Community and Public Sector Union

Mark Gepp – Acting National Secretary

Friday 9 January 2009

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3521
Fax: 02 6277 5706
eewr.sen@aph.gov.au

Dear Mr Carter

Senate Employment, Workplace Relations and Education References and Legislation Committee Inquiry into the *Fair Work Bill 2008*

Please find attached a submission from the Community and Public Sector Union (PSU Group) to the Inquiry into the *Fair Work Bill 2008*.

The contact person for this submission is Dr Kristin van Barneveld, Director of Policy and Research CPSU. Phone: 02 8204 6930.

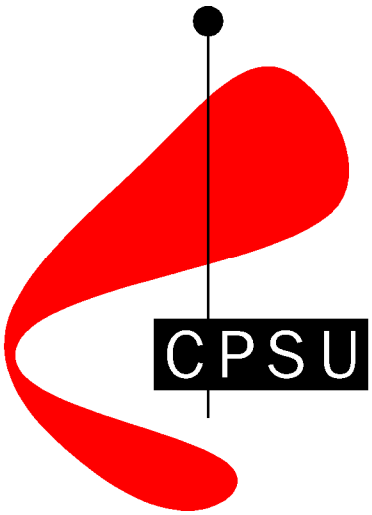
Yours sincerely

Mark Gepp
CPSU Acting National Secretary

VIC Regional Office – Level 10, 440 Collins St, MELBOURNE VIC 3000
Phone: 03 8620 6301 – Fax: 03 8620 6369 – Email: mark.gepp@cpsu.org.au - Web: www.cpsu.org.au

Senate Employment, Workplace Relations and Education References and Legislation Committee

Inquiry into the *Fair Work Bill 2008*



CPSU (PSU Group) Submission

January 2009

Table of Contents

Introduction

1. The PSU Group of the Community and Public Sector Union ("CPSU") represents workers in the Australian Public Service ("APS"), the ACT Public Service, the Northern Territory Public Service, the telecommunications sector including Telstra, call centres, employment services and broadcasting.

2. The CPSU has read the ACTU submission and supports that submission.

3. In preparing this submission, the CPSU has relied on the experience and opinions of its members.

4. The CPSU and its members endured the full force of the Howard Government's WorkChoices laws. CPSU members have had to deal with some of the most difficult and ideologically driven employers in Australia; the Howard Government and Telstra. The CPSU and its members have routinely experienced:
    - AWAs as a condition of engagement or promotion;
    - AWAs where key conditions were removed or put at risk;
    - Commonwealth Government agencies that refused to bargain collectively with their employees;
    - Commonwealth Government agencies that refused to respect employees' rights to be represented by their union; and
    - Union members and delegates subject to disciplinary proceedings for engaging in basic union activities.

5. The CPSU and its members in Telstra continue to deal with an employer that uses the full force of WorkChoices when dealing with its employees. Unwilling to accept the clear rejection of WorkChoices in the federal election, Telstra management continue to blatantly disregard the right of employees to bargain collectively and be represented by their union. The way in which Telstra management continues to behave demonstrates the urgent need to abolish WorkChoices.

6. Given these experiences, the CPSU supports the Fair Work Bill and the restoration of industrial relations laws that balance the interests of employees and employers and respect employees' rights at work.

7. This submission focuses on the areas in which CPSU members have had particular experience:
    - Bargaining
    - Right of entry
    - Delegates' rights
    - Transfer of business

Bargaining

8. Throughout the twentieth century, Australian industrial relations were subject to a unique form of government regulation in recognition of the fundamental imbalance between an employee and employer in bargaining for employment conditions. Wage and bargaining regulation was accepted by all parties as a central tenet of Australian working life[1].

9. This framework dramatically changed with the introduction of the *Workplace Relations Act 1996*. This legislation challenged the legitimacy of industrial relations regulation and championed a laissez-faire attitude to bargaining. The rights of employees in bargaining were not prescribed and the role of the Australian Industrial Relations Commissions to intervene in disputes over employee rights was curbed. The legislation created the climate in which disputes about employees' bargaining rights would inevitably arise and removed any mechanism for such disputes to be dealt with effectively.

