42/120 Collins Street GPO Box 1472 Telephone +613 8664 2664
Melbourne 3000 Melbourne 3001 Facsimile +613 8664 2666

www.bca.com.au

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Business Council of Australia

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email: eewr.sen@aph.gov.au

Dear Mr Carter

INQUIRY INTO FAIR WORK BILL 2008

Introduction

This submission on the Fair Work legislation is made by the Business Council of Australia (BCA) which represents the chief executives of the top 100 companies in Australia.

The BCA accepts that the government has an electoral mandate for changes to the existing workplace relations system and that in the lead-up to the 2007 federal election, it spelled out how it proposed to effect these major changes. Since gaining office, it has undertaken an extensive consultation process with stakeholder groups, including business, as it has developed the current draft legislation and other instruments. It has also been consistent in its use of pre-election commitments as the key reference point for determining decisions on points of ambiguity or subject to differing views. Both approaches have been welcomed by the BCA.

The BCA is also pleased that the Bill has been completely re-written and therefore does not have the complexities that arise from amended legislation. Its simplified structure is also welcome, although we have not been able to assess the effects of the interplay of the National Employment Standards (NES), the modern awards, this Bill and the anticipated regulations. Consistent with our strong support for the development of a seamless Australian economy, the BCA welcomes the continued national approach to industrial relations contained within the Fair Work Bill and the award modernisation process. We strongly support the continued evolution to a national system and urge states to refer their IR powers to the Commonwealth.

In this submission, however, we believe it is important to step back and to review the system as a whole, to the extent possible, in terms of its likely impact on the economic prospects for Australia. For that reason, the submission will review the draft legislation against the BCA's previously published policies on workplace relations. The submission also incorporates feedback from members about their expectations of the impact of the legislation.

The economic significance of the workplace relations system

The workplace relations system of any economy is a key element affecting its international competitiveness. Through its structure and performance, workplace regulation affects the comparative costs, quality, responsiveness and innovation of its domestic and exporting industries. Because of the openness of the Australian economy and the growing intensity of global competition, Australian industries need access to a workplace relations system that allows them to meet competitive pressures and to adapt quickly to changing circumstances and opportunities. Flexibility and speed of adaptation to meet changed demand or competitive pressures have therefore become essential characteristics of an internationally competitive workplace relations system.

Historically a workplace relations system has also had a domestic role in fairness and equity. Concepts of fair pay and decent conditions and the capacity to balance the competing interests through an independent umpire have been important in Australia. The BCA believes that in trying to balance the sometimes competing forces of international competitiveness and domestic fairness, all policy avenues should be considered rather than overburdening one mechanism. For example, in dealing with job security, some countries focus on minimising time in unemployment by providing strong transition support schemes, rather than increasing the barriers to job loss.

From the BCA's perspective the objectives of the workplace relations system should be to:

1 Enhance flexibility to meet changing international circumstances and facilitate Australia's international competitiveness.

2 Reduce barriers for job creation and enhance workforce participation.

3 Provide for efficient regulations with low compliance costs.

(BCA: *Action Plan for Workplace Relations*, 2005)

Further, the workplace relations system should not be seen in isolation from other key employment-related areas, such as social security, taxation and most importantly, education and training policies/systems. It should be seen as part of a suite of workforce policies, that together balance the needs of the employed and the unemployed and optimise Australia's international competitiveness and capacity to drive productivity improvements to underpin future economic prosperity. The BCA would urge the Committee therefore to consider whether all of the policy objectives sought through this Bill are appropriate, or whether there are other policy levers available. It believes that international competitiveness and business' capacity to respond quickly to changing international circumstances must be the key objective. This is reflected, to some extent, in the proposed objects of the new workplace relations system - see clause 3 of the Fair Work Bill, especially paragraphs (a) and (f). However, the BCA questions whether the substantive provisions of the Bill give effect sufficiently to the goal of promoting productivity and economic growth. For example, the government has highlighted the potential contribution of the new bargaining framework to improving firm-level productivity, yet by shifting the focus

away from genuine enterprise-level bargaining, the proposed statutory provisions may have the opposite effect.

Nor can this Bill be seen in isolation from other arenas of policy that affect cost structures, productivity and the relationship between employers and employees. Current proposals that increase parental leave benefits and charge for greenhouse gas emissions – worthy as they might be – are part of the total cost impost faced by Australian businesses. Similarly as the government seeks to increase the proportion of certain underrepresented groups in the workforce, by reducing barriers (for example, the disability employment reforms) the changes proposed to the workplace relations system need to be evaluated for their effect on those policy goals.

