

INDUSTRIAL LEGISLATION POLICY

ACTU CONGRESS 2000

1 Legislative Framework

1.1 A legislative framework should:

- i) provide for worker and union rights in relation to collective bargaining which meet the standards set by international law;
- ii) ensure that all workers have access to fair and relevant wages and conditions as a basis for bargaining;
- iii) enable compulsory conciliation and arbitration of industrial disputes;
- iv) facilitate the operation of independent and genuine industrial organisations with the capacity to effectively represent members.

1.2 The Commission's powers should be enhanced and its independence assured. The Commission should be required to develop and publish a protocol for defining, receiving and handling bona fide complaints against Commission members as well as complaints about Commission systems and processes.

1.3 The full constitutional powers of the Commonwealth should be used to ensure that all Australian workers receive access to rights and protections no less than those available under federal legislation. These powers should not override state systems that provide comparable rights and protections to the federal system, but legislation must ensure that federal standards prevail over inferior state systems.

2 The Award System

2.1 The Act should be amended to give the Commission the power to make awards on any matter that is the subject of an industrial dispute; that is, empowering the Commission to the full extent of the constitutional conciliation and arbitration power. In particular, the Act should provide

that, prima facie, provisions removed from awards pursuant to the 1996 amendments, should be restored.

- 2.2 The Act should be amended to remove the requirement to contain facilitative provisions. The amending Act should contain provision for facilitative provisions inserted as a result of simplification to cease to have effect unless their continuance is consented to by all award parties or their representatives.
- 2.3 The Commission should be required to ensure that awards provide for secure, relevant and consistent wages and conditions and provide for fair standards for employees in the context of living standards generally prevailing in the community.
- 2.4 The Commission should be able to give regard to market rates, where appropriate, in determining award rates of pay.
- 2.5 The Commission should be required to ensure that achievement of equal remuneration for work of equal value is a consideration in its determinations.
- 2.6 Additional resources should be provided to ensure the operation of an effective system of compliance.

3 Collective Bargaining

- 3.1 Federal legislation that provides for collective bargaining should ensure that Australian law is consistent with international standards.

Objects of the Act

- 3.2 To make it clear that the legislation is directed towards the encouragement of collective bargaining between unions and employers or organisations of employers, the following should be included as objects of the Act:
 - i) establish and protect rights to collective bargaining between unions and employers or employer organisations;
 - ii) providing rights for parties in collective bargaining consistent with Australia's international obligations; and
 - iii) encouraging the association of workers and employers in trade unions and employer organisations.

The bargaining process

- 3.3 Employers should be required to bargain genuinely with a union which has indicated its desire to negotiate a collective agreement.
- 3.4 The Commission should be empowered to make binding orders in relation to the collective bargaining process to ensure that the parties negotiate genuinely. In determining whether to make such an order, the Commission should be required to consider issues including:
- i) whether or not the employees wish to negotiate collectively;
 - ii) the level of union membership;
 - iii) the relative bargaining strength of the parties;
 - iv) the nature of the enterprise or industry;
 - v) the negotiating conduct of the parties.
- 3.5 The orders should be able to deal with issues such as:
- i) provision of information to the other party;
 - ii) requirement to genuinely consider proposals from the other party;
 - iii) adherence to a program for meeting and responding;
 - iv) recognition of unions' representative role and preventing conduct which undermines the authority of a union to represent workers or which interferes with the relationship between a union and its members;
 - v) preventing the employment of replacement workers during protected action;
 - vi) time limits for the conclusion of an agreement.
- 3.6 The Commission should be empowered to arbitrate a bargaining dispute, taking into account matters including:
- i) the relative bargaining strength of the parties;
 - ii) the conduct of each party in the bargaining process;
 - iii) the history of wage fixing in the particular award, including whether it was characterised as a paid rates award;
 - iv) the effect of the dispute on the community or part of it or on the economy or part of it.

- 3.7 Employers required to bargain with a union should not be permitted to put alternative agreements directly to employees during the bargaining process.
- 3.8 In line with international standards, there should be legislated provisions covering union and delegate rights, including:
- i) physical and electronic right of entry for union officials;
 - ii) the right for unions to hold discussions with and meetings of employees on the employer's premises;
 - iii) delegates' rights to time off for training and facilities to enable them to carry out their functions, such as access to telephone, fax, email and reasonable time to consult with members.
- 3.9 It should be unlawful for an employer to discriminate in any way against an employee because the employee is seeking to bargain collectively through his or her union.

Industrial action

- 3.10 Workers should be able to take industrial action in accordance with international conventions, including on political issues. Industrial action should be dealt with by the Commission, not the courts.
- 3.11 The right to take protected industrial action should be extended to collective bargaining on a multi-employer or industry basis, and to sympathy action in support of workers taking protected action against their employer.
- 3.12 Sections 127, 170MN and Part VIIIA of the Act, together with sections 45D-EB of the Trades Practices Act should be repealed. The Commission should deal with industrial action by unions and/or employers in the context of its general powers in relation to industrial disputes.

Certification of agreements

- 3.13 Unions should have the right to be notified and intervene in certification proceedings for any agreement that is intended to cover an employee for whom the union has coverage under its rules.
- 3.14 The ACTU and its affiliates note that under the present legislation, non-union agreements have been used by employers to deunionise workplaces and undermine the union bargaining strategy. Unions believe that the only agreements that can genuinely protect workers are those negotiated with the involvement of unions. Multi-employer agreements should be able to be certified on the same basis as single enterprise agreements. Where an agreement has dominant coverage in an

industry there should be scope for the Commission to extend its terms to cover non-consenting employers.

