Business SA

Submission to the Senate Education, Employment and Workplace Relations Committee:

Inquiry into the Fair Work Bill 2008

7 January 2009

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Business SA

Business SA is the leading business organisation in South Australia, representing many thousands of members from across a broad range of industry sectors.

We deliver a wide range of integrated services to business, including:

> Lobbying and representation on issues significant to industry;
> Workplace relations advice, advocacy and consulting services;
> Health, safety, environmental and injury management training and consultancy services;
> Wide-ranging training programs;
> Reference publications and handbooks;
> International trade and business development services;
> Management of apprenticeships and traineeships;
> Administrative support services for industry and trade associations;
> Networking opportunities; and
> Workplace relations seminars and workshops

Business SA is a registered association of employers under the South Australian *Fair Work Act 1994* and is recognised under that, and other legislation, as the State's peak business and employer group.

Business SA has also been granted federal registration under the transitional provisions of the *Workplace Relations Act 1996*.

As the peak employer organisation in South Australia, Business SA is well placed to represent the South Australian business community in responding to the Senate's Standing Committee on Education, Employment and Workplace Relations Inquiry into the *Fair Work Bill 2008*.

Through membership of the Australian Chamber of Commerce and Industry (ACCI), Business SA is able to play an active role in national issues that impact on the local business community.

Business SA strongly supports the submissions of the Australian Chamber Commerce of Industry (ACCI) in relation to this matter and requests that our submission be considered in conjunction with the submission of ACCI.

Recommendations

1. Union right of entry provisions (Chapter 3, Part 3-4)

It is recommended that the right of entry provisions (Chapter 3, Part 3-4) be amended to reflect the current right of entry provisions in Part 15 of the *Workplace Relations Act 1996*.

2. Low-paid bargaining (Chapter 2, Part 2-4)

It is recommended that Chapter 2, Part 2-4, Division 9 be removed from the Bill. Alternatively, if Chapter 2, Part 2-4, Division 9 is retained, Section 262 of the Bill should be removed to prevent industry-wide agreements from being created through arbitration by FWA.

3. Workplace determinations (Sections 262 and 269)

It is recommended that Sections 262 and 269 be removed from the Bill.

4. Default bargaining representative (Sections 174(3), 176 and 183)

It is recommended that the default bargaining representative provisions in Sections 174(3) and 176 be removed. Furthermore, it is recommended that Section 183 be removed to reflect the commitment to provide for genuine non-union agreements.

Should Sections 174(3) and 176 be retained, it is recommended that Section 183 be removed to eliminate the ability for a union bargaining representative to become a party to the enterprise agreement through the backdoor.

5. Permitted matters and unlawful terms of enterprise agreements (Sections 172, 194 and 253)

It is recommended that the following matters be included in Section 194 as 'unlawful terms':

> terms that require an employer to provide information to a union about employees who are covered by an enterprise agreement or information about a union to an employee;

> terms that provide for employees to have time off to attend union meetings or participate in union activities;

> terms that provide for right of entry;

> the rights of an official of an organisation of employers or employees to enter the premises of the employer bound by the agreement;

> terms relating to particular staffing levels;

> restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;

> restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;

> terms that would require an employer to source only products from a particular supplier; and

> terms that would require an employer to engage or not engage particular clients, customers or suppliers.

To ensure compliance with Sections 172 and 194, it is recommended that Section 253 be amended to stipulate that provisions which are not related to permitted matters or unlawful terms are void, and that the inclusion of such content are subject to civil remedy provisions. In addition, a section pertaining to misrepresentation about unlawful terms, subject to a civil remedy, should be included. This could be based on Section 366 of the *Workplace Relations Act 1996*.

6. Majority support determinations (Section 237(3))

It is recommended that Section 237(3) be amended to require FWA to conduct a secret ballot among the employees to determine majority support for enterprise bargaining. Provisions on conducting the ballot could be linked to/modelled on the protected action ballot provisions in Chapter 3, Part 3-3, Division 8 of the Bill.

7. Genuine redundancy (Section 389)

It is recommended that Sections 389(1)(b) and 389(2) be removed from the Bill.

8. Scope orders and serious breach declarations (Sections 238 and 234)

It is recommended that Sections 234 and 238 be removed from the Bill.

9. Transfer of business (Chapter 2, Part 2-8)

It is recommended that the transmission of business provisions in Part 11 of the Workplace Relations Act 1996 be retained.

