CIVIL CONTRACTORS FEDERATION

SUBMISSION TO SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO *FAIR WORK BILL 2008*

JANUARY 2009

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The Civil Contractors Federation

The Civil Contractors Federation (CCF) welcomes the opportunity to make a submission to the Senate Employment, Education and Workplace Relations Committee Inquiry into the Fair Work Bill 2008.

The CCF is the member based representative body of civil engineering contractors in Australia providing assistance and expertise in contractor development and industry issues. The CCF is a registered industrial association , is the respondent to Awards concerning the civil construction industry and is currently taking part in the Award Modernisation process.

Through our Federation we represent 2000 small, medium and large sized contractors who in turn employ more than 40,000 people.

Our members are involved in a variety of projects and activities including the development and maintenance of civil infrastructure such as roads, bridges, dams, wharves, commercial and housing land development.

Infrastructure development plays a vital role in our national prosperity – a role which has been understood and supported by the Federal Government with its decision to establish an Infrastructure Ministry at Cabinet level and an independent body Infrastructure Australia.

Employee Relations regulation and the Industrial Relations framework within which it takes place plays a critical role in the productivity of the industry and is a primary concern of the CCF membership. Employee and Industrial Relations support and advice is a key component of the services that our Federation State Chapters provide directly to members.

Fundamentally our members see employee relations matters as part of their overall management of human resources and as a key part of maintaining and growing their enterprises.

We appreciate and understand the Government's fundamental commitment to workplace reform and that its policy on major issues such as the framework, Australian Workplace Agreements, minimum employment standards and unfair dismissal provisions were put to the Australian people at the 2007 election.

However, there are a number of aspects of the Bill where we seek to make a contribution which will which in our view improve the legislation.

Our key concerns relate to:

- What we see as a philosophy of re-regulation of the labor market in a number of key areas when the economy needs as much flexibility as possible; and;
- Provisions in relation to bargaining and right of entry which undermine the key principle of freedom of association by giving preferential rights to unions whether sought by the employees concerned or not.

We welcome the opportunity to put our position on such important and critical matters directly to the Committee.

Our submission is divided into two sections. The first, section A is a general section which deals with the nature of our industry and the proposed impact of the Bill. The second, section B maps out some specific areas of the Bill and the concerns we have with them together with suggestions for reform.

KEY RECOMMENDATIONS

Recommendation 1

The CCF accepts the general philosophy that sees collective agreements at the heart of the new industrial framework but within this context we would like to see preserved the concept of true Non Union Employee Collective Agreements and Union Collective Agreements.

Recommendation 2

Unions should not be provided with an automatic right to be party to an agreement simply by virtue either of the default bargaining status, the operation of section 183 where a union that is a bargaining representative can apply to be covered by an agreement or through the mechanism for a majority support determination.

The Bill must also contain protections in relation to majority support determinations such as secret ballots.

Recommendation 3

Our preferred policy position on right of entry is that:

- Right of Entry must be tied to employment of members;
- The right of entry to workplaces for discussion purposes where no members are employed should not be permitted;
- Unions should not have the right to inspect non member records. If that right is to be allowed then the position under the present Act should be preserved, that is access should only be available on order of FWA.

Recommendation 4

Current provisions in respect of Transfer of Business Rules should be maintained. If the Bill takes effect then there should be an education

campaign which includes a guide and practical tools especially targeted at small business.

Recommendation 5

The CCF strongly supports retention of industry specific regulation especially in relation to the future role of a specialist industry watchdog. We believe a number of the provisions of the Bill make this retention post 2010 even more critical.

A Overview

1 Key policy position on Employment and Workplace Relations

The CCF believes that the key features of a productive employment and industrial relations system should be based on the following underlying principles:

a) The *primacy of the relationship between an employer and an employee* with the parties free to bargain directly with each other to:

- achieve flexible and efficient outcomes for that workplace;
- negotiate agreements on an individual or non collective basis free from the interference of third parties; and
- to negotiate agreements which reflect and are tied to productivity in that workplace.

b) Genuine support for *freedom of association* that is the right to join or not join a union, or an employer association;

c) *Respect for the rule of law by both employers and employees* facilitated by meaningful sanctions, speedy enforcement mechanisms

and a strong regulator for unlawful industrial action– a particular issue in the building and construction industry;

d) The *central umpire* should have a defined and *limited role* and generally only become involved in the case of irreconcilable differences between the parties.

e) When an employment relationship does break down *unfair dismissal* laws which *appropriately balance* the rights of employers and employees.

