Senate Education, Employment and Workplace Relations Committee

Inquiry into the *Fair Work Bill 2008*

Communication, Electrical and Plumbing Union

Submission

January 2009

PART A – General Submissions of the CEPU

Introduction

1. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("the CEPU") appreciates the opportunity to make this submission to the inquiry of the Senate Standing Committee on Education, Employment and Workplace Relations into the *Bill 2008*. ("the *Bill*")

2. This submission is divided into two parts. Part A contains the general submissions of the CEPU. Part B contains further submissions from the Communications Division of the union, including a discussion of the union's experiences with Telstra and Australia Post under the current industrial laws. These experiences, together with other matters raised by the Communications division, provide additional material that supplements and extends the union's submissions in Part A.

3. The CEPU generally adopts and supports the submission of the Australian Council of Trade Unions (the ACTU). While the ACTU submission goes to a broad range of matters, our submission largely focuses on those issues of key, or particular, importance to CEPU members. The submission also includes a relatively small number of matters upon which the CEPU has a different view to that of the ACTU.

Consultation Commended

4. The CEPU commends the Government for the widespread consultation it conducted when drafting the *Bill*. The Consultation (including the Committee on Industrial Relations (COIL)) contrasts to the lack of consultation undertaken by the previous Howard Government when it developed the *WorkChoices* variations to the *Workplace Relations Act 1996* ("*WorkChoices*")[1].

5. The *Bill* is commendably a complete rewrite of the *Workplace Relations Act 1996.* As a result it is a more accessible and coherent document written in plain English.

6. If passed, the *Bill* will provide significant improvements in the promotion of bargaining underpinned by an appropriate safety net of entitlements.

International Labour Conventions

7. The Committee may have followed some of the discussion in the media concerning whether the Forward with Fairness legislation meets Australia's obligations under international labour agreements.

[1] The variations referred to are those substantially contained in the *Workplace Relations Amendment (Work Choices) Act 2005*

8. This submission does not provide a comprehensive analysis of whether the *Bill*, if passed, would fix the many breaches of Australia's obligations identified by the International Labour Organisation (ILO) in the current legislation. However, we do raise some general concerns based upon past observations from the ILO.

9. Clearly, the CEPU would not, and could not, support any provisions that breached Australia's obligations under international labour agreements. Ultimately, this is an issue upon which we urge further examination and consideration.

10. We expand upon this issue later in this submission.

Forward With Fairness Transition Legislation Supported by the CEPU

Individual Agreements Phased Out

11. The CEPU commends the government for phasing out individual agreements between employers and employees. The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* removed the ability of employers to continue to reduce employees' wages and conditions by entering into Australian Workplace Agreements (AWA's). That Act also provided for the making of Individual Transitional Employment Agreements (ITEA's) but these ITEA's are required to pass a no disadvantage test which protects employees significantly better than AWA's.

The *Bill* 2008: Comments and Concerns

12. Whilst the CEPU commends the general thrust of the *Bill*, there are several provisions of the *Bill* that the unionis concerned about and urges the Senate to amend. The following submissions deal with specific aspects of the *Bill* that the CEPU either supports or seeks to have changed.

Representation of members improved

13. If passed, the *Bill* will improve the ability of unions to represent the interests of their members in a number of significant respects including:

- The requirement that a union is automatically recognised as the bargaining representative of its members at each enterprise except where a member opts out. (s.174(3)).
- The ability of unions (as bargaining representatives) to obtain a bargaining order from Fair Work Australia ("FWA") to force employers to bargain in good faith. This is a substantial improvement on the current situation where employers can refuse to bargain with employees who overwhelmingly seek a collective agreement.
- The Right of Entry of a union official holding a Right of Entry Permit to hold discussions with employees being based on the ability of the unionto represent employees (eligibility to enrol those employees) rather than the existing requirement for the union to be bound by an award or agreement operating at the enterprise.

- The expansion in the types of matters that can be included in agreements applying at a workplace.

14. The CEPU strongly supports these improvements to the Act.

Abolition of Australian Pay Classification Scales

15. The abolition of Australian Pay Classification Scales is a major and welcome reform. The *Bill* provides for Awards to be comprehensive and contain wage rates and classification structures/career paths instead of the regrettable and confusing *WorkChoices* arrangement of stripping awards of wage rates and classification structures/career paths.

16. The changes would mean employees and employers have easier access to the documents that set out the safety net of entitlements underpinning their agreements.

Awards

$100,000 exclusion

17. The *Bill* provides that modern awards will not apply to "high income employees" (s.47(2)). The threshold of annual earnings and non-monetary benefits an employee must be guaranteed for an award not to apply to their employment is to be prescribed by regulation (s.333). The regulations have not yet been drafted.

18. The CEPU is concerned that the threshold being proposed by the government is to be $100,000 p.a (see paragraphs r103, 1304 and 1332 of the *Explanatory Memorandum*). This amount is too low. If there is to be an exclusion for "high income employees", something that the CEPU does not support, the threshold should be substantially increased to avoid employees whose 'base rate' may not be high, but who may work shift work and excessive rostered overtime to pass the $100,000 threshold.

19. The CEPU commends the government's intention not to allow employers to attempt to exclude employees from the application of an award where an enterprise agreement applies to the employees employment on the day the employee is engaged (s.330(1)(e)) & s.331(b)(ii)).

20. However the CEPU is concerned about the ability of employers to make an offer of employment conditional upon the employee accepting a guarantee of annual earnings, in circumstances where the Workplace Rights set out in the *Bill* (s.340-345) do not apply to protect the employees (s.341(4)).

21. Lack of Arbitration by Fair Work Australia over *disputes arising over the operation of awards and the NES*

22. The *Bill* does not provide Fair Work Australia with arbitral power to finally settle disputes arising over the operation of modern awards or the NES. Rather, the *Bill* only

allows FWA to finally settle disputes by arbitration where the parties to the dispute agree to allow the FWA to finally settle the dispute.

23. The prompt settlement of disputes over the operation of an award provision or NES without the consent of both parties to the dispute is essential to promoting productivity and ensuring fairness. The *Bill* proposes final settlement of disputes to be dealt with as breaches of awards/NES by the Fair Work Divisions of the Federal Court, and the Federal Magistrates Court (including small claims procedures).

24. While the courts may refer parties to FWA for conciliation prior to hearing, as noted above, FWA can only arbitrate the dispute if both parties agree.

25. Restricting final settlement of disputes to the courts (including the small claim procedures) will not provide for speedy and efficient resolution of disputes. This has obvious negative implications for both fairness and productivity in the workplace.

26. The Senate should amend the *Bill* to provide FWA with the power to settle disputes over the operation of awards and/or the NES, including the power to arbitrate. This is distinct from the need to allow courts to enforce breaches of awards/NES.

Small Claims Procedure

27. The small claims procedure proposed by the *Bill* (s.548) commendably provides an accessible remedy for breaches of awards/NES and agreements. The requirement that the courts not be bound by rules of evidence and that the courts must deal with applications without regard to legal forms and technicalities should make access to the court system easier and is commendable.

28. Nonetheless, to ensure that the small claims procedure is readily accessible to employees attempting to enforce their entitlements, there should be no application fees payable to access the procedure. This is especially important given the relatively low ceiling ($20,000) for claims.

Agreements

29. For the first time since enterprise agreements were introduced in 1993 the *Bill* does not provide for 'union collective' agreements as distinct from 'employee collective' agreements.

30. The *Bill* generally proposes that agreements are to be made between employers and employees. A union which acted as a bargaining representative may be named by FWA as being "covered by" the agreement.

31. Notwithstanding that under the *Bill* the rights of unions covered by an agreement are similar to those of a unionparty to a unioncollective agreement, the CEPU expresses our in principle opposition to the move away from a legislative regime where unions are recognised as parties to agreements.

32. The removal of union collective agreements unnecessarily complicates the bargaining provisions of the *Bill*. Further, the change inappropriately tends to characterise unions more as agents servicing individual employees, rather than as a democratically controlled body of the collective.

Employer/ Union *Greenfields Agreements*

33. The CEPU commends the government for discontinuing the *WorkChoices*' Employer Greenfield agreements which were subject to abuse by a minority of employers.

34. The CEPU also commends the government for the proposed changes to Employer/Union Greenfield Agreements. The new requirement that an employer seeking an Employer/Union Greenfield agreement must give notice to all relevant unions 14 days prior to an agreement being made (s.175) is a welcome reform. The change mitigates against inappropriate agreements being made between employers and a friendly union to the disadvantage of members of other unions traditionally involved in the industry.

Content of Agreements

35. The CEPU notes that the *Bill* allows parties to negotiate agreements over a much wider range of conditions than is allowable under *WorkChoices*. Whilst retaining the provision that agreements can be made about matters pertaining to the employer/employee relationship, the *Bill* commendably expands the matters that can be agreed to include matters pertaining to the employer/union relationship, employee authorised deductions from wages and operational clauses (s.172(1)).

36. While the CEPU recognises this positive expansion in what parties can bargain for, it urges the Senate to further expand the matters that can be agreed. Where unions, employers and employees come to an agreement on matters that they consider relevant to their circumstances, the role of the Fair Work Act should be substantially limited to ensuring that such agreements are enforceable. An obsession with the content of agreements was a hallmark of the *WorkChoices* regime.

37. If an agreement is above an appropriate safety net, and otherwise not illegal, there seems little legitimate role for the Government in prescribing the content of such an agreement. In particular, we submit that agreements should be able to include a wide range of matters including provisions going to: carbon emission reduction; green energy consumption; better access of unions to members at the worksite to assist in better work organisation issues and safe working practices; examination of new technology ecetera.

Model Flexibility Clauses

38. The CEPU is opposed to the requirement that all agreements must have an individual flexibility term, or a model flexibility term shall apply (s.202).

39. The individual flexibility term must allow for the employer and employee to agree to an individual flexibility arrangement which displaces relevant provisions of the agreement.

40. We recognise that the *Bill* provides the following protections to employees in negotiating such individual flexibility arrangements:
- a requirement that any agreement is genuinely agreed;
- a requirement that the employee be better off overall; and
- a requirement that any agreement can be unilaterally terminated by giving 28 days notice. (s.203)

41. Despite those protections, the compulsory individual flexibility provisions in agreement are likely to undermine the collective agreement in the longer term.

