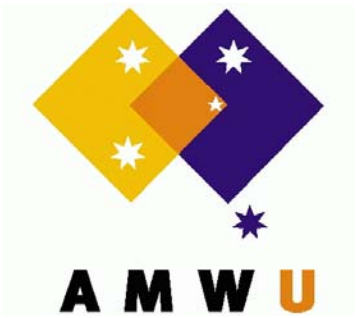
AUSTRALIAN MANUFACTURING WORKERS' UNION



Submission to The Inquiry into the Fair Work Bill 2008

Senate Education, Employment and Workplace Relations Committee

January 2009

SUBMISSIONS OF THE AUSTRALIAN MANUFACTURING WORKERS' UNION CONCERNING THE FAIR WORK BILL 2008

1. The Australian Manufacturing Workers' Union (the AMWU) welcomes the opportunity to make a submission to the Senate Education, Employment and Workplace Relations Committee *The Fair Work Bill 2008* (the Bill).

2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU represents approximately 120,000 members working across major sectors of the Australian economy. AMWU members are primarily based in the manufacturing division in the sub-divisions of metal manufacturing, printing and graphic arts, food and vehicle building, repair and service. The AMWU also has significant membership in the mining, building and construction, aircraft and airline operations, laboratory, technical, supervisory and public sector employment. Our members work in unskilled, semi skilled, trade and professional occupations within these industries and source their workplace entitlements and responsibilities from a variety of industrial instruments including award, over award certified agreements and common law arrangements.

3. The AMWU is a party to approximately 400 federal awards and 2000 industrial agreements. Each year, the AMWU maintains the wages and allowances of over 90 federal awards and negotiates an average of 500 industrial agreements. An overwhelming majority of these industrial agreements have a life of three years. In the first half of 2009, approximately 1000 of the AMWU industrial agreements will be due for renegotiation.

4. The Fair Work Bill 2008 represents one of the core policy reasons as to why the Rudd Government was elected; the dismantling of the divisive and nefarious Work Choices. It is Work Choices which has allowed employers such as Cochlear in New South Wales and Ron Gee, The Examiner and Harris Print in Tasmania, to refuse the recognition of the AMWU as the

legitimate representative of their members, or to be a party to agreements. It is Work Choices which allowed them to refuse to bargain with the AMWU and ultimately to avoid entering into union negotiated collective agreements with their employees despite a clear majority of those employees wanting to enter into union collective agreements. The provision in the Fair Work Bill[1] for bargaining orders to be made should mean that many of those situations referred to above do not rise again. The Bill allows for such situations to be fairly and independently remedied with all but the most truculent employers.

5. Whilst the AMWU broadly welcomes the Bill and acknowledges that once enacted, the Bill will undoubtedly mean the end of many of the dire and draconian aspects of Work Choices and the restoration of many workers' rights we believe that a number of further steps should be taken in the legislation to restore fairness, balance and workers' rights. It is these steps which form the substance of these submissions. If the Bill is passed into legislation in its current form, the AMWU maintains that there will still be much work left to do in realising the goals of industrial equity that was central to the Your Rights at Work Campaign, and bringing Australia into accord in respect of industrial relations with many of our OECD partners and to ensure full conformity with Australia's international obligations under ILO standards.

6. The AMWU supports and endorses the ACTU Executive Resolution of 9 December[2] regarding the Bill and the submissions of the ACTU. In addition to the submissions of the ACTU, the AMWU would like to make a number of submissions and comments on the Bill on behalf of its 120,000 members and Australian workers generally.

Bargaining

7. One of the central planks of the Rudd Government's industrial relations policy has been that of collective bargaining and agreement making. The AMWU acknowledges that the proposed legislation does much to restore

[1] Division 8 of Part 2.4 Enterprise Agreements
[2] See Attachment 'A' at the end of this document.

workers' basic protections generally, and acknowledges that there is an improvement in the proposed legislation in regard to now having the right to negotiate matters pertaining to employee associations.[3] However too many vestiges of Work Choices remain. The proposed provisions relating to bargaining are too limiting and too interfering. The AMWU's position is that for the purposes of being able to effectively bargain, particularly to lift industry standards, the parties to an agreement should be at liberty to bargain about any matter they consider relevant, not just what the government or the courts and tribunals consider to be a matter 'pertaining to the employment relationship'. No other country in the OECD places limits on the subject matter of what parties are able to bargain about. These restrictions were not mentioned in Forward with Fairness (April 2007) or the Forward with Fairness Policy Implementation Plan (August 2007). Indeed, in Forward with Fairness it is expressly stated that:

