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14 April 2009

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Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
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Assistant National Secretary
Greg McLean

Dear John,

Re: Inquiry into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

Attached is a Submission from the Australian Services Union to the Committee's Inquiry into the above Bill.

The Submission is made on behalf of the National Union.

Officers of the Union would be very pleased to meet with the Committee to speak to the Submission and to answer any questions Committee members may have.

Please contact either myself or Linda White, Assistant National Secretary on 0419 507 809 or by email to lwhite@asu.asn.au to arrange a convenient time.

Yours faithfully

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Paul Slape
NATIONAL SECRETARY

Submission

to

Senate Education, Employment and Workplace Relations

Inquiry into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

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9th April 2009

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Introduction

1. The Australian Services Union [ASU] is one of Australia's largest Unions, representing approximately 120,000 employees.

2. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

3. Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

    - Local government (both blue and white collar employment)
    - Social and community services
    - Transport, including passenger air and rail transport, road, rail and air freight transport
    - Clerical and administrative employees in commerce and industry generally
    - Call centres
    - Electricity generation, transmission and distribution
    - Water industry
    - Higher education (Queensland and SA)

4. The ASU has members in every State and Territory of Australia, as well as in most regional centres as well.

5. The ASU has, during its existence, been an active participant in the Australian industrial relations systems at both a State and Federal level. The Union has established on behalf of its members an array of federal and state awards and agreements providing terms and conditions of employment. In the Federal system, the ASU maintains about 200 underpinning awards, supplemented by hundreds of enterprise bargaining agreements. The same has applied in State IR systems.

6. Since bargaining at the workplace level has been a feature of Australia's IR systems, the ASU has actively bargained with the employers of our members for appropriate terms and conditions of employment and has fully participated in this system, despite limitations on the ability of unions to bargain on equal terms with employers introduced particularly by the WorkChoices amendments in 2006/07.

7. The submission is authorised by the National Secretary of the Union.

Overview

8. The ASU has welcomed the Federal Government's repeal the Howard Government's WorkChoices legislation and the introduction of a new national IR legislation based on the policies the ALP took to the last Federal election.

9. The WorkChoices legislation was extremely detrimental to workers and their families. It deliberately set out to strip from employees not only terms and conditions of employment by lowering or eliminating key elements of the safety net of terms and conditions of employment but to weaken the ability of employees to collectively defend and advance their interests as employees.

10. The WorkChoices legislation gave the whip hand in workplace relations to employers, particularly by promoting individual statutory contracts, the overwhelming bulk of which were 'unequal treaties' forced upon employees as 'take it or leave it' arrangements without any pretence at genuine or other bargaining.

11. The ASU made submissions to the Committee in relation to the substantive Bill and appeared at the public hearings into the Bill.

12. The ASU has welcomed the passing of the Fair Work Act by the Federal Parliament.

13. The ASU has been a full participant in the Government's award modernisation program currently being conducted by the Australian Industrial Relations Commission, although the Union is seriously concerned about the impact of this exercise on the terms and conditions of hundreds of thousands of Australian workers who are seeing their terms and conditions of employment being reduced without any demonstrable need for such reductions and without any compensation for their loss.

14. In the submissions of the ASU, to date, the outcomes from the award modernisation process are not consistent with the Government's expressed aims for this process and the Minister's Award Modernisation Request. This issue is further dealt with below and the Union makes strong recommendations about urgent action that is necessary from the Government to address serious disadvantage to workers arising from award modernisation, including with respect to Take Home Pay Orders.

Support for ACTU Submissions

15. The ASU supports the Submissions of the ACTU to the Committee regarding the Transitional Provisions and Consequential Amendments Bill.

