Australian Hotels Association

Submission to the Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the Fair Work Bill 2008

January, 2009

Executive Summary

The Fair Work Bill seeks to establish a single national industrial relation system that provides the legal, policy and - hopefully - cultural framework to govern workplaces operating in a modern service economy.

The AHA accepts that the Government has a mandate to change the current workplace relations laws. We have therefore assessed the Bill on whether it is consistent with the Government's election platform – Forward with Fairness. Our submission (i) focuses on areas that we believe are inconsistent with this policy or (ii) highlights concerns about the way the policy is interpreted in the Draft Bill.

In summary, the Bill is fair and balanced overall and has the potential to achieve increased productivity through bargaining at the enterprise level. It is underpinned by a guaranteed safety net, good faith bargaining obligations and clear rules governing industrial action.

The AHA recommends the following changes

- While we accept the inclusion of a multi employer bargaining arrangements for low paid workers we ask that the Senate Committee consider amendments that (i) provide a definition of low paid workplaces and (ii) remove the right for Fair Work Australia to arbitrate if there is no reasonable prospect of an agreement being made.

- We are opposed to unions having an automatic right to look at, and copy, employment records of all employees even if this only applies where those records are relevant to the suspected breach. We believe this contravenes the core principle of our Privacy Laws. We ask that Senate Committee recommend that unions be required to seek (i) approval from the relevant workers or (ii) an order from Fair Work Australia after proving they have reasonable grounds to suspect a breach.

The AHA retains concerns that there appears to have little or no modelling of the likely economic impact of the new laws, particularly on employment. We anticipate the new arrangements will initially increase compliance costs and workplace dispute as industrial parties seek to test elements of the new system in order to advance their interests

The Government appears to have made a sincere attempt to introduce legislation that seeks to provide the necessary foundations to support the emergence of productive workplaces that can successfully operate in a 21st century global economy.

The challenge is for the community, and more importantly the key players in the current "IR" system to use the new laws and jettison the old adversarial mindset and tactics. They need to engage in meaningful consultation and collaboration that achieves mutually beneficial outcomes for workers and their business.

Background to the Inquiry

The Senate has referred the provisions of the Fair Work Bill 2008 ("the Bill") to its Education, Employment and Workplace Relations Committee for report by 27 February 2009. The purpose of the Bill is to create a new framework for workplace relations to commence on 1 July 2009. The Bill will:

1. establish a guaranteed safety net of minimum terms and conditions;
2. ensure that the safety net cannot be undermined by the making of statutory individual agreements;
3. provide for flexible working arrangements;
4. recognise the right to freedom of association and the right to be represented in the workplace;
5. provide procedures to resolve grievances and disputes;
6. provide effective compliance mechanisms;
7. deliver protections from unfair dismissal for all employees;
8. emphasise enterprise level bargaining underpinned by good faith bargaining obligations and rules governing industrial action; and
9. establish a new institutional framework to administer the new system comprising Fair Work Australia and the Fair Work Ombudsman.

The Australian Hotels Association (AHA)

The AHA is the pre-eminent tourism and hospitality industry organisation in Australia. It has around 6000 members operating general and accommodation hotels.

The AHA is a Federally Registered Industrial Organisation of Employers. It has a National Office, branches in each state and territory and a National Accommodation Division to represent the interests of four and five star accommodation properties. State branches operate autonomously and manage their own finances.

Currently, our members operate under three federal awards and numerous state awards. Only a limited number of businesses have embraced enterprise based employment arrangements.

Further details on the industry are found at Attachment 1.

Overview of the draft Bill

"Today we deliver the creation of a new workplace relations system, one that allows Australia to grasp the promise of the future without forgetting the values that made us who and what we are" (2nd Reading Speech - Deputy Prime Minister)

The Bill seeks to establish a single national industrial relation system that provides the legal, policy and - hopefully - cultural framework to govern workplaces operating in a modern service economy.

The Government consulted the AHA during the development of the Bill. The AHA was a member of the Deputy Prime Minister's Business Advisory Group and our representative joined the expert panel established to review the draft legislation.

We have been impressed with the preparedness of the Deputy Prime Minister and the Minister for Small Business to discuss issues of relevance, listen to areas of concern and take action where appropriate.

The AHA accepts that the Government has a mandate to change the current workplace relations laws. We have therefore assessed the Bill on whether it is consistent with the Government's election platform – Forward with Fairness. Our submission (i) focuses on areas that we believe are inconsistent with this policy or (ii) highlights concerns about the way the policy is interpreted in the Draft Bill.

In summary, the Bill is fair and balanced overall and we believe this is an achievement considering the significant focus that workplace relations received in the lead-up to the last election.

However, there appears to have been no or little assessment of the likely economic impact of the proposed changes on the economy, particularly as they relate to employment. This could be an issue given the current world economic climate.

The Committee will receive a range of submissions that seek to promote, maintain, protect or eliminate certain elements of the current IR system. We believe it is important to view the new legislation as a comprehensive package of reforms and needs to be treated accordingly. Amendments should not be assessed in isolation and must be considered from a "whole of system" perspective.

The important issues for the Senate Committee are :

- Will the new law regulate businesses operating in 21st century service economy more effectively?

- Will the new law help promote innovation and productivity improvement, maintain business viability and meet the diverse needs of individual workers in a way that ensures fair outcomes for all?

- Is the law fair and balanced, clear and simple and capable of being rigorously enforced?

The Challenge Ahead

The world is a lot different to the one in which Australia devised the original conciliation and arbitration system more than one hundred years ago. Economic reform, globalization, new technologies and rising levels of education have rendered the old ways obsolete.

Today building greater opportunity for all Australians requires a degree of flexibility and responsiveness that would have been unimaginable to previous generations. Competition is sharper and innovation faster.

