Australian Education Union

Submission

Senate Education, Employment and Workplace Relations Committee

Inquiry Into The Fair Work Bill 2008

January 2009

Angelo Gavrielatos
Federal President

Susan Hopgood
Federal Secretary

Australian Education Union
Ground Floor
120 Clarendon Street
Southbank VIC 3006

Telephone: 61 3 9693 1800
Facsimile: 61 3 9693 1805
E-mail: aeu@aeufederal.org.au

Contents

1. The Australian Education Union 4

2. Corporations Power Imposes Undue Limits on the National System.....4

3. The Bargaining Regime 7

(i) Single Interest Employer Authorisation 7
(ii) Multi Enterprise Agreements (MEA).....8
(iii) Agreement Content 10

4. Industrial Action 10

(i) Multi enterprise agreements 10
(ii) The 30 day rule.....11
(iii) Suspension of bargaining period for threatening third parties with significant harm 11
(iv) Payment during Industrial Action 12

5. Role of Enterprise Awards.....13

6. International Labour Organisation Conventions.....13

7. RECOMMENDATIONS:.....15

APPENDIX: AEU Federal Executive Resolution on IR Reforms, November 2008.....16

Introduction

The Australian Education Union (AEU) submits the following views to the Committee's consideration of the Fair Work Bill 2008, and will take the opportunity to appear at proceedings where possible.

The AEU generally endorses the views of the ACTU to this Inquiry and welcomes the end of the Howard Government's *Workchoices* provisions designed to individualise employment relations, to promote the interests of employers at the expense of employees and to reduce the role and influence of unions as representative organisations.

To this end, the AEU strongly supports the ending of discrimination against building and construction workers by repealing the BCII Act and bringing all workers under the proposed Bill. Similarly the Bill should cover independent contractors and protect them as workers, not confine itself to employees.

While the abolition of *Workchoices* is welcome, the AEU does not believe that the *Fair Work Bill 2009* lives up to its title because it fails to establish a fair balance between the competing interests of employeers and employees which is the key requirements for sustainable legislation. Some of these concerns were expressed in the AEU's submission to DEEWR on the National Employment Standards Exposure Draft, which went forward unchanged from the consultation.

In that submission in April 2008, the AEU said:

> *"Setting employment standards by regulation will inevitably mean the politicisation of employment standards in future; they will run a gauntlet of political will and opportunity in the houses of the Federal Parliament. This is not a good basis upon which to construct a system which must gain the respect if not the goodwill of the industrial parties.*
>
> *The draft NES raises the importance of some employment issues in the architecture of the new system, notably flexible working arrangements for parents and carers, parental leave for childbirth or adoption, paid personal and carers leave for sickness and injury of the employee ,their immediate family or household member. The elevation of the importance of these issues is welcome.*
>
> *However, there are a number of aspects of these standards which fall short of the opportunities the NES provides.*
>
> *The NES purports to establish employment standards which create entitlements. However, in the case of the Fair Work Information Statement NES…the entitlement is to receive a description of the government's industrial relations legislation as included in the government Gazette. This trivialises the NES and would play no useful role in establishing the employment standards of most employees.*
>
> *It is not clear from the draft NES how the 'entitlements' the NES purports to establish are to be enforced. An 'entitlement' is something which can be ensured by some legal process. If an 'entitlement' is removed or unreasonably denied there must be a means of restoring or enforcing it.*
>
> *For example the 'parental leave' NES entitlement is highly codified but gives an eligible employee no more than a right to request the leave. The request may be refused 'only on reasonable business grounds' for which reasons must be given. 'Reasonable business grounds' is not defined but 'would be given its ordinary meaning' including 'costs to the employer, the employer's ability to reorganise workloads and the availability of replacement staff.' This provides a script for the employer in refusing a request."*

While it was not stated in the Exposure Draft, the Bill makes clear that alleged breaches of the NES and Modern Awards will be dealt with by the Fair Work Divisions of the Federal Court and The Federal Magistrates' Court. There is no provision for FWA to arbitrate disputes over the application of the NES as collective entitlements. However, the Bill compounds this problem with the NES because it does not provide a remedy where the employer is exercising a discretion that according to the NES they lawfully possess, but which they exercise in an unfair manner.

