Australian Business Industrial

Inquiry into the Fair Work Bill 2008

ABI submission to the Senate Education, Employment and Workplace Relations Committee

January 2009

Invigorating Business Representation

Introduction

Australian Business Industrial (ABI) would like to thank the Senate Education, Employment and Workplace Relations Committee for the opportunity to comment on the Fair Work Bill 2008. ABI is seeking to constructively engage with the Government to ensure that its proposed legislation and its new system are implemented in an optimal manner, with as little disruption to Australian enterprises and their employees as can be managed during the transition period.

ABI is the registered industrial relations affiliate of NSW Business Chamber, and is responsible for NSW Business Chamber's workplace policy and industrial relations matters.

It is also a Peak Council for employers in the NSW industrial system and a transitionally registered organisation under the *Workplace Relations Act 1996*, and regularly represents members in both the New South Wales and Australian Industrial Relations Commissions.

ABI is a successor to the Chamber of Manufacturers of NSW which was established in 1886 to promote the interests of its members in trade and industrial matters. The Chamber was registered in 1926. Since its inception the Chamber and its successor industrial organisations have played a major representational role in industrial relations in NSW.

NSW Business Chamber is an independent member-based company, and is the largest business association in NSW. Through its membership and affiliation with 129 Chambers of Commerce, NSW Business Chamber represents over 30 000 employers throughout NSW.

ABI in conjunction with NSW Business Chamber represents the interests of not only individual employer members, but also other Industry Associations, Federations and groups of employers who are members or affiliates.

ABI has chosen to focus its attention in this submission on issues of particular relevance to our membership, specifically Right of Entry; Transfer of Business; Agreement Making; Unfair Dismissal; and General Protections.

ABI Council, which comprises elected representatives of its membership, has had an opportunity to review the issues raised in this paper with respect to the Bill. This submission is reflective of the opinions and recommendations endorsed by the Council.

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Summary of Recommendations

Right of Entry

ABI has serious concerns that the Right of Entry (RoE) provisions in the Fair Work Bill 2008 significantly expand the scope of union right of entry.

> ABI strongly recommends that scope of union RoE should be confined to historical union coverage, recognising existing demarcation and/or the recognition of any unions bound by an enterprise award or collective agreement. In the longer term Fair Work Australia, or the Department, should be given the task of rewriting union eligibility rules in consultation with affected parties.

ABI also has concerns about the new capacity under the Fair Work Bill 2008 for unions to inspect the records of non-members.

> ABI recommends that union access to records should be confined to its proper members, or at least, that the Government amend the Bill to insert provisions similar to those which currently apply under the *Workplace Relations Act 1996* requiring a permit holder to seek an order from Fair Work Australia (FWA) before inspecting non-union member employee records. Alternatively, the Government should amend the Bill to insert a provision to ensure that in cases where the permit holder wishes to inspect non-member records, the express, written permission of each employee whose records it wishes to inspect must be provided.

Transfer of Business

ABI has serious concerns about the expansion of the criteria for transfer of business set out in the Fair Work Bill 2008, notably the focus on the transfer of “work” rather than a transfer of business, and the “connection” tests set out in the Bill, which go significantly beyond the tests currently derived from the existing case law. ABI contends that the provisions will not create a fair and balanced transfer of business regime, and will not promote business efficiency and economic growth.

> Thus, ABI recommends that the Government review and reconsider the concepts underpinning Part 2-8 of the Bill.

ABI also has concerns that the provisions of the Bill that deal with how an instrument transfers both lack clarity, and will impose disincentives on employers to employee “old employees”.

> ABI recommends that the Government insert provisions to both limit the operation of a transferable instrument to no longer than 12 months; or for a transferable instrument to cease operation once a new enterprise agreement that covers the employee comes into operation, whichever occurs sooner. ABI also recommends that the Government confine the transfer of instruments exclusively to transferring employees.

