Coalition Senators' Minority Report

Introduction

This Committee is required to consider the provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 ("the Bill").

This Bill is the second of three instruments to go before Parliament seeking to create a new workplace relations system outlined within Forward With Fairness.

The Bill intends to provide a mechanism for legislative transition from the existing workplace relations system underpinned by the existing Workplace Relations Act 1996. The substantive elements forming the new system have been previously dealt with by this Committee and are contained within the Fair Work Act 2009 ("the FW Act"). This Bill repeals the substantive elements of the existing Act and provides a bridge to the new system.

Although the Bill is relatively technical, its effects are very important as history has shown that any transition from one system to another can be a complicated process. In addition, the Bill provides important detail which will undoubtedly have a material effect on workplaces and the obligation of employers and employees.

Economic Challenges

Coalition Senators note that economic circumstances have altered dramatically since both the time Forward With Fairness was announced and also since the Fair Work Act passed through the Senate.

The rate of unemployment in April 2007 was 4.4%. It is, as of April 2009, 5.7%. This increase equates to an additional 168,200 Australians without jobs. Between January and March 2009 alone, the rate increased by 0.9%, evidencing the impact of worsening economic circumstances on jobs and moves by employers to adjust for the new workplace relations regime. The Updated Economic and Financial Outlook noted that unemployment would reach 7% by 1 July 2009. More recently, members of the Government have refused to rule out double digit unemployment may again become a feature of the Australian labour market.

Business confidence is at record lows, and indicators suggest that consumer confidence will continue to trend downwards. The economy in general has slowed to growth levels not seen since 1991. Despite recent glimmers of hope, there will clearly be a prolonged period before a recovery is achieved.

Coalition Senators Minority Report into the Fair Work Bill 2008 observed that the new workplace relations system would increase labour costs, replace flexibility with rigidity and reduce the capacity for employers and employees to adjust and account for current financial challenges. This view remains unchanged and has in fact strengthened after our inquiry into this Bill.

The new workplace laws will make it harder for Australians to find jobs and makes it harder for enterprises to provide jobs. This is an unfortunate yet inevitable consequence of any decision to shift labour market policy in to reverse.

Coalition Senators, while acknowledging the Government's mandate to repeal WorkChoices, do not believe that mandate extends to reducing the ability of Australians to find jobs. Nor does a mandate exist to create a system that will worsen and possibly prolong the negative economic and social impacts of the prevailing economic circumstances.

Therefore in assessing the Bill, Coalition Senators have been mindful of a number of key criteria. These include the effect on employment and job creation, the impact on small business and productivity, and the extent to which the Bill will ensure a smooth transition to the new workplace system.

Those who provided evidence drew the attention of the Committee to a broad number of matters and concerns. While we have no doubt that the Senate process will involve technical amendments, the focus of this report is on those areas which Coalition Senators believe are most significant and which have the capacity to worsen the effects of the FW Act.

Union Representation Orders

The Award Modernisation process has created circumstances where the traditional concept of a 'respondent party' to an award has been removed and is no longer relevant. As foreshadowed during Committee considerations of the Fair Work Bill 2008, a consequence of this removal is the creation of a potential for union demarcation disputes, or 'turf wars'. A number of employee and employer stakeholders previously expressed concern about this very real potential and requested a mechanism by which this could be addressed.

The Bill provides a facility whereby orders may be obtained from Fair Work Australia to hear and determine any such a dispute where one exists. Such a facility is welcomed and should provide an avenue to resolve demarcation disputes in the event they arise.

Coalition Senators note, however, that union representation orders are a solution to a problem exacerbated by the award modernisation process. The removal of the traditional 'party' concept does unsettle and give cause to disturb existing demarcation lines that have often been the subject of lengthy, complex and costly historical action. The outcomes of such action warrant recognition to prevent a revisitation of previously settled ground and to ensure that productivity and resources are not sacrificed unnecessarily.

Notwithstanding this new facility a number of stakeholders remained concerned about the proposed provisions. In particular, concerns were raised about the failure of the proposed Bill to:

- take account of the views of employers when making orders;
- the apparent limitations on circumstances when such orders can be proactively obtained; and
- the complexity surrounding the format and content of existing union rules and regulations.

