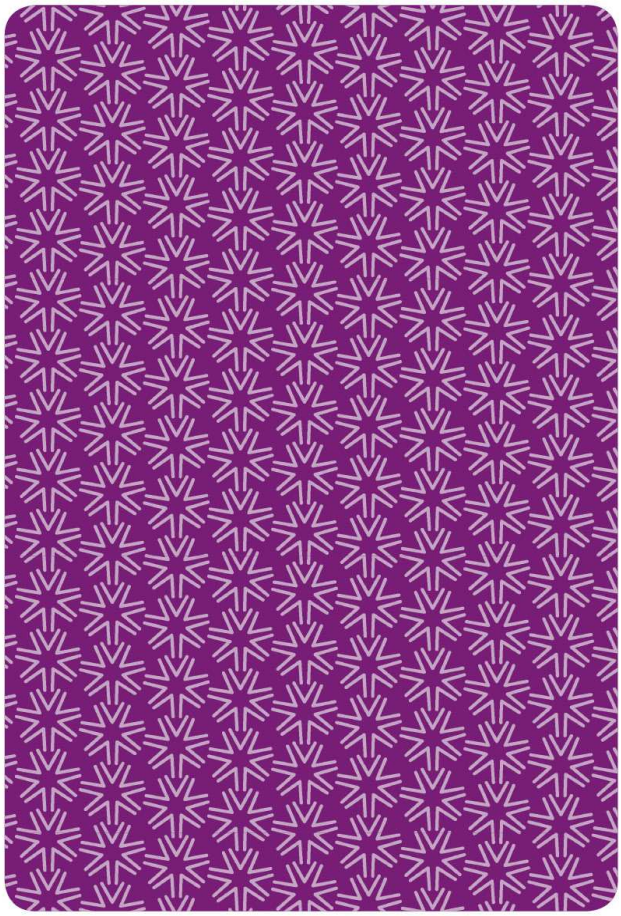
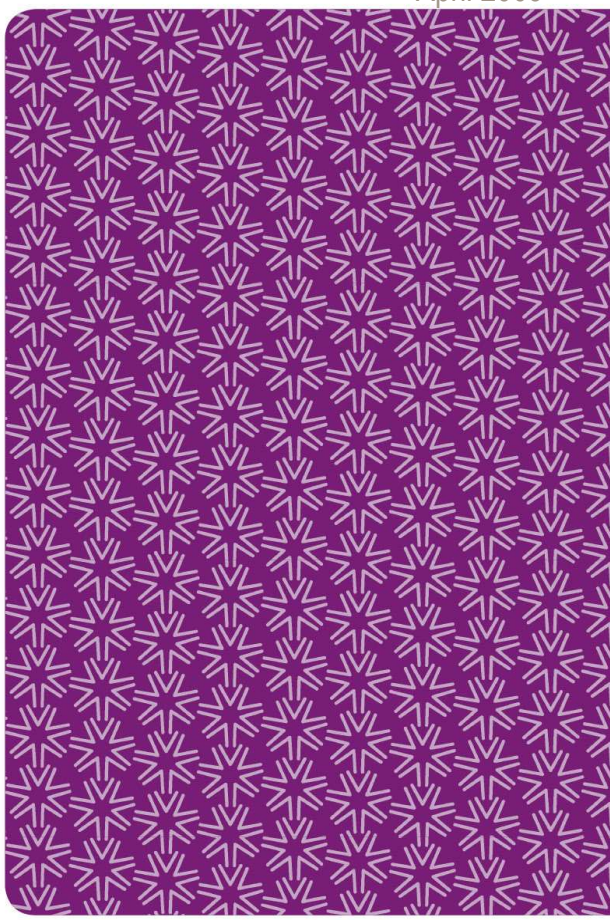
Australian Business Industrial

Inquiry into the Fair Work (Transitional and Consequential Amendments) Bill 2009

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

April 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 (Transitional and Consequential Provisions) Bill 2009. ABI wishes to constructively engage with the Government to ensure that its proposed legislation and its new workplace 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. The impact of transition needs to be assessed in the context of current economic circumstances.

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 Australian Industrial Relations Commission and Industrial Relations Commission of New South Wales.

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 for NSW businesses.

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 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

The general transitional rule for WR Act repeal day

ABI is concerned that the general transitional rule which favours the transfer of matters proceeding under the WR Act which have commenced before the AIRC because of conduct which occurred prior to FW repeal day to FWA might well be confusing to employers and employees and give rise to unnecessary technical errors to no-one's benefit. It recommends:

- That the Government reconsider whether transferring matters before the AIRC as a result of the operation of item 11 Schedule 2 to FWA because of proposed sub-items 12(1)(a) or 12(1)(c) is desirable. It may be preferable for matters to remain in the tribunal in which they were initiated until finished with by that tribunal.

ABI asks whether the test for the continued operation of the WR Act - the time of the relevant "conduct" - could give rise to confusion and technical complication. It proposes:

- That the Government consider whether item 11 Schedule 2 of the Bill should be amended for greater clarity.

Award Modernisation

ABI is concerned that award modernisation is not likely to develop the "neutral" outcome which seems intended by the Part 10A award modernisation provision and the Ministerial Request. The Bill's proposed take-home pay provisions suggest that either the bill should be amended to more certainly achieve neutrality, or failing that, the Ministerial Request should be amended. ABI recommends:

- That the Government consider amending the take-home pay provision so as to provide an equitable treatment for employers whose current working patterns arrangements fall into new penalty hours or are subject to new allowances. Although not an exhaustive solution this should facilitate equitably altering current arrangements. Alternatively the Government could consider amending the Ministerial Request so as to effectively ensure that making modern awards, and their commencement, does not increase employers' costs.

In the context of the deteriorating economy and economic outlook ABI is concerned about the consequences for the system of award modernisation of rescinding the current requirement under s 103(1)(b) WR Act for the AIRC to have special regard to the likely effects of exercising functions on employment and inflation. ABI recommends:

- That the Government consider amending Schedule 5 to explicitly preserve the operation of s 103(1)(b) during the Part 10A award modernisation process.

Under the Bill and the FW Act the FW (safety net provisions) commencement day will impose wage increases on some employers without regard to the pay period which applies at the particular workplace. ABI recommends:

> That the Government consider amending the definition of FW (safety net provisions) commencement day to provide that wages under modern awards, transitional wage instruments and national minimum wage orders which come into operation on FW (safety net provisions) commencement day take effect in relation to a particular employee at the start of the employee's next full pay period.

Award modernisation should not impose costs on employers nor losses to employees since the consolidation process of itself has no regard to the specific needs of individual workplaces. Modern awards are intended as a component of a fair safety net, which underpins enterprise bargaining. Enterprise bargaining is intended to assist improving productivity as well as yielding fair outcomes to employees. ABI is concerned that the Bill may make more likely that award modernisation may not result in this policy objective. It recommends:

> That the Government consider amending the take-home pay provision so as to provide an equitable treatment for employers whose current working patterns arrangements fall into new penalty hours or are subject to new allowances. Although not an exhaustive solution this should facilitate altering current arrangements. Alternatively the Government could consider amending the Ministerial Request so as to effectively ensure that making modern awards, and their commencement, does not increase employers' costs.