Agreement Making

ABI is concerned that the "Better Off Overall Test" (BOOT) as currently drafted will mean that an enterprise agreement cannot be approved unless FWA conducts a test on each and every employee to be covered by the agreement, and finds that each and every employee is better off. Such a requirement would add an unacceptable level of complexity and red tape to the agreement making process.

> ABI recommends that the Government redraft the BOOT to clarify the intent as contained in the Fair Work Bill 2008 Explanatory Memorandum; that the BOOT will not be applied to each and every employee to be covered by an agreement, but rather to classes of employees.

ABI is concerned that given that an agreement cannot commence operation until after it is approved by FWA, delays in agreement processing will cause significant inconvenience and uncertainty for employers and employees.

> ABI recommends that the Government amend the Bill to stipulate that if not approved by FWA within the 7 days alluded to in the Explanatory Memorandum, an enterprise agreement commence operation on an interim basis. If the agreement is later found to have failed the BOOT, FWA should have the capacity to ensure the agreement is rectified, and appropriate compensation afforded.

ABI is concerned that the expansion of agreement content beyond that which pertains to the employment relationship will facilitate distractions away from the proper purpose of bargaining, that is enterprise level productivity improvements.

> ABI recommends that the Government amend the Bill to ensure that agreements deal primarily with matters dealing with the relationship between employers and employees.

Unfair Dismissal

ABI has concerns with respect to the practical application of the definition of "genuine redundancy", and considers that the definition within the Fair Work Bill 2008 will cause uncertainty and confusion for employers and employees.

> ABI recommends that the Government re-draft the Bill accordingly.

General Protections

ABI is concerned about the expansion of the General Protections regime, particularly the duplication it will create with respect to other jurisdictions, and the capacity for applicants to "jurisdiction shop" or "cherry pick".

> ABI recommends that the Government mitigate the effects of duplication between the Fair Work Bill 2008 General Protections regime and State and Federal discrimination legislation, by introducing statutory limitations against bringing the same matter forward on multiple occasions under multiple pieces of legislation.

Right of Entry

1. ABI supports the retention of the current Right of Entry (RoE) provisions in the *Workplace Relations Act 1996* (Cth) (WR Act), which provide a balanced capacity for unions parties to relevant awards and agreements to enter workplaces to meet with members or prospective members; and in the case of a suspected breach, to inspect records.

2. Prior to the 2007 Federal Election, the (now) Government consistently maintained that "existing right of entry laws will be retained"[1], presumably because it was considered that the current provisions were adequate, appropriate and acceptable.

3. The RoE provisions as currently drafted in the Fair Work Bill 2008 (FW Bill) clearly do not represent a retention of existing laws; rather they constitute a significant expansion of RoE and union rights on entry. This is a major concern of ABI with respect to the FW Bill.

4. There are two key elements of the Bill's provisions with which ABI has concerns. The first is the increased scope of RoE, the second is the new capacity for union officials to access the employment records of non-members.

Increased scope of Right of Entry

5. Under the current provisions of the WR Act, a permit holder may enter premises for the purposes of holding discussions with eligible employees, provided the union to which the permit holder belongs is bound by an award or collective agreement covering work being carried out on the premises[2].

6. By contrast, cl. 484 of the FW Bill provides that a permit holder may enter the premises to hold discussions with persons who perform work on the premises and whose <u>industrial interests the permit holder's organisation is entitled to represent</u>[3]. Equally significantly, entry to investigate a suspected breach has been expanded so that a union seeking to investigate a suspected breach does not need to have any direct connection with the instrument which applies to the employee member. The relevant connection under cl. 481 is that the employee is a member and subject to the instrument, or the provisions of the Bill, which has been purportedly contravened[4]. It is unarguable that investigations of suspected breaches, even when properly conducted in accordance with the statutory requirements, are disruptive and impose costs on the business. At the very least they divert staff time in meeting the access and provision of information requirements. Whilst ABI accepts that unions should have a right to investigate suspected breaches, ABI is extremely concerned that unrestricted right of entry will result in unproductive conflict.

