The Senate

Education, Employment and Workplace Relations Legislation Committee

Fair Work Amendment (State Referrals and Other Measures) Bill 2009 [Provisions]

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Senate Standing Committee on Education, Employment & Workplace Relations
Legislation Committee

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Committee Majority Report

Reference

1.1 On 21 October 2009, the Hon Julia Gillard MP, Minister for Employment and Workplace Relations, introduced the Fair Work Amendment (State Referrals and Other Measures) Bill 2009 (the bill) in the House of Representatives. On 29 October 2009, the Senate referred the provisions of the bill to the Senate Standing Legislation Committee on Education, Employment and Workplace Relations for report by 16 November 2009.

Conduct of the inquiry

1.2 Notice of the inquiry was posted on the committee's website and advertised in *The Australian* newspaper, calling for submissions by 6 November 2009. The committee also directly contacted a number of interested parties, organisations and individuals to notify them of the inquiry and to invite submissions. Seven submissions were received as listed in Appendix 1.

1.3 The committee conducted a public hearing in Canberra on 11 November 2009. Witnesses who appeared before the committee are listed at Appendix 2. The committee thanks those who assisted with the inquiry.

Purpose of the bill

1.4 The bill will complete the framework to provide a national workplace relations system for the private sector. It will give effect to the references of power to be made by South Australia, Tasmania and any other state[1] that refers its workplace relations powers to the Commonwealth on or before 1 January 2010.

1.5 The bill amends the *Fair Work Act 2009* (FW Act) to enable the states to refer workplace relations matters to the Commonwealth for the purposes of section 51(xxxvii) of the Constitution.[2] The bill also amends the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* to establish arrangements for employees and employers transitioning from referring state systems to the national workplace relations system; and makes consequential amendments to other Commonwealth legislation required as a result of these arrangements.

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1 Queensland has indicated that it will refer its workplace relations powers to the Commonwealth and the Fair Work (Commonwealth Powers) and Other Provisions Bill 2009 (Qld) was introduced into the Queensland Parliament on 27 October 2009 and passed 12 November 2009.

2 Section 51 (xxxvii) of the Constitution enables the Commonwealth to make laws with respect to matters referred to the Commonwealth by the states.

Background

1.6 The bill gives effect to the Australian Labor Party's election commitment detailed in *Forward with Fairness* to deliver a uniform national system for the private sector either by state governments referring powers for private sector workplace relations or other forms of cooperation and harmonisation.[3] The introduction of the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* in May 2009 was the first stage in implementing this national system. This Act supported a renewal of Victoria's referral of workplace relations powers from 1 July 2009. The Minister for Employment and Workplace Relations indicated that the framework of the Act would be adapted in future Commonwealth legislation to accommodate anticipated further reference of workplace relations powers from other states.[4]

Consultation

1.7 Although the bill was not subject to a specific Committee on Industrial Legislation (COIL) process,[5] the committee majority notes that the government has undertaken negotiations for a national system as part of the development of the Fair Work legislation. This has been supported by extensive consultation with state governments through the Workplace Relations Ministers' Council (WRMC) and the High Level Officials' Group (HLOG), and bilateral discussions continue. DEEWR described the detail of the consultation process:

> The Government had led negotiations for a National System through extensive consultation with the States and Territories and through ongoing consultation with other major stakeholders, such as the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions and the Australian Industry Group. This consultation has been supported through a number of committees such [as] the Workplace Relations Ministers' Council (WRMC) which comprises Commonwealth, State and Territory Ministers for workplace relations and the High Level Officials' Group (HLOG) which comprises senior officials from Commonwealth, State and Territory workplace relations departments.[6]

1.8 In addition, jurisdictions consulted on the issue of referral to the Commonwealth formally and informally with their employer and employee representatives.[7] The ACTU commended the consultative approach taken by the

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3 Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, *Forward with Fairness*, April 2007, p. 6.

4 The Hon, Julia Gillard, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 21 October 2009, p. 6.

5 Mr Daniel Mammone, *Committee Hansard*, 11 November 2009, p. 5; Mr Stephen Smith, *Committee Hansard*, 11 November 2009, p. 14.

6 DEEWR, *Submission 2*, p. 3.

7 Mr John Kovacic, *Committee Hansard*, 11 November 2009, p. 23.

government in working with the referring states to determine the scope of their referrals and the transitional arrangements that will apply to employees and employers transferring from the state systems.[8]

State positions

1.9 The committee majority notes that the referral of matters to the Commonwealth under s. 51 (xxxvii) of the Constitution is a significant undertaking which has been carefully considered by each party.

1.10 DEEWR explained that a referral does not transfer power to the Commonwealth indefinitely. In 1964, the High Court stated that there is no reason that the words 'matters referred' in s. 51 (xxxvii) of the Constitution 'cannot cover matters referred for a time which is specified or which may depend on a future event even if that event involves the will of the State Governor-in-Council and consists in the fixing of a date by Proclamation'. Consistent with this, state referral laws generally provide for references to be terminated by the Governor-in-Council on a date fixed by Proclamation.[9]

Progress so far

1.11 Following extensive consultations through the development of the FW Act, at the June 2009 meeting of the WRMC, Ministers from South Australia, Tasmania and Queensland joined Victoria in indicating their intent to make referrals to the Commonwealth. South Australia, Tasmania and Queensland have introduced referral legislation into their Parliaments during 2009 to support referrals.

Victoria

1.12 Victoria has already referred its workplace relations matters. The *Fair Work (Commonwealth Powers) Act 2009* (Vic), which replaced Victoria's existing reference under the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) was passed by the Victorian Parliament on 9 June 2009 and received Royal Assent on 23 June 2009. The Victorian Minister for Industrial Relations, the Hon Martin Pakula MLC, noted:

> Australian workplaces will benefit from a simplified award system, balanced unfair dismissal laws, and bargaining laws that focus not on conflict but on facilitating fair agreements that contribute to workplace productivity. The Minister also noted the new system will provide the greatest possible protection to the maximum number of employees and employers across Victoria, including outworkers.[10]

8 ACTU, *Submission 3*, p. 2.

9 DEEWR, *Submission 4*, p. 5.

10 DEEWR, *Submission 4*, p. 9.

South Australia

1.13 The Fair Work (Commonwealth Powers) Bill 2009 (SA) was passed by the South Australian House of Assembly on 13 October 2009 and is currently before the Legislative Council. When introducing the bill into the South Australian Parliament, the South Australian Minister for Industrial Relations, the Hon Paul Caica, MP, stated:

> There are many benefits for South Australians resulting from the referral of IR powers. A streamlined national system of industrial relations will result in significant red tape reductions for business and greater administrative efficiency by eliminating regulatory overlap and duplication. Businesses will no longer have to deal with complex jurisdictional questions about which system of industrial relations they are operating in.[11]

Tasmania

1.14 The Tasmanian government introduced the Industrial Relations (Commonwealth Powers) Bill 2009 into the Tasmanian Parliament on 7 October 2009. The bill was passed by the Tasmanian House of Assembly on 14 October 2009 and by the Legislative Council on 28 October 2009. The Tasmanian Minster for Workplace Relations, the Hon Lisa Singh MP, noted that the Tasmanian referral has broad support and will enable all Tasmanian private sector workers to be dealt with under one system.[12]

Queensland

1.15 On 27 October 2009 the Fair Work (Commonwealth Powers) and Other Provisions Bill 2009 (Qld) was introduced into the Queensland Parliament.[13] The Queensland Attorney-General and Minister for Industrial Relations, the Hon Cameron Dick MP, stated:

> The Queensland government has not taken this step lightly and not without extensive consultation with Queensland employers and unions. The current State industrial relations system, embodied in the *Industrial Relations Act 1999*, has fairly balanced the interests of employers and employees. However, a national system can achieve comparable results, and that is why Queensland has taken the step to refer State's power on this issue...This bill today is a giant step forward in establishing a cooperative system that respects State rights, but also creates an overarching national industrial relations system which is in the best interests of business and workers...[14]

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11 The Hon Paul Caica MP, South Australian Minister for Industrial Relations, Second Reading Speech, *Hansard*, 9 September 2009.

12 DEEWR, *Submission 2*, p. 11.

13 The bill was passed 12 November 2009.

14 The Hon Cameron Dick MP, Queensland Minister for Industrial Relations, second reading speech, *Hansard*, p. 2862-2864, 27 October 2009.

