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

NUW NSW and QLD State Branch Submission

ABSTRACT

"By seeking to sandbag the influence and operation of existing Federal organisations within the system over the historical existence, role and culture of State registered entities, this Bill will encourage many organisations and employees to "go rogue" and seek to circumvent the limitations and impositions of the Act by seeking organisational and operational models outside those sought to be limited by this Bill".

Glossary

ACTU: ***Australian Council of Trade Unions***

AEC: ***Australian Electoral Commission***

FWA: ***Fair Work Australia***

FWB: ***Fair Work Bill 2008***

IRA: ***Industrial Relations Act 1999 (Qld)***

IR Act: ***Industrial Relations Act 1996 (NSW)***

NES: ***National Employment Standards***

NUW: ***National Union of Workers***

WHS: ***Workplace health and safety***

Introduction

This submission is tendered on behalf of the State branches, as identified herein, of the Federally registered National Union of Workers and should be read in conjunction with attachment A (the submission previously lodged on the Fair Work Australia Bill).

This submission seeks to address specifically the matters in the Transitional Bill impacting on the operation of historically State registered entities within the new national system.

This submission acknowledges the Queensland Council of Unions submission on this Bill and fully endorses the scope and recommendations of that submission.

This submission also notes the submission of the Australian Council of Trade Unions on this Bill and refutes that submission and its recommendations with respect to the matters contained herein. This submission also questions the validity of any claim the ACTU submission may make as to being representative of the views of affiliates and or State and Territory Labor Councils. Specifically, we question the ACTU submission and any claim it makes with respect to their submission representing the views of registered organisations affiliated with the Trades and Labour Council of the A.C.T.

Matters pertaining to this Bill have not been addressed to those organisations operating with the singularly affected Territory jurisdictions, and we are aware that the concerns of the A.C.T. Trades and Labour Council and affiliates within the A.C.T. have not been incorporated within the ACTU submission nor has that submission been endorsed by affiliates within that jurisdiction.

Evidence provided to the Senate employment and education committee on 19 February on the Fair Work Bill illustrates the matters of concern within the Territory jurisdictions.

Registered organisations

The Bill preserves Schedules 1 and 10 of the WR Act and converts them into the *Fair Work (Registered Organisations) Act 2009*.

The Transitional Bill seeks to consolidate the evolution of the State and Federal systems into an integrated single system and seems intent on smashing the historically harmonious inter-relationship between the two systems that has evolved since 1904.

The previous transfer of the Victorian industrial system into the Federal jurisdiction some years ago appears a model of sober consideration and mitigation of impacts in comparison to this blunt approach presented to the Parliament in the current Bill.

This submission expresses a grave concern about the negative consequences of this Bill, and, we warn that there will be inherent threats to employers and employees as the dislocation of co-existing systems gives way to a "shotgun marriage" into the Federal Jurisdiction with little regard to the impacts at the functional level.

This Bill ignores the strong incentive that will be created within the new system for participants to seek to operate outside the system altogether and utilise the underlying

opportunities to operate in an unregistered capacity free from the impositions and restrictions on registered organisations.

By seeking to sandbag the influence and operation of existing Federal organisations within the system over the historical existence, role and culture of State registered entities, this Bill will encourage many organisations and employees to "go rogue" and seek to circumvent the limitations and impositions of the Act by seeking organisational and operational models outside those sought to be limited by this Bill.

This concern also raises the need for some clarity as to the impacts that will be envisaged to take place at the completion of the transitional period to organisation reliant on continued existence through the mechanism established for a transitional period only. Many questions are asked by these proposals, yet few answers are available.

Recommendation 1: Greater clarity should be provided in the legislation as to the future operation and existence of organisations after the expiry of the transitional period.

6.1 State and federal organisations

Reference is made to the ACTU and QCU submission regarding the proposal for transitional recognition of State-registered unions in the federal system.

In the ACTU's submission it is suggested that the concept of a federal counterpart (as defined in sch 22 cl 55) is too narrow. By using two examples they then try to define as to why it is narrow.

The ACTU submission begins with the Australian Workers' Union of Employees, Queensland ('AWUEQ') "State Union" as the counterpart of the Australian Workers' Union ('AWU') "Federal Union".

More importantly, their second example is in the case of the National Union of Workers Industrial Union of Employees Queensland ("NUWQ") "State Union", which is separate, but aligns with the Federal NUW nationally (inaccurately abbreviated to the NUWIUEQ in the ACTU submissions).