10. The CPSU and its members have extensive experience in collective bargaining since the introduction of statutory enterprise agreements in the early 1990s. We estimate that 75 per cent of CPSU members are presently covered by collective agreements negotiated by the CPSU. Unfortunately though, the CPSU and its members have also been at the forefront of many disputes about the rights of employees to collectively bargain that arose as a consequence of WorkChoices.

11. The WorkChoices legislation allowed intractable disputes to arise during bargaining that were not about employees' pay and conditions but about the process of negotiation itself. The legislation provided little assistance to the parties in resolving such disputes. Disputes over the agreement making process are unproductive, unnecessary and distract parties for the real issues affecting employees and employers.

Right to bargain

12. Under WorkChoices, employers are legally entitled to ignore the wishes of their employees and can simply refuse to bargain. At present, despite majority support by employees, an employer is entitled to unilaterally determine if any bargaining is to occur and the form of that bargaining. This is undemocratic as it denies employees the opportunity to determine for themselves how their industrial interests will best be represented. The only legal remedy open to a group of employees and unions in such a position is to take industrial action in support of bargaining itself, rather

[1] This was part of the social policy established at Federation commonly referred to as 'Australian Settlement'; see Paul Kelly, *The End of Certainty: The Story of the 1980s,* Allen & Unwin, St Leonards 1992.

than over any disputed bargaining claims regarding pay and conditions of employment.

13. Today, Telstra management continue to ignore the choice of CPSU members to have the CPSU represent them in bargaining. Negotiations between Telstra and the CPSU, CEPU and APESMA for a replacement agreement commenced in May 2008. However, Telstra unilaterally terminated negotiations on 17 July 2008.

14. Since taking that decision, Telstra has refused to meet with the unions to negotiate a replacement collective agreement. This is despite a clear majority of Telstra employees covered by the current collective agreement being union members and strongly supporting a union collective agreement. CPSU and CEPU members in Telstra are now taking protected industrial action in an attempt to get Telstra management back to the bargaining table.

15. A system of industrial relations that allows for such recalcitrant employer behaviour is not conducive to harmonious or productive workplace relations, nor is it economically sustainable. A fair system of industrial relations laws would not give the employer the right to refuse to negotiate a collective agreement.

16. The Fair Work Bill gives employees the right to collectively bargain with their employer where a majority of employees support bargaining. The CPSU and its members believe the right to collectively bargain proposed in the Bill is of paramount importance. It is a basic human right and consistent with International Conventions which Australia has ratified[2].

17. The Fair Work Bill does not guarantee that there will be an agreement, but it does guarantee that there will be a bargaining process and that employees will have the opportunity to reach agreement with their employer. According to the Bill, an employer will be required to meet with employees and their union, consider claims put to them and respond to those claims.

Right to be represented

18. Under WorkChoices, an employee's right to be represented by a representative of their choice in bargaining became contested ground.

19. In December 1997, CPSU members employed in Pacific Access authorised the CPSU to negotiate a certified agreement on their behalf.

[2] Right to Organise and Collective Bargaining Convention, 1949 (ILO Convention 98), Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Convention 87).

Pacific Access engaged in a union avoidance strategy and refused to include the CPSU in any form of negotiations.

20. Similarly, in November 2002, Sensis employees sought to be represented by the CPSU in bargaining. Despite the employees' choice, Sensis management refused to negotiate with the CPSU. In this matter, the CPSU sought the assistance of the AIRC to direct Sensis to include the CPSU in bargaining meetings. However, in the absence of a clear legislative right to representation, the availability of a remedy was contentious and this issue became the subject of years of litigation.

21. These situations developed because the law allows them to. The CPSU and its members believe that a fair industrial relations system would not allow an employer to unilaterally determine employees' representation in bargaining and a fair industrial relations system would provide a remedy when an employer sought to do so.

22. The Fair Work Bill eliminates these representational disputes. The Bill achieves this by providing employees with an unambiguous statutory right to representation. Employees have to be advised of this right and an employer must accept whoever the employee appoints as their representative. In providing that a union represents its members, unless the members advise otherwise, the Bill recognises the reality that employees choose to join unions so they may be represented by that union in industrial matters.