These concerns were debated at length with various witnesses appearing before the Inquiry.

In our view, section 137A requires that a 'dispute' must exist before an application can be made for a representation order. This would necessarily require the existence of a disagreement between two competing unions prior to the intervention of Fair Work Australia.

As evidence before the Committee noted, demarcation disputes can be quite time consuming and raise complex legal considerations. The need for such disputes to be resolved in a timely manner is essential to ensure disruption to productivity is minimal and jobs are not lost. The Committee heard evidence that it is often the case that demarcation disputes arise during the infant stages of a 'Greenfield' site. As section 137A is predicated on the existence of a 'dispute' before it is enlivened, it is essential that there be a pre-emptive or pro-active element to the section so proposed.

Various witnesses argued that proposed section 137A, taken conjunctively with relevant notes in the explanatory memorandum, does in fact provide scope for representation orders to be obtained without the existence of a dispute. Others suggested that the phrase 'threatened, pending or probable' as used in the current Workplace Relations Act be considered.

Irrespective of the views advanced by various witnesses, it is clear that the provision as drafted creates uncertainty. Such uncertainty can be easily alleviated via amendment.

Recommendation 1:

- **that section 137A be amended to ensure that representation orders are available without the precondition that a dispute exists; and**
- **that section 137A be amended to allow an employer party to initiate proceedings to obtain a representation order for a particular workplace.**

Demarcation issues also often emerge in circumstances involving union entry into a particular workplace. This entry is a right bestowed upon unions by virtue of the Fair Work Act, and can carry significant penalties in circumstances of non-compliance by an employer. The right or otherwise for a union to enter a workplace has already been complicated by various provisions within the Fair Work Act. This complication would be exacerbated in circumstances of a demarcation dispute.

Recommendation 2:

- **that the Bill be amended to empower Fair Work Australia to stay any attempt to workplace entry when sought at a workplace subject to a demarcation dispute.**

Section 137B of the Bill details matters of which Fair Work Australia must take account in making a representation order. These matters exclude what Coalition Senators consider to be two significant factors, being (a) the existence of any demarcation orders made under the current Workplace Relations Act 1996, and (b) the views of the employer. There does not appear to be any valid logic or reason for the exclusion of these two factors which, in our view, are essential to ensuring the timely and sensible making of representation orders.

Recommendation 3:

- **that section 137B be amended to require Fair Work Australia to take account of the views held by an employer when making representation orders; and**
- **that section 137B be amended to have greater regard for existing representation orders.**

A theme that arose during the earlier Committee inquiry into the Fair Work Bill 2008 is the apparent complicated and unclear state of union eligibility rules. While this uncertainty and complexity may be of great interest and challenge for those who practice in the area of employment law, it denies the everyday layperson (both employer and employee) access to an efficient determination of employee representational rights.

One helpful suggestion advanced was that Fair Work Australia be required to prepare a 'plain English' guide to union organisational rules. This would assist all stakeholders in being able to minimise demarcation issues and resolve matters in a manner that does not involve Fair Work Australia.

Recommendation 4:

- **Fair Work Australia be directed to produce a plain English union eligibility rules guide.**

National Employment Standards (NES)

The Bill as proposed requires that the NES established by the Fair Work Act 2009 operate in conjunction with transitional instruments. The extent of the interaction is to be considered on a no-detriment basis that requires a 'line by line' comparison between the conditions within the NES and those within an existing instrument. Where a particular term or condition within an instrument provides an outcome which is of detriment in comparison to the NES, the NES will take precedence.

There are obvious problems associated with the approach adopted by the Bill, in that it requires the overlay of new employment conditions on existing settled arrangements. These arrangements are, by default, made lawfully under an alternative system and have been negotiated, agreed and settled under a different legislative regime. As the NES are new, and in some respects different to the existing Australian Fair Pay & Conditions Standard, complications will inevitably arise as the two regimes are overlaid.