But in this new world, Australians voted for a workplace relations system that delivers a fair go, the benefits of mateship at work, a decent safety net and a fair way of striking a bargain. (2nd Reading Speech - Deputy Prime Minister)

The Government understands that the needs of a 21st century, global economy cannot be met by tinkering at the edges of the existing industrial relations system.

However, the Government is dealing with a population with little knowledge, understanding or interest in major reform to the current system. At the same time the Government is faced with a "workplace relations industry" that will seek to maintain its power and influence by retaining much of the current rule bound, legalistic, adversarial system. The creation of a 21st century industrial relations system is too important to be left to the "IR club". We need a national conversation about the appropriate level and means of regulation that is required to protect individual interests and enhance business viability in a way that harnesses the potential of this great country.

Finding quality staff will remain a key business challenge for the next few decades despite the current economic slowdown. Economic modelling contained in a report commissioned by the Howard Government Workforce Tomorrow indicates that Australia faces a potential shortfall of 195,000 workers by 2012 resulting from an aging population. We know now that the workforce of the future will be more diverse. It will consist of a greater number of older workers, parents, people with disabilities, Indigenous Australians and people wanting to work part time.

Employers will need to be able to adjust their workplace arrangements to cater for these changes if they are to attract a shrinking supply of available talent. They will need to offer innovative work arrangements in diversified and flexible workplaces.

There is a continuing expectation by some people that third party intervention is an essential ingredient in creating fair and productive Australian workplaces. This expectation requires critical evaluation. Increasingly Australians want to get on and manage their own lives. The new processes and systems must therefore define rights and obligations, moderate the influence of differential bargaining power and ensure disputes are minimised and/or dealt with in a fair, prompt and cost effective manner. The modern service economy needs to move away from the adversarial mindset that underpinned the traditional Australian IR system.

The Fair Work Bill must promote a workplace transformation similar to the one that occurred a century ago. The Bill is the final step in the transition of an Australian workplace relations system established in the industrial age to one that can harness the unlimited potential of a service economy.

Where have we come From ?

The new law is the next step in transforming the legalistic, centralised, occupationally - based IR system established at the beginning of the 20th century to one responsive to the needs of a service economy.

The shape of industrial relations in the 20th Century was defined by the views of Justice Henry Higgins. In the 1907 Harvester Judgement Higgins ruled that workers were entitled to a living wage which "must be enough to support the wage earner in reasonable and frugal comfort". A wage earner was seen as a married man with 2 children. This decision was overturned on appeal by the High Court but still set a benchmark in Australian industrial case law. Higgins regarded the minimum wage as sacrosanct and applied the Harvester reasoning to subsequent judgments in his long and distinguished career as President of the Conciliation and Arbitration Court. It also influenced the decisions of the state counterparts. Higgins was also vehemently opposed to "the higgling" of the market place and referred to the "despotism of contract". In the view of Higgins the contractual relationship between employer and employee needed to be supervised by an independent third party.

Despite two decades of reform the organisational infrastructure and mindsets of the old IR system is still prevalent. This system had its roots in a world where the new Federation was moving from an agrarian to an industrial economy. The Federal Government combined wage regulation with tariff protection in the Conciliation and Arbitration Act of 1904 and the Tariff Act of 1906 to create a closed, protected, European enclave in the Asia Pacific.

The original constitutional bases for Commonwealth industrial relations power required the existence of an industrial dispute that extended beyond the boundaries of one state. This created legal processes, systems and cultures based on a perceived conflict between labour and capital. It led to the centralised fixation of employment conditions through occupational awards. These undermined the need for managers to negotiate and foster collaboration in the workplace.

The emergence of the global economy forced the Whitlam Government to reduce tariff protection in the 1970's. In the 1980's the Hawke/Keating Government dismantled the "one size fits all" system of centralised wage fixation, replacing it with one focussed on bargaining at the enterprise level. The Howard Government introduced further reforms that continued the move away from the centralised model.

Underpinning the reform process was the decision by the Keating Government to base Federal WR laws on the Corporations power rather than the Conciliation and Arbitration power.

The Future

A "one size fits all approach" is inconsistent with the needs of a modern society. The overwhelming majority of Australia's 2 million businesses are small operations employing less than 20 people. Union membership has declined to just 14% of the private sector workforce and this is predominately in industries linked to the industrial age. The needs of a hotel in Broome are not the same as one in Burnie.

The new law has to facilitate a cultural change in the way Australians engage in the workplace. The new laws must provide fairness and flexibility across all Australian workplaces ranging from global mining corporations like BHP Billiton, national retailers like Woolworths and in particular, the many thousands of small and medium size businesses that provide the foundations of the Australian service economy. It must cater for differences in size, functions and location.

The rise of casualisation, outsourcing, contracting and off-shoring show that the old rules and attitudes were longer relevant in a service economy operating in a 24/7 world and global market place.

This is why the Keating Government chose to walk away from the central fixation of employment conditions and promote bargaining at the enterprise level.

The Role of Management

The management guru Peter Drucker said that increased productivity is the reward for good management. The 1996 Karpin Report analysed the quality of Australian management. It identified a number of flaws in the quality and development process of mangers in this country. It found that many lacked the necessary soft skills required to manage and develop an effective modern workplace.

The quality of management will therefore need to change if the potential of the new laws are to be realised. The previous WR system enabled many managers to abdicate their obligations to consult and develop collaborative workplaces because employment terms and conditions were imposed from afar and outside the control and responsibility of line management.

Fair Work Australia will need to ensure that managers have the knowledge, skills and motivation to foster productive and fair workplaces.

