Coalition Senators' Minority Report

Introduction & Summary of Coalition Senators' Position

The *Fair Work Bill 2008* represents the latest iteration in a succession of evolutionary changes to Australia's workplace environment. Though sharp distinctions are drawn by the Rudd Government between this bill and the workplace relations legislation of the Howard Government, in reality one draws heavily on the other, including in particular the concept of a *national* industrial relations system. This concept, hitherto so vigorously resisted by the union movement and state Labor governments in the High Court, is now embraced as sound public policy by both sides of politics.

The right of the Government to abandon much of the *WorkChoices* architecture, based on its commitments in the lead up to the 2007 Federal election, is clear and beyond challenge. **Coalition senators acknowledge that *WorkChoices* is dead;** only the makeup of its successor remains to be determined.

While acknowledging the Rudd Government's mandate to determine that makeup, Coalition senators believe that the universal verdict of witnesses that the Bill is flawed needs to be responded to. To ignore these concerns, emanating from every corner of the stakeholder community, would make a mockery of the Senate committee's inquiry.

Accordingly Coalition senators have laid out in this report aspects of the legislation which appear to be unfair, which may destroy jobs and which are at odds with the Rudd Government's promises as to what the legislation would do.

We are also conscious that these changes are under contemplation at a time of serious economic uncertainty. These reforms must contribute to a stronger, more secure economic outlook. Coalition senators affirm that the Bill must indeed fulfil the goals it sets for itself of creating flexibility and certainty for the businesses on whom Australians will depend for job creation.

Background

In April 2007, the Australian Labor Party released “Forward with Fairness” representing the industrial relations policy upon which it would contest the 2007 Federal election. This initial policy was followed by a further document representing an ‘implementation plan’ released in August 2007.

Further details about the proposed new system were detailed after the election in two speeches delivered by the Minister for Employment and Workplace Relations, Hon Julia Gillard, on 17 September 2008 and 14 November 2008, and via the release of various fact sheets.

On 25 November 2008, the Minister introduced the *Fair Work Bill 2008* into the House of Representatives. The Bill sought to represent the legislative implementation of the commitments contained within Forward with Fairness.

When introducing the Fair Work Bill, the Minister stated:

> The bill being introduced today is based on the enduring principle of fairness while meeting the needs of the modern age. It balances the interests of employers and employees and balances the granting of rights with the imposition of responsibilities. The bill delivers:
>
> - a fair and comprehensive safety net of minimum employment conditions that cannot be stripped away;
> - a system that has at its heart bargaining in good faith at the enterprise level, as this is essential to maximise workplace cooperation, improve productivity and create rising national prosperity;
> - protections from unfair dismissal for all employees;
> - protection and hope for a better future for the low paid;
> - a balance between work and family life; and
> - the right to be represented in the workplace.

To achieve the above intentions, the Bill introduced a number of key elements of the proposed new workplace relations system. These include:

- A safety net of modern awards, National Employment Standards, and National Minimum Wage orders;
- A new industrial tribunal called Fair Work Australia and enforcement arm called the Fair Work Ombudsman;
- The positioning of enterprise collective bargaining as a central tenet underpinning the operation of Bill;
- Frameworks for dealing with transfer of business, general employee protections, limitations on industrial action, unfair dismissal protections, and right of entry; and
- Various compliance and enforcement provisions.

While the Bill represents a comprehensive overhaul of the existing workplace relations system, it retains and builds upon a number of key elements of the current Workplace Relations Act 1996. Such elements include a continued reliance upon the Corporations power to sustain a "national" industrial relations system (a matter that Labor vigorously opposed), the establishment of key national minimum conditions of employment, and the promotion of bargaining as an alternative to the safety net.

Structure of the Bill

Coalition senators congratulate those who drafted the Bill on both its layout and clear nature. The Bill is easy to read and understand, and uses language and terminology that is clear and simple. It is envisaged that this will ultimately make the Bill more readily accessible and useful to those to whom it applies, namely employers and employees within a workplace.

The Bill contains a framework usefully separated into six chapters. These are:

Chapter One: Outlines the structure and aims of the Bill. It also contains a dictionary of key definitions and phrases used throughout the Bill.

Chapter Two: Concerns terms and conditions of employment, modern awards, National Employment Standards, bargaining architecture and transmission of business.

Chapter Three: Deals with the rights and responsibilities of employers, employers and organisations.

Chapter Four: Concerns compliance and enforcement matters.

Chapter Five: Provides the basis for administrative functions, such as the establishment of Fair Work Australia.

Chapter Six: Deals with miscellaneous issues.

A Mandate?

A key consideration for Coalition senators is the extent to which the Government has a mandate to implement the changes contained within the *Fair Work Bill*. When introducing the Bill, the Minister noted:

> They [the voters] chose to reject Work Choices and all it stood for, and to put in its place the promises Labor made in its policy statement Forward with Fairness. They gave the Rudd government the strongest possible popular mandate for the introduction of this bill.[1]

The existence of a mandate and the extent to which that mandate should be honoured was an issue that occupied much of the Committee's attention. The issue was thrown into sharp relief by the fact that *all* witnesses who appeared before the inquiry called for changes to the Bill. Many of these witnesses were asked: what right does the Senate have to change a bill for which the government of the day has a mandate? The responses varied. Mr Dave Oliver, from the AMWU, gave the following evidence:

1 Julia Gillard, 25 November 2008

> There are mandates and there are mandates. I would simply say that if we went to the Australian public now and said, 'What was a clear mandate you had given the government with regards to IR legislation?' I do not think, with respect, that we would have too many people in the general public rattling off about all the specifics.[2]

Mr Joe de Bruyn from the SDA stated that:

> The parliament is master of its own situation. It is entitled to pass whatever legislation it believes is appropriate, and it is not limited to what the government promised prior to the election. If there are ways of improving the legislation, then the parliament should do so.[3]

Mr Jeff Lawrence, Secretary of the ACTU, on the question of mandate observed:

> Well, I think it is really a question of the major thrust of the legislation.[4]

If a consensus emerged, it was that a mandate exists only with respect to the central elements or "major thrust" of Forward with Fairness. The right of parliament to amend non-core provisions that were flawed or unfair was acknowledged by several witnesses. Coalition Senators concur with this view. A loose interpretation of the notion of a mandate could undermine the architecture of the Government's Bill, while a strict or narrow interpretation will unduly restrict the Parliament from responding to valid concerns raised by the community during this inquiry. Accordingly, this dissenting report accepts that the Government has a mandate to implement the key elements of the *Fair Work Bill* consistent with the commitments laid out in Forward with Fairness.

