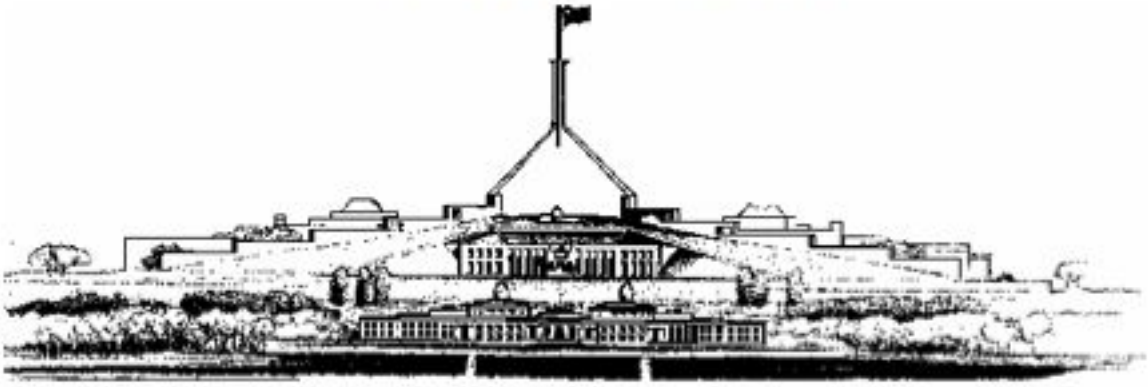
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE

FAIR WORK BILL 2008

Second Reading

SPEECH

Tuesday, 10 March 2009

BY AUTHORITY OF THE SENATE

SPEECH

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Questioner		**Responder**	
Speaker	Xenophon, Sen Nick	**Question No.**	

Senator XENOPHON (South Australia) (5.24 pm)—I indicate my support for the second reading of the Fair Work Bill 2008, but I reserve my position in relation to the third reading stage. I believe that Australians want their workplace relations system to be both fair and functional. They want to know that they will not lose their job due to unreasonable grounds or unexpected whims. They want to know that the wage they earn has parity with others doing the same job. They want to know that if their work life and their family life are out of balance it is by their choice, not by their employer's. They do not want our most vulnerable, especially our young people, to be exploited in the workforce. However, Australians also want a system that is functional. They want to know that business is not being frustrated by red tape or unnecessary industrial disputes. They want to know that their livelihoods are not being lost because of the actions of those who make a living out of workplace disputes. They want to know that if someone has the energy and initiative to start a new business they will get a return for their efforts. In a time of global economic turmoil, they do not want the economy hampered by ideology.

That was the situation that we faced with Work Choices. I believe the Howard government's policy was driven by ideology and that it went too far. I believe that it unsettled the balance of fairness and functionality. I believe that it put Australians at risk in a time of economic uncertainty. I know that the majority of the Australian public agrees with this proposition. So I welcome the move by the Rudd government to address the imbalance caused by Work Choices. Further, I acknowledge the mandate that it was given by the Australian people at the last federal election to scrap Work Choices. Work Choices is dead and I will not be mourning its loss.

But permission to knock down an unsafe house is not permission to build an equally unsafe one just painted a different colour. This was my concern when the Fair Work Bill was first introduced in the House of Representatives. At its introduction the minister promised the creation of a new workplace relations system for Australians that embodied the Australian genius for fairness and enterprise. She explained that a key purpose of this bill is to provide a comprehensive safety net of minimum National Employment Standards. She said the bill builds on top of these standards a new system of modern awards which will cover issues such as minimum wages, flexibility arrangements, leave provisions, dispute resolution and representation.

The minister also detailed other aspects of the bill, including the introduction of Fair Work Australia, a body to replace a number of other workplace relations bodies, such as the Australian Industrial Relations Commission. She also announced the creation of a Fair Work Ombudsman to replace the employment ombudsman. Aligned with these changes are also expanded powers for the Federal Court and the Federal Magistrates Court. Further measures announced by the minister include conditions for enterprise bargaining, unfair dismissal, redundancy and the transmission of business.

At 575 pages and 800 clauses, it is an extensive and complex bill, but I think it is much more clearly written and much less complex than its predecessor. Yet, despite its relative clarity, what has typified much of the debate surrounding this bill since its introduction has been not so much the scrutiny of substance but rather the echoes of ideology. This at times heated IR debate has been fuelled by major political parties, unions and business groups. I have found it amazing to observe the different parties reading the same text in the bill and coming up with such diverse and divergent interpretations of that text. As was put to my office recently, it is as though most of the commentators on this bill are reading it through differently coloured glasses. For some this may be due to real fears for the future. For others this may be due to bad experiences in the past. But for still others it is just ideological blinkers at work.

