Fair Work Bill's settings and adjusting to some challenges of the global economic crises

Industrial Relations Society of Queensland

Annual Breakfast Function

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24 FEBRUARY 2009

Outline

[1] The *Fair Work Bill 2008*, (the Substantive Bill), was introduced to Parliament on 25 November 2008. Building on changes already made by the *Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008*, enactment of the Substantive Bill will implement major elements of the Rudd Government's *Forward with Fairness* policy.[1] The package, when backstopped by the foreshadowed *Fair Work (Transitional and Consequential Provisions) Bill 2009*, is to result in a "*new workplace relations system*" to be fully operational by 1 January 2010.

[2] This paper, and my presentation of it this morning, attempts to do three things. First give an indication of the major content and timing of the legislation for changes to the industrial relations system. Several aspects of the proposed new system have excited controversy in public comment or in submissions to the Senate Education, Employment and Workplace Relations Committee: Inquiry into the Fair Work Bill 2008. I have selected and comment upon what I think to be the most topical issues for practitioners. I conclude with some observations about points raised for or against the appropriateness of the proposed legislative package in perspective with the economic crisis that has overtaken Australia. I am by no means master of the detail of the legislation; also, amendments will be moved in the Senate, so you must approach what I say with double caution.

[1] Joint Statement of Kevin Rudd MP and Julia Gillard MP *Forward with Fairness –Policy Implementation Plan* 28 August 2007: and *Workplace Relations Act 1996-2008* as amended.

[3] Processor Andrew Stewart has been advising on the drafting of the legislative scheme. He has indicated that the best possible result for the Government would be to have the Substantive Bill passed by February or March. Before the substantive legislation was tabled in the House of Representatives, he expressed the modest hope that the legislation will *end up being far simpler.*[2] Prudently, Professor Stewart added that he expects the transitional legislation to be *frighteningly complex.* A significant degree of simplification and coherence has been achieved. Most of us will associate legislative simplicity with brevity. The Fair Work Bill 2008 runs to a mere 575 pages encompassing 800 Clauses; we are told in the Explanatory Memorandum that the current Act is around 1500 pages but not told that tally includes transitional provisions! The 1904 Act was comprised of 92 sections fitted within 20 pages; the 1988 Act had expanded to 359 sections plus or minus some single alphabeticals in 298 pages, including transitional stuff.

The Fair Work Bill: what is to happen and when?

[4] Generally, the new system will apply to *national system employers* and *national system employees,* defined to pick up approximately 85% of Australian employees. Effectively, the Bill has the same coverage as WorkChoices[3]: employment by most corporations, and employment by the Commonwealth or in the Territories: State government employment and employment by sole traders or partnerships or non-trading corporations will still be within State jurisdictions, except for Victoria. The federal system will also act on *non-national system* employment: ILO standard rights and duties related to unpaid parental leave and termination of employment will extend to Australian employment generally.

[5] 80 pages of "regulatory analysis" preface the Explanatory Memorandum for the Bill.[4] That analysis usefully outlines the key elements of the new system. It contrasts current arrangements with proposed changes. Those who want a quick tour of the detail may find that summary useful. Another summary, incorporating references to topical debate and commentaries, can be downloaded from the Parliamentary Library.[5]

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[2] Andrew Stewart: op.cit

[3] Clauses 13-15 of the *Fair Work Bill 2008* correspond with sections 6-7 of the Workplace Relations Act 1996.

[4] Fair Work Bill 2008: Explanatory Memorandum (429 pages-downloadable from workplace.gov.au) at pages: i-lxxx.

[5] *Fair Work Bill 2008:* O'Neill, Goodwin and Neilsen (30 January 2009) ISSN 1328-809.1 number 81, 2008-2009. www.aph.gov.au/library

[6] The Substantive Bill is laid out in 5 Chapters, structured to bring coherence if not always simplicity to the enactment. **Chapter 1** is introductory; it establishes the legislative foundations, outlines the Bill's content and indicates linkages between its components. It introduces the scheme of the legislation; an internal "Guide" to the contents assists understanding; so far as I am aware that Guide is an innovation to parliamentary drafting.

[7] Chapter 2 makes provision for *terms and conditions of employment* of national system employees. The sources of those conditions are broadly summarised in Clause 5 of the Guide. Part 2.2 establishes a statutory, mandatory, directly enforceable[6], safety net of 10 legislated *National Employment Standards*, (NES), *for all national system employees*. That set of conditions is to be augmented by *modernised awards*, to apply at specific industry and occupational levels, regulating 10 other conditions including minimum wage rates provisions or orders. Modern awards will cover national system employers; and, their employees who are not *high-income employees.* Hence employees above a *high-income threshold,* (HIT), are excluded but for an employee otherwise covered by a modern award, only if his or her income level is protected by a guarantee.[7] The NES/modern award safety net is able to be built upon in particular cases by workplace specific inputs from several other sources: *enterprise agreements* arrived at through an enterprise-level collective bargaining system;[8] "*workplace determinations*", including special low-paid workplace determinations, able to be made by the new administering authority, Fair Work Australia, (the FWA); [9] or, subject to new criteria, on transfer of some conditions on *transmission of a business*.[10]

[8] The substantive powers of the FWA to make modernised awards, to facilitate enterprise bargaining, the *good faith bargaining duties* and rules governing employer's exposure to particular terms and conditions are all interwoven with the respective sources of conditions of employment. **Division 4 of Part 2.4** deals with the approval by FWA of enterprise agreements by reference to the important concept of a *Better off Overall Test,* (BOOT). Effectively Clause 193 requires that, at the test time when an application is made for approval

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[6] Clause 44 provides that an employer must not contravene a provision of the NES; the prohibition of contravention is a civil remedy provision.

[7] *Fair Work Bill:* Part 2.3 *Modern Awards;* and Part 2.6 *Minimum Wages.* Clause 47 (2) provides that a modern award does not apply to a high-income employee at the time of being such an employee. To be a high-income employee, an employee must be covered by a guarantee of annual remuneration provided under Clauses 328-329.

[8] *Fair Work Bill:* Part 2.4 Enterprise *agreements: Clauses 169-257*

[9] *Fair Work Bill:* Part 2.5 *Workplace determinations Clauses 258-281*

[10] *Fair Work Bill:* Part 2.8 *Transfer of business: Clauses 307-320*

of an agreement, each award covered employee and each prospective award covered employee, fto be covered by the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

[9] The Chapter concludes with provision for mandatory payment of wages entitlements. A separate set of corresponding duties and offsetting exemptions in relation to *guarantees of annual earnings* will be applicable to employees, covered by an operative modern award, but remunerated above the HIT.[11] In effect employees above that $100,000 threshold will be subject to the NES but, if covered by a modern award, and by a guarantee of annual remuneration, the modern award will not apply.[12]

[10] **Chapter 3** of the Substantive Bill is devoted to prescription of *rights and responsibilities of employees, employers, organisations* and others such as independent contractors. Three of the more hotly debated features of the Bill are dealt with in this Chapter: unfair termination, the scope of protected industrial action, and union right of entry. In form, Chapter 3 breaks important new ground by converting some well-established regulatory provisions into *workplace rights,* and *protections*; with other prohibitions formulated as duties binding particular persons. Through those conversions, the legislative structure goes beyond form to substance. In that respect, from the viewpoint of the Australian Institute of Employment Rights, which fosters recognition of explicit workplace rights and duties, I believe the innovation will be welcome.

[11] Clause 6 of the Guide outlines the six Parts of Chapter 3. The first covers *general workplace protections* prohibiting *adverse action* for reasons that include the existence, exercise or possible exercise of a *workplace right*. Generally, those rights relate to freedom of association, involvement in industrial activity or industrial proceedings, protections from discrimination, and from sham arrangements to mask employment relationships. The consolidation of specific WR Act provisions affords protection against a broader range of

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[11] *Fair Work Bill:* Part 2.9 *Other terms and conditions of employment*: Clauses 321- 333

[12] Commenting upon this feature of the new system, John Buchanan submitted to the Senate Committee: *It remains somewhat of a mystery as to what the policy rational for this feature of the Act is. As noted above, our research shows, for example, over one in four employees earning $100,000 per annum report that awards play a role in setting their wages and conditions. Clearly these people are set to suffer a reduction in their enforceable rights at work.* Labour standards, flexibility and economic renewal**:** Advice to the Senate Education, Employment and Workplace Relations Committee Inquiry into the *Fair Work Bill* 2008
Dr John Buchanan, Director, Workplace Research Centre, Faculty of Economics and Business, University of Sydney

adverse action than does the current system. The Explanatory Memorandum points out that whereas the existing provisions protect an employee against dismissal because the employee has participated in proceedings involving alleged violation of laws, the new protections cover a wider range of adverse action such as refusal to employ or injury to the employee in his or her employment.[13] Part 3.1 also contains specific compliance processes. A court will deal with *a general protections dispute* involving dismissal from employment only if the dispute has not been resolved by FWA. The FWA is also empowered to conciliate such disputes not involving dismissal but not finally determine them.[14]