- 3.15 The no-disadvantage test should ensure that employees are not disadvantaged in their terms and conditions of employment by the making of the agreement.
- 3.16 The ACTU notes that under the present legislation non-union agreements have been used by employers to deunionise workplaces and undermine the union bargaining strategy. Union believe that the only agreements that can genuinely protect workers are those negotiated with the involvement of unions.

Certification of collective agreements made without union involvement should be available only where there are no union members at an enterprise, and should be subject to the Commission being satisfied that the agreements are:

- i) the result of a genuine collective bargaining process, involving genuine majority support of the employees concerned; and
- ii) not capable of being used by employers to undermine or exclude collective bargaining involving union representation.

Where there is at least one union member involved, the union must be permitted to be party to the negotiating process and the agreement.

- 3.17 Section 170LL appears to allow the employer to pre-select the bargaining partner on behalf of potential employees at a greenfields project, regardless of whether or not the employer's preferred partner will ultimately be truly representative of the workers later employed. Accordingly the Act should be amended to ensure that certified agreements are not misused as de facto demarcation instruments.
- 3.18 Provision should be made for certified agreements to include a term providing that a specified negotiating fee be deducted from the wages of all employees covered by the agreement to be forwarded to the relevant union, with such fee to be offset against union dues if paid by the employee.
- 3.19 The Office of the Employment Advocate, together with the system of AWAs, should be abolished. There should be no legislative provision for individual agreements.

4 Job Security and a Balanced Life

Employment certainty

- 4.1 The definition of an "employee" should be extended to include persons who work under a contract wholly or substantially for labour only, even

where that person is a lessee or owner of tools or other implements of production or of a vehicle used to transport goods or passengers.

- 4.2 The definition of an “employer” should be extended to include partnerships, group training schemes and labour hire agencies.
- 4.3 The Commission should be required to ensure, as far as practicable, that casual employment be applicable only for workers engaged on an unpredictable non-continuous basis, essentially for emergency situations, unforeseen absences or short-term demands. Casual and seasonal workers should be entitled to pro-rata leave on the same basis as other workers.
- 4.4 The Commission should be empowered to determine disputes about the use of contractors and labour hire companies.
- 4.5 The Commission should be empowered to regulate the use of precarious employment forms, depending on the circumstances of particular industries or workplaces.
- 4.6 Transmission of business provisions should apply in all cases where work or functions are transferred from one entity to another.

Protection of employee entitlements

- 4.7 There should be a scheme for the payment of workers’ entitlements in full in cases of employment insolvency to be funded by employers through a levy. The Commission should be empowered to provide for this scheme through specified employee entitlements being paid into an industry trust fund established for the purpose.
- 4.8 The Corporations Law should be amended to:
 - i) define accrued and contingent employee entitlements to be debts of the company;
 - ii) increase penalties for trading while insolvent;
 - iii) place employee entitlements higher in priority than secured creditors;
 - iv) allow recovery for employee entitlements against related corporations and individual directors, particularly where there has been deliberate restructuring or other arrangements in order to avoid liability;
 - v) increase the ability of ASIC to prosecute directors involved in corporate arrangements designed to avoid obligations in relation to employee entitlements and disqualify directors found to be involved in such arrangements from holding office in other companies;

- vi) create an offence of failing to make real provision for accrued employee entitlements;
- 4.9 The Act should be amended to provide that a transmission of business includes where an employer ceases operations, and another company re-commences a similar business where that second company includes one or more of the same directors as the first company, whether or not the same assets are involved.
- 4.10 The Superannuation Guarantee Act should be amended to provide that superannuation contributions must be paid monthly.

Working hours

- 4.11 An object of the Act should be inserted to ensure that award working hours provisions facilitate regular and predictable work, and prevent the working of excessive or unreasonable hours.
- 4.12 The Commission should be empowered to regulate the hours of work of all workers, including part-timers and casuals, and to include a maximum duration of employment for casual workers.
- 4.13 The Commission should be empowered to provide for portability of entitlements.
- 4.14 The Commission should be specifically empowered to set minimum and maximum hours of work for part-time workers.
- 4.15 The Commission should have power to determine disputes over hours of work.
- 4.16 The Commission should be able to determine requirements for consultation, monitoring and agreement about rostering, staffing levels and hours of work.

Work and family

- 4.17 The Commission should be required to ensure that awards contain effective and innovative provisions to assist workers to combine work with family responsibilities, including provisions relating to hours of work.
- 4.18 The Commission should be required specifically to examine proposed agreements in relation to whether or not they positively assist the workers covered by the agreement to combine work with family responsibilities, and in particular, that flexible hours provisions be held to contravene the no disadvantage test if they could result in disadvantage to workers with family responsibilities.
- 4.19 Personal/carer's leave should be legislated as a minimum standard of employment to apply to all employees who do not have access to at

least this standard.

4.20 Unpaid parental leave should be extended to regular casuals.

4.21 Paid maternity leave of 12 weeks, in line with the ILO Maternity Protection Convention, should be introduced.

5 Unfair Dismissal

5.1 The legislation should be amended to ensure that all employees have access to a timely and fair remedy to prevent and compensate cases of unfair termination of employment.

5.2 As a priority, provisions relating to unfair dismissal should be streamlined.

5.3 The Commission should be required by legislation to:

- i) hear and determine unfair dismissal cases within set timeframes; and
- ii) Give the remedy of reinstatement primacy.

5.4 In circumstances of mass terminations, unions should be given the ability to make a single application to be heard and determined within set timeframes

5.5 Application and filing fees for unfair dismissal applications should be abolished.