CEPU

COMMUNICATIONS
ELECTRICAL
PLUMBING
UNION

NATIONAL
OFFICE

Peter Tighe
National Secretary

Ed Husic
National President

Suite 701, Level 7
5-13 Rosebery Avenue
PO Box 380
Rosebery NSW 2018

Ph: (02) 9663 3699
Fax: (02) 9663 5599

Email:
peter@nat.cepu.asn.au

9 April 2009

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

email: eewr.sen@aph.gov.au

CEPU Submission to Senate Inquiry into Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

Dear Mr Carter,

Please find attached a copy of the submission of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) to the inquiry by the Senate Standing Committee on Education, Employment and Workplace Relations into the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*.

If you have any queries in relation to this matter please contact Mr Alister Kentish either at this office or via email at: *akentish@nat.cepu.asn.au*

Yours faithfully,

Peter Tighe
National Secretary
CEPU

2008/0028 D2009/00420

Senate Committee on Education, Employment and Workplace Relations

Inquiry into the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*

Communication, Electrical and Plumbing Union

April 2009

Introduction

1. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) welcomes the opportunity to make submissions to the inquiry into the provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (the Bill) by the Senate Standing Committee on Education, Employment and Workplace Relations.

2. The CEPU has seen a draft submission of the Australian Council of Trade Unions (ACTU) and generally supports the concerns the ACTU has raised in relation to the Bill.

3. In addition, the CEPU seeks to make the following submissions.

Industrial Action During Transitional Period

4. The CEPU strongly opposes the guillotining of industrial action at 30 June 2009. The explanatory memorandum gives no reason why it is necessary to terminate legitimately authorised industrial action.

5. While we recognise there are significant changes occurring in bargaining and in what may be agreed in a collective agreement under the Act, we submit it is significant that agreements made under the new legislation can be *wider* in scope than those under the current legislation. The substance of a proposed agreement under the current legislation could largely be included in an agreement under the new legislation. Further the current legislation (and the new legislation) recognises that the proposed content of agreements may change over a negotiating period.

6. In such circumstances, and given that the new legislation allows for industrial action effectively to be terminated where a union is not "genuinely trying to reach agreement", we submit that there is no reason to terminate current authorisations for industrial action and every reason to let them continue.

7. If the transitional laws do remove authorisations of industrial action on the basis of transitional issues, something which we oppose, such removal should be by application only – not a general removal of all authorisations. In the alternative, at the very least, unions should be able to apply to have the authorisation extended.

New Representation Orders

8. The CEPU strongly opposes the proposed "Representation Orders for Workplace Groups" (the new s.137A). Representation orders are already available under s.133 of Schedule 1 to the *Workplace Relations Act 1996*. There is no legitimate case for expanding the role of FWA in this respect beyond the powers under s.133 of Schedule 1.

9. Under s.133 of Schedule 1, certain preconditions must be met before the Commission may make representation orders. Those preconditions require conduct, or threatened conduct, that is "preventing, obstructing or restricting the performance of work" or "harming the business of an employer" (s.134 of Schedule 1).

10. The new provisions contain no such pre-requisite.

11. According to the explanatory memorandum the new orders are "intended to address any potential demarcation disputes that may arise as a result of the removal of the requirement that a union be bound to an award or agreement to exercise a right of entry or changes to the bargaining framework proposed under the FW Bill" (paragraph 767 of the explanatory memorandum). We note however that the wording of the proposed s.137A is not confined to such circumstances.

12. Moreover, the proposed orders are totally inconsistent with the general scheme of the Act, including but not limited to, the "more conveniently belong, more effectively represent" test contained in s.19 and s.158 of Schedule 1 of the current Act and replicated in the proposed new *Fair Work (Registered Organisations) Act 2009*.

13. Unions who have previously gained eligibility to represent employees, have enrolled employees and are now seeking to represent those same employees in a manner that is otherwise consistent with the industrial relations legislation, should not have that right subject to being removed.

14. Similarly, employees who have chosen a particular organisation to represent them, in circumstances where that organisation has legitimately been granted eligibility to enrol such persons under the Act or one of its legislative antecedents, should not be denied the freedom to be represented by such an organisation.

