



# ACTU CONGRESS 2006

## Industrial Relations Legislation Policy

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# Principles for fair workplace laws

## 1. Preamble

1. The Howard Government's new industrial relations laws (WorkChoices) represent the greatest legislative attack on the rights of working people ever seen in Australia. The laws threaten living standards and democratic rights. The laws aim to destroy collective bargaining and union organisation. The laws are fundamentally biased in favour of business.
2. The new industrial relations laws:
  - Deliver workplace power to employers by promoting individual contracts and discriminating against collective bargaining;
  - Drastically weaken the comprehensive protection of wages and employment conditions through awards, replacing them with an inadequate set of basic minimum standards;
  - Destroy the ability of the Industrial Relations Commission to maintain the safety net of pay and conditions, carry out the functions of an independent umpire, and ensure fair treatment of all parties to industrial disputes;
  - Criminalise the normal functioning of unions by unreasonably limiting the representation rights of union members;
  - Allow employers to dismiss workers without regard to fair treatment or natural justice;
  - Aim to eliminate the state industrial relations systems which have provided effective protection for workers for well over one hundred years;
  - Breach fundamental international labour standards and ILO Conventions to which Australia is a party; and
  - Fail to ensure free and fair collective bargaining by further restricting the subject matter and level at which agreements can be made, imposing barriers to protected industrial action that have the effect of restricting the right to strike and delivering employers legal means to avoid or walk away from the commitments that they have made in agreements.

3. The industrial relations laws are the product of the prejudiced ideology of the Howard Government. The laws represent the belief that national economic prosperity can only be achieved at the expense of social fairness and equality and that democratic rights must be jettisoned in the face of competition from Australia's trading partners. The laws will take Australia further down the path of US-style inequality.
4. The Rights at Work campaign to repeal the "WorkChoices" legislation is the most important to be waged by the ACTU and unions in generations. The campaign is founded upon the fundamental values and beliefs of the labour movement – the cause of social justice and fairness.
5. A key part of the Rights at Work campaign involves the articulation of an alternative approach to industrial relations – a model of industrial relations laws which respects the rights of working people as well as facilitating continued sustainable economic prosperity, and ensuring that workers can share equitably in the benefits of this prosperity.
6. This Congress policy attempts to define such a model. It identifies an approach that unions will campaign for in all forums, including within the Australian Labor Party.
7. In considering the shape of industrial relations laws that will be relevant to the Australia of the 21st century, unions are looking forward, not back.
8. The ACTU Congress shares with the majority of the Australian people the view that fair working conditions and decent employment rights are not inconsistent with the imperatives of a modern economy.
9. The fact is that Australia needs a fresh approach to economic policy if prosperity is to be sustained and fairly shared – an approach which boosts productivity by investing in education and skills, social and economic infrastructure, technology, research, and modern manufacturing processes.
10. The industrial relations policy of the 2006 ACTU Congress is intended to form part of a movement for progressive political, economic and social change.

## 2. Principles

11. Regardless of the jurisdiction or constitutional underpinning of the legislation, a 21st century industrial relations system for Australia must be based on the following principles:
  - To the extent possible, the system should apply consistently throughout the labour market to all forms of employment covering all employers, employees and contractors. Rights and entitlements should apply to all workers without discrimination and that the law discourage artificial arrangements to exclude workers from the protections of the system;
  - The labour market should be underpinned by a decent, relevant and secure safety net of fair and enforceable minimum standards contained in awards and/or legislation that is able to be reviewed and adjusted to take account of community and/or industry standards;
  - A system of collective bargaining should exist over and above the safety net which is built on the assumption that parties will bargain in good faith and uphold democratic values;
  - The prohibition of individual arrangements that can be used to undermine the safety net, collective bargaining or union representation. There should be no statutory individual contracts, and existing legislation that provides for AWAs should be repealed;
  - The implementation of transitional arrangements that ensure that the repeal of the legislation providing for AWAs does not result in workers being disadvantaged;
  - An independent tribunal to maintain and improve the award safety net, to oversee the bargaining system and to guarantee fair treatment in the workplace;
  - Rights of union membership and representation. The law should retain union registration and eligibility rules, and the representation rights that these confer. The legislation should uphold the role of unions in Australian society and should facilitate independent, genuine and democratically operating unions and employer organisations with the capacity to effectively represent members;
  - Unions should have a statutory right to represent their members in collective bargaining, and a general right to representation on discussion with employers about matters including but not limited to grievances, discipline, dispute resolution, and enforcement of terms and conditions of employment;

- Workers should have protection from arbitrary or capricious decision-making. Workers must have the right to have their day to day grievances heard and determined by an independent body that is affordable, accessible, and acts in a timely and transparent manner;
- Workers must be guaranteed important rights, including rights to fair treatment, union representation, collective bargaining and the right to strike with access to the Industrial relations Commission as an independent arbiter;
- The system should promote secure, safe and healthy workplaces that are free of discrimination or harassment. The system should provide means to address gender pay inequity and achieve pay equity. Working arrangements must facilitate workers living secure and balanced lives; and
- The establishment of statutory rights and protections for delegates in the workplace.

### **3. National and State industrial relations systems**

12. Congress recognises that consistent national application of the above principles is in the best interest of all Australian workers.
13. Australia has a diverse economy that operates in an international trading environment. Increasingly, major employers operate nationally and internationally, and are governed by uniform national laws.
14. Many union members are employed by large corporations or government entities that operate throughout Australia. At the same time there are many members employed by State and local governments, State-based enterprises and community organisations who historically have been well served by the State industrial relations systems.
15. Unions need to be able to deal with employers and employees at the level most likely to achieve stronger union organisation and the outcomes contained in this policy.
16. The Howard Government's WorkChoices legislation attempts to replace the State industrial relations systems with national legislation based upon the use of the corporations head of power in the Australian Constitution.

