



**Submission to the Senate Education, Employment and Workplace
Relations Committee – Inquiry into the *Fair Work Bill 2008***

**Carolyn Sutherland, Anthony Forsyth and Chris Arup
Workplace and Corporate Law Research Group
Department of Business Law and Taxation, Monash University**

Executive Summary

Fair Work Information Statement in the National Employment Standards ('NES')

1. The submission proposes that Part 2-2 of Division 12 of the Fair Work Bill be amended to include a requirement for employers to nominate in the Fair Work Information Statement the industrial instruments which apply to employees in the workplace. This requirement would encourage employers to turn their minds to this essential issue at the right time in the employment relationship, and would make employees aware of the source of their entitlements, reducing the need for employees to seek third party assistance in order to understand the key conditions of their employment.
2. The proposed requirement would not be unduly onerous for employers. The NES already require the employer to make a statement. The specific information is to the employer's benefit too. The requirement would be far less onerous than the information requirements which apply in some overseas jurisdictions.
3. We propose that no penalties should apply where an employer makes a mistake in the provision of this information, nor should the incorrect statement be legally binding on the employer.

Small Claims Procedure

4. Once an employee has become aware of his or her minimum entitlements under applicable industrial instruments, it is vital that the employee is able to enforce those rights. We welcome the increase in the monetary limit for a small claim from \$10,000 to \$20,000.
5. To ensure that the small claims procedure is accessible to employees we propose: first, that clause 548(5) of the Fair Work Bill be amended to allow an employee to be represented by a lawyer as a matter of course; and, secondly, that funds be made available to engage duty lawyers on site at the relevant courts to assist employees to navigate through the small claims procedure.

Fair Work Australia and Dispute Prevention

6. We commend the Government's moves to establish Fair Work Australia (FWA) as a body that is less adversarial, more accessible and responsive to the needs of its users.
7. In our view, the establishment of FWA presents a significant opportunity to move away from the traditional Australian model of industrial tribunals that are mainly focused on resolving disputes brought before them by the parties. We suggest that the Government could make FWA a much more dynamic, innovative and responsive agency by giving it a more expansive dispute prevention capability.
8. We recommend that this enhanced dispute prevention role for FWA be modelled on the Advisory Services Division of Ireland's Labour Relations Commission (LRC), and/or the information, advisory and training services provided by the Advisory, Conciliation and Arbitration Service (ACAS) in the UK. Further, we consider that this type of role would be more appropriately located within FWA, rather than within the Fair Work Ombudsman. The promotion of harmonious and cooperative workplace relations sits uncomfortably with a body such as the Fair Work Ombudsman that is likely to be predominantly compliance-focused.
9. Much of the dispute prevention work of ACAS and the LRC involves establishing and developing relationships with industrial relations parties, in order to address the root causes of workplace problems and avoid the need for later recourse to dispute resolution or enforcement agencies. It would be preferable, in our view, to establish a separate division of FWA to provide specialist dispute prevention services of this nature.

Fair Work Information Statement in the National Employment Standards

We propose that Division 12 of Part 2-2 of the Fair Work Bill be amended to include a requirement for employers to provide specific information about employee entitlements as part of the Fair Work Information Statement. This proposal addresses the problems which employees currently experience in determining their rights and entitlements within a highly complex system of workplace relations laws.¹ Employers will also benefit from giving attention to this issue at the commencement of the employment relationship, but the proposal also takes into account the needs of employers by proposing a soft compliance regime in relation to the accuracy of the statement. Accordingly, the proposal suits the Government's key objective in introducing the NES, which is 'to address public concern about the adequacy of the safety net under the current workplace relations system by providing a safety net which is fair for employers and employees and supports productive workplaces.'²

Proposed Changes

Complexity and compliance under the current workplace relations system

There is no doubt that the Fair Work Bill is simpler to understand and apply than its predecessors and that the new national workplace relations system as a whole will be less complex than the system established by Work Choices. However, the new system retains a wide range of industrial instruments with potential application to an individual employee's employment. It will remain the case that a high proportion of employees will not be able to identify and apply these instruments without third party assistance. For example, to establish whether they are being paid their correct entitlements, an employee will need to know whether their employer is covered by the national workplace relations system and, if so, whether the employee is covered by an award, or a workplace agreement and/or a common law contract. Once the employee has identified the applicable instruments, he or she will also need to understand how these instruments interact with each other and with the NES.

