The Senate

Standing Committee on Education, Employment and Workplace Relations

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 [Provisions]

May 2009

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Table of Contents

Chapter 1

Introduction

Reference

1.1 On 19 March 2009, the Hon Julia Gillard MP, Minister for Education, Employment and Workplace Relations, introduced the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the bill) in the House of Representatives. On the same day, the Senate referred the provisions of the bill to the Senate Standing Committee on Education, Employment and Workplace Relations for report by 7 May 2009.

Conduct of the inquiry

1.2 Notice of the inquiry was posted on the committee's website and advertised in *The Australian* newspaper, calling for submissions by 9 April 2009. The committee also directly contacted a number of interested parties, organisations and individuals to notify them of the inquiry and to invite submissions. 32 submissions were received as listed in Appendix 1.

1.3 The committee conducted public hearings in Sydney on 20 April 2009 and Canberra on 29 and 30 April 2009.

1.4 Witnesses who appeared before the committee are listed at Appendix 2.

1.5 Copies of the Hansard transcript from the hearings are tabled for the information of the Senate. They can be accessed on the internet at http://aph/gov.au/hansard.

Background

1.6 The Fair Work Bill 2008 gave effect to the government's election commitment to implement a new workplace relations system. It was considered by this committee in its report tabled on 27 February 2009.[1] Transitional and consequential arrangements to operate with the Fair Work Bill are to be set out in two separate bills. The first of these is dealt with in this report and the second will be introduced in May 2009, which will make consequential amendments to all other Commonwealth legislation and deal with amendments consequential on any state referrals of power that have been completed by that time.[2]

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1 Senate Education, Employment and Workplace Relations Committee, Report on the Fair Work Bill 2008 [Provisions], 27 February 2009.

2 DEEWR, *Submission 18*, p. 1.

1.7 As with the Fair Work Bill, the proposed transitional and consequential arrangements have been considered by representatives of employee and employer organisations in the Committee on Industrial Legislation and by officials from state and territory governments.[3]

Purpose of the bill

1.8 This bill details the transition of current workplace arrangements under the Workplace Relations Act (WR Act) to the new system under the Fair Work Act (FW Act). It repeals the *Workplace Relations Act 1996* (other than Schedule 1, which deals with registered organisations and Schedule 10, which deals with transitional registered organisations), creates a stand alone Act and renames it the *Fair Work (Registered Organisations) Act 2009* to reflect the remaining content.

1.9 The bill also covers issues which include:

- how existing workplace instruments will interact with the new system;
- arrangements to enable bargaining under the new system to commence;
- arrangements for the transfer of assets, functions and proceedings from WR Act institutions to Fair Work Australia and the Fair Work Ombudsman; and
- consequential amendments to Commonwealth legislation essential to the operation of the Fair Work Bill such as the creation of the Fair Work Divisions of the Federal Court and the Federal Magistrates Court.[4]

Timing

1.10 The *Fair Work Act 2009* is expected to take effect from 1 July 2009. However, there are two start dates for the new system with most provisions to take effect from 1 July 2009 but the National Employment Standards (NES), and modern awards to start from 1 January 2010. The period between these dates is called the 'bridging period' and requires particular arrangements.

Acknowledgements

1.11 The committee thanks those who assisted with the inquiry.

3 Hon Julia Gillard MP. Minister for Workplace Relations, Second Reading Speech, *House of Representatives Hansard*, 19 March 2009, p. 6.

4 Ibid.

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.

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.

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,

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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.

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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.

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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

Additional Comments

The Australian Greens

The Australian Greens support the analysis and comments made in the Majority Report on the Fair Work (Transitional Provisions and Consequential Amendments) Bill ("the Fair Work Transitional Bill"). The Australian Greens also fully endorse and support all the recommendations made in the Majority Report.

We share the concerns raised in the Majority Report about a number of aspects of the Fair Work Transitional Bill including:

- the continuation of sub-standard agreements, individual and collective;
- the consequences of award modernisation for many workers;
- the modernisation of enterprise awards;
- the limitations in accessing low paid workplace determinations;
- the issues facing non-federal system employees; and
- the proposed new representation orders.

We wish to make a few short additional comments on some of these important issues.