10. Initiation of bargaining period

It is recommended that an amended Section 423 of the *Workplace Relations Act 1996* is inserted, requiring bargaining parties to formally initiate a bargaining period by giving the other parties and FWA written notice.

Introduction

Small to medium businesses are the engine room of the South Australian and Australian economies. A key reason for their ability to create jobs and provide real wages growth is the flexibility recent workplace reforms have provided.

The Federal workplace relations system has undergone significant and important reforms in the last 15-20 years with the focus on enabling employers and employees to achieve outcomes in the workplace without the interference of third parties. During this period, there has been an emphasis on enterprise bargaining, the end to central wage fixation, the simplification of agreement making, dispute resolution focused on the workplace level and protection against unlawful industrial action. These reforms have assisted Australian workplaces achieve greater flexibility and productivity levels, and encouraged employment growth.

A successful Australian industrial relations system will ensure the following key outcomes:

1. Increase productivity and employment;
2. Provide industrial relations stability and certainty;
3. Function under diverse economic and business conditions;
4. Function under diverse employment and union contexts; and
5. Respect employer body/union representation.

In October 2008, the Organisation for Economic Co-operation and Development (OECD) stressed the importance of continuing workplace relations reforms in Australia by "…preserv(ing) wage flexibility, not extending collective bargaining beyond the company level"[1] to strengthen the economy and ensure its resilience during difficult times.

Furthermore, the Productivity Commission's *Review of National Competition Policy Reforms* noted that "In particular, any backsliding that reduced flexibility and the capacity to tailor labour market arrangements to the circumstances of particular firms and the needs of an ageing population, would almost certainly lessen workforce productivity and thereby reduce living standards."[2] Hence, it is essential that any changes to the workplace relations system are focused on achieving greater labour market flexibility and increased productivity.

Business SA is concerned that the government has not published any economic modelling or analysis of the overall economic impact of the proposed changes. Business SA calls on the Government to release the economic modelling on the overall impact of the changes to the workplace relations system. Alternatively, if no such modelling has been carried out, the Government should ensure that such modelling is carried out and

[1] OECD, *Policy Brief*, 'Economic Survey of Australia 2008'.
[2] Productivity Commission 2005, *Review of National Competition Policy Reforms, Report no. 33.*

released. For businesses not only in South Australia, but across Australia, it is important to know whether the proposed legislation will support businesses in dealing with difficult economic conditions.

The *Fair Work Bill 2008* (the Bill) does not merely amend the current *Workplace Relations Act 1996*, but completely rewrites the current Federal workplace relations legislation.

In assessing the Bill and its impact on South Australian businesses, Business SA identified ten key issues of concern. They are as follows:

1. Union right of entry provisions
2. Low-paid bargaining
3. Workplace determinations
4. Default bargaining representative
5. Permitted matters and unlawful terms of enterprise agreements
6. Majority support determinations
7. Genuine redundancy
8. Scope orders and serious breach declarations
9. Transfer of business
10. Initiation of bargaining period

In addition, the Bill has been assessed against the commitments in the Labor Party's *Forward with Fairness* platform and policy implementation plan.

1. Union right of entry provisions (Chapter 3, Part 3-4)

It is important that rules and regulations relating to union right of entry are balanced, respecting workers' rights to freedom of association and their ability to consult with a representative. However, a right of entry regime must provide for industrial peace, stability and protect employers from unnecessary disruption.

In 2007, Business SA supported the Labor Party's policy position of retaining existing right of entry laws, as outlined in its *Forward with Fairness: Policy Implementation Plan.* Since the election, the Labor Government has reassured the business community on numerous occasions that the current right of entry regime would stay. On 28 May 2008, the Minister for Employment and Workplace Relations reinforced this position to the Masters Builders Association Australia: "We promised to retain the current right of entry framework and this promise too will be kept".[3]

According to Section 481 of the Bill, a union is entitled to enter a workplace to investigate a suspected breach of an industrial instrument which relates to a member of the union. Business SA does not object to this as it is in line with current provisions. However, Section 482(1)(c) provides a union with the power to inspect and make copies of any record, including records of non-members, in investigating a breach.[4] It is important to note that the Australian trade union movement has experienced a steady decline in membership density over the past two decades, with only 19 per cent of the total Australian workforce current members of a union. In the private sector the number is even lower: 14 per cent.[5]

Section 481 significantly increases a union's access to employment records which contains confidential and sensitive information. If passed, this section could undermine both the employer's and employee's right to privacy and responsibility to keep sensitive information confidential.