17. This constitutional approach has been challenged in the High Court by Labor State governments and unions. ACTU Congress supports the High Court challenge to the laws.
18. No matter what the outcome, the High Court judgment will likely identify the extent to which any Australian Government can legislate a national industrial relations system based on the corporations power.
19. Congress stresses that it is the quality of the system itself, and the rights it confers on working people, rather than the jurisdiction or the constitutional means used to achieve it, which is the primary issue of concern to unions.
20. Within this context the ACTU Congress endorses the following approach to future national industrial relations legislation:
  - Congress supports the use by a future national Labor Government of all of the powers available to it under the Australian Constitution for the purpose of legislating an industrial relations system which is consistent with the principles and measures contained in this policy.
  - Congress recognises that State Governments will continue to have a role in the regulation of the workplace, in particular in the areas of State Government employment and organisations and businesses which are unincorporated. It will be a matter for unions representing these employees to determine a policy approach to their future regulation.
  - Congress would support the inclusion of provisions in the national industrial relations laws enabling parties to opt to be bound by State industrial relations laws rather than the national legislation, in particular where the community of interest of the employees is best served by regulation in a single jurisdiction.
  - Congress calls upon a future national Labor Government to consult with the State Governments and unions concerning the options for consistent national application of industrial relations laws.
21. ACTU Congress support for this approach to future national industrial relations legislation is based on such legislation meeting the standards set out in this policy.

# Fair minimum standards and a decent safety net

## 4. Fair minimum standards and a decent safety net

22. The ACTU Congress supports the establishment of a decent safety net of pay and employment conditions to underpin the Australian labour market. All workers should have the protection of the safety net regardless of the form of their employment or the nature of their work.
23. The safety net should:
  - Comprise legislated minimum employment standards in combination with comprehensive awards;
  - Underpin the collective bargaining system and comprise the 'no disadvantage test' for the making of collective agreements;
  - Include, for low paid workers, the certainty of a test against all the terms of the relevant award, to guard against disadvantage;
  - Be regularly reviewed and adjusted by an independent Industrial Relations Commission to take account of improvements in community and industry standards;
  - Enable regular adjustments to minimum wages and conditions through test case procedures; and
  - Underpin all common law employment arrangements.

### 4.1 Legislated minimum employment standards

24. The legislated minimum standard should provide:
  - An average of 38 hours of work in ordinary time each week, and a limit on the working of unreasonable overtime;
  - A minimum of four weeks of paid annual leave for each 12 months of service and an additional week for regular shift workers, with no cashing out of annual leave;
  - Paid parental leave and the provisions arising from the Family Provisions Test Case;



- 10 days personal/carer's leave per annum;
  - A minimum of 11 Public Holidays each year;
  - Up to 2 years unpaid parental leave and a right for parents of pre-school children to part time work;
  - A right to information and consultation in the workplace;
  - Fair notice of termination,
  - Retrenchment pay; and
  - A statutory guarantee that workers' entitlements will be paid in the event of company failure.
25. These conditions would be guaranteed to every worker. While they may be improved through bargaining or the award system, they could not be traded off or removed.
26. Legislated minimum employment standards should be varied from time to time following reviews conducted by the independent Industrial Relations Commission and involving submissions from all interested parties. These reviews should take into account:
- Fairness;
  - Community standards;
  - The needs of the low-paid and those with little bargaining power; and
  - The needs of workers with family responsibilities.
27. The legislation should also ensure that all workers have protection from unfair dismissal, an avenue to pursue equal remuneration for work of equal value, and access to the independent Industrial Relations Commission to hear and determine any grievance that cannot be settled at the workplace.
28. The Commission should be empowered to hear and determine grievances related to the application of the safety net of legislated and award minimum wages and conditions, and the grievances related to the application of agreements and other day to day workplace grievances.
29. Legislated minimum standards should operate alongside employment rights established through other legislation, whether State or national, such as long service leave, jury service leave,

superannuation, occupational health and safety and equal opportunity.

## 4.2 Minimum Wages

30. Congress believes that minimum wages contained in awards should continue to play a crucial role in underpinning bargaining and achieving wage justice for those unable to collectively bargain. Adjustments to minimum wages have also been an important vehicle for narrowing the gender pay gap.
31. Congress rejects the proposition that reducing the value of minimum wages compared to average wages will boost employment opportunities for the unemployed.
32. Congress notes that minimum wages linked to skill based classification structures are a mechanism to ensure equal minimum pay for work of equal value, and encourage employees to obtain new skills and qualifications.
33. Congress believes that the responsibility for setting minimum wages should be returned to the independent Industrial Relations Commission.
34. In adjusting the minimum wage the Commission should be required to have regard to:
  - the need for fair, relevant and secure minimum wages in the context of living standards prevailing in the community;
  - the needs of the low paid,
  - the desirability of improved living standards and employment security, better pay, high employment and low inflation;
  - international competitiveness through higher productivity and a fair labour market;
  - the need to ensure equal pay for work of equal value and narrowing the gender pay gap including through pay equity principles ;
  - ensuring that work is valued in a manner free of assumptions based on gender
  - the needs of workers with disabilities; and
  - the public interest.

### 4.3 Awards

35. Congress notes that the WorkChoices legislation has altered the legal basis upon which awards stand, and that awards now bind employers and employees because of the classification of the employer, and not as a party to an interstate industrial dispute. In addition John Howard's WorkChoices laws render a number of important award provisions unallowable and unenforceable. The laws foreshadow the rationalisation of the coverage of awards and further simplification of their content. The framework and the timetable for rationalisation and simplification are currently uncertain.
36. Regardless of the status of federal awards, a modern IR system should have the following features:
  - Awards should provide appropriate minimum wages and conditions for specific occupations, organisations and industries over and above the legislated minimum employment standards. There should be no limit on the matters to be contained in awards;
  - The awards in combination with legislated minimum employment standards together should comprise the safety net below which no worker should be paid, and form the basis for the 'no disadvantage test' in agreement making;
  - The independent Industrial Relations Commission should have the responsibility for establishing and maintaining wages and conditions in awards at a relevant level;
  - The coverage of the awards should be extended throughout relevant occupations, organisations and industries on a common rule basis;
  - Awards should be able to be varied by the Commission on application of a union or employer organisation that is bound by the award with rules coverage in the occupations, organisation or industry covered by the award; and
  - Where bargaining and/or market rates are substantially higher than the award rates of pay, the Commission should be empowered to consider industry-based supplementary payments in awards to reduce the gap between award-reliant workers and those with access to collective bargaining while also maintaining and recognizing industry relativities.