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1 Australian Labor Party, *Forward with Fairness - Policy Implementation Plan*, August 2007, at pg 2

2 *Workplace Relations Act 1996* (Cth) (WR Act), at s. 760

3 Fair Work Bill 2008, at cl 484

4 Id at cl 481

7. It is important to note that under the Bill, the capacity to enter for either discussions or investigation is no longer anchored to the organisation being bound by an award or collective agreement. The new provisions focus on the coverage rules of the union or unions in question. In many cases, this will expand right of entry to a particular workplace from one or two unions to several, particularly where there are indistinct union rules and overlapping union coverage. Even where there is a collective agreement or enterprise award in operation that binds one or more union, a competitor union with overlapping eligibility rules, but no previous relationship to the enterprise, also has right of entry. The current drafting also means that unions will have access to workplaces to meet with prospective members where there is no award or collective agreement, where the employees may be covered exclusively by common law contracts, AWAs or ITEAs.

8. The FW Bill provisions significantly expand the scope of union right of entry and as such are not reflective of policy prior to the 2007 Federal Election; which was to retain existing right of entry laws.

9. Expanding the number of unions with a right to enter an enterprise will cause inevitable confusion and disruption to business. It also seems counter to the Fair Work system goal of simplifying industrial regulation and reducing the number and complexity of instruments affecting a workplace. Expansion of the number of eligible unions sits uncomfortably with the process of reducing the number of modern awards which will apply in a workplace.

10. As well, anchoring RoE provisions on union eligibility rules is highly problematic, because of the extent of ambiguity and complexity commonly encountered in union eligibility rules. Business operators, particularly SMEs, are not equipped to navigate through this area of regulation.

11. In addition, overlapping union eligibility rules will result in competitor unions having overlapping coverage rights, which will increase the likelihood of union demarcation questions, disagreements and disputes, which do not assist orderly business operations or productivity, and can cause significant damage to business.

12. There is a second dimension to the expansion of the number of unions with access to enter for discussions which arises from the Fair Work system itself and the process of award modernisation. In many industries different unions were party to awards applying to different industry participants depending on the geographic operation of the particular award. Similarly, state awards (now NAPSAs) might have different (state) unions party to them than equivalent federal awards and sometimes NAPSA "coverage" demarked segments of an industry. Potentially all of these unions will be brought together by the process of modernisation.

Recommendation

ABI strongly recommends that scope of union RoE should be confined to historical union coverage, recognising existing demarcation and/or the recognition of any unions bound by an enterprise award or collective agreement. In the longer term Fair Work Australia, or the Department, should be given the task of rewriting union eligibility rules in consultation with affected parties.

Access to employee records

13. In the case of a suspected breach of the Act or industrial instrument, the WR Act allows an eligible permit holder to enter the premises of the employer and inspect any union member records relevant to the suspected breach[5]. In order for a permit holder to gain access to non-member records, the permit holder must make an application to the Commission[6]. This requirement provides balanced and vital protection for the privacy of non-member records and respects the employee's decision to not be a member of that union.

14. The current draft of the FW Bill deprives non members of this current provision. Clause 482(1)(c) of the FW Bill requires "the occupier or an affected employer to inspect, and make copies of, <u>any record or document relevant to the suspected contravention</u>", i.e. records relating to union members and non-members are treated alike for the purposes of this provision[7].

15. This provision significantly expands union rights and is not reflective of ALP policy prior to the 2007 Federal Election; as such it is inappropriate.

16. ABI accepts that unions should be able to inspect records of a union member in relation to a suspected breach, as a part of their broader capacity as the chosen representative of the employee union member. By the same token, the general capacity to inspect records of non-member employees, for whom the union is not the employee's chosen representative, is completely inappropriate, open to abuse by permit holders, and in turn may encourage breaches of freedom of association. This general access has the capacity to be abused by unions seeking to expand their membership and in demarcation disputes between unions.

