SA UNIONS

Senate Education, Employment and Workplace Relations Committee

Inquiry into the Fair Work Bill 2008

Submission by the United Trades and Labour Council of South Australia (SA Unions)

January 2009

SUBMISSION OF SA UNIONS – INQUIRY INTO THE FAIR WORK BILL 2008

PREFACE

1. This submission is made on behalf of SA Unions the peak body representing employee organisations in South Australia.

2. We support the submissions made by the ACTU and wish to supplement those submissions with a South Australian perspective.

3. Part 1 of this submission examines the impact of the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices) legislation on employees in South Australia and the impact it had on the South Australian industrial relations system. This provides context for considering whether the reforms introduced by the *Fair Work Bill 2008* (the Bill) are necessary.

4. In Part 2 we address topics covered by the Bill which are of particular importance to employees in South Australia.

5. In Part 3 we set out a number of our concerns with the Bill, including criticism of provisions which fail to properly implement the government's election promises and a number of suggestions for amendments which we consider would improve the Bill.

6. In Part 4 we refer to transitional arrangements. We support the technical suggestions for amendments that are contained in Appendix 1 of the submission of the ACTU.

INTRODUCTION

7. For over a century industrial law in Australia evolved a unique system of compulsory arbitration and conciliation.

8. The Australian system acknowledged the imbalance of bargaining power between employees and employers. It has been labour law's *"focus upon protecting and enhancing the lives of employees by lessening the unilateral power of management – either via conciliation and arbitration or collective bargaining – which has contributed significantly to improvements in the living standards of workers and their families in our nation."*[1]

9. The enactment of *Work Choices* struck directly at the central tenets of labour law, abolishing virtually all vestiges of conciliation and arbitration, and elevating individual bargaining over and above collective bargaining.

10. This did not produce productivity or employment increases but did change the share of wealth with profits increasing at the expense of wages, employment rights diminishing and inequality rising.

11. For the majority of Australian workers *Work Choices* did not represent workplace reform for the future, instead it turned the clock back to the anti-union, anti-worker laws of the of the nineteenth centaury.

12. SA Unions supports positive reform to industrial law. We support moves towards a national Industrial Relations system with the introduction of Commonwealth legislation that complements the legislation that exists in the States.

13. We consider this is best achieved by:

    - An intergovernmental agreement between the Commonwealth and the States governing the transfer of certain industrial relations powers to the Commonwealth.
    - Spelling out the terms of any new legislation referring State powers to the Commonwealth (i.e. a text based referral of powers)

[1] Professor Ron McCallum AO-Sir Richard Kirby Lecture- May 2007

- South Australia retaining a State industrial system for public employees and those employees not covered by the proposed Fair Work Australia.
- The existing personnel of the State Commission becoming part of Fair Work Australia (but also retaining State IR powers to deal with public sector issues).
- Future changes to law only occurring with the consent of State and Commonwealth Governments.

14. We consider that the *Fair Work Bill 2008* needs to incorporate these broad principles;
    - Freedom of association
    - Right to collective representation
    - Right to information and consultation
    - Protection against unfair treatment
    - Right to bargain collectively
    - No discrimination
    - Right to take industrial action
    - Equal remuneration for work of equal value
    - Access to a safety net

PART 1 -THE IMPACT OF WORK CHOICES IN SOUTH AUSTRALIA

15. In late 2007 the Industrial Relations Commission of South Australia reported on its *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers* [2](the *SA Work Choices Inquiry*).

16. The Report noted that *Work Choices* expanded the federal system to cover all trading, financial and foreign corporations, precluding those employers from regulation by the *Fair Work Act 1994* (State FWA), other employment laws and State awards and agreements. It displaced numerous elements of the previous

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

system and resulted in two vastly different industrial regimes operating in South Australia. [3]

17. The *SA Inquiry* estimated that in addition to some 316,000 employees subject to the Federal industrial system before *Work Choices* (then approximately 45% of the South Australian workforce), some 105,000 additional employees have been brought within the system. *Work Choices* thus covers approximately 421,000 employees constituting approximately 60% of the South Australian workforce. [4]

18. Other key changes resulting from *Work Choices* that were identified by the SA Inquiry included;

    - Alterations to the process for establishing and maintaining a safety net of minimum standards and conditions of employment
    - Promotion of Australian Workplace Agreements (AWAs) between individual employers and employees.
    - Discouragement of collective agreements.
    - A diminished role for the Australian Industrial Relations Commission (AIRC), with the responsibility for adjusting minimum entitlements transferred to the Australian Fair Pay Commission (AFPC).
    - Legal protections against unfair dismissal eliminated for many employees and curtailed for others.

19. The evidence on the impact of *Work Choices* on the labour market is now overwhelming. This research shows unequivocally that *Work Choices* has had a significant and negative impact on many employees and their families. In particular the SA Inquiry noted the impact of the laws on vulnerable workers in the, including women, young workers and the low paid.

20. The Inquiry went on to say "*We conclude that Work Choices is unfair and lacks balance. The lowering of the underlying minimum standard of terms and conditions of employment, the further curtailment of the role of the independent AIRC, changes which encourage and give primacy to direct individual bargaining between*

[3] Ibid page 24
[4] Ibid page 5

employer and employee over collective bargaining, together with far reaching restrictions on access to a remedy for unfair dismissal, are features of Work Choices which have substantially disadvantaged some employees to date and have the potential to disadvantage more in the future. The legislation has failed to deliver flexibility or fairness for employees as a whole"[5].

The Safety Net

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

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

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

24. Increases awarded by the AFPC to minimum wage workers in its jurisdiction are less than the increases awarded by various State industrial tribunals.