It is against these key criteria that we have measured the FWA Bill.

2 Nature of workplace relations in CCF membership

The employment arrangements and the nature of the work performed in the civil construction industry are both relevant for an understanding of the particular issues which will arise for our members under the FW Bill.

2.1 Employment arrangements for civil contractors

The CCF membership comprises a range of contractors from the very large contractors to single operators. In general the workforce of our small to medium contractors are not union members and most are employed on Award or on non union agreements. The norm would be for our contractor employers to negotiate directly with their employees. It is more common for larger contractors to enter into union collective agreements but this is not always the case.

Due to skills shortages in the sector most would be enjoying above award conditions. However, we do note that deteriorating economic conditions will impact both upon employment and the structure of businesses within the industry.

Employment practices within the civil construction industry can be very different from the building sector and often see employees in continuous employment with one employer even though the work may be organised on a project basis. This can cause particular issues for employers when their

employees are working across a number of sites with different industrial instruments (ie agreements or awards) governing employment conditions on each.

This problem may be exacerbated under the FW Bill where negotiating non union agreements will be difficult.

This is dealt with in paragraph 5.3 of our submission.

2.2 Structure of Projects

The work of civil contractors can be organised in a number of ways. One of the most common relevant to the workplace relations framework is when a Principal Contractor calls for tenders for particular aspects of a project which require particular expertise.

In tendering for the job the sub-contractors are advised of the industrial arrangements which have been negotiated with the head contractor in relation to the site. Those arrangements might already contain rates of pay, site allowances and other conditions and may be with a union that the contractor does not normally deal with.

Effectively, for a sub-contractor who employs their employees directly and on a continuing basis as noted above it can mean paying different rates to the same employees dependent upon which job or site the employee is working on. Its employees if union members may not be members of the particular union with site coverage.

2.3 An example of a particular project under present arrangements

The following example highlights the complexity of the workplace relations environment within civil construction.

Civil contractors pty ltd (CCPL) are engaged to undertake the earth moving works on a large construction site upon which an office block is being constructed. CCPL has 80 employees, 60 of whom are not union members, 8 of whom are AWU members, 2 who are CFMEU members operators and 2

who are TWU members. CCPL employees currently operate under a non union agreement.

On gaining the job CCPL has 40 staff on the project, two of the AWU members are also on the job. However, the principal contractor has negotiated an agreement for the project with the CFMEU. Although CCPL has no CFMEU members on site, it is required to meet the site conditions and terms negotiated by the CFMEU as it undertook to do so on accepting the job.

At the same time a number of the same employees are working on other projects some with AWU coverage and others which are small domestic construction jobs - they are therefore being paid different rates on different sites, even though the movement between sites may be on the one day.

Obviously, this situation is administratively complex. It can also lead to an inflation in rates of pay which are not sustainable for a small employer and effectively can “lock them out” of particular jobs.

We believe this situation will be exacerbated under the Bill with the default bargaining representative provisions and the expanded right of entry.

3 The economic environment

With the difficult economic climate the Government has taken a number of welcome and timely steps to stimulate the economy including a bring forward of infrastructure development.

A return to disputation, inflated wage claims and loss of productivity on building and construction sites would be particularly concerning at this time. With tightening credit markets, certainty of construction costs will be vital if Australian companies are to be able to secure finance for major projects on commercially attractive terms and the Government is to deliver on its commitment to infrastructure.

In our view a number of the provisions in the Bill provide the opportunity for excessive claims by building and construction unions which will be deeply damaging for jobs and business activity. We have welcomed the

Government's public comments in relation to the need for restraint but would urge the Government to reconsider a number of provisions which give increased and unwarranted advantages to Unions regardless of the wishes of the workforce concerned.

B Key issues of concern in the FWA Bill

4 General comments in relation to the FWA Bill

In this section we raise two particular general issues as follows.

4.1 Re- regulation of the employment relationship

One of primary concerns relates to what we believe is a re-regulation of the employment relationship at a time when flexibility is critical given the state of the world and Australian economy as outlined in the previous paragraph.

We acknowledge and understand the mandate given to the Government to institute workplace relations reform in relation to community dissatisfaction with AWA's, minimum employment standards and unfair dismissal limitations.

