Senate Education, Employment and Workplace Relations Committee

Submission from Unions Tasmania

to the

Inquiry into the Fair Work Bill 2008

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Preliminary: Unions Tasmania

Unions Tasmania is the peak organisation for unions in Tasmania and is the State branch of the Australian Council of Trade Unions and seeks to represent the working people of Tasmania.

Affiliate members of Unions Tasmania represent approximately 50,000 union members, from all industry sectors and across both the private and public sectors.

Our long-standing aims are as follows:

(a) *to contribute to the establishment of an economic and social order in which persons can live with freedom and dignity and pursue both their spiritual development and their material well being in conditions of economic security and equal opportunity;*

(b) *to improve the conditions and protect the interests of all classes of labour within the sphere of the Council's influence;*

(c) *to give effect to the Australian Council of Trade Unions' policy as determined from time to time;*

(d) *when requested to assist by conciliation or decision in the settlement of disputes between affiliated organisations;*

(e) *to provide machinery for the just resolution of industrial disputes between employees and employers;*

(f) *to promote, develop, and encourage the study of literature, science, art and other cultural activities amongst affiliated organisations by such means as Council may determine from time to time;*

(g) *to establish Provincial Councils and to assist them in their operations;*

(h) *to do all things expedient or incidental to the carrying out of these objects.*

Clearly the industrial framework and in particular the legislative framework are critical to the achievement of our aims. This legislation represents the fourth major rewrite by the Federal Parliament in fifteen years and Unions Tasmania thanks the Senate for the opportunity to provide comment.

Introduction:

Australian industrial relations or, in contemporary parlance, Workplace Relations, is an evolving thing. As we evolve from a primary and manufacturing economy to a service economy our work becomes more complex and sophisticated and so do our relationships.

Some basic fundamentals however, never change. For the vast majority of employees and, in more recent times, contractors, the relationship of buying and selling labour is one of power imbalance. As a general rule the lower the skill and educational requirements of a job the more the imbalance works against employees. This imbalance has long been recognised nationally and internationally and mechanisms developed to oversight employment affairs to provide some level of balance and fairness.

In Australia these mechanisms have centred around industrial legislation of the state parliaments and the more complex application of the Conciliation and Arbitration powers of the Commonwealth Parliament. Following judicial re-interpretation of the constitution the Commonwealth now has the corporations power, a broader and simpler power to rely on.

In 1993, 1996, 2005 and again this year we have seen substantial rewrites of the federal legislation. The 2005 legislation known as Workchoices was a departure from evolutionary change and was fundamentally flawed from the perspective of fairness, being a mechanism for balance or as a system acceptable to Australian workers. The 2008 legislation, while retaining some of the features of Workchoices, aims to restore balance and fairness.

This submission will cover two of the major features of Workchoices retained in the Fair Work Bill - the aim to cover the field to the exclusion of the States and the attempt to continue the legislative micro management of workplace relations in Australia. It will also look at some of the outcomes experienced by Tasmanian workers as a result of Workchoices.

This submission will examine the safety net, the bargaining arrangements and the dispute resolution powers from the perspective of Tasmanian workers who have been drawn into the system and those who are still outside it but of whom the Commonwealth is desirous of including. It will also include some other minor matters of concern.

This submission will conclude that the Fair Work Bill is a necessary and significant improvement for workers covered by the federal system but is not yet an improvement for those who remain covered by Tasmanian legislation, particularly in the state public sector.

1. The Impact of Workchoices

The Workchoices legislation was a savage attack on working families and particularly the more vulnerable, lower skilled and young workers. In this submission is included a case study of petrol station workers who lost up to $190 a week and another dealing with young workers in a fast food franchise who lost up to $80 a week.

United Petroleum. In 2006 Norvac commenced a takeover of most of the Mobil service stations in Tasmania. As they had been petrol wholesalers but had not run petrol stations directly before, they used provisions in the Federal Government's new industrial laws to write what was called an "Employer Greenfields Agreement"

A Greenfields Agreement has traditionally been a deal negotiated between an employer establishing a brand new business and a relevant union - thus the image of an empty green field that a new business is going to be built on.

The original idea of a Greenfields Agreement was to give a new business flexibility and a basis for employing staff. However the Workchoices legislation changed the whole idea of a Greenfields site. Norvac was allowed to make an agreement with itself, negotiating with no-one. That's what an <u>Employer</u> Greenfields Agreement is. And, despite these service stations all having been open and run by another operator for years, Norvac saw an opportunity to claim them as Greenfields sites.

The Norvac Employer Greenfields Agreement explicitly excluded a long list of basic award entitlements including:

Rest breaks
Incentive based payments & bonuses
Annual leave loadings
Observance of public holidays
Overtime payments
Shift work allowances
Penalty rates for any kind of shift work

Employees earning less than $900 a week lost up to $190 dollars a week in casual, overtime and penalty payments & shift loadings. Norvac argued that the employees now had the extra security of being permanent part-time employees. Even if this argument stands and being permanent part-time with no minimum hours is somehow seen as having a more secure job than being a casual, employees still lost a substantial proportion their take home pay.

A subsequent investigation by the Workplace Ombudsman concluded that the company had employed staff prior to the lodgement of the Employer Greenfields Agreement and thus the agreement was void. However, under another twist of the Workchoices legislation, because Norvac had not employed staff prior to taking over the businesses it was deemed to be not

bound by any Industrial Award. By reason of the EGA being void, Norvac was bound by the Australian Fair pay Commission standard and the Pay Scale derived from the Tasmanian Automotive Industries NAPSA (but not the NAPSA in its entirety). The employees were now considered to be Award free. With their Award conditions stripped away, the main code controlling their employment conditions was the NES with its five minimum standards.

