bill does not make clear that Minimum Wage Panel Members can only perform minimum wage functions, and not other FWA functions. We also submit this amendment is necessary.

Fair Work inspectors

174. In order to accommodate the repeal of the BCII Act, we submit that a note should be added under clause 704 of the Bill to explain that the Ombudsman may issue a general direction to certain FWA inspectors, with appropriate skills and experience, to concentrate on compliance issues in particular industries.

PART 4 - TRANSITIONAL ARRANGEMENTS

175. This Bill does not address arrangements for the transition to the new industrial relations system. The Second Reading Speech for the Bill notes that a separate bill dealing with transitional and consequential matters will be introduced into the Parliament in the first half of 2009. We commend the Government on the consultative processes undertaken in developing this Bill and trust the Committee will encourage the government to adopt a similar process for the next bill.

176. The ACTU notes that the success of many key reforms in the Fair Work Bill depends upon the way in which workers are transitioned into the new system. The ACTU will seek to ensure that the transitional arrangements do not operate so as to disadvantage employees. In this submission we deal with three issues.

Termination of *Work Choices* instruments

177. We note that the government intends that WorkChoices workplace agreements will continue in force in accordance with their terms, and be terminated by consent, or, following their nominal expiry, be terminated unilaterally (AWAs) or by FWA (collective agreements). While the government has indicated that the NES will apply to employees covered by these instruments, this fails to recognise that the terms and conditions that were lost from AWAs, employer greenfields and

employee collective agreements are overwhelming found in awards, not the NES. It was the loss of penalty rates, overtime, and allowances that had the immediate impact on take home pay and living standards. Agreements made prior to May 2006 will expire in 2011, and agreements made subject to the so called fairness test will not expire until 2012, meaning that unfair instruments would continue for longer under a Rudd Government than the Howard Government.

178. We acknowledge that labour turnover will see the incidence of these instrument decline, but this is no comfort to the employees who remain on these instruments, who in the current environment have little opportunity to abandon unfair arrangements. The transitional Bill must provide a means for employees to initiate early termination of these instruments. Our preferred option for automatic termination of AWAs, and that FWA be empowered to terminate any workplace instrument that fail to meet the new better off overall test. FWA should be empowered to accept enforceable undertakings as to the arrangements that replace the agreement, to ensure employees are not disadvantaged. Applications could be brought by an employee, or their union. In addition, from 1 July 2008 the resources of the Workplace Authority could be devoted to conducting an audit of all agreements, and contacting the parties where the agreement appears to fail to meet the better off overall test.

State and federal system issues

179. The Bill does not deal with employees currently covered by State systems, on the presumption that, where a government refers powers, this will be addressed in the transitional Bill. The ACTU expects that Victoria will continue to refer its powers to the Commonwealth and that the matter will be actively considered by the other States.

180. We note that that *Forward with Fairness* promises that "*State governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees."* Forward with Fairness also promises that

"*transitional arrangements [will be] put in place so that those currently covered by State industrial relations systems will not be disadvantaged as a result of the creation of Labor's national industrial relations system*".[83]

181. The ACTU has called upon State governments to consult with unions, and to only refer powers if the best possible workplace rights are guaranteed. In the event that powers are referred, we expect the federal government to ensure that its commitments to employees in State IR systems are delivered. This includes ensuring arrangements for employees covered by State IR systems to opt into the federal system and for participation by State registered unions.

182. The Bill does not currently acknowledge the referral of power of many Victorian workers, particularly public sector employees. We urge the government to ensure that amendments are prepared promptly, following appropriate consultation, so that Victorian public sector and non-corporation private sector employees can have certainty that their award, agreements and workplace rights will be preserved, and that their participation under Commonwealth laws is on at least as favourable terms as employees of national system employers.

183. The ACTU proposes that the transitional Bill should provide an avenue for employees to opt in to the federal system where a State government does not refer the employees, despite the wishes of the workforce. This is particularly relevant for State public sector employees whose employer and regulator are one. This could be achieved by use of a patchwork of the conciliation and arbitration power and external affairs powers to confer the NES, make modern awards and enterprise agreements, and confer the Chapter 3 rights and obligations on employers and employees who are party to an interstate industrial dispute.

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[83] Kevin Rudd MP and Julia Gillard MP, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces,* April 2007, 6.

Legacy instruments

184. The transition Bill will need to outline how a complex array of legacy instruments and institutions interact with the new system as they are phased out. We reserve detailed comments for the transitional Bill, but at this stage indicate support for the notion that certain legacy instruments have a sun-setting arrangement, subject to the ability of a party that relies upon an instrument to make application to preserve it. We also support the notion of conversion of certain preserved State instruments (enterprise NAPSAs and PCSAs) to permanent federal instruments.

CONCLUSION

185. The ACTU is pleased to support the Fair Work Bill 2008, subject to the suggestions for improvement identified in this submission. The reforms in this Bill will go a long way in restoring rights for working Australians after more than a decade of unfair industrial relations laws.

186. The ACTU calls upon the members of the Committee to recommend that this Bill be passed.

187. We look forward to the Parliament implementing further legislation later this year which ensures a fair transition to the new industrial relations system.

ACRONYMS

ACTU	Australian Council of Trade Unions
AFPCS	Australian Fair Pay and Conditions Standard
AFPC	Australian Fair Pay Commission
AIRC	Australian Industrial Relations Commission
AWA	Australian Workplace Agreement
Bill	Fair Work Bill 2008 (Cth)
FWA	Fair Work Australia
ILO	International Labor Organisation
NAPSA	Notional Agreement Preserving a State Award
NES	National Employment Standards
PCSA	Preserved Collective State Agreement
Work Choices	*Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

APPENDIX 1 – SUGGESTIONS FOR TECHNICAL AMENDMENTS

<table>
<tr><th>PROVISION OF THE BILL</th><th>ACTU POSITION</th><th>COMMENTS</th></tr>
<tr><td colspan="3">CHAPTER 1 INTRODUCTION</td></tr>
<tr><td colspan="3">Part 1-1 Division 2 Object of this Act</td></tr>
<tr><td>3 Object of this Act</td><td>Supported with amendments</td><td>The ACTU welcomes the new Objects of the Act. However the Objects of the Bill should:
• refer to workplace health and safety;
• be consistent with our ILO commitments, include to promote collective bargaining;
• specifically refer to ensuring equal pay for work of equal or comparable value;
• be amended so the Object is “to give effect to Australia’s international obligations,” rather than to “take into account” Australia’s international obligations.
Amend section 3, and section 578 ‘Matters FWA must take into account in performing its functions’, to specifically refer to workplace health and safety and equal remuneration for work of equal or comparable value.</td></tr>
<tr><td colspan="3">Part 1-2 Division 2 Section 12 The dictionary</td></tr>
<tr><td>Associated entity</td><td>Supported, but note need for additional arrangements with States</td><td>In the event that State governments refer some or all non-corporate employers, then this definition will need to be amended to reflect the existence of related entities that are not corporations.</td></tr>
<tr><td>Employee organisation (cross refer registered employee association)</td><td>Technical amendment</td><td>These definitions do not work. This definition would include informal organisations, yet the definition of registered employee organisation uses this definition to define a registered organisation.</td></tr>
<tr><td>Long term casual employee</td><td>Technical amendment</td><td>The definition does not define “casual”, and the common law definition of casual is mutually exclusive to this definition of long term casual</td></tr>
</table>

Relevant employee organisation	Opposed	This definition is used to limit the organisations with whom an employer may make a greenfield agreement. Greenfield agreements should be made with registered associations only. Note that the ACTU has proposed that transitional arrangements be enacted to enable State registered unions to participate in the federal system.
Licensed ship and permit ship	Proposed additional definitions	The Dictionary should have two new definitions of 'licensed ship' and 'permit ship' as derived from the Navigation Act 1912. These are required to accommodate amendments to the geographic application of the Bill (see sub-section 33(i)(e) and 34(1)(c)).
Division 4 Other definitions		
16 Meaning of base rate of pay	Technical amendment	This definition is used in the NES to define the rate at which annual leave, personal leave, community service leave are paid the rate at which a pregnant mother who is transferred to a safe job must be paid. Because it excluded allowances and other identified amounts it is lower than the rate under which many awards traditionally paid some, or all, of these entitlements, which were often paid at the employee's ordinary rate which included over award payments. In making modern awards the AIRC has not (with some exceptions) elected to substitute the statutory base rate for the traditional definition of ordinary time earnings for the purpose of taking annual leave. This means many employees will be paid less whilst on annual leave under this Bill than previously.
Division 4 22 Meaning of service and continuous service	Supported, but note need for transitional arrangements with States	Consistent with the commitment to a unified national system of workplace regulation, the federal government should seek commitments from each of the State governments that service is recognised between State and federal system employers. The Bill and each remaining State industrial law should be amended accordingly.

