

Future of Work

Industrial Relations Legislation Policy

Introduction

1. Congress welcomes the repeal of the Howard Government's WorkChoices laws and the enactment of the Rudd Labor Government's Fair Work Act 2009. The new Act represents a substantial, albeit imperfect, translation of the 2006 ACTU Congress policy into legislation.
2. Congress notes that the Fair Work Act has collective bargaining underpinned by a decent safety net at its core. This is consistent with the imperatives of a modern economy, and remains important to ensure sustained and fairly shared prosperity.
3. The Fair Work Act (and ancillary legislation):
 - a) Establishes a secure safety net of fair and enforceable minimum standards contained in modern awards and legislation that must be periodically reviewed and adjusted to remain relevant and take account of community and/or industry standards and the needs of the low paid;
 - b) Provides for collective bargaining over and above the safety net which enshrines an obligation upon the parties to bargain in good faith and to respect the decision of employees to bargain collectively;
 - c) Abolishes individual arrangements that can be used to undermine the safety net, collective bargaining or union representation, and phases out statutory individual contracts;
 - d) Establishes Fair Work Australia (FWA) as an independent tribunal to maintain and improve the award safety net, and to oversee the bargaining system and fair treatment in the workplace;

- e) Retains union registration and eligibility rules, and the representation rights that these confer, albeit not generally as parties to industrial instruments. Unions are given a statutory right to represent their members in collective bargaining. Employees are entitled to be represented in discussions that might lead to dismissal, dispute resolution, and when enforcing terms and conditions of employment;
- f) Guarantees important rights for employees, including protection against unfair treatment, union representation in disputes and bargaining, collective bargaining and the right to strike, albeit with legally protected strikes only available in limited circumstances;
- g) Prohibits a wide range of arbitrary or capricious decision-making by employers. The Act provides for penalties where an employer:
 - i) disadvantages an employee because they are entitled to a workplace right;
 - ii) exerts undue influence or pressure on an employee in relation to certain workplace rights;
 - iii) knowingly or recklessly misleads an employee about their rights including their status as an employee; or
 - iv) is guilty of discrimination.
- h) Reinstates access, albeit after differential qualifying periods based on the size of the business, to a fair, cost effective, non-legalistic and speedy process for determining claims that a dismissal is unfair. This will restore unfair dismissal remedies for more than 3 million employees. Where a dismissal has been found to be unfair, reinstatement is the primary remedy; and
- i) Requires FWA to take account of the principle of equal pay for work of equal or comparable value when setting and adjusting minimum wages and providing for binding equal remuneration orders that can address pay inequity in awards, agreements or over-award payments.

Transition to the new system

- 4. The government must ensure that employees are not disadvantaged in transitioning to the new system:
 - a) The Commonwealth and State governments must provide jurisdictional certainty, whether through full referral of powers

or retreat from the field to allow State laws to operate. This must be done in consultation with affected employees and their unions. The commitment that employees covered by State IR systems not be disadvantaged must be honoured. Consistent with previous Congress policy the federal government should use all of the powers available to it to ensure employees not currently covered by the national laws are not disadvantaged;

- b) The setting of the new modern award safety net must not result in a loss of take home pay or overall conditions for employees, nor in a reduction of industry or occupational employment standards;
- c) Employees must not be employed on workplace instruments that fall below the new safety net. Fair Work Australia should be empowered to make orders terminating instruments that fail the Better Off Overall Test.

Priorities for Legislative Reform

- 5. Australia's workplace laws should apply to all employees regardless of the industry in which they are engaged. While there is a case for supplementary protections for vulnerable employees, the laws must not impose harsher conditions or confer inferior rights on groups of employees. The government must immediately repeal the BCII Act and abolish the ABCC.
- 6. Industrial legislation must ensure a decent safety net, bargaining rights and protections against unfair treatment apply to all workers regardless of the type of labour contract under which they are engaged. The ACTU and unions will campaign for:
 - a) amendments to the Independent Contractors Act to ensure that all workers in Australia have decent working arrangements, access to low cost remedies against unfairness;
 - b) amendments to the Trade Practices Act to ensure contractors can be represented by their union in collective bargaining;
 - c) amendments to the SG and workers' compensation legislation to extend these entitlements to excluded contractors. Unions will also seek to enforce the rights of members engaged under contracts for labour to SG contributions.
- 7. Our laws need to protect delegates from unfair treatment and confer rights upon delegates that recognise their role in representing employees. The Fair Work Act should be amended to ensure that accredited delegates are entitled to reasonable:

- a) paid time off from duties to prepare for and engage in bargaining; consult members during bargaining; to participate in the operation of the union; to attend union meetings and to undertake union training and education;
 - b) access to facilities to carry out their work as a delegate, consult with workplace colleagues and the union, and distribute information at the workplace;
 - c) leave without pay to be employed by the union.
8. Affiliates will also seek to enshrine delegates' rights in agreements and awards.
 9. The collective bargaining provisions should recognise that enterprise level bargaining is not appropriate where the legal employer does not ultimately control the wages or working arrangements at the enterprise. This is particularly the case in the funded sector, in subcontracting arrangements and in labour hire. The laws should be amended to ensure unions can initiate multi employer bargaining in these circumstances.
 10. The collective bargaining provisions must allow parties to agree to bargain and agree to any matter that they choose. In particular, there should be no limit on bargaining about arrangements that enhance job or income security, workforce planning and use of alternative labour, consultation rights, access to the workplace and the rights of workplace representatives.
 11. The laws must provide a right to arbitration as the final step in procedures dealing with disputes arising under the NES, awards and collective agreements, including disputes about flexible work for carers. Arbitration should be conducted in a transparent, timely and cost effective manner.
 12. The means by which a union obtains democratic support for the taking of protected action should be determined by the union, and employers should not be able to object. The public interest should be satisfied by FWA supervision.
 13. The right of entry provisions of the Act must not restrict employees' access to advice, information and union representation at work. Employers should be obliged to facilitate entry by union officials to allow this to occur.
 14. All employees, including employees to whom neither an award nor agreement applies, should be entitled to be consulted about decisions that affect them at work, and have access to a disputes procedure to settle grievances.

Working with the new laws

15. The priority for unions over the coming three years is to grow unions, protect jobs, and advance workers' interests. The new Act presents a unique opportunity for unions to ensure the interpretation of the laws-in workplaces and by tribunals and courts - gives effect to the legislated opportunities to improving working arrangements, organise workplaces and bargain collectively.
16. Consistent with Congress policies on the future of work the ACTU and unions will prosecute applications to set and adjust minimum wages and review modern awards against the new modern award and minimum wages criteria to achieve longstanding ambitions to improve the safety net.
17. The collective organisation of workers is the best means to ensure that rights and standards are observed in the workplace. Congress also confirms the important role of union enforcement of the laws. Union right of entry and the ability of unions to initiate legal proceedings in their own name is integral to effective compliance.
18. Unions will be encouraged to ensure that they actively enforce workplace instruments, and the general protections. This will include:
 - a) Prosecution of instances of victimisation of delegates in their organising role;
 - b) Prosecution of employers for deliberately misleading employees about their rights; and
 - c) Prosecutions for sham contracting.
19. Unions will also be encouraged to test the new bargaining rules to provide the most supportive environment for successful agreement-making. This might include selecting appropriate test cases to:
 - a) Determine the reach of the obligation to refrain from unfair or capricious behaviour designed to undermine freedom of association and collective bargaining;
 - b) Establish the dominant criteria for scope orders;
 - c) Set the precedent for ascertaining the view of the majority of employees in a majority support order;
 - d) Define the meaning of matters pertaining to the employer-union relationship, and of unlawful agreement content;

- e) Test the preparedness of FWA to make innovative orders that support positive rights for unions in bargaining;
- f) Explore the approval requirements for enterprise agreements; and
- g) Test the low paid bargaining provisions of the Act.

Ongoing reform

20. Congress notes the provisions of the Act which do not comply with the ACTU's expectations for fair industrial laws. Congress notes that many of these provisions also fail to meet the International Labour Organisations standards. Congress calls upon the Labor government in its next term of office to amend the laws by:

- a) Removing restrictions on the scope of agreements, particularly those that render agreed subject matter unlawful;
- b) Repealing provisions that give primacy to enterprise level collective agreements and restrict the level at which bargaining can occur, and removing legal and other obstacles to coordinated bargaining at the industry level;
- c) Removal of restrictions on and penalties for taking industrial action, including retention of the prohibition of industrial action in support of pattern bargaining and the requirement that employers deduct strike pay even in circumstances where the employees are at work, and a restoration of discretion for FWA when dealing with applications for industrial action orders;
- d) Repealing the ability for FWA to suspend industrial action that is harming a third party, and repeal the Minister's powers to end protected action;
- e) Removing penalties for industrial action taken during the life of an agreement, regardless of the circumstances. This provision is particularly onerous, as the law fails to guarantee effective alternative dispute resolution while agreements are in place to deal with unfair actions by the employer or significant changes in circumstances during the agreement;
- f) Conferring additional powers on FWA to promote collective bargaining in workplaces that have not been had the benefit of collective agreements;
- g) The exemption of high income earners who have traditionally been entitled to award protection from the application of awards should be removed, particularly as the mechanism

envisaged in the Act not only suspends the application of award conditions of employment, but also suspends the employees' award rights to be consulted about significant change and to access the award disputes procedures;

h) All provisions of the Trade Practices Act applicable to unions and employees should be repealed.

21. Unions and the ACTU will monitor the negative impact of these provisions in workplaces, publicly highlight instances where these provisions disadvantage workers, and develop an ongoing campaign to see these provisions of the law repealed and replaced with fair laws that meet our international obligations in respect of freedom of association and collective bargaining.