Submission

to the

Fair Work Act Review Panel

Review of the Fair Work Act 2009

Submitter: David Smith

Organisation: Australian Services Union

Address: 116 Queensberry Street, Carlton South, Vic, 3053

Phone: 03 9342 1400

Fax: 03 9342 1499

Email: dsmith@asu.asn.au

Date: 17th February 2012

Introduction

1. The Australian Services Union [ASU] is one of Australia's largest Unions, representing approximately 120,000 members.

2. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

3. Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

    - Local government (both blue and white collar employment)
    - Social and community services
    - Transport, including passenger air and rail transport, road, rail and air freight transport
    - Clerical and administrative employees in commerce and industry generally
    - Call centres
    - Electricity generation, transmission and distribution
    - Water industry
    - Higher education (Queensland and SA)

4. The ASU has members in every State and Territory of Australia, as well as in most regional centres as well.

5. The ASU has, during its existence, established on behalf of its members an array of federal and state awards and agreements providing terms and conditions of employment. Prior to the introduction of the Fair Work Act, the ASU had established about 200 Federal awards providing terms and conditions of employment for the Union's members, supplemented by hundreds of enterprise bargaining agreements. The same applied in State IR systems.

6. Following the introduction of the Fair Work Act, the ASU has continued to be a significant actor in the Fair Work system both as a bargaining union and in relation to the establishment of minimum terms and conditions of employment through

modern awards. The Union's members are covered by a large number of the modern awards given the diversity of our membership. The Union continues to actively bargain on behalf of members.

7. The ASU was strongly opposed to the Howard Government's WorkChoices legislation.

8. These unjust laws were rejected by the Australian people at the November 2007 election and the ASU strongly supported the passing of the Fair Work Act despite some concerns about the adequacy of the proposed new laws and the retention of some significant features of the former system, especially with regard to industrial action and right of entry.

Review of the Fair Work Act

9. The ASU notes that the terms of reference of the present Review are as follows:

"The review is to be an evidence based assessment of the operation of the Fair Work legislation, and the extent to which its effects have been consistent with the Objects set out in Section 3 of the Fair Work Act.

The review will examine and report on:

1. The extent to which the Fair Work legislation is operating as intended including:
    - the creation of a clear and stable framework of rights and obligations which is simple and straightforward to understand;
    - the emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and related powers of Fair Work Australia;
    - the promotion of fairness and representation at work;
    - effective procedures to resolve grievances and disputes;
    - genuine unfair dismissal protection;
    - the creation of a new institutional framework and a single and accessible compliance regime; and
    - any differential impacts across regions, industries occupations and groups of workers including (but not limited to) women, young workers and people from non-English speaking

backgrounds; and

2. Areas where the evidence indicates that the operation of the Fair Work legislation could be improved consistent with the objects of the legislation."

10. The ASU has submissions to make and recommendations which are based on the experience of the Union since the commencement of the legislation in July 2009.

The creation of a new institutional framework and a single and accessible compliance regime

11. The ASU supported the establishment of a national system of industrial regulation through the use of the corporations and referral powers so long as terms and conditions of employment previously enjoyed by members in the various States and Territories were not reduced as a result.

12. The Union acknowledges that the present Review is not a review of modern awards, a process which is being conducted separately by Fair Work Australia. However, as a major participant in the award modernisation process, the ASU remains concerned that terms and conditions of employment for some members have been reduced significantly and other conditions, being classified as State or Territory differentials, will disappear at the end of the transitional period. In other cases, conditions have been averaged or reduced meaning that, over time, levels of entitlements will reduce, notwithstanding take home pay protections for 'existing' workers.[1]

13. In addition, some employees who previously enjoyed award coverage have lost that coverage. The ASU is seeking through the 2012 award review process to correct these and other deficiencies in awards and award coverage but the tribunal will be constrained by the provisions of the Act in dealing with these matters.

14. The tribunal will not for example be allowed to retain State and Territory differentials beyond the transitional period unless the Act is amended. This means that current entitlements as to:

- District allowances which apply predominantly in north Queensland, the NT and northern WA

[1] FW Act, section 154

- Accident make up pay for Victorian workers
- superior redundancy provisions applying to former NAPSA and Division 2B state award employees
- other entitlements that operated solely in respect to one State or territory

will be lost from the 1st January 2014 for all employees previously entitled to them.

15. **The ASU does not support the permanent loss of these entitlements and recommends that the Act be amended to allow modern awards to continue to include past the transitional period terms and conditions of employment which operate on a state, territory or regional basis where FWA is satisfied that these entitlements were part of the established award safety net prior to the introduction of the Fair Work Act 2009.**

National coverage – local government

16. The Fair Work Act sought to introduce a single national system by means of reliance on the Corporations power and the use of the referrals power [as well as continuing reliance on the Territories and External affairs power]. No use is made of the conciliation and arbitration power, which the ASU views as a mistake.

17. In practice, the combination of the corporations, Territories and referrals powers have acted to create a national system and a single institutional framework. The exception to this situation is of course in West Australia where the State Government has refused to refer its industrial relations power to the Commonwealth.

18. This has resulted in an unsatisfactory and uncertain situation for a significant number of employees in WA who remain uncertain as to their coverage and the enforceability of their terms and conditions of employment.

19. A particular case in point in WA is the situation with regard to local government. The constitutional status of local government remains uncertain. The Etheridge case in Queensland found that the Shire of Etheridge was not a constitutional corporation and therefore could not be in the federal system on the basis of that power. The

case was decided on the facts as they applied to that shire but all local government shares certain fundamental characteristics which may be relevant to this question.

20. At the time of the introduction of the Fair Work Act, different policy approaches to the appropriate industrial coverage of local government applied. This remains the case and the ASU strongly supports the provisions of the Fair Work Act which enable State Governments to either refer powers with respect to local government to the Federal system or to exclude the sector from the federal system and retain it in State systems. [2]

21. This system has brought certainty to local government. Victoria and Tasmania have referred such powers while Queensland, NSW and SA have chosen to exclude local government. The NT is in the federal system on the basis of the Territories power.

