ACTU

Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the *Fair Work Amendment (State Referrals and Other Measures) Bill* 2009

SUBMISSION OF
AUSTRALIAN COUNCIL OF TRADE UNIONS

6 NOVEMBER 2009

Introductory remarks

1. The ACTU is the peak body representing 47 unions and almost 2 million working Australians.

2. We are pleased to have this opportunity to contribute to the Committee's consideration of the *Fair Work Amendment (State Referrals and Other Measures) Bill* 2009 (the Bill).

3. We note the brief period allotted for commentary in relation to the Bill. The brevity of our submission reflects the level of consideration we have been able to give the Bill in this time frame.

4. The ACTU supports the Bill and urges the Committee to recommend that the Senate adopt the Bill. The Bill will give effect to the government's election policy to "deliver a uniform national industrial relations system for Australia's economic future"[1]. We applaud the consultative approach adopted by the government in working with the referring States to determine the scope of their referrals, and the transitional arrangements that will apply to employees and employers transferring from the State systems.

5. This submissions addresses:

    a. The mechanisms used to develop the national system.
    b. Some issues which arise implementing it; and
    c. some technical matters which in our view may require clarification.

The development of a national system

6. The ACTUpolicy adopted in 2006:

   a. Supported "..the use by a future national Labor Government of all of the powers available to it under the Australian Constitution for the purposes of legislating an industrial relations system…";

   b. Recognised that "State Governments will continue to have a role in the regulation of the workplace, in particular in areas of State Government employment and organisations which are unincorporated" and that "It will be a matter for unions representing these employees to determine a policy approach to their future regulation";

   c. Supported "the inclusion of provisions in the national industrial relations laws enabling parties to opt to be bound by State industrial relations laws rather that the national legislation in particular where the community of interest of the employees is best served by regulation in a single jurisdiction"; and

   d. Called upon "a future national Labor Government to consult with the State Governments and unions concerning the options for consistent national application of industrial relations laws"

   We support and welcome the decision to provide a mechanism for State system employees and employers to participate in a truly national scheme. We value the commitment made in the *Forward with Fairness* policy that:

   "A Rudd Labor Government will rely upon all of the Constitutional powers available to it to legislation national industrial relations laws. Labor will work cooperatively with the States to achieve national industrial relations laws for the private sector. This will

be achieved either by State Governments referring powers for private sector industrial relations or other forms of cooperation and harmonization"[2]

The constitutional foundations

7. The ACTU supports the use of referrals of power as the primary means to plug the gaps in the Commonwealth's power to regulate industrial relations matters. This mechanism provides the greatest flexibility to the Parliament to describe with certainty the intended scope of its legislation.

8. The *Fair Work Act* 2009 ("the FW Act") rests (almost) exclusively upon the corporations power and State referrals. In proceeding this way the government has abandoned the conciliation and arbitration power. The ACTU is disappointed that the Government has not been prepared to consider the other powers available to it to plug the gaps, particularly where a State has not been prepared to refer its powers and where the employers and employees wish to be covered by the national laws.

9. This is not simply a matter of policy. The practical out-working is that employees of non-trading corporations in Western Australia who now rely on federal workplace relations instruments will be excluded from the national system despite their desire to remain within it. Unless the Western Australian government abandons its opposition to referral, employees of non trading corporations in that State (potentially parts of local government and the social and community services sector) whose federal awards will cease to operate in March 2011, and for whom there is no comparable State safety net, will be severely disadvantaged.

10. In previous submissions regarding the Fair Work legislation, the ACTU has supported continued reliance on the conciliation and arbitration power to support the system:

"The ACTU proposes that the transitional Bill should provide an avenue for employees to opt in to the federal system where a State government does not refer the employees, despite the wishes of the workforce. This is particularly relevant for State public sector employees whose employer and regulator are one. This could be achieved by use of a patchwork of the conciliation and arbitration power and external affairs powers to confer the NES, make modern awards and enterprise agreements, and confer the Chapter 3 rights and obligations on employers and employees who are party to an interstate industrial dispute."[3]

"We submit that, in the interests of fairness and certainty, the Bill should allow parties to an interstate industrial dispute to participate in the federal industrial relations system. We do not see any constitutional impediment to allowing these parties to have recourse to the federal system to help settle their dispute 'by conciliation or arbitration' (in the words of the Constitution), whether through the making of a modern award (provided it is within the ambit of the parties' dispute) or through the lodgment and enforcement of an enterprise agreement. The remaining provisions of the Fair Work Act (dealing with the NES, general protections, industrial action, right of entry, etc) can also be safely extended to these parties, as furthering the settlement of the original dispute and preventing future disputation."[4]

11. We note that this Government has at all times strived for a national industrial relations system which is simple for all users to comprehend and operate in. We have doubts as to whether the interaction between the Bill and the Constitutional foundation of the FW Act will fulfill this desire.