The Fair Work Australia Bill includes ten minimum employment standards so the lot of these employees would be improved. The Fair Work Bill does remove the Employer Greenfields Agreement as an employment mechanism so employees will not be able to be treated in this way again. The Fair work Bill does not allow a new business to operate Award free so the new NES and the relevant Award will apply to new businesses.

However, the Fair Work Australia Bill does not specify a way in which these employees could make the transition back to being covered by an Industrial Award.

Until the Transitional Legislation is presented we will not know if it is possible for workers like these, who were removed from Awards by various unfair mechanisms made legal by Workchoices, will once again be able to work under Award conditions.

> *It is submitted that the Transitional Legislation take into account that some Australian workers were removed from Awards by Employer Greenfields Agreements and other mechanisms under Workchoices and ensures that these workers have their Award conditions restored.*

2. The Fast Food Franchise (not named on request of the employees)

In 2006 & early 2007 a group of young workers at a fast food franchise in Hobart largely aged 15 to 21 years old signed an AWA that took away their penalty rates. Most were deeply unhappy about the new agreement which saw some of them lose up to $80 a week in take home pay but, as casual employees, they were deeply concerned that they would lose work if they did not sign. These are particularly vulnerable workers being casuals, young, unskilled at negotiating and powerless in the employment market.

The AWA removed award provisions including:

- Incentive payments and bonuses
- Annual leave loading
- Public holiday payments
- Allowances
- Overtime
- Penalty rates
- Shift allowances

Under the AWA employees were paid a flat hourly rate regardless of when they worked.

This AWA was made prior to the introduction of the so called Fairness Test and so the test did not apply.

When the AWA expires, under the current laws, it will need to be terminated by the employees (or employer) in order to cease operation.

Most of the employees are anxious to go back onto the Award right now and not wait until the AWA expires. They are also anxious that any one of them who terminates their AWA may be singled out for less work because they will be paid Award entitlements. The situation is inherently unfair and the prospect remains for it to drag on. The only way this unfair AWA can be terminated while retaining some protection for these type of vulnerable employees is for Fair Work Australia to be able to terminate it unilaterally without an individual having make an application. Unless Fair Work Australia has these powers there is the very real possibility that unfair agreements such as these will linger on in the Industrial landscape for years to come.

The employer is now attempting to persuade the same employees to agree to an unsatisfactory Collective Agreement. One draft of that agreement proposes that no employee can be a casual after 12 months service and thus they become permanent part-time with the loss of their casual loading but gaining sick leave, annual leave etc. While such an arrangement might be welcomed by staff in some businesses, this is not the case for these employees. The key issue here is that for many of the staff the number of shifts they work mean the accrual of these benefits would be minimal and the employees would lose their flexibility to refuse shifts. Most of them are studying and need to be able to take less work at certain times of the year. Most of these employees just want to go back onto the Award. The employees are concerned that they may be picked off one by one to sign the new Collective Agreement that has not been genuinely negotiated with them and that once again they will be worse off.

It is clear that the intention of the Fair Work Australia legislation is that in order to approve an agreement, Fair Work Australia must be satisfied that:

"12 (a) if the agreement is not a greenfields agreement—the 1 agreement has been genuinely agreed to by the employees covered by the agreement;"

> *It is submitted that where existing Australian Workplace Agreements are retained Fair Work Australia, should be able to terminate unfair AWAs prior to their expiry if they would not pass the new 'better off overall' test (BOOT).*

Mercury Newspaper 1st Dec 2008

HELEN KEMPTON

WORKERS at a major fast-food franchise in Tasmania are celebrating the demise of WorkChoices and the prospect of returned penalty loadings.

At the same time there are industrial rumblings in the meat processing industry as one company baulks at the prospect of collective bargaining under new federal workplace laws.

A young franchise employee, who agreed to talk on the condition of anonymity for fear of losing her job, said the fast-food company had introduced Australian Workplace Agreements about 18 months ago.

"We lost all our penalty rates. We were paid a flat rate whether it was a public holiday, a weekend or night hours," the worker said.

The 21-year-old said the average take-home wage of the 11 young employees at her workplace dropped about $80 a week.

She also claimed the workers had signed AWAs under duress.

"I was told if I did not sign, I would not get any hours and that there were a lot of other people waiting to take my job," she said.

It is also the experience of many workers that the loss of power under Workchoices changed the workplace and management. Tools of fear and greed began to replace more cooperative relationships. The quote from ANF Tasmanian Secretary Neroli Ellis describes one such experience.

> *"Even if an employee has been working satisfactorily for many years with an employer they are excluded from accessing a remedy for an alleged unfair dismissal if the employer has less than 100 employees.*
>
> *Since the implementation of the Workchoices changes employers, particularly in the Aged Care Sector, have been less co-operative with unions and have clearly targeted union members for treatment which has either resulted in them resigning or having their employment terminated on very flimsy grounds. For example an employer may assert that an individual was terminated for 'gross misconduct' yet the 'misconduct' complained of was very minor.*
>
> *Anecdotally, incidences of bullying in the workplace against employees known to be sympathetic, or supportive of the unions have dramatically increased with employees often being fearful of raising concerns of bullying for fear of being sacked."*

These are experiences that no decent fair minded Australian wants to see repeated.

It is submitted that any part of moving to fair work as proposed by the Bill will have as an essential ingredient mechanisms to ensure that the unfair and harsh employment agreements created under Workchoices are swept away or the very least made subject to automatic adjustment under the Better of Overall Test.

