SUBMISSION FROM UNIONSACT

TO

SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

SENATE INQUIRY INTO FAIR WORK BILL 2008

UNIONSACT, 189 Flemington Rd, Mitchell, ACT 2911

PO Box 279, Dickson, ACT 2602 Tel: 02 6247 7844

Authorised by Kim Sattler, Secretary of UnionsACT

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Introduction

UnionsACT is the peak body of trade unions in the Australian Capital Territory and represents 24 affiliated unions and 30,000 union members in the ACT. We welcome the opportunity to make a submission to this Senate Inquiry into the *Fair Work Bill 2008* introduced into the parliament in November 2008. The Bill is a significant step towards the creation of a fair national system of workplace and industrial relations .

UnionsACT applauds the government in honouring it's commitment to Australian workers to overturn the Work Choices legislation and abolish Australian Workplace Agreements and to develop a modern, fairer industrial relations system for all workers. UnionsACT welcomes the opportunity to respond to the Bill and make a useful contribution to ensuring all the current problems in the Work Choices legislation are eliminated and their impact minimised. However, *UnionsACT* believes that the Bill in its current form demonstrates that there is still much work to do in reversing the effects of *Work Choices* and in achieving the goals of industrial equity articulated in the *Your Rights At Work campaign*. The new Bill will go some way toward meeting our international obligations under the ILO convention and bring us into line with our OECD partners. (p 3 AMWU)

Along with our affiliates and fellow peak union councils *UnionsACT* are keen to see a new system that works with the genuine involvement of all key stakeholders. The protection of rights to freedom of association is critical to any successful democracy shown throughout our industrial history. Trade unions exist to protect the rights and conditions of workers and are critical to a successful and functioning industrial relations environment. The fundamental failure of the *Work Choices* legislation was that it sought to exclude unions from the bargaining process, assuming that all individuals were capable of entering into fair and equal agreements with their employer. The ACTU submission clearly articulates the range of workers who were clearly unable to achieve fair outcomes in the bargaining process.

This submission has been prepared in response to the new legislation and will address issues of concern that particularly affect our affiliates in the ACT and region.

Whilst all ACT workers are currently covered under Federal legislation, most of our affiliates are sub branches of their NSW unions and as such they also cover workers in the ACT/NSW region (including Cooma, Tumut, Wagga, Albury, the South Coast , Queanbeyan and Yass). Many union members can work both in the ACT and the region and therefore their status under a state or Federal industrial

relations system can be confusing. *UnionsACT* is concerned that in the absence of any new referral of powers by the States that some of our members who are not employees of trading corporations will over time lose access to the federal jurisdiction and be without a safety net of employment rights and protections.

UnionsACT is further concerned about the Commonwealth Government's reliance upon the corporations and territories powers and to a lesser extent the external affairs power. Through this they may have isolated themselves from a proven mechanism enabling state and territory public sector employees to access the new national system when a state industrial relations system fails to provide a fair and effective level of minimum terms and conditions of employment. For example such employees may require better mechanisms for the prevention and settlement of industrial disputes.

UnionsACT's key concern is that no worker will be disadvantaged under the new Federal system. We believe that protections, and conditions workers have under current common rule, and NSW State awards and agreements must be maintained as a minimum standard. We can also see some differences in union right of entry provisions that may result from the introduction of the new Bill. One simple example is the prescription of only 8 public holidays in the new National Employment Standards when the norm established in most state and territories is up to thirteen public holidays.

This submission complements and supports the submission of the ACTU of which we are an affiliated body. Our submission will also complement those of our fellow Trades & Labour Councils in other states and several other affiliated unions including the Australian Education Union , the AMWU, the Australian Services Union , the National Union of Workers and United Services Union.

CAPITAL TERRITORY SPECIFIC ISSUES

It is regrettable for workers within the ACT Jurisdiction that the historical evolution of this jurisdiction and its uniqueness of circumstance has been largely overlooked or ignored by both the Federal and ACT governments in this matter.

The ACT is a Federal Industrial Jurisdiction located wholly within the NSW State Industrial jurisdiction geographic zone, and this has impacted on the nature and form of the ACT environment in a manner that has specific issues with the application of the Fair Work Bill.

