SUBMISSION BY THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION

TO

THE INQUIRY BY THE SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS INTO THE FAIR WORK BILL 2008

JANUARY 2009

EXECUTIVE SUMMARY

The Australian Rail, Tram and Bus Industry Union (RTBU) is a federally registered Union of some 35,000 members who work in both the private and public sectors and in every state and territory. With some minor exceptions, our members are covered by the federal jurisdiction for the regulation of most of their industrial interests. It follows that they and the Union have a vital interest in what happens at the federal level.

For most of the past 12 years, our members have been the subject of industrial legislation that was decidedly against their interests in the workplace. Introduced by the then Howard Coalition Government it reached its pinnacle with legislation that, in the Orwellian sense, was titled "Work Choices". Many of our members eagerly participated in the Your Rights at Work Campaign designed with the objective of putting an end to that legislation.

With the election of a Federal Labor Government in November 2007, the chance to see that objective achieve fruition was greatly enhanced. Together with some earlier legislation that prohibited the making of individual contracts known as Australian Workplace Agreements in the future, the current Fair Work Bill 2008 (the "Bill") takes a further swipe at Work Choices.

The RTBU welcomes the Fair Work Bill 2008 as a further sign of the reintroduction of common sense and the notion of a "fair go" into the industrial relations processes in the workplace. Much of the contents of the Bill remove the shackles that Work Choices placed on the legs of workers and their Unions; shackles deliberately designed to significantly increase the power of the employer in the workplace and to undermine the very existence of the trade union movement. The Bill should make it much easier than it has been for unions and their members to pursue their rights and interest in the workplace.

However, the RTBU is concerned that the Bill does not go far enough to demolish Work Choices and leaves some objectionable provisions in place. The provisions as identified in this submission are unnecessary, indeed undesirable, and do nothing to advance the cause of a progressive industrial relations system.

In this submission the RTBU seeks to identify the major changes that will be brought about by the Bill. Further the RTBU seeks to identify a number of areas where, in our submission, the Bill could be improved. The amendments as sought by the RTBU are, in our submission, entirely consistent with the objective of ridding the country of Work Choices – an objective endorsed in November 2007 by the Australian people. In this submission the RTBU urges the Senate Committee to give favourable attention to the issues raised and to recommend to the Federal Government that it amend the Bill in the manner as sought.

INTRODUCTION

The Australian Rail, Tram and Bus Industry Union (RTBU) welcomes this opportunity to make a submission to the Senate Standing Committee on Education, Employment and Workplace Relations with respect to its Inquiry into the Fair Work Bill 2008. There is no doubt that this Bill will be regarded as one of the more important pieces of legislation for this term of the Labor Government. It is also a substantial and detailed Bill covering many facets of the industrial relations process.

The RTBU is a federally registered Trade Union pursuant to the Workplace Relations Act 1996 (Cwth). The constitution of the Union provides for coverage of employees employed in or in connection with the rail and tramway industries, the railway train running industry and certain employees employed in particular urban bus operations. Our membership is currently about 35,000 and our members can be found in each of the States and Territories.

The RTBU and its members have endured the tribulations of the Work Choices legislation and its predecessor industrial legislation introduced by the Howard Coalition Government between 1996 and 2008. There is no doubt, based on our experience, that Work Choices was designed to and in many cases had the effect of reducing worker entitlements and rights in the workplace. It did this directly through the use of individual contracts and the diminution of the safety net and indirectly through attacking the capacity of workers to join and utilise the services of trade unions to protect and advance their interests in the workplace. To see the end of Work Choices is a welcome sight to unions and workers.

The RTBU generally welcomes the Fair Work Bill 2008. Relative to the current Workplace Relations Act 1996 and in particular that Act as it existed prior to the Forward with Fairness Act, this Bill represents a quantum leap for the better. The abolition of individual contracts, the removal of barriers to collective bargaining, the broadening of the content of collective agreements, the increased access to unfair dismissal rights, a more articulate and substantial safety net and the removal of unnecessary complexity designed to frustrate the work of Unions are welcome changes.

The Bill however, does contain room for improvement. In this submission the RTBU outlines a number of areas where we believe the Bill should be amended to improve its operation and effect. In our submission these changes are consistent with the position of burying Work Choices and as such would meet with the approval of the Australian community.

The aim of this submission is to bring to the attention of the Senate Committee a number of observations about the Bill and to recommend a number of areas where the provisions

of the Bill could be improved. To put the submission into its right context, the next section of the submission sets out the background to the Bill. This is followed by the detail of our observations and recommended changes. Finally the submission contains a summary and conclusion.

This submission does not consider each and every part of the Bill. The RTBU has had the opportunity to read the submission of the ACTU. To the extent that this submission does not cover parts of the Bill noted in the submission of the ACTU, the RTBU supports and adopts the position taken by the Australian Council of Trade Unions.

The RTBU seeks that the Senate Committee gives our submission favourable consideration.

BACKGROUND

The industrial relations system in Australia has changed significantly in the last 20 years. Up until the 1980's the system was dominated by the operation of awards and the role of the (then) Australian Conciliation and Arbitration Commission. This is not to say that collective bargaining did not occur but rather that the role of awards and the tribunal in establishing wages and conditions tended to predominate.

From the late 1980's the system has seen a reduction in the importance of awards and the tribunal and a relative increase in the incidence and importance of collective bargaining. The tribunal continued to play its part in the setting of the minimum wage, in overseeing and certifying collective agreements and dealing with claims for unfair dismissals

Overlaying the practical day to day operation of the industrial relations system was an ongoing debate about the nature of that system; a debate that has been significantly influenced by the government of the day. The result was a system that was either being changed, was about to be changed or was the subject of change. For example, the relevant legislation was changed significantly in both 1988 and 1993.

The election of the Howard Government in 1996 turned up the heat on industrial relations. Between 1996 and 2008 the Australian workforce was confronted with an ongoing round of aggressive anti-worker legislation.

