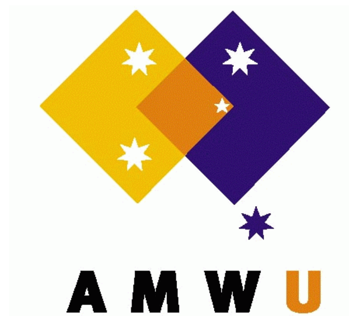
AUSTRALIAN MANUFACTURING WORKERS' UNION



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

Senate Education, Employment and Workplace Relations Committee

April 2009

SUBMISSIONS OF THE AUSTRALIAN MANUFACTURING WORKERS' UNION

1. The Australian Manufacturing Workers' Union (the AMWU) welcomes the opportunity to make a submission to the Senate Education, Employment and Workplace Relations Committee concerning the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (the Bill).

2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU represents approximately 120,000 members working across major sectors of the Australian economy. AMWU members are throughout Australia's manufacturing industry, including metal manufacturing, printing and graphic arts, food and vehicle building, repair and service. They also comprise a significant proportion of workers in Australian mining, building and construction, aircraft and airline operations, laboratory, technical, supervisory and public sector employment. AMWU members are unskilled, semi skilled, tradespersons and professionals, with employment conditions and entitlements sourced in a wide range of industrial instruments, from awards, to certified agreements, to the common law.

3. The AMWU is a party to approximately 400 federal awards and 2000 industrial agreements. Each year, the AMWU maintains the wages and allowances of over 90 federal awards and negotiates an average of 500 industrial agreements. An overwhelming majority of these industrial agreements have a life of three years. In the first half of 2009, approximately 1000 of the AMWU industrial agreements are due for renegotiation.

4. The devastation which Work Choices sought to inflict on these conditions and entitlements gave rise to the resounding mandate of the Australian Labor Government to restore dignity and fairness to the employment arrangements of Australian workers, including AMWU members. That is why the AMWU broadly welcomes the bulk of both the *Fair Work Act 2009* ("the *FW Act*") and this Bill. But this is also why the AMWU must draw attention to the weaknesses of this Bill – where the Bill facilitates some of the unfair aspects of the Work Choices regime to pervade Australian labour relations for years to come.

5. The AMWU welcomes and endorses the submission of the ACTU on this Bill. We are particularly concerned at the failure of this Bill to provide adequate opportunities for employees to exit unfair Work Choices agreements as set out in the ACTU submission. In addition, we wish to draw the Committee's attention to the following aspects of the Bill which require attention and amendment.

6. Several of the weaknesses of the Bill insert inequities into the respective entitlements of different groups of employees. These inequities may be the results of accidents of drafting, or a failure to appreciate the ramifications of relationships between employees and the instruments which govern their employment. We seek that these inequities be addressed.

7. **Retaining protection for redundancy entitlements where an agreement is terminated.** A prime example of inequitable outcomes preserved by this Bill is the situation of two almost identical groups of workers, who have each negotiated redundancy entitlements which are recorded in a collective agreement. One group's agreement is terminated after its nominal expiry date (NED), whereas the other group's agreement is first transferred to another business, but then sought to be terminated:

   7.1. Under the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 ("Transition Act")*, which came into force on 28 March 2008, the test to terminate an agreement was made more balanced (see *WRA*, s 397A). This is the test largely replicated in the *FW Act* at s.226, and is applied to collective agreement-based transitional instruments by this Bill at item 16 of Schedule 3.

   A consequence of an agreement's termination is that the terms and conditions of employment provided by the agreement fall away to the safety net. Sometimes the difference between these two levels is substantial.

   One respect in which this system can have harsh consequences for employees is when an agreement passes its NED just as business conditions deteriorate. When this occurs, the employees' principal economic weapon, protected industrial action, becomes ineffective. So, if an employer can easily terminate an expired agreement, the power balance swings heavily in the employer's favour. This is the market in operation.

   In all of this, employees can be particularly vulnerable if an agreement provides for a generous redundancy benefit, and just as the agreement becomes open to termination the employer contemplates redundancies. If the agreement is terminated, an employee's redundancy pay may fall dramatically: for many long serving employees it might go from 40-50-60+ weeks' pay down to the safety net of 12 weeks' pay for 10 or more years' service.