Right of Entry Provisions of Agreements

42. The *Bill* proposes unnecessary restrictions on terms about Right of Entry within agreements.

43. The *Bill* proposes that a term of an agreement is unlawful (and the agreement cannot be approved by FWA) to the extent that the term provides an entitlement:
- to enter premises to investigate suspected breaches; and/or
- to enter premises to hold discussions with employees;

other than in accordance with Part 3-4 of the *Bill* which deals with Right of Entry (s.194(f)).

44. Part 3-4 of the *Bill* imposes several unnecessary restrictions on how right of entry is to be exercised, including:
- entry only during working hours;
- entry for discussions with employees only during meal times or other breaks;
- conducting interviews or discussions in a particular room or area of the premises;
- allowing employers to "reasonably" dictate the route to be taken to a particular room or area (s.490. s.492).

45. These universal restrictions are totally inappropriate.

46. The *Bill* restricts employers and employees (via their union) to agree on practical and beneficial right of entry arrangements that best suit the needs of the enterprise. It also restricts those employers and unions who have developed cooperative relations from codifying the union's ability to enter the workplace to hold discussions with members.

47. We submit that unions, as bargaining representatives, should have the right to negotiate to represent members in an unfettered way. This means the *Bill* should enable right of entry provisions to be included in agreements that, amongst other things, allow for:
- shorter and more flexible notice requirements; and

- provisions that allow permit holders to examine work practice and safety issues at the coal face.

48. At a minimum, the CEPU urges the Committee to recommend that the issue of right of entry in agreements be dealt with in the manner it was under the Act prior to *WorkChoices*.

The Bargaining Process

Complexity of Bargaining Process

49. As noted earlier in this submission, the lack of union collective agreement has increased the complexity of the bargaining process.

50. Despite the added complexity of the process, the CEPU commends the government for introducing good faith Bargaining Orders to ensure that employers cannot simply refuse to bargain with employees collectively where those employees overwhelmingly seek a collective agreement.

Prohibition on Pattern Bargaining

51. Section 442 of the *Bill* allows a person to apply to the Federal Court or Federal Magistrates Court for injunctive relief to restrain bargaining representatives from pattern bargaining. If employee claim action for a proposed enterprise agreement is being engaged in, threatened or probable and a bargaining representative of an employee to be covered by the agreement is engaging in pattern bargaining the protected status of the industrial action is removed (s.409(4)). Pattern bargaining is defined in s.412.

52. Pattern bargaining is a legitimate approach to bargaining which may suit employers and employees in an industry to ensure a level playing field of wages conditions across an industry or industry sector. It should be a matter for the bargaining participants to decide, not for Parliament to prescribe.

53. In relation to the availability of injunctions pursuant to s.442, it is noteworthy that an application can be made for an injunction by any person, not necessarily by an affected employer. This is completely inappropriate as it appears to allow persons with no relationship to the action being able to obtain an injunction against the action. If injunctions against pattern bargaining are to be provided for at all, applicants for injunctions should be restricted to employers affected by the action.

Particular Aspect of Bargaining Orders

54. Whilst the bargaining orders proposed in the *Bill* are a welcome facilitator of fair bargaining, one aspect of the bargaining order provisions is of concern.

55. Subsection 231(3) of the *Bill* sets out the kinds of orders FWA can issue, including an order excluding a bargaining representative for the agreement from bargaining (s.231(2)(a)), and an order that bargaining representatives meet and appoint one of the bargaining representatives to represent the other bargaining representatives in bargaining (s.231(2)(b)).

56. The Electrical Division of the CEPU represents electrical/electronic workers who often constitute a small proportion of the workplace, yet have particular bargaining needs because of the unique nature of the trade. That is why they choose to have the Electrical Division represent them rather than join industry unions.

57. The CEPU is concerned that s.231(2)(a) may become a vehicle for employers to discriminate against minority groups within the workforce by removing their bargaining representatives from the bargaining process.

58. The *Bill* should be amended to avoid minority groups such as maintenances electricians being denied the representation of their choice.

Industrial Action

Definition of Industrial Action

59. Industrial action is defined in s.19 of the *Bill*. It is defined in similar terms to the *WorkChoices* definition of industrial action.

60. The CEPU is concerned that the proposed definition of industrial action applies to a wide range of employee action and not to employer action, except for lockouts.

61. Employees who perform work in a manner different from how it is customarily performed, or who impose bans or limitations on work, are taking industrial action as defined in the *Bill*.

62. On the other hand, an employer can unilaterally change how work is allocated/performed and change rostering arrangements without that action being industrial action and without employees being able to seek FWA orders to stop such action.

63. This discrepancy has important implications. Aside from the wide range of common law remedies available to employers where employees do not perform work in accordance with their contract (including disciplinary action and dismissal), the *Bill* also requires FWA to order that industrial action (which is not protected industrial action) cease (s.418-421).

64. The practical application of this regime is that prior to the Nominal Expiry Date (NED) of an agreement, employees are unable to take any action in response to employers who unilaterally change shift rosters, the allocation of work and other changes to how work is customarily performed. Even holding a meeting during working hours is industrial

action and the employees must lose at least 4 hours pay irrespective of the length of the meeting (s.474). This is clearly inequitable.

65. At a minimum, the definition of Industrial Action should be amended to incorporate action by employers. The *Workplace Relations Act 1996* (prior to the *WorkChoices* amendments) defined industrial action to apply equally to action by employers and employees. That more balanced approach should be adopted in this legislation.

Protected Action Ballot Orders

66. A quick but revealing insight into the technical and substantive barriers that face unions and employees in applying for protected action ballots under the *WorkChoices* regime can be gained from a perusal of a "checklist" developed by one of Australia's well known legal publishers. The checklist covers a vast array of matters – many of them with a significant amount of case law applying to them. A copy of the checklist may found at Appendix 1A.

67. The multitude of technical and substantive barriers identified in the checklist can lead to long delays in the Commission's consideration of protected action ballot orders. For example, in *Automotive, Food, Metal, Engineering, Printing and Kindred Industries* Union *v. Mayfield Engineering Pty Ltd*, the relevant union applied for a protected action ballot order on 25 August 2006. The Commission did not issue its decision to grant the application until 21 November 2006. The orders subsequently contained a closing date for the ballot of union members of 18 December 2006. A four month delay being imposed on a union to ballot its own members is clearly unacceptable.[2]

68. The proceedings concerning the CEPU's application for a protected action ballot order in relation to members at Bilfinger Berger Services (Australia) Pty Ltd[3] also illustrates further problems with the current legislation that have led to delays and unfairness.

69. On 1 July 2008 the CEPU lodged an application for a protected action ballot order. The application was contested however, the Commission in a decision on 14 July 2008, found that an order should issue. The order was subsequently issued on 15 July 2008.

70. Bilfinger Berger Services (Australia) Pty Ltd appealed the decision and the order. A stay of the ballot order was granted on 21 July 2008, pending determination of the appeal. The appeal was heard on 12 August 2008, with further written submissions filed on 19 August 2008. The appeal was dismissed by decision of 7 October 2008.

71. The CEPU subsequently applied to vary the ballot order pursuant to s.469(1) of the *Workplace Relations Act 1996*. The application was brought on the basis that the passage of time during which the order was stayed meant that the dates associated with the ballot within the order had passed and required amendment in order to give practical effect to the ballot order. On 16 October 2008, the Commission found that there was no

[2] See Prints PR974707 and PR974728.

[3] See variously the AIRC's decisions in PR982447, [2008] AIRCFB 763 and [2008] AIRC 818.

power to vary the ballot order. The Commission however, issued a fresh protected action ballot order, with a closing date of the ballot of 4 November 2008. Again, however the delay of 4 months for a union to ballot it's own members is clearly unacceptable.

72. Whilst we recognise that the process for obtaining a protected action ballot order has been simplified and improved, the CEPU is concerned that the *Bill* retains much of the *WorkChoices* procedures for obtaining a protected action ballot order.

Unions to Ballot Own Members

73. The CEPU's primary submission is that where only union members are to vote in support of a course of industrial action, a formal declaration from the relevant union that such a vote has validly been conducted should be sufficient to authorise a union to call for protected industrial action to be taken in support of an agreement.

74. Where non-union members are being asked to authorise a course of industrial action, the CEPU accepts that different provisions may be appropriate.

Alternative Submissions

75. In the alternative, if the Committee does not recommend that the need for protection action ballot orders be removed, the CEPU has a number of suggestions for reforms to the ballot process that have been identified by the Communications Division of the union in Part B of this submission. In addition, the union makes the following submissions regarding the current "genuinely trying to reach agreement" and quorum requirements.

Genuinely Trying To Reach Agreement

76. Unions should be able to ballot their members without having to prove that they have been genuinely trying to reach agreement with the employer as required by s.443. To reduce the burden on bargaining representatives attempting to obtain a ballot order, the onus of proof should rest with any person alleging that the bargaining representative has not been genuinely trying to reach agreement. The presumption should be in favour of obtaining the order unless the employer can show that the applicant has not been genuinely trying to reach agreement.

Quorum for Protected Action ballots

77. The *Bill* requires a majority of employees on the roll of voters to vote in a protected action ballot, with a majority of those who vote to be in favour of the action for the action to protected (s.459).

78. This requirement is too high. A majority of those who vote should be the requirement. Requiring at least 50% of those on the roll of voters to vote is excessive. Many employees may choose not to participate in the ballot for a variety of reasons. The

employees who do vote should not be potentially penalised for others not voting and the 50% quorum not being reached.

79. If a quorum is to be maintained at all, the CEPU submits that a quorum of 30% of those on the roll would provide a more manageable process.

Notice Requirements for Industrial Action

80. The *Bill* requires a bargaining representative to give an employer a minimum of 3 'working days' notice of the intention to take protected action (s.414(2)).

81. A working day is defined as '*a day that is not a Saturday, Sunday or a public holiday*" (s.12).

82. This requirement is unnecessarily restrictive. It does not account for workplaces where ordinary hours of work take place 24 hours a day, 365 days a year. Many workplaces operate on continuous shift arrangements where employees are rostered to work on Saturdays, Sundays and Public Holidays.

83. The minimum notice period should be 3 working days with working days being any day the employees subject to the notice are rostered to work.

Wide range of restraints on taking industrial action

84. The *Bill* regrettably retains most of the restraints on protected industrial action introduced by *WorkChoices* and extends them to include the capacity of FWA to suspend or terminate protected industrial action where the action is protected and causing significant and imminent economic harm to the bargaining parties (s.423).