#### **4.4 Transmission of business**

37. Congress believes that when a business takes over an existing business that has an award or current enterprise agreement in place, the incoming employer must be obliged to honour the terms of the award or enterprise agreement. The legislation should provide that incoming employers inherit the obligations of outgoing employers and that workers should not be disadvantaged by changes in company ownership. Legislation should enshrine an obligation on a new business to recognise the commencement date of employment of an employee with the old business for the purposes of all accrued and contingent entitlements.
38. The Commission should have responsibility for determining disputes about the coverage of each award or the ongoing application of agreements, and the system should guard against artificial arrangements designed to reduce the award entitlements of employees.
39. Agreements should continue unless and until they are replaced by a newly negotiated agreement, or unless the employees covered by it agree to its termination.

#### **5. Unfair dismissal**

40. All workers should have access to a fair, cost effective, non-legalistic and speedy process for determining claims that a dismissal is unfair. Where a dismissal has been found to be unfair, reinstatement should be the primary remedy.
41. Congress believes that all employers, large or small, should adopt fair and clear procedures in dealing with employees in order to avoid the need for termination of employment and, where this does occur, to avoid possibility of challenge.
42. The unfair dismissal provisions of the legislation should ensure a fair go all round, and the Commission should be empowered to consider all the circumstances of a dismissal including the conduct of the parties and the resources available to the employer and employee involved.
43. The Commission should be required to hear and determine unfair dismissal applications within set timeframes.

# Freedom of association and rights to organise

## 6. Freedom of Association

44. Freedom of association is a universally recognised civil liberty and one of the most fundamental human rights of workers. Respect for the principles of freedom of association is vital for the proper functioning of a fair industrial relations system.
45. Congress notes that freedom of association is a fundamental principle that is protected and promoted by a number of ILO Conventions and Recommendations to which Australia is a signatory as well as by the ILO Declaration on Fundamental Principles and Rights at Work of 1998.
46. Australian industrial relations legislation must effectively enshrine workers' freedom of association by:
  - Providing effective rights for all workers to join their appropriate union and to participate actively in their affairs;
  - Guarding against anti-union discrimination or victimisation;
  - Providing effective relief for workers who are denied freedom of association; and
  - Including effective remedies that are sufficient to dissuade employers from engaging in anti union activities.
47. Specifically the Freedom of Association provisions of the legislation should be amended to:
  - Supplement the penalty provisions of the Act which are enforced by the Court with a specific power for the Commission to make orders with respect to breaches of freedom of association;
  - Include a fast track mechanism for hearing allegations of discrimination or victimisation on the grounds of union activities, and the provision for interim orders reinstating the status quo pending determination of the allegation;

- Recognise that freedom of association comprises the promotion of collective bargaining between workers and their employers and the right to strike. Conduct by an employer that is designed to, or has the effect of deterring workers from engaging in collective bargaining, taking part in protected industrial action, or relying on collective agreements should be prohibited conduct; and
- Prohibit employers from offering inducements that are designed to deter, or that have the effect of, deterring workers from:
  - joining a union;
  - exercising the statutory representation rights that accompany union membership,
  - participating in collective bargaining,
  - taking part in protected industrial action or relying on a collective agreement; or
  - taking action by an employee in support of professional standards.

## **7. Delegates' rights**

48. Strong, effective and representative unions are essential to a fair and just society. Unions provide the democratic organisation for working people to have a say in their workplace.
49. Representative workplace union delegates hold a vital position in the union. Union delegates represent the collective and individual hopes, aspirations and needs of their work colleagues. They are critical to the improvement of pay, employment conditions and health and safety.
50. Industrial legislation should recognise the role of delegates in representing workers in preparing for bargaining, during the bargaining process and in implementing the outcome of collective agreements. The independent Industrial Relations Commission should be empowered to ensure delegates can perform these duties.
51. Authorised delegates should have legislated rights including access to and communication with workers, inspection of the workplace and documents, and the necessary paid time off to perform, and be trained in how to perform their representative roles.
52. The industrial legislation should ensure that accredited union delegates have the right to:

- be treated fairly and to perform their role as union delegate without any discrimination in their employment;
- formal recognition by the employer that endorsed union delegates speak on behalf of union members in the workplace;
- bargain collectively on behalf of those they represent;
- be consulted and have access to relevant information affecting the workplace, the workforce and the business;
- paid time to represent the interests of members to the employer and industrial tribunals;
- reasonable paid time during normal working hours to consult with union members;
- reasonable paid time off to participate in the operation of the union; to attend union meetings and to undertake accredited union and health and safety education;
- address new employees about the benefits of union membership at the time that they enter employment;
- reasonable access to telephone, facsimile, post, photocopying, internet and e-mail facilities for the purpose of carrying out work as a delegate and consulting with workplace colleagues and the union;
- place union information on a notice board in a prominent location in the workplace; and
- take reasonable leave to work with the union.

## **8. Information and consultation**

53. Workers must have a right to be consulted and informed of business decisions that affect them in their work. The legislation should require that awards and agreements include provisions giving employees the right to be consulted on a regular and comprehensive basis including the right to attend a minimum of two paid meetings of workers in any year.
54. In particular there should be a requirement for the provision of information to unions and workers on the company's overall strategy and planning, with particular reference to employment-related issues, including new technology, products and processes, the company's future planning, future labour requirements and proposed changes to work organisation.

