New South Wales

ATTORNEY GENERAL
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OIR No: 08DOC0623

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Dear Mr Carter

I note that on 25 November 2008 the Australian Senate referred the provisions of the *Fair Work Bill 2008* to the Senate Committee on Education, Employment and Workplace Relations for report by 27 February 2009. In the context of the Committee's request for written submissions by 9 January 2009 I am now supplying the following information.

The New South Wales (NSW) Government welcomes the introduction of the *Fair Work Bill 2008* and the opportunity to contribute further to its development through this Senate Committee process. The *Fair Work Bill 2008* provides an opportunity to restore fairness and balance in Australian industrial relations which was unilaterally removed by the *Workplace Relations Act 1996* and, in particular, by the *Workplace Relations Amendment (Work Choices) Act 2005*.

In 1995 the NSW Government began a process of reform which produced a highly successful industrial relations framework that is well regarded by employers, employees and their representatives. I believe that it would be useful to describe some of the key features of the NSW approach to inform the Committee's consideration of the critical topic of shaping an appropriate national industrial relations system.

History of contemporary NSW industrial relations reform

In 1996 the NSW Government introduced objectives for the operation of its industrial relations legislation which remain particularly apposite for the Committee's consideration of the *Fair Work Bill 2008*. These objectives are:

(a) to provide a framework for the conduct of industrial relations that is fair and just,

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(b) to promote efficiency and productivity in the economy of the State,

(c) to promote participation in industrial relations by employees and employers at an enterprise or workplace level,

(d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,

(e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,

(f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value,

(g) to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality, and

(h) to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations.

Like the current Commonwealth Government, in 1995 the NSW Government faced the challenge of replacing a complex, dysfunctional and divisive industrial relations system. Like the current Commonwealth Government and in stark contrast to the secretive way in which the *Workplace Relations Amendment (Work Choices) Act 2005* was developed, the NSW Government considered that the best way to produce an enduring and adaptable industrial relations system was to consult widely and deeply with all interested persons.

Accordingly, the NSW *Industrial Relations Act 1996* commenced in September 1996 only after an extensive process of consultation with key business, industrial and community organisations.

Since its implementation, the NSW *Industrial Relations Act 1996* has served the needs of the employers and employees of NSW well. It has evolved as necessary, to meet the challenges of a changing industrial climate and has encouraged a co-operative approach to industrial relations in this State.

The main features of the industrial relations system established by the NSW *Industrial Relations Act 1996* may be conveniently summarised as including:

- a comprehensive and flexible safety net achieved through a mixture of industry, occupational and enterprise awards,
- an independent tribunal equipped with adequate powers to arbitrate disputes and not bound by excessive formality,
- easy access to dispute resolution, with an emphasis on conciliation without the need for the parties to engage in actual industrial disputation,
- comprehensive regulation of all forms of work and not just traditional areas of employment (as evidenced by the NSW statutory framework dealing with unfair contracts involving the performance of work, contracts of bailment, contracts of carriage and provisions deeming certain categories of work to be employment, including outworkers), and

- industrial relations service delivery being based locally, especially in regional areas.

Prior to the compulsory movement of most incorporated employers into the Commonwealth industrial relations system under the *Workplace Relations Amendment (Work Choices) Act 2005*, the NSW award system covered almost half of all employees in this State. The operation of other NSW industrial relations legislation, including the NSW *Annual Holidays Act 1944* and the *Long Service Leave Act 1955,* significantly extended the overall coverage of the NSW industrial relations system.

The NSW common rule award system, which was and remains the most common form of industrial coverage in NSW, reaches far into industries with little capacity for or interest in comprehensive enterprise bargaining. It is therefore particularly effective in protecting some of the most vulnerable workers in this State's community.

On 26 March 2006 the commencement of the *Workplace Relations Amendment (Work Choices) Act 2005* produced an abrupt end to the traditional patterns of industrial coverage. All employers who were constitutional corporations were compulsorily moved into the new Commonwealth system, which privileged individual agreements over hard-won collective rights and reduced the capacity of the industrial tribunal to deal with the underlying causes of disputation.

