Chapter 2

2.1 This chapter details the key provisions and elements of the bill regarding transitional instruments that attracted comment from submitters and witnesses during the inquiry.

Treatment of existing instruments in the new system

2.2 Schedule 3, Item 2(2) sets out that the following WR Act instruments will become transitional instruments from 1 July 2009 and continue to apply:

- an award;
- a notional agreement preserving state awards;
- a workplace agreement (either a collective agreement or an ITEA);
- a workplace determination;
- a preserved state agreement (either preserved collective state agreements or preserved individual state agreements);
- an AWA;
- a pre-reform certified agreement;
- a pre-reform AWA;
- an old IR agreement; and
- a section 170MX award.

2.3 Schedule 3, Part 2 contains general rules for transitional instruments in the new system which can be summarised as follows:

- an agreement-based transitional instrument (including AWAs or ITEAs made under the WR Act, collective agreement, pre-reform certified agreement, workplace determination, section 170MX award, as well as a preserved state agreement or an old IR agreement) will continue until terminated or replaced; and

- award-based instruments (unmodernised awards, notional agreements preserving state awards (NAPSAs) and Australian Pay and Classification Scales (APCSs)) will cease operation once replaced by modern awards (Schedule 5, Item 3). While NAPSAs will continue as award-based transitional instruments, they have a cessation date of 1 January 2014 (Schedule 3, Subitem 20(1)).

2.4 In Schedule 6, Item 4, the bill establishes a process to modernise enterprise instruments. These are enterprise awards and NAPSAs derived from a state-based enterprise award. It also provides for the modernisation of certain preserved state agreements. Parties may apply to FWA by the end of 2013 to modernise and integrate

the instrument into the modern award system. If an application is not received by this time, the enterprise instrument will cease and employers and employees will be covered by any relevant modern award.[1]

2.5 Schedule 3, Item 20 deals with sunset provisions for some transitional instruments. Subitem 20(1) provides for NAPSAs to terminate on the fourth anniversary of the FW (safety net provisions) commencement day. Subitems 20(2) to 20(6) provide for the following transitional instruments that apply to non-national system employers to terminate on 27 March 2011: Division 3 pre-reform certified agreements (1997-2006 made under the conciliation and arbitration power); old IR agreements (pre-1996); and section 170MX awards (1997-2006).[2]

2.6 Schedule 3, Item 10 provides for the variation and termination of transitional instruments including providing FWA the power to vary instruments to resolve ambiguity or uncertainty.

Issues raised with the committee

Substandard agreements

2.7 DEEWR advised that transitional agreements can be terminated at any time by agreement of the parties whether or not it has passed its nominal expiry date. Once they have passed their nominal expiry date, one of the parties may seek to terminate the agreements in accordance with the rules that apply to the relevant type of instrument. So any party covered by a collective agreement-based transitional instrument may apply to FWA to terminate the agreement after the nominal expiry date and either the employee or employer may apply to FWA to terminate an individual agreement-based transitional instrument after the nominal expiry date.[3]

2.8 In particular, AWAs will continue until terminated by agreement of the parties, or, after its nominal expiry date, by the giving of 90 days' notice by either party (Schedule 3, Item 19). In addition, conditional termination agreements will allow employees whose AWAs and ITEAs have not reached their expiry date to participate in collective bargaining in their workplace (Schedule 3, Item 18) (see below).

2.9 The ACTU expressed its disappointment that the bill potentially allows substandard transitional agreements made under the WR Act to continue indefinitely, and noted the problem is particularly acute for agreements made under WorkChoices, without the involvement of unions, in the period before the Fairness Test was introduced. It informed the committee that more than 510,000 employees became

1 EM, pp. 38-39.

2 EM, p. 16.

3 DEEWR, *Submission 18*, pp. 8-9.

covered by WorkChoices agreements and this represents six per cent of the workforce.[4] In addition:

> Many, if not most, of these substandard agreements would have a nominal life of five years, meaning that the last batch of pre-Fairness Test agreements will not be able to be terminated unilaterally by employees until 6 May 2012. Even after that date, many employees on these instruments will not be aware of their right to terminate the agreement and return to the safety net conditions provided by modern awards.[5]

2.10 The ACTU argued that allowing the NES to override any transitional agreements from 1 January 2010 does not go far enough as, even with NES entitlements restored, employees on WorkChoices agreements may still be significantly worse off than under a modern award. It advocated changes to allow FWA to terminate transitional instruments in cases where they disadvantage employees compared to the modern award.[6]

2.11 Concern about the continued operation of substandard agreements was also expressed by SDA. It argued:

> The fact that these workplace agreements were made in the first place and were made with employees who would be clearly worse off under the workplace agreement is reasonably conclusive as to the total lack of bargaining power of those employees. The likelihood that such employees will be able to simply terminate their workplace agreement once it passes its nominal expiry date is extremely farfetched and fanciful.[7]

2.12 The SDA provided examples of the likely consequences of allowing disadvantageous WorkChoices agreements to continue.[8] It argued that every workplace agreement made before the commencement of the FWA which has passed its nominal expiry date should be required to pass the BOOT if the parties wish it to continue. Where it has not reached the nominal expiry date they should only be allowed to continue if they have passed an NDT or fairness test.[9]

2.13 The ASU opposed the government's decision to continue the operation of agreements, arguing that they are unfair for employees. It pointed out that many of these were not freely entered into but were imposed by employers on a 'take it or leave it' basis, and made a number of recommendations to deal with these agreements.[10]

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4 ACTU, *Submission 14*, p. 2.

5 Ibid, p. 3.

6 Ibid, p. 4; Ms Cath Bowtell, ACTU, *Proof Committee Hansard*, 30 April 2009, pp. 17-19.

7 SDA, *Submission 15*, p. 18.

8 Ibid, pp. 20-22.

9 Ibid, p. 20.

10 ASU, *Submission 8*, p. 13.

2.14 The bill provides that an employee on a substandard agreement can only have that agreement terminated prior to the nominal expiry date if the employer consents. The CPSU submitted that in its experience with Telstra, the company has been unwilling to give assurances that the company would consent to any employee's request to terminate their AWA. It therefore appears that these employees will be forced to stay on their AWAs for their full term, which may be up to five years. The CPSU added that:

> This outcome is particularly unjust where employees had no real choice about signing up to an AWA; that is the employee was only offered the job on the condition that they sign up to the inferior AWA.[11]

2.15 The CPSU advocated unilateral terminations prior to the nominal expiry date in the public interest, to cover situations where the employees are disadvantaged respective to the next applicable industrial instrument.[12]

2.16 The CFMEU was also concerned that employees would be locked into substandard arrangements for many years into the future. To highlight this, it provided a number of confidential statements to the committee from CFMEU members currently employed under AWAs and ITEAs.[13] It urged that a mechanism be adopted to terminate AWAs and ITEAs where they can be shown to undermine the safety net and advocated a sunset provision with other transitional instruments.[14]

2.17 The AMWU also submitted that the opportunities for employees to terminate unfair WorkChoices agreements are inadequate.[15] The SDA told the committee of an enterprise agreement where ' no employees at any one work site would know who the other employees under the agreement were in which case, trying to get majority support across the whole of the agreement would not be effective'.[16]

2.18 An important issue raised with the committee was the matter of continuation of substandard agreements which are a legacy of the WorkChoices regime. There was much argument that this likelihood was very strong in the case of vulnerable low-paid workers who were reluctant to confront their employers with a request for a renegotiated pay rate. Such workers were often fearful for their jobs. This has particular application in the small business sector.

