ARTIO
Australian Road Transport
Industrial Organisation
ABN: 63734697902

17 February 2012

The Fair Work Act Review Panel
C/- Department of Education, Employment and Workplace Relations
GPO Box 9880
CANBERRA ACT 2601

By email: fairworkactreview@deewr.gov.au

Dear Sirs,

Submission to the Fair Work Act Review Panel by the Australian Road Transport Industrial Organisation (ARTIO)

Please find attached for your information the submission by ARTIO on the Review of the Fair Work Act 2009. We have not commented on the Regulations as it does not appear they are part of this Review.

ARTIO is the only organisation of employers registered under the Fair Work (Registered Organisations) Act 2009 representing employers specifically in the transport and logistics industry.

ARTIO has focussed on issues from a practical perspective and discussed the following issues in detail in this submission:

1. Collective Bargaining
    a. Bargaining representatives
    b. 'Better off overall test'
    c. Collective agreements and processing them
    d. Is productivity part of the bargaining equation
    e. Concerns surrounding protected industrial action

2. Awards
    a. Who has the power to vary a modern award
3. Unfair Dismissals
    a. The continued claims for ‘go away’ money
    b. An improved threshold to access the UFD provisions
4. General Protections
    a. The pendulum has moved too far to the employee side
5. The One Stop Shop Approach
    a. Confusion exists between FWA and FWO
    b. The powers of an FWO inspector and ‘reasonable belief’ to act

ARTIO would be happy to elaborate on matters raised in this submission or any other matter which may assist the Committee in its deliberations and would welcome the opportunity to appear at any public hearings that may be scheduled.

Please direct any enquiries to Paul Ryan, the National Industrial Advisor on 0415331031 or via email at reception@vta.com.au

Yours faithfully

Philip Lovel AM
Secretary/Treasurer

Submission by the Australian Road Transport Industrial Organization (ARTIO) to the Fair Work Act 2009 (the Act) Review

Background

1. The Australian Road Transport Industrial Organisation (ARTIO) is the national Industrial Organisation of Employers registered under the Fair Work (Registered Organisations) Act 2009 (FWRO Act 2009). It represents employers and prime contractors in the transport and logistics industry, particularly those engaged in road transport. As at 31 December 2011, it had around 440 members. These include, but are not limited to the large multi-national transport companies such as Linfox and the Scott Group of Companies, down to the family owned businesses that perform the largest percentage of Australia's freight task.

2. ARTIO operates as a federation with Branches in all States except South Australia. ARTIO and its Branches operate independently and in accordance with the particular Constitution applying in that Branch.

3. ARTIO Council, which has a representative from each of its State Branches, meets on a bi-monthly basis to consider and discuss Industrial Relations issues impacting on the organisation (industry) and its members. Much of its day-to-day activities are carried out by the Branches, especially when dealing with operational issues and providing advice to members on issues surrounding industrial obligations and other regulatory matters.

4. This submission is made on behalf of ARTIO and its Branches.

5. In 2009, ARTIO successfully applied to DEEWR to participate in the Fair Work Education and Information Program. This involved running over 60 workshops in all states and territories to help the road transport industry to gain an understanding of the Act and its likely impact on the transport and logistics industry.

6. ARTIO delivered the workshops in 2 separate modules as follows:
    a. Module 1 focused on the Act and the legal obligations created thereunder, specifically directed towards:
        i. Key elements of the Act and their impact on employers in the transport industry
        ii. Agreement making under the Act
        iii. The new Unfair Dismissal Laws
        iv. The Fair Dismissal Code for Small Business operators

    b. Module 2 was aimed at those parts of the new legislation which commenced on 1 January 2010, specifically:
        i. Legal rights and responsibilities of employers
        ii. The new institutional structure
        iii. National Employment Standards
        iv. New Modern Awards

7. In addition to these workshops, ARTIO prepared a series of Fact Sheets to ensure employers had some 'ready reference' information. These facts sheets are available upon request by the Review Panel.

8. Moreover, in 2011, ARTIO partnered FWO in devising training and information aids to assist road transport employers with adapting to and complying with the 2 leading, road transport modern awards. In this exercise ARTIO produced 2 "modern award handbooks" to be used in conjunction with the said awards. These handbooks not only explain the relevant modern award and its transitional provisions but also explain how the NES interacts. The ARTIO handbooks have been very highly rated by both employers and employees in the road transport industry and anecdotal evidence suggests an improved understanding and compliance of the modern award regime in the industry.