Part 1-3 Application of this Act		
Division 2 Interaction with State and Territory laws	Support with amendments	The ACTU supports the exclusion of the listed areas of regulation from the application of the Act, so that these remain the preserve of state governments. We note however that there is a lack of certainty as to which aspects of the state law governing training arrangements relate to the contract of training, and which aspects relate to the contract of employment. We urge the government to develop regulations that clarify this.
Division 3 Geographical application of this Act.		
General comment	Opposed	The Bill does not provide for the application of workplace laws to all seafarers working in the Australian coasting trade. The definition of an *Australian Employer* is substantially the same as its definition in the current WorkChoices Act. This definition has the effect of excluding a foreign corporation employer of a foreign crew which is supplied to a foreign registered ship engaged in the coasting trade from the application of the Bill. In the following paragraphs we outline how the Bill should be amended to ensure the Act will apply to all ships in the exclusive economic zone or above the continental shelf which are operated or controlled or managed in Australia.
33 Extension of this Act to the exclusive economic zone and the continental shelf	Amend	The Bill should be amended to extend the application of the laws to any ship operated controlled or managed within Australia, or operating under a permit or licence. This could be achieved by amending sub-sections 33(1)(d) to read *(d) any ship, in the exclusive economic zone or in the waters above the continental shelf, that is operated or controlled or managed in Australia.* so that the Act will apply to all ships in the exclusive economic zone or above the continental shelf which are operated or controlled or managed in Australia.

		And by inserting a new subsection 33(1)(e) that reads: *(e) any licensed or permit ship.* This will ensure the Act will have application with respect to ships operating under the 'licences' and 'permits', as defined. Subsection (2) would be deleted and remaining subsections re-numbered.
34 Extension of this Act beyond the exclusive economic zone and the continental shelf	Amend	This section should be amended to delete references to Australian employers, and replace these with references to ships that are either controlled or managed in Australia or to ships operating under a permit or licence. Sub-section 34(1)(b) should be amended to read *(b) any ship, outside the outer limits of the exclusive economic zone and the continental shelf, that is operated or controlled or managed in Australia.* A new subsection 34(1)(c) should be inserted as follows. *(c) any licensed or permit ship.* Sub-section 34(2) should be deleted and subsection 34(3) should be amended to delete any reference to 'Australian employer' and 'Australian-based employee'.
35 Meanings of Australian employer and Australian-based employee	Opposed	Delete the section. The definitions have no work to do except to restrict the reach of the proposed Act
CHAPTER 2 TERMS AND CONDITIONS OF EMPLOYMENT		
Part 2-1 Core provisions for this Chapter		
44 Contravening the National Employment Standards	Supported with significant amendment	Subsection (2) prohibits orders relating to whether an employer has reasonable business grounds for refusing flexible work or extended parental leave. These provisions should be enforceable, although if FWA had power to settle disputes about the application of these provisions, then enforcement

		proceedings would be rare. Ideally power would be conferred upon FWA to settle such disputes directly. Alternatively this could be dealt with through award and agreement disputes settlement clauses. At the very least, FWA should be able to settle these disputes where both parties submit to FWA's authority.
Division 3 Interaction between the National employment standards, modern awards and enterprise agreements		
55-58	Supported except for Subdivision B	The ACTU supports the entrenchment of the NES as universally applicable employee entitlements that cannot be removed by either awards or agreements. We also support the ability of awards to supplement the NES. We do not support the statutory rule that the making of an enterprise agreement suppresses the application of an award. This rule prevents employers and employees from regulating their arrangements in part by award, and in part by agreement. While sophisticated parties will be capable of ensuring award conditions are preserved by either making a comprehensive agreement, or by incorporating the award terms into the agreement, there is a real risk less sophisticated parties will unintentionally remove award protections. This provision also discourages bargaining as parties must bargain all of their arrangements and cannot "put a toe in the water" by bargaining one or a few workplace specific issues. This is because the making of an agreement not only suppresses the operation of the award but also introduces a ban on taking industrial action.
Part 2-2 The National Employment Standards		
General comment	Supported	Subject to the comments below, the ACTU welcomes the extension and simplification of the matters included in the universal legislated safety net.
Division 4 Requests for flexible working arrangements		
65 Requests for	Supported with	Subsection 2 should be deleted. Imposing a 12

flexible working arrangements	amendments	month qualifying period upon parents before requesting flexible work undermines the effectiveness of the provision as parents returning to the workforce will be ineligible to exercise the right to request, and will restrict labour mobility for parents.
Division 5 Parental leave and related entitlements		
68 General rule for adoption related leave	Supported with amendments	Workers in NSW are entitled to adoption leave for all children to the age of 18. Amend section to ensure adoption leave for child up to age 18.
72 The period of leave – members of an employee couple who each intend to take leave	Technical amendment	The requirement that the second parent's leave commence immediately after the first parent's leave unduly restricts parents management of the care of the child during the first two years. It is hard to see how this would disadvantage employers. The second parent should be entitled to take their parental leave at any time within 24 months of the birth or placement of the child (subject to the concurrent leave provisions).
75 Extending the period of unpaid parental leave – extending to use more of available parental leave	Technical amendment	The effect of subsection (4) is that a parent who underestimates the period of leave required effectively forfeits part of their parental leave entitlement. This provision should be removed.
79 Interaction with paid leave	Opposed	The effect of subsection (2) is to deny an employee access to sick leave while on unpaid parental leave. There should be an exception to this rule where an employee is required to take parental leave pursuant to section 73 Pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth.
81 Transfer to a safe job	Additional provision	Amend so also provides for transfer to a safe job whilst breastfeeding. This is consistent with the NSW legislation.
Division 8 Community Service leave		

Community service leave	Supported. Additional provision sought	Include blood donor leave as form of community service leave for purposes of NES entitlement.
Division 11 Notice of termination and redundancy pay		
Exclusions from obligation to pay redundancy pay	Opposed	The ACTU opposes the small business exemption. In the 2004 Redundancy Test Case the AIRC determined that redundancy pay should be paid regardless of size of business, albeit at a lesser rate for small business.
Miscellaneous		
130 Restriction on taking or accruing leave of absence while receiving workers' compensation	Technical amendment	The purpose of this section appears to be to ensure employees do not, by virtue of the NES, accrue or take annual, personal or other leave. However it is not to prevent employers agreeing to supplement the NES and allow leave to accrue or be taken. The Section should be expressed to say *"This Part does not entitle an employee to take or accrue any leave …etc"*
Part 2-3 Modern awards		
Division 1-Introduction		
132 Guide to this Part	Supported with amendment	There does not appear to be any rationale for the separation of FWA's award making, award review, and wages review functions. This separation is artificial and, in practice, will likely lead to confusion or to the use of legal artifice. The Bill should be revised to combine the FWA's powers to make modern awards and set award wages, and to review modern awards including award wages. This would be relatively simple, and would retain the annual and four yearly statutory review cycles, and the involvement of Minimum Wage Panel members in the annual review of the minimum wage orders and award minimum wages.
134 The modern awards objective	Supported with amendments	The objectives should include the health, safety and welfare of employees, and should refer to improving the level of skills of the Australian workforce. The