> 'Under Labor's system, bargaining participants will be free to reach agreement on whatever matters suit them.
>
> Labor believes that as long as bargaining participants bargain in good faith and are able to reach agreement, they should be free to do so without the need for government intervention or to comply with complex procedural rules and requirements.'[4]

8. These pledges should be honoured. There is no evidence that workers in Australia have sought to bargain or take industrial action around irrelevant matters. Workers will only persist with demands that they see as truly relevant to their present and future interests and those of their fellow workers and communities.

9. The AMWU submits that it is legitimate to be able to bargain to improve the legislated minimum standards concerning the unfair dismissal eligibility period and right of entry. In general we should have the ability to be able to

[3] See section 172(1)(b) and the Explanatory Memorandum at paragraph 676 where examples of the sort of terms that are intended to fall within the scope of the permitted matters.
[4] Forward with Fairness, Labor's plan for fairer and more productive Australian workplaces, April 2007 pages 14-15.

bargain on behalf of employees above the minimum standards; only bargaining below the minimum should be prohibited. In particular, the freedom to bargain about job security, bans on redundancy and the contracting out of work, which is intimately aligned to job security, should not be limited by this legislation.

10. Prior to Work Choices many workers sought to protect their job security by pursuing clauses in agreements that restricted labour hire and contractors. It has long been accepted that industrial instruments could impose on employers' requirements to engage labour hire workers and contractors on wages and conditions no less than that of comparable direct employees. If contractors or labour hire workers were no cheaper than direct labour there is less economic incentive to engage labour this way, thus direct employees' jobs are more secure

11. Industrial instruments could also require that employers consult with employees and their unions ahead of engaging labour hire workers or contractors. The test utilised for agreement content was the 'matters pertaining test' laid down by the High Court in the Electrolux case.

12. Work Choices rendered contractors clauses prohibited content. Thus, they remained lawful and enforceable in pre-Work Choices certified agreements and they were pursued in so called 'side-deeds', but they were not permitted to be a topic or matter that could be formally bargained about for a Work Choices agreement.

13. The central issue in relation to contractors is that of job security. There may be legitimate safety concerns about contractors coming on site or performing work previously done by Australian based permanent workers, for example the outsourcing of Qantas maintenance. The pay equivalence requirement is also a very important reason, but unless workers are informed of an employer's moves to use such labour there cannot be effective monitoring of these arrangements, and workers will be deprived of the opportunity to present an argument for having contractors' work done in-house (which can save jobs.). The retention of the "matters pertaining test" unfairly and

unnecessarily limits the capacity to bargain about job security and limitations on the contracting out of work in particular. Given the current economic climate, provisions in agreements requiring the sourcing and use of locally made content would contribute to job creation and job security. It is currently uncertain whether such provisions would pass the matters pertaining test. Removing this test would remove the uncertainty and be economically responsible.

14. In high performance workplaces internationally increased levels of participation by workers and their representatives in decision making is common and contributes to productive performance. The legal framework established in the 20th century in Australia around 'matters pertaining' is one which is based upon entrenching the old fashioned notions of 'managerial prerogative' from the master and servant era. This is out of place in the 21st century particularly regarding legislation based on the corporations power. It is in Australia's economic interest for workers to be able to bargain about a more productive workplace without such limitations.

Industrial Action

15. Bargaining rights are essentially meaningless without the capacity to take industrial action. Having the capacity to take action often means that less action will be taken as the bargaining balance is restored by the existence of the right to take industrial action. Without those rights the balance is shifted unfairly to the employer as it will be if the Bill as it stands becomes legislation. Limiting the matters to those pertaining and limiting the ability to bargain with multiple employers on an industry basis by removing the right to take protected action derogates workers' rights and will add to job insecurity. The economic crisis that we are facing requires of us the capacity to enter into agreements that are pragmatic and that can offer solutions industry wide. This will be seriously hampered by maintaining these Work Choices restrictions. An employer is able, and will still be able, to raise a false claim of patterning bargain to disrupt what is internationally considered a legitimate action and right.

16. The AMWU submits that this is perpetuating a practice that has been condemned by the International Labour Organisation (ILO) as being against International Conventions to which Australia is a signatory.

