UNIONSWA

Senate Inquiry into the Fair Work Bill 2008

Submission from UnionsWA

Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email to: eewr.sen@aph.gov.au

Introduction

UnionsWA supports the current Federal Government's intentions to repeal the *Workplace Relations Act 1996 (WR Act)* and replace it with the new *Fair Work Act 2008* (*FW Act).* There can be little question now that the *WR Act* was amended by the previous Coalition Government in such a way as to significantly diminish the rights of all workers, to complicate and confuse not only employees but also many employers, and to breach many of the international labour obligations of this country.

Whilst supporting the introduction of the Fair Work Bill in many, if not most, of the provisions, there is still a question as to whether or not this Bill satisfactorily redresses the concerns outlined above.

We accept that there has been a concerted attempt to streamline and simplify some elements of the previous legislation in a way that should please employers. Our question is whether this still in some way discriminates against, or reduces the rights of employees. An example of our concern on this would be the attempts to streamline unfair dismissal applications but in such a way that the employee remains disadvantaged.

We acknowledge that the task for the Federal Government in redressing the previous Government's legislative inequities was monumental and inevitably not all parties in the system will be happy.

However, if the intention is to restore balance and fairness into workplaces then does this legislation achieve that wherever it can and where it should? We would contend that some elements of the *Fair Work Bill 2008* do not go far enough in restoring the balance for employees. We outline these concerns below.

In this regard we also note the comments of Sydney University Professor of Law, Ron McCallum, who stated "*It is a big mistake to use Work Choices as the reference point for balance when considering the new legislation, because Work Choices was "so unbalanced and so wrong".* [1]

Although it is not the subject of this legislation, we remain steadfastly of the view that the *Building and Construction Industry Improvement Act 2005* should be repealed and construction industry employees and employers should fall under the jurisdiction of Fair Work Australia on the same terms and conditions as for any other industry sector governed by FWA. Our joint submission with the Australian Council of Trade Unions (ACTU) to the Senate Standing Committee on Education, Employment and Workplace Relations inquiring into the provisions of the *Building and Construction Industry (Restoring Workplace Rights) Bill 2008* refers to this point.

We support the ACTU's submission to this Inquiry and UnionsWA's submission should be read in conjunction with it. For the sake of efficiency we will not repeat the supported elements of the ACTU submission but rather highlight those areas of concern raised with us by UnionsWA affiliates as matters of ongoing concern in the *FW Bill*. Items we consider require particular attention but have been dealt with in sufficient detail by the ACTU include the enforceability of national employment standards and possible diminution of conditions through the award modernisation process.

[1] Harmers Workplace Lawyers forum, Sydney, 21/11/2008

Australian Workplace Agreements (AWAs)

We welcome one of the first legislative initiatives of the Rudd Labor Government, the abolition of new AWAs. We believe, as do many of the voting Australian public, that these individual contracts were designed to undermine minimum employment standards. It has been widely documented that this was many employees' experience of AWAs[2]. Therefore we believe that ensuring no new AWAs are made, and that that those still in existence are subject to a no disadvantage test against basic employment standards, is crucial to reinstating fairness to the country's work laws.

It is for these reasons that we are angered at the announcement to undermine many of the Government's previous commitments by allowing existing AWAs to continue in operation past their expiry date. This is in direct contradiction to the Government's previous assertions, made clear by Deputy Prime Minister herself:

> *When the Australian people read our policy documents, or heard the Prime Minister speak, including at our campaign launch, or listened to me debate the previous Minister for Workplace Relations they were left without a doubt that central to our workplace relations policy was a commitment to rid Australia of all statutory individual agreements.*[3]

While we await the details of the continuation of existing AWAs through further transitional legislation, we cannot overstate our concern at the development to allow the continuation of individual contracts.

There should be no continuation of AWAs past their nominated expiry date.

Right of Entry

The current Bill allows employers to nominate which area of the workplace is to be used for a union meeting. Unions can challenge the employer's choice if they believe it to be

[2] van Wanrooy, B., Oxenbridge, S., Buchanan, J. and Jakubauskas, M. (2007) *Australia at Work: The Benchmark Report*, Workplace Research Centre, Sydney.

[3] *Workplace Relations Amendment (Transition To Forward With Fairness) Bill 2008 Second Reading Speech 14 February, 2008*

unreasonable, and FWA has the power to deal with the dispute. While it is welcome that FWA has been given this power, it may give rise to unnecessary legal proceedings. It would be preferable for clearer directions to be provided in the Bill.