Specifically, Coalition senators recognise the Rudd Government's entitlement to dismantle the former government's WorkChoices legislation of 2005 pursuant to this mandate.

There are several areas however where the Bill ought to be amended to improve its operation, technical matters, broker true or real fairness and ensure that the system so implemented is appropriate for all economic conditions. There are many areas where the Bill seeks to implement changes on which Forward with Fairness was silent. The areas of concern Coalition senators identify in this report are, in our view, either consistent with the broad mandate held by the Government or deal with matters on which Forward with Fairness was silent.

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[2] Mr D Oliver, Committee Hansard, 19 February 2009, p.36

[3] Mr J de Bruyn, Committee Hansard, 17 February 2009, p.4

[4] Mr J Lawrence, Committee Hansard, 17 February 2009, p47

Transfer of Business

The Bill contains substantially new provisions dealing with what has traditionally been known as 'transmission of business'. In the industrial relations context, such provisions deal with employee entitlements and employment generally when a business (or part thereof) is sold or transferred to a differing legal entity. Commonly, this occurs in circumstances involving a traditional business sale, however business structures are becoming increasingly complex. High Court and other similar authority exists and has kept pace with the changing business environment, most notably in the *PP Consultants*[5] and *Gribbles*[6]cases.

The Bill as drafted proposes a radical new approach to established transmission of business principles. It replaces the accepted approach of 'asset transfer/business character' with a broader concept of 'transfer of work'. This has the practical effect of overturning the High Court authorities noted above.

In addition, the Bill widens the circumstances in which an industrial instrument transfers with the relevant employees affected by a business sale or restructure. The potential also exists for such industrial instrument to form the basis of employment for any new employee that commences after the business has been transferred.

The reason for such a fundamental shift from universally accepted and well settled principle is unclear. The proposed clauses are (at best) problematic and economically restrictive, and (at worst) a disincentive to achieve ongoing employment for affected employees. The evidence of the Australian Chamber of Commerce and Industry was particularly relevant in this regard:

> I am talking about models of organising a business. So if I take over a business that is uneconomic, that is failing, I need to be able to go to that business's business model and all parts of it, renew them, replace them, take them over, and move them onto a sound footing, onto my footing, as the incoming employer. And that is one of the things we are very concerned about: stasis paralysis, or indeed—and a number of witnesses have come before you to say this—a clear disincentive to take over the new employees.[7]

The evidence of Australian Business Industrial was:

> In my career I have been involved in the transfer of businesses, the acquisition of businesses, both in a HR sense and as a line manager, and I can assure you that one of the things that is always done as part of the due

[5] PP Consultants Pty Ltd v Finance Sector Union [2000] HCA 59; 201 CLR 648; 75 ALJR 191; 101 IR 103; 176 ALR 205 (16 November 2000)

[6] Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd [2005] HCA 9; (2005) 222 CLR 194; (2005) 214 ALR 24; (2005) 79 ALJR 679; (2005) 138 IR 252 (9 March 2005)

[7] Mr S Barklamb, Committee Hansard, 17 February 2009, p. 21.

> diligence is to look at the consequences of bringing those people in. If the consequences of bringing those people in strike at the heart or potentially undermine the business objective that you are pursuing, then you would look for ways in which to make sure that that did not happen. So I think the assertions that the bill as it stands will act or could act as a disincentive in certain circumstances, in my experience, will hold true. [8]

The Australian Industry Group was unequivocal about the effect of the new provisions:

> The provisions are antiemployment and would create a huge incentive for companies not to employ workers of businesses they take over.[9]

Evidence direct from business was:

> The way the bill is structured, what it fundamentally will do is put businesses such as ours in the position that we will say that, unless there are very good, compelling reasons to take on existing employees from the client, frankly we will not do that. It will be less convoluted for us to simply employ fresh people and then not be burdened with the transfer of business provisions. We say that is not good public policy.[10]

It is clear that the proposed transfer of work provisions create a disincentive for an incoming employer to retain employees engaged within a business. Secondly, they encourage the retention of business practices that may be uneconomic or failing.

The current challenging circumstances facing the Australian economy are already manifesting themselves in many ways, most relevantly in the form of increased levels of unemployment. The Government's own predictions see this trend continuing. At this time, it is crucial to ensure that every arm of government policy is aimed at ensuring that Australian workers have a job. The proposed alterations to transfer of business do not achieve this aim, and may in fact contribute to worsening unemployment levels.

The Coalition senators appreciate that the transmission of business provisions are intended to be 'anti-avoidance' in nature, and reflect evidence highlighting some inappropriate practices of some businesses. However, such evidence must be balanced against a need to ensure that workplace relations laws do not negatively impact upon a normal business transactions or operate in a manner that costs jobs. The existence of expanded general protections for employees, combined with a stronger safety net, expanded enforcement powers and the removal of AWA/ITEA's suggest that the incidence of and scope for inappropriate activities will be substantially reduced, if not eliminated, by the Bill. The jettisoning of existing and well settled transmission of business provisions do not, in our

[8] Mr G Pattison, Committee Hansard, 17 February 2009, p. 25.

[9] Ms H Ridout, Committee Hansard, 18 February 2009, p. 3

[10] Mr B Blythe, Committee Hansard, 29 January 2009, p 27.

opinion, contribute to addressing the type of inappropriate business practices given during evidence.

The provisions of the existing Workplace Relations Act 1996 strike an appropriate balance. Currently, when an employee is transmitted with a business the underpinning instrument also transmits for a 12 month period. Within this period there exists scope for negotiation of a new agreement and, if this does not occur, the instrument ceases and conditions become set by an industrial award. The new 'good faith' bargaining provisions, a strong safety net of awards, and other bolstered protections within the Bill will ensure appropriate protections for transmitted employees whilst not impeding a business sale or costing jobs.

To this end, Coalition Senators have grave and serious concerns about both the rationale behind, and the effect of, the proposed transfer of business provisions. They can only be considered as unnecessary, unwarranted, and anti-jobs.

