Submission

to

Senate Education, Employment and Workplace Relations

Inquiry into the Fair Work Bill 2008

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Introduction

1. The Australian Services Union [ASU] is one of Australia's largest Unions, representing approximately 120,000 employees.

2. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

3. Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

    - Local government (both blue and white collar employment)
    - Social and community services
    - Transport, including passenger air and rail transport, road, rail and air freight transport
    - Clerical and administrative employees in commerce and industry generally
    - Call centres
    - Electricity generation, transmission and distribution
    - Water industry
    - Higher education (Queensland and SA)

4. The ASU has members in every State and Territory of Australia, as well as in most regional centres as well.

5. The ASU has, during its existence, been an active participant in the Australian industrial relations systems at both a State and Federal level. The Union has established on behalf of its members an array of federal and state awards and agreements providing terms and conditions of employment. In the Federal system, the ASU maintains about 200 underpinning awards, supplemented by hundreds of enterprise bargaining agreements. The same has applied in State IR systems.

6. Since bargaining at the workplace level has been a feature of Australia's IR systems, the ASU has actively bargained with the employers of our members for appropriate terms and conditions of employment and has fully participated in this system, despite limitations on the ability of unions to bargain on equal terms with employers introduced particularly by the WorkChoices amendments in 2006/07.

7. The submission is authorised by the National Secretary of the Union.

Overview

8. The ASU welcomes the Federal Government's commitment to repeal the Howard Government's WorkChoices legislation and to introduce a new national IR legislation based on the policies the ALP took to the last Federal election.

9. The WorkChoices legislation was extremely detrimental to workers and their families. It deliberately set out to strip from employees not only terms and conditions of employment by lowering or eliminating key elements of the safety net of terms and conditions of employment but to weaken the ability of employees to collectively defend and advance their interests as employees.

10. The WorkChoices legislation gave the whip hand in workplace relations to employers, particularly by promoting individual statutory contracts, the overwhelming bulk of which were 'unequal treaties' forced upon employees as 'take it or leave it' arrangements without any pretence at genuine or other bargaining. The award safety net was stripped from employees and reduced to just the five Fair Pay and Conditions Standards. Protections – such as those offered by concepts such as 'protected award conditions' were notional and frequently non existent in practice.

11. The ASU strongly supports the submissions of the ACTU with regard to the impact of the Howard government's WorkChoices legislation on Australian employees. The ASU's members suffered as a result of the previous legislation and some of those effects are detailed in this submission as well as in separate submissions and publications of Branches of the Union and in particular those of the Victorian Private Sector Branch of the ASU.

12. **Recommendation:** The ASU supports the passing of the Fair Work Bill, with reservations and with proposed amendments, which are noted in this submission. Some of the ASU's concerns are of particular concern to the Union and its members and the submission makes specific recommendations for improvements to the Bill.

13. The ASU, its Branches and members were active participants in the ACTU-led 'Your Rights at Work' Campaign in the lead up to the 2007 election. The ASU spoke to its members, workers and citizens generally to explain the pernicious, anti-worker nature of the WorkChoices legislation. The Australian people rejected that legislation in the 2007 Federal poll, and expect the Rudd Labor Government to give full effect to the abolition of WorkChoices.

14. The ASU welcomes the Government's initial moves to prevent the making of new individual statutory agreements [AWAs] [other than transitional ITEAs]. The ASU believes that individual statutory agreements should have no place in any industrial relations system in a modern democratic society. Further measures need to be taken to eliminate as soon as possible continuing sub-standard individual statutory agreements.

15. The ASU has been a full participant in the Government's award modernisation program currently being conducted by the Australian Industrial Relations Commission, although the Union is seriously concerned about the impact of this exercise on the terms and conditions of hundreds of thousands of Australian workers who are seeing their terms and conditions of employment being reduced without any demonstrable need for such reductions and without any compensation for their loss. To date, the outcomes from the award modernisation process are not consistent with the Government's expressed aims for this process and the Minister's Award Modernisation Request. This issue is further dealt with below and the Union makes strong recommendations about urgent action that is necessary from the Government to address serious disadvantage to workers arising from award modernisation.

This submission deals with a number of key issues of concern to the Australian Services Union arising from the terms of the proposed Bill. The stated purpose of the IR Bill is to create a new framework for workplace relations to commence on 1 July 2009. It will:

- establish a guaranteed safety net of minimum terms and conditions;
- ensure that the safety net cannot be undermined by the making of statutory individual agreements;
- provide for flexible working arrangements;
- recognise the right to freedom of association and the right to be represented in the workplace;
- provide procedures to resolve grievances and disputes;
- provide effective compliance mechanisms;
- deliver protections from unfair dismissal for all employees;
- emphasise enterprise level bargaining underpinned by good faith bargaining obligations and rules governing industrial action; and
- establish a new institutional framework to administer the new system comprising Fair Work Australia and the Fair Work Ombudsman.

16. The ASU submits that these stated objectives are only partly met by the provisions of the proposed Bill and action should be taken by the Government now, and in the further Transition Bill, to address these deficiencies.

17. The ASU submission also deals with other key issues of concern to ASU members in particular industries and sectors, including:

- Award modernisation
- IR system coverage for local government and social and community services employees
- Multi-enterprise bargaining.

Award Modernisation

18. Award modernisation was a key part of the ALP's Forward to Fairness policy that it took to the 2007 election. The award modernisation process has been commenced by the Australian industrial Relations commission as a result of Part 10A of the

Workplace Relations Act and in particular an award modernisation request made by the Minister in accordance with s.576C of the existing Workplace Relations Act as modified in 2008 by the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008.

19. The Objects of part 10A of the existing Act include an objective that modern awards "must provide a fair minimum safety net of enforceable terms and conditions of employment for employees;…" [s.576A (2)(b).

20. This objective is carried forward into the proposed Fair Work Act. The Bill presently before the Committee contains the following objective:

> ***"s. 134 The modern awards objective***
>
> *What is the modern awards objective?*
>
> *(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions,…"*

21. Section 576C (1) provides that any award modernisation process must be carried out in accordance with a written request made by the Minister. The Award modernisation request made by the Minister in 2008 states in part that "The creation of modern awards is not intended to…disadvantage employees;..".[1]

22. The ASU submits that the award modernisation process is not achieving the objectives of the Government or the requirement of existing and proposed legislation as set out in the Fair Work Bill for the reasons set out below. Specifically, modern awards so far made do not provide fair terms and conditions of employment and disadvantage many employees.

23. Modern awards are a key instrument in the new industrial relations system to be put in place by the fair Work Bill. It is essential that this work is done in accordance with the Government's objectives from the start.

24. Awards remain very important to members of the ASU and the classes of employees covered by the ASU, notwithstanding the Union's active participation in bargaining over the past two decades. A considerable number of employees

[1] Consolidated Award modernisation request, accessed via the AIRC website 8th January 2009.

represented by the ASU are award dependent, either wholly or in part. This includes employees in business services [including clerical and administrative employees] and in social and community services. In some industries and sectors, award level wage and conditions fixing has been dominant, e.g. NSW local government. General award standards are important to the many workers who have common law agreements covering their employment.

25. Of course, even in sectors and occupations where enterprise bargaining pre-dominates, awards remain of vital importance, since they form the base for enterprise bargaining – although this system was partially destroyed by WorkChoices [the base being only the five conditions in the so-called Fair Pay and Conditions Standard]. The Award – combined with the National Employment Standards - is being restored under Forward with Fairness as the basis of the "Better off Overall Test" and thus is of great importance to all Australian workers, union and non union workers alike.

26. The level of the award minimums set by the AIRC as part of the award modernisation process is therefore at the heart of the Government's promise to the Australian people to restore their industrial entitlements. Unfortunately, on the evidence and the experience so far, this promise is not being delivered by the award modernisation process and the Government must take urgent action to address the serious deficiencies that have already emerged in the outcomes of the process so far.

27. The ASU has been an active participant in the award modernisation processes conducted by the AIRC. The Union made 37 different written submissions during 2008 and appeared at nearly all general and specific sector public consultations so far held on the priority and Stage 2 industries and occupations and expects to do so again in 2009. The ASU has been an active participant in the award modernisation process because it has a particularly diverse coverage in a range of industry sectors and occupations and because the Union is the principal union for private sector office employees.

28. The Minister's Award modernisation request required that priority awards be made by the end of 2008. The AIRC published 17 priority awards on the 19th December 2008. Amongst these was the Clerks – Private Sector Award 2010 – an award that the ASU has taken a close interest in.

29. The ASU and its members are bitterly disappointed with the outcome of the award modernisation approach with respect to this award and believe that the making of this award will seriously disadvantage hundreds of thousands of clerical and administrative employees throughout Australia. The reasons for this are as follows.

30. The Australian Industrial Relations Commission (AIRC) decision on the final form of the Clerks Private Sector Award has severely cut rates of pay and conditions for clerical workers. The cuts affect clerical workers across the country and significantly reduce their safety net contrary to Government promises that workers would not be disadvantaged.

31. For example, for the first time, clerical workers in South Australia, Tasmania, the ACT and Queensland can be required by their employers to work on Saturday mornings as part of their ordinary hours of work.

32. The AIRC has determined a loading of 25% for work on Saturday mornings but this will be cold comfort for the mainly women workers covered by this Award who will be forced to work instead of taking their children to Saturday morning sport or other family activities. The inclusion of Saturday work as "ordinary hours" will create the potential for many thousands of workers to be forced to work Saturdays as part of their normal working week in future.

33. Following the publication of the Exposure Draft of the modern Clerks Award in September, the ASU consulted members and other clerical workers about the impact of working ordinary hours on a Saturday morning. Clerical workers were horrified at the prospect and the ASU gave the AIRC the full results of that consultation, but to no avail. These survey results are attached as Attachment A.