The business community has expressed concerns that this system could potentially be open to abuse with unions using the information obtained from non-members in recruitment drives and to request employers to provide an equal level of pay irrespective of performance. Giving parties the right to make a complaint to the Privacy Commission if they believe that personal information has been misused by unions, as provided in Section 504, does not mitigate the violation of an individual's right to privacy.

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[3] Hon. Julia Gillard MP, Minister for Employment and Workplace Relations, 2008, 'Speech – The Masters Builders Australia Industry Dinner', 28 May, 2008.

[4] The term 'employment record' has been given the meaning as defined in the *Privacy Act 1988,* and as such would include information on performance and conduct, salary or wages, annual and sick leave entitlements.

[5] Australian Bureau of Statistics 2008, *6310.0 – Employee Earnings, Benefits and Trade Union Membership.*

The government has not provided any reasons for why a union should be entitled to inspect and make copies of non-members employment records and it is apparent that this is not consistent with the Government's promise that existing right of entry laws will be retained.

1.2 Right of entry in relation to entry for the purposes of holding discussions (Section 484)

Pursuant to Section 484, a union is entitled to enter a workplace provided the union is entitled to represent the industrial interests of the employees. This suggests that unions have the right to enter a workplace for the purposes of holding discussions, regardless of whether the union has any members in the workplace.

Business SA submits that linking the right of entry to membership eligibility, based on complex constitutions and rules, is inappropriate as it would be extremely difficult for an employer to determine eligibility criteria for right of entry.

This is likely to give rise to demarcation disputes, whereby multiple unions compete to represent the interests of the employees. This may result in multiple unions using their new powers to access the workplace to recruit new members, which would be highly disruptive for businesses and significantly damaging to harmonious workplace cultures. Furthermore, Section 484 could potentially damage long-established and functioning relationships between an employer and a particular union that traditionally has been representing the employees and which may be party to a workplace/enterprise agreement.

Recommendation

It is recommended that the right of entry provisions (Chapter 3, Part 3-4) be removed from the Bill and that the current right of entry provisions in Part 15 of the *Workplace Relations Act 1996* be retained.

2. Low-paid bargaining (Chapter 2, Part 2-4)

Business SA supports the right of employees to have fair wages and conditions. Provisions are already in place to ensure this occurs, namely the safety-net of Modern Awards and the NES.

Section 243 of the Bill states that a representative may apply to Fair Work Australia (FWA) to bargain on an industry-wide level provided this, among other things, would be in the public interest and assist low-paid employees who traditionally have not engaged in enterprise bargaining.

FWA may on its own initiative provide any assistance to the bargaining representatives, deemed appropriate to facilitate an agreement.

Furthermore Section 262, Chapter 2, Part 2-5, Division 2 requires the FWA make a low-paid workplace determination if a bargaining representative has applied and is concerned that an agreement is unable to be reached and there is no reasonable prospect of an agreement being reached. A low-paid workplace determination has the effect of an enterprise agreement as per Chapter 2, Part 2-5, Division 6 of the Bill.

The Bill does not provide a definition of the term 'low-paid', which gives FWA the power to make an arbitrary decision on what constitutes a low-paid employee. This creates uncertainty for businesses which pay employees in accordance with the applicable award, as to whether the current arrangements are sufficient or whether they may be roped-in to a process which may result in significantly different terms and conditions. This section is not conducive to industrial stability and certainty as businesses will be vulnerable to sudden alterations to current arrangements.

Low-paid bargaining is unlikely to either generate productivity and employment, or work under diverse economic and business conditions. Combined with the likely increases in labour costs arising from the Modern Awards, low-paid bargaining may see businesses, particularly small and medium businesses, on which low-paid workplace determinations are imposed, reduce their workforces to offset higher labour costs.

As indicated by statements from unions in the childcare, cleaning, hotels and security sectors, up to 20 per cent of the workforce could have access to low-paid bargaining authorisations.[6] Furthermore, unions have referred to these authorisations as giving them 'the facility to get some sector-wide solutions' and 'industry-wide settlement'.[7] The low-paid bargaining authorisation provides an opportunity for industry-wide bargaining with industry-wide arbitration, which is pattern-bargaining by another name.