Modern Awards under Fair Work Australia

ABI is concerned that the requirement on FWA to undertake a review of modern awards after the second anniversary of their commencement to assess their compatibility with the modern awards objective risks imposing additional cost through the safety net. ABI proposes:

> That the Government consider amending the Bill to provide a transitional provision requiring FWA to place special attention on employment and inflation when performing of its functions and powers under Parts 2-3 and 2-6 of the FW Act. The provision would desirably be indefinite and Government could consider an appropriate termination mechanism - perhaps by subsequent amendment or by a power in the Minister.

Transitional Arrangements for Agreements

The proposed transitional arrangements for the start of the National Employment Standards do not strike a fair balance and do not sufficiently recognise the context of agreement making. ABI recommends:

> That the Government consider providing transitional arrangements for the introduction of the NES on transitional instruments, at least to the extent that the instrument makes provision for the condition of the NES.

Should there still be a need to retain a form of "no detriment rule" in the form described in the Explanatory Memorandum, it is not clear that the provision achieves this object. Proposed item 23(1) is triggered by the "transitional instrument" having a term which, to the extent it is detrimental in any respect, is of no effect. This seems equally capable of being read so that in the event that a term (say, annual leave) in the transitional instrument is detrimental in any respect, it is of no effect (the NES annual leave term replaces that term in the "transitional instrument"). ABI recommends:

- That the Government consider amending the "no detriment rule", to the extent one is required, so that the provision clearly only replaces a term of a transitional instrument only to the extent (the particular respect) to which the transitional instrument imposes a detriment on an employee.

Modern Enterprise Awards

Whilst the Bill's provisions provide access to state derived industrial instruments to be converted to modern enterprise awards, which is welcomed, ABI considers that the treatment of enterprise preserved collective State agreements may need additional provisions. It recommends:

- That the Government consider amending proposed item 6, the modern awards objective, to explicitly recognise that bargained wages may be inappropriate for inclusion in an enterprise award.

Greenfields Agreements

ABI supports amendments made to the greenfields agreements provisions during the FW Act's passage through Parliament. It is concerned that the "public interest" provisions required for approval of a greenfields agreement by FWA are counter-productive without obvious benefit. ABI proposes:

- That the Government consider amending the bill to amend the FW Act by rescinding s 187(5)(b). If, after reconsidering paragraph 187(5)(b), the Government concludes that it wishes to retain the provision, it might consider delaying the commencement and operation of s 187(5)(b) indefinitely as a transitional measure. The provisions could be subsequently enlivened by providing a power to the Minister.

ABI is pleased to have the opportunity to make submissions about the Fair Work (Transitional and Consequential Provisions) Bill 2009 (the Bill) to the Senate Education, Employment and Workplace Relations Committee (the "Committee"). It thanks the Committee for the opportunity. ABI shares with the Deputy Prime Minister and Minister for Employment and Workplace Relations (the "Minister") the desire to ensure an orderly and fair transition to the new workplace relations system and to provide certainty in employment arrangements. ABI makes its recommendations with that objective in mind.

The context of the Committee's inquiry into the Bill

The Committee is undertaking this inquiry into the provisions of the Bill at a time when the FW Act has received assent. During The FW Act's passage through Parliament a number of amendments were made to the FW Bill as originally tabled. As well, if proposed Schedule 18 of the Bill now before the Committee is not amended during its passage the transitional act will have the effect of varying the FW Act in some respects before the FW Act itself comes into operation.

In these senses some aspects of the FW Act are new.

More importantly, the economic circumstances attending the Committee's consideration of the Bill, and indeed the commencement of the FW Act itself, are significantly different from those prevailing during the development of the policy underpinning the FW Act and its supporting legislation.

Forward with Fairness was released in April 2007. Presumably its policy was mostly developed during financial year 2006-2007. Certainly the policy's finalisation will have taken place during this time. In August 2007 *Forward with Fairness* was supplemented by *Forward with Fairness - Policy Implementation Plan.* The Implementation Plan would have been developed in the latter part of 2006-2007 and going into 2007-2008. The details of the 2007-2008 Budget would certainly have been known while it was being written.

The economic context of the Fair Work policy

These were good times for Australia, and they were the continuation of a prolonged period of good times. In the *Fiscal Strategy and Budget Priorities* of the 2006-2007 Budget the Treasurer said:

> "The Australian economy is forecast to continue to grow solidly, with GDP growth forecast to strengthen from 2½ per cent in 2005-06 to 3¼ per cent in 2006-07. Moderate inflation, low unemployment and strong business investment will provide a sound basis for sustained economic growth.
> An underlying cash surplus of $10.8 billion is expected in 2006-07, with further surpluses projected for the three years following."[1]

In the following year's Budget (2007-2008), the Treasurer said:

> "The Australian economy is currently in the longest period of continuous expansion ever recorded. Economic growth has been supported by sound fiscal management and the Government's policy reforms.
> Economic growth is expected to be sustained with the Australian economy forecast to grow at 3¾ per cent in 2007-08.
> An underlying cash surplus of $10.6 billion is expected in 2007-08, with further surpluses projected for the following three years."[2]

By the 2008-2009 Budget economic circumstances were changing. In the corresponding budget overview for 2008-2009, the Treasurer said:

> "Consumer price inflation has intensified over the past two years, reaching 4.2 per cent in the year to March 2008. As a result of slower global growth, tighter credit conditions and higher interest rates, economic growth is forecast to moderate to 2¾ per cent in 2008-09. With the economy slowing and tight monetary and fiscal policies in place, inflation is expected to ease to 3¼ per cent by mid 2009.
> Powerful countervailing forces are confronting the Australian economy. Slower growth in advanced economies and greater global financial market turbulence could slow growth in the Australian economy. Counteracting this, robust growth in emerging economies is expected to lead to further large rises in Australia's terms of trade, which will boost income and increase upward pressure on prices. Through this Budget, the Government is putting downward pressure on inflation and helping to keep the economy strong in the face of difficult global financial conditions.
> ...
> An underlying cash surplus of $21.7 billion (1.8 per cent of GDP) is expected in 2008-09 — the largest surplus as a proportion of GDP since 1999-00 — with further strong surpluses projected in the following three years."[3]

The table below[4] shows key economic variables for budgets 2005-2006 to 2008-2009. Figures are year average, and where possible outcome figures have been used. This means that 2007-2007 figures are estimates and 2008-2009 figures (shaded) are forecasts. While not a like-for-like comparison this approach means that the most recent figures have been used.