34. The ASU made strong representations to the AIRC regarding a range of disadvantages that clerical employees would face if the terms of the Exposure Draft were confirmed in the final award. The Commission's decision acknowledged that:

> *"Extensive submissions were made about the content of the exposure draft for this award. The ASU identified a number of areas of disadvantage for current and future employees."*

35. However, little note appears to have been taken of the extensive list of disadvantage if changes were not made to the draft award. In October the ASU and

the Australian Nursing Federation (ANF) went advertised publicly expressing strong concern about the impact of the proposed modern awards on women workers, including clerical and administrative employees and nurses. These fears have been realized. The ASU/ANF advertisement is attached as Attachment B.

36. A list of the key cuts in terms and conditions for clerical and administrative employees including pay rates includes:

- Saturday morning work as part of ordinary hours and extended Monday to Friday spreads of hours for many workers.

- Cuts in the level of minimum wages paid to clerks: the AIRC used the SA Clerks Award classification structure for the modern award but cut $18.10 per week (or $941.20 per annum) from the Level 1 year 1 entry rate of pay without giving any reason or explanation. General clerical rates will now start at $20 per week or $1000 per year less than clerks under the general Retail Award.

- Casual loadings for Victorian workers have been cut from 33.3% to 25% - a cut for a casual clerk in Victoria working 30 hours per week of $45 each week or $2300 per year.

- No jury service ‘make up’ pay beyond the level provided in the National Employment Standard [itself inadequate on this point] despite all clerical awards having vastly superior make up pay provisions.

- Higher redundancy standards for workers under state awards have only been preserved for workers employed when the new modern award commences - new employees will lose this part of their safety net and all employees will lose it after five years.

- Additional parental leave entitlements have been lost.

37. Under Division 3 of part 2-9 of the Fair Work Bill, a high income employee, that is, an employee guaranteed at least $100,000 per annum in pay will not be covered by a modern award. Inexplicably, the AIRC has cut this guarantee in half for clerical employees, giving way to pressure from some employers to introduce a so-called exemption rate into the modern clerical award. Exemption rates, which apply in

some State clerical awards, are not a feature of most Federal awards. The ASU has strongly argued that they are out-dated and again severely cut the safety net for employees.

38. The AIRC has decided to impose the archaic NSW Clerical Award exemption level on all clerical employees. This means that a clerk earning as little as 15% above the highest rate in the award will not be covered by key award safety net protections.

39. The highest rate in the proposed Clerks Award is $740 per week. Thus a clerk earning just $851 per week will be exempt from key award provisions including:

- Hours of work clauses, including spreads of ordinary hours and weekend penalty rates
- Overtime pay clauses
- Minimum engagement periods
- Part-time work arrangements
- All allowances including accident make up pay
- Shift penalties and hours arrangements
- Rest breaks

40. The only award safety net conditions retained by an exempt employee are:

- Superannuation;
- Annual leave;
- Personal/carer's leave and compassionate leave;
- Public holidays and
- Community service leave.

41. Since, with the exception of Superannuation [which is largely a legislative entitlement anyway], all these retained conditions are provided for in the National Employment Standards, employees exempted from the operation of the award by

this new exemption provision lose all award benefits [except where the award may supplement the NES in regard to these matters]. These employees will forced to rely simply on the NES plus any limited award supplementation of NES conditions.

42. The table below shows the award terms and conditions lost by 'exempt' employees.

Award clause	**Conditions lost by employees**
Access to the Award and the NES	Right of access to a copy of the award and the NES
Consultation regarding major workplace change	Obligation on the employer to notify employees re changes that will have significant effects on employees and obligation on employer to discuss the effects of those changes and measures to avert or minimize those effects.
Dispute resolution	No access to dispute resolution procedures re disputes arising under the award **or the NES**
Types of employment	No protections for part-time employees including re pro rata entitlements; agreed hours; roster changes; minimum number of consecutive hours. Casual loading. Minimum payment guarantee for casuals.
Termination of employment	Award employment termination provisions in excess of the NES – including job search entitlement.
Redundancy	Award redundancy provisions in excess of the NES including entitlements re transfer to lower paid duties as a result of redundancy; job search entitlement [one day's leave during each week of notice]; higher redundancy pay arising from a NAPSA [transitional provision]
Allowances	Transport of employees – shiftworkers Clothing and footwear allowance Meal allowance Vehicle allowance Living away from home allowance First aid allowance Higher duties allowance District allowances – NT and WA

Award clause	Conditions lost by employees
Accident make up pay	Accident make up pay – Victoria
Payment of wages	Provisions re frequency of payment; method of payment
Ordinary hours of work	Protection of spread of ordinary hours Monday to Friday. Notice of rostered days off
Breaks	Meal break Two 10 minute rest breaks each day
Overtime rates	Overtime rates of pay for work in excess of or ordinary hours of work and outside the spread of ordinary hours: time and a half for the first two hours and double time thereafter. Minimum of three hours overtime on a Saturday if employee works 38 hours Monday to Friday. 10 hours between duty where overtime is worked. Return to duty provisions: minimum of three hours at overtime rates. Time off in lieu of overtime
Saturday and Sunday rates	Saturday [within the spread of hours] – time and a quarter Sunday: double time. Minimum of fours hours work on a Sunday.
Shift work	Shift arrangements – no more than 10 ordinary hours on any day. Afternoon shift allowance: 15% Night shift allowance: 30% Paid meal break Overtime rates: including double time for all work on a Saturday, Sunday or public holidays if ordinary shift hours do not include such days.

43. This approach to award ‘regulation’ means employers will have open slather on these vital employee protections by paying rates of pay just 15% above the highest minimum rate in the award. The effect of exemption rates is magnified when the fact that many employees are paid above the minimum award rates as a result of

enterprise bargaining is taken into account. This has significantly – fatally – undermined the integrity of the safety net for employees affected by this provision.

44. For example and by way of comparison, the Fair Work Bill $100,000 guarantee means that employees paid this amount will not be covered by the Award. This equates to an 'exemption rate' of more than $1900 per week - and the employer must guarantee to pay this rate. The AIRC exemption rate for clerks is half this sum, with absolutely no guarantee of any compensation other than the higher minimum rate (which may be below the actual or paid rate in any case due to enterprise bargaining).

45. Section 330 of the Fair Work Bill provides that high income employees must agree with the terms of the earnings guarantee offered by the employer for them to lose the benefit of modern award coverage. Office employees have no such right. Clerical workers lose their award coverage and protection at a level just 44% of the Government's legislated cut off point.

46. As a result, a savage cut in take home pay for clerical workers looms as the key outcome of the award modernisation process. The ASU has repeatedly advised the AIRC of the impact of award modernisation on women workers and women clerical workers in particular. The AIRC has failed to implement the Government's legislative scheme and parameters in relation to the avoidance of disadvantage to employees.

47. The Federal Government must now take our warnings seriously and direct the AIRC to restore terms and conditions for clerical workers. The integrity of the Government's process is being significantly undermined by the current AIRC approach. In the submission of the ASU, the Government cannot sit back and see key policy planks that were voted on by the Australian people so significantly undermined.

48. The ASU submits that there is absolutely no justification for stripping award covered clerical employees of all essentially all award terms and conditions of employment at a level 44% of the legislated exemption rate.

49. **Recommendation:** The Senate should recommend that the Minister direct the AIRC to immediately remove this anomaly from the Clerks Private Sector Award.

50. In addition, it is clear that the AIRC has taken an averaging approach to setting terms and conditions of employment in modern awards. The Commission is limited in its ability to retain terms and conditions in some Federal and State awards because of the Government's direction that interstate differentials must be eliminated in five years time.

51. The ASU submits that state based differentials need to be preserved for as long as required to bring the safety net up, over time, to the best of the existing minimum standards. Many ASU members and other employees rely on the terms and conditions provided by State Awards/NAPSAs. The standards in state award are not generous, but are minimum safety net standards set having regard to criteria not dissimilar to those in Fair Work Bill. The ASU can see no case for reducing the level of the safety net for any employee or class of employees.

52. In the same way, the ASU is opposed to any averaging of terms and conditions of employment – since it inevitably leads to a loss of minimum entitlements for some workers without any compensation. Casual clerical employees in Victoria who are currently entitled to a casual loading of 33% will lose this – without compensation – as the Commission moves to implement a standard 25% casual loading. NSW casual clerical employees are entitled to a 28% loading. The effect of the standardisation of loadings is that the Award safety net is permanently reduced for Victorian and NSW workers, the two biggest States.

53. Existing casual loadings under common rule clerical awards/NAPSAs are

Victoria	25% plus 1/12th if annual leave is not paid: 33.3%
NSW	20% plus 1/12th if annual leave is not paid: 28.3%
Queensland	23%
ACT	25%
WA	25%
Tasmania	20%
SA	20%
NT	20%

54. The ASU sees no justification for the elimination of interstate differentials, or in the averaging of terms and conditions of employment whereby workers lose entitlements, without compensation. In the award modernisation process, there has been considerable discussion about a ‘swings and roundabouts’ approach to award modernisation.

55. However, this is a false and inappropriate concept. For a Victorian worker who has lost a 33.3% casual loading, there is no swing or roundabout to compensate for this loss. The introduction of a standard 25% loading which means that a Queensland casual moves from 23% to 25% does not compensate the Victorian employee. All that has occurred is that the integrity of the safety net for Victorian employees has been compromised.

56. In all previous award restructuring exercises, where conditions have been traded compensation has been available. Employees traded a condition to gain a benefit. In enterprise bargaining, employees can make conscious decisions to accept or reject bargains with gains and losses. In the current context, employees are at the mercy of the process and stand to lose conditions with no prospect of compensation.

57. **Recommendation:** The Senate should recommend that the Government move immediately to protect the terms and conditions of employees covered by awards so that they cannot be reduced below levels that are currently applying, now or in the future. This must be done with respect to all employees in a particular class of employment, where that disadvantage can be identified. This cannot be left to a case by case consideration with regard to individual employees who will simply be further disadvantaged in this process.

58. Disadvantage to employees can be identified with respect to the conditions to be lost by comparing the terms of draft modern awards with the Federal or state instruments that they will supersede. The Federal Government must act to ensure that these terms and conditions are protected for all affected employees.

59. Employees will see no reason why the integrity of their safety net – which they voted to protect in 2007 – is to be whittled away in the name of award modernisation to create an industrial relations system which disadvantages them in a key respect.