2. Coverage of the Field

It is a common feature of Workchoices and the Fair Work Australia Bill that both aim to remove choice of jurisdiction from Australian workers by mandating a national system to the exclusion of state systems.

Prima facie, and to the extent that constitutional powers exist to enable it, this was part of the mandate given to the Rudd government in the 2007 election.

It is not however part of the mandate given by the Australian Constitution. The Constitution respects States Rights and by so doing allows for regional difference. The High Court has of course provided an unintended broadening of the Constitution by deciding that the power to regulate for Corporations includes the power to regulate for their industrial relations.

The FWA Bill defines national scheme employers in Section 14 and in Section 13 defines national scheme employees as persons employed by a national system employer. The Bill, in section 26 explicitly sets out to exclude state or territory industrial laws for those who are national system employers and employees. In so doing it does not respect that these are shared powers and nowhere does the Bill attempt to create governance structures that respect these shared powers.

The term: “trading and financial corporations”, along with the other heads of power, ropes in all employees for whom constitutional coverage now exists. However significant parts of the workforce remain out of the Fair Work Australia jurisdiction. This includes state employees, many local government employees and most employees who are not employed by the Commonwealth or financial or trading corporations. There remains a significant grey area around what a trading corporation is and the boundaries of this group will only be clarified by Court decisions over time. It is estimated by Unions Tasmania between twenty and thirty percent of the Tasmanian workforce does not come under the FWA jurisdiction.

This reluctance to recognise sharing of powers creates two significant structural flaws in a national system.

The first is that the system can only be truly national if the States agree. The States have the capacity to hand over their powers in this area and allow the Commonwealth to regulate and manage the system. However, given that the majority of Tasmania’s workers are not employed by large national companies but by small and medium size businesses and the State Government for whom the current system has worked well, there is a different perspective. The question of handing over powers, whether to do it and how to do it, is one that requires a great deal of consideration and would be made a lot simpler if power sharing was part of the deal.

The second is the inherent instability in a system that changes every time there is a change of government. We have not only seen the size and complexity of the various Acts grow enormously but the basics are also

subject to regular change. In 2003, 1996, 2006 and in 2009 the Conciliation and Arbitration Act has or will become the Fair Work Act through four major rewrites. Each of those rewrites has created various levels of instability, uncertainty and expense and ironically, given that some of it was in the name of deregulation, has lead to a ballooning in size and level of prescription in the Act. Although the Fair Work Bill is far superior in drafting and ease of use than the Workchoices Act it remains a far cry from being simple and easy to work with.

The most fundamental of labour issues is recognition of the power imbalance that resides in favour of the employer when negotiating an employment contract. Given that one side of politics views this imbalance as the natural order of things to be cherished and maintained while the other views amelioration by collective bargaining as the just and proper method of building a fair and decent society, ongoing rewrites following government-changing elections seem inevitable.

> *It is the Unions Tasmania submission that these flaws can be rectified by the creation of a governance arrangement where the Commonwealth, States and Territories share industrial relations powers. Such an arrangement could ensure common legislation across the country by establishing legislation and then requiring a two thirds majority of parties to amend it.*

3. The Safety Nets

Both systems create safety nets of legislated conditions, minimum wages and Industrial Awards.

The conditions matters that may be in Federal Awards are listed in Section 139 of the Act and are limited to:

- Minimum wages including skill-based classifications, reduced wages for juniors, and other provisions
- Employment types including shift work and flexible patterns
- Hours, rostering, notice periods, breaks
- Overtime
- Penalty rates
- Annualised arrangements at no disadvantage
- Allowances
- Leave, leave loadings and arrangements for taking leave
- Superannuation
- Dispute settling procedures

In Section 140 special conditions for outworkers are included and Section 141 outlines restricted redundancy provisions.

The conditions that may be found in an Award of the Tasmanian Industrial Commission are not restricted by a prescriptive list and may include any matter that is an industrial matter. Typically this will include all of the matters listed in Section 130 of the FWA Bill and more.

An analysis of the safety nets can be found in the table Attachment 1. From this it is clear that the matters included in the FWA safety net are substantially similar to those found in the Tasmanian system.

Matters Included or Excluded by Awards

Example of matters excluded by FWA but included in Awards of the Tasmanian Commission are:

Insurance Award

- **clothing**, if the employer requires a uniform it will be provided
- **Stewards**, a person who is an elected steward may have reasonable time to do the job

Impact Fertilisers Award

- **training**, when employees are at work they are required to undertake training required to perform their duties

Independent Schools (Non Teaching Staff) Award

- **Board and Lodging**, provides that board and lodging will be free if employees are required to live on the premises during rostered periods and the rates to be charged otherwise

- **First Aid** , the employer will maintain first aid facilities

Entertainment Award

- **Fares**, the employer will pay the cost of transport from town or city of engagement to place of event

These examples are lifted from just four of the seventy three Awards of the Tasmanian Industrial Commission. There are many more. It is clear that there are a number of sensible conditions, important and relevant to specific operations that cannot be included in a Federal Award.

Minimum Rates of Pay

It is considered likely, but not yet confirmed, that national wage rates will vary from the Tasmanian rates. For example the modern Award for the retail sector which has recently been released by the AIRC includes the following minimum wages:

17. Minimum weekly wages

Classifications	Per week$
Retail Employee Level 1	600.00
Retail Employee Level 2	615.00
Retail Employee Level 3	625.00
Retail Employee Level 4	637.60
Retail Employee Level 5	665.00
Retail Employee Level 6	675.00
Retail Employee Level 7	710.00
Retail Employee Level 8	740.00

The equivalent figures from the Tasmanian Retail Award are:

8. WAGE RATES

(a) Adults
Adult employees of a grade hereunder mentioned shall be paid the amount assigned opposite that grade.