[1] P 1-1, *Statement 1*, Budget 2006-2007
[2] P 1-1, *Statement 1: Fiscal Strategy and Budget Priorities*, Budget 2007-2008
[3] P 1-1, *Statement 1:Budget Overview*, Budget 2008-2008
[4] Compiled from Table 1 *Statement 3: Economic Outlook* for the 2007-2008 Budget and Table 1 *Statement 2: Economic Outlook* for the 2008-2009 Budget

BUDGET PAPERS - SHOWING YEAR AVERAGE FIGURES

	2005-2006 OUTCOMES	2006-2007 OUTCOMES	2007-2008 ESTIMATES	2008-2009 FORECASTS
Panel A –Demand and output				
Household Consumption	2.6	3.6	4 ½	2 ¾
Private Investment				
Dwellings	-3.9	2.4	2 ½	2
Total Business Investment	16.2	6.7	9 ½	8 ½
Non-dwelling Construction	21.6	12.4	8 ½	5 ½
Machinery and Equipment	14.5	2.9	9 ½	11
Private Final Demand	4.4	4.0	5 ¼	4
Public Final Demand	4.3	4.3	4 ¾	3
Total final Demand	4.4	4.1	5 ¼	3 ¾
Change in Inventories	- 0.5*	0.1	¼	- ¼
Gross National Expenditure	4.1	4.2	5 ½	3 ½
Exports of Goods and Services	2.2	3.8	3	6
Imports of Goods and Services	7.2	8.9	11	9
Net Exports	-1.1	-1.2	- 2	-1
Real Gross Domestic Product	2 .9	3.2	3 ½	2 ¾
Non-Farm Product	2.9	3.9	3 ¾	2 ¼
Farm Product	4.6	-22.8	2	20
Nominal Gross Domestic Product	-	8.2	7 ¾	9 ¼
Panel B-Other Selected Economic Measures				
External Accounts				
Terms of Trade	10.9	6.7	4 ¾	16
Current Account Balance (per cent of GDP)	-5.5	-5.6	-6 ¼	-5
Labour Market				
Employment (Labour force survey basis)	2.2	2.7	2 ½	¾
Unemployment Rate (per cent)	5.1	4.5	4 ¼	4 ¾
Participation Rate (per cent)	64.5	64.8	65 ¼	65
Prices and Wages				
Consumer Price Index	3.2	2.1	4	3 ¼
Gross Non-Farm Product Deflator	4.9	4.8	4	4 ¼
Wage Price Index	4 .1	4 .0	4 ¼	4 ¼

* Private non-farm for the 2005-2006 Budget outcome

Since the Budget

As usual into the budget year the Treasurer released the annual Mid-Year Economic and Fiscal Outlook (MYEFO) updating budget forecasts, and unusually, in a sign of the times, subsequently, an Updated Economic and Fiscal Outlook (UEFO).

The table below shows the significant changes in forecasts of key economic variables in the forecasts at the time of the 2008-2009 Budget, MYEFO and UEFO[5]. The first three columns show the changes which took place in the forecasts for 2008-2009, the fourth (shaded) shows the UEFO forecast for 2009-2010.

	FORECASTS			
		2008-2009		2009-2010
	BUDGET	MYEFO	UEFO	UEFO
Panel A –Demand and output				
Household Consumption	2 ¾	2	1 ¾	½
Private Investment				
Dwellings	2	0	-2	4
Total Business Investment	8 ½	5 ½	½	-15 ½
Non-dwelling Construction	5 ½	½	-2	-18
Machinery and Equipment	11	8	2	-16 ½
Private Final Demand	4	2 ½	¾	-2 ½
Public Final Demand	3	3 ½	5 ½	7 ¼
Total final Demand	3 ¾	2 ¾	1 ¾	- ¼
Change in Inventories (e)	- ¼	- ¼	- ¼	0
Gross National Expenditure	3 ½	2 ¼	1 ½	- ¼
Exports of Goods and Services	6	6 ½	½	½
Imports of Goods and Services	9	7	2 ½	-3
Net Exports	-1	- ½	- ½	¾
Real Gross Domestic Product	2 ¾	2	1	¾
Non-Farm Product	2 ¼	1 ¾	1	½
Farm Product	20	13	11	5
Nominal Gross Domestic Product	9 ¼	7 ¾	6 ¾	0
Panel B-Other Selected Economic Measures				
External Accounts				
Terms of Trade	16	10 ¾	9	-12 ¾
Current Account Balance (per cent of GDP)	-5	-4 ½	-3 ¾	-5 ½
Labour Market				
Employment (Labour force survey basis)	¾	½	- ¼	0
Unemployment Rate (per cent)	4 ¾	5	5 ½	7
Participation Rate (per cent)	65	65	64 ¾	64 ½
Prices and Wages				
Consumer Price Index	3 ¼	3 ½	2	2
Gross Non-Farm Product Deflator	4 ¼	6	5 ¾	- ½
Wage Price Index	4 ¼	4 ¼	3 ¾	3 ¼

[5] The table is a composite, taken from Table 3.2 p 30 MYEFO and p33 UEFO.

Since UEFO

After UEFO was released, the December quarter national accounts were released. The national accounts report a contraction of 0.5% from the September to December 2008 quarter which is the first quarterly contraction in eight years. Year-on-year, the Australian economy grew by 0.3 per cent, the slowest pace since 1991. Only a slight improvement in farm production forestalled an official declaration of recession.[6]

The national accounts reported a non-farm decline in GDP of 0.8% for the December quarter which followed a 0.2% decline in the September quarter[7]. There was a decline of 5.6% (s.a.) in gross operating surplus for non-financial corporations against a 6.2% increase for the September quarter.[8] Non-farm real unit labour costs increased 1.2% (s.a.) following a 0.7% increase in the September quarter.[9]

Wages' share of total factor income rose to 53.3% (s.a.) from 52.4% in the September quarter and the profit share declined to 26.9% from 28.0%.[10] Non-rural exports fell and Australia's terms of trade (the relationship between the prices of exports and the prices of imports) declined 2.8% (s.a.) against a 6.2% increase in the September quarter.[11]

Since the December national accounts the economy has not stood still.

Business Confidence

The February 2009 *Sensis Business Index*, released 5 March 2009, reported a +12% balance for small business confidence which is the lowest figure since the series commenced in 1993. This is down from +13% for the November result and could represent a stabilisation at a low level of confidence following the precipitate fall in that quarter. NSW recorded the first negative result ever reported.

The last four months of the NAB survey have reported net confidence levels of -30 (November), -20 (December), -32 (January 2009) and -22 (February 2009). The February survey's measure of forward orders (fell 7 points to -27 points, a level seen in 1991), trading conditions (fell 11 points to -15), export sales (up but at - 26, still at very low levels), profits (fell 5 points to -17), capital spending and employment all stayed negative. The employment figure went to -27 which was last seen in 1991, but the fall between January and February (-10 points) was the sharpest in the Survey's history.

Consumer confidence

[6] Elizabeth Fry, 'Australia begins to feel heat of global turmoil', *Financial Times*, 5 March 2009, <http://www.ft.com/cms/s/0/ad066fe6-0926-11de-b8b0-0000779fd2ac.html>.
[7] Table 41, Cat 5206.0, *Australian National Accounts: National Income, Expenditure and Product*, ABS
[8] Table 19, Cat 5206.0, *Australian National Accounts: National Income, Expenditure and Product*, ABS
[9] Table 2, Cat 5206.0, *Australian National Accounts: National Income, Expenditure and Product*, ABS
[10] Table 41, Cat 5206.0, *Australian National Accounts: National Income, Expenditure and Product*, ABS
[11] Table 2, Cat 5206.0, *Australian National Accounts: National Income, Expenditure and Product*, ABS

The March 2009 *Sensis Consumer Report*, released 18 March, reported a decline in consumer confidence. Net confidence fell 8 points to 21% for the February quarter and had halved over the last 12 months. The least confident consumers were in NSW, continuing a trend, with only 11% net confidence (down 9 points).