The Role of Trade Unions

"the strength of trade unionism is based on representing a majority of workers across most economic activities. If the union movement cannot adept to the emerging new economy, it

will end up a niche player representing a declining number of workers quarantined within a particular set of industries" Lindsay Tanner Tales from the New Shop Floor – Page 6

The Bill provides trade unions with increased power and influence.

The key role that trade unions played in the development centrally determined employment conditions in defined occupations has gone and should not return.

However, unions should play a role in representing their constituents in the development of the new system by contributing to the development of the minimum terms and conditions in Modern Awards and, if requested, representing the interests of members at the enterprise level.

The key to new system is to ensure workers and employers have an opportunity to create an environment where their individual and collective needs are recognised and pursued. While this will be through collective bargaining it should not be assumed that the involvement of external employee and employer groups is required.

Trade unions should also not be able to use individual workplaces to pursue agendas that are not in the direct interests of workers or that enterprise.

Review of the Fair Work Bill - Terms and Conditions of Employment

The Bill aims to achieve productivity and fairness through enterprise-level collective bargaining underpinned by the guaranteed safety net, simple good faith bargaining obligations and clear rules governing industrial action. (2nd Reading Speech - Deputy Prime Minister)

The bedrock of the new system is the promotion of enhanced productivity through bargaining at the enterprise level. It is important that the promotion of collective bargaining foster collaboration in the workplace.

Negotiations at the enterprise level will be underpinned by a safety net of basic entitlements and employment arrangements for all workers in Australia. These entitlements are contained in the National Employment Standards and modern awards. Informed employees will have the right to negotiate variations to these arrangement that meet their particular needs through enterprise bargaining or the application of the new flexibility clause.

Despite significant media comment the abolition of individual contracts and the promotion of collective bargaining are peripheral issues. Collective bargaining was always available under the current legislation. The new laws do not provide an appropriate balance between the right to have direct negotiations with employees and allowing for union involvement if an appropriate proportion of employees select to go down this path.

The AHA believes that business owners, managers and staff will need assistance to develop the knowledge and skills to negotiate collectively at the workplace level. Fair Work Australia must have the resources to provide this assistance.

Reforms introduced since the 1980's have acknowledged the need to move away from a system were employment arrangements were determined away from the enterprise by external parties. They have promoted bargaining at the enterprise level by prescribing the negotiating process and requiring all parties to abide by the agreed terms of the final agreement. Industrial action is an accepted element but only during the bargaining period. It has recognised that once "a deal" is finalised all parties should comply with the agreed terms. Failure to do so should activate dispute resolution procedures and if necessary enforcement processes.

The Bill maintains this approach and includes provisions to restrict industrial action during and outside the bargaining period. It will provide a framework that allows individuals in a workplace to manage their own destiny in a fair and flexible manner without the uninvited intervention of third parties.

The Bill has the potential to maintain the evolution to a system based on fair and effective bargaining at the enterprise level. The challenge will be to ensure a new environment emerges that enables the key elements of the legislation to operate as intended in practice.

The AHA retains concerns that the new arrangements will increase compliance costs and workplace dispute as industrial parties seek to test elements of the new system in order to advance their interests.

The Safety Net

The Bill provides for a comprehensive safety net of minimum wages and employment conditions that cannot be stripped away. The safety net is in two parts.

The National Employment Standards comprise the ten legislated employment conditions covering essential conditions such as weekly hours of work, leave, public holidays, notice and redundancy pay and the right to request flexible working arrangements.

Modern awards are currently being developed by the Australian Industrial Relations Commission. Modern awards will build on the National Employment Standards and will cover a further ten subject areas, including: minimum wages, arrangements for when work is performed, overtime and penalty rates, allowances, leave and leave loadings, superannuation and procedures for consultation, dispute resolution and the representation of employees. (2nd Reading Speech - Deputy Prime Minister)

Former Clinton Labour Secretary Robert Reich in his book Essentials for a Decent Working Society identified three principles underpinning a fair and decent society:

- As companies do better, their employee should too

- Jobs should pay enough to lift a family out of poverty
- All of us should have full opportunity to make the most of our God-given talents and abilities.

The essential elements of a decent society already exist in Australia. We have a high minimum wage, access to free universal health care, affordable tertiary education, a generous social welfare system by OECD standards and a well-established retirement savings scheme.

Under the Bill, Modern Awards will define the base entitlement for workers in all workplaces. They should provide a simple and transparent guide to terms and conditions and will be the industrial equivalent of a "standard form contract". They will provide employers and workers clearer guidance in enterprise negotiations and address the confusion and uncertainty that exists under the estimated 4300 industrial awards and agreements that currently operate.

In a speech to the Fair Work Australia Summit in 2008 the Deputy Prime Minister explained *"our award modernisation process is not about trying to drag old awards kicking and screaming into the 21st century. Our goal will be to create new up-to-date awards, not simplify old awards around the edges".*

The Government has indicated that there will be no winners or losers from this process and existing terms and conditions in State and Federal Awards will be maintained for at least five years.

Individual flexibility arrangements

The Bill provides that each modern award must include a flexibility term to enable employers and employees to negotiate an individual flexibility arrangement to meet their needs that may vary the application of specified award terms. The Bill provides strict protections to ensure that any such individual agreement is entirely voluntary and that an employee cannot be disadvantaged. (2nd Reading Speech - Deputy Prime Minister)

The AHA strongly supports this provision and believes it must operate without the need for third party intervention and approval.

Modern awards and employees on high incomes

The Government recognises that awards have less relevance to employees earning high incomes. Under the Bill, an employer and an employee who is guaranteed to earn more than $100,000 indexed may enter a written guarantee that results in a modern award not applying. The Bill includes a number of important protections to ensure employees enter such an arrangement voluntarily. (2nd Reading Speech - Deputy Prime Minister)

The AHA strongly supports this provision

Reviewing modern awards

The Bill requires Fair Work Australia to undertake four-yearly reviews of modern awards to ensure that they maintain a relevant and fair minimum safety net and continue to be relevant to the needs and expectations of the community.