16. This ASU submission deals with the following key issues of concern to ASU members which relate to the present Bill, including:

- Award modernisation – disadvantage to employees – "Take Home Pay" Orders
- AWAs & ITEAs and sub-standard non union agreements – expiry, setting aside and replacement
- Low paid workers determinations
- Non federal system employers

Award Modernisation – Employee Disadvantage - Take Home Pay Orders

17. Award modernisation was a key part of the ALP's Forward to Fairness policy that it took to the 2007 election. The award modernisation process has been commenced by the Australian industrial Relations Commission as a result of Part 10A of the Workplace Relations Act and in particular an award modernisation request made by the Minister in accordance with s.576C of the pre-existing Workplace Relations Act as modified in 2008 by the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008.

18. The Objects of part 10A of the previous Act included an objective that modern awards "must provide a fair minimum safety net of enforceable terms and conditions of employment for employees;…" [s.576A (2)(b).

19. This objective was carried forward into the proposed Fair Work Act. The Act as passed by the Parliament contains the following objective:

> ***"s. 134 The modern awards objective***
>
> *What is the modern awards objective?*
>
> *(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions,…"*

20. Section 576C (1) of the 2008 Act provided that any award modernisation process must be carried out in accordance with a written request made by the Minister. The Award modernisation request made by the Minister in 2008 states in part that "The creation of modern awards is not intended to…disadvantage employees;..".[1]

21. The ASU submits that the award modernisation process is not achieving the objectives of the Government or the requirement of existing and proposed legislation as set out in the Fair Work Act for the reasons set out below. Specifically, modern awards so far made do not provide fair terms and conditions of employment and disadvantage many employees.

22. Modern awards are a key instrument in the new industrial relations system to operate 1st January 2010. It is essential that this work is done in accordance with the Government's objectives.

23. Awards remain very important to members of the ASU and the classes of employees covered by the ASU, notwithstanding the Union's active participation in bargaining over the past two decades. A considerable number of employees represented by the ASU are award dependent, either wholly or in part. This includes employees in business services [including clerical and administrative employees] and in social and community services. In some industries and sectors, award level wage and conditions fixing has been dominant, e.g. NSW local government.

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[1] Consolidated Award modernisation request, accessed via the AIRC website 8th January 2009.

General award standards are important to the many workers who have common law agreements covering their employment.

24. Of course, even in sectors and occupations where enterprise bargaining pre-dominates, awards remain of vital importance, since they form the base for enterprise bargaining – although this system was partially destroyed by WorkChoices [the base being only the five conditions in the so-called Fair Pay and Conditions Standard]. The Award, in the form of modern Awards – combined with the National Employment Standards - is being restored under Forward with Fairness as the basis of the "Better off Overall Test" and thus is of great importance to all Australian workers, union and non union workers alike.

25. The level of the award minimums set by the AIRC as part of the award modernisation process is therefore at the heart of the Government's promise to the Australian people to restore their industrial entitlements. Unfortunately, on the evidence and the experience so far, this promise is not being delivered by the award modernisation process and the Government must take urgent action to address the serious deficiencies that have already emerged in the outcomes of the process so far.

26. The ASU has been an active participant in the award modernisation processes conducted by the AIRC. The Union has already made more than 60 different written submissions during 2008 and 2009 and appeared at nearly all general and specific sector public consultations so far held with respect to the Priority , Stage 2 and Stage 3 industries and occupations. The ASU has been an active participant in the award modernisation process because it has a particularly diverse coverage in a range of industry sectors and occupations and because the Union is the principal union for private sector office employees.

27. The Australian Industrial Relations Commission (AIRC) decision on the final form of the Clerks Private Sector Award [as originally made and as further modified by the April 3rd 2009 Decision] has severely cut terms and conditions for clerical workers. The cuts will affect clerical workers across the country and significantly reduce their safety net contrary to Government promises that workers would not be disadvantaged.

28. For example, the Australian Industrial Relations Commission has introduced into the modern award an ‘exemption rate’, which severely limits the coverage of the Award in situations where employees earn 15% more than the highest rate in the modern award.