The ACT has very few union organizations specifically registered within the ACT as such, and has evolved as a Federal jurisdiction where the historical co-location with NSW has blended the operation of the Federal/State organizational divide.

All ACT workers are covered by Federal legislation. Those that are unionized are predominantly members of NSW registered industrial organizations servicing the ACT geographic zone with an agency status conferred through their relationships with federally registered organizations. ACT Unions are predominantly sub branches of their NSW counterpart unions and as such they also cover workers in the ACT/NSW region (including Cooma, Tumult, Wagg, Albury, the South Coast , Queanbeyan and Yass).

This is a situation unique to the ACT Jurisdiction and its inter-relationship with the Federal/State industrial systems. Further complications to the jurisdictional issues are manifested from the complex residential and working relationships in the region that see residents from the NSW jurisdiction working cross border with the ACT being employed within the ACT jurisdiction and vice versa.

To give effect to this servicing relationship, many State NSW Unions have deemed in reciprocal arrangements with Federal unions membership and servicing relationship that often cut across potential demarcation and respondency arrangements.

As a result of these issues, many employees status under the proposed state or Federal industrial relations system can be confusing. UnionsACT is concerned that in the absence of any new referral of powers by the States that some of our members who are not employees of trading corporations will over time lose access to the federal jurisdiction and be without a safety net of employment rights and protections.

Those elements of the Bill that impact on the registration of organisations and the capacity of the entities to operate across State and Federal jurisdictions requires specific review with respect to the application to the NSW/ACT issues. The ACT must provide stated recognition of the capacity of NSW registered organisations to operate within the ACT in terms similar to their historical involvements in that jurisdiction.

Given the ACT has no historical industrial framework of its own, UnionsACT recommends transitional provisions be framed to give mutual recognition to the operation of the NSW system within the ACT in so far as it facilitates the current operations of the environment. An example would be the recognition of existing registered organisations registered under the NSW system being facilitated in the ongoing operations with the ACT jurisdiction. We would welcome to the opportunity to expand on this through the public hearing phase of the Bill[1]s consideration.

UnionsACT is also aware of confusion and concern over the right of entry being maintained within the ACT by State registered unions where their representation of the ACT is through agency arrangements with other federal bodies. The provision to employers of the constitutional provisions of an organisation to represent an employee is more complex than it would first appear.

Within the ACT and other jurisdictions, servicing or representation of employees within the Federal system is often conferred through internal servicing arrangements within and between industrial organisations registered at the State and Federal levels. In many cases the individual union official may be representing a deemed member of their federal union structure where they themselves are a state union official employee. By definition this is an agency relationship that was give stability of operation by the historical nature of the Industrial system.

The move to a centralised unitary industrial model will cut across historical industrial organisation arrangements with such force as to create substantial instability at the organisational level of the registered organisations within the system. The capacity for internal and external demarcation disputes over representation and coverage will be opened up with the current model in a manner that has never been possible before. It will be a failure of this legislation if the attempt to establish a unitary industrial model in effect establishes a contestable industrial market across the traditional State and Federal divide.

The current award modernisation process is already escalating this reality.
The attempt to forge new national and modernised awards creates multiple respondency problems for employers and unions where Federal and State awards with historically variable respondent employers and unions get lumped into single national outcomes. Again in the ACT jurisdiction with its specific complexity and its common rule environment is a significant victim of these impacts.

UnionsACT is further concerned about the Commonwealth Government[1]s reliance upon the corporations and territories powers and to a lesser extent the external affairs power. Through this they may have isolated themselves from a proven mechanism enabling state and territory public sector employees to access the new national system, when a state industrial relations system fails to provide a fair and effective level of minimum terms and conditions of employment. For example such employees may require better mechanisms for the prevention and settlement of industrial disputes.

UnionsACT[1]s key concern is that no worker will be disadvantaged under the new Federal system. We believe that protections, and conditions workers have under current common rule, and NSW State awards and agreements must be maintained as a minimum standard. We can also see some differences in union right of entry provisions that may result from the introduction of the new Bill.

We understand that many of these issues will be addressed in the subsequent transitional arrangements but we wish to ensure that the passing of the new Bill does not create any further disadvantage.

