Chapter 3

3.1 This chapter deals with the remaining issues raised in submissions and by witnesses during the inquiry, including registered organisations, representation orders and institutional arrangements.

Bargaining and agreement making

3.2 The bill sets out transitional bargaining and agreement-making rules including that:

- employees on individual statutory agreements will be able to agree with their employer to enter into a conditional termination agreement to enable them to participate in collective bargaining processes, including voting on a new agreement;
- bargaining and protected industrial action under the WR Act will not carry over to the FW Act and participants will either have to complete their bargaining under the WR Act prior to 1 July 2009 or commence bargaining under the FW Act;
- FWA can recognise the history of bargaining participants when exercising discretion under the bargaining and industrial action provisions of the FW Act;
- application of the 'no disadvantage test' to enterprise agreements made before modern awards and the NES commences on 1 January 2010; and
- ITEAs can be made up until 31 December 2009.

3.3 The Electrical and Communications Association noted that although FWA is required to take into account the previous dealings between bargaining participants when exercising discretion under the bargaining provisions, where parties have commenced negotiations for collective agreements, they should be allowed to continue to negotiate those agreements by applying for an order. It also advocated this for protected industrial action (see below).1

Industrial action during transitional period

3.4 The ACTU submitted that there is a double standard in the bill regarding the transition of industrial processes and proceedings. It pointed out that:

> On the one hand, orders and processes that favour employers (such as orders stopping industrial action) will continue past 1 July 2009. On the other hand, orders and processes that are generally instigated by employees (such as bargaining and industrial action) are guillotined on 30 June 2009. This double standard must be removed. Either the Bill should guillotine all

1 ECA, *Submission 28*, p. 4.

> WR Act orders and processes or, preferably should allow all orders and proceedings commenced under the WR Act to continue.[2]

3.5 The ACTU noted that the largest bargaining dispute affected is the Telstra dispute with the CEPU and the CPSU balloting more than 17,000 employees in December 2008. The AEC fee was approximately $12,000 (split 80:20 between the Commonwealth and the unions) and the cost of the voting campaign was $50,000 (paid by the unions). It pointed out that this money will be wasted in the event that the bargaining dispute is not resolved by June 30. It also noted that a further 75 ballots may be affected.[3]

3.6 The CEPU argued that as agreements made under the new legislation can be wider in scope than those under current legislation, the substance of a proposed agreement under the current legislation could be included in an agreement under the new legislation. The new legislation also allows for industrial action to be terminated where a union is not genuinely trying to reach agreement and it therefore sees no reason to terminate current authorisations. At the very least the CEPU suggested that removal should be by application only, or unions should be able to apply to have the authorisation extended.[4]

3.7 The CPSU agreed. It also cited the process for a protected action ballot for Telstra members where the election process took many weeks to complete. The CPSU noted that the effect of the bill is that all successful ballot applications will have to be rerun. It concluded that it is difficult to imagine an application and a ballot that was successful under the current laws having a different result under the new laws.[5]

3.8 DEEWR explained that as bargaining will not carry over into the new system, all protected action ballot orders, authorisations for industrial action and notification of intention to take protected industrial action will lapse on 1 July 2009.[6]

Committee view

3.9 As a result of protected action ballot orders lapsing on 30 June 2009, the committee majority expects to see an initial increase in the number of protected action ballot applications as parties await the new system to commence.

Registered organisations

3.10 The bill makes amendments to Schedules 1 and 10 of the WR Act to create the *Fair Work (Registered Organisations) Act 2009* (FW(RO)Act). It includes

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2 ACTU, *Submission 14*, p. 9.