Nevertheless, despite the jurisdictional impact of the *Workplace Relations Amendment (Work Choices) Act 2005* at least 20 per cent of this State's private sector employers remain within the NSW industrial relations system. The majority of these employers are unincorporated businesses, such as sole traders and partnerships. Other areas of strong State coverage exist in the community services sector, where incorporated businesses lack the requisite trading or financial activities to be covered by Commonwealth legislation.

The NSW system is preferred

A considerable additional proportion of NSW's employers have continued to apply NSW industrial relations standards even though now they are now covered by Commonwealth legislation. These employers remain covered by instruments artificially created by the *Workplace Relations Amendment (Work Choices) Act 2005*, such as Notional Agreements Preserving State Awards and Preserved State Agreements.

Anecdotal evidence from workplace investigations undertaken by inspectors from the NSW Office of Industrial Relations suggests that the percentage of employers in this category still accounts for the majority of employers in some large NSW industry sectors, including the retail and hospitality sectors.

Many large employers in NSW have taken and continue to take advantage of the opportunity to access the NSW Industrial Relations Commission, a tribunal with practical power to deal with and resolve industrial disputes and differences, as a way of maintaining established relationships with their workforces and ensuring stability in their industrial arrangements.

Employers with agreements established under section 146A of the NSW *Industrial Relations Act 1996* include many State-owned corporations and a

number of very large private sector employers in a range of industries such as Australian Steel Mill Services, Blue Circle Southern Cement, Bluescope Steel, Boral, Chubb Security, Hansen Construction Materials, Linfox, Patricks Logistics, Port Waratah Coal Services, Toll Transport, Transfield and Westfield.

Most local government authorities also chose to use such agreements, because of uncertainty about their legal status. However, since the enactment of the *Local Government Amendment (Legal Status) Act 2008* which decorporatised local government bodies, any doubt about the capacity of these employers to access the State system directly has been removed.

Thus, as a result of recognising that the vast majority of this State's employers and employees continue to operate under or through the influence of the NSW industrial relations system, the NSW Government continues to provide services to these employers and their employees.

A harmonised national framework

For a number of years the NSW Government has worked towards the establishment of a truly co-operative and harmonised national industrial relations framework for the private sector. As recently as 2007, the NSW Government commissioned Professor George Williams from the University of New South Wales to undertake an inquiry into options for a new national industrial relations system.

The Williams Report recommended that any new national industrial relations system be set on principles of fairness, efficiency, universal acceptability, cooperativeness and adaptiveness. The Report also recommended that an intergovernmental agreement involving all Australian governments be established to govern any national system.

I note that the Explanatory Memorandum issued for the *Fair Work Bill 2008* states that the Commonwealth Government's policy is to enter into new arrangements with State and Territory governments to ensure a uniform workplace relations system for private sector employers and employees. In this regard I draw the Committee's attention to the activities of the Workplace Relations Ministers Council. At its meeting on 1 February 2008 the Council issued a communiqué stating:

> Ministers discussed options for achieving a genuinely national, uniform and stable workplace relations system. Ministers endorsed *Forward with Fairness* as providing the basis for a modern, fair and flexible workplace relations system and in that context noted the Williams report. Ministers agreed to engage actively on the development of the Federal Government's substantive workplace relations reforms. Ministers agreed to create a high level officials group to collaborate on the development of the new system and its interface with State systems.

As noted in the Explanatory Memorandum, the high level officials group referred to in the communiqué met on twelve occasions throughout 2008 and I would add that discussions continue. Members of the group also participated in a review of the partially drafted *Fair Work Bill 2008* during October 2008.

The Workplace Relations Ministers Council has also continued to meet through 2008, focusing mainly on the development of the new Commonwealth laws but also considering how a national system might be developed. At its meeting in May 2008 the Council communiqué noted that:

> Ministers unanimously endorsed a set of principles that will guide the development of governance arrangements for a stable uniform national system.