However, we are concerned that a number of the provisions in the Bill especially those within Chapter 2, Part 2-4[1] dealing with bargaining and Agreement making will unduly fetter contractors in dealing directly with their own employees. Employers will end up with multiple agreements on multiple sites and will be required to bargain with a union even if a majority of the workforce are either not union members or do not want the union involved.[2] This will impact upon productivity.

We would prefer to see a position which allowed for the continuation of the concept of non union employee collective agreements and union collective agreements. We do not support an approach which has at its heart " a one size fits all" philosophy. The continuation of true non union agreements would properly reflect the intentions of employers and employees in making an agreement appropriate for their workforce.[3]

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[1] Division 1 -3

[2] This is expanded upon at 5.3 of this submission.

[3] Whilst non union agreements could continue to be negotiated this will be very difficult we note the provisions which provide for the union as the default bargaining agent.

We also believe that the enhanced role given to Fair Work Australia indicates a return to central regulation which is undesirable and in our view a backward step.

Finally, we believe that a number of the provisions which enhance the role of unions do so at a cost to productivity and bring with them the possibility of increased union demarcation disputes, inappropriate wage claims and industrial unrest. The provisions which support a default position of union involvement [4]also in our view undermine the right of freedom of association and deny the choice that employees have legitimately made not to belong to a union.

4.2 Industry Specific Laws

There is also still considerable uncertainty as to how the FW Bill will impact on building and construction participants particularly given that the government has not yet stated a position in respect of the content of specific laws for the sector.

We do note the Government's general commitment to specific legislation in *Forward with Fairness* that:

" the principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue, as will a specialist inspectorate for the building and construction industry."[5]

We also note the Hon Julia Gillard Deputy Prime Minister's statement in relation to the process currently being undertaken that:

"Well we've been very clear that whatever industry it is, people have to comply with the law. The building industry can be a tough game. In the building industry we have said people have to comply with the law. That's true of employers, of employees and of unions.

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[4] Clause 174 (3) default bargaining representative

[5] Australian Labor Party 2007 *Forward with Fairness: Policy Implementation Plan* p 24

And we've said that there would always be a tough cop on the beat in building and construction. That tough cop on the beat will be in our new specialist inspectorate in Fair Work Australia and His Honour Murray Wilcox is working through the process with all industry stakeholders to design the way in which that tough cop on the beat will work."[6]

The CCF has argued strongly (indeed before this committee) for retention of industry specific regulation especially in relation to the future role of a specialist industry watchdog. We believe a number of the provisions of the Bill make this retention post 2010 even more critical.[7]

5 Specific issues

In this section we raise a number of specific areas of concern.

5.1 Award Modernisation

The FWA Bill cannot be considered without reference to the Award Modernisation process which is currently taking place. In this regard we welcome the efforts by the Deputy Prime Minister the Hon Julia Gillard and the AIRC to ensure that the two processes are tracking together and consistently.

In this section we highlight issues in Award modernisation which are relevant to the FWA Bill particularly to the National Employment Standards.

5.2 Particular issues in relation to National Employment Standards

CCF does not object to the concept of National Employment Standards contained within Chapter 2 Part 2-2. In relation to the standards themselves,

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[6] ABC "Insiders" 23 November 2008 – transcript of Interview between Barrie Cassidy and Julia Gillard Deputy Prime Minister

[7] CCF Submission to Senate Employment, Education and Workplace Relations Committee – October 2008 available from the Committee website.

with a view to developments in the modern award process we comment on three matters; hours of work[8], redundancy[9] and long service leave[10].

(a) Maximum Weekly Hours - Hours of Work

We are generally supportive of the provisions in relation to maximum weekly hours however we would note two matters in relation to the modern Award process.

Firstly, Awards and NAPSAs relevant to the civil construction industry prescribe a range of provisions in relation to the arrangement of working hours. We have made a submission that a modern Award should rightly prescribe a variety of options for the arrangement of the 38 hour week (determined at workplace level) and should not be limited to mandated RDO's.

In our view, it is essential that the modern award contains these flexibilities. We have also acknowledged that it is not unreasonable to include a provision preserving (at enterprise level) the hours of work arrangement that existed immediately prior to the operation of the modern award. We believe this to be in keeping with two requirements, namely that there be no reductions in entitlements for employees and no increased costs for employers.