17. ABI contends it is not an appropriate function for a union to represent employees who have not chosen that union as their representative or to inspect their personal details, including in the case of a suspected breach. Rather, it is and should be the independent umpire, Fair Work Australia (FWA) which is disinterested, that has the role to ensure that

[5] WR Act at s. 484(4)
[6] Id at s. 448(9) & (10)
[7] FW Bill at cl 482(1)(c)

employees are receiving their due entitlements under legislation and industrial instruments, and which should have equal access to all employee records.

18. A union believing that access to non-member records is necessary for the proper investigation of a suspected breach affecting its members is always able to call upon FWA which is able to investigate suspected contraventions. This is the preferred position which respects employee decisions as to membership. In the event this is perceived to be a retraction from the current situation the current rules could be reinstated, requiring FWA to issue a permit for access. Failing that, a union permit holder should only be permitted access to inspect non-member records with the express, written permission of each and every non-member employee whose records it wishes to inspect.

Recommendation

ABI's recommendation is that union access to records should be confined to its proper members, or at least, that the Government amend the Bill to insert provisions similar to those which currently apply under the WR Act requiring a permit holder to seek an order from FWA before inspecting non-union member employee records[8].

ABI's secondary recommendation is that the Government amend the Bill to insert a provision to ensure that in cases where the permit holder wishes to inspect non-member records, the express, written permission of each employee whose records it wishes to inspect must be provided.

[8] WR Act at s. 448(9) & (10)

19. WorkChoices introduced a number of provisions that deal with the circumstances in which an industrial instrument may or may not transfer, and that regulate the consequences of the transfer of an industrial instrument from one business to another when a transmission of business occurs. Over time, including with the passage of the WorkChoices amendments, the rules concerning the transfer of instruments have become more comprehensive and complicated.

20. However, the WorkChoices provisions rely upon, and do not disturb the tests set out in the prevailing case law concerning when a business or part of a business is transmitted; the High Court decisions in *PP Consultants* and *Gribbles*[9]. In other words, the WorkChoices transmission of business provisions do not seek to define when a transmission of business occurs, but rather what happens to the industrial instruments after transmission occurs.

21. There are two competing interests which need balancing when considering a transmission where one or more employee follow the business. The first is the operational needs of the transmitting business. The second is protection of employees' conditions, particularly against sham transmissions designed to avoid rights.

22. Contracting out aspects of a business which are more efficiently done by another (because of specialisation, economies of scale or different technology) is an important flexibility which enables individual businesses to adapt, survive, change course and expand into new areas of activities. This dynamic also allows new specialist businesses to establish with the overall economic benefit that this entails. Buying and selling businesses has little economic benefit unless it leads to productive improvements.

23. ABI contends that the current WR Act provisions have established strong protections for employees although they are excessively complex and easily open to technical breach. One key issue is whether employees affected by a transmission actually do transfer to the new employer. This is not only a question of whether the employee wishes to enter the new employment but also whether it is offered in the first place.

24. Part 2-8 of the FW Bill deals with what is now termed "transfer of business". The FW Bill significantly recasts the concept of transmission of business, overturning the tests set out in *PP Consultants* and *Gribbles*, in addition to altering the application of a transferring instrument with respect to spread and longevity.

25. The Government made no policy statements about transmission of business prior to the 2007 Federal Election. However, its policy focused strongly on the importance of collective bargaining at the level of the enterprise, noting that "…enterprise level

[9] *PP Consultants Pty Ltd v Finance Sector Union of Australia* [2000] HCA 59 (PP Consultants) and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9 (Gribbles)

bargaining enables the development of fair and flexible employment arrangements that are tailored to suit the needs of an individual business and the needs of employees. Collective enterprise bargaining fosters team work, employee involvement and commitment to the workplace. It improves loyalty and morale, lowers labour turnover which in turn delivers better performance and productivity”[10].