12. Whilst we appreciate the complexities that are inherent in administering a national system which is contingent on the establishment of an "interstate industrial dispute" for the purposes of reliance on the Conciliation and Arbitration power, we note that the reliance on the Corporations Power in combination with State Referral introduces a new array of difficulties. These are considered in the next section. At this point, we simply comment that it may have been preferable to rely on an alternate combination of Constitutional Power (such as Corporations, External Affairs and Conciliation and Arbitration) in concert with an Administrative Agreement as to referral as this may have provided for a more uniform application of the FW Act. In combination with this, the treatment of the public sector could have been simplified if existing State Public Sector Awards were deemed to be Enterprise Awards for the purposes of the Enterprise Award Modernisation process, rather than deemed to be Notional Instruments.

The scope of the referrals

13. The ACTU welcomes those aspects of the Bill that give effect to the collaborative approach that the government has adopted in determining which people and which subject matters should be included or excluded from the referrals.

14. In particular we support the mechanism adopted in the proposed amendments to section 14 of the FW Act set out in Schedule 3 of the Bill. This will allow the Commonwealth to retreat from covering any local government entity or state enterprise that is a trading corporation where the State has determined (in consultation with the employers and employees in the local government sector) that it will not refer them. This sensible approach draws a "bright line" around the sector and avoids the

difficulties that otherwise arise in determining whether a particular council or enterprise is a trading corporation.

15. While not directly relevant to this Bill, we also offer comment on the Victorian referral. The *Fair Work (State Referral and Consequential and Other Amendments) Act* 2009 (First Referral Act) that gave effect to this referral was neither the subject of a Senate inquiry nor examined by the COIL, and there are some peculiar matters related to the public sector referrals that remain concerning. These go to the exclusion of *Re AEU* matters, and the treatment of public sector employers in award modernisation.

Re AEU issues

16. While the ACTU supported the Victorian referral of powers to Commonwealth, we remain concerned that Victoria did not refer all its powers in respect to all public sector employees, leaving them without statutory redundancy protection and restricting their ability to secure redundancy protection through bargaining. It also left law enforcement officers with fewer protections against adverse treatment than the general population.

17. We understand that this was because both the Victorian and Commonwealth governments felt constrained by the High Court's decision in *Re AEU*[5]. However the ACTU is not convinced that the *Re AEU* exclusions apply to referrals of power. There is a decent prospect that a State can waive this immunity and give the Commonwealth powers that the Commonwealth would not be able to gain itself. This argument is bolstered by the fact that (unlike the old referrals, which were subject based) this referral was text based. This gives a referring State much greater control over the content of the laws that the Commonwealth will apply to its employees.

18. The other practical issues associated with the treatment of *Re AEU* type matters arises because of the practice that governments only refer powers to the extent the Commonwealth does not have power. Therefore, bargaining in a State owned enterprise that is a trading corporation might be subject to the implied immunity (depending on its function) while bargaining in a state owned enterprise that is not a trading corporation will be subject to the statutory exclusions (regardless of its function). This entrenches the need to know with certainty the status of the employer.

Public sector award modernisation

19. Again, whilst not strictly relevant to the Bill, we regret that the legislative mechanism adopted in the First Referral Act provided for the making of a new class of Modern Award, being a State Reference Public Sector Modern Award, with different modern award objectives, and the use of notional instruments. Whilst we are supportive of the intent to continue to operation of State Public Sector Awards that apply only in one State, this could have been more conveniently achieved by amending the definition of Enterprise Award to include State Government as enterprises.

Implementation issues

20. The Bill maintains a distinction between referred power and non-referred power: the sections of the FW Act as it would be amended by the Bill will be operative in relation to non-federal system employers only to the extent that the referral is necessary.

21. We support the provisions of the Bill that provide a transition mechanism from state systems, including:

a. The preservation of State Awards for up to 12 months;
b. The preservation of State Agreements;
c. Requiring Fair Work Australia to consider including terms from State Awards into Modern Awards; and
d. Extending the National Employment Standard Safety net.

22. We note that pursuant to Item 7 of the proposed Schedule 3A of the *Fair Work (Transitional Provisions and Consequential Amendments)* Act 2009, Division 2B State Awards will be taken to include a model dispute term that is to be prescribed by the regulations. The ACTU has previously urged this Committee to support the inclusion in all industrial instruments of a robust dispute mechanism that includes arbitration of disputes about the operation of the instrument. We note that there would be no legal impediment for such a term to provide for the arbitration of disputes by a third party.

Technical matters

23. We are concerned that the definition of "referred subject matters" in the proposed section 30K of the FW Act might be argued to imply a restriction on what would otherwise be "permitted matters" for the purposes of an Enterprise Agreement. Whilst we presume that the reference to "terms and conditions of employment" within the definition is intended to be facilitative and to capture all things which would fall within "permitted matters", it might be suggested that the expression is insufficient to capture matters pertaining to the union-employer relationship. Some clarity, at least of the intent in that regard, would be beneficial.

24. Finally we question the rationale for removing the discretion of the Courts in relation to applications to intervene by a Minister of a State or Territory

when intervention in Fair Work Australia appears to be subject to an objective public interest test: compare proposed section 569A and 597A.

Endnotes:

[1] *Forward with Fairness – Labor's plan for fairer and more productive Australian Workplaces*, April 2007, page 6.
[2] *Ibid.*
[3] *Submission by the ACTU the to Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008*, January 2009, para 183.
[4] *Submission by the ACTU the to Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work (Transition Provisions and Consequential Amendments) Bill 2009*, May 2009, page 5.
[5] *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.