29. This single provision has the effect of stripping award coverage from tens or even hundreds of thousands of employees who have had the benefit of award coverage in the past.

30. In addition, the AIRC has included in the modern Clerks Award weekend penalty provisions based on the terms of the Contract Call Centre Industry Award – which award had limited application to a small number of employers and their employees – and applied them to all employees working in call centres. This will have the effect of reducing the safety net of terms and conditions for such call centre employees from 1st January 2010. No submission called for such an outcome.

31. In addition, the AIRC has extended the ordinary hours of work for most clerical and administrative employees to include ordinary hours of work on a Saturday morning. This will be detrimental to many such employees, 75% of whom are women, many with family responsibilities.

32. Casual clerical and administrative employees have suffered cuts to their casual loading: from more than 33% and 28% in Victoria and NSW respectively to the new averaged standard of 25%.

33. Clerical and administrative employees – many of whom rely on the award for their terms and conditions of employment – will be disadvantaged by the introduction of modern awards, contrary to the terms of the Minister’s Request.

34. The Government has sought to address this issue by providing – in the current Bill – for the making of Take Home Pay Orders by Fair Work Australia.

35. The Bill provides:

Schedule 5 Modern awards (other than enterprise awards)

Part 3 Avoiding reductions in take-home pay

8 (1) The Part 10A award modernisation process is not intended to result in a reduction in the take-home pay of employees or outworkers.

[…]

(3) An employee suffers a ***modernisation-related reduction in take-home pay*** if, and only if:

(a) a modern award made in the Part 10A award modernisation process starts to apply to the employee when the award comes into operation; and

(b) the employee is employed in the same position as (or a position that is comparable to) the position he or she was employed in immediately before the modern award came into operation; and

(c) the amount of the employee's take-home pay for working particular hours or for a particular quantity of work after the modern award comes into operation is less than what would have been the employee's take-home pay for those hours or that quantity of work immediately before the award came into operation; and

(d) that reduction in the employee's take-home pay is attributable to the Part 10A award modernisation process.

9 Orders remedying reductions in take-home pay

Employees

(1) If FWA is satisfied that an employee, or a class of employees, to whom a modern award applies has suffered a modernisation-related reduction in take-home pay, FWA may make any order (a ***take-home pay order***) requiring, or relating to, the payment of an amount or amounts to the employee or employees that FWA considers appropriate to remedy the situation.

….

36. The Explanatory memorandum explains how it is intended that these provisions operate:

201. An order can be sought (under item 9) in respect of a modernisation-related reduction in take-home pay. An employee suffers such a reduction if, and only if:

the modern award starts to apply to the employee when it commences operation - that is, the orders are only available in respect of current award covered employees;

the employee is employed in the same position (or a position that is comparable to) the position they were employed in immediately before the modern award came into operation. This makes clear that the provision is designed purely to ensure a fair transition from the old award to the new - it is not intended that this provision apply where employees change jobs, or where working arrangements change;

> the employee's take-home pay for working particular hours (including a particular shift pattern or spread of hours) or for a particular quantity of work is less than it would have been immediately before the modern award came into operation; and
>
> the reduction is attributable to the modernisation process - the intention is that orders can only be made where modernisation is the operative or immediate reason for a reduction in take-home pay.
>
> 202. Equivalent provision is made in relation to non-employee outworkers.
>
> 203. It is not intended that the take-home pay orders should prevent an employer from taking action (e.g., reorganising roster arrangements) that would otherwise be lawful.

37. The ASU submits that these provisions are inadequate to protect employees from the consequences of award modernisation that are now almost certain to occur [unless the AIRC changes the terms of modern awards already made]. This is because:

- The Ministerial Request said that the making of modern awards was not intended to disadvantage employees. The Orders that may be made by FWA only relate to take home pay, whereas disadvantage is much broader in effect that simply effects on take home pay.