Various reports and surveys have confirmed that many employees under Work Choices have been confused about their rights and entitlements.³ Despite greater access to information about workplace relations laws through public awareness campaigns and the assistance provided by various agencies, employees have found it difficult to identify information which is sufficiently specific to enable them to understand and pursue their entitlements.⁴

¹ See A Stewart, "A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation" (2005) 31 *Australian Bulletin of Labour* 210.

² Explanatory Memorandum to the *Fair Work Bill 2008*, p x.

³ See eg Queensland Industrial Relations Commission, *Final Report: Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers: Volume 2* (29 January 2007) at 118.

⁴ See eg S Bertone, S Zuhair, H Babacan, S Marshall and C Fenwick, *Work Choices 'The Victorian Experience': A statewide study conducted by Job Watch in conjunction with Victoria University and the University of Melbourne*, at 28; *Child Employment Principles Case 2007* [2007] NSWIRComm 110 at 73.

This issue would be addressed by a requirement for employers to provide a more detailed information statement. Such a requirement would not impose a major burden on employers. The NES is already requiring employers to furnish a statement. Our recommendation only goes to the usefulness of the content of the statement. After all, such knowledge (of the applicable industrial instrument) is something the employer should have in any case when entering into an employment relationship. That knowledge (and the form of the Statement that is developed) will be applicable to whole categories of employees. The correct identification of the instrument will help employers to avoid costly disputes with employees at a later stage. It would also reduce the workload of the Office of the Fair Work Ombudsman which is responsible for compliance with the safety net.

Proposal for specific information to be provided

While it is the practice of some employers to provide new employees with a letter of offer which includes information about applicable industrial instrument(s), this is not a mandatory requirement.

Under Division 12 of Part 2-2 of the Fair Work Bill, the Fair Work Information Statement will be a one-size-fits-all document which will provide very general information about the workplace relations system to new employees. Given that employers must go to the effort of providing this statement anyway, it would not be unduly onerous to require employers to insert into the statement the name(s) of the industrial instrument(s) which apply to the employee, and to provide information to assist employees to access the instruments. This obligation would be far less extensive than the information requirements which apply in the European Union, where employers must provide very detailed information about the place of work, title and description of the work, notice, leave, pay, frequency of payment, hours of work, and details of any applicable collective agreement.⁵

The provision of specific information would substantially improve an employee's understanding of their entitlements and would be of much greater practical use to employees than simply being provided with general information about the workplace relations system.

Our proposal is that the Fair Work Information Statement should include a 'Specific Information Section' in which the employer must:

1. identify any industrial instrument(s) which apply to the employee (ie, agreements and/or awards); and
2. identify the location of those instruments (by attaching a copy or providing a website or onsite location).

The standard form part of the statement should also state that the employee has the benefit of any entitlements in the NES which are more favourable than the industrial instruments listed in the specific information statement.

⁵ Directive 91/533/EEC of October 14th 1991, article 2. See also Employment Rights Act 1996 (UK), s 1 and Employment Act 2002 (UK), ss 37-38.

Provision of the information statement to those not covered by an award or agreement

The requirement to provide the Specific Information Section would be straightforward in its application to employees who are not covered by an award or a statutory agreement. A standard form could be provided for these employees which states that no award or agreement applies and therefore only the NES have application.⁶

Option of including specific information in letter of offer

Another option, which should also be permitted by the proposed provisions, would be for employers if they so choose to provide the specific information (about the application of agreements and awards to the employee) within the terms of the letter of offer or contract of employment, while still providing a separate standard form information statement about general rights.⁷

Provision of statement to those who change their employment status

Over the course of employment, through transfer, promotion, and other events, some employees obtain a new classification. In some but not all of these situations, a new contract of employment is formed. We propose that the Statement be required if the applicable industrial instrument is changing (including a specific statement which identifies the new industrial instrument). Again it is in the interests of both the employer and employee to know that this is happening.