Right of Entry / Access to Records

The issue of union right of entry and access to records is important to both employers and unions. That so much of the evidence before the Committee was on this point is testament to the importance it holds for both employer and employee representatives. There is a universally accepted right for a union to enter a workplace where it has members; however there are also important historical limitations and rules defining such a right.

Forward with Fairness contained an express commitment to retain existing right of entry provisions. This
commitment was unambiguous. In a speech delivered in April 2008, the Minister stated:

> *…the current rules in relation to right of entry will remain. With the right to enter another's workplace comes the responsibility to ensure that it is done only in accordance with the law.*[11]

This could not be clearer. Other examples of such intention follow:

> We will make sure that **current right of entry provisions stay**. We understand that entering on the premises of an employer needs to happen in an orderly way. **We will keep the right of entry provisions**.[12]

and

> We promised to **retain the current right of entry framework** and this promise too will be kept.[13](our emphasis)

[11] Julia Gillard, 29 April 2008, Speech - Fair Work Australia Summit

[12] Julia Gillard, 28 August 2007, Press Conference

Based on these promises, it was rightly expected by all stakeholders that existing right of entry provisions would be maintained. However this is simply not the case. The overwhelming evidence confirms that there have been a number of breaches of this unambiguous concept.

By and large, such breaches arise from abandoning the concept of 'parties' to industrial awards and instruments. The evidence of DEWR confirmed that

> …the bill removes the existing requirement for a union to be bound to an award or agreement applying in the workplace as a condition of entry.[14]

This arises as an outcome of the award modernisation process currently before the Australian Industrial Relations Commission. The existing concepts have been replaced with provisions that allow union entry based on union organisational 'rules' that determine what workplaces and what type of work a union can 'cover'. It is clear that such an approach requires an employer to be familiar with the 'rules' maintained by a particular union as opposed to simple reference to an award. This can cause significant problems for an employer faced with such a circumstance. Evidence before the Committee, from an experienced industrial advocate, highlighted this point:

> I am an industrial relations practitioner, and I cannot look at a set of union rules and say, 'Well, this type of employee is covered and this type is not.'—particularly our small medium members, and we are predominantly an organisation of SMEs—they are going to have no hope. Someone will say, 'Look, I want to come in and meet with your members.' And they say, 'Well, I don't actually know if you have right of entry.' 'Well, I have got a permit.' 'Well, I am not sure whether your organisation laws would cover my staff.'[15]

The provisions also give rise to the potential for demarcation disputes between competing unions, described by some as 'union turf wars'. This concern is due to the proposed ability for a union to seek penetration within a workplace where another union already has significant presence, flowing from the removal of the traditional 'party' concept.

> In addition, there are a range of changes to the legislation which, on the face of it, look to be very minor but when put together represent substantial changes in focus. An example is the right of entry provisions. The government went to the election saying that it would not change the right of entry provisions, but the fact that it has stepped away from agreements and awards regulating right of entry now means that in our sector there will be overlapping coverage between unions. There will be unions who are not party to an agreement who will

[13] Julia Gillard, 28 May 2008, Speech to Master Builders Australia

[14] Mr J Kovacic, Committee Hansard, 19 February 2009 p. 62

[15] Ms L Brown, Committee Hansard, 17 February 2009 p.26

now have a right of access, and those provisions have the potential to result in union turf wars.16

Evidence from the Australian Workers Union was:

> "As you will understand, the nature of union rules coverage is vastly different to the nature of demarcated coverage. Under our rules, for example, we could argue that we cover New South Wales public firefighters, security guards and the entirety of the coverage of the AMWU, for example, and so on. There are other rules that are allowed for under our eligibility rules. What we are concerned about is the potential for disputes to arise that have never happened in the history of industrial relations in this country." Mr P Howes, Committee Hansard, 18 February 2009, p.16

and later:

> **Senator ABETZ**—I think that is a very good segue for me to ask a bracket of questions in relation to the right of entry, because it appears in the proposed legislation that right of entry will be provided to permit holders of trade unions if the organisation has employees that are eligible to be members of that particular union. Given the width of particularly the AWU's rules, we could have a situation where, should they so desire, permit holders from the AWU could walk into a huge number of workplaces in Australia. Indeed, we could have a situation where one day the AMWU walks in for a suspected breach and the very next day, for exactly the same suspected breach, the AWU could walk in. Isn't that right?
> **Mr Herbert**—In many cases, yes, that is correct. There is a massive overlap in eligibility rules throughout Australia, particularly as a result of the amalgamation of unions that occurred 10 or 15 years ago. There is a very large overlap, as Mr Howes has just pointed out.
> **Senator ABETZ**—And in fact the rules of the various unions as to eligibility are quite complex.
> **Mr Herbert**—Yes, and, one would have to say, in many cases beyond the wit and wisdom of a security guard at a gate who is being confronted with a union official with a 27-page eligibility rule and an explanation by the union official as to why it is they are entitled to be there. The argument might be quite right, but—
> **Senator CAMERON**—Security guards act much more decisively now.
> **Mr Herbert**—Security guards do act decisively on occasions. Without being too flippant about it, I have made a living out of the eligibility rules of unions for a number of years, and they can be extremely complex. You are quite right about that.[17]

[16] Mr C Platt, Committee Hansard, 27 January 200, p. 3.

[17] Committee Hansard, 18 February 2009, p.16

The Government promised that:

> Under Labor, all workers will be free to decide whether or not to join and be represented by a union, or participate in collective activities[18]

The proposed provisions repudiate that promise. Employees at every workplace have to be able to choose who represents them and the extent they want the involvement of a union. Employees have a right to a genuine choice and their rights and decisions should be respected.

In addition, the Bill allows a union official who is a permit holder to inspect the records of workers who are not members of a union in certain circumstances. This is a significant deviation from the existing provisions that, in the absence of authorisation from the Australian Industrial Relations Commission, restrict access only to records of union members. This raises significant concerns about the right to privacy for records involving non-union members. Many witnesses appearing before the committee gave evidence on this aspect of the proposed legislation.