3 Ibid, pp. 9-10.

4 CEPU, *Submission 9*, p. 2.

5 CPSU, *Submission 22*, pp. 3-4.

6 DEEWR, *Submission 18*, p. 11.

provisions to enable state-registered organisations to participate in the federal system. State-registered associations of employees or employers may apply to be 'recognised' as a federal organisation for the purpose of the FW Act. However, this can only occur if the association has no federal counterpart and the relevant state's law has been prescribed in the regulations.[7]

3.11 The existing transitional registration provisions in Schedule 10 to the WR Act will be extended for five years. After this period, transitionally recognised associations will have to gain full registration (if they have no federal counterpart), become a recognised state-registered association (RSRA) (if they have no federal counterpart) or arrange with their federal counterpart to represent members in the federal system.[8]

3.12 Unions NSW was concerned about the expiry of a state-registered union on 1 July 2014, believing the timeframe to be unrealistic. It supported the additional five year period proposed by the Queensland Council of Unions, with the ability to extend recognition for an additional period of time.[9] The ACTU also supported a longer period of recognition in order to allow counterpart state and federal unions to harmonise their operations.[10]

Separate legislation

3.13 The ACTU did not support the separate Act, as 'locating the rights and responsibilities of trade unions in a separate Act weakens the fundamental nexus between organisations and workplace law and also weakens the nexus between the incorporation and regulation of unions and the regulation of corporations'.[11] Nor did the SDA support separating the statutory control of organisations from the FW Act. It argued that the role of trade unions has been recognised in the new industrial relations system. However, the SDA submitted that these provisions separate trade unions from the very legislation that spells out their role.[12] This view was supported by Unions NSW which saw no reason to remove the rights and responsibilities of registered organisations into a separate Act.[13]

3.14 AiG stated that a separate Act is not its preferred approach and it would prefer to see registered organisations regulated through provisions of the FW Act, perhaps in a separate Part. It noted that 'this would reinforce the important rights and

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7 EM, p. 120.

8 Ibid.

9 Unions NSW, *Submission 16*, p. 3.

10 ACTU, *Submission 14*, p. 13; Qld Council of Unions, *Submission 3*, p. 21.

11 ACTU, *Submission 14*, p. 12; Ms Cath Bowtell, ACTU, *Proof Committee Hansard*, 30 April 2009, p. 20.

12 SDA, *Submission 15*, pp. 22-26.

13 Unions NSW, *Submission 16*, p. 3.

responsibilities that registered organisations have under the workplace relations system'.[14]

3.15 Master Builders Australia supported the registration of organisations being regulated under a separate statute 'because matters of workplace relations organisational governance are often better dealt with separately from the substance of the law.'[15]

State and federal organisations

3.16 The ACTU supported the proposal for transitional recognition for state-registered unions in the federal system but with certain caveats. The concept of a federal counterpart (as defined in Schedule 22, Clause 55) is too narrow. The ACTU submitted that the test of whether a state-registered union has a federal counterpart should be changed so that the central criteria are whether the two organisations share a substantially similar membership, and have a history of integrated operations.[16]

3.17 The AMWU supported the amended test proposed by the ACTU.[17] The concern about the definition of a 'federal counterpart' was supported by the AWU which noted that the rules could force some state unions to register independently under the federal system because their connection with their federal unions does not match up with the 'counterpart' provisions. It noted that this would not assist the legislative intent to avoid duplication of industrial organisations in the federal system. The AWU's proposed solution was to amend the words' substantially the same' to words such as 'which contain provisions to a similar effect'.[18]

3.18 The ACTU supported federal unions being able to expand their eligibility rules to reflect the broader coverage of a counterpart state-registered union and that this should not be available where the state counterpart has never used that wider coverage. However, the ACTU indicated that the bill appears to require the federal union to demonstrate active representation in every case and argued that this would potentially deprive employees in certain sectors of representation by any union at all.[19]

3.19 The ACTU was also concerned that the bill allows the recognition of state-registered unions to be cancelled or withdrawn in very wide circumstances, including cases where a substantial number of the union's members take unprotected action. It noted that in the FW Act, unions are not held responsible for the acts of members where unions 'took all reasonable steps' to prevent those acts and it submitted that a

14 AiG, *Submission 4*, p. 6.

15 MBA, *Submission 5*, p. 6.

16 ACTU *Submission 14*, pp. 12-13.

17 AMWU, *Supplementary Submission*, p. 2.

18 AWU, *Submission 21*, pp. 2-3.

19 Ibid, p. 13.

similar defence should apply to the criteria for de-recognising unions on the basis of the activities of its members.[20]

