UNIONS NSW SUBMISSION TO

SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

INQUIRY INTO THE FAIR WORK BILL 2008

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Executive Summary

Unions NSW welcomes the introduction of the Fair Work Bill and the demise of the Workplace Relations Act (herein referred to as "WorkChoices"). There are however elements to the Fair Work Bill which have to be improved in order to ensure that workers throughout this country, and in particular in NSW, are not disadvantaged. They are:

a. The Act should allow for parties to opt out of the national system by agreement so as to continue to be covered by State regulation.

b. The capacity of FWA to arbitrate should be extended to every situation where the FWA has formed the view that the parties have exhausted all reasonable avenues to reach agreement

c. Changes should be made to ensure that employees in New South Wales are not disadvantaged by the move to standardised conditions contained in the NES and modern awards.

d. Legal restrictions as to what the parties can agree to include in agreement should be removed.

e. Enterprise agreements should be expressly allowed to contain provisions dealing with contractors and labour hire workers.

f. Greenfields agreements involving projects should allow for new employers working on the project to be added with their agreement.

g. Dispute settlement procedure in agreements and modern awards should explicitly allow for those making those instruments to include a provision conferring upon a body or person a power to arbitrate any dispute arising under such award or agreement.

h. There should be a new general provision permitting a person to make an application to vary their terms and conditions of employment where such terms are determined by FWA to be unfair.

i. High income employees (s 329) should have a right that ensures that by entering into an agreement to obtain a guarantee annual earning their overall terms and conditions are not rendered unfair either generally or by comparison to a relevant industrial instrument.

j. Parties should be prevented from seeking interlocutory orders from courts to prevent industrial action if they have not first sought relief from FWA.

Introduction

On 25th November 2008, the Australian Government introduced the Fair Work Bill into Parliament.

Unions NSW welcomes the introduction of the Fair Work Bill which is to replace the Workplace Relations Act (herein referred to as "WorkChoices"), but believes that there are elements to the Fair Work Bill which need to be addressed in order to ensure that workers throughout this country, and in particular, NSW workers are not disadvantaged. Unions NSW also welcomes the inquiry and the ability to comment, particularly in light of the history of the introduction to the Workchoices legislation.

This submission by Unions NSW and its affiliates is in response to the Senate Inquiry into the Fair Work Bill. It is intended that this submission support and supplement the ACTU submission, with particular reference to deficiencies in the Fair Work Bill in relation to workers rights and entitlements currently enjoyed by those employees employed under the NSW IR System.

Unions NSW is a State Peak Body as defined by the Industrial Relations Act 1996 (NSW). Unions NSW has over 60 affiliated unions, with each union representing members from many diverse backgrounds and industries. NSW unions represent members employed in a wide range of industries including public sector, teaching, local government, retail, distribution, childcare, manufacturing, electrical, health, emergency services, engineering, construction, administrative etc

Collectively Unions NSW and its affiliates represent approximately 600,000 workers employed in NSW.

Unions NSW has had a long history of seeking to enhance the conditions of NSW working people through legislative and arbitral means.

Unions NSW and its affiliates support the development of a system that is fair and allows working people to obtain and maintain decent working conditions. We do not support any changes that would result in a loss of entitlements, rights or a reduction in benefits currently enjoyed by those employed under the current NSW system.

History

The NSW Industrial Relations system is one of the largest and most robust systems in Australia, with approximately 45% of the NSW workforce being covered by the system prior to the introduction of Workchoices.

The NSW Industrial Relations System has a strong history of regulation dating back to 1901. A brief summary of important changes in the industrial regulation and minimum conditions of employment are as follows:

1901 *Industrial Arbitration Act 1901, first 'modern' industrial relations statute came into force in December 1901.*

1926 *Forty-four Hours Week Act 1926 reduced the standard working week to 44 hours. Workmen's Compensation Act 1926 introduced NSW's first 'modern' compensation scheme for workers injured at work.*

1944 *Annual Holidays Act 1944 introduced a standard entitlement to 2 weeks holiday leave for each completed year of service. In 1958, this entitlement increased to three weeks leave per annum.*