Current economic outlook and longer term labour market prospects

The current economic downturn and the speed with which it has affected global and Australian economic fortunes underscore the volatility faced by businesses and employers and their consequent drive for flexibility. From an economic environment characterised by supply constraints, including labour and skill shortages, key industries are now facing steep reductions in demand, both internationally and domestically. Cost reductions to meet reduced revenue projections have been foreshadowed or implemented, leading to second-round reductions in demand and many planned private investments have been deferred or are subject to re-evaluation. The capacity to vary wages and/or conditions can enable companies to reduce labour costs while still retaining jobs. Flexibility to tailor labour to changing market conditions is essential both across the cycle and in response to seasonal/weekly demand from consumers. Just as critical as the speed of adaptation to downturns is the capacity to respond quickly to increased demand as the cycle turns. This implies a capacity to build workforce participation quickly through efficient labour markets and a skill base that meets the emerging needs. As the BCA has indicated previously, building long-term workforce participation is key to Australia's future economic growth and prosperity as the population ages.

While the capacity to respond quickly to changed circumstances is critical to business viability, equally important is the capacity to achieve ongoing productivity improvements through the adoption of new technologies and through new ways of operating and to effect these changes as efficiently and in as timely a way as possible. The Prime Minister, in speaking on the carbon reduction pollution scheme, has already foreshadowed the extent of economic re-structuring Australia and Australian business face in reducing emissions over the coming decades, while at the same time striving for growth.

Thus BCA members have reviewed this Bill for its capacity to support this economic restructuring to ensure ongoing competitiveness.

Analysis of changes against BCA Workplace Relations Action Plan 2005

In 2005 the BCA published an action plan for reforms to the workplace relations system and associated social security, taxation/transfer and education and training systems (a copy of the action plan can be found at www.bca.com.au). The aims of the proposals were to enhance Australia's international competitiveness, through promoting greater flexibility and responsiveness and improving opportunities for productivity growth. The table shows how the Fair Work Bill affects these actions:

Actions for workplace reform, recommended by the BCA in 2005*	**Status of recommended action in new system**
Greater flexibility in agreement-making:	
• Award simplification (reduce to 6 matters)	• Awards being simplified but number of matters increased. Combination of NES (10 matters) and awards (10 matters).
• Simplification of no disadvantage test	• No disadvantage test becomes "better off overall test" – left to Fair Work Australia (FWA) to interpret. Adopts no individual worse off but explanatory memo says can be interpreted as classes of employees.
• Retention and reform AWAs	• AWAs abolished; existing AWAs can run to expiry as long as both parties agree; individual flexibility clauses in awards/agreements; awards not applicable to employees earning over $100K.
• Reform certified agreements	• Agreements – distinction between union and non-union effectively abolished and the impact of bargaining representative provisions is expected to make non-union agreements rare. Good faith bargaining obligations applicable to all bargaining representatives. • Re-introduction of limited 'arbitration' powers to FWA where bargaining has broken down but Minister has stressed to be used sparingly.
• Provide legislative base for mediation in dispute resolution	• FWA will have a strong mediation focus but does have the capacity to settle disputes where bargaining is seen to have broken down. The orientation to mediation favoured by the Minister will be heavily dependent on the way in which FWA executes its powers and the expectations this sets in those undertaking bargaining.
Reduced barriers to job creation and workforce participation:	
• Reform safety net wages	• FWA will assume responsibility for setting minimum wages but is being directed to use the same approach as the Fair Pay Commission.
• Streamline unfair dismissal processes	• Unfair dismissal provisions have been re-introduced for small medium businesses 1-100 employees but with a 12 month qualifying period for those with fewer than 15 employees
• Address high effective marginal tax rates	• The Henry Review is relevant here but job protection and minimum wages and conditions have also been built into the Fair Work Bill/IR system.

Actions for workplace reform, recommended by the BCA in 2005*	Status of recommended action in new system
More efficient workforce regulations:	
• National system of workplace relations	• The Bill retains the national system of IR but is dependent on existing constitutional powers. This would be strengthened by states referring powers, for which there is no agreement.
• Strengthen and streamline procedures on unlawful or harmful industrial action	• The Bill retains the distinction between protected and unprotected action and the scheme for protected action remains much as for Work Choices (except no bargaining period). The deduction of wages remains compulsory for unprotected action, but for protected action in the form of partial work bans the value is time-based. FWA can resolve disputes about the basis of deduction and intervene where serious damage is being done to employees or enterprises.
• Transmission of business	• Transfer of business – significant changes to circumstances in which transfer will be deemed to have occurred, with consequent transfer of industrial instruments. Now linked to transfer of employees and work performed. Significant impacts for restructuring and career paths.
• Multi-unionism – rationalise representational rights	• The Bill itself does not change multi-unionism; it is the *interplay* between the modern awards and the provisions for bargaining representation that effectively mean employers are now faced again with potential for multi-unionism and demarcation disputes.

