SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

INQUIRY INTO THE FAIR WORK BILL 2008

SUBMISSION OF THE ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS, AUSTRALIA

The Association of Professional Engineers, Scientists and Managers, Australia ("APESMA") is an organisation registered under the Workplace Relations Act 1996 (the Act) representing over 25,000 professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers and transport professionals throughout Australia. We are the only industrial association representing exclusively the industrial and professional interests of these groups.

This submission will look at 4 discrete aspects of the Fair Work Bill 2008 ("the Bill"):

1. Guarantee of Annual Earnings;
2. Unfair Dismissal;
3. Enterprise Agreements; and
4. Compliance and Enforcement.

In relation to other aspects of the Bill, APESMA generally supports the submissions of the Australian Council of Trade Unions (ACTU).

This Submission is a submission of the Association of Professional Engineers, Scientists and Managers, Australia and is authorised by Michael Butler, Director of Industrial Relations.

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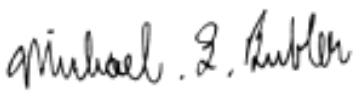

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Michael Butler

Dated:12 January 2009

1. GUARANTEE OF ANNUAL EARNINGS (Part 2-9, Division 3)

Background - History of Award Coverage for Professional Employees

1. APESMA has the capacity to represent both professional and managerial employees. However the history of the industrial regulation of both groups has been different. Industrial regulation for professional employees has enjoyed a long history. Of major significance was what was known as the Professional Engineers Case 1961. This case is credited with reinforcing the industrial identity of Professional Engineers and had a major flow-on effect in each of the public (including commonwealth, state and local governments) and the private sectors.

2. As of 2009 APESMA is a respondent to awards governing the employment of Professional Engineers, Professional Scientists, Architects, Transport Professional Officers, Community Pharmacists, Veterinary Scientists, Collieries Staff, Information Technology Professionals, Telecommunications Industry Professionals

3. The industrial regulation of managerial employees, albeit with some exceptions, has traditionally been restricted to the discharge of supervisory and managerial functions within the context of various professional disciplines. For example, this may include such positions as technical manager, engineering manager, laboratory manager etc. This type of management is qualitatively different from management, which is, for example, primarily an administrative function and which to a large extent has been traditionally award free.

4. Among the exceptions to this include the Collieries Industry where historically supervisory and managerial staff up to and including Mine Managers have been covered by awards; the Australian Broadcasting Commission Senior Executives and Telecom and Australia Post Senior Managers.

Currently APESMA is a respondent to 120 Federal awards. These awards regulate the employment of professional employees in each of the public (including federal, state, statutory authorities, local government) and the private sector providing a safety net of minimum rates of pay and conditions of employment. A list of the relevant awards is set out in Appendix A.

Guarantee of Annual Earnings

5. Chapter 2, Part 2-9, Division 3 of the Bill introduces for the first time in Australian Industrial Law the concept of a "Guarantee of Annual Earnings" ("GAE"). In its simplest terms, the guarantee is an exchange between an employer and an employee whereby an employer guarantees to pay an employee an annual salary of not less than $100,000 in cash and kind while the employee agrees with the employer to forgo all of the entitlements that would otherwise accrue to the employee under a modern award.

6. While the GAE is new, the concept of employers and individual employees bargaining outside the obligations of an applicable award is not. This concept was introduced in 1996 with the introduction of Australian Workplace Agreements (AWAs). The AWAs introduced in 1996 were subject to a no-disadvantage test, meaning that the AWA was measured against the applicable award to ensure that the employee was not disadvantaged by entering into an AWA which had the effect of bargaining away award entitlements.

7. Under the WorkChoices legislative changes introduced in March 2006, the provisions in relation to AWAs were amended by the abolition of the no-disadvantage test. Following WorkChoices, an employer and an employee merely needed to agree to the terms contained in an AWA in order to escape the obligations and entitlements within the applicable award. Due to immense public pressure against this policy, the government amended this particular

provision to again make AWAs subject to an evaluation that referenced the applicable award. This was referred to as the Fairness Test[1].

8. This latest incarnation of an employer/employee agreement designed to negate award coverage, the GAE, does not provide any form of test that is referenced against an applicable award. In fact, no type of comparative test (fairness, no-disadvantage or better-off-overall) is required at all. Rather, there is an arbitrary threshold that merely provides that the employee need be a "high income employee". A high income employee is defined as an employee earning (in cash and kind) $100,000 per annum (indexed as of August 2007). The introduction by the Federal Government of an individual agreement that can remove award conditions is at variance with the objects of the Bill as stated by the Hon Julia Gillard MP in the Bill's Second Reading Speech:

"This Bill guarantees a safety net of fair, relevant, and enforceable minimum terms and conditions for Australian workers that can no longer be undermined by the making of statutory individual employment agreements of any kind, given such agreements can never be part of a fair workplace relations system"

The fact is, an AWA that was subject to the no disadvantage test or the fairness test provided working Australians with a greater degree of fairness than a GAE which is subject to no objective fairness test.