> ...the bill substantially increases union entry rights, giving each union access to a much wider range of workplaces and giving union officials access to wage records of non-union members. We believe that existing entry rights are appropriate and should not be expanded.[19]

Evidence from the mining sector was:

> Our concern in relation to the Fair Work Bill is, firstly, that the protections in relation to union access to employee information have been removed. It is not just a question of unions being able to access non-member records. Unions will be able to access any record of any employee in the business, and all they have to do is put together an argument to say that that is valid in respect of an alleged breach of the act or an industrial instrument. There is no fetter on that access; there is no person in Fair Work Australia checking that the access is reasonable. Once the access is given, it includes everything that is contained in a personnel record. That may well be your application for the position. It may well be the preliminary drug testing, and that might show that at some point in time you had some drugs present in your system. It may show the employee's disciplinary outcomes or performance outcomes. It could show that your wages have been garnisheed because you have an outstanding obligation under family law or a taxation problem. There are myriad issues which are unrelated to any breach of an award or industrial instrument that could be accessed. The

[18] Forward with Fairness, April 2007 p.12

[19] Ms H Ridout, Committee Hansard, 18 February 2009, p. 2

> problem has arisen because the Fair Work Bill has removed the definition of record, has expanded access to record keeping and has removed the protections. Whilst there is a provision in there concerning the privacy laws, those privacy laws essentially have an exemption for marketing purposes. We are aware that the ACTU and its affiliates have been using member information or employee information for canvassing as part of their political processes.[20]

and

> We are strongly opposed to unions having the capacity to inspect nonmembers' records under the bill and propose that nonmembers' consent be required as a condition of inspection. Again, I make the point that union coverage amongst our private sector workforce is very low, and it is our view that you are subjugating the 86 per cent of employees who are not union members to a level of intrusion on their rights that is neither fair nor appropriate.
>
> We also have concerns that the proposed Fair Work Act significantly increases union rights to bypass the law of trespass and get access to workplaces and private employee information of nonmembers. This is, and represents, a significant change to the status quo, which effectively, we believe, expands union rights in a way that is not appropriate.[21]

There is no "public good" policy reason for the shift in right of entry or access to non-union member records. However, it is undeniably designed to increase union power.

It is clear that there are a number of concerns arising from proposed changes to right of entry. These are:

- Significantly increased potential for a return to disruptive union demarcation disputes;
- An increase in complexity associated with determining who has entry rights arising from the abandonment of the traditional 'party' concept; and
- The widened access given to a permit holder to view non-union member records.

The express and unequivocal commitments made by the now Deputy Prime Minister in 2007 (and many times since) have been breached by the proposed changes.

All employees have the right to privacy of information specific to them, such as their own employee records. These records often contain personal and sensitive information. Except where required by public authorities under statute, an employee should give permission

[20] Mr C Platt, Committee Hansard, 27 January 2009, p. 5-6.

[21] Hon. Mr T Buswell, Treasurer, Minister for Industrial Relations, Western Australian Government, Committee Hansard, 29 January 2009, pp 12-13.

before their own records are divulged to a third party. The Bill as proposed gives a right to a union boss to inspect employees' personal records. Coalition senators see no basis for unions to be given such huge and special powers. The appropriate checks and balances are absent in this proposal.

Bargaining Architecture

The Bill creates a system that, at its heart, relies heavily on the use and promotion of collective agreements and enterprise bargaining. There are two aspects that feature within the bargaining stream, being a new concept of 'good faith' bargaining and distinct set of requirements for 'low paid' bargaining.

As these aspects are new to the industrial relations framework in Australia, they were the subject of many submissions before the Committee and unsurprisingly a number of concerns were identified with this new approach to bargaining.

(a) Bargaining Orders

The legislation provides Fair Work Australia with a suite of options that, upon application, can be issued as orders to parties who are engaging within the bargaining process. In general, these orders are designed to ensure that the bargaining parties engage in a process that is genuine, efficient and free from capricious or unfair conduct. However, there are a number of relevant concerns that arise from the examination of bargaining orders on a practical level. In general terms, there exists a concern that the orders may be used in a manner that was not intended, or to achieve bargaining outcomes that are not genuinely negotiated. The ACCI submission observes:

> No longer will it be possible for an employer or a small business to simply employ persons in full compliance with the myriad of wages and employment conditions set out by legislation and industrial awards applying in their industry, and get on with business.
> Each employer will be exposed to a regulatory system which can, in one form or another and subject to certain criteria, require that employer to answer to its employees, a union or industrial regulator as to why the employer should not pay more or provide different (higher) conditions of employment.[22]

It is well known that the workplace relations history within Australia has generally relied upon a 'safety net' of minimum conditions of employment, contained within industrial awards, legislation, and various minimum standards. This safety net was important as, for many employers and employees, it set a floor upon or above which many employment relationships were based.

[22] ACCI Submission p. 21

The move toward enterprise bargaining arose from a recognition that the 'one size fits all' approach of the safety net was not appropriate for every business, in every location, in every sector of the economy. Various systems have developed that allowed for flexibility by way of negotiation at the enterprise level and were specific to the needs of a particular enterprise. However, a feature of the move towards enterprise bargaining was the 'voluntary' nature thereof. In simple terms, employer and employees could negotiate for an enterprise agreement of sorts knowing that if negotiations failed and agreement could not be reached, the safety net existed as the fall back position.

The Fair Work Bill seeks to expand and strengthens the safety net within the Australian workplace relations system. In general terms, the proposed system of National Employment Standards and modernised awards is perhaps the strongest safety net that has existed. It is with this in mind that concerns arise regarding what is a significant watering down of the 'voluntary' aspect of enterprise bargaining. Evidence before the Committee expressed significant concerns about one party being forced to bargain with another and, potentially, being the subject of orders that would forcibly implement terms and conditions that extend beyond the safety net. In other words the vital ability of one party or the other to 'walk away' from the negotiation process when agreement cannot be found is removed.

(b) Low Paid Bargaining Stream

The 'low paid' stream of bargaining is one such example of this as it creates a system whereby orders (in the form of 'workplace determinations') must be issued in certain circumstances. These circumstances, in deviation from the general good faith stream, allow for a workplace determination to be made where the parties are simply unable to agree on a negotiated outcome. There are potentially serious and negative consequences of such a system.

First, the 'low paid' stream is focussed on industries that have a lower incidence of workplace bargaining and higher incidence of safety net reliance. This is often as a result of limited economic capacity and marginal trading conditions, and where labour costs form a high percentage of business expense. It is inappropriate for this type of business to face a higher likelihood of arbitrated outcome given the conditions within which they operate. This is particularly the case given the current economic challenges and the reduced capacity for 'low paid' business to survive such circumstances.