The round commenced with the Workplace Relations Act 1996. This Act was the subject of virtual continuous change – or attempted change. The icing was put on the cake in 2006 with the Work Choices legislation.

The following list presents a broad but incomplete view of the measures taken by the Howard Government to attack and undermine unions and workers in Australia.

1. Legislation promoting and enabling the use of non-union agreements and individual contracts over union based collective agreements.

2. Unions and unionists had no legal entitlement to a union based collective agreement. An employer could refuse to negotiate a union collective agreement and, in that situation it is up to the union and its members to entice the employer to change its position.

3. There was no such thing as a requirement to bargain in good faith.

4. Unions were not permitted to "pattern bargain" i.e. seek the same outcome for members employed across a number of companies.

5. Multi- employer agreements were only permitted on a very restricted basis and only after a long and careful scrutiny of the agreement.

6. Where an employer was looking at commencing a new business, the employer was permitted to negotiate an agreement with itself to apply to workers who will be employed on that site.

7. Whilst unions and their members may take legal industrial action during the negotiation of an agreement, the process for doing so was long and convoluted and gives an employer plenty of opportunities to frustrate it.

8. The government placed restrictions on the contents of agreements. For example, agreements cannot contain provisions on labour hire companies or contractors, or place restrictions on the use of casual labour, or enhance the role of unions in the workplace beyond that contained in legislation.

9. Industrial action outside of a bargaining period i.e. the period of time taken to negotiate an agreement was unlawful, regardless of the reason.

10. The capacity of the Industrial Relations Commission (the tribunal) to resolve disputes in the absence of the consent of the parties to do so was removed.

11. The capacity of the Industrial Relations Commission to fix the minimum wage was removed.

12. The right of a union official to enter a workplace was significantly fettered.

13. Employees of employers with less than 100 employees were denied the right to take an unfair dismissal claim to the Industrial Relations Commission

14. Special legislation was introduced to restrict the capacity of unions in the building and construction industry to operate effectively. This included the removal of the right to refuse to answer questions on the grounds of self-incrimination, the right of the government to deny an employee's choice of legal counsel and other breaches of human rights. The definition of the building and construction industry has been drafted broadly. To that end, it included railway workers involved in the maintenance of railway infrastructure.

15. The government attacked the capacity of unions to play a constructive role in occupational health and safety. The independent Occupational Health and Safety Commission was abolished and it responsibilities moved to a government department. Union health and safety representatives were removed from workplaces of the federal government. Employers have been provided with the means of avoiding more workers friendly state based occupational health and safety legislation. The federal government has also used its powers to override industrial manslaughter legislation in the Australian Capital Territory.

16. The government made it more difficult for its own employees and other employees covered by the federal workers compensation scheme to claim for work related injuries/illnesses. The government removed the entitlement to claim workers compensation for injuries/illnesses sustained travelling to or from work or whilst on a recess break away from the workplace, and made it more difficult to pursue stress related illnesses.

The government left no stone unturned in pursuing its ideologically driven attack on workers and their Unions. Its general attitude and behavior towards unions ranged from the petty to the absurd. On the one hand the government denied the unions access to the "lock-up" to preview the Work Choices legislation prior to its introduction into Parliament, whilst allowing the employers access. On the other hand it supported the use of guards with ski-masks and dogs to tread the waterfront during the MUA dispute. Any opportunity to criticize, oppose, or frustrate a union in the legitimate pursuit of its members' interests was taken up with alacrity.

In the aftermath of the introduction of Work Choices many employers did not hesitate to take immediate and full advantage of its terms. The Federal Government went on a crusade, not only amongst its own employees but amongst employers generally. Millions of taxpayers' dollars were spent on advertising, on gimmicks and on handouts to employers to push the Work Choices barrow.

The impact on the workforce was significant. There has been a wealth of literature on the negative impact of Work Choices.[1] This literature was in many cases objective, sophisticated and powerful. The Federal Government tended to respond with superficial statements usually attacking the author of the material rather than to constructively address the content of the material.[2] However, nobody out in the world of work was under any illusion of the impact on Work Choices.

Not unsurprisingly a reaction soon came. Workers, Unions and the community in general rallied around the banner of the "Your Rights at Work" campaign. Convinced that the Howard Coalition Government was not going to rid us of Work Choices the idea was to rid us of the Howard Coalition Government. In November 2007, the Australian people voted to do just that. There is no doubt that the Your Rights at Work campaign made a significant contribution to that outcome.

The next step was to get rid of Work Choices, to send it to the dustbin of history and to weld the lid on it. In the early part of last year the Federal Government effectively abolished the capacity to make Australian Workplace Agreements. The Fair Work Bill 2008 goes further in abolishing Work Choices. However, it does not go far enough.

The RTBU has an ambivalent view about the Bill. We recognize that it contains much that is good and welcome. We recognize that much in the Bill puts the Union in a

[1] The RTBU refers the Committee to the submission of the Australian Council of Trade Unions where in its analysis of Work Choices it footnotes numerous references.
[2] For example, academics such as David Peetz were regularly attacked as mere mouthpieces of the unions.

position where it can effectively pursue its primary objective of representing, defending and advocating the cause of our members. The removal of the countless walls put in place by Work Choices is a positive response to the demands of the workforce. The Fair Work Bill 2008 does not put any Union in an advantageous position. What it does is to remove the shackles of Work Choices. It is up to the union movement to do the rest.

However, the RTBU believes that the Bill contains a number of features that are either unnecessary or undesirable or inconsistent with the objective of demolishing Work Choices. This submission outlines those features and, as noted earlier should be read in conjunction with the issues raised by the ACTU.

In our view there are a number of steps that can be taken to improve the operation and effect of the Bill. We believe those steps are consistent with the position of the Australian community at the last election to institute a system of industrial relations that reflects the notion of "a fair go" and removes for all time the odium of Work Choices. We would urge the Committee to impress this upon the Federal Government.