The failure of the *Fair Work Bill 2008* to ensure that the NES provides entitlements which are enforceable by FWA undermines the Bill's claim to "fairness" which should be based on a clear statement of rights. A standard which is not enforceable is not a right.

The present submission focuses on some aspects of the Bill which are of particular interest and concern to the AEU in the limited time available for comment. The submission is thus not intended to be comprehensive or exhaustive of the AEU's views about industrial relations regulation and rights.

Appended to the submission is a decision of the AEU Federal Executive which was adopted by the Federal Executive on 19-20 November 2008 on the industrial relations reforms of the Rudd Government.

1. The Australian Education Union

1.1 The AEU has a membership of 175,050 which rose by 12% in the last decade. Members work in public schools, preschools and TAFE colleges in all states and territories as well as Adult Multicultural Education and Disability service settings. The largest group of members are professional school teachers, including principals and administrators, together with support staff generally performing educational roles.

1.2 The core business of the AEU is the maintenance of comprehensive industrial protection and effective representation on employment and professional issues as they affect AEU members as employees. The AEU is also concerned about developments in the wider community which impact on our members' work through the intersection between educators and the students, families and communities they work with and the industries in which they work.

2. Corporations Power Imposes Undue Limits on the National System

2.1 The Bill represents a major step in the creation of a national system of workplace and industrial relations but for national system employers only, which excludes the state public sectors as defined in s13 and s14 of the *Fair Work Bill*. Consequently, based on its reliance upon the Corporations power (s51 xx) of the Constitution, to the exclusion of the Conciliation and Arbitration or Labour Power (s51 xxxv), the Bill will only extend Commonwealth powers to state employees who are employees of trading corporations and to employees of Territories.

2.2 The exclusion of the Labour Power is an unwarranted break with a century of federal industrial legislation which underpinned the Australian federal award and dispute resolution system. This system was responsive to economic changes and maintained the relative equity which distinguishes Australian society. Undue reliance upon the Corporations Power puts both employment rights and equitable social outcomes behind the interests of corporations. This is not a balanced approach to legislation and thus will lessen support for federal industrial laws by employees and their representatives.

2.3 The election of the Rudd government in no way provided a mandate for the removal of the Conciliation and Arbitration power from the regulation of industrial relations by the Federal Government. The political mandate to create "a national system for the private sector" did not mean that the comprehensive powers granted to previous tribunals would be denied to Fair Work Australia. Neither did it mean that access to the national system could not be available to public sector employees because they were not employed by constitutional corporations. The AEU supports the ALP policy elaborated prior to the 2007 election that "all the powers" available should be used to create a fair and workable industrial relations regime.

2.4 The terms under which Fair Work Australia will operate are a matter of policy and negotiation, but the operation of constitutional powers on which it operates should not be curtailed by the definitions of a "national system employer" in s13 and s14 of the *Fair Work Bill 2008.*

2.5 Due to the exclusion of the Conciliation and Arbitration power the provisions of the *Fair Work Bill 2008* cannot extend to protect the employment of many AEU members because their employers are not "national system employers" for the purposes of s14. Prior to the passage of the *WorkChoices* legislation AEU members employed by state governments in Victoria, South Australia, Tasmania, Western Australia as well as the Northern Territory and the Australian Capital Territory were regulated by Federal industrial instruments. AEU Branches and Associated Bodies other than those in the territories and Victoria were able to gain protection for members in state jurisdictions to avoid the consequences of the Howard legislation. The decisions of those branches and bodies of the AEU to remain in or return to state industrial jurisdictions is not and should not be disturbed by the *Fair Work Bill 2008*.

2.6 The current Bill will only apply to teachers in TAFE colleges in those states where TAFE provision is organised as a corporation, such as in Victoria. This is less than 2% of AEU members. Under its reliance on the Territories power, the Bill will also apply to AEU teaching and support staff members in the ACT and the NT in the schools, preschools and TAFE sectors. Employees of the territories comprise 2.9% of AEU members. The *Fair Work Bill 2008* then can only extend to less than 5% of AEU members on its own terms.

2.7 The previous referral of power by Victoria (and possibly other states in future) provides the other source of power for the jurisdiction. Victorian members make up approximately 21% of AEU members nationally. However, the current Victorian

referral is limited and does not provide the basis for the current Commission to exercise the same powers as it can in respect of private sector employees. This is a matter dealt with in more detail below.