Submissions

9. In relation to the Guarantee of Annual Earnings, APESMA makes the following submissions:

1. Part 2-9, Division 3 of the Bill should be deleted in its entirety;

[1] The Fairness Test only applied to award covered employees earning less than $75,000 per annum. The $75,000 was limited to "gross basic salary" which did not include bonuses, loadings, monetary allowances, penalties and non-monetary entitlements (such as vehicles) – all if which can distort the value of a gross basic salary to an amount in excess of $100,000.

2. In the alternative to 1. above, all agreements subject to the guarantee of annual earnings should be subject to the Better Off Overall Test such as applies to enterprise agreements;

3. In the alternative to 1. and 2. above, all agreements subject to the guarantee of annual earnings should be subject to judicial review employing the unfair contracts jurisdiction in the *Independent Contractors Act 2006 (Cth)*;

4. In the alternative to 1. above and in addition to 2. and 3. above, the threshold amount of $100,000 should be increased to an amount that is truly representative of high income earners.

5. Further to 4 above, the definition of "earnings" under s 332 of the Bill should be amended by deleting the reference to "non-monetary benefits".

1. Deletion of Part 2- 9, Division 3

10. As outlined in the introduction, APESMA has a long history of award creation and maintenance and is cognisant of the important role that awards play in underpinning the rights and entitlements of employees. This importance is repeated in the explanatory memorandum of the Fair Work Bill. The very first page of the explanatory memorandum, under the heading "outline" states that the Bill establishes a simple and stable safety net comprising: the NES, modern awards, and national minimum wage orders. It seems incongruous with the objectives of the Bill that it would introduce a section which allows the parties to remove the provisions of one the key planks of the stated "simple and stable safety net" – modern awards.

Removal of Workplace Rights – Inequality of Bargaining

11. The only reasons provided in the explanatory memorandum for the removal of award protection for *high income earners* is that *"The government believes that these workers can negotiate their own arrangements and do not require the same level of safety net protection as*

lower paid employees."[2] It is APESMA's submission, having worked to secure the industrial interests of professional employees who would fit the proposed definition of *high income earners*, that this statement is simply not true. All employees, regardless of the level of their income, require the protection afforded by properly negotiated awards.

12. The presumption articulated by the Government, that high income earners can negotiate their own arrangements, ignores the systemic bargaining inequality between individual employees and employers. Professional Engineers, for example, often work for large private firms or for large public entities. The employers have access to Human Resources experts and have on-going experience in dealing and negotiating with staff. An engineer and other technology based professional employees do not, on the whole, have the same level of human resources expertise. The bargaining relationship between the parties, then, is significantly weighted in favour of the employer. The codification of GAEs in the Bill supports and encourages this inequality. It is therefore APESMA's submission that, on the basis of fairness, Part 2-9, Division 3 of the Bill should be deleted.

Role of Awards – Status and Career Paths for Professionals

13. Part 2-9, Division 3 of the Bill further ignores the fundamental role awards, in particular professional awards, has played in elevating and enhancing the status of professional employees. As stated in the introduction to this submission, the Professional Engineers Case of 1961 ("the 1961 Case") had a profound impact on the profession of engineering, elevating it from virtually a trade based occupation and recognising the skills and high level of training unique to the profession. The 1961 Case also allowed for professional engineers to be afforded the protection of industrial instruments which ensured that professional engineers were granted the same rights industrially as trade based employees. In this way the 1961 Case served the dual roles of elevating the status of engineers and, by allowing for the setting of Engineers' wages without reference to other trades, it elevated their remuneration. The

[2] Explanatory memorandum, r.103

benefits that were gained from the 1961 case gradually flowed to other technology based professionals.

14. The recognition of reward and status for professional engineers was essential in retaining employees in the profession and came at a time of the greatest infrastructure creation and renewal in Australia which throughout the 1960s and 1970s. Australia is again facing great pressure to respond to demands on present infrastructure as well as deal with new concerns in the form of global warming and the associated need to cap greenhouse gas emissions. Unfortunately these demands coincide with a skills shortage in Australia. By allowing for an instrument that removes the long held Award entitlements of employees, the Bill has the potential to make award protected professions such as engineering, science and architecture less attractive to potential students as well as forcing those within the professions to look at more attractive markets overseas (such has been the experience presently with engineers and scientists). Further, classification structures contained in awards covering professional employees have traditionally also played a role in defining the scope of professional career paths. A weakening of the award safety net in the manner proposed could potentially have an adverse impact on professional career structures generally.

15. In addition to the issues of reward and status, the undermining of award entitlements means that professional employees are afforded less certainty in their employment than award covered employees. For instance, employees on GAEs may be rostered to work continuous night shifts or continuous weekend shifts without the benefit of any additional remuneration. As well as the inconvenience to work/ life balance, the failure to be paid penalties for such shifts over a sustained period would result in professional employees being paid less money that a non-professional employee who are covered by an applicable award. This would further reduce the attractiveness of entering into these award protected professions.