55. While the full detail of consultative mechanisms required in awards and agreements should be developed through a broad debate, key requirements for unions include:
- enterprise level consultative mechanisms not having a role in collective bargaining;
  - where there is union representation in existence at the workplace, this being recognised as representing employees for the purpose of consultation;
  - employers being required to provide all relevant information on issues including the economic and financial position of the business, its likely development, probable employment trends, the introduction of new working methods or technology, and substantial organisational changes.

## **9. Right of entry**

56. Congress also notes unions play an important role in enforcement and compliance of the law. Training for union delegates and an effective right of entry for union officials to inspect suspected breaches of the law should be part of an effective compliance regime.
57. Congress notes that the provisions of the Act severely restrict union access to members' records inhibit effective compliance, and effectively require the disclosure of unions' membership records to employers. These provisions must be repealed.
58. Congress also believes that effective unfettered freedom of association (as per ILO Conventions) and the right to recruit and bargain collectively depend upon workers having access to advice and information in the workplace. The right of entry provisions of the Act must facilitate collective bargaining by ensuring workers have access to advice and representation. Meetings with workers should be expressly allowed to take place in meal rooms and the requirement for 24 hours' notice should be removed.

## **Collective bargaining**

### **10. The framework for collective bargaining**

59. Congress supports the establishment of an enforceable legal right for workers to collectively bargain for pay and employment conditions over and above the safety net. The right to collectively bargain includes the right to organise and freely associate in a union, and to take protected industrial action.



60. The industrial relations legislation should establish collective bargaining on the basis that parties will have a statutory obligation to bargain collectively in good faith.
61. Industrial relations legislation should also provide basic rights for employees who are union members, including the right to be represented by the union in the workplace for the purpose of collective bargaining. Other statutory rights generated by membership of a union should include:
  - The right for an employee to be represented in grievances;
  - The right of an employee to information and representation in the workplace;
  - The right of an employee to have their pay and employment conditions enforced by their union; and
  - The right to take protected industrial action.
62. Employers should have a statutory responsibility to recognise and deal with a union representative acting on behalf of a member.

### **10.1 The legislative framework**

63. Congress endorses a system of good faith collective bargaining. The law should oblige employers, unions and workers to collectively bargain in good faith, and provide remedies where this is not occurring.
64. The legislative underpinnings of a good faith collective bargaining system would:
  - Include within the Objects of the Act the protection of freedom of association and the promotion of collective bargaining.
  - Ensure that all workers have the right to bargain, to union representation in collective bargaining and the right to take industrial action.
  - Provide for all workers to have access to information in the workplace, including translated information in the languages spoken in the workplace; and
  - Provide that union membership should confer representational rights. Union members should have a statutory right to representation in collective bargaining, and a general right to representation in discussions with their employer about

matters including but not limited to grievances, discipline, enforcement of their terms and conditions of employment.

65. A union's ability to represent a worker should continue to be governed by the unions' eligibility and coverage rules.

## **10.2 A good faith bargaining system**

66. The good faith collective bargaining system should include the following features:

- The Act must require good faith collective bargaining;
- The making of a claim to collectively bargain should be open to workers, unions or employers;
- The independent Industrial Relations Commission should be empowered to enforce good faith collective bargaining;
- Collective bargaining and agreement-making which is entered into voluntarily on a single business or multi employer level should be available without recourse to the Commission;
- Where a party is not collectively bargaining in good faith, the Commission should be able to make good faith bargaining orders;
- The ability for parties to engage freely in 'pattern bargaining' - that is to pursue common claims and outcomes in two or more single business agreements;
- Where bargaining has failed, and there is no reasonable prospect of reaching an agreement, or where good faith orders have been breached, the Commission must be able to arbitrate as a last resort to resolve the dispute;

67. The obligation on the Commission should be to promote bargaining in good faith towards the making of collective agreements, and the presumption should be that employers cannot refuse to bargain on the grounds that they oppose the making of a collective agreement;

68. Where an employer opposes the collective bargaining process and/or the making of a collective agreement, the views of the majority of workers to be covered by the agreement should determine the issue.

## **10.3 The scope of collective agreements**

69. ILO principles and overseas practice recognise the importance of bargaining parties being free to agree to negotiate collective agreements at the workplace, enterprise, multi-employer or industry level, and for employers and unions to pursue common claims and outcomes in single business agreements. The constraints on collective bargaining in Australia would not be tolerated in other democratic societies. For these reasons Congress believes that there is a need for greater flexibility in the scope and the level at which bargaining occurs in Australia.
70. While collective agreement making will predominantly continue to be at the level of a single business, employer, or a group of related businesses bargaining as a single business (commonly described as enterprise bargaining) Congress calls for a greater capacity for the parties to pursue bargaining at different levels.
71. The ability for unions, not just employers, to pursue common claims and outcomes in collective agreements must be a feature of any future collective bargaining system. So too there must be a capacity for the making of multi-employer agreements - single agreements which bind more than one employer. Frameworks for dealing with issues such as occupational health and safety, or skill development, are also common overseas at an industry level.
72. Collective agreements should generally cover all employees performing the work to be covered by the agreement. If the scope of an agreement is contested the Commission should have the power to settle the matter, guarding against the artificial expansion or fragmentation of the workforce to be covered by the agreement.
73. Where a collective agreement is sought at the level of a single business, (ie an employer, or a group of related businesses bargaining as a single business) negotiation, bargaining and protected industrial action should all be available without the involvement of the Commission. This would include the pursuit of single business agreements on the basis of making common claims and seeking common outcomes. In these circumstances the role of the Commission, if called upon, should be limited to application of the good faith bargaining procedures set out in the following recommendations, and the agreement approval processes.
74. Consistent with the principle that parties should be free to determine the level at which they bargain, multi-employer collective agreements (i.e. a single agreement binding more than one employer) should be available where the parties agree to bargaining at that level.