> "The main reason Australians gave for feeling confident about their financial prospects for the year ahead was having a secure job, which increased strongly in relative importance over the past quarter. This is the fourth successive quarter where the trend of increasing job security has been considered more important than the quality of the job. The main reasons Australians reported feeling worried were the level of unemployment, which has increased significantly over the past quarter, as well as uncertainty over the direction of the economy and investments not performing well. … For Australians feeling worried about their financial prospects in the coming year, the main reason was increasing unemployment, which was nominated by 18 per cent of those who were worried. This has increased by eight percentage points over the past quarter and is the first time since the survey commenced that this has been the foremost reason for concern."[12]

The economic analysis presented in the minutes of the 3 March 2009 meeting of the Reserve Bank Board suggest that the federal Government's stimulus packages have maintained household disposable income, but not business confidence:

> "In the business sector, the NAB [National Australia Bank] survey indicated that after the sharp fall late last year, confidence had remained at very low levels in recent months. Business conditions, while also having fallen, were fluctuating around levels similar to those seen during the slowdown early in the current decade. Slowing business activity had led to further declines in capacity utilisation, which had fallen noticeably from the peak levels reached a year or so earlier. Turning to the household sector, retail spending had increased sharply in December, after a run of weak readings in previous months …"

Employment, as well has confidence, has deteriorated further since the national accounts were released. The March Labour Force reported an increase in the unemployment rate to 5.7% (s.a.), an increase of 1.7% (s.a.) in the year to March 2009. To some extent this figure masks the severity of the problem. Between March 2008 and January 2009 the unemployment rate (s.a.) remained below 5% but between January and March 2009 the unemployment rate rose from 4.8% to 5.7%.[13]

The Minister said of the Labour Force figures:

> "The ABS Labour Force figures released today clearly show that the global recession is bearing down on the Australian jobs market.
> According to the ABS, the unemployment rate increased from 5.2 per cent to 5.7 per cent in the month of March.
> The number of people in full time work decreased by 38,900 while the number of people in part-time employment increased by 4,200 in March. The participation rate remained steady at 65.5 per cent.
> Nobody likes to see job losses. Today's figures are an inevitable consequence of the worsening global recession which is destroying jobs the world over.
> Seven of Australia's top 10 trading partners are now in recession.
> The IMF and the World Bank have recently issued dramatic downgrades for the global economic outlook and Australia is clearly not immune.

[12] P 7, *Sensis Consumer Report - March 2009*
[13] Table 2, Cat 6202.0, *Labour Force*, ABS

> The OECD is now forecasting unemployment across advanced economies will increase by around 25 million by the end of next year."[14]

It is submitted that the Committee's inquiry into the Bill's provisions should have regard to the economic conditions and outlook.

[14] Media Release, 9 April, 2009 at http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/Article_090409_143243.aspx

The general transitional rule for WR Act repeal day

Proposed item 11 of Schedule 2 provides that the WR Act continues to apply in relation to "conduct" which occurred prior to WR Act repeal day. Orders made under the WR Act prior to WR Act repeal day continue to apply. This is a typical consequence of repeal.

Proposed item 12 provides that some processes which are subject to the WR Act are undertaken to or by FWA. Proposed sub-item 12(1)(a) applies to "…applications which could have been made…" to the AIRC, a member or Registrar. This is widely cast. Sub-item 12(1)(c) applies to "…process[es] however described that could be initiated by the Commission its own motion…". This, too, is widely cast.

The Explanatory Memorandum says:

> "21. Item 11 continues the WR Act (including all substantive, procedural and jurisdictional provisions and associated instruments and orders) for conduct that occurred pre-repeal and which is subject to processes in the AIRC or the Australian Industrial Registry. For example, it continues the unfair dismissal provisions in relation to a dismissal that occurred before the WR Act repeal day, and dispute resolution provisions where the dispute arose before the WR Act repeal day. It continues the jurisdiction, powers and rules of the AIRC to deal with the dismissal or dispute (see also item 5 of this Schedule) and any orders made by the AIRC before the WR Act repeal day.
>
> 22. However, where a process is instituted in the AIRC or the Australian Industrial Registry after the WR Act repeal day, item 12 provides that the WR Act provisions are to be administered by FWA or the General Manager of FWA, rather than by the AIRC or the Australian Industrial Registry. Thus an unfair dismissal application in relation to a dismissal that occurred before the WR Act repeal day is to continue before the AIRC, but an application in relation to a dismissal that occurred on or after the WR Act repeal day is to be made to FWA."[15]

Thus, an application which could have been made to the AIRC, a member of the AIRC or the Registrar under the WR Act, or an appeal to the AIRC, if made/lodged on or after WR Act repeal day is made to/lodged with FWA instead. Similarly, a process able to be initiated by the AIRC on its own motion after repeal day concerning a matter which remains subject to the WR Act is to be initiated by FWA.

Accepting the explanation of items 11 and 12 put forward in the Explanatory Memorandum, the operation of items 11 and 12 seem to bring about untoward consequences and give rise to the likelihood of confusion, as, for example, in the circumstances of a termination of employment immediately prior to FW Act repeal day.

Assume a 1 July commencement for the Bill. An employee is terminated on 25 June and lodges an unfair dismissal application (under s 643 WR Act) on 2 July. This is lodged with FWA and proceedings take place before that body.

[15] P 9, *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 - Explanatory Memorandum*.

If, on the other hand, the same employee's unfair dismissal application was lodged on 30 June, proceedings would take place before the AIRC. Actually, in this case, proceedings would take place before the AIRC unless there was an item 12 "trigger" event, in which case proceedings, of whatever kind, which are consequential upon the "trigger" would be before FWA.

For example, there may be a conciliation of the dismissal application before the AIRC in July. If that conciliation failed to settle the matter but no certificate was issued (under s 650 WR Act) a number of possibilities arise:

- The respondent elects to challenge the jurisdiction of the AIRC to deal with the dismissal under s 645(1) WR Act. The respondent's motion would be made to FWA.
  - If the motion were successful FWA would dismiss the application which had until this time been before the AIRC.
  - If the motion were unsuccessful FWA would dismiss it. Seemingly the AIRC would continue to conciliate the dismissal application under s 650(1) WR Act until it was settled or a certificate under s 650(2) WR Act was issued.
- The applicant elects to discontinue. The employee's application under s 643(16) would be made to FWA. All other aspects of the matter had been under the auspices of the AIRC.
- Both parties continue with a second conciliation. That conciliation would be before the AIRC.

The issue of certificates under s 650(2) WR Act also appears problematic.

The dismissal is before the AIRC. The Commission must attempt to settle the matter by conciliation [s 650(1) WR Act]. If the Commission is satisfied that conciliation is likely to be unsuccessful it must issue a certificate and indicate the merits of the grounds in the application [s 650(2)(a) and (b) WR Act]. This would not appear to be a situation where the Commission is acting on its own motion and the AIRC would issue the certificate.

