Chapter 1

Introduction

1.1 This chapter provides a policy context to the bill, its purpose and background. As in all its major reports, the committee takes the opportunity to make broad observations about policy trends and details which have been observed over a number of years.

Reference

1.2 On 25 November 2008, the Senate referred the provisions of the Fair Work Bill 2008 (the bill) to the Senate Standing Committee on Education, Employment and Workplace Relations for report by 27 February 2009. The bill was passed by the House of Representatives on 4 December 2008.

Conduct of the inquiry

1.3 Notice of the inquiry was posted on the committee's website and advertised in *The Australian* newspaper, calling for submissions by 9 January 2009. The committee also directly contacted a number of interested parties, organisations and individuals to notify them of the inquiry and to invite submissions. 154 submissions were received as listed in Appendix 1.

1.4 The committee conducted public hearings in:

- Brisbane on 27 January 2009;
- Adelaide on 28 January 2009;
- Perth on 29 January 2009;
- Melbourne on 16 and 17 February 2009;
- Sydney on 18 February 2009; and
- Canberra on 11 December 2008 and 19 February 2009.

1.5 Witnesses who appeared before the committee are listed at Appendix 2.

1.6 Copies of the Hansard transcript from the hearings are tabled for the information of the Senate. They can be accessed on the internet at http://aph/gov.au/hansard.

Acknowledgements

1.7 The committee thanks those who assisted with the inquiry.

Purpose of the bill and its context

1.8 The Fair Work Bill is the second of four pieces of legislation which, taken together, will ultimately replace the current *Workplace Relations Act 1996* (WRA) and provide for a new workplace relations system to commence on 1 January 2010.

1.9 The first piece of legislation, considered by the committee in its report tabled on 17 March 2008, was the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, which changed the framework for making workplace agreements, abolishing Australian Workplace Agreements (AWAs) and initiating award modernisation.

1.10 Key features of this second piece of legislation include: a safety net of National Employment Standards (NES) and modern awards; reaffirmation of the principle of collective bargaining at the enterprise level; restoration of unfair dismissal appeal rights; an independent umpire, Fair Work Australia (FWA); and strong compliance measures including rules on industrial action and right of entry.

1.11 Eventually the bill may also facilitate the referral of powers from the states to the Commonwealth regarding private sector workplace relations which would enable a national workplace relations system for the private sector.

1.12 The legislation dealing with transitional and consequential arrangements will be presented to parliament in two separate bills, the first expected to be introduced shortly. The Minister has stated that the transitional bill will: ensure maintenance of take-home pay levels during the transition to agreements made under the new bargaining framework; ensure that the NES and minimum wages apply to all employees from 1 January 2010, including those covered by existing agreements; and, allow parties to modernise enterprise awards to continue in the new system and treat NAPSAs derived from the state enterprise awards in the same way.[1]

1.13 The approach of legislating transitional arrangements separately has been criticised by some organisations for its failure to allow for a proper assessment of its effects.[2] It appears that the government has sought to keep the focus on the system rather than on the complex transitional matters.[3] Some of the transitional issues raised with the committee are listed at the end of chapter eleven for consideration by the government as the transitional bills are drafted.

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1 Hon Julia Gillard MP. Minister for Workplace Relations, Second Reading Speech, *House of Representative Hansard*, 25 November 2008, p. 11196.

2 See AMMA, *Submission 96*, p. 18; NSW Office of Industrial Relations, *Submission 102*, p. 8.

3 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 14.

Background

1.14 As noted earlier, the Fair Work Bill builds on the Transition to Forward with Fairness amendments to the WRA to give effect to the remainder of the government's substantive workplace relations election commitments which are detailed in the policy documents released in 2007, *Forward with Fairness* and the *Forward with Fairness Implementation Plan*. In particular, the bill gives effect to the government's election commitment to implement a new workplace relations system. While retaining some of the features of the current WRA, the bill aims to restore balance and fairness.