		AIRC has been required to have regard to these matters in exercising its award-making functions, both specifically and under its obligation to have regard to the public interest. Such obligations should continue to form part of FWA's responsibilities.
139 Terms that may be included in modern awards - general	Supported with amendments	The Bill allows for the regulation of redundancy in modern awards, provided the award term is supplementing or ancillary to the NES, or under proposed section 141. However FWA has no substantive power to deal with redundancy. Redundancy should be added to the list of matters that can be regulated by awards. Redundancy is currently an allowable award matter, having been retained as an allowable award matter under the 1996 and (with limits) WorkChoices amendments to the WRA. There is no obvious policy rationale for treating redundancy differently to other matters that can be regulated by both the NES and awards.
141 Industry specific redundancy schemes	Supported with significant amendment	FWA should have the discretion to determine the application of industry specific redundancy schemes. These schemes, especially in the construction industry, respond to the project nature of the work and to the unsuitability of schemes based on continuous length of service with one employer. FWA should have discretion to develop alternative schemes or extend the scope of current arrangements where the employment arrangements are similarly unsuited to the NES redundancy arrangements.
New section - Exceptional matters	Proposed new provision	FWA should have the power to include exceptional matters in awards. Certain industries have specific conditions outside the award matters listed in the Bill that should be able to be included in modern awards, for example, the regulation of driving safety contained in the Transport Industry — Mutual Responsibility For Road Safety (State) Award (NSW). Exceptional matters were allowed under the 1996 reforms to the WR Act.
Division 3 Subdivision C Terms that must be included in	Proposed new provisions	Forward with Fairness says that "Labor will give effect to important workplace rights that are essential to a functioning democracy [including] the right to representation, information and consultation

awards		in the workplace". Our primary submission is that these be enshrined in Chapter 3. Alternatively all awards should include procedures for both consultation and representation.
143 Coverage terms	Technical amendment	Organisations should be named as parties covered by the award. Such specification will assist in giving effect to the Forward with Fairness policy on representation (see above) and will recognise the important role of organisations in improving and maintaining the safety net of awards. This could be achieved by requiring FWA to name organisations as covered by modern awards. Alternatively the award modernisation request should be amended to require the AIRC to include in modern awards unions with coverage in each modern award. Naming an organisation as covered by a modern award will not preclude other organisations that have eligible members covered by the award having representational rights in respect to the award.
144 Flexibility terms	Technical amendment	This section should include *all* of the safeguards developed by the AIRC to date through the award modernisation process. The AIRC specification in its decision of the model flexibility clause that flexibility agreements *can not* be a condition of employment should be included in this section of the Bill. Such clarification will avoid confusion and potential litigation in the future.
146 Terms about dispute settlement	Supported, but with significant amendment	The ACTU's concerns about dispute settlement are dealt with in the body of the submission. Our primary submission is that there should be a statutory right to access a disputes procedure. In the alternative, all award dispute settlement procedures should, like agreement dispute settlement procedures be required to provide for employee representation. All award dispute settlement procedures should be required to provide for the binding resolution of the dispute, on the initiative of one party to the dispute.

146 Terms about dispute settlement	Remove note	The note to this provision prohibits FWA from settling disputes about whether an employer has reasonable business grounds for refusing flexible work or extended leave. These disputes should be able to be settled by FWA, as a matter of right. At the very least FWA should be able to settle such disputes where both parties submit to FWA's authority.
146 Terms about dispute settlement	Technical amendment	If our primary submission is not accepted, then all award disputes clauses should be required to allow for the representation of employees covered by the award for the purpose of the disputes procedure. This is consistent with the requirement for dispute settlement under enterprise agreements (see s186(6)).
152 Terms about right of entry	Technical amendment	As it is currently drafted, the provision might prevent FWA including terms that deal with consultation, representation and dispute settlement. This section needs to be amended to clarify that this provision does not apply to the entry into workplaces of union officials/ representatives for the purposes of consultation, representation and dispute settlement.
154 Terms that contain State based differences	Opposed	This provision is causing significant difficulty in the making of modern awards, particularly as modern awards cover employees previously covered by NAPSAs. If it is necessary to retain the provision, the award modernisation request should be amended so that state based differences are phased out by aligning the national standard to the highest state based standard. We recognise this might involve offsets in other conditions, provided that employees do not lose take home pay or overall conditions of employment.
154 Terms that contain State based differences	Technical amendment	There is some confusion as to the extent to which the Commission may include district-based allowances and accident make-up pay in modern awards. The AIRC has included district allowances in the first set of modern awards but has provided for these allowances to cease operation after 5 years. The Bill should clarify that district-based allowances and accident make-up pay may be included within

		modern awards and are not subject to clause 154 (state based differences).
155 Terms dealing with long service	Technical amendment	This provision should be amended so as to clarify that modern awards may supplement long service leave entitlements, including through the inclusion of portable long service leave schemes.
156 4 yearly reviews of awards to be conducted	Supported with amendments	Subsection (3) limits FWA's ability to vary wages during a 4 yearly review to work value reasons. There are many other reasons to consider wages at the same time that conditions are being reviewed. For example, employers might seek to incorporate an allowance or loading into the general rate to simplify payroll arrangements. FWA should have discretion to consider the total package of wages and conditions in undertaking an award review. See also subsection 157(2)(a).
Part 2-4 Enterprise agreements		
Division 2 Employers and employees may make enterprise agreements	Supported with amendments	The ACTU supports the Bill's focus on collective agreements. However we note that the Bill removes any role for unions as parties, except in greenfields agreements. At a policy level this infringes free bargaining, and we advocate the inclusion of a means by which unions can make agreements with employers, subject of course to the subsequent democratic endorsement of the agreement's terms by the employees to be covered. At a drafting level, it leaves a vacuum that must be filled to ensure employees are represented after an agreement is made, i.e. during the FWA approval process, in variation and termination of agreements, and in other circumstances where continuity of the employee 'voice' is required.
172 Making an enterprise agreement	Supported with amendments.	The ACTU supports the extension of matters that can be the subject of agreement. We oppose the restrictions in the Bill upon the matters that can be the subject of an agreement between employers and employees. This constitutes a breach of the government's pre-election commitments. At a technical level, we consider retention of the term "matters pertaining" to the relationship

		between employers and employees to be counterproductive, because: • it has persistently proven to be difficult for parties to identify whether a matter does pertain to the relationship; and • the term imports case law that developed in the context of establishing a boundary where it was appropriate for the State to interfere in management prerogative by the exercise of arbitral power. This boundary is not relevant to the making of agreements.
172 Making an enterprise agreement	Technical amendment	The definition of "genuine new enterprise" includes a new activity of an employer. The definition should not allow an employer to avoid their existing agreement or named employer award that is capable of covering the work that the employees who will be performing work associated with the new activity by making a new greenfields agreement.
175 Relevant employee organisation to be given notice of employer's intention to make a greenfields agreement etc	Technical amendment	The definition of relevant employee organisation should be limited to registered organisations or associations.
Division 3 Bargaining and representation during bargaining		
176 – Bargaining representatives for proposed enterprise agreements that are not greenfields agreements; and 178 Appointment of	New provisions	Subsections 176 (1) (b), 176 (1) (c) and 176 (4) establish unions as the bargaining representative for its members but additionally provide a democratic process whereby union members and non union members alike can nominate other bargaining representatives. The Bill should ensure employers play no part in an employee's decision to appoint a bargaining representative, and should prevent employers "stacking the bargaining table" by encouraging the appointment of employees from the ranks of management or persons otherwise more interested in

bargaining representatives – other matters		establishing favour with the employer rather than genuinely representing the interests of employees. The Bill should prohibit employers from: • encouraging employees to nominate, or • proposing particular representatives (such as so called independent consultants which in some cases in the past have been the employers own law firm) for employees to nominate, or • organising and conducting ballots for employees to nominate particular representatives. *Section 176 (1)(e) Other than as prescribed by this Division, an employer will not become involved in or participate in the appointment of, or the process of appointment of, an employee bargaining representative.* In addition to dealing with employer influence over appointments, the Bill should require bargaining representatives to be independent. This could be included in the qualifications of bargaining representatives, but should be included in Act, not in the regulations. The ACTU endorses the ILO standard which is that a bargaining representative must be "free from control by, or improper influence from" the other bargaining representative.
180 Employees must be given a copy of a proposed enterprise agreement etc.	Supported with amendment.	While we support the reform of the pre approval requirements, 7 days is too short a period for employees to consider an agreement. This is the same time period as the current Act and there are many examples to show this is too short a period for employees and their representatives to genuinely consider the proposed agreement.
181 Employers may request employees to approve a proposed enterprise agreement	Technical amendment	The Bill provides that the employer must notify employees of the method of approval (s180(3)) and that employers must explain the agreement to employees in an appropriate manner (s180(5)) but does not require that the method of approval be either appropriate to the workplace nor that the voting arrangement be fair and democratic. The Bill should be amended to ensure the method of voting is

		appropriate, including conferring an obligation on employers to have regard to the views of bargaining representatives in determining the voting method.
183 Entitlement of employee organisation to have an enterprise agreement cover it	Technical amendment	Rights to be covered by agreements should be limited to registered organisations [or, on transitional basis, associations] that are eligible to represent the industrial interests of the employees covered by the agreement. See also section 201(2).
185 Bargaining representative must apply to FWA for approval of an enterprise agreement	Technical amendment	Under *Work Choices*, employers lodge agreements. Employers have lodged the wrong document or have failed to lodge the agreement. The Bill improves on this position by allowing any bargaining representative to lodge the agreement, but leave open the prospect of the wrong document being lodged, and also the prospect that more than one bargaining parties lodging the same agreement. The Bill should require copies to be certified, and should require a party lodging an agreement to notify the other bargaining representatives. Bargaining representatives should be required to declare that the prerequisites for making a valid agreement have been met. Bargaining representatives should not be able to frustrate the making of an agreement by withholding the paperwork. This problem arises in the Bill because it does not provide for employers to make agreements directly with unions. This creates problems throughout the Bill as it has to keep conferring rights on bargaining representatives that they would otherwise already have.
Subdivision B – Approval of enterprise agreements by FWA	Technical amendment	The Bill requires agreements to contain a provision for consultation, but does not oblige FWA to satisfy itself that the agreement contains the relevant provision. FWA should be required to satisfy itself that the parties have included all of the mandatory terms in their agreement.
Division 4 Approval of enterprise agreements		