AWARD MODERNISATION AND STATE REGISTERED UNIONS

A key issue for many of our affiliates who represent workers in the private sector is the issue of coverage and the status of state registered unions. It is essential that state registered unions are able to either opt into the Federal system or remain in the state system in order to protect the current agreements and conditions of their members. We can envisage situations where the award modernisation process may result in a loss of take home pay, overall conditions for employees, or a reduction in standards in an occupation or industry. This could occur in sectors such as:

- the social and community services,
- allied health,
- warehousing and
-

Many private sector workers were forced into 5 year AWA's which will not expire until 2011 and we are severely concerned that the new Bill does not allow termination of such unfair contracts despite the fact that they would not pass the better off overall test.

CONTRACTORS

While the Bill provides for some redress for sham contracting, it does not provide an effective and low cost remedy for unfair contracts. The *Independent Contractors Act* should be reviewed to ensure all workers in Australia, no matter what industry they work in, have:

- decent working arrangements,
- access to low cost remedies against unfairness,
- and are able to bargain collectively.

We are particularly concerned about the fact that the Bill still does not provide a right to arbitration as the final step in procedures dealing with disputes arising under the National Employment Standards, awards and collective agreements. We hope that the committee will continue to dialogue with unions about this particular issue prior to the Bill being passed.

CONSTRUCTION INDUSTRY

The new Bill does not address the inequity of treatment and protection for workers in the construction industry brought about by the maintenance of the Building & Construction II Act. We urge the government to repeal this contradictory legislation and abolish the ABCC to create equity of treatment of all Australian workers by bringing them all under the jurisdiction of the Fair Work Bill.

UNFAIR DISMISSAL

The restriction to redress for unfair dismissal for workers employed in the private sector with fewer than 15 employees, is grossly unfair to workers employed in small enterprises. This situation will conitinue to impact negatively on low paid women and young workers, who are often those discriminated against and unfairly dismissed. Either the dispute settling procedures need to be strengthened to particularly protect these workers or they should be entitled to receive parity with the same provisions as all other workers.

The seven day restriction to lodge the necessary application for unfair dismissal is both unrealistic and unfair. Our experience indicates that it is very difficult to gain the necessary information from the workplace in that short time frame. This provision works against a resolution and encourages poor employers to stall for time and hence negate the option for an application by the employee.

The exclusion of long term casual employees is extremely inequitable and will seriously affect many retail workers , cleaners and community sector workers. Access to unfair dismissal provisions for

fixed term employees and seasonal employees remains unclear and needs to be defined. The 12 month qualifying period creates an unfair distinction regarding “unfairness”. Surely being dismissed unfairly is apparent no matter how long the person has been employed.

PARTIES BOUND

The issue of union representation is of particular concern to our affiliates as it is unclear whether unions are included as parties bound to an award or agreement. This issue will create a lack of representation by particular groups of workers and particular sub-branches of unions. This will be especially apparent when these groups operate in a region such as ours where state and territory boundaries do not reflect the way in which an industry might operate. Some examples of industries where this situation occurs are forestry, community services, aged care, and the power industry are.

INDUSTRY BARGAINING AND SINGLE BARGAINING UNITS

All ACT Government employees are covered under a common template agreement which covers 22 awards and 8 departments and all categories of employees. This agreement is bargained collectively between 10 unions and the ACT Government. The new *Fair Work Bill* is silent in regard to the status of this type of agreement. The current bargaining process has significant benefits .It would be sensible to retain this industrial instrument because it is critical for territory governments and creates an efficient bargaining process. This method of bargaining is critical to creating equity in areas where there is one employer that performs many functions, similar to a state government , such as the provision of education and health services. In this we ask two questions:

1. Will this type of agreement be allowed under the Fair Work Bill?
2. Can it be regarded as an enterprise agreement?

This issue needs clarification prior to 2013 as this agreement will commence re-negotiation in 2009. These agreements are negotiated every three years through negotiating a common enterprise agreement. This instrument regulates general wage increases and conditions for all employees and entities of the ACT Government, covering over 17,000 employees. It has helped to address pay inequities between female and male full-time employees, common arrangements for part-time and casual employees and has assisted in addressing allowance inequities between departments and different employees. This process has seen the equalisation of working hours on the grounds of pay equity. It has also assisted in achieving equity improvements in the areas of occupational health & safety, skills based salary systems, superannuation, flexibility provisions and paid maternity leave

and common classification structures. It also assists employees and unions to have the capacity to achieve wage and employment outcomes that are fair and equitable across industry sectors.