Employers who provide terms and conditions and pay either above, or in line with, the safety net, Modern Awards and the National Employment Standards (NES), may find

[6] The Australian, 'Union flips on sector pay deals', 27 November 2008.
[7] ibid.

themselves involuntarily involved in an industry-wide bargaining process. A business unable to agree to economically unsustainable terms and conditions, may find themselves with an arbitrated instrument for the whole industry.

In its *Forward with Fairness: Policy Implementation Plan*, the Labor party reassured businesses that industrial action would not be allowed to be taken in pursuit of pattern bargaining.[8] Business SA welcomes Section 413(2) which prevents protected industrial action in relation to multi-enterprise agreements. However, as FWA must arbitrate industry-wide bargaining for the low paid if parties are unable to agree, this Section is of little practical support for South Australian and Australian businesses.

Business SA believes that pattern-bargaining is not about semantics: it is a concept which encourages a party to seek common terms to be included for separate agreements or for the whole industry, rather than genuinely bargaining at the workplace level.

Business SA is deeply concerned that low-paid bargaining authorisation, although perhaps not intentional, bears a close resemblance to pattern-bargaining in operation and will have the same negative impact on jobs and the viability of businesses.

Recommendation

It is recommended that Chapter 2, Part 2-4, Division 9 be removed from the Bill.

Alternatively, if Chapter 2, Part 2-4, Division 9 is retained, Section 262 of the Bill should be removed to prevent industry-wide agreements from being created through arbitration by FWA.

[8] Australian Labor Party 2007, *Forward with Fairness: Policy Implementation Plan, August 2007.*

3. Workplace determinations (Sections 262 and 269)

Business SA was pleased that the Labor Party, while in Opposition and then in Government, ruled out arbitration from being a feature of the system. The Government noted: 'Our policy clearly states that no one will be forced to sign up to an agreement where they do not agree to the terms'[9] and 'Compulsory arbitration will not be a feature of good faith bargaining'.[10] Unfortunately Sections 262 and 269 of the Bill does not appear to be consistent with these policy commitments.

Enterprise agreements can only be created by genuine agreement between the parties. Creating enterprise agreements through arbitration would be a contradiction in terms, as there would be no agreement created between the parties, and an outcome would be imposed. An enterprise agreement created through arbitration would be closer to a traditionally arbitrated industrial award rather than a 'true' enterprise agreement.

Section 262 of the Bill authorises FWA to make workplace determinations in relation to low-paid bargaining authorisations, if parties are genuinely unable to reach an agreement.

Section 269, on the other hand, would require a serious breach notice to have been issued and the parties being genuinely unable to reach an agreement before FWA would be able to make an enterprise bargaining related workplace determination. This enables the FWA to create enterprise agreements through arbitration in certain circumstances.

There is concern that FWA's power to create agreements through arbitration could result in bargaining parties making ambit claims without the intention to negotiate so they can request FWA to arbitrate the matter. There is also a risk that a business' refusal to accept ambit claims could be misinterpreted as acting unreasonably by not giving due consideration to the claims, and being unwilling to negotiate. This action could be construed as breaching good faith bargaining requirements which then could give rise to a workplace determination under s269.

If negotiating parties are unable to reach agreement, they should be free to refer the negotiation to FWA for arbitration provided both the parties genuinely agree to such action. This is currently provided in Section 240 of the Bill and ensures that parties engaged in genuine bargaining can seek assistance should they agree to do so. However, the extension of this Section which gives FWA the power to arbitrate the negotiation of an enterprise agreement without agreement by parties will only encourage ambit claims and damage genuine bargaining efforts.

Recommendation

It is recommended that Sections 262 and 269 be removed from the Bill.

[9] Julia Gillard MP, Speech to the National Press Club, 30 May 2007.
[10] Julia Gillard MP, Speech to the National Press Club, 17 September 2008.

4. Default bargaining representative (Sections 174(3), 176 and 183)

Employees currently engaged in negotiating a workplace agreement may appoint anyone as a bargaining agent to represent, assist, support and advise the employee in the negotiation process. When a bargaining agent is appointed, it is likely to be a colleague or union representative. Employers are prevented from taking any action which would coerce an employee into not appointing a bargaining agent. Business SA supports this protection.