Arbitration of Award and NES disputes

60. Access to binding arbitration for the purpose of resolving industrial disputes and grievances has been a central characteristic of industrial relations in Australia since the time of Federation.

61. The absence of access to binding arbitration is a central deficiency of the Fair Work Bill.

62. Arbitration has occurred in two central contexts:

- in the establishment of industrial rights in the form of industrial awards by the Federal and State IR Commissions [and State Wages Boards in Victoria and Tasmania before that]

- In the resolution of specific collective industrial disputes and individual grievances.

63. The use of the conciliation and arbitration power to determine the nature of award terms and conditions is not contemplated by the Fair Work Bill. The passing of this system should not go unremarked. While at the Federal level the resolution of industrial disputes via award making had its peculiarities as a result of constitutional requirements, the system was based upon the active participation of representative bodies of both employees and employers. Without self-directed action by these organisations, tribunals did not make awards.

64. Tribunals acted to assist these bodies resolve issues but did not take responsibility for these matters out of the hands of participants. Award making is now a devolved quasi legislative function in which ‘interested parties’ can be consulted but they no longer have ownership of the system or the process. This represents a weakening of the voluntary, self-help function of organisations of employees and employers and a heavy strengthening of the role of the State.

65. Awards made by the Australian Industrial Relations Commission and maintained by Fair Work Australia will typically contain a disputes settling clause in the following terms:

> In the event of a dispute about a matter under this award, or a dispute in relation to the NES, in the first instance the parties must attempt to resolve the matter at the

> workplace by discussions between the employee or employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate.
>
> If a dispute about a matter arising under this award or a dispute in relation to the NES is unable to be resolved at the workplace, and all appropriate steps under clause 9.1 have been taken, a party to the dispute may refer the dispute to the Commission.
>
> The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.
>
> Where the matter in dispute remains unresolved, the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.

66. Thus arbitration of a dispute can only occur – with respect to both award issues and the provisions of the NES – with the consent of both parties. In the absence of such consent, the matter cannot be resolved by binding arbitration.

67. Enterprise agreements made under the terms of the proposed Fair Work Act must include disputes settling provisions which may include access to binding arbitration but only if the parties agree to this at the time of making the agreement. Thus, either side may prevent an agreement containing a binding arbitration clause.

68. It is clear that there were some constitutional difficulties with providing the previous Federal Commission with binding arbitration powers with regard to the settlement of some disputes, namely individual grievances. Even the settlement of disputes under the terms of agreements was considered to be the exercise of a power of private arbitration granted to the Commission by the parties. It was never entirely clear from a policy sense why this should be regarded as a private matter since the agreements made were made under statute and were required to contain provisions providing for the settlement of disputes. This would seem to be in the public domain and the public interest.

69. Nevertheless, these constitutional and other issues do appear to be present in a new Act based on the corporations power and not limited by any notion of requiring interstatedness to provide a firm basis for the exercise of an arbitral power. There

appears to be no constitutional reason why Fair Work Australia cannot have the power to resolve disputes by binding arbitration as occurs in the State tribunals at present.

70. Giving either side in a dispute the power to withhold consent to binding arbitration is likely to lead to less dispute resolution, not more. Without the 'incentive' of being likely to suffer an adverse finding in arbitration a party to a dispute is less inclined to genuinely seek to resolve a matter.

71. This will work to the disadvantage of the employees in most cases since it is employers who have the power to impose change in workplaces or to act in an arbitrary manner. If that employer also resists binding arbitration, they employee is left with no practical option for dispute resolution outside of costly legal proceedings which will be beyond the resources of most employees.

72.

Recommendation: The ASU submits that it is in the public interest that Fair Work Australia have the power of binding arbitration with regard to:

- Resolution of award entitlement related disputes
- Resolution of NES entitlement related disputes
- Resolution of disputes arising under enterprise agreements

73. The resolution of such disputes appears to be a clear exercise of arbitral power, rather than judicial power and has been regularly exercised on that basis in the past.

74. The settlement of disputes is not the determination of legal rights as such and is a function that both the Federal Commission and State tribunals have extensive experience in undertaking in the past. As the ACTU submission notes, many disputes are about an employer's lawful but unfair exercise of authority. A court will be unable to deal with such matters on the basis of legal rights but there is still a need for an arbitral process to ensure fairness at work. This applies whether the dispute arises under the terms of an award, an agreement or in respect to employment-related matters not covered by either an award or an agreement.

75. Moreover, as the ACTU submission also notes, since the Bill proposes to make all industrial action during the life of an agreement unlawful [which the ACTU and the ASU opposes] it is essential that there be a way for employees to resolve disputes during the life of the agreement and in relation to matters that arise that were not contemplated in the agreement or which have emerged since.

76. It is otherwise completely unfair and contrary to principles of natural justice to make industrial action by employees in pursuit of legitimate grievances unlawful without providing any other means of resolving the dispute.

77. The determination of legal rights should be retained by the courts but courts are not expert at settling industrial disputes.

78. The Fair Work Bill provides that any non consensual resolution of a dispute must go before a Court for determination as a matter of legal rights. However, this is an impractical course of action in many cases particularly where it requires a judgement as to "reasonableness" rather than a black and white interpretation of a strict legal entitlement.

79. The Federal and State IR Commissions have proved themselves adept at resolving workplace disputes. IR tribunals have been able to work informally, emphasise conciliation [with the 'stick' of arbitration to follow to encourage settlement], act promptly and flexibly to meet the needs of parties and to work with parties to resolve grievances for the long term.

80. This is not a feature of court processes.

81. Frequently, as noted above workplace disputes do not always revolve around a question of legal rights or award or agreement entitlements but to organisational and operational matters in the workplace. These may involve such disputes are matters of:

- Bullying or harassment
- Notification and consultation regarding change
- Implementation of workplace change, including restructures
- Reasonableness of employee requests [see further below]

- Gradings and classifications
- Rosters

82. It is appropriate that there be a means of finally resolving such disputes which may not involve a determination of legal rights but of fairness or reasonableness in a workplace context.

83. The settlement of industrial disputes and grievances through Australia's industrial tribunals has normally been the preserve of lay advocates and representatives of employee and employer organisations. While lawyers have appeared more frequently in recent times, the presumptive emphasis has remained on lay participation by direct participants in industrial situations as the best likelihood of resolving disputes. Determination of matters through court processes by lawyers is not generally productive in the first instance in terms of resolution of disputes.

84. Award disputes settling clauses also give access to employees to resolve disputes about the operation of the NES in relation to employees. Although the NES provides entitlements to employees that might be enforced through the courts, many of the NES entitlements depend on questions of reasonableness of certain actions of employers and employees.

85. The word 'reasonable' appears 23 times in the NES. While most of these refer to actions or stances of a 'reasonable person', reasonableness appears in relation to a number of entitlements.

86. For example:

- An employer may request an employee to work reasonable additional hours in the week: the employee may refuse to work additional hours if they are unreasonable – considerations of what is reasonable involve a number of factors
- Employees who are parents of non school age children can request a change in working arrangements to assist with the care of the child – the employer may only refuse the request on reasonable business grounds
- Employees who take unpaid parental leave may request and extension of that leave for a further 12 months – the employer must agree to the

requested extension unless the employer has reasonable grounds for refusing

- An employer may request an employee to work on a public holiday if the request is reasonable – the employee may refuse the request if it is not reasonable or if the refusal is reasonable. A number of factors must be considered in determining whether a request or a refusal is reasonable.

- An employee engaging in an eligible community service activity is entitled to a period of absence from employment which includes:

- Reasonable travelling time

- Reasonable rest time immediately following the activity so long as the employee's absence is reasonable in all the circumstances.

87. Disputes about the reasonableness or otherwise of such requests and periods of absence are not readily amenable to a resolution by determination of legal rights but by a judgement as to reasonableness in all the circumstances.

88. Moreover, the only practical method of resolving such disputes would appear to be access to a low cost arbitral tribunal. No employee is going to risk legal expenses to determine whether an extension of parental leave is reasonable in normal circumstances. If an employer refuses binding arbitration of such NES related disputes, the employee is left with no practical way of resolving the dispute.

Status of Local Government and Social and Community Services in the new industrial relations system

89. The Federal Government has again decided to base the new Act on the Commonwealth's Corporations power. While this head of power provides adequate certainty for the Commonwealth's ability to legislate in the private sector, it does not provide that certainty for the local government and social and community services sectors.

90. **Local Government**: Since the enactment of the WorkChoices legislation, local government outside of Victoria and the NT has been subject to uncertainty as to its industrial coverage. Following the Etheridge Shire Council case decision, where the

Shire was found not to be a constitutional corporation, the Queensland Government moved to settle the status of local government by clearly removing it from any suggestion that it was covered by the Federal system and placing industrial arrangements clearly in the State jurisdiction.

91. Following the Queensland Government move, the NSW Government has also acted to resolve the status of local government in that State by decorporatising it as well. The actions of the NSW Government are detailed in the submission to the Senate by the United Services Union [USU],. The ASU fully supports these submissions.

92. As those submissions note, while the United Services Union has always held the view that Councils were not captured by WorkChoices, significant disputes arose about this issue within the industry. Throughout 2006, 2007 and much of 2008 local government was placed in a no man's land of jurisdictional uncertainty causing difficulties for employers and employees alike. This led to major disputes about the application of State Award and AFPC increases, together with a threatened wage freeze in late 2007.

93. If the Commonwealth continues to rely on the corporations power as the basis for its industrial legislation it cannot introduce a single IR system unless the States agree to refer their constitutional powers to the Commonwealth. Uncertainty will remain in the system, which is not in the best interests of either employers or employees.

94. In any event, prior to the 2007 Federal election, the ALP Leader Kevin Rudd undertook that, if the States preferred, local government could continue to operate under State industrial relations legislation. A copy of the letter of the then Opposition leader to the ASU is attached to the USU submission. In 2007, the current NSW premier wrote to the Prime Minister formally seeking that local government in NSW be dealt with under State industrial legislation and formally excluded from the *Workplace Relations Act 1996*.

