Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008

Submission by Professor Andrew Stewart
Law School, University of Adelaide

This submission is made in my capacity as an academic, rather than as a consultant to the national law firm Piper Alderman, and the views expressed are mine alone. I should also disclose to the Committee — though it is already a matter of public record — that in 2008 I was engaged by the Workplace Relations Legal Group in the Department of Education, Employment and Workplace Relations, through Piper Alderman, to provide advice on the drafting and structure of the government's new workplace legislation. I was not engaged to advise on policy issues, however, and nor was I involved in the actual drafting of what became the Fair Work Bill 2008.

General Observations on the Fair Work Bill

I am in general agreement with the approach adopted in the Fair Work Bill 2008 to the regulation of employment and workplace relations. To quote Professor Margaret Gardner, what labour regulation should strive to establish is 'a framework that reconciles the demands of an open economy with a regard for social justice and fairness; that balances the rights of the individual and the collective; and has room for an independent forum to assist where negotiations break down or legislative requirements are breached'.[1] In my opinion, the Bill meets those objectives.

In particular, I welcome:

- the expansion of the statutory safety net of minimum conditions for all national system employees, to include matters such as redundancy pay, long service leave and a right to request flexible working conditions;

- the maintenance of a strong, effective and streamlined award system that sets additional but more flexible standards on an industry or sectoral basis, and from which parties can only bargain up, not down;

- the abandonment of the Howard Government's unworkable and unfair system of statutory individual agreements, and the renewed emphasis on collective bargaining;

- the capacity for parties to choose to enter into multi-enterprise agreements, without the need to seek prior authorisation;

[1] 'Beyond WorkChoices: Negotiating a Moment' (2008) 18(2) *Economic and Labour Relations Review* 33 at 40.

- the restoration of unfair dismissal rights, and in particular the abandonment of the arbitrary and unfair exclusion of employees dismissed by firms with less than 100 workers, or in the middle of fixed term or fixed task contracts;

- the rationalisation and streamlining of the various prohibitions on discriminatory or wrongful treatment into a single set of 'general protections';

- likewise, the rationalisation of procedures and remedies for compliance and enforcement under the legislation;

- the removal of the arbitrary and unfair limitation on union rights of entry for discussion purposes, whereby unions even with substantial membership in a workplace may be excluded merely because a non-union collective agreement (or an agreement with another union) has been voted up by other workers at that site;

- the increased protection given to workers when transferring employment, both in the context of a transfer of business and when moving between jobs at related employers;

- the broad flexibility and discretion given to Fair Work Australia (FWA) as to the way in which it conducts its processes;

- the encouragement to parties to use FWA as a forum for settling a wide range of disputes, including disputes over bargaining;

- the establishment within the Federal Magistrates Court of Australia of a Fair Work Division which, if properly structured, staffed and administered, is capable of offering a low-cost, accessible but expert forum for the adjudication of a wide range of employment-related claims.

I also wish to commend the government on its willingness to draft more effective and accessible workplace laws, an issue I have raised on a number of previous occasions with the Committee. Although still lengthy, the Bill has a far more simple and straightforward style than the complex and convoluted provisions that abound in the current Workplace Relations Act 1996. Outlines appear at the beginning of each main part and there are frequent 'signposts' to alert readers to other relevant provisions. With rare exceptions, the Bill's provisions are structured in a logical sequence that makes them far easier to read and comprehend than the legislation it is replacing. It is also worth emphasising that less is left to regulations than had become the norm under the Workplace Relations Act.

There are still perhaps parts of the new legislation — especially those dealing with bargaining, agreement-making and industrial action — where the Bill lapses into the kind of 'micro-regulation' that the Explanatory Memorandum (at [r.4]) professes to avoid. But overall, this is a vast improvement on what has gone before. Every manager, union official and industrial practitioner that has to consult this legislation on a regular basis will find their work much easier to do.

Areas of Concern

Having said all that, there are aspects of the Fair Work Bill with which I disagree. I have a problem, for instance, with the retention of 'clear, tough' rules on industrial action that flagrantly breach Australia's obligations under international labour law.[2] But I also recognise that the government has a clear mandate for its Forward with Fairness policies.