Striking the right balance between employee and employer needs

1.15 Fairness and balance are concerns of long-standing in industrial relations legislation. The proponents of the Workplace Relations Bill in 1996 claimed that the new legislation was based on the need to restore 'balance'. It was argued that business, especially small business, was much hampered by the 'privileged' access of employees to collective agreements, backed by coercive union power. AWAs would restore 'balance'. While the introduction of AWAs more than shifted that balance, the WorkChoices amendments to the WRA in 2005 drastically tilted it. Over time, it became apparent to the electorate that AWAs, especially after WorkChoices, were simply a device to strip employee entitlements to the bone and to maintain the existence of a low-paid casually-employed underclass.

1.16 This bill implements *Forward with Fairness* and reverses the trend evident in the WRA, especially in its later amendments, of elevating individual agreements above collective agreements, especially where such agreements were negotiated by unions. It restores union participation in industrial relations because without it there is no effective way of ensuring the right of employees to freedom of association and the maintenance of fair minimum conditions of employment. Yet this is also the first time that industrial legislation has facilitated the move toward a truly national system of industrial relations. While WorkChoices was grounded on the use of the corporations power, this appeared to be more of an expedient and did not achieve a truly national system for the private sector as it did not extend to many employers who are not constitutional corporations, leaving those employers and their employees covered by state systems. Instead Forward with Fairness embodied a consultative process with the states in relation to a proposed workplace relations system that has wide electoral support. This legislation is intended to restore fairness and balance across the entire workforce. As one employee representative submission recognised: 'The Government understands that the needs of a 21st century global economy cannot be met by tinkering around at the edges of the existing industrial relations system.[4]

1.17 This legislation further advances this commitment and continues the reversal of the imbalances in WorkChoices. As expressed by the Minister for Education, Employment and Workplace Relations:

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4 Australian Hotels Association, *Submission 100*, p. 5.

> We have presented to this parliament a bill that puts workplace relations right where is should be – in the dead centre, where the pendulum should be, between the interests of employers and employees.[5]

1.18 This balance has been recognised by employer groups. On the day the bill was released, the Australian Industry Group (AiG) described it as 'by and large a workable compromise'.[6] This recognition is in no small way due to the unprecedented level of consultation that was undertaken by the government.

Consultation process

1.19 In *Forward with Fairness* the government committed itself to consult on the development of the legislation. Since the passage of the Transition Forward to Fairness Bill the government has consulted widely with interest groups as part of the legislative drafting process, particularly in regard to identifying ways of improving the practical operation of the laws and identifying unintended consequences. The consultation process included stakeholders such as peak union and employer bodies and state and territory officials and workplace relations ministers. The government formed two new groups; the Business Advisory group and the Small Business Working Group, and kept the main two former government groups, the National Workplace Relations Consultative Committee and its subcommittee, the Committee on Industrial Legislation (COIL).[7]

1.20 The stakeholder groups have acknowledged the government's consultation process as being genuine, comprehensive and thorough.[8]

1.21 This contrasts with the lack of consultation undertaken by the former government on the WorkChoices legislation. For instance, consultation with COIL involved over 60 people for two weeks in Canberra in October 2008 to work through the detail of the draft legislation.[9] This may be compared with the few short hours they were given to review the complex and lengthy WorkChoices Bill.[10]

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5 Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, p. 12646.

6 Media Release, Australian Industry Group, 'Fair Work Bill – by and large a workable compromise', 25 November 2008.

7 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 2.

8 See Recruitment and Consulting Services Australia, *Submission 94*, p. 6; Master Builders Australia, *Submission 64*, p. 5; AiG, *Submission 118*, p. 5; Business Council of Australia, *Submission 116*, p. 1; Australian Hotels Association, *Submission 100*, p. 4; WA Government , *Submission 16*, p.2.

9 Ibid.

10 Hon. Julia Gillard MP, Minister for Employment and Industrial Relations, Address to the Australian Labour Law Association, 14 November 2008.

1.22 In addition, this Senate inquiry process has taken three months, with hearings in six locations, compared to the three week process undertaken for WorkChoices which held hearings in Canberra only.