Compliance with the Fair Work Information Statement standard

In keeping with the aim of the Government to ensure the NES are 'flexible for business', we are not proposing that employers bear a heavy compliance burden in relation to the provision of accurate information in the Specific Information Section. The purpose of the requirement to provide specific information is to increase employer and employee awareness of applicable entitlements - by prompting employers to investigate and document the instruments which apply to their employees - not to trap the employer into providing enhanced benefits. A penalty for non-compliance with the Fair Work Information Statement standard should only be imposed where an employer fails to provide the statement at all or fails to complete the Specific Information Section, or where the employer knowingly or recklessly provides inaccurate information in the statement.

More importantly, the statement should indicate to employees that the employer will not be bound by any mistaken statement in the Specific Information Section, and that the contents of the Fair Work Information Statement do not form part of the contract of employment. The legislation would need to give the employer immunity from action, under contract and related laws such as the Trade Practices Act and Fair Trading Acts, arising from the provision of the Statement. This would ensure that the Fair Work Information Statement does not provide an additional layer of entitlements. For example, if the employer identified that a particular award applied to the employee, but upon later investigation it was discovered that the award did not bind the employer with respect to that employee, the employer would not be held to its

⁶ It would not be necessary for the employer to identify other sources of law such as applicable State legislation or common law principles.

⁷ Again, this is permitted under the Employment Act 2002 (UK), s 37.

incorrect statement. However, if the employer *chose* to include the specific information as a term of the contract of employment itself, then the contractual term would be binding. But this would be matter of general contract law not compliance with the NES.

We are not proposing that the employer should be required to lodge a copy of the notice with Fair Work Australia.

Small Claims Procedure

Once an employee has become aware of his or her minimum entitlements under applicable industrial instruments, it is vital that the employee is able to enforce those rights. We welcome the increase in the monetary limit for a small claim from \$10,000 to \$20,000. We refer the Committee to the ‘user-friendly’ forms and guides which have been adopted by the Victorian Magistrates Court to assist unrepresented litigants using the small claims procedure.⁸

Despite the adoption of a ‘user-friendly’ procedure in the Victorian Magistrates Court, the Court’s 2006-2007 annual report reveals that for 2006-2007, only 201 complaints were issued for the whole of the Industrial Division’s jurisdiction (with 133 being finalised). The majority of these claims were in excess of \$10,000 (and therefore not making use of the small claims procedure).⁹ In our view, employees are more likely to initiate and persist with a small claim if they are offered assistance throughout the process. Our research shows that vulnerable workers need legal advice and assistance with the complexities of the law and procedure. Employers, especially larger firms, are likely to have the benefit of officers with experience appearing for them.

We note that the Victorian Magistrates Court’s simplified forms inevitably require employees to make legal judgements in order to make a claim. For an underpayment claim in particular, these judgements may include the correct identification of the relevant employer, applicable industrial instrument(s) and applicable employee classification. A small claims procedure can only be effective if the employee has access to legal advice and assistance at each stage of the process, from the point of initiating a claim, through to participation in any alternative dispute resolution processes and, if necessary, a court hearing. Employees should not be obliged to give up on legal rights or compromise them because they are daunted by the law or procedure. We appreciate that the Workplace Ombudsman can assist in the early stages of these claims. However, claims up to \$20,000 represent vital sums of money for many workers and it is important that employers do not come to think there is a category of entitlements they do not effectively have to respect.

We propose: first, that clause 548(5) of the Fair Work Bill be amended to allow an employee to be represented by a lawyer as a matter of course; and, secondly, that funds be made available to engage duty lawyers on site at magistrates courts and the Fair Work Division of the Federal Magistrates Court to assist employees to navigate through the small claims procedure.