95. **Recommendation:** The ASU strongly supports that request. The ASU recommends that the status of local government be considered and determined on a State by State basis and where the relevant parties in the State so determine power to provide industrial laws with respect to local government should be clearly referred to that State for the avoidance of doubt.

96. This is essential since ‘decorporatisation’ – whether in NSW or Queensland - is only a partial solution to the problem of regulation since it is possible that local authorities may seek to arrange their affairs via outsourcing or joint ventures or the like which may have the characteristics of corporations and thus bring some elements of local government employment back within the purview of the federal system, contrary to the intention of governments. This would again lead to uncertainty and dual system coverage, which the ASU and others consider to be an unstable and undesirable state of affairs.

97. This situation is occurring already. As the USU submission notes, employees who are transferred into local government corporations or other entities face the loss of employment security as they lose their status as local government employees, including rights under the Local Government (State) Award. Employees engaged by associated entities may be forced onto inferior federal agreements and lose access to the NSW Industrial Relations Commission for the purposes of dispute resolution and in respect of unfair dismissal hearings. The USU is currently taking action in respect of corporations at Penrith City Council, Hawkesbury City Council and in respect of a proposed corporation at Tamworth.

98. A similar situation may exist in other States and is also occurring at Ipswich City Council which has sought to outsource local government work.

99. In excising councils from the Federal *Workplace Relations Act* such amendments need to include reference to the excision of both councils and associated corporations and other entities.

100. The ASU submits that action to resolve the status of local government can and should be taken on a state by State basis. This is because the situation with regard to industrial coverage is different in each state. As noted above, both Queensland and NSW have moved to decorporatise local government and expressed a clear intention and desire to have local government covered by one system – the relevant State industrial relations system.

101. In Victoria, there being no State IR system, local government employees will almost inevitably remain in the Federal system. The same will of course apply in the NT, where the Federal system has always operated.

102. Local Government employees in Tasmania and WA have always operated in the Federal system and this appears to remain the preferred option for all parties in those states. SA has operated in both systems with a strong preference for regulation other than by respect to the corporations power.

103. In this situation, it is appropriate and important that the key bodies representing employers and employees, in conjunction with State governments, have the ability to determine one system in which they should operate.

104. **Social and Community Services:** Much the same situation applies with regard to social and community services. This sector is dominated by not for profit community organisations but some for profit providers also exist. Based on the extensive experience of the ASU in the sector, some SACS organisations will and have been considered to be trading and therefore constitutional corporations and others will clearly be not – the WA Aboriginal Legal Service is a recent case of the latter. The mix of constitutional and non constitutional corporations varies from State to State.

105. Other SACS organisations will have a status which is unclear and uncertain and which may even alter from year to year depending on the activities of the organisation, its funding sources and the like.

106. The ASU strongly submits that this uncertainty is unhelpful to all concerned in this vital sector and that this issue must be resolved.

107. The exclusive reliance by the Commonwealth on the corporation's power means that this confusion and uncertainty can only be resolved by an inter-governmental agreement.

108. Again, the most appropriate way to do this is to consider the position of the SACS sector on a State by State basis.

109. SACS funding arrangements are determined largely on a State basis, in response to State and Federal funding agreements.

110. Approximately 47 awards apply to this industry and on the basis on outcomes to date in Award Modernisation the Senate cannot be satisfied that employees, should they be transferred to the federal system, would not be severely disadvantaged.

111. SACS is important, not only because of the vital services that it provides to Australians, but because the award system is dominant. Funding agreements are

normally based on award entitlements. Employers and employees have a greatly reduced capacity to bargain above award rates and conditions, in most cases because of a range of constraints not the least of which is because in all States funding arrangements are linked to the existing Award rates of pay.

112. It is essential that the SACS sector be completely in the Federal system or completely in a state system and this is capable of State by State determination without adverse effects.

113. Historically bargaining has not been a feature of this industry and there is limited use of bargaining across the sector.

114. Awards made in State Systems, which are common rule in nature, or Awards in the Federal System, have until now, acted as the “industry bargain”. In most cases employers and employees have little or no capacity to bargain above award rates and conditions.

115. In addition, the SACS industry is seen as a single market – by and large employers do not, and do not wish to, compete with each other for labor – rather they are engaged in the delivery of social services predominately funded by government. Accordingly, it is in both the public interest and in employers interest that wages and conditions across the sector are the same or similar.

116. For all of these reasons, it is essential that the SACS sector be completely in the Federal system or completely in a state system and this is capable of State by State determination without adverse effects.

117. **Recommendation:** Accordingly, the ASU recommends that the Commonwealth refer its powers back to the States with regard to SACS, where the States request it.

AWAs & ITEAs – expiry and replacement

118. As a result of repeated changes to federal industrial legislation since 1996 and the previous promotion of individual agreements there are now in existence at least four kinds of individual statutory contracts with continuing legal effect.

119. They are:

- Pre-WorkChoices AWAs based on the no disadvantage test as it operated prior to WorkChoices

- WorkChoices AWAs based on a test against the Fair Pay and Conditions Standard

- WorkChoices AWAs subject to the Fairness Test introduced in 2007

- ITEAs – subject to the new no disadvantage test.

120. All these individual instruments have a different basis and provide different and possibly unfair and unequal outcomes for employees, even those in the same workplace. All such individual arrangements have a nominal expiry date – which can be up to five years in the case of AWAs or the 31st December 2009 in the case of ITEAs.

121. The Government has decided that all these agreements shall be allowed to continue to operate until their nominal expiry dates and thereafter until terminated in accordance with the law.

122. AWAs were able to be offered – and were - up to the death knell of the WorkChoices legislation with a five year life which means that some of the instruments are fully operative until early 2013. All such agreements however continue in effect until terminated or replaced. This includes ITEAs.

123. The ASU strongly submits that it is unfair and unreasonable for employees to continue to be bound by individual agreements that would not meet the tests under the new IR system to operate from 1st January 2010. Many, if not most, of these agreements were not freely entered into but were ‘take it or leave it’ arrangements imposed on workers at the commencement of employment and in particularly inappropriate circumstances – for example see the case study of continuing workers at Qantas Valet Parking forced to accept old AWAs just before the commencement of the transitional Forward With Fairness Act in March 2008 – see the ASU Victorian Private Sector Branch submission for further detail.

124. These individual contracts were assessed under a variety of tests as noted above, but all such tests were ‘point in time’ tests; that is to say that the test was whether the agreement passed the test at the time it was made and there is no obligation under such agreements to ensure that future wage increases were included or that the agreement keeps pace with improvements in the safety net, including minimum

wage rates. As a result, agreements can rapidly become sub-standard over time, even if they met the test at a particular point.

Case study – sub-standard agreements in the aviation industry

Case study 1: Workplace: Aviation Ground Handling – Queensland

Industrial Instrument: ITEA

ITEA NED: 31 December 2009 however will continue to operate until it is replaced or terminated in accordance with the *WPR Act.*

Relevant Awards: Clerical employees Award- Queensland 2002
Airlines Operations (TWU) Award – 1998

Rates of pay differential between ITEA and Award:

Paid under ITEA

Customer Service Agent:	$127.86 less per week
Customer Service Supervisor:	$127.62 less per week
Ramp Baggage Handler:	$140.74 less per week
Ramp Leading Hand:	-$129.30 less per week

Case study 2: Workplace: Australian Airsupport Pty Ltd

Industrial Instrument: ITEA

ITEA NED: 31 December 2009

Relevant Award: Airline Operation - Clerical & Administrative Award 1999

Difference between ITEA and Award:

Paid under ITEA

Customer Service Agent:	-$17.21 per week

125. **Recommendation:** The ASU recommends that these agreements be dealt with as follows:

- All individual statutory agreements continuing in force beyond 1st January 2010 should be deemed to include from that date all minimum protections afforded by the National Employment Standards and the modern award which applies to employees in the industry or occupation in which the employee works.

- Where an employee believes that a continuing agreement would fail the new Better off Overall Test if made on or after the 1st January 2010, the employee should be able to make an application to FWA have the BOOT applied to the agreement. If the agreement fails the test, the employee may make application to terminate the agreement and the agreement should be terminated by FWA unless it was in the public interest not to do so or if the employee would be worse off for any reason if this occurred. If the agreement is terminated, the employee would be covered by the modern award or any collective agreement operating in the workplace concerned so long as that arrangement provided a better outcome for that employee.

- Where an agreement is varied [whether formally or informally], for example, by an increase in the rate of pay payable to an employee, the varied agreement must be re-tested to ensure that it meets the BOOT at the date the variation takes effect.

- When an individual agreement passes its nominal expiry date, the agreement shall automatically cease to operate and the employee covered by the NES, the modern award applicable and any agreement operating in the workplace, so long as that outcome was not detrimental to the employee concerned.

126. The ASU submits that these processes are fully consistent with the provisions of the Fair Work Bill that require enterprise agreements to at least keep pace with the minimum wages provided for in modern awards. Section 206 provides:

206 Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate etc.

If an employee is covered by a modern award that is in operation

(1) If:

(a) an enterprise agreement applies to an employee; and

(b) a modern award that is in operation covers the employee;

*the base rate of pay payable to the employee under the agreement (the **agreement rate**) must not be less than the base rate of pay that would be payable to the employee under the modern award (the **award rate**) if the modern award applied to the employee.*

(2) If the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.

127. Many employees have been disadvantaged during the WorkChoices period by being required to enter into sub-standard agreements which have not kept pace with movements in awards and which offer little or no wage increases over their life. The ASU sees no reason why this situation should be perpetuated into the future. All employees should have the benefits of the minimum standards provided by the new system and not be trapped in sub-standard agreements because they were made at a point in time during which employees could be and were severely disadvantaged by their employers.

