Senate Education, Employment and Workplace Relations Committee

Inquiry into the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* 2008

Submission by the

Construction, Forestry, Mining and Energy Union

(Construction and General Division)

29 February, 2008.

Introduction

1. The Construction, Forestry, Mining and Energy Union (Construction and General Division) (CFMEU) welcomes the introduction of the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* 2008.

2. For many workers, over the past 12 years Australian Workplace Agreements have been little more than a convenient means for employers to reduce terms and conditions of employment. AWAs have divided Australian workplaces and were often an integral part of a broader long term strategy of de-unionisation.

3. The previous Government was never serious about ensuring that those who had entered into AWAs were not losing out as a consequence. The AWA process was flawed from beginning to end. There was never any proper scrutiny of these agreements or the circumstances surrounding their making. Statutory tests against which AWAs were supposed to be measured were inadequate and largely ignored in any event. The terms of individual AWAs were not publicly disclosed and full access to them was never granted even for such purposes as academic research. In many cases, employment or ongoing employment was conditional upon signing an AWA. Direct and indirect coercion and duress were commonplace.

4. The AWA stream of agreement-making was also a discouragement to the processes of collective bargaining. Often employers would resort to AWA 'negotiations' either as a lever in the bargaining process or to circumvent the prospect of a collective agreement altogether. During the 'WorkChoices' era, absolute primacy was given to AWAs over any other form of collective agreement. Bargaining that had been settled by a collective agreement could be re-opened and re-settled on different terms through the use of AWAs. The previous Government's promotion of AWAs over and above all other agreements was inconsistent with Australia's obligation to encourage and promote collective agreement-making under ILO Convention 98, *Right to Organise and Collective Bargaining Convention.*

5. AWAs represent a dramatic failure of public policy. They have proved deeply unpopular amongst the Australian workforce which has had to bear the brunt of this policy failure. This Bill is a practical measure which will ultimately bring about the end of this failed experiment in Australian industrial relations.

Comment on the Bill

Award Modernisation

6. Under the Transition Bill the new s 576(J)(2) allows for modern awards to include terms about any other matter specified in the award modernisation request to which the modern award relates.

7. According to paragraphs 61 and 62 of the Explanatory Memorandum the proposed award modernisation request will specify that modern awards may include terms about the proposed National Employment Standards (NES) and include the rules as to how and whether modern awards can deal with matters that form part of the NES.

8. Under the proposed award modernisation request clause 5 provides that "*subject to paragraphs 29-35 below, modern awards may also include provisions relating to the proposed National Employment Standards (proposed NES).*"

9. Under clause 26 of the award modernisation request the proposed NES is to be finalised by 30th June 2008. Under clause 27 a modern award may cross-reference a provision of the proposed NES but may only replicate a provision 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 provisions of the modern award.

10. Under clause 28 a modern award cannot exclude a term of the proposed NES or operate inconsistently with a term of the proposed NES. Under clause 29 (subject to clause 32 which deals with LSL) a modern award may include industry-specific detail about matters in the proposed NES.

11. For the avoidance of doubt, the Bill itself should provide such matters as are referred to in s 576(J)(2) include terms about matters dealt with in the NES.

12. The Discussion Paper on the NES notes in paragraph 290 that "*some awards (eg in the building and construction industry) and laws may provide redundancy entitlements that are structured differently from the proposed NES and/or are more beneficial than the NES."* It then poses questions as to whether the NES should address the different types of redundancy schemes, and if so, how?

13. Clause 30 of the award modernisation request is important in terms of providing adequate scope, where appropriate, for modern awards to deal with matters that are also dealt with by the NES. The terms of that clause should be broadened to ensure that there is sufficient scope for awards to be able to deal with industry specific matters that have a long established history of constituting the safety net for particular industries but which, because they may have a different structure or be more beneficial, are not covered by the NES. The Commission should therefore be required to have regard to any award provisions that have reflected the needs of particular industries, including the development of such provisions over time, in the determination of an appropriate safety net for those industries. Such an amendment would allow modern awards to incorporate industry specific provisions that have traditionally been regarded as forming part of the safety net, to the extent that they are not ultimately dealt with as part of the NES. This would ensure that ultimately, the combined effect of a modern award and the NES would be to provide an effective and relevant safety net of employment conditions.