22. The difficulty is the State of West Australia where the State Government has chosen to neither refer power to the Commonwealth nor to exercise the option to exclude such employees and to cover them in the Federal system. A combination of State and federal instruments applies in WA. The ASU's members have been largely covered by federal instruments and while the Union has acted to ensure that mirror State awards apply, there remains a considerable area of uncertainty which will grow over time.

23. **The ASU recommends that the Commonwealth Government again use its good offices with the WA Government to resolve this matter and to provide certainty to employers and employees in local government in WA.**

Effective procedures to resolve grievances and disputes;

24. Since Federation, Federal industrial relations has been firmly based on the premise of access of all workers to conciliation and if necessary arbitration of disputes between employers and employees. This operated at a number of levels [for example interstate industrial disputes leading to the making of federal awards] but also included resolution of individual workplace grievances and disputes. While there were some legal uncertainties in individual grievance resolution in some instances, it remained a fundamental cornerstone of Australian industrial relations

[2] Fair Work Act, section 14(2)

that disputes of all kinds should be able to be resolved by direct negotiation, conciliation by an independent body and arbitration by the relevant tribunal where necessary.

25. This principle has been weakened over a number of years, particularly in relation to disputes about the making of agreements where the tribunal can only intervene in exceptional circumstances or at the request of parties, but also with regard collective and individual disputes arising under awards and agreements.

26. Using the corporations' power in combination with the other powers, the Fair Work Act could have resolved this matter and made access to last resort arbitration of collective and individual award or agreement disputes a fundamental right of all Australian workers.

27. The Act does not do so. Firstly, it retains essentially the provisions of previous Acts with regard to industrial disputes about the making of agreements whereby the tribunal must not arbitrate unless requested by the parties or in certain circumstances where there is a threat to the national economy or a significant part of it or in certain other limited circumstances.

28. Secondly, and very importantly, there is no absolute right to arbitration of collective or individual disputes arising from the terms of an award or agreement. With regard to award disputes, the Fair Work Act provides that the tribunal may use only use certain means to resolve a dispute, including "consent arbitration". This means that if one or other party objects to arbitration, it cannot be utilised.

29. The general powers of the Act given to FWA to settle disputes are set out in section 595 of the Act:

> **595 FWA's power to deal with disputes**
>
> (1) FWA may deal with a dispute only if FWA is expressly authorised to do so under or in accordance with another provision of this Act.
>
> (2) FWA may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:
>
> (a) by mediation or conciliation;
>
> (b) by making a recommendation or expressing an opinion.

(3) FWA may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if FWA is expressly authorised to do so under or in accordance with another provision of this Act.

Example: Parties may consent to FWA arbitrating a bargaining dispute (see subsection 240(4)).

(4) In dealing with a dispute, FWA may exercise any powers it has under this Subdivision.

Example: FWA could direct a person to attend a conference under section 592.

(5) To avoid doubt, FWA must not exercise any of the powers referred to in subsection (2) or (3) in relation to a matter before FWA except as authorised by this section.

30. Access to dispute settling provisions regarding the NES are available under award DSPs, but also only by consent arbitration. Awards must contain disputes settling procedures but these do not include arbitration other than consent arbitration. FWA is also prevent from settling some types of disputes at all, e.g. in relation to 'reasonable business grounds' – see Section 146 and later in this submission.

31. Modern awards typically contain a dispute settling provision along the following lines:

> **9.2** If a dispute about a matter arising under this award or a dispute in relation to the NES is unable to be resolved at the workplace, and all appropriate steps under clause 9.1 have been taken, a party to the dispute may refer the dispute to Fair Work Australia.
>
> **9.3** The parties may agree on the process to be utilised by Fair Work Australia including mediation, conciliation and ***consent arbitration***.
>
> **9.4** Where the matter in dispute remains unresolved, Fair Work Australia may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.[3]

32. Arbitration of disputes arising from an agreement already made and approved is permitted but only to the extent that the disputes settling provision of the agreement authorises the tribunal to act to settle disputes [see s.595 above]. Ironically, the Act requires that all agreements contain a disputes settling provision but does not require that provision to actually empower the tribunal to resolve each and every dispute by last resort arbitration.

[3] This example is from the modern Clerks-Private Sector award 2010, Clause 9- emphasis added

33. This deficiency in the Act has a number of consequences. Firstly, if an employee is only covered by an award, no compulsory arbitration of any dispute arising from the terms of that award is possible and disputes may go unresolved for ever.

34. Secondly, if an employee is not covered by an award, no access to a dispute settling mechanism regarding NES entitlements is available at all. Award free employees may only seek to enforce their NES entitlements in court, which is unsatisfactory.

35. Thirdly, whether an employee has access to last resort arbitration of agreement based disputes depends entirely on whether the employer has agreed to the insertion of such a provision in an agreement. While unions normally seek where possible such clauses, non union agreements are much less likely to contain such clauses. Most employers are unwilling to bind themselves to compulsory arbitration.

36. Since the Fair Work Act maintains the legislative position that industrial action during the life of an agreement is not protected, the absence of last resort arbitration in many agreements means that there is no opportunity for employees to take any action whatsoever to resolve disputes which may go unresolved for ever with employees powerless to act.

37. Given that many non union agreements are, fundamentally, determined by the employer and are presented by employers as a "take it or leave it" proposition, many employees have no access to arbitration of agreement based disputes either.

38. Table 2 in the background paper indicates the coverage of employees by various types of industrial instrument at May 2010:

Table 2: Employees by methods of setting pay in Australia in percentage terms

	2008	2010
Award or pay scale only	16.5	15.2
Collective Agreement (registered and unregistered	39.8	43.4
Individual Arrangement (registered and unregistered)	38.7	37.3
Owner manager of incorporated enterprise	5.0	4.1
All methods of setting pay	100.0	100.0

Source: ABS Employee Earnings and Hours (Cat. No. 6306.0) August 2008, May 2010.