25. In the first two years of *Work Choices*, 62% of minimum wage workers suffered a decrease in their real wages as a result of the Australian Fair Pay Commission's

[5] Ibid page 6
[6] The *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* required all agreements lodged with the Workplace Authority from 6 May 2007 to pass the 'fairness test'.
[7] See C Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' (2007) 20(3) *Australian Journal of Labour Law* 245.
[8] WRA s 23.

determinations.[9] Employees in low paid industries, including retailing and hospitality, experienced a relative and real fall in earnings under *Work Choices*.[10] Research by the AFPC shows that wage increases for award-reliant employees have fallen significantly behind wage increases for the rest of the economy.[11]

Unfair Dismissals

26. Under *Work Choices*, over 4 million Australians lost any protection against being dismissed arbitrarily or unfairly. The legislation removed protection from unfair dismissal for employees of businesses with 100 or fewer employees and employees dismissed for 'genuine operational reasons or reasons including genuine operational reasons'. The 100 employee exemption alone removed unfair dismissal protections for around 62% of the Australian workforce.[12]

27. The *South Australian Work Choices Inquiry* estimated that at least 350,000 of those South Australian employees covered by *Work Choices* have been deprived entirely of an unfair dismissal remedy. This affects not just the minority of employees who have been unfairly dismissed without remedy, but many of those in continuing employment who experience a heightened sense of insecurity and disempowerment, compounded by loss of other protections to employment conditions and an attitudinal change among some employers[13].

28. The South Australian Inquiry observed:

We consider there is cause for concern at the serious implications the lack of recourse to an unfair dismissal remedy has for many in the workforce, resulting as it does in a loss of self esteem, a sense of disempowerment, and anger and resentment at an inability to seek redress or to have grievances heard. We conclude also that there is a pervasive sense of job insecurity as a result of Work Choices,

[9] See ACTU, *Submission to the Australian Fair Pay Commission*, March 2008, 20.
[10] D Peetz, *Assessing the Impact of 'Work Choices' One Year On*, Report prepared for Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, March 2007, 48-50.
[11] Australian Fair Pay Commission, *Economic and Social Indicators – Monitoring Report: January to June 2008*, August 2008, 24.
[12] A Forsyth, *Freedom to Fire: Economic Dismissals under Work Choices*, Report prepared for the Office of the Victorian Workplace Rights Advocate, 26 August 2007, 6.
[13] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers*, 25 October 2007, 5

particularly in lesser skilled and lower wage areas of employment. A substantial cause of this insecurity is the exclusion of many employees from any access to an unfair dismissal remedy."[14]

Workplace Agreements

29. *Work Choices* removed the safeguards formerly in the WR Act that ensured that employees were not worse off under a statutory agreement than under any relevant award or law (the 'no disadvantage test').[15] From the introduction of *Work Choices* until the commencement of the so called "Fairness Test" on 7 May 2007, the terms and conditions of employment found in awards could be stripped from workers by the making of a workplace agreement, *without any compensation being paid*.[16] The effect of these changes was deterioration in the wages and conditions of work for many employees, particularly those in low paid industries, who are especially reliant on the income they derive from penalty rates, allowances and other such payments under their award.[17]

30. Even after the Fairness Test was introduced, workers were still being disadvantaged by agreement-making. As the *State Work Choices Inquiry* noted "*the Fairness Test is less comprehensive than the pre-reform no disadvantage test and will not prevent loss of non-protected award and other conditions without adequate compensation."*[18]

[14] Ibid page 7-8
[15] The introduction by the former Coalition Government in May 2007 of a 'fairness test' did not restore protections for employees: see C Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' (2007) 20(3) *Australian Journal of Labour Law* 245.
[16] "Protected" award conditions could be removed by express provision in workplace agreements. These "protected" award conditions were: rest breaks, incentive-based payments and bonuses, annual leave loadings; public holidays; overtime or shift loadings; some monetary allowances; and penalty rates.
[17] See Standing Committee on Social Issues, *Impact of the Work Choices Legislation*, Legislative Council, NSW Parliament, November 2006; Queensland Industrial Relations Commission, *Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers*, 29 January 2007; Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers*, 25 October 2007; Victorian Office of the Workplace Rights Advocate, *Report of the Inquiry into the Impact of the Federal Government's Work Choices Legislation on Workers and Employers in the Victorian Retail and Hospitality Industries*, November 2007; D Peetz and A Preston, AWAs, *Collective Agreements and Earnings: Beneath the Aggregate Data*, Report to Industrial Relations Victoria, March 2007.
[18] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers,7*

31. The Fairness Test did not prevent: workers losing their redundancy benefits, without any compensation nor did it protect against non-monetary losses to employees, such as the loss of award rights to be consulted about changes to working conditions. As a consequence the Fairness Test never operated as a true 'no-disadvantage test' and it is a concern that this Bill does not provide a mechanism that enables employees to withdraw from industrial instruments that enshrine this unfairness.

Australian Workplace Agreements

32. The *SA Work Choices Inquiry* estimated that AWAs covered up to 4.5% percent of the State workforce[19]. The majority of AWAs in existence are found in low-paid sectors of the economy, where there have traditionally been a high proportion of employees reliant on awards to set their pay and conditions.[20]

33. In terms of industries most AWAs in South Australia were in manufacturing retail, hospitality, community services, property and business services, and education[21].

34. The majority of AWAs are not the product of negotiation between an employer and an individual employee. Most AWAs are template agreements, unilaterally developed by employers and imposed upon thousands of employees with little labour market power.[22] The State Work Choices Inquiry noted *"..the prevalence of "take it or leave it" template AWAs being presented to employees without meaningful consultation or negotiation. We conclude that, despite the introduction of the Fairness Test, the supposed ability of most employees to genuinely bargain*

[19] Ibid page 6

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

[21] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers,* 80

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

with their employers on a level playing field and from positions of equal strength remains a myth.."[23]

35. Employers have used AWAs to minimise labour costs by stripping away the award safety net. Analysis of AWAs lodged in 2006 by the Workplace Authority found that the vast majority of AWAs (89%) remove 'protected' award conditions[24]

36. The Workplace Authority data also indicates that more than one quarter (28%) of AWAs go so far as to undercut legally protected minimum conditions of employment, including about six percent of AWAs that pay less than the legal minimum wage.[25]

37. Most AWAs increase hours of work. The average AWA employee works a 13% longer week than their peers employed under collective arrangements.[26] Often, they work longer hours for less pay.

