Submission to the Senate inquiry into the Fair Work Bill 2008

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1) Executive Summary

In summary, the bill:

a) seeks to rewrite Australian unions into the processes of workplace relations law.

b) attempts to create a model of workplace relations which genuinely serves the interests of both business and workers.

c) creates several new concepts in workplace relations law in Australia, the implications and outcomes of which cannot readily be predicted.

2) The bill's workplace relations model

The model has a three tiered approach to providing employment standards: legislative, awards and enterprise agreements. At each level individual employment contracts are provided for conditional that individual arrangements do not drop below the standards.

The bill provides for the following:

Legislated minimums

- All employees are guaranteed 10 minimum legislated National Employment Standards (NES): (clauses 59 to 131)

Individual arrangements $100,000 plus

- Employees earning more than $100,000 a year have individual employment arrangements conditional on the arrangements not falling below the NES: (clauses 59 to 131). Although there are some uncertainties about how the arrangements will interface with the NES, the bill seems to create a genuine individual contract stream. (For example, it is not clear how someone earning say $200,000 a year and working 60 hour weeks will meet the NES requirement for a 38 hr week.)

Award minimums

- Employees earning below $100,000 a year have 10 basic award conditions applying to them in addition to the 10 NES. (clauses 132 to 168). The 4000 or so industry awards are going through a 2 year simplification and consolidation process which is being conducted by the Australian Industrial Relations Commission. The process seems to be progressing within the planned timetable.

Individual arrangements award minimum plus

- All awards must contain a clause enabling individual employees to enter an individual agreement with their employer should both parties wish, the terms of which must deliver better conditions to the employee than under the award. (clause 144) Unions or any other third party cannot be a party to the agreement. Similarly, approval of the agreement cannot be subject to union or any other third party interference. (clause 144(4:5)) The provisions seem to be genuine individual employment arrangements underpinned by award and NES minimums.

Enterprise agreements

- Enterprise agreements must deliver conditions better than the award and NES minimums. There are some surprises here because what was anticipated to be a two tier system of union and non union agreements really only provides for union agreements. Furthermore, there is a new element in the model "good faith bargaining" which is a large deviation from enterprise models applied over the last several decades. This is explained and discussed below.

Individual arrangements enterprise agreement plus.

- All enterprise agreements must have a clause enabling individual employees to enter an individual agreement with their employer should both parties wish, the terms of which must deliver better conditions to the employee than under the enterprise agreement. (clauses 202-204) As with award individual arrangements, unions and other third parties cannot be included in the agreement or exercise control over approval. (clause 203(5))

Union entry rights

There are some aspects of union entry rights that are familiar;

- For example unions must give 24 hours notice and give the occupier an entry notice (clause 487). Entry is only allowed during meal and other breaks during work time (clause 490). Unions must comply with work safety requirements of the occupier (clause 491) and conduct meetings in a room designated by the employer (clause 492).

Other aspects are unfamiliar and new;

- The bill allows unrestricted union entry rights even where the union does not have members (clause 484) [*A permit holder may enter premises to hold discussions with one or more persons: (a) who perform work on the premises; and (b) whose industrial interests the permit holder's organisation is entitled to represent; and (c) who wish to participate in those discussions.]* Further the bill gives unions wide powers to inspect any company records. (Clause 482) [*While on the premises, the permit holder may do the following: 1(c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document relevant to the suspected contravention…]*

Industrial action & pattern bargaining

- On the surface the bill only allows legal strikes (protected action) during enterprise bargaining and when authorized by a secret ballot of employees. Further, industrial action is not allowed for pattern bargaining. Illegal (unprotected) strikes open unions and others to litigation for damages.
  - The clauses that reflect this include; A strike is only allowed over matters to do with enterprise negotiations (clause 409). A ballot is required for a strike (clause 409(2)). Strikes over pattern bargaining are illegal (clause 409(4)). Strikes over union demarcation disputes are illegal (clause 409(5)).

However strong uncertainty exists given other provisions.

- The bill creates an avenue of workplace bargaining for "low paid" employees which is quite different to the general provisions for enterprise agreements. (clauses 260 to 265). There are a number of problems with this, in particular that no definition is given to the meaning of "low paid" creating an undefined reach of the sections and the provisions can apply to "multi-enterprise" agreements. What this means is hazy and could well create the possibility of de-facto, backdoor pattern bargaining. Because there is

insufficient clarity in the bill to dispense with this possibility it is prudent to assume that pattern bargaining will be legal under the "low paid" steam of enterprise bargaining.

Small Business Dismissals

- A new regime for "fair dismissal" is created for businesses with fewer than 15 employees. Unfair dismissal laws apply to businesses larger than 15 employees after 6 months employment. For businesses with less than 15 employees a new "fair dismissal code" applies enabling fair dismissals in the event of theft and other matters. (clauses 379 to 405)

The Enterprise Agreement Stream

In relation to enterprise agreements the bill is significantly new in that it applies concepts of "good faith bargaining." Good faith bargaining is completely new as a legal idea in Australian workplace relations law. It is a new invention created and promoted by the Australian union movement.