23. During the Howard Government's term in office, many Commonwealth Government agencies routinely ignored the form of agreement preferred by employees, instead taking the view that they would only negotiate non-union agreements, as that was the preference of the Government of the day. This would often lead to long and protracted industrial disputes about the form of agreement and who was entitled to represent employees in negotiations.

24. For example, in February 2005, negotiations for a replacement agreement in the Australian Public Service Commission commenced. The majority of employees signed a petition in support of a union collective agreement and that petition was presented to the Commissioner in June 2005. However the Commissioner refused to accept the petition and decided that employees and the agency would be best served by an employee collective agreement. When the CPSU made an application to the Australian Industrial Relations Commission for assistance in settling the dispute, the Australian Public Service Commission ignored the recommendation of the Commission to hold a ballot of affected employees.

25. By removing the distinction between union collective agreements and employee collective agreements, the Fair Work Bill removes the basis for these disputes. The Bill simply provides that if a union acted as a

bargaining representative in the course of negotiations[3] the union is entitled to be bound by the collective agreement.

Scope of agreements

26. The current WorkChoices laws allow an employer to segregate its workforce into individual bargaining units through the use of employee collective agreements. Using such non-union agreements, an employer can select the group of employees, no matter how large or small in number, to be covered by the agreement. Thereby an employer can manipulate the scope and coverage of an agreement and subvert the natural bargaining unit of its workforce.

27. For example, in November 2007 Telstra management offered an employee collective agreement to Telstra employees working in particular parts of its call centre workforce. The offer, however, failed to gain employee approval. In September 2008, after calling off negotiations with unions, Telstra management again released employee collective agreements this time to two national business lines. These offers also failed to gain employee approval.

28. Telstra management has been unwilling to accept these outcomes and other evidence of employee support for a union collective agreement and are now engaged in a process of further dividing up the Telstra workforce into smaller units of employees.

29. The strategy of segregating parts of the workforce through different agreements runs counter to the history of negotiations in Telstra where the current enterprise agreement covers the vast majority of Telstra business groups - there are approximately 11,000 people covered by the 2005-2008 collective agreement. However, at present, Telstra has sought that employees vote on collective agreements covering groups as small as eleven people.

30. Where an employer pursues such an undemocratic and unfair approach, the Fair Work Bill provides a remedy. If there are concerns about the scope of a proposed agreement, a bargaining representative is entitled to apply to Fair Work Australia for scope orders. In circumstances where the proposed agreement does not cover all employees of the employer or a group that is geographically, operationally or organisationally distinct, Fair Work Australia must satisfy itself the group of employees to be covered by the agreement was fairly chosen.

[3] Clause 183

Good faith

31. The CPSU believes that by providing the right to bargain and be represented, the Fair Work Bill deals with the vast majority of problems that have hampered industrial negotiations since 1996. However these changes alone do not address concerns that the CPSU has about how bargaining parties should conduct themselves in negotiations – that is, with good faith.

32. The concept of good faith is familiar to other areas of law. For example, the *Native Title Act 1993* requires parties to negotiate in 'good faith' with a view to obtaining agreement[4]. It is also common for commercial contracts to require parties to participate in dispute resolution in good faith. Such contractual obligations have been held by the Courts to be enforceable[5].

33. Obligations to negotiate in good faith are fundamentally important to industrial relations, where there exists an acknowledged power disparity between the parties. Good faith bargaining obligations help ensure parties conduct negotiations fairly, openly and honestly.

34. The current situation in Telstra demonstrates how damaging a lack of a requirement to act in good faith can be. Telstra's negotiations with the unions earlier this year did not occur in good faith. Leaked Telstra slides show that as early as February 2008, even before Telstra management commenced negotiations with the unions, they had devised a plan to call off those negotiations and offer non-union agreements.

35. In an attempt to bring Telstra back to the bargaining table, the unions sought the assistance of the Australian Industrial Relations Commission. In respect of the history of negotiations at Telstra, Senior Deputy President Lacy found:

> *It is implicit in the ACTU's further submissions and in the documentation it provided, that Telstra's strategy from the outset was to make it appear that it was prepared to negotiate an agreement with the unions but without any real intention to do so. A fair reading of the documentation certainly gives that impression. The documentation suggests that Telstra intended negotiations to proceed to a particular point in time before diverging on another course.*[6]

36. Despite this, Telstra management has either refused to attend Commission hearings or merely attended to argue that the Commission does not have power to compel Telstra to do anything.

