Chapter 11

Toward a national system and transitional issues

11.1 This chapter covers issues raised regarding the development of a national industrial relations system and matters that are required to be covered by the transitional bill currently being drafted.

National system and coverage issues

11.2 The Fair Work Bill anticipates the eventual evolution of a national industrial relations system through referrals of power and other forms of harmonisation. At the Australian State, Territory and New Zealand Workplace Relations Ministers Council meeting on 5 November 2008, it was agreed in principle that draft legislation to provide the foundation for a national workplace relations system for the private sector would be based on *Forward with Fairness*.[1] Like the later amendments to the WRA, the provisions of this bill are based on the corporations power[2] of the Constitution (s 51(xx)), which has seen at least 70 percent of employers move into the national system of workplace relations.[3] Pending the development of a national system, DEEWR estimated that up to approximately 85 per cent of private sector employees will be covered, while noting some variance in levels of coverage between the states. Despite achieving 85 per cent coverage of employees, the bill will not provide a comprehensive national system for all private sector employers and employees and this can only be achieved through clear referral of powers by the states.[4]

11.3 The committee has not concerned itself with a national industrial relations system, apart from considering issues which relate directly to this bill. It notes that the government has said it will engage in further discussion with the state governments concerning their approaches to the development of a national system. In the meantime a number of provisions in this bill, which are relevant to any consideration of a national IR system, were raised with the committee.

Coverage of local government and public sector employees

11.4 While expanding the reach of the Commonwealth system, WorkChoices legislation led to significant confusion over coverage, particularly for local government and not-for-profit sectors. An employer can be covered only by the

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1 Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers Council, 5 November 2008.

2 Some parts have extended application through reliance in the external affairs power.

3 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 16.

4 Ibid., p. 19.

federal system if it is a 'constitutional corporation', that is, a trading, financial or foreign corporation.[5]

11.5 Uncertainty remains about whether local government is engaged in trading or financial activities that meet the criteria for being a constitutional corporation. The NSW Office of Industrial Relations noted:

> While there can be no doubt about a proprietary limited company that trades for profit, there is considerable doubt about the status of a not-for-profit organisation that has chosen to incorporate to provide stability and certainty for tax and funding and other purposes, and also it seems municipal, charitable and educational corporations, to name but a few. It seems unlikely that the High Court will be in a position to make any authoritative ruling or rulings in the short to medium term, and so the uncertainty for such organisations lingers.[6]

11.6 Nonetheless, the New South Wales Government has legislated to ensure that local government employees, by virtue of the fact that local government is maintained under state legislation, do not come under the corporations law. The states and territories retain control of their public sector employees (including local government) in accord with federalist principles. Currently there are no provisions in the bill for state referral into the national system, but should referral of powers result from discussions with some states, the legislation can be amended at that time to ensure certainty of coverage for local government.

Trading corporations

11.7 The United Services Union (USU)[7] and the ACTU have noted the difficulties in establishing whether some employers are trading corporations. In the event that state governments refer their powers, the ACTU also urged the government to ensure its commitments to state employees are delivered. In the absence of referrals it argued the government should amend the bill and withdraw from covering 'borderline' entities.[8]

11.8 SA Unions supported a national system, noting that about 60 per cent of the South Australian workforce would be affected by the new legislation.[9] This would be best achieved through a 'text-based' referral of powers but which retained within a state industrial system state public sector employees and those employees not covered by FWA.[10] The committee notes that already QLD and NSW have passed legislation

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5 NSW Office of Industrial Relations, *Submission 102*, p. 14.

6 Ibid.

7 USU, *Submission 4*, pp. 2-3.

8 ACTU, *Submission 13*, pp. 25-26.

9 SA Unions, *Submission 121*, p. 3.

10 Ibid., pp. 2-3.

de-corporatising local councils which removed them from the potential application of the federal system.[11] It also notes that at the hearing on 29 January 2009, Mr Troy Buswell MLA, Minister for Industrial Relations in Western Australia, announced to the committee that the WA government had decided not to refer the state's industrial relations powers to the Commonwealth but would instead reform its own state industrial relations system.[12]

11.9 Clauses 24 to 30 address how the act affects the operation of certain state and territory laws. Clause 26 (1) states that the act is intended to exclude all state and territory industrial laws so far as they would otherwise apply in relation to a national system employee or national system employer. The Bills Digest advised that the intention is for the proposed Act to cover the field in relation to industrial relations to the extent that it is constitutionally possible. It further explained:

> Where the Commonwealth successfully covers the field the states and territories are precluded from legislating in the area and their existing laws which regulated this area become inoperable.[13]