At the time of the implementation of the *Workplace Relations Amendment (Work Choices) Act 2005* the NSW Government endorsed five principles for a national industrial relations system which are particularly relevant for this Committee's consideration of the *Fair Work Bill 2008*. The five principles are:

i) an up-to-date and comprehensive safety net for all workers written in plain English,

ii) an independent umpire with broad dispute-settling powers, including disputes about dismissal,

iii) a fair minimum wage set by a truly independent tribunal after a public hearing,

iv) the right of employers and employees to bargain to make workplace agreements without government dictating what can and can't be agreed, and

v) special protections for vulnerable workers including protection from exploitative contracting arrangements.

To champion these five principles and to oppose the *Workplace Relations Amendment (Work Choices) Act 2005*, between 2005 and 2008 the NSW Government took a number of direct steps to ameliorate wherever possible the impact of those laws on NSW employers and employees, including:

- ensuring that State government employees who worked for incorporated public sector entities remained in the State industrial relations system,
- enacting legislation with similar effect for local government employees,
- enacting child employment laws that protected young people who made agreements with Work Choices covered employers, and
- giving incorporated employers and their employees and unions the opportunity to make common law agreements to continue to refer matters to the Industrial Relations Commission of NSW for resolution (as outlined above).

NSW submissions to the Committee

As I have noted above, the NSW Government strongly opposed the *Workplace Relations Amendment (Work Choices) Act 2005* and its predecessor legislation.

Since 2005 the NSW Government has provided the Committee with no fewer than eight written submissions detailing its position on various industrial relations matters, highlighting the shortcomings of that legislation and describing superior alternatives. These submissions include the:

- NSW Government submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (4 June 2007) which outlines the NSW Government's position on the need for a comprehensive industrial relations safety net and a workable enterprise bargaining system,
- NSW Government submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the Independent Contractors Bill 2006 and the Workplace Relations Amendment (Independent Contractors) Bill 2006 (21 July 2006) which explains the rationale underpinning the NSW statutory framework dealing with deemed employment, unfair work-based contracts and contracts of carriage and contracts of bailment,
- Submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the Workplace Relations Amendment (Work Choices) Bill on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory (9 November 2005) which outlines the major concerns held by the NSW Government (with other Australian governments) about the *Workplace Relations Amendment (Work Choices) Act 2005*,
- NSW Government submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into Workplace Agreements (12 August 2005) which outlines the NSW industrial relations system's framework for workplace bargaining, dispute resolution and the fair and effective functioning of unions,
- NSW Government submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the Building and Construction Industry Improvement Bill (April 2005) which outlines the concerns held by the NSW Government about the former Commonwealth Government's approach to regulating industrial relations in the construction industry,
- NSW Government submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into Unfair Dismissal Policy in the Small Business Sector (11 March 2005) which details the NSW statutory framework of unfair dismissal laws in the context of Australia's international obligations and reviews a evidence about the link between employment and unfair dismissal laws,
- NSW Government submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004 (February 2005) which details the NSW framework of laws and awards dealing with redundancy and general employment termination provisions, and the
- NSW Government submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the Workplace Relations Amendment (Right of Entry) Bill 2004 (February 2005) which

outlines NSW's union right of entry laws and more generally deals with the need for co-operative inter-jurisdictional arrangements in the administration of Australia's industrial relations system.

Other relevant NSW submissions

Relevantly for this Committee's consideration of the *Fair Work Bill 2008* and the general operation of industrial relations laws in Australia, the NSW Government has also made eight further submissions to other Committees of the Australian Parliament and Commonwealth authorities since 2005. These have included the:

- NSW Government Submission to the Wilcox Inquiry into the proposed Building and Construction Division of Fair Work Australia (December 2008) which details the NSW Government's position on the proper regulation of the construction industry, including the institutional framework which should be adopted through legislation,
- NSW Government submission to the Australian Industrial Relations Commission hearing into Exposure Draft Modern Awards (October 2008) which outlines the NSW Government's position on the application of modern awards and the loss/diminution of NSW community standards and award conditions by draft modern awards,
- NSW Government supplementary submission to the Australian Industrial Relations Commission hearing into Award Modernisation (June 2008) which explains the NSW award review process and the operation of enterprise awards in the NSW industrial relations system – specifically how these instruments were then imported by the *Workplace Relations Amendment (Work Choices) Act 2005* as Preserved State Agreements into the federal industrial relations system,
- NSW Government submission to the Australian Industrial Relations Commission hearing into Award Modernisation (May 2008) which explains the NSW common rule award system in detail and the nature of the economic and social benefits accruing from this system,
- NSW Government submission to the Australian Fair Pay Commission (28 July 2006) which outlines the rationale underpinning the NSW Government's support for a comprehensive minimum wage fixing mechanism and the relationship between a robust minimum wage and equal remuneration for work of equal or comparable value,
- NSW Government submission to the Federal Award Review Taskforce (3 February 2006) outlines the NSW Government's concerns that rationalisation of awards without proper regard to community and industrial standards may have a deleterious impact on those workers who are already marginalised due to other factors,
- NSW Government submission to the House of Representatives Standing Committee on Family and Human Services Inquiry into Balancing Work and Family (May 2005) which explains the nexus between comprehensive safety net conditions, fair workplace

bargaining and unfair dismissal laws in the promotion of work/life considerations, and

- NSW Government submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workplace Participation Inquiry into Independent Contracting and Labour Hire Arrangements (11 March 2005) which outlines the NSW Government's actions to provide an appropriate statutory framework for the regulation of work-based contracts involving employees and contractors.

Access to these submissions, which provide extensive details of the NSW Government's established industrial relations policy, is possible via the above links. Copies of these submissions are also available from the NSW Office of Industrial Relations at www.industrialrelations.nsw.gov.au.

The Fair Work Bill 2008

It is apparent that the *Fair Work Bill 2008* is not a complete statement about how the new Commonwealth industrial relations system will operate and how it will affect the rights and obligations of employers and workers. On 25 November 2008, in the second reading speech accompanying the *Fair Work Bill 2008*, the Deputy Prime Minister announced that:

> Separate legislation, the transitional bill, will be introduced in the first half of 2009 to set out transitional and consequential changes to ensure a smooth, simple and fair transition to the new scheme, while providing for certainty.

Thus, the forthcoming Bill will be crucial in providing a proper understanding of the practical impact of the new system. Also of importance to considering the impacts on workplaces are the developing modern award system and the implications of any recommendations made by the Wilcox Inquiry into the proposed specialist division for regulating the building and construction industry. NSW has highlighted to that Inquiry the importance of ensuring equity of industrial relations regulation across all sectors of the national economy, and warned about the risks of perpetuating current inefficiencies.

This acknowledgement by the Deputy Prime Minister that further legislation is forthcoming has influenced the breadth of detailed issues put forward in the remainder of this submission for the Committee's consideration. Matters such as the regulation of the construction industry, the participation of state-registered industrial organisations in the Commonwealth industrial relations system, the regulation of contractors and the interaction between State and Commonwealth industrial relations systems have not been fully outlined in this submission as a result of the Deputy Prime Minister's statements to the Australian Parliament. Accordingly, having regard to the NSW Government's principles enunciated earlier, I offer the following comments about various aspects of the *Fair Work Bill 2008*.

National Employment Standards (NES): The expanded statutory safety net of conditions provided in the *Fair Work Bill 2008* applying to all employees is welcomed. However it is appropriate to note that in a number of areas the current NES level is below the NSW community standard. Relevant NSW community standards are contained in legislation (eg parental leave

provisions of the NSW *Industrial Relations Act 1996* and the NSW *Annual Holidays Act 1944*) while others are provided by way of common rule award provisions (eg right of casual employees to take leave to care for family members in emergencies and protection from any subsequent victimisation by their employers). The Committee's attention is directed to these twin sources of entitlement in its consideration of the NES provisions.