However, under s 650(2)(c) WR Act, the Commission may recommend that the applicant not continue with one or more grounds of the application <u>if it sees fit</u>. If so, the Commission must invite the applicant to put further material [s 650(3)(b) WR Act]. This seems to fall within the reach of sub-item 12(1)(c), and if so, FWA would issue the advice and make the invitation for further material.

Should the Commission decide to advise the parties that it considers the application has no reasonable prospect of success having regard to all the material before it [s 650(2)(d) WR Act] it must invite the applicant to put further material [s 650(3)(b) WR Act]. As this arises from the AIRC's consideration of what has been before it, exercising this requirement to advise may not be the AIRC acting on its own motion, and so the AIRC would require the further material - but the line is not clear. It may be that FWA must make the invitation.

Recommendation:
That the Government reconsider whether transferring matters before the AIRC as a result of the operation of item 11 Schedule 2 to FWA because of proposed sub-items 12(1)(a) or 12(1)(c) is desirable. It may be preferable for matters to remain in the tribunal in which they were initiated until finished with by that Tribunal.

Should the Government conclude that these sub-items should remain, the Government might consider a deeming provision so that:
(i) applications falling within sub-item 12(1)(a) wrongly made to the AIRC;
(ii) applications under the WR Act as revived by item 11 which should be made to the AIRC or a Registrar are wrongly made to FWA; or
(iii) processes under sub-item 12(1)(c) wrongly undertaken by the AIRC;
are deemed to have been properly made or undertaken.

Proposed item 11 prescribes a general rule and it is modified or excluded in specific circumstances by other provisions of the Bill. However, for those general circumstances which are not dealt with by specific provisions elsewhere in the Bill, the notion of "conduct" is very broad. It is also a term of imprecise meaning.

Conduct is defined to include an omission. "Conduct" can be an act (or omission) or it can be a number of acts (or omissions). "Conduct" can be used in many instances where "…course of conduct" could also be used.

Assume a small employer of 7 employees terminates an employee on 25 June. Proposed item 11 means that no unfair dismissal claim would lie because the "conduct", being the termination, was subject to the WR Act. Initially, the employee's conduct does not appear to alter this. The employer's conduct is subject to the WR Act because of its timing. This does not alter in the event the employee were to lodge his/her application after 1 July (although the date of lodgement is conduct by the employee).

Assume the employer who terminated the employee on 25 June employed a total of 250 employees. The employer's 25 June "conduct" means that the employee has 21 days in which to lodge [s 643(15) WR Act]. The employee's application must be made by 16 July to be within time.

If the employee lodges his/her application with FWA on 30 July, the employee's "conduct" has given rise to an out of time application. FWA can allow a late application. Under what rules does FWA consider an extension? Were the matter to proceed under s 643(15) WR Act FWA's consideration would be subject to the Court's decision in *Brodie-Hanns v MTV Publishing Ltd*[16]. Were the matter to proceed under s 394(3) FW Act it would be subject to the different terms of that subsection. The employee's late lodgement has arisen out of the employee's "conduct".

As ABI understands the Government's intention with the Bill, the out of time application would be considered subject to s 643(15) WR Act. However, it is clear that the out of time "conduct" is that of the employee and is not related to anything done or omitted by the employer, nor does it arise out of the employer's "conduct".

Recommendation:
That the Government consider whether item 11 Schedule 2 of the Bill should be amended for greater clarity.

[16] Reported (1995) 67 IR 298

Award modernisation

The award modernisation process is currently proceeding on the basis of the Minister's Request and the provisions of Part 10A of the WR Act. Part 10A was itself inserted into the WR Act by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*, which commenced 28 March 2008.

At present award modernisation is part completed. The AIRC developed a timetable based on 4 tranches of awards. It has made modern awards from the first two tranches, is proceeding on the third tranche and the fourth tranche is scheduled to be completed by 4 December 2009. The AIRC has determined that it will need to vary the modern awards that it has already made because of a number of developments since modernisation began; to finalise the structure of coverage between awards and also because the Commission has not determined appropriate provisions for transition into modern awards.

Part 10A WR Act gave the AIRC powers to make modern awards in accordance with the Minister's Request and in compliance with specified statutory requirements and to vary them. Variations must also accord with the Minister's Request (and the statutory requirements). A separate Ministerial Request is not required for the AIRC to vary a modern award (although the Minister may vary a Request).

The Minister's Request required that the making of modern awards should not disadvantage employees nor increase costs for employers. Proposed item 8 of Schedule 5 of the Bill provides that award modernisation should not result in a reduction in an employee's "take-home pay". "Take-home pay" seems to equate to "full rate of pay" [s 18 FW Act] and includes such remuneration components as overtime or penalty rates. In other words an alteration in a modern award to ordinary hours might mean that an arrangement which currently invokes an overtime penalty, but which subsequently under the modern award falls within ordinary hours, continues to attract current pay (which includes the overtime penalty rates). Conversely, subject to the transitional provisions which are yet to be inserted into modern awards, if what is currently ordinary time becomes overtime, penalties will be attracted and have to be paid, perhaps on a higher classification rate.

ABI does not oppose a provision which retains the status quo for employees so long as the status quo is also preserved for employers on equitable terms. The proposed "take-home pay" provision does not do this.

Recommendation:
That the Government consider amending the take-home pay provision so as to provide an equitable treatment for employers whose current working patterns arrangements fall into new penalty hours or are subject to new allowances. Although not an exhaustive solution this should facilitate equitably altering current arrangements. Alternatively the Government could consider amending the Ministerial Request so as to effectively ensure that making modern awards, and their commencement, does not increase employers' costs.

While award modernisation is primarily regulated by Part 10A WR Act modernisation is subject to other provisions in the WR Act, including s 103(1)(b)[17], which requires the AIRC to have regard to the objects of the WR Act and the state of the national economy and the likely impact of any order that it is proposing to make, "...with special reference to likely effects on the level of employment and on inflation".

Obviously the impact of the Commission's decisions on the level of employment and rate of inflation are a major consideration at any time, but they are so particularly in the context of the current rapid deterioration to the economy and economic outlook. It seems unlikely that the Government would not want the AIRC to pay special attention to these factors during its finalisation of modern awards.

Award modernisation is a confined process.

Proposed Schedule 5 provides for the AIRC to continue and complete the award modernisation process. Proposed item 2 continues the "Part 10A award modernisation process". It explicitly provides continuing capacity for the Minister to vary the Minister's Request. The AIRC is able to vary the modern awards it has made up until they commence.

The effect of proposed item 4 is that a modern award which is made under the Part 10A award modernisation process is a modern award on FW (safety net provisions) commencement day or on the day of its making if not made by the commencement day. These modern awards will commence on the commencement day, or if made later, not before that date of their making. The modern awards themselves must express their commencement date and this must be consistent with these provisions.

This means that the AIRC retains the power to make and vary modern awards until the FW (safety net provisions) commencement day, but the AIRC would not be able to vary awards it makes after that date them unless it provided a lead time between the making of the modern award and its commencement. This seems unlikely, especially since

- the continued operation of the AIRC itself past "FW (safety net provisions) commencement day" is dependent upon the Minister
- item 4 has the effect of overcoming the "normal" rules for modern awards made by FWA, which is that they would commence on the first day of the financial year after being made.