New South Wales and Western Australia

1.16 The committee majority notes that New South Wales is yet to decide about participation in the national workplace relations system for the private sector. Western Australia has indicated that it will not refer its industrial relations powers to the Commonwealth. Instead, the Western Australian Minister for Commerce, the Hon Troy Buswell MP, has indicated that the approach of the Western Australian government will be 'to work co-operatively with the Commonwealth to build a harmonised industrial relations system without handing over Western Australia's long-held, constitutionally established role and powers'.[15]

1.17 The ACTU noted the difficulties created for employers and employees in Western Australia who wish to be covered by the national laws:

> ...The practical out-working is that employees of non-trading corporations in Western Australia who now rely on referral workplace relations instruments will be excluded from the national system despite their desire to remain within it. Unless the Western Australian government abandons its opposition to referral, employees of non trading corporations in that State (potentially parts of local government and the social and community services sector) whose federal awards will cease to operate in March 2011, and for whom there is no comparable State safety net will be severely disadvantaged.[16]

1.18 The ACTU has previously proposed that the government should provide an avenue for employees to opt in to the federal system where a state government does not refer the employees, despite the wishes of the workforce. It submitted that this could be achieved by the use of the conciliation and arbitration power and external affairs powers as an alternative combination of Constitutional power to the corporations power which the FW Act relies on.[17]

Governance arrangements

1.19 There are three components to the governance arrangements for the national system: the referral bills, the multilateral inter-governmental agreement and bilateral intergovernmental agreements. The provisions of the bill are underpinned by the multilateral inter-governmental agreement, which outlines the principles of the national workplace relations system for the private sector and the roles and responsibilities of those participating. At the 25 September 2009 meeting of the WRMC, the *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector* (IGA), was signed by Ministers from Victoria, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory.[18]

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15 DEEWR, *Submission 2*, p. 12.

16 ACTU, *Submission 3*, p. 4; Ms Cath Bowtell, *Committee Hansard*, 11 November 2009, p. 2.

17 ACTU, *Submission 3*, pp. 4-5.

18 DEEWR, *Submission 4*, p. 7.

1.20 In addition to the multilateral IGA, the governance framework for the national system provides for the establishment of bilateral agreements between the Commonwealth and individual jurisdictions. These are intended to set out state and territory specific arrangements for service delivery; tribunal related matters and other arrangements relevant to the referral of powers in the individual jurisdictions concerned.[19]

1.21 Although the IGA is not yet a public document,[20] employer groups expressed concern about the IGA on the basis of what state governments have said about it when introducing referral bills into their parliaments.[21] DEEWR explained that the aspect of the IGA in question provides for a Commonwealth proposal or amendment to the Fair Work legislation to be considered by the WRMC referring states and territories subcommittee if the proposal or amendment is considered to undermine one or more of the key principles outlined in the IGA. The IGA provides that:

> ...such matters will be resolved by endorsement of a two-thirds majority of that subcommittee. Where a two-thirds majority does not endorse a Commonwealth proposal or amendment, the intergovernmental agreement provides that the Commonwealth will not proceed with the proposal or amendment until identified issues are resolved.[22]

1.22 Australian Industry Group (AiG) argued that through this mechanism, the states are being given the power to potentially delay and frustrate important amendments, which could cause disruption and confusion for businesses. Mr Stephen Smith, Director, National Workplace Relations, AiG, acknowledged that this aspect is not contained in the bill. However, to the extent that it 'reflects the understandings that surround the bill', at the hearing he argued that the bill should not be passed.[23] The committee majority notes that this is not the position stated in AiG's written submission.

1.23 DEEWR emphasised that in developing the IGA, it was mindful of similar agreements. Mr John Kovacic, Deputy Secretary Workplace Relations, informed the committee:

> In general terms it would be true to say that the intergovernmental agreement is consistent with the approach taken in other IGAs but nonetheless reflects the specifics of the process that has been agreed to by

19 DEEWR, *Submission 2*, p. 25.

20 Following the committee hearing, the IGA was made public and is available at http://www.deewr.gov.au/WorkplaceRelations/WRMC/Documents/Multilateral_IGA.pdf .

21 Mr Daniel Mammone, *Committee Hansard,* 11 November 2009, p. 5; Mr Stephen Smith, *Committee Hansard*, 11 November 2009, p. 13.

22 Mr John Kovacic, *Committee Hansard*, 11 November 2009, p. 21.

23 Mr Stephen Smith, *Committee Hansard*, 11 November 2009, pp. 14-15.

> state and territory ministers and the Commonwealth through Workplace Relations Ministers Council.[24]

1.24 DEEWR added that it is a usual feature of intergovernmental agreements to provide for a process of voting or approval of Commonwealth proposals to amend national law and therefore the processes contained in this IGA are nothing out of the ordinary.[25] The committee majority agrees and notes that the views of employer groups fail to take account of the need to develop new arrangements to deal with referrals by more than one state and the requirement for a mechanism to resolve any disputes between them.

Committee view

1.25 The committee majority points out that the area of concern expressed by AiG is not contained in the bill but in the IGA. The IGA has been developed in close consultation and cooperation with the state and territory governments. The committee majority recognises that as the bill deals with the referral and the acceptance of the referral from various state jurisdictions, the focus of DEEWR's consultation has been with the relevant jurisdictions. A referral of powers is a significant undertaking and the committee majority understands that extensive consultation was undertaken within jurisdictions with a range of stakeholders. The views brought by jurisdictions to the discussions would naturally reflect the views of their stakeholders.

1.26 Responding to the concerns of employer groups regarding states having an effective power of veto over amendments, the committee majority notes that the right of veto by states exists already, as each state has the capacity to terminate references. The committee majority notes with concern the views expressed on the IGA by employer groups that the Commonwealth has gone too far in making compromises with the states. It appears employer groups do not wish to acknowledge the potential of cooperative federalism. The development of the legislation and the IGA reflect cooperative federalism in action. To that end the committee majority recognises the following reflections from Mr John Kovacic, Deputy Secretary, DEEWR, who has been involved in the negotiations:

> ...My involvement with the Workplace Relations Ministers Council dates back to the early eighties. It is probably the most significant and comprehensive level of consultation around a set of workplace relations reforms that I can recall through forums such as the Workplace Relations Ministers Council, and I think it would be true to say that the discussions through the ministerial level and, equally, the officials level, have been the most constructive and most cooperative that I have been involved with. I think that is a reflection of the positive approach that all ministers in all jurisdictions have brought to the ministerial council.[26]

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24 Mr John Kovacic, *Committee Hansard*, 11 November 2009, p. 24.

25 Ms Elen Perdikogiannis, *Committee Hansard*, 11 November 2009, p. 24.

26 Mr John Kovacic, *Committee Hansard*, 11 November 2009, p. 24.

1.27 Regarding the development of the IGA, Mr Kovacic added:

> As a general comment, the bill together with the multilateral IGA reflect the spirit of cooperation and collaboration that have been a hallmark of the discussions and development of the Fair Work legislation and the discussions with not only state and territory officials but also state and territory ministers. That is the spirit that is reflected in the bill. Indeed, the multilateral IGA is an extension of that cooperative spirit, a continuation of it and a recognition that, in terms of a national workplace relations system, a fundamental underpinning of it is the need for a continuation of those sorts of cooperative arrangements.[27]

Benefits of a national workplace relations system

1.28 A national workplace relations system has received strong support from key stakeholders in business, unions and academia. Business has called for a national workplace relations system for the private sector for many years to end the complexity, duplication, overlap and confusion created by competing state and federal workplace relations systems. When introducing this bill, the Minister for Employment and Workplace Relations outlined the benefits of a national system for business:

> The Bill I introduce today answers the many calls made by business over many years to end the overlap and duplication of state and federal workplace relations systems; to end the inefficiency, uncertainty and legal complexity for Australian businesses and employees.[28]

1.29 The Australian Chamber of Commerce and Industry (ACCI) has supported the development of a national workplace relations system for some time and it acknowledged that the bill 'represents a step forward towards the ultimate goal of achieving a truly national system for all employers across Australia'.[29] To achieve even greater benefits, ACCI and AiG urged the government to work towards a full referral by state governments.[30]

1.30 ACCI has estimated that the state industrial relations system costs taxpayers at least $122 million per year on top of a federal system of at least $312 million per year.[31] While noting that there will be significant cost savings for state governments that refer powers, ACCI submitted that there will be some additional costs and regulatory burdens on referral employers as most workplaces do not operate on a

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27 Mr John Kovacic, *Committee Hansard*, 11 November 2009, p. 28.