Collective Agreements - the bargaining regime for multi-enterprise agreements [MEAs]

128. The Bill essentially provides for three forms of multi enterprise agreement in the following circumstances:

- Where employee representatives and employers consent,
- Where a single interest employer authorisation has been granted, and
- Where a low paid bargaining order is in place

129. The ASU makes no specific submissions in regard to consent MEA's [the first situation].

Single Interest Employer Authorisation

130. The provisions of the Bill in relation to single interest employer bargaining are of particular interest and concern to the ASU as they bear upon bargaining in the .social and community service areas of its (the Union) membership coverage. These areas largely consist of small employers providing a range of important services to the Australian public, including neighbourhood houses, community legal services, alcohol and drug services and other community services. These are in a sector of the economy and workforce where the state provides the majority of each service's funding and where state legislation provides a common regulatory framework.

131. However, as currently drafted, the Bill's provisions will do little to facilitate bargaining in these areas where bargaining has traditionally been fraught with difficulty both in terms of access to and capacity for bargaining.

132. The Bill's provisions are cumbersome and lacking in fairness in that only an employer can make an application. 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.

133. The ASU is concerned that the provisions depend upon employer initiative and give no weight at all to employee interests or initiative. It is also concerned that the processes of declaration and authorisation will delay or hinder bargaining and will result in unproductive and unnecessarily incurred transaction costs.

134. In the context of bargaining, the Bill should provide for a balance of interests. The current proposal is unbalanced and to that extent is unfair.

135. **Recommendation:** the ASU recommends that the Bill be amended to provide for a single stage process for approval to enter into MEA negotiations overseen by the FWA utilising criteria as provided for the Ministerial declaration in the Bill at S247 (4)

136. **Recommendation:** The ASU recommends the Bill be amended to also enable employee bargaining representatives to apply for the declaration/authorisation.

137. This would mean that an employer or group of employers, or a union or employee representative, should be able to make an application for the issuance of a single interest employer authorisation to FWA, and that FWA should be required to issue that authorisation subject to the criteria set out in S247 (4).

Multi Enterprise Agreements (MEA)

138. The Bill provides that FWA has to be satisfied that no person has coerced or threatened to coerce an employer to make the MEA (s186(2)(b)(ii)); such a provision is unreasonable and potentially puts at risk the entitlements of multiple employers and thousands of employees as a result of the actions of a single person.

139. Despite all the employers covered by the MEA having to have genuinely agreed to its making, a single enterprise agreement made during the term of operation of the MEA and expressed to apply (even in relation to a single subject matter) to an employee otherwise covered by the MEA, will 'oust' the operation of the MEA in relation to the employee and it will never operate again (s58(3)).

140. Despite the significant and stringent requirements that need to be met to obtain an MEA, employees are denied the right to strike in the bargaining process.

141. The ASU submits that such provisions will undermine the Bill's provisions allowing parties to reach a Multi-enterprise Agreement.

142. Accordingly the Bill should be amended.

143. Given that an MEA must contain a flexibility term (s202), there can be no public interest requirement for the inclusion of s58(3) which militates against certainty and the general requirements (s58 (2)) for an agreement's term to prevail over subsequent agreements made prior to the passing of the earlier agreement's nominal expiry date. This section stands as an incentive for parties to dispense with one form of agreement (MEA) in favour of another (single-enterprise agreement). This runs contrary to the principle, "The Agreement is the Agreement."

144. In the absence of the ability to obtain low-paid bargaining orders (s229(2)), and given the inability to take protected industrial action (s413(2)) for an MEA, employees and their bargaining representatives may be left with no choice but to

resort to actions which might be found to be coercive within the meaning of the Bill (s186(2)(b)(ii)). Just what coercion may be intended or found to mean is not clear. This is not a balanced approach to employer and employee rights.

145. Even where the bargaining representatives and the overwhelming majority of employees did not engage in coercive action, their best efforts – and the Objects of the Bill – may be undermined where the coercive actions or threat of such actions by any person, including an employee not immediately involved with the bargaining process, will prevent FWA from approving the MEA.

146. **Recommendation:** The ASU recommends the deletion of s58(3) which provides for a single-enterprise agreement to prevail over an existing multi-enterprise agreement prior to its nominal expiry date.

147. **Recommendation:** The ASU 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.

Collective Agreements – Better off Overall Test

148. In the new system, Fair Work Australia (FWA) will apply the Better off Overall Test to ensure that each employee covered by the agreement is better off overall in comparison to the relevant modern award.

149. The Test will be applied as a point in time test, similar to the application of the No Disadvantage Test. Minimum wage provisions in awards or the National Minimum Wage will override less generous minimum wage provisions in an enterprise agreement, to ensure that agreements are not made with the intention of bypassing the safety net and the integrity of the safety net is maintained.. This will mean that where minimum award rates increase during the life of an agreement to above the agreement rates, rates of pay will have to be adjusted to keep pace. The ASU submits that this is an important protection for employees and welcomes the Government's decision on this matter.

150. Under WorkChoices, both before and after the introduction of the Fairness Test, the process for the approval of workplace agreements and the application of the so-

called fairness test was inadequate and produced delays, as well as unfair outcomes for employees.

151. The ASU strongly submits that the application of the Better off Overall Test [BOOT] must contain procedural safeguards to ensure that employees are not disadvantaged by decisions of FWA. These safeguards must ensure that the current inadequacies in the operation of the Fairness Test are not replicated in the new arrangements.

152. The Explanatory Memorandum suggests that the application of the BOOT by FWA will be simpler and more effectively done. The ASU supports the provisions of the Bill which seek to ensure that there are fairer and quicker outcomes for employees in the approval process.

153. Under WorkChoices, the incapacity to question or challenge a decision of the Workplace Authority [other than by an application to the High Court] has been a significant shortcoming of the current process. There has been no practical opportunity for an employee or a union, on a member's behalf, to seek an explanation or clarification of the operation of a particular decision in the event that the Workplace Authority misinterprets or overlooks a particular clause.

154. Branches of the ASU are aware of instances where the Workplace Authority, relying solely on information from an employer, used the incorrect Award to determine whether a group of workers on AWAs were being properly recompensed. This occurred, for example, in the City of Melville case in Western Australia where despite the existence of an Industrial Magistrate's Court decision in Western Australia as to which Award was the appropriate, the incorrect Award was applied.

155. This necessitated a series of letters from employees and the ASU Western Australia Branch seeking explanation before the matter was rectified and the appropriate Award used. This took considerable time – several months, in fact – during which employees became frustrated and angry with the process. In this set of circumstances, where workers are unfamiliar and uncomfortable with bureaucratic processes, many simply gave up trying to maintain their rights.

156. The ASU welcomes the provisions of the Fair Work Bill which allow decisions on the approval of agreements to be appealed within FWA.

157. The ASU also has examples of the Workplace Authority fixing an entirely inadequate figure as appropriate recompense for loss of protected award conditions in AWAs. In the example above, even after the appropriate award had begun to be used, the Workplace Authority deemed as adequate compensation, a rate of pay far inferior to that which the award provided, taking into account overtime and penalty rates. This was particularly significant as the AWAs in question provided for the removal of all penalty and overtime rates in return for an annual fixed rate of pay. Despite telephoning and writing to the Workplace Authority by both employees and the ASU, this matter remains unresolved.

158. The capacity for employers, where an agreement has been deemed not to have passed the Fairness Test, to give undertakings to the Workplace Authority without reference to the affected employee simply adds to the difficulty, for the employee or his/her representative, of establishing precisely what undertaking has been given and from when it must apply. This obviously affects any ability to accurately calculate what is owed.

159. The ASU notes that undertakings are not intended to be a feature of the operation of the new system, although they are retained in certain circumstances.

160. Further, Workplace Authority decisions regarding the Fairness Test are sometimes inconsistent. The ASU is aware of situations where workers on identical agreements are receiving different assessments as to whether their agreements have met the Fairness Test. The lack of clear explanation from the Workplace Authority has made it extremely difficult for workers to understand why particular decisions have been made and what compensation, if any, they are entitled to claim. Employees have tried, unsuccessfully, to get the Workplace Authority to put in writing – in simple terms - reasons for its decision and what they – the employees – can expect as a result. This has caused frustration and anger within the same workplace with employees not understanding the basis for the variation in decisions.

161. In the ongoing saga of the example referred to above, some employees are now having (differing) amounts of money deposited into their bank accounts by their employer without explanation. Again, because all the AWAs for these particular workers are identical, there is confusion and concern as to how the dollar figures have been arrived at and why they should be different.

162. The ASU shares the Government's hope that the new procedures for approval of agreements will lead to a greater consistency of outcome.

163. In addition to procedural issues there is also the question of resourcing FWA. The volume of work being handled by the Workplace Authority has been well beyond its capacity to assess agreements in a timely fashion.

164. Currently there is a significant time delay between the lodgement of agreements and the assessment by the Workplace Authority. The ASU has examples where it has taken almost eighteen months for an employee to be told that his agreement has not passed the Fairness Test. Examples of twelve month delays are not uncommon.

165. This greatly increases the likelihood of an employee having left the employ of a particular employer without knowing that his/her agreement has not met the Fairness Test. This of course complicates matters in relation to claiming any shortfall which may be due. For the employee or his/her representative, the tracking of accurate information is labour intensive and extremely time consuming.

Transmission of Business/Transfer of Business

166. The ASU welcomes key elements of the new provisions of the Fair Work Bill dealing with transfer of business, particularly the elimination of the 12 months life on transmitting agreements. However, the Union is concerned that the new provisions do not deal with all situations whereby employers can effectively transmit businesses or parts of their business to other entities without employees being able to benefit from either the existing transmission of business rules or the proposed transfer of business rules.

167. This is because the new Bill retains a key element from the WorkChoices legislation, that is, that industrial instruments do not transfer unless there are transferring employees. This was made clear in the Departmental briefing given to the Committee on the 11th December 2008 [proof Hansard, page 19]:

> *{Mr James]…The bill has a very express test for what we refer to as 'transfer of business'. We have retained one of the changes from Work Choices that I just talked about, which is that instruments only transfer in the event that employees go over. We have retained that, but we have not retained the 12-month limitation.*

168. The ASU submits that this means that the effectiveness of the Bill in maintaining the integrity of the safety net of awards and agreements and protecting employees whose work is effectively transmitted is not comprehensive and effective in all circumstances.