Secondly, the Bill does not provide a clear definition of who is considered to be within the 'low paid' stream. This creates uncertainty for both employers and employees, and unnecessarily opens the door for misleading or coercive conduct. Coalition senators believe the inclusion of a succinct definition of 'low paid' will provide much needed certainty to ensure that those who fall within that definition know within which system of bargaining they operate.

Thirdly, the 'low paid' stream seems premised on an assumption that the safety net is not an appropriate standard of employment conditions. Coalition senators question this assumption. Those workplaces that abide by the law, providing the conditions set out in the National Employment Standards and modern awards, are effectively being sent a

message that the minimum conditions safety net is not sufficient and higher conditions should be imposed. This a perplexing position given our previous comments about the strength of the safety net provided by the Bill. The safety net should not be considered a spring board. The evidence of the Australian Industry Group supported this view:

> …the low-paid bargaining stream, in our view, would undermine Australia's enterprise bargaining system and add a further layer of arbitrated employment conditions above the safety net. In our view, it should be scrapped.[23]

Fourthly, the 'low paid' stream opens the door for circumstances that are akin to pattern bargaining. The Government has been very emphatic in its view that the Bill continues to prohibit pattern bargaining, and in this respect relies upon the inability for protected industrial action to occur in support thereof.[24] However, the pursuit of industrial action is not the only major concern associated with pattern bargaining – it is also the prospect of standardised outcomes, lack of genuine 'enterprise' level discussion, and reduced (or no) linkage to productivity gains. Such features of pattern bargaining are not conducive to encouraging future enterprise agreement negotiations, and may have the potential to cost jobs or lead to artificial wage outcomes. The spectre of pattern bargaining, no matter how remote, exists under the guise of the 'low paid' stream. Evidence of this was found in the comments of the LHMU who, on the day the Bill was introduced, stated that the 'low paid' stream would:

> give us the facility to try to get some sector-wide solutions…There is a very compelling logic as to why you want an industry-wide settlement (in industries such as childcare, cleaning, hotels, and security)[25].

Lastly, 'low paid' stream bargaining has the potential to reward a negotiation that is not genuine or has been half-hearted. It is very easy to envisage circumstances where a negotiation is one that simply 'goes through the motions' knowing that the prospect of compulsory arbitration looms large should agreement not be reached voluntarily.

Coalition Senators have serious misgivings about the low paid steam of bargaining. While the stated intention of this stream is commendable, in reality it is nothing more than a covert attempt to promote pattern bargaining in direct breach of numerous promises whilst hiding behind the rhetoric of assisting low paid workers.

In addition, we see it as a deliberate attempt to undermine the effectiveness and historical relevance of the safety net, by seeking to alter the expectations of workers within the low-wage sectors, those who are the most vulnerable.

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[23] Ms H Ridout, Committee Hansard, 18 February 2009, p2

[24] Julia Gillard, House of Representatives Hansard, 4 December 2008, p. 12646

[25] The Australian, 27 November 2008

There is absolutely no evidence that the safety net, either proposed or current, is not an effective provider of fair and reasonable conditions of employment.

(c) Good Faith Bargaining

Although the prospect of compulsory arbitration is reduced outside of the 'low paid' stream, the new bargaining architecture nevertheless creates a number of circumstances where parties to the bargaining process may experience the forced intervention of a third party, being Fair Work Australia.

The existence of majority support orders, scope orders and general good faith bargaining orders all create circumstances where one party or another will be the subject of a direction to bargain in a particular manner, provide particular information or bargain with a particular set of employees. While the stated rationale behind such orders is not without merit, it is feared that such intentions may be statements of aspiration and that bargaining orders be used for other purposes in real life bargaining situations. There are, therefore, a number of concerns identified with the processes available to parties requiring them to bargain in good faith.

(d) Majority Support Determinations

The creation of 'Majority Support Determinations' is intended to provide an avenue where Fair Work Australia can establish the extent of employee support to engage in bargaining, in circumstances where that support is contested. However, the discretion given to Fair Work Australia is broad and can contemplate matters such as petitions or the outcome of a 'show of hands'.

Such discretion has the unintended consequence of opening the door for inappropriate workplace conduct such as coercion or intimidation. Notwithstanding the protections against such conduct elsewhere in the Bill, a better approach would be to avoid the problem in the first instance by creating a method of determining majority support that is democratic and genuine.

There are likely to be very few circumstances where a business contests the legitimacy of its employees desire to bargain. However, common sense also tells us that where such a contest does arise, it would be for very good reason and in particular circumstances. Therefore the need for a transparent and genuinely democratic method of determining support is paramount, and preferable to the tabling of a petition or an affidavit describing a show of hands.

(e) Default Bargaining Agents

The Bill provides that where an employee is a member of the union, their bargaining agent automatically becomes that particular employee's union, unless that employee 'opts out' and elects an alternative agent. This means that if a workplace of 1000 employees contains one union member, then that union must be recognised as a bargaining representative during enterprise bargaining. This is without any positive or proactive

action on the part of the single union member. There is a requirement that, when bargaining commences, the employer must provide a document to all employees giving them information about the right to be represented by a bargaining agent and, if they are union members, that the bargaining agent is automatically the union unless they 'opt out'.

Such a provision will operate in practice to limit an employee's choice of bargaining agent. It assumes, as a default, that the union will be the agent and requires a positive step from an employee to elect otherwise. Such an approach encourages laziness and mandates the involvement of a union unless employees take positive steps to say otherwise.

It would be preferable to require a union member to confirm in writing who their bargaining agent will be. This is an 'opt in' situation for union involvement. It gives employees the opportunity for genuine choice as to need for, and nature of, representation during the bargaining process. It would require an employee to genuinely think about the bargaining process and the extent to which they require assistance.

(f) Voting on Agreements

The process of voting for or against an agreement is also of concern. The Bill provides that an agreement will be approved by employees when it is supported by the majority of those who vote. Such a provision could result in a situation where a minority of employees decide the outcome for the majority. For example, if an agreement is to cover 100 employees, and only 50 of those employees are present to vote, then only 26 people need to vote in favour of the agreement for it to be made. In principle a binding agreement should be supported by a majority of those who will be bound by it, not just by a majority of those who are present to vote.