There are also a number of issues arising from the practical interaction between NES entitlements and State laws that will continue to operate. For example, the interaction between the NES public holidays provisions and the NSW *Bank and Bank Holidays Act 1912* does not remove all uncertainty about industrial entitlements for workers.

Right to request: The NES lacks any means by which an employee can enforce the right to request flexible work practices or extended parental leave. The *Fair Work Bill 2008* explicitly excludes any capacity for an employer's refusal to grant such a request to be reviewed or appealed or to be the subject of dispute resolution processes.

While it is apparently open to the States and Territories to legislate to provide more meaningful remedies at least in terms of a request for flexible work arrangements (clause 66), consideration would be appropriate to establish a nationally consistent remedy within the Commonwealth law.

Modern awards: The NSW Government has contributed extensively to the award modernisation process being undertaken by the Australian Industrial Relations Commission (AIRC) by making three submissions (listed above) directed at ensuring both substantive and procedural rights under NSW industrial arrangements are not undermined by the new modern awards. The Committee's attention is directed to these submissions concerning the actual modern award provisions being drafted by the AIRC.

It is also appropriate to note the very different nature of awards under the NSW system and the modern award system proposed by the *Fair Work Bill 2008*. The NSW Commission may make awards 'setting fair and reasonable conditions of employment' under section 10 of the NSW *Industrial Relations Act 1996* either on its own initiative or on application by an industrial party. Modern awards will be far more limited instruments in terms of the scope of matters to be contained, the lack of 'parties' in the understood sense and the restricted capacity to vary the terms. The capacity for variation of modern awards in some circumstances in between the four yearly review procedures is welcomed.

The role played in the NSW industrial relations system by test cases has proven to be an effective and efficient means to adjust community standards when warranted. Accordingly, NSW would encourage the Committee to consider this mechanism as part of its review of the provisions dealing with modern awards.

Minimum wages: As noted in several of the submissions listed earlier, NSW has taken the view that a proper National Wage Case approach is more likely to produce good outcomes in the area of minimum wage fixation. Giving the major industry parties the opportunity to examine and cross-examine evidence

and submissions is a robust process that works well within a minimum wage fixing framework.

Equal remuneration: The NSW Government welcomes the considerable improvements contained in the *Fair Work Bill 2008* in the approach to dealing with equal remuneration issues, in particular the inclusion of the concept of equal pay for work of equal or comparable value and the deletion of any requirement to demonstrate discrimination.

It remains to be demonstrated whether pay equity can be dealt with effectively as an issue by a tribunal while it remains somewhat separate from the mainstream adjustment of modern awards and minimum wages. In this respect, the Committee's attention is drawn to Re Equal Remuneration Principle [2000] NSWIRComm 11 where the NSW Commission adopted a new wage fixing principle to provide a process which effectively assists in ensuring that equal remuneration issues can be fully addressed.

Fair Work Australia's role as an independent umpire: One of the great strengths of the NSW industrial relations system is that at its centre stands an institution with broad discretion to deal with any industrial matter that comes before it, not in a punitive way, but by dealing constructively with the substance of any issue between the parties.

The new tribunal proposed by the *Fair Work Bill 2008*, Fair Work Australia (FWA), is assigned a wide range of functions which is a welcome improvement on the *Workplace Relations Amendment (Work Choices) Act 2005*. Within this context, consideration is warranted about providing FWA with an explicit overarching discretion to deal with matters in the public interest, along the lines of that reposed in the NSW Commission by section 146(2) of the NSW *Industrial Relations Act 1996*.

As a practical example of how this public interest consideration would operate, under the *Fair Work Bill 2008,* FWA's powers to deal with industrial action are largely limited to stopping industrial action, rather than dealing with the conflict or dispute that lies behind any industrial action. By way of contrast, the NSW Commission can both order an end to the action and then go on to deal, by conciliation and arbitration if necessary, with the underlying dispute. Clearly it will be for the members of the new FWA to develop and establish their capacity and authority to assist industrial participants in meaningful ways.