85. The CEPU acknowledges that the capacity of FWA to suspend or terminate the protected industrial action in such circumstances is limited.

86. We also acknowledge that the suspension/termination power can be used by employees to settle protected lock outs by employers but it also adds to the armoury employers have to frustrate employees taking protected industrial action.

87. The array of sanctions available to employers to stop or suspend protected and unprotected industrial action by employees makes the *Bill* biased in favour of employers.

Removal of 'acting in concert with'

88. The *Bill* commendably does not include the *WorkChoices* exclusion from protected industrial action where it is engaged in concert with persons who are not protected (s.438 of *WorkChoices*). This is a welcome reform. The 'acting in concert with' prohibition left unions vulnerable where all appropriate steps were taken by unions and

their members to take protected action, only to have that protection removed by the actions of others who were not protected.

Minimum 4 hour loss of pay for any period of unprotected industrial action

89. The *Bill* requires employers not to pay employees for the duration of any unprotected industrial action. It also requires employers not to pay employees for a minimum of 4 hours if the duration of the unprotected action is less than 4 hours in a day (s.474).

90. This provision is unduly harsh and encourages employees to extend any period of unprotected action to at least 4 hours.

91. The following example illustrates the problem.

92. Ajax Manufacturing is a hypothetical employer based in Western Sydney. After many years of good relations with its employees and their unions, new management has taken over the business. The new management unilaterally reallocates work and changes rosters leading to significant changes in income for some of its employees. Ajax Manufacturing's action is not industrial action (s.19) leaving the employees with few remedies before the FWA or courts.

93. The employees contact their unionand a meeting is held outside the factory to discuss the issue at the normal start of work (7am) the next day. The meeting takes 20 minutes and decides to return to work and to seek discussion with the employer to attempt to settle the dispute. As the action of the employees constitutes industrial action (s.19), Ajax Manufacturing is obliged to deduct 4 hours pay from each employee.

94. The obligation to deduct 4 hours pay in such circumstances will only further exacerbate the dispute and creates a clear incentive for employees to extend their non attendance at work for at least 4 hours.

95. The *Bill* should be amended to remove the minimum 4 hours reduction in pay. Pay should only be deducted for the period of industrial action. This would encourage industrial action to be as short as possible with obvious advantages to all parties.

Unfair Dismissal

96. Employees who claim to have been unfairly dismissed have only 7 days from the date the dismissal took effect to apply to FWA for a remedy (s.394(2)).

97. While this period to apply to FWA may be extended by FWA under specified circumstances (s.394(3)), the 7 days window is too short.

98. Seven days does not provide sufficient time for the employee to seek and obtain legal or other advice and lodge an application. There is abundant evidence in Commission proceedings for extensions of time under *WorkChoices* of the difficulty employees have in making applications within a short period. The reduction in the time to 7 days is

likely to result in the Commission having to deal with very high numbers of applications for an extension of time to make an application.

99. The 2007/2008 Annual Report of the AIRC shows that of the 600 termination of employment matters disposed of by decision of the Commission in 2007/2008, 135 were dismissed for being out of time (22%). This does not include applications being dismissed for being out of time in the conciliation process.

100. *WorkChoices* provides 21 days from the date the employee is given notice of the decision to terminate the employment for the employee to lodge an application for a remedy. The 21 days may be extended by the Commission (s.643(15) of *WorkChoices*).

101. Whilst the *Bill* proposes the 7 days limit to start from the day the dismissal took effect (as distinct from the day the employee is given notice of the decision to terminate under *WorkChoices*), the 7 day limit is too restrictive.

The *Bill* should be amended to allow an application to be made within 21 days of the day the dismissal took effect.

The *Bill* and Australia's Obligations Under International Labour Conventions

102. While this submission does not purport to give a comprehensive analysis of Australia's obligations under international labour conventions, the CEPU is concerned that a number of matters contained in the *Bill* appear to maintain aspects of the *Workplace Relations Act 1996* that the International Labour Organisation (ILO) has previously observed are inconsistent with Australia's obligations under various international labour agreements.

103. For example, in 2008 the ILO Committee of Experts observed that:

104. Article 3 of the Convention. Right to strike. The Committee's previous comments concerned numerous discrepancies between the provisions of the WR Act - as amended by the *WorkChoices* Act - and the Convention. In particular, the Committee had raised the need to amend the following provisions of the WR Act with a view to bringing them into conformity with the Convention: provisions which lift the protection of industrial action in support of: multiple business agreements (section 423(1)(b)(i)); "pattern bargaining" (section 439); secondary boycotts and generally sympathy strikes (section 438); negotiations over "prohibited content" (sections 356 and 436 of the WR Act in connection with the Workplace Relations Regulations 2006); strike pay (sections 508 of the WR Act); and provisions which prohibit industrial action in case of danger to the economy (sections 430, 433 and 498 of the WR Act) through the introduction of compulsory arbitration at the initiative of the Minister (sections 500(a) and 504(3) of the WR Act).[4]

[4] See CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Australia (ratification: 1973) Published: 2008. The observation can be found at http://www.ilo.org/ilolex/english/newcountryframeE.htm.

105. In 2007, the ILO Committee of Experts observed when considering the *Workplace Relations Act 1996* that:

106. The Committee once again recalls that strikes can be prohibited under the Convention only in essential services in the strict sense of the term, that is, those the interruption of which would endanger the life, personal safety or health of the whole or part of the population, and for public servants exercising authority in the name of the State, in addition to the armed forces and police (1994 General Survey on freedom of association and collective bargaining, paragraphs 158 and 159). Thus, the prohibitions noted above with regard to multi-employer agreements, "pattern bargaining", secondary boycotts and sympathy strikes, negotiations over "prohibited content" that should otherwise fall within possible subjects for collective bargaining, danger to the economy, etc., go beyond the restrictions which are permissible under the Convention.[5]

107. The *Bill* contains an objective that the legislation will provide:

108. "workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and **take into account Australia's international labour obligations**" (s.3(a))

109. The CEPU submits this is a worthwhile objective that should be vigorously pursued.

110. In this context, the CEPU notes the interest Senator Cameron took with respect to the compliance of the *Bill* with Australia's international labour obligations at the first hearing of the inquiry on 11 December 2008 (see for example page 12 and page 17 of the transcript). Senator Cameron's interest in Australia's obligations under international labour conventions is consistent with the ALP's platform which provides in chapter 7:

111. 23. Labor will ensure that Australia's domestic industrial relations arrangements are consistent with its international obligations. Labor will restore Australia to a position of international leadership and pride.

112. In an increasingly globalised era, such a policy is more necessary than ever before. As a November 2007 Parliamentary Library Research paper suggested:

113. Should the Workplace Relations Act not be significantly amended following the 2007 election, there is a real prospect of escalating criticism from the ILO's supervisory bodies. Such criticism has implications for Australia's standing and role within the ILO. It also has implications for Australia's ability to influence its regional neighbours to

[5] See CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Australia (ratification: 1973) Published: 2007.

improve the conditions of their workers and, in the longer term, move towards a more level playing field for international trade.6

114. Respecting international labour agreements is of fundamental importance for workers in Australia and overseas.

115. In this context we note that the Government - through its actions in signing the Kyoto Protocol, for instance - has recognised the value of cooperating internationally on matters of critical importance.

116. This action has been a vital first step in marking a definite point of difference to the flagrant indifference of its predecessor when it came to international fora and their conventions.

117. Nothing better demonstrated this indifference that its position in relation to the ILO's serious concerns about the deficiencies and impacts of its workplace laws.

118. We believe that an ideal opportunity exists for the new government to differentiate itself further from its predecessor - by measuring the revised laws against the relevant conventions and declarations. The government should, of its own initiative, amend the initial legislation to bring it in line with these conventions and declarations.

119. Given the almost notorious nature of the former government's laws, it would be foolish to believe that any amendments to the *Workplace Relations Act 1996* would escape international attention and review. It would be far better for the government to manage the process and be proactive in aligning the new laws to international standards - as opposed to risking being subjected to the negative feedback reserved for the previous Government's efforts.

120. The CEPU urges the Committee to consider whether the *Bill* is likely to remedy the breaches of our international obligations identified by the ILO in relation to the *WorkChoices* legislation.

121. The CEPU further urges the Committee to recommend that the Government agree to a comprehensive review of all industrial laws following the passing of the *Bill* by the Parliament, with a view to bringing further amendments, if necessary, to ensure compliance with Australian's international labour obligations.

[6] Romeyn, J "The International Labour Organisation's Core Labour Standards and the Workplace Relations Act 1996", 29 November 2007, Parliamentary Library. The paper can be downloaded at www.aph.gov.au/library.

Appendix 1A – Extract of Checklist Developed by Legal Publisher Lexis Nexis

[12,020] Checklist: Protected Action -- Secret Ballots

[ ] Has the application been made before the nominal expiry date of an existing agreement?

[ ] Did the applicant initiate the relevant bargaining period?

[ ] If the application has been made by an employee or employees, is it supported by the prescribed number of employees who would be subject to the proposed agreement?

[ ] If the application has been made by an organisation of employees, has the organisation provided evidence that the application was authorised by or through its committee of management?

[ ] Does the application include the following information:

- [ ] the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed industrial action;
- [ ] details of the types of employees who are to be balloted; and
- [ ] any details required by the AIRC rules.

[ ] Is the ballot application accompanied by:

- [ ] a copy of the notice initiating the bargaining period and the particulars accompanying that notice;
- [ ] a declaration by the applicant that the industrial action to which the application relates is not for the purpose of advancing or supporting claims to include prohibited content in the proposed collective agreement;
- [ ] if the applicant is an organisation of employees, a written notice showing that the applicant has been authorised by its Committee of Management or someone authorised by such a committee; and
- [ ] if the applicant is represented by an agent, a document containing the name of the employee applicant or applicants.

[ ] Did the applicant give a copy of the application to the relevant employer and any person nominated in the application to conduct the ballot, within 24 hours of the application being lodged with the AIRC?

[ ] Did all parties and relevant employees have a reasonable opportunity to make submissions in relation to the application?

[ ] Is there sufficient material to satisfy the AIRC that the applicant:

- [ ] has, during the bargaining period, genuinely tried to reach agreement with the employer; and
- [ ] is genuinely continuing to attempt to reach agreement with the employer; and
- [ ] is not engaged in pattern bargaining.

