Submission on the Fair Work Act

UnionsWA is the peak union body of Western Australia, representing over 30 affiliated unions and around 150,000 union members. We thank the Review Panel for the opportunity to outline our views about the impacts of the Fair Work Act in Western Australia.

Positive impact of the Fair Work Act

UnionsWA supports the ACTU’s view that the Fair Work Act has restored the rights of working people and their families that were taken away by the Howard government’s WorkChoices legislation. UnionsWA notes in particular that

- the abolition of Australian Workplace Agreements (AWAs),
- the placement of collective bargaining at the core of the Australian industrial relations system,
- the restoration of unfair dismissal rights, and
- the restoration of representation rights under ‘general protections’

are all significant improvements brought about by the Fair Work Act.

UnionsWA notes that many business groups are complaining that these improvements ‘getting in the way’ of employment relationships and are ‘obstructionist’.\(^1\) Evidence from UnionsWA affiliates however, suggest that many of these improvements have not gone far enough, and that if anything employers are the most ‘obstructionist’ side of industrial relations. UnionsWA argues that any reforms to the Fair Work Act need to further improve, not restrict, the rights of workers.

Concerns of UnionsWA affiliates about the operation the Fair Work Act

UnionsWA affiliates have asked us to bring to the Review’s attention a number of significant concerns they have about the operation of the Fair Work Act. This submission will refer in particular to

- **Right of Entry** – employers can still frustrate in many and varied ways
- **Taking industrial action** – the limitations on workers versus the relative freedom of employers
- **Unfair Dismissal** – The current time limit of 14 days should be extended to 21 days as per the previous legislation.

WA’s experience of being an ‘early adopter’ of WorkChoices

In WA we were unfortunate enough to experience the worst aspects of WorkChoices in advance of the rest of Australia, through the Court state government’s three ‘Waves’ of industrial legislation between 1993 and 2003. Instead of AWAs, in WA we had Workplace Agreements (WPAs) as our individualised employment arrangements. While there was much rhetoric about the benefits of ‘choice’ for employers and employees to take up WPAs, subsequent research found that:

- WPAs were not equally distributed across industries, but were concentrated in casualised work and semi-skilled occupations in the supermarket and grocery stores sector, the accommodation, cafes and restaurants sector, and the business services sector - not areas where employees had a great deal of bargaining power.

\(^1\) [http://www.afr.com/p/national/crucial_to_lift_nation_productivity_Uz3WvLFbTt57h7sq5g23lI](http://www.afr.com/p/national/crucial_to_lift_nation_productivity_Uz3WvLFbTt57h7sq5g23lI)
25 per cent of WPAs reduced wages below the award.

More than half of WPAs reduced or eliminated significant conditions such as overtime premia, penalty rates and annual leave loading, with a number of employees clearly losing two or more significant conditions.

Women workers were 50% more likely than men to have their wages reduced below relevant award rates when they signed a WPA.

The last point is particularly pertinent given that WA continues to have Australia’s largest gender gap in average weekly earnings. The latest figures for August 2011 has female average weekly earnings at 28.2 per cent less than male average weekly earnings, compared to the national figure of 17.9 per cent. We are deeply concerned that any ‘reforms’ to that Fair Work Act that reintroduce individual employment arrangements will make an already bad situation for gender pay much worse.

WA’s experience of Industrial Relations law being ‘reviewed’

WA has also been unfortunate enough to experience in advance of the rest of Australia a government that has planned to reintroduce the worst aspects of WorkChoices under the banner of a ‘Review’. After the Barnett state government came to power in 2008, then state Treasurer Troy Buswell commissioned lawyer Steven Amendola, one of the architects of WorkChoices to review the WA state industrial relations system. After spending $850,000 Mr Amendola made 193 recommendations that included the reintroduction of individual workplace agreements, and the gutting of unfair dismissal laws.

Between 2008 and 2011 WA unions campaigned vigorously against the Amendola recommendations, which if implemented would have brought the worst of WorkChoices back under a different name. Eventually even the Premier Mr Barnett admitted that the recommendations had ‘a WorkChoices thrust’ and decided not to go ahead with any of the Review’s recommendations.