We believe that this problem could be resolved by removing the employer prerogative to nominate the meeting venue and instead allowing permit holders to hold discussions with eligible workers in the lunch-room and/or usual break area. Given that union meetings are almost always taken in unpaid breaks, this is the sensible option for the purposes of holding discussions.

UnionsWA submits that the employer should not have the prerogative to nominate the meeting room for permit holders to conduct discussions or interviews. Permit holders should be entitled to hold discussions or interviews with eligible workers in the lunch-room and/or usual break area.

Workers in small business (less than 20 employees) can be prevented from having discussions with a union official in their workplace if none of them are members and their employer holds a conscientious objection certificate (s485).

That means that if one or more workers want to speak to a union official at work, they can be prevented from doing so if their *employer's* religion prohibits membership of another group.

This is extraordinary. Surely it is the worker's own religion, not their employer's that should determine whether or not they should speak to a union representative.

UnionsWA submits that the exemption from right of entry (for discussion purposes) for employers with conscientious objection certificates should be removed.

The Bargaining Regime

UnionsWA intends to comment on only a few aspects of the bargaining regime contained within the FW Bill. Our biggest concern is that with the exception of the low paid bargaining stream, Fair Work Australia can only make orders on procedural matters (ie ensuring that bargaining is taking place) and not on the content of agreements. This means that employers who do not wish to enter into a collective agreement can go through the motions of meeting with employees or their representatives (ostensibly bargaining in good faith) with no intention of reaching a bargaining outcome.

There are examples in other jurisdictions or prior to the WR Act where one party may oppose arbitration in the bargaining process, however arbitration or the prospect of arbitration has led to a protracted bargaining dispute being finalised. Save for the bargaining stream for low paid employees, or the issuing of a workplace determination in specified circumstances, there is nothing in the FW Bill which facilitates the completion of the bargaining process.

The same powers conferred upon FWA to make a determination on the terms to be contained in an agreement within the low paid bargaining stream should be extended to all agreements.

We are also concerned at the power which has been handed to the Minister to end protected industrial action. Assurances have been made about this power (eg the explanatory memorandum to the Bill says that Ministerial power is restricted to 'essential services' only and is likely to have a neutral impact as, to date, Ministerial power to stop industrial action has never been used[4]). However we think that the powers conferred upon both FWA and the Minister to stop protected action are too broad in the current Bill, should only be given to FWA and should be limited to extreme circumstances.

[4] Fair Work Bill 2008 Explanatory Memorandum r.314. Regulatory Analysis page lxiii

We appreciate consideration has been given in the Bill to ensure that any employees proposed to be covered by an agreement must have the opportunity to vote on an agreement. However, there have been cases of companies who have, since the abolition of new AWAs, circumvented genuine collective bargaining by choosing a small number of employees to vote on an agreement which will later apply to a much wider group as previous agreements (usually AWAs) expire. [5] There is no solution in the FW Bill for employees severely disenfranchised by this employer activity.

Unfair Dismissal Provisions

UnionsWA's areas of concern relate to the following:

1. Exclusion of coverage for Trainees and employees deemed to be "high-income employees". We fail to understand any position that excludes certain groups of employees from the right to initiate a claim for unfair dismissal and have it heard by an independent party. Any position that supports such an exclusion, as does this Bill, is inherently discriminatory and does **not** restore balance and fairness to the system.

   In the case of those "high-income earners", most of whom are traditional employees in all senses of the term (eg not senior executives) and who are ordinary wage earners, the Bill will leave them extraordinarily vulnerable to unscrupulous employers.

   There have been numerous examples of employees working in the north-west of WA (in particular) in the resource sector who would easily fall into the definition of a so-called "high-income earner" and who have been unceremoniously dismissed simply for raising safety concerns, pay concerns or challenging rostering arrangements. Indeed, some of these employees have been driven out of their homes because they were living in company owned housing. How can it be equitable to allow this to occur without redress on the part of the employee?

   The provision excluding this category of employees (high-income earners) should be removed.

[5] For example the BHP Billiton Iron Ore Employee Workplace Agreement 2008 is a five year non-union collective agreement voted on by less than 50 employees, made in the exact terms of the company's previous AWAs, will apply to hundred of employees as their AWAs expire.

The question of Trainees is, admittedly, a more complex matter considering that there are substantial numbers of them in the system and obviously it is important to encourage employers to take on Trainees.