28 The Hon, Julia Gillard, Minister for Workplace Relations, *House of Representatives Hansard*, 21 October 2009, p. 6.

29 ACCI, *Submission 5*, p. 6.

30 Mr Daniel Mammone, *Committee Hansard*, 11 November 2009, p. 5, 6; Mr Stephen Smith, *Committee Hansard*, 11 November 2009, p. 13.

31 ACCI, *Submission 5*, p. 6.

collective basis and have no history of bargaining.[32] The Explanatory Memorandum notes that the state referral of powers for private sector unincorporated businesses is expected to result in only minor transitional costs to employers in terms of their understanding and compliance with the FW Act.[33]

1.31 The Australian Industry Group (AiG) strongly supported the referral of the state industrial relations powers to the Commonwealth and stated:

> Australia's modern economy and the need to remain globally competitive necessitates that a national system be implemented. All Australian employees and employers in the private sector should have the same system for employee entitlements and employment obligations.[34]

1.32 The ACTU expressed support for the bill as providing a mechanism for state system employees and employers to participate in a truly national system.[35]

1.33 The Regulation Impact Statement accompanying the Explanatory Memorandum to the bill identified a number of issues that arise under the current workplace relations system:

- limitations on the corporations powers under s. 51 (xx) of the Constitution which contribute to higher levels of uncertainty and legal complexity in determining jurisdictional coverage, which can be costly and time consuming to resolve;

- the maintenance of separate workplace relations systems creates administrative inefficiencies which can lead to increased compliance costs for employers due to navigating competing legislation;

- there is often unclear demarcation between the federal and state systems where employers must comply with more than one set of workplace relations obligations. This can lead to inequalities and differences among businesses and employees resulting from different regulations, wages and working conditions depending on the state in which they operate or are employed;

- the multiplicity of jurisdictions and laws is generally accepted as a factor which creates barriers to productivity.[36]

1.34 In addressing these issues, DEEWR noted that the benefits of creating a national system for the private sector will contribute to the creation of a seamless

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32 ACCI, *Submission 5*, pp. 8-9.

33 EM, p. xvii.

34 AiG, *Submission 6*, p. 3.

35 ACTU, *Submission 3*, p. 3.

36 DEEWR, *Submission 2*, pp. 11-15.

national economy which is simple, fair and flexible and better able to adapt to global markets and competition.[37]

1.35 These views were supported by Professor Andrew Stewart, Adelaide University, who provided a number of reasons to support the creation of a national system of labour regulation for the private sector. He submitted that the system would be 'simpler, cheaper and more efficient than the present arrangements' and would set 'universal standards that are more likely to be understood and observed'. In addition, he noted that the bill will remove the uncertainty that currently applies to a large number of not-for-profit organisations:

> Since March 2006, many of these organisations have had no reliable way of knowing whether they are subject to federal or State workplace laws. As a result they are in constant risk of breaching their legal obligations as employers.[38]

1.36 The issue of public sector and local government employees is discussed in more detail below.

Provisions of the Bill

1.37 All submissions indicated general support for the bill notwithstanding the AiG's sudden change of position from its submission at the hearing. However, as covered above, AiG's main concern is not with the bill but with the IGA. A couple of minor or technical issues were raised by witnesses who emphasised that they did not want these issues to hold up passage of the bill.

State references of workplace relations matters

1.38 The bill creates a legislative mechanism for states to make three referrals of powers: the 'initial reference', 'amendment reference' and 'transition reference'; and allows states to refer and terminate each of these references under proposed clause 30L of Schedule 1. These references will enable the Commonwealth to:

- extend the FW Act in referring states to cover unincorporated employers and their employees; outworker entities, and extend the operation of the general protections (initial reference);
- amend the FW Act so that it applies uniformly in referring states (amendment reference); and
- establish arrangements for the transition of referral employees and employers from state industrial or workplace relations systems to the new national system (transition reference).[39]

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37 DEEWR, *Submission 2*, pp. 4-5.

38 Professor Andrew Stewart, *Submission 4*, p. 1.

39 DEEWR, *Submission 2*, p. 14.

1.39 The ACTU supported the use of referrals of power as the primary means for the Commonwealth to regulate industrial relations matters as this mechanism provides the greatest flexibility to clarify the scope of the legislation.[40]

Initial reference

1.40 To give effect to Victoria's workplace relations reference, the first referral Act inserted Division 2A into Part 1 to 3 of the FW Act. Schedule 1 will insert a new Division 2B into Part 1 to 3 of the FW Act to give effect to further state references of workplace relations matters to the Commonwealth after 1 July 2009 but on or before 1 January 2010. The framework reflects that states are referring workplace relations matters to the Commonwealth at different times.

1.41 Like Division 2A, Division 2B extends the meaning of 'national system employee' and national system employer' (new sections 30 M and 30 N) to cover all employees and employers in referring states subject to exclusions relating to state public sector and local government employment. Division 2B also extends the definition of 'outworker entity' (new section 30 Q) and extends the operation of the FW Act's general protections in referring states (new section 30R).

Amendment reference

1.42 Schedule 1 would give effect to references enabling amendment of the FW Act in respect of specified subject matters, to the extent that such amendments would otherwise be outside Commonwealth power. The amendment reference provisions would enable the FW Act to be amended to apply to all employers and employees in referring states uniformly. Consultation on amendments will be governed by the supporting inter-governmental agreement.

1.43 Some subject matters reflecting areas of state responsibility, such as equal opportunity and discrimination, occupational health and safety, public holidays and workplace surveillance, are excluded from the subject matter of the reference. However, these exclusions will not prevent the Commonwealth from amending the FW Act in relation to any of these matters to the extent that the FW Act as originally enacted deals with them or enables modern awards and enterprise agreements to deal with these matters.[41]

Termination of reference

1.44 Proposed subsections 30L(7) and (8) would enable referring states to terminate their amendment references and remain in the national system in the following circumstances:

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40 ACTU, *Submission 3*, p. 4.

41 DEEWR, *Submission 2*, p. 15.

- by proclamation of the State Governor with six months notice, if the amendment references of other referring states all terminate on the same day; or

- by proclamation of the State Governor with three months notice, if the Governor considers that an amendment to the FW Act is inconsistent with the fundamental workplace relations principles.[42]

1.45 DEEWR explained that the six month notice provision is the standard provision that exists in Commonwealth referral schemes and the three month notice provision reflects the understanding between the Commonwealth and the states on the operation of the system in the future.[43]

1.46 ACCI expressed concern about the ability for states to terminate an 'amendment reference' and remain a referring state. It noted that Victoria has not had such provisions since 1997 and this has not caused any problems to date. It argued that:

> If the termination of an amendment reference is ever invoked by a State Government, this will cause confusion and unnecessary dislocation for referral employers, as non-referred employers continue to be bound by the fair work laws, but their referral counterparts do not. It also appears to indicate that State Governments are not fully committed to achieving a national system for the private sector.[44]

1.47 DEEWR responded that when combined with the arrangements in the IGA, the termination of amendment reference provisions:

> ...protects states' long-term interests in a cooperative workplace relations system and addresses states' concerns that unwelcome changes to workplace relations laws could be forced upon them without any consultation by a future Commonwealth government. The amendment reference provision was developed in close consultation with the states and provides an assurance of the Commonwealth's intention to work cooperatively with them on amendments into the future. However the provision is not anticipated to be used in any but the most extreme circumstances.[45]

Committee view

1.48 The committee majority notes the need to provide incentives and address the disincentives for the states to join a national system. To achieve this the

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42 Ibid.

43 Ms Elen Perdikogiannis, *Committee Hansard*, 11 November 2009, pp. 28-29

44 ACCI, *Submission 5*, p. 16; Mr Daniel Mammone, *Committee Hansard*, 11 November 2009, pp. 6-7.

45 Mr Kovacic, *Committee Hansard*, 11 November 2009, p. 22.

Commonwealth recognises the need and the right for states' to protect their long-term interest from the imposition of unwanted changes to workplace relations laws by a future Commonwealth government. The Commonwealth acknowledges the historical role of the states in industrial relations and values working with them cooperatively to reach a national system to provide certainty and stability for private sector employers and employees. This arrangement was developed in close consultation with the referring states. It recognises the cooperative nature of the approach being taken by the Commonwealth and the states on these issues and provides assurance of the Commonwealth's intention to work cooperatively with them on amendments in the future.