GENERAL AND SPECIFIC ISSUES

Collective Bargaining

In a major reversal of Work Choices, the Bill refocuses the attention of the industrial relations system on to where it rightly belongs; on collective bargaining. This is a welcome change. The exploitative system of Australian Workplace Agreements (AWA's) is no more. This does not mean that employees cannot enter into individual contracts but rather any individual contract relies for its legal underpinning on the common law and must be at least consistent with the safety net system established by the Bill.

The industrial relations system now reflects the need to redress the inherent imbalance of power in bargaining between an employer and an individual; an imbalance that can be corrected to some degree by employees acting collectively. Unions are free to represent employees and employees are free to be represented by Unions. Unlike Work Choices, the employer will no longer have a right of veto over who may represent the employees and/or whether the wages and conditions of the employees should be determined by a collective agreement (and if so, whether it should include a Union) or an individual contract.

In a number of respects the Bill provides a bargaining system that is easier and simpler to operate. Unions and employees will no longer be bogged down in the bureaucratic maze that is Work Choices. Gone is the need to draft documents such as an "initiation of a bargaining period", ensuring the AIRC gets a copy, being careful to ensure the employer can't allege the claims in the document include non-permissible matters and seeking injunctions against the Union in the event it seeks to take protected industrial action.[3] The capacity of an employer to interfere in the bargaining process with the aim of frustrating the requirement of Unions to conform to Work Choices is gone.[4] Also gone is the list of matters that, under Work Choices, were regarded as not allowable in a collective agreement. In other words, whilst the Howard Coalition Government reluctantly conceded the right to negotiate a collective agreement, it decided that it would determine what could and what could not be put in such an agreement.

[3] In one matter involving the RTBU, the employer claimed in the Federal Court that certain clauses in a draft enterprise agreement were non permissible and succeeded in obtaining an injunction to prevent the taking of protected industrial action. A perverse feature of this matter was that the employer complained about a certain clause that it had in fact drafted and sought to be put in the agreement. In another case, an employer sought to deny an application for a protected action ballot on the grounds that because the RTBU's claims were inconsistent with government policy the RTBU could not be genuinely making the claims in the bargaining notice. Whilst it failed to impress the AIRC, it nevertheless delayed and temporarily frustrated the RTBU in expeditiously pursuing the agreement.

[4] A not uncommon example was the taking of a technical point that the wording of the question(s) on a ballot paper for the taking of protected industrial action was confusing or ambiguous.

The proposed industrial relations system in the Bill also ensures that any agreement passes what is now termed the Better Off Overall Test (BOOT), thereby setting in place a test that is a significant improvement on the original test initiated by Work Choices and the test that would still be in place if the Howard Coalition Government had had its way. The system also provides that the employees must genuinely agree to any agreement through the approval process.

The Bill also seeks to address the situation where employees are in a difficult bargaining position and where, in the absence of some assistance, a collective agreement is unlikely to eventuate. This has been called the low paid bargaining stream.[5] The RTBU is concerned, however, that the rules set in place for access to this bargaining scheme are too narrow and that genuine problem areas may be excluded for that reason. Further, there is no right to take protected industrial action. In our view, these provisions will require consideration if, as we expect, experience shows that they are not assisting the low paid to achieve worthwhile collective agreements.

The Bill continues the aversion to pattern bargaining and the capacity to negotiate a collective agreement on other than an enterprise basis. Whilst it permits multi-employer bargaining in restricted circumstances, the ground rules are such as to make its practical application very much the exception. The RTBU sees no reason why employees in the same industry performing essentially the same work albeit for different employers should not be able to combine to pursue a multi-employer or industry agreement if they so choose. This type of bargaining is not unusual on other countries – for example it takes place in many parts of Europe such as the Scandinavian countries and Germany. It is also in our submission in the interests of collective bargaining that it may occur at the industry or multi-employer level. The noted British labour law academic, Dr. Keith Ewing has observed that: "No major economy with decentralised collective bargaining at enterprise level underpinned by recognition laws has a collective bargaining density of more than 50%". He goes on to note, conversely: "There is no major economy that has sectoral bargaining where there is collective bargaining of less than 70%".[6] Of course these figures help to explain the opposition of the employers to bargaining that extends beyond the enterprise. As we see it, the real position of employers - ably supported by the Coalition Parties – is a scheme of individual agreements. That way they can control the agenda. The greater the number of levels of collective bargaining, the higher the degree of collective bargaining that will occur. This is not seen by the employer as in their interests. On the other hand, for a party that sees collective bargaining as the way to go, it is clearly the path to pursue. It is our submission that the Federal Labour Government should review its position on the level that bargaining can take place – if not in this Bill but shortly thereafter.

Whilst the Bill significantly increases the range of matters that can be included in a collective agreement relative to Work Choices, it still puts some unnecessary limits on the content of collective agreements. There is no reason, in our submission, why a

[5] See Division 9 of Part 2-4

[6] Ewing K., Restoring Rights at Work – Lessons from the United Kingdom, Paper given to a seminar arranged by

collective agreement should not contain right of entry provisions if the parties to the agreement are happy for some provisions to occur. Further the notion of "matters pertaining" leaves unnecessary scope for debate and litigation by determined employers. The Bill should be amended so as to put it beyond doubt that the parties are free to include whatever they so choose. It is, in our submission, a nonsense to suggest that workers would be seeking to have covered by a collective agreement matters that do not bear some relationship to their working life and their workplace.

In summary, the bargaining provisions in the Bill are a significant improvement on the current situation. They are a mile in front of the provisions in Work Choices and what the Opposition would really prefer. Nevertheless to meet the objective of the destruction of Work Choices, the Bill should permit pattern bargaining and bargaining beyond the enterprise and also ease the limitation on access to the low paid bargaining stream.