* Reference: BCA (2005) *Action Plan for Workplace Relations*

This brief overview shows that many of the actions recommended by the BCA have been adopted through the changes in legislation since 2005 and retained within the current Bill.

Concerns about proposed system

Nevertheless the BCA's key concern is the potential of the reformed system to reduce our international competitiveness by weakening the enterprise focus and slowing our capacity to adapt and change. Genuine enterprise-level bargaining offers the best opportunity for agreements to contain specific terms, conditions and wages appropriate to the needs of the particular enterprise and its employees. Any weakening of the focus on the specific needs of each enterprise has the potential to de-couple reward and productivity. Whether these concerns are realised will depend on the way in which players operate within the new system – the FWA, employers and unions – and the extent to which the re-regulation of the labour market encapsulated in the Bill engenders a re-centralised and adversarial system of workplace relations. Speed of reaction and decentralised enterprise-specific agreements are, in our view, the key characteristics we should seek to ensure Australia's future economic development and, in particular, the adaptive challenges it faces as it reduces carbon emissions.

In this section we present issues for BCA members arising from the Bill. In some cases, these concerns may arise as a result of expectations and interpretations from past experience rather than the concepts from which the Minister has sought to design the Bill. Nevertheless they demonstrate the capacity for provisions to be misunderstood or misinterpreted. Great clarity in relation to them is therefore sought.

Specific concerns

1 Enterprise focus for agreement making and link between reward/productivity. The BCA believes that having a strong emphasis on bargaining at the enterprise level with direct relationships between employers and employees optimises the chances of rewards and productivity being aligned.

a. The Bill:

i A major concern relates to the apparent lack of definition of 'enterprise' (for purposes of the agreement-making provisions) and in its absence, the potential for a return to centralised bargaining between head offices of corporations and unions. Clause 172 of the Bill refers to 'single-enterprise' and 'multi-enterprise' agreements (although in fact, the single-enterprise agreement stream provides for the making of various types of multi-employer agreements). However, it needs to be made clearer that single-enterprise agreements under clause 172(2), other than those relating to 'single-interest employers', are agreements relating to 'a single business or part of a single business' (this picks up the current terminology in sections 327-328 of the Workplace Relations Act 1996).

Recommendation: Amend the terminology relating to single-enterprise agreements as suggested above.

ii Lack of clear definition of 'low paid' employees for purposes of the new low-paid bargaining stream in Part 2-4, Division 9 of the Bill, although the Explanatory Memorandum seeks to clarify this. The BCA is concerned about the potential of these provisions to apply beyond the target groups of employees they are intended to benefit.

Recommendation: Clarify/restrict definition of low paid employees by reference to low-paid sectors (i.e. child care, aged care, community services, security and cleaning as specified in Explanatory Memorandum pages xlii-xliii).

iii Capacity of processes in Bill to be used to slow adaptation to change and fail to capture productivity improvements. For example, the good faith bargaining (GFB) processes allow for injunctions to be sought by unions if they believe an action is in breach of GFB processes, and for 'serious breach declarations' to be made by FWA leading (potentially) to an arbitrated outcome; the capacity for there to be a significant number of bargaining representatives all requiring information and discussion has the potential to add to what is already a time-consuming and expensive process.

Recommendations: Limit the number of bargaining representatives or establish a threshold test for representatives (for example, by linking this to the tests for establishing 'majority support' for collective bargaining in clause 237 of the Bill, so that only unions with majority support from the workforce can act as bargaining representatives); limit or eliminate the capacity to seek injunctions and/or serious breach declarations, or at least limit the potential application of clause 228(e) relating to 'capricious or unfair conduct that undermines freedom of association or collective bargaining'.

iv The right of entry of union representatives to inspect personal records of non-union employees when a breach is suspected will require strong proof of breach and acceptance by employees in order to ensure that the privacy protections are sufficient. Employers are concerned about the potential for this to undermine the relationship of trust they have with their employees.

Recommendation: Remove the proposed right of union officials to inspect non-member records in clause 482(1)(c) of the Bill, or at least require the provision and handling of such information to be conducted through an intermediary, preferably an independent statutory officer (for example, from FWA or the Office of the Fair Work Ombudsman).

v Third party intervention – this is increased in several ways: for example, through unions as default bargaining representatives (see for example clauses 176(1), 177(c)); union representation and coverage by agreements even where they have only one member (see for example clause 183); the expansion of agreement content to include union rights (clause 172(b)); and the number of matters now referrable to FWA through GFB procedures, including arbitration of agreements in a wider range of situations than under the current legislation.