Simpler legislation

1.23 The government pointed to the exposure draft of the National Employment Standards (NES) released on 14 February 2008 as evidence of its commitment to greater simplicity. Employer and employee stakeholders expressed approval on the simpler approach.[11]

1.24 This approach has been continued with this bill where the government has aimed at drafting workplace legislation that is simpler and more workable for employers and employees. The government commissioned University of Adelaide law professor Andrew Stewart to assist this process. Professor Stewart had criticised former coalition and Labor governments for allowing the industrial legislation to rival the income tax laws for complexity. Although he listed some areas where further improvements could be made, Professor Stewart expressed satisfaction that every manager, union official and industrial practitioner who needs to consult this legislation regularly would find their work much easier.[12] The Workplace and Corporate Law Research Group, Monash University also agreed that the bill provides simpler legislation:

> There is no doubt that the Fair Work Bill is simpler to understand and apply than its predecessors and that the new national workplace relations system as a whole will be less complex than the system established by Work Choices.[13]

1.25 The committee majority notes that the WRA totalled some 1,500 pages. This bill is significantly shorter at fewer than 600 pages. It notes the general agreement that the bill is easier to read and comprehend, which will assist those who need to consult it regularly. This improvement has been noted more than once by Opposition participating committee member Senator Abetz.[14]

Economic context

1.26 The debate about the relative importance of industrial relations as a determinant of productivity has continued over the life of the WRA and continues still. The government has been criticised for its timing of the new legislation given the

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11 Mark Davis, 'Push to make workplace laws simpler', *Sydney Morning Herald*, 18 June 2008, p. 7.

12 Professor Andrew Stewart, *Submission 98*, p. 2.

13 Workplace and Corporate Law Research Group, Monash University, *Submission 8*, p. 2.

14 Senator the Hon Eric Abetz, *Committee Hansard*, 28 January 2009, p. 9; *Committee Hansard*, 18 February 2009, p. 46; *Committee Hansard*, 19 February 2009, p. 68.

unfavourable economic cycle the country now finds itself in.[15] The Minister has stated that the government takes a long term view:

> Labor in opposition deliberately designed these laws so that they could be the workplace relations laws of this country in good times and in difficult times. We designed a workplace relations system that was ready to meet the challenges this nation could face in the future; a workplace relations system that would be fair to employees, flexible and productive no matter what was going on in the economy. Consequently, our Fair Work Bill is there to set the workplace relations laws for this country for the long term.[16]

1.27 The Minister added that the priority was to achieve balance in meeting the needs of the economy, and advised:

> …we believe we've got the balance right and that the Bill is good for employees, good for employers and good for the economy and future productivity and prosperity.[17]

1.28 The government has responded to the current global financial crisis through its $10.4 billion Economic Security Strategy to strengthen the economy and create 75,000 jobs.[18] In addition, on 3 February 2009 the government announced a $42 billion Nation Building and Jobs Plan to support long term economic growth, and up to 90,000 jobs in 2008-09 and 2009-10.[19]

1.29 In current economic conditions the government believes it is all the more important to deliver certainty and stability regarding workplace relations laws.[20] In the committee's mind, employment confidence underpins consumer confidence. The committee majority particularly deplores statements made by some employers that the legislation is ill-timed, given the current threat of world recession. This is not defensible. No economic justification has been put forward to support it. It reflects only a fear of change, and an opportunistic tactic to delay it. The prevailing wisdom is that the workforce must be protected so as to be ready for recovery.

1.30 Critics of the bill have claimed that the proposed changes add to industry costs, implicitly through the 'inevitably' increased cost of labour. This is also an implicit admission that they remain trapped in the low-wage time-warp in linking prosperity with the driving down of wages. They appear to believe that if the IR

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15 See ACCI, *Submission 58*, Part 1, p. 3.