194(c) Meaning of unlawful term	Oppose	The provision will prevent 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.
194(f) and (g) Meaning of unlawful term	Oppose	This provision appears to prevent an employer reaching agreement that a permit holder will have additional access to the workplace, e.g. by agreeing that notice of entry could be given by phone rather than in writing or that the official can have access to a particular room on a regular day each month. It is also unclear whether employers can agree to additional access rights during bargaining or at other times. These provisions were regularly contained in agreements pre *Work Choices*. Indeed the Coalition Senators who considered this matter in 2005 were critical of their own Minister's Bill, observing "Government senators are concerned that the likely effect of preventing the Commission from certifying agreements which include right of entry provisions, as currently provided for in the bill, is that employers and unions will be more inclined to enter into common law agreements. This is likely to result in the creation of a separate regime without recourse to any arbitration or conciliation process when agreements break down, and which may provoke expensive litigation."[84]
Division 5 Mandatory terms of enterprise agreements.		
202 Enterprise agreements to include a flexibility term etc	Oppose	The ACTU believes that parties should be free to determine if individual flexibility provisions are necessary in their agreement – such provisions should not be mandatory. We have reservations about how a model clause can be developed that is suitable to every workplace. That said, we support the protections provided in section 203.

[84] *Report of the Senate Employment, Workplace Relations and Education Legislation Committee into the Provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004 14 March 2005.* http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2004-07/wr_rightentry/report/index.htm *(accessed 5 January 2009).*

Division 7 Variation and termination of enterprise agreements		
	Technical amendment	The drafters of the Bill appear to regard variations and termination of agreements as less likely than agreement making to involve bargaining. The Bill should be re-written to ensure that: • registered organisation covered by an agreement are notified of, and involved in, the variation and termination of agreements; and • the provisions relating to FWA involvement in agreement-making apply, with appropriate modification, to variation and termination of agreements.
Division 8 FWA's general role in facilitating bargaining		
General comments	Support, but with caveats	It is appropriate that FWA can facilitate bargaining and oversee the processes of agreement-making and encourage parties to reach agreement. The introduction of good faith obligations are welcome, as is the ability of FWA to make bargaining related determinations where there has been a serious and persistent breach of good faith. The additional support for low paid employees who have not had the benefits of bargaining should assist many low paid workers, many of whom are women engaged on a part time or casual basis; achieve better wages and conditions of employment. We note however that hurdles to achieve a low paid authorisation are considerable. Even more onerous are the hurdles to access a special low paid determination. While we welcome the intent, we harbour significant doubt that the single interest declaration provisions will be widely utilised. We expect that, despite these provisions, significant groups of employees who do not meet the criteria as low paid will remain locked out of effective bargaining because their bargaining outcomes are effectively in the hands of a third party and their workplace is unsuited to enterprise level bargaining. This is dealt with further in the body of our submission.

228 Bargaining representatives must meet the good faith requirements	Supported with amendments	The ACTU strongly supports the introduction of good faith obligations in the Bill, and the approach to drafting the Bill, which is to give FWA broad powers and wide discretion. We support parties' ability to commence bargaining prior to the nominal expiry of their agreements
228 (1) (b)	Technical amendment	The current provision relating to disclosure of relevant information would allow employers to avoid the good faith bargaining requirement to disclose information simply by labelling all information commercial in confidence. Amend (b) so that it reads: (b) disclosing relevant information (other than genuinely commercial in confidence information) in a timely manner.
231 What a bargaining order must specify	Technical amendment	Subsection (2) provides an indicative list of the types of orders FWA can make. The Bill should include a provision or at least a note, that bargaining orders do not lie against protected industrial action, which is dealt with in Part 3-3.
Subdivision B Serious breach declarations	Supported	The ACTU supports the making of serious breach declarations, but notes that the factors that must be satisfied suggest these declarations will not be readily available.
235 (c)	Technical amendment	The requirement for the other bargaining representative to have exhausted all reasonable alternatives appears to require every bargaining representative to have participated fully in seeking to reach agreement. This could be impossible to satisfy where there are large numbers of employee bargaining representatives. Indeed the failure of a representative to exhaust other alternatives might be part of the serious breach under consideration by FWA.
Subdivision C Majority support determinations and scope orders		
238 Scope orders	Supported with amendments	It is appropriate that FWA be able to settle disputes regarding the scope of bargaining and a proposed agreement. In accord with our ILO obligations with respect to freedom of association, subsection (4) should be amended to ensure that, in making scope

		orders, FWA is obliged to have regard to the views of the employees (or their bargaining representatives) seeking the agreement.
Division 9 Low paid bargaining		
241 Objects of this Division	Supported	As noted in the body of the submission, the ACTU believes that multi employer bargaining should be available, having regard to: • ILO conventions and principles, and the freedom of the parties to determine the level at which they bargain; • The community of interest of the employees; • The community of interest of the employers; • A collective multi-employer agreement covering a site or project involving multiple employers engaged in the same undertaking (e.g. a construction site) should clearly be available without limitation; • The desirability of promoting collective bargaining, particularly where the employees or the employers lack the capacity to bargain at the single business level, or the size or number of workplaces in a particular industry or industry sector mitigates against collective bargaining at the single business level; • The needs of lower paid workers and the desirability of promoting bargaining and lifting living standards; • The history of bargaining; or • Any potential, demonstrable and long-term negative impact on the viability of a single business. This provision goes part way to meeting our stated policy.
242 Low paid authorisations	Supported with amendments	The explanatory memorandum indicates that the application must specify each employer by name. This section should be amended to allow the applicant to identify the employer by their trading name. There is no obvious rationale to preclude low paid bargaining for a greenfields agreement and this provision should be deleted, although we acknowledge the evidentiary hurdle would rarely be met in a

		greenfields situation.
243 When FWA must make a low paid authorisation	Supported with amendments	Subsection (e) is unclear and should be re-worded to better reflect the intention expressed in the explanatory memorandum.
Division 10 single interest employer authorisations		
General comment	Support with significant amendments	The ACTU supports the notion of single interest authorisations. This mechanism gives partial recognition to the fact that enterprise level bargaining is not appropriate in all cases, particularly where the employer does not have ultimate control over the outcome in bargaining. However, we are disappointed that access to multi employer bargaining is so restricted. This is dealt with further in the body of the submission.
247 and 248 Ministerial declaration that employers may bargain together for a proposed enterprise agreement and single interest employer authorisations	Opposed	Employees (and their unions) should be able to make applications to the Minister for a declaration, or to FWA for authority to bargain at a multi-employer level. Without this amendment it is likely that these provisions will be a dead letter. This is addressed further in the body of the submission.
Part 2-5 Workplace determinations		
275 Factors FWA must take into account in deciding terms of a workplace determination	Technical amendment	The Bill provides that, in making any workplace determination, FWA must have regard to the public interest. The public interest is relevant to the decision if there should be a determination – but, at least in respect of bargaining related determinations, it is not relevant and should be removed.
Part 2-6 Minimum Wages		
	Generally supported	The ACTU generally supports the government's approach to setting and adjusting of minimum wages.

