Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008

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This supplementary submission deals with a number of issues that were raised during my appearance before the Committee in Adelaide on 28 January 2009.

Time Limit for Lodging Unfair Dismissal Claims

A number of submissions to the Committee have identified problems with the 7-day time limit imposed by clause 394(2) of the Fair Work Bill for lodging unfair dismissal claims. It seems likely in practice that there will be many dismissed workers who will be unaware of that time limit, and who will discover it only after obtaining advice about their legal options. Such workers will need to rely on the willingness of Fair Work Australia (FWA) to exercise its discretion to accept late claims.

Ideally, it would be better to retain the 21-day limit that presently applies under section 643(14) of the *Workplace Relations Act* 1996 (WR Act). But the introduction of a 7-day limit was clearly outlined in the government's 'Forward with Fairness' policies. Furthermore, it does have the potential advantage, in combination with the other procedural reforms in the Bill, of speeding up both the making and resolution of unfair dismissal claims. That can only enhance the prospects of reinstatement being a practical option for successful applicants — though I would still expect most claimants to prefer or settle for compensation instead, given the breakdown in relations that will have inevitably occurred with their former employer.[1]

The question then is whether there is anything that can or should be done to make national system employees aware of the need to lodge any claim within 7 days of their dismissal. A general education campaign might have some effect, but is unlikely to capture the attention of those who are least likely to be aware of their rights, such as many younger workers. And besides, what is needed is knowledge of the time limit *at the time of dismissal*, not at some earlier point when the worker is unlikely to be thinking about losing their job.[2]

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[1] As to the dominance of compensation as a preferred remedy for unfair dismissal, see the statistics and sources quoted in B Creighton and A Stewart, *Labour Law*, 4th ed, Federation Press, Sydney, p 477, especially at n 213. In practical terms, reinstatement orders have always been a more effective remedy where the claim is one that is supported by a trade union that has the capacity to 'enforce' the order: see M R Sherman, 'Unfair Dismissal and the Remedy of Re-employment' (1989) 31 *Journal of Industrial Relations* 212.

[2] For that reason, including information about the time limit in the Fair Work Information Statement that must be given to new employees (see clauses 124–125 of the Bill) would be unlikely to achieve much in practice.

What I propose therefore is that national system employers should be encouraged, though not required, to provide dismissed employees with written advice that they may be entitled to lodge an unfair dismissal claim, and that such a claim must be lodged with FWA within 7 days. That advice could be in the form of a standard factsheet, prepared by FWA and available from its offices and website. It would explain both the eligibility and procedures for making a claim, as well as briefly alluding to other legal options (such as an application under the 'general protections' provisions in Part 3-1 of the Bill).

The availability of this option could be specifically recognised in clause 394(3) of the Bill, which sets out the factors to be taken into account by FWA in determining whether to allow a late application. The following factor could be added to the list:

> (ba) whether the employer provided the person, at or immediately after the time of the dismissal, with a Dismissal Information Statement;

The term 'Dismissal Information Statement' would then be defined to mean a factsheet issued by FWA, along the lines set out above.

What this would do is to strengthen an employer's case for resisting an extension of time for lodging an application if they could show they had furnished the information statement — although there might still be other factors that warranted the extension. Conversely, the fact that no statement had been given would strengthen an applicant's case for being allowed to lodge a late claim, although again FWA might still determine that there were other factors militating against the extension.

Under this proposal, it would still be up to each employer to decide whether they wanted to provide the statement. Some might take the view that they did not want to 'encourage' unfair dismissal claims. But if so, they would have to accept the risk of having a weaker case for resisting an otherwise late application. Hopefully, over time, most employers would see the value in issuing the statement as part of their standard processes for terminating employment.

Greenfields Agreements

Greenfields agreements can be made in respect of a new enterprise, prior to the employer engaging employees to work in that enterprise. In contrast to the WR Act, clause 172 of the Bill only allows an employer to make such an agreement in conjunction with one or more 'relevant employee organisations' — that is, registered unions that are eligible to represent the interests of one or more of the employees who will be covered by the agreement (see clause 12).

Concern has been expressed by employer groups such as AMMA and the MBA that clause 182(3) might be interpreted to mean that a greenfields agreement can only be 'made' under the new legislation if and when *all* relevant employee organisations give their consent. It has been argued that such a requirement would hold up the making of greenfields agreements, especially for resources sector project agreements, and indeed

put some such projects at risk. Judging from some of the submissions made to the Committee, there appear to be at least three separate issues that are causing concern:

- where two unions (such as the AWU and CFMEU) have overlapping coverage of workers on a project, the ability of an employer to choose to negotiate with one union rather than the other;

- the prospect of a 'rogue' union holding up the making up of an agreement, despite representing only a minority of the likely employees;

- the possibility that unions will seek to 'outbid' each other, ie insist on settling only on terms that are more favourable than another relevant union has been able to secure, so as to cast themselves in a better light to their members.