16. Overall the cumulative effect of the negative consequences as outlined above would ultimately undermine the efforts the Government is currently putting in place to firstly address the skills shortage and secondly to tackle the problems that can be addressed by these skills.

2. Implement the Better Off Over All Test

17. Part 2-4 of the Bill deals with the procedural requirements for making and approving Enterprise Agreements. Enterprise Agreements, like common law employment agreements, are agreements designed to regulate the conditions of employment between an employer and an employee. Section 193 of the Bill recognises that there is a minimum level of entitlements that need to be preserved in employment agreements and therefore mandates that enterprise agreements are to be subject to the Better Off Overall Test ("BOOT"). The BOOT is in addition to the requirements that enterprise agreements contain mandatory terms (flexibility terms) and exclude certain terms (discriminatory terms, right of entry provisions, unfair dismissal etc). Anomalously, common law agreements subject to the GAE provisions are not subject to the BOOT or any other form of review.

18. Under s57(1) of the Bill a modern award ceases to apply to an employee once an enterprise agreement binds that employee. It is, in effect, the same as when a GAE is in place – the award ceases to apply. Part 2-4 recognises that the right to bargain away an employee's rights under an award should not be unfettered and as such protections have been put in place. Only once Fair Work Australia ("FWA") is satisfied that these protections (BOOT, mandatory terms and prohibited terms) have been met can an enterprise agreement be approved.

19. A GAE is not subject to any external review. In fact, parties to a GAE can agree to any terms they like without the requirement that the employee be better off over all or that the terms of the Guarantee not be objectionable. This is based on the presumption that payment of

benefits and salary with an agreed total value of $100,000 per annum is sufficient compensation for the loss of not only award conditions but also an independent third party review of the substituted employment conditions. This, in APESMA's submission, is a false presumption.

Awards – Key Conditions of Employment

20. Award conditions cover not only matters in relation to wages and allowances, but also matters in relation to other conditions of employment including those for example that relate to occupational health and safety. For instance, there are awards that cover our members that provide for adequate breaks between shifts, to ensure the health of the employee and the safety of the work site.

21. Awards also provide for 'on-call' allowances which provide that an employee is to be paid an allowance if the employer wishes the employee to be available on limited notice. This ensures that employers do not place a ceaseless burden on employees to always be ready to be called up for work. As well as performing a valuable occupational and safety function, on-call allowances (together with overtime allowances, weekend allowances and penalty rates) act as an economic leverage to ensure that employers are cognisant of their employees' work/life balance requirements.

Work/Life Balance

22. The issue of excessive hours of work and its affect on work/life balance has been a matter of on-going concern for Association members. While the working of unreasonable hours is a matter that is dealt with in the National Employment Standards (NES) it is the Association's view that the economic leverage that can be provided through award entitlements operates to protect professional employees. In this regard because they are more likely to take on the role of primary care giver the working of unreasonable hours is more likely to impact on female professionals.

Accordingly the Association believes that the removal of what are already flexible protections from professionals who will be excluded from award entitlements will make it harder to achieve a work/life balance.

Training Provisions

23. Another issue that has occupational health and safety implications are award terms that provide for training and skills development (including OH&S training), first aid training and payment of a first aid allowance. Any system that allows for these award safeguards to be undermined without recognising their value is not only unfair but potentially dangerous as it undermines occupational health and safety.

For the reasons outlined above, APESMA submits that GEAs must be subject to the Better Off Overall Test.

3. Review of Unfair Contracts

24. As outlined in submission 2. above, enterprise agreements that are negotiated between experienced industrial relations experts (i.e. unions and employer groups) are subject to review by a third party (FWA) to ensure that the agreed terms place the subject employees in a position where they are better off over all. Conversely, an individual employment agreement that eradicates award entitlements and is negotiated between an individual with absolutely no industrial relations experience and a human resources expert is not subject to any third party review. This situation offends every principle of fairness that should inform a Fair Work Bill.

25. In 2006 the Federal Government introduced the *Independent Contractors Act 2006* ("IC Act") to regulate the relationship between contracting parties. A key feature of this Act was the creation of a jurisdiction to review unfair contracts. At its simplest, this jurisdiction works by allowing independent contractors to have their agreements reviewed by an independent third party, being a magistrate of the Federal Magistrates Court. The only question put to the

Federal Magistrate is whether the contract is either unfair or harsh. In performing this review, the Court is limited in the matters that it can have regard to and these are set out in s.15 of the IC Act;

(a) *the relative strength of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and*

(b) *whether any undue influence or pressure was exerted on, or an unfair tactics were used against, a party to the contract; and*

(c) *whether the contact provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and*

(d) *any other matters that the Court thinks is relevant.*

If the Court finds that the agreement is either harsh or unfair then the Court can set aside either the whole or part of the contract or make an order varying the contract[3].