⁸ See Magistrates Court of Victoria, Small Claims Information Sheet, <[http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Industrial_Division_Forms/\\$file/PD1-2007_Infosheet_Form_4a.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Industrial_Division_Forms/$file/PD1-2007_Infosheet_Form_4a.pdf)>.

⁹ Magistrates Court of Victoria, Annual Report, 2006-2007, 33, at <<http://www.magistratescourt.vic.gov.au>>.

Fair Work Australia and Dispute Prevention

We commend the Government's moves to establish Fair Work Australia (FWA) as a body that is less adversarial, more accessible and responsive to the needs of its users.¹⁰ We also welcome the Government's engagement¹¹ with the potential role of public dispute resolution agencies as not only 'dispute settlers' (in the traditional sense), but also in terms of dispute *prevention*. This is a role that has become an increasingly significant part of the work carried out by industrial tribunals in several other industrialised countries in recent years – notably the UK, Ireland, Canada and the USA.

The dispute prevention activities and programs of public agencies in those four countries are examined in the attached paper, 'Third Party Intervention Reconsidered: New Roles for Australian Industrial Tribunals'; the paper also evaluates the effectiveness of these dispute prevention functions (eg the level of 'take-up' of dispute prevention services by parties, firm-level and broader economic benefits of these services, etc).¹²

The Government appears to be particularly interested in the Advisory, Conciliation and Arbitration Service (ACAS) in the UK. In fact ACAS, and the Irish Labour Relations Commission (LRC), are the two overseas bodies that the authors of the attached paper recommend as particularly useful models for structuring dispute prevention initiatives by industrial tribunals in Australia.¹³

The Fair Work Bill provides that 'FWA must perform its functions and exercise its powers in a manner that ... promotes harmonious and cooperative workplace relations' (clause 577(d)). However, FWA is not given any *specific* function in that respect (see the functions of FWA set out in clause 576). Rather, it is the Fair Work Ombudsman that is given the function of promoting harmonious and cooperative workplace relations (clause 682(a)(i)), along with promoting compliance with the legislation and fair work instruments (and the other functions of the Fair Work Ombudsman referred to in clause 682). The Fair Work Ombudsman is to perform these promotional functions 'by providing education, assistance and advice to employees, employers and organisations' (clause 682(a)).

The Government points to the example of ACAS in the UK as the basis for asserting 'that the changes to be implemented with the establishment of FWA are likely to result in economic benefits for Australia.'¹⁴ However, the Government also states that: 'While *FWA will not have the same expansive dispute prevention capacity as ACAS*, it will provide information and advice to employers and employees and it will have a greater capacity to mediate disputes than the AIRC.'¹⁵

¹⁰ Explanatory Memorandum to the *Fair Work Bill 2008*, pp lxvi-lxvii.

¹¹ See *ibid*, pp lxxi-lxxv.

¹² See Anthony Forsyth and Holly Smart, 'Third Party Intervention Reconsidered: New Roles for Australian Industrial Tribunals', Paper for the Australian Labour Law Association, Fourth Biennial Conference, 14-15 November 2008, pp 2-20.

¹³ See Forsyth and Smart (2008), p 27.

¹⁴ Explanatory Memorandum to the *Fair Work Bill 2008*, p lxxiii; there, the Government refers to recent research by the National Institute of Economic and Social Research providing evidence of the significant benefits for the UK economy arising from ACAS' activities, including its dispute prevention functions; this research is also discussed in Forsyth and Smart (2007), p 20.

¹⁵ Explanatory Memorandum to the *Fair Work Bill 2008*, p lxxiii (emphasis added).

In our view, the establishment of FWA presents a significant opportunity to move away from the traditional Australian model of industrial tribunals that are mainly focused on resolving disputes brought before them by the parties. That dispute resolution function will be a big part of the work of FWA, as it should be (and we commend the provisions of the Fair Work Bill that restore the powers necessary for effective dispute resolution that were taken away from the AIRC under Work Choices:¹⁶ see clauses 589-595). But we suggest that the Government could make FWA a much more dynamic, innovative and responsive agency by giving it a more expansive dispute prevention capability.

