SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO THE FAIR WORK BILL 2008

DEPARTMENT OF EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS SUBMISSION

9 JANUARY 2009

Contents

Section 1. Introduction

Overview

1.1 The Department of Education, Employment and Workplace Relations welcomes the opportunity to make a written submission to the Senate Committee Inquiry into the *Fair Work Bill 2008*.

1.2 The *Fair Work Bill* (the Bill) was introduced into the House of Representatives on 25 November 2008 and was passed by the House on 4 December 2008.

1.3 The Bill provides for a new workplace relations system to commence from 1 July 2009 and be fully operational from 1 January 2010. It gives effect to the *Forward with Fairness* policy commitments the Government took to the last election and follows on from earlier transitional legislation, the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008,* that commenced on 28 March 2008[1].

1.4 The key features of the new system include:

- a fair and simple safety net, with ten National Employment Standards (NES) covering all employees that cannot be bargained away, with a further 10 minimum conditions for employees covered by new, modern awards;
- an enterprise-level collective bargaining system, underpinned by good faith bargaining, to drive improved productivity;
- fair treatment in the workplace, with strong but simple protections against unfair dismissal;
- a new, institutional framework made up of Fair Work Australia (FWA) and the Fair Work Ombudsman, which will provide streamlined access to practical information, advice and assistance to deal with workplace issues and to ensure compliance with workplace laws; and
- strong compliance measures, including clear, tough rules on industrial action.

1.5 These key components of the new system will be supported by transitional arrangements – to be introduced in separate legislation - which will move employees and employers into the new system.

1.6 The introduction of the Bill is the culmination of a year-long process of consultation that reflects the Government's commitment to get the new system 'right', to properly recognise and balance the interests of both employees and employers and to provide the basis for a stable and enduring system of national workplace laws for the future.

Purpose of the submission

1.7 The submission supplements the briefing the Department provided to the Committee on 11 December 2008. The transcript of the evidence from the Department on that day can be found at: http://www.aph.gov.au/Senate/committee/eet_ctte/fair_work.

1.8 The purpose of this submission is not to repeat the factual overview the Department has already provided to the Committee on the contents of the Bill

[1] The Department's submission to the Senate Inquiry on the transitional legislation can be located at http://www.aph.gov.au/Senate/committee/eet_ctte/wr_tff08/submissions/sub27.pdf

or the content of the Regulatory Analysis contained in the Explanatory Memorandum.

1.9 In this submission, the Department intends to focus on a number of key aspects of the Bill and to discuss and examine their underpinning policy intent and anticipated impact.

1.10 In doing so, the submission will also respond to a number of issues that have been raised by various stakeholders since the Bill was introduced.

Outline of submission

1.11 The submission is divided into eight sections.

1.12 This opening section introduces the submission with a brief overview of the Bill and outlines the purpose of the submission.

1.13 Section 2 of the submission examines the likely economic impact of the Bill. This will include an overview of the economic environment in which the Bill will operate and analyses the impact of the reforms on key economic indicators, such as employment, wages, productivity and workplace disputation, with reference to relevant national and international evidence and research.

1.14 Section 3 of the submission focuses on agreement-making and the safety net. These are central elements of the new system, which will shape the working arrangements of the vast majority of employers and employees across Australia. The analysis in this section will examine the extent to which the reforms will support increased agreement-making, underpinned by a guaranteed safety net at the workplace level. This includes consideration of the protections provided by the new NES and modern awards and the opportunities and benefits available under the new bargaining framework, with reference to key provisions such as good faith bargaining and the new bargaining stream for the low-paid.

1.15 Section 4 deals with issues of fairness and representation at work and the prevention of discrimination. This section will focus on those provisions in the Bill that set out the rights and responsibilities of employees, employers and the organisations that represent them. Particular reference is made to the introduction of broader workplace rights under the new general protections provisions in the Bill, balanced right of entry laws, fairer protections against unfair dismissal, improved anti-discrimination protections and a greater capacity to pursue pay equity.

1.16 Section 5 looks at how the Bill helps to introduce a simpler workplace relations system that will enable a better understanding of the application and enforcement of workplace rights. This includes an examination of the benefits, from an implementation perspective, of the introduction of a simple safety net that is easy to understand and apply for both employers and employees; a new institutional framework that will operate in effect as a “one-stop-shop”; simple and quick enforcement of employee entitlements and simplified legislative drafting in areas such as secret ballots.

1.17 Section 6 examines the flexibilities the Bill offers for both employers and employees, particularly in helping to manage the balance between work and family responsibilities. These flexibilities are available through the NES, individual flexibility arrangements in modern awards and enterprise agreements

and are supported by the reference in the Objects of the Bill to balancing work and family responsibilities through flexible working arrangements.

1.18 Section 7 informs the Committee on progress towards a national workplace relations system for the private sector and the implications for employees, employers and the Australian economy of moving towards a single, national workplace relations system for the private sector.

1.19 Section 8 provides some concluding comments.

Section 2. Economic environment

Introduction

2.1 This section provides details of the economic environment in which the Bill is being introduced. There is a particular focus on how the Bill will impact on wages, industrial disputation, employment and productivity.

2.2 The information in this section should be read in conjunction with the Regulatory Analysis contained in the Explanatory Memorandum to the Bill. The Office of Best Practice Regulation agrees that the Regulatory Analysis has effectively documented the regulatory implications of the Government's legislative proposals compared with the legislative framework under the *Workplace Relations Act 1996* (the WR Act).

2.3 The provisions in the Bill are designed to meet the needs of Australia's employers and employees by providing a framework for workplace relations that is flexible, simple and adaptable.

2.4 The measures contained in the Bill will benefit workers who will have the protection of a strong safety net and greater security in employment. Both employers and employees will have greater opportunities to share in the intended benefits available from collective bargaining, in terms of improved wages and conditions and greater productivity.

2.5 Specific provisions in the Bill reflect the Government's commitment to put in place a comprehensive safety net which cannot be "stripped away". While it is difficult to quantify additional labour costs that may result from this measure - for example, some employers made agreements under the *Workplace Relations Amendment (Work Choices) Act 2005* (the Work Choices amendments) that reduced wages and conditions - the Department anticipates it will not significantly affect costs for the vast majority of employers.

2.6 While the Bill provides unfair dismissal rights in a way which may expose more businesses to unfair dismissals claims, it provides longer probationary periods and a Fair Dismissal Code for small businesses. In addition, the Bill aims to simplify the process and reduce the costs involved for employers who do find themselves the subject of unfair dismissal action.

2.7 The NES will introduce greater certainty about entitlements and greater flexibilities for employees, which should have a positive impact on labour force participation and productivity. Similarly, the flexibilities and simplifications available through modern awards and the institutional framework should have a positive effect on business costs.

2.8 The Government acknowledges the detrimental economic effects of pattern bargaining. Accordingly, the Bill retains the existing approach to pattern bargaining, that is, industrial action taken in support of pattern bargaining will not be protected action and will be subject to injunctions.

2.9 The recently released OECD Economic Survey of Australia provides broad support for the measures contained in the Bill.

Economic Environment

2.10 Some commentators have suggested that provisions in the Fair Work Bill will increase employment costs at a time of significant global economic uncertainty[2].

2.11 Clearly, there has been a seismic shift in the global economic outlook. The fallout from the sub-prime crisis in the United States of America has spread around the world, with the reverberations being felt in Australia.

2.12 The International Monetary Fund (IMF), in its World Economic Outlook Update released on November 6 2008, states that "Prospects for global growth have deteriorated over the past month, as financial sector deleveraging has continued and producer and consumer confidence have fallen." Furthermore, it found that "Markets have entered a vicious cycle of asset deleveraging, price declines and investor redemptions". Against this background, the IMF observed "Global action to support financial markets and provide further fiscal stimulus and monetary easing can help limit the decline in world growth."[3]

2.13 As a result of these developments, the focus of concern in Australia has shifted away from inflation towards unemployment and there have been significant downward revisions to domestic economic forecasts. The latest Australian National Accounts data show growth in Gross Domestic Product (GDP) was just 0.1 per cent in the September quarter 2008 and 1.9 per cent over the year to the September quarter 2008.[4]

2.14 In response to these difficult economic circumstances, the Government has developed a $10.4 billion Economic Security Strategy to strengthen the economy in the face of the global financial crisis and create up to 75,000 jobs.

2.15 The provisions contained in the Bill provide a stable framework for cooperative and productive workplaces in Australia. This framework is designed to provide flexibility and fairness throughout the economic cycle.

2.16 For example, in setting minimum wages, FWA must take into account the performance of the national economy, productivity, business competitiveness and viability, inflation and employment growth, as well as social factors.

The OECD and Australia's workplace relations reforms

2.17 The OECD released its latest Economic Survey of Australia on 10 October 2008. While the survey was completed before the current magnitude of the global financial crisis was evident, it makes some pertinent observations on workplace relations in Australia and several recommendations. The OECD compiled the survey before the full details of the provisions in the Bill were made public.

2.18 The OECD's key observations relevant to the *Fair Work Bill 2008* are as follows:

[2] P. Kelly, 'IR reforms asking for trouble', *Weekend Australian*, 29 November 2008, and L. Yilmaz, 'NES a burden to small business costs: VACC', *WorkplaceInfo*, 25 June 2008

[3] International Monetary Fund, *World Economic Outlook Update*, 6 November 2008

[4] ABS *Australian National Accounts* (Cat. No. 5206.0) September quarter 2008, seasonally adjusted data

- The Work Choices amendments were heavily criticised in Australia for going too far in expanding employers' prerogatives and being used to cut labour costs.
- The labour market will benefit from the move towards a national system of industrial relations, resulting in the simplification and harmonisation of regulations between the states.
- Care should be taken not to undermine labour market flexibility. The aim should be to have moderate minimum wages and labour costs, while providing effective protection of the most vulnerable wage earners.
- The Government's reforms encourage collective bargaining at the firm level. Collective bargaining arrangements should preserve a close tie-in between productivity and wage increases at the company level. The reforms acknowledge this through a ban on pattern bargaining.
- Plans to re-introduce unfair dismissal protection should retain flexibility for small businesses. A small business fair dismissal code that does not entail high administrative costs would be welcomed.

2.19 According to the OECD, the following recommendations are necessary to maintain a flexible labour market:

- preserve collective bargaining at the firm level to maintain a close link between productivity and wages;
- harmonise the systems of industrial relations across the states; and
- modernise awards.

Summary of the Fair Work Bill 2008 in light of the OECD's recommendations

2.20 Overall, the Bill is broadly consistent with the OECD's recommendations. The three recommendations are all addressed in the Bill, which is focussed on bargaining at the enterprise level and limits the imposts on employers necessary to achieve the appropriate balance between the rights of employers and employees.

2.21 The OECD identified two potential concerns. The first is the potential for the re-introduction of unfair dismissal protection for small and medium-sized businesses to reduce labour market efficiency by discouraging the employment of new staff. The second is the potential for multi-firm bargaining to lead to wage rises that are not related to productivity gains. These issues are dealt with in turn below.

2.22 The OECD expects the average level of employment protection in Australia to remain moderate by comparison with international standards after the Bill comes into operation. Importantly, the OECD has found that there is no clear cut relationship between employment protection legislation, of which unfair dismissal protection is a key component, and levels of employment. The Bill balances the need for protection for employees from unfair dismissal with the need for employers to be able to manage their businesses with confidence.

2.23 The vast majority of bargaining under the new system will be done at the single enterprise level. The Bill also gives effect to the Government's commitment in *Forward with Fairness* to assist low-paid employees and their employers to access the benefits of collective bargaining by providing a special stream of multi-employer bargaining for the low paid. However, improvements in wages and conditions in this bargaining stream will still be negotiated and be linked to productivity and service delivery improvements. Agreements made in the low paid stream can be negotiated to apply across one, some or all of the employers listed in the notification. FWA will facilitate the bargaining process

and, in limited situations where agreement cannot be reached, will be able to make a workplace determination. To make a low-paid workplace determination, FWA must be satisfied that:

- it would promote productivity and efficiency in the enterprises;
- it is in the public interest;
- no employer that will be covered by the relevant determination is, or has previously been, covered by an enterprise agreement, or another workplace determination, in relation to the work to be performed by the employees to be covered by the relevant determination; and
- the terms and conditions of the employees to be covered by the determination were substantially equivalent to the minimum safety net of terms and conditions provided by modern awards together with the NES.

2.24 In making a low-paid workplace determination, FWA must take into account the interests of the employers and employees to be covered by the determination, including ensuring that the employers are able to remain competitive. This is a strictly limited category of workplace determination for low-paid employees and their employers, which will assist both groups to get the benefits of enterprise bargaining, including productivity and service delivery improvements.

2.25 Other groups of employers not in the low-paid stream may also bargain voluntarily on a multi-employer basis, but with protections in place to ensure there is no coercion to do so. It should also be noted that, while these multi-employer bargaining options are available, protected industrial action is not available when bargaining for multi employer agreements and industrial action cannot be taken in support of pattern bargaining. Section 3 deals further with these issues.

Impact of the Bill on the level of unemployment

2.26 The forecast for rising unemployment in the 2008-09 Mid-Year Economic and Fiscal Outlook (MYEFO) are attributed to "the marked deterioration in the global growth outlook and the resulting slowdown in Australian economic growth"[5]. The forecast rise in unemployment is in no way attributed to workplace relations reform. It is consistent with the national and international evidence, more generally, that drivers of national economic growth and performance come from a far wider range of sources than the type of workplace relations system that a country adopts[6].

2.27 Changes in unemployment levels are a result of many, often interdependent, factors. These include the strength of domestic conditions, consumer and business confidence, global growth and unforeseen external shocks. These factors will be the main drivers of employment levels in the medium term.

Minimum standards

2.28 The increase in flexibility provided under the NES will encourage an increase in workforce participation among those for whom flexibility and leave are

[5] Australian Government, *Mid-year Economic and Fiscal Outlook 2008-09*, 2008, p6.

[6] See, for example, K. Aiginger, 2004, 'The relative importance of labour market reforms to economic growth; the European experience in the nineties', paper delivered at the *OECD NERO meeting on labour market issues*, Paris, 25 June 2004; D. Parham, 2002a, 'Microeconomic reforms and the revival in Australia's growth in productivity and living standards', paper presented to *Australian Conference of Economists*, Adelaide, 1 October 2002; D. Parham, 2002b, 'Productivity growth in Australia: are we enjoying a miracle', *2002 Economic and Social Outlook Conference*, Melbourne, 4-5 April 2002.

important. For example, parents and older workers are more likely to participate in a labour market that promotes flexibility to meet caring needs.

Unfair dismissal

2.29 Concerns about the impact of the Bill on unemployment tend to focus on the impact of the new unfair dismissal provisions, particularly on small business. The Bill contains specific measures to minimise the impact of unfair dismissal laws on small business, while ensuring that employees have a remedy against unfair dismissals.

2.30 Businesses with less than 15 employees have a 12 month period in which to evaluate the performance of new employees before the employee can access the unfair dismissal provisions. For businesses with 15 or more employees, this period will be six months. These qualifying periods recognise that employers require a reasonable period of time to determine whether the employee can undertake the requirements of the job.

2.31 If a small business employee is dismissed after this period and the employer followed the Small Business Fair Dismissal Code, FWA will deem the dismissal to be fair.

2.32 Where a dismissal is a case of genuine redundancy, it will not be unfair. For example, a genuine redundancy could be where a position is no longer needed because of a downturn in business.

2.33 These measures recognise the fact that small business employers often lack human resource capabilities required to deal with the administrative burdens associated with contesting unfair dismissal claims. It affords them additional confidence to take on new employees without the potential expense of unfair dismissal claims.

2.34 The employment-related concerns about providing proper protection against unfair dismissals are not supported by the empirical research in this area.

2.35 The OECD has found that there is no clear link between stricter employment protection legislation, including unfair dismissals, and employment[7]. For example, in its 2006 Employment Outlook, the OECD found that the impact of employment protection legislation on overall unemployment is probably small and recent studies have generally not found robust evidence of significant direct employment effects. It also found that moderately strict employment protections can help create a dynamic labour market while also providing adequate employment security to workers.

2.36 The OECD's conclusions are supported by several authors that found no link between employment protection legislation and levels of employment. In general, studies find that any decrease in hiring is offset by a decrease in dismissing employees, consistent with increased employment security[8].

[7] OECD, *Going for Growth*, 2007; OECD, *Employment Outlook*, 2006, p. 96; OECD, *Employment Outlook*, 1999, page 50.

[8] R. Barrett, 2005, 'Small business and unfair dismissal', *IR changes report card*, School of Business, University of Sydney; P. Browne, 'Government's IR figures only tell half the story', *Australian Policy Online,* 3 November 2005

2.37 There are two Australian studies that attempted to estimate the employment impact of the unfair dismissal laws operating earlier this decade[9]. However, these studies are based on more restrictive unfair dismissal frameworks, without the flexibilities for employers, than the framework contained in the Bill and are therefore not relevant in assessing the current changes. For example, the studies did not include a fair dismissal code for small business and had shorter qualifying periods for employers to assess staff performance.

The impact of the Bill on productivity

The importance of productivity growth

2.38 Productivity growth means that more can be produced for a given amount of labour. Labour productivity growth has been a key driver of Australia's rising living standards over the last forty years. On average, labour productivity growth has contributed 1.8 percentage points of a total 2.1 per cent growth per annum, equivalent to 85 per cent of growth in real GDP per person[10].

2.39 Historically, productivity growth in Australia has been associated with lower prices[11] and therefore, productivity growth puts downward pressure on inflation. Productivity growth also results in higher living standards of Australians. Productivity growth will increase in importance over the coming years as Australia's population ages.