When this bill was introduced in its original form in the House of Representatives, I too felt that there was more than a hint of old style ideology about it. I have been concerned that the bill could allow uninhibited access by union representatives to work sites and to non-union-member personal records. I have been concerned that potentially the bill could allow unions to extend their powers beyond those which we saw in the Hawke-Keating workplace relations system. I have also been concerned at the possibility for an expansion of forced arbitration, which would undermine the important emphasis on flexibility and negotiation between employers and employees. I have been concerned about the transmission of business provisions that seem to provide

a disincentive to purchase a business because the new owner would be hamstrung by previous industrial instruments. Finally, I have been concerned about the impact on small business and jobs. If the costs associated with protecting workers' employment conditions are such that the boss goes out of business, who is the winner then?

I am a strong believer in the Senate as a house of review and the important role of Senate committees in that review. The committee process concerning this bill has borne out my faith in that process. The Senate Standing Committee on Education, Employment and Workplace Relations explored a number of my concerns, as well as the concerns of many others, in thorough detail. It was made clear that union right of entry was not unlimited in the evidence that was heard. Rather, unions were taking on their previous role as investigators of industrial breaches and that strict conditions guided right of entry to consider documents relating to a breach. However, there remain issues of privacy, which I will refer to shortly. It was also made clear that the powers of the unions were not being expanded beyond those prior to Work Choices, although there is some debate about that. Rather, the place of unions as a participant in discussions was being reinstated now that they are no longer parties to an award. This is part of the new emphasis on negotiation between employer and employee.

The position of government senators in the committee report is that provisions in the bill would not open the gate for widespread pattern bargaining and forced arbitration. On the basis of the government senators' report, the one area where it could be argued that there has been an expansion, namely the lower paid bargaining stream, has the protection from industrial action and can only be accessed once. Finally it was argued by the government that its wide consultation and work with advisory groups resulted in changes that had the endorsement of small-business bodies. It is fair to say that there has been a significant degree of consultation with respect to this bill. While I will still be taking up each of these points in the committee stage, I was reassured that the government was heading in a welcome direction with this bill.

The committee process also noted inconsistencies, highlighted drafting errors and pointed out potential practical problems and, in some cases, unintended consequences. As a result, a series of recommendations were made and I am pleased to say that the government has moved to respond to a number of the recommendations. That is what the Senate process is meant to be about. It is about scrutinising legislation and, where possible, improving legislation. In contrast, if the Senate is a rubber stamp, I think you get a lot of adverse consequences. In relation to the Howard government's Work Choices legislation, if it had been the case of a Senate with the balance of power held by the crossbenches then we would have got a different outcome; it would have been much more moderate and much fairer. I think it is important at this time of economic challenge that we get the balance right.

Over the last 24 hours, I have been encouraged by the discussions I have had with the government in relation to this and they have acted on a number of issues. Late yesterday, I and the other crossbenchers met with Minister Gillard to discuss the findings of the committee inquiry and the passage of this bill. Concerns were raised and the minister listened. There will be further discussions. In response, the minister has provided a detailed series of amendments that take on board a number of the significant concerns put to her by crossbench senators and detailed by the Senate committee inquiry.

It is pleasing to see in relation to the issue of greenfield sites that the government has listened to the concerns of the Australian Industry Group, and that is a good thing. I have been expressing my concerns for some time about protecting the privacy of non union members in relation to right of entry. I note also that the Office of the Privacy Commissioner raised similar concerns in their submission to the Senate inquiry. In the minister's letter I am pleased to see that she intends to address the concerns raised about privacy.

In discussions with the minister's office my office raised the possibility of including information about privacy in the Fair Work Information Statement, which all new employees are expected to receive. I am pleased that the minister has adopted this idea and also indicated that additional information will be provided about workplace flexibility and enterprise bargaining. I believe this will be of great benefit to all employees but particularly to our young people when first entering the workforce. With this in mind, I put to the minister that it might also be useful to provide information about unfair dismissal, appropriate union representation, the role of the ombudsman and appeal rights in this document. These are things that will provide a degree of clarity and certainty, and that is a good thing.

In line with my interest in family-friendly flexibility and provisions, I am pleased to see that the minister is considering the capacity, when an enterprise agreement allows it, for an employer's refusal of a request

for flexible arrangements to be resolved by Fair Work Australia. I have also expressed concerns about union demarcation over greenfield agreements. I am pleased, as I have indicated previously, that the government has moved on that, and I think that is a significant improvement.

I have expressed concern over the possibility of new transfer of business provisions being a disincentive for prospective buyers. Again I am pleased to see the provision for prospective buyers to check with Fair Work Australia prior to entering into purchase negotiations as well as the requirement for Fair Work Australia to consider the efficiency of the new business in the transfer of industrial instruments. The government is to be commended on its willingness to take up these concerns, which I and others have been raising for some time.

