SUBMISSION BY THE

Housing Industry Association

to the

Senate Education, Employment and Workplace Relations Committee

on the

Inquiry into The Fair Work Bill 2008

January 2009

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1. EXECUTIVE SUMMARY

1.1. The Housing Industry Association is Australia's largest representative of employers in the residential construction industry, representing over 40,000 builders, contractors, suppliers, and manufacturers.

1.2. HIA believes the Fair Work Bill ('*the Bill*') would be improved by amendments to the following provisions:

Rights of Entry

1.3. The Bill should clearly limit rights of entry to the employer/employee relationship so as to prevent unions from using statutory powers to interfere in independent contractor arrangements.

1.4. Only workplace inspectors should have access to non-union employee records. In the construction industry, inspecting such records should be the responsibility of the proposed Specialist Division of the FWA inspectorate.

Rights of Representation

1.5. Industrial associations should have the same rights of appearance as industrial organisations. There is no basis for granting some representatives preferential status.

Content of Agreements

1.6. Agreements should not be permitted to contain content pertaining to the union/employer relationship. This invites protected industrial action for union privileges rather than employee entitlements. Such disputes are divisive, protracted, and rarely settled in a way that improves productivity, efficiency, or freedom of association.

Bargaining and Representation Rights

1.7. Unions should not automatically be the bargaining agent of their members. Employers may be unaware they have obligations to a particular bargaining agent and can only be assured of meeting their obligations to bargaining agents by demanding to know whether employees are union members.

Voluntary Multi-Employer Agreements

1.8. The Bill allows employers to enter into multi-employer pattern bargains. These types of agreements should be scrapped. They invite pattern bargaining and are antithetical to improved productivity and competitiveness.

Arbitration

1.9. The Bill allows the Fair Work Australia to arbitrate an agreement if employees inflict sufficient harm upon themselves in response to an employer's lock out. This is an unacceptably low hurdle for arbitration. Instead, the relevant sections should limit arbitration to situations where the employer lock out is continuing.

Award Modernisation

1.10. One of the major potential benefits of the Government's policy is award modernisation. Genuinely modern, flexible awards suitable to the fair and efficient performance of work would be a major benefit to small business generally and the residential construction industry specifically.

1.11. However, award modernisation is being sidetracked by concerns about scope and award coverage. These problems arise in part because the Bill maintains the possibility that organisations may be parties to awards.

1.12. It would greatly assist the award modernisation process - and the modernisation of Australia's employment law framework - if *the Bill* abandoned the notion that organisations might be party to awards.

2. RIGHT OF ENTRY ISSUES

2.1. HIA is concerned that the current wording of the Bill permits unions to enter sites and inspect books and records relating to independent contractors and non-member employees.

Independent Contractors and Right of Entry

2.2. The rights of entry provisions in the Bill are not limited to the employer/employee relationship. Instead, they relate to a broader category of persons whose industrial interests the union is entitled to represent.

2.3. For example, ***Section 481***permits a union to enter premises and inspect records in relation to a suspected contravention of the Act or a fair work instrument that affects a member whose industrial interests the union is entitled to represent.

2.4. To investigate the breach the union is entitled to enter premises where people 'whose industrial interests they are entitled to represent' are performing work and 'view relevant work, process, or object', interview any person 'whose industrial interests they represent who agrees to be interviewed', and require the occupier or 'affected employer' to make copies of relevant documents available.

2.5. Further, ***Section 484*** permits a union to enter premises to hold discussions with 'people whose industrial interests the union is entitled to represent'.

2.6. Many unions, notably the TWU and CFMEU, have eligibility rules that cover independent contractors. So the phrase 'persons whose industrial interests the union is entitled to represent' covers independent contractors.

2.7. The right of entry rules therefore give unions a statutory right to enter sites and hold discussions where there are no employees, just independent contractors. It also potentially gives unions the right to review records of independent contractors, even if they are not members.

2.8. The Government's policy is to ensure that contractors are covered by commercial law, not industrial law. The current formulation of the right of entry provisions potentially undermines this objective because it allows access to sites and books and records where only a commercial, rather than employment, relationship exists.

Proposed Change
Right of entry to hold investigate a breach should be limited to 'employees whose industrial interests the union is entitled to represent'.

Non-Member Records

2.9. ***Section 482*** permits a union to require an employer to produce a record for the purpose of investigating a breach of the Act or a fair work instrument.

2.10. HIA is concerned that unions will have the ability to access non-member records. This right can be abused and used as a form of harassment, particularly in the construction industry.