The Safety Net

The notion of a safety net under Work Choices was one that existed in name only. In the period following its introduction, Unions and a number of brave individuals identified example after example of significant losses of income, increased employment insecurity and diminishing workplace conditions. These examples were brushed aside by the Howard Coalition Government as the bleating of the Union Movement and a beat-up. By the time the then Government woke up (or faced up) to the reality, it was too late. A mad scramble in mid 2007 was seen for what it was – a desperate move motivated by a forthcoming election rather than any genuine attempt to fix a mess.

The Bill introduces a two-part safety net system – the National Employment Standards and a Modern Award system. This is complemented by an annual adjustment to the minimum wage after an examination of the situation by Fair Work Australia.

The safety net is now further from the ground than it was under Work Choices. For that reason the Bill is a significant improvement on the current situation.

The safety net is, in other respects, a mixed blessing. Whilst it is an improvement on Work Choices, it is coming from a low base. Over the years the gap between wage increases under collective agreements and wage increases through amendments to the safety net has been diverging. In other words, the difference between the world of work where actual wage rates are considered and the world of the safety net is increasing. The extent of that increase and the likelihood of its continuation will only act to undermine the effective role of a safety net. Further, to the extent that this gap exists it becomes a disincentive for employers to bargain collectively and opens up an industry to widely divergent wage rates that in turn is a generator of workplace dissatisfaction. Why should an employer bargain when the safety net provides no incentive to do so? If the difference between the safety net and the "market" rate is in the order of 20+% then, to the workforce, the credibility of any safety net system is under threat.

For those on the safety net their situation becomes relatively worse over time. And these are commonly the employees that need the most help from the system. As noted above, the bargaining system goes some way to help their situation but we suspect it will not be sufficient to provide the necessary boost.

Further, the National Employment Standards and the Modern Award system have, in some respects, undermined a safety net system. In this submission the RTBU expresses a number of concerns with some of the national employment standards. The modern award process for the rail industry has also, in our submission, has not helped the situation.

While we appreciate the difficulty the Commission face in translating a number of disparate and, sometimes out of date, awards into a single award for the rail industry, we have the impression that the process reflected more finding the lowest common denominator for conditions that implementing a genuine safety net. Rail industry awards have generally contained extensive provisions containing hours of work. The applications of these hours have varied across states, employers and employees (such as train drivers, guards and infrastructure workers). Few of these conditions are now in the modern award.

The creation of the wages and classification system is also of concern as, in our submission, it does not reflect the variation across the rail industry. These classification streams are not fully defined, and contain grey areas in relation to employees who could be classed as either administration or operations. There is no guarantee, given the existing classification structures already in existence in workplaces, that there will be uniformity in classifications based on the new systems contained in the Rail Award 2010. Simplicity does not always equal sound foundations for a safety net

Further the rail industry has traditionally covered middle and sometimes senior manager positions through the award system. These employees still deserve the basic protections given by awards.

Part of the problem with the modern award process was the limited time period given to the parties to develop the outcome. It was an enormously time and resource-consuming process that had to be done over and above other duties of the parties. The Federal Government in our submission expected the parties to meet an unrealistic timetable. Whilst it was met, it was a process that meant a less than desirable outcome. This was a situation beyond the control of any of the parties to the process

The Federal Government through this Bill has shown that it appreciates the importance of a safety net. However, it is not only a safety net per se that counts but the effect of that safety net. This is where the RTBU has concern. In our submission the Bill is deficient in that regard. Provision should be made for a review of the basis of the safety net and, if necessary, its elevation. Further amendments to the national employment standards as recommended in this submission should be done and provision for further work to be done on the modern award system should be allowed. In our view, to do a second best job simply to meet the political timetable of others is counterproductive and unnecessary.

The new system can be implemented whilst running changes are made to improve its operation.

Industrial Disputation/Arbitration

For most of the period since federation, unions and employers have had the capacity to appear before an Industrial Tribunal to assist in the resolution of industrial disputes. In most circumstances the tribunal had the capacity to arbitrate an outcome of the dispute and in doing so to establish legal rights and obligations. Of course, most industrial disputes were resolved by direct negotiation between the employer and the union. Further there was a capacity to have any such resolution certified as an agreement by the Industrial Tribunal. This "New Province for Law and Order" in the words of Justice Higgins, was envisaged as a system whereby arbitration would replace the industrial law of the jungle.

It is a truism that industrial disputation will arise regardless of the industrial relations system in place – the system cannot anticipate the myriad of issues that may arise between employers and employees in the workplace. The basis of the system is to provide a means by which the parties can resolve any particular dispute.

Since the late 1980's the industrial relations system has put an emphasis on bargaining between the parties in contrast to the role of industrial tribunals and a process of arbitration. Once an agreement was reached the system in many respects assumed the parties would live happily together until the nominal expiry date of the agreement. Agreements were required to provide for a means of resolving disputes concerning its operation but no provision for arbitration could exist in the absence of explicit agreement of the parties to have such a provision.

The problems that flow from this system are twofold. Firstly, it established a motive for employers not to agree to arbitration in any disputes settlement procedure. Secondly, and this explains the first, industrial action was explicitly outlawed (except for "protected action" during a bargaining period) and the power of the Commission to arbitrate was removed.

The result was that the deck was stacked in favour of the employers.[7] The province as envisaged by Justice Higgins was abolished – but the jungle was regulated to the advantage of employers. Outside of the negotiation of a collective agreement, a Union could not take industrial action without the risk of an order to prevent it from doing so. In addition the Union could not seek arbitration of a dispute. Unless explicitly covered by a collective agreement, an employer's capacity to act unilaterally was significantly enhanced.

The RTBU has experienced situation where part of the contentious issues in negotiating a collective agreement is the system to resolve disputes that could arise about the operation

[7] Of course, the situation was exacerbated under Work Choices with its bias towards individual contracts and restrictions on the capacity of unions to properly represent their members.

of the provisions of the collective agreement. In other words, a dispute about how to deal with disputes. This is an important issue – the nature and contents of a disputes settlement procedure sets the ground rules and with it explicitly influences the power relationship between the parties.