As pleasing as this outcome is for WA workers and their families, it remains the case that while the WA state government wants to retain a state industrial relations system for the state public sector and unincorporated private sector, it also wants to ‘harmonise’ WA industrial relations law with national industrial relations law. This is code for picking and choosing the worst aspects of national legislation, without the offsetting pro-worker parts of the Fair Work system.

We have already seen evidence of this approach in the Barnett government’s approach to national Occupational Health and Safety law harmonisation. It has refused to sign up to those parts of the national system that would:

- Allow trained Health and Safety Representatives to direct work to stop when they see a serious and imminent safety problem;
- Improves protection workers from discrimination for raising health and safety issues

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2 Janis Baily and Bob Horstman ‘Life is Full of Choices’: Industrial Relations ‘Reform’ in Western Australia since 1993

3 6302.0 - Average Weekly Earnings, Australia, Aug 2011, Australian Bureau of Statistics,

4 Review by Steven Amendola

• Enable the family or union of someone killed at work to initiate a prosecution against the employer if the state WorkSafe authority declines to do so
• Enable workers’ union representatives to have timely access to a workplace to provide important advice when it is needed

Given this track record, UnionsWA is concerned that if the anti-worker reforms to the Fair Work system being demanded by many business groups are adopted, the Barnett government will follow by incorporating them into the WA state system. For that reason we are concerned not simply to defend the Fair Work Act as it stands, but also recommend improvements that will make the Act fairer for working people.

Workers in the Federal and State Industrial Relations systems in WA

As previously mentioned, over the next few years at least WA will have a unique industrial relations system in that it will retain a state system for unincorporated private sector. Exactly how many workers are in the various systems has been a matter of debate in WA industrial relations circles. To its credit the Amendola Review did attempt to grapple with this issue and produced the following table:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Proportion of employees (%)</th>
<th>Number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Federal jurisdiction</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal award or agreement (a)</td>
<td>32.4</td>
<td>378,600</td>
</tr>
<tr>
<td>State award or agreement (b)</td>
<td>0.8</td>
<td>9,400</td>
</tr>
<tr>
<td>Unregistered arrangement (c)</td>
<td>27.8</td>
<td>324,800</td>
</tr>
<tr>
<td>Working proprietor or incorporated business</td>
<td>4.7</td>
<td>54,900</td>
</tr>
<tr>
<td>Total (Federal jurisdiction)</td>
<td>65.7</td>
<td>767,700</td>
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<tr>
<td><strong>State jurisdiction</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State award or agreement</td>
<td>14.0&lt;sup&gt;1&lt;/sup&gt;</td>
<td>163,800</td>
</tr>
<tr>
<td>Unregistered arrangement (c)</td>
<td>6.2</td>
<td>72,400</td>
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<tr>
<td>Total (State jurisdiction)</td>
<td>20.3</td>
<td>237,200</td>
</tr>
<tr>
<td><strong>Unable to be determined</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>1,168,500</td>
</tr>
</tbody>
</table>

<sup>1</sup> Estimate has relative standard error of between 25 and 50 per cent and should be used with caution.

Based on this data, approximately 65.7 per cent of WA employees are covered by the Federal Industrial Relations system.<sup>6</sup>

Bargaining Outcomes in the Federal System in WA

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<sup>6</sup> Amendola p.61.
According to the DEEWR ‘Trends in Federal Enterprise Bargaining’ Report for June 2011 there are 3,049 current federal wage agreements in WA covering around 161,100 employees, and delivering average annualised age increases (AAWI) of around 4.6 per cent. By Industry the largest number of employees covered by federal wage agreements are in Health and Community Services (around 29,100); and the smallest number are in Rental, Hiring and Real Estate Services (around 400). The industry with the highest AAWI is Accommodation and Food Services (4.3 per cent); and the lowest is Education (2.1 per cent). While WA pay increases are better on a general level than the rest of Australia (the national all sector increase was 4.1 per cent in June 2011), individual industries in WA do not necessarily do as well as their national counterparts (e.g. Mining in WA’s AAWI was 3.9 per cent compared to 4.2 per cent nationally). When compared to the most recent Total Earnings Growth for Full-time Employees in WA (11 per cent between August 2010 and August 2011) it does not appear that Federal Enterprise Bargaining in WA is making an excessive contribution to any ‘wages breakout’ in this state. This is particularly striking when you consider that WA is the booming economy of the nation.

