9 April, 2009

Committee Secretary
Senate Standing Committee on Education, Employment and Workplace Relations
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Sir/Madam

Re: *Fair Work*
(Transitional Provisions and Consequential Amendments)
***Bill* 2009**

We write in relation to the abovementioned Bill which is currently the subject of scrutiny by the Committee.

We make the following submissions.

Sub-Standard Individual Agreement Based Transitional Instruments

The CFMEU (Construction and General Division) [CFMEU] has serious concerns about the way the Bill proposes to deal with statutory individual employment contracts made under both the Workchoices regime and following the enactment of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008. Under the proposed arrangements many thousands of employees will be locked in to sub-standard arrangements for years into the future with no realistic option of reverting to collective agreements or even to have the full benefit of the modern award/NES safety net. This is contrary to the general scheme established by the Fair Work Bill and the Government's pre-election commitment to do away with the inferior regulation of employment conditions provided by individual contracts.

To highlight the problems we refer to, we enclose with this submission a number of statements from CFMEU members who are currently employed under AWAs and ITEAs. The employees concerned have asked that their names not be publicly disclosed but are happy to provide any further information to the Committee should that be required.

It is clear from these statements that the conditions are vastly inferior to the prevailing collective agreement, that the conditional termination agreement process is unlikely to provide a mechanism to release these employees from these individual contracts and that such contracts will carry on for years into the future if the Bill is enacted in its current form.

We therefore, adopt the submission of the ACTU in this respect and urge the Committee to recommend a simple mechanism for the termination of AWAs/ITEAs in circumstances where they can be shown to undermine the safety net established by the new legislative regime. Further, we see no reason why a sunsetting provision should not be introduced in respect of these instruments as is the case for other transitional instruments.

Representation Orders

For the reasons advanced by the ACTU we oppose the introduction of the new provisions relating to representation orders as set out in the Bill.

These provisions will generate disagreement and litigation rather than reduce or resolve it.

As presently worded s 137A of the Bill requires only that there be *'a dispute'* about representation rights to enliven the jurisdiction of FWA. Although that term is not defined, it seems that such a dispute need not, for example, be confined to disputes between organisations of employees. An employer might have a particular view (or preference) about representation rights which is contrary to that of a union or unions and that disputed view or preference be used to found an application and seek orders. Whilst an employer might be involved in a demarcation dispute under the *Workplace Relations Act* 1996, under s 134 of Schedule 1 of the present Act it is nonetheless a precondition to the making of representation orders under s 133 of the WRA that the Commission be satisfied that the conduct or threatened conduct of the organisation to which the order would relate is preventing/restricting etc., the performance of work, or is harming the business of an employer, or that such consequences have ceased but are likely to recur, or are imminent.

No such preconditions apply under Part 3 of Schedule 22 of the Bill. Unless an employer is directly affected as a consequence of disagreement between unions over representation rights, it is difficult to see why such an employer should be able to seek and obtain orders which result in a loss of representation rights for unions.

Moreover, because there is no sufficient nexus between the consequences of any 'dispute' and obtaining orders (save for the requirement that FWA consider the consequences of not making an order for any employer – s 137B(1)(e)), not only can an

employer who is not directly (or even indirectly) affected seek orders, but such an application may also be made in respect of employees who are not even employed by the employer but are merely part of a class of employees who perform work at the same premises or workplace (see Schedule 22 Part 3 Item 86). Thus an employer can draw employees into the scope of the 'dispute' and any proposed order purely on the basis that they share a workplace with a smaller class of employees whose representation rights are 'disputed'. This will broaden the scope of potential orders and unnecessarily convert minor arguments about representative rights into major ones, particularly in multi-employer workplaces such as construction sites.

The situation is compounded by the operation of the proposed s 137B(2) which contemplates employer applications for representation orders in circumstances where the employees necessary for the normal conduct of the enterprise are yet to be employed. This highlights the fact that such cases will be brought by employers purely in order to attempt to achieve representation of future employees by the ***employer's*** union of choice. This kind of speculative 'union shopping' by employers will not only generate unnecessary applications it is fundamentally contrary to freedom of association principles. It also clearly has the potential to generate ongoing disputation because employees may bring with them a strong affiliation to a particular union only to be told that their union of choice does not have representation rights within their workplace. Experience has shown that employees in such a situation will resist changing unions which can lead to disputes, or they may relinquish union membership altogether. Industrial legislation that respects freedom of association should not tend to encourage either of those outcomes.

Section 137(B)(2) is also problematic in that it requires FWA to have regard to the criteria in (1) *'as they would apply in relation to the persons who* ***would be*** *the employees in the workplace group.'* This provision highlights the difficulties in establishing workable criteria for the making of representation orders in a context where there are no employees yet employed in respect of whom such orders can operate and potentially no real dispute as to representation rights.

Whilst we oppose Part 3 of Schedule 22 in its entirety, we are of the view that if these provisions are to remain in any form then peak union councils should not only be entitled to make a submission in respect of proposed representation orders (s 137C) but that FWA must have regard to any such views which are put. This should be so since the question of union representation rights is essentially a matter for unions themselves to determine.

Thank you for the opportunity to draw these matters to the attention of the Committee.

Yours faithfully

Dave Noonan
National Secretary
CFMEU
Construction & General