39. While only 15.2% of employees are totally award dependent, those who have their pay set by individual arrangement are also not covered by an agreement and are also therefore not likely to have any access to any last resort arbitration of any individual or collective workplace dispute or grievance. In total this represents 52.5% of all Australian workers – more than half.

40. Agreements, including unregistered agreements cover 43.4% of employees. It is not known to the ASU how many of these agreements include a last resort arbitration clause. However even if three-quarters of such agreements do [a high estimate], this would mean that about two-thirds of all Australian workers do not have access to compulsory arbitration of any collective or individual dispute or grievance.

41. **The ASU submits that for the reasons given above, that the Act should be amended to provide that all employees should have access to last resort arbitration. This should apply in the following situations:**

- **To award free employees in respect to their NES entitlements or any other provision of the Act**
- **To award covered employees in respect to their award entitlements**
- **To agreement covered employees in respect of their agreement entitlements and**
- **In all cases, any other matter arising out of an employee's employment relationship**

<u>The promotion of fairness and representation at work;</u>

42. Prior to the commencement of the Fair Work Act, Australia's industrial relations legislation and under pinning regime had as a fundamental object support for the existence of representative bodies of employers and employees as important actors in establishing, maintaining and improving fair labor standards in this country.

43. This reflected a long held view in this country that fairness could only be achieved by collective action and while individual rights and responsibilities are important, equity in industrial relations was an outcome most likely to be derived by collective

action for the common good through the formation of representative bodies of employees.

44. The ASU submits that an object along these lines should be restored to the Fair Work Act. The separate Fair Work (Registered Organisations) Act 2009 has a version of this object expressed as an intention of the parliament but it should be restored as an object of the principle Act.

45. Section 5 of the Fair Work [Registered Organisations] Act includes the following:

> "…(4) It is also Parliament's intention in enacting this Act to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered."

46. A focus simply on individual rights will not ensure fairness including fairness in representation at work since the relative economic power of employers and employees is very uneven in most workplace contexts. Collective rights and collective action for the common good must be recognised as a fundamental part of fairness in each and every workplace.

47. Fairness and representation at work is in part dependent on access to last resort arbitration as discussed in the previous section. Fairness in representation also requires access to independent advice and advocacy at all relevant stages in dispute resolution, including grievance resolution. While dispute settling procedures formally provide for employees to be represented, in practice this right is frequently sought to be negated by employers at the workplace level.

48. Often, employers seek to argue and insist that employees may only be "supported" by their chosen representative who is not allowed by the employer to speak on behalf of the employee. Section 336 of the Act contains the Objects of that Part of the Act dealing with General protections in the workplace and includes the following Objects:

336 Objects of this Part

The objects of this Part are as follows:

(a) to protect workplace rights;

(b) to protect freedom of association by ensuring that persons are:

(i) free to become, or not become, members of industrial associations; and

(ii) *free to be represented, or not represented, by industrial associations; and…*

49. **The ASU submits that the Fair Work Act should be amended to provide that, as part of the NES and as a specific general protection, that all employees are entitled to be represented by an person of their choice at all stages of any grievance or dispute resolution process, including access to effective support at the earliest possible point of resolution of the dispute. Disputes about such representation should be resolved where necessary by access to FWA.**

Genuine unfair dismissal protection

50. The ASU has welcomed the removal of arbitrary limits on who can seek protection for unfair dismissal. This is an important aspect of fairness in the workplace. The Union's Branches are heavily involved in providing representation for members who believe that they have been unfairly dismissed.

51. The ASU notes the apparent increase in unfair dismissal applications being considered by Fair Work Australia set out in the background paper and in recent reports of FWA. However, the Union notes

    1. that the increase in the number of applications appears to be less than the increase in coverage of the federal system since the creation of a single jurisdiction for the handling of most claims

    2. that the overwhelming bulk of applications are resolved at or prior to conciliation with a relatively small number resolved by determination by the tribunal.

52. Despite the success of the conciliation processes under FWA, the ASU believes that further reform could assist more cases being resolved at that stage.

53. In the experience of the ASU, Australian industrial tribunals have a history of bringing a practical and informal approach to the resolution of industrial applications. The objects of the Fair Work Act 2009 remain consistent with this

tradition. Section 3 observes that the Act provides for workplace relations laws that are accessible, balanced and fair. In the case of unfair dismissals the object of achieving a "fair go all round" is explicitly referred to at s281(2). Section 381(1)(b) also states the objects of the act in providing procedures for unfair dismissals that are "quick, flexible and informal."

54. Since the introduction of the Fair Work Act 2009 procedures associated with the conduct of unfair dismissal applications have altered significantly. Matters can now be commenced by way of telephone application, documents can be filed and served by way of facsimile and e-mail. Significant resources have been invested in the establishment of conciliation services aimed at resolving matters by consent, with a minimum of legality and fewer costly proceedings. Recent statistical reports suggest that where conciliation conferences are conducted by Fair Work Australia, they have had a high rate of success in resolving matters by agreement between the parties.

55. The ASU's Branches are principally responsible for dealing with unfair dismissal applications. ASU Branches have reported mixed experiences in the success and utility of telephone conciliations. While these are at times and efficient manner in dealing with applicants and cases in remote and regional locations, Branches also report difficulty in achieving effective conciliation outcomes via telephone conciliations in a significant number of instances.

56. **The ASU submits that an unfair dismissal applicant should have access to a face-to-face conciliation where the applicant believes that this will result in a greater likelihood of the matter being resolved at the conciliation stage.**

57. In addition, despite the pragmatic focus of the objects and administration of the legislation, the ASU has become aware of a trend in whereby some unfair dismissal applicants are being denied any access to the conciliation stage of the process. This occurs when a party to the proceedings opposes the holding of a conciliation conference under section 398 and FWA sends the matter straight to a fully contested hearing.