[12] It is in **Part 3-2** that unfair dismissal laws are reinvigorated; Clause 382 read with Clause 385 provides eligible national system employees with a right to *protection from unfair dismissal* as defined. The proposed changes have been canvassed now for some time; for present purposes, I will pass over them without detailed summary. Broadly, eligibility for the protection will be founded upon completion of a qualifying period applicable to the class of employment: six months generally for larger employers, 12 months for businesses employing fewer than 15. Subject to the qualifying period casual employment and employment terminated prior to the completion of a fixed term will be eligible for relief. A Fair Dismissal Code will provide a protective simplified guiding procedure for small business and other procedural simplification including a requirement for application to relief to be lodged within seven days of dismissal will be introduced. The exemption for redundancy dismissals will be narrower. I draw attention in particular to an addition the criteria for testing whether a dismissal breaches the protection. Clause 387 (d) requires the FWA to take into account any unreasonable refusal by the employer to allow the dismissed person to have a support person present to assist that any discussion relating to the dismissal. That change may become a basis for unions and perhaps legal service agencies to assert a representative presence. Another point worth noting is that the FWA power to award costs is to be generalised beyond the unfair dismissal matters; Clause 611 grants the FWA power to award costs *in any matter before the FWA* where it is satisfied that an application or response is considered to be unreasonably or vexatiously pursued. An indicative summary of the main changes is set out at pages *xlv* to *liv* of the Analysis section of the Explanatory Memorandum. Tim Donaghey, Barrister, presented a very thorough and in my view authoritative analysis of the new regime

[13] Explanatory Memorandum at [1386-1389]

[14] Clauses 365 and 372 of the Substantive Bill respectively enable applications to the FWA to deal with disputes where a person has been dismissed allegedly in contravention of the general protections; and, for disputes not involving dismissal, to mediate, conciliate, recommend in outcome or express an opinion.

to a Law Institute of Victoria conference in December 2008. A copy of that paper will in due course be available for purchase from the LIV.[15]

[13] The definition of **protected industrial action** is defined in **Part 3-3**. Action is protected if it is *for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement.* Such claims must be about, or reasonably believed to be about, *permitted matters*. Related *employee response* and *employer response industrial action* for the agreement is also protected.[16] The definition of *employee claim action* imports the requirement for authorisation by a *protected action ballot*, prohibits claiming unlawful terms in the agreement, prohibits engaging in *pattern bargaining* in relation to the agreement, or industrial action relating to a demarcation dispute.[17] Otherwise, Part 3-3 prohibits organising industrial action that is not protected and provides remedies where such industrial action is taken; it enables orders by the FWA in relation to industrial action, permits suspension or termination of protected industrial action by the FWA, or by the Minister; prescribes the process to allow secret ballots to authorise the taking of protected industrial action and restricts payments during periods of industrial action.[18]

[14] The FWA is empowered to issue an *entry permit* to an official of an organisation, who thereby may become a *permit holder*; upon giving an *entry notice*, an eligible permit holder may enter premises. Entry rights for eligible permit holders are provided for in **Part 3-4**.[19] A permit holder is allowed to enter workplaces to represent members in the workplace, hold discussions with potential members and to investigate suspected contraventions of the regulatory scheme The remainder of Chapter 3 deals with a miscellany of rights and duties of a national system employer. Here can be found the *right to stand down* an employee in certain circumstances; the *obligation to notify and consult about decisions to terminate 15 or more employees* for reasons of an economic, technological or structural nature; and obligations to make and keep *employee records* and give pay slips. Throughout this Chapter also, rules enabling applications to and orders by the FWA are interwoven with the rights and duties expressed.[20]

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[15] Tim Donaghey: *Fair Work Bill 2008-A New Regime of Termination of Employment: An Examination.* Seek access from www.liv.asn.au or from author at Aickin Chambers Queen Street Melbourne.

[16] Clauses 408-412; the definition of permitted *matters* appears at Clause 172 in the context of defining the parameters of enterprise agreements.

[17] Clause 409. The definition of pattern bargaining is in Clause 412

[18] Clauses 413-477.

[19] Clauses 478-521.

[20] Clauses 522-536.

[15] **Chapter 4** covers *compliance and enforcement*, civil remedies, jurisdictions of the Federal Court, (the FCA), and Federal Magistrates Court, (the FMC), and like matters. A number of obligations imposed throughout the Bill are labelled as civil remedy provisions. A person may apply to an eligible Court for an order for a pecuniary penalty and other orders against an alleged breach of such obligations. **Part 4-1** establishes a single compliance framework for the new system. Standing, jurisdiction and maximum penalties, those who may apply to enforce, the appropriate court(s), and the remedies available, in respect of each civil remedy provision are conveniently set out in a single Table.[21] An important innovation is the provision in Clause 543 allowing the Federal Court or Federal Magistrates Court to enforce *safety net contractual entitlements.* Read together with the definition in Clause 12, enforcement of safety net entitlements such as a contractual entitlement to wages in excess of minimum wages set out in the modern award or enterprise agreement will be streamlined and assisted. At present Fair Work Inspectors cannot enforce contractual entitlements of an employee in any court, even if the Inspector is bringing enforcement proceedings in relation to the employee's statutory entitlements. Another innovation is a *small claims procedure*, for amounts under $20,000. Claims relating to an amount due under a fair work instrument or safety net contractual entitlements and the like may be dealt with by the FMC, or an eligible State court, in an informal manner involving minimal legal form and technicality.[22]

[16] **Chapter 5** covers *administration and the establishment of the institutional framework.* That framework includes **Fair Work Australia**, (the FWA), as the tribunal, administrative agency and source of advice and support on all workplace relations issues. The functions of the FWA are summarised in Clause 576, which should be read with Clauses 595 and 738-740. The list in Clause 595 provides a convenient path from which to explore the scope for and degree of intervention that will be available to the tribunal. There is a broad but by no means exact correspondence between the procedural quasi-judicial directions binding the FWA and those that have traditionally bound Commonwealth Arbitration tribunals; perhaps a lower standard of quasi-judicial performance is to be expected. Fact diminished expectations resonates in the alteration ensuring that appointees to the tribunal as Presidential Members generally will no longer have the rank and status equivalent to members of the Federal Court,

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[21] Clause 539: *Applications for orders in relation to contraventions of civil remedy provisions.*

[22] Clauses 541-543: *Applications for orders in relation to safety net contractual entitlements*; Clause 548: *Plaintiffs may choose small claims procedure.* The Explanatory Memorandum at pages 325-331.

or associated conditions and entitlements. That change is likely to significantly decrease the attractiveness of an appointment to the tribunal for higher functioning lawyers. I note also that Clause 596 relating to *representation by lawyers and paid agents* before the FWA, more or less corresponds with established practice under the WR Act: a person may be represented by a lawyer or paid agent only where FWA grants permission based upon considerations of efficiency or fairness. Significantly, Clause 611 expands the risk of costs being awarded in industrial proceedings; *in any matter before the FWA*, it may award costs if satisfied the application or a response to it is vexatious or without reasonable cause. Another separate agency to be established is the **Fair Work Ombudsman**. It will be tasked to promote harmonious and cooperative workplace relations as well as compliance with the Act and industrial instruments, labour inspectorate functions and enforcement of legal entitlements.

[17] Finally, there is a **Chapter 6**, appropriately headed *Miscellaneous.* Its content generally relates to other Chapters. It provides against multiple applications or complaints in relation to the same conduct. Part 6-3 and Part 6-4 extend to non-national system employees and non-national system employers the NES entitlements to unpaid parental leave and notice of termination and a prohibition against unlawful termination of employment on grounds specified.

[18] **Part 6-2** is about *dealing with disputes* between national system employees and their employers under modern awards, enterprise agreements and contracts of employment. The Regulations are to prescribe *a model term for dealing with disputes* through enterprise agreements. In response to the Minister's award modernisation request, each modern award includes provision for dispute resolution in relation to a matter arising under the award or a dispute in relation to the NES.[23] The Bill enables or requires corresponding dispute settling terms in both modern awards and enterprise agreements.[24] Clauses 738 and 739 establish and limit the powers of the FWA to deal with a class of disputes. It may do so if the relevant modern award, enterprise agreement, (or contract of employment concerning disputes about matters in relation to the NES or safety net contractual entitlement), includes a term that provides for the FWA or a person to deal with the dispute. The FWA is prohibited from dealing with a dispute about whether an employer had reasonable grounds for refusing an NES based request for flexible working arrangements. It may not exercise any powers limited

[23] Clause 10, kept manufacturing and Associated Industries and Occupations Award 2010. See generally Award Modernisation Full Bench [2008] AIRCFB 1000] 19 December 2008 at [42-46]

[24] Clause 146 in relation to modern awards; Clause 186 in relation to enterprise agreements.

by the term of the enabling dispute settling procedure. Importantly, and I believe awkwardly, subclause 739 (5) provides in effect that, although the parties have expressly agreed the FWA may arbitrate, it must not make *a decision that is inconsistent with the Act or a fair work instrument that applies to the parties.* According to the Explanatory Memorandum, the rationale for that provision is that:

> *FWA cannot make a binding decision that is inconsistent with the parties' rights or obligations under the Bill (including the regulations) or a fair work instrument (such as an enterprise agreement) that applies to them. These rights and obligations can only be finally determined by court…. The FWA could not make a binding decision that would modify the way the NES or modern award would apply in a particular workplace… this maintains the integrity and stability of the safety net, by ensuring that NES or a modern award cannot be modified than in accordance with the processes provided in the bill so that it does not apply differently in relation to particular workplaces or employees.*[25].

[19] I cannot reconcile that rationale with the incontestable function of industrial arbitration to create new rights. Arbitration does not proceed upon a determination of existing rights. This limitation upon the FWA's power to arbitrate, in effect *the private arbitration power*, will effectively torpedo arbitral determinations of new rights in matters arising out of awards and agreements. Determinations of that kind have been at the core of tribunal functions since the inception of arbitration as a form of industrial dispute settlement. Retention of the provision in this form will probably frustrate the use of arbitration to make other than consent determinations. Such determinations will often be sufficient to the day but they will be unenforceable. For those who do use arbitration, a jurisdictional hazard seems to have been erected out of more abundant caution. If the purpose is to protect the integrity and stability of the safety net, the provision goes too far when it precludes an arbitral determination inconsistent with *a fair work instrument*. That expression includes enterprise agreements. In the effect, dispute settlement arbitration will be jurisdictionally unable to achieve a result that the parties would be permitted to arrive at by agreement.