16 Hon Julia Gillard MP, Transcript of E&OE Transcript Press Conference, 15 January 2009.

17 Hon Julia Gillard MP, Transcript of ABC AM interview with Hayden Cooper, 16 January 2009.

18 DEEWR, *Submission 63*, p. 7.

19 Media release, Prime Minister of Australia,' $42 billion nation building and jobs plan', 3 February 2009.

20 Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, p. 12646.

system is skewed, or 'balanced' toward a 'take-it-or-leave-it' system of wage negotiation, economic growth will automatically follow. As evidence from the Department of Education, Employment and Workplace Relations (DEEWR) noted:

> …drivers of national economic growth and performance come from a far wider range of sources than the type of workplace relations system that a country adopts. [21]

1.31 Professor Andrew Stewart agreed that 'job creation responds predominantly to forces other than the conditions that are set by labour law'. He added that he did not see the legislation leading to any higher levels of unemployment than will be due to the economic downturn.[22]

1.32 In summary, the committee majority regards external forces, principally the decline in foreign demand for goods and services, and the limited availability of investment funding, as the likely drivers of unemployment. The new National Employment Standards have no significance in the employment equation, compared, for instance, with the decline in China's economic growth from 9 to 6.8 per cent in the final quarter of last year[23] which is already having a direct effect on jobs in sectors such as the mining industry.[24] As well, the general downturn in the domestic economy is affecting retail and other jobs. Protecting jobs in this economic climate is a key goal for the government, but not one that would be assisted by allowing industrial relations reform to falter.

1.33 In response to criticism from the Coalition that the government has not relied on any economic forecasts or impact statement before introducing the bill into parliament, the Minister has pointed out that 77 pages of regulatory and economic effects are included in the explanatory memorandum. The Minister added that the Office of Best Practice Regulation agreed that this analysis has effectively documented the regulatory implications of the bill.[25]

1.34 The government has pointed to evidence that identifies a clear link between enterprise bargaining and increased productivity.[26] DEEWR noted that the bill is broadly consistent with the recommendations to maintain a flexible labour market made in the OECD Economic Survey of Australia, released on 10 October 2008. In particular, the OECD recommended that collective bargaining be preserved at the

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21 DEEWR, *Submission 63*, p. 9.

22 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 7.

23 Michael Stutchbury, 'Growth near zero, says IMF, as China slowdown hangs over Australian economy, *The Australian*, 23 January 2008. available at: http://www.theaustralian.news.com.au/story/0,25197,24950554-5018001,00.html.

24 Mr Christopher Platt, AMMA, *Committee Hansard*, 27 January 2009, p. 2.

25 Hon Julia Gillard MP, Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, p. 12646.

26 EM, p. xli.

enterprise level; that industrial relations systems be harmonised across states; and that awards be modernised.[27]

1.35 Government senators recall that over many years the committee has been given economic modelling data which purported to show the certainty of increased productivity as a consequence of the operation of AWAs. The WRA was supposed to usher in an era of increased productivity. In fact, the early years of its operation coincided with the coming to fruition of micro-economic reforms commenced earlier, together with enterprise bargaining which was part of pre-WRA industrial reform.

1.36 There is evidence for this in data relating to trends in productivity growth which report that: based on ABS figures from 1988-99 to 2003-04 annual growth in labour productivity averaged 2.2 per cent which is 1.1 percentage points below the average of 3.3 per cent over the previous growth cycle of 1993-94 to 1998-99. DEEWR noted that this was the highest growth rate on record and coincided with the formal introduction and spread of enterprise bargaining. More recently, since 2003-04, productivity growth has averaged 1.1 per cent which suggests growth over the current cycle will be down on the longer term average.[28]

1.37 The Explanatory Memorandum mentions research by the Productivity Commission and the Melbourne Institute which linked productivity gains to collective bargaining. It also mentioned work by Tseng and Wooden which found a correlation between collective bargaining and higher productivity. Specifically they found that firms with employees on collective agreements had a nine per cent increase in productivity levels compared to employees on awards. In addition, work from Fry, Jarvis and Loundes was cited which found that organisations entering into collective agreements reported higher levels of self-assessed labour productivity relative to their competitors.[29]

1.38 In response to the claims that wage claims will spiral out of control, DEEWR noted the close tie between productivity and wage increases, which, together with the continued prohibition on pattern bargaining, place limits of the possibility of unsustainable wage increases.[30]

Flexibility

1.39 While Coalition senators and employer groups have raised questions about the sufficiency of flexibility of the system, the committee majority is mindful that flexibility has to be balanced with fairness. It is clear from some of the evidence to be discussed later that 'flexibility' often has different meanings for employees and employers. Measures to achieve genuine flexibility to meet the needs of individual

27 DEEWR, *Submission 63*, pp. 8-9.

28 Ibid., p. 11.

29 EM, pp. xli-xlii.

30 DEEWR, *Submission 63*, p. 13.

employees and employers – without sacrificing minimum standards – is inherent in the framework of the bill. The bill ensures that employees are better able to balance work and family life.[31] There are individual flexibility arrangements in awards, and flexibility terms must be contained in enterprise agreements. These arrangements are subject to protections to ensure they are genuinely agreed and do not undermine the safety net of employment standards.