Proposed Change
Only members of the proposed Specialist Division should be able to exercise such rights in the construction industry.

3. RIGHTS OF REPRESENTATION

3.1. The rights of representation penalise those who choose not to belong to registered industrial organisations or who are not large enough to employ in-house lawyers.

3.2. The Bill grants different rights of representation as follows.

a **Right to appear for a fee:** Under ***section 596,*** registered organisations are entitled to appear on behalf of members for a fee, but if unregistered associations charge a fee they are paid agents and cannot appear without FWA's leave under ***section 596***.

b **Right to use lawyers:** Lawyers can only appear with leave, regardless of whether they are appearing for free, but in-house lawyers employed by registered organisations and large companies may appear 'as of right' under ***section 596.***

c **Liability for costs:** Where a lawyer or paid agent has been granted leave to appear they may be ordered to pay costs for encouraging an applicant to file an unmeritorious claim or because of the way the matter was conducted.

These costs orders can be granted under ***section 780*** in respect of a conference regarding a breach of the General Protection provisions, under ***section 376*** in respect to a conference regarding an unlawful dismissal claim, and under ***section 401*** in respect to an unfair dismissal claim.

In-house lawyers for registered organisations and large companies can never face such sanction. While costs can be ordered against an applicant for bringing an unmeritorious claim, registered organisations or company lawyers can never face sanction for conducting a case belligerently.

3.3. HIA believes these different rights of representation are discriminatory. They offend the principle of freedom of association by penalising those who choose not to associate with registered industrial organisations and instead be represented by some other type of representative.

Proposed Change

Associations should have same representation rights as registered organisations.

The word organisation should be replaced with Association is ***section 596.***

4. CONTENT OF AGREEMENTS – MATTERS PERTAINING TO UNION RELATIONSHIP

4.1. ***Section 172(1)(b)*** expands the lawful content of workplace agreements to include matters pertaining to the employer/union relationship.

4.2. HIA believes this is the most serious concern with the Bill.

4.3. We have enjoyed many years of declining and now negligible industrial action across all industries. HIA believes a key reason for the industrial peace was the legislative changes that progressively limited the range of matters that could be pursued through protected industrial action.

4.4. The Bill sunders these important structural barriers. It invites protected industrial action for union privileges rather than employee entitlements. Such disputes are about workplace power. They are divisive, protracted and rarely settled in a way that improves productivity or freedom of association.

4.5. These problems will be exacerbated because the concept of "union/employer relationship" is new law. There is considerable uncertainty about what matters pertain to the union/employer relationship. The picture will not be certain until it is resolved after protracted and expensive test cases, probably all the way to the High Court. In the interim, the battle may be fought out in crippling industrial disputes in some of Australia's most important industries and workplaces.

4.6. A further concern is that the concept is not confined to unions in their capacity as representatives of members or employees. A union is a legal personality with its own interests and concerns independent of, and potentially at odds with, employees both members and non-members. HIA does not believe there is a policy justification for allowing protected industrial action for such interests unless they are somehow tethered to the interests of the people they represent.

4.7. This point only highlights the way in which the proposed changes offend the principle of freedom of association. It means one type of employee representative has access to protected industrial action as

a tool for demanding money, resources and preferential treatment from an employer.

4.8. This current provision risks shattering the industrial peace we have secured in recent years, undermining the productivity of Australian workplaces, and damaging the government's economic credentials.

Proposed Change

Section 172(1)(b) should be deleted.

5. BARGAINING & REPRESENTATION

5.1. ***Section 176(1)(b)*** makes unions the default bargaining representative of any member. The presumption can only be undone if the employee nominates a different representative. HIA believes this rule is unfair, unworkable, and unnecessary.

5.2. It is unworkable because employers do not know – and are not allowed to know – whether employees are union members. Many employees in the construction industry do not realise they are still union members even though they have not paid their due for many years. Many are members without their knowledge because their dues were paid directly by a previous employer.

5.3. It is unfair because rights and obligations – including obligations on third parties such as the good faith bargaining obligations in ***section 228*** - flow from being a bargaining representative. Such obligations should only be triggered by positive nomination. Otherwise both employers and employees could unknowingly breach their good faith bargaining obligations.

5.4. Finally, the presumption of representation is unnecessary because a union only needs one member to nominate for them to be at the bargaining table. In the vast majority of cases a union's request to be at the bargaining table will not be challenged and if it is obtaining an authorisation from a single member is unlikely to be a problem.