Useful and practical examples of these difficulties were outlined in written evidence provided by the Chamber of Commerce and Industry – Western Australia. They provide three examples of the difficulties faced should one adopt the approach in the Bill as currently drafted, involving the health, metal and mining sectors. In all cases, an employee affected by the examples would not suffer an overall detriment or be worse off in any way – however all would technically represent a circumstance where a detriment may be found.

The examples as provided would result either in an entitlement 'double-dip' situation and increased cost to an employer and job losses, or the unnecessary disturbance of well settled and agreed arrangements.

Coalition Senators recognise that the intention of the NES is to provide a universally applicable set of minimum standards for employees. However this intention must be balanced against the need for a sensible transition to universal NES that creates minimal disturbance to existing arrangements.

Witnesses before the Inquiry suggested a number of courses to rectify concerns arising from the universal application of the NES. These were that:

- the NES only apply to agreements made on or after 1 January 2010; or
- existing instruments continue without disturbance and not be subject to the NES until they have passed their nominal expiry date; or
- Fair Work Australia be given power to determine that a provision of the NES has no application while a particular agreement operates; or
- the requirement for detriment to be determined on a 'line by line' basis be removed and instead determined on a global or "no net detriment" basis in context of the entire operation of a particular agreement.

Recommendation 5:

- **that the Bill be amended to reflect that the concept of detriment be assessed on a global basis rather than a line by line basis; and**
- **that the Bill stipulate that the NES should not apply to an instrument that already deals with the same matter, subject to that instrument providing no net detriment.**

Take Home Pay Orders

The Bill creates power for Fair Work Australia to make what is described as "take home pay orders". Such orders are available where an employee's take home pay is reduced as a result of the transition from an existing instrument to a modern award.

The existence of this provision is, in essence, a legislative confession that the terms of the Ministers Award Modernisation request were both unrealistic and nonsensical from the outset. Requiring the Australian Industrial Relations Commission to consolidate and modernise thousands of existing instruments without "increasing costs for business nor disadvantaging employees" was an extremely ambitious request that even the most casual of observer could identify as unattainable and ambitious.

Further evidence of the unrealistic nature of this request was revealed during Senate debates throughout the passage of the Fair Work Act. On several occasions, the Government acknowledged that there was no reference to the terms of the Ministers request within that legislation and, in addition, voted against a Coalition amendment that would have enshrined the Minister's award modernisation request as law.

The resulting draft modern awards as issued by the AIRC will, according to inquiry witnesses, result in both a disadvantage to employees and increased costs to employers. Both employee and employer stakeholders argue that such outcomes are detrimental in varying respects.

Take home pay orders are, therefore, an avenue created by the Bill to address the shortcomings arising from the Ministers flawed award modernisation request and ensure that employees are not disadvantaged. There is, however, no equivalent employer provision that would enable an employer to address the increased costs arising from the transition to a modern award.

Some evidence before the Committee argued that the five year phase in period available to the AIRC should allay employer fears about increased costs. It was argued that this time frame would allow an employer "an appropriate adjustment period"[1] for which it could "transition to the new industry standards"[2]. This same evidence stated that stakeholder perceptions of take home pay orders treating employees more favourably than employers were "not correct."[3]

The Coalition Senators reject this evidence. The evidence of Restaurant and Catering Australia, noted below, pertinently demonstrates the basis for our rejection

> …whether the modern award for hospitality is phased in over five days, five months or five years, it will still have the same impact. All that the phasing-in process does is extend the pain over a greater period of time. A

1 *Committee Hansard*, 30 April 2009, p. 26.

2 Ibid.

3 Ibid.

> 15 per cent increase in wage costs is a 15 per cent increase in wage costs whether it occurs over five years or five days.[4]

It is beyond dispute that employers must (at some point) absorb increased labour costs arising from the modernisation process. Employees who may suffer a reduction in pay have access to remedial orders (available immediately.) The view of the Australian Industry Group was that they regard the take home pay provisions as "lopsided and unfair upon employers"[5] and Coalition Senators strongly agree.

Anecdotal evidence suggests that employers are making alterations to their staffing levels, and that employees are losing their jobs, in anticipation of the new workplace laws.

The impact of the Award Modernisation process on jobs and business should not be underestimated. The evidence presented to the Committee is of extreme concern as it reveals that thousands of jobs will be lost directly as a result of this process.