Recent trends in productivity growth

2.40 Year-on-year estimates of productivity growth can be volatile and misleading. The ABS advises that the most reliable estimates of underlying trends in productivity growth are those based on a growth cycle analysis[12]. During the most recent completed growth cycle from 1998-99 to 2003-04, annual growth in labour productivity averaged 2.2 per cent. This is 1.1 percentage points below the average of 3.3 per cent over the previous growth cycle of 1993-94 to 1998-99, which was the highest growth rate on record, and coincided with the formal introduction and spread of enterprise bargaining.

2.41 Since 2003-04, productivity growth has averaged just 1.1 per cent, strongly suggesting that growth over this current cycle will be well down on the longer term average. Thus, there is considerable room for improvement in Australia's rate of productivity growth rate.

Enterprise bargaining and productivity

2.42 There is a significant body of research linking collective bargaining at the workplace level with higher rates of productivity growth.

[9] D Harding, 'Identifying and measuring the economic effects of unfair dismissal laws', 2005 and P Oslington and B Freyens, *Dismissal Costs and Their Impact on Employment: Evidence from Australian Small and Medium Enterprises*, University of New South Wales, 2005 downloaded from Munich Personal RePEc Archive (MPRA), Paper No 961, posted 7 November 2007.
[10] Australian Government *Intergenerational Report 2007*, p 31
[11] D Parham, P Barnes, P Roberts, S Kennett, *Distribution of the Economic Gains of the 1990s*, Productivity Commission Staff Research Paper, Ausinfo, Canberra, 2000
[12] ABS *Australian System of National Accounts* (Cat. No. 5204.0) 2007-08. According to the ABS, the most recently completed growth cycle ended in 2003-04

2.43 For example, research undertaken by Fry, Jarvis and Loundes[13] found that organisations entering into agreements with their workers reported substantially higher levels of self-assessed labour productivity relative to their competitors.

2.44 Another study by Tseng and Wooden[14] found that firms where all employees were on enterprise agreements had almost 9 per cent higher levels of productivity than comparable firms where employees relied upon conditions specified in an award.

2.45 Studies by the Productivity Commission[15] have found that collective agreement making is good for productivity. Collective agreements allow employees and employers to negotiate working arrangements at the enterprise level that tie wage increases to productivity improvements. History has shown that keeping wage increases in line with productivity improvements helps to contain inflation.

2.46 These studies support the view that enterprise bargaining on a collective basis can help improve productivity by promoting co-operative relationships in the workplace. This can encourage, for example, greater innovation, employee commitment to workplace efficiency and cost-reduction programs (such as energy efficiency or recycling) and use of new technology.

How the Bill promotes productivity growth

2.47 The Bill supports additional productivity enhancements by promoting collective agreement making at the enterprise level.

2.48 The new minimum standards framework ensures that firms no longer have the option of improving their financial position by cutting wages and conditions. The Bill provides employees, particularly those with children, with flexible arrangements to maintain their attachment to the labour market. This can have a positive impact on productivity growth by supporting the labour market retention of experienced workers.

2.49 The Bill's prohibition on pattern bargaining, together with the conditions surrounding multi-firm bargaining, consolidates the link between enterprise level bargaining and productivity. This accords with a recommendation by the OECD, discussed earlier, that the Government's reforms preserve the link between productivity and wage increases.

2.50 The Bill also delivers, through the NES, the right for employees to request flexible working arrangements. This is an important measure in terms of productivity and also participation. The right to request these arrangements encourages an employee to remain at their workplace as family circumstances change. Therefore, the firm retains the human capital investment they have made in the employee.

2.51 Modern awards will have flexibility terms to enable employers and employees the flexibility to negotiate mutually beneficial employment arrangements. This should facilitate productivity growth.

[13] T Fry, K Jarvis and J Loundes, 'Are Pro-Reformers Better Performers?', *Melbourne Institute Working Paper*, No. 18/02, September 2002.
[14] Y-P Tseng and M Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, Melbourne Institute Working Paper No. 8/01, July 2001, page 28
[15] Productivity Commission *Microeconomic Reforms and Australian Productivity: Exploring the Links, Volume 2: Case Studies*, Research Paper, AusInfo, Canberra, 1999; A Johnston, D Porter, T Cobbold and R Dolamore, *Productivity in Australia's Wholesale and Retail Trade*, Productivity Commission Staff Research Paper, AusInfo, Canberra, 2000.

2.52 A study conducted by Bradford University for British Telecommunications (BT), a provider of communications solutions and services operating in over 170 countries, found that BT's flexible work arrangements delivered an increase in self-reported productivity by an average 20 percentage points[16]. The report also noted that the return rate after maternity leave was 99 per cent compared to the UK average of 40 per cent.

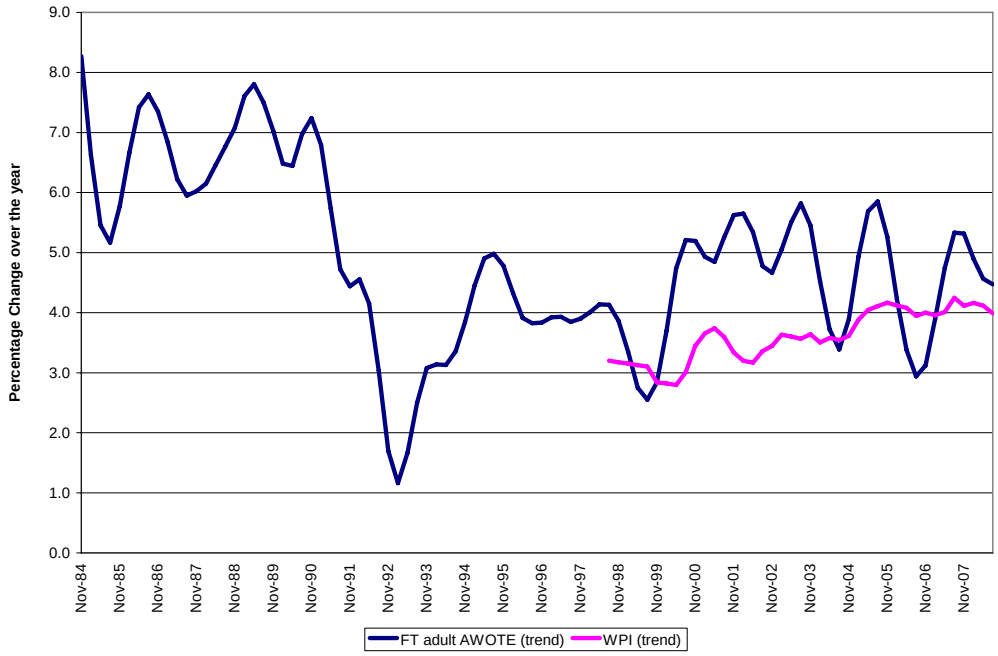
Impact of the Bill on wages

Wage growth over recent years

2.53 Chart 1 shows the two measures of quarterly wages growth published by the ABS. The Wage Price Index (WPI)[17] is the more reliable but only commenced in 1997. The Average Weekly Ordinary Time Earnings (AWOTE) series is considerably more volatile, but provides a comparison over a longer period.

2.54 The WPI series shows that aggregate wages growth has trended up over the last decade by about 1 percentage point to around 4 per cent. Despite recent skill shortages, there has been no appreciable acceleration in wages growth.

Chart 1: Annual percentage changes in Average Weekly Ordinary Time Earnings and the WPI (trend)



Source: ABS Labour Price Index (Cat. No. 6345.0) and ABS Average Weekly Earnings (Cat. No. 6302.0).

2.55 The close tie-in between productivity and wage increases, together with the continued prohibition on pattern bargaining under the Bill, places limits on the possibility of unsustainable wage increases. The Bill will provide for different bargained wage increases across enterprises and sectors based primarily on productivity and labour market conditions. Wage price signals due to skill shortages are an important factor in a smoothly functioning labour market.

Impact of the Bill on disputation

[16] British Telecommunication, 'BT's Sustainability Report 2008'

[17] The WPI excludes changes in the quality of labour and compositional shifts in the labour market. The series shown in the chart is total hourly rates of pay *excluding* bonuses.

Recent trends in industrial disputation

2.56 Some commentators have raised concerns that the provisions contained in the Bill will result in increased industrial disputation[18].

2.57 The Government recognises that while protected industrial action can be a part of the bargaining process, it can have negative impacts on families, businesses, communities and the Australian economy.

2.58 For this reason, the provisions in the Bill relating to industrial action are clear, tough and provide workable options for employers and employees to respond to industrial action. The provisions ensure that industrial action is only protected when taken during genuine bargaining and subject to strict requirements.

2.59 The new bargaining framework outlined in section 3 includes the requirement to bargain in good faith. The good faith bargaining requirements are likely to result in bargaining parties spending more time talking to each other in an endeavour to reach an agreement, before resorting to industrial action. For example, in the event that an employer did not respond to a bargaining proposal put on behalf of employees, a new option for ensuring the employer responds will be a good faith bargaining order, rather than taking industrial action. Should employees decide to take authorised protected action in pursuit of bargaining claims, they will have to comply with strict provisions, including employees approving the action through a mandatory secret ballot and providing three days' notice of action to the employer.

2.60 There will be significant disincentives to take unprotected action, such as snap strikes, including a mandatory deduction of four hours' pay. FWA will have the power to issue orders preventing or stopping the action and will be required to issue interim orders to stop the action if it is unable to determine within 48 hours whether the action is unprotected.

2.61 Parties will be able to enforce FWA orders in the Federal Court and Federal Magistrates Court, which will also be able to issue injunctions directly to stop industrial action where it is occurring before the nominal expiry date of the relevant agreement or where a bargaining representative is engaging in pattern bargaining.

2.62 The industrial action provisions in the Bill have been streamlined but will operate in generally the same way as those in the WR Act. On that basis, the Department expects that low levels of industrial action will continue, subject to short-term volatility associated with peaks and troughs in the bargaining cycle.

2.63 Data from the ABS *Industrial Disputes* collection showed that industrial disputation accounted for 3.9 working days lost per thousand employees in the September quarter 2008, down from 9.2 in the June quarter 2008.[19] This is a substantial fall after four consecutive quarters of increases.

2.64 It is important to note that industrial disputes data are particularly volatile – a view shared by the Governor of the Reserve Bank, Mr Glenn Stevens[20].

[18] P. Williams, Union war feared in reform Bill, West Australian, 25 November 2008
[19] ABS *Industrial Disputes, Australia* (Cat. No. 6321.0.55.001), September 2008.
[20] Extract from House of Representatives Standing Committee on Economics Proof Committee Hansard, 8 September 2008, pages ECO25-26

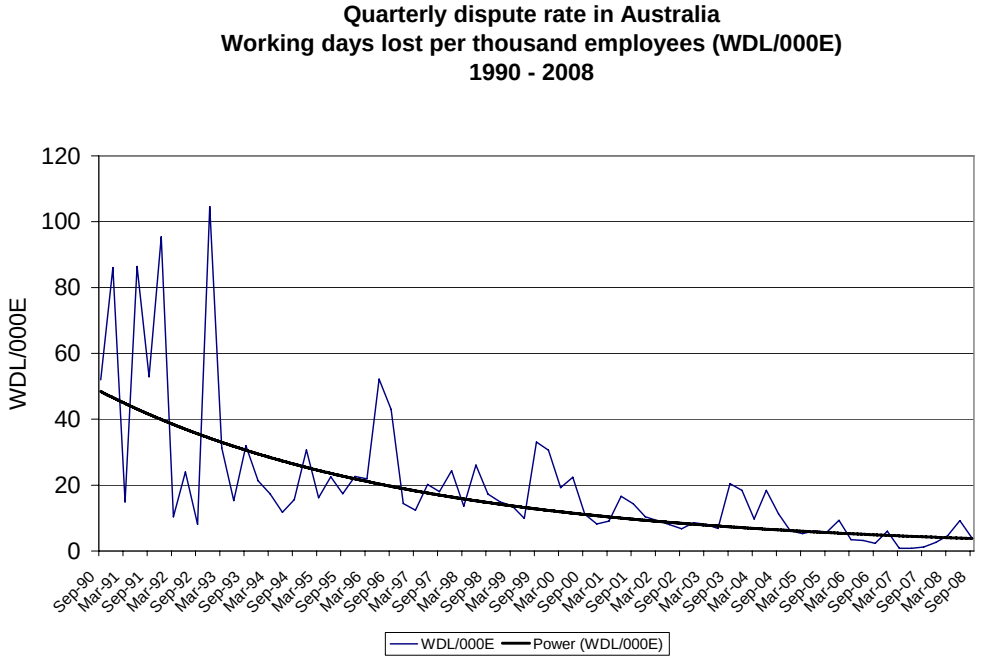
2.65 This is particularly the case as changes in the level of industrial disputation can be affected by the number of expiring federal collective agreements and the number and type of employees covered by these agreements.

2.66 Data from the Department's Workplace Agreements Database indicates that the number of collective agreements due for renegotiation in the second half of 2008 increased significantly compared with the same period in the previous year. This coincided with the increase in the dispute rate.

2.67 3,591 federal collective agreements expired in the second half of 2008 compared with 2,848 in the second half of 2007. This is an increase of 26 per cent from the previous year. These agreements covered approximately 360,000 employees, compared with 310,000 in the second half of 2007. This is an increase of 16 per cent from the previous year. These trends indicate that the dispute rate is closely related to the proportion of agreements being negotiated.

2.68 Chart 2 shows that industrial disputation has declined markedly over the longer term. Chart 2 also shows that there is less scope for further declines in industrial disputation from its current low levels. This is consistent with international experience.

Chart 2: Quarterly dispute rate in Australia – Working days lost per thousand employees (WDL/000E), 1990-2008



Source: ABS Industrial Disputes, Australia (Cat. No. 6321.0.55.001), September 2008.

2.69 In addition, Australia's annual rate of industrial disputation compares favourably against other similar countries. From the latest available comparable data, the annual rate of industrial disputes in Australia for 2007 was 5.4 WDL/000E (the lowest rate since 1913)[21], significantly lower than the UK (38 WDL/000E)[22] and slightly lower than New Zealand (6.5 WDL/000E)[23].

[21] ABS *Industrial Disputes, Australia* (Cat. No. 6321.0.55.001), September 2008.
[22] UK Office for National Statistics, 'Labour Disputes in 2007', *Economic & Labour Market Review*, vol. 2, no. 6, June 2008, page 19.
[23] DEEWR calculation based on data from the Statistics New Zealand '*Work Stoppages: March 2008 quarter'* and *'Labour Market Statistics: 2007'* publications.

Section 3. Agreement-making and the safety net

Introduction

3.1 The Bill is designed to provide a fair and simple framework for employees and employers to determine their working arrangements in a way that encourages productivity at the enterprise level.

3.2 Central to this framework is a comprehensive safety net of key minimum entitlements and conditions comprising the 10 NES that apply to all employees and a further 10 minimum conditions to be contained in modern awards. The safety net cannot be stripped away.

3.3 This safety net provides the basis for employees and employers to bargain collectively for enterprise agreements that deliver productivity improvements for the business and improved wages and conditions for employees that make them better off overall.

3.4 As this section will outline, the bargaining framework under the Bill offers a number of flexible agreement-making options to suit the different needs of employees and employers. It is premised on simple good faith bargaining requirements that apply to all bargaining representatives and provides a fast and simple process for the approval of agreements by FWA. It makes specific provision for the needs of low-paid employees, who have struggled to bargain effectively with their employers in the past, with the introduction of a separate bargaining stream. The focus is on parties reaching agreement voluntarily, with FWA playing a role only where requested or in other limited, exceptional circumstances. The bargaining framework recognises that industrial action can be a legitimate part of the bargaining process but within the context of clear rules set out in the Bill. Pattern bargaining is prohibited and will not be a feature of the new system.

3.5 This section provides an overview of these key features of agreement-making and the safety net and how they are intended to operate under the Bill and, where appropriate, responds to issues of concern that have been raised by various parties.

Safety net

Overview and statement of policy intent

3.6 The Government's new workplace relations system provides all employees with clear, comprehensive and enforceable minimum protections that cannot be stripped away. Both employees and employers will benefit from a safety net that is simple, easy to understand and to apply. A sound, stable and contemporary set of minimum entitlements, where employers and employees know where they stand, will support bargaining.

3.7 The safety net will comprise two parts—the legislated NES and modern awards, both of which come into operation on 1 January 2010.

3.8 The NES contained in the Bill cover:

- maximum weekly hours of work;
- the right to request flexible working arrangements;
- parental leave and related entitlements;
- annual leave;

- personal/carer's leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay;
- provision of a Fair Work Information Statement.

3.9 To ensure the NES provide appropriate minima that balance the interests of employers and employees and take into account relevant community standards, the Government consulted extensively during their development.

3.10 The second element of the safety net is modern awards. Modern awards may be industry or occupation-based and will streamline and simplify hundreds of awards with thousands of pages. The Australian Industrial Relations Commission (AIRC) is currently undertaking the process of award modernisation with extensive input from all interested parties.

3.11 Modern awards build on the NES and may include an additional 10 minimum conditions of employment, tailored to the needs of the particular industry or occupation. These include:

- minimum wages;
- types of employment;
- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- annualised wage or salary arrangements;
- allowances;
- leave related matters;
- superannuation;
- procedures for consultation, representation and dispute settlement.

3.12 FWA will undertake four yearly reviews of each modern award to maintain a relevant and fair minimum safety net and to make sure it continues to meet the needs of the community. The first such reviews are set to take place in 2014.

3.13 Awards may also be varied in other limited circumstances (for example, for 'work value' reasons). This will ensure that the modern award safety net continues to provide an effective 'floor' for collective bargaining.

Minimum wage-setting

3.14 An integral part of a fair, relevant and legally enforceable safety net will be the new, comprehensive minimum wage-setting provisions in the Bill.