2.8 The architecture of the Bill is such that, absent corporatisation of its functions, only a referral of powers by a state would enable its public sector employees to access the federal jurisdiction. The terms of any such referrals are unknown at present and conjecture would not be productive. The AEU does not support referral by state governments if the consequence would be a reduction in the entitlements and rights of its members and their unions. Neither does the AEU support corporatisation of state functions for this purpose as state provision is thereby likely to be undermined in terms of quality and cost to the community.

2.9 Unlike the current Act which applied comprehensively to public sector employees and employers in Victoria through the referral to the Commonwealth of its industrial relations powers by the State of Victoria, the *Fair Work Bill 2008* makes no provision for public sector Victorian employees or employers where they do not fall within reach of the Corporations power. This may be corrected in future by action of the Victorian Government but that is not the current position.

2.10 The AEU is concerned that in the absence of any new referral of powers by the State of Victoria, approximately 30,000 of its members who are not employees of trading corporations could over time lose access to the federal jurisdiction and effectively be without a safety net of employment rights and protections.

2.11 The AEU is further concerned that in its reliance upon the Corporations and Territories powers and to a lesser extent the External Affairs power, the Commonwealth has deprived itself of a proven mechanism which would enable state public sector employees to access the new national system in circumstances where a state industrial relations system failed to provide a fair and effective safety net of minimum terms and conditions of employment and fair mechanisms for the prevention and settlement of industrial disputes.

Case Study

For the AEU this is not an academic exercise in constitutional or labour law. Late in 1992 the Kennett Government abolished the Industrial Relations Commission of Victoria and the awards and industrial instruments it had created. It also refused to honour contracts with associated unions of the AEU to deduct union dues and forward them to the designated union. At the same time the Kennett government commenced a significant reduction in public education sector employment through a redundancy programme. There was no question of referral at that time; referral occurred after the AEU had successfully gained Federal Awards of the Australian Industrial Relations Commission.

It was only because the AEU was able to access the federal jurisdiction in 1992 that interim awards to maintain the rights of AEU members in Victoria were made. The constitutional

basis of the awards made then was the Conciliation and Arbitration power exercised by the Australian Industrial Relations Commission pursuant to the *Industrial Relations Act 1988.*

The legal basis of these awards was tested on appeal to the High Court of Australia. In *Re AEU* (1995) the Court found the awards were properly made. Similar interim awards were made in relation to members in Western Australia in the face of the Court Government's removal of employment rights. Interim awards were also made in Tasmania and South Australia. The making of these awards was followed these states by the conclusion of Certified Agreements in the federal system.

2.12 The AEU submits that the recourse which was possible pursuant to the *Industrial Relations Act 1988* to the federal jurisdiction by state employed teachers and support staff members of the AEU should be possible under the terms of the *Fair Work Bill 2008* and amendments should be made, including to the definition of "national system employer," to make this possible.

RECOMMENDATION 1

The AEU recommends the Fair Work Bill be amended to incorporate a mechanism which would enable state public sector employees to access the national system where they no longer have access to a fair and effective safety net of minimum terms and conditions of employment legislated by a state government. The Conciliation and Arbitration power should be the explicit source of power founding such a mechanism.

3. The Bargaining Regime

(i) Single Interest Employer Authorisation

3.1 The provisions of the Bill in relation to single interest employer bargaining are of particular interest and concern to the AEU as it bears upon bargaining in the Early Childhood, Disability Services and TAFE college areas of its membership coverage in Victoria. These are sectors of the economy and workforce where the state provides the majority of each service's funding and where state legislation provides a common regulatory framework.

3.2 However as currently drafted, the provisions will do little to facilitate bargaining in the above mentioned areas where bargaining has traditionally been fraught with difficulty both in terms of access to and capacity for bargaining.

3.3 The provisions are cumbersome and lack a public interest justification. The single interest employer bargaining process requires employers to apply for a Ministerial declaration that they be permitted to bargain (s247) or the employers may apply to the

FWA for an authorisation (s248). Thereafter the Bill treats the bargaining process as if it were for a single enterprise agreement.

3.4 The AEU is concerned that the provisions depend upon employer initiative and give no weight at all to employee interests or initiative. It is also concerned that the processes of declaration and authorisation will delay or hinder bargaining and will result in unproductive and unnecessarily incurred transaction costs.