75. Where a multi-employer agreement is proposed but the claim for such an agreement is contested, the Commission should have the power to determine whether a multi-employer bargaining process should proceed, and determine who the bargaining parties will be. The Commission should apply the following criteria when authorising a multi-employer bargaining process:
- ILO conventions and principles, and the freedom of the parties to determine the level at which they bargain;
  - The community of interest of the employees;
  - The community of interest of the employers;
  - A collective multi-employer agreement covering a site or project involving multiple employers engaged in the same undertaking (e.g. a construction site) should clearly be available without limitation;
  - The desirability of promoting collective bargaining, particularly where the employees or the employers lack the capacity to bargain at the single business level, or the size or number of workplaces in a particular industry or industry sector mitigates against collective bargaining at the single business level;
  - The needs of lower paid workers and the desirability of promoting bargaining and lifting living standards;
  - The history of bargaining; or
  - Any potential, demonstrable and long-term negative impact on the viability of a single business.
76. If the Commission authorizes a multi-employer bargaining process the good faith bargaining procedures of the legislation would apply and protected industrial action would be available.
77. The legislation should provide for Industry Consultative Councils to facilitate industry level consultation/negotiations and the development of industry level framework agreements. The parties should be free to determine their own agenda.

#### **10.4 Parties to agreements and the initiation of bargaining**

78. Unions, workers and employers should have a right to initiate a claim to bargain. The parties to the agreement should be those parties who negotiate the agreement.

79. There should be a general obligation on all parties to bargain in good faith. Congress opposes the establishment of any union membership “threshold” which would trigger a right to initiate a collective bargaining process. The right of union members to representation should not be conditional upon the level of union membership at the workplace. In the Australian context, as a matter of industrial common sense, we believe that bargaining by a union should be based upon the support of employees in the workplace.
80. The two concurrent streams of union and non-union collective agreements should be simplified and streamlined into a single agreement-making process. This approach would still provide for collective agreements to be made without a union. However, where a union has a member, it would be entitled to represent the member and be party to the agreement.
81. Congress also believes that there must be parties to a negotiation and an agreement. There should not be employer greenfields agreements. Nor should employers be able to determine who represents their employees in negotiations or oust unions from their legitimate areas of coverage, through the use of greenfields agreements.
82. If there are disagreements about who is a party to the negotiations (including a single bargaining unit) or disagreements about which workers would be covered by the agreement these should be resolved by the Commission, having regard to the right to representation in collective bargaining that union membership confers upon workers, the history at the workplace, the community of interest of the employees, and need to guard against artificial fragmentation of workforce.
83. Employer organisations should be able to represent employers in the negotiation of collective agreements with unions.

## **10.5 How good faith would work**

84. Employers and unions (within their area of coverage) should have the freedom to voluntarily enter into collective bargaining negotiations and to reach agreement, following which approval and certification processes would occur.
85. The legislation should be established upon the basis and on the assumption that parties will collectively bargain in good faith.

86. The initiation of the bargaining process, negotiation, and agreement making should all be available without the necessity of accessing Commission involvement in the bargaining process.
87. A bargaining party however would have the right to apply to the Commission for good faith bargaining orders where it was asserted that another party is not collectively bargaining in good faith.
88. The Commission should be able to facilitate collective bargaining. It would have appropriate powers to ensure:
  - the Objects of the legislation are upheld, prominent amongst which would be the promotion of collective bargaining as the principal means of determining pay and employment conditions;
  - the right of employees to freely associate in unions and to collectively bargain;
  - the obligation on all parties to collectively bargain in good faith and to attempt to reach agreement;
  - the right of employees and their union(s) to engage in protected industrial action;
  - that where bargaining has failed and there is no reasonable prospect of agreement being reached, or where a party has seriously undermined the principle of good faith bargaining “last resort arbitration” is used to resolve bargaining disputes.
89. Where a party is not bargaining in good faith, the Commission should have the power to make orders to facilitate good faith bargaining.
90. Whether conduct amounts to a breach of good faith should be for the Commission to decide, subject to some clear guidance. In particular:
  - Good faith does not require a bargaining party to agree on any matter for inclusion in an agreement or require a party to enter into, or prevent a party from entering into, an agreement.
  - The taking of protected industrial action is not, of itself, a breach of good faith.
  - ‘Pattern bargaining’ and the taking of protected industrial action in pursuit of common claims and outcomes in more than one collective agreement is not of itself a breach of good faith.

91. In determining whether to make a good faith order the Commission should consider the parties' conduct in negotiations including:
- whether each party has agreed to meet at reasonable times and attended the agreed meetings;
  - whether a party has refused or failed to negotiate with one or more of the parties;
  - whether a party has refused or failed to negotiate with a union which is entitled to represent an employee(s);
  - whether each party has complied with agreed negotiating procedures;
  - whether a party has capriciously added or withdrawn items for negotiation;
  - whether each party has provided relevant information and documents;
  - whether a party has engaged in conduct designed to undermine the bargaining right of another party;
  - whether a party is respecting the collective bargaining process;
  - the views of the bargaining parties; and
  - where it is a matter contested between the bargaining parties, the level of support amongst employees for the collective bargaining process.