Worryingly, the sectors that will be most adversely affected are those that are more likely to be affected by worsening economic conditions. These sectors, such as retail and hospitality, also employ significant numbers of young workers and female workers. Casual and part-time employment opportunities are higher in these sectors.

Evidence demonstrated that the retail pharmacy sector will have increased labour costs resulting in 61% of community pharmacists being forced to reduce staffing levels. Examples provided from this sector in Western Australia show increased labour costs of 13.8%, resulting in an expected 680 jobs to be lost.[6] In four states, the expected average increase to labour costs was approximately $100,000.00 per year – a rise of 20%.[7]

In the retail sector generally, increased labour costs would be at least 8% and up to 50% dependent upon the location and nature of the business. On average nationwide, increases would total 14% or $22,000.00 per annum.[8]

Analysis conducted in the hospitality sector showed an even more gloomy future. KPMG/Econtech reports estimated that 8000 jobs would be lost in this sector alone, adding 0.07% to unemployment figures and leading to a lower level of GDP of some 0.04%.[9] It was also estimated that, due to very low trading margins within the sector,

---

4 *Committee Hansard*, 20 April 2009, p. 11.

5 Ai Group correspondence to Committee, 4 May 2009.

6 Australian Chamber of Commerce and Industry, *Submission 7*, p. 50.

7 Ibid., p. 36.

8 Ibid., p. 38.

9 Ibid., p. 42.

approximately 1000 businesses would close as a result of the impact of modern awards.

The opening evidence of the hospitality sector during committee proceedings is worthy of reproduction.

> Firstly, I say that the views expressed in our submission and the views I will express today are those of our organisation and the state associations which are members of our organisation; we have come to these views through our process of negotiating such matters. I start out by saying that we believe that this bill will decide the fate of the Australian restaurant industry. We know that our businesses survive by the slimmest margin; the ABS reports a 3.8 per cent margin for our businesses, and we believe all of that margin has the capacity to be wiped out by this one activity, the process of award modernisation. We believe that it is this critical scenario that makes the handling of award modernisation, particularly by the Australian Industrial Relations Commission, even more contemptuous. We believe the commission have disregarded what appears to be the most extensive submission that they have received by simply extending the current federal hotels award to cover restaurants. We believe that, rather than building relevant awards from the ground up as was the promise in the policy position taken to the 2007 election, what has taken place is a simple and lazy extension by the commission of the hotels award to cover restaurants around Australia. We believe that this is not what the government wanted, not what the hotels wanted, not what the relevant union wanted and not what we wanted; it is simply a lazy extension of the hotels award by the commission.
>
> We believe that, if this bill is allowed to take effect, we will see an incredible impact on our industry that would take place in spite of not having had any assessment of the impact. This committee has received, obviously, a considerable number of submissions in relation to what the impact of this bill would be but has no objective analysis undertaken by the government as to what the impact would be. You can question the data that we put before you and have put before you in the past, but the reality is that you do not have independent data that you are able to question it with. We have undertaken the analysis, and it appears to me that others have not undertaken an analysis to contrast with ours. If you do not believe that the 8,000 jobs that we refer to will be lost, that the $150 million to $250 million impact will materialise in our industry or that the thousand businesses will close as a result of award modernisation in our industry then I would like to see our figures challenged. They can only be challenged if there is data available to contest and refute the claims that we make as to the impact of award modernisation on our industry.[10]

Given the above evidence, it was unsurprising to Coalition Senators that many employer submissions urged that an employer equivalent to 'take home pay orders' be included within the Bill. Much debate was devoted to how such a system might work.

---

10 *Committee Hansard*, 20 April 2009, p. 11.

In this context we note that both state and federal industrial systems have, for many years, contained provisions that contemplate a particular employers business circumstances and their capacity to meet a particular industrial obligation. The most common example of this is found in redundancy provisions, where a court or tribunal is given discretion to exempt a particular business from the obligation to pay where there is no capacity to do so.