Minimum Rates of Pay – Lack of Certainty over Pay Scales

14. Under Schedule 3 of the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, the powers of the AFPC in regard to wage setting are to be changed. In particular the AFPC's power to establish new pay scales is to be removed.

15. According to page 82 of the Bill's Explanatory Memorandum:

    "5. It is intended that the AFPC will continue to undertake annual minimum wage reviews during this period. As part of its minimum wage reviews, the AFPC will continue to adjust wage rates in existing APCSs. The AFPC will not, however, have the power to make new APCSs."

16. Whilst the CFMEU is not opposed to this course of action per se, we are concerned about the lack of attention to filling the void that remains. The problem here is that although the AFPC has had the power to issue APCSs (Australian Pay and Classification Scales) since its inception, apart from one or two isolated cases, it has not done so. This failure to issue a legally binding document has led to confusion over what are the appropriate minimum rates of pay in many industries, but particularly in the building and construction industry. (NB this is not the case for those employers covered by the transitional versions of awards as orders of the Australian Industrial Relations Commission (AIRC) are legally enforceable).

17. This confusion has been increased by the unduly complex definitions of basic periodic rates of pay in the *Workplace Relations Act* and the unsuccessful attempts by the Department of Employment and Workplace Relations to interpret the *Act* and publish their own versions of Pay Scale summaries without any consultation with the industry parties who deal with the awards and wage rates on a daily basis.

18. To date the Department has posted approximately 8 different versions of the Pay Scale summary for the National Building and Construction Industry Award. These Pay Scale summaries, which are now produced by the Workplace Authority following the demise of the WorkChoices web site, cannot be relied on. Not only are these Pay Scales inaccurate they also include a disclaimer as to the accuracy of the summary. Just as disturbing is the fact that for some awards no pay scale summaries have been produced at all (eg the Mobile Crane Hiring Award 2002).

19. The easiest and most productive solution would be to restore the wage setting powers of the AIRC in the Transitional Bill (whilst leaving the minimum wages determination with the AFPC in the interim). The AIRC would still be required to take into account the determinations of the AFPC. The benefits of this proposal would be to provide certainty to the industry (and to the Workplace Authority in considering agreements against the safety net) as to the accurate minimum wages to be paid, and to assist the parties in the award modernisation process (as minimum wages are one of the Government's 10 award matters).This could be achieved by the following:

    (i) By deleting clause 171(2)(a) from Part 7, Division 1 (i.e. removing basic rates of pay and casual loadings as part of the Australian Fair Pay and Conditions Standard, although you would have to amend clause 173 to include award minimum wages and casual loadings).

    (ii) By deleting the majority of Part 7, Division 2 – Wages, and inserting appropriate provisions that refer to the minimum wages and casual loadings as contained in the relevant pre-reform award.

(iii) By amending clause 513 in Part 10, division 2, to includes wages, classification structures and casual loadings as allowable matters in pre-reform awards (see Schedule 6 Clauses 17(1)(a), (c) and (k) for appropriate wording)

(iv) Amend Schedule 8, Part 3, Division 3, to allow wage rates in NAPSA's to be varied by the AIRC.

There would also be other consequential variations that would be required.

20. Inserting wage rates back into pre-reform versions of awards would not be difficult as in the majority of cases there will be an identical transitional award that contains the wage rates already agreed to by the parties. We strongly believe that addressing this issue in the Transitional Bill would be welcomed by both employers and unions.

Other Issues not Dealt with in the Scheme of Transition/Bill

Employer Greenfield Agreements

21. The WorkChoices legislation introduced the concept of 'employer greenfield agreements' for the first time. The term 'agreement' here is really a misnomer since these documents are determined unilaterally by employers and presented to prospective employees on a take-it-or-leave-it basis. There is no negotiation as to the terms of these documents by any employees or employee representative organisations. In fact unions are automatically written out of the script before a project even begins. In this respect there are similarities between AWAs and employer greenfield agreements. Undoubtedly, employer greenfield agreements suffer from a similar crisis of credibility.

