IEUA SUBMISSION TO THE SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE INQUIRY INTO THE PROVISIONS OF THE FAIR WORK BILL 2008

JANUARY 2009

Introduction

1.The Independent Education of Australia (the IEUA) has prepared this submission for the Senate Education, Employment and Workplace Relations Committee Inquiry into the provisions of the Fair Work Bill 2008.

2. Having had the opportunity of reading the ACTU submission to this Inquiry, the IEU wishes to place on record its support and endorsement of the ACTU's submissions.

Background to the IEUA

3. The IEUA is a federally registered organisation pursuant to the provisions of the *Workplace Relations Act 1996* and operates in the non government education industry which comprises Catholic and other independent schools, pre schools and kindergartens, English and Business Colleges.

The union's membership of over 63,000 consists of teachers, principals, teacher aides, education support staff, clerical and administrative staff and other ancillary staff such as cleaners and grounds and maintenance staff.

4. The IEUA and its branches and Associated Bodies are party to numerous awards and certified agreements. The awards and agreements applying to schools in Victoria, the ACT and the Northern Territory are federal awards with an increasing number of agreements for schools in the other States also falling into the federal industrial relations jurisdiction.. Other federal awards to which the union is a party cover English and Business Colleges across most states and the ACT.

5. The IEUA is strongly committed to an orderly and fair approach to industrial regulation for all education workers. The union is also open and responsive to a flexible system of industrial relations which recognises the particular history, ethos, organisational and professional practices of the various educational institutions in our sector. This is evident in the substantial

number of awards and certified agreements negotiated by the union under the present system of industrial relations.

6. The non government education sector is a significant and diverse one. In the schools area alone there are approximately 2,670 non government schools, of which approximately 1700 are Catholic Schools. There are approximately 1350 system and individual employing authorities. Non government schools are often affiliated with groups which have particular educational, ethnic or religious philosophies.

Impact of the Bill

7. Approximately half of schools in the non government schools sector operate in the federal jurisdiction. Colleges which provide English Language Intensive Courses for Overseas Students (ELICOS) are respondent to federal awards. There are approximately 90 of such accredited institutions operating in the non government sector. Of the significant number of child care institutions in which the IEUA has coverage approximately 65 are respondent to a federal award.

8. The IEUA estimates that a significant proportion of schools, child care institutions and ELICOS colleges in every state and territory would have less than 15 employees. In Victoria, more than 80% of employers are parish priests who act as employer in respect of a single parish primary school.

9. There are a significant proportion of religious and independent schools in Western Australia, Victoria and the Northern Territory that have consistently refused to bargain with their staff, and where the capacity for employees to achieve improvements through a certified agreement is nonexistent. Even where market rates may be paid for wages, staff are dependent on the award for all other conditions such as parental leave, personal leave, long service leave, and redundancy benefits.

Positives with Respect to the Bill

10. IEUA members employed in the federal system will have greater legal entitlements under the Fair Work Bill compared to the WorkChoices legislation.

11. Key changes in the legislation welcomed by the IEUA include:

- Unfair dismissal rights for employees will no longer be limited to workplaces with 100 employees or more.
- There will no longer be a provision deeming all dismissals for “operational reasons” to be automatically fair.
- An employer can be ordered to meet and bargain good faith if 50% of employees so request
- A union has the right to be involved in negotiations if only one member requests and has a right to be party to agreements if they have represented an employee in the bargaining process

- There will no longer be artificial limits on the content of agreements so, for example, provisions requiring unions to be consulted in cases of redundancy can be included.

Concerns with the Bill

Modern Awards

12. Teachers and educators employed in the Education industry, and the Non-Governmental Education industry in particular, have patterns of work which are not replicated in any other industry. Such employees are subject to high pressure intensive period of work whilst teaching students.

13. The work of teachers and educators is made up of face to face teaching, duties associated with face to face teaching, maintain of good order and behaviour, and duties which are in excess of the required academic curriculum of the school.

14. Face to face teaching is generally limited by class time and term times. However, duties associated with face to face teaching are not subject to award regulation. As professionals, many hours are spent (both at school and at home) in preparation and correction. Preparation involves individual lesson preparation and general curriculum work.

15. The most obvious example of duties which are in excess of the academic curriculum relate to weekend sport, but it should be noted that such duties extend far beyond sport. Such duties can represent significant time impositions for employees and are generally not subject to any form of Award regulation.

16. The proposals relating to modern Awards do not suit the working environment which applies to teachers and educators.

17. Four weeks annual leave is of no relevance to these employees. Similarly, a maximum of 38 hours work per week is not a limitation which is suitable to the industry of education. The quantum of work is a consequence of the curriculum (and often extra-curricular activities) which is required by the employer. However, teachers and educators perform much work at a professional level to ensure that the students are educated. The direction from the employer is that the curriculum be presented. The preparation and production of resources is a matter of professional judgement for the teacher concerned.

18. Hence, whilst significant hours are involved in such preparation, it is arguable that such hours are not worked at the request or requirement of the employer. It is unlikely that the interpretation of ‘request or require’ (s 62 (1) of the Bill) will be different from the normal requirement that hours must be ‘directed’ by the employer before an employee is entitled to overtime.

19. Recommendation: Fair Work Australia needs to be empowered with greater flexibility in relation to the content of Awards where that flexibility is required by the industry which is subject

to the Award. Consequently s 139 (1) of the Bill needs to be extended to allow for that discretion.