		We welcome the new minimum wage objective which, by requiring the maintenance of a fair minimum wages having regard to, amongst other things, relative living standards and the needs of the low paid, compares favourably to that currently guiding the Fair Pay Commission. We also welcome the introduction of a statutory timetable for regular annual minimum wage reviews which creates greater certainty for business and employees, and we support the retention of statutory minimum wages and casual loadings for award free or agreement free employees. The ACTU also welcomes the return of minimum wage rates to awards, which should enable FWA to have regard to both minimum wages and conditions of employment when setting and adjusting the safety net. However we have some concerns about the extent to which FWA will be able to capitalise upon the return of wages to the award system. The strict division between the minimum wage function and the award making and varying function of FWA seems to artificially constrain the capacity of FWA to deal with wage-related matters during the four yearly or "exceptional circumstances" reviews of awards. Wage fixing procedures The Bill will see new procedures for minimum wage fixation. The ACTU welcomes the legislative requirement for transparency, and the continued emphasis on informality and consultation rather than adversarial proceedings. The ACTU also welcomes the introduction of specialist Minimum Wage Panel members to FWA. However we believe the Bill should be amended to ensure that these members, who are appointed because of their special expertise, are not involved in the other FWA functions. We also call for the Bill to be amended to ensure that the majority of the wage fixing Bench is made up of permanent appointees. We expect that, in according natural justice, FWA will ensure its procedures enable robust examination and an opportunity to test the evidence before FWA

		in performing its minimum wage fixing functions. However, we note that the Bill does not confer any special standing on persons who are named as bound by awards nor on the traditional participants in national wage case proceedings. We urge the government to monitor the approach adopted by FWA to ensure that employers and employees have confidence in the process.
284 The Minimum wages objective	Supported with amendment	Amend s 284(1)(2) to require FWA to take make equal pay an outcome requirement by “the need to ensure equal remuneration for work of equal or comparable value.”
Part 2-7 Equal Remuneration		
General comment	Supported	The ACTU welcomes this Part of the Bill. We support the simplification of the provisions and the broad discretion granted to FWA to make orders to ensure equal remuneration for work of equal or comparable value. The use of this language puts beyond doubt that the federal equal remuneration principles apply regardless of whether a direct comparator is available.
Part 2-8 Transfer of business		
General comment		Our general comments are provided in the body of our submission
312 Instruments that may transfer	Supported with amendments	The Bill refers to “an enterprise agreement that has been approved by FWA”. The ACTU has two concerns with this definition. First, where an agreement has been made but not approved it should be capable of transfer, provided it meets the approval requirements. Ideally FWA will approve agreements in a timely manner, but this is not the current experience. Second, we assume the transitional arrangements will deal with transfer of instruments made under the *Workplace Relations Act 1996* (Cth). The Bill does not treat modern awards as “transferable instruments” because they will generally apply to an industry or occupationally

		based class of employees. FWA's power to vary awards should expressly allow the coverage of an award to be varied to ensure it applies in a transfer of business.
312(2) Meaning of named employer award	Note need for additional arrangements with States	The foreshadowed legislation dealing with transitional instruments should ensure that same rules should apply to other named employer instruments (enterprise awards, PCSAs, enterprise NAPSAs).
314(1)(d) New non transferring employees of new employer may be covered by transferable instrument	Supported with amendments	The Bill provides that, where a modern award covers an employer, then any new, non-transferring employees who perform the transferring work will be employed under the modern award even where the transferring employees are employed under the terms of a transferring enterprise agreement. It would be preferable if, where the new employer does not have an existing enterprise agreement, as a default the transferring employees' agreement should apply to all relevant employees in the new employer's business. The new employer can apply to FWA to modify this rule.
315 Organisations covered by transferable instrument	Supported with amendments	The Bill provides that a transferring instrument 'covers' the relevant organisations. The provisions need to go further, and also provide that references to the old employer in the instrument are references to the new employer. . However, since the terms of the agreement will not confer rights or obligations on the new employer, some 'deeming' is needed to make the transfer work. The Bill should provide, expressly that, in a transfer: (a) references in the instrument to the old employer should be deemed to be a reference to the new employer; and (b) the instrument is to be construed as applying, so far as possible, to the new employer, unless it would disadvantage the employees to do so. E.g. if the agreement says 'you will get severance pay according to company policy' then the reference to 'company policy' should be construed as a reference to the new company's policy, unless the

		old company's policy was more advantageous (in which case the old employer's policy ought to be regarded as incorporated by reference).
319 Orders relation to instruments covering new employer and non-transferring employees	Technical amendment	FWA has the power to make an order that a transferring instrument will apply to a new employer, but a modern award is not a transferring instrument. FWA's general power to vary the coverage of modern awards is not adequate to deal with circumstances where, in a transfer of business, there is a need to clarify whether the new employer is covered by a particular modern award. Subsection 319(c) should be amended to enable FWA to make an order that a modern award that covers the old employer will cover the new employer.
Additional comments	Additional provisions	The explanatory memorandum notes [at p. 196] that an attempt to change an employee's employer without their consent may be ineffective. Employees should not be transferred without their explicit informed consent. At the very least, the employees should be given full details of the transfer. We propose that the Bill be amended to ensure that employers are required to give employees a notice informing them of the date of the proposed transfer, the identity of the new employer, details of their new role (if changed), and advising them of their right not to transfer.
	Additional provision	Since there is no transfer unless employees go across to the new employer, there is a statutory incentive not to take employees from the old employer. Once employees are made redundant by the old employer, they no longer "have the benefit of an industrial instrument" and so lose their protections against being refused re-employment. This could be remedied by replacing proposed s 342 (5) with a general protection that that a new employer cannot refuse to re-employ employees from the old employer just because they were covered by an enterprise agreement.

	Additional provision	There should be a general anti-avoidance rule. There is a risk that employers will restructure their businesses solely to avoid these provisions (e.g. by creating a new subsidiary and waiting 4 months to transfer the workers over).
	Note need for additional arrangements with States	The Bill only applies to transfers between national system employers. In order to ensure there are not artificial gaps in this protection, the federal government should negotiate with the States to ensure transfers of business between national and state system employers are included within the scheme
Part 2-9 Other terms and conditions		
Division 3 Guarantee of annual earnings		
Division 3	Opposed	The ACTU opposes this Division of the Bill. The comments below seek to ameliorate the provisions.
328(3) Employer obligations in relation to guarantee of annual earnings	Opposed	As noted in the body of our submission, the Bill must, as a minimum, preserve the rights of so-called "high income employees" to representation, consultation about change at work, and access to dispute settling clauses. As noted above, these should be enshrined in the legislation rather than in awards and agreements. If our primary submission is not accepted, this provisions should be amended so that an employer is obliged to give the employee written notice that the terms of the modern award (with the exception of the terms relating to representation, consultation and dispute settlement) will not apply during the period where there annual rate of the guarantee exceeds the high income threshold.
328 Employer obligations in relation to guarantee of annual earnings	Technical amendment	As drafted an employee can enforce the guarantee but can't enforce their actual entitlements. The Bill should be amended so that the employee's contractual entitlements are enforceable in same way as a contractual matter relating to the NES is enforceable

330(2) guarantee of annual earnings and annual rate of guarantee	Opposed	The application of the guarantee on a pro rata basis is problematic. Some employees (e.g. actors, voice-over artists) are engaged for short periods at relatively high income, partly based upon an expectation that they will not be continuously employed for 12 months.
333 High income threshold	Technical amendment	Amendment required to ensure high income threshold cannot be reduced by regulation. The Bill should be expressed to exclude employees earning more than $100,000 (indexed at August 2007) or such higher amount worked out using that formula as it applies from time to time.
CHAPTER 3 RIGHTS, RESPONSIBILITIES OF EMPLOYEES, EMPLOYERS, ORGANISATIONS ETC.		
General comment	Additional provisions	The ACTU supports the enactment of a chapter of the Bill dealing with rights and responsibilities. However the Bill only partially enshrines the right of employees to be represented (and the corresponding obligation upon employers to deal with an employee's representative) and the right of employees to be consulted by their employer about decisions that affect them at work. The Bill gives partial support to these rights in agreement content, and the right to be accompanied in unfair dismissal, but does not adequately enshrine these in all workplaces. While these rights could be included in the NES, they are more properly considered workers' rights not employment standards, and this Chapter is the appropriate location for new provisions.
Part 3-1 General protections		
General comment	Supported	The ACTU supports the simplification and extension of the general protections in the Bill. We strongly support the extended notion of workplace rights, the transfer of the anti discrimination provisions from awards and agreements to the body of the legislation. We support the retention of the protection against sham contracting as a partial protection against unfair contracts. We also support the removal of the sole or dominant purpose test