That being the case, rather than airing every possible point of difference I intend to concentrate in this submission on a few areas in which I believe the Bill could be improved, without radically altering the overall framework or compromising the government's policy objectives.

Enforcing the Right to Request

Clause 65 of the Bill creates a new right for employees with at least twelve months' service to request 'a change in working arrangements' to assist them in caring for pre-school age children. Employers are permitted to refuse, if they have 'reasonable business grounds'. So long as an employer actually provides a written response to an employee's request, however, the Bill makes it clear that there is to be no challenge to any refusal. No court order can be made against the employer for an alleged failure to specify reasonable grounds (cl 44(2)). Nor can any dispute resolution process in an award, enterprise agreement or contract authorise arbitration over that issue (cll 739(2), 740(2)).

I support the proposed new standard. However I would strongly argue that it is necessary to provide *some* basis for a worker to dispute an employer's assertion that there are 'reasonable business grounds' for a refusal to accommodate a particular request. If an assertion that such grounds exist is treated as being irrefutable, then there is no meaningful 'standard'.

In the February 2008 Discussion Paper, when the exposure draft of the new National Employment Standards (NES) was released, it was said that experience in the United Kingdom 'has demonstrated that simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees'.[3] But the UK *does* provide for employees to be able to lodge a complaint challenging an employer's response.[4]

---

[2] See C Fenwick and I Landau, 'Work Choices in International Perspective' (2006) 19 *Australian Journal of Labour Law* 127 at 140–3; J Romeyn, *Striking a Balance: The Need for Further Reform of the Law Relating to Industrial Action*, Parliamentary Library Research Paper, Parliament of Australia, Canberra, 2008.

[3] Department of Education, Employment and Workplace Relations, *Discussion Paper: National Employment Standards Exposure Draft*, Commonwealth, Canberra, 2008 at [61].

[4] See *Employment Rights Act* 1996 (UK) ss 80H–80I.

I do not necessarily suggest that the question of 'reasonable business grounds' be treated as an objective standard that is capable of being reviewed by a court. But at the very least, and in line with the UK provisions, an aggrieved employee should be able to ask FWA to review an employer's decision, on the basis either that the employer has not given an adequate response, or that the response was based on incorrect facts. If satisfied that there was a prima facie case for review, FWA could convene a conference to discuss the issue. If the dispute was not resolved, and FWA was satisfied that the employee's complaint was made out, it could then order the employer to reconsider the decision, and/or compensate the employee.

What makes the absence of any complaint mechanism under the Bill even more puzzling is the acceptance in clause 66 that State or Territory laws can validly provide more beneficial employee entitlements in relation to flexible working arrangements. The Explanatory Memorandum confirms (at [272]) that this is intended to preserve the operation of laws such as the recently enacted Equal Opportunity Amendment (Family Responsibilities) Act 2008 in Victoria, which prohibits an unreasonable refusal to accommodate a worker's responsibilities as a parent or carer.

Now if the government is prepared to accept that it is appropriate for Victorian workers to have an *enforceable* right to insist on a reasonable change to their working arrangements, why is that not good enough for their counterparts interstate?

Agreement Content and the 'Matters Pertaining' Requirement

One of the most objectionable features of the Work Choices legislation was the extent to which it sought to dictate what could or (more particularly) could not be included in workplace agreements. It was an approach that made a mockery of any commitment to promoting 'freedom' and 'choice' in workplace bargaining. The effect of the 'prohibited content' restrictions under s 356 of the Workplace Relations Act has been to force many employers and unions to adopt the absurd practice of negotiating two agreements at a time: a formal agreement to be registered under the 1996 Act; and a 'side' agreement, which might or might not be enforceable as a common law contract, to deal with any provisions that might involve prohibited content.[5]

In its Forward with Fairness policy, Labor promised to 'remove the [Howard] Government's onerous, complex and legalistic restrictions on agreement content'. Bargaining participants should be 'free to reach agreement on whatever matters suit them', subject only to the requirement that the terms be 'lawful'.[6]

It is extremely disappointing that the Fair Work Bill does not give effect to this commitment. Indeed so far as I can tell, the prescription of the content of enterprise

[5] See eg *Australian & International Pilots Association v Qantas Airways Ltd* [2008] FCA 1972. See generally A Stewart and J Riley, 'Working Around Work Choices: Collective Bargaining and the Common Law' (2007) 31 *Melbourne University Law Review* 903.