38. Workers on AWAs have significantly lower wages than workers on collective agreements. Nationally, the median AWA worker earns 16.3% less per hour than the comparable worker on a collective agreement.[27]

39. In low-paid industries, where AWAs have been the vehicle through which employers have reduced the costs of labour, AWAs have resulted in even lower wages. In the hospitality industry, average AWA earnings in 2006 were 1.6% below average earnings of workers reliant on the minimum wage.[28]

[23] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers,7*
[24] Julia Gillard, 'AWA Data the Liberals Claimed never Existed', Media Release, 20 February 2008.
[25] Davis article
[26] ABS, *Employee Earnings and Hours Australia,* Cat 6306.0, May 2006, 33.
[27] D Peetz and A Preston, AWAs, *Collective Agreements and Earnings: Beneath the Aggregate Data*, Report to Industrial Relations Victoria, March 2007, 13.
[28] D Peetz, *Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008,* March 2008.

Employee Collective Agreements and Employer Greenfield Agreements

40. Employers have used employer and employee collective agreements to strip away the award safety net. Employer Greenfield Agreements (EGAs) [29], introduced by *Work Choices* enable employers establishing a 'new businesses, project or undertaking' to unilaterally set the terms and conditions of work for new employees for up to 12 months

41. A study by the University of Sydney's Workplace Research Centre of all collective agreements lodged in the retail and hospitality industries between March and October 2006 found that non-union collective agreements were 'overwhelmingly' used to reduce award conditions.[30] More than half of all non-union agreements (EGAs or employee collective agreements) removed at least 5 'protected' award provisions.[31] 'Protected' award conditions removed through the non-union agreements include:

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

[29] WR Act, s 330.
[30] J Evesson et al, *Lowering the Standards: From Awards to Work Choices in Retail and Hospitality Collective Agreements,* Synthesis Report prepared for the Queensland, New South Wales and Victorian Governments, September 2007, ii.
[31] Ibid, vi. In contrast, 90 percent of union agreements retained the protected award matters.

42. The vast majority of non-union agreements also reduced or removed non-protected award conditions, including severance pay (75%) and consultation with employees (90%).[32]

43. Approximately half of the non-union agreements studied were based on six template agreements that simply reiterated the statutory minima, demonstrating the lack of bargaining occurring at the workplace level. Almost a quarter (24%) of all agreements were based on one agreement template.[33]

44. A Report on "Employer Greenfields in South Australia" prepared for the Office of the Employee Ombudsman showed that the number of South Australian EGAs which expressly excluded all protected award conditions was as high as 77.8%, with a further 5.6% expressly excluding one or more protected award conditions[34].

Bargaining practices

45. Employers who wished to do so could easily impose individual contracts on their employees. Examples of unfair bargaining practices lawfully used by employers to reduce their employees' terms and conditions of employment under *Work Choices* include offering 'take it or leave it' AWAs, refusing to grant pay rises to employees until they enter AWAs; and making misleading statements in agreements or in information provided to employees prior to the employee signing an AWA.[35]

46. Under *Work Choices*, there is no requirement for employers to collectively bargain with their employees, even when a majority of workers have expressed a preference for a union collective agreement. The SA Work Choices Inquiry cites examples[36] including the prolonged conflict in 2006 between the management at Radio Rentals

[32] Ibid; ibid 23–4.
[33] Ibid, ii and v.
[34] Monash University "Employer Greenfields Agreements in South Australia"10 Aug 2007 p 5.

[35] C Sutherland, *Agreement Making under Work Choices: the Impact of the Legal Framework on Bargaining Practices and Outcomes*, Report prepared for the Office of the Victorian Workplace Rights Advocate, October 2007, 37-8.
[36] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers*, 71 - 76

and employees who were members of the AMWU over the refusal of the employer to negotiate a new collective agreement. The parties had been unable to negotiate a new agreement since the termination of the previous collective agreement (made under the pre-reform WRA), there having been a number of such agreements in the past. As a result, there had been no pay increases or other alterations to terms and conditions since that time. Radio Rentals offered AWAs instead of a union collective agreement.

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47. In August 2006, a majority of employees voted by secret ballot to take industrial action until satisfactory negotiations for a collective agreement recommenced. Upon industrial action being taken, the employer responded with a lock-out notice. Some union member employees prominent in the dispute were dismissed for alleged "operational reasons", it being alleged that this was done to intimidate remaining employees, AWAs were offered to the workforce, and some employees signed them, although most continued to agitate for a collective agreement. The dispute was resolved when after prolonged industrial action the employer relented and negotiated a collective agreement.[37]

Gender and social inequalities

48. The gender pay gap has widened under *Work Choices*. While women in 2004 earned 87 cents for every dollar earned by men, this had decreased to 84 cents in 2007.[38] Seventy percent of the gains achieved in the decade 1996 to 2006 were wiped off in the first nine months of *Work Choices*.[39] Full time women workers now earn on average 16% less than men.[40]

49. As noted above, industries which employ large numbers of women (such as retail and hospitality) have suffered stagnant real wages growth or even real wage

[37] Ibid page 73
[38] ABS, *Average Weekly Ordinary Time Earning*s, Cat No. 6302, May 2008.
[39] D Peetz, *Assessing the Impact of 'Work Choices' One Year On*, Report prepared for Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, March 2007.
[40] ABS, Average Weekly Ordinary Time Earnings, Cat No. 6302.0 May 2008.
[40] ABS, *Employee Earnings and Hours Australia*, Cat 6306.0, February 2007.

declines under *Work Choices*.[41] Within industries, women have also fallen behind their male counterparts. In the transport and storage industry, for example, full-time non-managerial women earned 84% as much as men in 1994. But by 2006, female earnings had dropped to 75% of male earnings.[42]

50. ABS data referred to in the SA Work Choices Inquiry highlights the difference in South Australia between weekly earnings of men and women on union and non-union collective agreements.[43]

Females

Union			Non-Union		
Full-time $ pw	Part-time $ pw	Total $ pw	Full-time $ pw	Part-time $ pw	Total $ pw
930	478	734	812	368	585

Males

Union			Non-Union		
Full-time $ pw	Part-time $ pw	Total $ pw	Full-time $ pw	Part-time $ pw	Total $ pw
1063	391	1014	1019	325	893

51. The difference in South Australian weekly earnings between female union members and female non-members ($149 pw or approximately 25%) is greater than that of males ($121 pw or approximately 13.5%). The SA Work Choices Inquiry said *"Access to representation and advice on workplace issues and the involvement of unions in collective bargaining would be contributing factors to the disparity in wages. This is evident from other ABS data already referred to, and to (non-union) submissions to the Inquiry."*[44]