The use of the NUW in Queensland as representative of their views is both fallacious and dishonest. It is also stark that the ACTU drafters sought no clarification of the matters they refer to with Queensland representatives of the NUW (specifically the Federal Branch Secretary of the Queensland NUW) and were ignorant of current matters before the courts pertaining to just such matters of interpretation.

To quote the ACTU submission, " The second example is the case of the National Union of Workers Industrial Union of Employees Queensland ('NUWQ'), which the union movement regards as the counterpart of the National Union of Workers ('NUW'). The two unions currently have identical officers, but a proposed restructure of the federal union will see a change in the identity of the federal officers who are responsible for the union's affairs in

Queensland. In our view, this alteration should not result in the NUW losing its status as the federal counterpart of the NUWQ".

We submit that this element of the ACTU submission is both a dangerous and illegitimate one as it purports to claim a view on behalf of the "union movement" that has not been endorsed as such, is subject to matters of disputation and legal processes and may or may not be resolved in a manner inconsistent with ACTU policy.

Whilst this submission does not purport to formally represent the view of the NUWQ, it is a matter of record that the views of the ACTU on this matter do not reflect the views of NUWQ, its executive or membership.

Furthermore, the ACTU's submission fails to recognise the NUWQ's principle historical and current coverage in the majority of the workplaces over the NUW QLD Branch, as a result of the industrial landscape in Queensland.

Recent views on a referendum regarding the ongoing existence of the QLD, SA and WA branches of the NUW is a matter currently being considered by the registrar and has been subject to disputation regarding the registration of proposed new rules.

Furthermore, the two unions currently have identical officers, but as raised within the ACTU submission, the proposed restructure of the federal union will see a change in the identity of the federal officers who are responsible for the NUW ***and not the NUWQ's*** in Queensland.

If this is to be the case then the historical relationship between both Unions needs to be defined. In the case of the NUWQ it has always been reasonable for work undertaken in the State Industrial Relations system, since 1947, arranging from the creations of awards, the review and modernisation of awards, dealing with certified agreements, dealing with disputes and unfair dismissals, with very little assistance from the NUW "National Office".

Whereas the NUW QLD Branch of the "Federal Union" has always received assistance for services rendered by the NUW National Office, this is a result of sustentation fees paid. This results in most of the industrial work done for the branch at a national level. This included creations of awards, the review and modernisation of awards, but only to extent of having application in Victoria and very rarely in Queensland as a result of common rule awards, certified agreements "nationally", dealing with disputes and unfair dismissals "national companies".

To this extent the National Office "NUW" has never fully understood the Queensland Industrial Relations environment, in regards to the application of awards to specifically callings vs. eligibility, which is unique to Queensland. Such a lack of understanding would only result in demarcation disputes with other Unions and employers.

Also a recent gerrymandered referendum wherein a majority of Victorian NUW members voted and sought to determine the ongoing future of the other State branches,

despite a vast majority of members in the affected states voting to retain their State branches should not be viewed as an endorsement of the ACTU view of its world.

The ACTU in its submission does not address nor recognise the fact that the vast majority of members within the states proposed to have their state branch structures abolished, voted against such a proposal.

In fact the vote to remove such branches was in effect carried by the Victorian membership of the national union who where unaffected directly by the proposed changes. A majority "yes" vote to close the state branches was only achieved because approximately 54% of the national membership of the NUW at the time of the ballot, were members of the Victorian branch.

The use of the NUW within the ACTU submission is an appalling piece of adventurism into a domain they seemingly have no understanding of.

We reject the ACTU submission in its entirety on this matter and we strongly endorse the proposal for transitional and ongoing recognition of State-registered unions in the federal system. We also believe this view is maintained by the vast majority of unionised employees and members of unions at the State level.

Recommendation 2: The Bill should retain and consolidate the transitional and ongoing recognition of State-registered unions in the federal system.

Where there may be uncertainty as to wether a State-registered union does, or does not, have a federal counterpart, and the Bill proposes that a court determine this.

We endorse this view strongly, in that recognises the singular capacity of a court of competent jurisdiction to consider and interpret the myriad of historical and legally predicated issues that have evolved organisations to their current state of being. It also allows proper recognition of the scope of considerations to be made when determinations will be made that may affect directly the assets and operations of member based organisations.

Recommendation 3: Courts retain the right to determine if a State registered union has a federal counterpart.