26. The concept of transfer of business as it is outlined in the FW Bill is antithetical to the concept of true enterprise bargaining. The idea that employment arrangements should be negotiated at an enterprise level between an employer and a group of employees to suit their individual needs, fundamentally conflicts with the idea that a “new employer” caught up by a transfer of business be bound indefinitely by an arrangement reached between two parties wholly unconnected to the employer, and an outcome upon which the employer was unable to exert any influence. The suitability of the FW Bill provisions must also weighed against an extended safety net created by the National Employment Standards and Modern Awards which provide significant entitlements to employees. The balance of interests must also be considered against the background of the significant expansion of the general protections.

27. Particularly in the current economic environment, it is important that any transfer of business regime appropriately balance the protection of employees who may be vulnerable with the facilitation of a flexible environment that encourages optimum efficiency and business competitiveness. The transfer of business provisions in the FW Bill run the risk of undermining competition by saddling successive contractors or businesses with the same inefficient practices and industrial arrangements, and act as a serious disincentive to the employment of staff of the “old employer”. Inhibiting existing businesses from adapting to market needs disadvantages them against new entrants, or increases the likelihood that businesses will be closed down rather than traded, causing significant trauma and disruption to employers, employees and the economy at large.

Extension of Definition

28. Clause 311 of the FW Bill defines a transfer of business as taking place when an employee is terminated by the “old employer”; the employee is employed by the “new employer” within three months; the employee performs substantially the same work with the new employer; and there is a “connection” between the old and new employer. A “connection” can be any one of the following:

    - In accordance with an arrangement between the old and the new employer (or their associated entities), the new employer (or an associated entity) owns or has the beneficial use of tangible or intangible assets which were owned or used by the old employer (or an associated entity) that relate to, or are used in connection with the transferring work;
    - The old employer outsources work to the new employer;

[10] Australian Labor Party, *Forward with Fairness*, April 2007, at pg 13

- The new employer insources (ceases to outsource) work from the old employer; or
- The new employer is an associated entity of the old employer[11].

29. Clause 312 of the FW Bill defines a transferable instrument as an enterprise agreement, a workplace determination or a named employer award[12].

30. ABI has serious concerns about the expansion of the criteria for transfer of business set out in the FW Bill, notably the focus on the transfer of "work" rather than a transfer of business, and the "connection" test set out in cl. 311(3)-(6), which go significantly beyond the tests currently set out in the existing case law.

31. The asset test set out in cl. 311(3) can be taken as an example of particular concern; it allows an extremely tenuous connection between the old and new employer to result in a transfer of business. Under the tests set out in *PP Consultants* and *Gribbles*, in the first instance, for a transmission of business to take place, the nature of the business of the old and new employer need to bear substantially the same character (*PP Consultants)*[13], in the second instance there must be a transfer of tangible or intangible assets (*Gribbles)*[14].

32. Under the tests set out in the FW Bill, there need be no substantial connection between the old and new employer, rather the employee merely needs to perform work that is substantially the same, which may be relatively easy to establish (for example, in a generic administrative role). This means, for example, that if an "old employer's" business is closed and there is an arrangement to sell premises or IT equipment between the "old" and the "new" employer (which could be reasonably said to relate to the transferring work) the asset connection test would establish a transfer of business, without any further connection between the "old" and "new" employer required. For this sequence of events to give rise to a transfer of instrument is inappropriate.

Recommendation

That the Government review and reconsider the concept of transfer of business as outlined in cl. 311 of the FW Bill, particularly the focus on "transfer of work" and the "connection" test.