3.15 Under the Work Choices amendments, both the AIRC and the Australian Fair Pay Commission (AFPC) had functions in dealing with minimum wages and minimum wage increases took effect on varying dates. Minimum wage rates were contained in notional pay scales. Preserved pay scales have not been reduced to writing and published, which has caused confusion. Although summaries of key pay scales were published, these are not legally enforceable instruments. The large number of federal and state-derived pay scales and the fact that these are "notional" instruments, not published anywhere, has meant that it has been difficult for employees and employers to be certain about their wages obligations.

3.16 The Bill addresses these issues. As noted above, modern awards simplify and consolidate the large number of awards and notional agreement preserving

State awards (NAPSA) that currently apply and will contain legally enforceable minimum wages. This will provide employees and employers with a single, easy to find and understand point of reference for verifying their minimum wage rights and obligations for a particular industry or occupation. As well as providing better compliance outcomes, this will reduce the compliance burden for employers.

3.17 Under the Bill, FWA will be the single body responsible for reviewing and setting minimum wages. The new arrangements will bring certainty and predictability to minimum wage rate adjustments, with the Bill providing for the Minimum Wages Panel to review minimum wages once a year and for any adjustments to take effect from the first pay period on or after 1 July.

3.18 Minimum wage reviews will be open and transparent, with all individuals and organisations in Australia having the opportunity to make submissions. Importantly, the Minimum Wages Panel will review minimum wages in accordance with the minimum wages objective under the Bill. This will ensure that minimum wage rate adjustments are both fair and economically responsible. Adjustments will be made so that there is a strong and comprehensive safety net for the most vulnerable low paid employees, while at the same time providing an effective floor for the collective bargaining arrangements at the heart of the new workplace relations system.

Protections for safety net conditions when a business transfers

3.19 The Bill ensures that the safety net will be protected on a transfer of business. This means that when a business changes hands and a new employer takes on employees of the old employer, a new employer will be bound to recognise employees' service with the old employer when calculating certain entitlements derived from the NES. These are personal/carer's leave, parental leave and the right to request flexible work arrangements. In the case of annual leave and redundancy pay, if there is a transfer of business between employers that are not associated entities and the new employer engages employees, it will have a choice to recognise service. However, if the new employer does not agree to recognise service, the old employer must, subject to the provisions of the NES, pay out these entitlements.

3.20 If an employee is transferred to an employer that is an associated entity of the previous employer, service with the previous employer will be deemed to be continuous for the purposes of all service-related entitlements derived from the NES, including annual leave and redundancy pay. An associated entity is defined in section 50AAA of the *Corporations Act 2001*.

3.21 The transfer of business provisions also operate to protect entitlements under awards and agreements.

3.22 Under the Bill, on a transfer of business, certain workplace instruments that covered employees of an old employer will continue to cover those employees if they obtain employment with a new employer within three months. These include enterprise agreements that have been approved by FWA, workplace determinations and named employer awards.

3.23 The Work Choices amendments provided for a transmission period of 12 months. At the end of this period an employer was no longer bound by the transmitted instrument. Consequently, employees' terms and conditions of employment reverted to whatever other agreement the employer had in place, or in the absence of an agreement or relevant award, the Australian Fair Pay

and Conditions Standard. This could result in employees losing pay and conditions.

3.24 The Bill, by contrast, provides that transmitted instruments will remain in place until they are replaced with an enterprise agreement or the parties agree to terminate them. This provides certainty for all parties and the flexibility to enter into new arrangements.

3.25 In addition, FWA has broad power to change the coverage of transferred instruments and a new employer's existing agreements to ensure the rules work in a practicable and fair way for employees and employers.

3.26 Transfer of business provisions are dealt with further in section 6.

Agreement-making

Opportunities and benefits under the new agreement-making framework

3.27 The new agreement-making framework in the Bill provides opportunities for employees and employers to bargain together in a way that best suits their needs.

3.28 Under the new framework, there will be two types of enterprise agreement – single-enterprise agreements and multi-enterprise agreements. The Bill also allows for greenfields agreements, which can be made to cover a new enterprise before any employees have been engaged. These types of agreements are discussed further below.

3.29 Under the Bill, all agreements will be made between employers and employees (with the exception of greenfields agreements, which are made with a relevant union or unions). This means that unlike previous workplace relations legislation, the Bill does not make a distinction between union and non-union agreements.

3.30 A union may elect to be covered by a non-greenfields enterprise agreement where it is a bargaining representative for that agreement. However, before a union can be covered, it must first notify FWA. A union that elects to be covered by an agreement will have certain entitlements that it would not otherwise have, such as having standing to enforce the terms of that agreement. In addition agreements may contain terms that apply to the relationship between the employer and a union covered by the agreement, such as a term requiring the employer to notify or consult with the union about major changes in the workplace.

3.31 Providing for a single stream of agreements made between employers and employees means all agreements are made directly between the employee and the employees to whom the agreement will apply. This also removes the capacity for disputes over which type of agreement parties should enter into. Under this Bill, employees have the right to be represented in bargaining – and this may be by a union – but unions are not "parties" to agreements.

Single-enterprise agreements

3.32 In most cases a single-enterprise agreement under the new system will be made between a single employer and some or all of its employees. This is the most common form of enterprise bargaining and there is no requirement to seek authorisation or notify FWA when an employer and their employees wish to bargain for an agreement on this basis.

3.33 The Bill also introduces the concept of single-interest employers who will also be able to make single-enterprise agreements. Single interest employers are two or more employers who operate in a related way or share such a common interest that they may wish to bargain together for a single-enterprise agreement.

3.34 As is the case currently, if two or more employers are engaged in a joint venture or common enterprise, or the employers are related bodies corporate, they will be able to bargain for a single-enterprise agreement and will not need authorisation to do so.

3.35 In addition, some employers will be able to bargain together as single interest employers where FWA authorises them to do so. The provisions in the Bill for single interest employer authorisations have been designed to cover franchisees carrying on similar business activities under the same franchise, as well as certain groups of employers that operate within a common regulatory framework and substantially rely on public funding. For example, groups of employers that could be interested in bargaining on this basis include schools in a common education system and public hospitals that are technically distinct employers but have a high degree of coordination and common employment arrangements. These types of employers need to obtain a declaration from the Minister before they can bargain in this way. Entry into this stream is voluntary to ensure that employers who do not wish to bargain together cannot be forced to do so.

Multi-enterprise agreements

3.36 The Bill does not restrict the choice of multiple employers (who are not authorised as single-interest employers) to voluntarily bargain together for a multi-enterprise agreement. There will be no public interest test for voluntary multi-enterprise bargaining and the employers will not need to seek authorisation from FWA in order to bargain together.

3.37 The current public interest test for multiple-business bargaining under the WR Act prevents employers and employees choosing to bargain in a way that suits their needs. Figures from the Workplace Authority show that it took an average of 119 days to authorise the making of a multiple-business agreement under the current Act. Applications that were refused took an average of 95 days to process.

3.38 As multi-enterprise bargaining (except in the low-paid stream) will be voluntary, and in order to prevent pattern bargaining, bargaining orders and protected industrial action will not be available when bargaining for a multi-enterprise agreement.

3.39 Furthermore, an individual employer can withdraw from multi-enterprise bargaining at any time to bargain with their employees for a single-enterprise agreement. A single employer and its employees will not be covered by a multi-enterprise agreement unless those employees vote in favour of the agreement. When approving a multi-enterprise agreement, FWA will need to be satisfied that all employers genuinely agreed to make the agreement and were not coerced.

3.40 The general protections in the Bill, including those that prohibit coercion in agreement-making, and the non-availability of protected action, will ensure that multi-employer bargaining only occurs where all parties consent.

Greenfields agreements

3.41 Prior to the Work Choices amendments, greenfields agreements could be made between the new employer and a union able to represent at least one of the future employees. The agreement would then be tested by the AIRC to make sure the future employees would not be disadvantaged compared to the award. However, under the Work Choices amendments an employer-to-be could make a greenfields agreement, effectively with itself, and unilaterally set the terms and conditions that would apply to its future employees.

3.42 The Bill removes the capacity for 'employer greenfields agreements' and provides that a greenfields agreement can be made with one or more unions that are entitled to represent the interests of employees to be covered by the agreement. This was the position prior to the Work Choices provisions and ensures that greenfields agreements are true agreements negotiated between the relevant bargaining representatives and made by more than one party.

Response to issues raised by stakeholders on agreement-making provisions in the Bill

Bargaining representatives

3.43 A general criticism levelled at the Bill in some quarters is that unions will be given a 'preferential position' at the bargaining table, even where they may only have one member at a workplace[24].

3.44 Under the Bill, an employer must notify employees of their right to be represented in bargaining when negotiations commence. Each employee can choose someone to represent their interests. If they are a union member, that union will the default bargaining representative. Equally, however, the employee may choose some other person. Unions will be involved in negotiations, as they should be, where they are acting as a bargaining representative for one or more of their members.

3.45 It should also be noted that it is fundamental to the principle of freedom of association that a person is able to join and be represented by a trade union where that is their choice. The International Labour Organisation has identified as a basic human right that "all workers and all employers have the right to freely form and join groups for the support and advancement of their occupational interests[25]."

3.46 Under the WR Act, employers were required to notify employees of their right to be represented by a union during the access period for a certified agreement. If an employee requested that their union represent them in this process, the employer was required to meet and confer with the union before a certified agreement was made. The WR Act also gave employees the right to appoint a bargaining agent when making, approving, varying or terminating an Australian Workplace Agreement (AWA) and required an employer to recognise the appointed agent. The Work Choices amendments largely maintained these provisions and for both individual and collective agreements gave employees the right to appoint a bargaining agent.

3.47 Under the Bill, non-greenfields agreements will be made when the agreement is approved by a majority of employees to be covered by the agreement and who cast a valid vote. This means that a union who has been involved in the

[24] B. Norington & E. Hannan, 'Jobs on the line', *Weekend Australian*, 6 December 2008 and B. Norington & E. Hannan 'Unions regain power to bargain', *The Australian*, 25 November 2008

[25] The International Labour Organisation's Fundamental Conventions, p. 9

bargaining cannot prevent an agreement being made between an employer and its employees. An employer can still offer an enterprise agreement to its employees and the employees can still approve the agreement, even if the union does not support or recommend it.

3.48 As noted above, a union that was a bargaining representative for an agreement, and which has the right to represent the industrial interests of employees covered by the agreement, can apply to FWA at the approval stage to be covered by the agreement. This is effectively the same situation that existed prior to the Work Choices amendments to the WR Act, where a union that had at least one member who was covered by a non-union agreement could apply to the AIRC to be bound to the agreement.

Greenfields agreements

3.49 In relation to greenfields agreements, there have been claims that greenfields agreements must be made with every relevant union and that this will allow one union to frustrate bargaining for a greenfields agreement[26].

3.50 Previous legislation allowed an employer to choose which union they would make a greenfields agreement with. This meant that a greenfields agreement could be made with a union that covered a minority of the future employees, while the union that would have covered the majority of the employees may not even know that bargaining was taking place.

3.51 To make sure that the unions with relevant coverage are aware that bargaining for a greenfields agreement is going on, the Bill requires an employer proposing to make a greenfields agreement to notify all relevant unions (that they know of). The employer must also advise FWA, which can check that all relevant unions have been advised. It is then up to those unions to respond and approach the employer if they wish to be involved in bargaining.

3.52 The employer and all relevant unions who seek to bargain will be required to bargain in good faith for a greenfields agreement. This means that if the employer or one of the unions is not complying with the good faith bargaining obligations – for example, it is refusing to meet or is engaging in capricious or unfair conduct that undermines the bargaining then the affected bargaining representative can apply to FWA for a bargaining order to require another representative to bargain in good faith.

3.53 The Bill provides that a greenfields agreement is made when it has been signed by each employer and each relevant union that will be covered by the agreement. This does not require the employer to make an agreement to be made with every union that was notified or that was involved in bargaining, although it is free to do so. This means that if an employer strikes a deal with just one of the relevant unions then the employer can ask to have the agreement approved by FWA. The employer is also free to not make a greenfields agreement at all.

3.54 It should be noted that union demarcation disputes will still be able to be dealt with through the making of representation orders which will continue to be available under provisions regulating registered organisations.

[26] S. Scott, 'Lawyers sound IR alarm bells', *Australian Financial Review*, 28 November 2008, p. 18

The positive impact of good faith bargaining

Overview and statement of policy intent

3.55 The bargaining framework in the Bill reflects the fact that most bargaining currently occurs voluntarily, and the majority of employers and employees are able to reach agreement without recourse to a third party. Under the Bill, bargaining will be largely unregulated where parties voluntarily bargain together and successfully reach agreement.

3.56 The good faith bargaining requirements in the Bill provide mechanisms to deal with situations where bargaining breaks down and directly address situations which arose under the Work Choices amendments where protracted and damaging disputes resulted because there was no requirement to bargain in good faith. Even where a majority of workers wished to have a union collective agreement, the employer could ignore their wishes and not bargain with their representative, potentially causing a dispute. The good faith bargaining framework will help avoid long-running disputes and resultant productivity losses, which have resulted from the employer refusing to recognise their employees' right to be represented by their union in negotiations.

3.57 The good faith bargaining requirements are simple and reflect good bargaining practice that occurs as a matter of course in the majority of enterprise agreement negotiations. The requirements are that all bargaining representatives must:

- attend and participate in meetings at reasonable times;
- disclose relevant information (other than confidential or commercially sensitive information) in a timely manner;
- respond to proposals made by other bargaining representatives for the agreement in a timely manner;
- give genuine consideration to the proposals of other bargaining representatives for the agreement and give reasons for the bargaining representative's responses to those proposals; and
- refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

3.58 The Bill specifically states that the good faith bargaining requirements do not require a bargaining representative to makes concessions during bargaining or to reach agreement on the terms that are to be included in an agreement. Likewise, there is no requirement that parties must make an agreement once they have commenced bargaining. Parties are entitled to take a tough stance in negotiations.

Response to issues raised by stakeholders on good faith bargaining provisions in the Bill

3.59 During both Parliamentary and public debate on the Bill there have been claims that the good faith bargaining provisions are detailed and onerous and will place a significant burden on employers, with unions able to deliberately frustrate the bargaining process by seeking good faith bargaining orders[27]. A number of points can be made in response to these concerns.

3.60 First, the good faith bargaining requirements apply equally to all bargaining representatives, including employers and any employee bargaining representatives, such as unions.

[27] P. Kelly, 'IR Reforms asking for trouble', *The Australian*, 29 November 2008, p. 19

3.61 Second, bargaining orders will only be made to help representatives overcome problems they have been unable to resolve themselves. If a bargaining representative believes that another representative is not bargaining in good faith they must first advise the relevant bargaining representative of their concerns and give them a reasonable time within which to respond, before they can apply for an order from FWA. These notification requirements are designed to encourage bargaining representatives to deal directly with each other to resolve any issues relating to good faith bargaining, rather than immediately calling on FWA to become involved. They also go to ensuring that bargaining representatives cannot be subject to vexatious bargaining orders.

3.62 Third, if FWA issues an order requiring a representative to bargain in good faith, the orders will be procedural in nature. As noted above, they will not direct a bargaining representative to make concessions in relation to the agreement or deal with any matters about the content of the agreement. For example, they may order a bargaining representative to attend meetings in order to meet the good faith bargaining requirements, or order a representative to refrain from capricious or unfair conduct.

3.63 Fourth, FWA may dismiss an application that is frivolous or vexatious (clause 587).

3.64 The Bill allows a bargaining representative to apply for and gain access to a workplace determination by FWA in response to serious and sustained breaches of good faith bargaining by another representative. The provisions are designed to ensure this will only occur in the rare cases where a bargaining representative deliberately breaches good faith bargaining orders to the extent their action seriously undermines the bargaining process. This will ensure compliance with the scheme by providing that a bargaining representative cannot gain an advantage by persistently ignoring their obligations.

3.65 Good faith bargaining provisions currently operate in the Queensland and Western Australian workplace relations systems. Good faith bargaining provisions were also included in the *Industrial Relations Act 1988* as enacted between 1993 and 1996. While noting that this framework operates differently to those systems, the Department is not aware of any evidence that these systems impose or imposed onerous additional obligations on employers or of any concerns about these good faith bargaining systems among state-based employer representatives.

3.66 For example, in Western Australia there were only 4 applications for good faith bargaining orders between 2002 and 2006. This was prior to the Work Choices amendments, when the scope of the state industrial relations jurisdictions was considerably larger.

Approval and content of enterprise agreements

Overview and statement of policy intent

3.67 The Government's policy is that while employers and their employees should be able to discuss and reach agreement about whatever matters suit them, enterprise agreements made under workplace relations legislation should be about matters pertaining to the employment relationship between the employer and their employees, or between the employer and an employee organisation that represents employees in the enterprise and will be covered by the agreement.

3.68 This definition will regulate permitted content and allow enterprise agreements to contain terms that properly relate to work performed and the entitlements of employees in the workplace. Matters that do not pertain to the employment relationship, for example, decisions by employers to close an unprofitable plant or to use a preferred supplier, will not be permitted content in enterprise agreements.

3.69 The concept of 'matters pertaining' has a long history in Australian workplace relations law. It is a well recognised concept, however, one where there has been some ambiguity at the margins as to what might fall within it. Much of this ambiguity was resolved after the High Court's decision in *Electrolux Home Products Pty Limited v The Australian Workers' Union and others* (2004) 221 CLR 309 and subsequent decisions of the AIRC, which considered a large range of these matters and whether they pertained to the employment relationship. The provisions of the Bill retain the broad concept but provide bargaining participants with some additional certainty on matters permitted to be contained in enterprise agreements.