When will changes take effect?

[20] Exposure drafts of modern awards for 11 priority industries were published on 12 September 2008; each draft includes the model *individual flexibility agreement* Clause issued by the Award Modernisation Full Bench on 20 June 2008. The *Substantive Bill* was introduced to Parliament on 25 November 2008. A full Senate Committee Inquiry has

[25] Explanatory Memorandum at [2739]

considered it. The Report of the Senate Committee is scheduled to be completed and tabled by 27 February 2009. " *It is intended that the Bill will commence on 1 July 2009 but consistent with policy commitments, the NES and modern awards will commence on 1 January 2010*". Subject to passage of the Substantive Bill, key elements of the new system including the Transmission of Business provisions, the bargaining framework, unfair dismissal and associated protections will commence on 1 July 2009.

[21] A separate *Transitional IR Bill* will be introduced in 2009 to cover the shift to the new system:

> "*The transitional Bill will:*
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> - *Ensure that an employee's take-home pay is not reduced as a result of the employee's transition onto a modern award by allowing for FWA to make orders to deal with any such matter;*
> - *Provide that existing agreements will continue to apply until terminated or replaced by a new agreement made under the new bargaining framework;*
> - *Ensure a fair safety net with the National Employment Standards and minimum wages applying to all employees from 1 January 2010,* ***including those covered by existing agreements****; and*
> - *Allow parties to "modernise" enterprise awards so that they can continue to operate in the new system and treat Notional Agreements Preserving State Awards (NAPSAs) derived from state enterprise awards in the same way"*[26] *(My emphasis).*

A selection of contested or topical issues.

[22] Perhaps the most useful thing to do this morning would be to try to focus upon a handful of topics. Points most contested in submissions to the Senate Inquiry are one pool from which to select. Topics likely to be key concerns for IR practitioners and HR people in the short term are another. It is impossible to cover all of them. I have done what I can to supply references to background papers and material that may be of assistance in relation to topics that I pass over. Practitioners should by now be in advanced stages of preparing advices about priority matters for their client's attention. My unsolicited vote goes to an admirably free-to-air online publication by Corrs Chambers Westgarth, *Corrs' "In Brief*". It seems to be publicly available and supplies suggestions to clients through a 13-point *To Do*

[26] Minister Julia Gillard: Second Reading Speech.

List.[27]. In deference to whatever copyright applies, that list is not reproduced here but a couple of points that overlap my own commentary are drawn upon to give the flavour.

[23] Predictably, the most contested issues are indirect reflections of the ideological conflict of objectives implicit in the challenge that the Fair Work Bill makes to the WorkChoices settings and regime. Principal objectives served by WorkChoices included the pursuit of individualised contractual arrangements, curtailment of collectivist influences in workplaces and minimisation of regulatory or third-party intervention in management's flexible use of labour resources. There is opposition between those objectives and the Fair Work Bill settings. That tension stimulates the *7 key policy issues* agitated by the AiG in its Submission to the Senate Inquiry[28]: four of which are also prominent in the 7 concerns that AMMA seeks to have "resolved" by that Inquiry.[29] Propositions advanced by the ACTU in its submissions to that Committee are more discursive but join issue with the employers on most of the major points raised.[30] The topics I deal with in this paper include some key policy issues and some less controversial matters that should be of immediate concern to practitioners:

- The impact of modern awards;
- Whether old system agreements and their extensions should be subject to a d*rop-dead Clause* on 1 January 2010;

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[27] Corrs Chambers Westgarth: *Corrs In Brief: (December 2008)* at page 8. Available at www.corrs.com.au

[28] Australian Industry Group: *Submission to Senate Committee: January 2009*. The submission identifies certain " problems and solutions": not increasing union entry rights; no union coverage by enterprise agreements except where made with the union; enabling greenfields agreements without canvassing all relevant unions; multiple problems with enterprise agreement making procedures generally and obligations to bargain; scrap the low paid bargaining stream; prevent enterprise agreements overriding long service leave laws; retain the WR Act transmission of business provisions.

[29] AMMA Fair Work Bill Submission 12 January 2008: Denouncing the Bill as *the greatest increase in union power since federation*, AMMA listed its "key concerns" as: expansion of union right of entry and access to non-member records; union greenfields agreements; good faith bargaining; transfer of business; hours of work and Rostering; cashing out of annual leave; taking of annual leave.

[30] ACTU: *Submission by the Australian Council of Trade Unions:* 9 January 2009: its concerns relate to the non-application of the Bill to construction workers, independent contractors, foreign ships and community sector employees; the unenforceability of the right to request flexible working arrangements; aspects of modern awards including individual flexibility arrangements and the high income threshold; the bargaining process particularly permitted matters, scope orders and multi-employer bargaining; several aspects of limitations on protected action; and, aspects of the general protections, unfair dismissal, dispute resolution and transfer of business. In relation to transitional arrangements, the survival of WorkChoices instruments is opposed.

- The limits to be applied to survival of employment entitlements on transmission of work or business;
- The limits on union right of entry to workplaces;
- The procedural requirements associated with the enterprise bargaining framework including greenfields agreements, union coverage by enterprise agreements, and the powers of the FWA;
- Curtailing the scope for the exceptional treatment of the low paid bargaining stream.

The impact of Modern Awards.

[24] The establishment of modern awards as a key component of the safety net that will be in place from 2010 is evolving quickly. The process has a bearing upon a number of other matters and issues. Two of the things that Corrs advises its clients to do are:

> - *Review existing workplace arrangements to consider what impact the commencement of the NES might have on your business.*
> - *Ensure that you keep informed of the award modernisation processes that are taking place in respect of your employees so that, as detail becomes available, you can plot an appropriate strategy for your business.*[31]

[25] Modern awards will contribute an additional element of the safety net in respect of 10 broad allowable award matters. The minimum wage provision is a necessary component of each modern award. That provision, along with the NES, will *apply to all employees from January 2010, including those covered by existing agreements.*[32] Thus an employment covered by any form of existing agreement, including an individual agreement extant at 1 January 2010, will need to extend conditions consistent with the NES including the minimum wages prescribed by the relevant modern award. The relevant existing agreement will be overridden to the extent that it is inconsistent. Seventeen modern awards were finalised by the Award Modernisation Full Bench (the Full Bench), on 19 December 2008.[33] It seems the 17 modern awards will replace some 500 awards that currently cover the 11 selected priority industries. Ironically, that progress toward a statutory objective of minimising the number of modern awards may be compromised by the survival or resuscitation of pre-existing *enterprise award*s or NAPSAs derived from State enterprise awards.[34] It seems that pre-reform single business awards and single business NAPSAs will operate beyond the coverage of modern awards unless the current parties agree to have them reviewed. Employer preference for single enterprise awards was the major contributing factor to the proliferation

[31] Corrs: Ibid; at 8
[32] Second Reading Speech: supra
[33] Award Modernisation Full Bench [2008] AIRCFB 1000] 19 December 2008
[34] W.R Act: section 576U, 576V; Minister's Consolidated Award Modernisation request: *the creation of modern awards is not intended to result in the modification of enterprise awards.*

of awards at federal level from about 1980 onwards; in 2005, the proponents of WorkChoices targeted that proliferation of awards: "too many rules and regulations". By no means least prominent of those proponents was AMMA; in May 2008, AMMA's submission in response to the AIRC President's Award Modernisation Statement, pressed for the anomalous exclusion of NAPSAs from the definition of enterprise awards to be "resolved".

[26] The "finalised" modern awards can be downloaded from www.airc.gov.au/awardmod. On 23 January 2009, the Full Bench published a further decision about the first 17 modern awards. It identified terms that must be revised and foreshadowed that relevant effects of the Transition Bill will need to be taken into account. The Full Bench will amend at least the *coverage Clause*, the *award flexibility Clause* and the *annual leave Clause* of each modern award to cover requirements by the Minister that modern awards be expressed:

- *so as not to bind (sic) an employer who was bound by an enterprise award or a NAPSA derived from a state enterprise award"* and,

- *to ensure that a flexibility term in a modern award: requires the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall; prohibits an individual flexibility arrangement agreed to by an employer and employee from requiring the approval or consent of another person, other than the consent of a parent or guardian if an employee is under 18;*

- *so that a right allowed to an employer to require employees to take annual leave be subject to the condition that the requirement is reasonable.*[35]

[27] Exposure drafts of a further 24 modern awards, (the Stage Two industries), were published by the same decision on 23 January 2009. The timetable for making those modern awards set a deadline of 3 April 2009. In its latest decision of 30 January 2009, the Full Bench listed existing awards and NAPSAs for the 39 industries and occupations to be covered by Stage Three of the modernisation process.[36] The voluminous lists of those awards and NAPSAs identify enterprise awards and enterprise NAPSAs separately. That division suggests we can confidently anticipate enablement of modern enterprise awards through the Transitional Bill. A deadline for making modern awards for those industries has been set at 4 September 2009.

[35] [2008] AIRCFB 1000] at [5-9]
[36] Award Modernisation Full Bench [2009] AIRCFB 100jj

[28] The terms of modern awards will be of pressing concern to practitioners responsible for identifying and transposing the operation of particular instruments to employments bound by extant existing agreements. Three mandatory terms are of particular interest:

- coverage and application of modern awards;
- award flexibility provisions;
- the minimum wage rate provision.