(b) Long Service Leave

Within the Civil Construction Industry there are a number of different long service schemes.

Not only are there different long service leave schemes applying in each State or Territory but the situation is further complicated by there being contributory

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[8] Chapter 2 Part 2-2 Division 3

[9] Chapter 2 Part 2-2 Division 11

[10] Chapter 2, Part 2-2 Division 9

and non-contributory schemes with different employer contribution and employee entitlement levels.

For example in South Australia there is contributory scheme for many employees and other employees are covered by a non-contributory scheme with a higher accrual rate than the other states. We would resist any attempt to make the South Australian standards the ones applicable overall in the industry.

In moving towards a national standard these issues will need to be taken into account. Given the nature of long service leave transitional arrangements will also need to be carefully considered.

(c) Redundancy

We support the definition contained within Clause 119 of the FWA Bill and believe this should form the basis for redundancy within the modern Award for the civil construction industry.

Currently three issues arise in the Civil Construction Industry in relation to Redundancy:

Firstly, the definition of Redundancy in many construction industry awards is different to that in the FWA bill and in most other Awards.

Secondly, the redundancy provisions in many of those construction industry awards limit an employee's entitlement to 8 weeks pay, whereas the NES provision provides up to 16 weeks entitlement.

Thirdly, the construction industry awards which have these different redundancy provisions are not going to be subject to a small business exemption according to decisions made in the award modernisation process.

Our position is that there must be consistency between the legislation and awards and that accordingly:

- The FWA Bill definition of redundancy should apply overriding any alternative definition in award
- Any awards which are not subject to a small business exemption should have common small business provisions (as per the standard Termination Change and Redundancy provisions, from which the NES redundancy provisions in respect of larger businesses have been derived).

5.3 Enterprise Agreements and Bargaining

There are a number of elements of the new Agreement and Bargaining provisions contained within Chapter 2, 2-4 of concern to the CCF.

(a) Overview of general concerns

We note the general policy philosophy of the Government that has collective agreements at the centre of the new industrial framework. Accordingly, the new Bill introduces new types of agreements, a concept of good faith bargaining and changes to content and approval requirements.

Our primary concerns relate to:

- the interposition of a third party (ie union) into the bargaining process whether the employees of an enterprise desire it or not – contravening in our view the commitment to freedom of association; and

- Greenfields Agreements where an employer will be required to notify all relevant unions with representational rights – with a consequent opening up of the possibility of damaging and time consuming union demarcation disputes;

These major concerns are detailed further in this section of our submission.

(b) Contents of Enterprise Agreements

The abolition of the concept of “prohibited content” and the introduction of permitted matters may lead to confusion amongst employers. Accordingly, it

will be important that further clarification be provided and the FWA adopt a balance approach consistent with the provisions of enterprise bargaining.

Our position is that, at a minimum, any provision in any form of agreement must be directly relevant or material to the employment relationship and must not contravene legislation in relation to freedom of association, equal opportunity, right of entry or privacy.

(c) Flexibility issues

While we acknowledge that collective bargaining is central to the Government's Fair Work policy, we equally appreciate the recognition given by both the Government and the AIRC to the need for at least a limited form of individual agreement making via award flexibility clauses in modern awards without such agreements having to be approved by another person (or majority of other employees).

Our understanding is that such a flexibility agreement is only available to a person who is in employment - and therefore covered by an award with this award flexibility clause at the time that the agreement is made.

Another limitation is that the AIRC will, according to its award modernisation decision of 18 December 2008, not be incorporating provisions allowing for annualisation of salaries or wages or for salary sacrifice arrangements in most awards.

If these limitations have the effect of removing such very common and accepted options for employers and employees who are technically covered under the award system, the options need to be made available via legislation and regulation.

(d) Date from which an Agreement applies

The Agreement should be operational from when it is made not from when it is approved by an authority for a number of reasons not the least of which is that employees (and often unions) expect the employer to apply the Agreement once it has been made with them (not some future date when an external authority confirms its approval).

Our members have encountered serious and unacceptable delays in approvals of Agreements under the previous arrangements and, while we note the undertakings for turnaround of agreement approvals under the proposed new system, delay remains a serious concern for all parties. This problem can be minimized from a practical point of view if the Agreement is made when the parties actually agree to it.

