The Australian Workers' Union

Submission to
The Senate Standing Committee on Education, Employment and Workplace Relations
Inquiry into the
Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009.

April 2009

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

DEFINITION OF FEDERAL COUNTERPART

1. The test to determine whether a State Registered Union has a *"federal counterpart"* as defined in the definition proposed to be inserted at Section 6 of Schedule 1 (p 227 of Bill) is too tight and could leave many State registered unions including the AWUEQ in a twilight zone. Legal advice to the AWUEQ at the moment is that the AWUEQ would probably fail to qualify as having a "federal counterpart", despite the two unions having operated in a partnership arrangement for many decades. The AWUEQ understands that the ACTU is of the same view.

2. The AWUEQ would probably fail to qualify because of the requirement that the branch of the federal union is required to have *"..(a) substantially the same eligibility rules as the association;…"* (being the State Union). It is a strong possibility under the wording in the current Transitional Bill that it would be determined that the eligibility rules of the AWUEQ and the AWU Queensland Branch of the federal union are **NOT** substantially the same. If this were to be the case the AWUEQ can apply to FWA for recognition as a *"..State Registered Association.."* and have the same recognition, and rights to represent its members as a registered organisation under the *Fair Work Act 2009*.

3. This course would mean the AWUEQ would automatically retain the entirety of its current State eligibility rule in the federal jurisdiction on a permanent basis. This is because in the event that a State Registered Union is found not to have a *"federal counterpart"* it is entitled to federal recognition including for its eligibility rules as they currently exist in the State system.

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

4. Ironically however this path does not achieve the general legislative intent of avoiding duplication of industrial organisations in the federal system, and would have the effect of creating on a permanent basis three separate entities under the broad AWU banner in Queensland, two of which would operate in the federal system. The entities would be;

(i) The Australian Workers' Union of Employees, Queensland (State Union operating in the State system)
(ii) The Australian Workers' Union, Queensland Branch (which is the Statel Branch of the Federal AWU), and
(iii) The Australian Workers' Union of Employees, Queensland (Recognised State Registered Association also operating under the Federal Act).

5. The same considerations may also have a similar impact on other State Registered Unions who have different, and often much more narrow, rules than their federal "counterpart" union. For example it may well be found that the eligibility rule of the FEDFA, BLF and CFMEU (Q) are not *"..substantially the same.."* as the CFMEU federal union. The same could be said for the FIA, a State Union in Queensland when comparing its eligibility rules to the federal AWU. This could mean all of the above named four State Unions will necessarily become recognised State Registered Associations in the federal system in order to continue to represent their members. The Transitional Bill as it is drafted could accidentally exclude those who it is intended to include in the definition of having a *"..federal counterpart.."*

6. The proposed solution to this issue would be amend the words *"substantially the same"* to say words such as *"which contain provisions to a similar effect "*, or some other language which loosens the test. The continued secondary requirement that the two purported counterparts have substantially the same officers will ensure that loosening of the primary test does not lead to unintended consequences.

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

7. The AWU also proposes that the Bill be amended to provide that where it is clear that a state union does not have a federal counterpart, that the state union is given the right to amalgamate with a federal union on the same terms as federal unions are entitled to amalgamate with each other. This is to avoid a circumstance where a State union which falls into the category of being a Recognised State Registered Association exists in the federal jurisdiction in one State but is forever barred from having the same right as all other organisations in the federal jurisdiction (namely to amalgamate).

IF A STATE REGISTERED UNION DOES HAVE A FEDERAL COUNTERPART

8. It is the preference of the AWU not to have a duplication of unions operating under a broad banner associated with the AWU. However under the Transition Bill as it is currently drafted there is the potential for dramatically different consequences and outcomes for the same State Registered Union regarding its future representation rights and retention of its eligibility rules in the federal system, depending on the question of whether it has a federal counterpart or not.

9. As stated above if the AWUEQ is found not to have a federal counterpart it need only follow a very simple process to gain full recognition for its existing eligibility rule. The AWUEQ does not disagree with that proposal in the Bill for a Union that does not have a federal counterpart. However if it is found that the AWUEQ does have a federal counterpart it may face a much more difficult path in retaining its existing eligibility rules if certain language in the Transition Bill is not clarified.