Coverage and application of modern awards

[29] The Bill breaks new ground displacing the industrial notions of awards "*binding*" *parties*" and having "*application to*" particular industries work or occupations. Instead the Bill defines notions of an award or agreement that "*covers*" an employer or employee. Coverage in this sense means that the relevant employment is within the jurisdictional scope of the instrument.[37] However, a modern award or enterprise agreement operates to confer entitlements or impose obligations on particular employments only if it "*applies*" to the employer or employees covered by it.[38] Hence, under the new system a *fair work instrument* applies only if it covers, is in operation, and no other provision of the Act has the effect that it does not apply. So, a modern award covers but does not apply to a particular employment at a time when an enterprise agreement covers and applies to that employment.[39]

[30] If you are confused by the explanation you join the Minister, the Full Bench and almost everyone who will be called upon to apply the results. After one false start, the Full Bench has now arrived at a stipulation of the coverage of the Manufacturing Modern Award. It reads in part:

4. Coverage

4.1 This award covers employers throughout Australia of employees in the Manufacturing and Associated Industries and Occupations who are covered by the classifications in this award and those employees. However, this award does not cover:
(a) an employer who is outside the scope of Clause 4.2(a) or (b) unless such employer employs an employee covered by Clause 4.2(c) and the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee; or
(b) an employer bound by an enterprise award in respect of any employee who is covered by the enterprise award; or
(c) an employee excluded from award coverage by the Act; or
(d) exempt employers and employees, as set out in Clause 4.4.

4.2 Manufacturing and Associated Industries and Occupations means:
(a) the following industries and parts of industries:

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[37] Clauses 48 and 53.
[38] Clauses 47 and 52; Explanatory Memorandum at 199-201
[39] Legislative note to Clause 57 of the Bill.

(i) the manufacture, making, assembly, processing, treatment, fabrication and preparation of:
the products, structures, articles, parts or components set out in Clause 4.3; or
the materials or substances set out in Clause 4.3; or
any products, structures, articles, parts or components made from, or containing, the materials or substances set out in Clause 4.3. …….

(b) the provision of any of the operations or services set out in Clause 4.2(a) on a contract basis by one business to another business, where the first business is independent of the second business.
(c) the following occupations:
(i) maintenance employees in the engineering streams.
(ii) technical workers……

[31] The Manufacturing Modern Award, as I understand it, will apply from 1 January 2010, to the employer and employee for an employment: in an industry and occupation covered, provided: the employer is not covered by an enterprise award in relation to the employment, the particular employment is not covered by an enterprise agreement that applies to it, neither the employer or the employee is exempted by subclause 4.4, and the employee is not a high income employee as defined, meaning he or she has a guarantee of annual remuneration above the HIT.[40]

[32] The Full Bench explained and deployed the "covers" and "applies" concepts in its decision of 19 December 2008. That decision rejected proposals that the modern awards bind unions and other organisations. The Full Bench's reasoning usefully outlined the fundamentals of the right of entry provisions before concluding:

> *[20] As we indicated earlier, the submissions in favour of naming registered organisations in awards as covered by them were based on various assumptions about representation rights and coverage. The relevant terms of the Fair Work Bill do not indicate that awards will affect legal rights in that respect. Furthermore the terms of the Fair Work Bill do not indicate that the ability of a registered organisation to make an application to vary a modern award is in any way dependent on the organisation being covered by the award. We have concluded that under the proposed legislative scheme awards will not be instruments for delineating rights of industrial coverage, entry onto premises or enforcement of awards. Indeed we have been unable to discover any substantive legal right which would accrue to a registered organisation by virtue of being covered by a modern award.*
>
> ……
>
> *[22] In our view there is no point embarking on an exercise to identify the organisations which should be covered by each modern award, and to what extent, when, for the reasons we have given, nothing appears to turn on the outcome. It is also relevant to observe that under the award system which operated prior to the Work Choices amendments the identification of parties bound was necessary because of the requirement for an antecedent dispute between named employers and organisations. That requirement is not a feature of the modern award system. We have decided,*

[40] Clauses 46, 47, 48.

> *therefore, that as a general principle we shall not name registered organisations as covered by modern awards. Should it be necessary to do so we shall of course reconsider the matter when the legislation has been passed.* ***Although organisations will not be named in awards, we would expect that as a matter of course lists will be compiled of registered organisations, and of other entities, with an interest in a particular award so that they can be informed of developments in relation to that award.***[41] ***(My*** *emphasis****)***

Minimum wages, Classifications and adult minimum wages.

[33] As we have seen, the current intention is that the Transitional Bill will provide that the safety net comprised of the NES and minimum wages will apply to employees covered by existing agreements. The Overarching Provision in Clause 284 of the Bill, and the definition of *modern award minimum wages* ensure that, as part of the safety net, modern awards will supply minimum wages appropriate to particular employments. That construction seems consistent with Clause 57 of the Substantive Bill, which prevents a modern award having operative effect at a time when an enterprise agreement applies to the employee in relation to the employment. By way of exception, Clause 206 prescribes that the base rate of pay under an enterprise agreement must not be less than the modern award rate. The Manufacturing Modern Award can be used to illustrate the potential impact of these provisions. Subject to it being sufficiently clear that the Award would apply to a particular employment was it not for the existing agreement, the adult minimum wage integral to the safety net would appear to be that set out in Clause 24 Classification and Adult Minimum Wages. Clause 24 fixes minimum weekly and minimum hourly wages for each of the classification levels C14 to C1 (b). Those classification levels are associated with the classification structure and definitions set out in Schedule A the Award.

[34] The application of a heightened safety net to sometimes amorphously worded conditions entrenched in an old-system agreement is a difficult exercise. A new labyrinth for litigational efforts may be awaiting those who hope to muddle through with a legacy AWA, ITEA or even perhaps collective agreement arrived at with unions or employees. The ACTU would like a *drop-dead* provision to apply to existing AWAs. It also seeks that the FWA be enabled to terminate any other existing agreement that fails to meet the BOOT.[42] Whatever the outcome of representations about these issues, some real problems will need to be resolved. It was not uncommon for workplace agreements to omit details of pay rates; it was

[41] Award Modernisation Full Bench [2008] AIRCFB 1000] at [16-22]
[42] ACTU Submission at [178]

very common for Classification pay rates to be left obscure. Corroboration for my allegation can be found in AiG's Submission to the Senate Committee where it urges that subclause 601 (4) be read down to prevent any requirement to publish supporting materials, such as wage rate information that does not form part of the agreement: "*Many agreements include wage increases but do not include actual wage rates*."

[35] Employers may be well-advised to keep it simple: ignore the labyrinth around an existing agreement, just identify the most relevant bits of the new safety net, especially the relevant modern award rate and apply them on 1 January 2010. That approach seemed to work well enough for one of Therese Reine's companies a few years ago.

Award flexibility provisions

[36] "Individualisation" of binding employment conditions in the Australian labour market and workforce is a continuing employment market setting. All employment depends upon the existence of a common law contract. Such contracts are often the primary or sole source of conditions of employment for about 30% of the workforce. By end 2007, only about 5% of the workforce, 400,000 or so, were subscribed to AWAs.[43] There is apparently bipartisan support at federal level for statutory segregation of "independent contractors" from industrial regulatory regimes, using the Corporations head of legislative power. About 1.9m people are engaged under that form of relationship.[44] For the foreseeable future, considerable scope will remain for the use of individual contracts to marginalise resort to collective bargaining in many workplaces.

[37] The Rudd Government's action on its promise to scrap AWAs reduced the scope for new entries into individual industrial agreements with statutory force. However, its legislation in force since 28 March 2008 allows employers the full term of extant AWAs to make suitable workplace arrangements for employees currently on AWAs. I have just discussed the condition imposed on that extended operation. The continued use of such agreements to "trump" minimum standards will be curtailed; from 1 January 2010, conditions inferior to those prescribed by the proposed National Employment Standards, (the NES) *will be overridden by it*.

[43] The ALP Policy Implementation Plan adopts the 5% estimate based on ABS statistics.
[44] Kevin Andrews; Media Release 3 May 2006: *New Protections in Independent Contractors Bill*

[38] For employees engaged after 28 March 2008, until 31 December 2009, an eligible employer may resort to Individual Transitional Employment Agreements subject to a new *no disadvantage test*. [45] An ITEA passes the no-disadvantage test if the Workplace Authority Director is satisfied that the ITEA *does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employee whose employment is subject to the agreement* ***under any reference instrument relating to the employee***. A reference instrument includes an assortment of relevant awards or agreements that would have bound the employment but for the operation of AWAs.[46] The no disadvantage test operating at present foreshadowed the content of the proposed *Better off Overall Test,* (the BOOT test), to be applied as a condition precedent to approval by the FWA of workplace agreements under the new regime. Approval of collective workplace agreements under the new system will be dependent upon satisfaction that: *employees are better off overall by entering into the agreement* on the basis of a test for whether *each employee covered by the agreement is better off overall* ***in comparison to the relevant modern award.***[47] Clause 193 of the Substantive Bill confirms that the BOOT test is met if each modern award-covered and prospective award covered employee would be better off overall if the agreement applied to the employee than if the relevant modern award applied.