11.10 Clause 26(2) defines a 'State and Territory industrial law' to clarify which laws are excluded. Clause 27 details the areas in which states and territories will still retain some powers to legislate. The more significant non-excluded matters set out in 27(2) include superannuation, workers compensation, occupational health and safety, outworkers, child labour, long service leave (except for those with entitlements under the NES), and regulation of employer and employee organisations and their members.[14]

11.11 While acknowledging that clause 26 is better drafted than its equivalent in the WRA, the NSW Office of Industrial Relations argued that it is unlikely to do away with the continuing uncertainty about which aspects of which state and territory laws operate with respect to national system employers and employees. It noted that again, cooperation between jurisdictions is the preferred method for achieving outcomes in this area.[15]

Agricultural sector

11.12 The agricultural sector laments the absence of a national industrial relations system. The great majority of farm businesses are not constitutional corporations, operating through unincorporated trusts or partnerships. The National Farmers

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11 DEEWR, *Submission 63*, p. 65.

12 Hon Troy Buswell MLA, Minister for Industrial Relations, WA, *Committee Hansard*, 29 January 2009, p. 13.

13 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, pp. 19-20.

14 Ibid., pp. 20-21.

15 NSW Office of Industrial Relations, Submission 102, p. 15.

Federation (NFF) believes that it is against the commercial interests of farm businesses to become incorporated entities. The previous government legislated for the Federal Transitional Award System which continued five years of federal award coverage of unincorporated entities. The NFF wishes to see this arrangement maintained for a lengthy, if not indefinite, period. It has doubts that a referral of powers will be given by all states. If referral or maintenance does not occur, the NFF claims that a majority of agricultural employers will have to remain within an 'inflexible' state award system adding up to 30 per cent in labour costs to farming businesses.[16]

11.13 The NFF told the committee that since lodging its submission they have had discussions with the Minister's office and been given an undertaking that if referral does not occur then the transitional system will be in place until its expiry in March 2011. The committee majority notes that this issue will be addressed in the transitional bill.[17]

The special case of Victoria

11.14 The bill does not include provisions relying on a referral of power from Victoria.[18] The Bills Digest notes that the transitional bill may provide for the Victorian referral.[19] In its recent Annual Statement of Government Intentions (February 2009) the Victorian Government announced its intention to refer powers to the Commonwealth:

> The Victorian Government believes in a unitary industrial relations system that has fairness at its core. The Commonwealth Government has introduced its Fair Work Bill to replace WorkChoices and restore fairness to the Commonwealth industrial framework.
>
> Once this legislation is passed through the Senate, the Victorian Government will work to amend its existing referral of industrial relations powers to the Commonwealth to ensure that the improved unitary system will apply comprehensively in Victoria.
>
> The proposed Victorian Fair Work (Commonwealth Powers) Bill will mean that, for the first time, Victorian businesses and workers will have access to a fair national industrial relations system.[20]

16 NFF, *Submission 10*, pp. 5-8.

17 Ms Denita Wawn, NFF, *Committee Hansard*, 19 February 2009, p. 2.

18 Local Government Association of Queensland, *Submission 39*, p. 2.

19 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 19.

20 www.premier.vic.gov.au Annual Statement of Government Intentions 2009, section 9.3

Foreign ships on the coasting trade

11.15 The application of the bill to seafarers engaged in the coasting trade was a matter of particular interest to the committee. Submissions were received from shipping companies and from the Maritime Union of Australia. Shipping associations were concerned about ships operating under a coasting trade permit granted under s286 of the *Navigation Act 1912*, and which have not been subject to Australian workplace laws. Currently the *Workplace Relations Act 1996* and the Workplace Relations Regulations 2006 do not apply to foreign employers and foreign crew on a permit ship. Shipping associations note that this approach has been endorsed by the AIRC[21] and recommended that this exclusion continue.

11.16 A submission from the Maritime Union of Australia (MUA) pointed out that the bill has the effect of depriving the AIRC or Fair Work Australia from extending award coverage to foreign-owned or foreign-operated ships competing with Australian ships in the coasting trade. The MUA stated that all it wanted was to have the AIRC apply the appropriate award to all crews, foreign as well as Australian, manning ships engaged in the coasting trade.