9. Accordingly ARTIO is well placed to make the following points in its submission.

The Act

10. The Act is comprised of 800 sections, which run to around 500 pages, and has been in operation for almost 3 years. There are still many sections of it that have not been fully tested before Fair Work Australia or through the legal system.

11. It is also important to bear in mind that the Act has built on the 'Workchoices' initiative to build a national industrial relations framework. This in itself was a marked efficiency improvement over the obsolete 6 state systems. ARTIO supports the national framework.

12. ARTIO's submissions are based around the experiences it has had on a practical basis in assisting its members to process matters arising out of the employment relationship or the termination thereof.

Collective Bargaining

13. The collective bargaining provisions generally work well. However, it is ARTIO's view that they can be improved by making the following changes:
    a. Removing the union as the default bargaining representative. As most employees now choose not to belong to a trade union that choice should be respected and the ability to bargain collectively with their employer through a designated employee or some other representative should be allowed expressly as part of the statutory regime.
    b. The 'better off overall test' (BOOT) is confusing in that it seems to have been applied on the basis of each and every employee must be better off at any point in time. This makes it difficult to average wages, or develop 'all up' rates, as it is possible that an individual employee or a group of employees will not be better off in the short term but will over a 6 or 12 month period. Further, it appears that the BOOT can only be measured in financial terms. Individuals may well value time off or a different working week but it appears those factors are not relevant to the BOOT. Reforms to the BOOT are required to address these shortcomings.

c. The current approval process is unwieldy and inefficient, particularly around the paperwork required to be lodged. It would be more efficient to return to a system of public hearings where undertakings or other necessary alterations can be made on the public record.

d. Inherent in the rationale of the bargaining regime is that an employer and employee can always bargain to improve productivity. The prevailing political view seems to accept that this bargaining to increase productivity is limitless. In the transport and logistics industry this view does not hold water. It is a service industry and we are confined by our client's service parameters and constraints. The industry would be much more efficient if more freight was picked up or delivered between 10pm and 6am but unfortunately, neither the freight receivers nor general public, will accept that. As it is now, many local councils preclude the collection of rubbish before certain hours and deliveries cannot be made to supermarkets and to other customers in urban areas outside specified hours. On account of the fact that there is not much room for continued and increased productivity in the transport and logistics sector it may be timely to re-consider a stronger arbitral role for the Tribunal.

e. The powers and procedures possessed by FWA to suspend or to terminate protected action seem inadequate to resolve retractable disputes. The circumstances in which FWA may suspend or terminate protected action under s 424(1) do not apply to the majority of negotiations. Safety issues, financial impacts on employees, public convenience and provision of essential services do not meet the criteria in which s 424 can be invoked.

f. It seems that the objects of the Act, particularly the object to promote productivity and economic growth are secondary to the employee's right to invoke and sustain protected action. Protected action is rarely used as a last resort but often used as the employee's first means of negotiation tactics. Protected action should be a <u>ballot of the entire workforce to be covered by the particular agreement</u> and undertaken only after genuine negotiations and compulsory FWA conciliation has failed. This is to be contrasted with the "scope provisions" that require the workforce, subject to an enterprise agreement, to be fairly chosen. As the protected action provisions currently apply, a particular bargaining representative can seek a protected action ballot solely from amongst his/her selected group of employees.

g. Concepts and objects of the Act including fairness, good-faith bargaining and productivity are not promoted when disproportionate weight is given to the employees right to strike, particularly when FWA has limited power to suspend, stop or arbitrate disputes. Compulsory arbitration can play a more important role in settling disputes.

Awards

14. Accepting the premise that the system is collectively based and modern awards are in place to provide a 'safety net', then it is incongruous to allow an individual employer or employee to seek variation of an award because of peculiar circumstances to a particular business. The rationale of having a collective system is destroyed by allowing individuals, whether employers or employees, to vary an award. It is ARTIO's view that such arrangements should be processed through the bargaining regime at the enterprise level.

Unfair Dismissals

15. ARTIO respects the Government decision to extend the unfair dismissal provisions to all employees irrespective of the size of their employer's business. Inevitably, this has led to a sharp increase in UFDs. Unfortunately, ARTIO's practical experience is that not all applications for relief are about 'justice or fairness' but simply about what can be 'screwed out of the employer', more colloquially known as 'go away' money.

16. The system is not helped by having telephone conciliations and the fact that 'settlement' is running at 76% - Fair Work Australia Annual Report 2010-11, Page 13, Chart 2 – reinforces this fact. It is cheaper for an employer to pay five or six thousand dollars than defend a strong position in arbitration. The dilemma faced by an employer revolves around the actual cost of a defending a matter in addition to the hidden costs of time and effort required to participate in the process. A manager may well be out of the business for 2 or 3 days.