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11 CPSU, *Submission 22*, p. 2.

12 Ibid, pp. 2-3.

13 CFMEU, *Submission 12*, p. 1.

14 Ibid, p. 2.

15 AMWU, *Submission 26*, p. 2.

16 Mr John Ryan, SDA, *Proof Committee Hansard*, 20 April 2009, p. 37-38.

Conditional termination

2.19 Related to the issue of renegotiating individual agreements is the problem of moving from individual to collective agreements. A provision for conditional termination will allow employees on individual agreements to participate in and benefit from collective bargaining. Where an employer is covered by an AWA or ITEA that has passed its nominal expiry date but remains in operation, an employee is entitled to participate in bargaining for a new enterprise agreement if a 'conditional termination' has been lodged with FWA under Schedule 3, Clause 18.

2.20 The ACTU argued that allowing an employee on a substandard AWA or ITEA to seek to have it replaced by an enterprise agreement is not sufficient. The employee must convince their employer to allow them to participate in collective bargaining by either agreeing to terminate the AWA or making a 'conditional termination agreement'. The ACTU pointed out that 'employers who benefit from the fact that their employees are receiving substandard conditions are unlikely to agree to terminate the AWA early, or release the employee into collective bargaining'.[17]

2.21 The ASU also agreed that the ability for employees to have their agreement replaced by an enterprise agreement in certain circumstances is inadequate as it effectively requires the agreement of the employer which is unlikely to be obtained.[18]

2.22 The ACTU pointed out the potential for employers to use conditional termination agreements to frustrate collective bargaining. 'This may be done, for instance, by seeking to flood a vote on a collective agreement with AWA/ITEA-based employees with the intention that those employees will vote in a particular way'. It suggested the addition of a note below section 238(4) to clarify that FWA would have the discretion to exclude these employees from the scope of the agreement.[19]

2.23 Noting the priority given to collective bargaining under the FW Act, Professor Andrew Stewart recommended that an enterprise agreement should automatically supersede any expired AWA or ITEAs, unless the enterprise agreement specifies otherwise. However, if the conditional termination is to be retained, then it could be limited to employees covered by unexpired AWAs or ITEAs.[20]

The problem of industrial instruments made before the FWA

2.24 Professor Stewart advised the committee of three practical problems with the failure to set an end date for transitional instruments apart from transitional instruments binding on non-national system employers and NAPSAs not based on an enterprise award:

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17 ACTU, *Submission 14*, p. 4.

18 ASU, *Submission 8*, p. 12.

19 Ibid.

20 Professor Andrew Stewart, *Submission 1*, p. 6.

- it will be necessary to refer back to the 'content rules' or 'interaction rules' that applied to such instruments under the WR Act for an indefinite period, although such rules are not currently accessible in any simple form;
- some of the old continuing instruments do not exist in any authorised form as NAPSAs, and preserved state agreements and pay scales are 'notional' rather than actual instruments that depend on complex transitional provisions in the WR Act; and
- from 1 January 2010, all transitional instruments will be subject to the NES, although there is no requirement to amend the instruments so that they reflect the NES, and there is the potential for employers and employees to be misled into thinking that certain terms of an old instrument have an effect that they do not have.[21]

2.25 Professor Stewart noted that a key objective for the government is to create simpler and clearer legislation, and recommended that:

- the remnants of the WR Act should only operate for a transitional period with all transitional instruments ceasing to have effect after 31 December 2013, or their nominal expiry date, whichever is the later; and
- FWA be empowered, on application by a party to any agreement-based instrument, to convert it to a workplace determination with effect under the FW Act.[22]

2.26 While commending the government for the improved FW Act, ACCI also drew attention to the amount of information and detail employers will need to cover:

> …the system now requires employers and their representatives to be across the detail of over 2,288 pages of regulation which covered the Workplace Relations Act 1996, association regulations, FW Act and this Bill. Additional regulations will also be promulgated that will add further detail.[23]

Publishing content and interaction rules for transitional instruments

2.27 Professor Stewart told the committee of the practical difficulties in referring to the relevant 'content' and 'interaction rules' applying prior to the FW Act. He illustrated his point with the following examples:

> In the case of 'pre-reform'(ie. Pre-Work Choices) agreements, for example, it is necessary to refer to the transitional provisions in Schedule 7 of the WR Act. These in some cases preserve the effect of selected provisions

21 Professor Andrew Stewart, *Submission 1*, pp. 3-4; *Proof Committee Hansard*, 29 April 2009, p. 29.

22 Ibid, p. 4.

23 ACCI, *Submission 7*, p. 1.

from the pre-Work Choices version of the Act, but in other instances (as with clause 3) substitute slightly different versions.[24]

2.28 The result is that there is no one place where it is possible to find the content or interaction rules for these instruments. They can only be identified by piecing together provisions from two different versions of the WR Act which is a 'challenging task for anyone not thoroughly familiar with this legislation'. In addition, the challenge with pre-reform federal awards is even more difficult.[25] Professor Stewart recommended that the Office of the Fair Work Ombudsman be required, as part of its education and advice role, to publish factsheets that set out the content and interaction rule information for each of the transitional instruments preserved by the bill.[26]

Committee view

Setting an end date for transitional instruments

2.29 The committee heard compelling evidence of the undesirable (and the possibly unintended) effects of old instruments continuing in effect indefinitely. It believes there needs to be additional mechanisms available to Fair Work Australia to protect employees from substandard agreements continuing indefinitely and to modernise transitional instruments made prior to the FW Act.

Recommendation 1

2.30 The committee majority recommends that where a transitional agreement significantly disadvantages an employee compared to the award that would otherwise apply to their employment, Fair Work Australia should have the power to:

(a) terminate the agreement (whether before or after its nominal expiry date); or

(b) vary the agreement to re-make it in the form of a workplace agreement that meets the requirements of the Fair Work Act.

Accessibility of information

2.31 The committee majority is concerned about the need to refer back to parts of the WR Act for content and interaction rules which are not easily accessible for many. It believes that the FWA should remedy this deficiency.

24 Professor Andrew Stewart, *Submission 1*, p. 5.

25 Ibid; *Proof Committee Hansard*, 29 April 2009, pp. 33-34.

26 Ibid; *Proof Committee Hansard*, 29 April 2009, p. 30.

Recommendation 2

2.32 The committee majority recommends that the content and interaction rules for each of the transitional instruments preserved by the bill be made available by FWA in a readily accessible form.