## **10.6 Good faith orders**

92. Where there is a failure to bargain in good faith the Commission should have discretion, subject to legislative guidance, to grant orders to do, or stop doing certain things.
93. The Commission should to be able to make remedial orders to restore the status quo in order to remedy a breach of good faith.
94. The orders might relate to:
- Orderly bargaining (meetings schedules, exchange of information and proposals, adhering to undertakings and requiring parties to attend conciliation proceedings; time limits etc);

- Respect for the collective bargaining process and the role of representatives (prohibiting action that undermines collective bargaining or the representative role of another party, or that disadvantages workers or discriminates against union membership, and orders to remedy any unfair practices);\*
  - Ascertaining the level of workplace support (in accordance with procedures outlined under “majority support”);
  - The suspension, or deferral of industrial action for a short period of time (having regard to the right of parties to engage in protected industrial action and that the taking of such action is not of itself contrary to bargaining in good faith) and/or;
  - Preservation of the status quo.
95. A party which is opposed to the collective bargaining process and/or the making of a collective agreement should bear the onus of demonstrating why the Commission should not make a good faith order. Opposition to the making of a collective agreement of itself should not be considered a valid reason.

## 10.7 Majority support

96. Congress expects that in most cases the obligation to bargain collectively in good faith will be complied with, and that employers will respect the rights that accompany union membership.
97. However there are circumstances where good faith bargaining orders are sought, and the issue of employee support for the collective bargaining process is contested between the bargaining parties.
98. In these circumstances the legislation should expressly require the Commission to make good faith bargaining orders where a majority of employees support the collective bargaining process. This means the making of orders would be mandatory.

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\* These orders might include:

- orders to ensure workers have appropriate opportunities to receive advice and information from their union during bargaining, including paid time off for meetings, opportunities for workers to meet with their union representatives individually or in small groups, and access to workplace communication methods;
- orders to ensure delegates have appropriate resources to perform their representative roles; or orders that parties retract false or misleading statements made during bargaining.



99. The orders must facilitate the bargaining process and to the extent possible facilitate the making of a collective agreement. Orders would not require a party to make admissions or concessions on the matters proposed to be in the agreement.
100. The Commission should have discretion as to the means of ascertaining majority employee support. The Commission must ensure that employee opinion is ascertained in a fair manner free of intimidation or inducements. The Commission may:
- consider evidence from employees or their representatives, including evidence of a vote at a workplace or mass meeting;
  - consider petitions and/or workplace resolutions from employees;
  - consider the result of a ballot conducted by a union(s);
  - consider evidence concerning the level of union membership amongst employees; or
  - as a last resort, and if the Commission is not satisfied by any of the foregoing measures, order a secret ballot of employees. The Commission would not be able to order a secret ballot unless it had first considered others indicators of majority employee opinion, and only where there was clear evidence contradicting such indicators. If a secret ballot is ordered, majority support should be a simple majority of those who cast a vote.
101. A lack of majority employee support would not of itself be grounds for the Commission to refrain from making any good faith bargaining orders. That is, the Commission would still have an obligation and the discretion to promote collective agreement making consistent with the Objects of the legislation.

## **10.8 Industrial action**

102. Legally protected industrial action is integral to bargaining, as it provides the means to balance the economic power of the bargaining parties.
103. Taking protected industrial action in pursuit of an agreement to cover a single business (including the pursuit of common claims and outcomes at more than one single business) should be available without recourse to the Commission. Where a multi- employer agreement is being pursued, protected action should be available

where the Commission has noted the consent of the parties to a multi-employer bargaining process, or where the Commission has ordered that bargaining for a multi-employer agreement should occur.

104. Legally protected industrial action should be available to employees during bargaining, without the need for a secret ballot. However, as a matter of good union practice, unions should not take action unless it has been democratically endorsed.
105. Protected industrial action should not be able to be undermined by use of replacement labour.
106. Industrial action by employers (lock-outs) should not be automatically available. ILO jurisprudence does not support an automatic right to employer industrial action. An automatic right to lockout is rare amongst OECD nations, although it is available to employers in Australia. Congress calls for the removal of this right for employers.
107. The law should also enable the lawful conduct of meetings to prepare for bargaining, actions to promote the social or economic views of workers, fair provisions re OHS, and allow workers to protest breach of statutory duties. Legally protected industrial action should also be available during an agreement where the employer proposes significant organisational change.

## **10.9 Last Resort Arbitration**

108. Where the good faith collective bargaining process fails to result in agreement the Commission should have the discretion to terminate the bargaining process and commence an arbitration of the bargaining dispute.
109. "Last Resort Arbitration" would generally only occur as a last resort where there is no reasonable prospect of agreement being reached and:
  - where there is a significant risk to the safety, health or welfare of people affected by the bargaining dispute; or
  - where there is a risk of significant damage to the economy or an important part of it; and/or
  - it is otherwise in the public interest for the Commission to make a Last Resort Arbitration.

110. In considering the public interest the Commission should be required to take into account:

- the primary objective of promoting collective agreement making;
- whether there is a history of bargaining at the workplace and, if not, the desirability of establishing a Last Resort Arbitration which will facilitate future bargaining;
- whether a party has breached good faith bargaining orders;
- whether all of the bargaining parties were trying to reach agreement;
- whether a reasonable period of active bargaining has taken place;
- whether the good faith bargaining process has been genuinely exhausted;
- the views and interests of the bargaining parties and the employees;
- the relative bargaining strengths of the parties, and in particular the needs of the low paid;
- the rights of the parties to engage in protected industrial action and that the taking of such action is not of itself contrary to bargaining in good faith or grounds to terminate bargaining and institute a Last Resort Arbitration.

111. A Last Resort Arbitration would also be available where the parties have agreed to submit for arbitration any outstanding matters which they have not been able to resolve by negotiation.

112. The legislation should enable the Commission in arbitrating the dispute to take into account issues including:

- the matters at issue in the bargaining process;
- the merits of the arguments;
- the interests of the bargaining parties and the employees;
- the public interest;
- any other relevant issues.

113. A Last Resort Arbitration should have a maximum term of three years.

114. A Last Resort Arbitration should also be conducted on the basis that employees not be disadvantaged overall with respect to their existing pay and employment conditions.

### **10.10 Rules relating to Agreements**

115. The matters to be included in an agreement should be for the parties to agree subject to agreements meeting a genuine "no disadvantage test".