169. The ASU has had considerable experience in situations where businesses [and employees] are effectively transmitted without the protections of the Act applying to the employees. Two particular and distinct examples of this in the ASU's experience are:

- Qantas Valet Parking
- Qantas Holidays

170. In the first case, the contract to run Qantas valet parking was lost by one contractor and gained by another. In brief, since the business did not transmit from the first contractor to the second, no transmission of business occurred. Employees of the first contractor were offered jobs with the second contractor but on lesser terms and conditions as "new" employees [AWAs, in fact]. The same business and work was carried out and went from one business to another but no legal transmission occurred and the employees of Qantas valet parking were among the last victims of WorkChoices. This is unacceptable.

171. Further detail regarding the Qantas valet parking matter is in the ASU Victorian Private Sector Branch submission. This situation was also briefly referred to on the first day of the Committee's deliberations when the Committee was briefed by Departmental representatives. The Department confirmed that the Bill did not cover the type of situation that occurred with Qantas valet parking – see page 21 of the proof Hansard of the Committee's proceedings on the 11th December, 2008:

> ***Ms James****—I could not comment on that except to say that the situation I have just described is a secondary transaction—I suppose that is the way you would describe it—rather than the primary transaction. I actually think they are quite common. We have seen a number of cases where, in fact, the Workplace Ombudsman has examined these sorts of examples. One is the Qantas valet case. Again, I do not remember all of the details of the facts of that case but that was a situation where certain services had been outsourced and then they went out to tender a second time and a new company won the tender. Employees went over. Employees were offered jobs—they did not*

have to accept them but they were offered jobs—but the terms and conditions were different. In the Qantas valet case, I think the ombudsman found that it was not a transmission of business under the current rules, and I think that we would probably say that we do not address those facts here.

172. In the second case, Qantas sold a wholly-owned subsidiary [Qantas Holidays Ltd] to another company [Jetset TravelWorld Limited]. Qantas then purchased majority ownership of Jetset TravelWorld Ltd. Qantas Holidays Ltd became a wholly owned subsidiary of Jetset TravelWorld Ltd and another wholly owned subsidiary- a new company– Qantas Business Travel Pty Ltd - was created to perform both holidays and corporate travel work.

173. Existing Qantas Holidays Ltd employees have transferred with their company to the new operation and the applicable industrial instruments have transmitted. The new subsidiary, Qantas Business Travel Pty Ltd is also being expanded to perform work previously [and currently] done by direct employees of Qantas Airways Limited in the existing Qantas Business Travel [QBT] Division of Qantas. No employees of the old QBT Division have transferred into the new QBT Company and thus no transmission of business has occurred with respect to this work. All new employees who would otherwise have been engaged by Qantas Holidays Ltd are now employed by the new corporate entity – Qantas Business Travel Pty Ltd. As these employees are not transferring employees, they do not benefit from transmission of business arrangements including transmitted industrial instruments even though work has effectively been outsourced or transmitted from Qantas to this new Qantas related company.

174. Despite the obvious interrelatedness of these companies and the transfer of business between them because a corporate transaction has been able to be constructed that corrals the existing employees in companies on their existing conditions but provides for new employees to be engaged in a different “new” company, there is an ability to avoid the current awards and agreements just because no existing employee transfers to the new entity. This arrangement undermines both the integrity of the applicable safety net and the security of the transferring employees [and the continuing QBT Division employees].

175. Since the new entity does not have transferring employees, the terms of the proposed Bill would not consider this to be a transfer of business. This is a serious flaw in the Bill.

176. **Recommendation:** The ASU submits that new transfer of business rules must be amended to apply so that employers do not have the opportunity to outsource work through corporate restructure and avoid the necessity continue to apply existing industrial instruments to employees doing the outsourced work. The test should be whether work has transferred, whether or not there is a direct transmission and whether or not there are transferring employees.

177. Other issues with the proposed new transfer of business rules include the following.

178. Under section 311 (1) (b) a transfer of business will only occur if an employee goes to work for the new employer within three months. The ASU is concerned that this will encourage new employers to avoid the provisions by withholding offers of employment for 3 months or more. We submit that the 3 month period should be extended to 6 months to discourage avoidance.

179. Section 312 fails to transmit awards and enterprise agreements which are in force on 1 July 2009 through to January 2010. As this Section fails to transmit the current awards and enterprise agreements that will be in force on 1 July 2009 through to January 2010 it is assumed that transitional provisions will come into force which will provide for the transfer of those awards and enterprise agreements which currently exist.

180. Section 312 is set out and discussed below:

312 Instruments that may transfer

Meaning of ***transferable instrument***

(1) Each of the following is a ***transferable instrument****:*

(a) an enterprise agreement that has been approved by FWA;

(b) a workplace determination;

(c) a named employer award.

*Meaning of **named employer award***

*(2) A **named employer award** is a modern award that is expressed to cover one or more named employers.*

181. Paragraph (a) of s312 limits the meaning of transferable enterprise agreement to:

"(a) an enterprise agreement that has been approved by FWA."

Enterprise agreements approved by Fair Work Australia can only come into force after 1 January 2010.

182. All existing enterprise agreements in force on 1 July 2009 through to January 2010 have not been approved by Fair Work Australia. It will be necessary therefore to make provision in the transitional provisions for all categories of enterprise agreement that existed before 1 July 2009 to be legislated as transferable instruments. (All enterprise agreements existing on 1 July 2009 through to the commencement of 2010 will either be pre reform agreements certified by AIRC or approved by either the Office of the Employment Advocate or the Workplace Authority.)

183. Paragraph (c) of s 312 limits the meaning of transferable award defined as follows: "A named employer award is a modern award that is expressed to cover one or more named employers.

184. **Recommendation:** Awards in force on and before 1 July 2009 through to the commencement of 2010 will not be modern awards. Modern awards can only come into force after 1 January 2010. It will be necessary therefore to make provision in the transitional provisions for all categories of awards of that existed before 1 July 2009 through to 2010 to be legislated as transferable instruments.

185. **Legislative uncertainties in early 2009 until Transitional Provisions are known.** It is important for industrial parties subject to transfers of business around 1July 2009 that information regarding the transitional provisions for the operation of this Part is available well before 1 July 2009 if this part is to operate from 1 July 2009. This is to enable planning and provide certainty and security to transferring employees.

Tasmanian Case Study – 1 July 2009

A “real life” transfer of business which will occur in Tasmania in 2009 whereby all water functions currently performed by 29 Local Government bodies will transfer to four newly established Tasmanian state owned corporations. These four new Corporations are National system employers which are incorporated under the Corporations Act.

Coincidently the transfer of the Local Government employees performing water related functions to the four new State owned bodies is scheduled to occur on **1 July 2009** being the same date upon which the Fair Work Act is scheduled to come into force. This coincidence together with Tasmanian state legislation is creating uncertainty as to what requirements will be legally binding on employers and upon what rights employees will have after they transfer on 1/7/09.

Each of the 29 Tasmanian Councils is respondent to either three or four federal Awards (as the case may be) which currently provide the basic conditions of employment for the transferring employees.

In addition to the federal award coverage each council is signatory to their own federal enterprise agreement (29 in all) which prevails over the federal awards to the extent of any inconsistency.

The Tasmanian Government has passed state legislation known as the Water and Sewage Corporations Bill. Some sections (s 47 - 50 attached as Attachment C) of this Act covers similar employment related ground as the transmission of business provisions of the Workplace Relations Act and the Transfer of Business provisions of the Fair Work Act.

On 1 July 2009 the transitional provisions in force will determine whether the existing Workplace Relations Act or the Fair Work Act will provide for the employment obligations and rights. The federal Act will prevail over the Tasmanian state legislation to the extent of any inconsistency. Wherever the federal legislation is silent the state Act will prevail. For these reasons it is important for the transitional provisions to be announced as early as possible so that these employers and employees know what rights and obligations will apply on 1 July 2009 when employees transfer their employment when the substantive Act is partly operative and on 1 January 2010 when the substantive act is fully operative.

Details of the uncertainties facing Tasmanian water industry employees are in Attachment D

186. The ASU supports the following ACTU submissions to the Senate regarding unfair provisions relating to transfer of employment.

- **Accrued leave entitlements**: the Bill allows a new employer to offer employment to a transferring employee on terms that they lose their accrued annual and personal/carer's leave entitlements. If the employee refuses this offer, it appears they will not be entitled to a severance payment from the old employer. This is unfair. Although FWA will have the power to reverse this conclusion in individual cases, we submit that it would be better to make it clear that in every case an employee is entitled to reject an offer of employment with a new employer which does not recognise his or her accrued entitlements, and to instead accept a severance payment from the old employer.

- **Unfair dismissal**: the Bill allows a new employer to require a transferring employee to re-serve a qualifying period for accessing unfair dismissal remedies. This is unfair, particularly to longstanding employees. It is also unwarranted, since the new employer can conduct its own 'due diligence' to ascertain which employees should be taken on. The provision should not be accepted.

Unfair Dismissal

Application timelines

187. Under the Workplace Relations Act the current unfair dismissal laws provide that an unfair dismissal application must be made within 21 days of a dismissal taking effect. However under the new workplace relations system the time limit to lodge an unfair dismissal claim will be reduced from 21 days to 7 days.

188. This reduction in time is contrary to the governments claim that the new unfair dismissal laws will deliver protections for all employees. The current system of 21 days is a reasonable period of time within which it is feasible to lodge an unfair dismissal claim.

189. Branches of the ASU have flagged this issue as being of great concern, specifically our Branches in New South Wales, Queensland, South Australia, Northern Territory

and Western Australia who all have significant numbers of membership based in regional and rural areas.

190. Many Branches have regional offices that are open only intermittently as union officials operate largely in the field. Rural and regional employees will have great difficultly in obtaining unfair dismissal advice, gaining the necessary industrial support and filing an unfair dismissal application within the 7 day time limit.

191. Employees working in small public and private sector workplaces will also experience difficult in meeting the 7 day time limit. These small workplaces are often without on-site union delegates and therefore access to unfair dismissal information will be limited.