1.49 The committee majority recognises that the arrangements to terminate the amendment reference are not to be used in any but the most extreme circumstances, and the committee majority notes that this was acknowledged by employer groups.[46] This was also acknowledged by the South Australian Minister, the Hon Paul Caica MP, who stated:

> It is envisaged that if all jurisdictions were meeting their obligations under the intergovernmental agreement, the provisions of this bill for the termination of the amendment reference because of inconsistency with the fundamental workplace relations principles would not need to be applied and, in effect, would only be contemplated in the most extreme circumstances, where the agreed fundamentals of the national system are threatened.[47]

Transitional reference

1.50 Proposed subsection 30L(5) requires a referring state to refer matters relating to the transition to the national system. It is anticipated that state references would enable the Commonwealth to legislate to transition employers and employees from the state systems, or from the Workplace Relations Act, to the national system under the FW Act.[48]

Transitional arrangements

1.51 Schedule 2 deals with transitional arrangements for state referral employers and employees. Part 1 covers current instruments and processes and deals with federal awards and agreements made with reliance on the conciliation and arbitration power. The transitional arrangements proposed are as far as possible similar to the transitional arrangements that were put in place in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* for the transition of federal instruments to the national workplace relations system. The key features are:

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46 Mr Daniel Mammone, *Committee Hansard*, 11 November 2009, pp. 7-8.

47 DEEWR, *Submission 2*, p. 16.

48 EM, p. 12.

- state awards and state agreements will be preserved as federal instruments in the same terms as the state instrument and will be known as Division 2B state awards and Division 2B state employment agreements (known collectively as Division 2B state instruments);

- Division 2B state awards and state employment agreements will operate on a 'no-detriment' basis with the National Employment Standards and the national minimum wage order;

- a Division 2B state award (other than a Division 2B enterprise award) [49] will continue to apply as a federal instrument for a period of 12 months from referral commencement (anticipated to be 1 January 2010). After that time, a relevant modern award will cover the relevant employees and employers;

- during the 12 month period, Fair Work Australia (FWA) will be required to consider whether a modern award should be varied to provide appropriate transitional arrangements for incoming state employees and employers;

- FWA will be able to make remedial take-home pay orders where the take-home pay of one or more employees is reduced as a result of movement to the modern award;

- a Division 2B state employment agreement will continue to operate as a federal instrument until replaced at any time by a new enterprise agreement under the FW Act or terminated in accordance with the provisions of the bill;

- the bill provides a model dispute resolution term to be prescribed by regulations which applies in relation to Division 2B state awards. Dispute resolution terms in state employment agreements will continue as terms of the referral state employment agreements derived from them. This means that, where a state agreement nominates a state commission as being able to resolve disputes arising under the agreement, this provision will continue to operate;

- the new transfer of business rules in the FW Act will apply to transfers that occur on or after the referral commencement. Division 2B state instruments will be transferable instruments for the purposes of the FW Act transfer of business provisions;

- bargaining and industrial dispute processes under state systems will not be carried over into the new system. Bargaining participants will either have lodged a state agreement for approval by a state tribunal before the referral

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49 The 12 month rule does not apply to Division 2B state enterprise awards as these will be subject to the separate enterprise award modernisation process provided for by Schedule 6 to the T&C Act (items 57-61 of Schedule 2).

commencement or commence bargaining for a new enterprise agreement under the FW Act;

- as a general rule, proceedings in relations to conduct that occurred before the referral commencement will remain subject to state laws and be dealt with in state systems;

- part-heard proceedings commenced before 1 January 2010 involving the making, variation or termination of state awards will terminate on 1 January 2010;

- appeals against state tribunal decisions will lapse on 1 July 2010 (other than decisions to make or not make an award which will lapse on 1 January 2010); and

- if an application to certify or approve, vary or terminate an agreement has been made in a state system before 1 January 2010 but has not been finalised by that date, a state tribunal can continue to deal with the application after 1 January 2010. [50]

1.52 The ACTU supported the provisions providing a transition mechanism from state systems including:

- the preservation of state awards for up to 12 months;

- the preservation of state agreements;

- requiring Fair Work Australia to consider including terms from state awards into modern awards; and

- extending the National Employment Standard safety net.[51]

1.53 ACCI noted that currently award-free referral employees who will be subject to an applicable modern award, including the miscellaneous award, from 1 January 2010, will not be subject to adequate transitional provisions as it appears that FWA is only obliged to consider transitional provisions for referral employers subject to state awards.[52]

1.54 ACCI also drew attention to the timeframe for employers to understand their applicable modern award, noting that many awards will not be finalised until 4 December 2009. It asked that additional time be considered for small business to

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50 The Hon, Julia Gillard, Minister for Workplace Relations, *House of Representatives Hansard*, 21 October 2009, pp. 8-9. See also DEEWR, *Submission 2*, pp. 17-21.

51 ACTU, *Submission 3*, p. 9.

52 ACCI, *Submission 5*, p. 18.

receive education and assistance to implement any necessary changes.[53] The committee majority notes that the Commonwealth will provide additional services to assist transferring employers and employees to understand the new system. This will include telephone advice and visits to workplaces which will be undertaken in cooperation with the referring states.[54] The provision of additional services was welcomed by ACCI which made suggestions on the provision of information to assist with overall compliance.[55]

1.55 AiG noted the model term about disputes (Schedule 2, Item 7) and asked that this be developed in conjunction with industry representatives such as AiG.[56]

Committee comment

1.56 In response to a concern raised by ACCI about the possible effect on employers of transitioning to the federal system,[57] the committee majority notes that the AIRC will have determined transitional arrangements for employers and employees covered by a Notional Agreement Preserving a State Award (NAPSAs) which are derived from state awards, so there will already be a framework in place for translating Division 2B state reference employers and employees to coverage by modern awards. The government provided a full five year phase in period so that employers and employees would gradually move from arrangements in old state and federal awards to a new modern award. The government envisages that FWA will apply these transitional arrangements to the transition of Division 2B referral state award-covered employees to modern award coverage.[58]

1.57 This approach was supported by Professor Stewart who argued that 'there is a good deal of sense in the 12-month grace period provided before State awards applicable to referred employers are supplanted by modern awards under the *Fair Work Act 2009'*. He noted that even after this period expires, it is likely that the transitional provisions in most modern awards will ensure that those employers do not immediately move to a new set of pay rates and penalty rules. He expected that the awards would provide for the new rates to be phased in over the further period of five years.[59]

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53 ACCI, *Submission 5*, p. 19.

54 The Hon, Julia Gillard, Minister for Workplace Relations, *House of Representatives Hansard*, 21 October 2009, p. 9.

55 ACCI, *Submission 5*, p. 22, Mr Daniel Mammone, *Committee Hansard*, 11 November 2009, pp. 5-6.

56 AiG, *Submission 6*, p. 10.

57 ACCI, *Submission 5*, pp. 19-20.

58 DEEWR, *Submission 2*, p. 18.

59 Professor Andrew Stewart, *Submission 4*, p. 5.

Coverage of public sector and local government employees

1.58 The bill recognises that referring states can choose the extent to which matters relating to state public sector or local government employment are referred or excluded from references. The committee majority notes this is in line with the government's commitment in *Forward with Fairness* that:

> Current arrangements for the public sector and local government can continue with many of these workers regulated by state industrial relations jurisdictions...State Governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees.[60]

1.59 Proposed subsection 30L(2) enables a state to exclude matters relating to state public sector and local government employment from its reference and still be a referring state (item 39 of Schedule 1). Schedule 3, Item 2 also amends the FW Act to enable states to exclude certain state public sector and local government employers over which the Commonwealth currently has jurisdiction from the FW Act. Such declarations would be able to be made in relation to:

- entities established for a public purpose by or under state or territory law, but not universities, electricity, gas, water, rail or port utilities; and

- entities established for local government purposes by or under state or territory law, and their wholly-owned or wholly-controlled subsidiaries.[61]

1.60 The ACTU supported this mechanism to allow states to nominate which of its public sector or local government employees are in the state system; however, it saw no need for statutory limits on which public sectors can be nominated.[62] This issue was taken up by the United Services Union (USU), which expressed concern that the bill does not facilitate the exclusion of state-owned energy corporations from the FW Act as clause 2(6) of Schedule 3 of the bill specifically prohibits exclusion of declarations concerning state owned energy generation, supply or distribution.[63] This view was supported by Unions NSW, which argued that these entities should not be exempted from the provisions allowing a state to declare entities not to be national system employers.[64]

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60 Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, *Forward with Fairness*, April 2007, p. 6.

