Submission

to

Senate Standing Committee

Education, Employment and Workplace Relations

Terms of reference for the inquiry

To inquire into and report on: Fair Work Bill 2008

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9 January 2008

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Dear Sirs

Inquiry into and report on: Fair Work Bill 2008

Please find attached submissions relating to the inquiry into the Fair Work Bill 2008. I have identified seven areas where I believe that amendments are required. They are:

1. Clarification of the Term "*Parties to the Dispute*"
2. General Dispute Resolution Provision
3. Duplication
4. Transfer of Business – Qualifying Period
5. Transfer of Business – The Classic Dilemma
6. Relationship between FWA Decision and an Enterprise Agreement
7. Workplace Determinations

In each case I have attempted to explain the difficulties and suggest a remedy. I thank you for the opportunity to make these written submissions.

Yours faithfully

Dan Dwyer

1. CLARIFICATION OF THE TERM "*PARTIES TO THE DISPUTE*"

When referring to disputes that may be dealt with by FWA, the following clauses appear in the Bill:

> *595 FWA's power to deal with disputes*
>
> *(1) FWA may deal with a dispute only if FWA is expressly authorised to do so under or in accordance with another provision of this Act.*
>
> *739 Disputes dealt with by FWA*
>
> *(1)…*
>
> *(6) FWA may deal with a dispute only on application by a party to the dispute.* (my emphasis)

The term "*party to the dispute*" is not defined in the Bill. The question is whether a Union (or employer organisation) can apply to FWA to have a dispute arising under an Award or Agreement conciliated or arbitrated in accordance with a dispute resolution process.

It is now clear that a Union will not be a "party" to an Award. The Modern Award decision of the AIRC Full Bench of 19 December 2008 makes this clear:

> *[12] … The Minister's submission on behalf of the Australian Government contained the following passage:*
>
> *"60. Rather than using a concept of parties being `bound' to awards and other terminology associated with the conciliation and arbitration system, the substantive workplace relations bill will adopt two new key concepts which better reflect the new modern workplace relations system.*
>
> *61. These are:*
>
> - *that an instrument covers an employer and employee or organisation (that is they fall within the scope of the instrument); and*
> - *the instrument applies to the employer and employee (that is the instrument actually regulates rights and obligations).*
>
> *[22] In our view there is no point embarking on an exercise to identify the organisations which should be covered by each modern award, and to what extent, when, for the reasons we have given, nothing appears to turn on the outcome. It is also relevant to observe that under the award system which operated prior to the Work Choices amendments the identification of parties bound was necessary because of the requirement for an antecedent dispute between named employers and organisations. That requirement is not a feature of the modern award system. We have decided, therefore, that as a general principle we shall not name registered organisations as covered by modern awards.* (my emphasis)

A Union (or employer organisation) is not a party to an agreement. The scheme appears to deem unions to be "bargaining representatives" (section 176). However a union can request to be covered by an agreement.

> *183 Entitlement of an employee organisation to have an enterprise agreement cover it*
>
> *(1) After an enterprise agreement that is not a greenfields agreement is made, an employee organisation that was a bargaining representative for the proposed enterprise agreement concerned may give FWA a written notice stating that the organisation wants the enterprise agreement to cover it.*

The critical question is whether being *covered* by an agreement will also make the Union a *party* to any dispute for the purposes of the Act. In my submission, it is ambiguous in the context of the whole Act.

The terms *party* and *parties* appear in the Bill as follows

- Costs – section 376, section 401, section 403, section 570, section 780
- Third Party – section 423, section 426
- Small Claims – section 548
- Contraventions – section 550
- Minister deemed to be a party – section 569
- Ombudsman may be a party – section 682
- Equal Remuneration application – section 724
- General Protections advice – section 370, section 375
- Unfair Dismissal Disputes – section 374, section 398, section 399, section 778
- Work Bans Disputes – section 472
- Right of Entry Disputes – section 505
- Stand Down Disputes – section 526
- General Disputes – section 595 (note)
- Dispute Resolution – section 739, section 740

There are other indicators to interpretation. For example, in relation to transfer of business:

> *318 Orders relating to instruments covering new employer and transferring employees*
> *Who may apply for an order*
>
> *(2) FWA may make the order only on application by any of the following:*
> *(a)…*
> *(c) if the application relates to an enterprise agreement-an employee organisation that is, or is likely to be, covered by the agreement;*

The various references, in the context of the whole Act, probably infer that a Union is not a "*party*". The Explanatory Memorandum does not assist. While an individual employee may make an application to the FWA to deal with a dispute and be represented by a Union, this does not allow a Union to perform its representative role in full. Usually disputes involve a number of employees. Even then individual members are usually reluctant to be identified to the employer by being named in an application.

If we consider the phrase "*party to a dispute*" in isolation, then problems may still arise. It is often successfully argued that an organisation cannot create an (industrial) dispute. To remove any doubts, my suggestion is a definition. This allows unions to make an application under Awards, Agreements, transmitted instruments and Determinations, and will not deter members from pursing their rights.