1.40 Further the legislation recognises that award protections are of less relevance to employees on high incomes. The bill therefore provides that employees earning a guaranteed annual salary of more than $100,000 per annum (indexed) are not subject to modern awards.

1.41 In contrast, the WRA gave employees the 'flexibility' to offer AWAs that removed basic employment entitlements such as leave, penalty rates, public holidays, redundancy pay and overtime. These could be offered on a 'take it or leave it' basis as a condition of getting a job or a promotion. AWAs were often entered into as result of such pressure and significantly disadvantaged employees by providing minimal (if any) wage compensation for employees foregoing such basic work entitlements. Such 'flexibility' may have been appealing for employers, but much less so for most workers.

1.42 Professor Stewart had some relevant remarks to make about flexibility in the bill in response to questions from Senator Cameron:

> I would also say that of course there is flexibility built into the system in a whole lot of ways anyway…. There is still ample scope for many parties to engage in workplace bargaining that could indeed, in some instances, see some employment conditions being negotiated away. We are starting to see some of that happen already in the current economic climate and I would expect that will continue. The question is: do we want to move to a situation where you can bargain below the safety net?
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> For a very large number of workers in industries like retail, hospitality, cleaning, child care and community services, there is not a lot of scope there to bargain downwards. Until and unless there is a convincing economic case which says that society as a whole benefits massively by cutting employment conditions of some of our lowest paid, most vulnerable workers, then I for one would not support that.[32]

Committee view

1.43 The committee majority believes that there is sufficient provision in the legislation to allow wide scope for negotiation of flexible working arrangements. Current arrangements and enterprise awards, as well as current enterprise Notional

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31 Hon Julia Gillard MP, Minister for Workplace Relations, *House of Representative Hansard*, 25 November 2008, p. 11190.

32 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 6.

Agreements Preserving State Awards (NAPSAs) will be a part of the new system. The bill provides for common law contracts and individual flexibility arrangements on top of an award or an enterprise agreement which will enable employers to attract and retain staff.

1.44 As noted earlier, the WRA allowed an imbalance to occur in the bargaining power of employers and employees. While the majority of businesses treated their employees well, the WorkChoices laws removed the previously accepted notions of obligation which employers owed to employees, notably that of fairness. In some cases, it led to unscrupulous employers exploiting vulnerable workers, but more serious was the encouragement it gave to treat employees as expendable commodities, especially at the low-paid casual end of the market. The committee majority believes that the general condition of employees would have been considerably worse had not skills shortages over recent years given employees in some areas more bargaining power. It is important to consider this fact at a time when the demand for labour is likely to fall, and when the protections afforded by Fair Work legislation will be even more necessary. In this regard the committee notes evidence given by Ms Janet Giles from SA Unions who told the committee:

> We believe that there was an overwhelming call for the reinstatement of balance and fairness at work by the Australian people at the last election. We believe we now need that more than ever because of the economic times that we are in. Work Choices was bad in good times; it is going to be horrific for vulnerable people in difficult times and where individual workers have far less bargaining power. It is the role of industrial relations to not only provide a collective voice for workers but also to protect the vulnerable and the young, and that is why we think that right now it is crucial to have this strong safety net based legislation.[33]

1.45 In summary, the Fair Work Bill promises certainty and stability in workplace relations laws. It has been drafted to stand for the long-term, providing flexibility and fairness through changing economic cycles. Above all, it provides a genuine balance between the interests of employees and employers, in the pursuit of national economic growth.

Key issues raised with the committee

1.46 This section of the chapter summarises the key issues most frequently raised in submissions and discussed at hearings. They are subject to more detailed examination later in the report. The committee majority notes that much of the commentary and criticism made in submissions appears to be based either on a lack of understanding of crucial provisions of the bill, or on speculation about worst-case outcomes which have no basis in fact.