[ ] Is the application consistent with the object of Div 4 of Pt 9?

[ ] Has the applicant or a relevant employee contravened a provision of Div 4 of Pt 9 or an order or direction given under the Division?

[ ] Does the ballot order specify the following:

- [ ] the name of the applicant or the applicant's agent;
- [ ] the type of employees to be balloted;
- [ ] the voting method;
- [ ] the timetable for the ballot, including;
  - [ ] the day on which the roll of voters is to close (which must be at least 2 working days before the ballot is to be held); and
  - [ ] the day on which the ballot is to close and the time on that day by which votes must be received (if the order specifies a postal ballot) or by which votes must be cast (if the order specified an attendance ballot);
- [ ] the name of the person authorised by the AIRC to conduct the ballot;
- [ ] the name of the independent adviser for the ballot (if one is appointed); and

[ ] the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed action.

[ ] If the order does not specify a postal ballot as the voting method, was there sufficient material to satisfy the AIRC that the other voting method chosen was more efficient and expeditious than a postal ballot?

[ ] If the ballot is to be by postal ballot, does the order specify that voting is to take place by way of declaration voting?

[ ] If the ballot is to be conducted by an attendance ballot, does the order specify that voting is to take place during breaks or otherwise outside work hours?

[ ] Is the AEC named as the authorised ballot agent?

[ ] If the AIRC has named a person other than the AEC as the authorised ballot agent was there sufficient material to satisfy the AIRC that the person appointed:

[ ] is capable of ensuring the security and secrecy of votes cast in the ballot, and that the ballot will be fair and democratic;

[ ] will conduct the ballot expeditiously; and

[ ] is otherwise a fair and proper person to conduct the ballot: see also Ch 2 reg 9.5.

[ ] If the applicant is appointed as the authorised ballot agent, has the AIRC appointed an authorised independent advisor?

[ ] Is the authorised independent advisor a person who:

[ ] is sufficiently independent of the applicant;

[ ] is capable of providing advice and recommendations to the authorised ballot agent that are directed towards ensuring that the ballot will be fair and democratic; and

[ ] has consented to being named as the authorised independent advisor.

[ ] Has the authorised ballot agent taken all reasonable steps to give all eligible employees to be included on the roll of voters the following information:

[ ] advice that the AIRC has made the order;

[ ] the matters specified in the ballot order;

[ ] the times and locations at which an attendance ballot (if any) may occur;

[ ] the contact details of the authorised ballot agent;

[ ] if a person has been authorised to be the independent advisor for the ballot -- the person's name and contact details;

[ ] a statement of the employee's right to contact the authorised ballot agent to confirm whether the employee is on the roll of rosters;

[ ] a statement of the employee's right to seek to be included on the roll of voters under s 468;

[ ] a statement of the employee's right to inform the authorised ballot agent or the independent advisor (if any) of irregularities in the conduct of the ballot.

[ ] Did only eligible employees vote in the ballot? A person is only eligible to vote if the person:

[ ] was employed by the relevant employer on the day of the ballot order was made; and

[ ] would be subject to the proposed agreement.

Note: If the applicant is a union, an employee must also be a union member in order to be eligible to vote and a person subject to an AWA whose nominal expiry date has not passed is not eligible to vote.

[ ] Was the ballot conducted by the authorised ballot agent?

[ ] Was the authorised ballot agent qualified to be appointed to that position: see Ch 2 reg 9.5?

[ ] Was the ballot paper consistent with Form 1 of Sch 1 of the WR Reg? The ballot paper contains the following information:

[ ] the name of the applicant or applicant's agent (as the case requires);

[ ] the types of employees who are to be balloted (for example, their occupations, work groups and locations);

[ ] the name of the ballot agent authorised to conduct the ballot;

[ ] the question or questions to be put to voters, including the nature of the proposed industrial action;

[ ] a statement that the voter's vote is secret and that the voter is free to choose whether or not to support the proposed industrial action;

[ ] instructions to the voter on how to complete the ballot paper; and

[ ] the day on which voting in the ballot is to close: s 474.

[ ] Did anyone not on the roll of voters vote in the ballot?

[ ] Were scrutineers appointed?

[ ] Were the scrutineers appointed in accordance with Ch 2 regs 9.19-9.20?

[ ] Did at least 50% of persons on the roll of voters vote in the ballot?

[ ] Did more than 50% of the valid votes cast approve the industrial action?

[ ] Did the authorised industrial action commence within a 30 day period beginning the day on which the result was declared?

[ ] Did the authorised ballot agent make a declaration of the results of the ballot in writing and inform the applicant, the affected employer and the Industrial Registrar of the results as soon as practicable after the close of voting?

[ ] Did the authorised ballot agent and the authorised independent advisor (if one was appointed) provide a written report to the Industrial Registrar about the conduct of the ballot?

Part B – Submissions of the Communications Division

1. Introduction

1. The Communications Division of the Communications, Electrical and Plumbing Union represents employees in the communications industry, chiefly in the postal and telecommunications sectors.

2. Since the passage of the *Workplace Relations Act 1996*, our members, like other Australian working people, have been obliged to operate within a legal framework which was designed to weaken their bargaining power in relation to their employers. They have been subject to an aggressive approach to employee relations which this legislation and the subsequent Workplace Relations Amendment (*WorkChoices*) Act 2005 licensed employers to adopt. The CEPU welcomes the introduction of the *Bill*, as it will begin to wind back some of the harsher elements of *WorkChoices*.

3. The CEPU nevertheless has concerns about aspects of the *Bill* currently before the Senate. These are based chiefly on our experience over the last decade in dealing with two of our major employers, Telstra and Australia Post.

4. The CEPU had an early introduction to the temper of the *Workplace Relations Act 1996* in the course of its dealings with Telstra in the period immediately following the introduction of the legislation. During these years (1997-2000) the company in fact acted as a laboratory for the implementation of the Act, with the 1997-98 industrial dispute, in particular, providing an opportunity for its architects, Freehills, to test its provisions and demonstrate its essentially punitive character. It was during this period, too, that Telstra began its attempts to weaken the Telstra Redundancy Agreement (TRA), an episode whose implications are considered in the body of this submission.

5. Telstra has subsequently gone on to distinguish itself as one of Australia's chief users of Australian Workplace Agreements (AWAs), conducting its last large scale offer within weeks of Labor's 2007 Federal Election win.

6. In more recent years, the CEPU has had the experience of trying to negotiate collective agreements on behalf of its members in the *WorkChoices* environment. The *WorkChoices* prohibitions on the content of such agreements have proved a major stumbling block in negotiations with Australia Post. The current *Bill* will not entirely remove this problem.

7. Meanwhile Telstra is currently availing itself of the opportunities *WorkChoices* offers employers to ignore the wishes of union members by refusing to bargain with the CEPU and other Telstra unions despite a bargaining period having been notified.

8. These circumstances have led to the CEPU's conducting two large scale protected industrial action ballots in support of its claims on Australia Post and Telstra. The Australia Post ballot, conducted in late 2007, was at that time the largest such exercise undertaken under the *WorkChoices* secret ballot provisions. As discussed below, we believe there is an opportunity for the *Bill* to further address the problems that can be encountered in the course of these processes.

9. In sum, the CEPU Communications Division has had extensive exposure to those powers and mechanisms which the *Workplace Relations Act 1996* has made available to employers to frustrate the legitimate attempts of employees to improve their circumstances. Our aim in this submission is to draw the Committee's attention to those areas where, in our view, these inequitable provisions have not been adequately addressed.

10. **2. Australian Workplace Agreements (AWAs)**

11. The CEPU understands that it is the Government's intention to address the future status of AWAs and other "old Act" agreements in a Transitional and Consequential Amendments *Bill* to be introduced in early 2009. However, given the centrality of these contracts to the whole edifice of the former government's industrial relations laws, we believe their future is an important issue for this inquiry.

12. Some 21,000 Telstra staff members out of a full time workforce of 32,000 are currently employed on Australian Workplace Agreements (AWAs), the majority of which were renewed at the time of the company's AWA re-offer in November 2007. This means that a large proportion of Telstra's staff will remain bound by these contracts until 2012. Indeed, under the Government's current policy, these contracts will be able to continue indefinitely beyond their nominal expiry date, provided this suits both parties.

13. The CEPU believes that the creation of Australian Workplace Agreements was one of the most invidious aspects of the *Workplace Relations Act 1996* and one which was central to the former Federal Government's strategy for weakening employees' bargaining power. We are therefore disappointed that these employment instruments will not be abolished quickly or completely.

14. Whatever immediate advantages or disadvantages may be conferred on a particular employee by the terms of an AWA, the key function of these contracts has been to strengthen the hand of management by removing large sections of the workforce from the collective bargaining stream, limiting their ability to negotiate and by specifically barring their participation in industrial action. The end result of this process must be an erosion of wages and conditions over time.

15. If this argument is accepted, then it should be of no surprise then when we consider how the wages "share" of the economy has shrunk to 52.7% in trend terms, its lowest point in 43 years – while the profit share of the economy has ballooned to 27.8% in trend terms, its highest level in 50 years, according to the ABS's National Accounts data released in August, 2008.

16. The previous government's 11 years combined effort to weaken collective bargaining to the benefit of employers has seen a massive transfer of wealth and income within our economy.

17. The test now for the current government is to see how the *Bill* can help improve the capacity of working Australians to gain equality of opportunity to secure a greater

portion of the wealth they help generate for their enterprise. Otherwise, profits will continue to grow at the expense of the pay-packets of ordinary Australians through a sustained assault on wages and conditions.

18. Nowhere can this dynamic be observed more clearly than in Telstra, where a high number of AWAs has emboldened management to launch a major attack on employee conditions and to attempt to sideline the Telstra unions in negotiations over a new Enterprise Agreement.

19. Should Telstra be successful in achieving its aims, a new and lower floor will be established for new employees (and those coming off time-expired AWAs) against which AWA pay and conditions will then be adjusted, Telstra's AWAs typically allowing substantial non-negotiated changes over the duration of the contract. All Telstra has then to do to lock its AWA employees in indefinitely is to offer AWA conditions marginally more attractive than those available on any collective agreement.

20. As long as AWAs continue to exist, they will provide the basis for this downward spiral – at least in companies where they have reached a critical level of density – undermining Labor's goal of establishing collective bargaining as the centrepiece of its industrial relations model.

21. The CEPU believes the Government needs to give close consideration to such circumstances when crafting its transitional legislation.