[6] K Rudd and J Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces*, Australian Labor Party, Canberra, 2007, pp 14–15.

agreements is the one aspect of the Bill which represents an unequivocal departure from Forward with Fairness.

What the Bill proposes is a distinction between 'unlawful' and 'non-permitted' terms. Unlawful terms, as defined in cl 194, are not just unenforceable: their presence in an agreement will prevent it being approved by FWA (cl 186(4)). But there is no equivalent obligation for FWA to look for, or do anything about, non-permitted content. Nor is there any penalty for proposing or adding a non-permitted term (or for that matter an unlawful term) to an agreement. Such a term will have no effect, but nor will it affect the validity of the agreement as a whole (cl 253). In effect, therefore, the Bill seems to allow non-permitted terms to be included in enterprise agreements with impunity — they are simply unenforceable.

While the definition of unlawful content might be broader than some would like, I can accept that what is being prohibited in each case is the sanctioning of conduct that would breach a standard set by the legislation, or undermine some aspect of the legislative scheme. What cannot be justified, on either of those grounds, is the concept of non-permitted content.

I have three broad objections to the approach taken in the Bill to non-permitted terms. The first, quite simply, is that it offends the principle that parties should be free to negotiate their own agreements. I find it objectionable that management and labour should be told that, even if they freely agree on a matter that *they* regard as important to their relationship, such as a commitment to certain climate change initiatives, they cannot include it in their agreement — even though what they have agreed offends no law as such.

The second objection is that it will tend to perpetuate the use of 'side' agreements, a practice which should be regarded as inefficient and unproductive. There may be some parties (perhaps even most) who are content to accept the unspoken invitation in the Bill to include non-permitted terms in their agreement, on the basis that they will not be removed by FWA, and that there is sufficient trust and confidence between the parties for them to be observed even without the threat of legal sanctions under the legislation. But, for the same reason that some side agreements have been expressed in formal deeds rather than looser understandings, some parties will want commitments on non-permitted matters to be spelled out in terms that are unequivocally binding.

Another reason for the continuing use of side agreements lies in the rules on protected industrial action. Under clause 409(1)(a) of the Bill, the inclusion of non-permitted content in a proposed agreement will render any action taken by employees in support of that agreement unlawful, unless those concerned reasonably but mistakenly think the content is permitted. So if a union wants to reach agreement on terms that it knows or strongly suspects to be non-permitted, but also wants to leave open the possibility of taking industrial action at some point during the process, it will have a clear incentive *not* to put those terms in any agreement it formally proposes to the employer,

but rather to leave them to a side agreement that can be conveniently disavowed if bargaining breaks down.[7]

The third problem lies with the definition of 'permitted matters' in clause 172(1). It does relax some of the restrictions imposed by the current rules on prohibited content, for instance by allowing the inclusion of terms on matters such as the deduction of union dues from the pay of employees, time off for union training or union meetings, and the provision of information about employees to unions. But it also means that it will continue to be necessary for parties, their advisers and potentially the courts to grapple with the concept of when a matter does or does not 'pertain' to the employment relationship.

In her address to the Australian Labour Law Association on 14 November 2008,[8] the Deputy Prime Minister made much of the relief that future law students would feel in never having to endure the 'tortured logic' of a range of doctrines associated with the old conciliation and arbitration system. Yet the concept that awards and agreements can only be made about 'matters pertaining to employment' is just such a doctrine, dating all the way back to the definition of 'industrial matters' in the Conciliation and Arbitration Act 1904. According to the Explanatory Memorandum (at [670]), there is a 'substantial jurisprudence' as to the meaning of the phrase. That is true. But what the EM does not mention is that it is a confusing, uncertain and downright inconsistent jurisprudence.[9]