1955 *Long Service Leave Act 1955 introduced a standard entitlement to 13 weeks long service leave after 20 years of service*

1958 *Equal pay. NSW became one of the first Australian States to legislate for equal pay for male and female workers.*

1959 *Unfair contracts regulated. Amendments to the Industrial Arbitration Act 1940 enabled the NSW Industrial Relations Commission to alter or void any contracts involving work performed in any industry. These provisions then covered most forms of individual contracts for the performance of work, including franchise arrangements.*

1963 *Long Service Leave improved and extended. Standard entitlements increased to 3 months leave after 15 years service. New legislation was introduced extending long service leave entitlements to the metalliferous mining industry*

1974 *Annual holiday entitlements increased. Following a test case decision by the NSW Industrial Relations Commission, The Industrial Arbitration Act 1940 was amended to introduce a standard entitlement of 4 weeks leave for each year of service.*

1979 *Transport industry workers covered. Amendments to the Industrial Arbitration Act*

1940 enabled the NSW Commission to regulate contracts of carriage (couriers) and contracts of bailment (taxi-drivers).

1980 *Industrial Arbitration Act amended to provide a standard 12 months unpaid maternity leave. After expanded to include paternity and adoption leave and in 2000 to allow leave to be taken by regular and systematic casuals.*

1982 *Employment Protection Act 1982 created minimum redundancy entitlements for NSW workers under awards.*

1985 *Long Service Leave entitlements increased to two months leave after 10 years of service.*

1991 *Unfair dismissal laws reformed by amendments to the Industrial Arbitration Act 1940 introduced to allow individual access and compensation for NSW workers who were unfairly dismissed.*

1998 *Report of the Pay Equity Inquiry confirms that work in certain female dominated industries was undervalued.*

2002 *Ethical Clothing Trades Act sets up Ethical Clothing Trades Council to advise on compliance with work related obligations to outworkers in the clothing industry. The Industrial Relations Act 1996 was amended to provide for recovery of moneys ujpaid or underpaid to outworkers.*

2003 *Industrial Relations Act 1996 amended to extend the adoption leave provisions of the Act (12 months unpaid leave) to parents who adopt children under 18 years of age.*

2005 *Ethical Clothing Trades Extended Responsibility Scheme established the first Industrial Regulation of retailer contacting practices to protect outworkers*

19 December 2005: *The NSW Industrial Relations Commission handed down its General Order in the Family Provisions Case 2005. This case varied all NSW awards to include:*

- *Extended use of sick leave for caring responsibilities when a family or household member is sick.*
- *Casuals can access unpaid leave to meet their caring responsibilities.*
- *Increase simultaneous unpaid parental leave to eight weeks*
- *Extending unpaid parental leave from 52 weeks to 104 weeks*
- *Permitting an employee to return from parental leave on a part-time basis until the child reaches school age.*

2006 ***28 February 2006:*** *In the Secure Employment Test Case, the NSW Industrial Relations Commission establishes a right for casuals to convert to permanent employment after a period of six months of employment.*

1 December 2006: *Industrial Relations (Child Employment) Act 2006 commences to protect the employment and conditions of young people aged under 18 employed by constitutional corporations. NSW Industrial Relations Commission commences proceedings to set principles for establishing whether such a child has suffered a net detriment as compared to the state award that would apply to the child's work.*

Opting out (Part 1-2, Division 1 and Part 2-4)

Parties should be permitted, where they agree, to opt out of the national system so that they can continue to be governed by State legislation in the manner which they have found to be productive and effective.

There are many employers and employee organisations in New South Wales who have been covered by the State industrial relations system and who would prefer to continue to be governed by that system. They prefer recourse to the Industrial Relations Commission of New South Wales and the Judges and Commissioners of that tribunal who have an ongoing knowledge of those parties' circumstances and their industry within NSW.