This does not, however, remove all obligations to provide remedies for unfair treatment. If protection from unfair dismissal for Trainees is not covered in other legislation then the *Fair Work Bill 2008* should deal with the matter.

UnionsWA would propose a simple system akin to that currently operating in the WA state jurisdiction. Certificate I and II Trainees may not necessarily have access to the unfair dismissal system (although we would prefer it if they did) but they can access to an independent coordinator who can review their claim and make alternative employment arrangements if the Trainee is found to have been unfairly dealt with. In this case the employer may only have limited opportunity to take on Trainees in the future. With respect to Cert. III and IV Trainees whose careers may be much more adversely affected at this point there should be a means whereby the employer and the Trainee can be required to attend a conference in an attempt to mediate the position, failing which, access to the unfair dismissal jurisdiction is available**.**

Some form of remedy should be made available to Trainees who may be unfairly dismissed.

2. Small Business Provisions Employees of businesses with fewer than 15 employees will only be able to make unfair dismissal claims after one year of continuous service, while employees of larger businesses are excluded for six months. The principles which will apply in determining unfair dismissal claims are based on the new Fair Dismissal Code which will be set out by the Minister in a legislative instrument. This Code must be complied with by a small business before the merits of the unfair dismissal application are to be considered. Why is any differentiation necessary? Why is there a contention that an employee of small business is not entitled to the same rights in the same time frame as an employee of any other business?

"Forward with Fairness" states that, in relation to the Work Choices legislation, *"Employees cannot bring a claim if they have been employed for less than 6 months are engaged on a short term casual, seasonal or fixed term basis, or by a business employing fewer than 100 employees".*[6] Although the policy document notes the position for small business and the Fair Work Bill 2008 reflects this, it is also clearly at odds with the opening statements in this section of the policy which highlight the discriminatory nature of employees not being able to bring a claim unless they have been employed for **6 months.** This Bill unfortunately takes the position even further for small business employees. We can see no evidence to support a 12 month exclusion period and do not believe that there is any real evidence to suggest that this provision will encourage or allow greater employment by small business, as has been claimed.

The small business exclusion should be removed with all employees falling under the same provision for six months employment being required.

Finally, we note also that a dismissal that is consistent with the Fair Dismissal Code will not be deemed to be an unfair dismissal. Whilst this is only applicable to businesses with fewer than 15 employees it is nevertheless an imperative that this Code is constructed in a way that does not further diminish the rights of small business employees.

3. Seven day period to lodge an unfair dismissal claim. Currently the WR Act permits applications to be lodged within 21 days. Therefore, this provision is worse than the existing WorkChoices provision. UnionsWA understands that it is the intent of the Minister that as the primary remedy is reinstatement so the application period needs to be shortened and the case heard and resolved quickly, for which the Minister should be congratulated.

   This is a laudable intent, however, the reality for any employee who has been dismissed is that they are often in shock; do not know what to do or perhaps who to turn to for help and will often only begin to think clearly after a few days have elapsed. As one employee put it to us "I will have barely stopped crying after seven days let alone thought about lodging any paper work".

[6] Forward with Fairness, April 2007, page 19.

We believe that the lodgment period provision is impractical and unfair. There is a presumption that all workers will have ready access to the material and forms or have internet access and can download the necessary forms from the internet, and that additionally they have a postal service which would ensure any mail could be sent overnight and arrive at the pertinent FWA office within the limitation period.

In WA and many parts of rural, regional and remote Australia this is simply not the case. Currently with AIRC Registries being located only in capital cities and internet access being difficult, and unaffordable for some families it will be physically impossible for many workers to lodge appropriate documentation within a seven day time frame.

UnionsWA questions why any government would enshrine in legislation a limitation period which can only serve to disadvantage an already disadvantaged regional and remote workforce.

We appreciate that there is intended to be a significant number more FWA offices in regional Australia. We also note that extensions of time may be sought. But why put in place a provision that may result in substantial numbers of extensions that would be unnecessary if 21 days were allowed?

Finally, we note that the intention is to streamline applications in the unfair dismissal jurisdiction. The seven day provision is, in our view, likely to increase the number of applications to FWA simply because no matter what the merit of the claim, an employee will be advised to lodge an application immediately to protect themselves. This will then require FWA to begin its assessment of the claim and before too long we can foresee the entire system being bogged down with numerous claims and resultant lengthy delays before any resolution is reached thus defeating the intent of the Minister.

The existing 21 days for lodging an unfair dismissal application should be retained.