We recommend that this enhanced dispute prevention role for FWA be modelled on the Advisory Services Division of Ireland's LRC, and/or the information, advisory and training services provided by ACAS. Further, we consider that this type of role would be more appropriately located within FWA, rather than within the Fair Work Ombudsman. The promotion of harmonious and cooperative workplace relations sits uncomfortably with a body such as the Fair Work Ombudsman that is likely to be predominantly compliance-focused. Much of the dispute prevention work of ACAS and the LRC involves establishing and developing relationships with industrial relations parties, in order to address the root causes of workplace problems and avoid the need for later recourse to dispute resolution or enforcement agencies. It would be preferable, in our view, to establish a separate division of FWA to provide specialist dispute prevention services of this nature.

This kind of approach is timely for several reasons. First, the traditional dispute settlement role of Federal and State industrial tribunals has significantly declined under Work Choices.¹⁷ These bodies need to be revitalised, in the way that their overseas counterparts have been, to ensure they have a part to play in the transformed 'world of work'.¹⁸ Secondly, some form of focused delivery mechanism is needed to assist in achieving the Government's often-stated objectives for the new system of workplace regulation: fairness for employees, greater workplace cooperation, national competitiveness, and the productivity needs of businesses. FWA and the Fair Work Ombudsman, as presently conceived, may contribute to achieving these objectives. However, the international evidence suggests that giving FWA a stronger dispute prevention remit would produce significant benefits for both workplaces and the national economy.

Finally, we urge the Government to examine other regulatory initiatives that have been adopted internationally to promote harmonious and cooperative workplace practices. In particular, we recommend that the Government consider recent developments in New Zealand (eg the Partnership Resource Centre, Workplace Productivity Project, and Partnerships for Quality in the public sector)¹⁹ and Ireland (eg the National Centre for Partnership and Performance, National Workplace Strategy and Workplace Innovation Fund).²⁰

¹⁶ See Anthony Forsyth, 'Dispute Resolution under Work Choices: The First Year' (2007) 18:1 *Labour and Industry* 21.

¹⁷ See Forsyth and Smart (2008), pp 20-24.

¹⁸ See further William Brown, 'Third Party Intervention Reconsidered: An International Perspective' (2004) 46 *Journal of Industrial Relations* 448, discussed in Forsyth and Smart (2008), pp 1, 27-28.

¹⁹ See eg Partnership Resource Centre, *Illustrated Report & Stocktake on Workplace Partnership in New Zealand*, Department of Labour, Wellington, 2006, p 94.

²⁰ See eg Tim Hastings, Brian Sheehan and Pdraig Yeates, *Saving the Future: How Social Partnership Shaped Ireland's Economic Success*, Blackhall Publishing, Dublin, 2007.

About the Workplace and Corporate Law Research Group (WCLRG)

The Workplace and Corporate Law Research Group (WCLRG) is a research concentration within the Department of Business Law & Taxation, Faculty of Business & Economics, at Monash University. It has been in operation since March 2008, having previously operated as the Corporate Law and Accountability Research Group (CLARG) since November 2005.

WCLRG provides a focus for collaborative research and external engagement for academics working in the fields of workplace relations and employment law, labour market regulation, corporate governance, corporate social responsibility, and the intersections between labour law and corporate law.

Several members of WCLRG have recently carried out contract research projects for the Victorian Government, examining the impact of 'Work Choices' on matters including bargaining arrangements, and access to unfair dismissal claims (the 'operational reasons' exclusion).

WCLRG members have also been at the forefront of public policy debate over the shape of workplace regulation post-Work Choices, including implementation of the Rudd Government's 'Forward with Fairness' policy.

Further information about WCLRG may be obtained by visiting our website at: <http://www.buseco.monash.edu.au/blt/clarg/>; or by contacting the Director of WCLRG, Associate Professor Anthony Forsyth, at: Anthony.Forsyth@buseco.monash.edu.au.