26. The above jurisdiction is a no cost jurisdiction and is intended as a flexible process whereby independent contractors can have their agreements simply and effectively evaluated by an independent third party. It is APESMA's submission that this jurisdiction should be open to those employees whose employment is regulated by a contract that is subject the Guarantee of Annual Earnings provisions of the Bill.

Fairness Test

27. Access to an unfair contracts jurisdiction under the Bill would allow employees subject to the GAE to have their agreements measured against those of employees performing the same work but not subject the GAE – that is, it would be a true fairness test by comparing the loss of award drive conditions against employees who have retained these conditions. A federal magistrate would also have the power within this jurisdiction to amend the value of non-monetary benefits where the agreed value contained in the GAE does not reflect the actual value of these items. Especially in circumstances where a GAE is offered as a prerequisite for

[3] *Independent Contractors Act 2006,* s16.

entering into employment or in the case of an employee taking up a new position within the same company, it is conceivable that an employee may agree to certain values for non monetary benefits only to discover subsequently, while in employment, that the true value of the benefits is dramatically decreased. The unfair contracts jurisdiction would allow for quick and efficient redress of these types of anomalies.

28. In summary, access to a 'fair contracts' jurisdiction would allow parties to a GAE to have a third party determine:

- Whether the GAE unfair or harsh based on the relative bargaining position of the parties;
- Whether the GAE provides total remuneration that is, or is likely to be, less than that of an employee performing similar work (including award covered employees); and
- Whether the agreed amounts for non-monetary benefits is a fair amount.

The unfair contract claims for GEAs could be conducted by the Federal Magistrates Court in a similar way to the manner in which that court manages the unfair contract claims under the IC Act.

In a similar vein one prudent measure that could be applicable to new employees is to allow employees in this category to determine after a trial period whether they wish to sign a GEA or exercise a right to have their contract of employment underpinned by the relevant award.

4. Increase the High Income Threshold

29. It is proposed under the Bill that a High Income Employee is one whose annual earnings exceed the High Income Threshold. The High Income Threshold is set at $100,000, indexed as of August 2007. It is APESMA's submission that this amount is too low. Based on a survey that we have done of our members, we approximate that 60% of professional engineers, 45% of professional scientists and 40% of IT professionals earn over $100,000 (based on salary exclusive of superannuation). Obviously these figures would be much higher if we were to take into account "non-monetary benefits" as defined in s. 332 (3) of the Bill. So simply on a base

salary basis, approximately half of our members could qualify as High Income Employees and, consequently, be forced to enter into a GAE as part of any future employment.

30. We note that in determining the top marginal tax rate for individuals in the 2007 – 2008 financial year, the Australian Tax Office ("ATO") uses a cut-off figure of $150,001 and over. For the 2008 – 2009 financial year this amount is to be increased to $180,001 and over. It is our submission that if the GAE is retained, then the High Income Threshold amount should be increased and pegged against the top marginal tax rate for individuals. This amount should then be indexed annually. This would ensure that the Government's aim of applying the GAE to "High Income Employees" is met. At present, the High Income Threshold of $100,000 (in cash and kind) as proposed in the Bill would cover employees not considered as high income earners under the Federal Governments own tax legislation – an inconsistent and unfair application of Government legislation.

5. Remove Reference to 'Non-Monetary Benefits'

(a) Distortion of value of total remuneration package:

31. Another area of major concern is the inclusion of non-monetary benefits.

The addition of non-monetary benefits under the heading of "earnings" in s.332 of the Bill has the effect of distorting the definition of High Income Employees. By including the "agreed" value of non-monetary benefits, it is possible for employees on relatively modest incomes to find themselves deemed as High Income Employees, as illustrated in the example below:

Employee Z is employed as a rail engineer in New South Wales and is subject to the *Railway Professional Officers Award 2002* ("the Award"). Employee Z earns a base salary of $83,809 per annum. With regular overtime and weekend work, Employee Z's pay, pre-tax and pre-superannuation, averages out to $95,000 per annum. Employee Z is covered by an award which, in addition to overtime and penalty rates, provides for a range of monetary and non-

monetary benefits which if accumulated and assigned an agreed value would place Employee's income over the High Income Threshold:

Award Entitlement	**Monetary Value**
Annual salary – Award salary 10(b)	$83,809
Annual overtime/ penalties – Award causes 39, 40, 41, 42, 43, 44 and 46	$10,000
Leave loading (@ 17.5%) – clause 31.16 of the Award	$1,128.20
Rostered Days Off (x 12) – clause 35.2 of the Award	$3,868.08
5 addition sick leave days (above NES entitlements) – clause 14.3 of the Award	$1,611.71
Picnic Day – clause 45 of the Award	$322.34
Instrument Allowance – clause 47 of the Award	$156.60
TOTAL	**$100,895.93**

32. While it is our strong preference that Chapter 2, Part 2-9, Div. 3 be removed in its entirety, we submit under this heading that the only way to ensure that the guarantee truly applies to High Income Employees (i.e. employees who actually earn a high level of income) is to amend the definition of "High Income Employee" to exclude arbitrarily negotiated values of non-monetary

benefits. In short, section 332(1)(c) and 332(3) should be deleted, removing the inclusion of 'non-monetary benefits' from the calculation of an employee's earnings for the purpose of deeming an employee a High Income Employee. This would put the test in line with the income test that applied for the Fairness Test, being "gross basic salary".