	Relativity	Base Rate	Safety Net Adjustment	Weekly Wage Rate
Retail Employee	%	$	$	$
Grade 1	85	354.60	220.70	575.30
Grade 2	92.1	384.10	220.70	604.80
Grade 3	96	400.50	220.70	621.20
Grade 4	100	417.20	222.70	639.90
Grade 5	105	438.10	222.70	660.80
Grade 6	110	458.90	222.70	681.60

At level one workers gain but this quickly diminishes until Level 4 where they are become worse off.

Another, more detailed comparison may be made for those working under the Private Sector Clerical Awards.

The results of a comparison of the new modernised Clerks—Private Sector Award 2010 (MA000002) and the Tasmanian Clerical and Administrative Employees (Private Sector) Awards show a number of interesting differences:

Pay Rates

Final Modern Award		Tasmania Grade	
		Grade 7	**719.00**
Level 5	740.00	**Grade 6**	**698.20**
		Grade 5	**679.30**
Level 4	710.00		
		Grade 4	**658.50**
Level 3	675.00		
Level 2 - Year 1	637.60	**Grade 3A**	**623.10**
Level 2 - Year 2	650.00	**Grade 3B**	**637.60**

Level 1 - Year 1	580.00	**Grade 2A**	**602.20**
Level 1 - Year 2	610.00	**Grade 2B**	**614.70**
Level 1 - Year 3	630.00		
		Grade 1A	**581.40**
		Grade 1B	**593.90**
		Adult entry First 6 mnths	**552.20**
		Second 6 mnth	**573.00**

In general the pay rates are higher in the modern Federal Award except for the Grade one employees who are expected to take a pay cut.

Age rates (juniors)

Age	**Federal Award %**	**Tas Award %**
Under 16 years of age	45	50%
16 years of age	50	50%
17 years of age	60	55%
18 years of age	70	65%
19 years of age	80	80%
20 years of age	90	85%

Juniors under the Tasmanian system do better until they reach 16 years of age and then are up to 5% worse off than their counterparts on the Federal Award until they reach age 21.

Meal allowances (Tea Money)

Tasmanian Award: TEA MONEY

(a) An employee who has worked six hours or more during ordinary time and who is required to work overtime for more than one and a half hours shall be either supplied with an adequate meal by the employer or be paid $14.60 meal money.

(b) Any dispute as to what constitutes an adequate meal shall be referred to and decided by the Tasmanian Industrial Commission.

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Modernised Federal Award: 19.3 MEAL ALLOWANCE

(a) An employee required to work for more than one and a half hours of overtime without being given 24 hours' notice after the employee's ordinary time of ending work will be either provided with a meal or paid a meal allowance of $12.00. Where such overtime work exceeds four hours a further meal allowance of $9.60 will be paid.

An employee under the Tasmanian Award has access to meal allowances of $14.60 whereas an employee under the Federal Award has access to meal allowances of $12.00. If the employer chooses to serve the employee a meal rather than pay the allowance the meal must be "adequate" under the Tasmanian Award with a mechanism to define 'adequate' in place. The meal the employer can provide under the Federal Award is not defined in any way.

Vehicle Allowances

The Federal Award includes a vehicle allowance, Tasmanian award does not.

9.4 Vehicle allowance (Modern Federal Award)

(a) An employee required by the employer to use the employee's motor vehicle in the performance of duties must be paid the following allowances:

(i) Motor cars

$0.74 per kilometre with a maximum payment as for 400 kilometres per week.

(ii) Motorcycles

25 cents per kilometre with a maximum payment as for 400 kilometres per week.

(b) The employer must pay all expenses including registration, running and maintenance where an employer provides a motor vehicle which is used by an employee in the performance of the employee's duties.

Hours of Work and Related Matters

Federal Award

25. Ordinary hours of work (other than shift-workers)

25.1 Weekly hours of work—day workers

(a) The ordinary hours of work for day workers are to be an average of 38 per week but not exceeding 152 hours in 28 days, or an average of 38 over the period of an agreed roster cycle.

(b) The ordinary hours of work may be worked from 7.00 am to 7.00 pm Monday to Friday and from 7.00 am to 12.30 pm Saturday. Provided that where an employee is employed in association with other classes of employees who work a five-day week the spread of hours during which ordinary hours can be worked are the hours contained in a modern award which apply to the majority of the employees at the workplace.

Tasmanian Award

1. Hours of Work

(a) The ordinary hours of work shall be an average of 38 per week to be worked on one of the following bases:

(i) Seven hours 36 minutes per day; or

(ii) Eight hours per day on 4 days and six hours on one day in each week; or

(iii) Eight hours per day on 9 days and four hours on one day in each fortnight; or

(iv) Eight hours per day on 19 days with an accumulated rostered day off; or

(v) Eight hours per day with an accumulation of rostered days off up to a maximum of five or, by agreement, up to a maximum of 12.

Notwithstanding the above, by agreement between an employer and employee, up to 10 hours may be worked on any day at ordinary time.

The method of implementation shall be determined on an enterprise by enterprise or - where appropriate - department by department basis where the primary consideration shall be the efficient maximisation of service in each enterprise.

(b) The ordinary hours shall be worked in five days of eight consecutive hours (excluding meal breaks) between the hours of 7.00 am and 6.30 pm, Monday to Friday inclusive.