3.20 The NSW and QLD Branch of the NUW sought to keep the narrow rules for identifying a 'counterpart' union and argued that state unions could lose their independent status. It suggested that:

> By seeking to sandbag the influence and operation of existing Federal organisations within the system over the historical existence, role and culture of State registered entities, the Bill will encourage many organisations and employees to 'go rogue' and seek to circumvent the limitations and impositions of the Act by seeking organisational and operational models outside those sought to be limited by this Bill.[21]

3.21 On the other hand, AiG argued that the bill creates an unfair advantage for state registered organisations seeking federal registration as the current system allows 'recognised state-registered organisations to be almost automatically registered federally with the same industrial coverage as held under the State system'. It argued that if this is allowed to continue 'the whole basis of federal registration of organisations will be thwarted'. AiG called for the bill to be amended to give FWA the power to hear objections from existing federal organisations to test industry coverage in the same manner as any other association applying for full registration.[22]

Committee view

3.22 The committee majority notes that the new Act will be closely linked to the FW Act. The new arrangements will address the existing complex duplication of regulations and facilitate rationalisation. The extension of current transitional registration provisions will allow state unions to represent members who become covered by the federal system and enable state and federal unions to rationalise their organisational arrangements. It also notes that the Commonwealth will continue to work with state governments to harmonise RAO legislation between jurisdictions and develop mutually acceptable minimum standards for registration.

Representation orders

3.23 Part 3 of Schedule 22 amends Schedule 1 to the WR Act to give FWA the power to make new type of representation order (removing a union's right of entry to work sites and its capacity to represent workers). These orders address potential demarcation disputes that may arise as a result of the change that a union's right of entry will be based on a union's right to represent the industrial interests of the employees rather than whether the union is bound by an award or agreement at the

20 Ibid. See also Qld Council of Unions, *Submission 3*, p. 18.

21 NUW, NSW and Qld Branch, *Submission 27*, p. 4.

22 AiG, *Submission 4*, pp. 36-37.

workplace.[23] The order would address demarcation issues in a wider range of circumstances than at present. This would include, where necessary, representation orders to preserve demarcations derived from state or federal award coverage.[24]

3.24 The bill details that an organisation, an employer or the Minister may apply for a representation order 'in relation to a dispute about the entitlement of an organisation of employees to represent...the industrial interests of employees'. The EM notes that FWA is only able to make a representation order where there is disagreement regarding the organisation's entitlement to represent a workplace.[25]

3.25 Unions took the view that the orders are too broad and will generate disagreements and litigation. The CEPU expressed concern with the concept of 'workplace group'. It explained that it is defined too broadly, as not all the views of members of the workplace group are relevant to the making of orders. In addition the definition appears to be fixed in time, not recognising that the composition of a workplace group may change over the life of an order. Further, allowing orders applying to a workplace group to extend beyond one employer means that other employers and employees who may have different views to the employer making the application may not have the opportunity to be heard or even identified at the time of an order.[26] While not agreeing with the basis of the new representation orders, the CEPU, in their submission, suggested a number of changes, including that the wishes of the employees affected should have primacy; no orders should be made for a class or group of employees who are not yet employed; there should be a presumption against making an order; there should be no power to extend an order beyond more than one employer; and they should be of limited duration.[27]

3.26 The ACTU submitted that there is no need to create an additional representation order regime and was opposed to this provision for the following reasons:

- the provisions are unnecessary as there is unlikely to be a significant increase in demarcation disputes under the new legislation[28];
- the FW Act already contains a range of very effective remedies to control this activity;
- the bill may have the effect of depriving employees who have joined a particular union the right to be represented by that union;

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23 EM, p. 126.

24 Hon Julia Gillard MP. Minister for Workplace Relations, Second Reading Speech, *House of Representatives Hansard*, 19 March 2009, p. 8.