3.70 By expressly allowing matters that pertain to the relationship between an employee organisation to be covered by the agreement and the employer, the Bill also resolves another area of ambiguity. Most of the clauses considered by the AIRC after the Electrolux case fell within this category.

3.71 The Bill expressly provides that agreements may also contain terms about salary deductions or the operation of an enterprise agreement, as this had been placed in some doubt by case law. This allows enterprise agreements to contain salary sacrifice arrangements or deductions for union dues or child care. Allowing such terms to be included in enterprise agreements is in the interest of both employers and employees and allows them to tailor remuneration arrangements to their needs. The Bill also expressly provides that agreements may include terms concerning the operation of the agreement, for example, a term specifying when negotiations will commence for a replacement agreement.

3.72 Before approving an enterprise agreement, FWA must be satisfied that, among other things, all parties genuinely agreed to the enterprise agreement, the agreement does not contain unlawful content and the agreement makes employees better off overall.

Response to issues raised by stakeholders on the approval and content of enterprise agreements provisions in the Bill

Better off overall test

3.73 An enterprise agreement passes the better off overall test if FWA is satisfied at the time of the test that the agreement makes each employee better off overall when compared to the terms and conditions of the relevant modern award. This is different to the Fairness Test that existed under the WR Act as amended by the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*, which only required that an employee be compensated for the modification or removal of a limited range of protected award conditions. The Department anticipates that FWA would take a broadly similar approach to that taken by the AIRC in their administration of the No Disadvantage Test that applied from 1996 to

2006[28]. Under the AIRC's application of the No Disadvantage Test, an agreement could not pass the test if one or more employees (including future employees) were disadvantaged[29].

3.74 The better off overall test ensures that no employee to be covered by an agreement can be disadvantaged compared to the safety net. The test is assessed at the point in time the agreement is made. However, to ensure that employees are not disadvantaged over the life of an agreement, if minimum wages specified in awards or national minimum wage orders are increased to be more beneficial than the wages specified in the agreement, then the employer must pay those higher wages. This is consistent with the concept of a true safety net – no employee is able to be disadvantaged by the making of an enterprise agreement. However, as an agreement will generally apply the same conditions to a class of employees (for example, casuals, checkout operators), FWA will generally be able to apply the better off overall test to such groups of employees, rather than investigating the circumstances of every individual employee.

Bargaining services fees

3.75 There have been claims in the parliamentary debate and in the media that the Bill allows unions to bargain for and demand the payment of bargaining services fees from non-members[30].

3.76 The Bill specifically states that FWA must not approve an agreement if it contains an objectionable provision, which includes terms that would require a breach of the general protections, or that require the payment of a bargaining services fee. There will be no capacity under the Bill for employees, employers or unions to bargain for or include bargaining services fees in an enterprise agreement.

3.77 The prohibition on bargaining fees is only intended to apply to situations where a person has the fee forced on them, for example through an enterprise agreement. The prohibition on bargaining fees in the Bill does not prevent someone freely entering into a contract for the provision of bargaining services. Clause 353, which is substantially identical to provisions in the WR Act that existed from 2003, ensures that industrial associations are not prevented from offering bargaining services on a fee for service basis. Examples of the sorts of situations this would cover include:

- an employee or employer may wish a union or employer organisation to act as their bargaining agent for an agreement but not wish to become a member;
- employer organisations who charge an additional fee on top of membership for any member who wishes to use particular services, such as legal advice or representation during bargaining.

3.78 The General Protections provisions in the Bill also contain various protections against coercive behaviour and misrepresentations to ensure that a person is free to decide whether they wish to pay a bargaining fee to an industrial

[28] Part VIE, *Workplace Relations Act 1996*. A similar No Disadvantage Test, administered by the Workplace Authority, is also provided for under the current version of the *Workplace Relations Act 1996*, as amended by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.
[29] *Salmat Teleservice Pty Limited Enterprise Agreement* [2003] AIRC 1568, *Bodyguard Security Services – Certified Agreement with Employees 2003* [2004] AIRC 125
[30] B. Norington & E. Hannan, 'Union bargaining fees in by stealth', *The Australian*, 4 December 2008

association. These provisions are similar to existing provisions and will ensure existing protections around bargaining fees are retained.

Right of Entry

3.79 While the Bill does not provide a blanket prohibition on right of entry terms in agreements, certain terms about right of entry will be unlawful. FWA will not approve an agreement if it contains unlawful terms.

3.80 A term of an agreement is unlawful if it provides an entitlement that is inconsistent with the right of entry part of the Bill in relation to:

- entry to premises to investigate suspected breaches of the Bill or an industrial instrument; or
- entry to premises to hold discussions with employees who are eligible to be union members.

3.81 This means, for example, that an agreement could not be approved that provided for a union to have 'walk around' rights – in order to meet with members, a union official must hold a permit, give the required notice and comply with the conduct requirements specified in the Bill.

3.82 It is intended that enterprise agreements could provide an entitlement to enter the employer's premises for other specific reasons connected to the terms of the agreement, such as to represent an employee in workplace disputes or for consultation over workplace change. These kinds of terms have historically fallen within the 'matters pertaining' rule.

Environmental issues

3.83 Environmental issues may be included in enterprise agreements if they pertain to the employment relationship between an employer and the employees covered by the agreement. The matters pertaining formulation means that a term of an agreement that, for example, required an employer to reduce their CO_2 emissions would not be a permitted term in an agreement. Such a term sets an obligation on an employer but does not pertain to the relationship between the employer and their employees.

3.84 However, it is likely that an enterprise agreement could contain a term that required employees to participate in recycling strategies in the workplace, or to take all reasonable steps to comply with an employers' CO_2 reduction target of x%, or that makes a bonus payable to employees conditional upon meeting a reduction target. Such clauses set the terms and conditions of employment for employees and do pertain to the employment relationship.

3.85 Some workplace agreements already contain terms relating to environmental issues, for example:

> *"All parties are legally obliged to take reasonable and practicable measures to prevent and minimise any environmental harm resulting from their own actions or company operations. Employees are legally bound to report any environmental harm caused by either themselves or others. Employees are to notify management of any pollution occurring. Site management is responsible for ensuring that the Environment and Protection Agency and senior management are notified of any environmental harm. Management will ensure that all employees fully understand and are fulfilling their legal duties.[31]"*

[31] *Hyne Timber Tumbarumba & Holbrook Union Collective Agreement 2007 — 2010*

A new bargaining stream for the low-paid

Overview and statement of policy intent

3.86 The Bill establishes a new stream of multi-employer bargaining to assist low-paid employees and their employers who, historically, have not had much experience or success with enterprise-level collective bargaining. The creation of this new low-paid stream gives effect to the policy commitments made in *Forward with Fairness*.

3.87 As noted elsewhere in the submission, enterprise bargaining is important in boosting productivity and has delivered economic benefits to both employers and employees over the past 15 years and it will be at the centre of the Government's new workplace relations system under the Fair Work Bill.

3.88 However, over that period not all employers and employees have had access to the benefits of enterprise bargaining and many low-paid employees in areas such as community services, cleaning and child care continue to rely on their award minimum rate of pay.

3.89 There is no evidence to suggest that low paid employees do not wish to bargain for improved wages and conditions, but they may lack the skills, knowledge and bargaining power to do so. Surveys by the Workplace Research Centre found that only 37% of award-dependent employees believe they had the opportunity to negotiate their pay and conditions[32].

3.90 Similarly, individual employers in some sectors may lack the skills and resources to bargain collectively with their employees.

3.91 In these types of cases, multi-employer bargaining may better suit the needs of both employers and employees by providing a mechanism for getting parties to the table and helping them think through what productivity improvements may be possible.

3.92 Employees and employers authorised to bargain in the low-paid stream will benefit from having access to FWA to help negotiate an agreement that delivers improved wages and conditions for employees, underpinned by improvements to productivity and service delivery at the workplace.

3.93 Under the Bill, the types of assistance that FWA can provide to facilitate the bargaining process in the low-paid stream include:

- compulsory conferences to bring the bargaining representatives together, as well as directing any third parties to attend, if they have such a degree of control over the terms and conditions of the employees that it is necessary for them to be involved for an agreement to be made;
- conciliation and mediation;
- making good faith bargaining orders; and
- making recommendations to the parties

3.94 In limited, defined circumstances where parties in the low-paid stream have gone through a facilitated bargaining process and there is still no reasonable prospect of agreement being reached, FWA may, as a last resort, make a workplace determination to settle matters that are in dispute.

[32] B. van Wanrooy, S. Oxenbridge, J. Buchanan & M. Jakubauskas, 2007, 'Australia @ Work; The benchmark report', Workplace Research Centre, p. 51

Response to issues raised by stakeholders on the bargaining stream for the low-paid provisions in the Bill

3.95 During the course of the public and parliamentary debate since the introduction of the Bill, there have been some suggestions that the new low-paid stream opens the door to industry-wide pattern bargaining and arbitration[33].

3.96 The low-paid stream is intended to help low-paid employees and employers to get the benefits of bargaining; to allow them to look – perhaps for the first time in a formal sense – at measures that could improve productivity and service delivery, such as different work practices, flexible work arrangements, or new arrangements for workplace consultation. This will ensure that any improvements to wages and conditions in these workplaces are based on improved productivity.

3.97 There are a number of in-built mechanisms in the Bill specifically designed to ensure that the needs of individual employers are recognised and the low-paid stream does not lead to pattern bargaining. These include:

- the objects of the Division include the need to take into account the specific needs of individual enterprises;
- before granting authorisation for parties to join the low-paid stream, FWA must consider, among other things:
  - the extent to which a union is prepared to consider and respond to reasonably to claims by an employer who wishes to bargain for its own single enterprise agreement;
  - whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to be covered by the proposed agreement;
  - the extent to which the likely number of bargaining representatives (that is, in this case, employers) for the agreement would be consistent with a manageable collective bargaining process (this clause guards against a catch-all 'yellow pages' type log which attempts to rope hundreds of employers – who may have little in common – into a single bargaining process; and
  - the views of the employers and employees who will be covered by the agreement;
- an individual employer may apply to FWA to be removed from a low-paid authorisation if their circumstances have changed;
- decisions by FWA that allow multi-employer bargaining for the low-paid will be subject to appeal; and
- there is no protected industrial action in support of bargaining claims in the low-paid stream.

3.98 In the end, the outcomes of bargaining in the low-paid stream will be up to the parties and what best suits their needs. In some cases, this could mean a single agreement that applies to a number of specified employers, but in other cases it could result in a number of agreements in different terms applying to different enterprises.

3.99 The treatment of pattern bargaining across different parts of the Bill is discussed further in paragraphs 3.149 – 3.163.

[33] S. Scott, 'Opposition launches attack on IR Bill', *Australian Financial Review*, 2 December 2008, p. 6 and B. Norington & E. Hannan, 'Unions regain power to bargain', *The Australian*, 25 November 2008, p. 1

3.100 The Department considers the concerns about the low-paid stream leading to widespread, industry-wide arbitration are unfounded.

3.101 The Bill provides for two types of workplace determinations to be made in the low-paid stream:

- a consent low-paid workplace determination that can be made where some or all of the parties agree to FWA resolving the issues that are in dispute;
- a special low-paid determination that can be made by an application by a single bargaining representative.

3.102 The Bill sets out a very high threshold which must be met before FWA can make a low-paid workplace determination, particularly where it is on application by a single bargaining representative.

3.103 To make a special low-paid workplace determination, FWA must be satisfied:

- that the bargaining representatives are unable to reach agreement and there is no reasonable prospect of agreement being reached;
- the relevant employees have never previously had an enterprise agreement or workplace determination with their employer;
- the employees are on substantially safety net conditions provided by modern awards and the NES;
- the making of the determination will promote productivity and efficiency, as well as encouraging parties to bargain in the future; and
- it is in the public interest.

3.104 If these strict conditions are met, the Government considers it is appropriate and fair that FWA has the discretion to be able to determine a settlement for low-paid employees who have genuinely tried to reach an agreement with their employer and there is no reasonable prospect of agreement being reached. This recognises the difficultly such employees have had in bargaining effectively with their employer in the past.

3.105 In making a determination in these narrow circumstances, FWA must again consider how productivity can be improved, incentives to bargain at a later time and the need to maintain the competitiveness of the employer.

3.106 As noted above, the focus of FWA in deciding whether to make a low-paid workplace determination, and again when it comes to actually deciding the terms of that determination, must include a consideration of how future agreement-making and bargaining can be encouraged. This is important if the low-paid stream is to enable employers and employees in low-paid sectors to move off minimum and award pay rates and into a bargaining culture. This is the rationale behind 'first contract arbitration' in North America[34] and support for this approach can be found from the experience of "MX awards" under the WR Act.

3.107 "MX awards" were made under the provisions of clause 170MX of the WR Act (prior to the Work Choices amendments). The majority of MX awards were made in the health and welfare sector, a typical low-paid sector. While this in part may reflect the nature of the criteria that applied for accessing MX awards[35], further analysis by the Department shows that of the employers

[34] D. Gilbert, B. Burkett, M. McCaskill, *Canadian Labour and Employment Law for the U.S. Practitioner*, BNA Books, 2000

[35] A Full Bench of the AIRC was empowered to make awards under s.170MX after a bargaining period had been terminated either under s.170MW(3), because industrial action was threatening health, safety or welfare or threatening to cause significant damage to the Australian economy or part of it, or under

covered by the 563 MX awards in the health and welfare services sector, at least 243 (43%) of them and their employees subsequently made collective agreements.

3.108 This move from MX awards to agreements has occurred even without any legislative direction for MX matters to be arbitrated in a way that encourages the parties to bargain in the future. Given that the Fair Work Bill expressly provides for FWA to consider how a low-paid determination will promote future bargaining, the impact of low-paid determination in creating the basis for a bargaining culture to develop should be even stronger than it was with MX awards.

3.109 A number of stakeholders have observed the Bill does not provide a definition of the low-paid[36].

3.110 This will be a matter for FWA to determine on the facts of each application for a low-paid authorisation that comes before it. This is consistent with the intention to have a simpler, less prescriptive statute. It is also the approach that is used in the current legislation, which uses the term “low-paid” but does not define it.

3.111 The Bill provides direction for FWA in determining when it must make a low-paid authorisation. For example, the Bill requires FWA to, among other things, take into account the current wages and conditions of the employees who will be covered by the agreement in comparison to relevant industry and community standards.

3.112 Low-paid employees will also benefit generally from the improvements to the safety net being made under the Bill, in the form of the NES and modern awards.

3.113 The introduction of a low-paid bargaining stream, in addition to the improved safety net, is important because it focuses on the benefits of bargaining for both employees and employers in sectors like aged care, community services and cleaning. The low-paid stream is about FWA helping the parties to negotiate and make an agreement that delivers the improvements to productivity and service delivery that can support further improvement to wages and conditions beyond the safety net.

Limited access to workplace determinations

Overview and statement of policy intent

3.114 The focus of the new workplace relations system under the Bill is to encourage employees and employers to bargain together in good faith and reach agreement voluntarily. This is the way that most bargaining takes place already. This means that for most parties the first and only contact they will have with FWA will be when their agreement is ready for approval.

3.115 During the bargaining process, FWA will be available to assist the parties to resolve matters in dispute about a proposed agreement. This may include assistance such as mediation or conciliation, expressing an opinion, or making a recommendation.

s.170MW(7), where the employees had previously been covered by a paid rates award and there was no reasonable prospect of the negotiating parties reaching agreement.

[36] B. Norington & E. Hannan, ‘Jobs on the line’, *Weekend Australian*, 6 December 2008, p. 19

3.116 There will be a very high threshold before the parties can gain access to a workplace determination by FWA that settles outstanding matters that remain at issue in bargaining negotiations. In each case, the Government believes there are very strong policy and public interest considerations which justify this power being available to FWA.

3.117 Under the Bill, workplace determinations will be available only in the following limited circumstances:

- where protected action is threatening to cause significant damage to the wider economy or safety and welfare of the community;
- where protracted industrial action has been causing significant economic harm to the bargaining participants;
- where there have been serious and sustained breaches of good faith bargaining orders that have significantly undermined bargaining; and
- as discussed above in 3.103 – 3.109, where parties in the low-paid stream are genuinely unable to reach agreement and there is no reasonable prospect of agreement being reached.

Response to issues raised by stakeholders on workplace determination provisions in the Bill

3.118 The Bill has been characterised in some quarters as representing a return to an era of compulsory arbitration[37].

3.119 The new bargaining system introduced under the Bill will not deliver access to arbitration any time parties get into a disagreement or negotiations stall during the bargaining process. The onus in the new system is on the parties to work through those bargaining issues, with the assistance of FWA where it is requested.

3.120 In addition, the Bill makes clear that good faith bargaining provisions will not require a party to make concessions or sign up to terms they do not agree with.

3.121 Where parties have bargained in good faith and agreement still cannot be reached, they will have the option of walking away from negotiations, without having a settlement imposed on them.

3.122 Only in those rare cases where bargaining difficulties are creating serious adverse consequences will there be scope for FWA to make a binding workplace determination that settles the matters in dispute.

3.123 Firstly, the Bill incorporates the long-standing capacity for a workplace determination to be made where industrial action is threatening or would threaten to endanger the life, personal safety or health or welfare of the population or cause significant damage to the economy or an important part of it. It is important that FWA continue to have this capacity in order to end industrial action that is extremely damaging on a national scale.

3.124 Secondly, a new ground for the making of a workplace determination will be where protracted industrial action is causing significant economic harm to the bargaining participants, or such harm is imminent. This provision is intended to apply only to the very small number of disputes where industrial action continues for an extended period, where the employees and the employer suffer greatly and the parties are so entrenched in their positions that there is

[37] B. Norington & E. Hannan, 'Jobs on the line', *Weekend Australian*, 6 December 2008, p. 19 and P. Kelly, 'IR Reforms asking for trouble', *The Australian*, 29 November 2008, p. 19

no prospect of a breakthrough in negotiations. It is only in these very unusual circumstances that such an intervention is warranted. It is not designed to prevent parties from placing economic pressure on each other during bargaining and mere failure to reach agreement or robust bargaining involving industrial action will not be sufficient to trigger this provision.