---

[4] s31
[5] See discussion in *Aiton v Transfield* [1999] NSWSC 996
[6] 2008 AIRC 714

37. Telstra management continue to pursue this strategy because it is possible under the current laws. WorkChoices allows Telstra to blatantly ignore employees' requests for a union negotiated collective agreement and to treat their employees, the employees' representatives and the AIRC with contempt.

38. The introduction of good faith bargaining provisions in legislation will provide a mechanism to ameliorate such conduct. The fact that the Fair Work Bill gives parties access to good faith bargaining orders will, in and of itself, improve the conduct of bargaining parties. Parties are far less likely to conduct negotiations in bad faith or refuse to recognise another party's chosen representative, when they know there are potential repercussions.

39. Even when a bargaining party does conduct itself unfairly, it will be possible to quickly access Fair Work Australia orders. By contrast, when this occurred under WorkChoices the legislation provided no remedy.

40. The importance of a legislative remedy being available to parties where there are serious and sustained breaches of good faith is demonstrated by the current situation in Telstra. When a party flouts its good faith obligations in a serial and deliberate fashion, there needs to be a remedy. Without a legislative remedy, there are no consequences and therefore no incentive for that party to act in good faith.

41. The CPSU supports the inclusion in the Bill provisions which enable arbitration for serious and sustained breaches of good faith and good faith bargaining orders. Whilst contravention of a bargaining order made by Fair Work Australia is a civil remedy provision, and therefore could give rise to a Court order and Court imposed fine, this is an insufficient remedy as it does not deal with the core issue in dispute.

42. The core issue in dispute is that a bargaining representative has persistently and illegally frustrated bargaining. Where this is an employer, Court proceedings and potential fines do nothing to help employees who are trying to negotiate improvements to their terms and conditions of employment. To be effective and fair, the remedy must go to the bargaining itself and provide some resolution for the innocent parties.

43. For these reasons, the CPSU and its members support the introduction of good faith bargaining and arbitration in cases of serious and sustained breaches of the good faith bargaining obligation.

Right of entry

44. The CPSU supports the modest amendments to right of entry provisions proposed by the Fair Work Bill. However we are disappointed that the Bill does not go further in addressing issues faced by employees when they are trying to access their union.

45. The right of entry provisions will remain restrictive and open to employer abuse. The CPSU believes the provisions do and will continue to allow an employer to use the right of entry provisions to make it difficult for employees to access their union in the workplace.

46. The Bill retains substantial parts of the rigorous right of entry regime established under WorkChoices, including the requirement for permits, qualifications for permit-holders, notice periods and requirements on where the permit-holder can meet with employees.

47. In exceptional circumstances, employees should have the ability to meet with their union in their workplace with less than 24 hours notice. This is demonstrated by recent examples involving CPSU members. In two separate incidents, employees of a service-delivery government agency were assaulted by clients of that agency. The CPSU was contacted by members in that agency who were obviously distressed and sought the immediate presence and assistance of the CPSU in their workplaces. The CPSU attended the workplaces but in both cases was refused entry because the union official had not complied with the right of entry provisions, that is, the provision of 24 hours notice. This is despite the fact that the affected employees had expressly sought the involvement of the union.

48. Another significant concern with right of entry provisions is the maintenance of the employer's authority to dictate the room a permit-holder uses to meet with employees and the route the permit-holder takes in getting to that room. The CPSU believes such a level of prescription is unnecessary. There are already extensive requirements regarding conduct of a permit-holder exercising right of entry and remedies open to any employer who believes that a permit-holder has breached those obligations.

49. The CPSU has experienced right of entry provisions being used by employers to choose rooms that are out of sight, rooms that are not easily accessible and rooms where managers can oversee the meeting. We have also had situations where managers seek to attend union meetings to scrutinise what is being discussed. Where the permit-holder is not informed of the room to which they have been allocated for the meeting until immediately before the assigned entry time, it almost impossible to communicate the location of the meeting to employees. Access by union members to their representatives is thereby deliberately affected.