The Committee's consideration of the interaction between FWA and the Federal Court is also relevant to an understanding of the role of FWA as an independent umpire. The constitutional limitations on a Commonwealth body exercising judicial and arbitral powers is noted. However, the Committee's attention is drawn to section 142 of the NSW *Industrial Relations Act 1996* as a statutory mechanism by which an industrial tribunal may be provided with an opportunity to deal with the underlying reasons for industrial disputation.

Unfair dismissal: The expansion of the right to challenge an alleged unfair dismissal is a welcome development and is consistent with submissions made by the NSW Government previously to this Committee. Generally, the conditions and qualifications on access to such a challenge are not inappropriate. However, it may be useful to introduce an application period

longer than the seven days currently envisaged. Such a relatively short time may generate a number of unintended consequences, such as:

- an unnecessarily large number of applications for extension of time to lodge applications,
- some former workers missing the opportunity to lodge applications due to factors such as the initial trauma of unemployment and poor awareness of their legal rights or how they should be exercised, and
- increased numbers of defensive applications to retain the option of an action after the application period expires, which may not otherwise be made.

There are also issues for consideration about the procedures for dealing with unfair dismissal actions and the status of any directions, recommendations or decisions that are not the result of a proper hearing process. The way in which the Fair Dismissal Code for small business operates in practice will require careful monitoring.

Service delivery: The provisions in both the FWA and the Fair Work Ombudsman parts of the *Fair Work Bill 2008* that contemplate the possibility of dual appointments of both tribunal members and inspectors, are welcomed.

These provisions provide a real basis for future cooperative endeavours between the jurisdictions as a means of creating greater stability and certainty for the regulated community, as well as ensuring the greater geographical reach of services.

Specialist division for building and construction industry: While this is not a matter that the *Fair Work Bill 2008* deals with explicitly, rather being a matter for the inquiry by Federal Court Judge Murray Wilcox commissioned by the Deputy Prime Minister, reference is made to the NSW Government submission to that Inquiry (above).

It is the view of NSW that there is no sufficient rationale to continue separating the control of building and construction industry workers' industrial conditions from the rest of the workforce. Instead, the specialist division should be constituted as a division of the Office of the Fair Work Ombudsman, exercising the same compliance powers as the rest of that office, in accordance with the same laws that apply to all other employers and employees within the national economy.

Enterprise agreements: NSW welcomes the more straightforward drafting of enterprise bargaining provisions in the *Fair Work Bill 2008*, as compared to the convoluted requirements under the *Workplace Relations Amendment (Work Choices) Act 2005*. The more streamlined approach should ensure that bargaining is able to proceed in a common-sense manner. The Committee's attention is also drawn to earlier submissions of the NSW Government concerning the principle that parties should be generally permitted to bargain without restriction about subject matter.

A significant concern with the bargaining provisions is not so much the details of the provisions themselves but the expectation that bargaining will be the main means for employers and employees to achieve improvements in their workplace arrangements. Many, if not most, small to medium workplaces do

not engage in bargaining and bargaining is more difficult for lower-skilled and less organised workers as well as for their employers. An adaptable and responsive award system has been the preferred means for ensuring that such workplaces are not left behind. Nevertheless, the new low-paid and multi-employer bargaining streams are welcomed.

A particular strength of the NSW industrial relations system has been the capacity of the NSW Commission to make awards or approve agreements that deal with whole projects, particularly in relation to major construction projects, where they provide industrial relations stability through common working conditions for everyone engaged in a relevant project.

The most significant aspect of the statutory framework underpinning NSW project awards and project agreements is the capacity of such instruments to apply to employers unknown at the time of the making of the instrument who may work on the project at a future time. These kinds of arrangements were put in place to underpin the most successful Olympics of modern times, the 2000 Sydney Olympics, and applied both to those engaged in the construction of Olympic sites and to all those employed during the operation of the sites during the Olympic period.

Further discussion of project instruments and their usefulness may be found in the NSW Government submission to the Wilcox Inquiry (above).