S 103 is located in Part 3 of the WR Act. It is therefore not directly revived by Schedule 5 which revives Part 10A.

Proposed item 5 of Schedule 2 provides that where a provision of the transitional Schedule provides for the continued application of one or more provisions of the WR Act any other provisions of the WR Act which are "...necessary for the effectual operation of ..." the provisions which were revived also apply. S 103 would not appear to be indirectly revived by Schedule 2

[17] S 103(1)(a) requires the AIRC to have regard to the objects of the WR Act. A similar requirement is placed on FWA with respect to the objects of the FW Act [s 578 FW Act].

since it is not necessary for the effectual operation of Part 10A, that is, modern awards can effectually be made in the absence of s 103(1)(b) requirements.

It clearly is not desirable that modern awards would be made in the present economic circumstances without special reference to their likely effects on the level of employment and on inflation.

> **Recommendation:**
> *That the Government consider amending Schedule 5 to explicitly preserve the operation of s 103(1)(b) during the Part 10A award modernisation process.*

The modern award system is intended to commence on 1 January 2010 ("FW (safety net provisions) commencement day"). The modern awards so far made by the AIRC are expressed to commence 1 January 2010.[18] This is consistent with s 576Y(1)(a) WR Act.

Proposed items 13 and 15 of Schedule 9 require an employee's "base rate of pay" to be no less than that in the applicable modern award, "national minimum wage order" or "transitional wage instrument" (which is the continuation of existing "bridging period" minimum rates as may have been varied by the final decision of the AFPC). Although the transitional provisions of modern awards are not yet known it is clear that some employers will face wage increases from "FW (safety net provisions) commencement day" because they are paying current rates under their APCS or employing under a pre-reform certified agreement (or AWA) with lower rates than the relevant modern award rate will have[19].

One effect of this is that these increases from the modern award wages in modern awards will also commence on 1 January 2010 without regard to pay periods. Increases which are not linked to pay periods create administrative difficulties which can be significant, especially in enterprises where there are continuous or night shift operations.

This is recognised in the FW Act. S 287 FW Act provides that wage review determinations come into operation on 1 July each year however they do not take effect with respect to an individual employee until the start of the employee's first full pay period starting on or after 1 July.

> **Recommendation:**
> *That the Government consider amending the definition of FW (safety net provisions) commencement day to provide that wages under modern awards, transitional wage instruments and national minimum wage orders which come into operation on FW (safety net provisions) commencement day take effect in relation to a particular employee at the start of the employee's next full pay period.*

[18] For example, cl 2 of the *Clerks-Private Sector Award 2010* provides: "This award commences on 1 January 2010." This provision is not modified elsewhere in the award.
[19] See, for example, the note to proposed item 22(2), Schedule 3

Modern Awards under Fair Work Australia

Following the completion of the Part 10A award modernisation process, on "FW (safety net provisions) commencement day", a number of changes will take place, apart from the fact that modern awards will come into operation. Making and varying modern awards, reviewing them and reviewing wages, becomes the province of FWA. As well, FWA will be able to modernise "award-based transitional instruments" (see Modern Enterprise Awards below).

S 157 FW Act empowers FWA to vary a modern award if it is satisfied that varying the award is necessary to achieve the "modern awards objective" and it may vary wages (s 156 FW Act) outside the four yearly modern award review on work value grounds if satisfied that is necessary to meet the "modern awards objective".[20] These potential variations to modern award wages are independent of the annual reviews required of FWA under s 285 FW Act.[21]

Proposed item 6 of the Bill requires that after the second anniversary of "FW (safety net provisions) commencement day" FWA must review all modern awards (except modern enterprise awards), to consider whether they meet the "modern awards objective" and operate effectively without anomalous or technical problems[22]. Proposed item 6 does not seem to preclude the operation of s 157 FW Act before or after the second anniversary of commencement.

A power to amend modern awards because of anomalous outcomes or technical problems is clearly desirable. However, the "modern awards objective" and consideration whether modern awards achieve the "modern awards objective" is a new requirement placed on modern awards by the FW Act.

As a result of s 157 FW Act, making modern awards (under the WR Act) is different, and clearly intended to be different, from the ongoing operation and variation of modern awards under the FW Act. There is no "modern awards objective" in the WR Act. The "Part 10A award modernisation process" is subject to both the provisions of Part 10A WR Act and the Minister's Request.

Neither of these is replicated in the FW Act[23] and the second anniversary review of modern awards against the "modern awards objective" seems quite likely to give rise to variations to the system of recently made modern awards. The "modern awards objective" is different in terms from the object of Part 10A [s 576A WR Act], the AIRC's modernisation function [s 576B WR Act] and the Minister's Request.

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[20] The s 156 FW Act four yearly review of modern awards permits FWA to vary modern award minimum wages if justified on work value grounds.

[21] They are subject to the "minimum wages objective" because FWA must take account of that when exercising powers under Part 2-6 FW Act and wage setting powers under Part 2-3.

[22] Item 5 of Schedule 5 also allows FWA to correct minor or technical problems arising because the Part 10A award modernisation process began before the enactment of the FW Act.

[23] P 136 Senate Hansard 19 March 2009. Senator Collins makes clear the distinction between the modernisation process and the intent of the FW Bill. She draws attention to the requirement that the AIRC take account of the intention that making modern awards not increase employers' costs, nor disadvantage employees.

For example, s 576A(2)(d) WR Act provides that modern awards must be:

> "...in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements."

This is further addressed in the Minister's Request, which replicates s 576A WR Act and at paras 10 and 11 requires:

> "[10] The Commission will prepare a model flexibility term to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee.
>
> [11] Each modern award will include the model flexibility term with such adaptation as is required for the modern award in which it is included."

Modern awards are to be made appropriately for the fact that they will operate in a collective bargaining system without provision for statutory individual agreements. Individual flexibility is accessible by way of "individual flexibility arrangements". S 144 FW Act provides that modern awards must contain "flexibility terms" enabling "individual flexibility arrangements". That is, the FW Act imposes a statutory requirement on modern awards to achieve the end achieved by the combination of Part 10A and the Minister's Request for the process of making modern awards.[24] However, the "modern awards objective" requires that FWA must ensure that modern awards (with the NES) provide a fair and relevant minimum safety net including by taking into account "...the need to encourage collective bargaining" (s 134(1)(b) FW Act) .

This latter requirement is not the mere continuation of the award modernisation provisions in a similar form: the "modern awards objective" imposes a significantly different requirement on modern awards. First, the context is different.

The provisions under award modernisation required modern awards to be written to contain "flexibility terms" because statutory individual agreements would not be a part of the system. That is, modern awards were to be made having regard to the nature of the "Fair Work" system, the context within which they will operate.

The FW Act requires modern awards to contain a provision for making "individual flexibility arrangements". Modern awards must have such a term. But the obligation under s 134(1)(b) FW Act is also directed to awards, but not now to underpin individual flexibility.