The RTBU has entered into some agreements that provide for arbitration by the Commission only where the all parties to the agreement concur that arbitration should occur. Our practical experience is that the employer will not agree to arbitration. In some agreements there is a provision that provides for the Commission to make a recommendation. It is our practical experience that the employer will do its best to avoid the Commission making any such recommendation. As we see it, it is not in the interests of the employer to accept these methods of resolution in circumstances where if, as a last resort, consideration is given to taking industrial action, the employer is in the Commission like a shot seeking an order to make it unlawful to take industrial action. Under the current arrangements and, it appears, the Bill, such an order will most likely be given. The irony here is that the employer who on other occasions argues that it does not want "third parties" involved in its business, is very quick to do so when it is perceived to be in its own interests. In other words, if the Union and its members are ultimately powerless to do anything, the employer can do as it pleases. In this context there is also a tendency for an employer to regard the matter as resolved (coincidentally in exactly the way it wanted). It is a misconception for employers to think that simply because its employees and the Union may be prevented from pursuing a matter to an acceptable outcome that the dispute goes away. As long as the underlying reason for the dispute prevails and the employees feel that their concerns have not be properly addressed the dispute is ongoing.

It has been noted earlier that the capacity of employees to take protected industrial action has been improved under the Bill with the diminution of the capacity of employers to frustrate the process.

Nevertheless the Bill places what we regard as unnecessary barriers in the path of taking protected industrial action.

Firstly, circumstances that involve pattern bargaining cannot be the subject of protected action.[8] Our earlier comments on pattern bargaining are equally as applicable here – pattern bargaining should be permissible and with it, protected industrial action.

Secondly, the Bill continues the provision whereby a party is required to give an employer 3 working day's notice of the intention to take industrial action.[9] The RTBU does not accept the rationale for such notice. In our submission this is a provision that is designed to undermine the tactical capacity of a Union and employees to harness their bargaining strength. It does no more than give an additional benefit to the employer and enhances its bargaining power.

[8] Section 412
[9] section 414

Thirdly, the Bill places unnecessary steps on the path a Union takes to conduct a ballot of its members with respect to taking protected industrial action. It is unnecessary in our view that a Union should have to seek authority from FWA to hold a ballot. And in that regard, it should not be necessary that FWA be satisfied by a Union has genuinely tried to reach agreement. Finally the quorum requirement in the Bill can lead to perverse outcome for no sensible reason.

Fourthly, the Bill provides a number of ways in which the taking of protected action can be circumvented by other than the union members. These include the institution of cooling off periods, the prevention of taking protected industrial action where it is causing harm to a third party or another corporation, and the capacity of the Minister to prevent protected industrial action from occurring. Each of these barriers constitutes an unnecessary and unacceptable infringement on the capacity of workers to legitimately use their bargaining power in the pursuit of a collective agreement.

The Definition of "service" and "continuous service"

The Bill sets out the meaning of the terms "service" and "continuous service".[10] These terms are important for determining an employee's entitlements in a number of respects.

The RTBU's concern goes in particular to sub-clause 22(2)(b), and the exclusion of "any period of unpaid leave or unpaid authorised leave" (subject to certain qualifications) from "service". In our submission this is an unfair provision. There is no logical reason why unpaid and in particular authorised unpaid leave should be so excluded.

Unpaid leave may be taken for a number of valid reasons. It may be taken as an alternative to redundancy, for study purposes (for example, where an employee undertaking a course by correspondence is required to spend a period of time "on campus'), for purposes of travelling overseas or for purposes of attending reserve forces training.

In addition it has a negative impact on the taking of parental leave (s22 (4)), an entitlement to redundancy pay (s384), and entitlement to notice or pay in lieu upon termination (s171 (3)) and the transfer of business provisions (s22 (5) (b)).

In our submission any provision that reduces an employee's period of service for purposes of an entitlement to provisions under the Bill for the taking of authorised unpaid leave should be deleted. Alternatively, a minimum time period should be prescribed – for example, only authorise unpaid leave in excess of 3 months would be not considered as service

[10] section 22

Application of a Modern Award

A modern award under the Bill does not apply to "high income employees"[11] A high income employee is one with an annual income of $100,000 or more (indexed on an annual basis).

As we understand it, the ostensible basis for the cap is that employees at this level of income are usually high skill/high responsibility employees who are in a position to effectively negotiate their day-to-day work arrangements with their employer. The RTBU disputes this reasoning. The level of income does not affect the inherent nature of the employment relationship. The Federal Government has not produced evidence to support its proposition. Further, whilst skill is one determinant of the level of income it is not the only one. In recent times the demand for labour and the prices of being obtained for certain commodities has resulted in high wages being paid in the relevant industries. However the reality of the current economic crisis is showing that these jobs of ultimately unstable and differ little from most occupations in that regard.

The RTBU has historically covered and has as members, employees who might be regarded as "middle management". Our experience is that when "push comes to shove" these members are the rest.

The modern award system should apply to all employees equally. In our submission the provision for limiting the application of the Bill with respect to high income employees should be deleted.

Community Service Leave

Community service leave includes a provision for jury duty.[12] An employee attending for jury duty is, under the Bill, entitled to be paid at the base rate for a period of 10 days. In our submission this is unfair.

An employee has a legal obligation (not to mention a duty to the community) to attend jury duty when so called. For many – if for no reason other than inconvenience – it is not something that is done with alacrity. Where an employee is faced with the possibility of losing income- and in some cases it can be significant – a disincentive to undertake it is manifest. People may be compelled to continuously seek exemptions for valid financial reasons. This in not in the interests of those who are legally obliged to attend for jury duty. Nor is it in the interests of the administration of justice.

The Bill should be amended to provide for payment at the level the employee would have been paid had he/she been at work for the duration of the period of jury duty.