The Federal Award makes Saturday morning work part of “ordinary hours”

Weekend Work

The Federal Award pays a lower penalty rate for Saturday morning work of time and a quarter whereas, under the Tasmanian award, it is paid at time and a half for the first 3 hours and then double time after that.

In this respect the modern Federal Award is worse than the Tasmanian Award which does not include Saturday morning as part of ordinary hours and pays overtime rates for all work on Saturdays.

Tasmanian Award:

Saturday Work

(a) For all time worked on a Saturday, payment shall be made at the rate of one and a half times the ordinary rate for the first three hours and double time thereafter.

(b) Employees working on Saturday shall receive a minimum payment as for two hours worked.

6. Sunday Work

For all time of duty on a Sunday, payment shall be made at the rate of double time, with a minimum payment as for four hours worked.

Federal Award:

27.2 Payment for working Saturdays and Sundays

(a) Work within the spread of ordinary hours on Saturday will be paid at the rate of time and a quarter.

(b) All work done on a Sunday must be paid for at the rate of double time.

(c) An employee required to work on a Sunday is entitled to not less than four hours' pay at penalty rates provided the employee is available for work for four hours.

Again the Tasmanian worker is worse off if required to work unsociable hours at the weekend. For example an adult level 3 clerk who normally works four hours on Saturday morning would, if their weekly rate remained the same, lose $17.76 a week.

In conclusion it is clear that there are disadvantages in being in the Federal system in terms of what is and is not in an Industrial Award. It is also clear that there are some areas of improved pay and others where take home pay will drop.

Clearly on the basis of this limited comparison of two Awards there is no great incentive to want to be in the Federal system.

4. **The Dispute Resolution Powers**

Section 595 of the Bill provides Fair Work Australia's power to deal with disputes.

This power includes mediation or conciliation, the making of a recommendation or the expressing of an opinion within the powers of the subdivision. This can be exercised on its own discretion or on application.

Fair Work Australia is given procedural discretion, the right to inform itself as it consider appropriate and is not bound by rules of evidence. The tools for that include:

- requiring attendance
- inviting written or oral submission
- requiring production of documents, records or other information
- take evidence under oath
- conducting inquiries or research
- conducting a conference including a power to direct attendance or
- holding a hearing

Section 595 provides an arbitration power but only when specifically authorised by another part of the Act.

These include:

Section 146 – a modern award must include a procedure for settling disputes under the Award matters or in relation to the National Employment Standard

Section186 (6) – agreements must contain a procedure that requires or allows Fair Work Australia to settle disputes about matters in the agreement or the NES. However neither of these provisions mandates an arbitral power.

Section 240(4) – where bargaining parties consent

Section 262 – special low paid workplace determination

Section 266 - industrial action related workplace determination

Section 269 – bargaining related workplace determination

Section 285 – award minimum wages and national minimum wage order

Section 302 – equal remuneration orders

Section 318 – orders for instruments on transfer of employee to new employer

Section 390 – order remedy for unfair dismissal

Each of these powers are very carefully described and limited to specific circumstances. Inside the bargaining process Fair Work Australia can only issue a determination in set circumstances. These do not include an intractable dispute if the employer is seen to be meeting the "bargaining in good faith" test as set out in Section 228 unless FWA decides the employee protected industrial action is causing significant economic harm to the employer and any of the employees. To achieve this trigger the action must have been continuing for a protracted period of time, harm must be imminent and there must be no resolution in sight.

The only exclusion from this is a situation where protected industrial action may endanger life, safety or the welfare of the population or cause significant harm to the economy or an important part of it.

In other words as long as the employer is seen to bargaining in good faith as defined in Section 228 employees have to go to extreme lengths to trigger arbitral powers for assistance in bargaining.

It must be noted that not even these provisions exist for disputes outside the bargaining context. By definition such industrial action is not protected and indeed under Section 417 is banned. Outside of the bargaining process Fair Work Australia is limited to disputes about the content of agreements, awards or the National Employment Standard (with unclear powers), equal remuneration orders, unfair dismissal orders, transferring employee orders and minimum and award wage orders.

In practical operation this has created a significant issue. To quote the AIRC Statement on Award modernization of 12th September 2008:

> ***[19]** The draft dispute resolution clause is designed to be simple, to emphasise the importance of resolution at the workplace, to encourage parties to agree on a process that suits them if the dispute reaches the Commission and, finally, to provide the Commission with the discretion and the power to ensure settlement of the dispute if the dispute is still unresolved.*

However the model dispute resolution clause in the draft modernized Retail Award for example currently says in Clause 9.4:

> *Where the matter in dispute remains unresolved, the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.*

This appears to be a circular reference with the effect that no arbitration is included until and unless the Act provides for it. Settlement may only be reached with consent of the parties and therefore employees will be forced into the Courts to get their entitlements. The one saving point is that under Section 570 a party may claim the costs involved if the other party has been unreasonable in obtaining resolution through Fair Work Australia.

The fuller affect of this is that there is no general dispute settling power of arbitration in this Bill. A wide range of matters that may arise in a workplace during the life of an agreement, but not necessarily covered by that agreement, may only be arbitrated with the consent of the employer. As has long been the experience, powers of conciliation are significantly enhanced by a reserve power of arbitration in the event resolution cannot be reached.