3.5 In the context of bargaining, the Bill should provide for a balance of interests. The current proposal is unbalanced and to that extent is unfair.

RECOMMENDATION 2

The AEU recommends the Bill be amended to provide for a single stage process for oversight by the FWA utilising criteria as provided for the Ministerial declaration in the Bill at S247 (4) .

RECOMMENDATION 3

The AEU recommends the Bill be amended to enable employee bargaining representatives to apply for a single interest declaration/authorisation.

(ii) Multi Enterprise Agreements (MEA)

3.6 The AEU welcomes the absence of any requirement, as in the current Act, that there be an authorisation for the making of a multi-enterprise agreement.

3.7 However a number of provisions of the Bill militate against the making of an MEA:

a) There is no 'enforceable' requirement for 'good faith' bargaining in relation to an MEA except where FWA issues a low-pay authorisation (s229(2)). In addition, FWA must still be satisfied that its approval of any MEA would not be inconsistent with or undermine good faith bargaining (s187(2));

b) FWA has to be satisfied that no person has coerced or threatened to coerce an employer to make the MEA (s186(2)(b)(ii));

c) Despite all the employers covered by the MEA having to have genuinely agreed to its making, a single enterprise agreement made during the term of operation of the MEA and expressed to apply (even in relation to a single subject matter) to an employee otherwise covered by the MEA, will 'oust' the operation of the MEA in relation to the employee and it will never operate again (s58(3)).

3.8 The AEU submits that such provisions will undermine the Bill's provisions allowing parties to reach a Multi-enterprise Agreement.

Case Study

In Victoria, TAFE institutions are established as body corporates and are the sole employers of teaching staff in their own right. A multi-enterprise agreement covering TAFE employers and teaching staff employees reached its nominal expiry date on 1 September 2006. Bargaining for a successor agreement was delayed for some 6 months while the relevant state minister pursuant to state legislation gave consideration to whether it was appropriate for there to be a series of single enterprise agreements or a further multi enterprise agreement. TAFE employers favoured single enterprise agreements but the Minister determined on a multi-enterprise agreement. TAFE employers insisted on a number of 'pre-conditions' for any bargain. Protracted but unprotected industrial action ensued and while agreement in principle has been reached, no agreement has as yet been made or approved.

3.9 Given that an MEA must contain a flexibility term (s202), there can be no public interest policy requirement for the inclusion of s58(3) which on the contrary militates against certainty and the general requirements (s58 (2)) for an agreement's term to prevail over subsequent agreements made prior to the passing of the earlier agreement's nominal expiry date. This section stands as an incentive for parties to dispense with one form of agreement (MEA) in favour of another (single-enterprise agreement). This runs contrary to the principle, "The Agreement is the Agreement."

3.10 In the absence of the ability to obtain low-paid bargaining orders (s229(2)), and given the inability to take protected industrial action (s413(2)) for an MEA, employees and their bargaining representatives may be left with no choice but to resort to actions which might be found to be coercive within the meaning of the Bill (s186(2)(b)(ii)). Just what coercion may be intended or found to mean is not clear. This is not a balanced approach to employer and employee rights.

3.11 Even where the bargaining representatives and the overwhelming majority of employees did not engage in coercive action, their best efforts – and the Objects of the Bill – may be undermined where the coercive actions or threat of such actions by any person, including an employee not immediately involved with the bargaining process, will prevent FWA from approving the MEA.

RECOMMENDATION 4

The AEU recommends the deletion of s58(3) which provides for a single-enterprise agreement to prevail over an existing multi-enterprise agreement prior to its nominal expiry date

RECOMMENDATION 5

The AEU recommends bargaining orders be obtainable in relation to bargaining for a MEA (providing other s230 requirements have been met) whether or not a low-paid authorisation is in operation.

(iii) Agreement Content

3.12 The AEU welcomes the proposed abolition of 'prohibited content' provisions. The rejection by the Australian electorate of the former government's *WorkChoices* legislation was based in part on its rejection of that legislation's imposition of unequal and unfair bargaining practices. Part of those practices was the arbitrary and unnecessary restriction on the subject matter upon which parties could bargain evidenced in the 'prohibited content' provisions.

3.13 However, the Bill's proposed introduction of 'permitted matters' (s172(1)) and the prohibition on 'unlawful terms' (s194) especially in relation to unfair dismissal, industrial action and right of entry subject matter effectively re-introduce by sleight of hand aspects of the current Act's 'prohibited content'.