**Days lost due to industrial disputes in WA**

As the chart below shows – there is simply no industrial dispute ‘problem’ in WA that comes anywhere close to previous levels over the last twenty years. According to the ABS, during the era of the Court government’s ‘waves’ of industrial relations reform working days lost to industrial disputes got as high as 31,900 in September 1995, and 28,800 in September 1998. While the WorkChoices period was relatively quiet industrially in WA, the increase in days lost since 2008 has been very small compared to previous eras. The most recent figure for September 2011 is 1,900.

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7 Trends in Federal Enterprise Bargaining June 2011

8 Average Weekly Earnings

9 6321.0.55.001 - Industrial Disputes, Australia, Sep 2011
Economic problems caused by the Fair Work Act: Myth not Reality

There is very little evidence that the Fair Work Act is causing any problems for the WA economy. For those workers who are in the Federal industrial relations system are not by and large receiving pay increases that match or exceed overall earnings growth in WA. Days lost to industrial disputes are at historically low levels despite a handful of high profile disputes. The ACTU has addressed the spurious nature of the productivity issues raised by business groups regarding the Fair Work Act in its Working Australia Paper Working by Numbers.\(^\text{10}\) UnionsWA will only add that so called business leader should put their own houses in order before trying to raise productivity off the backs of employees. In the words of business columnist Leon Gettler:

\begin{quote}
Australia’s poor productivity performance is an indictment of its management culture. Australia undoubtedly has some good managers. But the evidence suggests there are also many complacent careerists. Their only skill has been to work the system and rise up through the ranks. \\
The 2011 Telstra Productivity Indicator identifies the gap between those who say productivity is a top business priority, and those who actually do something about it, as the ‘productivity improvement deficit’. It is a depressing 52 per cent.\(^\text{11}\)
\end{quote}

Issues of Concern for UnionsWA affiliates

Right of Entry


Right of Entry is a worker’s right to representation of their legitimate industrial interests. However too many employers are exploiting the restrictions

The Rail Tram and Bus Union (RTBU) WA branch notes that employers have taken advantage of the complex interactions between the WA Industrial Relations Act and the Fair Work Act to prevent Unions registered in the Federal system from entering a Federal system workplace.

For example: Pacific National and John Holland are two rail industry employers that are covered by the Commonwealth OSH legislation by virtue of being Comcare self-insurers. Therefore any Federal union with relevant coverage has a right of entry. However constitutional corporations not in Comcare still fall under the WA Occupational Safety and Health Act 1984. To exercise right of entry for suspected breaches of a WA OSH law under the Fair Work Act requires that the Federal union satisfies ss49G and 49I of the WA Industrial Relations Act 1979. An essential prerequisite is that at least one employee is either a member of the State Union, or eligible to join it. Therefore where a (Federal) union has no State counterpart union members are restricted from seeing their representatives

RTBU submits that the test should be whether the employee of the constitutional corporation is eligible to be a member of the Federal union, by overriding any other limitation imposed by the State Act.

The WA branch of the Electrical Trades Union (ETU) submits that there needs to be a provision in the Act about what constitutes a reasonable meeting place e.g. four walls, a roof, access to water. Access should preferably be at the crib rooms or lunch facility or a like room. Please see the appendix for examples of the conditions that employers believe are ‘reasonable’ places for workers to meet their union representatives.

The Australian Meat Industry Employees Union (AMIEU) WA branch reports on its experience of organising in Abattoirs in the South West of Western Australia. AMIEU organisers are regularly encountering employers who insist that the union not go into meal rooms but instead use training rooms for discussions with members.

AMIEU argues that these are blatant attempts to discourage employees from speaking to their Union. Employers hope that, by requiring employees to walk past or through the main office areas to go to training or meeting rooms, they will feel intimidated because management will know where they are going.

The Breweries and Bottleyards Employees Industrial Union of Workers WA (BBEIUWA) reports that smaller ‘boutique’ brewers are also insisting employees can only meet union officials in small, hard to access rooms. This insures that workers in expanding sections of the industry find it hard to have adequate representation.

**Taking protected industrial action**

The current arrangements for protected industrial action, and the intervention of FWA for compulsory arbitration, are tilted in favour of employers, who have the ability to take action more quickly, and obtain arbitration on their own terms.