17. In June 2007 when considering whether or not the Work Choices Act complied with Article 4 of C098 (The Right to Organise and Collective Bargaining Convention, 1949) the supervisory body of the ILO, the Committee of Experts on the Application of Conventions and Recommendations (the CEACR), held that the right to strike is a fundamental right of workers and unions, while seeking to define its limits. For convenience the text of Article 4 of C098 reads as follows:

> 'Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.'

18. The CEACR noted the following in relation to Work Choices:

> '[T]he Work Choices Act introduces further restrictions concerning pattern bargaining … by prohibiting industrial action in relation to this type of bargaining (section 439 of the WR Act, as amended) and requiring the AIRC to suspend or terminate the bargaining period where pattern bargaining is occurring, thereby preventing the taking of lawful, protected industrial action (sections 431(1)(b) and 437 of the WR Act, as amended).
>
> The additional exclusion of "pattern bargaining" from protected action introduced … by the Work Choices Act … prevents parallel bargaining on a multi-employer basis.'

19. In relation to the above, the CEACR stated:

> ‘Action related to the negotiations of multiple business agreements and pattern “bargaining” represents legitimate trade union activity for which adequate protection should be afforded by the law. The Committee further emphasizes that the choice of bargaining level should normally be made by the parties themselves who are in the best position to decide this matter. … Collective bargaining should be decided by parties themselves and not be imposed by law.’

20. Towards the end of the Individual Observation Report 2007, the Committee stated that:

> ‘[A]lthough the expressions “where necessary” and subject to “national conditions”… allow for a wide range of differential practices in the implementation of measures for the encouragement and promotion of collective bargaining, they do not authorize in any way the introduction of disincentives, obstacles, to a downright prohibitions of negotiations which amount to a negation of a free and voluntary nature of collective bargaining enshrined in Article 4 of the Convention.’

21. Section 422 of the Fair Work Bill 2008 continues the restriction on pattern bargaining and is not compliant with C098. Section 422 of the Bill states that the Federal Court or the Federal Magistrates Court may grant an injunction against industrial action if a bargaining representative is engaging in pattern bargaining. Section 422 acts as a disincentive for unions to use pattern bargaining because industrial action, a significant union bargaining tool, is restricted.

22. At present, and also under the proposed Fair Work legislation, industrial action outside the bargaining period is not protected. The AMWU notes that, ‘paradoxically … the introduction of heavy sanctions against strikes has come after almost a century-long declining trend in the number of days lost to industrial action. More days are now lost to occupational injuries than those lost due to industrial disputes by a large margin implying that the

sanctions have been put in the wrong place, at least from a productivity perspective.[5]

23. Again in the Individual Observation Report 2007, the ILO Committee stated:

> 'The Committee notes that, in the absence of a bargaining period, industrial action is not protected (section 437 of the WR Act, as amended) and therefore workers continue not to be protected under the WR Act against acts of anti-union discrimination, in particular, dismissals, if they organize or participate in industrial action in support of multiple business agreements.'

24. The AMWU also submits that the means the Government is proposing for the dealing with alleged instances of pattern bargaining is misconceived. Prior to Work Choices, an alleged pattern bargaining strike was assessed in the Commission, and the Commission would hear evidence, compare it with the law and, if the allegation was made out, the remedial action was suspension or termination of the bargaining period

25. Work Choices retained the Commission's power to do all this, however, Work Choices also empowered the Federal Court or Federal Magistrates Court to issue injunctions to prevent pattern bargaining strikes (s 497).[6] This route, which has never been taken, potentially exposes employee organisations to the high costs of litigation in superior courts. This route for relief in the courts would be overly legalistic and inconsistent with the 'simplicity' tone of Forward with Fairness and concept of fairness generally.

26. The freedom to engage in pattern bargaining is vital. It is through the vehicle of pattern bargaining, the ability to take industrial action at the industry or economy wide level, that all the major changes to employment standards have been achieved. It is where workers have in common felt that a change was required and have pursued this with their employers. This is how changes to annual leave, shorter working hours, accident make up pay, and

[5] The State of Industrial Relations 2008, The Evatt Foundation. Chapter One is available free at the following online address: http://evatt.labor.net.au/publications/books/204.html
[6] This provision is now found at section 422 in the Bill

superannuation all came about. Such common claims and action are essential in a democratic society if standards are to be improved and injustices addressed. If the Bill goes through in its present form the ability to push for paid parental leave will be seriously curtailed. Paid parental leave should not exist solely as a national minimum standard; it should be possible to have industry wide agreements on such a standard. A right contained in an agreement will be much securer than a right in legislation, which, as Work Choices so starkly displayed, can be easily eroded.