		from the legislation.
Division 2 Application of this Part	Supported but note improvements possible through cooperation with the States	The application provisions are complex, and we urge the federal government to negotiate with the states to ensure these protections are universally applicable. Alternatively, the government should examine the extent to which these provisions could be enacted relying upon other powers, including external affairs.
Division 3 Workplace Rights		
341Meaning of workplace rights	Technical amendment	The unlawful termination provisions refer to trade union membership or activity (see s 772). Employees should also be protected from adverse action on this ground. Include words from section 772 (1) (b) here ("trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours.")
342 Meaning of adverse action	Supported with amendment	The ACTU strongly supports the extended definition of adverse action. However we are concerned that Items 5 and (6) of the Table in Subsection 342 (1) are cast too broadly. Under the provisions as drafted, an employee would be exposed to a civil penalty if he or she quit because the employer was covered by a particular award or because the employer initiated proceedings under a grievance procedure against them. Though unlikely to ever be used, it is an objectionable provision of the Bill.
342(4) Meaning of adverse action	Technical amendment	Change reference from 'standing down' to 'applying a protected lock out'. Otherwise the words suggest that standing down employee on strike (as opposed to locking them out) is not an adverse action. Employers should not be able to stand employees down "because" they are on strike.
342(5) Meaning of adverse action	Opposed	This provision gives employers the green light to refuse to employ employees in a transfer of business situation.

343 Coercion	Technical amendment.	'Coercion' is a very high bar. It would be preferable for the Bill to prohibit the use of undue pressure or undue influence in respect of all workplace rights, not just those specified in section 344.
Division 4 Industrial activities		
347 Meaning of industrial activity	Supported subject to amendment	Remove (g) strike pay. There is already a civil remedy elsewhere in the bill and it should not be subject to two different penalties.
Division 5 Other protections		
351 Discrimination	Supported	The ACTU strongly endorses the inclusion of anti-discrimination provisions in the Bill.
353 Bargaining services fees	Opposed	Bargaining services fees are consistent with freedom of association, and should not be outlawed. Indeed in both New Zealand and Canada bargaining fees are facilitated by legislation.
Part 3-2 Unfair Dismissal		
383 Meaning of Minimum employment period	Opposed	The ACTU opposes the government policy to impose a longer qualifying period on employees of small businesses.
384 Period of employment	Supported with amendment	The employees' period of service with the old employer should count as service with a new employer in a transfer of business without qualification.
385 What is unfair dismissal	Supported with amendment	"Genuine redundancy" should not act as a jurisdictional bar to claims – this is akin to the current law in relation to "operational reasons" (in s 649 of the Act). Redundancy as a jurisdictional bar has led to unfairness in the operation of the existing regime. Instead, redundancy should be a defence to an allegation that a dismissal is unfair.
386 Meaning of dismissed	Technical amendments	In dealing with constructive dismissal the Bill uses the term "forced" to resign. This is much narrower test for the purposes of constructive dismissal than the common law and should be replaced with a

		different term. It seems that an employee is only ‘dismissed’ after any notice period ends. This should not prevent FWA from dealing with applications prior to the dismissal taking effect. This would promote reinstatement as a remedy.
389 Meaning of genuine redundancy	Technical amendment	Many redundancy cases focus not on whether the work is no longer needed but whether the right person has been chosen. The Bill should include a third ground upon which a redundancy is not genuine, being whether the employee was fairly chosen for redundancy.
Division 4 Remedies for unfair dismissal		
390 When FWA may order remedy for unfair dismissal	Technical amendment	It appears that the dismissed employee must be the applicant. A trade union should be able to make the application on behalf of a dismissed member.
392 Remedy-Compensation (3)	Opposed	It is unfair that misconduct reduces the payment. Misconduct will be considered by FWA when deciding whether the dismissal was harsh. This provision should be deleted, or alternatively drafted to discourage misconduct by employers so that FWA must increase the payment where the employer’s misconduct/poor management has contributed to the early termination of the contract.
392 Remedy-Compensation (4)	Opposed	See above
392 Remedy-Compensation (4)	Technical amendment	The compensation cap does not work fairly where employees are employed on a performance pay system, because of the variable pay (e.g. in retail, if last six months did not include Christmas). FWA should have discretion to set a fair compensation cap in cases where employees receive performance pay or where there is variable pay.
Division 5 Procedural matters		
394 Application	Opposed	Seven days to lodge an application is a very short

for unfair dismissal remedy		period. It is likely that the shorter period will be counter-productive; resulting in more claims lodged "just in case" there is a claim and more extension of time applications. The provision is particularly harsh as employers are not required to give written notice of dismissal. This provision can only justly work if employee receives written notice of dismissal: e.g. a casual employee could simply not be rostered and so not learn of their dismissal until sometime afterwards.
400 Appeal Rights	Opposed	It will be almost impossible for an appellant to show there is a public interest in an appeal. Subsection (1) should be deleted.
Part 3-3 Industrial action		
409 Employee claim action		The current s 420(1) of the WR Act contains a note which refers to *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited,* PR946290. This case drew a distinction between an employee who does not attend for work in support of a collective demand that the employer agree to alteration of the conditions of employment as being clearly engaged in industrial action and an employee who does not attend for work on account of illness. We suggest an abbreviated, plain English form of this note be added to the definition.
412 Pattern bargaining	Opposed	The ACTU opposes the prohibition on so called pattern bargaining, which fails to recognise the common interests workers share across an industry *Forward with Fairness* envisaged a prohibition in industrial action in pursuit of an industry wide claim, not in pursuit of similar claims in more than one workplace. This is dealt with further in the body of the submission. If there is to be a legislative prohibition against pattern bargaining it should be within the context of the good faith bargaining regime. The Bill already provides a range of sanctions for bad faith bargaining, including loss of protection for industrial action (which exposes the persons taking or organising the action to penalties and damages).

		There is no need to elevate pattern bargaining above all other forms of bad faith bargaining.
	Technical amendments	The definition of pattern bargaining should be amended to clarify that where a party seeks some terms in common and some unique terms this is not pattern bargaining. It is unclear why the current exemption from pattern bargaining for claims relating to national standards has been removed: '(3) The course of conduct is not pattern bargaining to the extent that the bargaining party is seeking terms or conditions of employment determined by FWA in a decision establishing national standards.' The reverse in onus in subsection (4) should be removed. In that way a person alleging pattern bargaining would bear the onus of showing that the party is not genuinely trying to reach agreement.
413 Common requirements that apply for industrial action to be protected	Technical amendment	The requirement that persons have complied with orders in order for industrial action to be protected should exclude technical breaches of good faith orders.
414 Notice requirements for industrial action	Technical amendment	Amend to require 72 hours notice. Existing case law has determined that 'three working days' means three clear days, not simply a period of 72 hours after the notice has been given (*CFMEU v Curragh Qld Ltd* [1998] FCA 1231). The practical effect of this decision is that the 'three days' written notice required of a union commences at 12.01am on the day following the notice being served. *Work Choices* inserted a definition of working day that has been retained in this Bill, which excludes weekends and public holidays. The combined effect of these provisions means in industries that operate 24/7 the notice period is up to 6 working days, which undermines the intent of the legislation.
417 Industrial action must not be organised or	Opposed	We oppose this provision on two grounds. First, employees must have a means to resolve grievances. Typically, industrial relations jurisprudence provides

engaged in before nominal expiry date of enterprise agreement		that the trade off for industrial peace is access to arbitration in respect to interest based disputes during the period of the agreement. This Bill requires employees to deliver industrial peace, without imposing the countervailing obligation on employers to submit to binding arbitration. Second, the Bill elevates this industrial action to unlawful action by imposing a civil remedy. This introduces a notion of having breached public obligations rather than private obligations. *Forward with Fairness* does not envisage unlawful industrial action, only unprotected action. If the prohibition is to remain it should be treated in the same manner as other unprotected action.
420 Interim orders etc	Opposed	FWA should have some discretion in deciding whether to issue an interim order to suspend the industrial action. This prevents the issuance of interim orders in all cases, without any consideration of the merits of the application. This subclause should read: If FWA is unable to determine the application within that period, FWA must, within that period, make an interim order suspending the protected industrial action to which the application relates until the application is determined, *unless it is against the public interest to do so.*
422 Injunction against industrial action if pattern bargaining is being engaged in	Opposed	If there is a prohibition on pattern bargaining it should be subject to the same rules as other forms of non-genuine bargaining.
423 FWA may suspend or terminate industrial action – significant economic harm etc	Supported with amendments	The ACTU supports last resort arbitration where there is no reasonable prospect of an agreement. However FWA should be required to also have regard to the rights of the parties to engage in protected industrial action and that the taking of such action is not of itself contrary to bargaining in good faith or grounds to terminate bargaining and make a workplace determination. The Minister should not be able to make an