[39] Another new form of individual agreement will have the force of a modernised award. The Minister earlier this year made an award modernisation request under Part 10A of the *Workplace Relations Act* as amended by the Rudd Government from 28 March 2008. In conformity with that request, since reinforced by Clause 144 of the Substantive Bill, an *award flexibility agreements* term is to be a mandatory component of modernised awards.[48] The Award Modernisation Full Bench has since determined upon the likely content of those provisions. Clause 7 of the 14 priority modernised awards provides for a form of award flexibility by individual agreements. It allows for an individual agreement to vary the application of the award *concerning arrangements when work is performed, overtime and penalty rates, allowances and leave loading*. An award flexibility agreement will operate as part of the award. As with Section 349 (1) of the WR Act, Clause 57 of the Substantive Bill

[45] Joint Statement of Kevin Rudd MP and Julia Gillard MP *Forward with Fairness –Policy Implementation Plan* 28 August 2007: and *Workplace Relations Act 1996-2008* as amended.
[46] Sections 346D to 346J of *Workplace Relations Act 1996-2008*
[47] *Fact Sheet 8: Approval and content of enterprise agreements.* Available from http://www.workplace.gov.au/workplace/Publications/PolicyReviews/ForwardwithFairness
[48] Clause 7 Exposure Draft *Manufacturing and Associated Industries and Occupations Award 2010; and* similarly: *Hospitality Industry (General) Award* 2010

will ensure that the award and therefore the flexibility agreement will have no effect in relation to an employee while an enterprise agreement operates in relation to the employee. The provision in Clause 7 is relatively prescriptive; it requires that the agreement be confined to variation of the terms listed and not disadvantage the individual employee *by resulting on balance in a reduction of the overall terms and conditions of employment of the individual employee* ***under the award and any applicable agreement made under the Act… or under any relevant laws***. The resultant *no reduction in overall terms* test is similar in principle to the *no disadvantage test* for ITEAs. It casts a markedly wider net for non-reducible conditions than the *BOOT* that is a condition precedent to the approval of Enterprise Agreements under the Substantive Bill. The BOOT reference for comparison of conditions will be confined to the relevant **modern award** disregarding for that purpose any award flexibility agreement.[49]

[40] The Substantive Bill at Clauses 144 and 145 overtakes some of that detail; *flexibility terms* must be included in modern awards. The employer must ensure that any *individual flexibility arrangement*, made under such a term, must *result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed.* An employer's failure to ensure that requirement is met is a contravention of the modern award. Clause 7 of the Modern Awards may need minor revision to meet these changes; the passage quoted from the Full Bench decision of 23 January 2009 confirms that the flexibility term will be revised require the employer to ensure that any individual flexibility arrangement produces a result that the employee is better off overall. It remains to be seen whether that requirement replicates the need to satisfy the BOOT.

[41] The Substantive Bill makes provision also for another form of individual agreement. Clauses 202-206 will establish a requirement that the Minister foreshadowed: *to be approved under the new system, workplace agreements will be required to contain Clauses that provide for individual flexibility arrangements to be made between the employer and individual employees.*[50] The provisions of the Substantive Bill and the related detail in the Explanatory Memorandum make it likely that the mandatory requirement for a *flexibility term* in enterprise agreements will be translated into a provision akin to the award flexibility provision I have just described.[51] Should that transpire, the flexibility term in all collective agreements would

[49] Clause193 (2) Substantive Bill: Explanatory Memorandum at [816-824].
[50] Fact Sheet: 8 *Approval and content of enterprise agreements;* at 2
[51] Fair Work Explanatory Memorandum: [860-874]

open new ground for cultivation of individual bargaining or agreement-making at enterprise level during the life of extant workplace agreements.

[42] Industrial experience provides ample evidence that it has long been the case that a substantial degree of informal bargaining at individual employee level builds upon minimum award conditions. It is likely that resort to forms of individual agreements and contracts building upon award conditions will continue to be at a significant and growing level. The incentive to maximise work-time flexibility without incurring significant added cost burdens will sustain efforts to find ways to use the most suitable available formal or informal agreements. The "abolition" of AWAs and the strengthening of approval criteria to preclude industrial instruments undercutting minimum standard conditions will arrest the use of statutory individual agreements. Much of their appeal stemmed from the ability to deploy them to defeat protected award conditions and to preclude or discourage collective bargaining.[52] Under the new workplace relations system, individual award and it seems agreement flexibility arrangements will be much more limited, especially because of the need to overbid rather than to merely trump real safety net minimum standard protections. Nonetheless, employers who seek to discourage collective bargaining by either unions or groups of employees will find flexibility agreements and flexibility terms useful for that collateral purpose.

Existing Agreements: the *drop-dead clause* issue.

[43] The Australian Retailers Association stirred the possum in relation to existing agreements in an e-mail to its members last month. According to *Workplace Express* and the ACTU, the ARA spruiked the benefits of a template agreement, urging its members to "act now to avoid an increased wage bill". By putting the agreement in place before July 1, 2009, *employers would take their best chance to avoid: higher award wages, strict conditions around rostering, penalty rates, casual employees and averaging of work hours, mandatory good faith bargaining with unions, greater union representation rights, compliance with the BOOT, reduction in maximum agreement terms from 5 to 4 years and mandatory inclusion of the NES as a minimum entitlement in all agreements*.[53] ARA's Executive Director, Richard

[52] David Peetz: *Brave New Work Choices: What is the Story so Far*? Paper Presented to *Diverging Employment Relations in Australia and New Zealand?* 24th conference of the Association of Industrial Relations Academics of Australia and New Zealand, Auckland, NZ, 9 February 2007. Based on data current up to 8 February 2007.

[53] Workplace Express: 5 February 2009: *ACTU slams "Work Choices-style" agreements in retail sector*

Evans, supplied some corroboration for the report. He was quoted as urging the ACTU to *take a cold shower* because *there is nothing illegal about the agreements*.

[44] The ARA's apparent pursuit of advantageous ITEAs or employee collective agreements under the current regime highlights the nature and extent of the problem already touched upon when existing agreements confront whatever form of safety net applies to them from 1 January 2010. Let us assume that the ACTU will not be successful in having AWAs terminated and discretion vested in the FWA to terminate other existing agreements that do not satisfy the BOOT. Even on the best case for those who follow the ARA's advice, it would be misconceived to expect that any existing agreement would be immune from the effects of being overridden by the NES and the minimum wage component of the safety net through particular modern awards.

Greatest increase in union power since Federation: permit holder's right of entry provisions?

[45] The Fair Work Bill's provisions in Clauses 481,484 and 494 allow permit holders to visit employees in their workplaces:

- to investigate suspected breaches of industrial laws and fair work instruments in relation to or affecting their union members working on the premises;[54]
- To hold discussions with employees who are, or are eligible to be, members of the union;[55] or,
- To investigate breaches of state occupational health and safety laws.[56]

[46] The AMMA submission to the Senate Committee supports its argument that the Substantive Bill represents *the greatest increase in union power since Federation* with five points. The first two concern enhanced union access to workplaces for recruitment or investigation without any award or agreement covering the union and the granting of access to non-member records without the consent of the employee concerned. The AiG also claimed to be very concerned about right of entry provisions said to substantially extend union rights of entry in a way that would be productive of unfairness to non-union members and lead to disputation between employers and unions, among other evils. It suggests that existing entry rights should not be expanded.

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[54] Clause 481.
[55] Clause 484.
[56] Clause 494.

[47] Only someone with a blinkered view of industrial events since federation could see in the Bill's right of entry provisions a high tide mark for union power. Until section 42A was inserted into the Conciliation and Arbitration Act in 1973, the right of entry of accredited union officials was effectively dealt with under federal awards; that use of arbitral power had been valid since 1919. By 1973, there was a well established provision in the *Metal Trades Award* giving accredited union officials right of entry for *the purpose of interviewing employees about legitimate union business*; there was also a well established and relatively widespread award duty on employers to keep time and wages records that should be *open for inspection by a duly accredited union official during usual office hours at the employer's office or other convenient place*.[57] In the contemporary context, those award duties were much less restrictive on union right of entry than the rights proposed in the Fair Work Bill.

[48] Unquestionably the Substantive Bill expands upon existing union rights in two respects. It allows access to non-union employee records in certain circumstances. It removes an existing prohibition on union right of entry for discussions with employees and workplaces where all employees are either on AWAs or bound by non-union collective agreements. Neither of those expansions could reasonably be said to go beyond the boundaries established by analogous provisions under federal awards and State legislation. A right of access to workplaces in a manner consistent with rulings of the Freedom of Association Committee of the Governing body of the ILO Was well established until WorkChoices.[58] Of course, the history of such provisions since their inception demonstrates the need for balance. That need is especially marked in the construction and to a lesser extent the mining and manufacturing industries. The union movement would do well to bolster and encourage self-regulation; it needs to weed out bold spirits and outspoken bullies. Lack of restraint and decorum add fuel to the fire of those who wish to equate the union voice with thuggery. It is no answer that some of the union movement's tougher characters are simply evolved responses to employer thuggery. Employer thugs on building sites, even the men in balaclavas, do not gain entry through a statutory right granted in what is thought to be the public interest. As for the legislative formula, arguably legislative balance is supplied by the Fair Work Bill; there are other union obligations, penalties for abusing the scrutiny of employee records provisions, the obligations on permit holders to be fit and proper persons and, prospectively, a tightening of the limitation on using information in breach of privacy protections.

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[57] CP Mills and GH Sorrell: *Federal Industrial Law* (Fifth Edition) at 165-167 and 207-209
[58] Cited: Parliamentary Library Bills Digest No 81 2008-9 at 63-65

[49] Managerial, behavioural and political expedience can be well served by promoting revulsion against union interference and discouraging union membership. That expediency will probably influence the outcome of the debate about the limits of union access to workplaces. In Australia a reflexive cringe characterises political contemporaries of post-modern conservatism when called upon to defend unions as the representatives of collectivist values. Professor Keith Ewing made that point forcibly recently when he wrote:

> Compare the position of Barack Obama who on 2 April 2008 spoke to the AFL-CIO of 'build[ing] an America where labor is on the rise'. In the same speech, he said
>
> *We're ready to play offense for organized labor**. It's time we had a President who didn't choke saying the word "union."** A President who knows it's the Department of Labor and not the Department of Management. And a President who strengthens our unions by letting them do what they do best - organize our workers. If a majority of workers want a union, they should get a union. It's that simple. Let's stand up to the business lobby that's been getting their friends in Washington to block card check. I've fought to pass the Employee Free Choice Act in the Senate. And I will make it the law of the land when I'm President of the United States of America. (My emphasis)*[59]

Transmission of business Test: the "character of the business" or substantial identity of work and activities.