[11] FW Bill at cl 311
[12] Id at cl 312
[13] *PP Consultants* at [15] per Gleeson CJ, Gaudron, McHugh and Gummow JJ
[14] *Gribbles* at [39] per Gleeson CJ, Callinan and Heydon JJ

Termination of Transferring Employee

33. Clause 311 defines a transferring employee as one who has terminated from the "old" employer and is employed by the "new" employer within three months[15]. This captures employees whose termination from the "old" employer is totally unrelated to the transfer of business and whose employment with the "new" employer within three months could be totally fortuitous. ABI can see no sound policy reason for such a quixotic outcome, the transmission protections, whatever their balance, should be confined to those employees of the "old" employer who are directly impacted by the transfer.

Recommendation Subject to the outcome of the previous recommendation that the Government ensure that transmission protection is limited to employees whose employment by the "new" employer is a result of the transmission and arises as a result of the arrangement between the two employers.

Duration of Transfer

34. Clause 313 stipulates that where there is a transfer of business, the transferred employee is to be covered by the transferable instrument. While that transferable instrument covers the transferred employee, no other agreement or named employer award that applies to the new employer can apply to the transferred employee[16].

35. There are two key concerns raised by this provision. The first is the ongoing nature of the transfer of the industrial instrument. Under the WR Act, when an award or agreement does indeed transfer, the 12 month cap limits the length of time which an employer is saddled with a set of terms and conditions they were not a party to negotiating, and that the employer may not feel suit the requirements of their particular business. The WR Act also stipulates that where an agreement that covers the affected employee comes into operation after transmission takes place, the transmitted instrument ceases operation and the new agreement applies to the employee.

36. By contrast, cl. 313 provides no limitation upon the length of time a transferred instrument may operate, and it is not clear how a transferred employee is to eventually transition to the new employer's arrangements. At best it is inferential that when the transferable instrument is replaced otherwise in accordance with the Bill it would cease to apply. In the case of enterprise agreements (probably the most likely form of transferable instrument) it would mean that a later enterprise agreement applying to the "new"

[15] FW Bill at cl 311

[16] Id at cl 313

employer and the employee's work would apply after the nominal expiry of the transferring agreement. However, as noted above it is not clear that this is the case.

37. A named employer award would appear to continue to cover the transferring employee until rescinded or varied by FWA. This seems totally inappropriate, as a matter of course and especially inappropriate after the named employer award has ceased to apply because of the operation of an enterprise agreement with the new employer. While ABI supports the retention of named employer awards into the new modern award system (based on the existing system of awards and NAPSAs) it does not support the fragmentation of the industry base of the modern award system.

Recommendation That the Government insert provisions to both limit the operation of a transferable instrument to no longer than 12 months; or for a transferable instrument to cease operation once a new enterprise agreement that covers the employee comes into operation, whichever occurs sooner.

Extension of Instrument beyond Transferring Employees

38. Clause 314 stipulates that where a transfer of business has taken place, and no other enterprise agreement or modern award covers the new employer in relation to the transferring work, then the transferable instrument will apply to any new (non-transferring) employee who the employer engages to conduct the same work[17].

39. The application of a transferable instrument to a new employee is inappropriate; the introduction of this provision does not appear to be underpinned by any cogent policy consideration. The new employee would never have been a party to the transferable instrument, as such it does not represent an appropriate protection of the employee in the maintenance of their former conditions. Properly, existing employees doing the same work are not covered by the transferable instrument, and nor should unrelated new employees.

Recommendation That the Government confine the transfer of instruments exclusively to transferring employees as recommended above at Paragraph 33.

[17] Id at cl 314

Agreement Processing and Approval

40. Clause 186(2)(d) requires that in order to approve an enterprise agreement, for Fair Work Australia (FWA) must be satisfied that it passes the better off overall test (BOOT)[18]. The BOOT requires that FWA be "satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the modern award applied to the employee"[19].

41. FWA is also required by cl. 186(2)(c) to be satisfied that the agreement does not contain terms that exclude or detrimentally modify any of the National Employment Standards (NES)[20].