25 EM, p. 127.

26 CEPU, *Submission 9*, pp. 4-5.

27 Ibid, pp. 5-6.

28 See also Ms Cath Bowtell, ACTU, *Proof Committee Hansard*, 30 April 2009, p. 21.

- the legislative note suggests the purpose of the provision is to deal with demarcation disputes between federal unions and state-registered unions recognised in the federal system. If this is the objective then mechanisms to deal with these disputes already exist;
- it appears that FWA can intervene simply on the basis of a 'paper' dispute between unions or between an employer and one or more unions which will attract parties to use them on a pre-emptive and strategic basis rather than to resolve real disputes;
- there is a risk that provisions will be used by employers to 'pick' which union it prefers to deal with; and
- the provisions appear to give preference to the union which has been 'dominant' in the workplace at the expense of the union which has an equally valid right to represent employees in the workplace but which has played a lesser role.[29]

3.27 These points were supported by the Qld Council of Unions.[30] The ACTU added that it understands that some employers may not know which union is entitled to cover them and it would not oppose some declaration of clarity but they would oppose pre-emptive orders.[31]

3.28 The CFMEU submitted that the provisions would generate disagreement and litigation rather than reduce or resolve them. It pointed out that there appears to be no preconditions under Part 3 of Schedule 22 and argued that 'Unless an employer is directly affected as a consequence of disagreement between unions over representation rights, it is difficult to see why such an employer should be able to seek and obtain orders which result in a loss of representation rights for unions'.[32] It also pointed out that an employer cannot directly, or indirectly, seek an order, but an application may be made in respect of employees who are not even employed by the employer but are merely part of a class of employees who perform work at the same workplace. Thus there is the ability to broaden the scope of potential orders by an employer drawing employees into the scope of a 'dispute' and any proposed order purely on the basis that they share a workplace with a smaller class of employees whose representation rights are 'disputed'. This would particularly be the case in multi-employer workplaces such as construction sites.[33]

3.29 The CFMEU also pointed out that proposed s137B(2) anticipates employer applications where the employees are yet to be employed. It argued that such cases will allow employers to impose representation on future employees by the employer's

29 ACTU, *Submission 14*, pp. 14-15.

30 Qld Council of Unions, *Submission 3*, p. 14-15.

31 Ms Cath Bowtell, ACTU, *Proof Committee Hansard*, 30 April 2009, p. 18.

32 CFMEU, *Submission 12*, p. 2.

33 Ibid, p. 3.

union of choice rather than the employees' choice, which is contrary to freedom of association principles.[34]

3.30 In addition the CFMEU noted that s137B(2) requires FWA to have regard to the criteria in (1) as they would apply in relation to the persons who would be the employees in the workplace group, compromising the criteria for the making of representation orders where there are not yet any employees. While opposing Part 3, Schedule 22, the CFMEU suggested that if it is to remain then peak union councils should be entitled to make a submission in respect of proposed representation orders (s137C) and that FWA must have regard to any such views.[35]

3.31 Professor Stewart pointed out that the wording of the bill suggests that there must be some actual disagreement or difference of opinions between identified parties over representation issues at a workplace. However, he noted that the EM suggests the new power is able to be exercised where there is merely the potential for a demarcation dispute to arise. He suggested that, if this is the intention, the provision should be amended to make this clear.[36] He suggested the use of the words 'a threatened, impending or probable dispute' to provide the necessary clarification.[37]

3.32 Employer groups were keen to ensure that pro-active representation orders could be sought as indicated by the example in the EM. AMMA for example was very clear in advocating that applications for orders can be made prior to a dispute arising.[38] AiG submitted that an amendment is necessary in order to avoid an anticipated dispute about coverage and recommended the removal of the requirement in the bill that there be a dispute.[39] Master Builders Australia supported the representation orders but suggested that the criteria in proposed s137B, which outlined the factors which must be considered by FWA when making its determination, be extended to include reference to the conduct of the relevant organisations and the views of the employers and the effects on their businesses.[40]