Substandard Agreements

The Greens have held a consistent position since before the last election that substandard agreements, individual or collective, should be able to be terminated and the employee employed on the more favourable conditions of the award or superior collective agreement that covers the employer. We moved amendments in respect of the Workplace Relations (Transition to Forward with Fairness) Bill in 2008 to provide a mechanism for employees to terminate unfair AWAs. These amendments were not supported by the Government and many workers have stayed on unfair AWAs ever since.

Too many workers have been subject to inherently unfair workplace agreements due to the aberration that was Work Choices. In providing a fairer safety net comprising the National Employment Standards and modern awards, the ALP Government has an obligation to ensure that workers cannot continue to be employed on conditions that fall below the safety net.

We support the recommendation of the Majority Report that FWA is empowered to terminate or vary agreements which disadvantage employees as compared to the new safety net. We also specifically support the recommendation by the Majority Senators that a new enterprise agreement automatically replace an AWA or ITEA, without the need for conditional termination provisions.

Award modernisation

The Greens have also been concerned with the award modernisation process since it was provided for in the Workplace Relations (Transition to Forward with Fairness) Act last year. We appreciate the policy intent of the award modernisation process and recognise it is a very difficult task that the AIRC has been asked to perform in a relatively short time frame. However, some of the consequences for workers are difficult to reconcile with the Government's policy intent.

One such example was brought to the Committee's attention by the ASU and concerned the Clerks Private Sector Award. Of particular concern with that award is the setting of an exemption rate at $44 000 a matter discussed by the Majority Senators. The Greens support the recommendation that the Minister amend the Award Modernisation Request to ensure that there can be no exemption from the award below $100 000 as per the Fair Work Act.

We also specifically wish to mention our support for the recommendation that take home pay orders be expanded to cover significant non-financial disadvantage. Such an extension is vital for many of the most vulnerable award-reliant workers who will face potentially significant changes in their working hours due to the award modernisation process. We believe the take home pay orders are too restrictive.

We note that the two year review of modern awards, which was included in the Bill as a result of an agreement with the Australian Greens, was generally supported by the submissions to the Inquiry. The Greens believe an earlier review is important in ensuring the new award safety net is adequate.

The Australian Greens continue to be concerned about the long term consequences of the new award system under the Fair Work Act. As we stated in the debate on the Workplace Relations (Transition to Forward with Fairness) Bill in 2008 we want to see a fair, robust and relevant award system. We believe that awards should provide a comprehensive safety net for workers on an industry or occupational level that is flexible enough to allow for industry-specific conditions but secure enough to provide appropriate protections. Awards must be living documents that can adapt to the changes in community standards. Time will tell if the modern award system will provide the fairness Australian workers expect.

Low paid determinations

The Australian Greens moved an amendment in the debate on the Fair Work Act to delete the requirement that an employer must not have been covered by an enterprise agreement in the past to be subject to a low paid workplace determination. Our amendment was not supported by the Government. The Fair Work Transitional Bill extends that requirement to any collective agreement made in the past. As the Majority Report notes this includes Work Choices agreements where actual bargaining may never have occurred to single issue agreements. This provision is an

unnecessary and counter-productive limitation on accessing a low paid workplace determination.

The Greens support the low paid bargaining stream provisions. They are vitally important in encouraging and achieving genuine collective bargaining in low paid industries, often female dominated industries. We do not understand why the government would seek to limit their application.

We believe the requirement for no previous collective agreements in the Bill and the Act should be deleted and we support the recommendation in the Majority Report that Fair Work Australia be given the discretion to decide on a low paid workplace determination after considering all the circumstances.

Non-federal system employees

The Australian Greens have also been concerned for some time about the plight of non-federal system employees, especially those in the community and social services sector. As we discussed in the debate on the Fair Work Bill, many of these employees do not know if they are in the federal system or not given the technical and complicated determination of whether their employers are constitutional corporations.

If they are not in the federal system, while they may be currently covered by transitional instruments, those instruments will be terminated in 2011 and the workers will lose important protections. We appreciate the Government is attempting to deal with the jurisdictional mess by negotiating with the States to refer their powers. This does not seem guaranteed and indeed the Western Australian Government has specifically ruled out such a referral. This situation is a consequence of moving away from the conciliation and arbitration power to a reliance on the corporations power. It is an issue that is not going away and the Government must ensure those workers caught out by its laws are protected.