The Fair Work Bill has an enterprise bargaining model which imposes "good faith" negotiation processes on employers and employee representatives (unions and others). While the bill asserts conditions in an agreement cannot be imposed orders can be made against parties by Fair Work Australia requiring the parties to engage in certain discussion processes. And there are legislative 'hooks' that seem to turn the process into something potentially much more than a requirement to negotiate in certain ways. In fact there appears to be little effective choice available to employers and employees in the type of enterprise agreement they may want. Union enterprise agreements appear to be the only agreement available. The following features give some sense of the restriction of choice.

- Majority support determinations: (Clauses 236 to 238). This enables Fair Work Australia to declare that a majority of employees want to negotiate an enterprise agreement and to force an employer to engage in negotiations. There is no requirement for an employee ballot. The majority support determination effectively removes the choice of the employer not to have an enterprise agreement.
- Bargaining related workplace determinations: (clauses 269 to 271). This enables Fair Work Australia in circumstances where agreement cannot be reached to impose conditions in an enterprise agreement. This is at odds with earlier sections in the bill that declare that parties would not be forced to accept terms in an agreement. However these provisions have all the features of imposed, old style industrial relations arbitration, in that conditions can be imposed on employers that do not suit their business needs.
- Default bargaining representative: (Clause 176). This gives unions automatic bargaining representative rights where they have at least one member on a site and employees fail to make written authorization for an alternate representative.
- Union party to agreements: (clause 183) Where a union has been a bargaining agent and the agreement does not cover the union, the union can notify FWA that it is a party to the agreement. This can occur without employee or employer sanction.
- Low paid stream: (clauses 241 to 246 and 260 to 265) The outcome of these clauses is to pull into enterprise bargaining processes a multitude of businesses into collective "multi-enterprise"

agreements. The processes are complex and have the features of denying employers the choice not to enter enterprise agreements. They appear very much like sanctioned pattern bargaining using another name. There is no definition of "low paid" raising the prospect of very wide reach of the provision.

- Union only Greenfield agreements. Greenfield agreements are used where a new enterprise has begun and before anyone has been employed. They are common in the construction sector. Greenfield agreements now must only be with a union. (Clause 182(3))
- Employees voting on agreements. An agreement is passed when a majority of the employees who voted agree. Where all employees do not vote it is highly likely that agreements will be passed on the vote of a minority of the employees to be covered by the agreement. (clause 182(1))
- Matters pertaining. This is perhaps the most significant part of the enterprise agreement stream. It determines what content can be included and not included in enterprise agreements. There are three primary parts.
    a) An agreement cannot contain matters that are *unlawful* (clause 194). For example it prohibits union 'bargaining service fees' from being included.
    b) Matters must pertain to the *relationship between the employer and employee* (clause 172(a)). The explanatory memorandum argues that the reach of this provision is well known through long established legal precedent.
    c) Matters can pertain to the *relationship between the employer and the union*. (clause 172(b)). This is an unprecedented and historic shift in the design of industrial relations law which will have wide consequences. It has been accepted to date that legitimate union authority is derived from the fact that they represent and have employee members. This clause undoes this principle and delivers to unions a statutory authority independent of any employee representation they may have. They stand institutionally disconnected from employees.

Taken as a package these measures do not deliver an enterprise agreement process focused on the employer-employee relationship but rather makes employers and employees subservient to union statutory authority.

3) Overall view of the bill

Most of the bill has a model of workplace relations law which should enable a balance between the needs of employers and employees through a focus on the employer-employee relationship. In these areas the bill offers a workable model of workplace relations. The exception is the enterprise agreement processes that focus almost entirely on the interplay between employers and unions. Employees seem to be ancillary to the processes. It's a model that could result in the slow death of the enterprise agreement process in Australia (see discussion below).

On the positive side:

- The National Employment Standards are obvious and straightforward. The simplified award

arrangements and minimum standards are also likely to prove straightforward. In employing people, businesses and employees will have clear guidelines to which they must adhere.

- The individual agreement stream appears to be simple. If a business and an employee want to establish an individual agreement between themselves they can do so without interference from any third party. They have one responsibility, to ensure the arrangements are better for the employee than the minimums required under the NES and the relevant award.

A new union authority modeled on New South Wales laws

The delivery of a new level of union authority under enterprise arrangements has its closest modeling on the industrial relations laws in NSW. In NSW the industrial relations commission is a law unto itself. Natural justice is denied particularly with the prevention of appeals. The commission has authority to and does intrude into commercial transactions unrelated to employment and creates and sanctions commercial price fixing. The commission has higher authority than the High Court, NSW Supreme Court, ACCC and NSW workcover authority to name a few. NSW unions are the policing body for the NSW IRC with wide and almost unrestricted powers. They conduct work safety prosecutions and have unfettered powers of search and seizure of commercial company documents which they exercise regularly. They persistently breach privacy and confidentiality laws under the mask of the NSW IRC authority and processes. The full sweep of arrangements under the Fair Work Bill significantly reflects key part of these NSW laws.