The Bill allows adjustments to modern awards between the four-yearly reviews in limited circumstances, such as to deal with changes in the work value of classifications or to deal with pressing new circumstances affecting a particular award. (2nd Reading Speech - Deputy Prime Minister)

The AHA supports the integration and modernisation of awards to provide a logical set of industry based employment standards.

A key challenge for the AIRC will be the future of occupational awards that apply across industries. The trade union movement attempted to rationalise industrial coverage in the 1980's. Most employers would prefer that their workplace operate under a single Modern Award involving one union. This continues to provide challenges for the union movement.

It must also be remembered that the contents of existing State and Federal Awards are the cumulative result of centralised negotiations undertaken by the industrial parties over a number of years. They reflect the relative bargaining power of the parties during that time. They should not necessarily be seen as an objective assessment of a fair set of minimum entitlements and conditions for a worker in that industry.

The release of first batch of Modern Awards in key industries by the AIRC highlights the challenges confronting Australia in transforming our legalistic, centralised, occupationally-based industrial relations system into one responsive to the needs of a service economy.

The Federal Government indicated the Award Modernisation process would not be about trying to drag old awards kicking and screaming into the 21st century. It was supposed to be about starting from scratch and re-thinking a new, modern, relevant and decent minimum safety net for the industries or occupations covered by the award.

Despite this request, the AIRC has in the majority of cases delivered modern awards that are predominately a "cut and paste" of a current federal lead awards. It has missed an opportunity to revamp antiquated, legalistic industrial instruments into something that would be more operationally friendly for the service sector and support fair enterprise negotiations.

Rather than creating a template to foster improved relationships at the workplace, it has maintained arrangements that will require ongoing interpretation by external parties. Some Modern Awards will increase operating costs to low-margin businesses.

It is a concern that the AIRC has ignored the Government's request that the review process not disadvantage employees or lead to an increase of costs to employers. The Fair Work Bill provides the AIRC's new incarnation, Fair Work Australia, with significant power to intervene in workplace arrangements. The Modern Award Review process provides tangible evidence that more may need to be done to ensure the revamped independent body has the capacity to further the goals of the new legislation and support

the establishment of a workplace relations system that delivers fairness and productivity improvements by fostering direct bargaining by employees and their staff at the enterprise level.

Minimum wages

The Bill provides for minimum wages in modern awards to be reviewed every year by a specialist Minimum Wage Panel within Fair Work Australia. The minimum wages in modern awards will override any lower rates in an enterprise agreement made under the Bill.

The Bill also requires Fair Work Australia to make a national minimum wage order to provide minimum wages for all award free employees. (2nd Reading Speech - Deputy Prime Minister)

The AHA welcomes this provision and hopes it will lead to continuation of the current process operating under the Fair Pay Commission.

Our experience is that this approach is far superior to the quasi-legalistic system that operated in the National Wage Cases conducted by the AIRC.

Equal remuneration

The Bill strengthens the equal remuneration provisions to include the principle of equal remuneration for work of comparable value. (2nd Reading Speech - Deputy Prime Minister)

The AHA supports this provision

Enterprise Agreements

The Bill provides a new framework for enterprise bargaining which does not use any concept of union or non-union agreements. Instead, an agreement is made when approved by a valid majority of the employees to whom it will apply. A union that acted as a bargaining representative during the negotiations may apply to be covered by the agreement.

This new framework is premised on good faith bargaining and recognises that most workplaces already bargain in good faith without any intervention. However, where this does not happen, the Bill empowers Fair Work Australia to make orders to ensure compliance with the good faith bargaining requirements (2nd Reading Speech - Deputy Prime Minister)

Majority Support Orders

Firstly, the Bill provides that where an employer refuses to bargain with its employees, an employee bargaining representative can ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement. (2nd Reading Speech - Deputy Prime Minister)

The AHA supports this provision.

Good faith bargaining orders

The AHA supports this provision. Fair Work Australia must seek to assist businesses understand the opportunities and obligations associated with good faith bargaining at the enterprise level in order to foster a culture of consultation and collaboration.

Multi – employer bargaining

The Bill provides that where employees and employers genuinely wish to bargain on a multi-employer basis they will be free to do so. Protected industrial action and good faith bargaining orders are not available in these circumstances.....The Bill provides it is unlawful to coerce an employer to make a multi-employer agreement or to discriminate against the employer if they have not made a multiemployer agreement. . (2nd Reading Speech - Deputy Prime Minister)

The AHA supports this provision.

Bargaining for the low paid

The Bill provides a new scheme of bargaining for low paid employees. Protected industrial action is not available, but Fair Work Australia will have the obligation to facilitate the making of agreements and will play a hands-on role to get the parties bargaining. For example, The Bill provides for the possibility of a workplace determination in the low paid stream in two circumstances – by agreement or if there is no reasonable prospect of an agreement being made. (2nd Reading Speech - Deputy Prime Minister)

The AHA accepts that there could be benefit in a system that enables a number of small businesses to negotiate collectively in order to identify workplace arrangements that enhance productivity. We retain concerns that there will be an increase in compliance costs and workplace disruption as the parameters of the new provisions are explored and clarified.

The AHA's initial support for this provision assumed that (i) the protection would apply to legitimate low wage workplaces. These would generally be small operations without the capacity to justify a separate agreement (eg less than 6 employees and (ii) a business would have the right to not accept the outcome of negotiations.