[11] section 47
[12] section 111

Public Holidays

The Bill provides certain provisions on public holidays.[13] The entitlement to public holidays has been an issue of controversy in recent years. In 1994, the then Kennett Liberal Government in Victoria determined to remove a number of public holiday entitlements from workers. This decision led to proceedings in the Federal Commission and a subsequent test case decision.[14]

The outcome of the test case was the establishment of an entitlement of 11 public holidays each year – 10 named public holidays and an 11th public holiday to be determined on a state or regional or award basis.

The Bill however only provides for 8 named days. Whilst it provides for additional days it is contingent upon their declaration by the respective State/Territory Government for their practical operation. This Bill takes us back to the Kennett situation and the reason for the test case in the first place.

It is also somewhat ironical that a Federal Labor Government with pretensions for republicanism determines to remove Labour Day from the list of public holidays whilst retaining Queen's Birthday.

Further, s114 provides for an obligation on an employee to work on a public holiday where a request to do so is reasonable. Whilst it provides for a requirement to work it does not provide for the appropriate entitlement to payment for working on a public holiday. Payment should be provided for at the rate of double time and a half with an option to take payment at time and a half together with a day in lieu.

The RTBU submits that the Bill should be amended to provide for the provisions as determined in the test case of the Commission in 1995.

Notice of Termination and Redundancy

As noted above the definition of "service" has a negative impact on provisions for notice of termination and redundancy in circumstances where unpaid leave is taken and should be removed.

The Bill, however, goes further to place even more restrictions on an entitlement to notice of termination and/or redundancy provisions. An addition criterion for entitlement to such provisions has been added – namely the size of the employer.[15]

Section 123(3) provides that with respect to an entitlement to the notice of termination an employee must have been employed by the employer for at least 6 months and if the employer is a "small business employer" the minimum period of employment must be 12

[13] sections 114-116
[14] See decision prints L4534 & L9178
[15] Section 121

months. Section 121 provides that with respect to redundancy pay, no payment under s119 is payable where the employee is an employee of a small business employer.

There is, in our submission, no valid reason why an employee should be denied an entitlement to notice of termination or redundancy simply because of the size of his/her employer. Amongst other things, it's not as if the redundancy payment is overly generous. Nor is the termination payment overly generous. If a small business proprietor enters into a business it should be on the understanding (let alone the ethical position) that in the event of a termination or redundancy there is an obligation to provide their employees with some compensation, then it should be a common business practice to make provision for such an eventuality. It is very difficult to believe that such a provision would make or break a small business or deter such a business from being set up. Certainly no such evidence (as distinct from assertion) has been made available.

The RTBU submits that the provisions regarding the employees of small business employees should be deleted.

Payment Whilst on Workers Compensation

The Bill provides that, other than where provided by law, an employee is not entitled to accrue leave whilst absent from work on a period of workers compensation.[16]

The RTBU submits that this is an unfair and unreasonable provision. An employee is not on workers compensation voluntarily but rather as a direct consequence of an injury or illness incurred as a result of his/her job. Further, an employee on workers compensation has enough to deal with regarding the injury or illness to be then informed that he/she as lost a certain entitlement to various forms of leave.

This clause should be deleted.

Modern Award Provisions

These comments are in addition to those mentioned above with respect to a modern award as part of the safety net.

The Bill provides that each modern award contain a "flexibility term".[17] A flexibility clause, subject to fulfilling certain conditions, permits an employee to work in a manner that would otherwise be contrary to the modern award.

According to its provisions, any agreement between the employer and an individual worker must "meet the genuine needs of the employer and employee' and the employer and employee must "genuinely agree". Whilst some have described such provisions as a de facto AWA it clearly is not the case due to the protections in place that did not exist with an AWA. The fact that it permits an employer to "do a deal" with an individual

[16] section 130
[17] section 144

employee in the context of the workplace power relationship does however accord the term with a number of the characteristics of an AWA. Further, it does, in our submission, undermine the safety net.

Firstly, the safety net system is established to provide appropriate protection from employers attempting to circumvent the conditions in the award. Allowing individual deviations for the award provisions can only undermine the safety net.

Secondly, whilst the provisions refer to the requirement for "genuine agreement", the RTBU is sceptical as to the impact of such a provision in a practical situation. The notion of "genuiness" in our submission means next to nothing in the power relationship that operates in many workplaces. To maintain the credibility of a safety net, it should be sacrosanct and not deviated from. The so-called individual flexibility agreement permits it to occur.

The modern award provisions also determine that the awards must not contain any right of entry provisions.[18] In our view if the parties to an award see reasons for it to contain right of entry provisions there is no reason why the award could not contain such provisions. This appears to be a provision simply designed to keep the employers happy.

The RTBU submits that the provision designating a requirement for a flexibility clause and proscribing any provisions for right of entry be deleted.

Mandating Terms for Collective Agreements

The Bill provides that collective agreements, like modern awards, contain a flexibility clause.[19] The position that the parties to a collective agreement should be compelled in include a term that they would not otherwise include is, in our submission, contrary to the notion of an "agreement". If the parties agree that such a provision is unnecessary why should it be included? Further, it sets a precedent of the Government believing it has a role in determining the content of collective agreements. This was a position that was adopted by the Howard Coalition Government and used to the benefit of employers.

The RTBU submits that the Bill should delete any reference to a requirement to have a individual flexibility clause in a collective agreement.

Transfer of Business

At the outset it needs to be pointed out that the transfer of business provisions in the Bill are a significant improvement on the current provisions. The current provisions are most unsatisfactory. The circumstances exist whereby, through some arcane operation of law a person who continues to perform essentially the same work albeit for a new employer may not attract the benefits of the transmission of business entitlements. And, where they do, the new employer may make application to waive the operation of the provisions.

[18] section 152
[19] sections 202 & 203

And, where that does not work, the employer simply needs to wait 12 months whereat the transmission provisions expire.

Historically the provisions for transmission of business were enacted to prevent employers from avoiding their obligations under an award by simply changing the name of the organization whilst retaining effective ownership and control. This is important not only from the perspective of protecting the employees' wages and conditions but preserving the integrity of the industrial relations system.

