FEDERATION OF ETHNIC COMMUNITIES' COUNCILS OF AUSTRALIA

(WITH ASSISTANCE FROM THE FECCA WOMEN'S COMMITTEE)

SUBMISSION TO

SENATE EMPLOYMENT, WORKPLACE RELATIONS

AND EDUCATION LEGISLATION COMMITTEE ON

THE FAIR WORK BILL 2008

Contents

Overview

1. The Federation of Ethnic Communities Councils of Australia (FECCA) is the national peak body representing Australians from culturally and linguistically diverse (CALD) backgrounds. We advocate, develop policy and promote issues on behalf of our constituency to government and the broader community.

2. The submission was developed through consultation with the FECCA Women's Policy Committee (the Women's Committee) which concentrates on issues affecting women from CALD backgrounds. One of its priorities is to monitor, safeguard and promote the interests of such women in the workplace.

3. FECCA welcomes this opportunity to make a submission to the Senate Committee. The primary focus of the submission is on the interests of CALD women in the workplace and in particular the effect, on such women, of enterprise agreements. We also point to some drafting anomalies which appear to require attention.

4. We note that there is some debate concerning the compatibility of the proposed laws with international conventions. Although that is not the focus of this submission, we note, for the record, our view that Australia should respect its international obligations, whether in relation to workplace laws or any other field of activity.

Women and the Workplace

5. It is recognised that 'the capacity for parties in an employment relationship to choose a form of agreement-making that best suits their needs is closely related to their ability to genuinely bargain'[1]. It is also recognised that women are a vulnerable sector of the labour market, whose pay, entitlements and job security tend to be low, even where enterprise bargaining is available [2].

6. Balancing work and other aspects of life is especially difficult for women, who tend to shoulder a greater share of carer responsibilities, and who tend to be primary care givers.

[1] See for example the submission of Prof A Preston to the 2005 Senate Employment, Workplace Relations and Education Reference Committee Enquiry into Workplace Agreements at p 7

[2] See for example the submission by M.Baird and P. Todd , to the 2005 Senate Employment, Workplace Relations and Education Reference Committee Enquiry into Workplace Agreements at pp1,8.

7. There are various provisions in the *Fair Work Bill 2008* which assist women, including CALD women, in so far as the provisions seek to prevent discrimination[3] , to prohibit the inclusion, in modern awards and enterprise agreements, of discriminatory provisions[4] and so on.

8. Some of these provisions replicate the substance of existing provisions in the *Workplace Relations Act 1996* , though there is some fortification of protection in certain areas. While such provisions are welcome and are expected to contribute to a more equitable workplace, we submit that there are compelling reasons for the pre-approval phase of the enterprise agreement making process to be revised, in such a way as to take into account the interests of women. Our concern is illustrated when one considers the shift from the 'pre-WorkChoices' position to the one proposed by the Bill .

Pre-'WorkChoices' Provisions

9. Prior to the introduction of the "WorkChoices" amendments[5], the *Workplace Relations Act 1996* stipulated that a collective agreement could not be certified unless an explanation of its terms had taken place :

> *"in ways that were appropriate, having regard to the person's particular circumstances and needs. An example of such a case would be where persons included :*
>
> *(a) women*
>
> *(b) persons from a non-English speaking background or*
>
> *(c) young persons"*[6] (emphasis added)

10. This provision was a casualty of the 'WorkChoices' amendments. The *Fair Work Bill 2008* goes part of the way to restoring this provision, but unfortunately, does not reflect the interests of women.

The Proposed Provisions

11. The *Fair Work Bill 2008* does not restore the rights of women to receive a pre-agreement making briefing of the type described above. It requires that an employer must take all

[3] for example, cl 3 (e) – objects of the Act; Part 2-7 Equal Remuneration; s 351 –protection against discrimination
[4] cl 153, 195
[5] *Workplace Relations (Workplace Choices) Act 2005*.
[6] s 170LT (7) Workplace Relations Act 1996, as it was prior to the WorkChoices amendments

reasonable steps to ensure that '*the terms of the agreement and the effect of those terms*' are explained to the employees and that *'the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees'* .[7] However, examples of the kinds of employees whose 'circumstances and needs' are to be taken into account for this purpose are now listed as:

> *"(a) employees from culturally and linguistically diverse backgrounds;*
>
> *(b) young employees;*
>
> *(c) employees who did not have a bargaining representative for the agreement.[8]"*

12. In other words, women are no longer included in the categories of employees whose 'circumstances and needs' are to be taken into account. It is also worth noting that compliance with this provision is one of the factors taken into account by Fair Work Australia in deciding whether there has been '*genuine agreement'*[9], so it is of central importance in the scheme of agreement-making.

The Problem

13. While acknowledging that the categories of employee in cl 180 (6) are examples only (and can therefore be supplemented), we consider, for reasons set out below, that "women", should once more be positively specified as a group whose circumstances and needs are to be taken into account. We do not consider that the general provisions prohibiting discrimination in agreements[10] or any of the other 'anti-discrimination' provisions mentioned earlier in this submission are sufficient to ensure that women's circumstances and needs are considered prior to the making of an agreement.