58. Section 398 provides:

398 Conferences

(1) This section applies in relation to a matter arising under this Part if FWA conducts a conference in relation to the matter.

(2) Despite subsection 592(3), FWA must conduct the conference in private.

(3) FWA must take into account any difference in the circumstances of the parties to the matter in:

(a) considering the application; and

(b) informing itself in relation to the application.

(4) FWA must take into account the wishes of the parties to the matter as to the way in which FWA:

(a) considers the application; and

(b) informs itself in relation to the application.

59. The general power of FWA to hold conferences and to compel persons to attend is set out in section 592 [set out in full below] which provides such a power generally but not in respect to certain matters including unfair dismissal cases.

60. In the Union's experience the tactic of opposing conferences under section 398 or refusing to attend has been adopted on a number of occasions by employers, frustrating attempts to explore settlement options under the supervision of a conciliator. Instead, matters can be listed directly for hearing, at which time orders are made for the preparation of witness statements and the filing and service of documents. Proceedings then become contestable, lengthy, costly and highly legalistic. In many cases the applicant or their industrial organisation may not have sufficient resources available to pursue the matter further or may simply be unable to afford any further representation.

61. This "short circuiting" of the conciliation process is, in the Union's submission, clearly contrary to the objects of the Fair Work Act 2009 and can be highly prejudicial in terms of denying applicants the right to an informal, affordable and effective system of justice.

62. **The ASU proposes that this matter should be addressed by way of amendments to the legislation requiring all unfair dismissals to be the subject**

of a conciliation conference and genuine attempts at conciliation, including the power to compel persons to attend conferences. Further, where there are reasonable prospects of an agreed outcome, conciliation officers should be empowered to adjourn matters enabling the parties to exchange documentation and reach a settlement.

63. **Pending the review of this reform proposal the ASU recommends that this matter be raised with the tribunal through appropriate consultative forums and user groups.**

The emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and related powers of Fair Work Australia;

64. The ASU is a bargaining union. The ASU has worked within the terms of the Fair Work Act to continue its work to obtain the best possible enterprise agreements for its members. The ASU has sought to exercise its rights under many parts of the legislation relating to bargaining and is familiar with how many of these provisions operate in practice.

65. The Union notes that the industrial action provisions in the Fair Work Act as they apply to Unions are essentially the same as those which applied to employee organisations under the Howard government's WorkChoices legislation.

66. The Fair Work Act introduced some new provisions regarding bargaining including:

    1. The imposition of specific 'Good faith bargaining' obligations on all parties
    2. Access to majority support determinations, scope orders and bargaining orders to support bargaining

67. The ASU supports the overall scheme of the current Act with regard to bargaining although the Union finds that it is peculiar that registered employee organisations are almost an afterthought to the process despite the key role that unions have in the process in many cases and the stated intention of at least the Fair Work [Registered Organisations] Act to "assist employers and employees to promote and protect their economic and social interests through the formation of employer and

employee organisations, by providing for the registration of those associations ***and according rights and privileges to them once registered***". [4]

68. Under the Act, all collective agreements other than greenfields agreements, are made between one or more employers and their employees. Registered organisations involved in the initiation of bargaining and or as a bargaining agent are treated as no more than another bargaining agent, although they may apply to be bound by the agreement after it is made [and before it is approved] gaining certain limited rights by doing so. However, essentially, registered organisations have no rights and privileges above and beyond those of any other bargaining agent.

69. Non union bargaining agents have been a mixed blessing in practice and may represent no more than one employee and have no ongoing role after the approval of an agreement. Unions are continuing actors in the workplace and the only organisations which can, on an on-going basis, assist "employees to promote and protect their economic and social interests" in any meaningful way. The important role of registered organisations in collective bargaining should be enhanced under the Act.

70. The good faith bargaining obligations imposed on all bargaining agents by the Fair Work Act are important and the ASU supports them. However, it is well established by the Act and decisions of the tribunal that these obligations do not require that bargaining result in an agreement. The role of the tribunal in assisting the parties to reach an outcome is limited in the main to situations where the parties seek such assistance or where industrial action [or, in the recent Qantas case] unilateral non protected but non industrial action by employers escalates a dispute to the point where intervention by the tribunal can be triggered.

71. The good faith obligations relate mainly to process issues and while important are not determinative of any particular outcome. Good faith bargaining orders cannot prevent so-called 'surface bargaining' whereby a bargaining agent [usually the employer] goes through the motions of bargaining but has no real intention of making an agreement.

72. The Review background paper notes that in the period 1 July 2009 to 30 September 2011, 242 applications for bargaining orders were made but Orders or Decisions

[4] Fair Work [Registered Organizations] Act, section 5, clause 4 Emphasis added

with respect to these applications were made in only 33 cases. The ASU has been granted a number of bargaining orders but the overall impact of these provisions of the Act seem to be limited, at least until this point in time. [5]

73. A particular set of issues resolve around the commencement of bargaining. Where an employer genuinely decides to initiate bargaining by the issuing of the relevant notice prescribed by the legislation, the initiation of bargaining may be straightforward and the interests of parties protected.

74. Where an employer decides not to bargain or where the employer decides to prepare the way to get an agreement made that is in the interests of the employer by talking directly to employees without issuing a formal notice of intention to bargain [which would trigger the appointment and recognition of bargaining agents], the intention of the Act to have good faith bargaining is defeated.

75. Actions of employers to attempt to deal directly with employees have been upheld by decisions of the tribunal as consistent with the legislation.

76. The ability of the employer to put a proposed agreement directly to employees without the agreement of the bargaining representatives is also, in the submission of the ASU, contrary to the intentions of the good faith bargaining obligations in the Act.