REMEDY
A definition in the following terms:
Party to a dispute includes

- *employees covered by the relevant agreement, award or other instrument.*
- *organisations whose eligibility rule entitles them to represent the employees in such dispute*

2. GENERAL DISPUTE RESOLUTION PROVISION

Types of Disputes

There are a number of types of disputes. The proposed Act does not provide for every situation. To explain this, I suggest that there are (at least) four types of disputes. They are:

1. Disputes about matters not relating to employment
2. Disputes over the making of an agreement
3. Disputes over an employment matter arising under an Award/NES or Agreement
4. Disputes over an employment matter not arising under an Award/NES or Agreement

I will deal briefly with types 1, 2 and 3 and then explain type 4.

2.1 Disputes about matters not relating to employment

There is no provision for FWA to become involved in this matter. This type of matter is excluded from the definition of Industrial Action. Therefore the Commission will lack jurisdiction to issue orders to stop any industrial action. "Excluded" action is action that might otherwise be industrial action, but is excluded because it falls outside the above definition because the "purpose" was not "industrial" in character. See section 14 of the Bill for the definition, and the following Note.

> *Note: In Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.*

2.2 Disputes over the making of an agreement

FWA may be involved in several ways during a dispute arising from the making of an enterprise agreement. Generally these will relate to the issues of bargaining in good faith and the process to achieve and maintain protected industrial action However FWA may be required to determine a dispute by making an instrument called a Workplace Determination". Certain conditions must be met before FWA has jurisdiction to make a Determination.

2.3 Disputes over an employment matter arising under an Award/NES or Agreement

Each Modern Award and Enterprise Agreement is required to have a dispute resolution clause. The Award dispute resolution clause will cover matters in an Award and the NES. An agreement must have a dispute resolution clause that allows FWA, or another independent person to settle disputes:

- about any matters "arising under" the agreement
- "in relation to" the National Employment Standards

An arbitration clause in an agreement has been determined by the High Court to be "private arbitration". The powers of the arbitrator can only be those that have been given in the agreement. The Bill has a different approach that may create new law. Compare these words:

- s170LW (Pre Reform) to settle disputes over the application of the agreement
- s709 (Workchoices) in relation to matters in dispute under the terms of an agreement
- s740 (FWA) term allows FWA to deal with a dispute.

Let us assume that the combination of words result in this term:

> *FWA may deal with a dispute that arises under an agreement and in relation to an Award.*

2.4 Disputes over an employment matter not arising under an Award/NES or Agreement

There has been a growing body of law where employers are trying to avoid having a matter dealt with under a dispute resolution clause. This leaves the affected employees with nowhere to go, other than to take unprotected action. It leaves the employer in a position where it can simply dictate a position, and FWA will have no right to intervene.

The situation often arises with restructures or alleged restructures. This might mean a significant loss in shift penalties, a significant job change, a significant change in benefits or redeployment to another role (avoiding redundancy).

The strategy of some employers is obviously

- to avoid arbitration clauses, and
- to the greatest extent possible, ensure that the agreement deals with as little as possible.

In one case, an employer failed to disclose a forthcoming major restructure which would result in about 500 redundancies, so that it could not be included in, and not be subject to arbitration under the dispute resolution clause. While this would be covered by a "Consultation" or "job change" clause, these clauses are often ignored or invoked after the decision has been made. Even then consult does not mean "negotiate".

Even where certain matters are covered in an agreement, the employers will argue jurisdiction to avoid conciliation and/or arbitration. This will frustrate the employees, even if only to delay the employees while the employer fully implements the changes with impunity.

The AIRC even issues listings as a notification of an "alleged" dispute. The focus is usually on a legal argument about jurisdiction as certain employers try anything to avoid conciliation/arbitration. Some examples of cases where employers will even seek to avoid conciliation are:

- *Shop, Distributive and Allied Employees Association and Big W Discount Department Stores* 2002 AIRCFB PR924554
- *CPSU, the Community and Public Sector Union and Telstra Corporation Limited* 2000 AIRCFB Print 7179
- *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation* [2008] AIRC 901
- *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Telstra Corporation* 2003 AIRCFB PR940569
- *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation* [2008] AIRC 1148

Primarily, my view is that affected employees should be free to withdraw their labour if such a dispute arises. However, in the Australian context, arbitration should be available.

Providing FWA with the power to arbitrate any dispute that does not arise under an instrument (Award or Agreement). This would encourage the parties to identify all issues that are likely to arise during the term of the agreement and to determine a suitable dispute resolution process for those issues.

REMEDY
The Act should empower FWA to conciliate and arbitrate any industrial dispute that does not arise under an Award/NES or Agreement.

3. DUPLICATION

It appears that section 375 is a duplication of section 370. There appears to be no reason for this.

> *370 Advice on general protections court application*
>
> *(1) If FWA considers, taking into account all the materials before it, that a general protections court application in relation to the dispute would not have a reasonable prospect of success, it must advise the parties accordingly.*
>
> *(2) A general protections court application is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of this Part.*

> *375 Advice on general protections court application*
>
> *If FWA considers, taking into account all the materials before it, that a general protections court application in relation to the dispute would not have a reasonable prospect of success, it must advise the parties accordingly.*

REMEDY
Clarify the need, if any, for the separate provisions

4. TRANSFER OF BUSINESS – QUALIFYING PERIOD

While the transfer of business provisions deal with the instruments, there is a problem with the old "*qualifying period*", now known as the "*minimum employment period*". While the words in the Bill are different, see the Full Bench decision in *Ziday and others and Aged Care Services Australia Group Pty Ltd* [2008] AIRCFB 367 Print PR981582.This held that a qualifying period applies on transmission.