(g) Better Off Overall Test

The Bill creates an alternative to the existing "no disadvantage" test in the form of a Better Off Overall Test (or BOOT). The BOOT is conducted by Fair Work Australia when approving an agreement that has been accepted by parties within a particular workplace.

Certain evidence put to the Committee expressed concern about the nature of the BOOT when compared to existing tests. The BOOT appears to require that *every* employee who would be covered by a proposed agreement (and also future employees) must be 'better off' when compared to the terms of an underpinning modern award. In contrast, existing tests appear to have been more 'global' in nature, meaning that some employees may benefit and while others may simply be no worse off.

The intended operation of the BOOT was eventually clarified during proceedings on 19 February where the following exchange occurred:

> **Senator HUMPHRIES**—Just to clarify how the test is applied, assuming you have a benefit you can quantify and factor in, if there is a an agreement that is offered which in a workplace of, say, 50 members makes 49 of them

better off but one employee is neither better nor worse off, does it satisfy the BOOT test or not?
Ms James—Each employee has to be better off overall. It can be a marginal better off but I think the test would require that each employee be better off.
Senator HUMPHRIES—In that case, the agreement would fail because one employee would not be better off? Is that a 'yes'?
Mr Kovacic—That is certainly the way the Industrial Relations Commission has previously applied the no disadvantage test.
Senator HUMPHRIES—So you are saying yes to that question?
Mr Kovacic—Yes.
Ms James—Yes.
CHAIR—Just to clarify, the test is against the award only though, isn't it? It is not against—
Mr Kovacic—And it also needs to comply with the National Employment Standards once they come into effect as well.
CHAIR—That is right. So it is not better off against an existing instrument.
Mr Kovacic—It is the award and the NES[26]

This exchange creates two concerns for Coalition senators, being the practicability of compliance with the BOOT and the potential for its operation to act as a disincentive to voluntary collective bargaining.

It appears to be a clearly more difficult exercise to ensure that an agreement provides conditions that are "better" for each and every existing (and prospective) employee. In the example above, an agreement that benefits 98% of a workforce and leaves 2% on conditions that are no worse or unchanged, would fail. The bar set for the BOOT is therefore higher than the existing tests. While a higher bar may in one sense be appropriate, such a bar should not act as a disincentive for parties to collectively bargain and deliver benefits to the overwhelming majority of the workplace.

Coalition senators are concerned that the proposed application of BOOT is inconsistent with the stated aim of the Bill, being the encouragement of parties to collectively bargain.

(h) Greenfield Agreements

The conceptual retention of Greenfield agreements is welcomed by Coalition senators. It is recognised that such agreements are crucial to the establishment of new workplaces, sites and projects.

A focus of concern to many witnesses before the Committee is the new requirement obliging the maker of a Greenfield agreement to notify each relevant employee organisation of the intention to make such an agreement. Further, there is a requirement that each relevant employee organisation that will be covered by the agreement must

[26] Committee Hansard, 19 February 2009, p81

execute the agreement as a precondition of it being made. A relevant employee organisation is defined as one that is entitled to represent the industrial interests of employees whom the agreement will cover.

A number of problems immediately arise, the first of which is the practical difficulty associated with determining who is a relevant employee organisation. This question must be determined by the maker of the agreement, the employer. Evidence before the Committee suggested that answering this question is not easy, and has in fact been significantly complicated by the abandonment of the traditional 'party' concept to industrial awards. CCI WA, said

> One of our concerns is the process in terms of notifying all relevant unions, and committee members will probably be aware of the complexity of union rules and constitutional coverage, overlapping coverage, and what I would call blurry coverage, particularly in the construction industry, so that you potentially have to notify and negotiate with a large number of unions in a relatively short period of time.[27]

This evidence was further to other evidence given by experienced stakeholders highlighting the difficulties in interpreting complex and unclear union coverage rules. [28] Evidence from the mining sector was:

> So you need to go back to all of the union rules and take into account the demarcation decisions, and you would probably have to look at the transitional provisions for state unions that have come into the system. That would take me a few days, and I have been in the game for 20 or 30 years. It would be difficult for an HR manager in a construction company to do it and make sure that they got it right.[29]

Concerns remain about the capacity of a small or medium business to comply with the proposed requirements.

A second problem arises in relation to the potential for conflict between unions that may arise as a result of the mandatory notification provisions. The evidence of Master Builders Australia conveyed concerns raised by others:

> Master Builders does not believe that unions, which have traditionally been in bitter conflict, should be advised of the intention to make a greenfields agreement with their rivals. In addition, the bill is unclear concerning whether or not an employer is required to make a greenfields agreement with all unions who are entitled to represent employees who will be covered by the agreement or, as appears to be the government's position, whether

[27] Mr D Lee, Committee Hansard, 29 January 2009, p28

[28] Ms L Brown, Committee Hansard, 17 February 2009 p.26

[29] Mr C Platt, Committee Hansard, 27 January 2009, page 7

> making an agreement with one union is sufficient. Whilst we understood that government policy is that greenfields agreements are able to be made only with one union, we believe that this matter should be put beyond doubt and that the bill be amended to make that point clear, as well as to change the notification requirements, which could be like throwing petrol on fire.[30]

Mr Harnisch explained the actual impact of the proposed provision on project costs:

> A member, who wants to remain anonymous, has informed us of their experience with making a current union greenfields agreement. That company has informed us that making a greenfields agreement with one union rather than with the union's rival organisation was estimated to have saved up to $80 million on one project and around $15 million to $20 million on another project. If you were to extrapolate that to the government's proposed well-founded reinvestment in Australia's infrastructure, you can see the economic and, obviously, the budget consequences of escalating those costs. That member has indicated to Master Builders that it would be prepared to provide substantiating evidence to this committee, but only in camera. These are savings which relate to infrastructure projects and moneys that are better spent on that purpose than on escalating the cost of those projects. We cannot emphasise enough that confidentiality in making a greenfields agreement with one union is an outcome from the bill that would be a great boost to productivity when compared with the proposed scheme— or, at least, the ambiguities that we believe are the case.[31]

The close association of this witness with the realities of the building and construction, and its use of Greenfield agreements, makes this evidence particularly compelling for Coalition senators.

