Submission from

Australian Services Union of New South Wales

To

Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the Fair Work Bill 2008

Australian Services Union of NSW

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Authorised by Sally McManus, Secretary

Submission of the ASU of NSW

Senate Enquiry – Fair Work Bill

Executive Summary

1. The ASU of NSW is a State Registered Union. Our members are employed in a variety of industries which will be impacted by the provisions of the Bill and by the associated processes of Award Modernisation. In addition, a significant number of our members are employed by non-trading corporations or employers who are uncertain of whether or not they are trading corporations.

2. ASU of NSW members are employed in or by the following industries or employers:
    - Social and Community Services (SACS) Industry Employers (nearly 80% of employers are not trading corporations) – employers are, transferring, possibly transferring, or, uncertain
    - Railcorp (Federal System), State Transit Authority and Sydney Ferries (State System)
    - Sydney Water Corporation (a State Owned Corporation) – possibly transferring
    - Hunter Water Corporation (a State Owned Corporation) – possibly transferring
    - Information Technology – (Federal System)
    - Qantas and Overseas Airlines – (Federal System)

3. The ASU of NSW believes and submits that a significant proportion of its members will be severely disadvantaged by the provisions of the Bill and by the outcomes of Award Modernisation.

4. The ASU of NSW has identified the following issues as those issues of most concern in relation to the provisions of the Bill and the Award Modernisation process:

    - Ongoing and unresolved confusion as to which jurisdiction applies arising from the use of the corporations power and associated issue for members employed in the Social and Community Services Industry

- The proposed MEA provisions and the provisions in relation to Single Interest Employer MEA's are unfair and prejudicial to the interests of our members
- Loss of rights for those transferring from State Systems
- Loss of entitlements (award provisions) for those transferring from the State to the Federal System – in particular Award dependent employees
- A Federal system incapable of resolving workplace disputes – the abandonment of the conciliation and arbitration power

5. ***The ASU of NSW recommends that there be significant amendments to the provisions in the Bill relating to MEA's and in particular to ensuring that employers and employees have the same rights in respect of single interest MEA's.***

6. ***The ASU of NSW recommends that the Commonwealth refer back to the State of NSW the entirety of the social and community services sector as it was on March 26, 2006. This will resolve the uncertainty and ensure these workers do not lose rights or entitlements.***

7. ***The ASU of NSW recommends that the Bill be amended to provide that FWA can resolve and settle workplace disputes where conciliation has failed.***

8. ***The ASU of NSW recommends that the Bill be amended to ensure that no employee transferring from a State system has a loss of entitlements or a loss of rights.***

9. ***The ASU of NSW recommends that the Senate should commission a report on the compliance of the Fair Work Bill 2009 with ILO Conventions.***

10. This submission sets out the details of our concerns.

11. The ASU of NSW adopts in full the submission of the Australian Services Union (ASU) filed by Paul Slape, National Secretary.

Substantive Submissions.

Ongoing and unresolved confusion as to which jurisdiction applies arising from the use of the corporations power and associated issues for members employed in the Social and Community Services (SACS) Industry

1. The SACS industry, including the non-government Disability Services Sector, is almost entirely comprised of non-trading employers. Approximately 80% of employers are not trading and are subject to the relevant State jurisdiction. This sector is dominated by a range of "not for profit" community organisations.
2. There are approximately 30 000 workers employed in this sector in NSW.
3. Decisions since the advent of Workchoices in relation to the whether or not employers in this sector are trading corporations, and therefore covered by the Federal system, have almost entirely reinforced the view that employers in the non-government community sector are not trading corporations (i.e. *Hillman v Bankstown Handicapped Children's Centre Association Incorporated* decision of the Full Bench of the NSW IRC, *WA Aboriginal Legal Service* decision)
4. Whilst the majority of these organisations will not be trading corporations, many will have a status which is unclear and uncertain and which may even alter from year to year depending on the activities of the organisation, its funding sources and the like.
5. This uncertainty must be resolved.
6. The exclusive reliance by the Commonwealth on the corporation's power means that this confusion and uncertainty can *only* be resolved by an inter-governmental agreement.
7. The ASU strongly submits that this uncertainty is extremely unhelpful to all concerned it this vital sector and that this issue should be resolved as soon as possible.
8. The most appropriate way to do this is to consider the position of the SACS sector on a State by State basis.
9. SACS funding arrangements are determined largely on a State basis, in response to State and Federal funding agreements.

10. Approximately 47 awards apply to this industry and on the basis on outcomes to date in Award Modernisation the Senate cannot be satisfied that employees, should they be transferred to the federal system, would not be severely disadvantaged.