11.17 The National Bulk Commodities Group noted that clause 32 of the bill contains a similar exclusion to section 21(1) of the Workplace Relations Act but that the regulations to support the bill are yet to be released. It and CSL Australia recommended that a similar regulation to the current 2.1.1 (which ensures that current arrangements under the Navigation Act continue in regard to issuing Coastal Voyage Permits) should be included to ensure continuation of cost effective and flexible operations.[22]

11.18 Inco Ships also submitted that the current exclusion should remain until and unless:

> …informed policy debate and consideration has been applied to the question of whether it is appropriate or desirable that non-citizen crew on foreign flagged vessels be subject to the WRA or the Bill or some other statutory requirements and if so, the extent of such coverage.[23]

11.19 The Australian Shipowners Association (ASA) pointed out that while the language is open to interpretation, it believed clause 34(1)(b) extends coverage of the Act to an Australian company involved in the operation or chartering of foreign-flagged, international trading ships. In calling for deletion of this clause, it argued that Australian workplace relations law had no relevance to industrial arrangements applicable to the international shipping industry.[24]

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21 CSL Australia, *Submission 112*, p. 2.

22 National Bulk Commodities Group, *Submission 139*, p. 2.

23 Inco Ships, *Submission 142*, pp. 6-7.

24 Australian Shipowners Association, *Submission 144*, pp. 6-7.

11.20 Clarification of clause 33 was supported by the MUA so that an Australian owned company, based in Australia but operating in the international trade with a foreign crew is free of the jurisdiction of the AIRC. Mr Crumlin from the MUA added 'We are not seeking to cover foreign ships trading in foreign trade, unless they have an Australian crew aboard'.[25]

11.21 The ASA also noted that clause 33(1)(d) could be interpreted as providing coverage of the bill to some permit ships and noted the phrase 'uses Australia as a base' is open to interpretation and called for guidance. [26] The ACTU submitted that when foreign ships participate in the coasting trade they should be regulated by Australian law and proposed several amendments to address this issue.[27]

11.22 DEEWR clarified this issue for the committee and explained how the provisions would operate. The Bill applies generally in Australia, the coastal sea and the territories of Christmas Island and the Cocos (Keeling) Islands. As the explanatory memorandum to the bill notes, an express statement to this effect in the bill is not necessary because the *Acts Interpretation Act 1901* makes this clear. In the context of shipping, a foreign ship staffed by foreign crew would be within coverage of the bill when traversing the coastal sea. The bill will also apply to the following ships, wherever they are located in the world:

- ships that have Australian nationality under the *Shipping Registration Act 1981*; and

- ships that are operated or chartered by an Australian employer and using Australia as a base. This means, for example, that a foreign ship staffed by foreign crew would be within coverage when traversing the waters of the exclusive economic zone (EEZ), the continental shelf, or beyond, if the ship is operated or chartered by an Australian employer and the ship uses Australia as a base.

11.23 The department advised that as is currently the case with the Workplace Relations Act, regulations can be made to modify the bill's application in all of these areas. The Government is currently considering the recommendations made by the House of Representatives Standing Committee on Infrastructure, Transport, Regional Development and Local Government following its inquiry into Australian coastal shipping policy and regulation. In the area of shipping, the Fair Work Bill and any modifications made to its coverage made by the regulations will reflect the Government's response to this inquiry.[28]

25 Mr Crumlin, National Secretary MUA, *Committee Hansard*, 16 February 2009, pp. 17-18.

26 Ibid., pp. 9-10.

27 ACTU, *Submission 13*, p. 25.

28 Mr John Kovacic, DEEWR, *Committee Hansard*, 19 February 2009, p. 64.

Committee view

11.24 The committee majority accepts the assurances of the government that the Fair Work Act will have application to all ships and crews engaged in the coasting trade, but it sees no reason why this should not be stipulated in the bill. It notes that the explanation given by the department relates mainly to legislative drafting conventions than with the principle of award entitlements. Members of this committee are familiar with the status and limitations of delegated legislation as instruments of policy. Important principles should be enshrined in acts. Nor is it recognised that this principle stands apart from broader policy issues relating to the coasting trade.

Recommendation 12

11.25 **The committee majority recommends that the government give careful consideration to the issues raised in the submissions to the committee concerning the coasting trade and has regard to the desirability of ensuring the provision of a decent safety net of employment conditions to workers engaged in that trade.**

Transitional issues

11.26 As mentioned in chapter one the transitional and consequential bills are yet to be introduced into Parliament. Nevertheless a number of submissions included issues for consideration by the government and these are outlined below.

11.27 The Minister for Employment and Workplace Relations the Hon Julia Gillard MP has written to the Chair of the committee advising of the government's intentions for dealing with transitional and consequential provisions. A copy of that letter is Appendix 3 to this report. The letter makes clear that there will be further opportunity provided to the Senate to examine closely the transitional provisions.