[41] See, eg, Victorian Office of the Workplace Rights Advocate, *Report of the Inquiry into the Impact of the Federal Government's Work Choices Legislation on Workers and Employers in the Victorian Retail and Hospitality Industries*, November 2007, 35–7; 41–2.
[42] ABS, *Employee Earnings and Hours Australia,* Cat 6306.0 (May 1994) 44; (May 2006) 20.
[43] ABS, *Employee Earnings, Benefits and Trade Union Membership*, Cat. No. 6310.0, August 2006. Table 21, Mean weekly earnings in main job by trade union membership.
[44] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers,108*

52. The pay gap for women is much greater for those on AWAs than on collective agreements. Female non-managerial employees on AWAs earn 18.7% less than their male counterparts, compared to 10% for collective agreements.[45] Women on AWAs earned on average $2.90 an hour (or $100.20 per week) less than women on registered collective agreements.[46] Women in lower skilled jobs are particularly disadvantaged: in 2006 those on AWAs were paid 26% less than women on collective agreements and 20% less than women on the award rate.[47]

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

54. Qualitative research has shown that *Work Choices* has had a significant and overwhelmingly negative impact on working women.[48] Elton et al summarise:

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

[45] D Peetz and A Preston, AWAs, *Collective Agreements and Earnings: Beneath the Aggregate Data*, Report to Industrial Relations Victoria, March 2007, ii.
[46] Based on a 38 hour week, ABS, *Employee Earnings and Hours Australia*, Cat 6306.0, February 2007.
[47] D Peetz and A Preston, AWAs, *Collective Agreements and Earnings: Beneath the Aggregate Data*, Report to Industrial Relations Victoria, March 2007, ii.
[48] J Elton et al, *Women and Work Choices: Impacts on the Low Pay Sector - Summary Report*, Centre for Work and Life, University of South Australia, August 2007; B Pocock et al, 'The Impact of "*Work Choices*" on Women in Low Paid Employment in Australia: a Qualitative Analysis' (2008) 50(3) *Journal of Industrial Relations*, 475; F MacDonald, G Whitehouse and J Bailey, *Tipping the Scales: A Qualitative Study of the Impact of Work Choices on Women in Low Paid Employment in Queensland*, Report to the Queensland Department of Employment and Industrial Relations, June 2007; M Baird, R Cooper and D Oliver, *Down and Out with Work Choices: The Impact of Work Choices on the Work and Lives of Women in Low Paid Employment*, Report to the Office of Industrial Relations, Department of Commerce, New South Wales Government, June 2007.

it is not a desirable outcome for society at large. These are women who have pride in work and have been loyal and committed employees, many for extended periods."[49]

Work/family balance

55. Research has identified flexibility of hours, leave and other work arrangements as a necessary mechanism to achieving a balance between employees' work and family commitments. To be effective there must be a culture in the workplace that supports work/life balance and employees' rights to access such arrangements without fear or disfavour, victimisation or loss of opportunity in the workforce.[50]

56. In a media release in March 2007, the Minister for Workplace Relations stated:
"The Australian Government is committed to giving all Australian workers a fair go through policies that promote more jobs and flexible work places. The Government has achieved this by providing the opportunity for all Australians to negotiate working arrangements that best suit their work and family circumstances, not through regulation." [51]

57. However as the SA Work Choices Inquiry commented;
"Submissions and evidence to the Inquiry suggest that Work Choices has had the opposite effect. That is, individual negotiation has not been effective in delivering the outcomes necessary for work/life balance, for reasons discussed elsewhere in this Report. Power imbalances between employees and employers, insecurity at work, a lack of confidence in individual negotiations and the reductions in minimum entitlements that can occur under Work Choices have militated against positive outcomes in the area of work/life balance."[52]

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[49] J Elton et al, *Women and Work Choices: Impacts on the Low Pay Sector - Summary Report*, Centre for Work and Life, University of South Australia, August 2007, 8.
[50] EOC submission to Senate Select Committee on Balancing Work and Life Responsibilities, attachment to EOC submission, 18.6.07
[51] The Hon Joe Hockey MP, (2007) Media Release "*HREOC Report Confirms Benefits for Women*", 7 March 2007.
[52] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers,110*

58. *Work Choices* has undermined the capacity of many workers to balance work and family responsibilities. AWAs are associated with longer working hours, which take away from family time. AWAs tend to remove award-based restrictions over the employer's power to dictate the pattern of working time, and the probable result is that there is less 'flexibility' over working time for workers.[53] Data from the Department of Employment and Workplace Relations, for example, shows that more than one third of AWAs analysed (34%) had no restrictions on days to perform ordinary hours, compared to 25% for collective agreements. Similarly, eleven percent of AWAs contained provisions allowing management to alter hours, compared to 4% of collective agreements.[54] Finally, AWAs generally do not contain express 'family friendly provisions' (such as the right to request additional parental leave) which have become a feature of awards and collective agreements in recent years.[55]

59. Qualitative evidence further suggests that AWAs have led to increased employer flexibility at the expense of the capacity of workers to balance work and family life.[56] The negative effects of *Work Choices* – higher levels of job insecurity and stress and lower, less stable incomes - have been felt not only by individual workers but by the workers' children, parents and partners.[57]

Young People

60. Young workers have been adversely affected because *Work Choices* removes or reduces protections which in the past compensated in part for their relative

[53] See, e.g., R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.
[54] Reported in T Jefferson and A Preston, '*Work Choices* and Family-Friendly Working Hours: An Assessment of Data Sources' (2007) 18(1) *Labor & Industry* 47, 59.
[55] R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.
[56] H Masterman-Smith and J Elton, 'Cheap labour – the Australian Way', Paper presented at the AIRAANZ Conference 2007, Association of Industrial Relations Academics of Australia and New Zealand, Auckland, 7–9 February 2007.
[57] See B Pocock et al, 'The Impact of "*Work Choices*" on Women in Low Paid Employment in Australia: a Qualitative Analysis' (2008) 50(3) *Journal of Industrial Relations*, 475, 485. See also S Charlesworth and F MacDonald, *Going Too Far: Work Choices and the Experience of 30 Victorian Workers in Minimum Wage Sector*, Report prepared for Industrial Relations Victoria, July 2007; and J Elton and B Pocock, *Not Fair No Choice: The Impact of Work Choices on Twenty South Australian Workers and their Households*, Report prepared for SafeWork SA and the Office for Women, July 2007.

disadvantage, such as the award safety net, remedies for unfair dismissal, collective bargaining and access to unions.[58]

61. The SA Work Choices Inquiry expressed concerns about the vulnerability and inexperience of young workers and was concerned that if they were being exploited in a buoyant labour market their circumstances could get a lot worse in the event of an economic downturn.