The provisions of the Bill in relation to single interest employer bargaining are of particular interest and concern to a number of UnionsACT affiliates as they bear upon bargaining in the non-profit community services sector, disability Services and TAFE college areas of their membership coverage. The states and territories provide the majority of funding for these sectors of the economy and workforce. State and Territory legislation provides the common regulatory framework required for these important areas.

However as currently drafted, the provisions will do little to facilitate bargaining in the above mentioned areas where bargaining has traditionally been fraught with difficulty, in terms of access to and capacity for bargaining. The provisions are still quite cumbersome and lack a requirement for good faith bargaining that will militate against the successful making of an MEA. The single interest employer bargaining process requires employers to apply for a Ministerial declaration that they be permitted to bargain (s247) or the employers may apply to the FWA for an authorisation (s248).

Thereafter the Bill treats the bargaining process as if it were for a single enterprise agreement.
Due to its heavy reliance upon the Corporations power of the Constitution, the Bill will extend Commonwealth powers to State employees who are employees of trading corporations. This will include some local government employees, community sector workers, teachers in TAFE colleges in those states where TAFE is organised as a corporation/s, ie, Victoria, Tasmania and arguably other states. Through its further reliance on the Territories power, the Bill will also apply to AEU members in the ACT and the NT in both the schools, preschools and TAFE sectors. UnionsACT agrees with the issues raised by the AEU and the ASU in this regard.
We agree with the AMWU submission that states that workers should be able to bargain on any issue they deem relevant to their employment.

INDUSTRIAL ACTION

It is a basic labour right that all workers be permitted to take industrial action to provide a balance of power during negotiations and to protect their safety. As the right to strike is an internationally recognised right, *UnionsACT* believes that rendering industrial action unlawful is not in keeping with the declared aims of the Government's *Forward with Fairness* policy objectives. This combined

with other protected action limitations means that many low paid workers will have no ability to bring reluctant or intransigent employers to the bargaining table in a timely and efficient way.
It is contradictory that any employer -initiated industrial action, such as a lock-out, does not result in any penalty or breach of good faith bargaining. This is inequitable as the penalties imposed on employees taking unprotected action or unions authorising industrial action are most severe. In fact the Fair Work Bill makes it compulsory for employers to withhold a minimum of 4 hours pay for any action taken. This is unfair to employees and their representatives and plays directly into the hands of employers who do not wish to bargain in good faith. It appears that such a deduction is also at the employers discretion. An example of an employer using these tactics is the Cochlear Implant factory in NSW where hundreds of manufacturing workers have been trying for more than a year to get the company to recognise their right to be represented by the AMWU in negotiations.

$100,000 NON AWARD EMPLOYEES

The exclusion of employees on salary levels of $100,000 or above to not be covered under any industrial award is not only unfair but unrealistic in light of current salary levels in technical, trades and public sector arenas. This will immediately put some classifications at odds with their slightly lower paid counterparts. It has been assumed that such employees will not be disadvantaged by removing them from award coverage. Because of the impact of Work Choices many people on these salary levels have had been required to work significant amounts of overtime without additional payment or flexibility allowance and have ended up being paid less than if they had remained under award coverage. It is unlikely that this has been an intended consequence and will continue to occur for certain groups of highly skilled and in-demand workers who inch their way towards this unrealistic salary cap.

The problem with such a discrepancy for higher paid employees and management is that it creates a two tier system. This is problematic because it means one set of circumstances for the management and another for the lower weaker employees.

$100,000 is a low threashold even in current pay bands. If a two tier system is to be maintained it should not be based on a monetary figure but instead it should be set as a percentage of the minimum wage.