3.125 The Bill makes clear that there must be significant harm to both the employer and any of the employees. This avoids a situation where a party could manipulate matters to inflict harm upon themselves in order to get access to a workplace determination. The exception is in the case of a lockout by employers, where the significant economic harm need only be caused to the employees.

3.126 The Bill sets out a list of factors that would be relevant in working out if protected industrial action is causing significant economic harm to the employer and employees. These include the source, nature and degree of harm suffered or likely to be suffered, the likelihood the harm will continue to be caused or will be caused and the capacity of the person to bear that harm. FWA will take into account the views of the parties in making that assessment.

3.127 Thirdly, the Bill makes provision for a workplace determination to be made where FWA is satisfied that one or more bargaining orders have been contravened and the contravention is serious and sustained and has significantly undermined bargaining.

3.128 Before making a serious breach declaration, FWA must be satisfied that all reasonable alternatives for reaching agreement have been exhausted. For example, FWA must consider whether the bargaining representative has applied to the court to enforce the bargaining orders that have been contravened and whether FWA has already provided assistance such as conciliation and mediation to help the parties reach agreement and resolve the matters in dispute. FWA will also be required to consider the views of all other bargaining representatives.

3.129 These provisions set a very high bar for access to arbitration in cases of serious and sustained breaches of good faith bargaining orders where a bargaining representative does not comply with obligations. It will apply only in the most extreme cases where there is a complete lack of good faith by a bargaining representative and unwillingness to participate in the bargaining process. Access to a workplace determination under this ground is intended to ensure the integrity of the good faith bargaining scheme by ensuring there are effective disincentives to breaches of the good faith bargaining requirements.

3.130 Where a bargaining participant respects its legal obligations and complies with any orders made by FWA, this provision will never need to be used.

3.131 It is worth noting in each of the three circumstances outlined above, the Bill provides for a further negotiating period to give the parties a final opportunity to sit down and see if they can come to an agreement on matters which are in dispute, before FWA can make a workplace determination.

3.132 The negotiating period runs for 21 days from the day FWA makes the relevant bargaining-related instrument. This can be extended to 42 days if all the bargaining representatives agree to seek further time to settle matters in dispute.

3.133 If, at the end of the negotiating period, the bargaining representatives have still not reached agreement. FWA must make a workplace determination as quickly as possible.

3.134 Finally, as discussed earlier, there is scope for FWA to make a workplace determination in the low-paid stream. Again, there will be a high threshold before FWA can exercise such powers.

3.135 As noted elsewhere, the focus of the new system is on encouraging parties to bargain and reach agreement voluntarily. This applies equally to the low-paid bargaining stream.

3.136 The intention is that with assistance from FWA, in most cases parties bargaining in the low-paid stream will be able to come to an agreement that meets their needs. However, where parties in the low-paid stream have gone through a facilitated bargaining process and there is still no reasonable prospect of agreement being reached, the Government considers there should be some scope for FWA to make a determination to assist the low-paid, either by consent of some or all the parties or on application by a single bargaining representative. This is appropriate given the difficulties that these parties have had with bargaining in the past.

Industrial action

Overview and statement of Policy intent

3.137 Employees will continue to have the long-recognised right to take protected industrial action to support or advance claims during collective bargaining. This right will be balanced with clear rules around taking industrial action, including the requirement for a secret ballot to authorise action. The Bill also simplifies and clarifies the provisions regulating industrial action, including protected action ballots, as discussed further in section 6.

3.138 The Bill also provides for employers and employees to take protected action in response to industrial action taken by the other party.

3.139 The new industrial action provisions establish proportional, sensible and workable options for responding to industrial action. The Bill contains significant disincentives to taking unprotected industrial action. Appropriate remedies will be in place to stop action that is unprotected or causing harm. The Bill provides for additional flexibility and discretion in managing partial work bans.

3.140 The Bill introduces a number of new provisions, primarily around strike pay, to provide a more proportionate and fairer response to protected industrial action. In this regard, the four hour rule for strike pay will be repealed for protected industrial action. When protected industrial action occurs, employers must deduct pay for the actual period of time the employee stopped work. This means a half hour stop work meeting that is protected action will result in a half hour deduction from pay, rather than the current four hour requirement. Currently, if employees are going to take strike action it will almost always be of at least four hours' duration as the employees will be losing four hours' pay in any event. The four hour rule will however remain for unprotected industrial action.

3.141 Under the Work Choices amendments employers are legally required to dock employees' pay for a mandatory four hours for each incident of industrial action. The requirement to deduct four hours pay applies even where the industrial

action is a work ban that is contingent in nature. This means that where an employee has indicated an intention to not perform particular duties if requested by the employer, then arguably they are engaged in industrial action for the entire period, even if the employer does not in fact make any request to perform those duties. The employer is arguably obliged to deduct all of the employee's pay in such circumstances, even where the employer would prefer to either pay them as usual or reduce their pay proportionally.

3.142 The Bill provides additional discretion and flexibility for employers to respond to partial work bans. For example, nurses who are often reluctant to take industrial action because of the potential impact on patient safety, may wish to take protected action in pursuit of claims during bargaining in the form of limited work bans (such as not opening new beds or banning non-essential administrative tasks) rather than going on strike.

3.143 The Government's new option allows employers more discretion in dealing with these bans, so that if partial work bans are implemented as protected industrial action, employers will be able to issue a notice and deduct a proportion of pay. Any disputes over the amount can be resolved by FWA.

3.144 The Bill also provides that industrial action taken by employers - a lockout - will not be protected unless it is action in response to action taken by employees.

3.145 These changes, particularly those related to strike pay and partial work bans, should assist in disputes being resolved more quickly and efficiently and may prevent the escalation of some disputes.

The prohibition on pattern bargaining under the Bill

Overview and statement of policy intent

3.146 Pattern bargaining is not permitted. The Bill retains current provisions around pattern bargaining including no access to protected industrial action where pattern bargaining is occurring, stop orders and injunctions. The meaning of pattern bargaining in clause 412 of the Bill is in substance the same as the meaning of pattern bargaining in the WR Act, only simplified where possible.

3.147 The prohibition on pattern bargaining is achieved by the combined operation of various provisions and clauses of the Bill, some of which are discussed elsewhere in the submission in a broader context. It is important, however, in light of considerable debate on this issue, to show how these provisions operate together to ensure pattern bargaining will not be a part of the new workplace relations system.

What is pattern bargaining?

3.148 Pattern bargaining under the WR Act and under the Bill occurs where a person is bargaining in respect of two or more proposed agreements and is seeking common terms to be included in two or more of those agreements. The mere making of common claims is not pattern bargaining under the WR Act or the Bill so long as the bargaining representative is genuinely trying to reach agreement with each employer.

3.149 For example, a union that is involved in bargaining for a number of agreements expiring at around the same time in an industry is permitted to make the same set of claims on each of the employers, for example, a claim for a new qualifications allowance, increased superannuation and a common pay

rise. This would not be pattern bargaining if the union is prepared to genuinely negotiate those claims with each employer at each enterprise. This means considering individual employer responses and being prepared to make an agreement with that employer alone. However, if the union will not agree to terms and conditions with a particular employer unless all of the other employers agree, this would be pattern bargaining. Similarly, if a union was not prepared to take into account the individual requirements of an employer and respond to that employer individually, then this would be pattern bargaining.

No protected action ballot if pattern bargaining is occurring

3.150 Part 3-3 of the Bill deals with industrial action and includes a number of provisions that serve to prohibit pattern bargaining and provide remedies that are available if pattern bargaining is occurring.

3.151 For example, the Bill provides that industrial action is not protected unless it is first authorised by a protected action ballot (clause 409(2)). FWA must make a protected action ballot order if satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer. Conversely, FWA must not make a protected action ballot order if the applicant has not been genuinely trying to reach agreement.

3.152 An applicant for a protected action ballot who is engaged in pattern bargaining and is not prepared to take into account the individual circumstances of an employer in negotiations would not be genuinely trying to reach an agreement and therefore, a protected action ballot order must not be made.

Remedies for unprotected industrial action

3.153 The pre-requisite that a bargaining representative not be engaged in pattern bargaining in order for action to be protected has consequences for the action and its participants. The Bill provides that FWA must order that industrial action that is not, or would not be, protected industrial action stop, not occur or not be organised. In addition, the Federal Court or Federal Magistrates Court may also grant an injunction if a bargaining representative of an employee who will be covered by the agreement is engaging in pattern bargaining. Such an injunction can be obtained directly from the Court without the affected party first seeking an order from FWA.

Multi-enterprise agreements

3.154 The Bill will allow multiple unrelated employers to bargain together to make a multi-enterprise agreement. There is no public interest test for such agreements as there is in the current WR Act. Because of the voluntary nature of this kind of bargaining, protected industrial action and good faith bargaining orders are not available.

3.155 The Bill provides that FWA will not approve a multi-enterprise agreement unless it is satisfied that each employer covered by the agreement genuinely agreed to make the agreement and that no person coerced or threatened to coerce any of the employers to make the agreement.

3.156 Under the Bill, there will be no protected industrial action available in support of multi-enterprise agreements. In addition, good faith bargaining orders, serious breach declarations, majority support determinations or scope orders will not be available in respect of voluntary multi-enterprise bargaining.

General Protections

3.157 The general protections part of the Bill also includes protections that would protect an employer in the case of pattern bargaining.

3.158 For example, under the Bill, making, varying or terminating an enterprise agreement is a workplace right (clasue 341). Clause 343 provides that a person must not coerce another person to exercise or not exercise a workplace right, or to exercise a workplace right in a particular way. This means that no-one may coerce an employee to bargain for a particular type of agreement.

3.159 Furthermore, clause 354 of the Bill provides that a person must not discriminate against an employer because it is proposed that employees of the employer be covered, or not be covered, by a particular type of enterprise agreement.

3.160 The general protections are civil remedy provisions and can be enforced by the Courts.

Conclusion

3.161 This chapter has discussed the key features of the Bill that will support increased agreement-making by employers and employees under the new system.

3.162 These features include a simple range of agreement-making options for employees and employers to bargain in a way that best suits their needs, greater support and encouragement for low-paid employees and their employers to bargain together when they have not been able to do so in the past and simple obligations to encourage the parties to bargain in good faith. The framework for bargaining under the Bill allows parties to bargain freely without unnecessary regulation or micro-management.

3.163 FWA will have a role to play in assisting the parties to bargain and dealing with disputes where requested. FWA will be able to mediate, conciliate, call conferences and make recommendations at the request of one party. It may arbitrate if requested by all relevant parties. It will also have the power to make a workplace determination, but only in exceptional circumstances when it is necessary, for example, to ensure that damaging industrial action is not allowed to continue to harm the economy or the bargaining participants. Pattern bargaining is prohibited.

3.164 Employers and employees will be able to bargain confident in the knowledge that there is a strong set of legally enforceable minimum rights and entitlements under the NES and modern awards that cannot be stripped away.

3.165 The Government considers that this combination of a strong safety net with flexible agreement-making arrangements provides the right balance to ensure fair and productive workplaces under the new system.

Section 3. Fairness and representation at work

Introduction

4.1 The Bill promotes fairness and representation in the workplace, with a focus on both the rights and responsibilities of employers and employees.

4.2 This recognises the social and economic benefits for all parties that result from having a clear set of rights and responsibilities in the workplace. This is based on the Government's view that employees are less likely to be productive if they are concerned about their job security, do not have a right to fair treatment at work and cannot be represented in workplace negotiations by a person of their choosing. In addition employers need to have clear understanding of where they stand in terms of how they deal with their employees under the law.

4.3 This section outlines the following key features of the Bill that deliver fairness, choice and representation at work.

- Broader workplace rights under the General Protections provisions of the Bill.
- Right of entry laws that balance rights of unions to represent employees with the right of employers to manage their business with minimum disruption.
- Fairer protections against unfair dismissal.
- Improved anti-discrimination provisions.
- Greater capacity to promote pay equity between male and female workers.

Broader workplace rights under General Protections provisions

Overview and Statement of Policy Intent

4.4 The General Protections provisions are the key part of the Bill that ensures fairness and representation at the workplace by preventing discrimination and other unfair treatment and recognising the right to freedom of association.

4.5 At present, the WR Act contains a range of protections for employees and employers, but they are scattered throughout the Act and in many cases are duplicated and hard to understand. The General Protections provisions consolidate these protections into one part of the Bill making it simpler for both employers and employees to understand and apply.

4.6 The provisions incorporate and streamline the following WR Act provisions:

- unlawful termination;
- freedom of association and participation (or non-participation) in industrial activities;
- sham arrangements in relation to independent contractors; and
- various other specific protections including an employee's right to reasonably refuse to work on a public holiday and the protection from coercion in relation to making a collective agreement.

4.7 All protections available under the current WR Act will be maintained. However, the current provisions have been consolidated and streamlined into broad general protections, and in some cases a number of the protections have been broadened.

4.8 A central tenet of the General Protections provisions is that it will be unlawful for a person to take adverse action, such as dismissal or refusing to employ or demoting a person because that person has, or exercises, a workplace right under their award, agreement or more broadly under a Federal, state or territory workplace law.

4.9 There are three key elements in the definition of what is a workplace right. A person has a workplace right if:

- they are entitled to the benefit of, or have a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
- they are able to initiate, or participate in, a process or proceeding under a workplace law or instrument including, for example, protected industrial action, making or terminating an enterprise agreement or individual flexibility arrangement, or requesting flexible working arrangements; or
- they are able to make a complaint or inquiry about their conditions of employment to a person or body that has a capacity to seek compliance with the workplace law, such as the Workplace Ombudsman, or, if the person is an employee, to their employer.

4.10 As noted above, these workplace rights protections apply to a broad range of persons. The circumstances where the protections apply are specified through the definition of adverse action. The scope of conduct captured by the concept of adverse action depends on the nature of the relationship between the relevant persons. For example, adverse action can be taken by:

- an employer against an employee if the employer dismisses or prejudicially alters the employee's position;
- an employee against an employer if the employee engages in unprotected industrial action against the employer;
- a principal against an independent contractor if the principal discriminates against them in relation to the terms and conditions of engagement; and
- an industrial association, or member or officer, of that association against a person if the association organises or takes unprotected industrial action against the person.

4.11 Action that is authorised by or under other provisions of the Bill or under any other relevant federal, state or territory workplace law is not taken to be adverse action. For example, protected industrial action taken by an employee would not be adverse action. Similarly, action taken by an employer to comply with state anti discrimination or equal opportunity laws would not be adverse action.

4.12 The General Protections provisions provide protection against coercion in relation to exercising a workplace right, undue influence or pressure over certain decisions made by employees and misrepresentation about the workplace rights of another person.

4.13 The General Protections provisions also ensure that action taken by a prospective employer against a prospective employee, such as refusing to employ them or discriminating against them because of, or in relation, to their terms and conditions of employment, is a workplace right. The only exceptions to this are in relation to:

- a transfer of business, where new employers are free to decide whether or not to take on employees of the old employer without the risk of a general protections claim; and
- the guarantee in the Bill of annual earnings, where a prospective employer can make an offer of employment conditional on a prospective employee accepting a guarantee of annual earnings.

4.14 The Bill contains anti-double dipping provisions similar to the WR Act to prevent employees from seeking remedies for the same adverse action under different provisions of the Act or other federal or state laws.

4.15 The legislation also includes the current unlawful termination provisions under the WR Act in a separate part of the Bill (Part 6-4) to maintain their application to those employees not in the federal workplace relations system. This gives effect to Australia's international treaty obligations regarding termination of employment and ensures that no employee will lose their current universal protection from unlawful termination.

4.16 There will be a single enforcement process and combined set of remedies under the General Protections provisions.

4.17 Where there are contraventions of the provisions, FWA will be able to hold a private conference to attempt to resolve the matter. In most cases involving dismissal, this conference will be mandatory. If the matter cannot be resolved at the conference, parties will be able to apply to the Fair Work Division of the Federal Court or the Federal Magistrate's Court for a remedy. Remedies will include monetary penalties, injunctions, compensation and reinstatement in the case of dismissal.

Balanced right of entry provisions

Overview and statement of policy intent

4.18 The right of entry provisions in the Bill are designed to balance the right of unions to represent employees with the rights of employers to manage their business with minimal disruption. As outlined in the Department’s evidence to the Committee on 11 December, the provisions largely replicate the current provisions in the WR Act, with some adjustments having been made as a consequence of the new modern award framework and in response to specific concerns raised by both employer and employee stakeholders during consultations on the Bill.

4.19 A key difference with the WR Act is that right of entry will now be based on a union’s right to represent the industrial interests of the employees who work on the premises, rather than whether the union is bound by an award or agreement applying at the workplace.

4.20 Right of entry under the Bill will apply for the purposes of investigating breaches of the Act or a fair work instrument, as well as for the purpose of holding discussions on workplace issues. This is consistent with current arrangements.

4.21 Entry for the purpose of investigating a breach can only occur where the permit holder reasonably suspects a breach of the Bill or a fair work instrument under the Bill, such as a modern award or enterprise agreement. The breach must relate to or affect an employee who is a member of the union that is entitled to represent the employee and who is working on the premises.