(e) Capacity to make Non Union Agreements

The FW Bill removes the distinction between non union employee collective agreements and union collective agreements. It appears that non union agreements are only possible where there are no union members or where the union chooses not be covered by the Agreement.[11] This strikes at the heart of the ability of an employer, especially a small employer to make an agreement directly with its employees in relation to the terms and conditions which are best for that workplace.

We note that unions are being given this "favoured" position at a time when union membership is declining from 35% in 1994 to 19% in 2007.[12]

It also relies on a fundamental assumption that employees want the union on site when in fact employees have elected not to belong to a union. Furthermore unions will be able to be covered by an enterprise agreement that has no union involvement in the bargaining process and where the majority of employees do not want the union as party to the agreement.[13]

In our view as stated previously these represent a breach of the freedom of association provisions and are a backward step in a modern deregulated economy.

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[11] Freehills - Summary of the Fair Work Bill dated 25 November 2008 at www.freehills.com.au

[12] See ABS statistics Graph on Unionisation Rates in the Construction Industry -ABS Catalogue 6310.0

[13] The operation of section 183 where if an union is the default bargaining agent because the employee did not make a decision about the bargaining representative and then the union can notify the FWA that it wants to be covered by the agreement

We believe the power to make true non union employee collective agreements should be maintained.

(f) Bargaining Representatives

We note that the FW Bill has a number of provisions within Chapter 2, Part 2-4, Division 2 and Division 3 dealing with the concept of bargaining representatives.

Our primary position is that we believe the choice of a bargaining representative should be a positive act. We are strongly opposed to the view that the appointment of a union as a bargaining agent can happen either by default or through a majority determination order which has no protection from coercion or intimidation for the employees involved.

(g) Consequences of the new bargaining arrangements – demarcation disputes

In our view the new bargaining arrangements may give rise to Demarcation disputes[14]. Demarcation disputes are costly, divisive and impact severely on productivity. Under the new legislation they may be given life in two ways.

Firstly, in relation to Greenfield sites where the employer is required to give notice to each union that is a relevant union.[15]

Secondly, in non Greenfield sites the prospect that the employer must negotiate with a union where only one member of a workforce is a union member even if that member does not appoint a bargaining representative (ie the default position). We particularly foresee situations for our members

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[14] We have not provided extensive commentary on demarcation disputes but they were extensively considered and commented upon in the Final Report of the Royal Commission into the Building and Construction Industry available at htpp://royalcombi.gov.au

[15] Clause 175

where the Agreement they are party to involves one union and in working on another site, another union is involved. That is multiple agreements for multiple sites.

Our concern regarding demarcation is not of some historic note, it is a live, continuing and real concern as was evidenced in the recent Award Modernisation proceedings. In those proceedings counsel of the AWU stated:

"The CFMEU refer to the elephant in the room being what they described as demarcation. With all due respect the elephant in the room is the CFMEU in that respect. And it would be those of us around… in the last 15, 20 years would understand what is being said when the AWU says that it would be remiss of this commission (AIRC) to embark upon award modernisation in a way that was absolutely guaranteed to open up old wounds, old contests, old battle grounds and old disputes which have been resolutely settled by some fairly emphatic decision making by this Commission (AIRC) over a large number of years".[16]

(h) Potential for Demarcation Disputes to be exacerbated by Modern Awards and new coverage provisions

We also note the recent AIRC Full Bench decision in relation to Modern Awards on 18 December.[17]

That decision removes the concept of organisational respondency. Modern awards now apply to employers in respect of employees falling under the coverage of the relevant award - rather than on the basis of association membership. This does provide an avenue for the opening up of demarcation disputes and given the history of the sector is a serious concern to us.

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[16] Mr A Herbert on behalf of the AWU Transcript of Proceedings dated 1 December 2008 AM2008/15 Award Modernisation at http://www.airc.gov.au

[17] [2008] AIRCFB 1000

(i) Need for strong protections in relation to "majority determination orders"

We share the concerns of a number of other employer organisations in relation to the mechanisms underpinning how a majority of employees who are members of the union are to be determined.

This is particularly the case in the building and construction industry. Combined with expanded right of entry provisions there is a real prospect that union members will be exposed to coercion and duress to support a determination.

It is fundamental that such a process require a secret ballot.