61 DEEWR, *Submission 2*, p. 22.

62 Ms Cath Bowtell, *Committee Hansard*, 11 November 2009, p. 2. See also Mr Lindsay Benfell, *Committee Hansard*, 11 November 2009, p. 12.

63 USU, *Submission 1*, pp. 3-4.

64 Unions NSW, *Submission 7*, pp. 2-3.

1.61 The committee majority notes that these limitations reflect a distinction between entities engaged primarily in state public interest or regulatory activity and those in key areas of importance to the national economy that should be subject to nationally consistent workplace relations regulation.[65]

1.62 The declarations would be able to be made in relation to entities that are integral to state public administration and are appropriately regulated in state systems. To be effective, a declaration would need to be endorsed by the Minister administering the FW Act. Schedule 3 of the bill allows the Minister to make a declaration which would have the effect of excluding the Fair Work laws applying to certain national system employers.

1.63 ACCI submitted that this provision would effectively allow local governments to opt out of the national system and this would 'have a destabilising effect on the national system, particularly for those employers that have been subject to the federal system for a considerable period of time'. ACCI was also concerned that this mechanism would allow other employers to be excluded, such as not-for-profit organisations. ACCI expressed its preference for a referral to cover all employers and employees.[66] This view was supported by AiG, which also expressed its preference for a complete referral of powers. However, it noted that some states wish to retain their powers relating to employees in the state public sector and local government and accordingly supported the more restricted scope of the bill.[67]

1.64 For most employers their status should be clear as to whether they are in or out of the federal system. However, Professor Andrew Stewart noted a recent survey of small business of Western Australia conducted by the Small Business Development Corporation which found that over one third were unsure of their status. This is evidence of the need for clear and well understood demarcation between the federal and state systems.[68]

1.65 The committee majority notes that the treatment of local councils and not-for-profit organisations has caused confusion. By relying on the corporations power of the Constitution, the question of whether the federal or state system applies depends upon whether the business is a 'constitutional corporation' or not. Where this is not clear, Professor Stewart captured the difficulties that this has created for some employers:

> ...the situation is different for not-for profit corporations. Their status depends on the application of an imprecise and unpredictable test. Since 1979, the High Court has interpreted the Constitution to mean that even where an incorporated body has not been formed for the purpose of trading, it can still be a 'trading corporation' if it engages in trading activities to a

65 DEEWR, *Submission 2*, p. 22.

66 ACCI, *Submission 5*, pp. 16-17.

67 AiG, *Submission 6*, p. 3.

68 Professor Andrew Stewart, *Submission 4*, p. 2.

> 'substantial' or 'significant' extent...Applying this test, many not-for-profit bodies have been found to be trading or financial corporations, on the basis that they engage in trading and/or financial activities to a sufficient degree. The list includes local councils, public universities, private schools, hospitals, charitable bodies and community service organisations.[69]

1.66 Professor Stewart stressed that there is no clear or identifiable basis for determining the point at which an organisation 'has enough of these activities to qualify as a trading or financial corporation' and this had left many not-for-profit bodies in a state of confusion. He suggested that at some stage this may be resolved by the High Court if a suitable test case reaches the court but this may take years.[70] He supported the passage of the bill as the most effective solution to the present problems facing a large number of employers and noted that if the bill is not passed then:

> The status quo seems certain to prevail – that is, a federal system founded primarily on the use of the corporations power. That would in turn mean continuing confusion and difficulty for a large number of not-for-profit corporations.[71]

1.67 The USU noted that throughout 2006-2008, local government was placed in a 'no man's land' of jurisdictional uncertainty causing difficulties for employers and employees. In November 2008 the NSW government passed the Local Government Amendment (Legal Status) Bill which decorporatised councils and removed them from federal industrial relations coverage. The USU noted this interim solution but supported the passage of the bill to reduce uncertainty and enable workers to maintain entitlements and benefits available through the NSW industrial relations system.[72]

1.68 The bill will address the difficulties outlined above as it will:

> ...help create a clear and consistent delineation between federal and State industrial laws. At least in referring States, all private sector employers will be subject to the federal system, including the great majority of the non-for-profit organisations...The uncertainty over the status of incorporated local government employers, and certain other incorporated government business enterprises, will also be resolved. Either the power to regulate them will be referred to the Commonwealth, or they will be declared to be non-national system employers' under the mechanisms set out in the proposed s 14(2)-(7) of the Fair Work Act 2009.[73]

1.69 The ACTU supported the mechanism which will allow the Commonwealth to retreat from covering any local government entity or state enterprise that is a trading corporation where the state has determined that it will not refer them and noted:

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69 Professor Andrew Stewart, *Submission 4*, p. 3.

70 Professor Andrew Stewart, *Submission 4*, pp. 3-4.

71 Professor Andrew Stewart, *Submission 4*, p. 5.

72 USU, *Submission 1*, pp. 2-3.

73 Professor Andrew Stewart, *Submission 4*, p. 5.

> This sensible approach draws a 'bright line' around the sector and avoids the difficulties that otherwise would arise in determining whether a particular council or enterprise is a trading corporation.[74]

1.70 While supporting the bill, ACCI submitted that the current approach where certain state governments retain control over public and or local government sectors is a wasteful use of taxpayer's money. ACCI advocated their preferred approach for a general referral of IR powers to apply to all employers and employees without caveats, conditions, or mechanisms to allow state and territory governments to unduly restrict changes to the federal system.[75]

Committee view

1.71 The committee majority believes that the bill provides an appropriate mechanism to resolve the uncertainty that currently exists for some employers and employees by making clear the demarcation between state and federal workplace laws.

Technical matters

1.72 The following technical matters were raised in submissions and responded to by DEEWR.

Excluded subject matter

1.73 AiG drew attention to Schedule 1, proposed item 15 covering the definition of 'excluded subject matter'. It argued that the definition of 'excluded subject matter' in the bill must align with the definition of 'non-excluded subject matter' in s.27 of the FW Act, noting that the definition in s.27 of the FW Act was the product of an extensive consultation process. AiG understood the bill to provide states with increased powers in respect of training arrangements, long service leave, public holidays and claims for enforcement of contracts of employment. It argued that the lack of consistency between s.27 of the FW Act and section 30A would create uncertainty and potentially an increased regulatory burden for employers. These concerns also apply to item 39, proposed section 30K.[76]

1.74 DEEWR responded that the amendment does not expand the scope of 'saved' state laws but is a technical amendment to more clearly align the scope of the excluded subject matter with the saving of state laws in section 27 of the FW Act. States are required to refer matters that enable the Commonwealth to amend the FW Act (so far as not otherwise within Commonwealth power) in relation to the referred subject matters. This term is defined in section 30A and covers the matters

74 ACTU, *Submission 3*, pp. 6-7.

75 ACCI, *Submission 5*, pp. 7-8.

76 AiG, *Submission 6*, pp. 7-9.

dealt with by the FW Act such as terms and conditions of employment and rights and responsibilities of employees and employers. Certain matters are excluded from state amendment references. These are reflected in the definition of excluded subject matter in section 30A.

1.75 The excluded subject matter does not cover a matter that the FW Act as originally enacted deals with, either directly or indirectly, or that the FW Act requires or permits instruments made or given effect under it to deal with. This is necessary because some matters dealt with by the saved state laws are also dealt with by the FW Act and the Commonwealth needs to be able to amend these provisions in reliance on a state amendment reference.

- for example, state anti-discrimination laws continue to operate but the general protections (Part 3-1) provisions of the FW Act also protect an employee from adverse action because of discrimination on the basis of the employee's race, sex or other characteristics.

1.76 Paragraph 27(1)(c) and subsection 27(2) of the FW Act save the following state laws, subject to certain exceptions:

- training arrangements, except in relation to terms and conditions of employment provided for by the National Employment Standards (NES) or that can be included in modern awards (paragraph 27(2)(f));
- long service leave, except in relation to employees who have long service leave entitlements under the NES (paragraph 27(2)(g)); and
- the declaration, prescription or substitution of public holidays, except in relation to rights and obligations of employees and employers on public holidays, which are dealt with by the NES (paragraph 27(2)(j)).

1.77 The exceptions reflect the intention that matters concerning minimum terms and conditions of employment for national system employees should be dealt with exclusively by the FW Act.