   This problem has now largely been ameliorated. The first positive step came out of the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*, ("*IC Act*") which amended the *Workplace Relations Act 1996* ("*WRA*") on 28 June 2007.

This amendment preserved redundancy entitlements from an agreement for 24 months after that agreement was terminated. In addition, as noted above, the ability to unilaterally terminate a collective agreement was restricted in the *Transition Act* in 2008.

7.2. Right now, and as the *FW Act* comes into operation, there will remain one point at which employees become exposed to harsh agreement termination. It occurs in a transmission of business situation governed by the *WRA*'s provisions.

Currently, if there is a transmission of business, employees retain the benefit of their extant industrial instrument for one year from the date of the transmission. After that year elapses, the employees fall back to the safety net. This scheme thus has a similar effect to agreement termination. However, the disjunction is this: the *IC Act*'s preservation of redundancy provisions *does not apply* here unless the employees were already in a 24 month preservation period from an earlier agreement termination (see *WRA* s.598A). So, one group of employees, who have negotiated redundancy terms in a collective agreement have those terms protected for two years if their agreement is terminated. However, if the agreement is transmitted to a new employer (again as a result of unilateral action by their original employer), the redundancy conditions, inter alia, are only protected for one year.

This can be, and has been, a real problem. It means that an incoming employer in a transmission of business can put an ultimatum to employees on the one year saving period ending: accept the terms of this replacement agreement or you will be made redundant with only safety net severance pay. The AMWU was faced with this situation at Feltex Carpets Pty Ltd at Tottenham in Victoria in negotiations for a replacement agreement for the Feltex Carpets maintenance employees in late 2007.

A year earlier, Feltex Australia Pty Ltd went in receivership and the business was acquired by Feltex Carpets (part of the Godfrey Hirst Group). This meant that the agreements covering Feltex Australia transmitted to Feltex Carpets for a 12 month period.

Feltex Carpets were keen to drive efficiencies and keep costs down. As the transmitted agreement reached its fall over date in late 2007, Feltex Carpets management threatened to make long serving employees covered by the maintenance agreement redundant at the safety net rate if the AMWU did not accede to a new agreement on Feltex Carpets' terms. For the employees affected, the potential loss was significant;

the agreement provided, among other things, 3 weeks' pay per year of service, while the safety net stops at 12 weeks' pay after 10 years' service. Ultimately, the parties did reach agreement in early 2008 without this threat being carried out.

The potential harshness in the situation described above was but one of the unfair aspects of the Work Choices regime. Whilst the *IC Act*'s provisions that retained redundancy provisions on termination of an agreement partially redressed the problems referred to here, in transmission of business cases the provisions were unsatisfactory, and remain so.

It is therefore of concern that this Bill maintains the Work Choices schema for transmissions of business that occur right up until 1 July 2009 (Sch 11, Part 2). This means the precipitous fall off in conditions occasioned by the ending of the 1 year carry over of prevailing industrial instruments will continue well into the future, potentially until 1 July 2010.

If this is to happen, some balance should be imposed by adding the 24 month preservation of redundancy pay until after the expiry of the 1 year transmission of agreements. It is noted that, in the case of a transmission, the Bill maintains the preservation of redundancy terms for up to 24 months if a relevant agreement has *previously* been terminated for employees whose agreements are now transmitted or transferred to a new employer (item 4 in Schedule 11). However, employees working alongside those employees, whose agreements are transmitted, will only have their terms preserved for 12 months!

We submit in support of this extension of the 24 month preservation of redundancy provisions, where an agreement is terminated following transmission of business, that:

7.2.1. The industrial instruments that will most probably carry over due to a transmission of business will be agreements made under the Work Choices regime. These agreements will, of course, terminate in the first year of the *FW Act* regime. Thus the employees here under consideration will at last have the opportunity to bargain in a fair and balanced system; however, due to the possibility of an employer ultimatum over the termination of the transmitted agreement's redundancy provisions (if the employer is in the position of making redundancies), the employees affected will again have to suffer another lopsided round of bargaining.