77. **Employers should not be permitted to take this action without a declaration by FWA that the process of bargaining has been exhausted. Similarly, once an employer has commenced any form of communication with employees about the possibility of any type of collective agreement, the employer should be required to issue the notice of intention to bargain, to ensure that all bargaining agents are on the same footing and can represent and bargain effectively on behalf of those that they represent.**

Bargaining Representatives

78. Currently under the Fair Work Act there is no obligation on employers to identify to unions which are bargaining representatives, the identity of employee bargaining representatives. This is inefficient and contrary to good faith bargaining obligations.

[5] Fair Work Act Review Background Paper, table 4, page 14

All bargaining representatives are obliged to bargain in good faith with each other as set out in s.228 of the Act:

228 Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the *good faith bargaining requirements* that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) *recognising and bargaining with the other bargaining representatives for the agreement.*

79. The ASU submits that employers must reveal the identity of all bargaining representatives so that the parties can bargain in good faith in accordance with the requirements of s.228.

80. As a bargaining representative, the ASU is obligated to respond to proposals made by other bargaining representatives. Other employee bargaining representatives are also obliged to respond to the ASU's proposals. The ASU as a bargaining rep is obligated to genuinely consider the proposals of other bargaining representatives. Other employee bargaining representatives must genuinely consider our proposals. Restricting the identity of all bargaining reps by an employer is divisive and contrary to good faith bargaining.

81. **The ASU submits that employers must be obligated to disclose the identity of all bargaining reps to all other bargaining reps upon the commencement of bargaining.**

Permitted matters

82. The ASU does not support the current restriction on those matters that can be bargained for.Section 172 provides [in part]

> **172 Making an enterprise agreement**
>
> *Enterprise agreements may be made about permitted matters*
>
> (1) An agreement (an *enterprise agreement*) that is about one or more of the following matters (the *permitted matters*) may be made in accordance with this Part:
>
> (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
>
> (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
>
> (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
>
> (d) how the agreement will operate.

83. While these provisions remove most of the prohibited content rules from the former WorkChoices legislation, the ASU does not support an artificial limitation on the range of matters about which employers and employees can freely bargain. The Fair Work Act should amended to remove the restriction on permitted matters for bargaining.

Opt out provisions

84. The ASU has been involved in bargaining for a considerable number of collective agreements. In a number of negotiations, employers have sought to include in the coverage clauses of proposed agreements an 'opt out' clause. The ASU is opposed to opt out clauses in agreements believing that they are contrary to the spirit of freedom of association and collective bargaining and in particular good faith bargaining.

85. Section 3 outlines the object of the Act. On first principles, the ASU submits that op out clauses lie outside of Section 3(e)-(f) of the Act. Relevantly, s 3(e) states that the Act is to provide inter alia "the right to freedom of association and the right to be represented… [and] accessible and effective procedures to resolve grievances and disputes and providing effective compliance methods". Subsection 3(f) provides that the object of the act is to provide "productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations".

86. It does not seem possible to bargain in good faith for a collective agreement which allows employers, once the agreement is made and approved, to encourage or allow employees to opt out of the terms of the collective agreement. In the experience of the ASU, this has led to the absurd practise of employees being nominated as bargaining representatives by either themselves or a very small minority only to make their primary claim as advancing the employer position of providing an opt out clause. In this sense, the opportunity is open to a small number of employees to frustrate and subvert the collective bargaining process to pursue individual ends.

87. Employers will argue that employees have a 'choice' whether to be covered by an agreement or sign onto a common law contract. However, it is often the case that common law contracts are presented with a slightly higher salary rate, minus many the protections of an enterprise agreement, including access to representation and fair and simple dispute resolution procedures. In reality, given the difficulty that even veteran industrial relations practitioners might have in comparing the benefit of one agreement over another, in practise, most employees are not made aware of all the terms and conditions they forego when an employer offer the 'choice' to opt out of enterprise agreements.

88. The ASU is aware of the decisions made by FWA and the Federal Court in respect to the Newlands Coal agreement which contained an opt out clause. This agreement was not approved in the first instance, but allowed on appeal. A further appeal to a single Federal Court judge did not result in the opt out clause being found to be fatal to the power of the tribunal to approve the agreement and the agreement has subsequently been approved, with undertakings as to the operation of the opt out clause.

89. **Since the decisions of the tribunal and the Court were based on the particular wording of particular provisions of the FW Act about who is or will be covered by agreements, the ASU submits that the FW Act should be amended to specifically preclude collective agreements from containing 'opt out' clauses such as the one contained in the Newlands Coal agreement allowing employees to choose not to be covered by an agreement once it is made and approved.**

Multiple employer agreements [MEAs]

90. The predominant form of enterprise bargaining under the Fair Work Act is single enterprise bargaining. The Review Background Paper notes that there were more than 12,000 single enterprise agreements as at June 2011 and just 69 multi-enterprise agreements. The Act continues the unwarranted presumption against industry level bargaining by strictly limiting access to multi-employer agreements.

91. Where two or more employers are related bodies corporate or engaged in a joint venture or common enterprise or where they can otherwise obtain single interest employer authorisation, they can bargain together. The Review background paper notes that just 44 single employer authorisations have been obtained. This is most readily available to franchisees but has also been utilised by private sector schools.

92. However, it is important to note that single interest authorisations are the prerogative of employers. Unions have no legislative role in this process.

93. Multiple enterprise agreements are also possible between groups of employers and their employees. However, this can only be done by consent of all parties and protected industrial action in support of multi employer agreements is not permitted. In fact, any industrial action in support of so-called pattern bargaining is unprotected and not available. In addition, good faith bargaining orders can not be made with regard to MEAs.