1.78 The current definition of excluded subject matter in section 30A cross-references section 27 of the FW Act and therefore by implication the NES-related exceptions in paragraphs 27(2)(f), 27(2)(g) and 27(2)(e). However, the current definition of excluded subject matter then goes on to duplicate these exceptions, by using the words 'except to the extent that this Act as so enacted deals with the matter (directly or indirectly).' This duplication of exceptions led to uncertainty about the scope of the excluded subject matter.

1.79 A new definition of excluded subject matter is needed to avoid this. Accordingly, and consistent with the definition of excluded subject matter in new Division 2B, the bill provides a new definition of excluded subject matter in Division 2A that sets out the excluded matters expressly, rather than by cross-referencing the saved state laws. The new definition does not list the exceptions set out in paragraphs 27(2)(f), (2)(g) and (2)(j) of the FW Act because these are already covered by the general qualification that excluded subject matter does not encompass matters that the

FW Act as originally enacted deals with. In that way, the exclusions in the new definition of excluded subject matter more clearly align with section 27 of the FW Act.

Definition of referred subject matters

1.80 The Australian Council of Trade Unions (ACTU) expressed concern that the definition of referred subject matters might not encompass matters that can be included in an enterprise agreement which pertain to the relationship between the employer(s) and the employee organisation(s) (rather than the employees) that will be covered by the agreement.[77] DEEWR advised that this is not the case. Under Division 2A and proposed Division 2B of Part 1-3 states are required to refer matters that enable the Commonwealth to amend the FW Act (so far as not otherwise within Commonwealth power) in relation to the referred subject matters. This term is defined in sections 30A and proposed 30K.

1.81 The definition of referred subject matters is a broad statement of the general subject matter covered by the FW Act with a view to allowing amendment of the Act into the future without the need to secure additional references of subject matter from the states. Accordingly, the definition for the most part avoids using terms that are defined in the FW Act. Section 172 of the FW Act sets out the matters that may be included in an enterprise agreement, including:

- matters pertaining to the relationship between an employer or employers, and the employee organisation or employee organisations, to be covered by the agreement (paragraph 172(1)(b));

1.82 Paragraph 172(1)(b) authorises the inclusion of terms in enterprise agreements that relate to an employee organisation in its capacity as a representative of employees:[78]

- an enterprise agreement that is not a greenfields agreement can only cover an employee organisation if it was a bargaining representative for the enterprise agreement (ss 53(2)(a), 183(1)). An employee organisation will be a bargaining representative of an employee for an enterprise agreement if the employee is a member of the organisation and the organisation is entitled to represent the industrial interests of the employee in relation to the work performed under the agreement (section 176).
- a greenfields agreement can only cover an employee organisation with which it is made (s 53(2)(b)) and such an agreement can only be made with an organisation which is entitled to represent the industrial interests of at least one employee who will be covered by the agreement in relation to the work performed under the agreement (s 172(2)(b) and (3)(b), and definition of 'relevant employee organisation' in s 12). Before approving such an

77 ACTU, *Submission 3*, p. 9.

78 See paragraphs 675 and 678 of the Explanatory Memorandum to the Fair Work bill 2008

agreement, FWA must be satisfied that the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement (subsection 187(5)).

1.83 The phrase 'terms and conditions of employment' is broad and would encompass matters relating to an employee organisation in its capacity as a representative of employees. The phrase 'terms and conditions of employment' has been found to have a wide reach, encompassing all of the matters affecting the relationship between an employer and employee.[79]

Comparison of proposed sections 569A and 597A

1.84 In comparing proposed sections 569A and 597A, the ACTU questioned why a state or territory minister who has responsibility for workplace relations may intervene in court proceedings if he or she believes it is in the public interest of the State or Territory to do so, while the capacity of state or territory ministers to make submissions to FWA appears to be subject to an objective public interest test.[80]

1.85 DEEWR responded that proposed new sections 569A and 597A of the FW Act recognise the cooperation of states and territories in the national system and the important role that state ministers will continue to have in the national system. These provisions would extend to state ministers the same rights as the Commonwealth minister has to intervene in court proceedings (subject to a subjective public interest test) under s 569 of the FW Act, and to make a submission in a matter before FWA (subject to an objective public interest test) under s 597 of the FW Act.

1.86 If a minister intervenes in court proceedings he or she will be taken to be a party to the proceedings and a costs order may be made against him or her. Given this provision, a subjective test of what is in the public interest is considered appropriate. However, FWA may only order costs in very limited circumstances (see s 611 of the FW Act) so it is appropriate to provide for an objective test of the public interest to protect the parties to the proceeding from incurring undue costs themselves as a result of any such intervention.[81]

Conclusion

1.87 The bill received general support. It was developed in close consultation and cooperation with the states and offers the opportunity to create a fair, simple, balanced and flexible national workplace relations system for the private sector. It will provide

79 See for example Roderick v Australian Telecommunications Commission [1991] FCA 301 at paragraph 31.

80 ACTU, *Submission 3*, pp. 9-10.

81 DEEWR, *tabled documents*, 11 November 2009.

consistency, certainty of jurisdictional coverage, reduced legal complexity and reduced compliance costs. A national workplace relations system will provide administrative efficiencies and deliver savings which states can direct to other public services and it will contribute to the creation of a seamless national economy which is better able to adapt to global markets and competition. The committee majority understands that DEEWR continues to work with states on the details of their referrals and amendments may be required to the bill as a result of this process.[82]

Recommendation 1

1.88 The committee majority recommends that this bill be passed without delay.

Senator Gavin Marshall

Chair

82 DEEWR, *Submission 2*, p. 24; Mr John Kovacic, *Committee Hansard*, 11 November 2009, p. 28.

Coalition Senators' Minority Report

Introduction and Summary of Position

The *Fair Work Amendment (State Referrals and other Measures) Bill 2009* ("**the Bill**") continues the process of seeking to achieve and create a national system of workplace relations, originally commenced by the Howard Coalition Government in 2006.

The Australian Labor Party subsequently adopted this same aim, which it enunciated during the 2007 election campaign.

The advantages of having a national workplace relations system are widely known. The benefits to workplaces, particularly those that operate across State borders, are considerable and there are economic advantages for the public in general. A national system provides consistency of law and the application of that law, minimising the ability for the States to create conditions that vary from each other thereby providing certainty.

The Coalition maintains the view that Australia deserves a national system of workplace relations and to that end the Coalition is broadly supportive of the outcome this Bill seeks to achieve.

Coalition senators do, however, hold several reservations about the way in which the Bill seeks to achieve this aim. In particular, we are concerned, that in achieving a national system, the power to control and determine that system and its operation has effectively been handed to the State Governments which choose to refer their existing powers.

No consultation

The Government has made much of the consultative processes that it has followed when developing and introducing its Fair Work system. This approach is commendable and has utilised a number of processes, including the Committee on Industrial Legislation ("COIL").

Coalition senators do note, however, that in relation to this Bill there has been no such consultation. Witnesses appearing before the Committee gave evidence that the first time they saw the Bill was after its introduction into Parliament[1]. There appears to have been no subsequent formal consultation between stakeholders (including the Opposition) and the Government in relation to the content and effect of this Bill.

This has created significant difficulties for stakeholders given the tight time frames that have existed to consider the effect of, and provide views on, this Bill.

[1] Mr D Mammone, Committee Hansard, 11th November 2009 p.10.

We note that the Government has seen fit to implement a timetable which accommodated consultation through COIL for every other Bill by which the Government proposed general amendments to the federal workplace relations legislation. The rationale for the absence of consultation on this Bill is unclear to Coalition senators. We hope that it is not a sign of things to come for future legislative developments within the national workplace system.

In addition, some witnesses were concerned that this Bill be read in the context of the Inter-Government Agreement ("**IGA**") developed between the States, Territories and the Commonwealth. While a confidential copy of the IGA was provided to members of the Committee, it was not available to the public on 11th November 2009 (or before) and therefore many witnesses appearing before the Committee were missing a crucial element that would enable an appropriate assessment of the effect of this Bill. Witnesses observed that, because of this, they were effectively in the dark about the entire package of referral arrangements proposed by the Bill and the IGA.

Reference system

A reference by a State operates on the basis that industrial relations powers they currently hold will be referred, with respect to particular defined subject areas, to the Commonwealth. As it currently stands, powers held by the States relate only to those workplaces which are not covered by the existing Fair Work laws; being those non-incorporated trading entities such as sole traders, family trusts etc. This includes many small businesses.