- The provisions are said by the EM only to relate to current award covered employees who are employed when the modern award commences to operate on 1st January next year. Employees engaged on the 2nd January next year may be permanently disadvantaged by award modernisation without any compensation or remedial measures being available

- Employees must remain in the same or a comparable position with the employer – if an employee is promoted or otherwise transferred into a non comparable position [or goes to work for another employer] but is otherwise still covered by the modern award, an employee can suffer a disadvantage including a reduction in take home pay without any compensation or remedial measures being available

- As par. 203 of the EM notes, an employer make may lawful changes such as new rostering arrangements so long as they are permitted by the modern award and employees may suffer a disadvantage since they are no longer working a particular shift pattern or spread of hours.

- Employees may be able to obtain only one Take Home Pay Order whereas circumstances may change which requires further consideration and a new Order or Orders.

- The protection offered by Take Home Pay Orders does not take into account:

    - Reductions in the level of disadvantage brought about by a new employer commencing operation after 1st January next year and employing employees on a modern award with a reduced safety net

    - The reduction in the level of the safety net which will have an impact on the next round of bargaining to occur after 1st January 2010 particularly in the non union bargaining stream

    - Loss of non quantifiable protections, such as loss of access to dispute settling procedures

38. The ASU is aware of members who will suffer losses set out above who will not be able to benefit from Take Home Pay Orders.

39. For example:

- The extension of ordinary hours of work to include Saturday morning work will severely disadvantage many clerical and administrative employees who until now have not been able to be required to work on Saturday mornings. The payment of a 25% loading [new in some cases] does not compensate employees for having to work unsocial hours on weekends. In some cases, awards did not require employees to work on Saturday mornings as part of ordinary hours. In other cases, such work could be performed by agreement.

- Employers can clearly roster employees for periods of work over extended spreads of hours for which penalties used to be paid without this triggering the ability to apply for a take Home Pay Order since such shifts would be lawful.

- Employees paid above the exemption rate in the Clerks private sector Award will no longer have access to even limited dispute settling processes about award matters or even about the NES since they are exempted from the provisions of these clauses [along with many others].

- Casual employees may have limited or no access to such protections depending on how their employment is structured. In any case, existing casual employees who work for more than one employer or who change jobs will find that their take home pay is cut without access to apply for an Order.

40. The ASU notes that many employer organisations are now arguing in award modernisation consultations being conducted by the AIRC that the availability of Take Home Pay Orders means that the Commission does not need to concern itself with the concept of disadvantage to employees in the award modernisation process since any such disadvantage can be remedied by these Orders.

41. Employers began arguing this position in Award modernisation consultations that the ASU was involved in the day after the Bill was tabled in the Parliament. [2]

42. The Union strongly submits that the Government should advise the Commission and parties to Award Modernisation proceedings that the availability of Take Home Pay Orders does not lessen the obligation on the Commission to make modern awards which do not disadvantage employees, as provided for in the Minister's Request.

43. The ASU further submits that FWA must be allowed to make Orders ensuring that there is no disadvantage – financial or otherwise - to employees as a result of the award modernisation process in line with Government promises prior to the last election and in keeping with the requirement that award modernisation not disadvantage employees as per the Minister's Request.

44. In addition, the ASU submits that the Bill should be amended to make it clear that employees can obtain more than one Take Home Pay Order if the circumstances warrant it.

45. Finally, the Federal Government must now take the ASU's warnings seriously and direct the AIRC to restore terms and conditions for clerical and other workers. The integrity of the Government's process is being significantly undermined by the current AIRC approach. In the submission of the ASU, the Government cannot sit back and see key policy planks that were voted on by the Australian people so significantly undermined.

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[2] See for example submissions by employers in respect of Airline Operations – 20th March 2009.

46. Employees will see no reason why the integrity of their safety net – which they voted to protect in 2007 – is to be whittled away in the name of award modernisation to create an industrial relations system which disadvantages them in key respects.