22. As for the immediate impacts of AWAs on individual Telstra workers, these are mixed. Certainly some AWA employees have been able to earn take home pay in excess of that available under the current Telstra Enterprise Agreement (TEA), though typically this involves trade-offs against other conditions. Others, however, especially new entrants into the workforce for whom AWAs were made a condition of employment, have been placed on conditions decidedly inferior to those available under the TEA. This *Bill* offers no relief for workers in this position.

23. In our view, it is contrary to the Government's stated commitment to fair and equitable workplace relations that employees continue to be bound by such contracts. Whatever decision is made about the longer-term life span of AWAs in cases where both parties still genuinely wish them to continue, the CEPU believes that provision should be made now for employees to terminate their contracts at any time of their choosing and to move onto the relevant collective agreement without disadvantage.

24. **3. Old IR agreements and the Telstra Redundancy Agreement**.

25. The treatment of old IR agreements is another area in which the fate of existing industrial instruments is of critical importance to our members. The Telstra Redundancy Agreement 2002 (TRA), which provides key protections for Telstra employees, falls within this class of agreements.

26. As is the case with AWAs, it is our understanding that the Government's policy here will be effected in the Transitional and Consequential *Bill*. At this stage, however, it appears to be the intention to allow such agreements to extinguish when any new agreement which applies to the relevant group of employees is made.

27. The CEPU drew the attention of the Senate to the significance of this issue for our members in our submissions to the inquiry into the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*. That *Bill* deleted the clause in the Workplace Relations Act 2006 which had sunsetted all old IR agreements in March 2009 but left intact the clause which provided for them to be extinguished by the making on any new workplace agreement. This half-way house has not provided the degree of protection to our members which they deserve.

28. The Telstra Redundancy Agreement has its origins in the period following the first major wave of telecommunications industry liberalisation with the introduction of a fixed network duopoly in 1991. Moves by Telstra to reduce staff numbers soon followed, leading to a major industrial dispute in 1992 which in turn resulted in the creation of the TRA. The agreement was certified in 1993 under Division 3A of Part VI of the Industrial Relations Act 1988.

29. Since that time, the TRA has offered important protections to Telstra employees faced with the threat of redundancy and compensation to those who in fact lost their employment.

30. Back in 1998, Telstra shareholders were told clearly:

> *"Telstra is no longer a job for life organisation. Rather than life long employment, we aspire to develop life long employability for our people by training them so that they are equipped with the best skills for employment wherever they may chose. With growth at more than 10 per cent compound, there will be no lack of job opportunities in our industry."*
>
> [*David Hoare Chairman-Telstra AGM 1998*]

31. The role the TRA has played in cushioning the impacts of technological change, industry restructuring and company privatisation cannot be overstated. Of the estimated 50,00 full-time employees who have left Telstra since 1992-93, the great majority would have enjoyed the benefits of this agreement. It's also worth bearing in mind, many of those who left Telstra **have not** returned to the industry and if they do return to similar work, it is usually at a lower wage rate.

32. In 2005 Telstra announced it would cut at least 10,000 to 12,000 full-time jobs within five years as part of a long-range strategy assessment to improve its business, dubbed "transformation".

33. Specifically, the telco said its intention was to "reduce the number of Telstra's 52,000 full-time-equivalent (FTE) positions by between 6,000 and 8,000 over three years and

10,000 over five years." As at June 2008 Telstra had cut 8,784 FTEs and it recently announced another 800 job losses – 600 to take effect before Christmas 2008.

34. **3.1 Telstra Redundancy Outcomes**

35. Our Victorian Branches undertook a survey of Telstra members made redundant in 2005/06.

This is what the survey found:

- Average age at redundancy 47 years/3months
- Average years of service 19.4 years
- Of the survey group 55% had a workplace injury
- 85% of the survey group are no longer working in the industry
- Of the 15% still in the industry only one former Telstra employee in the survey group had an equal or greater salary than what he was earning at Telstra.

36. The Victorian survey confirms the available data from the Australian Bureau of Statistics, OECD, & the Productivity Commission:

- The Telecommunications Services Industry is shrinking
- Job opportunities are declining
- Wages and conditions in the industry outside Telstra are lower
- The majority of redundant Telstra employees do not work in the industry again.

37. Further, most people being made redundant are not at, or near, retirement age. A high proportion are injured due to the nature of the work and as a result find it difficult to find other work. They cannot access superannuation ie. many are not near preservation age.

38. The situation is worse for Telstra workers in regional and rural areas. Telecommunications workers have been deskilled due to workplace change and the retained skills do not easily translate into other work within the region.

39. **3.2 The future of the TRA … left in Telstra's hands:**

40. In 2006, the Workplace Relations Amendment (*WorkChoices*) Act 2005 created the category of "old IR agreement", defined as one which was certified under Division 3A of Part VI of the Industrial Relations Act 1988 prior to the commencement of Schedule 2 of the Industrial Relations Reform Act 1993. This definition was tailor-made to capture the TRA, a circumstance that the CEPU has never regarded as coincidental.

41. During the years following the certification of the TRA, Telstra made several attempts to weaken its provisions, the legal battle with the Telstra unions reaching as far as the High Court before these attempts were finally defeated. Then with a stroke of the pen, Telstra was handed the outcome it had sought by *WorkChoices*. Telstra's lawyers during its attacks on the TRA were Freehills, a firm which played a major role in the drafting of the *WorkChoices* legislation.

42. With the loophole created in the Government's transition legislation, Telstra has been presented another opportunity to change the TRA by introducing non-union agreements that water down existing entitlements. Its initial non-union deals saw the proposed payouts cut by 30 per cent, compared to the TRA. Telstra subsequently altered this proposal as employees voted down some of their non-union deals. However, our analysis reveals that Telstra's non-union agreements will impact on the existing redundancy process by:
    - Calculating redundancy payouts only on fixed salary – no accounting for incentives that form part of take-home pay;
    - Removing the internal Telstra redeployment program;
    - Stopping unions from receiving demographic information on affected individuals, denying the oversight ability to ensure Telstra is not unlawfully targeting older workers, injured workers, workers with family responsibilities;
    - Removing the need to consult unions about job losses and mitigate impacts on employees;
    - Denying any appeal to the AIRC for arbitration on complaints about the process breaches; and,
    - Denying a "cooling off" period for employees to consider proceeding with a redundancy.

43. Unlike other sectors impacted by major layoffs, telecommunications has never had any kind of industry assistance package.

44. Allowing Telstra to entirely determine how it makes people redundant will fast-track job losses and increase economic insecurity and financial hardship for our members.

45. The CEPU believes that an understanding of this history is important to any decision about how this agreement should be dealt with in the new legislative context. The unionis aware that it is the broad intention of the Government to streamline industrial instruments and, in general, to ensure that only one will apply to any group of employees at any one time. However, we consider that the application of this approach in an abstract and purely technical way to the TRA would do an injustice to our members. It values process above people.

46. The core value in the Government's workplace relations programme is fairness. We do not see how stripping a group of employees legally of major entitlements they have won industrially and defended successfully is fair.

47. We would note, too, that while the value-laden term "old IR agreement" carries with it the implications of obsolescence - conveniently for those who would like to see it extinguished - the Telstra Redundancy Agreement is not "old" in any real sense. Aspects of the agreement were renegotiated in 2002.

48. Moreover the circumstances in which it was originally negotiated still exist. The technologically dynamic character of the telecommunications industry means that employees in this sector continue to face a high degree of uncertainty in their

employment. Telstra's current transformation programme will involve the loss of some 10-12,000 jobs. The future extension of fibre further into Telstra's fixed network will also, in the longer-term, have an impact on labour requirements in this area. Retraining and redeployment should be among the measures used to deal with such trends, but the safety net offered by the current TRA will continue to remain indispensable to our members.

49. The CEPU believes that the Government's legislative package should allow for the continuing operation of the TRA. If a blanket provision sparing all "old IR agreements" from being extinguished is not acceptable, then a mechanism for preserving the specific entitlements contained in the TRA should be available.

4. Collective bargaining

4.1. Content of enterprise agreements (s 172)

50. The CEPU welcomes the removal of the blanket prohibitions which *WorkChoices* placed on the content of workplace agreements and of the punitive provisions that were attached to them. We also welcome the fact that the timetable for the introduction of these changes – to take effect from July 2009 – has been fast-tracked.

51. In particular, we welcome the clarification that terms relating to casual, labour hire and contract employees may, in certain circumstances, be deemed to fall within the scope of "permitted matters", the inclusion of matters pertaining to the relationship between unions and employer within this category and the provision for payroll deductions for union members to be an enforceable item in agreements.

52. The narrowing of the possible content of agreements which occurred under *WorkChoices* has proven a major stumbling block to the CEPU's attempts to conclude a new collective agreement with Australia Post since the nominal expiry of the existing EBA in late 2006.

53. The CEPU has been particularly concerned that the *WorkChoices* laws precluded any attempts for us to make a binding agreement governing any aspect of the use of casual or contract labour in Australia Post or of the franchising out of the company's operations.

54. Having said this, the Government has made an important and distinct departure from its 2007 Federal Election workplace relations policy "Forward with Fairness". Page 14 of its 2007 policy is clear:

"Under Labor's system, bargaining participants will be free to reach agreement ***on whatever matters suit them*** *(our emphasis added)."*

55. It is now apparent that this will not be the case.

56. Certain bargaining matters will no longer be classified as "prohibited" – they have been re-badged as "permitted". And case law will be relied upon, principally via the *Electrolux* case.

57. This latter clarification was never spelt out so simply in Forward with Fairness and the consequence of this decision will be to further encourage employers to rely upon "managerial prerogative" in arguments about how matters pertain to the employment relationship.

58. The concept of "prohibited" matters was introduced in *WorkChoices* - and the concept will remain in the *Bill*, albeit with a more "user-friendly" name tag.

59. This is not a minor point. Its impact will be the same – it will allow employers to have disproportionate advantage in determining what matters can be negotiated within an agreement and limit the ability of employees to collectively secure a fairer share of the wealth they help create in an enterprise.

60. It is our firm belief that the subtle shift from "prohibited" to "permitted" does little other than to maintain a system of interference in the bargaining process. Ultimately, the government should honour the election promise it made in 2007 and allow "bargaining participants (to) be free to reach agreement on whatever matters suit them." As a result this section should be re-written to give effect to the government's election commitment.