4) Recommendations

Areas of acceptance

Other than paying attention to drafting and technical matters the following sections of the Fair Work Bill provide the probability of a good workable model of workplace relations law within the current political environment:

- National Employment Standards
- Individual arrangements for employees earning more than $100,000 a year.
- Award minimums
- Individual arrangements for employees under awards
- Individual arrangements for employees under enterprise agreements.
- Sections on protected industrial action requirements.
- Prohibitions on pattern bargaining.
- Unfair dismissal and small business fair dismissal.

These sections offer a balance between ensuring minimum standards for employees and giving businesses an opportunity to work individually with employees to improve business outcomes.

There is one suggestion we offer. The fair dismissal processes should be extended to businesses employing less than 50 employees. The model of a fair dismissal process is a positive initiative. Employers should know when they can dismiss someone and the code that has been developed is practical. The fair dismissal process has been developed to assist small businesses. But a small

business does not have to be that big to employ more than 15 people particularly when casuals are taken into account. From an equity perspective extending the fair dismissal process to a wider range of small businesses would assist employment and commercial certainty

Areas to be reviewed and changes

Provisions relating to enterprise agreement processes do not offer a workable workplace relations model because it shifts the focus away from employers and employees and is effectively dependent on unions for its operations. There is no effective choice in this respect.

For around 20 years enterprise agreements have been viewed as a productivity driver for businesses and the economy. It is recognized that for businesses and the economy to be internationally competitive each individual business must constantly improve its internal operations. Enterprise agreements have been seen as the legal process by which businesses, with workers could modify national and industry based requirements to suit each specific business need. It is asserted that the enterprise approach has been an important contributor to wealth creation and distribution over the last few decades.

However during this same period private sector union membership has plummeted creating a 'business model' crisis for these unions. Their response in many instances has been that to survive they must force their way into the relationship between employers and employees. Some unions seek to do this through intimidation. Most unions seek to do this through legislative favour. The enterprise agreement provisions of the Fair Work Bill deliver such favours. The key to understanding this aspect of union survival motivation is that union membership is more dependent on employer attitudes and actions rather than employees. If employers can be induced into creating business dependency on unions', employees will join unions. Whether right or wrong this is the thinking. Whether this suits the commercial viability of businesses is not of concern to unions..

However, union survival is not what motivates businesses. Businesses are concerned with their own viability and survival. What exists is a disconnect between the needs of unions and businesses. Rather than finding common ground, the Fair Work Bill institutionalizes and expands the disconnect between unions and businesses.

There are three probable outcomes:

- Some businesses may find that their relationships with unions are constructive, that unions understand the pressures of business and that win-win productivity driven outcomes can be achieved. The bill in these instances may prove of assistance.
- Other businesses may find that unions they must deal with do not understand or want to understand the business pressures. Negotiations will be within the old paradigms of 'worker-boss war' and outcomes will be winner-loser focused. In these scenarios the bill will work against the interests of business productivity and the economy. Considerable damage to business viability, investment potential and jobs is probable.
- Other businesses may conclude that the enterprise route is not viable, decide to stay

exclusively within award boundaries and look for employee relationship building, productivity outcomes and win-win through the individual agreement provisions in the bill. That is, the bill provides an effective escape route from enterprise agreements.

It is likely that each of these scenarios will play out once the bill is passed. The consideration for the Senate is the extent to which it believes enterprise bargaining should be a primary element in a workplace relations model for Australia. It is highly probable that employers may simply avoid the use of enterprise agreements heralding the progressive demise of these workplace relations instruments.

In the Senate deliberating on the future of enterprise agreements the following items at least should receive close attention:

- The suitability of forcing employers into agreement negotiations against their wishes through majority support determinations.
- Whether imposing agreement terms through bargaining related workplace determinations is appropriate.
- Whether union bargaining representative rights should only be available on the written authorization of employees.
- Whether union can make themselves a party to agreements after an agreement has been approved without consultation or agreement from employers and employees .
- The extent to which the low paid stream processes amount to de-facto pattern bargaining
- Whether an avenue for non-union Greenfield enterprise agreements should remain available.
- Consideration to requiring mandatory voting of all employees on agreements to ensure the intent of all employees is obtained.

The following amendments at minimum should be made particularly to create clarity around the bill.

1) Matters pertaining: The content of agreements is too ill determined and will lead to disputes requiring time consuming and expensive litigation for resolution. Reliance on legal precedent does not serve the interests of clarity. The Senate should list those things that can and cannot be included in agreements by amending the unlawful content clauses and/or creating a list of matters that pertain/do not pertain to the relationship between employers and employees.
2) Employer-union relationship: Clause 172(1)(b) should be deleted. Unions should only derive their authority from their representation of employees. This is covered under clause 172)1)(a).
3) Define low paid: Should the Senate conclude that the low paid stream of enterprise agreements be retained, a definition of low paid should be included so that the parameters and reach of the low paid stream of enterprise bargaining is clear.

What is at stake is the viability of the enterprise agreement processes. It will only have a future if it is relevant to both employers and employees and genuinely reflects their joint intentions and wishes.