The Secretary of the Independent Education Union in Tasmania highlights the importance of an arbitral power in helping reach resolution. In her words:

> *"During the last few years the Independent Education Union, Tasmania has had a number of dispute listings in the Tasmanian Industrial Commission on behalf of individual members and groups of members.*
>
> *In the first instance these matters are listed for conciliation, but all parties accept that the Dispute Settling Procedure in the Tasmanian Catholic Education Agreement which is that the 'Final Reference' in resolving issues is: "the matter in dispute shall be referred by either party to the President of the Tasmanian Industrial Commission for arbitration, whose decision will bind all parties".*
>
> *Because the Commission has the power to arbitrate this has a profound effect on the behaviour of the parties in dispute:*
>
> - *Parties take the process seriously and prepare their case thoroughly because they know that if the issue is not resolved at conciliation the next step is arbitration*
> - *In the atmosphere of conciliation the parties may be more inclined to listen to and take on board arguments that they have rejected in direct discussions with the other party*
> - *If the matter goes to a hearing this will require formal submissions, research on case law, witnesses to be called - all in all a lot more time and disruption to the business is involved*
> - *The parties realize that a decision handed down by the Commission may be not be favourable to them yet they are compelled to abide by it in full*
>
> *Illustrative examples:*
>
> ***T10954 of 2003 St Virgil's College v Tasmanian Catholic Education Employees Association***
> *In this matter the college was conducting an 'Operational Review'. The union's view was that this pertained to the 'mode, terms and conditions of employment' therefore it was an industrial matter. The College's view was that management had prerogative to conduct such review under such guidelines and in such a manner as the*

college considered appropriate, and without any input or representation from the union.

The outcome of conciliation was the content included in a Memorandum of Understanding that set out the manner in which the Operational Review would be conducted, the report back procedure and the method of putting into effect agreed changes to operations and procedures.

Prior to the agreed outcome at conciliation the college had indicated their full intention to take the matter to arbitration on the basis of their right to exercise management prerogative unless the union withdrew their objections.

The union had indicated that they had no intention of withdrawing their objections to the manner in which the college was conducting the Operations Review and was prepared to defend that at Hearing.

T10937 of 2003 Tasmanian Catholic Education Employee's Association v the Archbishop of Hobart (in respect to Ted Sands at Sacred Heart School)

In this matter Mr. Sands was a 'Utility Employee' who was seeking recognition at a higher classification level. He was classified by his employer as a Level 4 employee at both he and the union believed that he was carrying out the duties of a Level 5 employee. Pre conference discussions had failed to resolve the matter.

At a protracted conciliation conference no agreement was reached. Mr. Sands was prepared to continue the case to arbitration so diaries were consulted and a date was agreed upon for a formal Hearing.

Subsequently a few days prior to the Hearing discussions were held by telephone between the union and the employer and agreement was reached on Mr. Sands being reclassified to Level 5 with consequent back payment of salary."

By way of contrast the Tasmanian Industrial Relations Act 1984 has less than one hundred sections and less than 20% of the volume of text but still performs the functions of establishing a safety net, settling disputes, making awards, facilitating agreements and providing rights and responsibilities for the parties.

This is all achieved in not only a far simpler and more effective manner but one that includes having confidence in the parties to manage their relationship while providing a strong guiding hand on the occasions when they cannot. This is in stark contrast to the legislative micromanagement evident

throughout the Fair Work Bill where paragraph after paragraph is devoted to minutely controlling processes and outcomes.

It is clear that having a general power of conciliation and arbitration over all industrial matters is a very important protection for workers not available under the Fair Work Bill. While the Fair Work Bill provides measures to stop workers taking industrial action it does not provide a mechanism to resolve disputes other than conciliation conferences and the making of recommendations.

When comparing current systems the lack of arbitral power is a significant problem. In the words of the Secretary of the ANF in Tasmania:

> *"Representing members in both the State and Federal Jurisdictions the following concerns have been identified:*
>
> *Following the Workchoices changes to the Workplace Relations Act the role of the Australian Industrial Relations Commission (AIRC) has been seriously curtailed. The AIRC, whilst it can be involved in conciliation, has no power to lay down enforceable orders. This means that, in times of an industrial impasse, there is no mechanism whereby the parties can move forward. Unfortunately this can then give rise to industrial action by members: industrial action which could have been avoided if the AIRC still had power to conclude a matter.*
>
> *Further the fact that (under the Act) an employer is required to withhold payment for four hours for sanctioned industrial action has been problematic when the industrial action allows most (but not all) of the job of the worker to be undertaken. This gives rise to a situation where two individuals are doing the bulk of a job yet the union activist will be denied payment. This also encourages a full four hours to be taken rather than the previus one hour for stop work meetings which are undertaken at handover time to ensure minimum patient care disruption.*
>
> *By comparison the Tasmanian Industrial Commission (TIC) is not restricted to only conciliation or an agreement. If necessary the TIC will hear evidence on a matter and can set down orders requiring a party to undertake, or not undertake, a course of action. This gives the TIC an ability to resolve industrial disputation. The fact that the parties are aware that the TIC can impose an outcome by way of an Order can also encourage the parties to reach an amicable agreement.*
>
> *Likewise a breach of an Industrial Agreement can be taken to the TIC for arbitration and orders. This is not the case in the AIRC where there needs to be 'agreement' as to what measures the AIRC can take to resolve any breach."*

Even though this statement refers to Workchoices the problem remains in the Fair Work Bill 2008 as general arbitration has not been restored. The aim of resolving workplace disputes in a civilised fashion is not advanced for those transferred from the Tasmanian system to the Federal system.

5. **The Bargaining Stream**

Parts 2-4 and 2-5 of the Fair Work Bill cover Enterprise Agreement making and, in certain circumstances, determinations that may be made by Fair Work Australia on the break down of bargaining. The parts cover 93 pages and 112 sections of legislation.

