The Australian Workers' Union Submission to The Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the Fair Work Bill 2008

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BACKGROUND

The Australian Workers' Union is Australia's oldest and largest continuously operating union. The AWU represents over 130,000 members throughout the country, from industries as diverse as mining, shearing, hyrdocarbons, retail, local government, aged care and health, horse racing and training, aluminium and steel refining and smelting, sugar harvesting and milling, civil construction, paper and glass manufacture, and aviation.

In over 122 years of continuous representation of millions of Australian workers, the AWU has been at the forefront of many of the significant advancements in terms and conditions of employment for Australian workers and their families. In 1907, the AWU became the first registered organisation to secure an industrial award for the benefit of working Australians.

In this time, the AWU has witnessed first-hand the effect of changes to industrial legislation throughout the Commonwealth. In many cases, legislative change has delivered real and meaningful advancements for workers. In the case of *WorkChoices*, the lives of millions of ordinary, hard working Australians and their families were fraught with greater insecurity, workplace imbalance and unfairness.

The AWU overwhelmingly supports the central objects of the *Fair Work Bill*. We believe that in many significant respects, this Bill (when enacted), will rightfully restore balance to the system of industrial relations in this country, and will ensure that workers and their unions have a meaningful and constructive role to play in the years ahead.

Whilst there are aspects of the Bill which we think need adjustment, we applaud the Rudd Labour Government for the steps that it has taken, and intends to take, in making this goal a reality.

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EXECUTIVE SUMMARY

STATE SYSTEMS

- The AWU supports and adopts the submission of Unions NSW

UNFAIR DISMISSAL

- The 7 day time limit for the filing of applications should be extended to 21 days
- Minimum employment periods for access to the unfair dismissal jurisdiction should be reduced to 3 months
- There should be no distinction made between minimum employment periods for employees of small and large employers
- If the Small Business Dismissal Code is to be retained, it must have stringent and exhaustive tests enshrined in substantive legislation
- Subclause 384(2)(b) of the Bill should be deleted.
- When a business is transmitted, an employee's service with an old employer should be counted as part of the service with the new employer for the purposes of the unfair dismissal laws
- Casual employees who have been employed by an employer for the relevant qualifying period should be entitled to access unfair dismissal laws
- Subclause 386(2)(c)(i) of the Bill should be amended so that reductions in responsibility, prestige and career advancement opportunity are taken into account
- Subclause 390(3) of the Bill should be strengthened to ensure that reinstatement is ordered unless such an outcome is entirely impracticable and unreasonable in the circumstances
- Subclause 392(3) of the Bill should be deleted
- Subclause 399(1) should be amended to provide every aggrieved individual with the right to a hearing, without applications being peremptorily dismissed
- Employees engaged on AWA's prior to March 2008 should be entitled to the same unfair dismissal protections as for employees under enterprise agreements

ENTERPRISE AGREEMENTS

- Sections 173(3) and 175(4) of the Bill should be amended and reduced to 7 days
- Sections 175(2)of the Bill should be amended to read *"if the employer does not know **and** could not reasonably be expected to know"* (emphasis added). Section 179(2) should similarly be amended.
- An employer should be taken to have agreed to bargain once the employer raises any issues about the potential terms of an agreement with any employees or employee organisations

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RIGHT OF ENTRY

- Right of entry provisions should be amended to include a requirement on employers conducting operations in remote locations to provide permit holders with accommodation and meals at a reasonable cost. Transportation may also be required in particular circumstances.
- The Bill does not go far enough to protect the rights of union members, or those employees wishing to attend meetings with permit holders, from intimidation by an employer, particularly with regard to the location at which meetings are to be conducted during working time.

GOOD FAITH BARGAINING

- The timeframes for bargaining orders restrictions should be amended, with bargaining to be permitted up to 6 months prior to the nominal expiry date of an agreement
- The AWU supports the introduction of good faith bargaining requirements in the Bill
- The concept of "commercially sensitive" information is ill-defined. The Bill should be amended to allow for the disclosure of such information to bargaining representatives, with a requirement for enforceable non-disclosure to be included.
- Good faith bargaining requirements should be extended to negotiations for the variation of an agreement

INDUSTRIAL ACTION

- There should be one set of industrial laws applying to all Australian workers. The BCII Act should be repealed with the passing of this Bill
- Clause 19 of the Bill should be amended to specifically provide that an activity that merely involves communication of information to persons entering or leaving a site is not "industrial action"
- The AWU is opposed to the retention of the term "imminent risk" as it relates to OHS matters and "industrial action"
- Subclause 363(1) of the Bill should be deleted as it relates to the actions of those that purport to be acting for an on behalf of union members, or the union itself
- FWA should be afforded wider discretion with respect to the issue of orders for the prevention of industrial action
- A protected action ballot order should be able to be made no more than 90 days prior to the nominal expiry date of an agreement

MODERN AWARDS

- A compulsory review of awards should be undertaken within one year of the awards becoming operative
- Organisations should be expressly given the right to be consulted with, and heard, with respect to scheduled award reviews

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MODERN AWARD APPLICATION – HIGH INCOME EMPLOYEES

- There provisions relating to “high income” employees and to “guarantees of annual income” should be deleted entirely

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STATE SYSTEMS

The AWU has read the submissions of Unions NSW with regard to State industrial relations systems, and entirely supports and adopts those submission.