This is demonstrated by the fact that a number of large employers across a range of industries have, post *Work Choices*, adopted the NSW Industrial Relations system to the extent that the law currently allows by entering into agreements pursuant to s146A of the *Industrial Relations Act 1996* (NSW). Pursuant to these agreements the parties agree that the NSW Industrial Relations Commission should continue to conciliate and arbitrate their industrial disputes: see statement by the IRC of NSW in matter No. IRC 1760 of 2008, dated 31 October 2008, the Honourable Deputy President Harrison which is attached and annexed at Appendix A. Employers that have continued to use the NSW Industrial Relations Commission in this manner include:

- *Local Government* virtually all Councils;
- *Transport* Linfox;
- *Manufacturing* BlueScope Steel;
- *Electricity generation* including Eraring Energy, Macquarie Generation and Delta Electricity;

An opt out provision could be achieved in a number of different ways. Unions NSW suggests that it be done by amending s 14 (which defines national system employer) to exclude any employer (and consequently that employer's employees) for so long as they have opted out of the national system.

Employers and their employees should be able to opt out in two ways:

a) Individual employers and their employees should be able to opt out by reaching an agreement. That could be done in a manner that is similar to the way an enterprise agreement is made; and

b) Multiple employers and their employees should be able to opt out where there is agreement between employers and their representative bodies and relevant industrial associations.

These options are discussed below in more detail.

Opting out by individual employers and their employees

Individual employers and their employees should be able to opt out by reaching an agreement. That might be achieved by amending Part 2-4 to create a new special type of enterprise agreement (which could be known as a "State enterprise agreement") being an enterprise agreement which includes as a term that the parties agree that so long as the enterprise agreement remains in effect they intend to be governed by State industrial relations legislation in the same way as such legislation would apply to them if they were not a national system employer and national system employees. Further Part 2-4 could be amended to provide that such a "State enterprise agreement" is to be varied and terminated in accordance with relevant State industrial law as if it were an enterprise agreement made under the relevant State Act.

The effects of those suggested amendments would be that the parties would enter into the enterprise agreement pursuant to the federal Act. Upon it commencing they thereafter would, in effect, be governed by a State enterprise agreement governed by the relevant State legislation. The employer and employees would come back into the Federal system upon that enterprise agreement being terminated and not being replaced by a new "State enterprise agreement".

Opting out by multiple employers

Multiple employers and their employees should be able to opt out by consent by agreement between one or more registered employee associations and/or a State Peak Council on the one hand and one or more employers and/or an industrial organisation of employers on the other hand. The opting out agreement would be given legal effect by FWA issuing an order that for a certain period named employers and/or employers defined by reference to an industry or other criteria and their employees are not national system employers and employees. The FWA would be required to issue such an order upon being satisfied of certain matters, including that the consent agreement was a genuine agreement made without duress .

During the period that an employer and its employees have opted out there would be provisions of the Federal Act that would continue to apply, being those provisions which apply to all employees and employers beyond those that are national system employees and

national system employers: see for example Part 3-1, General Protections, and Part 3-4, Right of Entry.

Further, we note the submissions dated December 2008 of our affiliated union, the New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union (herein referred to as the USU). Unions NSW support the USU's position for the amendment of the Fair Work Bill to specifically exclude NSW Local Government and associated corporations and entities from the operation of the Bill.

Arbitration/Workplace Determinations (Part 2-5)

Unions NSW encourages workplace bargaining between employee associations and employers. However, it is a reality that not every employer is willing to bargain with a genuine desire to make an agreement.

The legislation as currently drafted fails to provide a general right for employees and/or their organisations to make an application for a workplace determination where they have exhausted all reasonable avenues to obtain an agreement with an employer.

Where a party knows that if they do not agree a third party umpire will enforce a determination they are more likely to bargain genuinely and attempt to reach an agreement because they know that if they fail to do so an outcome will be imposed upon them. Where legislation fails to provide FOR arbitration there is no incentive for a recalcitrant employer to make an agreement.

The Bill as drafted provides FWA with the capacity to make bargaining orders (Division 8), but the FWA cannot require an employer to make concessions or to reach an agreement: see proposed s 228(2).

The Act provides only limited means for employees to obtain a workplace determination: see proposed ss 240 and 269. Other than employers of low paid employees (see Part 2-5, Division 2), employers who go through the motions of bargaining, meeting the bargaining requirements, but who refuse to make concessions or reach agreement cannot be the subject of such a determination.