Recommendation: As per paras i–iv above; through these measures, and by restricting content of agreements in clause 172 of the Bill to issues affecting employees (rather than their representatives) the focus of agreements should be on the future success of the enterprise.

b. Interplay with Awards:

i While the move to modernise and simplify award structures is welcomed, the industry/occupation basis of modern awards may undercut the desired enterprise focus.

ii The decision not to name parties to modern awards coupled with the bargaining representation provisions in the Bill have led many to fear a re-emergence of multi-unionism and competition for membership within enterprises. If history is a guide this will lead to unnecessary disputes and delays in bargaining. Of particular concern are the requirements in relation to greenfield agreements. The onus on employers to notify all relevant unions with an interest in the work to be performed on the site is likely to mean single-union agreements are improbable and to slow the process of reaching pre-start agreements for large projects. This adds a

further risk factor to be taken into account on deciding on large investment projects in Australia.

Recommendation: Rationalise the number of unions to be notified.

2 Incentives for job creation and workforce participation:

a. The re-introduction of unfair dismissals in the SME sector, albeit after an employee has been employed for 12 months, may represent a barrier to job creation and workforce participation (see clauses 382-383). The government's argument is that suitability/performance should be established within 12 months. This should be monitored. The lack of uncontested evidence of the effects of change in the labour market on economic growth and productivity hampers the process of policy development.

Recommendation: establish monitoring processes to identify impact on job creation and workforce participation by under-represented groups.

b. Unfair dismissals can now be brought for redundancies where some are redeployed and others are not (see clause 389). This may have the effect that employers make greater numbers of workers redundant, so as to avoid any argument based on differential treatment of certain employees.

Recommendation: Continue existing definitions

c. The focus of the new transfer of business provisions (in Part 2-8 of the Bill) on the automatic transfer of industrial instruments, based on similarity of the 'work performed' by employees of the old and new employers, goes far beyond the government's pre-election policy commitments. It effectively creates incentives for out-sourcers not to take on an employer's staff, and/or disincentives to outsourcing and other forms of restructuring that may be necessary in a volatile economy. It also has the potential to destroy career pathways between associated entities.

Recommendation: retain existing definition or at least ensure that resignation from one entity and re-employment does not allow continuity of previous conditions.

d. The extension of award coverage to previously award-free employees, the establishment of a cumulative three tier system of NES, awards and agreements, and the establishment of the low-paid stream industry-wide may act to increase overall costs for employers beyond what their businesses can bear. The Explanatory Memorandum expects those costs to increase. Such an effect will reduce job opportunities.

Recommendation: The monitoring process recommended above is relevant.

3 Efficient workforce regulation:

a. The regulations accompanying the Bill and the results of the award modernisation have yet to appear, so the full extent of the new system is as yet unclear. However the simplification achieved in the Bill is welcomed and the specification of the GFB processes, (despite the reservations expressed above about their likely practical operation), also clarify expectations. However, there are concerns about the potential breadth of 'unfair or capricious conduct' captured within clause 228 (e). For example, members would be concerned if normal management processes, such as performance management, were caught by these provisions.

Recommendation: narrow the scope of 'conduct' and associated avenues, as recommended above.

b. The transitional arrangements have been clarified (although subject to a further transitional bill to be released in early 2009), and the decision by government to allow existing agreements to run to their expiry date has assisted the transitional process to the new workplace relations system. However some concerns have been raised by those currently negotiating enterprise agreements about the nature of the "better off overall test' (BOOT) to apply in the interim. This needs to be dealt with in the transitional bill.

Recommendation: Ensure that no provisions of the legislation are retrospectively applied to existing agreements and that rules are clear for current negotiations.

c. BCA members are expecting that because of the lack of clarity in the Fair Work Bill on certain matters, there will be many matters referred to FWA, creating delays in the effective operation of key aspects of the new system (eg the bargaining framework) at least until new case law is established.

Recommendation: Ensure as many definitions as possible are contained in the legislation, rather than leaving these for decision by FWA.

Final points

As in many other parts of the regulatory environment, BCA members value predictability and clarity. The current Bill will establish yet another change to the workplace relations system. Members would hope that the resultant legislation not only provides for a system that supports their international competitiveness, but also achieves consensus and provides some predictability in labour markets. There are significant 'learning curve' and start-up costs associated with the implementation of any new system, especially if it overlays previous systems.

How this system will support productivity growth will depend very much on how the parties respond to the new provisions, including their interpretation by FWA and to the timeliness of agreement about operating environments for enterprises. Within a system heavily geared to collective agreements, behaviour aimed at reaching agreement, highlighting the common ground rather than differences, and mediation, rather than arbitration, will be essential. The BCA strongly recommends that the government develop and resource a communication and implementation plan to ensure that the system as designed eventuates in practice. Further, the BCA strongly recommends that independent monitoring processes are established to identify the effects of the new system on agreements, employment and productivity and future improvements.

Yours sincerely

Katie Lahey
Chief Executive Officer