50. The Bill does address this problem in part, by including grounds on which it would be unreasonable to require a permit-holder to use a particular room or route[7]. However the CPSU believes this is insufficient to ensure effective right of entry. It would be exceptionally difficult to prove that the employer's request was made for the purpose of intimidation or

[7] Clause 492 (2)

discouraging attendance. In effect an employer's choice of a room is reasonable, unless the permit-holder can establish otherwise. Rather the Bill should adopt the inverse position: the room be chosen by the permit-holder and employees and the employer bear the burden of proving the choice of room for the meeting is inappropriate or unreasonable.

51. Under WorkChoices, the making of non-union agreements extinguished employees' rights to be visited by and hold discussions with their union in their workplace. This has led to profoundly unfair results; a non-union agreement may be approved by a very small margin but all employees then lose the right to be visited by the union, whether they supported the agreement or not.

52. As outlined above, certain Commonwealth Government agencies have unilaterally decided collective agreements in their agency were to be non-union agreements. Where the position of the agency was immovable and in the absence of any legal remedy, employees were placed in the position that to secure any collective agreement, and therefore pay rise, they would have to make a non-union agreement. In making such an agreement they gave up their rights to be visited by the union. The CPSU believes this approach is unfair and inappropriately denies employees' the right to meet with their union in the workplace. The Bill remedies this situation.

53. The CPSU also welcomes amendments to the right of entry provisions dealing with breach inspections. On a number of occasions the CPSU has conducted breach inspections, including inspection of employee records, under the WorkChoices laws. The restriction on inspecting records to those of members only has greatly increased the time and expense involved in such inspections, not just for the CPSU but also for the employer. Employers have had to de-identify records (for example, rosters) to ensure non-member details were not included and search through pay slips and time records to ensure production is limited only to union members. Importantly it has also added significant time to the inspection process. In large agencies, the inspection process has often taken weeks. The delay and expense caused by the WorkChoices provisions is detrimental to employees, employers and unions.

Delegates' rights

54. Over the last decade, through legislative change and government policy, we have seen the politicisation of industrial relations in Australia. The objective of the legislative change and government policy has been to restrict collective representation and collective activity. A direct result of this has been the targeting of individual workplace delegates.

55. Delegates are the face of their union in the workplace. When unions are characterised as illegitimate, the everyday effects in the workplace of this policy in the workplace are felt by individual workplace delegates.

Delegates, in trying to represent the interests of their colleagues, become the subject of dispute, scrutiny and exclusion.

56. The conflict between the delegate and his/her manager arises because there are no bargaining or representation rights provided under the *Workplace Relations Act*. In providing these rights, the Fair Work Bill will go someway to redressing the issues faced by workplace delegates. The sheer existence of a statutory right to bargain or to be represented will alter the framework in which the roles of delegates are viewed.

57. Legislative amendment, in and of itself, will not however guarantee cultural changes occur in the workplaces that increase tolerance and respect for the role of union delegates. For the last decade, the union delegate has been characterised as a trouble-maker and not a 'team-player'. Some employers have indirectly and directly discriminated against delegates because of their union role. We must, therefore, be vigilant in ensuring that workplace delegates are afforded adequate protection and that the spirit of these laws is reflected in workplaces across Australia.

58. The freedom of association provisions of the *Workplace Relations Act* provided some limited relief, in extreme examples of delegates being subject to discrimination. Freedom of association court actions are, however, notoriously slow and expensive.

59. On behalf of members, the CPSU commenced Federal Court action proceedings after Commonwealth Government agencies refused leave applications where the purpose of the leave was to attend WorkChoices protest events in November 2005 and November 2006[8]. In each instance the litigation took between 14 and 17 months to finalise and cost the union tens of thousands of dollars.

60. Such legal action is beyond the reach of most individuals and in many cases, unions. The utility of the right to protection from discrimination because of union affiliation is only valuable if there is also a quick, cheap and accessible remedy.

61. Accordingly, the CPSU welcomes the expanded role provided for Fair Work Australia in these matters[9]. We note that Fair Work Australia will be empowered to accept applications in these matters. In cases involving a dismissal Fair Work Australia will be able to convene mandatory conferences. In other cases, Fair Work Australia will only be empowered to convene conferences by consent. The CPSU believes that in all cases involving breaches of workplace rights, Fair Work Australia should be empowered to deal with these disputes, regardless of parties' consent.