4.2. The scope of agreements.

61. Telstra's attempts to introduce non-unionEmployee Collective Agreements (ECAs) have highlighted the current ability of an employer to secure a desired outcome in the bargaining process by manipulating the scope of an agreement.

62. Between October 2007 and September 2008, Telstra employees rejected proposed ECAs on three occasions. The company's response has been to break the groups of employees offered the ECAs down into smaller and smaller units, based on its assessment of the number of employees in any one group likely to accept the proposal. Groups of as few as 32 employees have been offered these ECAs in a company that reports its full time staff numbers to be 33,982 and its total workforce (including contractors and agency staff) to be 46, 649 as at June 2008.

63. A further element of this strategy has been the blatantly manipulative restructuring of groups of employees either to ensure a pro-ECA majority or to lock as many employees as possible into the ECA by moving them into a group where a pro-ECA majority already exists. Such moves are clearly aimed at manufacturing majority will.

64. Additionally, numerous doubts have been raised by us regarding the transparency of the process.

65. In late 2008 "relevant" Telstra employees apparently "voted" for a Telstra Voice Solutions ECA (2008-2011). A number of employees approached the CEPU because they did not receive any voting materials from the AEC or agreement documents from Telstra, as per the requirements of the *Workplace Relations Act*. The employees advised the union they had their pays adjusted on the basis they had participated as part of the Voice Solutions ECA ballot. In fact, after inquiring with Telstra's payroll services section, the employees were clearly advised they were now covered by the Voice Solutions ECA. In response to inquiries from both the employees and the CEPU, Telstra subsequently suggested that this action was an "administrative oversight" and that this group of employees were not to be included in the Voice Solutions ECA. It now follows that these employees will now have their pay increase reversed.

66. This example brings into question the integrity of the entire process, which clearly is tilted in favour of the employer. The company refuses to provide specific outcomes of the ballot process i.e. for and against vote numbers or details of the voting catchment area. There are no checks and balances for the employees.

67. Section 238 of the *Bill* addresses these issues through the provision for scope orders, which can be made by Fair Work Australia. This is a positive step which the unionrecognises will allow it to challenge behaviour such as Telstra's. We are concerned however, that the *Bill* may still leave more room for such employer manoeuvres than we would wish.

68. Throughout the *Bill*, one threshold issue for the legitimacy of any such sub-division of a workforce for the purposes of agreement making is whether a group of employees is "geographically, operationally or organisationally distinct". This criteria operates in relation to majority support determinations (s.237 (2) (c)), scope orders (s. 237 (2) (c)) and approval of enterprise agreements by Fair Work Australia (s.186 (3) (b)). Its effect appears to the CEPU to be ambiguous.

69. Thus FWA may make a scope order under s.238 if it is satisfied that the group of employees to be covered by a proposed agreement is "fairly chosen" despite the fact that the agreement will not cover all the employees of the employer or employers and the group of employees that will be covered is not geographically, operationally or organisationally distinct ... (our italics) s.238 (4) (c).

70. This clause allows Fair Work Australia to establish the scope of an agreement on criteria other than those specified, as long as they are "fair", while implying that the fact that a group is (say) operationally distinct might normally be taken as legitimate grounds for making it subject to a separate agreement.

71. Less ambiguously, s.186 (3) (When Fair Work Australia must approve an agreements) provides that Fair Work Australia is not required to further satisfy itself that a group of employees covered by an agreement is "fairly chosen" for the purposes of approving an agreement if the group is operationally etc distinct.

72. In making a scope order, on the other hand, Fair Work Australia must ultimately consider what is "reasonable", the *Bill* thus allowing that certain sub-divisions of the workforce may not meet this criterion, whether or not they are operationally/geographically based.

73. There appears, in other words, to be some tension in the *Bill* between what are implicitly considered legitimate grounds for distinguishing a group of employees and what Fair Work Australia may consider "reasonable" in granting a scope order. It is unclear to the union how this tension will be resolved in practice.

74. A national company such as Telstra in a technologically complex and fast moving industry has, by definition, multiple divisions and sub-divisions organised on both geographical and functional lines – divisions which are, moreover, constantly being reorganised for operational reasons to an extent that employees sometimes have difficulty identifying with certainty exactly where they sit in the company's structure.

75. Such a company may have genuine operational reasons for offering agreements at a sub-enterprise level – or it may exploit such circumstances in order to override the will of the majority of employees, by "slicing and dicing" the workforce in the way Telstra has recently attempted to do.

76. It may be argued that it will be just these questions that Fair Work Australia will weigh when it is considering whether the making of a scope order is "reasonable" and that the *Bill* need go no further. The CEPU would prefer that Fair Work Australia was given some guidance in such cases, perhaps through regulations that drew on the Telstra experience. For instance, we would consider that the offering of an agreement to a sub-set of a group of workers who had already rejected it might provide grounds for a scope order preventing such action, even if the sub-group was functionally or geographically distinct.

4.3. Employee approval of agreements: balloting issues.

77. The CEPU's experience in relation to Employee Collective Agreements in Telstra has raised several questions about the agreement approval process. The *Bill* deals with some but not all of the problems we have encountered.

4.3.1. Notification of employee representational rights.

78. The CEPU is pleased to note that the *Bill* ensures that at least 21 days must elapse between the time when an employee is notified of his/her bargaining rights (under s. 173) and the date when a process for employees' approving an agreement can commence (s. 181 (2)). Under *WorkChoices*, it was actually possible for an employer to notify employees of such rights after a ballot was underway, the requirement being only that notification (in the form of an information statement) be given seven days before the agreement was approved. Even this requirement could be waived. The abuses that such provisions licensed are obvious.

4.3.2. Voting methods

79. Despite tightening the approval procedures noted above the *Bill* still grants a degree of discretion to the employer in the conduct of approval ballots which the CEPU regards as problematic.

80. s.181(3) provides that an employer may request that the employees vote by ballot or by electronic method. The CEPU considers this provision may, in practice, allow employers to identify the voting behaviour of their employees to their possible disadvantage.

81. There is, of course, no requirement either in the current Act or the *Bill* that requires a secret ballot for the purposes of approving an agreement. Nevertheless, in circumstances such as those the CEPU has encountered in Telstra, where we believe individual staff have been put under intense pressure to accept non-union agreements, a guarantee of privacy may be appropriate to protect employees and to ensure that they feel able to express their genuine preferences.

82. The CEPU believes that, on application by a bargaining representative, Fair Work Australia should have the power to order that a secure method of voting be adopted for the approval of an agreement. The power would be subject to Fair Work Australia being satisfied of exceptional circumstances such as threaten the integrity of the vote.

4.3.3. Ballot procedures

83. A further issue that has arisen for the CEPU recently is the inability of employees or their representatives to appoint scrutineers to observe the ballot count for ECAs. In November 2007, the CEPU requested that it be able to send scrutineers to the ballot for the Contact and Service Centre Agreement 2007, which was conducted by Computershare. This request was denied on the basis that Telstra was under no obligation to allow a bargaining agent to scrutineer an "independent ballot" and that the ballot was being conducted by Computershare on behalf of Telstra as a private client. Employees were required to vote online via their employer's computer network (e.g. in which a LAN Administrator can even monitor each employee keystroke). This raises serious doubts as to the confidentiality of the process.

84. A similar answer has been given to subsequent requests, even when the ballot was being conducted by the AEC and when not only the CEPU (as a bargaining agent) but individual employees covered by the proposed ECAs wished to appoint scrutineers for the ballot.

85. While the *Bill* will dissolve the distinction between union and non-union agreements and, with it, the concept of there being parties to an agreement, it is not clear to the CEPU that this will open the door to bargaining representatives or individual employees to scrutinise the agreement approval process.

86. The CEPU considers that the *Bill* needs to make provision for employees to appoint an employee organisation or any other representative of their choosing that has been a

bargaining representative for a proposed agreement as an observer of the approval process to satisfy itself and the members subject to the agreement that a valid majority cast a valid vote to approve the agreement. Employees who are not union members but are within the scope of the agreement should have the same right.

5. Protected industrial action (FWB Part 3-3)

87. The former government's restrictive regime governing the conduct of industrial action was specifically designed to undermine the ability of working Australians to secure stronger collective bargaining outcomes.

88. At the time of its election in 1996, the former Government inherited a stable workplace environment that was not riddled with industrial chaos – industrial action levels were relatively low.

89. The former government moves to curtail the access to industrial action as a means of achieving balance in the relations between employer and employees was a deliberate move to skew outcomes towards employer interests.

90. The regime inherited by the current government will not only be maintained – but, worse still – will be exacerbated by its efforts to dilute the effectiveness of arbitration as a means of resolving disputes.

91. With the move to water down the arbitration of disputes, the right to strike in the Australian context takes on greater importance. As such, we believe it critical that the right to take industrial action be strengthened, otherwise the ability to secure improve collective bargaining outcomes will be diminished further.

5.1. Protected industrial action ballots (FWB Part 3-3 Division 8)

92. The AEC has conducted two national protected industrial action ballots on behalf of the CEPU under the provisions of the current legislation, one in Australia Post and one in Telstra. This experience revealed to us the serious flaws in the process. Our two largest concerns with the process are:

    1. There is little understanding as to why members are excluded from the list of voters – which triggers justifiable concerns about the transparency of the ballot process

    2. There is absolutely no scope to correct errors made by ballot agents – even if the ballot agent agrees that they erred in excluding members from a roll.

93. It appears that while the *Bill* may not address our first concern, the new s.454 may provide greater ability for the AEC to amend rolls to ensure that members are not disenfranchised from voting in these important ballots.

5.1.2. Compilation and variation of roll of voters (FWB Sections 452- 454)

94. In both the Australia Post and Telstra ballots there was a marked discrepancy between the list of eligible employees submitted by the union to the AEC and the final number of eligible voters. The scale of the problem can be seen from the following figures.

A. CEPU & Australian Postal Corporation - Protected Action Ballot - BP 2007/3201

Names of CEPU APC members submitted by CEPU for roll	19,000+
Numbers of persons on the AEC roll of voters	17,996
Number of CEPU APC members excluded from roll	1004
Percentage of CEPU Post members excluded from roll (approx)	5.28%

B. CEPU & Telstra Corporation - Protected Action Ballot - BP 2008/4381

Names of CEPU Telstra Members submitted by CEPU for roll	6738
Numbers of person on the AEC roll of voters	5675
Number of CEPU Telstra members excluded from roll	1063
Percentage of CEPU Telstra members excluded from roll	15.78%

95. The CEPU acknowledges that inaccuracies may occur in member records, especially in circumstances such as affect our Telstra membership i.e. ongoing redundancies and changes to employment status (members going onto AWAs). However, it is important to stress two points:

1. We invest heavily in updating our membership databases, particularly in the lead up to protected action ballots. The chance of error in our databases is significantly curbed.