192. Several ASU Branches mentioned that they are already pressed to file unfair dismissal applications within the current 21 day time limit. Therefore a move to 7 days is a severe reduction to already established legal rights.

193. The Explanatory Memorandum states the aim of the new time limit is to promote quick resolution of claims and increase the feasibility of reinstatement as an option. However the ASU believes the reduction in time will actually reduce the number of unfair dismissal claims lodged as employees will struggle to meet the 7 day time limit.

194. This will no doubt increase the number of unfair dismissal applications requesting an extension of time. Whilst Fair Work Australia (FWA) will have the ability to grant a further period, it must be satisfied that there were exceptional circumstances for the delay in lodging the application. There is no guarantee that an application lodged outside of the 7 day period will be granted an extension.

195. What might have been exceptional circumstances in the terms of a 21 day context, takes on a completely different meaning within a 7 day timeframe. Applications to allow for a further period of time will no doubt create further delays and costs for both the employee and employer. A 7 day time limit will encourage dismissed employees to lodge claims simply to preserve their legal position while they obtain advice as to whether to proceed. This will increase work for FWA, and increase costs for employers.

196. **Recommendation:** The ASU firmly believes that the new time limit of 7 days is harsh, unjust and unreasonable and submits that the current system of 21 days remains intact.

Small Business Fair Dismissal Code

197. The ASU participated in the Working Party involved in the development of the so called Fair Dismissal Code. The ASU does not support the outcome.

198. The ASU supports the submissions of the ACTU regarding the Code.

Qualifying periods of employment

199. The ASU supports the submissions of the ACTU regarding qualifying periods of employment

200. In particular, the ASU submits that:

- Any general qualifying period should be no longer than three months, not six months as proposed in the Bill.
- The qualifying period of employment for small business employees should be the same as for employees of larger businesses
- The Bill should allow lesser or no qualifying or probationary periods of employment by agreement at point of engagement.

201. In addition, the ASU submits that there should be no new qualifying periods or new probationary periods of employment where a transfer of employment occurs. Such periods are unfair on transferring employees who may have had years of service with the former employer.

Flexibility Clauses

202. The Bill requires that both modern awards and new enterprise agreement contain flexibility terms.

203. Section 144 of the Bill requires that Modern Awards contain a flexibility term, which is a provision allowing the making of an arrangement by agreement between employers and employees varying the effect of an award. Such agreements must

meet the requirements of s 144 (4) of the Bill. This sub-section does not require that the agreements must be able to be terminated on four weeks notice by either party.

204. The model flexibility clause developed by the AIRC provides that flexibility agreements may be terminated by either party by the giving of four week's notice. This requirement should be mandated by the Bill.

205. This is consistent with the requirements as to mandatory flexibility terms that must be included in enterprise agreements. Section 203 (6) provides that :

> (6) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be 5 able to be terminated:
>
> > (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
> >
> > (b) by the employee and the employer at any time if they agree, in writing, to the termination.

206. **Recommendation:** The ASU recommends that the Bill be amended to include in s 144 (4) a provision in the same terms as that contained in s. 203(6).

207. The ASU further submits that individual flexibility agreements must not be used to undermine the conditions of employment in an enterprise agreement, or modern award.

208. The Bill provides that a flexibility term in an agreement or award must: set out the specific term(s) of the applicable agreement that may be varied; be genuinely agreed to by the employer and employee; ensure that the employee is better off overall; and that [in the case of agreements] the employee is able to terminate the flexibility term within twenty eight days, or at any time if both the employer and employee agree.

209. The flexibility term in an agreement must also be about permitted matters and not be about unlawful terms (clause 203 of the Bill).

210. A welcome safeguard in the Bill is that specific terms of an enterprise agreement that may be varied by an individual flexibility arrangement *must* be negotiated

between the bargaining parties. In the case of modern awards a flexibility arrangement must be genuinely agreed to.

211. It remains of concern however that individual flexibility arrangements have the potential to undermine collective outcomes. This is because employers will be able to negotiate flexibility arrangements with employees who are more vulnerable and less able to assert their rights.

212. Individual flexibility arrangements create individual statutory agreements by another name, and as a result the proposed Bill fails to render individual statutory agreements to the WorkChoices dustbin.

213. The ASU supports workplace rights provisions of the Bill that discourage adverse action (clauses 340 to 342), coercion (clause 343), undue influence or pressure (clause 344) and misrepresentations (clause 345) against employees in connection with the making of individual flexibility arrangements.

214. In each of these circumstances, a breach of one or more of these safeguards would enable the union (or the individual employee) to seek a civil remedy (the maximum penalty that may be imposed on a company is $31,500 per breach) through either the Federal Court or Federal Magistrates Court, or for the court to grant an injunction or interim injunction to prevent or stop a breach of one of these provisions of the Bill.

215. The opportunity to obtain an injunction in order to prevent a breach of these provisions strengthens workplace rights. In practice, measures that aim to prevent coercive or adverse conduct may force parties to *respectfully* make individual flexibility arrangements.

216. On the other hand, if the Bill enabled FWA to arbitrate disputes in respect of adverse action, coercion, undue influence or pressure and misrepresentations against employees in connection with the making of individual flexibility arrangements, the reforms would facilitate greater access to justice. This is because enforcing rights through the courts is prohibitive as it is more costly than pursing a dispute over rights through FWA.

217. Additionally, enabling FWA to arbitrate such a dispute, only where the parties agree, will result in workers with less bargaining power, such as women in low paid

industries, having a limited ability to win access to arbitration than workers with greater bargaining power.

Industrial Action Ballots

218. WorkChoices laws that are invoked to approve the taking of protected industrial action for a proposed enterprise agreement must be reformed.

219. Procedures should be streamlined so that workers can democratically and simply approve the taking of protected industrial action without unnecessary delay, the aim of which is to frustrate democratic industrial rights.

220. Continuing to require the Australian Electoral Commission, or an agent (if an agent is used, any costs must be paid for by the union) to conduct a ballot to approve taking protected industrial action, is an unnecessarily bureaucratic process.

221. Compiling a roll of voters to be balloted, adding and removing names from the roll, or varying the roll of voters is time consuming and open to abuse by a party that works the system to slow the process down.

222. The Bill should be amended to simplify procedures that approve the taking of protected industrial action. The industrial action ballot procedures should be akin to those that existed in the pre-WorkChoices *Workplace Relations Act 1996* (C2005C00709 (No. 86, 1988) as at 16/12/2005)

Industrial Action

223. The ASU supports the submissions of the ACTU with regard to industrial action, particularly with regard to ‘unlawful’ industrial action during the life of an agreement, harm to parties, including third parties and corporations, cooling off periods and the power of the Minister to terminate protected industrial action.

High income employees – award coverage

224. Division 3 of part 2-9 of the Bill provides that high income employees who have been offered and accepted an annual earnings guarantee will not be covered by an award for the period in which the guarantee operates.

225. The ASU supports the protections built into this Division of the Act to ensure that this provision is not mis-used and mis-applied. Further clarification of how the guarantee is to work is required as discussed below.

Shift Penalties

226. Workers who are paid shift penalties, and as a result earn more than $100,000 per annum, should not be treated as high-income employees who stand to lose modern award protections.

227. Clause 47(2) of the Bill provides that a modern award does not apply to an employee when an employee is a high-income employee.

228. A high-income employee is defined at clause 329 of the Bill as an employee whose *guaranteed* annual earnings are greater than the amount prescribed in the regulations.

229. The Regulations are yet to be released, however the Explanatory Memorandum to the Bill (par 1332) provides that the high-income threshold will be $100,000 per annum for full time employees, indexed from 27 August 2007 (the date that the policy was announced) and then indexed from 1 July every year there after.

230. While the Bill provides that 'earnings' for the purpose of determining whether an employee is a high-income employee does not include payment amounts which cannot be determined in advance (clause 332(2)(a) of the Bill), it does not specifically exclude shift penalties that may result in a full time employee's earnings amounting to more than $100,000 per annum. This is ambiguous and the either the Bill should be amended, or this matter should be clarified in the regulations, so that shift penalties are excluded when calculating the $100, 000 earnings cap.

231. This threshold is particularly problematic in industries that are twenty four hour operations such as in airlines or cash transport, and where employees are required to work shifts that attract shift penalties, often earning more than $100,000 per annum depending on their classification under the relevant award.

232. As a result, if shift penalties are treated as 'earnings' for the purpose of clause 332(1) of the Bill, many ASU members working in industries with twenty four hour operations will be classified as high-income employees earning more than $100,

000 per annum, with the result that modern awards may not apply to these employees.

Right of Entry

233. The ASU notes the simplification of some procedures regarding the exercise of the right of entry to employer premises provided for by the Bill.

234. However, the ASU is concerned that the Fair Work Bill does not necessarily provide sufficient balance between the competing interests of employers and unions, as representatives of employees. Unions exercise their right of entry to investigate suspected breaches of the various industrial instruments, to hold discussions with members and other employees and for OHS purposes.

235. Section 480 of the Bill sets out the object of this section of the Act:

> *"The object of this Part is to establish a framework for officials of organisations to enter premises that balances:*
>
> > *(a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:*
> >
> > > *(i) this Act and fair work instruments; and*
> > >
> > > *(ii) State or Territory OHS laws; and*
> >
> > *(b) the right of employees to receive, at work, information and*
> >
> > *representation from officials of organisations; and*
> >
> > *(c) the right of occupiers of premises and employers to go about their business without undue inconvenience."*

Subdivision A - Entry to investigate suspected contravention

236. Unions, as the recognised representatives of employees have a long established role in ensuring compliance with awards, enterprise agreements, and the Act. They need sufficient powers to investigate suspected breaches. Permit holders base their suspicions regarding possible breaches on information received, generally

from members and other employees. The information received may come from people who do not have a clear understanding of the rules or of exactly what has been occurring. A common complaint from members is that something is just not right or unfair. The union cannot be sure whether there has been a breach until it investigates.