62. The CPSU believes that ways in which Fair Work Australia could have greater involvement in these matters should be explored. Fair Work

[8] *CPSU & Ors v Commonwealth of Australia* NSD944/2006; *CPSU & Anor v Commonwealth of Australia* NSD2262/2006

[9] Specifically, clause 365 and clause 372

Australia will be able to provide faster and more cost-effective remedies in these matters and it therefore should be fully utilised.

63. We also welcome the creation of the Fair Work Divisions of the Federal Court and Federal Magistrates Court. Whilst it is yet to be shown, the CPSU hopes that the creation of these Divisions will also assist in having these disputes resolved in a timely and efficient manner.

Transfer of business

64. Legislation governing situations in which business interests are transferred serves an important policy objective. No fair system of industrial relations would allow an employer to evade their employment obligations by merely changing their corporate structure. The rationale is best expressed in the judgement of the High Court in one of the earliest cases on transmission:

> *Men are not so likely to submit to peaceful methods of settling their disputes, by agreement (conciliation) or award (arbitration) if they feel that those with whom they dispute can evade the obligations imposed by transferring their business to their sons, or by assigning it to a company having a new name and the same shareholders.*[10]

65. For most of the twentieth century, when industry awards governed employee entitlements, this issue of employee entitlement in instances of transmission was largely untested. The situation changed in the 1990s for two reasons; firstly, there was an increase in the number of businesses restructuring or transmitting their business, and secondly, the introduction and increasing use of enterprise agreements meant that the award system no longer necessarily determined employment conditions.

66. The issue of transfer of business increasingly became the subject of disputation and litigation between employers, unions and employees. It was up to the courts to balance the legitimate interests of business in arranging their operations alongside the legitimate interests of employees to ensure that the effect of such restructures was not to drive down employment conditions. Judgments in key decisions on this issue demonstrate the difficulty the courts experienced in trying to balance these interests[11].

67. The legal test for transmission of business is a complex question of fact and law, which requires characterisation of the nature of the old employer, characterisation of the nature of the business of the new employer and then a comparison of the two. Such a legalistic approach is removed from the actual experiences of the individual employees in the workplace. An employee doing substantially the same duties may not be covered by

[10] *George Hudson Ltd v ATWU* (1932) 32 CLR 413 at 452

[11] See for example *PP Consultants Pty Limited v Finance Sector Union of Australia* [2000] HCA 59 and *Stellar Call Centres Pty Ltd v Communications, Electrical, Electronic, Information, Postal, Plumbing and Allied Services Union of Australia* [2001] FCA 106

transmission of business if the nature of the business of the employer differed. This highly complicated test creates significant uncertainty for employees and employers.

68. The CPSU therefore welcomes the provisions in the Fair Work Bill. Transfer of business provisions will apply when the employee is undertaking substantially the same work and there is a connection between the old employer and the new employer. There is a connection between a new employer and an old employer where there is a transfer of assets, outsourcing, in-sourcing or where they are associated entities. We believe this test provides parties with far clearer guidance, it is easier to understand and apply and, will allow for far greater certainty in these situations.

69. Fair legislation must strike an appropriate balance between the employers' legitimate business interests, and employees' legitimate interests in protecting their entitlements. The law should not create an incentive for employers to restructure arrangements to evade employment obligations.

70. The WorkChoices legislation tipped the balance too far in favour of dishonest employers who could use the law to evade employee entitlements. The legislation only protected employees' terms and conditions of employment for a period of 12 months after the transmission of business.

71. This creates an incentive to transmit business. The fact that transferring employees' terms and conditions are protected for such a short time creates an opportunity and an incentive for employers to lock transferring employees into inferior agreements.

72. CPSU members in Excelior have had first hand experience of this aspect of the WorkChoices laws. In February 2007, it was announced that AAPT Bendigo and Robina Call Centres would be taken over by Excelior. The transfer was to occur in May 2007.

73. In April 2007, Excelior directly employed a handful of new employees in the Bendigo and Robina Call Centres. To use Bendigo as an example, before the AAPT employees had been transferred to Excelior, Excelior management lodged a 5 year non-union agreement. In accordance with the WorkChoices legislation it was approved by approximately five new employees who also waived their rights to a consideration period.