UNFAIR DISMISSAL

The AWU submits that the requirement to lodge unfair dismissal applications within seven days is unrealistically short and may result in unintended consequences. Many employees may find that the 7 days has elapsed before they become fully aware of their rights and the implications of their dismissal. The rationale behind the time limit is to ensure reinstatement remains a viable remedy, and the AWU supports reinstatement being the primary remedy for unfair dismissal. However, the reduction in the time limit for lodging applications is likely to result in employees and employee organisations submitting unfair dismissal claims whenever a dismissal occurs. This would be to ensure the application is within the legislated timeframe and may take place before determining whether the facts of the case actually warrant pursuing the application. The administrative burden that this would place on Fair Work Australia would be unsustainable and could result in many applications being rejected on the grounds that they are frivolous or have no real prospect of success. It could also result in increased costs for employee organisations as a result of application fees provided for at clause 395. The AWU submits that the 21-day timeframe should remain.

The AWU submits that the minimum employment periods[1] for access to unfair dismissal provided for in the Bill are unreasonably long. It appears that the intention behind these minimum employment periods is to give an employer an opportunity to assess an employee's suitability for a given job. The AWU submits that three months is ample opportunity for an employer to asses a new employee's suitability. All employees should be protected from unfair dismissal following a minimum employment period of three months.

The AWU opposes a distinction being made between minimum employment periods for employees of small and large employees. The Bill provides that small businesses will not have unfairly dismissed an employee provided that the dismissal was consistent with the Small Business Fair Dismissal Code.[2] The AWU submits that the inclusion of the Small Business Dismissal Code negates the need for a distinction between small and large businesses with regard to minimum employment periods.

The content of the Small Business Fair Dismissal Code is not yet apparent. Whatever form the code ultimately takes, the AWU submits that the steps that need to be followed by small businesses should be stringent and exhaustive if compliance with these steps will be sufficient to remove an employees' entitlement to unfair dismissal protection.

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[1] Fair Work Bill 2008, cl. 383.
[2] Fair Work Bill 2008, cl. 388

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Paragraph 384(2)(b) should be removed from the Bill. This provision could allow an employer to evade the unfair-dismissal provisions of the Bill simply by informing employees that their service with their previous employer will not be recognised. This provision could allow an employer to unfairly dismiss an employee who has performed the same job at the same business premises for 15 years and leave the unfairly-dismissed employee with no recourse. Moreover, the AWU submits that the interaction between the unfair-dismissal provisions in the Bill and the redundancy provisions of the National Employment Standards (NES) need to be clarified in relation to transmission of business. Subclause 63(2) of the NES provides:[3]

> *"[Redundancy pay] does not apply to an employee in a business being transferred if he or she rejects an offer of employment with the new employer:*
>
> > *(a) on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the old employer immediately before the termination of that employment; and*
> >
> > *(b)* ***recognising the employee's service with an old employer*** *in the business (whether or not the old employer was previously a new employer in connection with the business)." (Emphasis added)*

In a circumstance where an employee rejects an offer of employment on the grounds that the new employer refuses to recognise their service with the old employer, it would appear that the old employer would be liable for redundancy pay as a result. The AWU submits that, when a business is transmitted, an employee's service with an old employer should be counted as part of the minimum employment period for the purposes of unfair dismissal.

The Bill provides that the minimum employment ends when a person is given notice of the dismissal.[4] This could lead to a situation where an employer provides 2 months notice immediately prior to an employee having served 6 months. In such a circumstance, the employee will have actually been employed for 8 months and should not be excluded from unfair dismissal protection simply because they were previously informed.

The AWU submits that all casual employees who have been employed by an employer for the relevant qualifying periods should be entitled to unfair dismissal protection. Paragraph 384(2)(a) of the Bill excludes casual employees from unfair dismissal protection unless they are employed on a regular and systematic basis and they have a reasonable expectation of continuing employment. Whether a casual employee is engaged on a regular and systematic basis is entirely at the discretion of their employer. The AWU submits casual employees should be entitled to protection from dismissal on a basis that is harsh or unfair if they have been employed for the relevant qualifying period.

[3] National Employment Standards
[4] Fair Work Bill, para .383(a)(i)

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The AWU submits that sub-paragraph 386(2)(c)(i) should be amended. The reference to a significant reduction in duties should be reworded to ensure that a reduction in responsibility, prestige and opportunities for career progression are addressed by the provision. The concept of a reduction in duties is ambiguous and is likely to lead to disputes over application.