94. The ASU submits that in certain circumstances, the ability to take protected industrial action in support of multiple employer agreements is both desirable and appropriate. Bargaining representatives should have the ability to take protected

industrial action where related corporations are a created by a business rather than a meaningful measure of whether there is a common interest**.**

95. An existing exception to this rule against taking protected action regarding MEAs is where a low paid bargaining authorisation is in place following a decision of FWA. Good faith bargaining orders can be obtained to assist low paid bargaining [but protected industrial action is still not permitted]. Low paid bargaining authorisations can be sought by any bargaining agent, including employee bargaining representatives, including unions. Where a low paid bargaining authorisation is in place, FWA may in certain circumstances make a low paid bargaining determination if the parties cannot reach agreement.

96. The Review background paper notes that only two low paid bargaining authorisation applications have been made. One has been granted and one is yet to be heard. The ASU is involved in neither matter and makes no submission on this question.

97. Access to multi-employer agreements is therefore extremely limited and except in the case of low paid bargaining [yet to be fully tested] allows little or no scope to employee organisations to pursue these types of agreement if employers are opposed.

98. The ASU has had considerable experience in the use of multi-employer agreements under the Fair Work Act as well as under its predecessors. MEAs can be particularly useful and relevant in sectors, such as the social and community services [SACS] where employers depend on a common funding source.

99. Although bargaining in the SACS sector is of limited utility in respect to improving the level of wages and salaries due to funding constraints, employers and employee organisations in the sector have found it useful to negotiate such agreements with regard to other matters.

100. The ASU's experience over many years has however been that the process of negotiating such agreements is tortuous in the extreme given the nature of the employers in the SACS sector. That is to say, the sector is characterised by a large number of poorly resourced employers lacking access to human resources and industrial relations advice and expertise.

101. In one case in Victoria, the approval of a particular MEA took years commencing under the previous legislative regime [WorkChoices] and ending in the current framework.

102. One of the most significant difficulties faced by the union in utilising MEAs most effectively is the inability to add additional employers to the MEA once made. In a number of cases, employers have been unable to meet requirements for employee approval of agreements and have thus been unable to be covered by the MEA as approved by FWA. Once procedural issues have been resolved, it has been too late for willing employers and employees to be added to the MEA.

103. **The ASU submits that the FW Act should be amended to allow additional employers to be added to an existing MEA in appropriate circumstances.**

Industrial action

104. While the FW Act continues most provisions of the Workplace Relations Act with regard to protected industrial by employees and employee organisations, the ASU notes and supports has welcomed the limitation of employer protected action to action in response to employee claim action. Employers cannot initiate protected action against employees in pursuit of an agreement such as by means of lockouts or other industrial action as was previously permitted under the WorkChoices regime.

105. The balance between the ability of employees and employers to take protected action is still unequal. Employee protected action must only occur after a ballot of employees to be involved in the industrial action. Other limitations also apply including the requirement to give three clear days notice of intended action, which allows employers to put in place measures to avoid the consequences and impact of the proposed action.

106. Section of the FW Act provides as follows:

414 Notice requirements for industrial action

Notice requirements—employee claim action

(1) 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.

(2) The period of notice must be at least:

(a) 3 working days; or

(b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph—that period of notice.

Notice of employee claim action not to be given until ballot results declared

(3) A notice under subsection (1) must not be given until after the results of the protected action ballot for the employee claim action have been declared.

Notice requirements—employee response action

(4) Before a person engages in employee response 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.

Notice requirements—employer response action

(5) Before an employer engages in employer response action for a proposed enterprise agreement, the employer must:

(a) give written notice of the action to each bargaining representative of an employee who will be covered by the agreement; and

(b) take all reasonable steps to notify the employees who will be covered by the agreement of the action.

Notice requirements—content

(6) A notice given under this section must specify the nature of the action and the day on which it will start.

107. Employee claim action thus requires three days or more notice to employers of the commencement of the action. Employer response action requires only notice to the bargaining representatives and 'reasonable steps' to be taken to notify employees. No actual period of notice time is required by the legislation.

108. **The ASU submits that employers should also be required to give three working days' notice to bargaining representatives and employees of any proposed employer response action.**

109. The ASU further notes from the example of the action of Qantas in immediately grounding its fleet in November 2011 – an action that was not industrial action as such – shows that employers have a considerable ability to influence the outcome of bargaining disputes by taking immediate action which is not protected industrial action but which is nevertheless in response to employee claim action and can lead to the termination of that action when the employee claim action is not of itself sufficient to warrant intervention by the tribunal..

110. As can be seen from the decision below, made in response to an application by the Federal Minister, that it was the unilateral and immediate action of Qantas itself in this matter which brought about the legislative trigger leading Fair Work Australia to terminate not only Qantas's foreshadowed action but also the employee claim action. It was the employer's threatened action which the tribunal found was of sufficient concern to attract a mandatory response from the tribunal:

> "[10] It is unlikely that the protected industrial action taken by the three unions, even taken together, is threatening to cause significant damage to the tourism and air transport industries. The response industrial action of which Qantas has given notice, if taken, threatens to cause significant damage to the tourism and air transport industries and indirectly to industry generally because of the effect on consumers of air passenger and cargo services. The Qantas evidence was that the cost to it alone is $20 million per day."

111. By immediately taking unilateral and unnecessary non industrial action [in the legislative sense] as well as threatening protected employer response action by way of lockout, Qantas was able to bring about the termination of employee claim action which would otherwise have not invoked action by the Minister or the tribunal.

Requirements for taking protected action – ballot requirements

112. The ASU notes that enterprise agreements may be made by a simple majority of those voting in the ballot to approve it. There is no minimum threshold of a certain percentage of employees voting to make the ballot binding.

113. By contrast, the Act requires that in a protected action ballot that a majority of employees must vote and a majority must also support the taking of the proposed industrial action. This imposes a much higher requirement than that for approving enterprise agreements themselves and this provision should be reviewed.

The creation of a clear and stable framework of rights and obligations which is simple and straightforward to understand;

114. The framework of employee rights and obligations consists principally of the provisions of the National Employment Standards as contained in the Act and modern awards, supplemented for a significant minority of employees by collective agreements.