Just to give one example of the difficulty, in 1987 the High Court unanimously rejected the notion that there is a distinction between matters pertaining to employment on the one hand, and matters of 'managerial prerogative' on the other.[10] It ruled that staffing levels and recruitment matters were matters that had a direct impact on employment relations. Yet at the same time it refused to overturn previous decisions that appeared to be based on the very reasoning the court was rejecting. More recently, some members of the majority in the *Electrolux* case[11] appeared to reassert the idea that 'managerial' matters fall outside the area of industrial disputation — but without even referring to the 1987 case, let alone explaining whether it still represents good law. These kinds of inconsistencies have made it extremely difficult for parties (and the AIRC) in trying to determine what is permissible in an agreement and what is not.[12]

It is high time that the 'matters pertaining' concept is given a decent burial. If there has to be some kind of formula for 'permitted matters' (and as I have argued, I do not see the need), it should be expressed in far broader terms.

---

[7] See Stewart and Riley, above at 916–920.

[8] See www.deewr.gov.au/Ministers/Gillard/Media/Speeches/Pages/Article_081128_090051.aspx.

[9] See B Creighton and A Stewart, *Labour Law*, 4th ed, Federation Press Sydney, 2005, pp 97–104.

[10] *Re Cram; Ex parte NSW Colliery Proprietors Association Ltd* (1987) 163 CLR 117.

[11] *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309.

[12] See J Harris, 'Federal Collective Bargaining after *Electrolux*' (2006) 34 *Fed LR* 45.

It would seem that the real concern about allowing parties to make agreements about climate change initiatives and the like relates to the possibility of unions taking protected industrial action over such matters. If so, this is as clear an example as could be imagined of the tail being allowed to wag the dog. Most agreements are negotiated without industrial action. And even where there is conflict, it is far more often over the core issues of wages, rostering and the like. So it appears a concern about a minority of disputes, in a minority of industries, is being allowed to create doubt and uncertainty about what can be put in *any* enterprise agreement.

What I propose is that the permitted matters requirement be omitted from clause 172, and also clause 409(1). If there is a view that there should be some limitation on the taking of industrial action about 'extraneous' matters, then a new subclause (3A) could be inserted into clause 409, along these sort of lines:

> 'The industrial action must not relate to a significant extent to an employer's failure to agree to an incidental claim. An ***incidental claim*** is a claim concerning the agreement that does not relate either to terms and conditions of employment, or to the relationship between that employer and an employee organisation that will be covered by the proposed agreement.'

That should provide sufficient protection against employers being 'coerced' into accepting the 'wrong' sort of claims, while leaving the great majority of parties free to decide what they want to put in their agreement.

Bargaining Representatives

There are just two other matters I want to raise concerning the bargaining provisions in the Bill.

One concerns clause 179, which provides that an employer, or a bargaining representative for an employer, must not to refuse to recognise or bargain with another bargaining representative for a proposed agreement. Leaving aside the question of what 'recognising' a representative does or does not entail, the difficulty with this provision is that it appears to conflict with the more limited scheme for 'good faith bargaining' established under Division 8 of Part 2-4.

Clause 228 sets out certain good faith bargaining requirements that, on their face, apply in relation to any proposed enterprise agreement. But a failure to bargain in good faith does not carry any automatic consequences. Clause 228 is not, for example, a 'civil remedy provision' that can be enforced under the compliance provisions in Part 4-1 of the Bill. A failure by one or more representatives to comply with the provision may lead to another representative seeking a 'bargaining order' from FWA — but only in relation to a proposed single-enterprise agreement, and only where the employer concerned has either already agreed to bargain, or been compelled to do so by the making of a majority support determination, a scope order or a low-paid authorisation.

By contrast, none of these limitations seem to apply to clause 179. An employee bargaining representative could approach an employer and demand that the employer bargain over a proposed agreement., and on the face of it the employer would *have* to do so, or risk breaching clause 179, which *is* a civil remedy provision. It would not matter what type of agreement this was, or whether the representative had the support of any more than one person. And the obligation would be simply to 'bargain', with no reference to any concept of good faith.

Whatever the intent behind clause 179, it does not sit comfortably with the more elaborate framework established around the concept of good faith bargaining. I recommend that the government be asked to redraft it, so as to reduce the uncertainty it creates.