10. One of the concerns of the AWUEQ is the issue of its eligibility rules which are commonly expressed as *"..Industry rules.."* as opposed to *"..Occupational rules..".* It is the AWUEQ's current legal advice that the correct interpretation of the current wording in the Transitional Bill is that where an eligibility rule is expressed as an *"industry rule",* and the AWU can satisfy FWA that the AWUEQ has been *"..actively representing its members to whom the eligibility rules of the organisation (as*

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

proposed to be altered) would apply..” then the full industry eligibility rule as it is currently found in the State Unions Rules will be able to be granted for the federal union.

11. The AWU requests that this position is confirmed in order to avoid confusion around this issue. The AWU is concerned that the language in the Bill at the moment in Section 158(5) of Schedule 1 does not make this clear, and that attempts may be made to divide industry rules as they presently exist into individual callings or subsectors of an industry, depending upon precisely where in that industry the State union may presently have members.

12. The AWU believes that to make this issue clear the Transition Bill would require some amendments to Subsection 158(5) to make it clear that where the tests to show active representation of members within an *industry rule* are satisfied, that the whole *industry rule* is inserted. The AWU believes to make this issue clear the inclusion of a further Illustrative example in the Explanatory Notes to the Bill is also required. A further Illustrative example is required because the current example in the EM only deals with a scenario involving *occupational rules* and does not deal with a scenario involving an *industry rule*.

13. If the Transitional Bill does not clarify this issue it leaves open the real prospect of FWA being invited to embark on very lengthy and expensive litigation processes where opportunistic objecting parties seek to exploit a lack of clarity in the legislation and carve up long-standing existing eligibility rules expressed as *industry rules* that reflect the historical coverage arrangements of that industry.

14. To avoid the prospect of unnecessary and expensive litigation around the issue of whether a state union’s eligibility rule should be brought up into its federal counterparts Branch Rules, FWA should not be given broad discretion over this question but instead be provided with clear legislative direction to apply certain tests, and that when those tests are satisfied the application “must” (not may) be granted.

Paul Howes – National Secretary
The Australian Workers’ Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

15. In relation to the four tests as they are proposed at 158(5A) (a), (b), (c) and (d) the AWU propose the following. The four tests set out in (a), (b), (c) and (d) should be expressed disjunctively, requiring the word *"and"* be replaced with the word *"or"* so it is clear that the applicant does not need to satisfy all four of the tests in order for the application to be successful.

16. Secondly, the term *"members"* should be replaced with the term *"persons eligible to be members"* wherever it occurs in Subsection 158(5)(iii) and 158(5A). This is to provide fair and appropriate recognition for the fact that state unions have for many years, particularly in common rule state industrial systems, spent vast amounts of time and resources in achieving industrial outcomes and updating awards, and providing representation to both members and non-members that fall within that unions eligibility rules. This can be demonstrated by examining the types of tests proposed in 158(5A) such as maintaining awards, exercising right of entry, concluding enterprise bargaining agreements and seeking to increase its membership.

17. However consideration of whether these outcomes and representation have been provided to members only is not a reliable guide as to the extent of representation in the context of a common rule industrial system. Under state common rule industrial systems the question of union eligibility has a close association with relevant common rule award coverage in that State and the outcomes and benefits achieved by unions have historically been enjoyed by all employees that fall within the eligibility rule of the union, whether or not they ever become actual members of the union (often through the union maintaining the common rule award that corresponds to its eligibility rule). On this basis it would not be appropriate to limit consideration of, and recognition for, the work a state union has performed in a common rule system to only consider its impact on members, and not give proper consideration to that impact on *"persons eligible to be members"* who have benefited from that work.

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

18. When looking at the State jurisdiction the most critical evidence as to whether a union has being providing "active representation" is an examination of the award map read in conjunction with the eligibility rule. It is well understood that there has been a significant reduction in union membership levels in recent decades. This trend is more pronounced in some remote and regional locations, and in some industries including rural industries, seasonal industries and industries with high levels of casual or temporary employment. This trend has also been exacerbated by the *WorkChoices* legislation that placed heavy restrictions on the capacity of unions to organise membership.

19. If the legislative test for granting continued union eligibility is going to be evidence of current membership alone, this will lead to the creation of large holes in the geographical map of union representation. In some areas there may be no union coverage whatsoever if a union with actual cannot also show current membership. This will particularly be the case in a very large and decentralised State like Queensland where in many remote and regional parts of the State the AWU has no union competitor, has maintained modern common rule state award coverage for all persons eligible to be members, whether they did or did not join the union. Despite this activity, it may be very difficult in some cases to demonstrate levels of current membership in industries that are remote, regional, seasonal and casual.