(b) Distortion of value of non-monetary value:

33. The other problem we see with the inclusion of non-monetary benefits in defining a High Income Employee is that there is no requirement under the Bill for these non-monetary benefits to be individually itemised with an agreed monetary value. As such, it is possible for the non-monetary benefits to be bundled up and assigned a value, which may distort the true value of the non-monetary benefits and would also weaken the bargaining position of the employee. A practical example might be where the benefit of the provision of a motor vehicle, private use of the motor vehicle, provision of an onsite car park, payment of tolls and road costs are all bundled up together and given a universal value.

34. The ability to "bundle up" non-monetary benefits as outlined above would further create problems in relation to the transmission of business provisions at s.316(5) of the Bill. Section 316(5) of the Bill provides that:

If:

(a) the transferring employee is entitled to non-monetary benefits under the guarantee of annual earnings after the transfer time; and

(b) it is not practicable for the new employer to provide those benefits to the transferring employee;

then the guarantee of annual earnings is taken to be varied so that, instead of the entitlement to those benefits, the transferring employee is entitled to an amount of money that is equivalent to the agreed money value of those benefits.

35. If non-monetary benefits are all bundled under the one umbrella then it would be impossible to determine the true monetary value of each item, making section 316(5) inoperable.

A practical example of this submission would be as follows:

As part of a package employee A receives a car, an on-site car parking space, full private use of vehicle, a company paid e-tag, an annual Melway, fuel card to cover work and personal use, full servicing of the vehicle and all on-road costs. All of this is bundled up and given an agreed value of $20,000 per annum. Employee A also receives base salary of $87,000 per annum and is subject to a GAE.

Employee A's employer transfers employee A's employment to a regional subsidiary. The subsidiary offers the same type of vehicle with private use and full servicing, but does not provide an e-tag or Melway. Also, rather than a fuel card, all employees are to provide a log of kilometres travelled for work and are repaid a fuel allowance on a per kilometre basis. There is no allowance for personal fuel use. Also, given that the employment is located in a regional centre, free car parking is readily available off-site.

36. Applying the facts of the example above to the provisions of section 316(5) illustrates that bundling up non-monetary benefits frustrates section 316(5) of the Bill. There is no practical way that employee A can assert a monetary entitlement for the forgone non-monetary entitlements. The only practical solution is for section 332(3) of the Bill to be amended to clarify that each separate non-monetary benefit will need to be individually itemised and individually assigned an agreed value by the employer and the employee. In the above example, the employer and employee A would need to have an agreed annual value for:

- The vehicle;
- Vehicle servicing;

- Car parking space;
- Non-work related fuel use;
- Convenience of fuel-card over reimbursement;
- E-tag;
- Melway; and
- On-road vehicle costs (insurance and registration).

Therefore it is the Association's view that if non-monetary benefits are to be included then in circumstances as outlined above there needs to be the capacity for employees' entitlements to be adequately protected.

2. UNFAIR DISMISSAL (Part 3-2)

Introduction

37. In support of our submission in relation to unfair dismissal rights (see below) APESMA supports the decision to retain unfair dismissal rights for award covered employees through the use of the definitions of "applied" and "covered" in relation to modern awards as provided under Chapter 2, Part 2 – 1, Division 2, subdivision C of the Bill.

38. Part 3 – 2 of the Bill sets out the provisions in relation to unfair dismissal. The unfair dismissal laws in the Bill create a two-tiered system whereby employees employed by a small business (defined in the Bill as a business employing fewer than 15 employees[4]) receive a lower standard of fairness than those not employed by a small business. The fairness afforded to small business employees is codified within the Small Business Fair Dismissal Code ("the Code"), while all other employees receive the full statutory protections from dismissals which are harsh, unjust or unfair. Small business employees are also, by operation of the Code, denied one of the most basic employment rights of having their dismissal arbitrated before an independent third party.

[4] s23.

39. The provision of differing unfair dismissal rights for employees based on the size of their employment is not new in Australian Industrial law. WorkChoices introduced a system whereby employees employed by an enterprise with 100 or fewer employees were denied any rights to unfair dismissal laws while employees employed by an enterprise with greater than 100 employees received full access to unfair dismissal rights with the powerful caveat that employees had to establish that the termination was not for genuine operational reasons. This particular caveat has been retained, although it has been renamed "genuine redundancy" (Section 3 - 8, 9). The Fair Work Bill, like WorkChoices, retains a two-tiered system of unfair dismissal rights with small business employees afforded less rights than otherwise afforded to other employees. APESMA opposes the retention of a two tiered system of unfair dismissal rights. As many of our members in professions such as Pharmacy, Architecture and Veterinary Science work predominately for small employers, APESMA supports the right for these employees to be afforded the same rights as employees engaged by large employers.