In the submission of Unions NSW a failure to provide for an arbitral outcome will create a situation where groups of employees with limited bargaining power have no capacity to obtain fair and reasonable terms and conditions of employment.

This situation can be contrasted with the position which has existed for most employees in New South Wales for over 100 years pursuant to NSW legislation. That is, the right, where agreement cannot be reached, to go to an independent tribunal and obtain fair and reasonable conditions of employment: see s 10 of the *Industrial Relations Act 1996* (NSW). (This is to be contrasted to modern awards which set only a “minimum safety net” of conditions.)

Unions NSW notes that, outside the low-paid workforce, where an employer does bargain, but refuses to make concessions or reach agreement, FWA will have a power to make a workplace determination if, and only if, significant economic harm is being caused to both the employer and the employees as a result of protected industrial action. Such a provision means that employees faced with a recalcitrant employer who refuse to make concessions

will be forced to take protracted industrial action causing harm to both themselves and their employer to obtain fair terms and conditions of employment. In other words, the Bill as currently drafted, actively encourages protracted industrial action. Such a legislative approach is to be deplored.

Those employees who do not have the financial capacity or the desire to take such extended industrial action are left with no capacity to obtain fair and reasonable terms and conditions of employment.

Industrial legislation should be designed to encourage parties to reach agreement without the need for protracted and costly industrial action. This could be achieved by ensuring that the FWA had a power to make a workplace determination wherever it is satisfied that the parties have exhausted all reasonable attempts to bargain.

Unions NSW submits that the Bill should extend the provisions that currently apply where there is a low paid determination to all employees such that *all* employees could obtain a workplace determination whenever (to quote proposed s 261(b)):

> *"FWA is satisfied that the bargaining representatives who made the application have made all reasonable efforts to agree on the terms that should be included in the agreement."*

Modern Awards and National Employment Standards (Part 2-2)

There are well established community standards in New South Wales found in the *Industrial Relations Act 1996* (NSW) and in NSW State Awards (which in respect of national system employers are now Notional Agreements Preserving State Awards, or NAPSAs) which will be reduced if they are replaced by the standards to be found in the NES and in modern awards. These include:

a) Parental Leave – The NSW standard provides for 8 weeks of concurrent parental leave. The NES provides for only 3 weeks of concurrent parental leave. Further the NES fails to replicate an express entitlement for the transfer of an employee to a safe job whilst breastfeeding;

b) Personal Carers Leave – The NSW Test Case standard reflected in NAPSAs provides a higher standard and also allows for leave to be taken in the case of foster children;

c) NSW Test Case Redundancy entitlements reflected in NAPSAs provide for significantly higher severance payments in the event that an employee is made redundant; and

d) Throughout the NES, calculations are made at the 'base rate of pay' as compared to the 'ordinary rate of pay' for those employed in NSW IR system.

A complete list of the reductions that a move to the NES will bring about, including full details as to the matters listed above, can be found in the extract from Unions NSW submission to the Discussion Paper regarding the National Employment Standards Exposure draft, annexed at Appendix B.

Modern awards are not allowed to have State based differences for more than five years pursuant to the proposed s 154.

The net effect of these matters is that at some stage (depending on the terms of the transitional arrangements which are yet to be known) conditions for employees will be required to be standardised at levels below those currently enjoyed by employees in New South Wales.

Amendments to the Bill should be made that ensure that no employees are disadvantaged by the amendments, ensuring that current NSW community standards found in State legislation and NAPSA's are not reduced either immediately or at the expiry of the five year period.

Enterprise Agreements – Permitted Matters (Part 2-4, Division 2)

The legislature may consider it appropriate to limit the types of matters that are to be included in a modern award or a workplace determination. However, other than “unlawful terms”, there should be no limit to the types of matters that the parties can agree to include in an enterprise agreement.

In particular, proposed s 172(1) inappropriately and unnecessarily limits the matters that can be contained in an enterprise agreement to those that are caught by the term “permitted matters”, being principally matters pertaining to the relationship between an employer and the employer’s employees.