However, often in businesses, particularly small to medium businesses, employees are willing to, and do, negotiate directly with their employer.

Sections 174(3) and 176 overturns the status quo by making the union the default bargaining representative for an employee who is a member of that union. Unfortunately, the Bill's Explanatory Memorandum does not provide any reasons for this substantive change, or the nature of the deficiencies the current arrangement possesses.

It is difficult to see how positioning union bargaining representatives as the default bargaining representative and the subsequent right to become bound by the agreement is consistent with the policy commitment in *Forward with Fairness* which stated that "Labor has made it clear that under our proposed system a union does not have an automatic right to be involved in collective enterprise bargaining".[11]

Essentially, the combined effect of these provisions would give unions an automatic right to be involved in collective enterprise bargaining.

As noted earlier in this submission, only 19 per cent of the total Australian workforce is unionised, and only 14 per cent of private sector employees have chosen to join a union. These figures are pertinent when drafting industrial relations laws and regulations as the final legislation must be suitable for different employment and union contexts.

Appointing a union as the default bargaining representative would limit the ability for employees to bargain directly with the employer without any third party involvement. The Section will require an employee affiliated with a union, to actively request the union not represent them and to not be involved in the bargaining process.

However, what is more concerning regarding the ability for employers to engage directly with their employees is Section 183, which gives a union acting as the bargaining representative of an employee, the right to become a party to the agreement. In effect this would mean that in a workplace with 100 employees, 99 of them non-members and 1 of them unionised, the union is given equal status to the 99 other employees in the agreement.

[11] Australian Labor Party 2007, *Forward with Fairness: Policy Implementation Plan, August 2007.*

Furthermore, this would result in genuine non-union enterprise agreements no longer being available unless the workplace does not have a single union member, or the union member actively requests the union not to represent them in the negotiation process.

Many businesses today engage constructively with unions, resulting in union-collective workplace agreements. However, there are many non union-collective agreements in place. In workplaces with no or marginal union presence, it can be more appropriate to negotiate directly with the employees and enter into employee-collective agreements. Business SA submits that Section 183 effectively removes the opportunity to negotiate enterprise agreements that work in different employment and union contexts.

Recommendation

It is recommended that the default bargaining representative provisions in Sections 174(3) and 176 be removed. Furthermore, it is recommended that Section 183 be removed to reflect the commitment to provide for genuine non-union agreements.

Should Sections 174(3) and 176 be retained, it is recommended Section 183 be removed to eliminate the ability for a union bargaining representative to become a party to the enterprise agreement through the backdoor.

5. Permitted matters and unlawful terms of enterprise agreements (Sections 172, 194 and 253)

Removing the current provisions on prohibited content, combined with FWA's power to impose arbitrated agreements on the parties, should they be unable to agree, could lead to businesses having an agreement not resulting in any productivity improvements and efficiency gains, but principally focused on union rights and restrictions on casuals, contractors and labour hire staff.

Sections 672 and 673 of the Explanatory Memorandum set out that terms relating to particular staffing levels, the engagement of casuals, labour hire and contractors may be included. Provided the terms directly relate to an employee's job security, terms may require an employer only to source products from a particular supplier, to engage or not to engage particular clients, customers or suppliers.

If terms relating to staffing levels and terms restricting the utilisation of casuals, labour hire and contractors would be permitted to be included in enterprise agreements, this would severely affect a business owner's and/or management's ability to appropriately manage the firm and make decisions to ensure the long-term viability of the firm.

Furthermore, unions would be able to take protected industrial action to pressure businesses to engage only permanent staff (other than in exceptional circumstances) which could adversely affect the operations of businesses. This would be particularly troubling for businesses operating in sectors such as retail, hospitality and tourism, where the seasonal nature of such industries require the employment of staff on a casual basis.

According to the Explanatory Memorandum, Section 676, the terms below would fall within the scope of permitted matters for purpose of paragraph 172(1)(b) and therefore be permitted in enterprise agreements:

> terms that require an employer to provide information to a union about employees who are covered by an enterprise agreement or information about a union to an employee, and
> terms that allow unions to promote membership or have noticeboards in the workplace or otherwise provide information to employees.

Permitting these terms to be included in the enterprise agreements is concerning as these terms potentially could undermine the freedom of association of employees and result in employees being coerced into joining a union.'