Submissions

40. In relation to the unfair dismissal provisions of the Bill, APESMA makes the following submissions:

1. Protection from unfair dismissal: all employees should be afforded the same level of protection in circumstances where the dismissal is harsh, unjust or unfair;
2. What is an unfair dismissal: Reference to the Small Business Fair Dismissal Code should be deleted together with references to "Genuine Redundancy".
3. Remedy for unfair dismissal: Reinstatement must be the primary remedy;
4. Procedural matters: The time for filing an application should be extended from 7 days to 21 days.

1. Protection from Unfair Dismissal

41. Section 383 of the Bill sets out a definition of a "minimum employment period", which is a qualifying period before and employee can access unfair dismissal rights. Under this section, a small business employee must complete a minimum employment period of twelve months before being granted access to unfair dismissal rights, while other employees must complete a six month minimum employment period.

42. APESMA submits that all employees should be entitled to the same level of fairness, and have the same rights of access to that fairness. We therefore submit that the definition of Minimum Employment Period contained in s383 of the Bill should be amended to a period of six months for all employees, or such shorter period as agreed between the parties.

2. What is Unfair Dismissal

(a) Small Business Fair Dismissal Code

43. Section 385 of the Bill defines unfair dismissal in the following terms:

> *a person has been **unfairly dismissed** if FWA is satisfied that:*
>
> *(a) the person has been dismissed; and*
>
> *(b) the dismissal was harsh, unjust or unreasonable; and*
>
> *(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and*
>
> *(d) the dismissal was not a case of genuine redundancy.*

44. Of note in the above definition is the inclusion of the Small Business Fair Dismissal Code. The introduction of the Code adds another hurdle (additional to the qualifying period) for small

business employees to access unfair dismissal rights. It is stated at paragraph 1545 of the Explanatory Memorandum to the Bill that:

If a person's dismissal is consistent with the Small Business Fair Dismissal Code then the dismissal will be considered fair and the other factors relating to unfair dismissal do not need to be considered. This arises because clause 396 provides that whether a dismissal is consistent with the Code is an initial matter that FWA must consider before considering the merits of the application. If the employer has not complied with the Code, the claim will be treated the same way as any other unfair dismissal claim.

45. Further to the above, s.396 of the Bill states:

FWA must decide the following matters relating to an application for an order under division 4 before considering the merits of the application:

(a) whether the application was made within the period required in sub-section 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy.

46. In light of the above clauses and the statement in the explanatory memorandum, it is clear that the intention of the Bill is to create a two tiered system of unfair dismissal rights. Provided that an employer has complied with the Code, FWA will not have the jurisdiction to decide whether the dismissal is harsh, unjust or unreasonable – a jurisdiction which is open to all employees employed by a large employer. This situation is unjust.

47. The International Labour Organization Convention C158, Termination of Employment Convention 1982, provides at Article 8(1):

A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

The implementation of the Code is expressly designed to deny employees the ability to appeal against their termination to an impartial body, being FWA. It is on this ground that we submit that the Bill as currently drafted is unjust and should be redrafted to delete all reference to the Code.

(b) Genuine Redundancy

48. In addition to our submission above, we submit that s.385(d) and s.389 of the Bill should be deleted. Sections 385(d) and 389 of the bill introduce and exemption to unfair dismissal laws where the employer can demonstrate the dismissal was a case of "genuine redundancy". This provision replaces the contentious "genuine operational reasons" provision that was introduced under WorkChoices. In actual fact, this provision is merely a rewording of the genuine operational reasons provisions.

Principal to APESMA's objection to this provision is that all employees, regardless of the manner in which their employment is terminated, deserve to be treated with fairness – that is they should have a reasonable expectation that they will not be terminated in circumstances that are harsh, unjust or unreasonable.

49. A redundancy, even where it is a genuine redundancy, may be harsh, unjust or unreasonable. Harshness in relation to a termination by redundancy, for example, can take in the circumstances in which the termination is communicated and effected by the employer. An employee whose employment is made redundant should have a reasonable expectation that during their notice period they will be able to complete their work and be treated with respect within the workplace. Employees who do not received the benefit of this respect – such as where they may be escorted out of the building by security and barred from returning to the

workplace – should have a right to recourse on the basis of the manner in which the termination of their employment was effected (i.e., that their termination was harsh, unjust or unreasonable).

50. Further, one of the assessments in determining whether a dismissal is harsh is a subjective analysis on the effect of the termination on the particular employee. A redundancy that may be objectively genuine may nonetheless be harsh if the subject employee had a long history of employment with the employer, had a clean employment record and had personal circumstances (such as illness or the illness of a family member) that would result in the termination more adversely affecting the subject employee than another employee. These subjective considerations are ignored by the Bill's blanket refusal to grant a hearing on the question of unfairness where the employee's dismissed constituted a "genuine redundancy". It for this reason that we submit that the provisions in relation to genuine redundancy should be deleted.