Such a limitation will do much to promote legal argument and litigation and do little to assist parties reach reasonable consent arrangements. It is well established that limitations of this type lead to extensive litigation as parties attempt to convince a court as to whether, amongst the very many matters that may be being sought, there are, or are not, matters that fail to pertain to the relationship between an employer and the employer’s employees: see for example *Heinemann Electric Pty Ltd and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* C2006/3103 PR974265 Melbourne (6 October 2006).

The difficulty is compounded by the fact that industrial action sought to obtain a new enterprise agreement is not protected to the extent to which it is about matters that are not “permitted matters”: see proposed s 409.

It is common, in circumstances where employees are taking industrial action to obtain better conditions in a new enterprise agreement, for an employer to assert that amongst matters are being sought there are some matters which are not “permitted” (or to use the current legislative phrase are “prohibited content”). The employer will then commence court proceedings seeking injunctions, which they are permitted to obtain if any of the matters being bargained for include prohibited content. Thereafter complicated and expensive legal proceedings can ensue in circumstances where, on any view, the overwhelming nature of the claims being advanced are not prohibited content. Such cases are sometimes appealed all the way to the High Court: *Electrolux Home Products v AWU* (2004) 221 CLR 309.

In the view of Unions NSW taking such an approach invites legalism and an unnecessary focus on matters not central to the bargaining agenda and can lead to the dispute being determined by courts rather than with the assistance of FWA, as the Bill otherwise contemplates.

Unions NSW accordingly urges the legislature to amend the Bill so as to prevent the capacity of employers to refuse to bargain because there are matters being sought which they assert are not permitted matters, and to take legal proceedings in that respect.

Enterprise Agreements - Ability to regulate different forms of employment (Part 2-4, Division 2)

The limitation on matters that can be included in enterprise agreements should be redrafted in a manner that makes clear that parties can include in their agreement the basis upon which the employer will engage labour hire or contractors, including the terms and conditions upon which such labour hire or contractors are engaged.

At this stage the draft legislation at proposed s 172 does not state expressly whether an enterprise agreement can deal with terms and conditions upon which labour hire or contractors are engaged.

Section 172 uses the expression “matters pertaining to the relationship between an employer . . . and that employer’s employees”.

The explanatory memoranda at paragraph 671 notes (correctly) that, notwithstanding some jurisprudence in respect of the phrase *“matters pertaining to the relationship between an employer or employers and employees”,* there are subject matters where on current authority it is not immediately clear whether such terms are caught by that expression: see for example *Transport Workers’ Union of Australia* PR959284 (24 June 2005) and *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and others Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004 and others* PR956575.

The explanatory memoranda goes on in paragraph 672 to state that it is *“intended” that “terms relating to conditions or requirements about employing casual employees or engaging labour hire or contractors”* are within the scope of permitted matters *“if those terms sufficiently relate to employees’ job security – eg a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement”*.

In the view of Unions NSW if that is truly the intention then it should be dealt with in the legislation proper, and not be merely stated in the explanatory memoranda as a “hope”.

It is undoubtedly the case that employers will take the view that conditions upon which contractors are to be hired or not hired is not a matter pertaining the employment relationship. In that respect they would rely on High Court authority: see *R v Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313.

It is clearly relevant to employees concerned about their job security and future bargaining position that the employer not be able to hire other workers via labour hire or contract arrangements to take their jobs and/or do similar work at a lower cost.

Rather than simply express an "intention" in the explanatory memoranda the legislature should in the Act proper make clear what is or is not included in permitted matters, and in particular make clear that permitted matters can include the terms and conditions upon which employers engage labour hire or contractors, and the extent to which they will engage them (if at all).

In the absence of such amendments there will inevitably be ongoing litigation as to whether and to what extent the terms and conditions upon which such labour hire or contractors are engaged can be included. This can be avoided by the legislation setting out clearly what the explanatory memorandum states is its intention.

Project Agreements/Awards

Unions NSW opposes the continuation of a separate Australian Building and Construction Industry Commission. We believe the best way of providing industrial harmony in the industry is to provide mechanisms in law which facilitate the making of agreements for major projects.