2. Our experience has been that significant numbers of our members who were in roll until the ballot papers were sent out and they did not receive one.

96. While we see merit in the future operation of s.454 (Part 3-3), in our view, either the union should have access to the AEC roll for a certain period prior to the ballot in order to identify the reason for any discrepancies between it and the union's membership lists or individual employees who have been deemed ineligible should have an opportunity to challenge that exclusion before the ballot opens.

97. The first option would seem likely to be more efficient. It would not compromise freedom of association protections as the union already knows who its members are. The union(or any other applicant for such a ballot) should, in our view, have a brief period to identify and rectify any errors which have led to members being excluded from the roll. The period of time for this process should be no more than 48 hours so as not to delay the ballot process unduly.

5.1.3. Ballots in enterprises with national operations.

98. The CEPU believes that balloting arrangements/orders need to take account of the scale of any ballot when establishing timelines for voting. In the case of postal ballots being conducted on a national scale, sufficient time needs to be given for those participating to have an opportunity to receive and return their ballot papers before the close date.

99. In the case of Australia Post, the protected industrial action ballot opened on 14 September 2007 and closed on 26 September 2007. In the event it took up to a week for some members in outlying regions to receive their ballot papers with the effect that these employees were not guaranteed sufficient time to participate in the vote. While latitude was granted by the AIRC to extend the timeframe for the ballot, this application was still objected to by the employer.

6. Dispute resolution procedures

100. The *Workplace Relations Act 1996* ushered in a period of industrial relations which strengthened the hand of employers not only in agreement making but in the handling of disputes about the implementation of agreements. On the one hand, industrial action outside a formal bargaining period was "unprotected" and exposed any union and individual employee who undertook it to severe penalties; on the other, the capacity of the AIRC to settle such disputes was weakened, its ability to do so depending on the agreement of the parties.

101. These circumstances act to the advantage of employers – as they were no doubt designed to do – by making resolution of disputes lengthy, difficult and costly. Telstra again has provided a model as to how an employer may use these current laws to frustrate employees' attempts to assert their rights to agreed entitlements.

102. Since the introduction of the *Workplace Relations Act 1996* Telstra has refused to agree to any dispute resolution clause in any of its agreements which would grant the AIRC an ability to arbitrate disputes about their application. It has consistently challenged the powers of the Commission in this regard, mounting a campaign with this focus as early as 1996 in the run up to the finalisation and declaration of the Workplace Relations Act. 1996.

103. Telstra's stance is clearly designed to force its employees and their representatives to incur the costs of taking breaches of agreements to the courts.

104. Moreover, the company does not hesitate to use its resources to appeal any unfavourable judgement it receives. It is an attempt to deter unions from pursuing these issues on members' behalf.

105. In recent months, Telstra has adopted an even more aggressive approach to dispute resolution, with some versions of its Employee Collective Agreements (ECAs) allowing no role for an independent mediator in the process at all, let alone for arbitration. The CEPU welcomes the fact that under the provisions of the *Bill* such an approach will no longer be possible.

106. Nevertheless, we would wish to see the *Bill* go further and actually restore the arbitral powers of the AIRC/Fair Work Australia in this area. The provision that Fair Work Australia can play such a role only with the agreement of both parties offers no protections against the behaviour we have described above, based as it is on the huge imbalance between the resources available to the union and those available to a large corporation such as Telstra.

6.1. Dispute resolution: who are "parties to a dispute"?

107. When referring to disputes that may be dealt with by FWA, the following clauses appear in the *Bill*:

> *595 FWA's power to deal with disputes*
>
> > *(1) FWA may deal with a dispute only if FWA is expressly authorised to do so under or in accordance with another provision of this Act.*
>
> *739 Disputes dealt with by FWA*
>
> > *(1)…*
> >
> > *(6) FWA may deal with a dispute only on application by a* ***party to the dispute*** *(our emphasis).*

108. The term "party to the dispute" is not defined in the *Bill*. The question is whether a union(or employer organisation) can apply to FWA to have a dispute arising under an award or agreement conciliated or arbitrated in accordance with a dispute resolution process.

109. It is now clear that a Union will not be a "party" to an award. The Modern Award decision of the AIRC Full Bench of 19 December 2008 makes this clear:

> *[12] … The Minister's submission on behalf of the Australian Government contained the following passage:*
> > *"60. Rather than using a concept of parties being 'bound' to awards and other terminology associated with the conciliation and arbitration system, the substantive workplace relations Bill will adopt two new key concepts which better reflect the new modern workplace relations system.*
> >
> > *61. These are:*
> >
> > - *that an instrument covers an employer and employee or organisation (that is they fall within the scope of the instrument); and*
> > - *the instrument applies to the employer and employee (that is the instrument actually regulates rights and obligations).*
>
> *[22] In our view there is no point embarking on an exercise to identify the organisations which should be covered by each modern award, and to what extent,*

> *when, for the reasons we have given, nothing appears to turn on the outcome. It is also relevant to observe that under the award system which operated prior to the WorkChoices amendments the identification of parties bound was necessary because of the requirement for an antecedent dispute between named employers and organisations. That requirement is not a feature of the modern award system. We have decided, therefore,* ***that as a general principle we shall not name registered organisations as covered by modern awards (our emphasis).***

110. A union(or employer organisation) is not a party to an agreement. The scheme appears to deem unions to be "bargaining representatives" (section 176). However a union can request to be covered by an agreement.

> *183 Entitlement of an employee organisation to have an enterprise agreement cover it*
>
> *(1) After an enterprise agreement that is not a greenfields agreement is made, an employee organisation that was a bargaining representative for the proposed enterprise agreement concerned may give FWA a written notice stating that the organisation wants the enterprise agreement to cover it.*

111. The critical question is whether being covered by an agreement will also make the union a party to any dispute for the purposes of the Act. In our submission, it is ambiguous in the context of the whole Act.

112. The terms party and parties appear in the *Bill* as follows:

- Costs – section 376, section 401, section 403, section 570, section 780
- Third Party – section 423, section 426
- Small Claims – section 548
- Contraventions – section 550
- Minister deemed to be a party – section 569
- Ombudsman may be a party – section 682
- Equal Remuneration application – section 724
- General Protections advice – section 370, section 375
- Unfair Dismissal Disputes – section 374, section 398, section 399, section 778
- Work Bans Disputes – section 472
- Right of Entry Disputes – section 505
- Stand Down Disputes – section 526
- General Disputes – section 595 (note)
- Dispute Resolution – section 739, section 740

113. There are other indicators to interpretation. For example, in relation to transfer of business:

> *318 Orders relating to instruments covering new employer and transferring employees*
>
> *Who may apply for an order*

(2) FWA may make the order only on application by any of the following:

(a)…

(c) if the application relates to an enterprise agreement-an employee organisation that is, or is likely to be, covered by the agreement;

114. The various references, in the context of the whole Act, may infer that a union is not a "party". The *Explanatory Memorandum* does not assist. While an individual employee may make an application to the FWA to deal with a dispute and be represented by a union, this does not allow a union to perform its representative role in full. Usually disputes involve a number of employees. Even then individual members are usually reluctant to be identified to the employer by being named in an application.

115. If we consider the phrase "party to a dispute" in isolation, problems may still arise. It is often successfully argued that an organisation cannot create an (industrial) dispute. To remove any doubts, our suggestion is a definition. This allows unions to make an application under awards, agreements, transmitted instruments and determinations, and will not deter members from pursing their rights.

116. In an attempt to remedy this, we would recommend re-drafting the definition in the following way:

Party to a dispute includes:

- employees covered by the relevant agreement, award or other instrument.
- organisations whose eligibility rule entitles them to represent the employees in such dispute.

6.2. General dispute resolution provision

6.2.1. Types of Disputes

117. There are a number of types of disputes. The *Bill* does not provide for every situation. To explain this, we would suggest that there are (at least) four types of disputes. They are:
    - Disputes about matters not relating to employment
    - Disputes over the making of an agreement
    - Disputes over an employment matter arising under an Award/NES or Agreement
    - Disputes over an employment matter not arising under an Award/NES or Agreement

We will deal briefly with types i, ii and iii and then explain type iv.

i. Disputes about matters not relating to employment

118. There is no provision for FWA to become involved in this matter. This type of matter is excluded from the definition of industrial action. Therefore the Commission will lack jurisdiction to issue orders to stop any industrial action. "Excluded" action is action that might otherwise be industrial action, but is excluded because it falls outside the above definition because the "purpose" was not "industrial" in character. See section 14 of the *Bill* for the definition, and the following Note.

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

ii. Disputes over the making of an agreement

119. FWA may be involved in several ways during a dispute arising from the making of an enterprise agreement. Generally these will relate to the issues of bargaining in good faith and the process to achieve and maintain protected industrial action However FWA may be required to determine a dispute by making an instrument called a "Workplace Determination". Certain conditions must be met before FWA has jurisdiction to make a determination.

iii. Disputes over an employment matter arising under an Award/NES or Agreement

120. Each modern award and enterprise agreement is required to have a dispute resolution clause. The Award dispute resolution clause will cover matters in an Award and the NES. An agreement must have a dispute resolution clause that allows FWA, or another independent person to settle disputes:

- about any matters "arising under" the agreement
- "in relation to" the National Employment Standards

121. An arbitration clause in an agreement has been determined by the High Court to be "private arbitration". The powers of the arbitrator can only be those that have been given in the agreement. The *Bill* has a different approach that may create new law. Compare these words:
    - s170LW (Pre Reform) to settle disputes over the application of the agreement
    - s709 (*WorkChoices*) in relation to matters in dispute under the terms of an agreement
    - s740 (FWA) term allows FWA to deal with a dispute.

122. Let us assume that the combination of words result in this term:
    FWA may deal with a dispute that arises under an agreement and in relation to an Award.

iv. Disputes over an employment matter not arising under an Award/NES or Agreement

123. There has been a growing body of law where employers are trying to avoid having a matter dealt with under a dispute resolution clause. This leaves the affected employees with nowhere to go, other than to take unprotected action. It leaves the employer in a position where it can simply dictate a position, and FWA will have no right to intervene.