In the ideal situation the employer will respect the choice of employees, will recognize the bargaining agents appointed by those employees and negotiate with them in good faith. It should be noted that under the Fair Work Bill this could in theory mean one bargaining agent for every employee as Section 176 allows an employee to appoint any person they choose. It even requires under Section 173 that the employer must take all reasonable steps to advise employees of this fact.

As already noted, if the employer does bargain in good faith but does not reach agreement there is no way to proceed to agreement except through protracted industrial action to invoke the assistance of Fair Work Australia.

The Bill describes a number of steps to promote good faith bargaining including:

> Sec 236 Majority Support Determination – where the majority of employees to be covered by an agreement want to bargain the bargaining agent may apply for a majority support determination to say so.
>
> Sec 238 Scope Order – if a bargaining agent thinks some employees are being unfairly excluded (or included) from an agreement they may request a scope order to have them included.
>
> Sec 230 Bargaining orders - if either of the above two orders are in existence or the employer has initially agreed to bargain, bargaining orders may be obtained to ensure that good faith bargaining requirements are met.
>
> Sec 235 Serious Breach Declaration – If bargaining has collapsed due to the actions of bargaining representatives and there is no prospect of agreement and various other tests and pre-conditions are met an application may be made and a declaration made.
>
> Sec 269 Workplace Determination – 21 days after the serious breach declaration if matters remain unsettled Fair Work Australia may make a determination.

There are a number of prescribed behaviours in this Bill.
Four examples are:

> Sec 172 Permitted Matters - the parties are told what can be in their agreement, other terms are made unenforceable (Sec 253),

including unlawful terms (Sec 194) and discriminatory terms but not age discrimination (Sec 195). It must include a flexibility term (Sec 202), a consultation term (Sec 205) and dispute settling term.

Sec 172, two separate employers cannot conduct an agreement process with employees even if they all want to unless they are related bodies corporate or a joint venture or the Minister says so (Sec 247).

Sec 174 prescribes what an employer must tell the employees about their bargaining rights.

Sec 186 the Better off Overall Test must be passed. Sec 193 "Better Off Overall Test" means that an agreement must be better off overall than the relevant award, no further guidance provided.

This system demands protracted industrial action as a necessary part of reaching arbitration on any matter. The Bill provides 55 pages and 71 sections of legislation covering how this may or may not occur including a power for the minister to intervene. These procedures are lengthy and cumbersome and seem more designed to limit workers rights and powers than to resolve disputes.

By way of contrast workers under the Tasmanian system have a total of two pages of legislation to follow and six clauses of legislation. This includes access to hearings to resolve industrial disputes and the right to arbitration if there is an industrial dispute and the parties agree to accept the outcome. This system has successfully operated in an environment of easy access and quiet efficiency for some time.

Again it is hard to see how workers with access to the Tasmanian system are better off under, or have anything to gain from, the proposed national bargaining system.

Other Matters:

Sections 474 and 475

Payments not to be made relating to certain periods of industrial action.

Accepting or seeking payments relating to periods of industrial action

These provisions made their debut with Workchoices and unfortunately, have survived. They are harsh and unfair provisions that should not be in the Bill.

Docking an employee four hours pay for a stoppage that might have been only 15 minutes long is a harsh punishment and probably counter-productive. Instead of dissuading industrial action it may be that workers, knowing they will lose four hours pay, simply stay out for four hours instead of the fifteen minutes they may have taken otherwise.

Even worse, it may limit industrial action decisions to strikes as it prevents the imposition of bans no matter how soft they may be.

This provision is even clumsier in relation to overtime bans as it seeks to include overtime bans as industrial action but only where refusal to work overtime is a contravention of an employee's obligations. This creates a situation where it may be a matter of dispute as to the circumstances under which an employee can refuse overtime. Such a dispute may not be settled until long after the event. At its worst interpretation the provision may be saying a worker must lose four hours pay on any day that they decline overtime. Again this is a very harsh and totally unreasonable outcome.

The harshness of this provision is highlighted in Sections 470 and 471 where work bans under the limited protected action provisions are treated very differently. Here there is only a partial loss of pay equivalent to the proportional impact on the work affected.

This harshness is made ludicrous by making punishable the act of an employee accepting pay if the employer should not have made that payment because of Section 474. It is more than conceivable that an employee would not even know if a payment was in contravention of Section 474. Such an unfortunate provision can only be seen as excessive and punitive and does little to resolve disputes.

It has often been a gesture of good faith on the part of employers, when finalising a dispute, to put industrial action behind them and return to good working relations with employees by not stopping pay. Not only does the Act prohibit this healing action it makes it a punishable matter for the employer to not dock pay or for the employees to accept it. While promoting good

relationships is not an object of this Bill this is an unnecessary level of intervention and should be removed.

> *It is submitted that Sections 474 and 475 be deleted from the Bill as draconian and counter productive to good relations.*

Sections 739 and 740

Disputes dealt with by FWA

Disputes dealt with by persons other than FWA

These Sections deal with dispute resolution of matters being heard by Fair Work Australia or another nominated body. In particular Sections 739(2) and 740(2) specifically limit and prevent the resolution of certain disputes.

> *FWA must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under Sections 65(5) or 76(4).*

Section 65 provides that an employee may make a request for flexible working arrangements and 65(5) provides that the only grounds for refusal are: "*on reasonable business grounds".*

Section 76 provides than an employee may request extended periods of unpaid parental leave and 76(4) provides that the only grounds for refusal are: "*on reasonable business grounds".*

What is the purpose of this exclusion?