Matters Pertaining (prohibited content)

UnionsWA is disappointed that the Government has not fulfilled its election commitment to allow parties to bargain on any matter. Matters that do not pertain to the relationship between the employer and employees will be unenforceable in agreements.

Examples of matters that will be unenforceable include:

1/ Restrictions or qualifications on the use of contractors.

Reference is made to this example in paragraph 672 of the Explanatory Memorandum in which it is stated, "it is intended that terms relating to conditions or requirements about employing casual employees or engaging labour hire or contractors [would be within the scope of permitted matters], if those terms sufficiently relate to employees' job security – eg a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement."

UnionsWA applauds the intention of this statement but believes it is a serious deficiency to place it in the explanatory memoranda rather than the legislation proper. Of further concern is that if workers were to take industrial action in support of a clause to regulate the use of contractors, the legal status of that action would be questionable under the current Bill. This highlights the need to clarify the intention of the Bill in the legislation proper.

It is important for workers to be able to bargain for regulations on the use of contract labour because it can have a significant impact on workers' livelihoods. Performance of work by contractors that could otherwise be done by permanent staff deskills permanent staff and can deprive them of training and career advancement opportunities.

The use of labour hire companies is one common example of contracting out. In its 2005 *Inquiry into Labour Hire Employment in Victoria*, the Parliament of Victoria noted:

> *"Reliance on labour hire arrangements also affects host employers' investment in training. This is partly because labour hire allows host employers to draw on a pool of already skilled workers rather than training their own workers. If the use of labour hire is part of a strategy*

to reduce staffing levels and downtime, direct hire workers may also have less downtime to undertake training."[7]

2/ Cases where workers, unions and a particular employer agree to work together on a particular issue eg to help the business reduce its carbon emissions.

Paragraph 673 of the Explanatory Memoranda makes it clear that "terms that relate to corporate social responsibility, e.g., terms requiring an employer to participate in charity events or commit to climate change initiatives", are not intended to be within the scope of permitted matters.

We cannot understand why the legislation should render such arrangements unenforceable. The challenge that climate change poses to the long term viability of all businesses, and all jobs is significant. So too is the future workforce and the roles and skills essential for both productivity and sustainability.

Judgment on matters that pertain to the employment relationship should be left up to the negotiating parties to decide. All matters agreed between the parties (provided they are not criminal or contradictory to other laws) should be enforceable.

The FW Bill also lists unlawful terms that cannot be contained within agreements. While we agree that discriminatory terms are rightly considered unlawful, we disagree that improvements to unfair dismissal protections and right of entry should be considered unlawful. Again this is a breach of the Government's election commitment that the parties will be free to reach agreement on whatever matters suit them.

For example, collective agreements cannot allow for unfair dismissal claims to be made by workers who have not completed the six month qualifying period. It is conceivable that an employer would agree to a union's claim for a three month qualifying period for unfair dismissal, given that many employers stipulate a three month rather than a six

[7] "Inquiry into Labour Hire Employment in Victoria", Parliament of Victoria Economic Development Committee, June 2005

month probationary period. UnionsWA is concerned that the Bill can prevent an arrangement which would be a big win for workers and a zero loss for employers.

We do note, however, that no collective agreement can downgrade the unfair dismissal provisions contained in the FW Bill. We applaud this provision.

It is a concern that the restriction on bargaining for better union entry rights will undermine workers' fundamental right to representation. Of particular concern is the restriction on the bargaining of a State or Territory OHS right that seeks to lessen the 24 hour notice period required.

Terms that provide for better entitlements on unfair dismissal and right of entry should not be considered unlawful. Existing terms that prevent the downgrading of unfair dismissal provisions should be retained.

Independent Contracting Arrangements

We are concerned that the Bill does not cover independent contractors, which comprise approximately 10% of the current Australian workforce. [8] It has been estimated that at least a quarter of those are dependent contractors, that is, tied to a single employer.[9]

The trend is that there are an increasing number of employees disguised as contractors. Our concern is that employers use sub-contracting arrangements to avoid obligations such as superannuation, workers' compensation and collective bargaining.

There are problems with the common law definition of employee which is in current use. The Government should be as motivated to clarify labour laws on this matter as they are in taxation matters, or in superannuation laws, which comprise a much more comprehensive definition of who is required to make payments. There is a fundamental difference between being an independent contractor and being an employee. If a

[8] Dept Innovation, Industry, Science and Research Small Business and Independent Contractors Fact Sheet 26/11/2008

[9] Self-Employed Contractors in Australia: Incidence and Characteristics, Productivity Commission Staff Research Paper, 2001

person works as an employee they have the right to protection of their entitlements and in law.