3.14 The unlawful matters provisions as referred to above effectively mean that despite consensual arrangements, enterprise agreements will not be able to provide better conditions than what the proposed Bill provides as a minimum on right of entry, unfair dismissal and reserve matters.

3.15 If the AEU is correct in this assessment, the regime proposed by the Bill will simply mean that bargaining will continue on certain matters in avenues not able to be regulated by the Bill.

3.16 Pursuant to the use of the Corporations power, the parties should be able to bargain fairly and in good faith on any matter which affects the corporation.

RECOMMENDATION 6

The AEU recommends that s172 be amended to enable 'permitted matters' to encompass any matter on which the parties can agree subject to a further amendment to s194 that a term of an agreement would be unlawful if it were to provide a condition worse than the standards established by the Act.

4. Industrial Action

(i) Multi enterprise agreements

4.1 The AEU submits that the Bill should enable protected industrial action to be taken in support of a multi enterprise agreement subject to the same safeguards as apply to single enterprise agreements.

4.2 The 'majority support determination' provisions of the Bill (ss236-237) propose to constrain a reluctant employer to bargain in circumstances where FWA is satisfied that a majority of employees of the employer **or** employers support bargaining for a single

enterprise agreement. Presumably the reference to more than one employer is reference to 2 or more single interest employers.

4.3The interests of the employer and its employees who do not approve a proposed multi enterprise agreement are proposed to be protected by proposed s184 by excluding them from coverage. The intention would be to extend to all parties in a multi enterprise bargaining environment the same rights and protections as is proposed for single enterprise bargaining.

RECOMMENDATION 7

The AEU recommends removing the reference to a single enterprise agreement in s236 and duplicating the mechanism of s184 in the protected industrial action ballot provisions in s459 such that protected industrial action in support of a multi enterprise agreement could not be taken by employees of an employer where the majority of its employees did not support such action.

(ii) The 30 day rule

4.3 The requirement in s459(1)(d) & (3) that industrial action authorised by a protected action ballot be commenced within 30 days of the declaration of the results of the ballot unless FWA extends the period protects neither employer nor employee interests in the bargaining process or outcome. The requirement of the provision to take industrial action within a specified times takes the focus away from the conclusion of a mutually acceptable set of terms and conditions through bargaining.

4.4 Rather it forces a frustrated party to commence action earlier than might otherwise have occurred or even to take action that could have been avoided. The result is that parties become focussed on the mechanics of taking industrial action rather than on the negotiating process to achieve a mutually acceptable bargaining outcome.

RECOMMENDATION 8

The AEU recommends deletion of the 30 day rule in s459(1)(d).

(iii) Suspension of bargaining period for threatening significant harm to third parties (s426).

4.5 Industrial action always adversely affects the employer/s and employees involved and it always adversely affects in significant ways a host of 'third parties'. This is its purpose: to create pressure to influence one side in a bargaining situation to make decisions they otherwise would not. It is a purpose recognised by the legislature in permitting industrial action that would otherwise be unlawful to occur.

4.6 To permit industrial action to occur in the limited circumstances of bargaining and then to deny protection to such action because of threatened significant harm to third parties is to introduce into the bargaining situation a variable which is beyond the capacity of either party to control. This is simply unfair. The nature of the harm and the identity of third parties can be problematic.

Case Study
In late 2008 the Northern Territory Education Department applied under the Workchoices equivalent to this proposed section (s433 Workplace Relations Act 1996) to the AIRC to suspend the bargaining period of the AEU. By that application (which was granted by a single Commissioner) a long-running bargaining process was frustrated and a dispute seriously exacerbated by an allegation of significant threatened harm. The AIRC decision, subsequently overturned on appeal, to suspend a bargaining period on application by an alleged third party (which was in fact a surrogate for the bargaining party) meant that the rights of the AEU and its members were suspended with no alternative process of resolution available. The consequence was a more serious dispute, a higher level of resignation by teachers and more serious consequences for staffing in the education department concerned.

RECOMMENDATION 9

That s426 be deleted.

(iv) Payment during Industrial Action

4.7 The Fair Work Bill 2008 provides restrictions upon the discretion of the employer to make payments to employees during strike action. The Bill prescribes that where action is unprotected the employer must withhold payment for the period of the action or for four hours, whichever is the greater.