4.22 Unions have had a long-standing role under workplace relations legislation to investigate suspected breaches of awards and to take recovery action to make sure employees are, for example, paid correctly. The capacity to do this is fundamental to their ability to properly represent the interests of their members. Importantly, it recognises that employees who have a problem in the workplace and who belong to a union generally choose to approach their union in the first instance, rather than making a complaint directly to a Government agency. The

proposed approach therefore allows unions to investigate any suspected contraventions of workplace laws on behalf of their members, regardless of whether or not the union is covered by the award or agreement that governs the workplace.

4.23 Unions can only enter a workplace for discussion purposes with people who work at the premises, are entitled to be represented by the union and who want to participate in those discussions. To ensure minimal disruption to work being undertaken at the premises, discussions can only be held at meal times or other break periods and not during paid work time.

4.24 Unions will have to comply with strict conditions of entry, as follows:

- the union official must hold a valid right of entry permit, which is only issued to a 'fit and proper person' by FWA;
- the permit holder must give at least 24 hours' notice before entering and entry can only occur during working hours;
- the permit holder must set out the basis on which he or she has entry rights; and
- the permit holder must comply with any reasonable request from an employer that discussions take place in a particular part of the premises and that they take a particular route to reach that location.

4.25 Permit holders must declare their eligibility to represent employees in their entry notice, including by referring to the relevant parts of the union's rules that give the union the right to represent those employees. Sanctions apply to a permit holder who misuses entry rights or acts inappropriately.

4.26 As noted in section 3, the Bill allows for agreements to include terms about right of entry for purposes other than those set out in the right of entry part of the Bill. For example, an agreement might provide a union with an entitlement to enter an employer's premises to represent an employee under a dispute settlement process. In addition, employers are free to invite any person to enter their premises at any time outside the formal provisions of the Act. The ability to do this is not new and has always been open to employers.

Entry to residential premises

4.27 The right of entry provisions will specify that permit holders must not enter any part of the premises that is used mainly for residential purposes, but will allow permit holders to enter premises used for mixed purposes, where appropriate. This addresses the current situation under the WR Act where entry is not allowed into premises that are used for residential purposes, even if they are only partly used for that purpose. For example, the Act currently arguably prevents entry where nurses may be working at a residential care facility. The Bill will allow a permit holder to enter such premises, but only parts of the premises that are used mainly for non-residential purposes (such as a staff room).

Meeting locations

4.28 Under current right of entry rules, employers can request that a union hold discussions with employees in a particular area as long as the request is 'reasonable'. However, there have been cases where the location of meetings has been clearly inappropriate, such as outside a toilet, in an unsafe area or in full view of a senior manager's office. To address this, the right of entry rules under the Bill will provide non-exhaustive guidance as to what is considered a reasonable location for holding discussions. Employers will be still be able to request that a permit holder meet employees in a specific room or area of the

premises, but the area will need to be fit for purpose of holding the meeting and the request must not be made by the employer with the intention of intimidating, discouraging or making it difficult for people to participate in discussions. FWA will have the power to resolve disputes on the appropriateness of a particular meeting location.

Response to issues raised by stakeholders on right of entry provisions in the Bill

Union access to employee records and privacy issues

4.29 Since the introduction of the Bill, considerable attention has been placed on the fact that unions will be able exercise right of entry powers to access records of employees who are not union members[38]. The Department wishes to highlight several points in response to this issue.

4.30 Effective compliance with legal obligations is an important component of the workplace relations system. For this reason, if a permit holder is investigating a suspected breach of the Bill or an industrial instrument he or she will be able to look at and copy the employment records of any employee, but only where those records are relevant to the suspected breach. The permit holder is required to give the employer details of the suspected breach being investigated in its notice, so the employer will be able to independently ascertain whether the documents requested are in fact relevant to the investigation. Claims that a permit holder can copy lists of names and addresses of all employees are simply not correct.

4.31 The *Privacy Act 1988* also operates to protect personal information of employees in records obtained by the union, where the union is covered by the Privacy Act. Where the Privacy Act applies to a union, that union will generally not be able to use personal information in employee records it obtains during its investigation of a suspected breach for purposes other than investigating and seeking a remedy for that breach. There are some exceptions to this general principle, such as where an employee consents to the use of the information for other purposes or the use or disclosure is required or authorised by law. A person affected by a breach of the Privacy Act may complain to the Privacy Commissioner who can investigate and resolve the complaint. While complaints are usually resolved by conciliation, the Privacy Commissioner can determine whether a complaint is substantiated and, as part of that determination, can declare a complainant to be entitled to compensation.

4.32 New provisions in the Bill also allow fines to be imposed against a person who uses or discloses employee records obtained while investigating a suspected breach in a way that contravenes the Privacy Act. These fines can be up to $6 600 for individuals and $33 000 for unions. The Bill also requires FWA to revoke or suspend all entry permits held by a permit holder who has breached these new provisions or has a Privacy Act complaint substantiated against them by the Privacy Commissioner.

4.33 Access to non-member records relevant to investigating a breach is consistent with the long-standing position prior to the Work Choices amendments. The Department is not aware of any proceedings related to the alleged abuse of those provisions. However, the privacy protections contained in the Bill are stronger than those which existed prior to the Work Choices amendments.

[38] S. Scott, 'Union plan could reveal personal data: bosses', *Australian Financial Review*, 12 December 2008

Fairer protections against unfair dismissal

Overview and statement of policy intent

4.34 The new unfair dismissal system will remove the 100 employee exemption introduced under the Work Choices amendments and instead introduce new minimum employment periods that have to be served before an unfair dismissal claim can be made, as follows:

- 12 months for employees of businesses with fewer than 15 employees and;
- six months for employees in businesses with 15 or more employees.

4.35 These changes mean that many more employees will have access to unfair dismissal protections. Based on ABS data, the Department estimates around 6.7 million employees will be protected from unfair dismissal, compared to 3.7 million under the current system.

4.36 Casual employees who have been employed on a regular and systematic basis with a reasonable expectation of continuing employment with their employer will also be covered by the unfair dismissal provisions, provided they meet the same minimum employment periods as permanent employees.

4.37 Employees who earn more than the high income threshold ($100 000 as indexed from August 2007) will be able to make an unfair dismissal claim if their employment is covered by a modern award, or if their employment conditions are set by an enterprise agreement. This will ensure that highly paid employees in award industries that are currently protected from unfair dismissal remain so. Protections will not be extended to highly paid employees in industries that have traditionally been award free, unless they have entered into an enterprise agreement.

4.38 Under the Bill, the minimum employment period for unfair dismissal will include the previous service of an employee involved in a transfer of a business, unless the new employer expressly informs transferring employees, in writing, of a requirement for a new minimum employment period. This addresses the situation under the Work Choices amendments where service with the old employer was often not recognised in relation to the minimum employment period for unfair dismissal protection on a transfer of business and long-term employees discovered they had no remedy for an unfair dismissal following a transfer of business.

4.39 For example, in *Stanfield v Childcare Services Pty Ltd* [2008] AIRC 127, an employee with 17 years' service, including five months with the new employer, was found not to qualify for unfair dismissal protection, despite verbal assurances from the new owner. In *Ziday, Clarke, Tan, Paskins, Walker v Aged Care Services Australia Group Pty Ltd* [2008] AIRCFB 367, five aged care workers made an unfair dismissal claim against their new employer, within months of it taking over nursing homes from Professional Aged Care Enterprises Pty Ltd. Four of the applicants had more than 12 months' service and the remaining applicant had more than 6 months' service with an old employer. The Full Bench ruled that none of the five employees had completed the qualifying period with Aged Care Services Australia Group, so it had no jurisdiction to hear their unfair dismissal claims.

4.40 In addition, the Bill provides that where an employee takes up new employment, within a three month period, with an employer that is an associated entity of the previous employer, the employee's service with the previous employer will be taken to be continuous for the purposes of the unfair dismissal minimum employment period.

4.41 Under the new laws, 'genuine operational reasons' will not be a defence for an unfair dismissal claim. However, employers will still be able to dismiss an employee in cases of genuine redundancy. A redundancy will be genuine if:

- the employer no longer required the job to be done by anyone; and
- the employer has complied with any obligations to consult about the redundancy in a modern award or enterprise agreement that applied to the employee.

4.42 A redundancy will not be genuine if it would have been reasonable for the employee to be redeployed in the business or an associated entity.

4.43 FWA will be able to deal with unfair dismissal claims in a flexible and informal manner.

4.44 Claims will need to be lodged within seven days of the dismissal to promote quick resolution of claims and increase the feasibility of reinstatement as an option. However, in exceptional circumstances, FWA will have discretion to accept late applications.

4.45 To ensure a "fair go all round" for both employers and employees, where there are contested facts, FWA will hold an informal conference or a hearing. During a conference, FWA will act consistently with the principles of natural justice, including by ensuring that both parties get to have their say and are able to respond to allegations.

4.46 FWA will be required to take the wishes of the parties into account in the way it considers the application and informs itself. This could allow, for example, for conferences to be conducted at alternative venues, such as the employer's place of business or a neutral venue convenient to the parties. FWA will be able to make binding decisions following a conference, without the need for a formal, public hearing. Full public hearings will occur where, after considering the views of the parties, FWA decides this would be the most efficient and effective way to resolve the matter.

4.47 Under the new system, legal representation will be permitted, but only with FWA's permission. Legal representation will only be allowed if:

- it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
- it would be unfair not to allow the person to be represented because the person is unable to represent himself or herself effectively, taking into account the level of representation and expertise of the other party.

4.48 Reinstatement will be the preferred remedy. However, if it is not in the interests of the employee or the employer's business, compensation in lieu of reinstatement may be ordered. Compensation will be capped at the lesser of 6 months' pay or half the amount of the high income threshold and the factors for determining compensation within the maximum amount will be specified.

4.49 There will be particular measures to assist small business including a longer qualifying period of 12 months before employees working in small businesses can access the unfair dismissal provisions. In addition, there will be a Small

Business Fair Dismissal Code. Where FWA considers that the dismissal complied with the Code, the dismissal will be considered fair.

4.50 The Code sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is warranted, including cases of theft, fraud or violence. For under-performing employees, the Code requires the employer to give the employee a valid reason (based on the employee's conduct or capacity to do the job) why the employee is at risk of being dismissed and a reasonable chance to rectify the problem. Multiple warnings are not required. It is desirable, but not necessary, for a warning to be in writing.

Response to issues raised by stakeholders on protections against unfair dismissal provisions in the Bill

4.51 There have been claims that extending unfair dismissal protections will have a negative impact on employers' decisions to hire more people[39]. As discussed in section 2, there is no direct or conclusive evidence to support this claim. Employers make decisions to hire employees based on a range of reasons related to the needs of sustaining and growing their business. This will not change under the new system.

4.52 According to the May 2008 Sensis *Small Business Index*, 75 per cent of small to medium enterprises surveyed believed that reinstatement of the previous unfair dismissal laws would have no real impact on their business. This is consistent with earlier survey results from Sensis in 2005 which showed, for example, that the most prevalent reason that employers gave for not taking on new employees was a lack of demand for goods and services (27 per cent of employers who did not have any new staff) and that industrial relations policies generally were noted as a barrier by only 5 per cent of employers.

4.53 It is important to note that the new system will have special measures to ensure that it is less complex and easier to comply with than the previous system. For example, FWA will rule a dismissal as being fair if the employer complied with the Fair Dismissal Code. This means a small business employer will be able to avoid defending a lengthy unfair dismissal system by following a simple, easy-to-follow Code when dismissing an employee.

4.54 Section 2 dealt further with this debate about the employment impact of unfair dismissal laws.

Equal Remuneration

Overview and statement of policy intent

4.55 The Bill provides a comprehensive regime with regard to equal remuneration including important changes to the current provisions of the WR Act. Key elements of the Bill include:

- powers for FWA to make equal remuneration orders;
- broadening of the equal remuneration concept to include work of equal or comparable value;
- removal of current obstacles and restrictions relating to equal remuneration applications;
- limits on application of equal remuneration orders to national system employees;
- simpler and effective compliance measures; and

[39] K. Phillips, 'New IR law contains unnecessary risk', *Australian Financial Review*, 23 October 2008

- inclusion of equal remuneration as a guiding principle for FWA in conducting its modern award and minimum wage fixing functions.

Principle of equal remuneration for work of equal or comparable value

4.56 The Bill incorporates the principle of equal remuneration for work of equal or comparable value as a guiding principle.

4.57 The equal remuneration principle is incorporated in the modern awards objective, ensuring that FWA must take the principle into account when considering the operation of the safety net through modern awards (clause 34 (1)(e)).

4.58 Importantly the equal remuneration principle is also incorporated in the minimum wages objective ensuring that FWA must take the principle into account when setting or varying award minimum wages (clause 284 (1)(d)).

4.59 The principal object of the Bill also requires FWA to take into account Australia's international labour obligations, which include *ILO Convention (No. 100) concerning equal remuneration for men and women workers for work of equal value.*

Comparable value

4.60 The inclusion of comparable value enhances the scope and effectiveness of the equal remuneration provisions by removing historic obstacles to successful claims in the federal jurisdiction. It also supports the concept of a national system through consistency with equal remuneration principles in state legislation and the wage-fixing principles of state industrial tribunals.

4.61 New South Wales, Queensland, Western Australia and South Australia all use the concept of equal or comparable value in either legislation, wage fixing principles, or both. In Tasmania the wage fixing principle encompasses work of equal value only, however, the principle provides further guidance which clarifies that the intention is for a broad interpretation that would effectively provide for comparable value (Tasmania, State Wage Case 2008, Statement of Principles).

4.62 The concept of comparable value was originally developed to address equal pay concerns in occupations and industries that are dominated by one gender. It helps address the issue of undervaluation of the work traditionally performed by women, by allowing comparisons to be carried out between different, but comparable, work for the purpose of assessing an equal remuneration claim.

4.63 In a claim for equal remuneration, comparable worth is a method for comparing females' jobs with dissimilar (and generally male) jobs using job and skill evaluation techniques. For example, in the successful NSW Librarians case in 2000[40], comparable value was established by comparing the skills, educational requirements and level of responsibility in various positions in several professions, including librarians and geo-scientists or geologists, that demonstrated the existence of gender based valuations.

Discrimination should no longer be a threshold test

4.64 Case history, in both federal and state jurisdictions, has shown that requiring a comparator group that performed work of "equal value" effectively meant that

[40] *Public Service Association et al v NSW Government* [2002] NSWIRComm 55

discrimination (on the basis of sex) in the setting of remuneration needed to be found for a pay equity claim to proceed. Establishing discrimination thus became a threshold test for equal remuneration claims in the federal jurisdiction through the requirement for 'equal' comparison and also through the AIRC's interpretation of the ILO Convention[41] for equal remuneration.

4.65 By expanding the test to include 'comparable' value as well as 'equal' value and no longer relying on the external affairs power, the Bill should remove this threshold requirement that discrimination has occurred in the setting of remuneration from the application of the equal remuneration provisions. Instead, an applicant will be required to only demonstrate that there is *not* equal remuneration for work of equal or comparable value.

Coverage by equal remuneration provisions to national system employees only

4.66 Unlike the current WR Act, equal remuneration orders under the Bill are limited to national system employees. The equal remuneration provisions no longer rely on the external affairs power for application but apply through the provisions of the Bill for national system employees and employers (see clauses 13 and 14).

4.67 Limiting the provisions to national system employees does not exclude any state covered employees from pursuing equal remuneration. State legislation already contains equal remuneration provisions and these provide appropriate protection for employers and employees who are outside the national system.

Process for obtaining an equal remuneration order from FWA

4.68 The Bill provides that an employee, a union, or the Federal Sex Discrimination Commissioner can apply to FWA for an equal remuneration order (clause 302(3)). FWA will be able to make an order if it is satisfied that there is not equal remuneration for work of equal or comparable value (clause 302(5)). In making an order, FWA will be required to take into account (so far as is relevant), orders of the Minimum Wages Panel and the reasons for those orders (clause 302(4)).

4.69 In making an order, FWA may increase, but not reduce, employees' rates of remuneration by an equal remuneration order (clause 303). This means, for example, that FWA could not reduce the higher rates of remuneration of a male comparator group to bring the rates into line with the lower rates of remuneration of female employees subject to the application.

4.70 Importantly, in issuing an equal remuneration order FWA may phase in increases to remuneration over an appropriate period of time where FWA considers that it is not feasible for employers to immediately implement an order in full (clause 304).

4.71 The Bill prevents FWA from dealing with an application for an equal remuneration order under clause 302 if there is an adequate alternative remedy that would ensure equal remuneration for work of equal or comparable value for the relevant employees (Clause 721). For example, an employee may have access to an adequate alternative remedy under anti-discrimination laws in federal or state jurisdictions. A remedy under an anti-discrimination law that consists solely of compensation for past actions however, is not an adequate remedy for this purpose (clause 721(2)).

[41] International Labour Organisation (ILO) *Equal Remuneration for Men and Women for Work of Equal Value Convention* (Convention 100).

4.72 As noted above, in deciding whether to make an equal remuneration order, FWA must take into account orders and determinations by the Minimum Wages Panel. This requirement, however, does not restrict equal remuneration orders in the way the current provisions of the WR Act do. The current provisions restrict the ability of the AIRC to deal with equal remuneration applications where they may be inconsistent with terms under the Australian Fair Pay and Conditions Standard (s622). In contrast, the Bill requires FWA to consider minimum wage decisions but does not restrict FWA from continuing to hear an equal remuneration application.

4.73 FWA will have the capacity to best determine how to run cases involving equal remuneration claims and inform itself as it sees fit. Under the WR Act, the AIRC is required to attempt conciliation or mediation between the parties before starting to hear and determine an equal remuneration matter. While it would be open to FWA to adopt a similar process of conciliation or mediation in the first instance, it is not a mandatory requirement under the Bill and FWA will have flexibility to determine the most appropriate approach to take in each case.