20. The AWU also submits that the onus of proof in 158(5A) should be shifted so that FWA must grant the application for the eligibility rule unless the association has not,

.....

(a) sought variations to awards covering those *persons eligible to be members; or*

(b) exercised right of entry in relation to those *persons eligible to be members, or*

(c) sought to bargain on behalf of those *persons eligible to be members; or*

(d) sought to increase its membership amongst persons to whom the eligibility rules of the organisation (as proposed to be altered) would apply.

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

21. It is critical to clarify the point that where an eligibility rule is expressed as an *"industry rule"* the entire existing rule may be brought up into the federal branch rule upon application being made, where satisfaction of one or more of the tests in 158(5A) is shown. If this is not made clear a Union with eligibility rules expressed as *industry rules* faces the potential of having to spend vast amounts of time and resources in legal proceedings defending *industry rules* on a *"calling by calling"* or *"occupation by occupation"* basis, or some other criteria when the eligibility rule was never granted on such a basis. This is particularly so in the case of the AWUEQ which has many rules expressed as *industry rules.* Many AWUEQ eligibility rules were granted on an industry basis and the union proceeded to organise on an industry basis and to achieve common rule industry award coverage under those rules.

PARTIES TO ORDERS, INDUSTRIAL INSTRUMENTS ETC.

22. The AWU would also propose that in the case of an association with a federal counterpart, that once the federal counterpart union has concluded the process of amending its federal rules that the registrar have the authority to cancel the registration of the TRO.

23. The Transition Bill should include a further provision that upon cancellation of the registration of the TRO all orders of the AIRC in so far as they affected the TRO immediately apply to the Federal Union as if the order had been made for or against the Federal Union. Further the Federal Union is immediately substituted as being the party to any industrial instruments or orders (including NAPSA's, PSA's, EBA's, coverage orders etc) which were expressed to be binding on the TRO. From that point on all such industrial instruments, orders etc will continue to have effect as binding on the Federal Union.

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

24. The above proposal is entirely consistent with what the AWU understands to be the general legislative intent of avoiding the reopening of disputes between parties (including demarcation disputes) that are now settled.

EXISTING DEMARCATION ORDERS

25. The Transitional Bill also fails to make provision for the recognition of pre-existing demarcation orders issued by relevant industrial authorities. In this regard, the AWU submits that a further provision be included at Schedule 3, Part 2, s.2(2) – "Continued existence of WR Act instruments as transition instruments" as follows –

> *"(2)(k) representation orders made under the Workplace Relations Act or Regulations."*

In the alternative, a new section in Schedule 22, Part 3 should be inserted which has the effect of recognising all existing demarcation and representation orders.

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

SUMMARY

26. In conclusion the AWU has the following main concerns. The definition of having a *"federal counterpart"* may be too tight and unintentionally exclude many unions from being included within the definition, including the AWUEQ. The AWU has suggested some wording that may address this issue.

27. The Transition Bill needs to make it clear that where a union has an *industry rule* as opposed to an *occupational rule,* and where it satisfies the tests to show active representation of *"persons eligible to be members"* (not members only) within that *industry rule* under Subsection 158(5A) of Schedule 1, that the eligibility rule is granted as a whole and is not subject to extensive litigation on a calling by calling or occupation by occupation basis.

28. The tests to show *"active representation"* in 158(5A) be read disjunctively not conjunctively otherwise the test becomes excessive and increases the likelihood of extended litigation around the question of where a federal counterpart union should be able to retain an eligibility rule for which its state association has historically had responsibility. The principle focus of the test of *"active representation"* should be a combination of examining the servicing of the award map at the State level when compared to the eligibility rule at the State level, and should apply as a disqualification of it does not exist, rather than being required to be positively proved in order to retain a rule that already exists in the State union..

29. The Transition Bill needs to provide for a process for the transmission of effect of orders and industrial instruments across the federal union from the TRO to take effect immediately at the point the TRO's registration is cancelled.

30. The Transition Bill should allow State Registered Associations with no federal counterpart to amalgamate with an existing federal union.

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au

31. Specific provisions should be inserted to recognise all existing demarcation and representation orders issued by all relevant industrial authorities.

Paul Howes – National Secretary
The Australian Workers' Union
Level 10, 377-383 Sussex Street, Sydney NSW 2000
Phone: 02 8005 3333 | **Fax**: 02 8005 3300
Website: http://www.awu.net.au | **Email**: members@awu.net.au