3.33 DEEWR advised that:

> …a representation order will be available when there is a disagreement about a union's entitlements to represent employees at a workplace. It will not be necessary to show that the dispute is harming the business of an employer as a pre-condition for obtaining the order. The disagreement need

34 Ibid.

35 Ibid.

36 Professor Stewart, *Submission 1*, pp. 6-7; *Proof Committee Hansard*, 29 April 2009, p. 30.

37 Professor Stewart, *Proof Committee Hansard*, 29 April 2009, p. 31.

38 AMMA, *Submission 19*, p. 5; Mr Christopher Platt, *Proof Committee Hansard*, 29 April 2009, p. 2, 4.

39 AiG, *Submission 4*, p. 38.

40 MBA, *Submission 5*, p. 29.

not be manifested by particular negative consequences on the employer's business.[41]

Committee view

3.34 The committee majority does not see the need to create an additional regime for representation orders. It believes existing legislation will allow orders to be made even in the absence of any harm caused to a party. Instead the factors to be taken into account by FWA in s137B of the bill should be included in clause 135 to ensure that any representation order reflects the industrial relations arrangements in force at the workplace.

Recommendation 17

3.35 The committee majority considers that the proposed new representation orders are unnecessary because the FW(RO) Act will allow FWA to make a representation order to deal with an imminent dispute that threatens to harm an employer's business (see Schedule 1 Clause 134 of the WR Act). Instead, the criteria in clause 135 should be expanded to include the factors listed in clause 137B of the transitional bill, to ensure that any representation order reflects the industrial relations arrangements in force at the workplace.

Institutional arrangements

3.36 The bill details the institutional arrangements to transition to Fair Work Australia which will perform its functions from 1 July 2009. The functions of the Workplace Ombudsman will be taken over by the Fair Work Ombudsman from 1 July 2009. Other agencies will cease to exist as follows (subject to change of date by Ministerial declaration):

- the Australian Fair Pay Commission and its secretariat will continue until 31 July 2009 to enable the completion of the annual wage review in July 2009;
- the Workplace Authority will continue until 31 January 2010 to complete the processing of workplace agreements made or varied before 1 July 2009 and ITEAs lodged during the bridging period; and
- the AIRC and the Australian Industrial Registry will continue until 31 December 2009 to complete the process of award modernisation and other proceedings.[42]

41 DEEWR, *Submission 18*, pp. 14-15. See also Ms Natalie James, *Proof Committee Hansard*, 30 April 2009, pp. 30-31, 32-33.

42 EM, p. 4.

3.37 The bill makes amendment to the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* to establish Fair Work Divisions within these courts which will operate from 1 July 2009.[43]

Cessation date of the Workplace Authority

3.38 The AiG was concerned that the cessation time for the Workplace Authority may be too early, given that a large number of ITEAs are likely to be made during the bridging period. However, it noted that Item 7 allows the Minister to determine that a WR body ceases to exist on an earlier or later date than set out in the bill.[44]

Fair Work Divisions of the Federal Court and the Federal Magistrates Court

3.39 The AiG identified a need for change to Item 7 of Schedule 17. This item enables judges to be specifically assigned to the Fair Work Division of the Federal Court and to generally only exercise the powers of the Court in that Division. AiG submitted that 'the current approach of having a large number of Federal Court Judges dealing with industrial matters has led to much better outcomes for the Australian community than the previous approach of having a small number of judges dealing with all industrial relations matters via the Industrial Relations Court of Australia'. It recommended that Federal Court Judges should not be assigned to a particular Division but should be able to hear and determine matters in both Divisions of the Court.[45]

3.40 Employer groups and unions were concerned that Division 3, Part 20, ss.854 and 855 of the WR Act which among other things, give a registered organisation the right to appear in the Federal Court and Federal Magistrates Court in a matter or proceeding arising under the Act, have not been replicated in the FW Act. AiG noted that the only relevant provisions in the FW Act appear to be s548(8) and (9) which give registered organisations a very limited right to appear on small claims matters. AiG suggested these provisions be included in Schedule 22 and included as provisions in the FW(RO) Act.[46]

3.41 The committee notes the advice from DEEWR during the inquiry into the Fair Work Bill:

> …Of course persons will be able to be represented by their bargaining representative or an employee, member or official of a registered organisation of which they are a member.[47]

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43 Ibid.