This reference is also subject to certain exclusions, such as powers in respect to the State public service and areas of local government. These will remain within the domain of the powers retained by the States.

There are three categories of reference within the Bill, these being an *"initial"* reference, an *"amendment"* reference and a *"transition"* reference.

The *"initial"* reference is, effectively, the basic reference of State power to the Commonwealth in the first instance. This occurs via the creation of a new Division 2B at part 1-3 of the Act, which extends the definition of *national system employer* and *national system employee* to include those previously not subject to the coverage of the Commonwealth laws.

The *"amendment"* reference provides for the Commonwealth to amend laws with respect to the subject matters so referred by the States in their "initial" reference. This means that the Commonwealth will be able to amend the federal laws, with uniform application to all employers and employees in each referring state.

The *"transition"* reference is necessary as it allows for the Commonwealth to transition existing non-national system employers into the national system. This is detailed at schedule 2 of the Bill.

Coalition senators are unconcerned with the "initial" and "transition" reference concepts. We understand that these are necessary to bring the States into a national system. These references are, in simple terms, unconditional in that once a State has referred its powers they become the domain of the Commonwealth. Within the context of the Bill, they are references that are "one-off" in nature.

The "amendment" reference concept is similarly a necessary aspect to facilitate a national system. Taken at face value, Coalition senators accept the conceptual basis for this reference type and its probable necessity. However, concerns arise about this concept when considered in the context of complicated and various mechanisms proposed in the Bill for a State or States seeking to terminate initial, amendment and/or transitional references.

Termination of an Amendment Reference

Coalition senators are gravely concerned in the way that this Bill, taken together with the IGA, in essence, hands control of the Commonwealth laws and system to the States, in exchange for (and as the price of) referral of powers to the Commonwealth.

This is manifested in various mechanisms; some contained in this Bill and some arising from the Inter-government Agreement ("IGA").

We understand the proposed arrangements to be as follows:

1. A state wishing to amend or terminate its referral of powers to the Commonwealth, will give the Commonwealth not less than 6 months written notice (IGA Item 2.5). In this event, that state ceases to be a 'referring state".

2. Should all States wish to terminate their amendment reference of their powers, they can do so by proclamation of the State Governors with six months' notice, if the amendment references of the other States all terminate at the same time. In so doing, they do not cease to be 'referring states";

3. An individual State can terminate their amendment reference by proclamation of the individual State Governor with three months' notice, if the said State Governor considers that an amendment to the Fair Work Act is inconsistent with the "*fundamental workplace relations principles*". In that event, that state does not cease to be a 'referring state'; and

4. A future amendment to the *Fair Work Act 2009* will not proceed unless it is endorsed by a two-thirds majority of the referring State and Territory Governments (IGA Item 2.18).

Item 1 above
We note that *Item 1* above does not appear to be replicated in the Bill.

Items 2 and 3 above

The amendment reference termination mechanisms referred to in items 2 and 3 above are additional and different from other termination mechanisms contemplated by the Bill for initial, amendment and transition references. They introduce uncertainty and complexity. The Committee was not provided with clear evidence as to either the purpose or effect of the Bill's express provision that a state or states terminating amendment references in either of these two specific ways, did not (in so doing) forgo their status as a 'referring' state. Coalition Senators are concerned that there may be undesirable consequences of states terminating amendment references yet remaining 'referring' states, including:

- Those states are intended to retain powers under the IGA (eg to vote to veto future federal workplace relations amendments no longer covered by the package of federal laws)

- Much of the system of workplace laws covering non-constitutional corporations and their employees will continue to be administered and resourced by the Commonwealth (even though those laws will have fallen out of kilter with the then operative federal laws.)

Item 2 above

In respect of item 2 above, the Department provided evidence to the Committee that 'the six month provision is the standard provision that exists in Commonwealth referral schemes'[2]. However, it is unclear whether it is the six-month aspect **alone** in this provision, which is 'standard', and whether it is so provided in other Commonwealth referral legislation. We also note that subsection 30B(6) of the Fair Work Act envisages that a termination of reference is total in nature, representing a complete withdrawal for a referring State and does not stipulate any required time frames for such withdrawal.

Item 3 above

In the view of Coalition senators, *Item 3* proposes a number of difficulties.

Firstly, the terms of the "fundamental workplace relations principles" are particularly unclear. This lack of clarity arises from the broad nature of those principles and the potential for them to be interpreted to mean virtually anything.

Evidence before the Committee confirmed this lack of clarity with even the Department being unable to provide a definitive answer to questions about this issue. However, the Department did concede that an alteration to an associated Regulation or the terms of a Code (eg the Small Business Fair Dismissal Code) could result in the circumstances in item 3 becoming enlivened.

In short, virtually *any* endeavour to amend the Fair Work laws could be interpreted by any one State as offending the fundamental principles.

[2] Ms E Perdikogiannis, Committee Hansard, 11th November 2009 p.28.

Secondly, there is only a requirement that a particular State Governor (presumably, but not necessarily, in accordance with the wishes of the relevant state Government) "considers" that an amendment offends the principles. There is no requirement, for example, for the State Governor to be *satisfied on reasonable grounds* that an amendment offends the fundamental principles. This provision, in effect, gives the State Governors an ability to terminate an amendment reference at a whim in virtually any circumstance.

It makes a nonsense of any notion that if a state activates this termination mechanism, then the Commonwealth, in amending federal laws, must have breached a 'fundamental principle'. In fact, it makes a nonsense of a state having to be seen to justify, or proffer any reason, for termination of an amendment reference.

Thirdly, termination of an amendment reference will return workplace relations to a situation where different laws would apply to different States and, in addition, different laws within a particular State. As the submission of ACCI observes:

> *If the termination of an amendment reference is ever invoked by a State Government, this will cause confusion and unnecessary dislocation for referral employers, as non-referred employers continue to be bound by the fair work laws, but their referral counterparts do not. It also appears to indicate that State Governments are not fully committed to achieving a national system for the private sector.*[3]

Coalition senators agree with the concerns outlined by ACCI.

Fourthly, the provision allows the termination of reference ability to become a political tool for the States to control the future of the Commonwealth workplace system. Again, ACCI observes:

> *It would be unfortunate if it was ever used by States as a tool to extract concessions from the Commonwealth in modifying or refusing to modify the fair work laws in the future. And with a confidentiality clause in an IGA, we may all be none the wiser. Whilst it appears Victoria has introduced amendment legislation which would align their referral to these provisions, Victoria has not had such provisions since 1997 and this has not caused any problems to date. Whilst such action would not be supported by employers, a State which is truly concerned with future amendments to the fair work laws should withdraw from the system in toto, rather than cherry pick which parts it does or does not like.*[4]

This observation from ACCI also raises a fifth concern, being the ability for the States to "cherry pick" the parts of the Fair Work laws that it may agree with at a particular point in time. Coalition senators postulate this scenario, using the national employment standards:

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[3] ACCI Submission November 2009 p.16.

[4] ACCI Submission November 2009 p.16.

1. South Australia and Queensland refer their remaining power to the Commonwealth in accordance with the terms of the Bill as proposed;
2. The Commonwealth determines that it would like to increase the NES for Annual leave from 4 weeks to 6 weeks;
3. South Australia agrees with this amendment and chooses to not terminate its amendment reference;
4. Queensland does not agree with the amendment and terminates its amendment reference;
5. 6 weeks annual leave becomes the NES for both the Commonwealth and South Australia.

The effect of the above example becomes:

NES	**Commonwealth**	**SA**	**QLD**
Annual Leave:	6 weeks	6 weeks	4 weeks

The above confusion is exacerbated by the fact that the different NES conditions would also be different for employers *within* both South Australia and Queensland dependent upon whether or not they are considered to be national system employers (NSE) under the provisions of the Fair Work Act as it currently stands.

NES	**Commonwealth**	**SA**	**QLD**
Annual Leave:	6 weeks	6 weeks	4 weeks (6 weeks for NSE)

The above example, entirely possible under the provisions of the Bill as currently drafted, represents a situation that would create chaos and uncertainty within States and between States.

A simpler approach

A much simpler approach would be for the Bill to simply provide the States an ability to terminate their amendment reference at *any* time and for *any* reason, subject to the provision of an appropriate notice period. This dispenses with the complexity and confusion created by the Bill's array of termination mechanisms, and replicates the substance of existing provisions in the Fair Work Act.