The AWU submits that subclause 390(3) is not strong enough to address the potential for reluctance on behalf of FWA members to make reinstatement orders. Although, reinstatement should already be regarded as the primary remedy, compensation has always been the more likely outcome. There are a range of potential reasons that reinstatement could be considered "inappropriate". Reinstatement should be ordered unless such an order would be entirely impractical and unreasonable in the circumstances.

Subclause 392(3) should be removed. If a dismissal is determined to be unfair despite some misconduct on behalf of the employee, the employee should not incur further penalty in relation to compensation. The employee has already lost their employment and will not be reinstated, that is already a substantial penalty. Subclause 392(4) is inconsistent with subclause 392(3).

Clause 397 of the Bill provides that FWA must conduct a conference or hold a hearing if the matter involves "...facts the existence of which are in dispute".[5] The process of cross-examination is well established as the most appropriate manner to test disputed facts. This process will not occur if factual matters are determined at a conference. The potential for an imbalance to exist and be influential between a professional employer representative and an applicant at the conference is a strong concern. This issue is dealt with to some extent in section 398(3), however, there is likely to be a significant degree of inconsistency when FWA members are left with such broad discretion. An established process would provide for greater understanding, awareness and consistency.

Subclause 399(1) could result in disputes remaining unresolved. If FWA does not consider a hearing "appropriate" the matter may be left to the parties. The AWU submits that a hearing should follow if all other attempts at settlement fail. This is key to the effective resolution of disputes and this should be reflected more strongly in the legislation.

It must be remembered that apart from purchasing a house or raising a family, having secure employment (and consequently, having effective protection from unfair dismissal) is one of the most fundamentally important features of a working person's life. In our system of democracy, it is vitally important that aggrieved individuals have the right to challenge decision that are inimical to their interests, and to seek effective and meaningful forms of redress where those interests are believed to have been transgressed. The protection of these rights can only be maintained where individuals have the capacity to legally challenge decisions in an appropriate jurisdiction, without fear that a genuinely held claim will be peremptorily dismissed.

[5] Fair Work Bill 2008, cl. 397.

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The AWU submits that employees covered by Australian Workplace Agreements (AWAs) made prior to March 2008 should be entitled to the same unfair dismissal protection as employees under applicable enterprise agreements. Paragraph 382(b)(ii) should be amended to include reference to employees covered by AWAs.

ENTERPRISE AGREEMENTS – PART 2, DIVISIONS 1-4

Subclause 173(3) requires an employer to give employees notice of their representation rights not later than 14 days after the notification time for the agreement. The period should be reduced to 7 days to provide employees or their bargaining representatives with the maximum possible opportunity to bargain for the agreement.

Subclause 175(2) exempts an employer from providing notice about an intention to make a Greenfields Agreement "...if the employer does not know, or could not reasonably be expected to know, that the employee organisation is a relevant employee organisation in relation to the agreement".[6] The effect of this drafting is that the notice provisions do not apply if the employer does not know or could not reasonably be expected to know. This should be amended to read "if the employer does not know ***and*** could not reasonably be expected to know". (emphasis added)

Without amendment, an employer may plead ignorance and establish that they did not know that the employee organisation was relevant to avoid the notice provisions. There appears to be an intention to provide an objective standard on what an employer should be taken to have knowledge about. The AWU submits that this is not adequately reflected in wording of the subclause.

Subclause 175(4) should be amended on the same basis as subclause 173(3) so that the period is reduced to 7 days.

The AWU submits that subclause 177(c) will be largely ineffective unless the wording of subclause 175(2) is amended. If an employee organisation is not made aware of an intention to make the agreement because the employer did not "know" the organisation was relevant, a bargaining representative may not have an opportunity to participate in the process at all.

The same issue identified in relation to subclause 175(2) applies for subclause 179(2). There is no objective check on what an employer or their bargaining representative is taken to "know" about other bargaining representatives. This would render the civil remedy provision in subclause 179(1) ineffective unless the applicant can establish with evidence the actual knowledge of the employer or bargaining representative.

[6] Fair Work Bill 2008, cl. 175(2).

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FWA's GENERAL ROLE IN FACILITATING BARGAINING – DIVISION 8

Subclause 230(2)(a) states that a bargaining order can be made where the employer or employers have agreed to bargain. However, there does not appear to be any guidance regarding the interpretation of when an employer will be taken to have agreed to bargain. The AWU submits that an employer should be taken to have agreed to bargain once the employer raises any issues about the potential terms of an agreement with any employees or employee organisations. This should be reflected in the legislation to provide consistency and clarity around this significant issue. Whether or not an employer is taken to have agreed to bargain will determine whether an application for a good faith bargaining order can be made without the need for a majority support determination, scope order or low-paid authorisation.

Subclause 240(4) empowers FWA to arbitrate a bargaining dispute if the bargaining representatives have agreed on this course of action. The power to arbitrate should not be limited to agreement and should be available to FWA in circumstances where there is no prospect of agreement on a given issue. The arbitration power of FWA is similarly limited by subclause 595(3). Full arbitral powers such as these are not novel within Australian industrial jurisprudence. The Queensland Industrial Relations Commission has been reposed with these powers since 2000, and this has not presented bargaining participants (or indeed the Queensland Industrial Relations Commission) with any significant impediments to bargaining processes, or outcomes[7].