Proposed Change

Section 176(1)(b) should be amended to read any member who has nominated.

6. BARGAINING AND THE VOLUNTARY MULTI-EMPLOYER STREAM

6.1. The Bill contains a voluntary form of pattern bargaining.

6.2. Under ***section 172(3)*** two or more competing employers may agree to a single workplace agreement.

6.3. These types of agreements are supposed to be voluntary in the sense that no good faith bargaining orders (***sections 229(2))***, majority support determinations (***section 236)***, scope orders (***section 238),*** or protected industrial action (***section 413(2))*** can be obtained in connection with such agreements. However, the ability to move fluidly between bargaining streams undermines these prohibitions.

6.4. There is nothing that would prevent a union commencing an industry-wide or site-specific campaign for separate workplace agreements, supporting this campaign with good faith bargaining orders and protected industrial action, and then resolving each of the separate disputes through a series of 'voluntary' multi-employer pattern bargains or site agreements.

6.5. In the construction industry multi-employer agreements will be used to validate industry pattern bargains and site agreements *at the end of the process.*

6.6. Despite the general protections, particularly ***section 351*** which protects against discrimination, the mere fact that such agreements are possible will mean contractors will have to have them in order to obtain work. It will be hard to prove that the fact a contractor is not winning any tenders is because they have not signed up to the industry pattern agreement.

Proposed Change
Multi-employer agreements outside the single interest and low paid bargaining streams should be scrapped.

7. ARBITRATION

7.1. ***Division 6 of Part 3-3 of Chapter 3*** deals with FWA's power to terminate protected industrial action with the consequence that it may arbitrate an agreement under ***Division 3 of Part 2-5 of Chapter 3.***

7.2. Under ***section 423(3)*** FWA may terminate or suspend protected action if employees inflict sufficient harm upon an individual employee in response to an employer's lock out.

7.3. This is an unacceptably low hurdle for arbitration. It all but guarantees that any dispute where an employer resorts to a lock out will end in arbitration.

7.4. It is contrary to the government's stated policy in two ways:

a First, after a lock-out occurs, self inflicted harm is enough to justify arbitration. This is contrary to the Government's stated policy that self-harm would not be grounds for arbitration. The obvious reason for excluding self-harm is to not encourage industrial disputation as a pathway to arbitration.

b Second, the fact the harm is to a single employee means that only minor industrial action might result in arbitration because of the focus on each individual employee's personal circumstances. This is contrary to the government's stated policy that the arbitration would only be available in severe and protracted disputes.

Proposed Change

FWA should only take into account damage inflicted while the employer's lock out is continuing.

The relevant harm should be to employees as a group, not to an individual employee.

8. AWARDS AND AWARD MODERNISATION PROCESS

8.1. One of the real potential benefits of the Government's policy is award modernisation.

8.2. Under the Government's policy framework individual flexibility is provided through common law employment agreements, courtesy of a modern and flexible underpinning safety net.

8.3. Such flexibility would be a major benefit to small business. The time and cost required to negotiate collective workplace agreements is unnecessary and unwarranted for most small businesses. As a consequence, small business makes disproportionate use of individual arrangements compared to larger businesses. Without modern, flexible awards small business would be deprived of suitable mechanisms for implementing workplace flexibility.

8.4. Unfortunately, there is a risk the award modernisation process is being viewed solely as an award rationalisation exercise. HIA remains concerned that insufficient effort is going into designing simple flexible obligations. Instead, primary efforts appear to be invested in determining the scope of the award and which clauses from which old awards and NAPSAs should become the national standard.

8.5. This arises because industrial parties are wedded to old notions of awards being 'theirs' and sections of the Bill continue to reinforce this concept by granting preferential rights to industrial organisations that are a party to an award.

8.6. Registered industrial organisations were a necessary feature of system based on the settlement of interstate industrial disputes. With the Bill relying on the Commonwealth's power to regulate corporations, rather than its power to make laws regarding the settlement of interstate industrial disputes, awards are no longer settlements owned by the parties, or even the industry. They are modern, flexible safety nets, one of Government's economic and social tools for promoting productivity, fairness, and social inclusion. They are owned by FWA and through it the community.

8.7. There is no longer any merit in giving certain organisations a preferential say in the minimum standards of employment in Australia.

Proposed Changes

Delete the following sections of the Bill which give preferential rights to industrial organisations named as parties to the awards, including ***section 47***, ***section 48***, ***section 143(3)*** and particularly ***section 158(1)***