		application.
424 FWA may suspend or terminate industrial action – endangering life etc	Supported with amendments	Subsection (1)(c) should be amended to read ‘to endanger the life, the personal safety, or significantly endanger the welfare of the population or part of it.’ Without this amendment, public sector workers are effectively denied the option of taking protected action.
425 FWA must suspend protected action – cooling off	Opposed	FWA should have some discretion here. Our concern is that effective protected industrial action will be suspended on application every time someone bothers to ask. If not removed altogether, this provision should be amended so that FWA *may* suspend industrial action where it considers it appropriate, not that it *must* do so. If the provision is retained there should be a maximum period of suspension, of no more than 2 days.
426 FWA must suspend protected action – significant harm to a third party	Opposed	The ACTU believes this is unnecessary. There is already the capacity for FWA to suspend or terminate protected industrial action in cases where the action is endangering life etc and for the Minister to make a declaration terminating the protected industrial action. If the provision is retained, the test of harm should be at least as high as that contained in s 423.
Division 7	Opposed	The ACTU does not believe it is necessary for the Minister to have the capacity to make a declaration terminating protected industrial action. *Forward with Fairness* and the Australian Government’s Fact Sheet 10 “Clear, Tough Rules for Industrial Action’, both note that FWA will be able to order parties to stop taking industrial action when the action is causing significant harm to the Australian economy. Neither says that the Minister will also be able to terminate protected industrial action.
Division 8 Protected action ballots		
General comments		The ACTU strongly opposes the provision in Division 8 – Protected Action Ballots that provides the capacity for employers to intervene in the ballot

		process. The authorisation of protected industrial action is a matter for the employees and their representatives. The Bill already provides for an employer to stop threatened or pending industrial action if unions are not bargaining in good faith by making an application for a stop order. These provisions contradict the policy objective, articulated in *Forward with Fairness* – that ballots will not be used to frustrate or delay the taking of protected action, and that "The ballot process will be fair and simple, and will be supervised by Fair Work Australia." The Bill combines the previous *Work Choices* provisions that provided for union initiated ballots and employee initiated ballots. Under those provisions union members participating in action that was endorsed by a union initiated ballot were protected. The Bill should be amended to make clear that workers who join a union after the ballot, but before action is taken, can obtain the protection afforded by the ballot.
441 Application to be determined within 2 days after it is made	Supported	While we support this provision, we expect it will rarely be complied with because employers will raise technical objections to the making of the order. There are a number of examples demonstrating that employers seek to frustrate protected action ballots, with the effect of dragging the process on for extended periods of time. In a recent case, for example, IBM challenged the validity of an intended secret ballot by arguing that the ASU's union rules did not cover the relevant employees. The Bill should allow FWA to make interim orders so that the ballot can commence. This is consistent with the approach taken to stop orders in section 420.
459 Circumstances in which industrial action is authorised by a secret ballot	Opposed	As noted in the body of our submission, the quorum requirement is anti democratic and should be removed. The test of majority supports should be identical to the test imposed for approval of an agreement – i.e. the majority of those who cast a vote. Once action is authorised, the authority should remain on foot until an agreement is made, or alternatively, (consistent with single interest

		employer authorisations), for a period of up to 12 months.
Division 9 Payments for periods of industrial action		
Division 9	Opposed	The ACTU objects to this Division. We also query whether the 4 hour rule raises constitutional issues in relation to imposition of a penalty (only available from a court) and whether it constitutes acquisition of property on unjust terms.
Subdivisions A and B	Technical amendment	An employer should have the discretion to pay for part performance under both Subdivision A (protected industrial action) and Subdivision B (industrial action that is not protected industrial action).
470 Payments not to be made relating to certain periods of industrial action		The provisions relating to overtime are confusing and should be re-written. The Bill provides that, for overtime bans, an employer is not required to deduct pay unless the overtime ban is in breach of an award/agreement or common law overtime obligation, and the employee actually refuses to work overtime. While this is welcome, it appears to remain the case that an employee who works a full day but refuses to perform overtime is engaged in industrial action for the full day, and therefore will lose pay. Subparagraph 470(4)(b) is incomprehensible, but appears to mean that, only where the employee is not required by an award/agreement/or contract to work overtime, the period of deduction is limited to the period of the overtime ban Subsection (4) requires an employer to deduct an entire day's pay in response to an overtime ban.
		Deductions made by employers under Subdivision A or B should be calculated according to base rates of pay.
		It is impossible for an employee to know the intention of the employer. There should not be a mental element here.

Part 3-4 Right of entry		
480 Object of this Part	Supported	The ACTU welcomes the inclusion within the objects of 'the right of employees to receive, at work, information and representation from officials of organisations'.
481 Entry to investigate suspected contravention	Technical amendment	It may be useful for permit holders to have the capacity to enter premises and exercise a right of entry for the purposes of investigating a suspected contravention of other industrial laws, such as in areas in which the states have referred powers or non-discrimination laws. This could be achieved by adding 'any other industrial law described in the regulations' to s 481(1). The permit holder should be able to enter and inspect premises related to the suspected contravention, not just premises where the member performs work.
482 Rights that may be exercised while on premises	Technical amendment	482) (1)(b) should be amended so that a permit holder may interview any person about the suspected contravention (i) who agrees to be interviewed; *or* (ii) whose industrial interests the permit holder's organisation is entitled to represent. As it is currently drafted, a permit holder could breach this provision by speaking to an HR manager regarding access to records (as HR manager not a member).
483 Later access to record or document	Technical amendment	A permit holder's access to records or documents should not be contingent upon the permit holder entering the premises first. It is inefficient and unnecessary to require a permit holder to exercise a right of entry and access the premises where an employer could simply email the requested documents. It may also be very difficult for a permit holder to physically enter the premises where members are working at remote locations.
484 Entry to hold discussions	Supported	The ACTU welcomes the decoupling of award respondency and right of entry for the purposes of discussion purposes. This is simpler, more logical and will assist in the award modernisation process.
484 Entry to	Technical	484(c) – the requirement that the person 'wishes to

hold discussions	amendment	participate in those discussions' - should be removed. This subsection is unnecessary and there is the real risk that this wording will be used by unscrupulous employers to frustrate the rights of employees and trade unions.
485 Conscientious objection certificates	Opposed	The ACTU does not believe that the Bill should provide for conscientious objection certificates. These certificates are unwarranted and unnecessary.
487 Giving entry notice or exemption certificate	Technical amendment	The ACTU has concerns with the notion of an 'affected employer' for the purposes of giving entry notice (s 487) and producing authority documents (s 489). On large construction sites, there may a number of employers on and off the site at the time who are 'affected employers' under the definition provided in clause 482(2) (e.g. in the case of a suspected breach of OHS). It may be impossible, and certainly very onerous, for a permit holder to identify and notify all these employers. A permit holder who inadvertently does not notify all employers, including sub-contractors etc., may be in breach of clause 487. Clause 487 should be amended so as to require the permit holder to give the occupier of the premises an entry notice. The requirement that the permit holder also give notice to affected employers should be removed.
492(2) Conduct of interviews in particular room etc.	Technical amendment	This should be amended so as to read 'the request is made *with the effect of …*' It is not practicable or desirable to require a permit holder or FWA to establish the subjective intention of the employer.
493 Residential premises	Technical amendment	The ACTU welcomes the amendment to this provision. Many employees work in residences that are not the residence of the employer (e.g. nursing homes). While the provision is improved, it would still prevent entry to inspect employee accommodation. The ACTU proposes amending this provision so that permit holders may enter any part of premises owned or occupied by the employer except (in the case of residential premises) where the occupier of the part of the premises does not consent to entry.