116. The agreement should be approved by a majority of those employees who vote. Voting should be limited to those who are to be covered by the agreement.

117. Parties should be bound by agreements and not able to opt out. The system should guard against workforce or corporate restructuring to avoid agreements.

118. Agreements should continue for their term, and beyond until terminated by the parties or replaced by another agreement. The maximum term for agreements should be three years.

119. Variations to agreement should require the consent of all parties.

120. Where an interested party wishes to be heard, the certification of agreements should be conducted in an open forum.

121. Agreements should be publicly available.

## Equal treatment for all workers

### 11. Building and Construction Industry Improvement Act

122. Congress calls for the immediate repeal of the highly ideological and unbalanced BCII Act 2005.

123. The Act should be repealed because:

- its application to part of one industry, is inconsistent with the principle that all citizens should be required to obey the same laws;
- the Act renders almost all forms of industrial action in the building industry unlawful;
- the Act is unbalanced and shows that the Government is solely concerned with restricting the ability of unions to function and bargain on behalf of their members;
- the Act confers extensive and unprecedented powers on the ABCC to compel the provision of documents and information, and to attend at a time and place of the Commissioner's choosing for interrogation. Failure to give the required information, produce the required documentation, attend to answer the questions, take an oath or make an affirmation, or the answer the questions as required can result in up to 6 months imprisonment;
- the Act allows for substantial uncapped compensation and does not rely on an affected party to enforce the law. The Act is designed to give the government the capacity to enforce prosecutions in an attempt to extract maximum penalties from unions. This will occur regardless of the wishes of the parties to the matter is dispute;
- the Act is unnecessary; there is no evidence, either from the Cole Royal Commission, or otherwise, that justifies the application of a draconian regulatory approach to the industry;
- the Act will do nothing to address the real problems of employers or workers in the industry. It is solely fixated on the issue of industrial action, while nothing is done to assist certainty in relation to site agreements, or to address issues such as payment of entitlements, security of payments to contractors and the like;

- the Act is designed to do no more than stop unions entering into agreements with employers that will bring stability to the industry over the coming years;
- the Act will create confusion for employers under a state system in that it seeks to regulate industrial action that previously fell solely within the state jurisdiction; and
- the Act is a short sighted ideological attempt to dis-empower workers and their unions by seeking to impose heavy penalties for any breach of the Act.

## **12 Independent contractors and labour hire workers**

124. The Independent Contractors' Act 2006 should be repealed.
125. Congress rejects the notion that contractors should be regulated solely through the Trade Practices Act, as if individuals earning their income primarily through their own labour and frequently from one source should be prevented from protecting their interests as workers. Individuals in this position are indistinguishable in practice from employees and should not be subject to laws designed to apply to corporations and other businesses.
126. While making it easier for employers to use contract arrangements to avoid employment obligations, the legislation does not effectively address wide-spread abuse of this form of arrangement to avoid tax, superannuation payments and workers' compensation.
127. The Act does nothing to address the real issues caused by the explosion in the employment of so-called "independent" contractors, while stripping them of access to the protection, however limited, available under state legislation. The Act also fails to address the serious issue of the application of occupational health and safety standards for independent contractors and labour hire employees.
128. While the legislation claims to maintain and extend protection for outworkers – some of the most exploited workers in the country – the reality is that it significantly reduces protection by overriding relevant state laws.

### **12.1 Protection for independent contractors**

129. The legislation should protect all workers, whether they are employees or self-employed.

130. The protections should include minimum pay, hours and leave entitlements together with collective bargaining rights for all contractors other than those genuinely running a business on their own account. Congress supports the retention and improvement of current State legislative protections for owner drivers

## **12.2 Sham arrangements**

131. The legislation must safeguard workers' genuine choice as to their form of engagement. The legislation should:

- Confer power on the Commission to deem sham contracting arrangements as employees;
- Provide penalties to be imposed where an employer dismisses an employee for the purpose of re-engaging him or her on a sham contracting arrangements; and
- Ensure such workers have access to a remedy in unfair dismissal.

## **12.3 Unfair contracts**

132. The legislation must ensure that all workers have an avenue for the review of contracts and the removal of unfair provisions in those contracts, for the payment of compensation for unfair terms, and for orders preventing further unfair contracts being made.

133. The legislation should be modelled upon the NSW laws and should, amongst other things, ensure that:

- complainants can be represented in proceedings by their union;
- subject only to a remuneration cap, there is no limit on the type of contract or arrangement that can be reviewed on a relevant unfairness ground;
- a broad public interest test is applied in determining unfairness; and
- contracts that are designed to avoid the provisions of an industrial instrument should be deemed unfair.

## **12.4 Collective bargaining**

134. The legislation must ensure that workers engaged under contracts for services have a right to bargain collectively with the firms that engage them, and that they have the right to be represented by their union.

## **12.5 Labour Hire**

135. Congress notes the increased use of labour hire as a supplementary and replacement workforce by Australian business. Employees who work for labour hire firms generally receive inferior wages and conditions to those enjoyed by workers performing the same work in an employers business. Congress believes that the principle of equal pay for work of equal value should extend to labour hire workers.

136. To give affect to this Congress believes the industrial instrument which applies to at an enterprise should apply to all workers performing the same work at the enterprise, including labour hire employees.

## **13. Equal Treatment for workers**

137. Congress expresses grave concern at the misuse of guest labour and 456 and 457 visas by employers and declares that this is an industrial and political issue. Congress notes the complexity of this migration issues and the fact that there are emerging problems currently being addressed by various unions. Congress determines to refer this to the December ACTU Executive for comprehensive policy development.

## **14. Outworkers**

138. The legislation must maintain and extend protection for outworkers who are recognised as some of the most exploited workers in the country. Specific legislation deeming clothing outworkers as employees should be retained Protections in the federal system should mirror and expand on state systems which include provisions which deem outworkers as employees, comprehensive protection of terms and conditions, capacity to recover money up the contracting chain, record keeping and registration provisions, right of entry, inspection and enforcement powers for union officers, mandatory codes covering all parties in the contracting chain including retailers.