RIGHT OF ENTRY

The AWU notes that clause 484 of the Fair Work Bill provides for any permit holder to enter a workplace to hold discussions with employees "...whose industrial interests the permit holder's organisation is entitled to represent...".[8] The AWU opposes this provision on the grounds that it places an onus on the employer to be abreast of the eligibility rules of registered organisations. Clause 518 of the Bill, which deals with entry notice requirements, provides for the employee organisation to specify the provisions of the organisations rules which entitle the organisation to represent the person/member. For many registered organisations the eligibility rules are lengthy, complex and may list hundreds of callings. For small employers without the requisite expertise in the eligibility rules of registered organisations, there may be oversights and refusals in allowing officials to enter and increased administrative burden. This could result in entry disputes and potentially place a great burden on FWA. If the Bill is passed and becomes law and the right of entry provisions remain substantially unaltered, the AWU believes that the requirement to list the eligibility rule is unnecessary and will have no positive effect.

The AWU supports the provisions in the Bill relating to rights that may be exercised while on an employer's premises.[9] The AWU supports the provisions relating to the ability to inspect the employment records of non-members. The AWU submits that clause 482 provides employee organisations with the powers necessary to meaningfully investigate suspected breaches.

[7] refer s.149 of the Industrial Relations Act 1999 (Qld)
[8] Fair Work Bill 2008, cl. 484.
[9] Fair Work Bill 2008, cl. 482.

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The AWU notes that the requirement to provide 24 hours written notice of entry has been retained in the Fair Work Bill.[10] The retention of this requirement is an unnecessary obstacle to the ability of employee organisations' to consult with members and other interested employees. This is particularly the case in remote locations. There may be circumstances where a union member or group of employees request an urgent meeting with a union official to discuss a pressing workplace issue. In such circumstances it is unnecessary for the employer to post notices or inform employees of a scheduled meeting. The AWU submits that the requirement to provide 24-hours' written notice of entry is unnecessarily restrictive. It is an obstacle to members' abilities to meet with their employee organisation at short notice, and it should be removed from the Bill. The requirement to give notice may be retained, however an oral notice to an employer is sufficient. The legislature could provide an exception on the requirement to provide written notice where there is would be unreasonable to provide written notice.

With respect to the exercise of right of entry on remote locations, the AWU submits that amendments should be made to the Bill to require an employer to provide to a permit holder accommodation and meals, at a reasonable cost. In some instances, this will also necessitate the provision of transportation (eg. helicopter transportation to and from off-shore rigs or vessels) In many of the industries that the AWU has members engaged in (eg. mining, drilling exploration, off-shore hydrocarbons), operations are conducted away from regional centres and often necessitate permit holders traveling significant distances to and from worksites, where our members reside in camp conditions. Without a provision of this type, effective right of entry is rendered nugatory and meaningless.

The AWU submits that the provisions in the Bill relating the conduct of interviews in a particular room[11] do not go far enough to prevent the intimidation of employees wishing to participate in discussions with employee organisations. The Bill provides that employers may request an official of an employee organisation to conduct discussions in a "particular room or area of the premises",[12] and that this request must be reasonable. Paragraph 492(2)(b) provides that the request to conduct discussions in a particular room will not be reasonable if it is made with the intention of "...intimidating persons who might participate in the interviews or discussions...",[13] or "...discouraging persons from participating in the interviews or discussions...".[14] However, the AWU submits that it is currently common practice for employers and human resources managers to select a room for discussion which is adjacent or nearby the managers' offices. Managers often justify this by saying that all the rooms suitable for holding discussions are located in the administration area. Although this may sometimes be the case, it often requires employees who are interested in participating in discussions with their employee organisation to walk past a manager's office in order to attend the discussions.

[10] Fair Work Bill 2008, cl. 487(3).
[11] Fair Work Bill 2008, cl. 492.
[12] Fair Work Bill 2008, cl. 492(1)(a).
[13] Fair Work Bill 2008, cl. 492(2)(b)(i).
[14] Fair Work Bill 2008, cl. 492(2)(b)(ii).

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The AWU submits that this form of intimidation is not effectively dealt with by the Fair Work Bill 2008. The AWU submits that the designated lunch room or lunch area is most often the appropriate place for employees to hold discussions with their employee organisation as it is accessible to all employees. This ensures that the employee can participate in discussions without having to identify themselves as union members or employees interested in union activities. Therefore, the AWU submits that officials of employee organisations should be able to nominate a suitable and accessible location for conducting discussions and the employer should only be permitted to refuse this request on reasonable grounds.

The AWU is opposed to clause 495(1)(b), which requires 24 hours' notice to be given before a permit holder may exercise right of entry in relation to an OHS breach. This clause does not achieve the intention of readily allowing entry where the alleged OHS breach may pose an "imminent risk" to an employee's health and safety.