33 Ms Janet Giles, SA Unions, *Committee Hansard*, 28 January 2009, p. 13.

1.47 This attitude is most evident in the apparent reluctance by some employer groups to let go of their attachment to individual agreements. The committee experienced several exchanges with employer organisation witnesses where such concepts as negotiating above the award were unimaginable. There were similar exchanges about workplace flexibility**.**

The bargaining process

1.48 *Forward with Fairness* should by now have been absorbed by all employer organisations, but the committee has found that an attachment to individual agreements is still strong. The Minerals Council of Australia, for instance, expressed strong opposition to the making of collective agreements negotiated with unions under any circumstances. The CEO told the committee that 'We do not accept the premise that fairness in working arrangements can only be determined on a collective platform under the guise of a third party external to the business.'[34] According to the Minerals Council, this bill impinged on freedom of association rights.

1.49 Not all employer organisations took this view. The Australian Hotels Association stated that it believed that the government had made a sincere attempt to try and build an industrial relations system that is suitable for a service-based economy. It was a 'total re-write' of the legislation and that, like a quilt, if you start unravelling different strands of this legislation the whole thing starts to unravel.[35] The AHA was generally pleased with the bargaining arrangements in the bill, saying the system had a safety net of conditions above which it was up to individual businesses to take advantage of the bargaining arrangements to derive productivity offsets and then to share those productivity offsets.[36]

The Mandate

1.50 Opposition senators asked witnesses their view on the government's mandate to introduce the bill in the form that it has, and whether it passes some kind of 'mandate test'. Employer organisations have responded by declaring that certain provisions of the bill appear to contradict declarations made by Labor leaders during the course of the election campaign.

1.51 Such details as were discussed did not extend to the core of Labor policy or intentions. When asked about the mandate, the National Secretary of the SDA stated:

> It does have a mandate to legislate, and in broad terms that is what this bill does. It does away with Work Choices. It does away with a number of things which were part of the legislation that Work Choices had introduced, and clearly it had a mandate to do that. What we are now talking about are very much things at the margin and very much at the detail of the

34 Mr Mitchell Hooke, *Committee Hansard* , 19 February 2009, p. 12.

35 Mr William Healey, *Committee Hansard* , 16 February 2009, p. 42.

36 Ibid., p.43.

> implementation of the mandate. We are not talking about the fundamentals of the mandate that the government has.[37]

1.52 Mr de Bruyn made a related point:

> Well, if the government limited itself to its mandate and ignored suggestions which perhaps everybody might agree would make the bill better, that is not something that is going to improve governance. So obviously at the time when people are running an election campaign they put forward policies, but it is always possible, and in practice it happens frequently, that people come up with improvements subsequently, and so a government should not be limited only to what it says in its platform in the period before the election.[38]

1.53 The committee majority makes the point that questions asked about the mandate by the Opposition appear odd in view of their recent experience in government, and in view of a general understanding about the way governments must operate. The 'mandate' is widely understood to be based on a broad understanding of the thrust of policy presented in *Forward with Fairness*. No election manifesto can be expected to extend to legislative detail that could not be anticipated, or which may be required by the exigencies that will later arise.

Right of entry

1.54 The committee majority note that employer groups appear not to have understood that the bill changes the basis for a union's right of entry. It removes the current requirement for a union to be bound to an award or agreement as a condition of entry. Right of entry to a site is now linked to the union's right to represent employees as is set out in detail in the *Forward with Fairness Policy Implementation Plan*. It is a fundamental principle that employers must respect an employee's right to join and be represented by a union. Under the bill the right of entry to hold discussions with members and potential members is no longer displaced by non-union agreements and AWAs. It was the extreme, anti-union WorkChoices laws that in 2005 provided for the first time that non-union agreements and AWAs removed the right of entry for unions to enter to hold discussions with employees who were their members or potential members. In the view of the committee majority, this was a blatant breach of a person's fundamental right to join and be represented by a union if that is their wish.