62. This concern is borne out by a national audit undertaken by the Federal Workplace Ombudsman in industries that traditionally employ young people. Wage records, pay slips and holiday entitlement of employees were examined. The audit was finalised in September 2008 and of the 399 compliance audits undertaken 234 (59%) of employers were found to be compliant and 165 (41%) were found to be in breach of entitlements.[59]

63. Identified breaches mainly related to wages (60%) followed by weekend penalty a rates (18%). The majority of breaches were found in the retail trade (46%) and accommodation, and food services (41%) industry sectors.

Productivity

64. *Work Choices* was premised on the basis that individual statutory contracts delivered higher productivity but there remains no evidence to support this proposition. The SA Work Choices Inquiry concluded;

"there is no evidence that in the nineteen months since its commencement, the Work Choices system has enhanced productivity for employees, employers or workplaces in South Australia. We also conclude that to the extent that there have been any operational efficiencies and flexibilities flowing from Work Choices, some employers may have benefited but this has come at the expense of a substantial sector of the South Australian workforce."[60]

[58] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers, 8*
[59] www.wo.gov.au/asp/index.asp?sid=7407&page=audits-campaigns-results-view&cid=5387&id=1279
[60] Ibid page 128,

65. In 2008, the Senate Committee examined the economic effects of statutory individual contracts and productivity, concluding that the available evidence did not indicate that the use of AWAs has led to productivity gains.[61]

66. There is no empirical link between statutory individual contracts and higher productivity. If anything, AWAs may be associated with *lower* levels of productivity. For example, productivity has fallen (by 1.9%) in the mining sector over the past decade, despite the prevalence of AWAs there.[62] The relationship between AWAs and low productivity is explained by studies that have examined the content of AWAs and have found that they do not generally promote 'high productivity' employment systems, but instead simply increase management's power to set longer working hours at lower rates of pay.[63] The true source of long-term productivity growth (apart from greater capital investment) is 'working smarter'. This goal cannot be pursued by reducing wages and conditions, but requires employers and employees to work together in atmosphere of mutual trust, mutual flexibility and mutual reward. AWAs did not promote this type of working culture, which is why they could not have had any long-term positive effect on

[61] Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, 17 March 2008.
[62] ABS, *Yearbook Australia 2008*, Cat 1301.0, February 2008, 475.
[63] R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.

PART 2 –IMPORTANT REFORMS

67. In South Australia the impact of *Work Choices* legislation "was adverse to a large number of employees without bringing compensatory beneficial impacts in terms of increased productivity, flexibility, income or employment."[64] We welcome many aspects of the proposed legislation that act to reverse the negative impact of *Work Choices* and provide comments on the more important of these below.

Good faith bargaining

68. The good faith bargaining regime ensures that workers have the right to bargain collectively, and that bargaining occurs in a fair and efficient manner. Although the rules do not require parties to reach agreement, the mere fact that the parties are required to consider and engage with each other's position may well lead to more agreements being reached, with better outcomes for both workers and employers. On the other hand, if it emerges that, as the Bill becomes law and is applied by FWA and interpreted by the courts that recalcitrant employers can avoid the obligation to bargain in good faith by merely 'going through the motions' of good faith bargaining, without any genuine desire to reach agreement, the government will need to reconsider whether the Bill goes far enough in ensuring that good faith bargaining actually occurs.

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

[64] Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers. Statement 25 Oct 2007*

Low paid stream

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

71. This situation will continue indefinitely without some intervention. The solution is to encourage workers and employers to bargain for higher wages in return for better productivity. In many businesses, this can *only* occur on a multi-employer basis, where employers do not have to fear that paying higher wages will drive them out of business. We think that the government has taken the right approach in first encouraging the parties to negotiate their own wages–productivity arrangements. Only as a very last resort will FWA step in and arbitrate the working arrangements that balance the interests of workers, employers and customers. Once an arbitrated decision has been made, the parties will be expected to bargain on their own in future bargaining rounds. The role of the state is thus to help the parties to overcome the structural obstacles that have prevented them from bargaining, with the expectation that once they have received this one-off boost they will be able to bargain on their own in future. We hope that this expectation is matched in reality. If it is not, the operation of the low paid stream will need to be reviewed. This Committee should recommend that the government closely monitor the operation of the low paid bargaining stream, and the incidence and quality of bargaining at a single business level in low paid sectors of the economy.

Unfair dismissal

72. We welcome the restoration of unfair dismissal rights to 350,000 South Australians in the federal system. While we have some serious reservations about the design of the unfair dismissal regime, (detailed in Part 3) these rights are important, not just to ensure that people are not mistreated when their employment ends, but also to give

them the confidence to deal with their employer during the period of their employment, without fear of retribution. For these reasons, we maintain our position that these protections should be extended to *all* workers.

73. We do not accept the claims that unfair dismissal laws will create unemployment or impose excessive costs on business.

74. Statistics show that only 3.7% of workers who are dismissed (and who are within the scope of the federal unfair dismissal laws) bring an unfair dismissal claim.[65] The remaining 96.3% either accept that their dismissal was fair, or do not bring a claim for their own reasons (such as the costs involved, fear of confronting their former employer, etc). Of the claims lodged with the AIRC, approximately 90% are settled before hearing. Although employers complain that these matters are often settled by the payment of 'go-away money', there is no evidence that this is the case. The only major study to examine this issue found that most unfair dismissal claims that were settled at conciliation resulted in either no payment to the employee, or a 'small payment' of less than $2,500.[66] Even in the cases where settlement money was paid, one cannot be certain whether the payment was in truth a debt due to the employee (eg in respect of unpaid entitlements) or a bona fide compensation payment (in respect of a dismissal that the employer acknowledges was unfair), rather than a true 'go away' payment in respect of a completely unmeritorious claim.