## **15. Trade Practices laws**

139. All provisions of the Trade Practices Act applicable to unions and employees should be repealed. The independent Industrial Relations Commission should deal with industrial action as part of its general powers in relation to the bargaining process.
140. In considering whether to allow business takeovers to occur, the Australian Competition and Consumer Commission should be obliged to take into account likely effects on employment and the terms and conditions under which work is performed.

## **Protecting workers when companies fail**

### **16. Employee entitlements**

141. Congress views with great concern the continuing failure of the Federal Government to properly address the scandal of employee loss of accrued and contingent entitlements in cases of corporate insolvency.

#### **16.1 Corporations law**

142. Congress calls for the following changes to the Corporations Act:
- related companies being treated as single entities for the purpose of protecting employee entitlements;
  - directors being obliged to report the financial position of the company to employees and other major stakeholders to the same degree as their current obligations to shareholders;
  - ensuring directors take into account the interests of employees and other major stakeholders;
  - directors being obliged to act once they have reasonable grounds to believe that the company is likely to become insolvent;
  - all employee entitlements being ranked above secured creditors in insolvencies;

- All employee entitlements, whether they arise from an industrial instrument or any other instrument, law, contract, etc are given priority;
- employee entitlements being included in the definition of “debt” for the purposes of insolvency;
- directors carrying the onus of proof in defending actions for avoiding obligations to pay entitlements or trading while insolvent;
- provision being made for earlier appointment of administrators where this could assist in avoiding insolvency or maximising assets;
- provisions which reverse the onus of proof on directors barring directors from continuing to act as a director where a corporation for which they were a director went into liquidation unless they can demonstrate to an appropriate authority that they have exercised their duties in accordance with the law; and
- provisions strengthening the powers of ASIC in banning directors from holding office particularly in circumstances involving the collapse of a corporation which results in employees losing all or part of their entitlements.

## **16.2 Payment of Entitlements**

143. Congress does not believe that the GEERS scheme addresses the principles of being employer-funded and guaranteeing 100% of entitlements. The GEERS scheme suffers from a number of major deficiencies, including that:

- many employees are unable to claim although their employer has closed down operations, because a liquidator or administrator has not been appointed;
- it does not include superannuation;
- it does not cover the total of employees’ redundancy entitlements;
- it does not cover entitlements such as untaken RDOs, untaken accrued sick leave or unremitted employee deductions such as union fees and health fund fees;
- there are long delays in processing claims; and

- as an administrative scheme, GEERS is subject to limited scrutiny or review of its operations, administration and decisions.

144. Congress calls on the Federal Government to give priority to 100% of employee entitlements above secured creditors. and only to recover its own expenditure once employees' claims have been satisfied in full.

### **16.3 Other legislation**

145. Congress calls for further changes to other relevant legislation to ensure that:

- SG contributions are required to be paid monthly; and
- the Commission is empowered to vary industrial instruments to provide for payment of employee entitlements into trust funds.

## **Effective and independent enforcement & compliance**

### **17. Administration of the laws**

146. Over the 10 years of the Howard government there has been a proliferation of new statutory and other bodies. In addition to the Australian Industrial Relations Commission the system is now overseen by the Office of the Employment Advocate (OEA), the so called Fair Pay Commission (FPC), the Office of Workplace Services (OWS) and the Australian Building and Construction Commissioner (ABCC).

147. The establishment of these bodies has corresponded with reduced powers for the Commission, and the increased capacity for government interference in how these bodies perform their roles.

148. Congress believes that the independent Industrial Relations Commission is the appropriate body to administer the industrial relations legislation. The Commission's powers should be enhanced and its independence assured.

149. The Commission should continue to be obliged to administer the laws in accordance with equity, good conscience and the substantial merits of the case, without regard to legal technicalities.

150. The role of lawyers should be limited, and the Commission should be generally be required to refuse legal representation.

151. Congress calls for the abolition of the so called Fair Pay Commission.
152. The power to determine minimum award wages should be returned to the Commission, and the argument and evidence considered by the Commission should be open to examination, analysis and counter argument by interested parties.
153. The Office of Employment advocate should also be closed. The OEA is not independent, and performs its role subject to the direction of Minister.
154. Since 1996 the OEA has been a partisan advocate for AWAs. More recently the Office has provided unbalanced, unchallengeable, and unaccountable advice on matters that are prohibited in agreement-making, that has delayed the making of enforceable collective agreements.
155. The functions of the OEA should be transferred to the independent Industrial Relations Commission. The Commission should have responsibility for the administration of the collective bargaining regime and should have responsibility for administering the "no disadvantage test". The process should be open and accountable.

## **18. Compliance**

156. Inspectors should have powers to inspect breaches and to conduct prosecutions. However, the duties and functions of inspectors should not be subject to political direction or interference.
157. Congress notes that, during 2006, the Government has sought to use the Office of Workplace Services for political purposes. This has undermined the integrity of the Office. Unfortunately for the many inspectors who have provided a high quality inspection service over many years, this has and called in to question the motivation or professionalism of the entire office.
158. Congress also notes that the investigation tactics adopted by the ABCC are an affront to civil liberties and would not be tolerated in investigating breaches of criminal law.
159. To safeguard against political interference, the ABCC should be abolished and the inspection and compliance work of the OWS should be subject to the direction of the Registrar of the independent Industrial Relations Commission.

160. Congress calls for the repeal of legislation that allows the coercive powers of inspectors to be used to intimidate or harass workers or unions, and the abolition of imprisonment as a penalty for failure to provide information during an inspection.

*# Note – this is a preliminary version of the amended IR policy as passed at ACTU Congress 2006, 25 October 2006. Pagination and minor proofing changes may alter a subsequent final version.*