Second, the requirement under s 134(1)(b) FW Act relating to collective bargaining is in different terms. The terms and conditions of modern awards must be written having regard to the need to encourage collective bargaining. This aspect of the "modern awards objective" is most obviously achievable by writing provisions which encourage collective bargaining, and diminishing managerial rights is a simple way of achieving that end.

[24] Para 11AA of the Minister's Request identifies features of the "flexibility term" which the AIRC must insert into modern awards and similar requirements are provided by s 144 FW Act.

There are other changes as well. For example, what was under the Minister's Request at para 3(c) a requirement that the AIRC have regard to "...the needs of the low paid" when making modern awards became a requirement that FWA have regard to "...relative living standards and the needs of the low paid" when meeting the "modern awards objective" (s 134(1)(a) FW Act).

It seems likely that the second anniversary review will lead to modern awards being varied. In the current economic situation, having regard to the extraordinary measures which have been required of Government to seek to mitigate the rapid decline in economic activity and outlook, the fact of a systemic review which could lead to changes across the modern award system seems counter-productive.

Recommendation:
That the Government consider amending the Bill to provide a transitional provision requiring FWA to place special attention on employment and inflation when performing of its functions and powers under Parts 2-3 and 2-6 of the FW Act. The provision would desirably be indefinite and Government could consider an appropriate termination mechanism - perhaps by subsequent amendment or by a power in the Minister.

Transitional Arrangements for Agreements

Proposed Schedule 3 deals with WR Act instruments which become "transitional instruments" on WR Act repeal day. These include agreements, awards and determinations as they were immediately before WR Act repeal day together with any agreements or determinations which were made prior to repeal day, but which had not then come into effect, and instruments which subsequently come into effect because of an interaction rule.

As well, ITEAs, but not enterprise agreements, which are made during the bridging period become "transitional instruments" when made.

Proposed item 23(1) provides that:

> "To the extent that a term of a transitional instrument is detrimental to an employee, in any respect, when compared to an entitlement of the employee under the National Employment Standards, the term of the transitional instrument is of no effect."

This is the "no detriment rule". In the case of the National Employment Standards ("NES") providing for parental leave and notice of termination the "no detriment rule" also applies to state system employers employing under pre-reform certified agreements.

The Explanatory Memorandum advises that the "no detriment rule" applies on a line by line basis with the effect that with respect to any particular NES entitlement (such as annual leave) the "transitional instrument" provisions would apply except where replaced by a more beneficial NES provision. It gives as an example an employee attracting a more beneficial annual leave accrual

rate from the NES while maintaining a more beneficial amount of annual leave and annual leave pay from his/her "transitional instrument".

This seems a case of having it both ways, and can only impose additional costs on employers who have negotiated beneficial conditions with their employees

The Government's decision to impose the NES onto "transitional instruments", and enterprise agreements made during the "bridging period" regardless of the type of interaction rule which applied to their making and operation until "FW (safety net provisions) commencement day" is not supported. This approach differs from the position put in *Forward with Fairness - Policy Implementation Plan* and appears to be a consequence of the Government's decision to allow agreements to continue until formally terminated or replaced, rather than having them cease to apply after a transitional period.

ABI welcomed the Government's decision to move away from a sunset date, but believes the new policy of requiring subservience to the NES from "FW (safety net provisions) commencement day" is not an appropriate transitional mechanism. This approach has insufficient regard to the balance of items which were negotiated to give effect to the resulting agreement. The capacity for FWA to amend a "transitional instrument" "...to make it work more effectively with the NES..." [proposed item 26] does not adequately address this issue.

ABI believes that a better balance would be that "transitional instruments" continue with the same relationship to the NES as they have to the AFPCS and relevant minimum conditions (such as public holidays) for a reasonable transitional period such as December 2013. Failing this approach it may be appropriate to provide a transitional arrangement for new NES provisions which are provided by the "transitional instrument". Thus for example, a right to request changed conditions on return from parental leave or to request parental leave in excess of 12 months should continue in terms for a transitional period.

Recommendation:
That the Government consider providing transitional arrangements for the introduction of the NES on transitional instruments, at least to the extent that the transitional instrument makes provision for a condition provided by the NES.

Should there still be a need to retain a form of "no detriment rule", despite the Explanatory Memorandum, it is not clear that the provision achieves this object. Proposed item 23(1) is triggered by the "transitional instrument" having a term which, to the extent it is detrimental in any respect, is of no effect. This seems equally capable of being read so that in the event that a term (say, annual leave) in the transitional instrument is detrimental in any respect, it is of no effect (ie., the NES annual leave term would replace that term in the "transitional instrument").

Recommendation:
That the Government consider amending the "no detriment rule", to the extent one is required, so that the provision clearly only replaces a term of a transitional instrument only to the extent in any particular respect that the transitional instrument imposes a detriment on an employee.

Modern Enterprise Awards

Proposed Schedule 6 intended commence on 1 July 2009 provides for the continuation of "enterprise instruments" and provides access to the "enterprise instrument modernisation process" after "FW (safety net provisions) commencement day". "Enterprise instruments" are awards (pre-reform awards) or NAPSAs which apply to a single enterprise or a part thereof or to more than one enterprise which undertake similar business activities (such as franchisees of the same franchisor) or which are related bodies corporate.

ABI supports this general approach to state enterprise instruments and welcomes the Government's decision to include enterprise NAPSAs. However, proposed item 2 also provides that a state award which, by the operation of state law prior to the commencement of the Work Choices amendments, was deemed to be an agreement (under state legislation) gives rise to an "enterprise preserved collective State agreement" which is also an "enterprise instrument" and is also subject to the enterprise instrument modernisation process". ABI supports their inclusion.

Deeming conversions of this kind took place in NSW as a result of the *Industrial Relations Amendment Act 2006* (NSW). This act had the effect of deeming NSW state awards to be "enterprise agreements" under the *Industrial Relations Act 1996* (NSW) to the extent that

- they applied to constitutional corporations;
- parties to the making of the award could have been parties to an enterprise agreement; and
- the award was made largely by consent (to give effect to the consent of the parties).

The act came about because of the practice of bargaining through the award system as opposed to the formal (enterprise agreements) system in the NSW jurisdiction. The second reading speech for this legislation said:

> "The Bill [Industrial Relations Amendment Bill 2006] further provides that those enterprise consent awards that currently apply to constitutional corporations will cease to operate, and will be replaced by enterprise agreements in the same terms as the previous award.
> Given that enterprise awards are made with-and cannot be made without-the consent of the parties, they are in substance no different from an enterprise agreement, and so should be treated as such.
> As a result, such agreements will be transferred to the federal industrial relations system in a form which protects the agreed conditions to the maximum extent possible. This is in the interests of both the employers and employees because it protects the integrity of the agreement that they have made."[25]

So deemed, these collective enterprise agreements came into effect (as NSW enterprise agreements) just prior to the commencement of the Work Choices amendments ("reform commencement"). They therefore entered the federal system on "reform commencement" as preserved collective state agreements, rather than the NAPSAs and APCSs they would otherwise have become on reform commencement day if they had continued as state awards. Importantly for the transition into the FW Act, these agreements

[25] *Hansard*, Legislative Assembly, 7 March 2006

- gave effect to agreed conditions between the parties (being the employer and the relevant union(s));
- did not give rise to an APCS.