75. Of the very small number of substantive claims (69 last year) that reach a hearing in the AIRC, half are found to be fair dismissals, and the other half are held to be unfair. Where the dismissal is held to be unfair, reinstatement is ordered in about half of all cases, and compensation (on average 16 weeks' pay) awarded the other half of cases.

76. Considering these modest figures, it is no surprise that unfair dismissal laws are not regarded as having any major impact on decisions to hire, and hence on employment levels. Economists estimate, for example, that the exclusion of workers in small and

[65] Appendix A.
[66] Oslington & Freyens, p 8.

medium sized businesses from protection against unfair dismissal, under *Work Choices*, only created 6,000 extra jobs in Australia.[67] This represents a miniscule 0.08% increase in the total employed labour force.[68]

Transfer of business

77. We welcome (though once again with some reservations) the provisions of the Bill that are designed to ensure that a worker's entitlements under an enterprise agreement are not lost when their legal employer changes. Under *Work Choices*, an employee lost all of their entitlements if their employer's business was sold to a new employer that ran a different 'kind' of business, even if the employee kept on doing exactly the same work. Worse, even if the workplace agreement did 'transmit' to the new employer, this only lasted for 12 months, after which time workers lost all of their entitlements.

78. It is a fundamental principle of commercial law that '*pacta sunt servanda*' – agreements must be kept. If a company purchases an office building and there is a sitting tenant, the lease that the tenant made with the former landlord must be respected by the new owner. Why should the situation be any different in the employment sphere? If one business wishes to acquire another business, and its employees, they should respect the agreements that were made between the old employer and its workers, for the term of those agreements.

General protections

79. We are also pleased that the Bill expands the general protections to ensure that nobody may take adverse action to deny workers their workplace rights, or to frustrate their enjoyment or exercise. For the first time, the Bill recognises that workplace rights include the full range of rights to stick up for one's self and one's colleagues, including making a complaint to the boss on behalf of co-workers, or making a complaint to a union. Also for the first time, employers must not deceive workers about their rights, and must not use undue pressure to influence how

[67] Oslington & Freyens article, 2.
[68] ABS cat 6359.0 (Nov 04) 3.

employees exercise their rights. A third new feature is that freedom from discrimination is recognised as a workplace right, and can be directly enforced by employees, unions and inspectors.

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

Right of entry

81. Under *Work Choices*, employers could lock unions out of their workplaces (by making AWAs with staff or entering into non-union collective deals), thereby depriving employees of their right to be represented. This was a policy that was condemned by the ILO as being a fundamental breach of workers' rights.

82. We are pleased that the government has restored the position that (apart from the *Work Choices* years) has subsisted for decades in Australia, namely that:

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

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

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

86. We note however that the Bill continues the Howard government's requirements that:

- Unions can only enter workplaces by giving 24 hours' notice (except in cases of breach of safety laws).
- Unions can only enter during working hours, and can only hold discussions with employees during breaks.
- The union official entering must have a permit, which can only be given to a 'fit and proper person' and which can be suspended or revoked if the official is behaving inappropriately.
- There are penalties (up to $6,600 for the official, $33,000 for the union) for officials who act improperly in a workplace.

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

PART 3 – CONCERNS WITH THE BILL

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

Application of the Bill

Construction workers

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

Independent contractors

90. The Bill does not cover independent contractors. Independent contractors need greater protections. If the Bill is not to be amended to cover 'workers' rather than 'employees', then the beneficial provisions of the Bill should be extended to independent contractors through separate legislation.

Foreign ships

91. The Bill does not cover foreign-flagged ships (with foreign bases) that are exclusively or predominantly engaged in servicing Australian ports. If foreign ships substantially participate in the Australian economy, they should be regulated by our laws, even if they operate from outside Australia's territorial sea.

Public/community sector employees

92. It is difficult to establish at a glance (and indeed even with detailed analysis) whether some employers (public sector corporations, charities, schools, local government corporations, etc) are 'trading' corporations, within the meaning of the Constitution. Under *Work Choices* many employers and employees in these "borderline" sectors of the economy were uncertain as to their rights and obligations, and these could change based on the activities of the entity from time to time. The federal and State governments must negotiate sensible boundaries

between State and federal laws. We note that *Forward with Fairness* promises that: *"State Governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees."*[69] *Forward with Fairness* also promises *that "transitional arrangements [will be] put in place so that those currently covered by State industrial relations systems will not be disadvantaged as a result of the creation of Labor's national industrial relations system"*[70]. In the event that the State governments refer their powers, the Federal Government must ensure that its commitments to employees in State industrial relations systems are delivered. This includes ensuring arrangements for employees covered by State industrial relations systems to opt into the federal system and for participation by State registered unions. In the absence of State government referrals that enable a "bright line" between Commonwealth and State responsibility the Commonwealth should amend the Bill and withdraw from covering "borderline" entities.

The National Employment Standards

Right to request

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

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

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

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

Consultation and representation

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

97. While each award must contain a dispute settlement clause, there is no requirement that the clause confer a right to be represented. Consultation and representation clauses are not mandatory clauses in awards, and, while each enterprise agreement must contain a consultation clause, and the disputes clause must provide for representation, there is no general right to be represented in dealings with the employer.

98. The Bill should be amended to ensure that all workers have rights to consultation and representation at work. Ideally this would be achieved by including these as general rights under the NES. A second best option would be to require all awards, agreements and workplace determinations to include clauses conferring rights to representation and consultation, and to preserve the award terms where an employee accepts a high income guarantee.

Modern awards

Award modernisation

99. We are concerned that award modernisation will disadvantage employees. Although the government has committed that no worker will lose take-home pay as a result of the process, other forms of potential disadvantage remain, such as loss of non-monetary conditions, reduction of contingent entitlements (eg redundancy

entitlements), and a lowering of the benchmark for agreement-making (eg reduction of the 'better off overall' hurdle).

Modern award reviews – grounds

100. Modern award wages can only be reviewed on 'work value' grounds. This does not allow FWA to adjust wages on other grounds, such as where adjustments are necessary to ensure that the modern awards objective is met (i.e. to ensure that award wages are 'relevant').