3. Remedies for Unfair Dismissal

51. It is APESMA's submission that reinstatement should be the primary remedy in cases of unfair dismissal and that the primary status of this reinstatement should be clearly articulated within the Bill. Reasons for this submission are as follows:

- Continuity of employment preserves the employees reputation;
- Continuity of employment ensures that the party is returned to the position they were in prior to the act of unfairness (general damages principal);
- Eliminates the ability for employers to factor in the cost of unfair dismissal in deciding to get rid of employees;

- Adds further incentive for employers to place resources into properly managing employees and ensuring that employees have the necessary training and support to effectively perform their jobs.

4. Procedural Matters

52. We note that the Bill has reduced the time for filing unfair dismissal claims from 21 days from the date of termination to 7 days from the date of termination. This time period is too short. It is APESMA's experience that after having their employment terminated most employees need time to firstly overcome their initial shock and secondly to work out their options and consult with advisors. Seven days is too short a time frame to perform these tasks. It is important to note that in relation to unlawful dismissal and breach of workplace rights, employees have 60 days in which to file their applications. In weighing up an employee's rights to redress for termination under the *Workplace Relations Act* there are certain jurisdictional issues that will need to be considered, such as whether the claim properly lies in unfair dismissal or in unlawful dismissal. The full airing of these matters would require longer than the provided period of seven days to file for an unfair dismissal.

Further, APESMA respectfully submits that it can anticipate a situation where employees are encourage to file an unfair dismissal claim immediately following a dismissal regardless of the merits of the matter simply to preserve their entitlements. This would have the opposite effect of the intention of this provision, which is to limit the amount of claims that are filed within Fair Work Australia.

3. ENTERPRISE AGREEMENTS (Chapter 2, Part 2-4)

Introduction

53. Good Faith Bargaining is an industrial concept which has been employed effectively in other commonwealth jurisdictions, most notably Canada and New Zealand. The experience in those

jurisdictions has been positive and its introduction in Australia has been, in APESMA's submission, long overdue.

The changes made by the Bill to the respondency of agreements, whereby unions are no longer party to an agreement but are "covered" by an enterprise agreement, emphasises that the onus of enterprise agreements is the relationship between employers and employees and this is welcomed by APESMA. This change of emphasis will potentially eradicate demarcation disputes and will allow for a broad range of opinions to be canvassed at the negotiating stage of agreements by allowing all unions who are represented in a workplace to have an input into the bargaining process. Regarding the scope of matters that can be covered by an enterprise agreement, it appears that the Bill fails to deliver of the promise outlined in the *Forward with Fairness* policy document of April 2007. These provisions also appear to fall short of the ILO Collective Bargaining Convention 1982.

Submissions

54. In relation to enterprise agreements, APESMA makes the following submissions:

1. good faith bargaining: the introduction of good faith bargaining is supported;
2. representation: the coverage of employee organisations is supported;
3. that there should be a general capacity for "last resort" arbitration.
4. content: the content of agreements should be extended to allow all matters agreed between the parties to be incorporated into Enterprise Agreements.

1. Good Faith Bargaining

55. As indicated in the introduction, good faith bargaining is not new to industrial relations law, having been applied in New Zealand and Canada and briefly in Australia. Good faith bargaining requirements codify the behaviour and obligations of the bargaining parties so that they have both a moral and a statutory obligation to treat each other with respect and to

negotiate openly and in good faith. This was not the position under the previous Act, as articulated by Senior Deputy Lacy in a recent decision of the Australian Industrial Relations Commission:[5]

> *"The fact is Telstra's conduct was within the broad legal parameters of the WR Act, it had no obligation under the legislation to treat with [sic] the applicants in good faith. The fact that it was not legally bound to do so does not mean it had no moral obligation in that regard. The Commission has no jurisdiction to rule on such matters, but I do note that, contrary to Telstra's submissions, it has provided no evidence to rebut the impressions I expressed in my earlier decision about its apparent duplicity in dealing with the applicants."*

As the quote above indicates, a frustration that currently exists within the legislation is that there is no statutory requirement on parties to negotiate in good faith. The current Bill recognises this and provides a suitable and sensible solution.

56. In relation to the matter involving APESMA, CPSU and CEPU and Telstra (quoted above), the history of this matter provides an illustrative example of the need for good faith bargaining provisions within the Workplace Relations Act. It became apparent to the unions very quickly that Telstra was not prepared to bargain with the unions and ultimately what should have been a straight forward renegotiation of an existing agreement became increasingly litigious as various applications were heard before the Australian Industrial Relations Commission and the Federal Court. If the Australian Industrial Relations Commission had the power at the time of this dispute, only a few short months ago, to issue the type of good faith bargaining orders outlined within the Bill, then this entire dispute could have been expedited and dealt with at an initial stage. As it was, the matter remains unresolved with Telstra continuing to refuse to negotiate with the unions despite a clear mandate from Telstra employees that they do not wish to enter into an agreement with Telstra without their unions' involvement.