Conditional termination provisions

2.33 The committee understands the intent of conditional termination provisions to allow employees to participate in and benefit from collective bargaining. Evidence to the committee indicated potential difficulties and complexities which may frustrate this intent. Noting the priority given to collective bargaining in the FW Act, the committee majority believes that where a new enterprise agreement is put in place that it should replace any AWAS or ITEAS unless the enterprise agreement specifies otherwise.

Recommendation 3

2.34 The committee majority recommends, where a new enterprise agreement is put in place, that it replaces any AWAs or ITEAs unless the agreement provides otherwise.

Strengthening collective agreements opportunities

2.35 The next issue of concern for the committee was hearing that some employees may not be able to access the mechanisms to terminate agreements. In particular it notes the example provided by the SDA where, because of new business structures, some employees may not be able to find out who other employees are and therefore cannot terminate an agreement by majority. The committee majority was concerned to ensure that all employees are able to access the mechanisms to terminate agreements.

2.36 The committee asked Professor Stewart to check these provisions and is pleased to note that in a supplementary submission he confirmed that:

> …a single employee is able to apply to Fair Work Australia (FWA) to have an expired agreement terminated (s 225(b)). If the agreement is terminated, that will be the case for all employees covered by the agreement. But FWA must not make such a decision without considering the views of, and any impact on, all affected parties (s 226(b)).[27]

2.37 While the committee majority understands the mechanisms and protections in place to terminate substandard agreements, it is not satisfied that employees will be aware of these. It notes advice from the ACTU to this effect. The committee notes the launch of the Fair Work Education and Information program by the government on 13 April 2009 which is intended to ensure that employees, employers and small

27 Professor Andrew Stewart, *Supplementary Submission*, p. 1.

business understand the new workplace relations system.[28] The committee majority believes that as part of this program, information should be provided to employees to advise them of their rights and obligations under the relevant termination provisions and facilitate further opportunities for collective bargaining.

Recommendation 4

2.38 The committee majority recommends that, as part of the Fair Work Education and Information program, information should be provided to employees to advise them of their rights and obligations under the relevant termination provisions and facilitate further opportunities for collective bargaining.

Non-federal system employers

2.39 The ACTU expressed concern about the sunsetting of transitional instruments that apply to non-national system employers outlined above. It explained that as a result of this decision many employees will lose important rights, entitlements and protections that they had under the federal system. It particularly affects employees in areas that have traditionally been regulated by the federal system and for whom there is no alternative state-based safety net. Employees of Aboriginal hostels covered by a federal award based on s51(xxxv) are an example of workers who could be left without a safety net from 2011. The ACTU noted that there is no effective mechanism for such employees to transition back into the state system and submitted that this should not just be a matter which is left up to the states.[29]

2.40 In addition, the ACTU noted that the policy creates uncertainty for employees working in businesses which are not clearly in one system or the other, such as those working in the social and community services sector. It submitted that the bill should allow parties to an interstate industrial dispute to participate in the federal industrial relations system to help them settle their dispute, and that the remaining provisions of the FW Act could be extended to these parties 'as furthering the settlement of the original dispute and preventing future disputation'.[30] This view was supported by the ASU which noted that the status of local government and social and community services sector employees is an urgent transitional issue that must be addressed quickly.[31]

2.41 This view was also supported by the CPSU-SPSF Group which submitted that the bill should include the ability for non-federal system employers or employees to

28 The Hon Julia Gillard MP, Minister for Employment and Workplace Relations, Media Release, 'Launch of Fair Work Education and Information program', 13 April 2009.

29 Ms Cath Bowtell, ACTU, *Proof Committee Hansard*, 30 April 2009, p. 17.

30 ACTU, *Submission 14*, p. 5.

31 ASU, *Submission 8*, pp. 17-18; Ms Linda White, ASU, *Proof Committee Hansard*, 29 April 2009, pp. 12-13.

apply to join the federal system by the creation of new interstate industrial disputes pursuant to s51 (xxxv) of the constitution. The CPSU-SPSF Group explained its view that the corporations power should be supplemented by a limited reliance on the conciliation and arbitration power to permit non-federal system employers or employees to serve logs of claim, create interstate industrial disputes and become part of the federal system during the transitional period and beyond.[32]

2.42 The NFF advised the committee that the vast majority of farm employers are not constitutional corporations and rely on the existing transitional provisions contained in Schedule 6 of the WR Act. It commended the government for retaining Schedule 6 awards. It suggested that unincorporated new members of those organisations should also be bound by the continuing transitional awards.[33] The NFF reminded the committee that the incorporation of farm businesses to achieve eligibility for national coverage is not cost effective and that farm employers are reliant on the extent of state referral of powers or other mechanisms to achieve harmonisation.[34]

Committee view

2.43 The committee majority notes that the government is engaged in further discussions with the state governments concerning their approaches to the development of a national system.[35] The second transitional and consequential bill will deal with amendments that arise from any state referrals of power that have been completed by that time.

Effect of transitional instruments on state and territory laws

2.44 Professor Stewart recommended an amendment to cover an apparent omission on how transitional instruments interact with state and territory laws.[36] This lack of clarity was also identified by the AiG in its submission.[37]

Recommendation 5

2.45 The committee majority recommends that the government clarify the interaction of transitional instruments with state and territory laws.

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32 CPSU-SPSF Group, *Submission 6*, p. 4.

33 NFF, *Submission 31*, p. 6.

34 Ibid, p. 5.

35 Hon Julia Gillard MP, Minister for Employment and Workplace Relations. Media Release, 'Communique from Australian, State, Territory and New Zealand Workplace Relations Ministers' Council', 3 April 2009.

36 Professor Stewart, *Submission 1*, p. 6.

37 AiG, *Submission 4*, p. 7.

Outworkers

2.46 As with the Fair Work Bill the committee desires to ensure that protections for vulnerable workers in the outworker industry are in effect and their conditions are not diminished. It outlines a number of issues regarding outworkers below and in some areas, recommends specific amendments to address them.

Application of the modern award

2.47 The Textile Clothing and Footwear Union of Australia (TCFUA) pointed out that on 1 January 2010 an enterprise operating according to a workplace agreement made under WorkChoices will no longer be bound by the outworker terms of an award or by any terms in respect of outworkers in an agreement. It explained that this is because Clause 28 of Schedule 3 provides that, while a workplace agreement, workplace determination, preserved state agreement, AWA or pre-reform AWA applies, then a modern award will not apply. Therefore, in relation to the above agreements, the outworker terms of the Textile, Clothing, Footwear & Associated Industries Award 2010 (TCF Award) will not apply.[38]

2.48 Further, Section 29(3) provides that if a modern award containing outworker terms comes into operation then any previous award containing such terms will cease to apply to an outworker entity. Awards containing outworker terms, including the Clothing Trades Award 1999, will no longer apply to corporations. Therefore, where a collective agreement or AWA made under WorkChoices is in operation, from 1 January 2010, the outworker terms of neither existing awards or the TCF Award will apply.[39]

2.49 The TCFUA argued that current awards contain certain protections in relation to minimum terms, conditions of employment and ensuring the transparency of the supply chain. It advocated that Clause 28 of Schedule 3 be amended to ensure that all outworker terms of the modern TCF Award apply to workplace agreements concluded pursuant to WorkChoices.[40] This action was supported by the ACTU[41], FairWear Campaign[42] and Asian Women at Work.[43]

38 TCFUA, *Submission 13,* p. 1.

39 Ibid, pp. 1-2.

40 Ibid, p. 3.

41 ACTU, *Submission 14*, p. 4.

42 FairWear Campaign, *Submission 29*, p. 1.

43 Asian Women at Work, *Submission 30*, p. 4.

Recommendation 6

2.50 The committee majority recommends that Clause 28 of Schedule 3 be amended to ensure that all outworker terms of the modern TCF Award apply to all workplace agreements.