Modern award reviews – timing

101. Award wages have not been reviewed for their 'relevance' to market wages since 1989, and award conditions have not been able to be reviewed since 2005. Award modernisation has focused more upon the preservation of the status quo while rationalising and simplifying awards. No genuinely new terms or conditions that will benefit award covered employees or employers in a new system will emerge from modernisation. It appears that the first review of modern awards will occur in 2014. This is too long an interval, particular in relation to wages. The Bill should provide for an interim review of modern awards in 2010.

Exceptional matters:

102. The award system will not deal with many 'safety net' entitlements that are currently available under State systems. There should be capacity for modern awards to include additional matters on an 'exceptional' basis, as was the case before *Work Choices*.

Individual flexibility arrangements

103. The Bill does not mandate all of the protections that the AIRC has developed in the award modernisation process. In particular, it does not require awards to allow a party to terminate a flexibility arrangement by giving 4 weeks' notice. This is an important protection – as recognised by the AIRC – which should be enshrined in law.

High income threshold

104. We oppose the exemption from award coverage of 'high income earners' who have traditionally been entitled to award protection. The effect of this exemption is not only to remove the application of award conditions of employment but also to suspend important rights deriving from award coverage, such as the right to be represented at work, to be consulted about significant change and to access the dispute settlement procedure in the award.90. In light of the serious consequences of the high income threshold on workers' rights and entitlements, the Bill should be amended to remove the capacity of the Minister to reduce this threshold through regulation.

Bargaining process

Permitted matters

105. The government is not honoring its election promise to allow 'free bargaining', particularly by prohibiting bargaining for better unfair dismissal rights, better union entry rights, and by prohibiting parties from agreeing to 'reserve' certain matters for future bargaining. In particular, the restriction on bargaining better union entry rights:

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

106. We oppose the designation of agreements that confer unfair dismissal entitlements on employees who have not served the statutory minimum qualifying period as unlawful. The provision will prevents an employer not only from waiving or shortening the qualifying period for access to statutory unfair dismissal provisions

(including where the employer is the prospective employer in a transfer of business), but also from conferring any private remedies or entitlements upon their employees.

107. These restrictions should be abolished.

Confidential information

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

Scope orders

109. The Bill provides FWA with a list of criteria for making a scope order (clause 238(4)). We think that the fundamental consideration should be the freedom of workers to associate with other workers, of their choosing. Workers should not be forced to bargain with others with whom they do not wish to associate for industrial purposes. The Bill should be amended to reflect this.

Access period

110. The Bill provides a 7 day access period to a proposed agreement. This period is too short for a worker to consider the proposal and make contact with an adviser or representative. In our experience, in workplaces that are not organised, employees are most likely to respond to an employer offer to bargain only after a concrete proposal has been presented to them. In circumstances where these workers contact a union and express concerns about the offer, the union's first response will be to make application for good faith orders to delay consideration of the agreement, in order to preserve the status quo. If the access period were longer, the parties would have time to explore options for agreement first, without recourse to FWA. The period should be extended to 14 days.

Variation and termination

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

Industrial action

'Unlawful' industrial action

112. The Bill makes industrial action during the life of an agreement 'unlawful'. However, since there is an internationally recognised fundamental right to strike, we do not think it is appropriate to render such action 'unlawful'. It suffices that unprotected action may be stopped by FWA, and workers may be sacked or sued for engaging in it. Even these remedies are oppressive, given that often workers only take industrial action during the life of an agreement to protest unfair unilateral decisions that are made by management, or unforeseen circumstances (and which they have no other capacity to challenge, in the absence of a robust dispute resolution procedure in the agreement).

Secret ballots

113. The purpose of secret action ballot is to determine whether workers authorise the union (or other person) to organise industrial action on their behalf. As such, it is a matter between the workers and the person organising the action. We do not think that the prescriptive rules for holding a ballot are necessary, or efficient

Pattern bargaining

114. Pattern bargaining occurs where a bargaining representative makes settlement of a claim with one party contingent on other parties accepting a similar claim. We do not support the prohibition on pattern bargaining. This limits employees' freedom of association by dictating that the only common interests that they may protect are those shared by employees at the workplace in which they work. The restrictions on the negotiating parties to choose their own level of bargaining under Australian law

has been strongly criticised by the ILO's Committee of Experts on the Application of Conventions and Recommendations.

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

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

Harm to parties

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

Cooling off

118. This provision was introduced by *Work Choices*. There is no reason for it to be retained, now that FWA has the power to order the parties to meet and confer during a period of industrial action, in order to promote settlement of the bargaining dispute. If retained, it would undermine workers' rights to take industrial action and would conflict with our international legal obligations to respect the right to strike. It should be removed.

Harm to third parties

119. This provision was also introduced by *Work Choices*. It allows a third party employer to seek to have protected industrial action stopped on the grounds that the action is adversely affecting their business. The threshold for granting the application is so low that the provision effectively amounts to an automatic right for third parties to stop protected industrial action – especially manufacturers who have chosen to implement 'just in time' production systems, and who have chosen not to protect themselves from the disruptions to supply (eg by stockpiling parts).

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

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

Harm to Corporations

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

General protections

Right to award conditions

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

Responsibility for delegates

123. The Bill does not positively recognise delegates but makes a union strictly liable for the actions of its delegates, even if the union took reasonable steps to prevent the delegate from acting in an unlawful fashion. This 'reasonable steps' defence applies to a union's responsibility for the actions of its members; it should also apply to delegates, over whom unions have little direct control.

Unlawful dismissal

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

Unfair dismissal

Application timelines

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

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

Qualifying periods

126. The qualifying period has traditionally been 3 months, or a lesser period of probation. The standard qualifying period of 6 months proposed in the Bill is excessive. The 12 month qualifying period for workers in small businesses is worse. It excludes 22% of small business employees from claiming unfair dismissal; 41% of all hospitality sector workers; and 64% of young people aged 20-24.[71] As such, it operates almost as harshly as the total ban on unfair dismissal claims that workers in small businesses faced under *Work Choices*. The qualifying period should be returned to 3 months, or a lesser agreed period of probation.