22. Article 4 of ILO Convention 98 provides;-

> *Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

14. In a recent report on Australia's compliance with international labour Conventions to which it is signatory, the ILO's Committee of Experts on the Application of Conventions and Recommendations had this to say on the issue of employer greenfield agreements:-

> *The Committee's previous comments concerned the need to amend section 170LT(10) of the WR Act, which excessively restricted the opportunity for workers in a new business to choose their bargaining agent by enabling the employer to pre-select a bargaining partner prior to the employment of any persons in the new business. The Committee now notes that section*

352(1)(a) of the WR Act, as amended by the WorkChoices Act, reduces the period of operation of greenfields agreements from three years to one.

The Committee also notes however that, according to the ACTU, pursuant to its amendment, the WR Act has removed the requirement for an agreement to be made with a trade union, thus enabling the employer to unilaterally determine the terms and conditions of employment through an "employer greenfields agreement" (see section 330 of the WR Act). Moreover, the WR Act has also extended the scope of "greenfields agreements" beyond the establishment of a new business, project or undertaking to cover any new activity proposed to be carried out by a government authority, a body in which a government has a controlling interest or which has been established by law for a public purpose. The law has also been clarified to specify that the reference to a new project which is of the same nature as the employer's existing business activities is included in the definition of "Greenfield" section 323 of the WR Act; Explanatory Memorandum, paragraphs 798-801). The effect of these changes, according to the ACTU, is that employees on each of an employer's construction sites, for example, could be employed under a unilateral employer agreement for 12 months, during which time AWAs could be introduced to ensure that collective bargaining never became a practical reality.

The Committee observes that the inclusion of employer greenfields agreements, to the total exclusion of any attempts at good-faith bargaining, within the context of a much enlarged definition of new business to further include the very broad concept of "new activity", coupled with the greater primacy of AWAs, would appear to seriously hinder the possibilities of workers in such circumstances from negotiating their terms and conditions of employment. ***The Committee therefore requests the Government once again to indicate in its next report any measures taken or contemplated to amend the relevant provisions of the WR Act so as to ensure that the choice of bargaining agent, even in new businesses, may be made by the workers themselves and that they will not be prohibited from negotiating their terms and conditions of employment in the first year of their service for the employer even if an employer greenfields agreement has been registered.***[1]

23. Since their introduction, employer greenfield agreements have been used extensively by employers in the Australian construction industry. With the abolition of AWAs as part of the transition to the 'Forward with Fairness' model, we anticipate that employers will increasingly look to these greenfield agreements to avoid proper collective negotiations and trade union involvement.

24. Although the Bill provides for an improvement in the 'no disadvantage' test for all new agreements, including employer greenfield agreements, there should be no place for employer greenfield agreements in the period leading up to the full introduction of the 'Forward with Fairness' model. The Bill would be significantly strengthened and improved with the introduction of provisions to quickly phase out access to employer greenfield agreements. This would be

[1] Report of the Committee of Experts on the Application of Conventions and Recommendations – International Labour Conference 96th Session, 2007 Report III(Part 1A) pg 47

consistent with the present approach of the Bill to reinstate a genuine system of collective bargaining through the abolition of AWAs. Alternatively, the Government should consider a separate Bill which would have that effect. It would also be a positive step to bringing Australian legislation into conformity with ILO Convention 98.

25. In the interim, for whilst ever the capacity to make such agreements continues to exist, consideration should be given to having a relevant collective instrument operate in lieu of an award in circumstances where employer greenfield agreements are terminated. Similarly, employer greenfield agreements should take effect on the date of approval rather than date of lodgement to allow reasonable time for scrutiny to occur.

The *Building and Construction Industry Improvement Act* 2005

16. The CFMEU records its continued opposition to the *Building and Construction Industry Improvement Act* 2005. This legislation represents the most extreme elements of the former Government's industrial relations agenda. There is no justification for a continuation of these laws which should be phased out as a matter of the highest priority. The CFMEU will continue to advocate for the urgent repeal of this Act at every available opportunity.