The RTBU is concerned, however, that whilst the Bill significantly tightens what is current an unsatisfactory situation, it retains some "out clauses" for the determined employer.

The Bill provides FWA with the power to make an order that a transferable instrument does not or will not cover a non-transferring employee.[20] It also gives the FWA the power to vary a transferable instrument where the FWA is satisfied the instrument is not "capable of meaningful operation" because of the transfer of business or because the transfer of business has resulted in an ambiguity or uncertainty.[21]

The Bill already incorporates provisions to vary or terminate a collective agreement by agreement during its nominal operation period. In the event the new employer believes the agreement adversely affects its operation it can enter into discussion with its employee and their unions and where agreed utilise these provision of the Bill. In that case the provision of ss 319 and 320 are unnecessary and should be deleted.

The Bill also contains a 3 month limit for the employment of an employee from the "old" business by the "new" business. The RTBU believes that limit is too short and creates the potential for "abuse" by a calculating employer. The time period should be increased.

Unfair Dismissal

Once again it needs to be pointed out that the unfair dismissal provisions in the Bill are a significant improvement on the current provisions. Whilst it was politically unachievable to eliminate unfair dismissal provisions entirely, the Howard Coalition Government did the next best thing. Through a variety of measures in the Work Choices package it became increasingly difficult for employees to pursue a claim in the Commission that they had been unfairly dismissed. For example, where an employee was employed by an employer with less than 100 employees that employee was denied an entitlement to pursue an unfair dismissal claim. Further, the notion of an employee being unable to pursue a legitimate claim where the employer claimed the dismissal was for "operational reasons" only served to complicate and frustrate the process.

The RTBU remains concerned about the restrictions the Bill places on certain classes of employee to pursue an unfair dismissal claim. An employee in the "high income" class is

[20] section 319
[21] section 320

denied the right to pursue an unfair dismissal in the event the employee is covered by a modern award or a collective agreement.[22] An employee employed by a small business must have been employed for a period of 12 months before becoming eligible to pursue an unfair dismissal claim.[23] This compares unfavourably with an employee of any other employer who is to have been employed for a minimum period of 6 months.[24] And, as noted earlier the Bill puts certain restrictions on what can be taken into account for the purposes of service as an employee. Finally there is the small business dismissal code that makes it easier for a small business employer to justify a termination.[25]

In our submission these restrictions are neither necessary nor desirable. There are simply no grounds to discriminate between employees simply because of the size of the employer. An employee who is unfairly dismissed remains unfairly dismissed regardless of the size of the employer. It should be a matter of common sense for an employer, regardless of size, to treat their employees with dignity and respect and in the same manner that they would expect to be treated. An employer doesn't need access to a big city law firm nor have an in house human resources section to understand and apply that concept.

In our submission there should be no restriction on the capacity of an employee to pursue an unfair dismissal claim and such provisions in the Bill should be deleted.

In addition the timeframe required to lodge an unfair dismissal application with FWA is too short. While a person who is aware of their legal rights and is competent and confident enough to make an application about the dismissal may be able to do so within 7 days, the reality is that this is often not the case. Workers are often in shock and do not know how to respond, if at all. Often the first thought is to find an alternate source of income or that pressing payments – such as rent or mortgage – are taken care of before a reasoned 'what can I do" is taken. This sometimes includes telephone calls to their Union – by which time the deadline may already have passed; particularly if the decision is made just prior to Christmas or Easter. The Bill should be amended to lengthen the timeframe required to lodge an unfair dismissal application.

Right of Entry

The Bill provides a number of entitlements and conditions for the right of union officials to enter the workplace.[26]

In general terms a union official has, subject to meeting certain conditions a right to enter a workplace to investigate a suspected breach of the legislation or a Fair Work Instrument, and to attend discussion with employees who wish to participate in those discussions.

[22] section 382
[23] section 383 (b)
[24] section 383 (a)
[25] Section 388
[26] Sections 478-493

To do so a union official must be in possession of a right of entry permit, must give the employer at least 24 hours notice of an intention to enter the workplace, and only hold discussions non working periods. A union official is entitled to inspect any documentation relevant to a suspected breach by the employer.

There is also an obligation on the employer to act reasonably when responding to a union official's entitlement to enter a workplace.

The Bill establishes a system whereby employees are entitled to join, participate in and be represented by a union in the workplace. An integral part of this system is the capacity for unions to be able to enter the workplace to perform their legal obligations to their members. It is not enough to say that employees are entitled to join a Union, and then – as occurred under Work Choices – establish a regime that makes it difficult for employees to access their Union. Such a regime is tantamount to joining a golf club on the condition that you don't play golf! The Bill also puts in place conditions to facilitate the operation of a right of entry system.

The right of entry provisions have attracted an inordinate degree of attention by the Opposition parties. Given their position on Unions this is hardly surprising. The Shadow Minister for Employment and Workplace Relations has described the right of entry provisions as "This slight (*sic)* of hand approach to letting unions in to your workplace through the back door...."[27] For a not atypical but shrill performance, we can't go past the Liberal Party Member for Swan, Mr. Irons. He informed the House of Representatives: "Unions get access to non-union member records and a privileged seat at the bargaining table. They can even enter workplaces where the employer and employees have previously agreed that they do not want unions. I heard the member for Leichhardt state that businesses are confused. Well, they will be when the unions start jackbooting their way through the door. Whatever happened to the expectation of privacy of both the individual and the employer? In the case of an employee not wanting his records viewed by the unions, the employee cannot request this. ...The union supposedly cannot use the information gathered for any other purpose than what it gathered the information for, but I am sure that they will come up with a list of items as they see fit and then use that information as they like."[28] Putting to one side the anti-unionism that oozes from this statement, it is wrong in a number of respects.