Division 4 Prohibitions	Suggested new provision	This Division deals with prohibited conduct. The ACTU also proposes employers have a general obligation to facilitate the entry of a permit holder. This would, for example, require an employer in a remote site to allow the official access to company transport. The permit holder would bear any costs.
517 Return of entry permits to FWA	Technical amendment	The ACTU understands the policy position that permits should be returned when the either (a) or (b) occurs but where a permit has expired, it is clearly not valid. We suggest (c) is removed so that a person who inadvertently fails to return an expired entry permit within 7 days is not subject to civil penalties.
Part 3-5 Stand down		
524(1)(a) Employer may stand down employees in certain circumstances	Opposed	This provision appears to permit an employer to lock out employees who are taking protected industrial action without having to follow the rules for employer response action in Part 3-3 of the Bill. This provision should be amended so as to clarify that an employer cannot stand down employees taking protected industrial action.
524(2) Employer may stand down employees in certain circumstances	Technical amendment	We see no reason for having a legislative note to the effect that an enterprise agreement or contract of employment may confer stand down clauses more favourable to employers than in the Bill, without equally noting that such agreements may contain stand down provisions that operate more favourably for employees.
CHAPTER 4 – COMPLIANCE AND ENFORCEMENT		
Part 4-1 Civil remedies		
544 Time limit on applications	Technical amendment	The ACTU believes this provision should be amended so as to provide that a person may apply for an order under this Division in relation to a contravention of one of the following only if the application is made within 6 years after *the employee reasonably becomes aware of the contravention.* At a minimum, FWA should have the discretion to extend the 6 year time limit, so as to avoid harsh or unjust operation of the provision in some circumstances.

548 Plaintiffs may choose small claims procedure	Technical amendment	As currently drafted, this provision would appear to preclude unions from representing a member without a regulation to this effect. This provision should be amended so as to clarify that an employee has the right to be represented in court by a union.
Part 4-2 Jurisdiction and powers of courts		
570 Costs only if proceedings instituted vexatiously etc.	Supported	The ACTU supports the provision of the Bill providing that a party may be ordered by the court to pay costs incurred by another party where the court is satisfied that the party unreasonably refused to participate in a matter before FWA.
572 Regulations dealing with matters relating to court proceedings	Technical amendment	The ACTU is concerned to ensure that parties are not precluded from accessing justice because of the costs associated with pursuing a claim in court. We believe it is critical that the Government ensure that there are no, or minimal, application fees. This is necessary if the Bill is to achieve its objective of '… providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms' (s 3(e)).
CHAPTER 5 - ADMINISTRATION		
Part 5-1 Fair Work Australia		
576 Functions of FWA	Technical amendment	We believe that the Bill should provide for FWA to have the capacity to hold inquiries as to the adequacy of the NES and to make recommendations to Parliament as to desirable NES amendments.
593 Hearings	Technical amendment	This appears to read as a presumption against a hearing. We suggest it is amended to read 'FWA may hold a hearing in any proceeding, and must hold a hearing if required by a provision of this Act'.
601 Writing and publication requirements for FWA's decisions	Support, with suggestion for technical amendment	The ACTU welcomes the requirement that FWA publish its decisions and enterprise agreements that have been approved by FWA. This contrasts to the complete lack of transparency and availability of information pertaining to agreements under Work Choices. However we do not see why it is necessary to provide that FWA must publish its decisions on its website 'or by any other means that FWA considers appropriate'. In light of the difficulties

		encountered in accessing information relating to agreements under Work Choices, we think it is in the public interest to ensure beyond doubt that such information is publicly available on the FWA website. We suggest the section be amended to require FWA to publish its decisions on its website *and by any other means that FWA considers appropriate.* FWA should also be required to ensure agreements are provided in an electronic format which facilitates easy searching at the individual agreement and multi-agreement levels, rather than the current practice of scanning a paper document which cannot be searched electronically.
611 Costs	Technical amendment	The ACTU is concerned to ensure that a person does not incur costs as a result of seeking assistance from FWA. Costs should remain limited to unfair dismissal matters.
General comment		The ACTU believes that Part 5-1 should include a provision circumscribing the role of minimum wage panel members so as to ensure that they are not capable of hearing non-minimum wage-related matters. This is necessary given that a minimum wage panel member is not required to have qualifications or experience in workplace relations.
672 Persons assisting FWA	Technical amendment	This provision should be amended so as to clarify that persons who are not FWA staff who assist the FWA must only provide that assistance when acting under the control of the FWA. Such persons must not act under control or influence of anyone other than FWA.
Part 5-2 Office of the Fair Work Ombudsman		
General comment		The ACTU believes that it is important for the Explanatory Memorandum to clarify that the Fair Work Inspectorate is required to conduct itself in a manner consistent with Commonwealth as Model Litigant rules etc. Fair Work Inspectors should be able to issue: enforceable undertakings; provisional improvement notices; and infringement notices.

CHAPTER 6 - MISCELLANEOUS		
Part 6-2 Dealing with disputes		
739(2) Disputes dealt with by FWA	Opposed	The ACTU opposes the provision preventing FWA from dealing with a dispute to the extent that it is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) of the Bill.

APPENDIX 2 – UNFAIR DISMISSAL STATISTICS

- There are about 8.3 million 'true' employees in Australia.

- Each year, about 200,000 employees are dismissed at the initiative of their employer (ABS cat 6209.0, data for Feb 07–08).[85] This represents 2.4% of employees.

- A conservative estimate is that at least half of these dismissals are for redundancy.[86] Therefore the true 'dismissal' (for cause) rate is about 1.2% per annum.

- Of the 100,000 employees dismissed for cause, we estimate that 85% of these are in the federal IR system, or about 85,000 employees.

- To calculate the number of dismissals that are potentially within the jurisdiction of the AIRC:

  - Start with the 85,000 dismissals by federal system employers each year;

  - Exclude dismissals of employees working in small and medium sized businesses (perhaps 66% of employees, or 56,100 dismissals);[87]

  - Of the remaining 28,900 dismissals – exclude dismissals of employees with less than 6 months service (27% of employees, or a further 7,800 dismissals);[88]

  - Of the remaining 21,100 dismissals – exclude dismissals of short term casual employees (short term casuals represent 11% of all employees – in total, about 2,300 dismissals);

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[85] This excludes terminations of the contracts of temporary and seasonal workers (a further 317,000 terminations), persons dismissed because of ill health or injury (a further 91,000 terminations), and persons resigning because of unsatisfactory work conditions (344,000 employees who are potentially 'constructively dismissed').

[86] According to the ABS, over 1999–2001, on average 156,000 employees were made redundant each year, giving the following reasons: 'Not enough work/job cuts', 'Business closed', 'Change of management', 'Other business problems' or 'Nature of job changed/new technology'.

[87] J Mangan, *Shifting Industrial Relations Jurisdiction from the Queensland Government to the Commonwealth Government: Some Potential Implications,* Queensland Department of Industrial Relations, Brisbane, 2005, 41.

[88] ABS Cat. No. 6209.0.

- Of the remaining 18,800 dismissals – exclude dismissals of employees earning over $2,000 per week (4% of employees, or 750 dismissals);[89]

- This leaves just around 18,000 eligible dismissals (those that can potentially be scrutinised by the AIRC) each year.

Applications

- In 2007-08, 6,067 termination of employment claims were lodged with the AIRC.

- Many of these claims are technically outside the AIRC's jurisdiction. For example, of the 600 claims resolved by decision of the AIRC, 89% were dismissed for being out of jurisdiction (64% dismissed for lack of jurisdiction, 23% were dismissed for being out of time, and 2% were dismissed for being vexatious). Applying this 89% out-of-jurisdiction rate to the lodgement figure, it can be estimated that only about 670 claims each year are properly within the jurisdiction of the AIRC. This represents only **3.7%** of the 18,000 employees *eligible* to bring unfair dismissals applications in the federal system.

- Of those estimated 670 claims validly within jurisdiction, we know that only 69 proceeded to a substantive hearing. Presumably, the other 90% were settled or withdrawn.

- Of the 69 substantive valid claims heard and determined by the AIRC, 34 went in favour of the employer (49%) and 35 went in favour of the employee (51%), with reinstatement ordered in 18 cases and compensation awarded in 17 instances.

- Of the 17 cases in which compensation was ordered, the average payment was 15.8 weeks' pay.[90] At average weekly earnings, this equates to about $18,000 gross.[91]

[89] ABS Cat. No. 6306.0, 17.
[90] Data derived from the 10 published dismissal decisions in 2007–08. Figures are net of deductions in respect of the statutory cap on compensation, payments in lieu of notice received by the employee, wages earned in a new job, discounts for 'contingencies', and discounts for employee contribution to their dismissal.
[91] ABS cat 6302.0 (August 2008).