[5] APESMA, CPSU and CEPU v Telstra Corporation Limited, [2008] AIRC734 PR983202, dated 16 October 2008, para 11.

It is therefore APESMA's submission that the Good Faith Bargaining provisions in the Bill are a welcome and necessary inclusion into the *Workplace Relations Act 1996*.

2. Representation

57. APESMA represents a broad range of professionals in professions such as Information Technology, Pharmacy, Architecture, Veterinary Science, Engineering and Science. These members are not traditionally industrially adversarial and prefer negotiating with employers in a cooperative manner. By allowing all unions, regardless of size, to participate in bargaining where they have at least one member present at the workplace gives smaller unions an equal weighting to larger unions who may otherwise dominate. This will ultimately reward bargaining as it allows for a broader range of opinions to be aired and allows the entire bargaining process to be truly representative of the employees covered.

Further, the facility to make application for Good Faith Bargaining Orders means that other forms of traditional industrial activity to gain an employer's participation in bargaining won't need to be utilised. This further serves the purpose of allowing for full and comprehensive participation in bargaining for employees who may not be industrially adversarial.

3. Last Resort Arbitration

58. Whilst the introduction of Good Faith Bargaining is a positive development APESMA believes that collective bargaining could be promoted to an even greater extent if there was a capacity for last resort arbitration. This should be allowed in the event that the parties have negotiated in good faith but ultimately have failed to reach an agreement. APESMA believes that last resort arbitration should be able to be utilised as a general principle and not just in the restricted circumstances that are envisaged by the draft legislation. Such a provision would be of particular assistance to those workplaces unused to bargaining and those workplaces that are traditionally non-adversarial. As mentioned above many of APESMA's members come from professions that are non-adversarial and which prefer to develop cooperative

relationships with their employers. A general right to have access to last resort arbitration will encourage a cooperative industrial relations environment throughout Australia's workplaces.

4.Content

59. *"A Rudd Labor Government will also remove the Government's onerous, complex and legalistic restrictions on agreement content.*

> *Under Labor's system, bargaining participants will be free to reach agreement on whatever matters suit them."*[6]

As the quote above indicates, when The Honourable Julia Gillard MP first discussed the drafting of the Fair Work Bill it was anticipated that bargaining would be completely open. As stated in the *Forward with Fairness* policy document, it was anticipated that parties could reach agreement on all matters that were before them, regardless of whether these matters related to the employment relationship or not. The only restrictions to bargaining that *Forward with Fairness* foreshadowed were that "the terms of the agreement are lawful, the bargaining is conducted in good faith, the employees covered by the agreement are better off overall against the safety net and a majority of employees vote in favour of the agreement."[7] This policy position has been reversed, with s.172(1) placing a limit on the matters that the parties are "permitted" to negotiate on.

60. We note that ILO convention C154, the Collective Bargaining Convention 1981, at Article 2 states:

> *For the purpose of this Convention the term* ***Collective Bargaining*** *extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for -*

[6] *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, April 2007, pg14.
[7] Ibid, pg15.

(a) *determining working conditions and terms of employments; and/or*

(b) *regulating relations between employers and workers; and/or*

(c) *regulating relations between employers and their organisations and a worker's organisation or workers' organisations.*

It is APESMA's submission that the above Article 2 is far broader than the conditions contained in the Bill which provide that the parties must limit their negotiations to matters "pertaining" to the employment relationship.

In the above Article 2, at subclause (b), the parties are free to regulate relationships between employers and workers - a freedom which is in addition to determining working conditions and terms of employment. Subclause (a) is an open ended determination of working conditions and terms of employment which is unrestrained by the qualification of matters "pertaining to the employment relationship".

61. It is APESMA's submission that the Bill should conform with the requirements of Article 2 and delete from the Bill the current s172(1) and insert in its place Article 2 of the ILO's Collective Bargaining Convention 1981.

4. COMPLIANCE & ENFORCEMENT (sections 542 and 543)

62. APESMA notes the terms of section 542 and 543 of the Bill and welcomes any provision that allows for the expedient resolution of terms of employment that are contained within common law contracts.

It is APESMA's experience that over 50% of our members are now on common law contracts and that number continues to grow annually. By denying rights to these employees to seek access within flexible, fast and affordable jurisdictions effectively limits the rights available to these employees. By granting access to an industrial jurisdiction to these employees where a

term of their contract breaches the national employment standards at least partially restores some of this balance.

It is APESMA's submission that it supports sections 542 and 543 of the Bill.

STATEMENT OF AUTHORSHIP

63. This submission was written by Joseph Kelly for and on behalf of the Association of Professional Engineers, Scientists and Managers, Australia with the assistance of Michael Butler and Jocelyn Fredericks.