A third problem arises in relation to the potential delays to project commencement due to the new Greenfield notification requirements. Evidence presented to the Committee express concern that a union or unions may exploit notification requirements and associated good faith bargaining requirements and deliberately delay the period it takes for agreement to be reached. This was likened to a union being given the power of 'veto' over the timing or commencement of a new site or project. Evidence to this effect was given by the Australian Industry Group:

> …we regard the greenfields agreement provisions of the bill as unworkable and likely to result in substantial delays in the commencement of construction projects and increased construction costs.[32]

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[30] Mr W Harnisch, Committee Hansard, 28 January 2009, page 28

[31] Mr W Harnisch, Committee Hansard, 28 January 2009, page 28-29

[32] Ms H Ridout, Committee Hansard, 18 February 2009, p2

The mining sector described the situation as follows:

> Essentially that will ensure that any new project where an agreement cannot be reached will have very little chance of proceeding. Nobody in their right mind will start a significant investment infrastructure project without having agreements in order to prevent industrial action occurring on site. So, out of that $67 billion worth of future agreements, I suspect that any single union which would be covered by those agreements can essentially veto the project.[33]

The evidence of the Western Australian experience from the WA Treasurer was:

> Our view is that the changes to greenfields agreements and the requirement now whereby employers will be required to notify all relevant employee organisations has the capacity to significantly—and I highlight significantly—frustrate negotiations where unions have overlapping coverage of employees. Why is that particularly important in Western Australia? I talked about our economic growth earlier and the stellar economic performance of our state's economy in this century—well, over the last seven or eight years. That has been primarily driven by investment in capacity building in the resources sector; in other words, by construction activity building capacity in the resources sector. In our state, there is a well-documented history of issues dealing with certain unions in the construction sector, and we do not want to allow a situation to arise, for example, where unions like the CFMEU have the opportunity to frustrate the development of projects which are of significance to Western Australia. We will not sit by and let that pass unchallenged because that particular organisation—and I most certainly do not apply my views of that organisation across all industrial organisations; that is not the case—has a particular history in this state, and we do not encourage any changes to legislation which would let that organisation in particular frustrate the economic development of Western Australia. So we are gravely concerned about the encumbrance upon employers to have to notify all relevant organisations; and that is based on memories which are not pleasant of having to deal with certain unions in the construction sector in the past and given the significance of the construction industry to this state. You have to remember that large components of our economic growth are project based. These are significant projects, often the type that fit the category of greenfields agreements, and we are very concerned about the impacts on those.[34]

[33] Mr C Platt, Committee Hansard, 27 January 2009, p.7

[34] Hon. Mr T Buswell, Committee Hansard, 29 January 2009, p 15-16

Whether or not the Bill adequately addresses concerns about 'union veto' within the good faith bargaining requirements remains to be seen. However, Coalition senators are concerned that this would be akin to 'letting the cat out of the bag' and then waiting to see if the system hauled it back in. The problem that supposedly the Bill is designed to fix is in fact created by that system and need not exist in the first instance.

There was minimal evidence to suggest that unions had hitherto been excluded from negotiating Greenfield agreements when they wanted involvement. There was significant evidence that employers in sectors utilising Greenfield agreements normally sought constructive negotiations with a union. This, combined with the higher threshold required by the BOOT and strengthened safety net of modern awards and NES, suggest there is little or no reason to mandate the notification of a union or unions.

Unfair Dismissal

A common criticism of amendments made to the *Workplace Relations Act 1996* by the former government related to the perceived removal of an employee's capacity to seek legal recourse in the event of losing their job.

The *Fair Work Bill* proposes to address the perception that rights of redress for sacked employees had been swept away by removing a number of current jurisdictional bars preventing claims for alleged unfair dismissal. This includes reducing the small business exemption figure from 100 to 15, and removing the notion of 'genuine operational reasons'. Other substantive changes to alleged unfair dismissal provisions include new procedural requirements to be followed by Fair Work Australia and the development of the Fair Dismissal Code.

The evidence before the Committee was that, in general terms, the alleged unfair dismissal provisions within the Fair Work Bill are consistent with the policy thrust of Forward with Fairness. Although certain organisations noted their disappointment with the removal of current exemptions and expressed concern about the practical operation of the provisions, general acceptance of the mandate to make these changes was evident.

There are, however, a number of matters that came to the attention of the Committee which warrant comment.

(a) Right to Appear

The Bill provides an automatic right for employees of particular organisations to appear before Fair Work Australia without the need to seek leave or 'permission'. Other types of representatives, such as legal practitioners or agents, do not enjoy such a right. They are required to obtain the leave of the tribunal before making an appearance on behalf of a party involved in a proceeding.

Although the intention of this provision is to replicate the existing provisions within the *Workplace Relations Act 1996*, it appears that the bar has been raised. This was confirmed during proceedings on 19 February where Departmental evidence was:

> The drafting is a little bit different and I think it is probably fair to say the thresholds are a little bit higher in terms of having to demonstrate a need for legal representation. So, again, a person may only be represented by a lawyer or paid agent with permission of Fair Work Australia—we use the term 'permission' instead of 'leave'. And, again, criteria apply, including criteria that relate to the complexity of the matter, whether it would be unfair not to allow the person to be represented because they are unable to represent themselves or whether it would be unfair taking into account the relativities between the parties. The framework then says that if you are being represented by an employer or employee organisation you can be represented by their employee, and it makes it clear that if an employee of your union or your employer organisation happens to be legally qualified they do not need to meet those criteria.[35]

The practical effect of such a provision is that membership of an industrial organisation (employee and employer) provides a right to representation not afforded to those who choose not take up such a membership.

(b) Time Limit for Making Applications

The Bill replicates the commitments within Forward with Fairness by reducing the statutory time limit for commencing proceedings for alleged unfair dismissal from the existing 21 days to a proposed 7 days. It is also noted that the statutory time period for commencing an alleged unlawful dismissal has increased from the current 21 days to 60 days.

Although witnesses acknowledged that this time limit adjustment was consistent with Forward with Fairness, there were strong arguments from both business and unions that the change was inappropriate.

(c) Small Business Exemption

The Bill recognises the long accepted fact that termination of employment is a concept viewed differently depending upon the size and nature of a business enterprise. The impact of a financial penalty (in the form of compensation) and the potential ramifications of a reinstatement order are more salient to many small business employers. In this regard, it is generally accepted that unfair dismissal laws are a disincentive to employment with the small business sector.