27. Where there is an industry or economy wide improvement in a standard no one employer is disadvantaged, or perceived to be disadvantaged, in relation to its competitors.

28. It should be noted that it is not solely employees who engage in pattern bargaining; employers also adopt such an approach to achieve changes in work arrangements to meet changed economic conditions. The drive in the 1980s for increased use of shift work including twelve hour shifts is such an example. The drive for increased attention to training and improved work organisation in the late 1980s and early 1990s supported by both employer organisations and unions is another such example. Internationally, there is no relationship between the level of pattern bargaining and economic or productivity performance. In fact those countries where pattern bargaining or even more centralised forms of bargaining are widespread often have high levels of productivity and of productivity growth.

29. Protected action can also be removed by the suspension of the bargaining period for reason of third party harm. This ground of suspension discriminates against workers in certain enterprises with tight supply chains. These workers, through no fault of their own, can find themselves facing the same disadvantage that other workers face only after they have acted contrary to good faith bargaining requirements. Such workers in effect have fewer bargaining rights and consequently less bargaining power than other manufacturing workers.

30. The third party harm ground for bargaining period suspensions was not mentioned in Forward with Fairness (April 2007) or the Forward with Fairness Policy Implementation Plan (August 2007). To retain such a measure would be inconsistent with Labor's stated policy and it would maintain an unfair vestige of Work Choices. If the provision is retained then at the very least the standard used to assess the harm should be consistent with the test used between the parties to the agreement.

31. To date, the third party harm provision has had little use. A successful application was overturned on appeal in *Australian Education Union v Dept of Education and Training, NT Government* [2008] AIRCFB 787. While this might be said to support an argument that the provision has not been a real problem, the converse is also true: it is stale and unnecessary.

32. The AMWU submits that the most appropriate means for disputes involving the allegation of pattern bargaining to be settled is through the use of FWA's powers of conciliation and arbitration and not through the adversarial court forum that has been legislated for by Work Choices.

33. The AMWU notes that injunctions and other actions can now be sought on application to an appropriate court in the Fair Work jurisdiction in relation to breaches of agreements.[7] The AMWU opposes the limitations on unprotected industrial action generally but it is especially opposed to the inability of FWA to be able to take into consideration situations where the employer has taken unilateral action during the life of an agreement and where employees and their union may be legitimately responding to such unfair actions. The Bill retains Work Choices' excessive penalties for legitimate workers' action in response to the arbitrary action of employers and the penalties should either be removed or severely reduced. Importantly, FWA should have greater discretion available to it to conciliate such matters, thereby allowing the behaviour of employers to be given proper consideration prior to the instigation of court action. This is an additional practical approach and one that is in tune with the government's recent calls

[7] Section 545

for parties to work together[8] and it may reduce the need to resort to the adversarial alternative under the court system.

34. The proposed Bill contains some uncertainty regarding the use of the FWA's powers in relation to the suspension of protected industrial action. The proposed section 423 of the Bill is a new provision that allows bargaining representatives and employees to seek orders suspending or terminating protected industrial action if *significant economic harm* is being caused or is imminent. FWA can also make the orders on its own initiative or upon application by the Minister or a person prescribed by the regulations. Although the explanatory memorandum and the relevant section does contain some guidance[9] we believe that greater guidance is required from the government and that that guidance should indicate that the relevant test is to a high standard. What is in the explanatory memorandum should be more clearly reflected in the legislation to ensure that the provision does not stop legitimate industrial action.