7.2.2. In the current economic environment, it would be helpful to workers if workplace laws secured redundancy entitlements rather than imperil them.

7.2.3. The number of employees in the affected category would be small and in this position through no fault of their own. To deprive them of the protections enjoyed by all other employees now and in the future, to maintain their redundancy pay entitlement on an agreement facing termination, is unfair victimisation. Note that in every other case where an agreement faces termination under the *FW Act*, employees will have significant protection against capricious agreement termination. We would seek therefore, that this Bill does not also effect capricious treatment of a particular subgroup of employees.

The AMWU therefore proposes to insert provisions in the Bill at Schedule 11 to maintain redundancy provisions in industrial instruments for 24 months on the termination of any industrial instrument due to the expiry of its 1 year transmission of business agreement carry over. This would occur to any agreement expiring after 1 July 2009, and the 24 month protection proposed would apply in a manner analogous to the former s 399A in the *WRA*.

8. **Inequality of dispute resolution procedures maintained.** A fundamental inconsistency between Government policy and the outcomes which this Bill will produce is the maintenance of Work Choices policies continuing well after the repeal of the *WRA*. For example, during the "bridging period", disputes with respect to the "Australian Fair Pay and Conditions Standard" are to be resolved not using a model dispute resolution term, such as that to be prescribed by regulations further to Part 6-2 of the *FW Act*, but further to Part 13 or the *WRA* – which part of the Act has been notorious for denying the AIRC an ability to "compel a person to do anything". Why such impotence of the AIRC should be transmitted to the FWA in dealing with such disputes remains a mystery, yet that it what item 27of Part 6 of this Bill appears to do. It is simply providing a continued opportunity to avoid resolution of disputes, as Work Choices envisaged.

9. **Limitations on agreement content maintained.** A corresponding weakness is found in the operation of item 4 of Schedule 3 of this Bill. The same instrument content rules that applied in relation to *WRA* instruments apply to the corresponding transitional instrument that continues after the *WRA* is repealed.

What this provision allows, for example, is the continued operation of substandard dispute resolution procedures for the life of these Work Choices era agreements (now made

transitional instruments by this Bill). This applies to collective agreements, and to ITEAs, including those made until the "FW (safety net provisions) commencement day".

This Bill fails to prevent the disempowerment of employees via substandard dispute resolution procedures, but instead needlessly prolongs it. Again, an unnecessary inequality will exist between employees able to resolve their disputes through a procedure consistent with the model procedure, as prescribed under s.737 of the *FW Act*, or as drafted consistent with s.187 of the Act. For the years that the *FW Act* can allow a transitional instrument to continue operation, such inequities are prolonged.

The AMWU therefore proposes that all instruments applying to employees following the repeal of the *WRA* are deemed to include the model term for dealing with disputes made in Regulations under s.737. Parties may therefore avail themselves of either the dispute resolution procedure which continues in force under item 4 of Schedule 3 of this Bill, or the model procedure.

10. **Inadequate methods to enforce agreements.** The *FW Act* provides for civil remedies in order to enforce the rights provided and facilitated by that Act. It provides for certain remedies, such as injunctions by the Federal Court and Federal Magistrate's Court, which were either not available under previous legislation, or whose availability was disputed under certain judicial authority (see. s.545 *FW Act*). In so doing, the *FW Act* recognises that adequate judicial avenues should be available in order to enforce a right held by a party to an employment instrument.

    It is trite to argue that a right is no right at all if it is unenforceable. Nevertheless, item 17 of Schedule 16 of the Act denies parties to transitional instruments the ability to obtain an injunction restraining the breach of such a transitional instrument. Again, parties subject to Work Choices era agreements are denied the opportunity to properly enforce those agreements in a manner consistent with parties to new instruments operating under the *FW Act* regime. This is not an argument to grant extra rights to a party, this is about simply respecting rights previously agreed, and enabling the proper enforcement of them.

    The AMWU therefore proposes that item 17 of Schedule 16 be removed, as its current drafting prevents access to judicial enforcement of terms of transitional instruments,.