[50] Part 2.8 of the Substantive Bill supplies the rules that govern transfer of terms and conditions of employment from one employment to another. A fair work instrument applying to one employer may be extended to another when employees are offered and, within three months accept employment with a new employer whose business activity is connected with the old employer. The transferred obligations shall apply indefinitely until varied.

[51] Transmission of business provisions have been a feature of industrial legislation for many years. The version in the WR Act was worded to conform with precedent principles but was subjected to a progressively narrowing interpretation to accommodate the increased incidence of business mergers, reorganisations and the use of outsourcing. The process culminated with a restrictive construction of the provisions by the High Court. It reversed earlier reasoning. It based the test for transmission of a private sector business on an examination of *the character of the business in the hands of both the old employer and the new employe*r. The new employer would be bound by an industrial instrument applicable to the work only where the character of the business is the same and there is assignment or

[59] Keith Ewing: *Restoring Rights at Work- Lessons from the United Kingdom:* (November 2008) Occasional lecture for AIER.

transmission of a business in the form of assets tangible or intangible moving between the old employer and the new employer.[60]

[52] The changes made by the Substantive Bill switch the focus from the character of the business; instead the test is whether there has been a transfer of work between two employers and the reason for the transfer of that work establishes a connection between the two employers:

> *The Bill broadens the circumstances in which a transfer of business occurs and is designed to make it easier to determine where this has happened, with a definition that focuses on the activities of the employees in the work being performed rather than the character of the business. In this respect, the new definition in the Bill is similar to the substantial identity test, (*adopted by the Federal Court in *North Western Health Care Network v Health Services camp union of Australia [1999] FCA 897,* which was overruled by the High Court in *PP Consultants).*[61]

[53] The AiG submission opposed departure from the existing provisions. It condemns the change made by the Substantive Bill as inappropriate and problematic particularly for industries that carry out work outsourced from other industries. The AMMA Submission is more moderately framed in its opposition. It contends that the change is too restrictive, goes beyond the existing notions of transmission of business and will have the effect of being a disincentive to employ persons who worked with the old employer.

[54] The Bill provides for the transfer of an instrument where an employee has been terminated by the old employer and within 3 months is re-employed by the new employer. It also equips the FWA with an expanded capacity to rationalise instruments of employment that apply upon the transmission of business, giving the FWA broad power to change the coverage of transferred instruments and a new employer's existing instruments. The new test for transmission of business should also bring the rule governing transfer of private sector employment contractual liabilities into closer alignment with the rule as it had been understood to still apply to public sector employment.

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[60] *PP Consultants Pty Ltd v Finance Sector Union of Australia (2000) 201 CLR 648*; and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd (2005) 222 CL 194.* My summary is drawn from the Explanatory Memorandum at page 191.

[61] Department of Education Employment and Workplace Relations Submission to Inquiry into the Fair Work Bill 2008 at 55-56

The bargaining framework.

[55] In Part 2.4 of the Substantive Bill dealing with Enterprise agreements, Clause 172 allows collective agreements to be made about:

- *matters pertaining to the relationship between employers and employees*, and
- matters pertaining to the relationship between employer and the employee' s union;
- deductions from wages authorised by an employee, and
- how the agreement will operate.

Enterprise agreements may be single enterprise, multi-enterprise or greenfields agreements. *Greenfields agreements* can be made only for *new enterprises*, before either the single employer or multiple-employers engage any employees, and must be made with one or more employee organisations. Except for greenfields agreements, no distinction is made between "union agreements" and "non-union agreements". Where the union is involved, it is a bargaining agent not a party principal. Clause 183 allows a union to apply to the FWA to be covered by an enterprise agreement.

[56] Issues raised about enterprise agreements, enterprise bargaining and the related powers of the FWA are too numerous to be adequately covered here. The heading to this section of my paper serves to label a selection of points. Employer interests concentrate their opposition around the treatment of unions as default bargaining representatives, especially enablement of a union to be covered by an enterprise agreement that applies to only a minority of employees who are union members, (Clauses 176, 183 and 201); the requirement for all relevant unions to be notified in relation to proposed *greenfields agreements* (Clauses 175, 177,179); and, an array of concerns about both substantive provisions and possible interpretations of the "good faith bargaining system" requirements. The AiG Submission to the Senate Committee objects to protected industrial action being able to be taken in support of claims about matters pertaining to the relationship between an employer and a union or unions. The submission also proposes changes relating to dispute settlement, an employer's obligation to bargain, FWA's powers and the criteria for majority support determinations and scope orders.[62]

[57] Unions and some academic commentators have also pressed objections along different lines. The ACTU, disputes the limitation of bargaining to matters pertaining to the employment relationship; that limitation is thought by many commentators, I am one of them, to be an anachronistic carryover of principles related to earlier models of the system importing arbitrary judicial interventions. Other objections are directed to over restrictive

[62] AIG Submission at 42.

limitations on access to multi-employer bargaining; inappropriate and excessive prescription of *protected action ballots,* (Clauses 437-458)*;* and to setting too low a threshold for intervention by the FWA to order a cooling off period or suspend industrial action, (Clauses 420, 425, 426). The ACTU contends the discouragement of pattern bargaining in Clause 412 should be redefined to embrace only conduct making settlement with one party contingent upon other parties accepting a similar claim. It contends also that alleged pattern bargaining should not be subject to a blanket prohibition but should be dealt with under the good faith bargaining regime, open to sanction where infected by bad faith.

[58] Greenfields agreements: Because of the heat generated by changes to greenfields agreement provisions, it may be worth elaborating upon those issues. These are the only class of agreements that may be made between employer(s) and union(s); they may have a term of up to four years. Clauses 175(1) and 182(3) stipulate that in relation to a greenfields agreement, the employer must notify *each relevant employee organisation* of the intention to make such an agreement; to be approved, a greenfields agreement must be signed by each organisation that will be covered by it. According to AiG and AMMA it is critical that employers be permitted to make a greenfields agreement with a single union, through a process that does not require notification to relevant employee organisations. Without such freedom, the provision will be unworkable and will cause substantial delays in the commencement of construction projects, industrial mayhem and increased construction costs.[63]

[59] In relation to the same provisions, the ACTU's submission notes that the Bill removes any role for unions as parties except for greenfields agreements. It queries whether the requirement that there must be a "genuine new enterprise" will be sufficient to prevent employers avoiding an existing agreement or named-employer award capable of covering work that employees will be performing on the new activity associated with a greenfields agreement. It seeks also that the definition of relevant employee organisation be limited to registered organisations.

[60] Only the bolder spirits have recriminated against the Substantive Bill's jettisoning of the WorkChoices grant of a prerogative to an employer to make a greenfields agreement with itself without employee or union involvement. The possibility of a four-year term

[63] AiG Submission to Senate Committee at 46; AMMA Submission to Senate Committee at 6.6

greenfields agreement seems to have attracted little comment. The main protest is against denying employers the facility of making an agreement with the union of their choice. Employers wish to avoid having to run the gauntlet of "bargaining" from unions that might normally have a presence in workplaces of the kind in which the new activity is to be conducted. The Department's Submission responds directly to issues raised by stakeholders:

> *3.42 The Bill…. ensures that greenfields agreements are true agreements negotiated between the relevant bargaining representatives and made by more than one party….*
> *3.51 To make sure that the unions with relevant coverage are aware that the bargaining for a greenfields agreement is going on, the Bill requires an employer proposing to make a greenfields agreement to notify all relevant unions (that they know of)…*
> *3.52 The employer and all relevant unions who seek to bargain will be required to bargain in good faith… This means that if the employer or one of the unions is not complying with the good faith bargaining obligations-for example, it is refusing to meet or is engaging in capricious or unfair contact that undermines the bargaining then the affected bargaining representative can apply to the FWA for a bargaining order to require another representative to bargain in good faith.*
> *3.53 The Bill… does not require the employer to make an agreement … with every union that is notified or that was involved in bargaining although it is free to do so. This means that if an employer strikes a deal with just one of the relevant unions of then the employer can ask to have the agreement approved by FWA. The employer is also free to not make a greenfields agreement at all.*
> *3.54… Union demarcation disputes will still be able to be dealt with through the making of representation orders which will continue to be available under provisions regulating registered organisations.*

Other bargaining framework issues.

[61] It is beyond the scope of this paper to address the wide range of issues raised about the bargaining framework. It would serve little purpose for me to attempt to do so. From my perspective, much of the argumentation ignores the rationale or historical justification for some of the policies or provisions attacked. For instance, Section 170 LK of the 1996 W R Act is a statutory precedent for Clause 183; it allowed unions to apply to be parties to non-union workplace agreements negotiated and executed between an employer and employees. The Department's submission to the Senate Committee obliquely made a similar point when it stated:

> *Providing for a single stream of agreements made between employers and employees means all agreements are made directly between the employer and the employees to whom the agreement will apply. This also removes the capacity for disputes over which type of agreement a party should enter into. Under this Bill, employees have the right to be represented in bargaining-and this may be by a union-but unions are not "parties" to agreements."*

[62] In my experience with the AIRC, the most intractable and viciously conducted industrial warfare to come before the tribunal was directed to *type of agreement* issues. Usually an employer's refusal to negotiate with a union or to accept its representative role in relation to the workplace or agreement was at the core of the conflict. The Substantive Bill takes a big step to re-establishing the principle that acceptance of an employee's right to collective industrial representation is not an employer's prerogative nor is it a union's monopolistic entitlement.