In our view, the abolition of any State Branch of a union should bring into question the status of that Federal entity to operate within that jurisdiction and claim to be representative of employees within that State.

Recommendation 4: The Bill should limit the capacity of a Federal organisation from operation or existence within any State or Territory where they do not have a State or Territory geographic branch based within that jurisdiction.

More specifically we question the continued claim under this Bill for a registered organisation to remain with its national office operating within a singular State

geographic location and would urge the Parliament to consider amending the Bill to require any "national" registered organisation to have its functional registered office based within the ACT where the majority of other national peak body organisations operate from.

Recommendation 5: The Bill should require a Federally Registered organisation with scope and operations that transcends one or more State or Territory jurisdictions to have their registered national office and associated functions located within the ACT.

This would free the industrial movement of the increasingly myopic "Victorian IR club" view of the world and enable the Parliament and the industrial movement more ready access to each other.

Consistently with the above submission it is contended that it is very important that the requirement in the Bill that, in order to qualify as a Federal "counterpart", the office-holders in the putative "counterpart" must be substantially the same as the office-holders of the State-registered association, be retained in the Act when passed. This would prevent Federal organizations that are not truly reflective of the State association's membership, aims and aspirations being able to rely on the Federal eligibility rule alone to prevent the State association from continuing its independent existence, where that is appropriate.

If that provision is retained there can be no false claims of counterpart status, and no "hi-jacking" of independent State unions by existing Federal organizations under the new system.

Recommendation 6: The Bill must retain the requirement that to qualify as a Federal "counterpart", the office-holders in the putative "counterpart" must be substantially the same as the office-holders of the State-registered association

6.2 Representation orders

The Bill proposes that employers, the Minister, or a union, may apply to FWA for an order that one union is to represent a workplace group to the exclusion of all others. We submit that the ACTU assertion that this provision is not required is at odds with both practical experience and emerging realities within the industrial marketplace.

We do not, however, endorse the view that the FWA should only intervene in a dispute between two federal unions where the dispute is actually harming the employer's business, or affecting the work of employees. This fails to recognise that the organisations are organisations of employees and not of employers.

The provision of the Bill in this area should establish a further test that recognises the views or interests of employees where they believe that a dispute between federal unions harms or has potential to harm the interests of those employees within the effected enterprise.

Recommendation 7: The Bill is amended to provide for the FWA to intervene in a dispute between federal unions where a majority of employees at an enterprise may have their industrial rights and interests damaged or potentially damaged.

It must be stated clearly that where the Bill facilitates existing organisational coverage to be dislocated without the support of a majority of the affected employees, it will fundamentally open up opportunities and incentives for demarcation disputes to erupt between and within industrial organisations.

Also, working through a system that may inhibit the ongoing nature of existing registered entities to viably exist, an incentive will be created that will encourage and give rise to the evolution of organisational and operational models designed to protect the vast array of interests that exist in the industrial landscape. Most particularly if the majority of employees oppose the limitation of an organisation from representation of those employees.

Recommendation 8: We recommend that the Bill be amended so as to clearly establish a closer regard in the operation of this section to the historical role and representational activities of the parties to the dispute. The Bill should also give greater emphasis in this section on the views and or preferences of majority of the affected employees.

This would provide an effective enabling framework for the FWA.

The naive assessment of the ACTU in their submission that FWA should not have a role in this area seems totally ignorant of the emerging impacts arising from the creation of the new modernised awards system and the volatility that this alone will create in the demarcation culture that evolved over many years.

It also seems ignorant of the fact that the State and Federal structures that will be merged as a result of the new awards and the FWA framework will bring new participants and all existing vested interests into one model for the first time and will create inherent instability as these new partnerships will be required to strive for a viable future in a more compressed market place.

An example of the confusion that this will give rise to is the proposed amalgamation of the CPSU with the LHMU and potentially other State Public Service Associations. The concept of "conveniently belong" will no longer apply as a restraint in the demarcation market place as these mixed marriages occur due to political expediency, financial necessity or efforts to expand political ascendancy.

The ACTU submission asserts *"In 1996, the new enterprise bargaining rules allowed one union to bargain in a workplace where another union was present, even if the first union was not a party to any award or agreement that covered the workplace. This did not lead to an outbreak of demarcation disputes, since unions generally respected the de facto demarcations that have built up over a long period of time."*

This view is ignorant of the impact of amalgamations and the slow eradication of the Craft union structure. This period gave rise to greater instability within organisations

rather than between and this now threatens to spill out as the system becomes condensed and the national and state interests get mixed into the pot.