The current drafting of the Bill has meant that the AHA has withdrawn its support for this provision. We believe the Senate Committee needs to recommend amendments that address the following areas of concern:

(i) Definition of low paid

The Act does not define what constitutes a low paid worker and where the new provision should apply. For example a definition based on the one used by the ACTU in recent submissions to National Wage Cases would see up to 20% of the workforce covered.

Any definition needs to take account of the size of the business and the average hourly rate of pay in the industry. There is no reason why a large employer of low paid workers should be dragged into a multi employer arrangement unless they chose to do so. There is sufficient scope under the legislation for employers in a large organisation to initiate a bargaining exercise within that particular organisation.

It would also be inappropriate to define a low paid enterprise in a 24/7 service business by the 9 to 5, Monday to Friday rate of pay. Most workers enjoy penalty rates that boost the average hourly rate of pay and therefore this rate should be used to establish whether workers are low paid.

(ii) Arbitration by Fair Work Australia

The Government information sheet – Assisting Low paid employees and those without access to collective bargaining released in September, 2008 indicated that

"Fair Work Australia would not be able to order bargaining participants to make concessions or to require the inclusion of particular content in an agreement. "

The AHA was therefore extremely disappointed that the Fair Work Bill provides for *"the possibility of a workplace determination in the low paid stream in two circumstances – by agreement or if there is no reasonable prospect of an agreement being made."*

The AHA does not accept that the Bill provides protections that ensures that this provision will only be used in rare cases. The provision is inconsistent with the Forward with Fairness policy statement and more importantly will undermine the core principle of the new legislation - to foster mutually agreed arrangements negotiated at the enterprise level. It has the potential to trigger a return to the "bad old days" of central wage fixing. It will encourage applications for multi employer bargaining to be accompanied by a "logs of claims" similar to pattern bargaining. It will undermine "good faith" bargaining by providing parties with the incentive to resist compromise and "sit it out" making a decision while they wait for the intervention of the external referee.

The potential to turn the clock back has been foreshadowed by the union movement. The National Secretary of the LHMU In a recent newspaper article indicated that the *"union would use the new laws to seek industry-wide pay settlements"* (The Australian 27/11/2008).

The Deputy Prime Minister refuted this suggestion in the same article saying the low paid bargaining stream:

"does not provide for, and nor is it intended to provide, the whole-of-industry agreement making...it is the modern award that prescribes minimum conditions across an industry.....The primary focus of the act is agreement-making at the enterprise level as this has been demonstrated to deliver real wage increases that are offset by productivity gains to the employer tailored to the needs of the particular enterprise..... the purpose of the low paid bargaining stream is to provide an efficient means of helping to facilitate bargaining for low-paid employees and their employers who have not received the benefits of bargaining" (The Australian 27/11/2008 a copy of the article is found at Attachment 2)

There is no need to include a power for Fair Work Australia to arbitrate in multi employer negotiations. Any decisions in a "low paid" bargaining agreement will need to be underpinned by productivity offsets. A business operator should be free to reject the new terms if they wish to. In so doing they will forgo any productivity benefits and hence could suffer a market disadvantage against competing businesses.

The AHA believes that Fair Work Australia should be able to take account of if there is a demonstrable industry trend to avoid providing improved wages and conditions to low paid workers through enterprise bargaining in their tri-annual review of the relevant modern award

The AHA accepts the Deputy Prime Minister is sincere in her interpretation of how she believes this section will be applied. However, our experience with the award modernisation process suggests that this might not be the case in practice and we believe the provision for arbitration will merely turn the clock back to the days of the old adversarial, central wage fixing system for a significant number of labour intensive businesses in the service sector.

<u>Agreement content and Approval</u>

The Bill provides that all matters pertaining to the relationship between the employer and its employees, as well as to the relationship between the employer and a union representing those employees will be the subject of bargaining. . . (2nd Reading Speech - Deputy Prime Minister)

The Bill provides that in order for Fair Work Australia to approve an enterprise agreement it must contain:

- *a flexibility term that allows individual flexibility arrangements, subject to specified protections;*
- *a dispute settlement process that must involve either Fair Work Australia or another person or body independent of the parties and that provides for the representation of employees in the process; and*

a term providing for consultation with employees about major workplace changes and that provides for the representation of employees in that process. . . (2nd Reading Speech - Deputy Prime Minister)

The Bill provides that Fair Work Australia must not approve an agreement that includes terms that are inconsistent with unfair dismissal, right of entry, National Employment Standards and the general protection provisions of the Act. Fair Work Australia must also be satisfied that:

- *the employer and a valid majority of the employees to whom the agreement will apply genuinely agree to the agreement; and*
- *each employee would be better off overall under the agreement in comparison to the relevant modern award. . .* (2nd Reading Speech - Deputy Prime Minister)

The AHA accepts this provision: subject to:

1. The definition of matters pertaining to the relationship between the employer and its employees, is consistent with the High Court Decision relating to such matters.
2. A revision of the 21 day period that must have passed since the notice of employee representation was provided to the final employee before the ballot can commence, increasing the time it takes to get an agreement approved.
3. Changes to the Better off overall test ("BOOT"). This is too restrictive because it takes into account each prospective employee (not even employed by the employer) and makes it very difficult to establish that staff overall benefit from the agreement. The proposed BOOT test will mean that an Enterprise Agreement will fail unless every single employee is considered to be better off. The AHA suggests a return to the Best Interest Overall Test. This was contained in legislation prior to March 2006.

Workplace determinations

There are times when, despite their best efforts, parties cannot reach agreement. To assist the parties, the Bill enables Fair Work Australia to exercise broad conciliation powers at the request of one of the parties.

Provided the parties have bargained in good faith, the Bill provides that they will be able to walk away without having a settlement imposed on them.