14. We are also concerned that omission of the reference to 'women', in circumstances where 'women' were once a nominated category, in almost identical circumstances, will be seen as a deliberate shift in emphasis. We fear that it may be interpreted as a message from the legislature that the circumstances and needs of women are no longer as important as they once were or that employers no longer need to consider their interests to the same

[7] cl 180(6)
[8] cl 180(6)
[9] cl 188(a)(i)
[10] cl 195 Fair Work Bill 2008

extent. If no amendment is made to include women in the categories under cl 180 (6), it is unlikely that employers will take the initiative to incorporate an extra step into their obligation to explain the agreement.

15. The net effect is that an onus will be placed on women (an already vulnerable sector of the workforce) to insist on their right to have '*the terms of the agreement and the effect of those terms*' explained to them in an appropriate manner. This places an unnecessary and substantial burden on women and requires them, in effect, to self-nominate as a relevant category. For most women and in particular for CALD women, we consider this an unrealistic and onerous expectation.

The 'Manner of Explanation' and the 'Particular Circumstances and Needs' of Women

16. While it should go without saying, we take this opportunity to note that there are instances where women may have a particular need to have agreements explained to them in "*an appropriate manner*". There are also instances where women's "*particular circumstances and needs*" need to be considered. These include cases where, for example:

    a. meetings to discuss the agreement may be scheduled for times which are more difficult for women to attend (for example, before or after their usual working hours); and/or

    b. there is a small number of women in a male-dominated workplace, with different industrial interests from those of men, so the impact of the agreement on them may need to be explained at a separate time or even at separate venue; and/or

    c. an enterprise agreement stipulates hours of work or shifts which may have adverse implication for employees with parental, family or carer responsibilities (typically, women), so the operation of these aspects of the agreement may need to be clarified; and/or

    d. there is a pay equity issue in the workplace and the agreement perpetuates this ; and/or

    e. certain benefits under the agreement (for example, training) are provided within a framework which is more accessible to men than to women.

17. The common element in each such example is that women's interests risk being submerged, either because the workplace is male-dominated or because traditional approaches to workplace negotiation perpetuate past practices which discriminated on the

basis of gender. The danger is that, unless the legislation nominates women's interests as a focal point in the pre-approval process, women's concerns will never become part of mainstream industrial negotiation.

18. For completeness, we note that it cannot be assumed that the disadvantages faced by CALD women will be served simply because of the reference in cl 180(6) to *"employees from culturally and linguistically diverse backgrounds".* The needs of CALD women will not necessarily correlate to the needs of CALD men any more than the needs of women, as a general class, correlate to the needs of men, as a general class. As noted above, most women face certain barriers in the workplace. CALD women face not only these barriers but also additional barriers, because of their cultural backgrounds and life experience. The proposed provisions do not currently cater for this intersection of disadvantage. The likelihood of CALD women insisting on an explanation of the agreement, in a way appropriate to them, is exceedingly remote.

The Obligations of the General Manager of Fair Work Australia towards Women

19. We are fortified in our submission by the fact that subsequent parts of the *Fair Work Bill 2008* appear to be alert to the fact that, in reviewing the impact of enterprise bargaining, women are a sector whose situation requires special monitoring. The Bill provides that the General Manager of Fair Work Australia must review the effects of the making of enterprise agreements at 3 yearly intervals[11]. In doing so, the General Manager must review the effects that such bargaining has had during the period on the employment(including wages and conditions of employment) of :

    a. *women;*
    b. *part-time employees;*
    c. *persons from a non-English speaking background;*
    d. *mature age persons;*
    e. *young persons;*
    f. *any other persons prescribed by the regulations*.(emphasis added)

[11] cl 653(1) Fair Work Bill 2008

20. While welcoming this initiative, we also consider that, if the General Manager of Fair Work Australia has to monitor the effect of bargaining on women after agreements have been made, it would be logical for those agreements to be appropriately explained to women in the pre-approval process as well.

Drafting Anomalies

Use of the term "CALD"

21. As a matter of drafting consistency, we also suggest that the reference to "*persons from a non-English speaking background"* in cl 653(1)(c) be amended to read *"employees from culturally and linguistically diverse backgrounds".*

Discrimination in Workplace Determinations

22. While the Bill provides that modern awards and enterprise agreements must not contain discriminatory provisions[12], it is unclear whether this applies also to workplace determinations, where in cases of compelling circumstances, such as damage to the economy, danger to life, safety or welfare, serious breach of bargaining orders etc, Fair Work Australia (FWA) can intervene to make a binding determination to resolve a dispute.

23. Workplace determinations should not be permitted to contain discriminatory provisions and we suggest that an appropriate amendment to clarify this might be needed.

Conclusion

24. While we welcome much of the content of the Fair Work Bill 2008, we consider that cl 180(6) should be amended to include women as a category who require particular attention. Such an amendment would restore, to women, a benefit which they enjoyed prior to the 'WorkChoices' amendments, would maintain a focus on the interests of women in the bargaining process and would be consistent with the goals of the triennial review of agreements.

[12] cl 153 for modern awards. 186(4) and 195 for enterprise agreements