AWAs & ITEAs and sub-standard non union agreements – expiry, setting aside and replacement

47. As a result of repeated changes to federal industrial legislation since 1996 and the previous promotion of individual agreements there are now in existence at least four kinds of individual statutory contracts with continuing legal effect.

48. They are:

- Pre-WorkChoices AWAs based on the no disadvantage test as it operated prior to WorkChoices
- WorkChoices AWAs based on a test against the Fair Pay and Conditions Standard
- WorkChoices AWAs subject to the Fairness Test introduced in 2007
- ITEAs – subject to the new no disadvantage test.

49. All these individual instruments have a different basis and provide different and possibly unfair and unequal outcomes for employees, even those in the same workplace. All such individual arrangements have a nominal expiry date – which can be up to five years in the case of AWAs or the 31st December 2009 in the case of ITEAs.

50. The Government has decided that all these agreements shall be allowed to continue to operate until their nominal expiry dates and thereafter until terminated in accordance with the law.

51. AWAs were able to be offered – and were - up to the death knell of the WorkChoices legislation with a five year life which means that some of the instruments are fully operative until early 2013. All such agreements however continue in effect until terminated or replaced. This includes ITEAs.

52. In addition, a considerable number of employees remain covered by sub-standard non union workplace agreements made under the terms of the WorkChoices legislation and in particular before the introduction of the Fairness Test. The ASU believes that most of these agreements disadvantage employees.

53. The ASU opposes the Government's decision to allow all such agreements – individual and [non union] employee collective alike – to continue to operate. Unless terminated or replaced by another agreement, these instruments can continue to disadvantage employees indefinitely.

54. The Government has determined that transitional instruments will be over-ridden by the provisions of the NES [from 1st January 2010] and certain other entitlements including minimum modern award wages. However, the ASU does not believe that this goes far enough to restore the position of employees who are being disadvantaged by agreements.

55. The Government has also allowed employees on substandard AWAs or ITEAs to seek to have their agreement replaced by an enterprise agreement in certain circumstances. However, the ASU also submits that this is an inadequate policy response since it effectively requires the agreement of the employer which is unlikely to be obtained.

56. The ASU strongly submits that it is unfair and unreasonable for employees to continue to be bound by individual and collective non union agreements that would not meet the tests under the new system to operate from 1st January 2010. Many, if not most, of these agreements were not freely entered into but were 'take it or leave it' arrangements imposed on workers – for example continuing workers at Qantas Valet Parking forced to accept old AWAs just before the commencement of the transitional Forward With Fairness Act in March 2008.

57. These individual contracts and other non union agreements were assessed under a variety of tests as noted above, but all such tests were 'point in time' tests; that is to say that the test was whether the agreement passed the test at the time it was made. While such agreements will not now be able to fall below the level of wages in modern awards or the provisions of the NES, this only partially rectifies disadvantage suffered by the loss of protected and other award conditions as a result of the WorkChoices legislation.

58. A new industrial relations system should apply afresh to all Australian workers and not have different rules for workers depending on when their last workplace agreement was made.

59. **Recommendation:** The ASU recommends that these agreements be dealt with as follows:

- All individual statutory and other workplace agreements continuing in force beyond 1st January 2010 should be deemed to include from that date all minimum protections afforded by both the National Employment Standards ***and*** the modern award which applies to employees in the industry or occupation in which the employee works.

- Where an employee believes that a continuing agreement would fail the new Better off Overall Test if made on or after the 1st January 2010, the employee should be able to make an application to FWA have the BOOT applied to the agreement. If the agreement fails the test, the employee may make application to terminate the agreement and the agreement should be terminated by FWA unless it was in the public interest not to do so or if the employee would be worse off for any reason if this occurred. If the agreement is terminated, the employee would be covered by the modern award or any collective agreement operating in the workplace concerned so long as that arrangement provided a better outcome for that employee.