The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* amended Schedule 8 WR Act to allow for the variation of preserved state agreements, either to extend the nominal expiry date for up to three years from the date of extension or to vary terms of the agreement. Variations to any terms of preserved state agreements are subject to the "no disadvantage" test against a relevant state award. There must be no coercion to extend or vary a preserved state agreement in this way.

Since the commencement of these amendments some "enterprise preserved collective State agreements" have been extended and/or varied under these amended Schedule 8 WR Act provisions.

During the "bridging period" these preserved collective state agreements are "agreement-based transitional instruments", as well as "enterprise preserved collective State agreements" and they continue as agreements. From "FW (safety net provisions) commencement day" they operate to provide minimum wages for employees to whom they apply - which are the wages of the agreement - and in other ways they remain treated in the same way as other "transitional agreement-based instruments".

Proposed item 6 provides a "modern enterprise awards objective" which applies in addition to the "modern awards objective" when FWA decides whether to make a modern enterprise award from an "enterprise instrument". The "modern enterprise awards objective" requires FWA to take into account, in the context of the "modern awards objective", that "modern enterprise awards" may provide tailored conditions to reflect employment arrangements developed in relation to the particular enterprise. In effect, the policy emphasis is for FWA to have regard to the modern award which might otherwise apply.

One implication of this policy, supported by the Explanatory Memorandum[26], is that a "modern enterprise award" may contain terms which are those of the otherwise applicable modern award as well as tailored terms derived from the "enterprise instrument".

As with the making of other forms of agreement wage increases are related to the benefit to the enterprise as well as to the employees' claims. This means that wages in "enterprise preserved collective State agreements" are in many cases not likely to meet the "minimum wages objective". Nor will wages or wage increase under these instruments have followed work value principles. There is a difference between the value of the work undertaken by a classification (and the conditions under which it is undertaken) and increases provided through the bargaining process to accommodate fair increases for employees and improved efficiency. FWA will need to consider classification rates in "enterprise preserved collective State agreements" when determining classification rates for a "modern enterprise award".

[26] P 40, Items 254 - 258, *Explanatory Memorandum*

Perhaps one way of dealing with wages in "enterprise preserved collective State agreements" which are excessive in terms of the modern wages objective and "modern awards objective" is to consider similar classifications in the award system or the rates when the (then) consent award was made and the minimum wage increases since that time.

Recommendation:
That the Government consider amending proposed item 6, the modern awards objective, to explicitly recognise that bargained wages may be inappropriate for inclusion in an enterprise award.

Greenfields Agreements

During the passage of the FW Act the Government amended representation provisions for the making of greenfields agreements. These amendments are strongly welcomed. However, one aspect of these amendments seems to give rise to what seem to be unintended consequences.

Greenfields agreements have an important role to play in providing greater certainty for projects - particularly major projects - and start ups. In the contemporary world where access to credit and investment has significantly diminished, efficient access to greenfields agreements takes on a greater importance. Being able to stabilise and increase the predictability of costs may make the difference between an investment being committed or not.

To approve a greenfields agreement FWA must be satisfied that the relevant employee organisations (organisations which are capable of representing one or more of the future employees) which signed the agreement [s 182(3) FW Act] can represent a majority of the employees proposed to be covered for the work to be regulated by the agreement [s 187(5)(a) FW Act]. FWA must also be satisfied that the greenfields agreement is in the public interest [s 187(5)(b) FW Act]. These are additional requirements imposed only on greenfields agreements.

The requirement that the agreement is in the public interest means that the public interest must be made out which implies that greenfields agreements are inherently not in the public interest. ABI does not accept that greenfields agreements are not in the public interest, and nor does it understand the Government to. Even if the Government were to disagree on this issue, it seems an unlikely consequence that discouraging greenfields agreements in the current economic climate is in the public interest.

The requirement to be satisfied that the agreement is in the public interest also seems at odds with, and to impose a higher hurdle than, the requirement for approving agreements which do not meet the better off overall test. The better off overall test is a fundamental requirement for agreements, yet, in these cases FWA is to be satisfied that, because of the exceptional circumstances facing the enterprise the agreement is not contrary to the public interest [s 189(2) FW Act]. The "exceptional circumstances" test is not that the agreement is in the public interest.

As well, it is not immediately clear what is meant by the proposed greenfields agreement being in the public interest. The Supplementary Explanatory Memorandum is brief, saying:

> "In assessing the public interest, it would be expected that FWA would take into account the objects of the Act, and the need to ensure that the interests of employees who are to be employed under the agreement are appropriately represented." [27]

S 578(a) FW Act requires that FWA, when exercising powers or performing its functions (which includes considering whether an enterprise agreement is to be approved), takes the objects of the FW Act into account.

A greenfields enterprise agreement passes the better off overall test if FWA is satisfied that each employee to be covered is better off than under the relevant modern award [s 193(3) FW Act]. FWA can ascertain this, unless there is contrary evidence, by determining whether the various classes of employee proposed to be covered by the agreement would be better off than under their relevant modern award [s 193(7) FW Act].

Each employee, or usually each class of employee, must be better off for the agreement to meet the better off overall test. This is a common requirement with non-greenfields agreements. Not all relevant employee organisations must sign the proposed greenfields agreement, nor be involved in its negotiation, but the signatory organisations must collectively be able to represent a majority of the employees to be covered for the work it is regulating.

Two possibilities arise where not all relevant organisations are signatory.

First, some employees who are represented by a signatory organisation could also have been represented by a different, non-signatory organisation. Second, one or more classes of employees, while collectively a minority of employees to be covered by the proposed greenfields agreement, were not able to be represented by any signatory organisation. In either case, these employees must be found to be better off under the agreement than they would have been under the relevant modern award.

So, what does the requirement that employees are appropriately represented, as suggested by the Supplementary Explanatory Memorandum, require? It cannot require that each employee proposed to be covered is represented by an organisation which is able to represent his or her industrial interests, this runs counter to s 187(5) WR Act. Does it require FWA to determine whether each class of employee is as better off as it could be if differently represented? How, in compliance with the requirements that it perform its functions and exercise its powers quickly, avoiding unnecessary technicalities and in an open and transparent way [s 577 FW Act], does FWA ascertain this and how is the onus of demonstration properly located?

ABI believes the s 187(5)(b) requirement for approval is not appropriate and its removal will not result in the prospective employees being less than better off. The provision adds another level of uncertainty and also provides access to dissenting minority unions to delay and perhaps frustrate the finalisation of an enterprise agreement.

[27] P 20, para 118, *Fair Work Bill - Supplementary Memorandum*

Particularly in today's economic climate where access to investment capital or finance is extremely difficult and problematic the operation of s 187(5)(b) appears to impose costs out of proportion with its potential to benefit employees.

Recommendation:
That the Government consider amending the bill to amend the FW Act by rescinding s 187(5)(b). If, after reconsidering paragraph 187(5)(b), the Government concludes that it wishes to retain the provision, it might consider delaying the commencement and operation of s 187(5)(b) indefinitely as a transitional measure. The provisions could be subsequently enlivened by providing a power to the Minister.

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