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SUBMISSION TO THE SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

SUMMARY

This submission supports the passage of the Bill. However, we raise serious concerns about the architecture of federal industrial relations legislation. While we recognise that the Bill is essentially an interim measure, it perpetuates in several respects the flaws manifest in previous legislation. We urge the Senate to make clear its preference for legislation that is less convoluted and technical, and more accessible to the public. This is important in the lead-up to more extensive legislative reforms which will be presented at a later stage. We make several suggestions as to how the new legislation might be better designed.

1. Qualified support for passage of the Bill

1.1 **In our view, the Bill should be supported, although we have serious concerns about the drafting approach it reflects.** The Bill makes a number of changes to the Workplace Relations Act (WRA), the most important of which are the abolition of AWAs and the replacement of the award simplification and rationalisation provisions. A new interim statutory agreement, the Individual Transitional Employment Agreement (ITEA), is created.

1.2. **We welcome the abolition of AWAs as an important move towards simplifying the federal industrial relations system.** As we explain below, the proliferation of statutory agreements is undesirable and unnecessary, irrespective of the policy objectives they are intended to achieve. It is regrettable that the Bill creates a new form of statutory instrument, creating further complexity. However, we accept that this is only a temporary measure introduced in order to give early effect to the government's electoral commitments.

1.3. **We also welcome the restructuring of the award simplification process.** The 'award modernisation' amendments are less prescriptive than the existing WRA provisions and enable a more participatory process to be conducted. One concern we have with the modernisation process relates to the interaction between awards and the proposed National Employment Standards. We note that the proposed 'Award Modernisation Request' states:

> [27]. A modern award may cross reference a provision of the proposed NES. A modern award may replicate a provision of the proposed NES only where the Commission considers this essential for the effective operation of the particular modern award provision. Where a modern award replicates a provision of the proposed NES, NES entitlements will be enforceable only as NES entitlements and not as provision of the modern award.

1.4 This seems to be designed to maintain a distinction between remedies available for non-compliance with national standards and remedies available for breach of an award. In the current legislation, remedies for national standards (and particularly those comprising the Australian Fair Pay and Conditions Standard) are much broader than award remedies.[1] The policy may also be directed at continuing to differentiate between mandatory standards (such as the AFPCS) and 'default' standards (which parties can alter through negotiations – as is the case with awards).

1.5 **It would be preferable, in our view, to devise an instrument that integrates awards and minimum standards in order to avoid confusion arising from a multiplicity of standards sources.** This is one of the problems of the present system. If it is desired to restrict remedies available for breach of certain provisions, or to distinguish between mandatory and default standards, the legislation could do this within the award structure.

1.6 We support the other significant amendments of this Bill, including those changing the manner and consequences of terminating workplace agreements, and removing restrictions on incorporation of documents into agreements.

1.7 The remainder of this submission is intended to put on record **some fundamental problems with current federal industrial relations law**. This is with a view to contributing to debates about the nature of the anticipated broader reforms.

1.8 Our thoughts on these matters are informed in particular by our research into **comparative labour law** and by considerations drawn from empirically-based theories of **good regulation.**

2. Australian industrial relations law – a legacy of complexity

2.1 It is a telling feature of industrial relations debates in Australia that at least as much energy seems to be directed at debating particular types of statutory instruments as at the content of the standards themselves. **This reflects a system of industrial relations and labour standards which is perhaps the most legalistic and complicated in the world - especially in terms of the range of regulatory devices applying to the workplace.**

2.2 At the federal level, the relationship between employer and employee may be regulated by:

- the Australian Fair Pay and Conditions Standard;
- an award (subdivided into pre-reform and transitional awards);
- one of **six** types of statutory workplace agreement

[1] See WRA Part 7 Division 7 and Part 14.

- a large number **of transitional and interim instruments**, such as 'pre-reform certified agreements' and 'notional agreements preserving state awards' (this number will increase if a further one, the ITEA, is added with the passage of this Bill); and
- a common law contract of employment.

2.3 The proliferation of regulatory instruments, together with highly complex and prescriptive legislation, creates many practical problems. Most importantly, **most employers and employees will have difficulty in determining what their workplace obligations are;** they will frequently need to expend time and money in consulting with professional advisers. This defeats many of the purposes of the law. Insofar as the WRA is designed to provide a floor of labour standards, the floor is fragile if people cannot work out what the standards are. Insofar as the law is intended to facilitate agreement-making, it is not very facilitative to impose high transaction costs (such as lawyers' fees) as well as prescriptive rules and procedures.