Where the parties agree, the Bill provides that Fair Work Australia may also make a binding determination on matters in dispute.

In those limited circumstances where protected industrial action is occurring in a bargaining context that has a particularly negative or dangerous impact, the Bill provides scope for Fair Work Australia to resolve the dispute by making a workplace determination.

Firstly, the Bill incorporates the long standing capacity for a workplace determination to be made where industrial action in threatening (or would threaten) to endanger the life, personal safety or health or welfare of the population or part of it or to cause significant damage to the economy.

Second, a new ground in the Bill for the making of a workplace determination is where protracted industrial action is causing significant economic harm to the bargaining participants, or such harm is imminent. . (2nd Reading Speech - Deputy Prime Minister)

The AHA accepts this provision

Rights and Responsibilities - General protections

The Bill incorporates the current provisions relating to freedom of association, unlawful termination and other miscellaneous protections into a streamlined and easy to follow Part titled General Protections. In doing so, the Bill provides more comprehensive protections for workers in some situations. The Bill's general protections ensure that employees remain free to choose to be represented by a union, provide more comprehensive protections for those participating in collective activities (such as representing other employees or bargaining). Employees with carer's responsibilities will also now be protected from discriminatory treatment.(2nd Reading Speech - Deputy Prime Minister)

The AHA accepts these provisions. We currently have a constructive working relationship with our relevant union (LHMU). We have been discussing ways of working collaboratively to establish an effective industry development strategy.

Unfair dismissal

Under Work Choices, employees in businesses with up to 100 workers could be dismissed for any reason without rights to challenge the dismissal. The Bill provides a new scheme of unfair dismissal protections to ensure good employees are protected from being dismissed unfairly, while enabling employers to manage under-performing employees with fairness and with confidence. The process for Fair Work Australia dealing with unfair dismissal applications will be streamlined and simplified. (2nd Reading Speech - Deputy Prime Minister)

The AHA appreciates the efforts of the Minister for Small Business and the Deputy Prime Minister to establish arrangements that meet the diverse needs of a range of stakeholders in relation to the termination of staff.

The AHA accepts that this provision gives effect to a Government election commitment. The new Unfair Dismissal Code provides a fair process to facilitate the removal of non-performing staff in small businesses. It reflects contemporary human resource management practice. However, the need for this type pf protection remains contentious issue with small business operators who regularly indicate that unfair dismissal provisions stop them employing staff. The market volatility in the service industry means that staff costs are one of the few variable costs in a small service business. Many operators will avoid entering into permanent staffing arrangements if they perceive it will lock them into fixed cost structures.

There appears to have been no costing of the likely affect on employment of this change and the actual impact of the current unfair dismissal provisions. Anecdotal feedback from employers would suggest that the current laws gave them the confidence to employ more people or transfer casual staff to permanent employment.

AHA Branches have raised the following specific issues in relation to the arrangements outlined in the Bill:

- The provision that may see an employer that allows for an employer going straight into a hearing when they assume they are attending an initial unfair dismissal conference
- There are concerns that Commissioners have an ability to skip the conciliation conference and hold a hearing instead when determining an unfair dismissal claim. The conciliation conference is a key tool currently used to settle claims in a less formal, cost effective manner.
- The extended period of time (60 days) to make an unlawful claim.
- The requirement to signal the start of the notice period in writing, with the notice period not starting earlier than the date of the letter. This will prevent the practice of providing a letter of termination a few days after the official date of termination.
- Definitional issues associated with casual employee
- Issues related to genuine redundancy issues. A minor defect in process may render genuine redundancy invalid.
- The expectation that reinstatement will be to a position no less favourable (S391)
- The requirement that an application for unfair dismissal must be lodged within 7 days. This may lead to an emotional response and lead to an increase in numbers of claims. The 21 day period to lodge a claim can enable dismissed employee to think through termination and reduce claims.

Industrial action, secret ballots and strike pay

The Bill provides clear rules to govern industrial action. The Bill distinguishes between protected industrial action which may legitimately occur during bargaining and unprotected industrial action taken outside of bargaining. The Bill requires employees to approve industrial action through a secret ballot, while streamlining the ballot process. (2nd Reading Speech - Deputy Prime Minister)

The AHA supports this provision.

Right of entry

The Bill provides a fair and proper balance between the rights of employees and their union to meet in the workplace and the rights of employers to run their businesses without interference. The Bill provides a right for members of a union that is eligible to represent their industrial interests (and potential members of that union) to meet with their union at the workplace during non-working hours for the purpose of holding discussions. No employee can be discriminated against for participating in, or declining to participate in, such discussions.

The Bill provides that the right to enter premises to hold discussions comes with strict obligations, including the holding of a valid right of entry permit, the giving of 24 hours' notice to enter and requirements for conduct while on site. Unions will continue to be able to investigate alleged breaches of workplace obligations that affect a member or members

of the union. The right is subject to strict requirements. Unions will be able to look at and copy employment records of all employees but only where those records are relevant to the suspected breach being investigated. The Bill includes new protections against misuse of information obtained by the union investigating suspected breaches. (2nd Reading Speech - Deputy Prime Minister)

This is one of the most contentious areas of the Bill. The AHA cannot accept that trade unions should have the right to inspect the employment records of an employee without the permission of that individual. We believe this contravenes the core principle of our Privacy Laws.

Unions should be required to either seek permission from the relevant workers or seek an order from Fair Work Australia after proving they have reasonable evidence to suspect a breach.

The AHA requests that the Senate Committee amend the draft Bill to this effect

Compliance and Enforcement

The Bill establishes an integrated framework to oversee the new workplace relations system.

Fair Work Australia

The Bill establishes Fair Work Australia to act as a one-stop shop for information, advice and assistance on workplace issues, by merging the functions currently performed across seven government agencies.