Protection of outworker terms of modern award

2.51 Section 57A of the FW Act introduces the concept of 'designated outworker term' (defined in section 12) and provides that these terms cannot be excluded by virtue of the operation of an enterprise agreement. Section 200 allows for other outworker terms of a modern award (non-designated outworker terms) to be excluded by an enterprise agreement provided the enterprise agreement provisions do not disadvantage an employee in any respect when compared with the terms of a modern award.

2.52 The definition of 'designated outworker term' does not include terms of the Textile, Clothing, Footwear and Associated Industries Award 2010 vital to the transparency of the supply chain, including with respect to:

- making, retention and filing of lists with the Register [D.2.3][44] which enables the union to track work along the supply chain and is crucial to transparency;
- observance of award [D.6.1], which is important for protection against conduct that hinders, prevents or discourages observance of the award; and
- incidental terms, for example, definitions and boards of reference, which are important to the operation of other terms.

2.53 Further, the definition of 'designated outworker term' does not include various minimum terms, which should not be modified because of the risk of abuse, including:

- time standards [D.4.4], necessary to maintain consistent, industry wide method of calculation to prevent undermining of minimum wages;
- time of payment of wages and details required [D.4.5], as once permitted it is open to risk of abuse, and the period should be set in order to provide certainty for outworkers of receipt of payment;
- provision of materials at no cost to outworker [D.4.6], an obligation which should not be subject to negotiation because it will permit minimal increases in wages to compensate in circumstances where the materials required will outweigh the increase in wage, and as different jobs require varying amounts of materials it will be impossible to assess the benefit or detriment to the outworker overall;
- stand down [D.4.7], where this clause provides for the making and retention of records relating to the stand down and the provision of the record to the

44 Clause in the award.

union, so that even where the union is not covered by the enterprise agreement, it may still monitor the abuse of the stand down provision; and

- extension of remaining award terms [D.4.8] (subject to those listed which do not apply), which permits the picking apart of the award and the undermining of the safety net in respect of outworkers.

Recommendation 7

2.54 The committee majority recommends the following inclusion as an amendment to section 12 of the FW Act:

'Designated outworker term' of a modern award, enterprise agreement, workplace determination or other instrument, means any of the following terms, so far as the term relates to outworkers in the textile, clothing or footwear industry:

(a) a term that deals with the registration of an employer or outworker entity;

(b) a term that deals with the making and retaining of, or access to, or filing of, records about work to which outworker terms of a modern award apply;

(c) a term imposing conditions under which an arrangement may be entered into by an employer or an outworker entity for the performance of work, where the work is of a kind that is often performed by outworkers;

(d) a term relating to the liability of an employer or outworker entity for work undertaken by an outworker under such an arrangement, including a term which provides for the outworker to make a claim against an employer or outworker entity;

(e) a term that requires minimum pay or other conditions, including the National Employment Standards, to be applied to an outworker who is not an employee;

(f) a term that deals with observance of terms of an award;

(g) a term that deals with time standards;

(h) a term that deals with payment of wages;

(i) a term that deals with provision of materials;

(j) a term that deals with stand down of outworkers;

(k) a term that deals with the application of further award terms;

(l) terms that are incidental to any of the above terms; and

(m) any other terms prescribed by the regulations.

Enforcement of enterprise agreement made with outworkers

2.55 Section 200 of the FW Act permits outworker terms of a modern award which are not designated outworker terms to be included in an enterprise agreement. In the circumstances where the TCFUA is not covered by the enterprise agreement, a real question arises as to the enforcement of these terms of the enterprise agreement. Section 539 must be amended to provide that in such circumstances the TCFUA may enforce the enterprise agreement.

Recommendation 8

2.56 The committee majority recommends the following inclusion as an amendment to section 539 of the FW Act:

Standing, jurisdiction and maximum penalties

Item	***Column 1*** ***Civil remedy provision***	***Column 2*** ***Persons***
4	50 (other than in relation to a contravention of an outworker term in an enterprise agreement)	
5	50 (in relation to a contravention of an outworker term in an enterprise agreement)	(a) an employee; (b) an employer; (c) an employee organisation which is entitled to represent the industrial instruments of the outworker to which the enterprise agreement concerned applies; (d) an inspector

Application of NES to all workers (sections 61, 60; amendment: 57A)

2.57 Sections 61 and 60 of the FW Act provide that the NES only apply to employees. This excludes non-employee outworkers. In circumstances where it is widely acknowledged that outworkers are employed under sham contracting arrangements and are amongst the most vulnerable workers in the country, it is untenable that so called non-employee outworkers be denied basic minimum entitlements.

Recommendation 9

2.58 The committee majority recommends the following amendment to section 60 of the FW Act:

In this part, 'employee' means:

(a) a national system employee,

(b) an outworker

and 'employer' means a national system employer.

Definition of outworker entity

2.59 The term ‘outworker entity’ is misleading as it suggests that outworkers are engaged by the entity. Pursuant to the terms of the definition this is plainly not the case. However, any award and legislative obligations imposed on outworker entities will likely be read by employers as having no application to their business if they do not engage outworkers. As outlined above, as soon as work is given out, award obligations apply regardless of whether or not outworkers are engaged to do the work.

Recommendation 10

2.60 The committee majority recommends that in section 12 of the FW Act the term 'outworker entity' be replaced by 'TCF entity'.

TCF right of entry- section 483A

2.61 Subdivision AA of Part 3-4 of the FW Act provides a specific right of entry relating to TCF outworkers. It provides for right of entry in the following circumstances:

1. (a) contravention of the Act, Fair Work Instrument (inc Award) that (b) affects/relates to outworker (c) who is on the premises and (d) where the permit holder has a reasonable suspicion of the contravention (s 483A(1))

2. (a) contravention of a designated outworker term (b) that relates to an outworker (s 483A(2))

3. (a) contravention of Act, Fair Work Instrument (inc Award) that (b) affects/relates to an outworker (c) where permit holder has reasonable suspicion (483D)

2.62 The regime is predicated upon being able to identify an outworker. This means that in the case of sweatshops, the TCFUA will need a member in order to check the pay and conditions applying to sweat shop workers (TCF right of entry regime will not apply in these circumstances). It also means that, in the case of an inspection of premises using the designated outworker terms right of entry, where it is discovered that work is being given out, no access will be permitted to documents relating to minimum wages and conditions (not being within the definition of designated outworker term). There is no means under any of the right of entry

provisions for access to these documents where these are not kept by an outworker themselves.