115. Modern awards as made by the AIRC do not include the text of the NES but usually only a reference to the NES provision. An employee needs to refer to two documents to determine in full his or her minimum entitlements. The ASU supports the inclusion of the provisions of the NES in full in modern awards.

116. Modern awards and agreements cannot operate with respect to an employee to the detriment of that employee's NES entitlements.

117. The first NES entitlement appears to provide a maximum working week for full time employees of 38 hours per week. However, this entitlement is poorly drafted and does not provide the entitlement it purports to provide.

118. The relevant provision of the NES [section 62 of the FW Act] reads:

> 62 Maximum weekly hours
>
> Maximum weekly hours of work
>
> (1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
>
> (a) for a full-time employee—38 hours; or

(b) for an employee who is not a full-time employee—the lesser

of:

(i) 38 hours; and

(ii) the employee's ordinary hours of work in a week.

119. Thus it can be seen that the 'entitlement' to a maximum working week of 38 per week is immediately qualified by the rider 'unless the additional hours are reasonable' which largely renders the entitlement unenforceable. The terms of the NES are stated operate as fundamental minimum entitlements: no award or agreement provision can provide a term of employment detrimental to the provisions of the NES. [6]

120. However, the ASU is aware of at least one enterprise agreement that effectively sets the minimum working week for employees at 40 hours per week contrary to the spirit and intent of the NES. That is the TNT Customer Service Express Agreement 2011-2013[AG2010-24253]. This requires that all employees work a minimum of 40 hours per week being 38 ordinary hours and two hours of overtime each and every week being 'reasonable additional hours' in the view of the employer.

121. The ASU objected to the approval of this agreement on the grounds that it was detrimental to employees compared to the provisions of the NES specifying a maximum working week of 38 hours. In response to the Union's concerns, the tribunal accepted an undertaking[7] from the employer that employees could refuse to work these additional hours where such hours were "unreasonable" in accordance with the terms of section 62 (3) of the Act. If employees could demonstrate unreasonableness, they could work 38 hours with the deduction of two hours pay at overtime rates.

122. In the submission of the ASU, this places an unreasonable burden on the employees concerned; firstly in having to justify on a weekly basis their entitlement to a maximum 38 hour week and secondly by requiring them to take a pay cut to achieve this outcome. The 40 hour week at TNT arose from the previous existence of a rostered day off arrangement [allowed under averaging rules] which maintained their 38 hour week. Now they are required to work 40 hours without an RDO.

[6] FW Act sections 44 and 55

[7] Decision of SDP Hamburger [2011] FWAA 398

123. **The ASU submits that the 38 hour week entitlement should be a guaranteed amount of regular hours and that employees must have an absolute right to refuse to work in excess of this period [unless under an averaging system] and not the highly qualified right as at present.**

124. The NES also provides an entitlement for employees to make requests for flexible working arrangements with regard to family responsibilities. Section 65 of the Act provides:

65 Requests for flexible working arrangements

Employee may request change in working arrangements

(1) An employee who is a parent, or has responsibility for the care, of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:

(a) is under school age; or

(b) is under 18 and has a disability.

…

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee—the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Agreeing to the request

(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

(5) The employer may refuse the request only on reasonable business grounds.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

125. Section 76 also provides an NES entitlement with regard to additional periods of unpaid parental leave:

> 76 Extending period of unpaid parental leave—extending for up to 12 months beyond available parental leave period
>
> *Employee may request further period of leave*
>
> (1) An employee who takes unpaid parental leave for his or her available parental leave period may request his or her employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period.
>
> *Making the request*
>
> (2) The request must be in writing, and must be given to the employer at least 4 weeks before the end of the available parental leave period.
>
> *Agreeing to the requested extension*
>
> (3) The employer must give the employee a written response to the request stating whether the employer grants or refuses the request. The response must be given as soon as practicable, and not later than 21 days, after the request is made.
>
> (4) The employer may refuse the request only on reasonable business grounds.
>
> (5) If the employer refuses the request, the written response under subsection (3) must include details of the reasons for the refusal.

126. Employers are prohibited from contravening terms of the NES by section 44 of the Act. However, this section also provides that no orders can be made with respect to the provisions of section 65 (5) or 76 (4):

> **44 Contravening the National Employment Standards**
>
> (1) An employer must not contravene a provision of the National Employment Standards.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection 65 (5) or 76(4).
>
> Note 1: Subsections 65 (5) and 76(4) state that an employer may refuse a request for flexible working arrangements, or an application to extend unpaid parental leave, only on reasonable business grounds.
>
> Note 2: Modern awards and enterprise agreements include terms about settling disputes in relation to the National Employment Standards (other than disputes as to whether an employer had reasonable business grounds under subsection 65 (5) or 76(4)).

127. While these entitlements relate only to the making of a 'request', the employer may only refuse the request on 'reasonable business grounds'. Access to this right is further limited by the fact that there is no available disputes settling mechanism to determine whether the employer has in fact reasonable business grounds for refusing the request unless the employer has agreed to one in writing. As seen above, modern awards do not allow for settling of disputes about the terms of an award or the NES by arbitration other than by consent arbitration. Section 146 dealing with modern awards further provides:

146 Terms about settling disputes

> Without limiting paragraph 139(1)(j), a modern award must include a term that provides a procedure for settling disputes:
>
> (a) about any matters arising under the award; and
>
> (b) in relation to the National Employment Standards.
>
> Note: FWA or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

128. Section 739 states:

739 Disputes dealt with by FWA

> (1) This section applies if a term referred to in section 738 requires or allows FWA to deal with a dispute.
>
> (2) FWA must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:
>
> (a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to FWA dealing with the matter; or
>
> (b) a determination under the *Public Service Act 1999* authorises FWA to deal with the matter.

129. The effect of these provisions is to prevent any employee challenging any decision of an employer to refuse a request under the relevant provision of the NES if that employer nominates 'reasonable business grounds' as the reason for refusal.