Workplace determinations: NSW welcomes the inclusion of the workplace determination provisions as a form of deadlock-breaking last resort arbitration.

Experience shows that not all bargaining is fruitful or productive. Many of the most bitter disputes under the *Workplace Relations Act 1996* regime arose because of the employer's ability to resist collective bargaining and insist on the signing of Australian Workplace Agreements (AWAs). It is to be hoped that the end of AWAs and the inclusion of new provisions promoting the capacity of employees to bargain collectively will mean that such intractable disputes are less common.

Nevertheless, it is appropriate and necessary to include access to last resort arbitration in circumstances where the parties are in deadlock. To this end, the Committee's attention is drawn to the full range of arbitral provisions provided to the NSW Commission in such circumstances under the NSW *Industrial Relations Act 1996*.

Special protections for vulnerable workers: The *Fair Work Bill 2008* relies on the common law meaning of 'employer' and 'employee', and therefore, unlike the NSW *Industrial Relations Act 1996*, does not extend its protections to a range of vulnerable workers. These workers are not employees at law, but possess many of the characteristics of employees.

The outworker provisions contained in the *Fair Work Bill 2008* are an example of the type of approach welcomed by the NSW Government, as the Bill gives explicit recognition that modern awards should be capable of covering and applying to entities that are engaged in supply chains that include the labour of outworkers. Consideration should be given to applying this approach to deal with other categories of workers, as this would assist in the development of an equitable and fair system.

In this context, the NSW *Industrial Relations Act 1996* provides for the deeming of certain categories of workers as employees, and additionally provides a special jurisdiction for owner drivers and bailee drivers in the transport industry. While not deeming the latter to be employees, Chapter 6 of the NSW *Industrial Relations Act 1996* creates a quasi-industrial relations jurisdiction for this industry, with the capacity for the NSW Commission to make contract determinations (analogous to awards) and to approve contract agreements (analogous to enterprise agreements). It is acknowledged that the operation of Chapter 6 is preserved for the moment under the terms of the *Independent Contractors Act 2006* but it is understood that the Commonwealth is reviewing the operation of that Act and the exemptions in place under it (see also the NSW Government submissions into independent contractor legislation, listed above).

Unfair contracts: Since 1959 the unfair contracts provisions in NSW legislation have provided relief to persons who find themselves bound by unfair work contracts, be they employees or independent contractors with no access to the award jurisdiction. The power of the NSW Commission to void or vary unfair contracts where work is performed supports the fair play and fair go all round principles upon which the State's industrial relations system is built.

However, this important jurisdiction will apparently be excluded from having any effect with respect to national system employers and employees due to clause 26 of the Bill, which relevantly repeats the provisions of section 16 of the *Workplace Relations Amendment (Work Choices) Act 2005*. While a truncated version of an unfair contracts jurisdiction for independent contractors exists under the *Independent Contractors Act 2006*, employees have no access to such relief (see also the NSW Government submissions into independent contractor legislation, listed above).

Right of entry: The Bill contains provisions which expand the capacity of unions to organise and meet potential members, as compared to the highly restrictive regime under the *Workplace Relations Amendment (Work Choices) Act 2005*. This is welcomed in the expectation that unions will exercise these powers responsibly.

Recognition of State unions: As noted above, the *Fair Work Bill 2008* contains no reference to the recognition or regulation of industrial organisations, whether of employers or employees. It is expected that these provisions will be introduced with the forthcoming transitional and consequential provisions bill. Of particular concern to NSW is the future role of State industrial organisations and the peak councils that are recognised under the NSW *Industrial Relations Act 1996*.

Many State organisations have members who were compulsorily moved into the Commonwealth system by *Workplace Relations Amendment (Work Choices) Act 2005* and who will remain in the Commonwealth system under the system envisaged by the *Fair Work Bill 2008*. These organisations should have the right and capacity to operate in the Commonwealth system in the interests of their members.