[35] Ms N James, Committee Hansard, 19 February 2009, p72.

The Bill's recognition of this view manifests itself in specific provisions for small business, which are defined as a business that engages 15 or fewer employees. These provisions provide two key distinctions.

The first is an extended period of 'qualifying' service that an employee of a small business must serve before being eligible to bring a claim for alleged unfair dismissal. This period is 12 months for an employee of a small business, whereas for all other employees the period is 6 months. The second is the development of the 'Fair Dismissal Code' for small business employers "which, if followed by a small business, will ensure that a dismissal is not found to be unfair."[36] These two distinctions for small business employers are welcomed by Coalition senators.

Less reassuring is the method by which the exemption applies. In simple terms, the 15 or less figure is established with reference to a straight 'head count'. The obvious problem this presents is the potential for inequality when distinguishing between full time, part time and casual employees.

A business may employ, say, 15 full-time workers, representing a total of 570 hours worked in a one week period. A comparable business may employ 25 workers, being 5 full-time (38 hours), 5 part-time (15 hours) and 10 casuals (5 hours). This would represent a total of 315 hours worked in a one week period. The second business, notwithstanding it engages employees for slightly more than half the number of hours when compared to the first business, is subject to claims for alleged unfair dismissal. The first business is not. Such a circumstance has the ability to result in perverse consequences, as one witness observed:

> … my understanding of 15 is 15 bodies, not 15 FTEs, or full-time equivalents. I think that that will act in a number of negative ways, and one of the most negative ways is that I think it will discourage small medium employers or smaller employers from engaging part-time staff with caring responsibilities because the difference between a 14 and below and a 15 and above is a six-month or a 12-month exemption. If a smaller employer employs staff for the available work, if you have a choice between employing one full-time—dare I say it—male with no caring responsibilities, as opposed to three part-time women with caring responsibilities, then I think that the choice becomes a lot easier for that employer to engage the fulltime male. And, as we know, we are in labour shortages and skill shortages despite the economic downturn, and one of the few available labour pools where we can increase employment is of women in particular, and women with caring responsibilities, so I do see this as a problem.[37]

[36] Julia Gillard – Second Reading Speech – 25 November 2008

[37] Committee Hansard, 17 February 2009, p. 28

Utilising the 'head count' approach to the question of 15 or fewer employees creates circumstances that, in our view, are unequal and open potential for unintended consequences. To avoid such outcomes, an alternative measure should be considered.

There are many alternative measures available, such as business turnover, profitability, and the existence of a dedicated employee with the responsibility for human resource management. However, these measures also have the potential for unintended consequences and manipulation.

A logical, clear and simple measure is that of full-time equivalency. This is an accepted practice that is capable of being easily understood by all stakeholders subject to the system. It represents a fair middle point between the need to provide fairness for employees and the legislative recognition of circumstances facing small business.

Superannuation as an allowable matter

The *Fair Work Bill* reinstates superannuation as an allowable matter in the award system.

In parallel with this proposed legislative change, the Government has directed the AIRC to develop a series of Modern Awards with the aim of reducing the current 4300 awards to around 70. In the lead up to the commencement of the Fair Work legislation, the AIRC has already released a number of modern awards which specify particular industry funds as default funds. For example, the new retail award specifies REST as the sole default fund.

The Committee received many submissions from industry associations [38] and financial services companies [39] flagging their concerns with both the reinstatement of superannuation as an allowable matter and the AIRC decisions in relation to the modern awards.

IFSA, in its submission, said that the combination of the reinstatement of superannuation as an allowable matter with the decisions of the AIRC, which in some cases specify only one industry fund as the default fund, would result in reduced competition in the selection of superannuation default funds. IFSA also argued there will be less flexibility for employers. It also argued that the lessening of competition would result in higher fees. IFSA considered that the *Fair Work Bill* should include a provision that gave guidance to the AIRC in relation to default funds to enable competition.

The Financial Planning Association (FPA) was similarly concerned about reduced competition in the sector. In its submission it argued that the Modern Awards effectively created mandated monopolies, duopolies or oligopolies for the default funds. The FPA recommended that the AIRC should not specify default funds but rather allow

[38] Investment and Financial Services Association, Submission 55; and Financial Planning Association, NSW Submission 76

[39] ING Australia Submission 93 ; MLC and NAB Submission 108; and AMP Financial Services Submission 145

competition between funds. Submissions from individual companies mirrored the concerns identified by the industry associations.

AMP noted that the award modernisation process eliminated the flexibilities that were present in many existing awards. An AMP analysis indicated that in around 30 per cent of existing awards funds that were not specifically included in the awards had the capability of competing for business. AMP said that this flexibility had been eliminated in the modern awards as well as removing the ability of the employer to review the appropriateness of a fund to ensure it matches the needs of its employees.

In evidence given before the Committee, IFSA stated that the mandating of a few, and in some cases, only one superannuation fund would have deleterious effects for employers. IFSA also indicated that if an employer wished to align its business philosophy with its default fund, for example, a church group might wish to appoint a social responsible investment fund as the default fund, it would be prevented from doing so in many situations under the new arrangements.

There is little doubt that the new arrangements will reduce competition, which might lead to an increase in fees and charges. There will be reduced flexibility for employers and in many instances it might prohibit businesses from aligning their default fund with the values of their business. This would be particularly true of church/religious agencies, and those employed in the environmental sector or social welfare agencies.

Coalition senators note that far from enhancing flexibility (which is one of the key objectives of the Bill), the Government's decision to reinstate superannuation as an allowable matter will limit flexibility, impede choice for employers and in all likelihood increase in costs.

The *Fair Work Bill* should be amended to mandate that "any complying superannuation fund" be included in all awards in addition to any specific funds specifically nominated by the AIRC.

Conclusion

The issues addressed above constitute significant and unresolved flaws in the framework of the *Fair Work Bill.* Coalition senators strongly urge the Government to embrace the constructive spirit in which these issues were raised by witnesses before the inquiry, witnesses who accept the tenor of the new workplace relations scenario but who are concerned that their ability to sustain jobs in that scenario will be undermined without some changes to the Bill.

Coalition senators believe the Government should honour commitments made to Australian business in Forward with Fairness.

Senator Gary Humphries
Deputy Chair

On behalf of
Senator the Hon Eric Abetz
Senator Michaelia Cash
Senator Mary Jo Fisher