Such an approach would provide certainty to the States about the future of the Commonwealth system, while concurrently encouraging them to refer State powers in the first instance. Significantly, it would not allow the States to "pick and choose" which refinements of the national scheme they will accept, thus avoiding the "checkerboard" effect of industrial laws which could result from the Rudd Government's approach.

The supposed "rationale" intimated to the Committee would be also be satisfied, in a manner that removes any pretence that a terminating state will do so under the guise of a legislated justification for so doing.

It substantially simplifies the Bill, both in its terms and effect. In addition, it would assist the Commonwealth to amend the Fair Work laws efficiently and effectively, in the event that circumstances warrant change.

Item 4 above

Item 4 above also creates unnecessary uncertainty for workplaces and fundamentally undermines the role of both the Commonwealth and the continued evolution of a national workplace system.

AiG's evidence presented to the Committee established that, subsequent to the introduction of the Workplace Relations Act 1996, there were many subsequent changes to the laws, the requirement for which were unforseen[5]. Should a similar circumstance arise in the future as it relates to the Fair Work laws, there would be a requirement for the States to be consulted and their approval gained, prior to the proposal or amendment being moved. This would create an unnecessary delay which would likely operate to the detriment of workplaces that require such an amendment or proposal.[6]

In a worst case scenario, the IGA seems to contemplate that referring States would have the ability to veto the proposal or amendment, undermining the role of the Commonwealth Parliament and the fundamental nature of a federal system of workplace laws.

Providing the States with the power to control the future evolution of the national Fair Work system is inherently dangerous. Not only is the role and purpose of the Commonwealth Parliament undermined, it provides control to jurisdictions who, in some circumstances, have to date created State industrial relations systems that are, at best, unworkable and, at worst, oppressive. Nowhere is this more apparent than in New South Wales, where the industrial relations system has acted as a disincentive to investment, employment and economic growth. A commonly held view is that the NSW system of industrial relations, its tribunal and its safety laws are the "ball and chain" of the NSW economy, and have directly and significantly contributed to the perilous economic position in which it now finds itself. Allowing a State government, with a record like that of New South Wales, to control national workplace laws would be a national disaster for Australia's future prosperity, economic growth and infrastructure development.

During committee proceedings it was suggested that the rationale for the "amendment referral termination" provisions comes from an attempt to achieve two outcomes for referring States. Firstly, the provisions provide encouragement for the States to refer their powers and, secondly, to provide the States with certainty about the potential for any future "mischief" that might occur to the Commonwealth laws and the effect upon them in that circumstance.[7]

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[5] Mr Smith, Committee Hansard, 11th November 2009 p.13.

[6] Mr Smith, Committee Hansard, 11th November 2009 p.15.

[7] Senator Collins, Committee Hansard, 11th November 2009, p.18.

While this might superficially appear to be a logical rationale, it raises the sobering spectre that the State Governments (even those who have signed the IGA) are not genuinely committed to achieving a nationally consistent set of workplace laws. Additionally, as noted above, it gives the States the ability to make workplace laws a political tool and encourages threats to block any amendment reference.

To this end, Coalition senators are concerned that the referral 'package' of the IGA and the Bill create new uncertainties and substantially reduces the role of the Commonwealth in shaping a workplace system over which it has primary responsibility. It is cold comfort that this aspect of the IGA is not proposed to be legislated in the Bill.

Problems with Fair Work Act 2009

Coalition senators note that there remains, in our view, a significant number of problems with the implementation of the Fair Work Act thus far.

Primarily, the so-called “award modernisation” process currently being dealt with by the Australian Industrial Relations Commission is increasingly viewed by many varying stakeholders as, at best, problematic and, at worst, bordering on farcical. The Minister for Employment and Workplace Relations has had cause, on many occasions, to intervene in this process. In the view of Coalition senators, the process has not met the expectations so vehemently promised by the Minister nor have the intentions, objects or stated aims of this process been satisfied.

That the so-called modern award system is due to commence on 1 January 2010 is of significant concern to Coalition senators, particularly given that the award modernisation process is not completed and will not be until at least December 2009. We believe that workplaces will simply not have the time they both need and deserve to appropriately understand and implement the changes required to accommodate the terms of modern awards.

The above observation is especially acute for those in the small business sector. In the context of this Bill, many of the workplaces that will become subject to the *Fair Work Act 2009* are likely to be small businesses, such as sole traders and related entities not previously captured by the Corporations powers.

A question that looms large in the mind of Coalition senators goes to whether or not it is appropriate for a large number of small private sector businesses, currently outside of the Commonwealth laws, to become subject to those Commonwealth laws and the associated system that has so far failed to meet its stated aims or live up to the rhetoric associated with its introduction.

As stated earlier, Coalition senators believe that Australia deserves a national workplace relations system. However, it is reasonable to expect that such a national system should be one

that works appropriately and without significant problems, such as those arising from the approach taken to award modernisation.

We consider that, notwithstanding our desire to facilitate building on the reforms commenced by the Howard Coalition Government in 2006, there is much to be said for ensuring that the existing system gets it right before enveloping thousands of small businesses which stand to be, in some sectors, adversely affected.

Conclusion

We reiterate our view that Australia deserves a truly national system of workplace relations. It is logical that a move to this end is necessary for a sophisticated economy such as Australia and to this end Coalition senators support the outcome this Bill seeks to achieve.

We do, however, remain gravely concerned that, in moving towards a national system, the power and role of the Commonwealth Parliament may be undermined by the States as provided in both this Bill and the associated IGA. We are concerned that the Bill as drafted introduces new complexities and uncertainties, provides scope for a future "chequerboard" application of the Commonwealth laws and allows the workplace relations system to become a political tool rather than an essential element in balancing workplace fairness, strong economic conditions and the promotion of jobs and job growth.

Additionally, there is a potential for the workplaces in small businesses to be adversely affected if they become subject to the Commonwealth laws. We should be careful to ensure that the Commonwealth laws deliver appropriate outcomes and there are valid reasons why this should occur prior to the States handing over their existing powers.

Senator Gary Humphries
Deputy Chair

Senator Michaelia Cash

Senator Mary Jo Fisher

Qualification – Senator Michaelia Cash – Western Australia

The states have the constitutional power to determine whether or not they refer any of their state based industrial relations powers to the Commonwealth. Some states have made or intend to make such a referral.

Whilst not challenging the constitutional right of those states who have made a decision to refer their powers, as a Senator for Western Australia, I support the previously stated decision of the Western Australian Government not to refer its state based industrial relations powers to the Commonwealth but rather "to work co-operatively with the Commonwealth to build a harmonised industrial relations system without handing over Western Australia's long-held, constitutionally established role and powers."

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	United Services Union
2	Department of Education, Employment and Workplace Relations
3	ACTU
4	Andrew Stewart
5	Australian Chamber of Commerce and Industry
6	Australian Industry Group
7	Unions NSW

Additional Information Received

Tabled Documents

- 11 November 2009, Canberra, ACT from the Department of Education, Employment and Workplace Relations, '*Responses by Department of Education, Employment and Workplace Relations in relation to technical matters raise in submissions*'

APPENDIX 2

Public Hearings and Witnesses

WEDNESDAY, 11 NOVEMBER 2009 – CANBERRA

- BARAGRY, Mr Ron, Legal Counsel,
  National Workplace Relations, Australian Industry Group
- BENFELL, Mr Lindsay John, Manager,
  Legal and Industrial, United Services Union
- BOWTELL, Ms Cath, Industrial Officer,
  Australian Council of Trade Unions
- CLARKE, Mr Trevor, Industrial/Legal Officer,
  Australian Council of Trade Unions
- KOVACIC, Mr John, Deputy Secretary,
  Workplace Relations, Department of Employment and Workplace Relations
- MAMMONE, Mr Daniel, Manager,
  Workplace Relations and Legal Affairs, Australian Chamber of Commerce and Industry
- PERDIKOGIANNIS, Ms Elen, Branch Manager,
  National System Legislation Team, Workplace Relations Legal Group, Department of Education, Employment and Workplace Relations
- RODDAM, Mr Mark, Branch Manager,
  Safety Net and Wages Branch, Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations
- SHELLEY, Ms Collette, Branch Manager,
  National Workplace Relations System Unit, Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations
- SMITH, Mr Stephen, Director,
  National Workplace Relations, Australian Industry Group