ROLE OF FAIR WORK AUSTRALIA

The reliance on Fair Work Australia (FWA) to resolve significant issues between employers and employees without the power to enforce their decisions is a significant problem. A number of UnionsACT affiliates have experienced significant delays in resolving member's problems even when the Authority recognises that the employer is in the wrong. UnionsACT have had a number of people who are not union members who have approached us after trying to secure backpay with the intervention of the FWA. They have been frustrated by the apparent lack of authority and resourcing invested in Fair Work Australia and their lack of ability to enforce their own recommendations.
The incapacity to question or challenge a decision of the Workplace Authority is a significant shortcoming of the current process. There is no opportunity for a union, on a member's behalf, to explain or clarify the operation of a particular Award in the event that the Workplace Authority misinterprets or overlooks a particular clause.

Currently there is a significant time delay between the lodgement of agreements and the assessment by the Workplace Authority. The ASU in their submission has provided examples where it has taken almost eighteen months for an employee to be told that their agreement has not passed the Fairness Test. Other examples of twelve month delays are not uncommon. This issue of the capacity of Fair Work Australia to provide timely remedies for workers in regard to breaches of good faith bargaining, backpay and other dispute issues becomes a much more critical issue when this body takes on a larger role. At least when the AIRC had carriage of these issues and all parties were able to appear before a Commissioner then these issues would be resolved in a timely way and with a binding decision which had to be upheld by all parties. The concern is that many of these matters will drag on for long periods without a binding resolution and little capacity of Fair Work Australia to enforce their own decisions.

CONCLUSION

UnionsACT has made a series of recommendations which we believe serve to make the Fair Work Bill a more practical and fairer system for all types of workers regardless of what industry, occupation or jurisdiction they may belong to. It is in everyone's interest that all the unions representing the

largest single group of employees in the nation are able to understand, navigate and thrive in this new industrial environment and will restore true democracy to this arena which has been sadly absent for over a decade in Australia. It is also critical that the rights that have been enjoyed by Australian workers in the past and which comply with international benchmarks such as those stipulated by the International Labour Organisation (ILO) and by the OECD are restored to our workforce so that our economy can continue to grow and thrive in an increasingly globalised market place.

We urge the Senate Committee to examine the recommendations and suggestions for improvement that have been offered by unions, in the spirit of co-operation with which they have been offered in order to redress the mistakes that have been made in the recent past with hastily and poorly thought out legislation and regulation.

We would also welcome any opportunity that may be offered to appear before the Committee in February in Canberra or at any of your other public hearings.

RECOMMENDATIONS

1. That the Inquiry note the concerns held by UnionsACT about Fair Work Australia, particularly with regard to failures in the areas of jurisdictional coverage, modern awards, industry bargaining and dispute resolution.

2. That the Inquiry recommend the amendment of the Fair Work Australia Bill to excise certain local and territory government and associated corporations and other entities from jurisdictional coverage under the Fair Work Australia Bill where such excise preserves better outcomes for those employees.

3. That the federal system include access to a well resourced, no cost industrial jurisdiction enabling the conciliation and arbitration of industrial disputes between bargaining periods. Arbitration clauses should also be manadatory in all agreements – not just a dispute settlement clause.

4. That the 7 day time limit for the filing of unfair dismissals be removed and that the present 21 day time limit be retained, with the capacity for employees and unions to make application for extensions of time.

5. We recommend that the Bill allow employees the option to terminate unfair or below standard AWA's particularly those workers in a vulnerable or unfair position such as young people, women, service industries.

6. UnionsACT recommends bargaining orders be obtainable in relation to bargaining for a MEA (providing other s230 requirements have been met) whether or not a low paid authorisation is in operation.

7. UnionsACT recommends the Bill incorporate a further mechanism which would enable state and territory public sector employees to access the new national system where they no longer have access to a fair and effective safety net of minimum terms and

conditions of employment. The Conciliation and Arbitration power has previously been used as a source of power founding such a mechanism.

8. Amendments to the Bill should be made that ensure that no employees are disadvantaged by the amendments and that community standards established in other state jurisdictions are not reduced at the expiry of existing NAPSA's.

9. That the new Bill have regard to the unique issues encountered by the ACT with respect to the Single Bargaining Unit approach which has been used to establish wages and conditions for the ACT Public Sector employees and provide a clear ruling as to the status of such agreements in the future.

10. That the NES enshrines more than 8 public holidays as a Minimum Standard to align with community standards in all jurisdictions.