11. **Mis-drafting in relation to approval/variation of agreements during bridging period**. We draw the Committee's attention to what must be an error in the drafting of sub-item 4(4) of Schedule 7 of the Bill. This sub-item currently reads:

"(4) *To avoid doubt, if there is a reference instrument in relation to one or more, but not all, of the employees referred to in subitem (1):*

> *(a) if the agreement passes the no-disadvantage test under subitem (1) – it passes the no disadvantage test in relation to all employees who are covered by the agreement; or*
>
> *(b) if the agreement does not pass the no-disadvantage test under subitem (1) – it does not pass the no disadvantage test in relation to any employees who are covered by the agreement."*

As this provision is currently drafted, it is framed in terms of the application of *"a reference instrument"* to some employees, but not all, and then using this reference instrument to perform the relevant no disadvantage test. On one reading of the provision, where there are two reference instruments applying to a relevant group of employees, it may be held that FWA could apply the no disadvantage test against either applicable reference instrument: each agreement would be "a reference instrument" which would apply to some employees but not all. The opportunity for inequities in the application of the no disadvantage test are obvious – ninety percent of a relevant group of employees could be covered by an agreement with much more beneficial terms and conditions than the other ten per cent, but the current wording of the act would allow a new agreement to be tested against the inferior enterprise agreement of the ten per cent. The ninety per cent could therefore lose out, because the ten per cent's agreement was "*a reference instrument in relation to one or more, but not all, of the employees*". If there is a group of employees to whom a "reference instrument" applies, it should be used for those employees when their proposed agreement is assessed under the no disadvantage test. We believe this must be the intention of the provision, but would seek the ambiguity in its wording be removed.

The AMWU therefore proposes that the provision be redrafted to read:

"(4) *To avoid doubt, if there is a reference instrument in relation to one or more, but not all, of the employees referred to in subitem (1), <u>and no other reference instrument applies to any of the employees referred to in subitem (1)</u>:*

> *(a) if the agreement passes the no-disadvantage test under subitem (1) – it passes the no disadvantage test in relation to all employees who are covered by the agreement; or*

(b) if the agreement does not pass the no-disadvantage test under subitem (1) – it does not pass the no disadvantage test in relation to any employees who are covered by the agreement."

12. **Inequities in industrial action.** The Bill includes a further curious disjunction, with respect to the treatment of industrial action and the treatment of orders of the Commission with respect to industrial action.. Each of: an application for a ballot, a ballot order or authorisation, and a notice of industrial action become ineffective on the day of repeal of the *WRA*. However, with respect to orders under ss.496 or 497 of the *WRA* preventing industrial action, an order continues in effect. Indeed, an application to stop or prevent industrial action is enabled to continue by the Bill at item 5 of Schedule 13, but the industrial action to which it relates can no longer take place in any event, absent an effective notice of industrial action (item 11). So, in addition to the inequity of continuing sanctions against industrial action when the activity of industrial action has been effectively disallowed, the s.496 order has no effective work to do. If protected industrial action is moot, then so is an order preventing industrial action – there is no need for an additional coercive instrument to continue.. We therefore support the view of the ACTU that either orders supporting industrial action (such as notices of industrial action, ballot orders etc) should continue along with orders that may stop or prevent industrial action (and proceedings relating to such orders), or that both types of industrial action regulation should fall together, at the repeal of the *WRA*.

    The AMWU also shares the view of the ACTU that the artificial quelling of industrial action prior to the repeal of the *WRA* will merely delay the commencement of industrial campaigns until after that date – simply to avoid the waste of resources that the artificial curtailing of properly authorised and conducted industrial action would cause. This shift of engagement in industrial negotiations and action will unnecessarily displace resources not only of parties to industrial action, but to the apparatus of the new *FW Act* system, such as FWA. An industrial action bubble is the inevitable result of Schedule 13 of this Bill. That can hardly be the intention of the drafters, but it something of which the Government should be aware.