We do not believe that the other remedies within the Act will inhibit the negative impacts of demarcation wars erupting without the capacity of the FWA determinations being made on representation orders.

We must question the nature of the ACTU submission in this area on the following matter, and to quote the perplexing section *"Third, the Fair Work Act is explicitly based on 'enabling … representation at work … by recognising the right to freedom of association and the right to be represented' (section 3(e)). The provisions proposed in the Bill completely undermine this right. They deprive employees who have joined a particular union the right to be represented by that union."*

It is implicit from this section of the ACTU submission that they no longer believe that a union should be constrained to coverage conferred by its constitutional coverage and that a fully competitive market place should exist based on an individual retaining the right to join whatever organisation they may choose.

This would of course fly in the face of many elements of ACTU policy and even their own submission in its efforts to provide greater rights of representation to Federally registered entities rather than historical State organisations. We would endorse the above view in respect of the existing membership of State unions being recognised and members having the right to exercise choice as to membership of a State union rather than a federal one.

We believe that for employers and employees to retain rights to seek protection as to their interests in this area, that 137A be strengthened so as to not limit the nature of the FWA capacity to intervene in any demarcation disputes that may arise regardless of their nature or the parties involved.

We submit that it is important that FWA have the capacity to intervene on a demarcation matter as provided in the existing provisions and reject the ACTU position that "actual harm" to a party must occur before this provision would enable FWA to intervene. It is neither productive nor viable for a union to have an incentive to actually damage the interests of other parties before an intervention could occur. Placing FWA into a position where it would be required to unscramble eggs would seem a ludicrous proposition and counter intuitive to productive outcomes in the current marketplace.

Again it surprises us that the ACTU refers in it's submission to the freedom of association right as a basis to prevent FWA a capacity to intervene on a demarcation dispute prior to damage to a parties interests occurring.

Should the ACTU propose that the freedom of Association rights be absolute for an employee, we would seek to make further submission on this matter and would request that the Parliament pursue further information on this matter as it would open up the question of the need to register any entity for coverage purposes and may effect our submission more generally.

Recommendation 9: We recommend that a simplistic interpretation of "dominant union" for the purposes of a representation order should be clarified with a recognition of the interests of the employees being preserved through and determination being of paramount interest.

It is our view that federal organizations should not have access to employees and employers where state organizations have had an existing relationship for the purposes of representation orders. As it currently reads, representation orders can be made between two federal unions, or two recognized State unions. If the objective of these provisions is to deal with disputes between Federal and State unions then it fails to achieve this goal. We submit that there is a very strong need to create an additional representation orders regime.

Conclusion

It is our view that should the recommendations outlined in the above submission be ignored by the Parliament, that significant and negative repercussions to the interests of employers and employees will occur.

We believe that the workplace and economic productivity of many employment sectors in the fragile economic market place will be subject to undermining by political and industrial opportunism. And, more importantly, the rights for working Australian that the Fair Work Australia Act was seeking to re-balance for employees will be undermined permanently and possibly destroyed.

Executive Summary of recommendations

Recommendation 1: Greater clarity should be provided in the legislation as to the future operation and existence of organisations after the expiry of the transitional period.

Recommendation 2: The Bill should retain and consolidate the transitional and ongoing recognition of State-registered unions in the federal system.

Recommendation 3: That courts retain the right to determine if a State registered union has a federal counterpart.

Recommendation 4: The Bill should limit the capacity of a Federal organisation from operation or existence within any State or Territory where they do not have a State or Territory geographic branch based within that jurisdiction.

Recommendation 5: The Bill should require a Federally Registered organisation with scope and operations that transcends one or more State or Territory jurisdictions to have their registered national office and associated functions located within the ACT.

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Recommendation 8: We recommend that the Bill be amended so as to clearly establish a closer regard in the operation representation orders to the historical role and representational activities of the parties to the dispute. The Bill should also give greater emphasis in this section on the views and or preferences of majority of the affected employees.

Recommendation 9: We recommend that a simplistic interpretation of "dominant union" for the purposes of a representation order should be clarified with a recognition of the interests of the employees being preserved through and determination being of paramount interest.

Authorised by:

Derrick Belan
Secretary
NSW Branch

John Cosgrove
Secretary
QLD Branch

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National Union of Workers