Improved anti-discrimination provisions

Overview and Statement of Policy intent

4.74 As outlined above, the Bill consolidates general protections for employees, including anti-discrimination provisions, into one Part, making the protections simpler for employers and employees to both understand and apply. The Bill expands anti-discrimination protections to more effectively protect employees from workplace discrimination and to provide consistency with state and territory laws. This also takes into account Australia's international labour obligations, including *ILO Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation (Geneva, 25 June 1958) [1974].*

4.75 Protection from workplace discrimination is a specific object included in the General Protections (Part 3-1).

4.76 The Bill will ensure an employee or prospective employee is protected from workplace discrimination (clause 351). The provisions in the Bill broadly cover measures in the current WR Act which make it unlawful to dismiss an employee for discriminatory reasons. However, protection has been expanded to prohibit any adverse action on discriminatory grounds. The protections against discrimination also expand on the current legislation by adding carer's responsibilities as a ground of discrimination.

4.77 The Bill prohibits an employer from taking adverse action against an employee or prospective employee of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (clause 351(1)). For example, refusing to employ a person, or treating an employee differently to other employees because of the employee's race or sex will be adverse action under the Bill.

4.78 In performing its functions, FWA will be required to take into account the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the grounds referred to above (clause 578).

4.79 Providing comprehensive protection against discrimination is especially important because in many instances the particular circumstances of a case are likely to give rise to breaches of both workplace relations laws and anti-

discrimination obligations under separate laws. The broadening and strengthening of protections against discrimination in the Bill will allow for most employment related matters to be dealt with simultaneously, rather than the affected parties being required to participate in multiple claims in often separate jurisdictions. This is consistent with the Government's intention to provide employees and employers with a single point of contact for information, advice and assistance on workplace relations issues.

Exceptions

4.80 There are exceptions to anti-discrimination prohibitions (clause 351(2)). Adverse action is not taken against an employee or prospective employee if the action is:

- authorised by or under a state or territory anti-discrimination law (clause 351(2)(a));
- taken because of the inherent requirements of the particular position concerned (clause 351(2)(b)); or
- taken against certain persons in good faith to avoid injury to the religious susceptibilities of adherents of a particular religion or creed (clause 351(2)(c)).

4.81 The exceptions in clauses 351(2)(b) and (c) above broadly cover the existing exceptions in the WR Act. The exception in 351(2)(a) ensures that action authorised by or under a state or territory anti-discrimination law is not adverse action. This would occur, for example, where the action is exempt because it was taken to protect the health and safety of people at a workplace.

Remedies and costs

4.82 The Bill provides discretion for the Courts to determine appropriate remedies for workplace discrimination.

4.83 Under the Bill, many discrimination complaints should be resolved at first instance by mediation at informal conferences held by FWA. Where a mediated outcome is not possible and the Court finds that discrimination has occurred, it will have the power to make any orders it considers appropriate to remedy the unlawful conduct.

4.84 For example, the Court will be able to order compensation for a loss that a person has suffered arising from the discriminatory conduct (see clause 545(2)). Appropriately, the Court will have powers to determine the appropriate remedy in the circumstances of a particular case.

4.85 The general costs provisions in the Bill (clause 570) will apply so that the Court will have a broad discretion to order costs against a party in appropriate circumstances, for example where:

- a party instituted proceedings vexatiously or without reasonable cause; or
- a party acted unreasonably which caused the other party to incur costs.

4.86 The Bill also includes measures to prevent duplication of claims in more than one jurisdiction in similar terms to the WR Act. Employees will be unable to seek more than one remedy for the same adverse action by making separate claims under the Bill or other Commonwealth or state anti-discrimination laws.

Discriminatory terms in modern awards and enterprise agreements

4.87 Modern awards (including individual flexibility agreements made under a modern award) will not be able to include discriminatory terms (clause 153).

FWA will have power to review modern awards, and to remove discriminatory terms from modern awards, on referral from the Australian Human Rights Commission.

4.88 However, consistent with the exceptions referred to above, a term of a modern award will not discriminate against an employee:

- if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or
- merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed (clause 153(2)).

4.89 In addition, a term of a modern award does not discriminate against an employee because the term provides a minimum wage for junior employees, employees with a disability or employees to whom training arrangements apply (clause 153(3)).

4.90 FWA must review an enterprise agreement if the agreement is referred to it under the *Human Rights and Equal Opportunity Commission Act 1986* (clause 218). The same exceptions that apply to modern awards similarly apply to enterprise agreements (clauses 195(2) and 195(3)).

Interaction with state and territory anti-discrimination and equal opportunity laws

4.91 Interaction rules ensure employees have access to the most appropriate remedy for their circumstances while also providing protection from 'double-dipping'. Employees will not be able to seek more than one remedy for the same adverse action by making separate claims under the Bill and other Commonwealth or state anti-discrimination laws.

4.92 The Bill 'preserves' certain state or territory laws that might otherwise be excluded by making clear they are intended to apply to national system employers and national system employees (clause 27). This measure includes state or territory laws dealing with discrimination and/or equal employment opportunity. This measure also protects terms in state awards or agreements that deal with "the prevention of discrimination (including discrimination in relation to parental or carer responsibilities)" (clause 29(2)(a)).

4.93 This has the effect that a person whose employment has been terminated or who has been adversely treated in employment for reasons such as race, colour, sex, sexual preference, age or other discriminatory reasons could seek a remedy under either a state or territory anti-discrimination or equal employment opportunity law or a remedy under the general protections measures for national system employees.

4.94 The Bill also makes clear that state and territory laws that provide employee entitlements in relation to flexible work arrangements are not excluded and continue to apply to employees where they provide more beneficial employee entitlements than the entitlements under the Bill (clause 66).

4.95 The intention is to ensure that more beneficial state or territory laws that confer a right to request flexible work arrangements and deal with discrimination in relation to parental or carer responsibilities apply to national system employers and their employees. For example, this clause is intended to enable the operation of provisions in the *Equal Opportunity Act 1995 (Vic)* that oblige an

employer in Victoria to accommodate an employee's responsibilities as a parent or carer and that prescribe remedies if an employer breaches those obligations.

4.96 An employee may also have remedies under relevant discrimination legislation (including federal anti-discrimination legislation) if an employee considers they have been discriminated against by the employer's handling or refusal of their request.

Section 4. A simpler workplace relations system

Introduction

5.1 The Bill aims to provide a simpler system of workplace relations for employees and employers.

5.2 There are a number of ways the Bill seeks to do this. For instance, the Bill itself, as a whole, has been drafted with the intention of providing a shorter, streamlined piece of legislation that is more readable and easier to understand than the current Act. The consolidation of the General Protections provisions outlined in section 4 is an example of this. A number of observations made since the Bill was introduced suggest this intention has been achieved[42].

5.3 As demonstrated in section 3, the design of key elements of the Bill such as agreement making and the safety net also go towards providing a less complex system for employees and employers. The new safety net will be simple to understand and apply and the bargaining framework allows for employees and employers to bargain together freely and in the vast majority of cases without any need to deal with FWA until their agreement is ready for approval.

5.4 This section focuses in particular on ways that the Bill provides a simpler system in terms of the application and enforcement of workplace rights and the institutional arrangements as examples where the system is less complex :

- enhanced powers of Fair Work Ombudsman inspectors to enforce compliance with the law and industrial instruments;
- simple enforcement of common law entitlements and an enhanced small claims procedure;
- a simple definition of transfer of business, with clear rights and broader protections for employees;
- the establishment of a new institutional framework that will operate as a one-stop shop for information, advice and assistance; and
- simplified provisions covering secret ballots and industrial action.

Enforcement of employee entitlements

Overview and statement of policy intent

5.5 Central to any system of workplace relations should be the right of employees to receive their full legal and contractual entitlements at work and, if this does not happen, to have the ability to enforce those entitlements in an efficient and timely fashion. To this end, the Bill provides simple mechanisms for dealing with claims about entitlements - such as underpayment of wages - whether under the Bill, industrial instruments or at common law.

Enhanced powers of Fair Work Inspectors

5.6 Under the Bill, the Fair Work Ombudsman (FWO) which will replace the current Workplace Ombudsman will be able to investigate and enforce breaches of the

[42] W. Harnisch, 'Increased Union rights will damage productivity', Media Release, Master Builders Australia, 25 November 2008; 'It's the safety net that's important to most; Victoria absent from the bill: Stewart', *Workplace Express*, 26 November 2008; T. Wood, 'One step forward, two steps back in IR', *The Australian*, 4 December 2008; P. Anderson, 'Risks and business costs in new IR laws outweigh opportunities, Australian Chamber of Commerce and Industry, 25 November 2008

Bill and fair work instruments, such as modern awards and enterprise agreements.

5.7 In doing so, the policy intention is that the FWO will be encouraging co-operative and voluntary compliance, particularly through educative activities. However, in some circumstances it will be necessary for the FWO to take more formal steps to enforce the law for example by court proceedings or using new mechanisms such as entering into enforceable undertakings or issuing compliance notices as outlined below.

5.8 Under the Bill, the FWO will be able to accept a written enforceable undertaking from a person who has contravened a civil remedy provision. This provides the FWO with another option to encourage co-operative compliance instead of pursuing litigation. The Bill provides inspectors with an alternative to court proceedings by empowering them to issue compliance notices in relation to entitlements such as those contained in the NES or an applicable modern award or enterprise agreement. A compliance notice is a notice that requires a person to take certain steps to remedy a suspected contravention and/or provide reasonable evidence of the person's compliance with the notice. Failure to comply with the notice may contravene a civil remedy provision. There is a statutory right of review in relation to compliance notices. The review would be carried out by a court.

5.9 These new compliance mechanisms will provide more options to resolve contraventions at the workplace level in the first instance. Both options support and encourage alternatives to court proceedings so as to avoid or reduce litigation costs.

5.10 As is the case under the current law, if voluntary compliance fails, or in cases of a serious breach of the law, the FWO will be able to bring enforcement proceedings in a court and may represent employees who are, or may become, parties to proceedings.

5.11 Under the Bill, the existing powers of workplace inspectors will be largely retained. These include the ability to:

- enter premises where work is performed, or where documents relating to the business are kept;
- inspect any work, process or object;
- require the production of documents; and
- interview a person (with their consent).

5.12 Inspectors will also have some new powers, including being able to:

- copy relevant documents and records on premises (this is intended to reduce delays by allowing copying of records on site);
- require a person suspected of breaching a civil remedy provision to give their name and address; and
- take an assistant onto premises to assist in an investigation.

5.13 Assistants will be able to accompany inspectors onto premises when this is considered necessary and reasonable and the assistant has suitable qualifications and experience. The FWO (or his or her delegate) will be required to approve the use of an assistant in advance, on each occasion. For example, in circumstances where an employee or an employer is from a non-English speaking background, the FWO may consider that it is appropriate for an inspector to take an interpreter onto premises to assist in their investigation.

5.14 These enhanced powers for inspectors are designed to assist inspectors to obtain necessary information and to identify the right people in the most

efficient and effective way. This will better enable inspectors to effectively monitor, investigate and enforce compliance. The new powers are consistent with inspector powers in other state and Commonwealth legislation.

Enforcement of safety net contractual entitlements

5.15 Workplace inspectors currently have no capacity to investigate or enforce any breaches of common law employment contracts. Instead, employees have to pursue these matters on their own. For example, if an employee is contractually entitled to 6 weeks' annual leave a workplace inspector can currently only investigate and enforce the relevant statutory safety net entitlement of 4 weeks. The employee would need to seek enforcement of the additional 2 weeks' contractual entitlement separately.

5.16 To address this, Fair Work Inspectors will be able to investigate breaches of a common law employment contract relating to a statutory safety net entitlement, such as the NES, a modern award, enterprise agreement or wages order (safety net contractual entitlements). This could include such things as annual leave, personal leave, allowances and the relevant minimum wage.

5.17 Fair Work Inspectors would not be able to investigate or enforce the safety net contractual entitlements unless they reasonably believe there is also a breach of a statutory safety net entitlement. Inspectors can only enforce such contractual entitlements on behalf of an employee if they also enforcing a statutory safety net entitlement. This ensures that Fair Work Inspectors do not intrude into purely contractual matters. However, given the extent to which breaches of common law entitlements and statutory entitlements arise from the same circumstances, this will make it easier for inspectors to help employers and employees resolve related employment matters at the same time.

5.18 For example, where a Fair Work Inspector reasonably believes that an employer has breached an employee's entitlement under the NES to 4 weeks' annual leave, the inspector could also investigate whether the employer had complied with its contractual obligations in relation to wages in relation to that employee.

Improved small claims procedure

5.19 Under the Bill, employees seeking to enforce a safety net contractual entitlement can elect to have a matter dealt with under the small claims procedure. The small claims procedure is intended to provide a simple and quick mechanism for dealing with claims of a relatively low amount.

5.20 The existing small claims mechanism only operates in state courts. The Bill extends small claims so that they may be undertaken in the Fair Work Division of the Federal Magistrates Court and the monetary limitation on the small claims mechanism will be increased from $10 000 to $20 000 (including in relevant state and territory courts). This mechanism will only apply where a person is not seeking a pecuniary penalty.

5.21 When dealing with a matter under the small claims procedure, the Fair Work Division of the court may act in an informal manner, will not be bound by formal rules of evidence and may act without regard to legal form and technicality. This makes it much easier for employees to bring claims themselves and for them to be dealt with in an efficient and effective manner. Lawyers are excluded from small claims proceedings (except with leave of the court), except where a lawyer is an employee or officer of a party to proceedings.

Transfer of business

Overview and statement of policy intent

5.22 The new transfer of business provisions in the Bill will assist in moving to a simpler workplace relations system that adequately protects conditions and entitlements, as outlined in sections 3 and 4. This is achieved with the inclusion of a clear, simple definition of transfer of business in clause 311 that provides greater certainty for all parties in relation to the transfer of rights and obligations, if there is a transfer of business from one employer to another employer.

5.23 The Bill broadens the circumstances in which a transfer of business occurs and is designed to make it easier to determine where this has happened, with a definition that focuses on the activities of the employees and the work being performed rather than the character of the business. In this respect, the new definition in the Bill is similar to the substantial identity test, referred to below.

5.24 The definition also specifies the required connections (asset transfer, in-sourcing, outsourcing, associated entities) between the employers.

5.25 These provisions replace the current provisions in relation to 'transmission of business' that are found in Part 11 of the WR Act.

5.26 The WR Act does not define 'transmission of business' and this has resulted in a number of tests being developed by the courts to determine whether a transmission has taken place. In a key decision in *PP Consultants Pty Ltd v Finance Sector Union of Australia* [2000] HCA 59 the High Court developed the 'business characterisation' test. This test applies to the private sector and has had the effect of excluding many outsourcing arrangements from the transmission of business provisions. The High Court held that the 'substantial identity' test, as set out by the Federal Court in *North Western Health Care Network v Health Services Union of Australia* [1999] FCA 897, was not an appropriate test.

5.27 The difficulty involved in determining the threshold question of whether a transmission of business has actually occurred is well illustrated by the number of cases which have arisen from consideration of the entitlements of meter readers since the privatisation of power utilities in Victoria. These cases include *Automated Meter Reading Services/ASU v Automated Meter Reading Services* (PR922053); *Australian Services Union v Electrix Pty Ltd* [1999] FCA 211; and, *Urquhart v Automated Meter Reading Services (Aust) Pty Ltd* [2008] FCA 1447.

Response to issues raised by stakeholders on transfer of business provisions in the Bill

Restructuring or sale of business

5.28 The Bill provides for the transfer of business rules to work in a practical and fair way for employees and employers. While the provisions uphold the principle that when a new business is acquired it comes with the legal contractual obligations that the business has entered into, such as enterprise agreements, FWA will have the capacity to rationalise the instruments of employment that apply.

5.29 The creation of modern awards on industry and occupational lines will mean that the transfer of businesses to a different award will be less relevant in the future, as the same award will generally apply to both the old and new employers in most cases. The principal operation of this part will therefore be in respect of enterprise agreements and workplace determinations.

5.30 The Bill provides that the new or old employer may make an application to FWA, either before or after the transfer, to rationalise the application of such instruments. This will assist purchasers in ensuring certainty as well as the workability of enterprise agreements during any outsourcing or restructuring activity.

5.31 Under Division 3 of Part 2-8 of the Bill, FWA has broad power to change the coverage of transferred instruments and a new employer's existing instruments. In deciding which agreements to apply however, FWA must take into account the views of the new employer and the employees who would be affected, whether any employees would be disadvantaged, the nominal expiry date of any agreement and the public interest.

Offering employment to existing employees

5.32 The Bill does not impose an obligation on a new employer to employee the employees of the old employer. However, it is often to the advantage of the new employer to take on the old employees and all their skills and knowledge of the business. Potential business purchasers are unlikely to be discouraged from taking on employees on a transfer of business as a result of the provisions of the Bill which relate to the transferability of instruments. Under the Work Choices amendments, a transmitted agreement ceased to have effect after 12 months. Under the Bill, while this won't occur, a request to rationalise agreements may be considered by FWA, either before, or after, a transfer of business. As noted above, FWA must take into account the views of the new employer and the employees who would be affected, whether any employees would be disadvantaged, the nominal expiry date of any agreement and the public interest.

5.33 In relation to the NES, the transfer of business provisions allow a new employer to have a choice to recognise service in relation to annual leave and redundancy pay. If the new employer does not agree to recognise service, the old employer must, subject to the provisions of the NES, pay out these entitlements. This issue is dealt with further in Section 3.

5.34 In relation to the minimum employment period for unfair dismissal protection, employers will also be given choice. Under the Bill, transferring employees' previous service for the purposes of the minimum employment period for unfair dismissal will be recognised unless the new employer expressly informs transferring employees in writing of a requirement for a new minimum employment period. This issue is dealt with further in section 4.