It is particularly concerning for CCF members that an employer can face not insubstantial fines for failing to "recognise or bargain" with a union but the employer can have no certainty that the union representation really does represent the wishes of the union members in the workplace.

(j) Consequences of not bargaining in good faith

We note that there is no automatic penalty provision for failure by a bargaining representative to bargain in good faith under Clause 228. Conversely however an Employer could be subjected to a civil penalty provision if they are found to have contravened a bargaining order made by FWA.

This could be we note in circumstances in which a majority determination order is made and where under the current Bill there are no independent mechanisms (such as a secret ballot) to verify that the outcome is indeed sought by a majority of the workforce.

This would seem inequitable.

(k) Cultural issues in Building and Construction industry

Finally, the new arrangements should be seen in the context of the history of the building and construction industry.

As the Committee is aware intimidation and coercion have been a particular problem for the industry particularly in relation to pressure on industry participants to belong to a union or to negotiate with a union[18]. There have been numerous inquiries into such matters including, the Cole Royal Commission, the work of the ABCC and the continuing media reports about these issues.

These prevailing circumstances and the new default provisions favoring unions particularly reinforce our argument for the retention of:

- industry specific laws; and
- a strong building and construction regulator to deal with any behaviour which contravenes the freedom of association provisions.

5.4 Right of Entry

The right of entry provisions which are contained within Chapter 3 Part 3-4 are a matter of serious concern for CCF members. The fundamental changes in the Bill in relation to the negotiation of agreements, bargaining agents and the concept of “representational rights” has washed away many of the protections for employers in relation to right of entry.

Our fundamental policy position is “no members no entry”. In other words unions should have no right of entry unless they have members on site both in

[18] Commonwealth of Australia *Final Report into the Building and Construction Industry* Summary of Recommendations Page 5 Paragraph 15 February 2003 available at www.royalcombci.gov.au

relation for discussion purposes with non members[19] and also in relation to any investigation[20].

In terms of the later we believe that the rights of inspection should be very limited and only on order of FWA.[21]

(a) Government's stated commitments to no change

It is our view that the previous legislation had the balance right. We note the Government's stated commitment that:

"…Labor will maintain the existing right of entry laws"[22]

Accordingly, it is with some disappointment that we note the changes proposed in the Bill which give unions enhanced right of entry.

(b) What the new provisions provide

Currently, unions can only enter premises to hold discussions with a member who is covered by an award or agreement binding on the union.[23] The FW Bill however, provides that unions will be able to enter a workplace to hold discussions with potential members if they are "entitled to represent the industrial interests of employees at the workplace."[24]

Additionally, union officials will be able to copy and inspect any record or document that is kept on or is accessible on the premises relevant to a suspected breach of the legislation or term of a fair work instrument. This extends to access to non union member records.[25]

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[19] Clause 484

[20] Clause 481

[21] See Current provision Section 748 (9)

[22] ALP August 2007 *Forward with Fairness Policy Implementation Plan* p 23

[23] Section 760 of the Workplace Relations Act 1996

[24] Proposed Clause 484

[25] Proposed Clause 482 (c)

The changes to right of entry are unacceptable as they give precedence to unions in circumstances where either individual employees have chosen not to join a union or do not require or want the union presence on site. They also give the opportunity for "fishing expeditions" and access to personnel records of non union members. We do not regard the privacy principles as any comfort to employees who are not union members.

We also seek further clarification as to how union right of entry will operate in workplaces still covered by an enterprise agreement.

(c) Coverage and representational orders

The delinkage of union right of entry from coverage or a relevant award to a requirement that a "union is entitled to represent the industrial interests of relevant employees" will have a number of consequences.

It will raise the issue of which union will be able to apply for entry to workplaces and the potential for demarcation disputes and claims.

We foresee that this will be a serious concern for our members having to deal with this on site. At present if there is a non-union agreement effectively unions are precluded from the site.[26] If there is a union agreement the union with whom the agreement has been concluded is the union with right of entry. The employer is not exposed to different claims from different unions and any disputes are limited to the actual issues the union seeks right of entry on.

In any event as will be seen in paragraph (d) below this alone is a serious problem in some sectors of our industry. We also question how employers will be in a position to assess whether a union has "representational rights"?

(d) The history of the industry in relation to right of entry

Abuse of right of entry was key issue raised before the Cole Royal Commission into the Building and Construction Industry.

[26] This is because a non union collective agreement excludes the operation of an Award.