Fair Work Australia will be independent and will be focused on providing fast and effective assistance for employers and employees. (2nd Reading Speech - Deputy Prime Minister)

The Australian Industrial Relations Commission has played a pivotal role as the independent umpire in Australian workplace relations. This role has involved establishing, adjudicating and enforcing the "rules of the game".

The new system will require Fair Work Australia to play a broader role. The key to an effective new system is to create an environment where the parties can establish an effective working relationship. Maintaining the sporting analogy Fair Work Australia needs to "steer rather than row". The traditional role of the AIRC needs to be extended to cover the "whole game".

Fair Work Australia must go beyond being an umpire and rule maker and assume the roles of administrator, coach, trainer and commentator. These roles cover:

- Setting rules and minimum standards through the Modern Awards (governing body)
- Developing the skills of the players through information, advice, education and training (Coach)

- Monitoring performance and enforcing compliance (Referee)
- Mediation, dispute resolution and applying penalties (Tribunal)
- Monitoring and reporting on the effectiveness of the system and identifying best practice (commentator)
- Maintaining records and processes (trainer)

The new body therefore must change not only what they do but how they do it. Fair Work Australia needs to ensure that the adversarial processes of the traditional system give way to a less legalistic system based on a range of administrative and inquisitorial processes. This could provide challenges for the many existing AIRC office holders who will transfer to the new body.

Fair Work Divisions of the courts

Fair Work Divisions will be created in the Federal Court and the Federal Magistrate's Court to hear matters which arise under the new workplace relations laws. The Courts will have new and more effective powers to deal with any breaches of the Act and entitlements, including the power to make 'any order they consider appropriate' to remedy a breach as well as injunctions to restrain breaches. A new user-friendly small claims jurisdiction will be provided where the Court will not be bound by the rules of evidence and may act in an informal manner

Fair Work Ombudsman

The Bill establishes the Office of Fair Work Ombudsman, with functions including promoting harmonious and cooperative workplace relations and compliance by providing education, assistance and advice. *(2nd Reading Speech - Deputy Prime Minister)*

The AHA welcomes the establishment of these bodies. We have had constructive relationship with the current Workplace Ombudsman and this has led to betterinformed employers and improved compliance with statutory obligations. We hope that the new arrangement will retain and build on the current arrangements.

National System for the Private System

The Bill will apply to 'national system' employers and their employees, relying principally on the corporations' power of the Constitution. The Government is working with States and Territories to achieve a national workplace relations system for the private sector. *(2nd Reading Speech - Deputy Prime Minister)*

The AHA encourages the States to transfer industrial powers to the Commonwealth to enable the creation of a new, truly national system.

Conclusions

Most Australians go to work oblivious to the debate that will take place on the future of our workplace relations system. They are confident that laws will be in place to protect their interests and ensure avenues for redress if they not treated fairly.

The challenge ahead is to ensure that further reforms allow business owners and workers to create more productive, flexible and fairer workplaces.

The Government appears to have made a sincere attempt to introduce legislation that seeks to provide the necessary foundations to support the emergence of productive workplaces that can successfully operate in a 21st century global economy.

The challenge is for the community, and more importantly the key players in the current "IR" system to use the new laws and jettison the old adversarial mindset and tactics. They need to engage in meaningful consultation and collaboration that achieves mutually beneficial outcomes for workers and their business.

Attachment 1 - Hotels and the Economy

The AHA is comprised of around 6000 members across Australia.

The overarching objective of the AHA is to contribute to the establishment and maintenance of an economic and social environment that fosters the business success of members and pubs and hotels generally. In order to achieve such objectives, we are concerned with the stability, viability and growth of the Hospitality and Tourism sector.

The AHA aims to provide relevant advice and services to members by maintaining effective relationships with key politicians, government agencies and both industry and corporate partners. The focus of these relationships is to:

- increase opportunities to generate revenue;
- reduce the cost of doing business;
- manage their regulatory environment, and
- access an adequate supply of appropriately skilled and credentialed people.

Hotels compete for consumers spending with a range of other retail and hospitality providers. These include general retail, clubs, restaurants, casinos, bars and nightclubs, as well as a variety of domestic and international accommodation and entertainment providers.

Since the 1970s the hotel sector has undergone significant change as a result of a reduction in the per capita consumption of alcohol and a shift in where, when and what people drink.

There has been a shift away from drinking in licensed premise to the home and other venues. This has resulted from intense competition from liquor stores and supermarkets for the alcohol dollar. By 1990 many hotels were under significant financial stress and only survived when State Governments allowed electronic gaming machines in hotels.

Hotels are important contributors to the Australian economy. They have grown and developed over the last 15 years on the presumption that their income will include a contribution from the various regulated products and services they provide. Changes in the availability of these products and services provided by hotel venues would significantly reduce their financial viability placing jobs, bank loans and community amenity at risk.

Extracts from the most recent ABS survey of Pubs, Taverns and Bars (8687.0) found that at the end of June 2005 there were 3,454 pub, tavern and bar businesses operating in

Australia. The total number of premises (4,252) were split almost evenly between capital cities and suburbs (2,108) and non-metropolitan areas (2,144).

There were 2,362 pub, tavern and bar businesses with gambling facilities at the end of June 2005 of which 1,401 (59.3%) had less than 20 persons employed. These were 1,092 pub, tavern and bar businesses without gambling facilities at the end of June 2005, of which 846 (77.5%) had less than 20 persons employed.