Fair Dismissal Code

127. All employees should be entitled to protection against unfair dismissal, regardless of the size of the business at which they work. We don't believe that the proposed Code ensures that employees in small businesses are treated fairly. For example, the proposed Code suggests that an employer may summarily dismiss an employee if they believe that the employee has engaged in a single act of theft, fraud, or violence. There is no requirement for the employer's suspicion to be correct, or for the employer to provide the employee with procedural fairness, such as the opportunity to put forward any mitigating circumstances that might be relevant. Furthermore, the Code encourages employers to report such activities to the police. This is highly inappropriate. We submit that the Code should be abolished or, failing that, redrafted to better reflect the jurisprudence of the courts and AIRC. We also submit that the Code should be incorporated into the Bill, or at least that the Senate should see the final version of the Code before it approves the Bill.

Genuine redundancy

128. In assessing whether a redundancy is genuine or not, the AIRC has traditionally inquired into the motives of the employer in selecting particular individuals for retrenchment. The Bill does not require this. As such, it will allow employers to unfairly select individuals for retrenchment on other grounds (such as poor

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

performance), in order to escape liability for unfair dismissal. The Bill should be amended to better reflect AIRC jurisprudence, and specify that a redundancy is only genuine if the workers retrenched were fairly chosen.

Notice periods:

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

Other rights

Stand down

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

Dispute resolution

Safety net

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

Enterprise agreements

132. Enterprise Agreements will be required to include a dispute settling clause, but this clause need not provide for disputes to be resolved by arbitration. This is a major flaw in the Bill. Since employees cannot take industrial action during the life of an agreement, it is imperative that there is some way to effectively resolve disputes that arise during the long (up to four year) life of the agreement. The Bill should simply provide that FWA may arbitrate a limited range of disputes that arise during the life of the agreement, namely:

- disputes about the unfair exercise of the employer's lawful powers (whether those powers are derived from the agreement or otherwise); and
- disputes about matters that are *not* dealt with in the enterprise agreement.

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

Transfer of business

Three month rule:

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

Accrued leave entitlements

135. The Bill allows a new employer to offer employment to a transferring employee on terms that they lose their accrued annual and personal/carer's leave entitlements. If the employee refuses this offer, it appears they will not be entitled to a severance payment from the old employer. This is unfair. Although FWA will have the power to reverse this conclusion in individual cases, we submit that it would be better to make it clear that in every case an employee is entitled to reject an offer of

employment with a new employer which does not recognise his or her accrued entitlements, and to instead accept a severance payment from the old employer.

Unfair dismissal

136. The Bill allows a new employer to require a transferring employee to re-serve a qualifying period for accessing unfair dismissal remedies. This is unfair, particularly to longstanding employees. It is also unwarranted, since the new employer can conduct its own 'due diligence' to ascertain which employees should be taken on. The provision should not be accepted.

Right of Entry

Entry for discussions:

137. The Bill has reworded the existing provision in a way which makes it seem necessary for the union to first establish that there are one or more eligible persons at the workplace who 'wish to participate' in discussions. This was never the intention of the provision. The former wording should be retained, or else the new wording rectified.

Administrative Arrangements

Minimum Wage Panel

138. The Bill provides that at least three Minimum Wage Panel Members must hear minimum wage cases. However, it does not specify that the other three members of the panel (apart from the President) are to be regular members of FWA. We think this amendment is necessary. Furthermore, the Bill does not make clear that Minimum Wage Panel Members can only perform minimum wage functions, and not other FWA functions. We also submit this amendment is necessary.

Fair Work Inspectors

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

PART 4 - TRANSITIONAL ARRANGEMENTS

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

141. We note that the success of many key reforms in the Fair Work Bill depends upon the way in which workers are transitioned into the new system. We will seek to ensure that the transitional arrangements do not operate so as to disadvantage employees. There are three issues.

Termination of Work Choices instruments

142. We note that the government intends that *Work Choices* workplace agreements will continue in force in accordance with their terms, and be terminated by consent, or, following their nominal expiry, be terminated unilaterally (AWAs) or by FWA(collective agreements). While the government has indicated that the NES will apply to employees covered by these instruments, this fails to recognise that the terms and conditions that were lost from AWAs, employer greenfields and employee collective agreements are overwhelming found in awards, not the NES. It was the loss of penalty rates, overtime, and allowances that had the immediate impact on take home pay and living standards. Agreements made prior to May 2006 will expire in 2011, and agreements made subject to the so called fairness test will not expire until 2012, meaning that unfair instruments would continue for longer under a Rudd Government than the Howard Government.

143. We acknowledge that labour turnover will see the incidence of this instrument decline, but this is no comfort to the employees who remain on these instruments, who in the current environment have little opportunity to abandon unfair arrangements. The transitional Bill must provide a means for employees to initiate early termination of these instruments. Our preferred option for automatic termination of AWAs, and that FWA be empowered to terminate any workplace

instrument that fail to meet the new better off overall test. FWA should be empowered to accept enforceable undertakings as to the arrangements that replace the agreement, to ensure employees are not disadvantaged. Applications could be brought by an employee, or their union. In addition, from 1 July 2008 the resources of the Workplace Authority could be devoted to conducting an audit of all agreements, and contacting the parties where the agreement appears to fail to meet the better off overall test.

State and federal system issues

144. The Bill does not deal with employees currently covered by State systems, on the presumption that, where a government refers powers, this will be addressed in the transitional Bill.

145. We note that that *Forward with Fairness* promises that *"State governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees." Forward with Fairness* also promises that "transitional arrangements [will be] put in place so that those currently covered by State industrial relations systems will not be disadvantaged as a result of the creation of Labor's national industrial relations system".

146. We have had discussions with our State government and we expect that they will only refer powers if the best possible workplace rights are guaranteed. In the event that powers are referred, we expect the federal government to ensure that its commitments to employees in State IR systems are delivered.

Legacy instruments

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

CONCLUSION

148. SA Unions supports the *Fair Work Bill 2008*, subject to the suggestions for improvement identified in this submission. The reforms in this Bill will go along way in restoring workplace rights for Australians after more than a decade of unfair industrial relations laws.

149. We invite members of the Committee to recommend that this Bill be passed.

150. We look forward to addressing the Committee.