42. The BOOT as outlined in cl. 186(2)(d) appears to mean that an enterprise agreement cannot be approved unless FWA conducts a test on each and every employee to be covered by the agreement, and finds that each and every employee is better off. Such a requirement has never been a feature of any of the various tests that have been applied to statutory agreements since their inception, even prior to 1996. Such a requirement would add an unacceptable level of complexity and red tape to the agreement making process, particularly considering the agreement would have already passed through a negotiation and approval process which requires employee approval.

43. ABI acknowledges that the Explanatory Memorandum to the Bill states with respect to the BOOT that "it is intended that FWA will generally be able to apply the better off overall test to classes of employees. In the context of the approval of enterprise agreements, the better off overall test does not require FWA to enquire into each employee's individual circumstances"[21]. However, Courts and Government agencies are required to apply statute, not explanatory memorandums. The failure to clarify the intended application of the BOOT within the text of the legislation will cause unnecessary ambiguity and complexity.

Recommendation

ABI recommends that within the text of cl. 193, the Government clarify the intent that the BOOT will not be applied to each and every employee to be covered by an agreement, but rather to classes of employees.

[18] Id at cl 186(2)(d)
[19] Id at cl 193
[20] Id at cl 186(2)(c)
[21] Explanatory Memorandum to the Fair Work Bill 2008 (Ex Mem) at para 818

44. Clause 54 of the FW Bill states that an enterprise agreement approved by FWA commences operation 7 days after the agreement is approved or a later day as specified within the agreement – whichever is the later[22].

45. ABI considers that the appropriate date of commencement of operation for all agreements is the lodgement date, or such later date as is specified by the terms of the agreement. There is no information publicly available that details how long some employers and employees have waited/are currently waiting to have their agreement assessed under the No-Disadvantage Test and even the Fairness Test, however anecdotal evidence suggests that some agreements have been in the queue for many months. This creates uncertainty and inconvenience, and is clearly not ideal.

46. The explanatory memorandum states that "it is intended that FWA will usually act speedily and informally to approve agreements, with most agreements being approved on the papers within 7 days"[23]. This can be relied upon as no more than an aspirational target. Recent history suggests that agreement processing generally takes much longer than that.

47. It is an undesirable industrial outcome for the commencement of a negotiated and approved settlement to be indefinitely deferred until 7 days after approval is received. It is also undesirable and unfair for an employer to pay the new rates under an agreement without being able to implement it. Protracted delays will also undermine the credibility of the agreement making system in the eyes of both employers and employees.

48. Given there are viable corrective mechanisms available to ensure that the minority of agreements that do not pass the BOOT are rectified and appropriate compensation is accorded, it would be more appropriate to allow agreements to operate if not from lodgement, a prescribed time soon after.

Recommendation

That the Government amend cl. 54 of the FW Bill to stipulate that if not approved within the 7 days alluded to in the Explanatory Memorandum, an enterprise agreement commence operation on an interim basis. If the agreement is later found to have failed the BOOT, FWA should have the capacity to ensure the agreement is rectified, and appropriate compensation afforded.

[22] FW Bill at cl 54

[23] Ex Mem at para 768

Australian Business Industrial

Agreement Content

49. Along with provisions about matters pertaining to the relationship between the employer and employees; deductions from wages; and how the agreement will operate, cl. 172(1) of the FW Bill stipulates that enterprise agreements may also contain matters about the relationship between the employer and unions[24].

50. This means that many of the matters that are currently prohibited content under the WR Act[25], such as union rights in dispute settlement unless the union is the employees' chosen representative, terms with respect to right of entry etc. are capable of inclusion in an enterprise agreement, and industrial action can be taken in support of their inclusion.

51. ABI is concerned that these provisions will facilitate distractions away from the proper purpose of bargaining, that is enterprise level productivity improvements. Rather, agreements should deal primarily with issues related to the relationship between the employer and employees.

Recommendation ABI recommends that the Government amend cl. 172(1) to delete sub-sections (b) and (c).