44 Ibid, p. 31.

45 AiG, *Submission 4*, p. 30.

46 AMWU, *Submission 26,* pp. 10-11; AiG, *Submission 4*, pp. 34-35; ACTU, *Submission 14*, p. 15.

47 DEEWR, *Submission 63* to the Fair Work Bill, p. 57.

Recommendation 18

3.42 The committee majority recommends that the government ensure registered organisations have the right to appear in the Federal Court and the Federal Magistrates Court.

Transfer of business

3.43 The transmission of business rules in the WR Act continue to apply to transmissions completed before the FW Act commences, including the 12-month limit on the transmission of awards or agreements. If the transfer occurs after 1 July 2009 then the FW Act rules will apply.

3.44 AiG submitted that despite the amendments, these provisions are ill-conceived, will be highly problematic and will require amendment 'once the full extent of the problems become apparent'. It recommended careful drafting of transitional arrangements to protect industries such as ICT, labour hire and contract call centres.[48]

3.45 The AMWU pointed out that under a transmission of business, employees retain the benefit of their extant industrial instrument for one year from the date of transmission. After that time, the employees fall back to the safety net. It explained:

> …the IC Act's preservation of redundancy provisions does not apply here unless the employees were already in a 24 month preservation period from an earlier agreement termination…It means the incoming employer in a transmission of business can put an ultimatum to employees on the one year saving period ending: accept the terms of the replacement agreement or you will be made redundant with only safety net severance pay.[49]

3.46 As the transfer of business provisions were raised by witnesses the committee majority takes the opportunity to again raise the potential for employers to evade their responsibility to pay accrued entitlements. This was mentioned in the committee majority's report on the Fair Work Bill.[50] The committee majority's recommendation was not accepted by the government and it notes the government's response that:

> The Bill requires that a new employer notify transferring employees if a minimum employment period will be required. If the employer fails to notify transferring employees in writing of the requirement to serve a new minimum employment period, previous service with the old employer will be recognised and the employees will not be required to serve a new minimum employment period for unfair dismissal purposes. The Government decided that it was important to give a new employer

48 AiG, *Submission 4*, p. 23; Mr Stephen Smith, *Proof Committee Hansard*, 30 April 2009, p. 19.

49 AMWU, *Submission 26*, pp. 3-6.

50 Senate Education, Employment and Workplace Relations Committee, Report on the Fair Work Bill 2008 [Provisions], 27 February 2009, pp. 109-110.

> flexibility in this regard. To not do so could provide a disincentive to new employers offering employment to employees of the old employer. The Government also notes that the General Protections provisions provide for better protections for employees in the event that a new employer was to terminate the employment of transferred employees for the purpose of avoiding the payment of accrued entitlements, such as long service leave.[51]

3.47 The committee is not convinced by this explanation. It retains its view that this is an important issue which needs to be addressed.

Recommendation 19

3.48 The committee majority recommends that the government consider this issue, noting particularly the example provided by the Australian Nursing Federation in the committee majority's report on the Fair Work Bill, and develop a mechanism to ensure employers are not able to evade their responsibility to pay accrued entitlements.

Conclusion

3.49 The Fair Work Act established a new workplace relations system and the arrangements for transition to the system are provided in this bill. Given the complexity of a number of transitional instruments and the two starting dates, the committee majority notes the proposed arrangements have received general support. However, as a result of the committee inquiry, a number of aspects of the legislation have been further investigated by the committee and improvements suggested through recommendations which the committee majority commends to the government to improve the bill.

Recommendation 20

3.50 The committee majority recommends that the bill be passed with amendments as set out in this report.

Senator Gavin Marshall

Chair

51 Government Response to the Senate Education, Employment and Workplace Relations Committee, Report on the Fair Work Bill 2008 [Provisions], 27 February 2009, p. 7.