1.55 The argument by employers was that this policy would lead to demarcation disputes. The committee majority believes this fear is unfounded The provisions are not intended to displace existing union coverage boundaries and a mechanism to handle demarcation disputes will continue to be available under provisions regulating registered organisations.

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37 Mr Joe de Bruyn, SDA, *Committee Hansard*, 17 February 2009, p. 4.

38 Mr Joe de Bruyn, SDA, *Committee Hansard*, 17 February 2009, p. 3.

1.56 The most persistent concern of employer groups was the right of entry provisions and the 'considerably expanded' rights of unions. This fear is unfounded. The changes to the right of entry regime: to allow union access to non-union employee records where this is necessary to investigate a contravention, and allowing all employees to meet with their union in the workplace regardless of the form of agreement applying, are not new and existed in the pre-WorkChoices WRA (and for very many years before that) without the kinds of consequences that some employers have suggested to the committee would occur. They are balanced with appropriate obligations placed on unions and sanctions apply for misuse. It is worth noting that under the anti-coercion provisions, no employees can be forced to attend discussions with unions. See chapter seven for more detail.

Access to employee records

1.57 Another concern for employer groups was in relation to union access to employee records. Once again the protections in the bill seem to have been overlooked. The committee majority emphasises that permit holders cannot copy anything they wish and fears about open slather access to employee records are groundless. Access is allowed only to the extent that it is relevant to a suspected breach. Privacy protections apply. The committee heard of no instance of misuse or abuse of employee records by a union and the department was not aware of any such allegation. The committee majority also notes that the protections for personal information are stronger and more comprehensive under the Fair Work Bill than under WorkChoices and there are also heavier penalties for the unauthorised use or disclosure of employee records.

1.58 As will be noted in more detail in chapter seven, the committee has received assurances from DEEWR officials about the operation of the legislation in regard to privacy safeguards, 24 hour notice served on employers responsible for producing the documents, and generally ensuring a balance between privacy and the rights of employers.

Greenfield agreements

1.59 Employer groups were particularly concerned about greenfield agreements which must be made with one or more unions eligible to represent employees. Employer groups have read this clause to mean that these agreements must be made with every relevant union, and fear that even just one union may frustrate bargaining. The committee majority believes these fears are unfounded, particularly in the light of advice which has been received about the operation of the legislation. There is an element of fear-mongering in some statements made by opposition members and by certain press commentators. Employer organisations appear to have feared the worst in speculating on the disruption that this is likely to cause. It is clear, however, that the provisions for good-faith bargaining would not permit a single union to hold a multi-union greenfield agreement to ransom.

1.60 The government has made it clear that an employer must notify all relevant unions and advise FWA but it is then up to those unions to approach the employer if they wish to be involved. An employer is not required to make an agreement with every union that was notified or that was involved in bargaining although it may choose to do so. If the employer strikes a deal with one of the relevant unions, the employer can ask to have the agreement approved by FWA. See chapter four for more detail.

Agreement content

1.61 Employer groups and unions expressed concern about what can and cannnot be included in agreements. Government policy is that agreements should include matters pertaining to the relationship between the employer and the employees and the employers and any union to be covered by the agreement. Matters irrelevant to the employment relationship cannot be the subject of protected industrial action. The bill will allow matters that are long-standing, basic features of workplace relations agreements but which were prohibited under WorkChoices to be included in enterprise agreements, such as union consultation clauses or leave to attend union training. This will allow parties to cover these issues in their agreements and make the current practice of 'side' agreements between employers and unions largely unnecessary.

1.62 Bargaining fees cannot be included in an agreement as bargaining agent fee clauses are objectionable provisions. The committee majority also notes there is no blanket prohibition on right of entry terms in agreements but certain terms about right of entry are unlawful if it provides an entitlement that is inconsistent with the right of entry part of the bill. A particular concern was whether environmental issues could be included in agreements. The committee majority notes that environmental issues are able to be dealt with in enterprise agreements where the issue has the necessary connection to the employment relationship between an employer and the employees covered by the agreement. Also see chapter four.