GOOD FAITH BARGAINING

The AWU supports the removal of provisions relating to the initiation of bargaining periods. Bargaining for an agreement may occur at any time under the Bill. In respect of subclause 229(3), the AWU submits that the legislature should reconsider the timeframe limiting the bargaining orders restriction to 90 days and the potential extension to 6 months prior to the nominal expiry date. It should be noted that there are protracted negotiations with larger companies which may extend bargaining well over the three month period.

The Good Faith Bargaining order provisions are welcomed by the Union. The provisions may assist representatives in addressing the actions required to specifically allow parties to meaningfully present and represent their interests.
The provisions may assist in breaking deadlocks, however it must be noted that there is potential for employers to ostensibly meet the good faith bargaining requirements without actually taking positive and meaningful steps toward the resolution of an agreement.

The limitation in paragraph 228(1)(b) for the non-disclosure of "commercially sensitive" information may be used as a mechanism to excuse employers from disclosing potentially relevant information. The term is not defined. Arguments around what constitutes commercially sensitive information in the context of the provision may result in administrative burdens for FWA.

The AWU believes the inclusion of the term "confidential information" does the work required and sufficiently protects employers.

Furthermore, if the term "commercially sensitive information" remains in the Bill and becomes law then such a provision should require disclosure of commercially sensitive information where the recipient bargaining representative undertakes to not disclose the "commercially sensitive information" to a third party. The undertaking could be enforceable. This will allow for the information deemed to be "commercially sensitive" to pass between representatives while protecting the information. This approach would accord with the approach taken in paragraphs 532(2)(e) and 787(2)(e).

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The AWU believes that the Good Faith Bargaining provisions should be extended to apply to the variations of agreements.

SCOPE OF BARGAINING

Section 172 expands the scope of those matters about which an Enterprise Agreement may be reached.

There has been much recent ambiguity and debate about what matters may be included in agreements. The AWU considers the scope of section 172 fairly and clearly outlines the content of future agreements.

We note the intention (at EM 670) that *matters pertaining to the employment relationship* should be construed within the existing jurisprudence. We support the express references (at ss. 172(1)(b) and (c)) to employee organisation and deductions from wages. We consider it fair and reasonable that terms relating to the organisation's legitimate role in representing employees be included. We also note that expressly permitting the deduction from wages serves to finally resolve inconsistencies in case law (at EM 679).

INDUSTRIAL ACTION

Since the enactment of the Building and Construction Industry Improvement Act 2005 [BCII Act] in September 2005 there has been a disconnected and additional set of industrial laws applying only to those working in the commercial construction industry.
The AWU supports a position where there is one law for employees in Australia, and submit that the BCII Act should be repealed with the passage of the Bill. Please refer to the earlier Senate Committee submission of the combined construction unions further on this matter.[15]

Definition of Industrial Action

The AWU proposes that for the avoidance of doubt the proposed clause 19 of the Bill should specifically provide that an activity that merely involves communication of information to persons entering or leaving a site is not "industrial action". This specificity will ensure that the confusion over the communication to employees is not misconstrued as industrial action by employers who are not knowledgeable in application of industrial law.

The AWU supports the inclusion of the note at 19(1) of the Bill.

[15] Submission by the Combined Construction Unions Senate Education, Employment and Workplace Relations Committee, Inquiry into the Building and Construction Industry (Restoring Workplace Rights) Bill 2008.

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Definition of Industrial Action and OHS Exception:

To the extent that the Bill's provisions relating to industrial action remain in substantially the current form, the AWU supports the removal of the reverse onus of proof on the employee regarding the health and safety.

Section 19 provides

"**Meaning of *industrial action***

*(1) **Industrial action** means action of any of the following kinds:*

(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;

(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;

(d) the lockout of employees from their employment by the employer of the employees.

Note: In Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.

*(2) However, **industrial action** does not include the following:*

(a) action by employees that is authorised or agreed to by the employer of the employees;

(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;

(c) action by an employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

*(3) An employer **locks out** employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts."*

The AWU is opposed to the retention of the term "imminent risk" in this clause and submits that the construction of that paragraph should be revisited by the legislature. The AWU understands that the term "imminent risk" has a long and involved history of application, however the terms of the paragraph are too restrictive and are open to misapplication, which could in turn result in increased risk to individual employees.

The AWU is aware of examples of risk to health and safety where the proximity of the employee to the risk is deemed not to be "imminent" by the employer to one employee's safety, including -

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Example 1 – This incident related to the projection of a bolt from a pressurised pipe, which slightly missed one employee. The employer deemed the risk to be "imminent" to only that employee and referred to the current provisions of the Workplace Relations Act, which are similar to those proposed in the Bill. Other employees working with the employee and in the proximity of the projectile of the failed pressurised pipe were advised by the employer they were not within the scope of the "imminent risk" exclusion from the meaning of "industrial action". The employees were advised that any stoppage of work would be industrial action and the employer would pursue litigation. The employer referred to the imminent risk element of the exclusion as the basis for their potential action.