The second issue arises where an employer is approached by a union that claims to be a bargaining representative for one or more employees. In most cases the employer will simply accept that claim at face value. But what if it asks for proof, and the union is unwilling to divulge the identity of its members? How is the employer to know whether the union is or is not truly a bargaining representative?

(This issue, it should be stressed, will only arise in relation to unions, which under clause 176(1)(b) are automatically treated as bargaining representatives for their members, except where a member appoints someone else. For any other type of employee representative, there must be a formal 'instrument of appointment', a copy of which must be given to the employer under clause 178(2)(a).)

One answer might be to leave it to the parties to engage in some sort of dispute over the matter, which FWA could then potentially settle. But another possibility, which might be worth considering, would be to extend the 'affected member certificate' process in clause 520, which allows a union to obtain confidential confirmation from FWA that it has a member in a workplace who is affected by a suspected contravention.

Secret Ballots for Industrial Action: Simplifying the Process

Even if it is accepted that protected industrial action by employees should first be authorised by a majority of the group concerned, that does not mean that the process should have to be as demanding and time-consuming as it is under Division 8 of Part 3-3 of the Bill.

The aspect of the procedure that is most problematic is the requirement that, to obtain a ballot order, the applicant (typically a union) must demonstrate that it has been genuinely trying to reach agreement with the relevant employer. Under s 450 of the WR Act, the employer is formally made a party to the ballot order application and hence can challenge whether this requirement has been met. There appears to be no equivalent provision in the Bill. But clause 440 specifically requires a copy of any application to be given to the employer, while it is difficult to see how FWA could be

'satisfied' under clause 443 as to the genuineness of the applicant's attempts to reach agreement without hearing from the employer.

Since the secret ballot provisions were introduced by Work Choices, employers have routinely used this stage of the process to challenge a union's right to take protected action, most commonly by asserting that the union has not genuinely been seeking agreement (including for instance by pursuing prohibited content claims), or by objecting to the questions that the union is proposing to put to its members.

It is hard to see why the second of these issues requires any input from the employer. And as to the first, the question of genuine bargaining, it is arguably premature for that matter to be ventilated. *If* the action is supported at the ballot, and *if* it goes ahead, there will still be ample opportunity for the employer to go to FWA and argue that the union has not been genuinely bargaining, that any action is accordingly unprotected (see clause 413(3)), and that the employer is therefore entitled to a stop order under clause 418.

It is strongly recommended that the requirement to show a genuine attempt to reach agreement be deleted from clause 443. If the ballot order procedure is to be retained, it could at least then operate as a swifter and more efficient process. Unions would be unlikely to waste the time and effort of going through a ballot procedure unless they felt confident they could satisfy the genuine bargaining requirement that would still be necessary to make any action protected. And employers would still retain their right to convince FWA otherwise.

Payment for Partial Work Bans

In relation to the new rules on strike pay in Division 9 of Part 3-3 of the Bill, I support the decision to abolish the 'four-hour rule' in relation to periods of protected action. As the Explanatory Memorandum correctly notes (at [r.269]), the rule has not only been a 'source of confusion', but has arguably created an incentive for employees to take longer action than they might otherwise have done. I also support the clarification as to the status of overtime bans.

A particularly useful reform is the proposed change in relation to partial work bans. Clause 471 effectively allows the employer to choose whether to make a proportionate deduction (the scope of which may be reviewed by FWA), or no deduction at all, rather than being forced to pay employees nothing for a period during which they may have been performing productive work. Many employers, in my view, will see this as offering them welcome flexibility in determining how to respond to a partial work ban.

The only question I would raise is why this helpful approach to partial work bans is confined to protected action. The Explanatory Memorandum argues (at [r.304]) that it will act as a 'strong disincentive' to the taking of unprotected action. But such action is becoming rarer, and can in any event be halted by FWA or the courts. Where it does occur though, and a partial work ban is involved, a continuing insistence on the

employer withholding all pay simply risks inflaming a dispute. At the very least, the employer in this situation should have the option of making a proportionate deduction.