Under New South Wales legislation organisations and employers in respect of major projects have traditionally been permitted to obtain a consent project award which applies to all work being done on that project, including by employers and employees (ie subcontractors and their workers) who are not necessarily known at the time that the industrial instrument is created. This permits a head contractor prior to the work commencing to have certainty as to the labour costs associated with that project. It permits the Principal Head Contractor to make it a condition of the contract that subcontractors should not pay their employees no less than the wages and conditions under the project award. The effect of this is to allow the subcontractors to tender and contract for the work in the knowledge that there is a level playing field in respect of conditions that will apply at that site.*(see IRC No. 3881 of 2003, Lend Lease hotel Intercontinental (Stage 1) Project Award).* It promotes industrial harmony at the site because employees on that project are provided the same terms and conditions regardless of whether they are working for one employer or another.

In the view of Unions NSW such project awards have been considered successful by both employers and employee organisations. Examples of project awards which have helped deliver significant projects on time and on budget, including during the construction leading to the Olympic Games are noted in the decision *Re The Westfield Design and Construction Pty Ltd Liverpool Shoppingtown Project Award and other matters* [2005] NSWIRComm 58 which is annexed and marked as Appendix C to this submission. This decision of Vice President Walton of the Industrial Relations Commission of NSW details the history of Project Awards within NSW. In *Re Lend Lease Hotel Intercontinental (Stage 1) Project Award and anor* (unreported, 26 September 2003) it was stated:

> *"..iii. In terms of all Project Awards/Agreements made by the Commission in 2004, very few have experienced disputes at a level which required the Commission's intervention. Most projects have come in, 'on time and on budget' and where they have not, it would seem factors beyond the control of the workforce have been the primary cause.*
>
> *In nearly all cases the objectives set out in the Awards have been advanced. The number of disputes and number of days lost to industrial action have decreased where project awards are in place."*

As currently drafted Part 2-4, Enterprise Agreements, does not permit such an approach to projects. That is because, as drafted, while an employer or multiple employers can reach an

agreement in respect of a new project (ie a Greenfields agreement, s 172(2)(b), (3)(b)), there is no capacity for terms and conditions contained in those agreements to also apply to any new employer that does work on that project.

The way a project award works in New South Wales is that whenever a subcontractor comes onto the site to work on the project they are, for the time they are working on that project, covered by that consent award. It may well be that in some projects a head contractor can identify a leading subcontractor before the project commences such that they could be named at the commencement of the agreement. However, many smaller contractors and subcontractors would not be known at that time and would only be contracted to come onto the site some time well after the initial agreement is made.

Unions NSW submits that Part 2-4 should be amended to ensure that in respect of a particular project a Greenfields Agreement can specify that it applies not only to the employer or employers that entered into the agreement in respect of that project enterprise, but that it also applies to any further employer, and that employer's employees, for so long as they work on that project enterprise. This may require the creation of a special type of enterprise agreement, such as a "Greenfields project enterprise agreement".

Dispute Resolution Procedures and Arbitration (Part 6-2)

As drafted the Bill appropriately requires industrial instruments, including modern awards, enterprise agreements and workplace determinations, to include a term to deal with disputes as to matters arising under the agreement and as to disputes in relation to the NES (a dispute resolution procedure, or 'DSP'): see for example proposed s 186(6).

However, as drafted the Bill does not make clear whether such DSPs can be drafted in a manner that confers on FWA, or such other body or person as is stated, a power to *arbitrate* such disputes where conciliation of them is unable to resolve them.

Unions NSW submits that disputes as to matters arising under a modern award, enterprise agreement or a workplace determination or in respect of the NES should always be able to be brought before the FWA, or such other person or body as nominated for resolution, including if necessary by arbitration. As noted above, the absence of an arbitral power means that one or other party can fail to approach the resolution of dispute in a manner that promotes the conciliation of the dispute. If parties are aware that if they do not agree in conciliation the matter will be determined by arbitration they are much more likely to take a realistic approach to resolving the dispute. Further, conferring an arbitral power means that the dispute can be determined quickly and with minimal legalism before a body with the relevant skills and experience to resolve such matters in an industrially sensible and fair manner. The absence of such an arbitral power means that the parties, if they fail to reach agreement, have no option but to commence court proceedings to enforce rights. Such proceedings are, by their nature, more likely to achieve "black and white" outcomes. Sensible industrial compromise is not an option available to a court which must determine whether someone does or does not have the relevant right. Such proceedings are by their nature more costly and time consuming.