The low paid bargaining stream exception.

[63] In line with the ALP's[64] pre-election policy, the Substantive Bill at Clauses 241-246 introduces a new stream of multi-employer bargaining to assist low-paid employees. Subject to the FWA granting an application for a *low-paid authorisation*, the FWA can assist and facilitate the bargaining process. The measures it may take include: compulsory conferences of bargaining representatives and third parties with effective control over the terms and conditions of relevant employees; conciliation and mediation; good faith bargaining orders and recommendations to parties. In defined circumstances, as a last resort, the FWA may make a workplace determination to settle matters that are in dispute. It may only do so if satisfied that: there is no reasonable prospect of agreement being reached; the employees have never previously had an enterprise agreement or workplace determination; the employees are substantially on safety net conditions; the making of the determination will promote productivity and efficiency as well as encouraging future bargaining; **and,** that it is in the public interest.

[64] There has been relatively widespread employer opposition to the low-paid bargaining stream. The AiG contends a separate low-paid bargaining stream is not necessary or desirable. It complains that the concept of "low payment" is not defined; that the provisions will encourage multi-enterprise agreements; and add a layer of arbitrated compulsory conditions over and above the minimum safety net, duplicating the minimum wage function allocated to the FWA in relation to that safety net.

[65] The Department's response to issues raised by stakeholders about the low-paid bargaining stream notes a parallel between the provisions and experience associated with *first contract arbitration* in North America and the approach in relation to what were known as

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MX-awards under the provisions of Section 170 MX of the WR Act prior to the WorkChoices amendments. It concluded:

> *3.110 (*The definition of the low-paid*).. will be a matter for the FWA to determine on the facts of each application for a low paid authorisation that comes before it.*
> *3.113 The introduction of a low-paid bargaining stream, in addition to the improved safety net, is important because it focuses on the benefits of bargaining to both employees and employers in sectors like aged care, community services and cleaning. The low-paid stream is about FWA helping the parties to negotiate and make an agreement that delivers the improvements to productivity and service delivery that can support further improvement to wages and conditions beyond the safety net.*

Regulatory regimes and economic effects

[66] A feature of the Substantive Bill is the lagged introduction of changes associated with the extended transitional periods for existing agreements. The discussion of individual agreements at [36-38] touches upon the degree to which the effect of the Bill will be staggered. Commencement of elements of the new regime from 1 July 2009 and 1 January 2010 will coincide with what is expected to be a marked loosening of the labour market and a rapid increase in unemployment over 2009. A grain of salt must be applied to ARA's promotion of an enterprise agreement template to produce a 14% wage cost reduction over a fair work enterprise agreement entered into after 1 July 2009. However it would be unrealistic to ignore the likelihood that labour cost impacts will be associated with the new regime. Restoration of a safety net through modern awards from January 2010 and the overriding of existing agreements by minimum wage provisions linked to the NES will increase costs for employers who have minimised costs under WorkChoices but review rates in order to comply with the relevant parts of the new safety net. The resuscitation of protections against unfair dismissal could in the short term be expected to affect people in employment more than those attempting to join a shrinking workforce. There is an almost inescapable cost element associated with that change. Some employers will maintain the well established plea that fear of exposure to the protection will discourage recruitment.

[67] Central to any analysis of economic effects of a new regime must be an actual or implicit response to a question: *what value, cost or cost benefit should you factor in for providing workplace relations laws that are fair to working Australians.* Let me postulate an extreme example. The economic or labour market effect of prohibiting slavery could be analysed without making allowance for a moral repugnance factor. Could such a factor even be made to fit an econometric model? Plainly calculation of labour market and economic effect must be sensitive to other societal values and leave room for them to be entered into a

balanced assessment. Reserve Bank Governor Stevens made a point that effect earlier this week when he told a House of Representatives Committee that:

> *"pure economic efficiency, and the text book says that minimum regulation points you towards the high efficiency end of the spectrum".*
>
> *But, he continued, "there's also community notions of fairness and equity and someone has to decide how to balance those two things and that's your job in the Parliament".*[65]

[68] We shall hear a great deal soon about the expected impact of the Substantive Bill upon employment, productivity and economic sustainability. Who does not share a view expressed by Larry Elliott, a writer for the Guardian Weekly that "*forecasting is a mug's game in this environment*"? To avoid playing that game, I shall do no more than draw attention to two broad sources or streams of analysis. In a postscript I suggest a possibly less adversarial model of employment that might evolve around a notion of industrial citizenship.

[69] The first source of material is the steady hand of the Minister's Department. A section of the Department's Submission to the Senate Committee assesses how the Bill will impact on wages, industrial disputation, employment and productivity. The information supplements the *Regulatory Analysis* contained in the Explanatory Memorandum to the Bill. It draws upon OECD recommendations and recent research in Australia about the impact on employment of protections from unfair dismissal provisions, the relationship between enterprise bargaining and productivity growth, and between productivity growth and wage increases. In relation to the impact of the Bill on the level of unemployment, the analysis is brief, disarmingly candid but opaque:

> *2.26 The forecasts for rising unemployment in the 2008-09 Mid-Year Economic and Fiscal Outlook (MYEF0) are attributed to "the marked deterioration in the global growth outlook and the resulting slowdown in Australian economic growth". The forecast rise in unemployment is in no way attributed to workplace relations reform. It is consistent with national and international evidence, more generally, that drivers of national economic growth and performance come from a far wider range of sources than the type of workplace relations that a country adopts.*
>
> *2.27 Changes in unemployment levels are result of many, often interdependent, factors. These include the strength of domestic conditions, consumer and business confidence, global growth and unforeseen external shocks. These factors will be the main drivers of employment levels in the medium term."*

The Submission concludes its economic analysis with the point that Bill will provide a stable framework for cooperative and productive workplaces in Australia. *The framework is designed to provide flexibility and fairness throughout the economic cycle. Thus in setting*

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[65] Workplace Express: 20 February 2009 *Its Parliament's job to balance efficiency with fairness: Stevens*

minimum wages, the FWA must take into account the performance of the national economy, productivity, business competitiveness and viability, inflation and employment growth as well as social factors.

[70] The Department's Submission maintains the idiom of the Rudd Government in its day-to-day efforts to promote respect for its economic management based on conventional analytic formula. Prime Minister Rudd has recently taken an opportunity to demonstrate his versatility by associating himself with the second set of analytical sources. His essay in *The Monthly* is a worthwhile and persuasive exposition of how the global financial crisis developed and of the kind of policies that will be necessary to combat it and restore economic equilibrium.[66] It gives a broader picture of the macro level effects of market driven policies and values that were brilliantly crystallised at the micro-level by Michael Lewis who traced the spread of the sub-prime mortgage contagion. In a remarkable article, recently republished in the Australian Financial Review, he substantiates the dysfunction of Wall Street, financial institutions and rating agencies, *the godheads of economic liberalism*, in determining allocations of capital since the 1980s.[67]

[71] Those two contributions may be useful in explaining what happened and perhaps what must be done but for today's purposes, I will refer to observations predominantly concerned with countering the notion that what we need to get back into a state of economic equilibrium is more of the same. Simon Caulkin, writing for the *Observer*, highlights several monuments to *a bankrupt management model* and suggests it is time to get angry:

> *Over the last year banks, jobs and money in colossal quantities have disappeared with barely a murmur of dissent, let alone the explosions of outrage that you might expect. This apparent fatalism is no doubt partly numbness in the face of figures that are truly incomprehensible.. more insidiously, it is also a measure of how completely the message of "One Market under God"… has been internalised.*
> *… The disasters of 2008 are not an aberration but the culmination of a rewriting of the management project that now leaves many companies with a vacuum at their centre.*
>
> *What's been lost over the last three decades is only now becoming clear…. The last 30 years have seen a steady erosion of balance between stakeholders. While layoffs of staff-"the most important asset"-were once a last resort for employers, they are now the first option. Outsourcing is so prevalent that it needs no justification. And the company's welfare role is now so attenuated it barely exists. First to go was the notion of career; more recently, the tearing up of company pension obligations is another*

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[66] Kevin Rudd: *The Global Financial Crisis:* The Monthly, February 2009 at 20

[67] Michael Lewis: *The End*: available from www.portfolio.com (December 2008 issue); Mr Lewis is the author of *Liar's Poker* (1989) a chronicle of his experience with a Wall Street investment bank dispensing investment advice.

unilateral recasting of the conditions of work-a historic step backwards-that has aroused barely a ripple of objection.

The justification for this behaviour is, of course, the pressure of the market. But this is to disguise a betrayal. As a class, managers have always occupied a neutral position at the heart of the enterprise-neither labour nor capital, but charged with combining the two to the benefit of both the company and society itself.

Everything changed in the 1980s with the advent of Reagan Thatcher and Chicago School economists who preached the alignment of management with shareholders in the name of "efficiency". In effect, efficiency came to mean short-term earnings to the detriment of long-term organisation building; what was touted as "wealth creation" was actually "wealth capture", from suppliers, clients and employees as well as competitors…

*Managers never looked back. As late as the 1980s, a multiple of 20 times the earnings of the average worker was perfectly adequate CEO pay. But under the compliant gaze of shareholders and remuneration committees, performance-pay contracts boosted the ratio to 275 times by 2007. As we now know, "performance pay" was a misnomer, an incentive to financial engineering that has destroyed value on a heroic scale…. By severing any common interest between top managers and the rest of the workforce, performance pay has fatally undermined the internal compact that makes organisations thrive in the long term. [*Pubs and institutions*].. rogered frontwards, backwards and sideways by financial whizzkids who piled them with complex debt and left them desperately underinvested-at the same time extracting exorbitant fees for the privilege.. are a fitting monument to a bankrupt management model. It's time to get angry.*[68]

[72] Robert Kuttner in a recent book about the challenges facing President Obama makes a series of points about causes, effects and possible answers for the US and indirectly the global economy.