17. The conciliators recognise this and regularly inform parties that you can control the process at this stage but if it goes to arbitration then you have lost control and your costs will be substantial. It is also important to remember that a lawyer or agent

representing a dismissed employee needs to recover their costs. ARTIO representatives have been involved in UFD cases where the dismissed employee receives a very small amount of a settlement figure – in one case involving a well-known plaintiff lawyer, the applicant received $200 or 7% of the agreed settlement.

18. As FWA and its predecessors have traditionally been a cost free jurisdiction, it is very difficult to obtain an order for costs. In fact, less than 0.1% of all matters involves an application for costs and of those that are brought the chance of success is almost zero.

19. This difficulty has been compounded by the fact that the costs provisions no longer contemplate costs against a party for an important second element that enlivened the "costs" issue where an applicant had been "put on notice" by the respondent of factual or jurisdictional deficiencies in the original claim, such that there was no reasonable excuse to persist with a baseless claim. This is the "failing to discontinue" or "failing to settle" or "unreasonable act or omission" element (as per old s170CJ(2) and (3) of the Workplace Relations Act 1996) that is missing from the current costs construct.

20. ARTIO submits that there is a need to strengthen employer's protection against unfair dismissal proceedings from vexatious and ill-conceived applications with little prospect of success.

21. ARTIO suggests that there needs to be some 'gate-keeping' of UFD applications perhaps through a 'case appraisal' stage. The current application fee of $62.40 to lodge a UFD matter is too low. We consider that a bond of $500, refundable if the claim is found to have merit, would improve the system enormously. Face to face conciliation conferences would also assist where applications appear prima facie without merit.

22. ARTIO further suggests that jurisdictional disputes (eg out of time applications or employment relationship issues) should be dealt with in a preliminary manner prior to a conciliation conference on the merits of the matter.

General Protections

23. It is ARTIO's view that the General Protections provisions have moved the pendulum too far to the employee side. We have seen them used when there is no chance of a UFD claim succeeding but the reverse onus forces an employer to prove their innocence. This is a difficult thing to do. As FWA only possesses the power to conciliate and not arbitrate such matters, it leads to 'costs' being a live issue for the employer.

24. As mentioned earlier in this paper, ARTIO would see a bond, refundable if there is some merit in the claim, as being an effective way to deal with the cost issue and further, the inclusion of the "old s170CJ(2) and (3)" provisions in this part (see para 19 above).

25. The extension of the general protection provisions to a 'prospective employee' has added to the cost of employment and ARTIO representatives have been advised that it has led to jobs not being filled.

26. General protection provisions should not be available in unfair dismissal cases, or alternatively should only be available within the same timeframes as unfair dismissal applications.

The One Stop Shop – Fair Work Australia (FWA)

27. It is ARTIO's view that the 'One Stop Shop' arrangement of having Fair Work Australia and the Fair Work Ombudsman as the bodies involved in this system has not worked. It has created confusion and uncertainty amongst both employers and employees. Employers are advised by their employees that 'Fair Work' said this and when pushed to determine which 'Fair Work' said what, confusion reigns. There is no real understanding of the different roles and functions of each body. They are statutorily separate but most Australian employers and workers do not and in ARTIO's view will never understand the differences.

28. ARTIO considers that Fair Work Australia needs to be re-named to clearly identify it as the body charged with:

    i. making awards,
    ii. processing collective agreements
    iii. resolving industrial disputes
    iv. dealing with UFDs
    v. conducting the Annual Wage Review

29. Any name must include the word 'Tribunal' or 'Commission' so that the body can be seen as being independent of the Fair Work Ombudsman, thereby avoiding much of the confusion currently being experienced.

The One Stop Shop – Fair Work Ombudsman (FWO)

30. The powers of inspectors of the Fair Work Ombudsman are essentially based around the notion of an inspector 'reasonably believing'. It appears to ARTIO that many inspectors accept an employee's complaint as the basis to form a 'reasonable belief' and thus assuming some jurisdiction and right to exercise a power contained in the FW Act.

31. ARTIO contends that before an inspector can form such a view he must speak to the employer involved. Many complaints to the FWO are based on an incorrect application of an award or other industrial instrument or a misunderstanding around award terms and conditions.

32. In fact, ARTIO representatives are aware of one particular case where an employer had to forgo certain work on account of the view expressed by an FWO inspector which was clearly wrong and shown to be so. But the damage was done and the employer lost a client worth $400,000 per annum and had to retrench staff accordingly.