Termination of WorkChoices instruments

11.28 While noting that labour turnover will see the use of old AWAs, employer greenfields and employee collective agreements decline, the ACTU pointed out that there will be a number of employees who will remain caught on the instruments. It argued that although the government has stated that the NES will apply to these employees from 1 January 2010, including the entitlement to the applicable minimum wage rate, the terms and conditions that were lost from AWAs, employer greenfields and employee collective agreements are overwhelmingly found in awards and not the NES. The ACTU advocated that the transitional bill must provide a means for employees to initiate early termination of these instruments.[29] This was supported by numerous organisations including Unions WA.[30]

29 ACTU, *Submission 13*, pp 54-55.

30 Unions WA, *Submission 70*, p. 3.

11.29 As an example, Unions Tasmania outlined a case where service stations were taken over and the employer used provisions in WorkChoices to write an Employer Greenfields Agreement which excluded a long list of basic award entitlements. It pointed out that although the bill removes the Employer Greenfields Agreement as an employment mechanism, it provides no detail about how employees who were removed from awards could transition back to being covered by an award. Unions Tasmania acknowledges that such issues will be dealt with in the transitional legislation and requested that the legislation take into account that some employees were removed from awards by Employer Greenfields Agreements and other mechanisms under WorkChoices and the legislation should include a mechanism to ensure these employees have their award conditions restored.[31]

11.30 Unions Tasmania also outlined a case where a group of workers signed an AWA that took away their penalty rates. According to Unions Tasmania these employees are anxious to go back on the award as soon as possible but believe that whoever terminates the AWA may be singled out for less work. Unions Tasmania suggested the only way this unfair AWA can be terminated while protecting the employees is for FWA to be able to terminate it unilaterally without an individual having to make an application. It submitted that where existing AWAs are retained, that FWA should be able to terminate unfair AWAs prior to their expiry if they would not pass the new BOOT.[32] This suggestion was supported by the ACTU which also suggested an audit of all agreements and contacting parties where an agreement fails to meet the BOOT.[33]

11.31 Jobwatch was concerned that employees may not be aware of their entitlement to unilaterally terminate AWAs or ITEAs after the nominal expiry date has passed and recommended that FWA be able to take action to advise employees of this right.[34]

11.32 The ASU also voiced concern over the continued operation of some AWAs and argued that it would be unreasonable to expect employees to be bound by agreements that would not meet the requirements of the new system. It submitted that all employees should have the benefit of the minimum standards provided by the new system.[35] It suggested that all individual statutory agreements continuing beyond 1 January 2010 should be deemed to include all minimum protections afforded by the NES and the applicable modern award. Where an employee believes that a continuing agreement would fail the BOOT if made on 1 January 20210, the employee should be

31 Unions Tasmania, *Submission 14*, pp. 4-5.

32 Ibid., p. 6.

33 ACTU, *Submission 13*, p. 55.

34 Jobwatch, *Submission 87*, p. 49.

35 ASU, *Submission 56*, pp. 26-30.

able to make an application to FWA to have the BOOT applied to the agreement. If it fails the BOOT, the employee may make an application to terminate the agreement.[36]

State and federal system issues

11.33 The ACTU suggested that the transitional bill should provide an avenue for employees to opt into the federal system, where a state government does not refer the employees, despite the wishes of the workforce.[37]

Police

11.34 The Police Federation of Australia told the committee of the jurisdictional, constitutional and policy issues facing them which result from the definition of 'employees' and the complicating factor of the referral of workplace relations powers by the states. It advised that the current position of the PFA is that all state police jurisdictions remain within their respective IR systems and that a specialist tribunal be created for the AFP. It has made its issues known to the government and suggested ways to move forward which include a research project to investigate the most effective way to structure a system for the police.[38]

Construction industry and long service leave

11.35 TasBuild told the committee about the state and territory portable long service schemes in the construction industry which have been established to take into account the nature of employment in that industry. It supported clause 29 and Division 9 of the bill as they relate to long service leave and asked for clarity and certainty on this issue for the future. TasBuild argued that clause 20 and Division 9 should be allowed to stand and not be overridden by any provisions in the upcoming transitional bill.[39]

State based registered organisations

11.36 The National Union of Workers raised the issue of transitional registered organisations (TROs) which arose under WorkChoices when the corporations power was introduced. It noted that these TROs are state entities which have the right to operate in the state and federal system for a specified period. It was seeking clarity to resolve issues around assets and finances.[40] DEEWR told the committee that consultations on the implications for registered organisations are underway with the ACTU and state and territory governments and will be dealt with in a separate piece

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36 Ibid., p. 54.