11. In all States funding arrangements are linked to the existing Award rates of pay. Historically bargaining has not been a feature of this industry and there is limited use of bargaining across the sector. Awards made in State Systems, which are common rule in nature, or Awards in the Federal System, have until now, acted as the "industry bargain". In most cases employers and employees have little or no capacity to bargain above award rates and conditions.

12. In addition, the SACS industry is seen as a single market – by and large employers do not, and do not wish to, compete with each other for labour – rather they are engaged in the delivery of social services predominately funded by government. Accordingly, it is in both the public interest and in employers interest that wages and conditions across the sector are the same or similar.

13. For all of these reasons, it is essential that the SACS sector be completely in the Federal system or completely in a State system and this be determined on a State by State basis.

14. The ASU of NSW has carefully examined the details of the Bill and does not believe that the new Federal system will be flexible enough to accommodate the interests of the industry, including the goals of the Commonwealth or State Governments policy social objectives, such as in the disability or homelessness sectors.

15. The ASU of NSW is particularly concerned that the provisions in regard to MEA's are totally inadequate to meet the needs of the sector. They are unfair, inequitable and overly complicated.

16. The Bill essentially provides for three forms of multi enterprise agreement in the following circumstances:

    - Where employee representatives and employers consent,
    - Where a single interest employer authorisation has been granted, and
    - Where a low paid bargaining order is in place

17. The ASU of NSW makes no specific submissions in regard to consent MEA's.

Single Interest MEA's

18. The provisions of the Bill in relation to single interest employer bargaining are of particular interest and concern to the ASU of NSW as it would be the form of bargaining most appropriate for the SACS industry.

19. However, as currently drafted, the Bill's provisions will do little to facilitate bargaining in these areas where bargaining has traditionally been fraught with difficulty as employers are largely depend on government funding to deliver services on behalf of the state.

20. The Bill's provisions are lacking in fairness in that only an employer can make an application. They are also cumbersome. The single interest employer bargaining process requires employers to apply for a Ministerial declaration that they be permitted to bargain (s247) or the employers may apply to the FWA for an authorisation (s248). Thereafter the Bill treats the bargaining process as if it were for a single enterprise agreement.

21. The ASU of NSW is concerned that the provisions depend upon employer initiative and *give no weight at all* to employee interests or initiative. This is conflict with the objects of the Bill.

22. We are also concerned that the processes of declaration and authorisation will delay or hinder bargaining and will result in unproductive and unnecessarily incurred transaction costs.

23. In the context of bargaining, the Bill should provide for a balance of interests. The current proposal is unbalanced and to that extent is unfair.

Recommendation: The ASU of NSW recommends that the Bill be amended to provide for a single stage process for approval to enter into MEA negotiations overseen by the FWA utilising criteria as provided for the Ministerial declaration in the Bill at S247 (4)

Recommendation: The ASU of NSW recommends the Bill be amended to also enable employee bargaining representatives to apply for the declaration/authorisation.

24. This would mean that an employer or group of employers, or a union or employee representative, should be able to make an application for the issuance of a single interest

employer authorisation to FWA, and that FWA should be required to issue that authorisation subject to the criteria set out in S247 (4).

Multi Enterprise Agreements (MEAs)

25. The Bill provides that FWA has to be satisfied that no person has coerced or threatened to coerce an employer to make the MEA (s186(2)(b)(ii)); such a provision is unreasonable and potentially puts at risk the entitlements of multiple employers and thousands of employees as a result of the actions of a single person.

Recommendation: The ASU of NSW submits that such provisions will undermine the Bill's objectives allowing parties to reach a Multi-enterprise Agreement. Accordingly the Bill should be amended.

26. Despite all the employers covered by the MEA having to have genuinely agreed to its making, a single enterprise agreement made during the term of operation of the MEA and expressed to apply (even in relation to a single subject matter) to an employee otherwise covered by the MEA, will 'oust' the operation of the MEA in relation to the employee and it will never operate again (s58(3)).

Recommendation: The ASU of NSW recommends the deletion of s58(3) which provides for a single-enterprise agreement to prevail over an existing multi-enterprise agreement prior to its nominal expiry date.

27. Despite the significant and stringent requirements that need to be met to obtain an MEA, employees are denied the right to take protected industrial action in the bargaining process.

28. Given that an MEA must contain a flexibility term (s202), there can be no public interest requirement for the inclusion of s58(3) which militates against certainty and the general requirements (s58 (2)) for an agreement's term to prevail over subsequent agreements made prior to the passing of the earlier agreement's nominal expiry date. This section stands as an incentive for parties to dispense with one form of agreement (MEA) in favour of another (single-enterprise agreement). This runs contrary to the principle, "The Agreement is the Agreement."