In August 2005 The House of Representatives standing committee on Employment, Workplace Relations and Workforce Participation looked in to the matter of independent contracting and labour hire arrangements. In the dissenting report, ALP committee members were concerned that

> *"…an inordinate amount of evidence suggested that many workers were being forced to work as so-called independent contractors in order to avoid taxation or traditional employer responsibilities, such as superannuation contributions or workers' compensation insurance.*[10]

They saw as central to the problem the blurring of the definition between independent contractors and employees and said that the best approach is to offer a comprehensive definition of 'employee' in the legislation. They went on to propose a definition of employee for inclusion into the Workplace Relations Act.[11]

---

[10] "Making It Work: Inquiry into independent contracting and labour hire arrangements The House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation August 2005 p158

[11] Alternative Recommendation 2

The Committee recommends that the Australian Government provide a new definition of "employee" by replacing the current definition of "employee" in s. 4(1) of the *Workplace Relations Act 1996*. It should be expressed in the following form:

(1) A person (the worker) who contracts to supply their labour to another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.

(2) A contract is not to be regarded as one other than for the supply of labour merely because:

(a) the contract permits the work in question to be delegated or sub-contracted to others; or

(b) the contract is also for the supply of the use of an asset or for the production of goods for sale; or

(c) the labour is to be used to achieve a particular result.

(3) In determining whether a worker is genuinely carrying on a business, regard should be had to the following factors:

(a) the extent of the control exercised over the worker by the other party;

(b) the extent to which the worker is integrated into, or represented to the public as part of, the other party's business or organisation;

(c) the degree to which the worker is or is not economically dependent on the other party;

(d) whether the worker actually engages others to assist in providing the relevant labour;

We strongly urge the inclusion of a clear and comprehensive definition of employee into the FW Bill to clarify this long-standing ambiguity and exploitation of the category of independent contractor.

In order to clarify the distinction of employee and independent contractor, the Fair Work Bill should contain a comprehensive definition of 'employee'.

No Award Coverage for Employees earning more than $100,000pa

Labor's *Forward with Fairness* policy document states that *"Under Labor award coverage will not be extended to cover those who are historically award free, such as managerial employees."*[12]

Since this statement, however, the Labor Government has somehow assumed that employees who earn $100,000pa or more are to be arbitrarily covered by this definition. Furthermore, in attaining the sum of $100,000 apart from direct wages, non-cash benefits and superannuation top-ups will be included.

(e) whether the worker has business premises (in the sense used in the personal services income legislation); and

(f) whether the worker has performed work for two or more unrelated clients in the past year, as a result of the worker advertising their services to the public.

(4) Courts are to have regard for this purpose to:

(a) the practical reality of each relationship, and not merely the formally agreed terms; and

(b) the objects of the statutory provisions in respect to which it is necessary to determine the issue of employment status.

(5) An employment agency which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client.

(6) Where:

(a) an arrangement is made to supply the labour of a person (the worker) to another party (the ultimate employer) through a contract or chain of contracts involving another entity (the intermediary), and

(b) it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of factors similar to those set out in (3) above, the worker is to be deemed to be the employee of the ultimate employer.

House of Representatives Standing Committee. P162. Definition taken from Submission on Independent Contracting and Labour Hire, Professor Andrew Stewart, School of Law, Flinders University]

[12] Forward with Fairness, April 2007, page 10.

This cap is far too low and will unfairly capture a wide range of employees that do not fit the criteria of being “historically award free” or “managerial employees”.

In particular, this takes no account of, for example, the resource sector in WA where ordinary workers, covered traditionally by the award system, regularly earn more than $100,000 pa in direct wages alone, paid partly to attract and retain such workers in the sector and due to the shortage of skills that industries such as mining, oil and gas have experienced.

On all counts it is wrong to assume that workers such as these, simply because of market rates payments for their skills in demand, should be penalised by not having the coverage of an award that is traditionally open to them.

We have dealt with the implications for these workers in terms of exclusions from unfair dismissal protections, above.

This cap should at least be doubled to $200,000 pa if it is to exist at all. Our preference is that no cap should exist and that all employees should be treated equally and have access to any relevant Award and the conditions in those Awards.

Conclusion

UnionsWA has appreciated the opportunity to give comment on such an important piece of legislation, and we will endeavour to present further evidence by way of case studies at the public hearing on 29 January.