2.4 More broadly, the complexity of the legislation inhibits public debate. For example, it would seem, from recent public statements and from our own observation of previous Senate processes that, it has been difficult for legislators to get the gist of important parts of the WRA. This means that there is insufficient scrutiny of the legislation. It also means that legislators' attention is diverted away from fundamental questions of principle (such as what standards should apply to working hours) to technical questions.

2.5 If this is a problem for legislators, then it is all the more difficult for community and small business organisations to make their much-needed contributions into the formulation of appropriate Australian labour standards.

2.6 A further problem is the 'barnacle' effect. Industrial relations legislation is like the hull of an old ship; so many things have been attached to it that it is difficult to see the original surface. Because the legislation is designed in a complicated way, amendments needed to adjust to changing circumstances (or unanticipated outcomes) must themselves be complex. Thus complexity increases markedly over time.

2.7 Another difficulty pertains to the interaction of various instruments. This has been well illustrated by Fetter and Mitchell in their analysis of the relationship between AWAs and common law contracts.[2] They have demonstrated that there are a great many uncertainties. For example, can an AWA override a term in a contract of employment that is more favourable to an employee? Are there implied terms in AWAs? To what extent does an AWA have contractual effect?[3] Can an AWA *be* a contract of employment? The practical consequences of this uncertainty can be seen in cases such as *McLennan*. [4]

2.8 This is by no means an exhaustive list of the problems with the federal approach to legislating in this field.

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[2] J Fetter and R Mitchell, 'The Legal Complexity of Workplace Regulation and its Impact upon Functional Flexibility in Australian Workplaces' (2004) 17 *Australian Journal of Labour Law* 276.
[3] It would seem to flow from *CFMEU v AIRC* (2001) 203 CLR 645 that it can.
[4] *McLennan v Surveillance Australia Pty Ltd* (2005) 142 FCR 105.

2.9. We emphasise that this order of complexity is **not** inherent in the nature of industrial relations regulation. An examination of **overseas jurisdictions** makes this plain. There is no comparable system characterised by numerous forms of statutory agreements in North America, East Asia[5] or Western Europe.

2.10 Nor is the complexity an inevitable consequence of the distinct nature of Australian labour law. It is true that, despite its originally simple design, the long history of conciliation and arbitration in this country saw the development of an increasingly arcane and technical jurisprudence and a legacy of thousands of awards (although the positive aspects of that system ought not be forgotten).[6] Simplification and a greater degree of flexibility were desirable. However, these could have been achieved without the extraordinary expansion of legislative provisions that has occurred over the last decade and a half. We suggest how it might now be done in the next section, which focuses on agreement-making and standard-setting.

3. The architecture of a genuinely simpler system

3.1 The following analysis may strike some as overly simple. However, we think it is a necessary corrective to an apparently pervasive approach in federal drafting, one beginning from particular trees rather than the forest

3.2. Most industrialised countries structure their regulation of labour standards and agreement making in a quite straightforward way. This regulation has the following elements:

- a means of giving legal effect to **agreements between employers and individual** employees: this is almost always based on the law of contract;
- a means of giving legal effect to **agreements between employers and groups of employees and/or their union (collective agreements)**; again, this is frequently based on the law of contract, but with modifications;
- a means of **setting standards** which ensure that employments agreements do not fall below a floor of rights; and
- a means for **providing remedies** where the agreements, or the standards, are breached.

Individual agreements

3.3. In Australia, until the 1990s, legal agreements between employers and individual employees were based primarily on contract. This changed with the advent of the AWA. As explained above, the existence of overlapping legal devices is a source of uncertainty. The (eventual) elimination of AWAs should enable a return to the simple system used almost everywhere else.

3.4. *Collective agreements*

In many jurisdictions – the US being a prominent example – collective agreements are also contractual in nature. Indeed, Americans frequently refer to collective agreements

[5] Some countries in South and South-east Asia have systems involving awards (e.g. India, Singapore). However, these do not have the range of statutory agreements to be found in Australia.

[6] J Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18 *Australian Journal of Labour Law* 325.

as ‘contracts’. It would obviate the need for much statutory regulation if collective agreements could also draw on the law of contract, although most countries have needed to enact legal provisions dealing with the *procedure* for making collective agreements.