However, contrary to the commitments that *'Existing right of entry laws will be retained',* unions will be able to bargain in relation to union right of entry. Although Section 194(f) initially may give the impression that unions cannot bargain in relation to right of entry, the Explanatory Memorandum, Section 838, indicates that right of entry for other purposes than those provided by the legislation, can be obtained through enterprise bargaining. Hence, unions would be able to gain entry to attend staff induction meetings. Currently, right of entry is not a permitted matter in agreements and the legislation

provides adequate right of entry provisions. The promise that *'Existing right of entry laws will be retained'* unfortunately does not seem consistent with Section 194(f).

It also appears that there is nothing in the Bill to prevent the inclusion of matters that are not permitted or that are unlawful. According to Section 253(2), although an agreement is about unlawful terms or matters that are not permitted the agreement still operates and there is no penalty for including content that is contrary to the legislation. If there is nothing in the Bill to discourage parties to misrepresent that a particular term is permitted or to lodge agreements containing such content, the Bill will be largely ineffective in relation to the content of agreements.

Recommendations

It is recommended that the following matters be included in Section 194 as 'unlawful terms':

> terms that require an employer to provide information to a union about employees who are covered by an enterprise agreement or information about a union to an employee;

> terms that provide for employees to have time off to attend union meetings or participate in union activities;

> terms that provide for right of entry;

> the rights of an official of an organisation of employers or employees to enter the premises of the employer bound by the agreement;

> terms relating to particular staffing levels;

> restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;

> restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;

> terms that would require an employer to source only products from a particular supplier; and

> terms that would require an employer to engage or not engage particular clients, customers or suppliers.

To ensure compliance with Sections 172 and 194, it is recommended that Section 253 be amended to stipulate that provisions which are not related to permitted matters or

unlawful terms are void, and that the inclusion of such content are subject to civil remedy provisions. In addition, a section pertaining to misrepresentation about unlawful terms, subject to a civil remedy, should be included. This could be based on Section 366 of the *Workplace Relations Act 1996*.

6. Majority support determinations (Section 237(3))

Business SA is concerned about the compulsory nature of enterprise bargaining, through the inclusion of good faith bargaining provisions in the Bill. However, if good faith bargaining provisions and majority support determinations are included in the Bill, it is essential to protect the integrity of majority support determinations and to ensure that employees have a genuine opportunity to either support, or not support, the initiation of enterprise bargaining.

Section 237(3) gives FWA full discretion in deciding which method to apply to determine whether majority support for enterprise bargaining exist in a workplace. According to the Explanatory Memorandum, Section 979, appropriate methods may be secret ballots, written statements or a petition.

Methods such as petitions and written statements would not allow for an employee to express his/her views without being identified by other employees or the relevant union. For instance, if a petition would be deemed to be a sufficient means to determine majority support, an employee not willing to support enterprise bargaining could be subject to coercion, bullying and intimidation by other employees having a different view. Hence, if employees are not able to express their preference without being identified, it is questionable whether employees have a genuine choice.

In order to take protected industrial action, the Bill requires a secret ballot to be held. Business SA submits that in order to ensure that employees cannot pressured into either supporting (or not supporting) enterprise bargaining, secret ballots should be the only method available to determine majority support.

Recommendation

It is recommended that Section 237(3) be amended to require FWA to conduct a secret ballot among the employees to determine majority support for enterprise bargaining. Provisions on conducting the ballot could be linked to/modelled on the protected action ballot provisions in Chapter 3, Part 3-3, Division 8 of the Bill.

7. Genuine redundancy (Section 389)

Whether a person is genuinely redundant should be a question of fact. That is, whether a person's job was no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise. Making an employee redundant is, for most businesses, a last resort measure after having exhausted all other options.

However, the provisions outlined in Section 389(1) may result in a termination not meeting the definition of 'genuine redundancy' (even though a person was made redundant for a genuine reason) due to an omission by the businesses to sufficiently consult as required by the Modern Award or enterprise agreement.

Furthermore, Section 389(2) gives FWA the power to determine whether a person could have been redeployed in the business. Essentially, this means that business management decisions can always be overturned by FWA finding that the employer should have found an alternative job for the employee. This would be contrary to decades of precedent decisions of the AIRC whereby the Commission has not sought to substitute its views on the decisions made by management, but rather questioned whether or not a person is genuinely redundant.