The implication that somehow a Union has "open slather" to enter a workplace is simply incorrect. There is no provision in the Bill that says a union official may enter a workplace as and when they wish – jackboots or otherwise! In the event a union official wants to have discussion with employees who are not members of the union, those discussions can only occur with those who wish to participate. If some or all employees want to participate then a scenario where the employer and the employees don't want the

[27] Keenan M., Speech to the Australian Industry Group PIR, 9 December 2008, p.5
[28] Address by Mr. Irons, Member for Swan to the House of Representatives, Hansard, 1 December 2008, p.25

union cannot exist.[29] If the employees genuinely don't want the union and won't participate in any discussions the official won't enter the workplace to have a meeting but only to stand alone in an empty room.

On the issue of access to information the allegation that a union official would only want access for such information for illegitimate reasons is both offensive and wrong. For many years prior to Work Choices, the right of entry provisions entitled union officials to access information from employees work records whether or not they were members of a union and/or whether or not they consented to such access. Over all of those years there was not a single example of a union official abusing the right provided by the relevant legislation. Further, the Opposition provides not a scintilla of evidence that the future will be any different to the past.

On the issue of employee privacy, it needs to be said that the Opposition has less than a perfect record. The fact of the matter is that as the law currently stands employee work records are not subject to the privacy laws. An employer is free to do with the information in those records as the employer chooses as long as there is some connection to the current or former employment relationship.[30] In 2004, the then Howard Coalition Government established an Inquiry into Privacy and Employee Records. The inquiry was to be conducted in-house by the Attorney General's Department and the Department of Workplace Relations. Of particular interest was the exemption on employee records. The RTBU made a submission to that Inquiry.[31] Unfortunately not another word was heard. Whether anything happened is a mystery. Certainly the relevant legislation remains unamended.

Further, in recent years a number of issues with privacy considerations in the workplace have arisen. The issues include computerised retrieval techniques, automated personnel information systems, electronic monitoring, screening, genetic testing, drug and alcohol testing and surveillance in the workplace. Despite being in government from 1996 to 2008, the Federal Coalition did absolutely nothing about the privacy implications of any of these issues. In this case of the Fair Work Bill 2008 the analogy between the position taken by the Federal Opposition and crocodile tears is apt.

The fact of the matter is that in circumstances where a union official requires access to certain employment records it is with the intention of determining whether there has been a breach of a particular law or industrial instrument. It is difficult to see where such information would have any other probity. History shows a perfect record of union compliance with the provisions and purpose of the legislation. In this light the Opposition position is mere posturing and scaremongering and should be rightly ignored.

[29] The concern here is that unscrupulous employers may attempt to manipulate the employees to say they do not want to participate. The Bill should be amended to remove this possibility

[30] Privacy Act 1988 (Cwth.), section 7B

[31] Australian Rail, Tram and Bus Industry Union, SUBMISSION TO THE FEDERAL GOVERNMENT INQUIRY INTO PRIVACY AND EMPLOYEE RECORDS, Australian Rail, Tram and Bus Industry Union, Redfern, April 2004

SUMMARY AND CONCLUSION

The RTBU welcomes the Fair Work Bill 2008 as a welcome relief for Australian workers from the draconian provisions of Work Choices. However we would like to see a number of amendments to the Bill. This submission outlines the following amendments that in our submission should be made to the Bill.

- With respect to collective bargaining, access to the low bargaining stream should be eased and pattern/multi-employer/industry bargaining should be available should the parties so wish to engage in that form of bargaining and employees and their unions should be free to include in a collective whatever they so choose to include.

- With respect to the safety net, provision should be made for more time and work to be done on the modern awards to ensure that employees are not disadvantaged and a number of the national employment standards should be amended so that they properly reflect the current standard.

- With respect to the taking of industrial action and arbitration, the Bill should be amended to provide for arbitration by FWA – whether in the context of making a collective agreement or otherwise – the ban on pattern bargaining should be removed, the giving of 3 day's notice before taking protected industrial action should be removed, the ballot requirements for seeking approval to take protected industrial action should be removed or eased, and the provisions that allow third parties (including the Minister) to take steps to prevent protected industrial actions from occurring should be removed.

- The definitions of "service" and "continuous service" should be amended to permit unpaid leave to be taken into account for the purposes of leave.

- The "high income" provisions should be removed.

- The provision for jury duty should be amended to provide for an employee on jury duty to be paid as if he/she was at work and for the entire duration of the jury duty.

- The provision for public holidays should be amended to reflect the test case outcome of the Commission.

- There should be no restriction on the entitlements to notice of termination or redundancy.

- The provision that excludes a period of time on workers compensation for leave purposes should be removed.

- The provision for individual flexibility clauses in modern awards and collective agreements should be removed.

- There should not be any restriction on the right of an employee to take a claim for unfair dismissal and the small business code should be deleted.
- The legislation should be amended to ensure that the right of entry provisions whereby a union official may enter a workplace where employees wish to participate in discussions cannot be abused by unscrupulous employers.

Further, as noted in this submission where the RTBU submission does not include issues raised by in the ACTU submission, the RTBU agrees with and adopts those parts of the ACTU submission.

The Bill, together with the earlier legislation to prohibit AWA's takes us a long way from Work Choices. That in itself is a welcome move. There is no doubt that the Bill makes life in the workplace alot easier for workers seeking to protect their wages and conditions, to enhance their expectation of being treated with the dignity to which they are entitled, to join a Union with less of a fear that the employer can act against them with impunity, to seek the advice and involvement of a Union, and to have a Union negotiated collective agreement.

Nevertheless, the Bill can go further and needs to go further to ensure that any whiff of Work Choices is removed from the workplace. In our respectful submission the Bill does not achieve that objective; an objective the Australian community has roundly endorsed time and time again and ultimately at the ballot box. The Labor Party at that last election promised to abolish Work Choices. This submission shows that the Bill falls short of that promise in a number of areas and seeks that the Federal Government fill in the gaps. Accordingly, the RTBU urges that the Senate Committee in its report recommend that the Federal Government make the changes contained in this submission and the additional changes in the ACTU submission.