Representation orders

The Australian Greens oppose the provisions in the Fair Work Transitional Bill providing for a new form of representation order. We will not support provisions which have the potential to undermine workers' freedom of association. We agree with the Majority Senators that the new provisions are unnecessary.

Outworkers

The Australian Greens also fully endorse and support the comments and recommendations made by the Majority Report with respect to outworkers. We have a longstanding commitment to ensuring appropriate and robust protections for outworkers. The analysis and recommendations made by Majority Senators points to unfinished business and this Government must take this opportunity to remedy all the gaps identified and ensure the utmost protection for these most vulnerable workers.

Conclusion

The Australian Greens believe significant amendments are required to be made to the Fair Work Transitional Bill to ensure it appropriately protects workers in the shift from Work Choices to the Fair Work Act. We support all the recommendations made in the Majority Report and we are prepared to move amendments to address all these concerns.

Senator Rachel Siewert

Appendix 1

Submissions received

Sub No.	Submitter
1	Prof Andrew Stewart, SA
2	Chamber of Commerce and Industry WA
3	Queensland Council of Unions, QLD
4	Australian Industry Group
5	Master Builders Australia , ACT
6	CPSU - SPS Federation Group, NSW
7	Australian Chamber of Commerce and Industry
8	Australian Services Union, VIC
9	Communications Electrical Plumbing Union, NSW
10	Yum Restaurants Australia
11	Restaurant and Catering Australia, NSW
12	CFMEU
13	Textile Clothing & Footwear Union of Australia, VIC
14	ACTU, VIC
15	Shop, Distributive & Allied Employees Association (SDA), VIC
16	Unions NSW , NSW
17	Business Council of Australia, VIC
18	DEEWR
19	AMMA, VIC

20	Australian Business Industrial
21	The Australian Workers Union, NSW
22	CPSU, NSW
23	VACC
24	NSW Government, NSW
25	Australian Hotels Association
26	Australian Manufacturing Workers Union
27	National Union of Workers, NSW/QLD
28	Electrical and Communications Association, QLD
29	Fairwear, NSW
30	Asian Women at Work Inc, NSW
31	National Farmers Federation
32	The Law Society of South Australia, SA

Appendix 2

Hearings and Witnesses

City Tattersalls Club, Sydney, 20 April 2009

Australian Business Industrial

Ms Leah Brown, *Senior Workplace Policy Advisor*

Mr William Dickson Grozier, *Director Industrial Relations*

Master Builders Australia

Mr Richard Calver, *National Director, Industrial Relations and Legal Counsel*

Mr Wilhelm Harnisch, *Chief Executive Officer*

Shop Distributive and Allied Employees Association

Mr Joe de Bruyn, *National Secretary*

Mr John Ryan, *National Industrial Officer*

Restaurant and Catering Australia

Mr John Hart, *Chief Executive Officer*

Parliament House, Canberra, 29 April 2009

National Workplace Relations, **Australian Industry Group**

Mr Ron Baragry, *Legal Counsel*

Australian Services Union

Mr Keith Harvey, *National Industrial Officer*

Ms Linda White, *Assistant National Secretary*

Australian Mines and Metals Association

Mr Christopher Platt, *Director, Workplace Policy*

Australian Industry Group

Mr Stephen Smith, *Director, National Workplace Relations*

Professor Andrew Stewart

Parliament House, Canberra, 30 April 2009

Australian Chamber of Commerce and Industry

Mr Peter Anderson, *Chief Executive*

Australian Council of Trade Unions

Ms Cath Bowtell, *Industrial Officer*

Mr Joel Fetter, *Legal Officer*

Department of Education, Employment and Workplace Relations

Ms Natalie James, *Chief Counsel, Workplace Relations Legal*

Mr John Kovacic, *Deputy Secretary, Workplace Relations*

Ms Sandra Parker, *Group Manager, Workplace Relations Policy*

Mr Mark Roddam, *Branch Manager,Workplace Relations Policy Group*

Construction, Forestry, Mining and Energy Union

Mr David John Noonan, *National Secretary, Construction and General Division*

Mr Thomas Roberts, *Senior National Legal Officer, Construction and General Division*