The threat of having decisions relating to restructuring and downsizing overturned by FWA, could result in businesses delaying the implementation of important measures, that if implemented earlier could have reduced the number of redundancies necessary. Alternatively, it could result in business having to provide unfair dismissal compensation for being unable to find alternative duties.

Section 389 could result in businesses having to provide extensive evidence and spend valuable resources on defending a claim for unfair dismissal in relation to redundancy. This would be yet another additional cost for businesses under the Bill.

Recommendation

It is recommended that Sections 389(1)(b) and 389(2) be removed from the Bill.

8. Scope orders and serious breach declarations (Sections 238 and 234)

Bargaining above the safety net should be voluntary and employers and employees should be allowed to bargain as far as possible without the involvement of third parties.

According to Section 238, a bargaining representative may apply to FWA for a scope order, setting out who should be covered by the agreement, if the representative believes that the agreement is not proceeding effectively or fairly because the agreement will not cover the appropriate employees, or will cover employees that it is not appropriate for the agreement to cover. This would give FWA the power to determine who should be covered or who should not be covered by the agreement.

Business SA questions the extent to which orders requesting a particular group of employees to be covered or not to be covered is consistent with genuine bargaining or whether this would be yet another form of arbitration. Issues about coverage should be left to the bargaining parties to determine and the Explanatory Memorandum does not provide any reasons as to in what way the current legislation is problematic and why scope orders have been included in the Bill.

It could also be questioned whether giving FWA the power to make scope orders is consistent with the government's assurance that "no one will be forced to sign up to an agreement where they do not agree to the terms."[12]

As employers are exposed to the threat to have an enterprise agreement imposed on them by arbitration, it could well be the case that a scope order is obtained by the other bargaining party requesting a particular group of employees to be covered against the wishes of the employer. The employer then would have the option of either accepting the scope order or have an enterprise agreement created through arbitration. This would not be genuine bargaining and in effect the employer would be forced to sign to an agreement where they do not agree to the terms.

As previously stated, Business SA believes that arbitration should not be available when negotiating an enterprise agreement. A serious breach declaration, Section 234, essentially paves the way for FWA to create an enterprise agreement through arbitration.

Recommendation

It is recommended that Sections 234 and 238 be removed from the Bill.

[12] Julia Gillard MP, Speech to the National Press Club, 30 May 2007.

9. Transfer of business (Chapter 2, Part 2-8)

The transfer of business provision completely overturns the concept of 'transmission of business' and a number of precedents that established when transmission of business actually occurs. Unfortunately, the Explanatory Memorandum does not provide any reason for this significant change and the Government has not provided any additional explanations in relation to this.

There are a number of concerns with the transfer of business provision, including the capture of 'in-sourcing' and 'out-sourcing' under 'transfer of business', and that a transmitted instrument can operate indefinitely and may also apply to the transferee/ new employed and current employees.

In addition, overturning the transmission of business provisions could make mergers and acquisitions less attractive.

Recommendation

It is recommended that the transmission of business provisions in Part 11 of the Workplace Relations Act 1996 be retained.

10. Initiation of bargaining period

Business SA is concerned about the Bill removing the requirement to formally initiate a bargaining period.

Enterprise bargaining is not only resource and time consuming, but may also give rise to protected industrial action resulting in a number of legal implications for the parties involved.

Section 423 of the *Workplace Relations Act 1996* recognises this by requiring a party wishing to negotiate a collective agreement to formally initiate a bargaining period by giving written notice to the other party and to the Australian Industrial Relations Commission. Furthermore, this ensures that all relevant parties are fully aware that the other party intends to initiate a formal bargaining period which includes the ability to take protected industrial action.

While removing the requirement to formally initiate a bargaining period may appear to simplify the bargaining process, this could have serious and unintended consequences for the bargaining parties.

The good faith bargaining provisions in the Bill place a number of obligations on the bargaining parties. Compliance with the provisions is essential as civil penalties apply for contravening good faith bargaining and FWA can ultimately impose an agreement on the parties through arbitration. Therefore it is essential that all parties are fully aware that a formal process of bargaining has commenced to assist them in meeting the extensive obligations under the Bill.

Recommendation

It is recommended that an amended Section 423 of the *Workplace Relations Act 1996* is inserted, requiring bargaining parties to formally initiate a bargaining period by giving the other parties and FWA written notice.