237. Employees often do not wish to be known as the person who called in the union, for fear of some adverse response by the employer. This fear may have no grounds in fact, but may be reasonable. It can be difficult to prove that a detriment to an employee some weeks, months or even years later was as a direct result of that employee asking the union to investigate a breach.

238. Employers often do not want unions to use their rights to investigate suspected breaches.

239. S481 (3) of the Bill provides that

> *The permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies on the person asserting that fact*.

240. There is little or no guidance in the Bill as to how that burden of proof is to be discharged if entry is disputed by an employer.

241. The ASU submits that any burden of proof should only extend to particularizing the nature of the suspected breach or breaches, as required by section 518 (2) (b). This will provide the employer with sufficient information to understand the concern that led to the investigation.

242. If the employer has grounds to contend the permit holder does not have a reasonable basis for suspecting a breach or is attempting to use right of entry for an unauthorized or unwarranted purpose, the employer can apply to Fair Work Australia to resolve the matter.

243. The ASU submits that a permit holder should not be required to reveal the grounds upon which the suspicion is held. It is very likely the permit holder will have to reveal the source of the information received by the union if the grounds have to be revealed. This is likely to dissuade complainants from making their concerns known

to their union. Employees who provide unions with information which ground their concerns should have the status of confidential information, similar to the exemption that applies to documents under the Freedom of Information Act, and for similar reasons.

Subdivision B - Entry to hold discussions

244. Section 484 of the Bill provides that Right of Entry may be exercised for the purpose of holding discussions with employees:

> ***484 Entry to hold discussions***
>
> *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.*

245. Section 490 provides when this right can be exercised:

> ***490 When right may be exercised***
>
> *(1) The permit holder may exercise a right under Subdivision A or B*
>
> *only during working hours.*
>
> *(2) The permit holder may hold discussions under section 484 only*
>
> *during mealtimes or other breaks.*

246. The Bill thus provides that discussions can be held to mealtimes or **other break periods** and is in the same terms as the current Act.

247. However, the ASU is concerned that the Bill may be interpreted as providing that discussions with employees cannot occur at all during paid work time, including paid breaks. This not assisted by the wording of the Explanatory Memorandum which contains the following statement at par 1939:

1939. The Bill limits when discussions can be held to mealtimes or other break periods. Discussions cannot occur ***during paid work time*** *(see subclause 490(2)).*[emphasis added]

248. The ASU has been involved in disputes about right of entry and its ability to hold discussions with employees during paid breaks as well as unpaid breaks such as meal times. The ASU is aware that many employers provide their employees with paid breaks from work, such as for morning tea and afternoon tea breaks. These are breaks during which the employer does not expect their employees to work.

249. When a dispute arises as to the meaning of the Act, extraneous materials may be taken into account to determine the intention of the Parliament.

250. **Recommendation:** The ASU submits that the Explanatory Memorandum for the Bill be amended so that it is clear that permit holders may hold discussions with employees during their meal or other breaks, whether these are paid or not. The issue is whether the employee is on a break from work or not, not whether the break is paid for or not.

251. The ASU refers to the decision of Deputy President Lawler in *AMACSU v ATO* [2007] AIRC 253 PR976679 @ [53-4] in which the Commission makes clear that certain recuperative breaks from screen based work are not breaks from work, while morning and afternoon tea breaks, though paid, are breaks from work.

252. The ASU supports the submissions of the ACTU with respect to the requirements for entry for discussions which appear to suggest that it will be necessary for a union to establish that there are eligible persons at a workplace who wish to participate. This is inappropriate if intended and the former wording which applied to this situation should be retained.

Other matters

253. **Building and Construction industry.** The ASU supports the submissions of the ACTU re coverage of the Bill with regard to building and construction industry workers. The ASU supports the view that there should be only one law for employees in Australia and supports the immediate repeal of the Building and Construction Industry Improvement Act 2005.

254. **National Employment Standards** – The ASU supports the submissions of the ACTU regarding the 'right' contained in the NES to request flexible working arrangements and/or extended parental leave. However, the Government has announced that any refusal by an employer to grant such as request cannot be reviewed in any way. This renders this right unenforceable. This situation is inappropriate and should be reviewed and reversed by the Government. FWA should have the power to review such decisions by employers.

Summary of Recommendations

Award modernisation

255. The Senate should recommend that the Minister direct the AIRC to immediately remove this anomaly [the exemption level] from the Clerks Private Sector Award.

256. The Senate should recommend that the Government move immediately to protect the terms and conditions of employees covered by awards so that they cannot be reduced below levels that are currently applying, now or in the future.

Access to Arbitration

257. The ASU submits that it is in the public interest that Fair Work Australia have the power of binding arbitration with regard to:

- Resolution of award entitlement related disputes
- Resolution of NES entitlement related disputes
- Resolution of disputes arising under enterprise agreements

Status of local government and SACS

258. The ASU submits that action to resolve the status of **local government** can and should be taken on a state by State basis. In this situation, it is appropriate and important that the key bodies representing employers and employees, in conjunction with State governments, have the ability to determine one system in which they should operate.

259. In any event, prior to the 2007 Federal election, the ALP Leader Kevin Rudd undertook that, if the States preferred, local government could continue to operate

260. The ASU strongly supports that request. The ASU recommends that the status of local government be considered and determined on a State by State basis and where the relevant parties in the State so determine power to provide industrial laws with respect to local government should be clearly referred to that State for the avoidance of doubt.

261. It is essential that the SACS sector be completely in the Federal system or completely in a state system and this is capable of State by State determination without adverse effects.

262. Accordingly, the ASU recommends that the Commonwealth refer its powers back to the States with regard to SACS, where the States request it.

AWAs and ITEAs - expiry

263. The ASU recommends that these agreements be dealt with as follows:

All individual statutory agreements continuing in force beyond 1st January 2010 should be deemed to include from that date all minimum protections afforded by the National Employment Standards and the modern award which applies to employees in the industry or occupation in which the employee works.

Where an employee believes that a continuing agreement would fail the new Better off Overall Test if made on or after the 1st January 2010, the employee should be able to make an application to FWA have the BOOT applied to the agreement. If the agreement fails the test, the employee may make application to terminate the agreement and the agreement should be terminated by FWA unless it was in the public interest not to do so or if the employee would be worse off for any reason if this occurred. If the agreement is terminated, the employee would be covered by the modern award or any collective agreement operating in the workplace concerned so long as that arrangement provided a better outcome for that employee.

Where an agreement is varied [whether formally or informally], for example, by an increase in the rate of pay payable to an employee, the varied agreement must be re-tested to ensure that it meets the BOOT at the date the variation takes effect.

When an individual agreement passes its nominal expiry date, the agreement shall automatically cease to operate and the employee covered by the NES, the modern award applicable and any agreement operating in the workplace, so long as that outcome was not detrimental to the employee concerned.

Multi-enterprise bargaining

264. **Recommendation:** the ASU recommends that the Bill be amended to provide for a single stage process for approval to enter into MEA negotiations overseen by the FWA utilising criteria as provided for the Ministerial declaration in the Bill at S247 (4)

265. **Recommendation:** The ASU recommends the Bill be amended to also enable employee bargaining representatives to apply for the declaration/authorisation.

266. **Recommendation:** The ASU recommends the deletion of s58(3) which provides for a single-enterprise agreement to prevail over an existing multi-enterprise agreement prior to its nominal expiry date.

267. **Recommendation:** The ASU 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.

Better Off Overall Test

268. The Better off Overall Test must contain procedural safeguards to ensure that employees are not disadvantaged by decisions of FWA. These safeguards must ensure that the current inadequacies in the operation of the Fairness Test are not replicated in the new arrangements.

Transfer of Business

269. **Recommendation:** The ASU submits that new transfer of business rules must be amended to apply so that employers do not have the opportunity to outsource work through corporate restructure and avoid the necessity continue to apply existing industrial instruments to employees doing the outsourced work. The test should be

whether work has transferred, whether or not there is a direct transmission and whether or not there are transferring employees.

270. Awards in force on and before 1 July 2009 through to the commencement of 2010 will not be modern awards. Modern awards can only come into force after 1 January 2010. It will be necessary therefore to make provision in the transitional provisions for all categories of awards of that existed before 1 July 2009 through to 2010 to be legislated as transferable instruments.

271. It is important for industrial parties subject to transfers of business around 1July 2009 that information regarding the transitional provisions for the operation of this Part is available well before 1 July 2009 if this part is to operate from 1 July 2009. This is to enable planning and provide certainty and security to transferring employees.

272. **Accrued leave entitlements**: the Bill allows a new employer to offer employment to a transferring employee on terms that they lose their accrued annual and personal/carer's leave entitlements. If the employee refuses this offer, it appears they will not be entitled to a severance payment from the old employer. This is unfair. Although FWA will have the power to reverse this conclusion in individual cases, we submit that it would be better to make it clear that in every case an employee is entitled to reject an offer of employment with a new employer which does not recognise his or her accrued entitlements, and to instead accept a severance payment from the old employer.

Unfair dismissal:

273. The Bill allows a new employer to require a transferring employee to re-serve a qualifying period for accessing unfair dismissal remedies. This is unfair, particularly to longstanding employees. It is also unwarranted, since the new employer can conduct its own 'due diligence' to ascertain which employees should be taken on. The provision should not be accepted.

274. The ASU firmly believes that the new time limit of 7 days is harsh, unjust and unreasonable and submits that the current system of 21 days remain intact.

275. The ASU opposes the Small Business Code of Dismissal

Flexibility clauses

276. The ASU recommends that the Bill be amended to include in s 144 (4) a provision in the same terms as that contained in s. 203(6).

Right of entry

277. The ASU submits that the Explanatory Memorandum for the Bill be amended so that it is clear that permit holders may hold discussions with employees during their meal or other breaks, whether these are paid or not. The issue is whether the employee is on a break from work or not, not whether the break is paid for or not.

Attachments

1. Attachment A: Survey results
2. Attachment B: Advertisement
3. Attachment C: Extract of provisions from Tasmanian Water and Sewage Corporations Act
4. Attachment D: Tasmanian Local Government / Water Corporation transfer of employment