4.8 Where industrial action is protected industrial action, if the action is a strike (or overtime ban), the employer must withhold pay for the duration of the industrial action.

4.9 If the action is a partial work ban, the employer has a number of options including paying the employees their full wage; or standing down or locking out the employees, and withholding all pay; or give the employees a notice informing them that if they continue to work, the employer will withhold an appropriate proportion of the employees' pay.

4.10 A provision that prescribes a process where an employee may have their pay ceased for either a period greater than the industrial action or while a partial work ban is in place causes rise to a circumstance where rather than taking partial work bans and/or one hour stop-work action, full day stoppages will occur providing greater disruption to industry than previously anticipated.

RECOMMENDATION 10

S471 and subsequent sections need to be amended to provide that in those circumstances where an employee refuses to work at all because they are not entitled to be paid is not taking industrial action.

5. Role of Enterprise Awards

5.1 Both the present Bill and the Explanatory Memorandum are silent on Enterprise Awards, which are "awards that regulate the terms and conditions of employment in a single business only (being the single business specified in the award" (s576U of the *Workplace Relations Act (Transition to Forward with Fairness) Act.* S576V (3) of the same Act provides:

"*A modern award must be expressed not to bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies."*

5.2 This poses major questions for the making of and application of Modern Awards in respect of AEU members. As explained before, AEU members employed by state governments other than Victoria are currently beyond the jurisdiction of the proposed Act, so Modern Awards do not apply. But even if this was not the case, or referral occurs, based on the definition above the vast majority would not be covered by Modern Awards as a result of the above definitions. As it is, all AEU members in NT & ACT and school sector employees in Victoria cannot be covered by a Modern Award as they are awards applying to single businesses.

5.3 Consequently, no public school sector employees can be covered by a Modern Award, whether or not referral occurs. Only TAFE and Early Childhood sector employees in Victoria (where multiple employers are involved) could be covered by a Modern Award, so presumably the only basis on which such an award could be made is the status quo.

5.4 The AEU is unable to determine the future of such enterprise awards. Can they be varied as Modern Awards can for work value changes, and if not how can they be the basis of the "better off over all test" (BOOT) for the purposes of approval of an Enterprise Agreement? At the moment s193(4) refers only to a Modern Award for the purpose of BOOT. Is it the intention of the Government to exclude those employed pursuant to enterprise awards from coverage by Modern Awards?

6. International Labour Organisation Conventions

6.1 The AEU supports the passage of the Bill but prior to doing so the Senate should commission its own independent report on the compliance of the Bill with relevant ILO Conventions. If doing so prior to the Bill being passed would unduly delay

passage of the Bill, the Bill should provide for a request to the ILO to provide an opinion on the compliance of Australia's labour laws with relevant ILO Conventions.

6.2 This should also include a request to the Joint ILO-UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART).

6.3 The ILO/UNESCO Recommendation concerning the Status of Teachers was adopted on the 5th of October 1966 and has since been considered an important set of guidelines to promote teachers' status in the interests of quality education. This is a concern of the current government and should be considered by the Senate Committee in relation to the employment of teachers.

6.4 The 1966 Recommendation provides for the rights of teachers to be represented by their organisations in negotiations on salaries and working conditions and for appropriate machinery to be established to deal with the settlement of disputes. (R.83, R 84) Where there is a breakdown in negotiations, teachers organisations should have the same rights as other organisations to defend their legitimate interests. (R84)

6.5 The 1966 Recommendation at Section IX further sets out the conditions which should apply to ensure effective teaching and learning. These include class sizes, ancillary staff, teaching aids and hours of work. Hours of work should take into account the number of pupils per day and per week, time for planning, preparation and evaluation, the number of different lessons assigned each day, time for research, co-curricular and extra-curricular activities, supervision and counselling duties as well as reporting and consultation with parents.

6.6 The 1966 Recommendation further sets out at Section X the criteria and methodology which should be used in determining teachers' salaries.

RECOMMENDATION 11.

That the Senate should commission a report on the compliance of the Fair Work Bill 2009 with ILO Conventions and in so doing obtain an opinion from the ILO-UNESCO Committee of Experts on the Application of Recommendations Concerning Teaching Personell (CEARTP).