Consider this scenario. A business is to be transferred to another owner.

- If the new employer does not accept a particular employee (with say 8 years of service) then that employee will almost certainly be made redundant at a cost to the old employer.
- If the new employer accepts a particular employee (with say 8 years of service) then that employee will be subject to a new *"minimum employment period"*
- If that employee (with say 8 years of service) is terminated within the 6 month "*minimum employment period*", then the employee
    - will not have access to unfair dismissal
    - will not be entitled to redundancy
    - will lose the 8 years of service counting toward long service leave

The worst situation I have encountered was a termination after one day with the new employer. The employee had worked for over 5 years with the old employer. In this case I am certain that there was no arrangement with the old employer to avoid the redundancy provisions that applied. Nevertheless, the employee lost his redundancy benefits. I believe that it is critical to remove this loophole.

REMEDY:
The "*minimum employment period*" should not apply on transfer of business.

5. TRANSFER OF BUSINESS – THE CLASSIC DILEMMA

One of the problems that occur with a transfer of business is the recognition of prior service. The new employer will sometimes make it clear that prior service will not be recognised. This leaves the employee in a difficult position. This relates in particular to redundancy benefits and long service leave.

A long term employee may prefer redundancy than to accept risky employment with a new employer. It is assumed that an employee may refuse to be employed by a new employer because of say:

- previous employment with that employer
- a knowledge of the reputation of the new employer

It is assumed that a refusal by an employee to be employed by the new employer will result in a redundancy with the old employer as no other position will be available with the old employer.

If the employee does transfer, then qualification for long service leave may start again. As this may take 10 years to qualify, substantial potential benefits are lost.

REMEDY:

1. On transfer of business, the Act should provide that unless an Agreement or Award makes other provisions, then the new employer must recognize the accumulated prior service with the old employer (for all purposes).
2. That the Act makes clear that an employee has the right to refuse to be employed by a new employer, and unless an Agreement or Award makes other provisions, then that employee will be entitled to redundancy benefits.

6. RELATIONSHIP BETWEEN FWA DECISION AND AN ENTERPRISE AGREEMENT

Section 201 provides that if a union makes an application under Section 183, then *FWA must note in its decision to approve the agreement that the agreement covers the organisation*. This means that the name of the Union may not appear in an agreement, even though the Union was the bargaining representative. Perhaps in drafting the agreement, the name of the bargaining agent will be included by the negotiating parties.

It is also noted that the FWA Decision may contain other critical information. This includes model flexibility terms, model consultation clauses and undertakings (see Section 201). As the past practice has been to record Decisions and Agreements separately, this important information may not accompany any agreement after approval.

I believe that the decision should be attached to the agreement and therefore incorporated into the final agreement so that the information is not overlooked by employees or employers.

REMEDY

A clause should be incorporated into the Act to provide that the FWA decision be attached to the approved Agreement and must accompany the agreement at all times.

7. WORKPLACE DETERMINATIONS

In the proposed Act, four types of Workplace Determinations are identified. These are

- Low paid Workplace Determinations
- Special Low Paid Workplace Determinations
- Industrial Action Related Workplace Determinations
- Bargaining Related Workplace Determinations

The Bill sets out the terms that may and must be included in a Workplace Determination. We wish to address the terms of the Bargaining Related Workplace Determination as set out in Section 270, and in particular Sub Sections 270(5) and (6). These set out the terms relating to *Coverage - multi enterprise agreement* and are compared below.

The preconditions set out in both clauses are identical, yet the terms must be expressed in different forms. It is unclear. While some suggestions can be made, it is probably more useful for the drafting revisit the section. Note that the explanatory memorandum is also in identical terms.

REMEDY While some suggestions can be made, it is probably more useful for the drafting revisit the section.

(5) If:	(6) If:
(a) the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed multi enterprise agreement in relation to which a low paid authorisation is in operation; and	(a) the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed multi enterprise agreement in relation to which a low paid authorisation is in operation; and
(b) the bargaining representatives for the agreement that contravened a bargaining order as referred to in subsection 235(2) were bargaining representatives of one or more employers that would have been covered by the agreement;	(b) the bargaining representatives for the agreement that contravened a bargaining order as referred to in subsection 235(2) were bargaining representatives of one or more employees who would have been covered by the agreement;
the determination must be expressed to cover:	the determination must be expressed to cover:
(c) each of those employers; and (d) their employees who would have been covered by the agreement; and (e) each employee organisation (if any) that was a bargaining representative of those employees.	(c) the employers of those employees if they are employers that would have been covered by the agreement; and (d) all of their employees who would have been covered by the agreement; and (e) each employee organisation (if any) that was a bargaining representative of those employees.