The Power of FWA to Arbitrate and Conciliate

35. The AMWU supports access to arbitration provided for in the Bill involving the low paid and breach of bargaining in good faith requirements. This is a good, sound social and economic initiative. Also, in addition to the submissions made by the ACTU regarding arbitration, which the AMWU endorses, we would like to emphasise that as a matter of practical consideration it should be possible for FWA to be able to arbitrate matters

[8] See for example the Prime Minister's speech to Australian Industry Group on 17 October2008

[9] Sub clause 423 (4) sets out the factors relevant to working out whether the protected industrial action is causing or threatening to cause significant economic harm. They are:
(a) the source, nature and degree of harm suffered or likely to be suffered;
(b) the likelihood that the harm will continue to be caused or will be caused;
(c) the capacity of the person to near the harm;
(d) the views of the person and the bargaining representatives for the agreement;
(e) whether the bargaining representatives for the agreement have met the good faith bargaining requirements and have not contravened any bargaining orders in relation to the agreement;
(f) if FWA is considering terminating the protected industrial action:
(i) whether the bargaining representatives for the agreement are genuinely unable to reach agreement on the terms that should be included in the agreement; and
(ii) whether there is no reasonable prospect of agreement being reached;
(g) the objective of promoting and facilitating bargaining for the agreement.
FWA must be satisfied that the harm is imminent and also satisfied that the protected industrial action has been engaged in for a protracted period of time and the dispute will not be resolved in the reasonably foreseeable future.

concerning awards and the National Employment Standards on application by one of the parties. The AMWU supports the practice of alleged award breaches being a subject matter more appropriate for a court, but submits that disputes when they arise regarding the application of an award and related matters would more appropriately be dealt with by conciliation and arbitration.

36. Related to this last point is provision for the inclusion of conciliation and arbitration clauses in agreements. They, rather than a flexibility term, should be mandatory.

37. The AMWU submits that there should be a reinstatement of the power to conciliate in circumstances which used to be covered under section 166A of the Pre-Work Choices Act. The Commission used to have a duty to attempt a resolution of an industrial dispute, specifically alleged tortious conduct. It will be recalled that section 166A required the Commission, on receipt of a notice, to take immediate steps to stop the conduct involved. The purpose of the provision as stated in the explanatory memorandum[10] was to establish:

> 'A pre-litigation conciliation period of up to 72 hours before civil actions in tort can be brought against federally registered unions, or their members, officers or employees.'

38. The AMWU submits that there should be a reimplementation of this practical and very useful process and that the FWA be given the appropriate powers.

39. It comes as a surprise to many in the Australian general public, and in particular those who are bound by them, that AWAs continue to exist and that they will continue to do so without any capacity to exit them until they have reached their nominal expiry date (which for some could be over four years away). The AMWU is concerned that there is nothing in the legislation curtailing the affront to the freedom of association principles in relation to

[10] Senate explanatory memorandum to the *Industrial Relations Reform Bill 1993.*

those employees who have had to sign up AWAs. Certain companies[11] have managed to avoid negotiating collective agreements with the AMWU, despite being nominated as employees' preferred representative, by engaging in a process whereby the company selects an artificial negotiating group for non-union collective agreements to replace expiring AWAs. To counter these unfair agreements there needs to be a mechanism in the Fair Work Act that allows for employees to opt out of such agreements and to enter into a genuinely negotiated agreement, negotiated by their representative of choice, under the new good faith bargaining rules and which will apply to the whole workforce.

Australian Building and Construction Commission

40. The AMWU is disappointed that the Government has not made use of this opportunity to abolish the Office of the Australian Building and Construction Commission (ABCC) and to clearly identify the system it proposes in its stead. The position of the AMWU in that regard is simply to scrap the ABCC and not replace it. There is no need to have two systems with different standards in place running parallel and actively discriminating against those workers in the construction industry.

Modern Awards and the NES

41. The AMWU has been heavily involved in the award modernisation process since its initiation. Beginning in July and through to December 2008, we have been a party to a number of consultations and made submissions in the areas of metals, manufacturing and associated industries, graphic arts, coal mining, metalliferous mining, finance, ICT, rail, agriculture, education, and health. We have worked on a collaborative basis with other unions and employer groups in preparing drafts of the modern awards. The AMWU has a number of concerns in relation to modern awards.

[11] For example Telstra, Austal Ships, BHP and Rio Tinto.

42. In its award modernisation request, the Government told the Commission that workers were not to be disadvantaged. The Commission's decision fails this test in relation to its draft flexibility clause and it must be revisited.

43. In determining the clause in June the Commission found:

> 'The purpose of a model flexibility provision is to permit a reduction in one or more minimum award entitlements as part of an agreement which meets the genuine individual needs of the employer without disadvantaging the individual employee.'[12]

44. If the purpose is to permit a reduction in entitlements this cannot result in anything but a disadvantage to the employee. The Commission's decision does provide some safeguards regarding documentation and capacity to cancel the agreement but it does not put any limits on the scope of the flexibility which can be agreed on, the key issue of the organisation of working hours and the penalty payments associated with it.