Scope and coverage: Reliance on the corporations power as the constitutional basis for the *Fair Work Bill 2008* undoubtedly expands the reach of the Commonwealth system beyond what was apparently possible under the conciliation and arbitration power. However, it brings with it its own uncertainties. Two fundamental questions arise – who is covered and by what laws?

An employer can only be covered by the federal system if it is a 'constitutional corporation' - that is, a trading, financial or foreign corporation (while clause 14 also includes other employers such as the Commonwealth itself, these others are not relevant to the present discussion). As is clear from the transcript of proceedings before the High Court in *NSW & Ors v Commonwealth* (the Work Choices Case) [2006] HCA 52, even some the members of the Court have their doubts about which types of corporations are intended to be caught by s51(xx) of the Constitution. While there can be no doubt about a proprietary limited company that trades for profit, there is considerable doubt about the status of a not-for-profit organisation that has chosen to incorporate to provide stability and certainty for tax and funding and other purposes, and also it seems about municipal, charitable and educational corporations, to name but a few. It seems unlikely that the High Court will be in a position to make any authoritative ruling or rulings in the short to medium term, and so the uncertainty for such organisations lingers.

In this situation it is open to the Commonwealth to amend the definition of 'constitutional corporation' in the *Fair Work Bill 2008* to exclude categories of employers whose status may be doubtful or changeable according to circumstances. Cooperation between the Commonwealth and the States to determine where the line should be drawn or to harmonise laws in such a way that the line is for practical purposes irrelevant, would seem to be the only practical way forward. Dialogue about such matters has already commenced between the jurisdictions and I look forward to positive outcomes being achieved.

The other area of uncertainty created by a federal law such as the *Fair Work Bill 2008* is the intended extent of its coverage and the associated question of which State and Territory laws should be ousted by that law, and to what extent those which remain should continue to be operative. Part 1-3 of the *Fair Work Bill 2008* deals with these matters.

While NSW acknowledges the view that may be held by some that it would be important to provide certainty to employers and employees by providing, as the draft Bill does, for the complete ousting of certain State laws (in particular the key industrial statutes, such as the NSW *Industrial Relations Act 1996*), alternative strategies could be adopted, such as leaving some choice to employers and employees about which system suits them best.

Given the popularity of section 146A referral agreements (described earlier), it is clear that there is a continuing demand for access to the NSW Commission. Accordingly, it may be desirable to build into the dispute resolution provisions, for example, a capacity for employers and their employees to 'opt-in' to access to such State tribunals where it suits both parties.

While clause 26 (which sets out which State laws will be excluded and which will not) is better drafted than its predecessor (section 16 of the *Workplace Relations Act 1996*), it is unlikely that it will do away with the continuing uncertainty about which aspects of which State and Territory laws are operative with respect to national system employers and their employees. Once again, cooperation between the jurisdictions is the preferred method for achieving sustainable and certain outcomes in this area. Relevant adjustment to clause 26 may be required to reflect any settlements achieved through such discussions.

Concluding comments

Through its participation in the Workplace Relations Ministers Council the NSW Government has reiterated its long-standing commitment to working together with the Commonwealth and the other jurisdictions to replace the *Workplace Relations Act 1996*.

The NSW Government has also made it clear that any decision about whether and how to join in a national system, whether by way of referral, mirror laws or other forms of harmonisation, depends very much on the final form of the laws enacted by the Australian Parliament and how it affects the rights and obligations of employers and workers in NSW.

As noted earlier, this letter serves to inform the Committee about the industrial relations policy of the NSW Government as a guide to understanding its concerns about certain aspects of the *Fair Work Bill 2008*. It does not represent a complete analysis of the Bill and is not intended to provide a detailed comparison with current NSW industrial relations settings.

Should any further information or detail be required by the Committee, officers of the Office of Industrial Relations would be happy to assist. Please contact Mr Don Jones, Executive Director, Office of Industrial Relations on (02) 9020 4511 or at don.jones@oir.commerce.nsw.gov.au.

Yours sincerely

(John Hatzistergos)