Although such "incapacity to pay" provisions are infrequently used, they do provide a forum whereby the financial circumstances of an enterprise can be appropriately ventilated and balanced against its legal industrial obligations. Clearly, industrial tribunals are equipped to deal with such a circumstance and we see no reason why they ought not be given such a role within the new workplace system

In our view, it is essential that the Bill be amended to provide an avenue for employers to seek relief from increased costs arising from the transition to a Modern award. The absence of such a provision is simply unfair and ignores the overwhelming evidence regarding the true cost and impact for employers. It is, clearly, in the public interest that such a provision be included and that an individual workplace or enterprise is afforded an opportunity to argue its own particular circumstances. Industrial laws and the new workplace system cannot ignore the economic realties felt within a workplace.

While an avenue such as that suggested above deals with individual workplaces, a similar problem exists in relation to particular sectors and/or particular states.

The Bill maintains the "transition phase-in period" contained at section 576T of the current Act. We understand that this provision allows the AIRC a defined period with which it can phase out state based differences within modern awards (and phase-in additional labour costs.)

This phase in period has also been referred to by the Minister with reference to the increased labour costs associated with the modernisation process, with reference to the maximum five year period.[11]

However some witnesses giving evidence before the Committee said they were disappointed with the outcomes and approach to award modernisation adopted by the AIRC, and expressed concern in relation to the AIRC exercising its discretion to phase out state based differences during any transition period.

We take the view that the Ministers Award Modernisation request does not provide the AIRC with enough guidance in relation to award modernisation. We also take the view that should the intentions of the Modernisation request be genuine, they should be enshrined as law.

---

11 Minister Gillard, Radio Interview ABC Gold and Tweed Coasts, 8:45am Tuesday 14 April 2009.

It is appropriate that the AIRC maximise the transitional period for phasing out state based differences in order to provide workplaces the best opportunity to deal with the resulting changes to conditions of employment and increased labour costs. The approach should be one that requires the AIRC to ensure changes are incrementally phased-out over the longest period possible with some discretion to determine a shorter period should it be satisfied it is in the public interest to do so. This is a different approach to that currently proposed, which contains an implicit presumption that state-based differences will be phased out immediately unless it can be convinced otherwise.

Recommendation 6:

- **that Part 2 of Schedule 6 provides power to FWA to hear claims from employers seeking relief from increased costs;**
- **that FWA be given power to exempt an employer from certain provisions of a modern award, or delay the application of certain provisions of a modern award, for any period it feels appropriate;**
- **that Part 10A of the Workplace Relations Act 1996, as continued by Part 2 Schedule 5 of the Bill, be amended to require FWA to adopt the five year phase-out period as a default, unless it is in the public interest to do otherwise.**

Some witnesses observed that a number of potential deficiencies exist with take home pay orders in the form as currently drafted.

Section 9(1) currently allows an individual employee, or a class of employees, to make an application for take home pay orders. This may cause confusion for an employer and employees who are, in our view, entitled to certainty regarding the operation of any particular order.

Section (9)(1) is unclear in relation to any time limit within which a THPO might be made, and does not provide any limitation on retrospective operation. Although unlikely, potential exists for an employee to seek a THPO some years after the original reduction originally took place thereby receiving a THPO that requires significant back payment. In our view such a situation would be unfair to an employer and encourage misuse.

Fair Work Australia appears to have been granted power in this section to make any order it considers is appropriate to remedy a reduction in an employees' take home pay. This opens the door for orders that are unrelated to the issue of take-home pay, and the potential for THPO to be confusing and inconsistently applied. Any power available to FWA in this section should be limited only to actual amounts of take home pay.

The orders available under section 11 appear to remain operative ad infinitum. It is unlikely that these THPO will only be relevant for a particular period, and therefore a time limit should be placed on each order.

Current economic circumstances, particularly those affecting small and medium sized business, will jeopardise their capacity to make any payments to employees arising from a THPO particularly in circumstances of a delayed claim requiring lump-sum payment. Fair Work Australia should have the capacity to take into account the circumstances of a particular enterprise when making any THPO and concurrently order staggered or phased in payments to be made.