Transfer of business

1.63 Employer groups criticised the new definition of a transfer of business and the requirement to continue to provide the entitlements in the transferring employees' existing industrial instruments. The committee majority notes that this concern should be allayed by the provision allowing an employer to apply to FWA to rationalise the instruments of employment that apply and that such a request may be considered before or after the transfer. This issue is dealt with in more detail in chapter nine.

Restoration of unfair dismissal rights

1.64 Employer groups have raised concerns that extending the unfair dismissal protections in the current economic circumstances will discourage employers from hiring staff. The committee majority notes advice from DEEWR that there is no direct or conclusive evidence to support the claim that unfair dismissal laws influence recruitment of employees. DEEWR cited the May 2008 Sensis Small Business Index,

surveying 75 per cent of small to medium enterprises, which reported that reinstatement of the previous unfair dismissal laws would have no real effect on their business.

1.65 While welcoming the restoration of unfair dismissal rights to most employees, the ACTU expressed the view that the protections should be extended to all workers, subject to a three-month probation period. The new scheme recognises that employees should have protections from unfair treatment while recognising that small business owners do not have the support of expert human resources advisers in managing under-performance. Unfair dismissal issues are covered in detail in chapter five.

Submission of unfair dismissal claims

1.66 A common criticism of the bill was that the seven day timeframe to lodge unfair dismissal claims is too short, and would disadvantage certain parties such as those in remote areas; employees who may not be aware of their rights; those from a non-English speaking background; and those who may be distressed. Most advocated a 14 or 21 day timeframe. Employer groups were also concerned that the timeframe might encourage claims that would otherwise not have been lodged and that the timeframe may result in the substitution of general protection claims for unfair dismissal claims. See chapter five for the committee's recommendations in this area.

Arbitration

1.67 The committee heard opposing views on access to arbitration. As might be expected, many employee organisations wanted wider access to arbitration and employers wanted less. The bill requires a modern award to include a term for settling disputes about any award or NES matter and enterprise agreements must contain a dispute settlement clause. In addition, FWA has broad powers to mediate or conciliate, make recommendations and make workplace determinations. For more detail see chapter eight.

Right to request flexible working arrangements

1.68 Although welcoming the right to request flexible working arrangements for those with pre-school age children, organisations wanted more clarity about what constitutes 'reasonable business grounds' for the refusal of such a request. The committee notes that FWA will provide further guidance on this issue. There were also concerns about an employee's ability to challenge a refusal. The committee majority notes that it is open to the employer or employee to suggest modifications which might be able to be more easily accommodated. An employee may also have remedies under relevant discrimination legislation if they feel they have been discriminated against by the handling of their request.

Individuals may request work arrangements in order to remain at workplaces as their family circumstances change, which will also enable employers to retain the human capital investment made in the employee. This is covered in chapter two.

Pattern bargaining

1.69 The committee heard opposing views on this issue. Some witnesses did not support the restrictions on pattern bargaining, arguing that it limits the employee's freedom of association and pointed out that some employers are quite happy with a pattern approach to bargaining as it ensures consistency in wages and conditions. In contrast, some employers expressed concern that the low-paid bargaining stream is a form of pattern bargaining. This was despite the explanation that apart from some language changes for simplification, the description of pattern bargaining is in substance the same as what is in the current act.

1.70 The prohibition on pattern bargaining is achieved by the combined operations of various provisions and clauses. The committee majority notes the assurances provided by the Minister to employers that there will be no return to pattern bargaining by unions. Industrial action in support of pattern bargaining is specifically prohibited and an injunction can be sought from the court to restrain any such industrial action. The committee notes that these assurances have been recognised by employer groups such as AiG which believes the ban on industrial action will prevent a return to pattern bargaining. See chapter four.

Structure of the report

1.71 Chapter two of the report will cover the first part of the legislated minimum employment standards, the NES. Chapter three will look at the second part, modern awards. Chapter four details the new bargaining framework. Chapter five examines unfair dismissal rights. Chapter six details industrial action and chapter seven, the rules around right of entry. Chapter eight examines the establishment of FWA. Chapter nine covers transfer of business. Chapter ten deals with outworkers and chapter eleven covers the development of a national system and coverage issues as well as issues to be covered by the transitional bill. The start of each chapter provides further details on the issues contained in each.