Is it simply saying that if an employer has reasonable business grounds then their decision to refuse the requests cannot be disputed. Even in this case the question needs to be asked, why such a blanket exclusion is provided. It is self evident that an employer may have reasonable business grounds for not agreeing to these requests but why, out of all the provisions in the Bill, are these two, very important, family friendly provisions singled out to provide unchallenged management prerogative.

The wording of this exclusion, if innocent, is clumsy and is reminiscent of tricks in the Workchoices legislation. The wording dictates that FWA must not deal with the dispute to the extent that the dispute is about whether the employer had reasonable business grounds. If an employer asserts that the reason for refusing a request is reasonable business grounds then that decision is immediately put beyond dispute.

The question being denied examination is not just whether the “reasonable business” grounds are valid or not but whether they exist or not. This exclusion would prevent an employee from challenging any decision as long as it was described as being on reasonable business grounds whether this was genuine or not.

It is submitted that Sections 739 and 740 of the FWA Bill should be deleted.

Conclusion

This submission has examined by example the impact of Workchoices on Tasmanian workers. It has found it harsh and not conducive to fair and healthy workplace relations. It is an extreme example of stripping away systems designed to provide workers with some power in the employment contract by providing various mechanisms to force them onto individual contracts and a minimalist safety net.

The Fair Work Bill goes some way to restoring the balance through recognising collective bargaining, providing mechanisms for workers to be collectively represented and establishing a sound safety net. This Bill should be enacted as soon as possible.

This submission has also set out to examine the Fair Work Bill from the perspective of Tasmanian workers who currently work under the Tasmanian Industrial Relations Act 1984, recognising that many workers have been removed coverage of this Act without choice. For those still in the system an examination of the safety net, bargaining systems and dispute settling processes has shown the Tasmanian system to be far less complex and prescriptive than the FWA Bill, comparable in safety net, pay, terms and conditions and still retaining an independent umpire with sufficient power to be effective.

This submission also recognised the inherent instability of a sole national system where fundamental philosophical differences mean it will be changed and significantly rewritten every time there is a change of national government. This submission proposes that a more effective method of achieving a stable national system is by cooperation of power holders creating and governance structure including the Commonwealth, States and Territories.

This submission has also highlighted key concerns with Sections of the Act.

Finally, it is the recommendation of this submission that the Tasmanian Government does not hand over industrial powers to the Commonwealth and maintains a system for workers not currently covered by FWA.

Attachment 1

Condition	Tasmania Safety Net	Fair Work Bill Safety Net
Working Hours	Maximum ordinary working hours - 38	**NES Maximum ordinary working hours** - 38 Plus reasonable additional hours and may be averaged over time 26 weeks or more.
Meal Breaks	Must have 30 minute break after five hours	An unspecified Award matter
Annual Leave	Four weeks of annual Leave	NES – four weeks or five for shift worker may be cashed out
Personal leave	Carers, sick and bereavement - 10 days paid	Carer and sick leave – 10 days paid 2 days compassionate each bereavement
Parental leave	52 weeks unpaid for birth or adoption	12 months unpaid for birth or adoption
Redundancy	four weeks notice and two weeks per year of service to a maximum of 12.	1,2,3 or 4 weeks notice and staggered scale to 12 weeks after 10 years
Statutory Holidays	**Tasmania – 12 (South) or 13 (North)** **(a)** New Year's Day (1 January), unless that day falls on a Saturday or Sunday, in which case the Monday following New Year's Day; **(b)** Australia Day (26 January), unless that day falls on a Saturday or Sunday, in which case the following Monday; **(c)** the second Monday in March, known as Eight Hours Day or Labour Day; **(d)** Good Friday; **(e)** Easter Monday; **(f)** Easter Tuesday;	**Fair Work Bill – 8 plus state days** **(i)** New Year's Day (1 January **(ii)** Australia Day (26 January **(iii)** Good Friday; **(iv)** Easter Monday; **(v)** Anzac Day (25 April); **(vi)** The Queens birthday as per state provisions **(vii)** Christmas Day (25 December), **(viii)** Boxing Day (26 December), Plus state days unless excluded by regulation plus

	(g) Anzac Day (25 April); **(h)** the second Monday in June, for the anniversary of the birthday of the Sovereign; **(i)** Christmas Day (25 December), unless that day falls on a Saturday or Sunday, in which case – **(i)** the Monday following Christmas Day, if that day falls on a Saturday; or **(ii)** the Tuesday following Christmas Day, if that day falls on a Sunday; **(j)** Boxing Day (26 December), unless that day falls on a Saturday or Sunday, in which case – **(i)** the Monday following Boxing Day, if that day falls on a Saturday; or **(ii)** the Tuesday following Boxing Day, if that day falls on a Sunday.	state days substituted for above.
Local Statutory Holidays (2 or 3)	Regatta Day (Southern Tasmania) Show Days (Regional) Cup Day (Launceston) Recreation Day (Northern Tasmania)	None
Long Service Leave	Various provisions but 13 weeks after 10 years in the mining industry and state service and after 15 years otherwise	State condition applies unless award applies
Minimum Wage	Tasmania $546.10 with annual adjustment	Australia $543.78 with annual adjustment
Award Wages	Award based with annual adjustment	Award based with annual adjustment
Type of Employment	Award based	Award based
Hours and Rosters of Work	Award based	Award based

Overtime	Award based	Award based
Penalty Rates	Award based	Award based
Annualised Wages	No provision	Award based
Allowances	Award based with annual adjustment	Award based
Leave arrangement and loading	Award based	Award based
Superannuation	Award based	Award based
Disputes Settling	Tasmanian Industrial Commission has a wide power to resolve disputes	Fair Work Australia has limited powers and disputes may end up settled in Court