Recommendation 11

2.63 The committee majority recommends the following inclusion as an amendment to section 483A of the FW Act:

(1) A permit holder may enter premises and exercise a right under section 483B or 483C for the purpose of investigating a suspected contravention of this Act, a term of the Textile, Clothing Footwear and Associated Industries Award 2010, or a term of an enterprise agreement, workplace determination or FWA order (where the Textile, Clothing Footwear and Associated Industries Award 2010 covers the employee or outworker), that relates to, or affects, an employee or outworker:

(a) whose industrial instruments the organisation is entitled to represent; and

(b) who performs work on the premises.

Definition of affected employer

2.64 Section 483B of the FW Act outlines that an 'affected employer' must allow access to documents when a union official is on the premises. A denial of an employment relationship will prevent access to documents. The definition of outworker in section 12 recognises so called non-employee outworkers, however the provisions do not provide the union with access to documents relevant to his or her engagement.

Recommendation 12

2.65 The committee majority recommends the following inclusion as an amendment to section 483B of the FW Act:

Meaning of 'affected person'

(1) A person is an affected person, in relation to entry onto premises under this Subdivision, if:

(a) the person employs or engages a TCF employee or a TCF outworker whose industrial interests the permit holder's organisation is entitled to represent; and

(b) the TCF employee or TCF outworker performs work on the premises; and

(c) the suspected contravention relates to, or affects, the TCF employee or TCF outworker.[45]

National Federal Legislation

2.66 The government has committed to introducing national legislation to protect outworkers which is based on best practice state legislation. The three main components of this legislation are:

- deeming of all outworkers as employees;
- recovery of money by outworkers along the supply chain; and
- mandatory codes of practice for industry

2.67 The committee majority notes that these measures are not contained within the FW Act or the current bill. They remain critical aspects of legislation to ensure the protection of outworkers and should be legislated as a matter of urgency.

Access to low-paid bargaining stream

2.68 The TCFUA noted that Clause 22 of Schedule 7 provides that the reference in section 263(3) of the bill to 'enterprise agreement' is to be read so as to include reference to a collective agreement-based transitional instrument. It pointed out that the definition of collective agreement-based transitional instrument in Clause 2(3) of Schedule 3 will severely limit access to the low-paid stream and argued:

> It cannot be contended that in circumstances where an enterprise in the low paid sector has not had an enterprise agreement in place for some time that workers have sufficient bargaining strength such that they do not require the assistance of the low paid stream.[46]

2.69 The TCFUA provided examples of companies in their sector which have not had an enterprise agreement in many years and argued their workers should not be prevented from accessing the low-paid stream where they are otherwise eligible.[47]

2.70 It recommended that the definition of 'enterprise agreement' for the purposes of section 263(3) of the bill be confined to enterprise agreements concluded pursuant to the Fair Work Act and Clause 22 of Schedule 7 should be amended accordingly.[48]

2.71 This was supported by the SDA which also noted the intention of Clause 22 of Schedule 7 to exclude any employer who has ever been covered by a collective agreement-based transitional instrument. The SDA recommended that in the event that

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45 This will require amendment of other references of 'affected employer' to 'affected person' throughout the division.

46 TCFUA, *Submission 13*, p. 4.

47 Ibid.

48 Ibid.

Clause 22 of Part 5 of Schedule 7 is not deleted, it should provide that where s263(3) of the FWA would be triggered solely on the basis that the employer had previously been covered by a collective agreement-based transitional instrument, then FWA should have the discretion to either grant or refuse the making of a low-paid workplace determination, having considered all the circumstances.[49]

2.72 The ASU also argued that the additional limitation imposed by Clause 22 of Schedule 7 is inappropriate as the agreement may:

- be unfair and have been imposed on the employees during the WorkChoices period;
- have long passed its nominal expiry date;
- have been made a long time ago.[50]

2.73 The ASU and the ACTU also submitted that this provision will encourage some employers to seek to make agreements between now and 30 June 2009 to ensure there is no possibility of a low-paid determination applying to them in the future.[51]

2.74 The ACTU agreed that employers who were covered by a collective agreement quite some years ago should not be excluded. It noted that the provision includes employers who negotiated single-issue agreements but have never been party to a comprehensive workplace agreement and provided the following example:

> Just one example is the Oroton group. In 1992, the employer was facing financial difficulties. The award required the employer to negotiate a shorter working week with the LHMU, in order to avoid redundancies. The result was the Oroton Leather Goods Pty Ltd Industrial (Hours of Work) Agreement 1992, which commenced on 29 October 1992 and ceased operating on 18 December 1992 – a period of six weeks.[52]

2.75 To address these issues, the ACTU submitted that FWA should have a discretion to ignore the effect of agreements initiated by employers with the intention of avoiding the low-paid bargaining stream.[53]

Committee view

2.76 The committee majority is concerned that employees are not unfairly excluded from accessing the low-paid bargaining stream in circumstances where

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49 SDA, *Submission 15*, pp. 28-29.

50 ASU, *Submission 8*, p. 16; Ms Linda White, ASU, *Proof Committee Hansard*, 29 April 2009, p. 12.

51 ASU, *Submission 8*, p. 17; ACTU, *Submission 14*, pp. 11-12.

52 ACTU, *Submission 14*, p. 11.

53 Ibid, p. 12.

unfair agreements were made, or where they were made a long time ago or rushed through before 30 June by employers in an attempt to avoid the determination.

Recommendation 13

2.77 The committee majority recommends that FWA be given the discretion to grant or refuse a low-paid workplace determination after considering all the circumstances in which they were made.

Interaction of transitional instruments and NES

2.78 The Australian Fair Pay and Conditions Standard will continue to apply to national system employees until 31 December 2009 (Schedule 3, Item 22). From 1 January 2010, the National Employment Standards (NES) and minimum wages will apply to all national system employees, including those covered by instruments made before commencement of the new system.

2.79 A provision in a transitional instrument (an instrument made before 1 July 2009, or an ITEAs made before 31 December 2009) will have no effect if it is deficient when compared to the NES under the 'no detriment rule' (Schedule 3, Item 23). The Minister has clarified that this provision:

> …means that from 1 January 2010, Australian employees who were required to make 'take it or leave it' substandard Australian Workplace Agreements under Work Choices will receive the benefit of the ten minimum National Employment Standards where their current agreement contains inferior conditions and minimum 'safety net' wages.[54]

2.80 Under Schedule 9, Item 14, FWA will have the scope to make a determination to 'phase-in' the effect of increases in base rates of pay if it is satisfied this is necessary to ensure the ongoing viability of the employer's enterprise.