- Where an agreement is varied [whether formally or informally], for example, by an increase in the rate of pay payable to an employee, the varied agreement must be re-tested to ensure that it meets the BOOT at the date the variation takes effect.

- When an individual agreement passes its nominal expiry date, the agreement shall automatically cease to operate and the employee covered by the NES, the modern award applicable and any agreement operating in the workplace, so long as that outcome was not detrimental to the employee concerned.

60. The ASU submits that these processes are fully consistent with the provisions of the Fair Work Act that require enterprise agreements to at least keep pace with the minimum wages provided for in modern awards. Section 206 provides:

> ***206 Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate etc.***
>
> *If an employee is covered by a modern award that is in operation*
>
> *(1) If:*
>
> *(a) an enterprise agreement applies to an employee; and*
>
> *(b) a modern award that is in operation covers the employee;*
>
> *the base rate of pay payable to the employee under the agreement (the **agreement rate**) must not be less than the base rate of pay that would be payable to the employee under the modern award (the **award rate**) if the modern award applied to the employee.*
>
> *(2) If the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.*

61. However, this protection should be extended to all applicable award conditions.

Workplace determinations – low paid employees

62. The Fair Work Act allows the Commission to make a special low paid determination under certain circumstances – see sections 262 and 263 of the Fair Work Act.

63. These circumstances include:

> **263 When FWA must make a special low-paid workplace determination—additional requirements**
>
> (1)…
>
> (2)…
>
> (3) FWA must be satisfied that no employer that will be covered by the relevant determination is, or has previously been, covered by an enterprise agreement, or another workplace determination, in

relation to the work to be performed by the employees who will be covered by the relevant determination.

64. The ASU has taken a close interest in the issue of the special provisions in the Act relating to low paid employees and their access to special determinations. The ASU understood, at the time the Fair Work Bill was before the Parliament and the Senate Committee Inquiry into it, that the reference to the limitation "covered by an enterprise agreement" was a reference to an agreement made under the terms of the new Fair Work Act.

65. The Transitional Bill appears to add an additional requirement before such a determination can be made at:

Schedule 7 Enterprise agreements and workplace determinations made under the FW Act

Part 5 Transitional provisions relating to workplace determinations made under the FW Act

22 Special low-paid workplace determination—employer must not previously have been covered by agreement-based transitional instrument

Subsection 263(3) of the FW Act (which deals with additional requirements for making a special low-paid workplace determination) applies in relation to a workplace determination, whether made during or after the bridging period, as if the reference in that subsection to an enterprise agreement included a reference to a collective agreement-based transitional instrument.

66. Collective agreement based transitional instruments are defined at subitem 2(5) of Schedule 3 as:

(c) agreement-based transitional instruments of the following kinds are ***collective agreement-based transitional instruments***:

(i) collective agreements;

(ii) workplace determinations;

(iii) preserved collective State agreements;

(iv) pre-reform certified agreements;

(v) old IR agreements;

(vi) section 170MX awards;

67. Subitem 2 (3) of the same Schedule suggests that such transitional instruments must be in operation at the commencement of the new Act to impose this additional limitation:

"The following WR Act instruments become ***transitional instruments*** on the WR Act repeal day:

(a) each WR Act instrument that was in operation immediately before the WR Act repeal day;…"

….

68. However, the Explanatory Memorandum takes a wider view:

Item 22 – Special low-paid workplace determination – employer must not previously have been covered by agreement-based transitional instrument

356. This item provides that subclause 263(3) of the FW Bill (which deals with additional requirements for making special low-paid workplace determinations) applies in relation to a special low-paid workplace determination made under the FW Bill as if the reference to an enterprise agreement included a reference to a collective agreement-based transitional instrument. That is, an employer must not be covered by, ***or previously have been covered by***, ***an enterprise agreement or collective agreement-based transitional instrument*** in relation to the work to be performed by the employees who will be covered by the special low-paid workplace determination. This item will continue to apply to special low-paid workplace determinations made after the bridging period [emphasis added].