3.5 Unfortunately, there are several obstacles in Australia to relying on the common law to give legal effect to collective agreements. One set of obstacles relates to the rather narrow approach taken by Australian courts to determining whether a collective agreement has legal effect. This is illustrated in the decision of *Ryan v TCFUA*[7] where rules of agency, consideration and legal intent conspired to deny an agreement legal enforceability. Another set of obstacles pertains to the available remedies for breach of collective agreements. Courts and legislatures in Australia have been reluctant to give parties seeking to enforce a collective agreement access to contractual remedies, at least where there is no express agreement to do so.[8]

3.6 It would therefore seem necessary in the Australian context for legislation to set out provisions dealing not only with the procedure for making a collective agreement, but also with their legal effect and the remedies for breach. Their relationship with individual contracts ought also to be specified. It is not necessary that this legislation be convoluted. For example, much current industrial relations legislation seeks to ‘micromanage’ the decision-making of specialist agencies and tribunals. This is often unnecessary as a matter can frequently be regulated effectively by leaving it to the discretion of competent personnel and/or by the specification of guidance material in legislative instruments. This might be done in the context of detailed rules about a fair collective bargaining procedure. Overseas jurisdictions provide a wealth of good (and sometimes bad) models, some of which could be carefully adapted to the Australian context.

Minimum standards

3.7 Systems of labour standards around the world may manifest some or all of the following elements:

- mandatory standards (which parties cannot contract out of) and default standards (which they can, under certain conditions);
- methods of setting those standards (including by the legislature, by the executive government and/or by independent tribunals or commissions;
- provisions as to the scope of standards (universal or confined to employees or certain kinds of employees, or certain industries or occupations); and
- conferral of authority on persons or entities to enforce the standards (inspectorates, unions, individuals).

3.8 Federal labour standards law in Australia comprises all of these elements, but they need to be rationalised. An important reason for this is that, unlike in many countries, many, if not most, labour standards were introduced through the conciliation and arbitration system. The test case system was a particularly effective way of delivering labour standards in an incremental, participatory way.[9] Direct specification of labour

[7] [1996] 2 VR 235.

[8] *ACTEW Corp Ltd v Pangallo* (2002) 127 FCR 1; the decision of the High Court of Australia in Byrne v Australian Airlines Ltd (1995) 185 CLR 410 has the effect that contractual remedies are unlikely to be available for breaches of award terms.

[9] Murray above n 6.

standards in legislation has become of major significance only very recently, particularly with the creation of the AFPCS.

3.9 It follows that in any new system, the *method* of standard-setting will be of central importance. The new government's policy is to persist with the previous government's 'two-track' system of legislated standards and awards determined by an independent Commission, albeit one where awards are likely to be more significant.

3.10 In principle, there are attractive features of a two track system. This is because the Parliament is in many ways better suited to establish 'bottom line' universal core standards (such as prohibition on forced labour, and certain forms of child labour, or an entitlement to sick or parental leave). On the other hand, an independent tribunal may be better placed to create standards applicable to certain industries and/or areas, especially where these need to balance completing objectives, and so have a 'negotiated' quality. Whether the government's particular approach to delineating legislated standards and those involving an independent agency is ideal is a question more appropriately dealt with through the NES Submission process.

3.11 More directly relevant to the present inquiry is the question of how one can opt out of default standards. Federal industrial relations law has generally rejected the possibility of opting out of standards through common law contracts.[10] A procedure that includes a statutory instrument is usually required. However, where good policy justifies access to an opt-out provision (and we make no comment on that in this submission), a statutory instrument is unnecessary. For example, legislation can enable an opt-out to take effect through the combination of a mandated procedure and the specification of the opt out in a contractual document.

Enforcement and remedies

3.12 While enforcement is outside the formal scope of the inquiry, we make brief comment on it, since this is an essential aspect of an effective system of agreement-making and labour standards.

3.13 It is obviously essential that any overhaul of federal industrial law provides for readily accessible remedies for non-compliance with agreements and/or standards. We note that existing enforcement procedures are deficient in several respects, including the following:

- the severely constrained nature of the AIRC with respect to labour disputes;
- the specification of differing remedies for different forms of labour agreement/instrument, without a clear underlying rationale for the differences;
- the absence of effective remedies for non-compliance with some standards, such as working hours;
- the excessive emphasis given to enforcement by bureaucratic means as the expense of enforcement through non-government organisations; and
- the differing availability of remedies depending on the (essential arbitrary) distinction between loss occurring as a result of, as opposed to prior to, termination of employment.[11]

[10] See, e.g. *Textile, Clothing and Footwear Union of Australia v Givoni* (2002) 121 IR 250.

[11]

4. Conclusion

4.1 This Bill is only the first step in changing federal workplace laws. While its aims are appropriate and it should be passed, its structure reflects the extreme complexity of the Australian system. We hope that any more comprehensive legislation passed by the Parliament reconstructs the system in a more rational manner.

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