The Commissioner stated that:

" in short I am satisfied from the evidence presented to the commission that disregard of the law in relation to entry and inspection by union officers and employees is widespread in the building and construction industry. Unlawful industrial action often coincide with abuses of right of entry and inspection. Even when actual or threatened industrial action does not result, abuses of right of entry in the building and construction industry usually result in unjustifiable disruption to productive work. That widespread abuses occur demonstrates that the law in this area is either inadequate, inadequately enforced or both,"[27]

(e) Evidence of continuing poor behaviour and the actions of the ABCC

The concerns our members hold in relation to tightly controlled and regulated right of entry laws are far from academic or "ancient history".

We note the commentary in the recent ABCC Report for 2007/2008 which states[28]:

"The ABCC commenced more proceedings in the Federal Magistrates Court and the AIRC than in 2006-07, whereas the number of cases commenced in the Federal Court remained at a similar level. **Right of entry is a major issue and this is reflected in the increased number of AIRC proceedings challenging the permits of various union organizers[29]. Table 2.12** shows the numbers of types of allegations for 2007-08 and compares them to the previous year.

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[27] Commonwealth of Australia *Final Report into the Building and Construction Industry* opcit Volume 7 paragraph 17

[28] The Office Australian Building Construction Commissioner *Annual Report 2007-2008* accessed at abcc.gov.au

[29] Our emphasis added

TABLE 2.12 Nature of allegations*	2007-08	2006-07
Unlawful Industrial Action	12	12
Freedom of Association	8	6
Right of entry	8	6
Coercion	7	2
TOTAL	**35**	**26**

NOTE: *EACH CASE IS COUNTED ONLY ONCE. WHERE A CASE INVOLVES MORE THAN ONE TYPE OF ALLEGATION, THE TYPE OF ALLEGATION MOST CENTRAL TO THE PROCEEDINGS IS SELECTED.

We also direct the committee's attention to a number of the case studies outlined in that Report particularly in respect of the CFMEU.[30]

(f) Preferred policy position

Our preferred policy position in respect of right of entry is as follows:

- Right of Entry must be tied to employment of members;
- The right of entry to workplaces for discussion purposes where no members are employed should not be permitted;
- Unions should not have the right to inspect non member records under Clause 482. If that right is to be allowed then the position under the present Act should be preserved, that is access should only be available on order of FWA.

5.5 Pattern Bargaining

We note the Government's stated comments that pattern bargaining is not permitted under the FWA Bill.

From a policy perspective CCF is opposed to the concept of pattern bargaining as we strongly support negotiation of agreements at the enterprise level with such agreements dealing with the specific matters that are

[30] Ibid Table 2.13

important for the particular employer and employees. That is at the heart of true enterprise bargaining.

Pattern bargaining imposes terms and conditions across the industry regardless of the particular circumstances of individual employers and employees.

In this regard, we remain concerned at the prospect of employers and especially small employers being coerced to sign off on a pattern or template agreement to ensure that there are no difficulties in gaining access to work on a project or worksite.

Equally, in an environment of skill shortages (notwithstanding the economic outlook) we can ill afford to have skilled civil contracting firms declining work opportunities on major infrastructural projects (where standard union agreements might apply) to avoid the confrontation and complications which they quite reasonably perceive to be involved in work on "union sites".[31]

The Commonwealth Government has called on the nation (employers and employees) to exercise restraint in wage claims and to save jobs. It is our view that this call is appropriate and one to which all parties in the industry should pay heed especially in relation to standard agreements that may be being negotiated.

Accordingly, in our view, it is imperative that the prohibition on pattern bargaining be maintained in legislation and enforced in practice as this is in the national interest as well as being necessary from a freedom of association perspective.

5.6 Unfair Dismissal provisions

We note that reintroduction of unfair dismissal laws was a specific election pledge of the Government. Accordingly, we have focused on aspects of the

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[31] The 2007/08 Annual Report of the Office of the Australian Building and Construction Commissioner details a number of compliance and investigation activities of the ABCC particular reference should be had to the section headed Legal pp36 -59.

provisions giving effect to this commitment rather than broader policy concerns.

Our primary concern in relation to these provisions is that they appropriately balance the interests of the employer with those of the employee.

We are also generally supportive of the development of a Fair Dismissal Code and the general simplification of the unfair dismissal resolution process.