Redundancy pay

2.81 Schedule 4, Item 5 sets out the general rule that an employee's service with an employer before the FW (safety net provisions) commencement day counts as service for the purpose of determining the employee's NES entitlements, except redundancy pay. Subitem 5(4) of the bill provides that an employee's service prior to 1 January 2010 does not count for the purpose of accruing an entitlement to redundancy pay, if, the terms and conditions of employment that applied immediately before that date, do not provide for an entitlement to redundancy pay. The ACTU pointed out that this provision essentially ratifies the effect of workplace agreements that purport to stop the employee accruing redundancy pay entitlements for the period up to 31 December 2009. It explained:

54 Hon Julia Gillard MP, Minister for Workplace Relations, Second Reading Speech, *House of Representatives Hansard*, 19 March 2009, p. 7.

> If those workplace agreements had fully compensated employees for the loss of redundancy rights, then this provision would merely operate to prevent 'double dipping', and would be uncontroversial. However, the reality is that most of the agreements made in the post-Work Choices period removed employees' redundancy rights without compensation. For example, as outlined above, in the retail and hospitality sectors, 75% of non-union Employee Workplace Agreements and 64% of AWAs excluded the employee's entitlement to redundancy pay – with no, or no significant, compensation.[55]

2.82 The ACTU submitted that to address this issue, Schedule 4 Item 5(4) should be deleted and instead the bill should provide employers with the right to apply to FWA for an order that time served by an employee under a workplace agreement not count towards the calculation of redundancy entitlements under section 119(2) of the FW Act. This should also apply where the agreement removed the right to redundancy pay and where the employer can show that the employee was fully compensated for that loss.[56]

2.83 While supporting the intention of the provision, Master Builders Australia pointed out that, in the building and construction industry, the application of Clause 16 of the National Building and Construction Industry Award is currently before the full Federal Court. In addition, the rule may not cover service in relation to accruals under 'industry specific redundancy schemes' which fall outside the NES. It recommended that the provision ensure the exclusion from Subitem 5(1) which encompasses industry specific redundancy schemes.[57] The CFMEU responded to the MBA evidence regarding redundancy provisions and stated that they believed the concern about double counting would not be realised.[58]

2.84 The Chamber of Commerce and Industry, WA, told the committee that in the mining industry it is common for redundancy provisions to be rolled into an hourly rate. So despite the fact that an employee is receiving a monetary benefit in lieu of the entitlements, the no-detriment rule in the provisions of section 119 will take effect. It advocated that agreement-based instruments should continue until they are replaced or terminated without the requirement of the NES interaction. Alternatively FWA should determine that a provision of the NES has no effect while the agreement exists.[59]

2.85 The committee majority notes that under Schedule 3, Item 26, a party to a transitional instrument may apply to FWA to clarify interaction with the NES.

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55 ACTU, *Submission 14*, p. 6.

56 Ibid; Mr Tom Roberts, CFMEU, *Proof Committee Hansard*, 30 April 2009, p. 11.

57 MBA, *Submission 5*, pp. 10-11.

58 Mr Dave Noonan and Mr Tom Roberts, CFMEU, *Proof Committee Hansard*, 30 April 2009, pp. 10-11.

59 Chamber of Commerce and Industry, WA, *Submission 2*, p. 12.

Modern award transitional arrangements

2.86 Schedule 5, Item 6 provides for FWA to conduct an interim review of modern awards after two years of operation from 1 January 2012, ahead of the regular four-yearly review cycle. This will allow any operational difficulties to be identified and addressed quickly.[60] The EM notes that the interim review will enable FWA to examine individual flexibility clauses in modern awards to ensure they are being used for the purpose intended. This addresses a concern raised by the committee majority in its report on the Fair Work Bill[61] and it is pleased to note the inclusion.

2.87 The NSW Government suggested that there would be merit in allowing FWA to have the capacity to review all transitional arrangements in modern awards to determine whether they are operating effectively and fairly.[62]

Unintended consequences

2.88 Outside the initial two year review, witnesses were concerned that, given the complexity of the process, there should be additional scope to address any unintended consequences arising from the award modernisation process.[63] The committee notes the provision to resolve ambiguity but beyond that believes there is a need for a mechanism to address any genuine unintended consequences such as the omission of a particular classification or the failure to set a pay rate for a classification, without opening the floodgates to grievances about the process and its outcomes. The committee asked Professor Stewart to investigate this issue. In a supplementary submission the committee was reassured to note his advice that:

> …there is indeed scope to deal with such issues. Section 160 allows FWA to vary a modern award, not just to resolve any ambiguity or uncertainty, but to 'correct an error'. In addition, s 157(1) confers a general power to vary modern awards, wherever that variation is 'necessary to achieve the modern awards objective' set out in s 134.[64]

2.89 In response to concerns about award modernisation and questions from the committee, witnesses said that the place to ensure award modernisation issues are addressed is through the award modernisation process.[65]

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60 Hon Julia Gillard MP. Minister for Workplace Relations, Second Reading Speech, *House of Representatives Hansard*, 19 March 2009, p. 9.

61 Senate Education, Employment and Workplace Relations Committee, Report on the Fair Work Bill 2008 [Provisions], 27 February 2009, pp. 36-38; EM, p. 33.

62 NSW Government, *Submission 24*, p. 3.

63 For example see Mr Christopher Platt, AMMA, *Proof Committee Hansard*, 29 April 2009, p. 2, 5-6.

64 Professor Andrew Stewart, *Supplementary Submission*, pp. 1-2.

65 Professor Andrew Stewart, *Proof Committee Hansard*, 29 April 2009, p. 31; Ms Cath Bowtell, ACTU, *Proof Committee Hansard*, 30 April 2009, p. 23.

2.90 The committee notes a particular unintended consequence identified by the ASU whereby the AIRC has determined that, in the modern Clerks – Private Sector Award 2010 at a salary of $44,000, these employees are not entitled to certain award protections.[66] The original intention was that, in the interests of flexibility, modern awards would not apply to employees earning over $100,000, although they would still be covered by the NES. The committee majority was concerned to hear that at half this salary, clerks suffer a loss of protections such as access to dispute resolution procedures, consultation regarding significant change, shift penalties and no right of access to a copy of the award. The committee majority considers that the AIRC decision conflicts with government policy which makes it clear that only those employees earning over $100,000 should be exempted from award protections and believes this issue should be addressed.

Recommendation 14

2.91 The committee majority recommends that the Minister amend the award modernisation request to ensure that the AIRC refrains from depriving employees of modern award protections where their salary is under the $100,000 threshold in line with government policy.

Take home pay orders

2.92 Schedule 5, Item 9 enables FWA to remedy a reduction in take-home pay that has resulted from award modernisation for one or more employees or outworkers. This will be known as a 'take-home pay order' and the scope will be tightly constrained.[67] The order can only be made where:

- there is an actual reduction in take-home pay – if award rates fall, but an employee's pay does not decline (because pay is maintained by their employer), an order cannot apply; and
- award modernisation is the operative or immediate reason for a reduction in take-home pay.[68]

2.93 The intention is to allow FWA to deal with cases in which an employee suffers a reduction in their take-home pay, for working the same hours or performing the same quantity of work, due to the award modernisation process.[69] However, Subitem 10 (1) provides that an order would not be made if FWA is satisfied that the modernisation-related reduction is minor or insignificant or the employee has been adequately compensated in other ways for the reduction.[70]

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66 Ms Linda White and Mr Keith Harvey, ASU, *Proof Committee Hansard*, 29 April 2009, pp. 16-17.