29. In the absence of the ability to obtain low-paid bargaining orders (s229(2)), and given the inability to take protected industrial action (s413(2)) for an MEA, employees and their bargaining representatives may be left with no choice but to resort to actions which might be found to be coercive within the meaning of the Bill (s186(2)(b)(ii)). Just what coercion may be intended or found to mean is not clear. This is not a balanced approach to employer and employee rights.

30. Even where the bargaining representatives and the overwhelming majority of employees did not engage in coercive action, their best efforts – and the Objects of the Bill – may be undermined where the coercive actions or threat of such actions by any person, including an employee not immediately involved with the bargaining process, will prevent FWA from approving the MEA.

> **Recommendation:** The ASU of NSW recommends bargaining orders be obtainable in relation to bargaining for a MEA (providing other s230 requirements have been met) whether or not a low-paid authorisation is in operation.

31. Should the Bill not be amended as recommended by the ASU of NSW, the ASU strongly recommends that the Commonwealth refer its powers back to the States with regard to SACS in NSW.

Loss of rights for those transferring from State Systems

Unfair dismissal

32. The NSW Industrial Relations Act gives employees who are dismissed the right to seek relief or redress from an unfair dismissal regardless of the size of their employer.

33. Approximately 75% of all employers in the SACS sector employ less than fifteen employees. This means that these employees would suffer a loss of rights transferring to the Federal system because of the different and reduced rights afforded to employees solely because they happen to be employed by a “small business”.

34. Accordingly, we also adopt in full the submissions made by the ASU and ACTU on Unfair Dismissals, the Small Business Code of Dismissal and the 12 month Probationary/Qualifying Period of Employment for small employers.

Arbitration of Award and NES disputes

34. There are a proportionally higher number of workplace disputes in the SACS industry than all other industries, public and private, covered by the ASU. This is because of the prevalence of small employers and voluntary management committees who constantly change with annual elections and often have limited knowledge of their legal obligations as employers, let alone under Awards or Agreements.

35. The NSW Industrial Relations Commission (IRC) has therefore played a very important role in settling disputes in a cost effective, accessible and efficient manner. This has been of great assistance to the sector.

36. So too, the NSW IRC has been relied upon by both the employer and the ASU of NSW to settle disputes in the Sydney Water Corporation and the Hunter Water Corporation. The terms and conditions of these employees are covered by State Awards (not Agreements) which became "Preserved State Agreements" prior to the enactment of Workchoices.

37. The loss of access to binding arbitration is a key right that will be lost by employees transferring to the Federal system.

38. The ASU of NSW therefore adopts the submissions made by the ASU (National).

Loss of entitlements (award provisions) for those transferring from the State to the Federal System – in particular Award dependent employees

39. The ASU of NSW is extremely concerned about the Award Modernisation process. We are alarmed at the outcome of the Clerical and Administrative Award Modernisation process and the fact that a replication of this outcome for the SACS industry will lead to an immediate and direct loss of pay and entitlements for tens of thousands of workers in NSW who are dependent on the Award. The pay and conditions in the NSW SACS Award are superior to those in the 46 other Awards it is currently proposed it be collapsed into.

40. This outcome would be unacceptable for workers in a sector who was struggled for decades to achieve their current, inadequate, rights and entitlements. It would also not be welcomed by employers and will create unnecessary confusion and disputation within the sector.

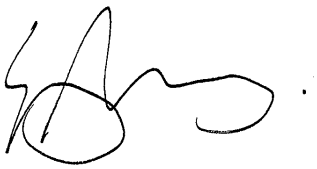
41. In addition, such an outcome will directly exacerbate the serious workforce development issues in the sector identified by the Commonwealth and the NSW Government as being key barriers to achieving their Social Inclusion policy objectives.

42. For these reasons, we adopt in full the submissions made by the ASU on Award Modernisation and strongly recommend that should the concerns not be addressed, the SACS sector in NSW should be referred back to NSW to avoid the obvious negative outcomes.

International Labour Organisation Conventions

43. The ASU of NSW supports the passage of the Bill but prior to doing so the Senate should commission its own independent report on the compliance of the Bill with relevant ILO Conventions. If doing so prior to the Bill being passed would unduly delay passage of the Bill, the Bill should provide for a request to the ILO to provide an opinion on the compliance of Australia's labour laws with relevant ILO Conventions.

Recommendation: The ASU of NSW recommends that the Senate should commission a report on the compliance of the Fair Work Bill 2009 with ILO Conventions.



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Australian Services Union of NSW

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