7. RECOMMENDATIONS:

RECOMMENDATION 1
The AEU recommends the Fair Work Bill be amended to incorporate a mechanism which would enable state public sector employees to access the national system where they no longer have access to a fair and effective safety net of minimum terms and conditions of employment legislated by a government. The Conciliation and Arbitration power should be the explicit source of power founding such a mechanism.

RECOMMENDATION 2
The AEU recommends the Bill be amended to provide for a single stage process for oversight by the FWA utilising criteria as provided for the Ministerial declaration in the Bill at S247 (4) .

RECOMMENDATION 3
The AEU recommends the Bill be amended to enable employee bargaining representatives to apply for a single interest declaration/authorisation.

RECOMMENDATION 4
The AEU recommends the deletion of s58(3) which provides for a single-enterprise agreement to prevail over an existing multi-enterprise agreement prior to its nominal expiry date

RECOMMENDATION 5
The AEU recommends bargaining orders be obtainable in relation to bargaining for a MEA (providing other s230 requirements have been met) whether or not a low-paid authorisation is in operation.

RECOMMENDATION 6
The AEU recommends that s172 be amended to enable 'permitted matters' to encompass any matter on which the parties can agree subject to a further amendment to s194 that a term of an agreement would be unlawful if it were to provide a condition worse than the standards established by the Act.

RECOMMENDATION 7
The AEU recommends removing the reference to a single enterprise agreement in s236 and duplicating the mechanism of s184 in the protected industrial action ballot provisions in s459 such that protected industrial action in support of a multi enterprise agreement could not be taken by employees of an employer where the majority of its employees did not support such action.

RECOMMENDATION 8
The AEU recommends deletion of the 30 day rule in s459(1)(d).

RECOMMENDATION 9
That s426 be deleted.

RECOMMENDATION 10
S471 and subsequent sections need to be amended to provide that in those circumstances where an employee refuses to work at all because they are not entitled to be paid is not taking industrial action.

RECOMMENDATION 11.
That the Senate should commission a report on the compliance of the Fair Work Bill 2009 with ILO Conventions and in so doing obtain an opinion from the ILO-UNESCO Committee of Experts on the Application of Recommendations Concerning Teaching Personell (CEART

APPENDIX 1

AEU Federal Executive Decision, November 2008

That the AEU Federal Executive welcomes the imminent introduction of the Fair Work Bill 2008 which the Minister for Employment and Workplace Relations promises will "consign Work Choices to history." The defeat of Work Choices in the campaign run by unions with community support strongly assisted the ALP to office and marks a defeat for the employing class and the political Right which has always sought to limit union rights and collective industrial agreements in favour of individual contracts, both at common law and by statute.

The national system which the Fair Work Bill (2008) and the Consequential and Transitional Matters Bill to be introduced in early 2009 marks the end of a century of labour legislation under the Constitution which the Minister says "will be gone from the system for good" in favour of the Corporations power which the Howard Government used to introduce Work Choices and replace state industrial powers over the private sector.

The consequences of the centralisation of power in the hands of the Federal government of the day and the abolition of the independent tribunal in favour of Fair Work Australia and legislated minimum standards are far-reaching. The terms under which the NES and Modern Awards are to be varied, including by Test Cases, are critical to the significance of this change.

The AEU welcomes the announcement that arbitration of disputes will be provided for in limited circumstances but believes that these will not meet the needs of unions particularly where bargaining strength is limited. These limits do not produce a "balanced" system as the Minister claims in the light of the fact that the Fair Work Bill will still retain the "most restrictive anti-strike laws of any country in the OECD" according to Professor Ron McCallum. The AEU supports further legislative changes to create a balanced and enduring system of industrial relations regulation.

Associated Bodies of the AEU in all states except Victoria remain registered in state industrial systems. The referral of powers by these States remains undetermined while

it is known that the Federal jurisdiction will incorporate trading corporations and their employees. Members of AEU associated bodies depend on the state as the employer and guarantor of fair legislation and employment rights. Where this guarantee is abandoned, as it was by the Kennett and Court governments, AEU members are vulnerable to abuse of employer powers. That the AEU write to Minister Gillard urging the Federal Government to ensure that the Fair Work legislation provides the opportunity for state public sector employees to have access to the Federal system if desired. Further, that Branches and Associated Bodies urgently lobby their IR Ministers to gain support for this proposal.