However, we remain concerned at the prospect of employers being subjected to vexatious, non meritorious claims and being required to make payments simply to avoid the costs and inconvenience of proceedings. In this regard we will need to see how the Code operates in practice.

5.7 Transfer (Transmission) of Business

(a) Overview

The FWA Bill provides a new test for transfer of business which is broader in scope than that previously provided for.

The overall goal in this area must be to balance the rights of current employees against the needs of a new employer to restructure and make a business more efficient and hence viable. We believe that sensible, practical and workable transmission provisions are critical at this time. We are not aware of such extensive changes to these provisions being foreshadowed in the policy process by the Government with the concern that the far reaching nature of the proposals has not been properly considered.

We caution that in our experience with members the present provisions are not well understood and in any change to the laws a public education campaign will be critical.

(b) Our concerns with the provisions

We have a number of concerns with the current Bill:

- The new test introduces further complexity in an area not well understood especially by small business;

- It inappropriately includes outsourcing as a “transmission event” – when this is a common employment practice
- It reduces flexibility just at the time that businesses will need it most;
- It has no end date in respect of transferred obligations (the current act has a 12 month period);
- It applies the terms and conditions of transferring employees to new employees where there is no policy rationale to do so.

(c) Our preferred policy position

We believe the present position should be maintained. In any event there needs to be an education campaign especially targeted at small business to explain what the new laws require including a tool kit. We would be very happy to assist in an education process for our members.

5.8 Other matters

(a) Limited Representational Rights before FWA

We note that representational rights for our members are limited under Clause 596 save and except by Order of FWA. The later may only grant such permission in limited circumstances (Clause 596 (2))

This may have implications for our members in respect of dispute resolution and unfair dismissal claims. It will be critical that FWA interpret this provision in a way that appreciates the position of small businesses which may not have either the resources or expertise to deal with matters without assistance especially from their industry or employer association.

It might be prudent to add in an additional paragraph 596 (2) (d) along the lines of a representation order to be made “where it would otherwise be appropriate to do so”.

(b) Transition arrangements

One of the difficulties in commenting upon the Bill is that the transitional arrangements which will be contained in a separate Bill are not yet available. Transitional issues will be key to the smooth work of the new Act. We welcome continuing government dialogue on issues as they arise.

For example one issue we raised in section 5.4 was what will happen to right of entry in relation to ongoing agreements?

We believe that serious consideration should be given to the commencement of the new legislation given the slowing economy and pressure on business. We note in this regard the calls for a delay in the introduction of the reforms.[32]

(c) Civil Penalty provisions

We note the extensive range of civil penalty provisions now contained in Part 4-1 of the Act.

This effectively brings together all provision concerning the court enforcement of rights and protections under the Bill, other than those concerning unfair dismissal in Part 3-2. We also note that Safety net contractual entitlements may also be enforced in the Federal Court or Federal Magistrates Court, as if they were statutory entitlements (Clauses 541-543)

This obviously raises compliance issues for business and we believe there should be an extensive education campaign in the first instance rather than a focus on penalties.

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[32] The Australian "*Julia Gillard defiant on jobs as business asks for a rethink"* 16 January 2009 note comment from Peter Anderson ACCI

6 Office of the Australian Building and Construction Commissioner

Our position in relation to the ABCC and specific industry legislation has been previously the subject of a submission to the Committee[33]. In brief our position is:

- We support the continuation of specific and targeted legislation dealing with the building and construction industry;
- We support a separate regulatory body dealing with building and construction matters; and
- We argue strongly for the retention of the powers of the ABCC such as the power contained in Part 2 Division 1 to compel people to attend and give evidence on oath or affirmation.

7 Conclusion

We welcome the opportunity to make a submission to the Committee. The Fair Work Bill will become law at a critical time with Australia facing very difficult economic times.

In summation we believe that providing flexibility in relation to workplace and labour relations is critical. We are disappointed that in a number of critical areas such as bargain making and right of entry the balance so important in this area has been unnecessarily swung in favor of unions.

We are particularly concerned that the specific history and nature of the building and construction industry be taken into account in the framing of the new laws. Delivering on the infrastructure this nation needs relies on a well run, dispute free employment and workplace relations framework. Our nation building and national prosperity depends on it.

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[33] CCF Submission to the Senate Education, Employment and Workplace Relations Committee October 2009