13. **Representation Orders.** Another area of industrial disputation which will be artificially enlivened by this Bill is that occasioned by new Representation Orders in new s.137A. Compared with extant provisions relating to representation orders in Chapter 4 of current Schedule 1 of the *WRA*, the new s.137A orders appear to be available at a much lower threshold of "dispute" rather than on the occasion of true disruption to an employer's operations, under the preconditions at current s.134. A real danger of enlivening disputation

regarding long settled demarcation agreements is brought about by the creation of this new type of representation order. Finding disputes to disturb settled demarcation arrangements will certainly not be difficult, on a reading of this new provision. It hardly seems credible that the intention of the Government would be to encourage demarcation disputation. We support the ACTU's view that this new s.137A be removed from this Bill, and existing remedies for resolving union disputes be maintained.

14. **Representation in the Federal Court and Federal Magistrates Court.** Chapter 4 of Part 4-2 of the *FW Act* is titled "Jurisdiction and powers of courts". The counterpart in the *WRA* is Part 20 which is titled "Jurisdiction of the Federal Court of Australia and Federal Magistrates Court". In the *WRA* is s.854 which is titled "Representation of Parties Before the Court or the Federal Magistrates Court".

Section 854 of the *WRA*, among other things, gives to a Registered Organisation the right to appear in the Federal Court and Federal Magistrates Court by its members, officers and employees. An organisation may also represent its members in this fashion. But for this section, organisations would have to be represented by lawyers, and so would organisations' members, in these courts. For some reason, the *FW Act* does not contain such a provision.

This important right for organisations has been in Federal industrial laws since 1904, apart from one 6 month hiatus: see s.469 in the *WRA* (pre-Work Choices), before that, s.58 in the *Industrial Relations Act 1988*; before that, s.117A in the *Conciliation and Arbitration Act 1904*, with s.46 and s.27 respectively prior to s 117A.

As for the 6 month hiatus, that happened in 1956 just after the splitting of the Commonwealth Court of Conciliation and Arbitration into the Australian Conciliation and Arbitration Commission and the Commonwealth Industrial Court. The split occurred in the first half of 1956. Shortly after this, in what may have been the first case heard by the newly established Commonwealth Industrial Court, a Full Court told an officer of the Painters and Dockers Union that he did not have standing to appear and he should get a lawyer. He did, but the lawyer was unable to help so the Painters and Dockers officer carried on by leave of the Court (*Re Ship Painters and Dockers Award* (1956) 11 IIB 916). This situation was quickly remedied, about 6 months later, by amending legislation inserting s.117A into the *Conciliation and Arbitration Act 1904*, and since then there has been an unbroken right of organisations to take proceedings in their own name and for organisations' officers to appear on behalf of their organisations or on behalf of their members.

What s.854 and its antecedents allowed is for organisations to deal with award and agreement breaches, unlawful terminations etc in-house, without going through lawyers. And, it is not just appearance in court that is covered by this provision; it goes to filing applications, defences, interlocutory applications, and the like.

This longstanding right may be seen as one of the privileges that come with an organisation's registration under industrial legislation, and it seems unusual that the Government would remove it deliberately.

The AMWU therefore proposes to insert provisions in the Bill in Schedule 17 that reinstate Organisations' rights to representation in the Federal Court and Federal Magistrates Court, consistent with extant provisions in s.854 of the *WRA*.

15. It is the view of the AMWU, that the key opportunity presented by the mandate of the Australian Government to rid the Australian people of the yoke of Work Choices is to restore fairness, certainty and balance to the Australian workplace relations system. As the ACTU has submitted, and as we have submitted above, we are strongly of the view that an intention to create a fairer system cannot be achieved unless the Bill is amended to ensure that the inequities of Work Choices are not unnecessarily prolonged. The amendments which we and the ACTU suggest will ensure that this Bill does not undermine the *FW Act* for which it is intended to provide a transition. Transitional provisions in the Bill should be those which are necessary to facilitate respect for workers, allowing them to engage in a fairer industrial relations system, despite varying sources of their current employment rights and entitlements. Transitional provisions should not be unnecessary or capricious. We therefore place our recommendations before the committee, in order to ensure that this Bill more fully reflects the objectives of the *FW Act*.