67 EM, p. 33.

68 Ibid.

69 EM, pp. 33-34.

70 EM, p. 35.

2.94 The ACTU raised a number of concerns regarding take-home pay orders, namely:

- the orders only remedy financial forms of disadvantage and do not compensate employees for non-financial forms of disadvantage such as loss of control over rosters and working hours and submitted that FWA should be able, in appropriate cases, to make orders remedying these forms of disadvantage. This was supported by the ASU[71] and Asian Women at Work[72];
- the orders are only available if the employee remains in the same or comparable position after 1 January 2010, and an award-dependant employee may be worse off as a result of a promotion as award modernisation reforms are to be phased in over five years and many employee's jobs are likely to change through promotion and job restructure;
- although it would be a breach of the general protections provisions, the bill should make it clear that it is unlawful for an employer to demote or dismiss an employee because of award modernisation or because they seek a take-home pay order; and
- the link between award modernisation and a loss of take-home pay will be difficult to prove in many instances and submitted that the burden of proof should fall on the employer to show that any loss of pay was not attributable to award modernisation.[73]

2.95 The ASU also raised the following concerns with take-home pay orders:

- the provisions only relate to current award-covered employees employed on 1 January 2010 whereas those engaged on 2 January may be permanently disadvantaged;
- employees must remain in the same or a comparable position with the employer so if they are transferred to a non comparable position or go to work for another employer but is otherwise still covered by the modern award, they can suffer disadvantage;
- an employer may make lawful changes such as new rostering arrangements;
- employees may be able to obtain only one take-home pay order but their circumstances may change and require further consideration and a new order or orders;
- the protection offered does not take into account: reductions in the level of disadvantage by a new employer commencing operation after 1 January; the reduction in the level of the safety net which will affect the next round of

71 ASU, *Submission 8*, p. 8.

72 Asian Women at Work, *Submission 30*, p. 3.

73 ACTU, *Submission 14*, pp. 7-8; Ms Cath Bowtell, ACTU, *Proof Committee Hansard*, 30 April 2009, p. 17.

bargaining; and loss of non-quantifiable protections such as the loss of access to dispute settling procedures.[74]

2.96 The ASU emphasised that employees will suffer non-financial losses which cannot be addressed by a take-home pay order including:

- the extension of ordinary hours of work to include Saturday morning work as the 25 percent loading does not compensate employees for having to work unsocial hours on weekends;
- employers can roster employees for periods of work over extended spreads of hours for which penalties used to be paid;
- employees paid above the exemption rate in the Clerks – Private Sector Award will no longer have access to even limited dispute settling processes as they are exempted; and
- casual employees may have limited or no access to such protections depending on how their employment is structured.[75]

2.97 Many of these points were also made by the Qld Council of Unions.[76] While welcoming the orders, the NSW Government noted that it will be important to monitor the operation of these provisions, particularly where FWA is satisfied that the employee has been adequately compensated in other ways and therefore declines to make an order. There is a need to be assured that the intention of the provision is achieved.[77]

2.98 On the other hand employers have criticised the take-home pay orders as 'one sided', claiming they will result in increased labour costs for employers which is contrary to the Minister's award modernisation request. Restaurant & Catering Australia submitted that, given the direction in the award modernisation request, the bill should have a reciprocal provision for employer costs.[78] It also suggested that the bill should provide the capacity to defer any cost increases to the end of the transitional period.[79] ACCI took this a step further, suggesting a number of additional limitations on take-home pay orders.[80]

2.99 DEEWR responded to these concerns:

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74 ASU, *Submission 8*, pp. 8-9; Ms Linda White, ASU, *Proof Committee Hansard*, 29 April 2009, p. 12.

75 Ibid, pp. 9-10.

76 Qld Council of Unions, *Submission 3*, pp. 3-4.

77 NSW Government , *Submission 24*, p. 4.

78 Also supported by NFF, *Submission 31*, p. 7; ACCI, *Submission 7*, p. 17; and Australian Business Industrial, *Submission 20*, p. 2.

79 Restaurant & Catering Australia, *Submission 11*, pp. 9-10.

80 ACCI, *Submission 7*, pp. 20-21.

> The creation of new modern awards necessarily involves the alignment of current terms and conditions applying across the states to a new standard. The scope to phase in modern award provisions over five years ensures that employers have access to an appropriate adjustment period. The commission will include provisions within modern awards that provide for transition to the new industry standard.[81]

Committee view

2.100 The committee received various complaints and concerns about the award modernisation process and its outcomes as well as recognition of its work so far on this mammoth task. The committee majority notes that this is a process being undertaken by the AIRC. It emphasises that the process is continuing and the next important step is the creation of transitional provisions. The committee majority encourages organisations to participate in the process established by the AIRC to propose transitional provisions.[82]

2.101 However, the committee majority also notes that employers have been urging for some time for a rationalisation of awards to address their number and complexity. This is now occurring and should result in changes benefiting WorkChoices employees paid at the lowest possible base and who now have ground to make up. It is a convenient argument for employers to use that now is not the time to be putting in place reforms. For instance, the committee notes the response by the LHMU to the RCA claims in which it is pointed out that the employer group's submission overstates the effect of award modernisation for restaurants in some states and ignores the benefits accruing to employers in other states.[83] The committee majority also notes the examples provided by the SDA of employers obtaining advantage through the award modernisation process.[84]

2.102 The committee majority also notes that the scope for take-home pay orders will be tightly constrained. The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* allows for any differences between current state award conditions and the new federal standard to be phased in over five years. This will provide employers with a lengthy adjustment period in which to plan for a new standard.

2.103 The committee majority believes there is a need to emphasise the obvious: that the take-home pay orders protect only the take-home pay of an employee. All other matters such as rostering and spread of hours[85] are not included and the

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81 DEEWR, *Proof Committee Hansard*, 30 April 2009, p. 26.

82 Initial submissions on transitional arrangements for the Priority and Stage 2 awards are due to the AIRC by 29 May 2009.

83 Workplace Express, 'RCA claims overblown, says LHMU', 22 April 2009.

84 Mr John Ryan, SDA, *Proof Committee Hansard*, 20 April 2009, pp. 35-36.

85 For example see Ms Linda White, ASU, *Proof Committee Hansard*, 29 April 2009, pp. 11-12.

committee is concerned about the potential for non-financial disadvantage which can be just as serious for employees as financial disadvantage.

Recommendation 15

2.104 The committee majority recommends that FWA should be able, in appropriate cases, to make orders remedying significant non-financial disadvantage.