Example 2 - A workplace forklift, which was suffering from very poor maintenance, was emitting diesel fumes and operating with the tines (forks) having been cut down illegally so the machine could travel easier through the factory. This could have lead to unstable loads being moved around the factory. Working in the proximity of this forklift may not be deemed an "imminent risk", even if there was a reasonable concern.

The removal of the reverse onus of proof in the exclusion from the definition of industrial action goes part of the way to achieving the intent of the legislation, however we are concerned the terminology of the section is unnecessarily prescriptive and can be referenced by employers in a way which increases the likelihood of the real risk to the employee. The reasonableness of the employee's subjective concern suffices as a test, without the necessity of the risk to be "imminent".

Notwithstanding the foregoing submissions, and in the alternative, the AWU proposes that consideration be given to refining the definition of "imminent risk" to provide some guidance as to when some event or thing becomes an imminent danger or becomes critical.

Definition of Action by an Industrial Association (s.363)

The AWU notes that Part 3-1 ("rights and responsibilities") contains a definition of industrial action which if transported to Part 3-3 ("industrial action") is particularly detrimental to the interests of industrial associations.

Section 363(1)(d) defines "for the purpose of this Part... action of an industrial association" to include those "actions taken by a member... who performs the function of dealing with an employer on behalf of the member and other members of the association, acting in that capacity." The onus then falls on an association to establish the exemption applies: that it took reasonable steps to prevent the action.

This provision essentially replicates the "deeming provision" at s.69 of the BCII Act. The effect is to hold an association liable for the industrial action of members in circumstances where the association played no role in organising that action.

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Section 69 has been applied broadly in Gregory *Charles Alfred v Robert Wakelin and Or*s Federal Court of Australia (Court) NSD 858 of 2007. In that case, the AWU was held to be liable for the industrial action of employees in the following circumstances:

- The member was neither elected delegate by members nor appointed by an Officer of the union;
- Without the knowledge of the union, the member attended a small number of meetings with management purporting to speak on behalf of members;
- The site was a remote location;
- An Officer of the union attended the site on at least one occasion to strongly and formally advise a mass meeting not to take industrial action;
- The Officer of the union did not know about the industrial action until after it occurred.

Such a decision runs contrary to the decision of the Full Court in *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26 which, in the absence of deeming provisions, carefully distinguishes between the liability of employees and their representative association.

Formally, the deeming provision of clause 363 will be construed to apply only to Part 3-1. However, Part 3-1 governs the rights and responsibilities of employees and industrial associations in *relation to industrial action*. Clearly, the rights and responsibilities contained in each Part are interconnected. The concurrent application of different laws relating to the standards of industrial associations inevitably leads to irregularities, confusion and potential misapplication.

It is the strong submission of the AWU that clause 363(1)(d) should be deleted. It provides no notable benefit to Part 3-1 and lends dangerous ambiguity to the operation of Part 3-3. An association should only be liable for unprotected industrial action where the association organises, encourages or incites that action.

Protected Industrial Action can be taken in relation to certain matters (s.409)

The definition of "employee claim action" is expanded to include the advancement of claims that are reasonably believed to be about permitted matters. Bargaining has become overly legalistic and complex. The AWU supports this expanded definition.

Immunity from prosecution lost for "pattern bargaining"

In our submission, "pattern bargaining" constitutes an instance where a bargaining representative is not genuinely trying to reach agreement. Proscribing such conduct does not require separate provisions.

We note that it is entirely legitimate to genuinely try to reach an agreement which imports recognised industry standards to a particular site. The inclusion of an ill-defined notion of "pattern bargaining" undermines the legitimacy of advocating for industry, market or sectoral standards.

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The AWU submits that the definitions of "genuineness" at s.412(3) and good faith bargaining at s.228 amply describe the proper conduct of bargaining representatives. The additional concept of "pattern bargaining" is both unnecessary and undermining of valid employee claims. In our submission it should be removed.

Removal of Secondary Boycott provisions

Currently, industrial action which involves persons who are not protected is excluded from the immunity from prosecution. In practice, this situation is likely to occur without the knowledge or intention of bargaining representatives. Most common examples involve non-members unwittingly joining participating in industrial action, or multi-union negotiating teams where one party has filed defective notices.

The AWU supports the removal of those provisions that rendered action unprotected if unprotected persons join in.

Orders stopping industrial action

The Bill retains the strict approach of the WRA in relation to orders banning industrial action. Like preceding legislation, FWA has no available discretion in the issue of an order. Additionally, if the matter cannot be determined within 2 days, an interim order must issue.

The AWU calls for greater discretionary power to be afforded to FWA.