Fair Work Australia

Overview and statement of Policy Intent

5.35 The establishment and operation of FWA will be a key part of moving towards a simpler workplace relations system for the benefit of all participants. This will be evident in a number of ways, as outlined below.

Improved accessibility

5.36 FWA, along with the Office of the Fair Work Ombudsman (FWO) will replace seven separate agencies that make up the institutional framework in the federal workplace relations system. The Government intends that FWA will operate as a 'one stop shop', providing Australian employees and employers with a central point of contact for information, advice and assistance on workplace relations issues. For example, it is intended that Australian employees and employers wishing to access information or assistance will be able to do so through a single FWA information phone line or through a single website.

5.37 The work of FWA will be complemented by new specialist Fair Work Divisions in the Federal Court and the Federal Magistrates Court.

Less formality and greater efficiency

5.38 FWA will be a modern institution with a user-friendly culture. The Bill contains provisions that enable and encourage FWA to use informal process that are not legalistic or unnecessarily adversarial. This will assist in ensuring employers and employees receive fast and effective assistance on workplace relations issues.

5.39 For example, while FWA will be required to observe the rules of natural justice and will continue to be able to hold hearings into matters, it will also be able to deal with matters through a wide range of less technical, inquisitorial processes, including informal conferences, or by determining matters 'on the papers' without a requirement for parties to attend formal hearings in person.

5.40 Administrative staff will be able to perform many ancillary, non-determinative functions to enquire and gather information about a matter. In some cases administrative staff can perform some functions under delegation. This will assist FWA to deal with matters quickly, informally and with less technicality, while still according the parties procedural fairness.

5.41 For example, the AIRC's Annual Report for 2006–07 stated that it took an average of 28 days before the first hearing in a dispute resolution matter was heard. In relation to termination of employment applications, 85% of matters took up to 102 days to be finalised. With the assistance of administrative staff and the practical integration of agencies, it is anticipated that matters will be heard earlier and be resolved quickly in a shorter timeframe.

5.42 When dealing with FWA, it is envisaged that persons would generally represent themselves, without legal or other professional representation. Of course, persons will be able to be represented by their bargaining representative or an employee, member or official of a registered organisation of which they are a member. Legal or other professional representation would be permitted in limited circumstances with the permission of FWA.

Response to issues raised by stakeholders on provisions in the Bill relating to Fair Work Australia

5.43 Some concerns have been expressed over the level of power FWA will have in the new workplace relations system[43]. These concerns are largely directed at FWA's capacity to make workplace determinations.

[43] B. Norington & E. Hannan, 'Jobs on the line', *The Australian*, 6 December 2008

5.44 As outlined in section 3, the power of FWA to make a workplace determination will be available only in limited, exceptional circumstances. Parties will have the option of requesting FWA to assist them in resolving disputes, but in most cases it is envisaged that parties will bargain without the need for assistance. Overall, the Bill encourages FWA to assist parties in an informal, efficient and non-adversarial manner.

5.45 Concerns have also been expressed regarding whether restrictions exist as to who may access FWA and whether these restrictions favour persons represented by a union[44].

5.46 While legal and other professional representation will be limited to ensure FWA operates in an informal, efficient and non-adversarial manner, employees and employers will be able to easily access FWA and choose whether to represent themselves or be represented by an appropriate representative. Clause 596 of the Bill sets out the matters to be considered by FWA in deciding whether to permit a person to be represented by a lawyer or paid agent. The key considerations are efficiency and fairness to the parties. Subclause 596(2)(b) recognises that some people are not in a position to be able to effectively represent themselves.

Streamlined provisions covering industrial action and secret ballots

5.47 Section 3 dealt with the industrial action provisions of the Bill in the context of how they relate to the bargaining framework. It is also instructive to raise these provisions again in terms of how they help to achieve the objective of a simpler Bill and simpler workplace relations system.

Overview and Statement of Policy intent

5.48 Provisions in the Bill regulating industrial action are streamlined and simplified, in comparison to the provisions in the WR Act, and some duplication is removed. The intention is that employers and employees, as well as representative bodies and practitioners, will find the provisions easier to follow. This may have the added benefit of improved compliance.

5.49 Provisions for secret ballots are a particular example. The secret ballot provisions in the WR Act are unnecessarily prescriptive. By contrast, the protected action ballot provisions in the Bill establish a simpler and more streamlined democratic process for protected action ballots.

5.50 In addition, to reduce delays in the protected action ballot process and prevent parties from having to re-apply for ballot orders that have expired, a ballot order will not be able to be stayed if a challenge to the ballot order is made. This addresses concerns highlighted by Senior Deputy President Watson of the AIRC when he suggested recently that consideration be given to rectifying the current provisions. In a decision handed down on 22 October 2008, SDP Watson stated that "…*The bringing of an appeal and the obtaining of a stay order based only on the establishment of an arguable case would provide a ready, and it would appear unintended, means of frustrating the substantive*

[44] A. Boswell, 'IR legislation won't work without us, say lawyers', *Australian Financial Review*, 28 November 2008

legislation right to engage in protected industrial action, where sanctioned by Part 9 of the Act…"[45].

5.51 Employers will still have recourse to FWA if they are concerned the subsequent industrial action is unprotected.

[45] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) v Bilfinger Berger (Australia) Pty Ltd* AIRC BP2008/3448

Section 5. Flexibilities for Employees and Employers

Introduction

6.1 The previous section of the submission focused on provisions of the Bill that promote fairness and representation in the workplace.

6.2 Equally, the Bill promotes flexibility so that employees and employers can determine working arrangements that best suit their needs. This is an especially important consideration, for example, in assisting employees to balance their work and family responsibilities by providing for flexible working arrangements, which the Bill expressly includes as an Object of the Bill.

6.3 The Bill helps to achieve this in various ways. Specifically, the NES for parental leave and flexible working arrangements are designed to encourage employers and employees to discuss and consider arrangements that allow employees to balance their work and family responsibilities. Furthermore, the Bill provides that agreements and awards must include a flexibility clause to enable employees and employers to negotiate flexible working arrangements which best meet their individual needs. These flexibility arrangements are discussed further below.

Flexibility in the National Employment Standards

Overview and statement of policy intent

6.4 The NES contain a number of flexible provisions that better enable employees to manage their work and family responsibilities, with the key examples being parental leave, the right to request flexible working arrangements and carer's leave.

Parental leave

6.5 The proposed parental leave standard is designed to provide parents with the flexibility of up to 24 months' unpaid leave to care for their child. This effectively doubles the entitlement to unpaid parental leave currently provided in the WR Act.

6.6 Parents can choose to use the new provisions in a flexible way. Each eligible parent can access separate periods of up to 12 months of unpaid leave associated with the birth of a child and the parents can take up to three weeks' unpaid leave concurrently. The timing of the concurrent leave may be negotiated with the employer as long as it is completed no later than six weeks after the birth of date of placement.

6.7 Once parental leave has commenced, an employee is entitled to make one extension to the period of unpaid parental leave up to the full 12 months, less any leave taken by the other member of the employee couple in relation to the birth of the child. Additional extensions or a reduction in the period of parental leave can be negotiated by agreement between employers and employees.

6.8 The Bill introduces a new right for eligible employees to request extended unpaid parental leave beyond 12 months. For example, where families prefer one parent to take more than 12 months' leave, that parent will be entitled to

request up to an additional 12 months of unpaid parental leave from their employer. Employers will only be able to refuse the request on reasonable business grounds. Any extension beyond the initial 12 months of unpaid parental leave reduces the parental leave entitlement of the employee's spouse by an equivalent amount.

Right to Request Flexible Working Arrangements

6.9 The proposed flexible working arrangements standard provides an employee who is a parent and has responsibility for the care of their child with a right to request flexible working arrangements to assist the employee to care for the child until the child reaches school age.

6.10 The Bill does not define flexible working arrangements as this could limit the scope or types of arrangements that an employer and employee might agree to assist the employee to balance their work and family responsibilities. However, flexible arrangements could include a reduction in hours of work (for example, part-time work), a change to standard start or finish times, working from home or another location, working 'split-shifts' or job sharing arrangements.

6.11 The intention of these provisions is to promote discussion and agreements between employers and employees about the issue of flexible working arrangements. Importantly, employees who do not meet the eligibility requirements to request flexible working arrangements, such as employees with less than 12 months' service or employees who have children older than school age, continue to be able to make requests for flexible working arrangements. However, their request is not subject to the procedures contained in the Bill in relation to the right to request.

6.12 Further, the Bill makes clear that state and territory laws that provide employee entitlements in relation to flexible work arrangements, for example the *Equal Opportunity Act 1995* (Vic), are not excluded and continue to apply to employees where they provide more beneficial employee entitlements than the Bill does.

6.13 An employee may also have remedies under relevant discrimination legislation (including federal anti-discrimination legislation) if an employee considers they have been discriminated against by the employer's handling or refusal of their request.

Carer's leave

6.14 The Bill enhances flexibility for employees with caring responsibilities by providing that paid carer's leave which can be used is no longer limited to 10 days per year. Instead, employees can use any amount of their accrued personal/carer's leave as carer's leave to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of a personal illness or personal injury, or an unexpected emergency.

Flexibility in enterprise agreements and modern awards

Overview and statement of policy intent

6.15 The Bill allows employers and individual employees to make arrangements that suit their particular needs and vary the operation of modern awards and enterprise agreements accordingly. Flexibility arrangements will assist

employees in balancing their work and family responsibilities and improve retention and participation of employees in the workforce.

6.16 The AIRC must include a flexibility term in each modern award. The terms the employer and the individual employee may agree to vary the application of are those concerning: arrangements for when work is performed; overtime rates; penalty rates; allowances; and leave loading.

6.17 The Bill also requires that all enterprise agreements contain a flexibility term that enables an employer and an employee to agree to an individual flexibility arrangement that varies the effect of the agreement in order to meet the genuine needs of the employee and employer.

6.18 Importantly, individual flexibility arrangements made under a modern award or enterprise agreement will be subject to certain requirements, including protections for employees. These protections will ensure that employees will maintain the full benefits of the safety net or of their collectively negotiated conditions should they enter an individual flexibility arrangement with their employer.

6.19 An employer and employee must genuinely agree to any individual flexibility arrangement and an employee must be better off overall than if the arrangement was not agreed. The Bill provides further procedural protections, including that the arrangement be in writing and signed by the employee and employer (or employee's parent or guardian if the employee is under 18) and that a copy of the arrangement is provided to the employee are included. The flexibility arrangement can be terminated by either the employee or employer providing written notice of not more than 28 days.

6.20 Should an employer fail to meet the requirement for a flexibility term, this will contravene the flexibility term of the applicable modern award or enterprise agreement. A contravention of a modern award or enterprise agreement term is a civil remedy provision.

6.21 Flexibility terms in modern awards or enterprise agreements are expected to be particularly useful for employees who have caring or family responsibilities, by allowing them to alter arrangements, such as hours of work, in order to meet their commitments. However, flexibility arrangements are not limited to employees with family and caring responsibilities and will be available to all employees covered by modern awards or enterprise agreements.

Flexibility for High Income Employees

Overview and statement of policy intent

6.22 The Bill strikes the right balance between fairness and flexibility with provisions that allow employees on high incomes to be exempt from modern awards.

6.23 Under the Bill, employees with guaranteed annual earnings above the high income threshold of $100,000 (indexed from 27 August 2007, the date the policy was announced, and pro-rata for part time employees) will be free to agree on terms to supplement the NES, without reference to an award.

6.24 This new modern award exemption will provide greater scope for flexible common law agreements, which have previously been required to comply with all award provisions, no matter how highly paid the employee.

6.25 Importantly, the Bill includes practical safeguards to ensure that any employee who enters into a modern award exemption does so voluntarily and in a way that ensures they cannot be unfairly disadvantaged.

Section 6. A national workplace relations system for the private sector

Introduction

7.1 Through its *Forward with Fairness* policy, the Government signalled its objective to establish a true national workplace relations system for the private sector. This is to be achieved through cooperative arrangements with the states and territories. *Forward with Fairness* anticipates the creation of a national workplace relations system for the private sector by either referral of powers for private sector workplace relations or other forms of cooperation and harmonisation.

7.2 This section of the submission outlines the current coverage of the Bill, reiterates the benefits that can be achieved through having a consistent, national workplace relations system and informs the Committee of progress to date towards that objective.

Coverage of the Bill and interaction with state and territory laws

7.3 Consistent with *Forward with Fairness*, the Bill establishes the basis for a national workplace relations system. The Bill relies on existing constitutional powers and will apply to national system employers and their employees. These definitions are supported by the corporations, trade and commerce, and territories powers and the Commonwealth's power to regulate its own employment relationships. The Bill will also rely on the external affairs power to extend parental leave, unlawful termination and notice of termination entitlements to other employees. As it stands, the Bill will apply to all constitutional corporations, extending coverage to up to 85 per cent employees across Australia, although noting there is some variance in levels of coverage between the states.

7.4 The Bill excludes the application of state and territory laws dealing with workplace relations and related matters insofar as they relate to national system employees and employers. It does not exclude state and territory laws about matters outside the core area of workplace relations, such as discrimination, training, workers compensation and occupational health and safety and essential services. These arrangements reflect extensive consultation, including on the detail of the provisions with the states and territories.

Removal of costs and confusion

7.5 The Government recognises that businesses increasingly operate across state borders and that having to comply with a number of different workplace relations systems can result in significant additional costs and duplication of effort. The existence of multiple workplace relations systems can also result in confusion and uncertainty as to coverage for employees and employers.

7.6 The achievement of a true national workplace relations system for the private sector will lead to reduced compliance costs for employers, as the national system would apply to all private sector employees and employers, regardless of which states or territories they operate in. The avoidance of unnecessary additional regulation will increase the nation's productivity and prosperity and

create certainty for employers and employees as to their workplace relations rights and obligations.

Certainty of coverage for employees and employers

7.7 The Work Choices amendments led to significant confusion over coverage for some organisations, particularly those in the local government and not-for-profit sectors.

7.8 In terms of the local government sector, there is uncertainty as to whether or not local councils are engaged in trading or financial activities that meet the tests for being a constitutional corporation and whether, therefore, they fall within federal coverage. The Government's *Forward with Fairness* policy made it clear that the coverage of State public sector and local government employees is a matter to be decided by each State.

7.9 In response to this immediate level of uncertainty, the Queensland Government passed legislation in early 2008 de-corporatising all local councils in Queensland other than the Brisbane City Council, which had the effect of removing the councils from the potential application of the federal system. The New South Wales Parliament passed legislation with similar effect in November 2008.

7.10 As set out in *Forward with Fairness*, it will be up to each State government to decide whether its public sector and local government employees will be part of the national system. The negotiation with the Commonwealth of clear referrals by the States will provide certainty of coverage under the national system for all employees and employers, including those in the not-for-profit sector.

Progress on negotiations with the states and territories

7.11 The Government is continuing to work cooperatively with the state and territory governments towards the achievement of a true national workplace relations system, including through the Workplace Relations Ministers' Council (WRMC).

7.12 At the 5 November 2008 WRMC meeting, Ministers acknowledged the Bill as providing the foundation for a national workplace relations system for the private sector. WRMC Ministers have previously endorsed *Forward with Fairness* as the basis of a modern, fair and flexible workplace relations system and agreed to a set of principles to guide the development of governance arrangements for a stable uniform national system.

7.13 It is noted that the Western Australian Minister for Commerce, the Hon Troy Buswell MLA, subsequently announced that he would be recommending Western Australia not join the national system and that a review of the Western Australian legislation and its administration would be undertaken[46].

7.14 The states and territories have contributed to the development of the substantive workplace relations reforms through the High-Level Officials' Group, which was established by the agreement of WRMC and comprises senior Commonwealth, State and Territory government officials. Ministers have directed the High Level Officials' Group to develop an inter-governmental agreement (IGA) for a national workplace relations system and work on an IGA is ongoing.

[46] T. Buswell (Minister for Commerce), *WA unlikely to hand its industrial relations powers to Canberra*, Media Release, WA Government, 8 November 2008

Technical process for referrals to the national system

7.15 The Bill does not currently contain provisions for state referrals into the national system due to the ongoing nature of negotiations in relation to state involvement.

7.16 When the nature of each state's involvement in the national system has been settled, any referrals will require subsequent amendments to the legislation. The timing of any such amendments is dependent on the timing of referral decisions by state governments and the timing of their own legislative processes. However amendments based on referrals could be included in the transitional legislation that the Deputy Prime Minister has foreshadowed the Government will introduce into Parliament in the first half of 2009. Other forms of cooperation and harmonisation will not require amendment to the legislation.

Section 7. Conclusion

8.1 The Bill delivers on the Government's plan for fairer and more productive Australian workplaces.

8.2 As this submission has demonstrated, the Bill does this through a balanced framework for workplace relations which addresses the key issues of importance to employees and employers in the workplace. These include:

- a guaranteed safety net of wages and conditions that is easy to understand and cannot be stripped away;
- a flexible bargaining system that is focused on achieving productivity at the enterprise level, with clear rules governing industrial action;
- the right to freedom of association and the right to be represented in the workplace;
- the ability to balance work and family responsibilities;
- protections from unfair dismissal and discriminatory treatment in the workplace;
- a single, independent umpire that is responsive to the workplace needs of employers and employees;
- effective compliance mechanisms and enforcement procedures;
- the capacity to meet the needs of employers and employees in all economic circumstances; and
- a simpler system of workplace laws.

8.3 As with any Bill of this magnitude, there are issues of concern that various parties will raise. The submission has sought to address these issues to assist the Committee in its deliberations and the Inquiry process provides an opportunity for these matters to be considered further.

8.4 However, with these key features outlined above, the Bill offers the opportunity to put in place a stable and enduring system of workplace relations to take Australia forward and meet the economic and social challenges of the future.