74. As the AAPT employees had not yet transferred to Excelior, they were not given the opportunity to vote on the proposed agreement. The Excelior non-union agreement was vastly inferior to the AAPT Agreement. It cut a number of key conditions, including pay, paid maternity leave, leave loadings, penalty rates, public holiday rates and severance benefits.

75. Twelve months after transmission of business from AAPT, these employees became covered by the inferior Excelior agreement for the

remainder of its five year term despite the fact they had no involvement in approving or making that agreement. WorkChoices transmission of business rules made such conduct legal.

76. Despite numerous meetings between the CPSU, employees and Excelior prior to the transfer of AAPT employees, Excelior management failed to advise the union or employees that they had lodged a 5 year non-union agreement. When employees and the CPSU were finally informed of the existence of the new non-union agreement, WorkChoices afforded them no protection.

77. Employees could not even seek to take protected action in support of an agreement that maintained their pay and conditions, as they became covered by an agreement that had not passed its nominal expiry date.

78. The Workplace Ombudsman investigated the actions undertaken by Excelior management and even recommended the company commence negotiations for a collective agreement so everyone could get a vote. The company refused.

79. On 18th December 2008 the Victorian Workplace Rights Advocate released his final report on the *Investigation into a Complaint Regarding Excelior Pty Ltd*. The Advocate found that there were detriments suffered by former AAPT employees in terms of their wages and conditions. The minimum rates of pay under the Excelior agreement placed former AAPT employees at a 'significant disadvantage'. Detrimental changes to conditions included paid maternity leave; the loss of annual leave loading and additional annual leave days for working Sundays; a reduction in redundancy pay for some employees; reduced higher duties entitlements; removal of the accrual of unused personal leave; changes to rest break provisions, removal of a comprehensive anti-discrimination provision and abolition of the consultative committee in relation to the introduction of change. The Advocate concluded (at paragraph 89) that:

> *Based on the above analysis, it is in my view that the unilateral decision of Excelior to apply the Excelior Agreement to the former AAPT employees on and from 27 May 2008 has operated to significantly disadvantage these employees in terms of their wages and other conditions of employment. In this case, the option to apply the Excelior Agreement to the former AAPT employees after a period of twelve months arose as a result of the substantial amendments made to the WR Act by WorkChoices.*

80. The Fair Work Bill addresses these issues by ensuring that in situations where there is a transfer of business, employees' terms and conditions are protected for the life of that agreement.

81. While broadly welcoming these changes, the CPSU has a significant concern about one of the transfer of business provisions in the Bill. Section s384 is ambiguous. It could be read as applying only to long term casual

employees however the Explanatory Memorandum at 1524 provides an example which suggests that the Government intends s384 to apply to all employees. Section 384 of the Bill provides that period of service of an employee in certain circumstances does not count towards the employee's period of employment with the new employer for the purposes of unfair dismissal protection. It is unfair that a new employer could dismiss a longstanding employee without remedy after a few weeks of transfer. The new employer is not compelled to take on the employees of the old employer but those people who are transferred should be entitled to have their previous period of service protected and should not be required to re-serve the qualifying period. This provision must be removed from the Bill.

Conclusion

82. CPSU members, in particular those employed by the Commonwealth Government and Telstra, have endured the full ideological force of the WorkChoices laws. These laws gave employers unprecedented power over employees and threatened employees' basic rights at work. We therefore welcome the abolition of these laws.

83. The CPSU and its members believe the Bill will provide Australian employees, employers and unions with a balanced system of industrial relations that promotes harmonious and productive workplaces.

84. Since the 1990s the industrial relations system has been plagued by disputes about the process of bargaining for collective agreements. Disputes over bargaining have focused on representation and the process of negotiation, rather than the content and outcome. This has occurred because the law provided no rights or remedies to ensure fair processes in negotiation.

85. The Fair Work Bill provides appropriate rights and remedies to deal with this kind of industrial dispute. We hope that the introduction of the Fair Work Bill brings to an end the kind of disputation we have seen and employees, employers and unions can concentrate on the major issues affecting Australian workplaces.

86. We therefore commend it to the Senate and seek its passage with minimal amendment.