Discretion should be available to either:

- Decline to issue an order in exceptional circumstances where it appears that industrial action is happening, threatened or being organised, yet the issue in dispute is of sufficient gravity. This would enable certain exceptional matters to be dealt with, more appropriately, as an industrial dispute rather than a legal proceeding; and/or
- Extend the deadline for the issue of interim orders. Most commonly, applications are listed for hearing approaching the expiry of the timeframe. This presents the following problems:
    1. Procedural fairness to employees and unions is compromised as their representatives have inadequate opportunity to be briefed and present submissions before an order issues.
    2. FWA has inadequate time to properly assess whether the jurisdictional threshold has been met before an order must issue regardless.
    3. Any possibility of resolving the issue by conciliation is removed.

The Bill confers significant discretionary and mandatory power on FWA to suspend or terminate protected industrial action in certain circumstances. In general, the AWU supports these provisions. We note that according to the rationale described in the Explanatory Memorandum, these provisions are not intended to be used by employers to prevent mere inconvenience or legitimate protected industrial action.

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However, in our submission, the inclusion of "cooling off" as a ground for mandatory suspension is not consistent with this rationale. An application made under clause 425 is particularly likely to be used as a tactical devise to undermine the legitimate role of protected action. The power available to FWA to determine such an application should be discretionary.

Protected Action Ballot

The Ballot application process has been further streamlined in two key respects:

1) Under WRA, the Commission has to be satisfied that "relevant employees" received a reasonable opportunity to make submissions. Each member deals with this requirement differently. Some require an additional hearing; others direct that certain conduct occur prior to a single substantive hearing. Overall, the procedure is unnecessarily cumbersome, confusing and frenetic given the 2 day timeframe. The additional procedural step also serves no genuine natural justice purpose. The AWU supports the removal of this provision.

2) Secondly, WRA imposes an awkward test regarding the genuineness of bargaining, confining the assessment of genuineness to conduct *during the bargaining period*. Any and all bargaining prior to the formal Initiation of a Bargaining Period is excluded from consideration. The AWU supports the broadening of the assessment to whether the applicant *has been and is* genuinely trying to reach agreement.

We also support enabling applicants to seek ballot orders prior to the nominal expiry date of agreements (s.438). This may assist some parties to negotiate the subsequent agreement efficiently and without gap. The AWU submits that if Subdivision B of Division 8 of Part 3-3 remains substantially unaltered then the legislature should consider changing the time within which the application for a protected action ballot may be made. The current provision [sub clause 438(1)] provides for a ballot order to be made no more than 30 days before the nominal expiry of the agreement. We submit that the to accord with the provisions relating to good faith bargaining orders the Bill should be amended so that the protected action ballot order may be made no more than 90 days before the nominal expiry of the agreement.

The AWU supports the intention of sub clause 464(2) and the Commonwealth's financing of protected action ballots. This alleviates the financial burden on the unions for the cost of protected action ballots, which are mandated by law.

Payments in relation to Protected Industrial Action

Under the Bill it is unlawful for an employer to pay, or for an employee to demand payment, for any period of protected (clause 473), or unprotected (clause 475), industrial action.

Clause 470 provides that where an employee engages in protected industrial action, the employee must not pay the employee for the duration of the action taken.

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The Bill distinguishes between payments in relation to protected and unprotected industrial action. Although we appreciate the rationale, we do not support this distinction.

We support the removal of a minimum deduction of 4 hours in relation to payment for protected industrial action. This will remove the incentive to conduct industrial action for a minimum duration of four hours.

The AWU also supports the introduction of a regime enabling proportionate pay in relation to partial work bans (clause 471). Under WRA, the imposition of a protected work ban meant total loss of pay. This is unfortunate given that such bans often serve practically to highlight an issue in contention in bargaining. They also impose a considered, targeted detriment on the employer, rather than the generalised, usually more burdensome, full stoppage of work. The AWU supports the move to confer jurisdiction on FWA to resolve issues of appropriate proportionate pay for partial work bans.

The AWU does not support the imposition of a more punitive standard in relation to payment for periods of unprotected industrial action. The provision of a minimum deduction of 4 hours merely acts as an incentive to escalate the duration of industrial action.

ADDITIONAL SAFEGUARDS

The AWU supports the additional safeguards which prohibit employers from taking adverse action against employees for exercising a workplace right (listed at clause 341)

MODERN AWARDS

Pursuant to clause 154, modern awards are not allowed to have State based differences for more than five years. Although employees are not to be disadvantaged in the Award Modernisation process, the standardisation of conditions will result in unintended reduction in conditions of workers at levels below those currently applied under the award system. This is an apparent outcome from review of the Priority Modern Awards made on 19 December 2008.

The compulsory review of modern awards is provided for in clause 156. The AWU is concerned that the FWA must only conduct a 4 yearly review of modern awards. Parliament should consider revising the timeframe for compulsory review to a shorter period. Within this four year review there should be provision made in the Bill for organisations to be heard and consulted as part of FWA's compulsory review process.

There are rights for an organisation to apply to vary modern awards, under clause 158, outside of the four yearly review processes. Organisations eligible to represent employees covered by a modern award may make application to vary modern awards. In addition, these application rights should be linked to the four yearly reviews so that organisations are also heard on the compulsory review. The award modernisation process has highlighted the capacity of organisations to provide invaluable input into the variation of awards and the Bill does not provide for a mechanism whereby organisations are heard and involved in the compulsory four-year review.