[24] FW Bill at cl 172(1)

[25] *Workplace Relations Regulations 2006* at Reg 8.5

52. Part 3-2 of the FW Bill deals with unfair dismissal. ABI recognises that the removal of the unfair dismissal small business exemption was a feature of the ALP's policies prior to the 2007 Federal Election.

53. However, ABI has serious concerns that the FW Bill unfair dismissal provisions will be of significant detriment to small business employment. SMEs in particular, will be averse to engaging employees in an environment where they consider the hurdles to be overcome in the event of a separation, expose the business to excessive administrative costs and financial risks.

54. ABI also has some concerns with respect to the practical application and operation of the provisions.

Definition of Genuine Redundancy

55. Clause 389(1)(a) defines genuine redundancy as "the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise"[26].

56. ABI has concerns with respect to what the practical application of the phrase "because of changes in the operational requirements of the employer's enterprise".

57. The draft legislation does not delineate the meaning of "operational requirements"; it is not clear how such a phrase would be interpreted by Fair Work Australia. The word "requirement" seems to denote that a genuine redundancy may not arise from a voluntary decision on behalf of the employer, for example; to close down the business to retire, travel or take up caring responsibilities, as such a decision may be completely unrelated to any circumstance within the enterprise.

58. ABI considers that the phrase "because of changes in the operational requirements of the employer's enterprise" will cause uncertainty and confusion for employers and employees and as such should be reconsidered for inclusion in cl. 389(1)(a).

Recommendation The Government should redraft cl. 389(1)(a) of the FW Bill to read "the person's employer no longer required the person's job to be performed by anyone".

[26] FW Bill at cl 389(1)(a)

59. Part 3-1 of the FW Bill deals with General Protections.

60. Currently, the WR Act provides that there are prohibited reasons for termination which give rise to unlawful termination; including but not limited to temporary absence from work because of illness or injury; membership or non-membership of a trade union; and discriminatory grounds such as race, colour, gender, sexual preference, age, religion etc.[27].

61. In addition, a number of actions, such as dismissing, refusing to employ, injuring an employee in his/her employment, altering an employee's position to his/her detriment, discriminating against the employee in his/her terms of employment, or threatening any of these actions, are, if undertaken for a prohibited reason relating to freedom of association, are unlawful[28].

62. These two streams of protections are collated and expanded under the new Part 3-1, General Protections.

63. ABI has a number of concerns about the expansion of the regime and its implementation.

64. Whilst ABI supports the appropriate protection of employer and employee rights in the workplace, there is little evidence to suggest that these rights are currently being abused in any significant or systematic manner, to the extent that the regime must be expanded and new rights should be created. The creation of a new, expanded General Protections regime does not appear to be justified, or a proportional response to any perceived risks.

Duplication, Jurisdiction Shopping & Cherry Picking

65. The introduction of an expanded General Protections regime also creates significant duplication with other legislation. Many of the offences created by Part 3-1 are also unlawful under legislation such as the *Sex Discrimination Act 1984* (Cth) and in NSW, the *Anti-Discrimination Act 1977* (NSW). Legislative duplication creates uncertainty, inefficiency and unnecessary red tape, and where possible it should be avoided.

66. Such duplication also provides an opportunity for individuals seeking to bring an action to 'jurisdiction shop' and/or 'cherry-pick'. That is, unless statutory limitations are also introduced, the same applicant can bring about more than one action in more than one jurisdiction with respect to the same matter. This should also be avoided at all costs. If an applicant brings an action about a particular matter in one jurisdiction; regardless of

[27] WR Act at s. 659(2)

[28] Id at s.792-793

the outcome, they should not be able to apply for remedy under another piece of legislation.

Recommendation That the Government mitigate the effects of duplication between the FW Bill and State and Federal discrimination legislation, by introducing statutory limitations against bringing the same matter forward on multiple occasions under multiple pieces of legislation.

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