There are three areas that should be addressed:

1. Proposed s 739(4) is ambiguously worded as to whether FWA can arbitrate every dispute so long as a conferral of arbitral power is contained in the DSP, or can only arbitrate each dispute if that particular dispute has been referred to the FWA for consent arbitration;

2. While it has been said that DSP provisions in enterprise agreements are intended to be able to confer an express arbitral power, that is not stated in the Act expressly in proposed s 186(6); and

3. In respect of modern awards (see proposed s 146) and workplace determinations (see proposed s 273(2)), it is not clear whether FWA is able to include a term which provides that any industrial dispute can be settled ultimately by way of arbitration.

The legislation in each respect should be amended to make clear that such instruments can contain terms expressly conferring on the FWA, or such other person or body as is appropriate, the power to resolve disputes arising under that instrument by arbitration if necessary. Such an amendment would be consistent with the way in which industrial disputes in the NSW Industrial Relations system have been successfully resolved for over 100 years.

Unfairness (Part 3-1)

Unions NSW endorses Part 3-1 which provides general protections to employees. There is, however, no general provision which allows an employee, or group of employees, to remedy unfairness that has arisen during the course of their employment.

By contrast, independent contractors governed by the *Independent Contractors Act 2006* (Cth) have such a general right: see Part 3.

Such unfair contract provisions currently exist under both New South Wales and Queensland legislation. They permit a wide range of unfair actions to be remedied including conduct designed to avoid the effect of relevant industrial instruments.

Unions NSW submits that the Bill should include a new provision providing a general right for all employees or group of employees to seek relief where they have been employed on conditions that are unfair, harsh or unconscionable or that is designed to, or does, avoid the provisions of an industrial instrument.

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High Income Employees (Part 2-9)

The Bill proposes that upon an employee being guaranteed an income of $100,000 from all sources (including overtime, shift penalties and other current award entitlements) then thereafter they not entitled to the benefits of such a modern award.

As drafted the Bill does not contain any provision to ensure that such an employee is not disadvantaged against that which they would have received if they been the subject of such a guarantee. Such a provision should be included.

It is not difficult to imagine a situation where an employee with a base rate of remuneration of less than $100,000 agrees to the guarantee and is thereafter required to work overtime and/or shifts without additional payment (because such amounts are included in the guarantee) such that they end up actually being paid less than if they had remained covered by the relevant industrial instrument. Unions NSW deplores an approach where employees can be offered a carrot to give up rights which are considered inherently fair and then be at risk of suffering a loss of pay as a consequence.

Conclusion

Unions NSW welcomes the introduction of the Fair Work Bill which is to replace the WorkChoices, but believes that there are elements to the Fair Work Bill which need to be addressed in order to ensure that workers throughout this country, and in particular, NSW workers are not disadvantaged.

Unions NSW have identified a number of key issues, in particular:

a. The Act should allow for parties to opt out of the national system by agreement so as to continue to be covered by State regulation.

b. The capacity of FWA to arbitrate should be extended to every situation where the FWA has formed the view that the parties have exhausted all reasonable avenues to reach agreement

c. Changes should be made to ensure that employees in New South Wales are not disadvantaged by the move to standardised conditions contained in the NES and modern awards.

d. Legal restrictions as to what the parties can agree to include in agreement should be removed.

e. Enterprise agreements should be expressly allowed to contain provisions dealing with contractors and labour hire workers.

f. Greenfields agreements involving projects should allow for new employers working on the project to be added with their agreement.

g. Dispute settlement procedure in agreements and modern awards should explicitly allow for those making those instruments to include a provision conferring upon a body or person a power to arbitrate any dispute arising under such award or agreement.

h. There should be a new general provision permitting a person to make an application to vary their terms and conditions of employment where such terms are determined by FWA to be unfair.