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In addition to the compulsory four yearly reviews, the AWU proposes that FWA be required to conduct a one-off review of the modern awards after their first year of operation. This will ensure that any oversights can be corrected in a timely and orderly fashion.

Modern awards are not allowed to have State based differences for more than five years. This provision anticipates a compulsory review of the awards after five years of operation. This timeframe is longer than the first four yearly review. If the first compulsory review were to take place one year after the modern awards become operative, then the next review (four years later) would allow for the five year limit on the State based differences to be addressed within the appropriate timeframe.

MODERN AWARD APPLICATION – HIGH INCOME EMPLOYEES

The Bill proposes to establish a mechanism by which certain "high income" employees are excluded from the application of the terms and conditions of a modern award ("mechanism").

The mechanism includes a process for the establishment of a "high income" threshold[16] (which is determined by Regulation), in conjunction with a process for the creation of a "guarantee of annual earnings" by agreement between an employer and an employee[17].

The AWU opposes not only the concept of the mechanism on the basis of an arbitrary income threshold, but also opposes the proposed mechanism for award exclusion on the basis of identifiable flaws in the design, operation, and likely effects of such a statutory scheme, for the following reasons.

1) Arbitrary Establishment of Income Threshold

There is no readily identifiable rationale or justification for the establishment of a "high income" threshold of $100,000 for the purposes of the mechanism. In the absence of a clearly articulated rationale, the threshold figure appears to be, at best, an arbitrary concept.

With the process of award modernisation presently proceeding before the Australian Industrial Relations Commission, it is evident that very few, if any, modern awards will contain minimum conditions of employment that would ordinarily result in an employee reaching the "high income" threshold. The non-coal mining industry is one notable exception, principally by reason of the fact that many significant mining operations are conducted in rural and remote areas, and are typified by fly-in/fly-out arrangements, with compressed and intensive rostering arrangements and extended daily hours of work provisions. Whilst the actual minimum rates of pay in a modern mining award do not exceed the threshold (they are, in fact, substantially less than the threshold

[16] Clause 333 Fair Work Bill
[17] Division 3 of the Fair Work Bill

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when factored on ordinary hours of work over a year), the configuration of rostering patterns and extended hours of work arrangements result in a level of aggregate award earnings that could, in fact, exceed the threshold (taking into account allowances, overtime, and other award-stipulated emoluments).

Consequently, it is only by reason of award related terms and conditions that an employee may exceed the threshold, as opposed to the stated (and conceptually vague) notion that persons earning more than $100,000 per annum are (by reason of their level of aggregate earnings alone) somehow better able to represent their own industrial interests and are not reliant on award-derived terms and conditions of employment. The policy underpinnings of the proposed mechanism are vacuous to say the least.

2) The Guarantee – Determining the Parameters

In accordance with the proposed mechanism, employers are required to guarantee an employee a minimum annual level of earnings in excess of the "high income" threshold in order for the employee to be excluded from the application of a modern award that would otherwise govern the employee's terms and conditions of employment.

There is nothing in the mechanism to guide, determine or assess the appropriateness of the monetary value of the guarantee offered against the level of aggregate earnings an employee may have earned subject to the operation of a modern award. Outside of the particular employer or employee concerned, there is no external or independent evaluation of the appropriateness of a guarantee either.

In order for an employee to make an industrially fair and informed decision about the appropriateness of the level of earnings guaranteed, one would usually expect a set of work-related parameters to be firmly established (eg. expected weekly rostered hours of work, ordinary daily working hours etc) in order for such an assessment to be properly made prior to acceptance. Such a process does not exist in the proposed mechanism.

Worryingly, once a guaranteed level of earnings are agreed, an employee is completely deprived of any protections that a modern award may otherwise provide with regard to consultation about changes to hours of work, rosters, the taking of rest breaks during working time, and award dispute procedures. There is nothing to prevent an employer from unilaterally changing fundamental and pre-existing working parameters relating to an employee's working time (that is, conditions that existed prior to the application of a guaranteed level of annual earnings), to the complete disadvantage of the employee. Arguably, more intensive rosters and greatly extended daily hours of work arrangements may be imposed upon an employee without their consent, with the perverse result that an employee might otherwise have earned more than the guarantee that had been entered into if they were working subject to the application of a modern award on the basis of those revised arrangements.

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From a policy perspective, such an outcome is industrially undesirable and invites methods of exploitation and unfair practice that may seriously disadvantage employees. This, coupled with a complete absence of statutory remedies or redress is incompatible with a modern, and fair, system of industrial regulation and goes much further than *WorkChoices* ever contemplated toward the deregulation of industrial arrangements.

3) Potential Changes to the "high income" threshold

It is proposed that the "high income" threshold be determined by Regulation. As a consequence, there is no guarantee that the threshold amount may not be reduced by subsequent governments, without any proper parliamentary oversight or debate.

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