15. We further submit that there are serious problems with the concept of the "workplace group". Under the scheme of the new provisions, the workplace group is the key "class or group" of employees that may be subject to an order. The wishes of the members of such a group are to be taken into account by the Commission when considering whether to make an order (s.137B(b)). In addition, the Commission must also consider the history of award coverage and agreement making of employees in the "workplace group".

16. Workplace group is defined to mean (see item 86: the definition is to be inserted into s.6):

    "a class or group of employees, all of whom perform work:

    (a) for the same employer; or

    (b) at the same premises or workplace; or

    (c) for the same employer and at the same premises or workplace"

17. The definition has a number of problems.

18. Firstly, workplace group is defined too broadly. The views of members of the workplace group who are not employees over whom there is a demarcation dispute are not at all relevant to the making of orders. For example, why should the views of managerial (or clerical or process) employees be considered in determining the representational coverage of trades persons?

19. Secondly, the definition appears to be fixed in time and does not allow for the fact that the composition of the workplace group may change dramatically over the life of any order. For example, for those employers engaged in seasonal work, for instance employers in the sugar industry, fundamentally different work is engaged in depending upon the time of year. The make-up of the directly employed workforce changes accordingly.

20. Given that orders may apply to a group of employees "at the same premises" the same observations are also very relevant to construction sites and/or major industrial operations which have shut downs for maintenance.

21. Indeed allowing orders applying to a "workplace group" to extend beyond one employer means that other employers and employees who may have completely different views to

the employer making an application may not be given an opportunity to be heard, or even identified at the time of making the order. This is fundamentally unjust. It is also impractical. For example, an employee who works for a contractor and is a member of a union may potentially not be able to be represented by that union for a particular (often short term) job at a particular site. That employee would either then have to join the union with coverage under the order, perhaps for a one month period, or have no right to union representation at all.

22. If new representation orders that are not based on a disturbance to the performance of work, or harm to an employer's business, are to be introduced, something which we very strongly oppose, we submit a number of changes need to be made to what is proposed:

(a) The wishes of the employees affected should have primacy.

(b) Even if the current proposal for a consideration of multiple factors remains, only the employees over which there is a dispute should be relevant to any order made. The wishes of other employees in the "workplace group" – or indeed the award coverage of such employees - should not be relevant.

(c) No order should be able to be made for a class or group of employees who are not yet employed (as the views of such employees cannot be assessed).

(d) The Commission should take into account the consequences of making an order, not simply of not making an order, for the employer, employees or organisations involved (see s.137B(e)).

(e) The Commission should have to take into account Australia's international labour obligations, particularly those relating to freedom of association.

(f) There should be a presumption against making an order.

(g) There should be no power to extend an order beyond more than one employer. In particular, it should not apply to contractors who may be engaged on a site.

(h) There should be no power to make interim orders. Given that there is no requirement that the performance of work is being hindered, or that harm is being done to an employer, there is no basis for interim orders that would remove representation rights that have been legitimately accrued through the registration process.

(i) There should be no power to make orders for greenfields sites. There can be no question of a change in status quo for employers who do not yet employ any employees. As this is apparently the reason for the introduction of the new orders, there is no justification for orders applying to greenfields sites.

(j) The orders should be of a limited duration. This would better reflect the stated reason for the introduction of the new orders. There is no reason that organisations who have eligibility to cover employees and who lawfully seek to represent those employees, should be shut out indefinitely.

(k) Applications for the new type of order should only be available during a short transitional period. Again, this would better reflect the stated reason for the introduction of the new orders.

(l) The provisions should explicitly provide that orders are able to be reviewed if any of the circumstance leading to the making of that order have changed.

Conclusion

23. The CEPU is disappointed with a number of aspects of the Bill and generally adopts the criticism of the Bill made by the ACTU. We strongly oppose the treatment of industrial action under the Bill and the proposed new representation orders. Such aspects of the Bill were never a part of the ALP's election promises – nor a part of its policy platform.

24. In particular, the proposed new representation orders, which may be made against a union even where that union is legitimately and lawfully representing employees within the union's eligibility rules, are unfair and unnecessary. We strongly urge the Senate Committee to recommend that the capacity for such orders to be made should be removed from the Bill.