However, I do have remaining concerns and questions about this bill and wish to highlight them simply. I have put these matters to the minister in person and now my invitation to the government is for them to respond to these concerns in good faith. If you like to use the terminology in the bill, 'to have some good faith bargaining'—

Senator Hurley—What about forced arbitration?

Senator XENOPHON—We do not have deadlocked conferences here, Senator Hurley, unlike the place you were at previously, the South Australian parliament. I think there has been a lot of good faith in terms of discussing issues with the government and I am looking forward to further discussions in relation to these concerns.

In relation to union right of entry to explore breaches, I am still concerned about privacy for non-union-member records. While I understand the need on occasions to compare union and non-union-member records to check things such as wage parity, I remain concerned about a third party having access to the records of the approximately 80 per cent of the workforce who are not union members. The minister made it clear to me that employers will still be able to contest an alleged breach and stop entry until FWA makes a ruling. While this is an important safeguard, I signal that I will be looking very closely at the government's amendments in relation to privacy protection. Also, I am concerned with the need for 24#hours notice to be given to employers before entering workplaces to explore outworker breaches. This is something perhaps from the other side of the fence, if you like. This much notice can result in backyard sweatshop operators packing up their operations so that, when the investigators arrive, there is nothing to see and unfair work practices can continue in another location.

In relation to unfair dismissal provisions, I am concerned that the 15-person threshold for small businesses to qualify for the small business unfair dismissal regime is too low. I am worried that a corner shop, snack bar or cafe with two or three full-time employees and a large turnover of casuals could too easily be burdened with these provisions, which could be a disincentive to employing people. I understand the practical problems—though they are not insurmountable—with suggestions such as having 15 full-time equivalent employees where an employer would have to calculate their staffing equivalent on the day of dismissal, but I signal that I am open to considering better ways to handle this issue.

Also in relation to unfair dismissals, I have concerns about the number of days in which a person can make a claim. I note that it is proposed to change it to seven days from the current 21 days. I think that, as was mentioned in the committee report, there is a real risk that a change to seven days may encourage people to make a claim before they have had a chance to consider whether they ought to claim or not or to get appropriate advice. The committee suggested 14 days; I suggest that even 21 days is more than reasonable and that we should not change the status quo.

Further, I wish to raise what appears to be an inconsistency where employees of particular organisations can appear before Fair Work Australia without the need to seek permission, but legal practitioners and agents are required to seek permission. I think that is unfair. Despite what Shakespeare said about lawyers, I think that lawyers do have a very valuable role in giving people the right to representation. As a lawyer, I think it is important that that right be acknowledged and that people not be disadvantaged if they want to exercise their right to representation for whatever reason.

Finally, I would like to explore better protections for work-life and family-life balance. Although I know these things were not ALP policy commitments, the inclusion of flexible working arrangements for parents of school-age children and children with disabilities and the capacity for some recourse if employers refuse flexible parenting arrangements out of hand are also areas of interest to me. I note from the committee report and from the *Hansard* that coalition senators raised this as an issue. It is certainly a live issue that is of concern, I believe, to both sides of the house, particularly where working parents have children with disabilities.

I am quietly confident that these concerns can be further dealt with and further advanced towards resolution. I have been impressed with the way that the Deputy Prime Minister and her office have handled negotiations with my office over this bill. Our dealings have been open, frank, cordial and practical. I want to also acknowledge the coalition. Michael Keenan and his office similarly have been very helpful. My discussions with him on the coalition's concerns and the legislation generally have been open, frank, cordial and practical.

My office has spent something like 10 hours in briefings with the minister and her staff painstakingly working through our concerns. They may well find me and my office a pain, but they have done so with good grace to enable me and my staff to understand the complexities and intricacies of this legislation. It is because of that level of detail that I am able to stand here and offer such a short list of matters for further consideration. My many other concerns and questions have been considered outside of this chamber and I have been reassured in many respects by the information provided. And, again, I express my gratitude to the coalition spokesperson, Michael Keenan, and his office for the work that they have done and their assistance in giving me a better understanding of this legislation and our areas of difference. I believe that all of these negotiations have been modelled on the spirit of the good#faith bargaining that is detailed in this bill and should be the norm, I think, in dealing with complex legislation.

In summary, I believe that 'work choices' need to be genuine choices for workers and 'fair work' needs to be fair to employers as well. I reiterate my ongoing interest in relation to privacy for employees, protection for small businesses and provisions for work-life balance. I will be looking forward to the committee stage to seek reassurance on these areas. Consequently, I indicate my support for the second reading of this bill, but I reserve my position in relation to the third reading.