130. **The ASU submits that, at the very least, the FW Act should be amended to remove the limitation on employees accessing disputes settling procedures with regard to reasonable business grounds disputes.**

General protections – adverse actions

131. The ASU strongly supports the provisions of the Act with regard to General protections and adverse actions. The ASU has had cause to seek to protect members from adverse actions taken against them by employers. Section 365 of the Act provides that where a contravention involves a dismissal, an application may be made to FWA to deal with the dispute.

132. However, the powers of FWA to deal with such disputes is limited. Section 368 of the Act provides that a conference *must* be convened but provides little power to FWA to resolve the dispute:

> **368 Conferences**
>
> (1) If an application is made under section 365, FWA must conduct a conference to deal with the dispute.
>
> Note 1: For conferences, see section 592.
>
> Note 2: FWA may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)). One of the recommendations that FWA might make is that an application be made under Part 3-2 (which deals with unfair dismissal) in relation to the dispute.
>
> (2) Despite subsection 592(3), FWA must conduct the conference in private.

133. Firstly, FWA is limited to dealing with the dispute by mediation or conciliation or by other non binding means. If the matter cannot be resolved at this stage, FWA can issue a certificate to that effect allowing further proceedings in a Court.

134. However, despite the fact that FWA *must* conduct a conference, it does not have the power to compel any person to attend. Section 592 relevantly provides:

592 Conferences

(1) For the purpose of performing a function or exercising a power of FWA (other than a function or power under Part 2-6), FWA may direct a person to attend a conference at a specified time and place.

(2) An FWA Member (other than a Minimum Wage Panel Member), or a delegate of FWA, is responsible for conducting the conference.

(3) The conference must be conducted in private, unless the person responsible for conducting the conference directs that it be conducted in public.

Note: This subsection does not apply in relation to conferences conducted in relation to unfair dismissal or general protection matters (see sections 368, 374, 398 and 776).

135. The ASU has had experience of employers refusing to attend such conferences, thus limiting the tribunal's ability to resolve disputes by conciliation and mediation.

136. **This situation has no rhyme or reason: there appears to be little reason to require FWA to hold a conference to which it has no power to summons persons to be in attendance. The ASU strongly submits that the limitation to the conference power in section 592 be removed and that FWA have the power to require attendance in respect of conciliations with regard to dismissals related to adverse action and unfair dismissal generally [see above].**

137. The same situation occurs where an action may be taken under s.372. S.374 provides that:

374 Conferences

(1) If:

(a) an application is made under section 372; and

(b) the parties to the dispute agree to participate;

FWA must conduct a conference to deal with the dispute.

138. FWA should have the power to at least require parties to attend conferences to seek to resolves matters at the earliest stage by conciliation.

General protections Sham contractor arrangements

139. Section 357 states:

Part 3 Division 6—Sham arrangements

357 Misrepresenting employment as independent contracting arrangement

(1) A person (the *employer*) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and

(b) was not reckless as to whether;

the contract was a contract of employment rather than a contract for services.

140. The ASU has experienced call centers combining sham contracting with work from home arrangements to further reduce their liability to employees, such as OH&S and access to workers compensation. As 'independent contractors' the minimum wages in the Contract Call Centre Award 2010 do not apply, and contractors are exposed to low wages through a variety of insidious employment practices such as:

- Cuts to per call rate when quality control standards are not met;
- No minimum number of calls guaranteed;
- No minimum length of shift;

Payment of their own superannuation and insurances

141. **The ASU submits that for these reasons, that the Act should be amended to strengthen the sham contracting clause and provide a clearer definition of a genuine independent contracting arrangement.**

Equal remuneration

142. The FW Act 2009 introduced new provision with regard to equal remuneration. The Workplace Relations Act 1996 provided:

> **623 Equal remuneration for work of equal value**
>
> (1) A reference in this Division to **equal remuneration for work of equal value** is a reference to equal remuneration for men and women workers for work of equal value.

143. The Fair Work Act now provides:

> **302 FWA may make an order requiring equal remuneration**
>
> *Power to make an equal remuneration order*
>
> (1) FWA may make any order (an *equal remuneration order*) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.
>
> *Meaning of equal remuneration for work of equal or comparable value*
>
> (2) *Equal remuneration for work of equal or comparable value* means equal remuneration for men and women workers for work of equal or comparable value.

144. The equal remuneration provisions of previous federal Acts were little used. Developments in equal remuneration had occurred principally at the level of State tribunals, especially in NSW and Queensland. The Fair Work Act 2009 included for the first time in the federal law the concept of equal remuneration for work of *comparable value* as well as for work of equal value.

145. The ASU supported this change believing it to be important to achieving pay equity for women workers.

146. Since the commencement of the Fair Work Act, there has been only one successful case taken under this new provision using this new provision. The ASU, together with four other applicants, initiated this case in respect of workers in the social, community and disability services sectors. The claim was lodged in March 2010 and involved extensive proceedings over nearly two years before a Full Bench of FWA. An interim decision was made in May 2011 and a final decision in February 2012. [8]

[8] [2011] FWAFB 2700 and [2012] FWAFB 1000

The decision operates in respect to certain classifications in the modern Social, Community, Home Care and Disability Services Industry Award 2010.

147. The ASU welcomes the successful outcome of the case which will ensure equal remuneration for many employees in these important sectors when fully implemented. In the May 2011 decision the Full Bench unanimously concluded that "for employees in the SACS industry there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with workers in state and local government employment".[9]

148. This submission is not the place to review the outcome of this case other than to note that the changed legislation was critical to the success of this case in the federal jurisdiction. The successful application required extensive witness and other evidence and will not be easily emulated but it supports the decision of the Parliament to extend the definition of equal work to comparable work if the concept of equal remuneration is to be given practical effect in this country.

****

[9] [2011] FWAFB 2700 at par 291