124. The situation often arises with restructures or alleged restructures. This might mean a significant loss in shift penalties, a significant job change, a significant change in benefits or redeployment to another role (avoiding redundancy).

125. The strategy of some employers is obviously:
- to avoid arbitration clauses; and
- to the greatest extent possible, ensure that the agreement deals with as little as possible.

126. In one case, an employer failed to disclose a forthcoming major restructure which would result in about 500 redundancies, so that it could not be included in, and not be subject to arbitration under the dispute resolution clause. While this would be covered by a "consultation" or "job change" clause, these clauses are often ignored or invoked after the decision has been made. Even then consult does not mean "negotiate".

127. Even where certain matters are covered in an agreement, the employers will argue jurisdiction to avoid conciliation and/or arbitration. This will frustrate the employees, even if only to delay the employees while the employer fully implements the changes with impunity.

128. Some examples of cases where employers will even seek to avoid conciliation are:
- *Shop, Distributive and Allied Employees Association and Big W Discount Department Stores* 2002 AIRCFB PR924554
- *CPSU, the Community and Public Sector Union and Telstra Corporation Limited* 2000 AIRCFB Print 7179
- *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation* [2008] AIRC 901
- *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Telstra Corporation* 2003 AIRCFB PR940569
- *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation* [2008] AIRC 1148

129. Primarily, our view is that affected employees should be free to withdraw their labour if such a dispute arises. However, in the Australian context, arbitration should be available.

130. Providing FWA with the power to arbitrate any dispute that does not arise under an instrument (award or agreement) would encourage the parties to identify all issues that

are likely to arise during the term of the agreement and to determine a suitable dispute resolution process for those issues.

131. We argue that the Act should empower FWA to conciliate and arbitrate any industrial dispute that does not arise under an award/NES or agreement.

7. Transfer of business

132. While the transfer of business provisions deal with the instruments, there is a problem with the old "qualifying period", now known as the "minimum employment period". While the words in the *Bill* are different, the Full Bench decision in *Ziday and others and Aged Care Services Australia Group Pty Ltd ([2008] AIRCFB 367 Print PR981582)* held that a qualifying period applies on transmission.

133. Consider this scenario: A business is to be transferred to another owner.

- If the new employer does not accept a particular employee (with say 8 years of service) then that employee will almost certainly be made redundant at a cost to the old employer.
- If the new employer accepts a particular employee (with say 8 years of service) then that employee will be subject to a new *"minimum employment period"*
- If that employee (with say 8 years of service) is terminated within the 6 month *"minimum employment period"*, then the employee

    - will not have access to unfair dismissal
    - will not be entitled to redundancy
    - will lose the 8 years of service counting toward long service leave

134. By way of example, it is worth recalling a case where an employee was terminated after one day with the new employer. The employee had worked for over five years with the old employer. In this case it is more than likely that there was no arrangement with the old employer to avoid the redundancy provisions that applied. Nevertheless, the employee lost his redundancy benefits. It is critical to remove this loophole.

135. The most appropriate manner to address this and prevent its recurrence is to ensure that the "minimum employment period" not apply on transfer of business.

7.1. Transfer of business – the classic dilemma

136. One of the problems that occur with a transfer of business is the recognition of prior service. The new employer will sometimes make it clear that prior service will not be recognised. This leaves the employee in a difficult position. This relates in particular to redundancy benefits and long service leave.
137. A long-term employee may prefer redundancy than to accept risky employment with a new employer. It is assumed that an employee may refuse to be employed by a new employer because of say:

- previous employment with that employer
- a knowledge of the reputation of the new employer

138. It is assumed that a refusal by an employee to be employed by the new employer will result in a redundancy with the old employer as no other position will be available with the old employer.

139. If the employee does transfer, then qualification for long service leave may start again. As this may take 10 years to qualify, substantial potential benefits are lost.

140. We believe that the potential remedies may lie in the following:

1. On transfer of business, the Act should provide that unless an agreement or award makes other provisions, then the new employer must recognise the accumulated prior service with the old employer (for all purposes).

2. That the Act makes clear that an employee has the right to refuse to be employed by a new employer, and unless an agreement or award makes other provisions, then that employee will be entitled to redundancy benefits.

8. Relationship between FWA decision and an enterprise agreement

141. Section 201 provides that if a union makes an application under s.183, then FWA must note *in its decision* to approve the agreement that the agreement covers the organisation. This means that the name of the union may not appear in an agreement, even though the union was the bargaining representative. Perhaps in drafting the agreement, the name of the bargaining agent will be included by the negotiating parties.

142. It is also noted that the FWA decision may contain other critical information. This includes model flexibility terms, model consultation clauses and undertakings (see Section 201). As the past practice has been to record decisions and agreements separately, this important information may not accompany any agreement after approval.

143. A clause should be incorporated into the Act to provide that the FWA decision be attached to the approved agreement and must accompany the agreement at all times, ensuring that employees or employers do not overlook the information.

9. Workplace Determinations

144. In the proposed Act, four types of Workplace Determinations are identified. These are
- Low paid Workplace Determinations
- Special Low Paid Workplace Determinations
- Industrial Action Related Workplace Determinations
- Bargaining Related Workplace Determinations

145. The *Bill* sets out the terms that may and must be included in a Workplace Determination. We wish to address the terms of the Bargaining Related Workplace Determination as set out in s.270, and in particular s. 270(5) and (6). These set out the terms relating to Coverage - multi enterprise agreement and are compared below.

146. The preconditions set out in both clauses are identical, yet the terms must be expressed in different forms. It is unclear why. While some suggestions can be made, it is probably more useful for the drafting revisit the section. Note that the *Explanatory Memorandum* is also in identical terms.

(5) If:	*(6) If:*
(a) the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed multi enterprise agreement in relation to which a low paid authorisation is in operation; and	*(a) the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed multi enterprise agreement in relation to which a low paid authorisation is in operation; and*
(b) the bargaining representatives for the agreement that contravened a bargaining order as referred to in subsection 235(2) were bargaining representatives of one or more employers that would have been covered by the agreement;	*(b) the bargaining representatives for the agreement that contravened a bargaining order as referred to in subsection 235(2) were bargaining representatives of one or more employees who would have been covered by the agreement;*
the determination must be expressed to cover:	*the determination must be expressed to cover:*
(c) each of those employers; and	*(c) the employers of those employees if they are employers that would have been covered by the agreement; and*
(d) their employees who would have been covered by the agreement; and	*(d) all of their employees who would have been covered by the agreement; and*
(e) each employee organisation (if any) that was a bargaining representative of those employees.	*(e) each employee organisation (if any) that was a bargaining representative of those employees.*

10. Right of Entry

159. The CEPU notes that improvements have been made to the provisions governing Right of Entry to workplaces including, as has been recognised in the submission by the CEPU National Office, that:

- Right of Entry of a union official holding a Right of Entry Permit to hold discussions with employees will be based on the ability of the union to represent employees (eligibility to enrol those employees) rather than the *WorkChoices* requirement for the union to be bound by an award or agreement operating at the enterprise.

160. Having said that, we also agree with objections to the way the *Bill* proposes unnecessary restrictions on terms about Right of Entry within agreements. It is understood that the *Bill* will make unlawful any agreement that the contains terms providing an ability:

- to enter premises to investigate suspected breaches
- to enter premises to hold discussions with employees

161. Other than in accordance with Part 3-4 of the *Bill*, which deals with Right of Entry. (s.194(f))

162. We believe this approach to restrict the ability of agreements to secure right of entry is contrary to the Government's policy Forward with Fairness – where it claimed it would allow parties to negotiate terms appropriate to the enterprise.

163. Additionally, we believe changes should be made to the process governing the way Right of Entry Permit holders re-apply for their permits. While the process of re-applying for a new permit should be straight-forward, experience has shown the CEPU that employers can abuse the process to withhold the quick issuance of new permits (inhibiting the ability of permit holder to perform their functions) and add unnecessary costs.

164. The CEPU would submit that FWA should be given greater power to quickly dismiss vexatious claims and to make quicker decisions on employer objections to the renewal of a workplace Right of Entry Permit.

165. To help provide context to our recommendations, it would be instructive to review the way in which Australia Post conducted its objection to the renewal of a permit for one of our Victorian officials.

166. Since 2004, Australia Post has objected twice to the granting of a Right of Entry Permit Ms Joan Doyle, the Victorian Branch Secretary of the CEPU Communications Division Postal and Telecommunications Branch.

167. Apart from making a successful application to revoke the Permit, in 2004, Australia Post has on these two occasions failed to block Ms Doyle from regaining her permit:

- On 2 July 2004, Australia Post opposed the granting of a Permit. Nine months later, a Permit was granted - after a hearing and by a Determination on 16 March 2005.

- On 13 March 2008, Australia Post objected to Joan Doyle's application for a new Permit upon the expiry of her three-year Permit. Australia Post objected utilising the new "fit and proper person" provisions introduced under *WorkChoices*. This objection was made despite Ms Doyle conducting over 500 workplace visits from 2005 to 2008 and with the employer making no formal application to the Registrar in that time calling for the revocation of Ms Doyle's permit. Seven months later, a Permit was granted (on 20 October 2008).

168. It's worth noting that within *WorkChoices* there was no definition of what constitutes a "fit and proper person". The definition needs to be constructed through a reliance on case law. We note that the *Bill* under Parts 3-4, Subdivision C, s508 has clarified how FWA may restrict rights if an organisation or official has misused rights, the definition of "fit and proper" has not been addressed there either.

169. Our key objections are that in the absence of this definition of what constitutes a "fit and proper" person, employers are using the re-application process to inhibit the ability of officials to secure Permits and, as a consequence, prevent officials from meeting with members at workplaces to perform their function. Ms Doyle was prevented from visiting workplaces for seven months due to Australia Post's 2008 objection.

170. Further, vexatious objections by employers are costly. Via the Parliamentary process, the union has learnt through Answers to Questions on Notice that Australia Post spent nearly $300,000 from 2004 blocking union right of entry permits. The union is forced to also engage legal representation to match the employer. We believe that this is a clear abuse of the process and we believe that FWA should be empowered to make timely decisions on these matters, or provide for the issuance of provisional Permits unless considerations of public interest would deem this inappropriate.