69. Thus the Bill appears to provide that low paid employees will not be able to get access to low paid determinations if they have an enterprise agreement in operation at the date of the repeal of the WR Act [on one reading] or have ever had an enterprise agreement in operation [on a second reading].

70. In either case, the ASU submits that the additional limitation imposed by Clause 22 of Schedule 7 is inappropriate and should be removed from the Bill. This is for the following reasons.

- the agreement in operation in relation to particular employees may be unfair and have been imposed on the employees during the WorkChoices period or at another time
- the agreement may have long passed its nominal expiry date and be in operation only because the agreement has not been terminated or replaced by another agreement
- [if no collective agreement can ever have applied] the agreement may have been made a long time ago.

71. In addition, the ASU supports the concerns of the ACTU that the retention of this provision in the Transitional Bill and Act will encourage some employers to seek to make agreements between now and the 30th June 2009 with their employees so that there is no possibility of a low paid determination applying to them in the future.

72. **Recommendation:** The ASU recommends the deletion of Clause 22 of Schedule 7.

Non federal system employers – local government and SACS

73. Clause 20 of Schedule 3 of the Bill provides that transitional instruments based on the conciliation and arbitration power of the Constitution will cease to have effect on the 27th March 2011 to the extent that employers covered by them are not 'federal system employers'.

74. The ASU represents many members employed by employers who will not be federal system employers under the new Act when it commences. In many cases, terms and conditions for these employees are provided by federal awards and agreements which were made as part settlement of industrial disputes under the conciliation and arbitration power. These members include employees working in local government and social and community services. Other such employees and members of the ASU are employed under the terms of State awards and will continue to be so covered unless States refer their powers to the Commonwealth.

75. The ACTU notes the submission of the ACTU that it does not see any constitutional impediment to preserving indefinitely transitional instruments based on the conciliation and arbitration power nor any compelling policy reason why parties to industrial disputes should not continue to have access to and participate in the federal system. The ASU supports this submission.

76. However, in the event that this submission is not agreed to by the Senate or the Parliament as a whole, the ASU submits that the status of local government and SACS employers [as well as employers in some other sectors] is an urgent transitional issue that must be addressed immediately by the Federal Government and the States.

77. Local government employers will not be federal system employers since they are not constitutional corporations. The States of NSW and Queensland have moved to

put this question beyond doubt by de-corporatising local government in those States.

78. The ASU submits that action to resolve the industrial coverage of local government can and should be taken on a state by State basis.

79. In any event, prior to the 2007 Federal election, the ALP Leader Kevin Rudd undertook that, if the States so determined that, local government could operate under State industrial relations legislation. In 2007, the current NSW premier wrote to the Prime Minister formally seeking that local government in NSW be dealt with under State industrial legislation and formally excluded from the *Workplace Relations Act 1996*.

80. The ASU strongly supports that request. The ASU recommends that the status of local government be considered and determined on a State by State basis and where the relevant parties in the State so determine, power to provide industrial laws with respect to local government should be clearly referred to that State for the avoidance of doubt.

81. The same situation applies to social and community services. There is doubt about the constitutional status of a significant number of employers in the SACS sector, many of which are currently covered by federal instruments which may cease to operate in respect to them in March 2011 unless urgent action is taken now.

82. It is essential that for certainty that each State's SACS sector be completely in the Federal system or completely in a state system and the ASU submits that this is capable of State by State determination without adverse effects.

83. At the time of writing these submissions, the position of State governments with regard to the referral of powers is not clear. The ASU therefore reserves its position to make further submissions with regard to how the policy of ensuring certainty of coverage with regard to non federal system employers can be best achieved. The ASU understands that this issue may be dealt with in a subsequent transitional Bill.

84. However, it is clear that the future of non federal system employers is now an urgent transitional issue and must be resolved as soon as possible in the public interest.