Although unlikely, Coalition Senators can foresee situations where the existence and availability of THPO may lead to claims that are frivolous or vexatious. To ensure that THPO are used solely for the purpose they are intended, FWA should be given the power to award costs should a claim be frivolous, vexatious or without merit.

Recommendation 7:

- **that section 9(1) be limited to an individual employee or a class of employee only where each employee is named.**
- **that THPO only operate on and from the day they are made and can not operate retrospectively.**
- **that section 9(1) limit the powers of FWA only to making orders dealing with actual proven reductions in take home pay.**
- **that THPO be limited in duration.**
- **that FWA be given power to take account of enterprise circumstances to whom a THPO will apply and be given discretion to stagger any associated compensation.**
- **FWA be given the power to award costs where a THPO claim is found to be without merit.**

Termination of Collective Agreement Based Instruments

The Bill provides that existing collective agreement based instruments may be terminated only in accordance with the terms of the FW Act. Many agreements contain rules that allow termination in different circumstances which will, apparently, be rendered unenforceable by the operation of the proposed Bill.

We see no reason for this approach and anticipate that it will cause confusion and uncertainty for employers and employees who have already agreed on circumstances under which a particular instrument will terminate.

It is appropriate that these agreements should be allowed to terminate in their existing terms.

Recommendation 8:

- **that the Bill be amended to ensure that existing collective based instruments remain terminable pursuant to their existing terms.**

Modern Enterprise Awards

Coalition Senators support the concept of modernising enterprise instruments, previously federal or state enterprise awards, as set out within schedule 6 of the Bill. Such a concept has also drawn broad support from relevant stakeholders who acknowledge the relevance and use of enterprise based instruments. There are two apparent problems, however, with this section of the Bill as it is currently drafted.

The Bill appears to not allow an enterprise instrument to continue operating in the event that FWA declines to make a modern enterprise award. This would mean that the instrument ceases to operate leaving a relevant modern award and/or the FW Act and NES as the basis for employment conditions. Such an outcome is unsatisfactory and may act as a disincentive to seek the assistance of FWA in modernising an existing instrument. We also envisage that any decision of FWA to decline to make a modern enterprise award would be instant – thereby leaving a workplace without certainty as to terms and conditions of employment.

The Bill gives FWA discretion to determine the number of unions to whom a modern enterprise award can cover. Such discretion invites the involvement of unions who have not previously been involved at the enterprise, represented employees, or negotiated terms of the transitional enterprise instrument. This discretion also expands opportunities for demarcation disputes to arise.

Recommendation 9:

- **allow transitional instruments to continue if FWA declines an application for them to be modernised;**
- **limit the power of FWA to order union coverage to those that were a party to the enterprise award subject of the application, with discretion to include new unions in the event it is considered appropriate to do so.**

Default Superannuation

Coalition Senators see the default superannuation provisions in the Bill as a restraint on competition. It also encourages apathy in superannuation at a time when we need people to engage in their retirement planning. It actively seeks to skew the super industry in favour of the industry funds.

Key questions which inherently emerge from this process are: should competition between funds be curtailed under any circumstance? Is there a place for subjectively and secretly chosen monopolies within our superannuation system? Should government foster apathy in any financial context? Each of these questions can be answered with a categorical no.

Competition fostered by Choice of Fund provisions has delivered quantifiable benefits in the form of better returns to fund members. Research completed late last year by

Rice Warner Actuaries demonstrates that increased competition has progressively put downward pressure on fees. Overall fees for the industry averaged 1.21% for the year to June 2008, down from 1.37% in 2002. Fee reductions are now at threat from reduced competition.

Just as striking, there remains a total lack of publicly released selection criteria which has been used by the AIRC. Whether or not the 'modernised' awards maintain the status quo in terms of default super funds is totally irrelevant. We've seen no criteria. This is inexcusable from our point of view; such a lack of transparency is simply retrograde, inappropriate and unfair.

The default super fund process undermines choice by stealth. Employers should be encouraged to seek a super fund, not merely rely on an award which only provides for industry funds. This process needs to be curtailed in the interests of competition and choice.

Recommendation 10:

- **that the Bill be amended to ensure employers can nominate any complying superannuation fund as the default fund.**

Senator Gary Humphries

Deputy Chair