Modernisation of enterprise awards

2.105 Schedule 6, Item 4 of the bill provides for a process to modernise or terminate existing enterprise awards.

2.106 The ACTU noted that while FWA has the discretion to terminate inferior enterprise awards and/or refuse to make a new modern enterprise award on substandard terms, the bill does not prohibit substandard enterprise awards. It submitted that FWA should be directed to terminate enterprise agreements that are substandard and should be prohibited from making modern enterprise instruments that are inferior to the modern award that would otherwise apply.[86]

2.107 The ACTU were also concerned that the bill tolerates a double standard in relation to the treatment of franchises. It pointed out that, for the purposes of bargaining, the presumption is that franchises are not running a single enterprise and franchisees must apply to be treated as a single business by applying for a 'single interest employer declaration'. However, regarding the safety net, franchises are treated as a single enterprise and may be covered by a single enterprise award. It informed the committee that the major fast food chains have hundreds of franchises which together employ around one third of the sector and:

> Most of these employees are covered by enterprise awards that are inferior to the general award. For example, the basic wage at McDonalds in Victoria is only $14.18 per hour, compared to $15.86 under the general award – a discount of 11 %. On Sunday's, the minimum adult wage at a McDonalds restaurant is $15.50 compared to $27.76 at other fast food establishments – a discount of 44%.[87]

2.108 The ACTU explained that this is a disincentive for enterprise bargaining and submitted that enterprise awards should be restricted to closely linked employers.[88]

Definition

2.109 The SDA expressed concern that the bill extends the definition of an enterprise award to include awards that apply to franchise systems or parts of a

86 ACTU, *Submission 14*, p. 8.

87 Ibid, p. 9.

88 Ibid; Mr Joel Fetter, ACTU, *Proof Committee Hansard*, 30 April 2009, p. 22.

franchise. It pointed out that franchise systems predominate in the fast food industry and it has the most franchise brand specific awards.[89] This change means:

> …that employees of an employer affected by the extended definition, who today can aspire to be covered by the Modern Fast Food Award determined by the Australian Industrial Relations Commission and effective from 1 January 2010, will be denied this by the terms of this Bill.[90]

2.110 The SDA also submitted that the inclusion of franchise system awards in the definition of enterprise awards is at odds with the provisions of the FWA which treat collective agreements made in relation to a franchise system as multiple employer agreement making. The SDA argued that the awards which the fast food industry seeks to be considered as enterprise awards were never intended to be awards in the usual sense of the term as each of the existing fast food industry brand specific awards was made as an enterprise agreement.[91]

2.111 Further, the SDA argued that the reason some employers wish to retain their brand specific awards is that they have a package of wage rates and terms and conditions that are lower than the same package in the fast food industry modern award.[92]

2.112 The SDA recommended that should awards applying to franchises be treated as enterprise awards, the definition of an enterprise award-based instrument should be amended so that only those existing awards which apply to the whole of a particular franchise should be considered an enterprise award.[93]

2.113 The SDA was also concerned that the modernisation process does not guarantee that any modern enterprise award will be at least equal to the modern award for the industry.[94] One of the criteria FWA must take into account is whether the modernisation of an enterprise award will have an effect on the continuing viability or competitiveness of the enterprise. The SDA believed that employers will use this to argue for the retention of substandard brand specific awards.[95]

2.114 The SDA explained that the original statements indicating that enterprise awards would not be subjected to award modernisation were in the context of mining industry enterprise awards. To address these concerns, the SDA recommended the

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89 SDA, *Submission 15*, p. 5.

90 Mr Joe de Bryun, SDA, *Proof Committee Hansard*, 20 April 2009, p. 30.

91 SDA, *Submission 15*, p. 8.

92 Ibid, p. 9.

93 Ibid.

94 Ibid.

95 Ibid, p. 10.

inclusion of a provision to ensure that modern enterprise awards do not fall below the total value of the safety net package of the relevant modern award for the industry.[96]

Coverage

2.115 The SDA also pointed out that Clause 8 of Schedule 6 permits FWA to extend the coverage clause of a modern enterprise award to include franchisees or other businesses which were never covered by the original enterprise award. It permits a modern enterprise award to express the coverage clause as applying to a franchise name. SDA noted the effect is that a modern enterprise award can have a coverage clause that is far broader than the coverage clause of the existing enterprise award.[97]

2.116 In summary, SDA proposed that the broad definition of 'franchise' in the corporation code, and the ability of the award modernisation process to permit modern enterprise awards to specify their cover as applying to all employers trading as the brand name, will permit some employers who currently have no relationship to the franchise to gain the benefit of the modern enterprise award by moving to that franchise system.[98]

2.117 Yum! Restaurants, which owns KFC and Pizza Hut, sought to ensure that new or transmitted franchisees can continue to be covered by enterprise awards rather than move to the modern fast food industry award on 1 January 2010. To address this it recommended that the date for making applications to modernise enterprise awards be brought forward to 1 July 2009. Yum was also concerned that their managers, who have not traditionally been award covered, may become covered as the modern Fast Food Award proposed by the AIRC covers managers.[99] Yum admitted that modernising their enterprise awards would mean that their awards are 'made so much like the industry awards that any practical benefit from having an enterprise award will be lost'.[100]

Unmodernised awards

2.118 The SDA believed that the bill fails to consider the situation of unmodernised enterprise awards which may be substandard. The bill permits an enterprise agreement to be tested against unmodernised awards without regard to its status or content. It recommended that where the underpinning award has not been modernised then FWA should designate a modern award for the BOOT.[101]

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96 Ibid, pp. 10-11.

97 Ibid, p. 12.

98 Ibid, p. 14.

99 Yum! Restaurants, *Submission 10*, pp. 3-5.

100 Ibid, p. 5.

101 Ibid, p. 27.

Committee view

2.119 The committee majority is concerned to ensure that as with other transitional instruments there are appropriate mechanisms to enable termination of enterprise awards. It notes that a person covered by an enterprise instrument will be able to make an application to FWA to terminate an enterprise instrument until 31 December 2013 (Item 5). However, it is concerned that employees could become locked into instruments that may have rates and terms lower than the modern award until that time.

2.120 The committee majority was also concerned that the bill may enable a modern enterprise award to have wider coverage than the existing enterprise award and the definition of franchise may allow employers who currently have no relationship to the franchise to gain the benefit of the modern enterprise award by moving to that franchise system. The committee majority notes that there should be a level playing field for employers and sees the potential for very large businesses to take advantage of this as troubling.

2.121 The committee majority notes the following advice from DEEWR that:

> It is not the intention for modern enterprise awards to undercut the safety net for employees in an industry or to impact on the competitive environment in which business, in this case fast food operations, are carried out.[102]

Recommendation 16

2.122 The committee majority recommends that the government ensure employers/franchises have no power under the bill to extend the reach of substandard enterprise awards to those not covered under the existing enterprise award, and that the government consider strengthening the criteria under Schedule 6 to ensure that enterprise awards not fall below the total value of the safety net package of the relevant modern award for the industry.

102 Mr John Kovacic, *Proof Committee Hansard*, 30 April 2009, p. 30.