Single-enterprise and multi-enterprise agreements

20. The IEUA supports the submissions, in respect of agreement-making and bargaining rights, made by the ACTU, the AEU and the ASU. Our submission seeks to augment those submissions.

21. The primary area of interest for the IEUA in respect of the new bargaining regimen sought to be established by the Bill is the distinction between single-enterprise and multi-enterprise agreements and the distinctions the Bill makes in the rights afforded to employees in each stream.

(i) Single- enterprise agreements with single interest employers

22. The IEUA welcomes the simpler definition, provided at s172(5)(a) of the Bill, of employers deemed to be a single entity for the purposes of bargaining by reason of their carrying on a common enterprise. The existing requirement, that such employers also be corporations that are related to each other for the purposes of the Corporations Act 2001, is unnecessarily restrictive.

23. We are concerned however that employees and employers bargaining in the belief that the operations of the various, proposed, employer parties to an agreement are such as to constitute their carrying on a common enterprise do so in the absence of any certitude. The bargaining parties in these circumstances face difficulties that the Bill clearly seeks to eliminate for all other bargaining parties in all other circumstances who are seeking a single-enterprise agreement with single interest employers.

24. From the perspective of the bargaining parties the primary practical and technical problem with all federal legislation to date, providing for a single agreement with multiple employers, has been the application of all tests for approval after, or immediately prior to, the making of the agreement itself. The current provisions of the Act operate in this manner, inter alia, by virtue of the Workplace Authority Director having resolved not to grant any authorisation to make a multi-business agreement without first having a full and final copy of that agreement.

25. Notwithstanding the matters raised below the Bill clearly seeks at ss147-148 to provide certitude for parties in these circumstances by requiring in effect that they seek authority prior to the commencement of bargaining. Parties bargaining by virtue of the provisions of s172(5)(a) however, as stated, do not have this imprimatur at the outset of bargaining and cannot reasonably be expected to seek declaratory relief from the court (their only current option) to obtain it. The practical result is that the parties will only be able to determine whether or not they meet the “common undertaking” test well after bargaining has commenced, either at the time that an application for a ballot order is made or when approval is sought for the agreement.

26. Recommendation: The bill should be amended to provide that two or more employers, or an organisation of employees, seeking a single-enterprise agreement with two or more single

interest employers by reason of those employers being engaged in a joint venture or a common enterprise may seek authorisation to bargain for such an agreement.

(ii) Single interest employer authorisations and multi-employer bargaining

27. The submissions of the ACTU and other unions to the Committee outline the disadvantages to employees inherent in the proposed "streams" of bargaining involving more than one employer. In essence the more significant of these disadvantages may be summarised as follows:

· Employers can effectively deny employees the right to take industrial action in support of bargaining claims by simply insisting on remaining within the "consent" stream

· There is no enforceable requirement for good faith bargaining in the "multi-employer agreement by consent" stream

· Comprehensive multi-employer agreements may be effectively replaced by subsequent single employer agreements prior to their nominal expiry date irrespective of the scope or content of the latter agreement.

28. The IEUA supports the recommendations of the ACTU and other unions dealing with the above matters which would have the effect of ensuring that employees in all streams of bargaining are treated equitably.

29. The IEUA seeks to provide support for those recommendations by providing the Committee, relevantly, with a brief overview of bargaining in Catholic education. The IEUA has as members more than 60% of the employees, teaching and non-teaching staff, nationally in Catholic school education.

30. With very limited exceptions all Catholic education is funded as a system at a state level. Administratively and operationally models vary from state to state but again, with limited exceptions, control, principally by way of the capacity to appoint "employers", is exercised at a diocesan level. System schools, representing in excess of 95% of Catholic schools nationally, provide for common salaries and conditions and these entitlements are fully portable between schools. This degree of commonality and capacity for portability parallels that in Government schools in all states.

31. Whether Catholic schools in any state or diocese are able to bargain for a single enterprise agreement by virtue of their being only one, nominal, employer or a single enterprise agreement by virtue of any of the provisions of s172 of the Bill, or a multi-employer agreement by virtue of the employer determining not to make an application pursuant to Division 10 of the Bill, should depend on the nature of the employers' operations as opposed to arcane and artificial employment arrangements in any state or bargaining preferences introduced by the Bill and made available only to employers.

Case study

32. In Victoria the IEUA has recently finalised its seventh successive state-wide multi-employer agreement with Catholic employers. There are in excess of 471 respondents to the agreement. The chief factor in the high number of employers is the practice, dating to the nineteenth century, of designating parish priests as employers singly or collectively (as canonical administrators) in respect of the majority of schools.

33. This agreement follows, again for the seventh successive time, agreements reached for government schools in the public sector. Rates of pay and conditions are closely aligned in both sectors of the industry.

34. In respect of each of these bargaining rounds public sector employees have had the opportunity to take protected industrial action in support of claims whilst employees in Catholic education have not.

35. The IEUA does not support those provisions of the Bill, principally, s247(1) and s248(1) that continue this unreasonable inequity. We fail to understand how it can be in the public interest for any group of employees not to have the right to take protected action, where, in order that they might have a single agreement approved, that group of employees has consistently met revised and increasingly stringent public interest tests over a 15 year period, the essence of which is that no other practical bargaining course is available to them.

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