Key statistics include:

- During 2004-05, income generated by pub, tavern and bar businesses was $11,114.3m, which represented an average of $3.2m per business. Total expenses incurred for the same period were $10,369.5m.
- The total industry value added by these businesses was $4,394m, which is the equivalent of 0.5% of Australia's gross domestic product (GDP) for 2004-05.
- For 2004-05, pub, tavern and bar businesses recorded an operating profit before tax of $784.2m, which represented an operating profit margin of 7.1%.
- The main source of income was from sales of liquor and other beverages which generated $6,706.1m (60.3% of total income). Other major income items were gambling income, which accounted for 24.3% ($2,703.1m) of all income, and takings from meals and food sales, which accounted for 10.8% ($1,200.6m).
- The total income of businesses with gambling facilities was $9,565.1m which represented 86.1% of total income for all businesses. The major sources of income for businesses with gambling facilities were the sale of liquor and other beverages of $5,511.6m (57.6%) and gambling income of $2,703.1m (28.3%).
- The gambling income of these businesses was sourced primarily from poker/gaming machines (96.7%), with the remainder generated from TAB commissions (2.7%) and Keno commissions (0.6%).
- Pub, tavern and bar businesses incurred $10,369.5m in expenses during 2004-05. Overall, purchases of liquor and other beverages was the highest single expense item, accounting for 36.7% ($3,806.5m) of total expenses, followed by labour costs (21.9% or $2,268m) and gambling taxes and levies (9.1% or $940.5m).
- Other major expenses for pub, tavern and bar businesses in 2004-05 were rent, leasing and hiring ($641m), purchases of foodstuffs for preparing meals ($546.5m), interest expenses ($273.5m), depreciation and amortisation ($227.9m) and advertising, marketing and promotion expenses ($199.5m).
- In 2004-05, pub, tavern and bar businesses with gambling facilities recorded total expenses of $8,901.5m. The largest expense items incurred by these businesses were purchases of liquor and other beverages ($3,317.4m) and labour costs ($1,891.4m).

- At the end of June 2005, there were 81,675 persons employed in pub, tavern and bar services. Of these, 57,262 persons (70.1%) were casual employees and 43,179 (52.9%) were female employees. Employment also included 18,779 permanent full-time employees and 4,574 part-time employees.
- Businesses with gambling facilities recorded employment of 64,905 persons, which accounted for 79.5% of total employment in pub, tavern and bar businesses. These businesses had 21,924 staff who were trained as licensed gaming staff (33.8% of total employment for businesses with gambling facilities).
- The majority (65.1% or 2,247) of pub, tavern and bar businesses employed fewer than 20 persons. These small businesses accounted for 26.9% of total employment in pub, tavern and bar services, 28.4% of income from sales of liquor and other beverages, 28.2% of gambling income and 27.9% of total income. .
- The 2004-05 survey results indicate that pub, tavern and bar businesses experienced modest growth between 2000-01 and 2004-05 financial years. Income grew by an average 5.8% per year since 2000-01 while expenditure grew at the rate of 6% per year for the same period. The operating profit before tax grew at an average annual rate of 2.3% per year (from $715.2m in 2000-01 to $784.2m in 2004-05).
- ABS Data indicates that hotels with Gambling facilities pay in excess of $1.05 Billion in tax This is comprised of EGM and other Gambling taxes and levies = $940.5 million; Payroll tax = $58.8 million; Land tax and Rates = $53.0 Million and FBT = $3.3 million
- Capital Expenditure – The introduction of EGMs into hotels has provided hotels with the funds to renovate and upgrade facilities. As a guide figures from Queensland indicate that this investment averaged nearly $400,000 per venue in 2005-06. This figure would be far higher since that time because venues renovated to cater for the new laws relating to smoking in enclosed areas. It has been estimated that $300 million was spent in NSW alone.
- Community Contribution – hotels make significant financial contributions to their local communities. They are also required to contribute to community benefit funds in each jurisdiction. This funding supports community activities, harm minimisation programs and interventions to prevent, reduce and/or respond to cases of problem gaming.

<u>Accommodation Hotel Information</u>

- There are 1284 licensed hotels in Australia with five or more accommodation rooms
- There are a total of 86,092 rooms in Australian hotels

- There are a total of 224,849 bed spaces in Australian hotels
- There are 77,940 people employed in Australian hotels
- In the financial year ending June 2008, there were 21,551,200 room nights occupied in Australian hotels
- The average length of stay in an Australian hotel is 2.2 days
- In the financial year ending June 2008, there were 15,801,500 guest arrivals in Australian hotels
- In the financial year ending June 2008, total takings from accommodation in Australia's hotels were $3,789,100,000
- The total industry value added of Australia's accommodation businesses is $4,774,900,000 or 0.5% of Australia's gross domestic product
- Australia's accommodation businesses spend $1,062,000,000 each year on capital expenditure, with renovations and refurbishments accounting for 21.1% ($224,100,000)
- Conventions and meetings generate $895,800,000 worth of income annually for accommodation businesses in Australia

The Current Trading Environment for Hotels

ABS data indicates that hotels had modest growth over the first half of the decade. Many Hotels are currently experiencing difficult trading conditions Rising interest rates and petrol prices reduced household disposable income and hence spending in hotels in the first half of 2008. This was exacerbated by the introduction of smoking bans in enclosed areas, which has led to an average drop in revenue of around 10%. The value of hotels increased significantly over recent years. Many hotels are highly geared and are affected by high interest rates and access to loans. They are vulnerable to any general decline experienced in the broader economy.

Accommodation hotels have had reasonable growth in occupancy levels and room rates over the last three years. The rate of return on accommodation hotels remains low by international standards and compared to other property classes. Staff costs as a percentage of total operating expenses are high. This amounts to around 35% of total costs compared to less than 20% in most industrialized countries.

The Australian Tourism Forecasting Council projections for 2009 indicate the first drop in international visitor numbers since the 1980's. Domestic demand will also decline as business travel drops with the economic downturn