ETU WA submits that, in light of the Qantas decision, there should be a notice period that an employer is required to provide in order to take protected industrial action (i.e. lockout). Even 24 hours notice would be an improvement, even if it is not the 3 days required by employees. ETU have had instances where employees have been advised to leave immediately and that they have been locked out.
RTBU WA notes that section 414 of the Act requires that ‘before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee’. The period of notice must be at least 3 working days. Weekends and public holidays are not included.

RTBU WA submits that in the case of businesses that typically operate one or more work shifts over the full seven days of the week, three calendar days’ notice should suffice.

The Union of Christmas Island Workers (UCIW) reports that in a recent industrial dispute at Christmas Island Phosphates, operators of the mine, the Union reports that the relative ease with which the employer was able to call in Compulsory Arbitration on the basis of ‘economic harm’, compared to the more complex process the union would need to undertake to gain the same intervention. Compulsory Arbitration will be inherently biased towards employers if, in words of acting General Secretary Gordon Thomson ‘the company was refusing to move and was threatening to have a shutdown for several months if the strike continued’. Since order affects only the workers who were taking industrial action – this amounts to a clear advantage to employers enabling them to shut down disputes on their own terms.12

**Unfair Dismissal**

UnionsWA affiliates were of one voice when it comes to a clear need to reform unfair dismissal provisions in the Fair Work Act. 14 days is too short a timeframe for many workers and needs to be increased.

ETU WA submits that the current time limit of 14 days should be extended to 21 days as per the previous legislation. We have had some employees fall outside of the 14 days but prior to the 21 days who have no exceptional circumstance reason for the lateness. It would be preferable if a telephone conference occurred first, followed by a conference before a member of Fair Work Australia, where the matter cannot be resolved, prior to the matter proceeding to hearing.

General protections matters, especially those relating to termination, should ideally be dealt with by Fair Work Australia rather than the Federal Court, as it is currently prohibitive to run such matters.

Shop Distributive and Allied Employees Association of WA (SDA WA) also argues for an increase to 21 days. It points out that this may actually lead to a reduction in unfair dismissal claims, as employees may not feel as ‘rushed’ to put in a claim before it is too late.

RTBU submits that while an employer may consider itself entitled to rely on the ‘policy’ as grounds for unfair dismissal, the unfair dismissal tests within the Act should include an explicit requirement that there be a connection provable on balance of probabilities between the requirements of the policy and its stated intention, and that penalties should be proportionate to the strength of that connection.

**In Conclusion**

UnionsWA believes that, while the Fair Work Act has achieved notable successes in abolishing AWAs and enshrining collective bargaining at the core of Australian industrial relations, it is not, as

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[http://www.abc.net.au/rural/news/content/201112/s3384064.htm](http://www.abc.net.au/rural/news/content/201112/s3384064.htm)
business groups argue, any kind of unbalanced, unambiguously pro-worker piece of legislation. As a consequence the priority reforms that are needed for the Act are as follows:

- **Right of Entry**: workers should be able to choose the circumstances and location under which they meet with their union representatives. It is plain that many employers actively prevent workers from doing this by making meetings between workers and their unions extremely difficult.

- **Industrial Action**: there should be a level playing field between workers and employers when taking industrial action. The Qantas dispute dramatically demonstrates that the Fair Work Act allows employers much more freedom to take action than workers. This means that when Fair Work Australia Arbitration occurs it does so on the employer’s terms, not the workers.

- **Unfair dismissal**: the current 14 day time limit should be extended to 21 days. This is a more reasonable time limit for a dismissed worker to lodge a claim. Consideration should also be given to whether the Federal Court is the most appropriate tribunal to deal with dismissal and other general protection matters, and to whether employers have too much leeway to invoke ‘policy’ as grounds for dismissal.

This is a by no means exhaustive list, as UnionsWA also fully supports the broader recommendations of the ACTU.
Appendix: ETU meeting locations

Boddington meeting location 36 degree heat (February 2011).

Employer recommended meeting place at Binningup Desal plant (April 2011).
Another employer recommended meeting place (March 2011)

Lunchtime meeting at Binningup Desal plant. Workers have lunch on the floor (March 2011)