37 ACTU, *Submission 13*, p. 56.

38 Mr Mark Burgess, CEO Police Federation of Australia, *Committee Hansard*, 19 February 2009, p. 55.

39 TasBuild, *Submission 154*, pp. 1-4.

40 Mr Derrick Belan, NUW NSW, Mr Criag Shannon, NUW NSW, Mr John Cosgrove, NUW, QLD and MS Kim Sattler, NUW, ACT, *Committee Hansard*, 19 February 2009, pp.38-47.

of legislation dealing with organisations. These changes will be included in the transitional bill.[41]

Legacy instruments

11.37 The ACTU pointed out that the transitional bill will need to address how a complex range of legacy instruments and institutions will interact with the new system as they are phased out. It offered support for certain legacy instruments to have a sun-setting arrangement, subject to the ability of a party that relies upon an instrument to make an application to preserve it. It also supported the notion of conversion of certain preserved state instruments such as enterprise Notional Agreement Preserving a State Award and Preserved Collective State Agreements to permanent federal instruments.[42]

11.38 Yum! Restaurants which cover KFC and Pizza Hut told the committee of their unique industrial instruments which have been negotiated with SDA and approved by the AIRC. The enterprise awards are used to underpin collective agreements and the representative asked for reassurance that enterprise awards could continue as outlined in *Forward with Fairness*.[43]

11.39 The CEPU were concerned to ensure 'old IR agreements' such as the Telstra Redundancy Agreement were protected until the new laws come into effect. This particular agreement provides protections about how employees were selected for redundancy and accountability measures. Currently it can be replaced by another agreement which could allow for weakened conditions on redundancy.[44]

Committee view

11.40 The committee notes that the Minister has said that existing enterprise awards, as well as existing enterprise NAPSAs, will be a part of the new system as many businesses were keen to retain their current arrangements.

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41 Mr John Kovacic, DEEWR, *Committee Hansard*, 19 February 2009, p. 63 and 66.

42 Ibid, p. 57.

43 Mr Richard Wallis and Mr Tim McDonald, Yum! Restaurants Australia, *Committee Hansard*, 28 January 2009, pp 38-41.

44 Mr Ed Husic, National President, CEPU, *Committee Hansard*, 19 February 2009, p. 25 and p. 28.

11.41 The committee majority also notes that to go some way to addressing the issue of existing unfair agreements, the Minister has stated that the NES will come into effect on 1 January 2010 for all employees and will override any inferior conditions. This would ensure that employees on substandard AWAs made under WorkChoices will receive the full benefit of the NES.

11.42 The committee notes that the issue of the interaction of transitional instruments with provisions of the bill will be dealt with in the transitional bill.

Conclusion

11.43 In conclusion the committee majority notes that the bill is about fairness and balance. It is the result of an unprecedented level of consultation and genuine engagement with small and large businesses, employee representatives and state and territory governments. No one side has achieved every outcome it wanted. The bill is even-handed in its treatment of employers, employees and their unions, seeking to accommodate the legitimate and reasonable needs of all.

11.44 The bill is a far simpler and less complex law than WorkChoices and is easier to read and apply. It will bring much-needed stability to workplace relations legislation for employees and employers over the long term. It provides for a comprehensive and fair safety net of employment conditions that cannot be stripped away. It allows flexibility in the forms of agreement-making available to meet different needs. It provides for individual arrangements that meet the genuine needs of employers and employees including to assist employees to balance work and family life, but without stripping away safety net entitlements. The bill ensures employees have access to transparent, clear and simple information about their rights and responsibilities. It provides a simple, fair dismissal system that enables employers to manage with confidence and protects employees from harsh and unjust treatment. The bill has at its centre bargaining at the level of the enterprise, with improvements to employment conditions underpinned by productivity. It helps low-paid employees to gain access to the benefits of enterprise bargaining.

11.45 The bill provides a framework that will achieve the appropriate balance between employee fairness, business flexibility and economic competitiveness which is consistent with continuing economic reform and meets the needs of the nation at all stages of the economic cycle. Regardless of requests for amendments, employers recognise the government's mandate for this bill and have stated that they can work with or cope with its provisions.

11.46 The committee looks forward to the presentation of the transitional and consequential bills to Parliament which will further detail and clarify the operation of some aspects of this bill. It will complete the detail of the transition to the new system.

Recommendation 13

11.47 **The committee majority recommends that the bill be passed without delay.**

Senator Gavin Marshall

Chair