In my opinion, the better interpretation of clause 182(3), when read in conjunction with clause 53(2)(b), is that it does *not* require every relevant union to 'make' (ie, be party to) a greenfields agreement. But I agree that clause 182(3) is not as clear as it could be, and could usefully be amended to avoid any uncertainty.

The question then is what the position *ought* to be under the Bill. As I understand it, the government did not intend for an employer to have to obtain the consent of *every* union with possible coverage at a new enterprise. But should it really be possible for an employer to make an agreement with the 'friendliest' union it can find, regardless of the views of other unions, and lock in conditions at the new enterprise for at least four years? What if that union represents only a minority of the employees who are likely to be hired?

One approach would simply be to allow these matters to be resolved under the general provisions in the Bill as to enterprise bargaining. Clause 175 provides that an employer that wishes to make a greenfields agreement must take steps to notify each union that it has reason to believe would be a 'relevant employee organisation', and hence give it the opportunity to bargain. If it fails to do that, no agreement it subsequently purports to make will be valid: see clause 182(4). Each of the notified unions is taken to be a bargaining representative (clause 177(c)), and all such representatives — including the employer — must comply with the good faith bargaining requirements in clause 228.[3] If the employer refuses to bargain with a particular union, or give genuine consideration to its proposals, that union can ask FWA to make a 'bargaining order' against the employer (clauses 229–233). Alternatively, it might seek a 'scope order' to narrow or broaden the categories of work to be covered by the agreement (clauses 238–239).

The problem with relying on these bargaining provisions is one of timing. Suppose that an employer gives notice to a number of unions of its intention to make a greenfields agreement, then proceeds fairly swiftly to reach a concluded agreement

[3] I put to one side the relevance of the employer's obligation under clause 179 to 'recognise' or bargain with any other bargaining representative, given the questions over that provision raised in my original submission to the Committee.

with some but not all of those unions. As long as the employer waits at least 14 days after the last notice has been given to get the agreement signed (see clause 182(4)), it may submit it to FWA for approval under clause 185. If that happens, it is unclear whether FWA has any power to do anything other than approve the agreement, regardless of any complaints about the bargaining process. Clause 186(1) provides that such an agreement *must* be approved if it meets the requirements in clauses 186 and 187. There is no general requirement in those provisions for the employer to have bargained in good faith.[4] By the time an 'excluded' union applies for a bargaining order, the agreement may be a fait accompli. But where an application for a bargaining (or scope) order has been lodged first, it is possible FWA might take the view that it should defer any approval of the agreement until it has considered whether to make the order. The making of any order would presumably then dictate that the agreement be set aside and negotiations resume.

A possible solution to these timing problems would be to remove the notification requirements, and/or specifically provide that good faith bargaining obligations do not arise in relation to greenfields agreements. But neither of these options are consistent with the government's stated policies, or indeed the principles on which the new agreement-making system is constructed.

In my opinion, the Bill needs to be amended to deal more specifically with the issues raised by greenfields agreements. Here is what I would propose:

1. A requirement should be added that a greenfields agreement can only be made with one or more relevant employee organisations that between them are eligible to represent the interests of a majority of employees likely to be covered by the agreement. This would avoid the extreme situation of an agreement being negotiated with a 'minority' union alone.

2. Where a greenfields agreement is submitted for approval, and it is signed by some but not all of the relevant employee organisations, FWA should have the power to do any of the following:

    (a) approve the agreement as proposed;

    (b) refuse to approve the agreement, pending the determination of any application before it for a bargaining order or scope order in relation to the agreement; or

    (c) allow the parties who have made the agreement to propose one or more variations (including as to its scope and/or nominal term), and approve the agreement as varied.

    The third of these options would allow the employer and unions who had reached agreement, if they chose, to modify that agreement in a bid to address

[4] Cf clause 187(2), which does mention good faith bargaining, but only applies where a scope order has already been made.

any concerns over the bargaining process. For example, they might opt to exclude a particular group of workers, and/or shorten the proposed duration of the deal. It would still be up to FWA, guided by the objects of the legislation, to exercise its discretion to determine the most appropriate course of action in each situation.

3. It is assumed that FWA will have the power, under an amended version of the 'representation order' provisions that currently appear in Chapter 4 of Schedule 1 to the WR Act, to make orders resolving actual or potential demarcation disputes between unions with overlapping eligibility rules.[5] Where an order has been made excluding a particular union from representing potential employees at a new enterprise, such a union would not constitute a either a 'relevant employee organisation' or a bargaining representative for the purpose of any greenfields agreement proposed for that enterprise.

These amendments are intended to strike an appropriate balance. They seek to ensure that greenfields agreements cannot be made in disregard of the representation rights of unions, but without slowing down the process for making such agreements to the point where they lose all practical value to businesses establishing new projects.