45. No provision has been made for an independent third party to ascertain whether such agreements will disadvantage an employee. There is also no definition or guidance from either the Commission or the Government as to what the test is to ensure 'on balance' an individual flexibility clause does not reduce an employee's remuneration.

46. The decision appears to be based upon the same false ideology which underpinned AWAs and Work Choices; that individuals are capable of entering into fair and equal agreements with their employer without collective organisation and trade unions. The decision is also based on the false assumption that individual worker's complaints and complaints services such as the Workplace Ombudsman are sufficient to deal with abuses. The international labour standards are based on the principle that the only effective way to ensure that labour standards are enforced is through the work of independent trade unions and through collective organisation.

[12] [2008] AIRCFB 550 at paragraph 163

47. Evidence from the Asian Women at Work group during the award modernisation proceedings established that vulnerable migrant women workers in manufacturing often agree to unfair work arrangements because they are concerned for their job security. Often the terms of the agreement are not understood.[13] The AIRC decision does not prevent an employer from requiring the signing of an individual flexibility agreement immediately following the offering of an employment contract. This will have the effect in practice of making it a condition of employment.

48. The reality for award reliant workers is often job insecurity and weak, or no, bargaining power.

49. The Australia at Work report identified that 46% of employees covered by AWAs feel they do not have the opportunity to negotiate their pay with their employer and that young and low skilled workers are more likely to be on non-negotiated AWA's which unsurprisingly provided the lowest earnings outcomes.

50. Participants at a FWA seminar on the No Disadvantage Test (Sydney October, 16 2008) were informed that the number of agreements that were failing the No Disadvantage Test was in excess of 30%.

51. The research and practice identifies that even where there is a third party review the outcome of bargaining for employees with little bargaining power is an erosion of the safety net. There is no reason to believe that bargaining by this group under an award flexibility clause will lead to a different outcome.

52. The decision also takes no account of the effect of individual flexibility agreements upon the interests of the collective. Such agreements could undermine hard won standards and practices and will undermine bargaining. Workers in a bargaining situation will be undermined in their pursuance of maintaining penalty rates and roster patterns in situations where the

[13] Available at:
http://www.airc.gov.au/awardmod/databases/metal/Submissions/AWatW_submission_ED.doc and
http://www.airc.gov.au/awardmod/databases/metal/Submissions/AWatW_full_submission.pdf

employer has already manipulated a significant proportion of the workforce to adopt the changes through individual flexibility agreements. There will be scant incentive for employers to bargain when it will be possible for them to achieve the flexibilities they want through individual arrangements which bypass the collective.

53. For these reasons we seek a clear decision that the flexibility clauses cannot be used to reduce employees' remuneration to which they would otherwise have been entitled. We seek a process of independent review. We seek protection of collective interests, not just individual interests. We also seek a formal review after 18 months as to the impact of these clauses.

54. The impact of the flexibility clause is compounded by the Commission's decision that a flexibility clause agreement can be used on top of an agreement made under an award's facilitative provision. This 'flexibility on a flexibility' seriously compromises the integrity of the award as a safety net.

55. An employee under the existing facilitative provisions could have an "agreement" to commence work at 5am without an overtime penalty. Under the award flexibility clause an employee could then be asked, and agree, perhaps because it has been put there will be less traffic and hence petrol savings, to commence work at 3 or 4am without an overtime payment. In such a situation it will be difficult to determine from which time the relative disadvantage should be identified. It may be from the 6am ordinary hours point identified in the safety net, or it may be the 5am start enabled under the existing facilitative arrangement.

56. The Commission should not countenance a flexibility on top of a flexibility.

The National Employment Standards & Public Holidays

57. The Bill with the National Employment Standards ('NES') together with modern awards will form the new safety net. The Minister's Award request and NES also state that an award should not generally include provisions covered by the NES. There are some problems with the way in which this is

being implemented by the Commission. For example, the NES deals fairly comprehensively with public holidays. It explicitly names eight public holidays and allows for the provision of other holidays as they are gazetted in a state or territory. To ensure that the existing award standard of eleven public holidays is maintained the Ai Group and the Unions agreed that the modern manufacturing award should specify the three additional days as currently provided for in the Metal Industry Award. However, the Commission's exposure draft of the modern manufacturing award removed those three additional days, including the Union Picnic day in New South Wales. This holiday is not a gazetted public holiday and, if not corrected, will result in workers in that state losing a public holiday. This is contrary to the requirement that employees should not be disadvantaged.