- The past year has brought a financial collapse, but not yet a collapse of the ideology and habits of mind that produced the crisis.
- Markets deliver better for most people when government counterweights complement what markets can't do and constrain what markets do recklessly
- For more than three decades, good jobs with secure careers have become more elusive… productivity increased in the 1990s and 2000s but earnings only became more unequal and jobs less secure. Basically, workers prior to the mid-1970s enjoyed far more bargaining power to get their fair share of the pie. … There is no more effective force for decent wages and working conditions than the labour movement.
- No matter how effectively the next administration adds labour or environmental standards to trade agreements, many millions of jobs will continue to be outsourced. But the fastest growing part of the economy is the service sector; most of whose jobs need to remain close to the customers and clients. Professionalise the human service economy! America needs a good-jobs strategy. And human-service jobs are a fine place to begin.
- One thing America utterly lacks is what other nations call *an active labour-market policy*. The idea is not just to cultivate a broadly educated population but to subsidise the customised training of workers for emergent technologies, as well as their living

[68] Simon Caulkin: *So horrible that we ought to be revolting* Reprinted from *Observer*: Guardian Weekly 16 January 2009 at 18-19.

expenses so they can afford to train. The country that comes closest to realising the strategy is Denmark. The Danes call their model ' *flexicurity'*-great labour market flexibility combined with superb worker security.

- And an Apollo-scale commitment to renewable energy.[69]

[73] One forecast that can confidently be made is that debate about the economic impact of the Fair Work Bill will pay only lip-service to the economic dysfunctions of the political partisanship embedded in the revolving door approach to industrial legislation. The Australian Institute of Employment Rights, (the AIER), is not alone in contending that Australia needs a fresh approach to industrial relations. Partisanship has characterised the last decade. Before that, over many years, it provided an intermittent opportunistic source of industrial electoral antagonism. Can political partisanship around industrial relations be eschewed? Industrial parties generally would welcome and find considerable productivity benefits in the reinstatement of a politically stable, widely accepted scheme for governance and guidance of employment relationships. The BCA, not so long ago a prominent instigator of the WorkChoices "reforms", made a similar point in its submission to the Senate Committee:

> *The current Bill will establish yet another change to the workplace relations system. Members would hope that the resultant legislation not only provides for a system that supports their international competitiveness, but also achieves consensus and provides some predictability in labour markets. There are significant "learning curve" and start-up costs associated with the implementation of any new system, especially if it overlays previous systems.*

A more active discouragement of political partisanship by the business community might be a good start toward promoting a vision of a stable secure system of industrial governance. Increased business membership of and participation in bodies like the IRSQ would help if only because the hour societies have consistently fostered the values associated with such a vision. The AIER's vision for Australia's industrial relations future is one that is underpinned by fairness to all sides, balance and fostering greater respect, harmony and innovation.

Beyond the Fair Work Bill: the AIER's tool for diagnosing the health of Australian workplaces.

[74] An intended purpose of the AIER's Charter of Employment Rights is to assist businesses and employees to align stated employment values and management practice.[70] The AIER is currently working on an approach that will identify standards appropriate to particular rights. That is the first step toward a process that will assist workplaces to diagnose

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[69] Robert Kuttner: *Obama's Challenge: America's Economic Crisis and the Power of a Transformative Presidency* 2008 Scribe Publications ISBN 9781921372735

[70] Heap L: *The Australian Charter of Employment Rights: Setting the Standard for New Legislation and Good Practice.* (March 2008). Journal of Industrial Relations Vol.50 at 349

problems that are impacting on performance and set standards against which to train managers. The process would give employees and the unions a framework within which to articulate what is important to them in the employment relationship and what is missing in their own workplaces. The AIER would intend to promote use of its process as a means whereby employers could demonstrate the objective attainment of a "good employer" status as well as minimising of risk or liability for falling below externally binding standards.

[75] One dynamic driving the AIER's work is the desirability of developing awareness of a risk management component relating to rights covered in the Charter. A chapter of the work in progress spells out the reasons why that is so. Managing the risks arising from an unsafe workplace, from discrimination or harassment, is part and parcel of the work of most employers. Employment rights allocate responsibility to either or both the employer and worker. An obligation to act in a fair and balanced way with regard to the other's well-being is integral to the right duty relationships established. Failure to provide a workplace where workers and employers interact in a climate of mutual respect, or where the participation of workers is discouraged, is not just a matter of management style. The business risks poor morale, low innovation and an inability to manage change. A business that understands the need to develop a proactive risk management of all rights covered by the Charter is more likely to succeed through a more committed workforce and a more profitable and productive workplace. Businesses face a tough challenge if they wish to succeed. Our labour market is unlikely to ever reach a point where there is no longer pressure upon employers to be *employers of choice:* employers who have a good reputation for managing, training and building their workers.

[76] The AIER expects to complete this phase of its work before June this year and expects that it will produce a publication on the topic. A phased process of accreditation of workplaces and enterprises that comply with the rights and standards to a level commensurate with their capacity and resources will then be rolled out.

[77] I am not in a position to develop in detail the process involved. However it may assist understanding if I elaborate upon the way in which the Charter Right 8: *Fair Minimum Standards* is elaborated upon. That right is expressed as follows:

> *Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provides for a minimum wage and just conditions of work, including safe and family-friendly working hours.*

[78] The AIER process would identify three *Standards* with that right. Each of the Standards might be elaborated upon for use as a component in diagnosing satisfactory observation of the right in a particular workplace. The Standards currently being contemplated would be to the effect:

- *There is a clear business commitment to complying with fair minimum standards imposed externally to the workplace.*
- *The employer, in consultation with workers, is willing and committed to providing fair minimum standards that build upon the legislative minimum and which are tailored to the needs of the workplace.*
- *The business respects the need of workers to live a fulfilling life and to obtain a fair balance between work and the rest of their lives. This requires that the business develop policies on parental leave, working hours and workloads and other conditions within the workplace.*

[79] In more than one sense, those standards might appear to be minimalistic. In the real world, observation of the rights and duties associated with minimum standards often boils down to practical measures. Managers and workers need to be familiar with the relevant standards. Policies will be established to ensure or check that external requirements are being observed and sound internal procedures are being fostered.

[80] The process we contemplate will develop standards relating to the reciprocal rights and duties connected with each of the rights identified in the Charter. Specifically those are: Good Faith Performance, Work with Dignity, Freedom from Harassment and Discrimination, a Safe and Healthy Workplace, Workplace Democracy, Union membership and Representation, Protection from Unfair Dismissal, Fair Minimum Standards, Fairness and Balance in Industrial Bargaining, Effective Dispute Resolution.[71]

ATTACHMENT A

AUSTRALIAN CHARTER OF EMPLOYMENT RIGHTS

Recognising that:

improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers

and drawing upon:

71

Australian industrial practice, the common law and international treaty obligations binding on Australia, this Charter has been framed as a statement of the reciprocal rights of workers and employers in Australian workplaces.

1 Good Faith Performance

Every worker and every employer has the right to have their agreed terms of employment performed by them in good faith.

They have an obligation to co-operate with each other and ensure a "fair go all round".

2 Work with Dignity

Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being:

- treated with respect
- recognised and valued for the work, managerial or business functions they perform
- provided with opportunities for skill enhancement and career progression
- protected from bullying, harassment and unwarranted surveillance.

3 Freedom From Discrimination and Harassment

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

- race, colour, descent, national, social or ethnic origin
- sex, gender identity or sexual orientation
- age
- physical or mental disability
- marital status
- family or carer responsibilities
- pregnancy, potential pregnancy or breastfeeding
- religion or religious belief
- political opinion
- irrelevant criminal record
- union membership or participation in union activities or other collective industrial activity
- membership of an employer organisation or participation in the activities of such a body
- personal association with someone possessing one or more of these attributes.

4 *A Safe and Healthy Workplace*

Every worker has the right to a safe and healthy working environment. Every employer has the right to expect that workers

will co-operate with, and assist, their employer to provide a safe working environment.

5 Workplace Democracy

Employers have the right to responsibly manage their business.

Workers have the right to express their views to their employer and have those views duly considered in good faith.

Workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace**.**

6 Union Membership and Representation

Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.

Workers have the right to require their union to perform and observe its rules, and to have the activities of their union conducted free from employer and governmental interference**.**

Every worker has the right to be represented by their union in the workplace.

7 Protection from Unfair Dismissal

Every worker has the right to security of employment and to be protected against unfair, capricious or arbitrary dismissal without a valid reason related to the worker's performance or conduct or the operational requirements of the enterprise affecting that worker. This right is subject to exceptions consistent with International Labour Organisation standards.

8 Fair Minimum Standards

Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provide for a minimum wage and just conditions of work, including safe and family-friendly working hours.

9 Fairness and Balance in Industrial Bargaining

Workers have the right to bargain collectively through the representative of their choosing.

Workers, workers' representatives and employers have the obligation to conduct any such bargaining in good faith.

Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond.

Conciliation services are provided where necessary and access to arbitration is available where there is no reasonable prospect of agreement being reached and the public interest so requires.

Employers and workers may make individual agreements that do not reduce minimum standards and that do not undermine either the capacity of workers and employers to bargain collectively or the collective agreements made by them.

10 Effective Dispute Resolution

Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith, and, where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy.

The right to an effective remedy for workers includes the power for workers' representatives to visit and inspect workplaces, obtain relevant information and provide representation.