I should stress that these proposals are directed only to greenfields agreements, where by definition there are no employees to decide whether a proposed agreement should be approved.

Payment for Periods of Industrial Action

In my original submission, I raised some issues regarding the new rules on strike pay in Division 9 of Part 3-3 of the Bill. A point that I failed to include in that submission, but subsequently raised with the Committee, concerns the practical difficulty that can sometimes arise for parties in distinguishing between protected and unprotected industrial action.

If employees take action during the nominal term of a workplace agreement that applies to them, or over a matter that has nothing to do with the negotiation of a new agreement, it will be obvious to all concerned that the action is unprotected. But sometimes action is taken which is capable of being protected, and is intended to be protected, but turns out not to have that status. This may only become apparent after the event, when FWA or a court rules that those concerned had not been genuinely seeking to reach agreement, or were taking action over unlawful or 'non-permitted' terms, or had failed to give adequate notice, and so on.

So here is the problem. Suppose industrial action has lasted for an hour (for example, it may have been a stop work meeting), and the employer, genuinely believing it to be protected, deducts an hour's pay from the wages of each employee, as clause 470(1)

[5] It is understood that the necessary amendments to the WR Act will be made by the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009.

of the Bill would require. If the action turns out to be unprotected, the employer has breached clause 474(1), which requires a deduction of 4 hours' pay — and the employees will have breached clause 475(1) by accepting that pay.

The same problem would arise if an employer chose to make a proportionate deduction, or no deduction, in respect of a partial work ban that it believed to be protected, but in fact was not.

Now it is true that a prosecution of either the employer or the employees in this situation is perhaps unlikely, and even then a court would have the discretion in fixing a penalty to reflect the degree of culpability involved. But it would still be better to close the loophole. This can be done in either of two ways.

The preferable option, in my opinion, would be to abandon the protected/unprotected distinction in this context, and apply the rules et out in clauses 470–473 of the Bill to all forms of action, whether protected or not. But if that approach were rejected, clauses 474 and 475 could still be amended so as to provide a defence where the party concerned reasonably believed that the action was protected, in circumstances where the conduct in question would have been lawful had that belief been correct.

Effects of the Bill on Employees and Employers

During my appearance before the Committee, Senator Fisher asked whether there is anything in the Bill that would achieve the government's 'promise' that the legislation 'would neither disadvantage employees nor increase costs for employers'.

I am unaware of any commitment by the government to that effect, other than in the specific context of award modernisation. The Minister's formal request to the Australian Industrial Relations Commission (AIRC) to modernise awards states that the creation of modern awards 'is not intended', among other things, to disadvantage employees or increase costs for employers.[6] The AIRC is obliged by section 576C of the WR Act to comply with that request. The Fair Work Bill is drafted on the assumption that by the time Part 2-3 dealing with modern awards commences, such awards will already have been created by the AIRC. Hence there is nothing in the Bill that deals with the modernisation process itself. That is not in any sense surprising or concerning.

I have made the point previously to the Committee that it is simply not possible to standardise conditions in any award-reliant industry or occupation without disadvantaging some employees, or some employers, or both. The progress to date of the award modernisation process has only confirmed that view. But that is not a matter that requires attention in this Bill.

[6] See Minister for Employment and Workplace Relations, *Request Under Section 576C(1) — Award Modernisation: Consolidated Version*, 18 December 2008, cl 2(c),(d).

If the question is more generally concerned with the impact of the Bill on employees and employers, I can think of nothing in the Bill that would disadvantage employees, compared to their position under the current WR Act. There will, on the other hand, be some cost increases for employers, primarily because of the improvements to the safety net of minimum conditions effected by the National Employment Standards. That is dealt with in the Regulatory Analysis included in the Explanatory Memorandum for the Bill.[7] Beyond that, the impact of the legislation will primarily depend on the way in which FWA carries out its statutory functions, for example as to the adjustment of minimum wages. In practice, I would expect FWA to continue to strike much the same kind of balance between the interests of employers and employees as the institutions it is replacing.

Effect of Bill on Union Membership

Senator Fisher also asked for my views on the effect the Bill will have on union membership. The best answer I can give is 'modest, if any'. The Bill proposes to remove some of the barriers that can currently prevent unions from organising effectively, notably the lack of any right to enter a workplace for discussion purposes where the employer has one or more workplace agreements to which the union is not party. It also places a greater emphasis on collective bargaining. But those changes will not automatically translate into higher membership rates. It will be up to unions to find ways to recruit more effectively, especially among younger workers, and to find the resources to visit and service new workplaces. Those are challenges that the union movement already faces, and they will remain challenges under the new legislation.

[7] See Explanatory Memorandum to the Fair Work Bill 2008, [r.22]–[r.86].