The Implementation of the National Employment Standards

58. The AMWU sees no reason why the NES cannot take effect with the other substantive parts of the legislation. To hold back the implementation of the NES until January 2010 (when the modern awards are due to come into force) will have an unbalanced effect on new workplace agreements, as those negotiated prior to the legal enforceability of the NES will be judged at a lower standard under the better off overall test than those that are made after January 2010.

Conclusion and Recommendations

59. As stated above, whilst the AMWU broadly welcomes the Bill and the many positive reforms that it contains, we believe that further steps need be taken to restore fairness, balance and workers' rights.

60. The AMWU makes the following recommendations:

1: Remove the requirement that a matter must pertain to the employment relationship and allow the parties to an agreement to be free to decide what matters they choose to include.

2: Remove the restrictions in relation to pattern bargaining.

3: Allow for disputes in relation to pattern bargaining to be conciliated and arbitrated.

4: Give FWA wider powers to conciliate and arbitrate prior to engaging in litigation.

5: Remove the provisions dealing with third party harm when taking protected industrial action.

6: Remove the penalty provisions where unprotected industrial action has been engaged in by workers in response to unfair employer actions.

7: Amend the Bill with regard to orders suspending and terminating protected industrial action to more clearly reflect the intention as expressed in the Explanatory Memorandum.

8: Make it a requirement for all agreements to contain conciliation and arbitration provisions.

9: Allow for alleged award breaches and disputes over awards to be conciliated and arbitrated.

10: Provide a mechanism for employees to opt out of existing unfair agreements.

11: Abolish the ABCC.

12: Provide for an independent third party to assess whether an agreement dealing with an award flexibility does not unfairly disadvantage the employee.

13: Allow for awards to deal with provisions covered by the NES.

14: Implement the NES at the same time as the rest of the Bill.

Attachment 'A'

(Double click to open in Acrobat Reader)

AMWU Submission Attachment 'A'

ACTU

Revised draft executive resolution
Tuesday, 9 December 2008

Fair Work Bill

1. ACTU Executive welcomes the introduction into the House of Representatives of the Fair Work Bill 2008, but believes that there is still much unfinished business.

2. Executive notes that the Bill addresses many of the inequitable features of the Coalition's WorkChoices laws by ensuring the rights of Australian workers to bargain collectively are respected and that balance is restored to our workplace laws by:

   (a) Restoring protection from unfair dismissal for more than three million workers;

   (b) Providing for significantly expanded safety net of fair minimum wages and conditions in that will be regularly adjusted having regard to living standards and the needs of the low paid;

   (c) Abolishing new AWAs, and ensuring that enterprise agreements cannot undermine minimum wages and conditions, and every employee covered by an enterprise agreement must be better off than they would be on the relevant modern award;

   (d) Protecting employees who choose to join and be represented by a union and to act collectively, and expressly acknowledging in law the right of employees to seek advice and information in the workplace;

   (e) Requiring bargaining for an agreement to be undertaken in good faith and conferring broad powers on FWA to ensure this occurs, including making a determination where good faith obligations are persistently breached; and

   (f) Establishing a new independent industrial tribunal Fair Work Australia.

3. These elements of the Bill keep faith with Rudd Government's commitment to the Australian community, especially the many thousands of working people and community members who campaigned under the Your Rights at Work banner for these laws.

4 Executive condemns the misleading and deceptive campaign against the Bill currently being waged by some extreme employer organisations and Members of Parliament. They are wrong to suggest workers should not have access to union advice and support in their workplace. It is vital that unions are able to prevent workers being exploited or discriminated against by inspecting pay and personnel records. Their suggestion that facilitated low paid bargaining will legalise industry-wide strikes is incorrect and simply demonstrates that they remain committed to the divisive politics that was a feature of WorkChoices.

5. Executive calls upon all Members of Parliament to vote for the Bill and vote for the end of WorkChoices.

6. However Executive notes a number of transitional and implementation matters that will be essential to ensure the laws deliver as promised. In particular Executive notes with concern: