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9 January 2009

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate

By Email: ewwr.sen@aph.gov.au

Dear Mr Carter,

Please find the submission of the LHMU to the Senate Education, Employment and Workplace Relations Committee's inquiry into the Fair Work Bill 2008.

Please contact me on 02 8204 3024 should you want to discuss any aspect of this submission further. All correspondence should be addressed to Locked Bag 9, Haymarket NSW 1240.

Yours faithfully,

A handwritten signature in black ink that reads "Tim Ferrari". The signature is written in a cursive, slightly slanted style.

TIM FERRARI
ASSISTANT NATIONAL SECRETARY

**LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
(LHMU) SUBMISSION TO THE INQUIRY BY THE SENATE,
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS
COMMITTEE INTO THE FAIR WORK BILL 2008**

1. Introduction

- 1.1** The LHMU welcomes the opportunity to make this submission to the Senate Education, Employment and Workplace Relations Committee's inquiry into the Fair Work Bill 2008.
- 1.2** The LHMU adopts the submissions made by the Australian Council of Trade Unions (ACTU), and we take this opportunity to supplement those submissions in relation to Part 2-4 Division 9 of the Bill relating to low-paid bargaining.
- 1.3** We urge the committee to endorse the above Division for the reasons set out in this submission.
- 1.4** Within this submission, the LHMU seeks to represent the concerns of all of our members. In particular, the LHMU's areas of coverage traverse many of the lowest paid industries in Australia, including:
- Hospitality;
 - Cleaning;
 - Security;
 - Children's Services;
 - Catering; and
 - Aged Care.
- 1.5** Employees working in these industries have traditionally been underpaid and undervalued in relative terms compared to other industries and occupations. As will be illustrated, these industries are characterised by low participation in collective bargaining on the part of both employers and employees. It is for this reason, amongst others, that a scheme is necessary in such industries to provide a meaningful and effective mechanism for employers and low-paid and vulnerable employees to access the benefits of a collective bargaining regime.

- 1.6** 60% of the LHMU's members are women, and around 50% are from culturally and linguistically diverse backgrounds. We support the submission of Asian Women at Work to the Australian Industrial Relations Commission in relation to certain matters in Award Modernisation¹, which details the significant barriers women and those from non-English speaking backgrounds must overcome in the workplace, as well as their vulnerable status as low-paid employees.

2. Low-paid bargaining (Division 9)

- 2.1** The objects of Division 9 of the Fair Work Bill, which the LHMU wholeheartedly supports, are as follows:

(a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs;

(b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises;

(c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and

(d) to enable FWA to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements.

- 2.2** As will be outlined in the specific industries of LHMU coverage below, employees in those industries of LHMU coverage mentioned above are genuinely low paid and have not, historically, had any effective access to the benefits of collective bargaining, as contemplated by object (a) of Division 9.

- 2.3** In addition, as will be illustrated, a large proportion of the employers in each of these industries fall into the categories of 'small' businesses, which lack the experience, resourcing and capacity to collectively bargain (as contemplated by object (c)) and therefore the benefits outlined in object (b) of the Bill.

- 2.4** Similarly, for reasons that will be identified, employees in these industries lack accessible structures, processes and real bargaining power (as

¹ Submission of 15 October 2008

mentioned in object (c)) to negotiate meaningfully for a collective agreement that provides them with benefits.

- 2.5** In terms of object (d) of the Bill, due to the above factors, the LHMU believes that it is imperative that parties in any low-paid bargaining scheme have access to an independent body like Fair Work Australia to enable them to raise and resolve any possible points of dispute that occur in any negotiations. This will ensure that either party in a negotiation does not exploit its potential greater bargaining power and that disputes are resolved quickly so as to avoid unnecessary delay.
- 2.6** The LHMU believes that the creation of a low paid bargaining scheme in the Fair Work Bill is a crucial part of a new legislative regime that aims to encourage and promote the benefits of collective bargaining to both employers and employees.

3. The Cleaning Industry

- 3.1** The Cleaning Industry remains an industry with significantly low barriers of entry for prospective businesses. 57% of employers employ fewer than 5 employees. In relative terms it is an industry that is lowly capitalised, with the top four operators controlling less than 35% of the market². As IBISWorld states in their 2008 industry report:

“the majority of operators in this industry are subject to a low level of concentration, largely stemming from the large number of small business operators and fragmented nature of the industry³”

- 3.2** Businesses with fewer than 100 employees in the cleaning industry have average revenue of \$174,500⁴. Franchised operators are a small but growing segment.
- 3.3** The industry which is largely based on contract tenders for work by businesses is highly competitive. Typically, commercial cleaning contracts have a short duration of one to three years. Because of this, price competition is intense⁵. Add to this the low barriers to potential new entrants and we see an industry that places huge pressures on the constant scrutiny and minimisation of labour costs (approximately 70% of employer total costs are labour and wage costs⁶).

² IBID

³ IBID

⁴ IBISWorld Industry Report, 16 April 2008 - Cleaning Services in Australia: L7866 p7

⁵ IBID p12

⁶ IBID p14

- 3.4** The workforce of the Cleaning Industry is undoubtedly low paid and vulnerable. In 2006 part-time employees earned on average only \$309 in income per week (at an average of 18 hours per week). Full-time employees working 38 hours a week were paid \$692 on average⁷.
- 3.5** Many of these employees, particularly part-timers, work extremely short shifts (2-3 hours) that are usually determined by the minimum engagement provision in their relevant award. Adding to the precarious nature of their employment is the fact that this work is often required to be undertaken outside of ordinary business hours, particularly in the commercial sector. In addition, the labour force contains a significant portion of employees seeking additional hours beyond these minimum engagements and it is common for employees to have to work two or more jobs just to earn a living wage.
- 3.6** The Cleaning Industry is heavily award reliant. The majority of employers are small and lack the resources and capacity to collectively bargain. Many employees lack significant collective bargaining power due to lack of job security, high turnover within the workforce generally and the precarious nature of their employment. ABS statistics support this contention and point to the fact that in the property and business services industry, of which cleaning forms one sector, only 15.5% of employees are covered by a collective agreement, compared to 85% for the electricity industry, 60% for health and 38% for manufacturing.

4. The Hospitality Industry

- 4.1** Employees in hospitality (including the liquor, accommodation and restaurant industries) are traditionally reliant upon awards for their wages and conditions, with 57.2% of all employees having their pay set by an award only⁸. Only 8.8% of employees have their pay set by a collective agreement⁹.
- 4.2** Hospitality as an industry was included in the AIRC's list of priority industries for Award Modernisation, in part because of the Commission's requirement to take into account Award reliance in the form of NAPSAs¹⁰.
- 4.3** Hospitality is a labour intensive industry, with a large proportion of lower-skilled workers¹¹. Low wages are paid to hospitality workers, with those

⁷ ABS Cat. No. 6306.0 Employee Earnings and Hours, Australia, May 2006 (Reissue).

⁸ ABS EMPLOYEE EARNINGS AND HOUR S 6306.0 MAY 2006, p. 28.

⁹ IBID, p. 28.

¹⁰ AIRCFB 550

¹¹ IBISWorld Industry Report, May 2008 – Cafes and Restaurants in Australia: H5731 p18

employed in accommodation, cafes and restaurants earning only 54.7% of the average adult rate¹².

- 4.4** In its submission to the 2007 Australian Fair Pay Commission Wage Review, the Australian Chamber of Commerce and Industry noted that those employed by small businesses tend to earn less, and have a reduced capacity to bargain. As an industry, hospitality is characterized by small employers and has low industry concentration – that is, the extent to which the top four players dominate an industry. IBISWorld estimates that the level of concentration for the top four operators was well fewer than 2% in 2007 in hospitality¹³. 92.1% of employers are classed as small employers, with fewer than 20 employees¹⁴.

5. The Security Industry

- 5.1** The Security Industry is highly competitive based (overwhelming on price) on high competition in this predominately contract industry by way of businesses tendering for work. Additionally, there is a perception among operators that due to the large number of small operators and very low barriers to entry that customers choose their security services on price only. According to IBISWorld¹⁵, competition tends to be particularly price-based in the static guard and patrol sectors.
- 5.2** Further, there is a high degree of sub-contracting of security services to smaller operators making it more difficult for enterprise bargaining to cover any significant number of security guards potentially working side-by-side.
- 5.3** In fact, ABS statistics support this contention and point to the fact that in the property and business services industry, of which security is an integral part; only 15.5% of employees are covered by a collective agreement¹⁶.
- 5.4** In terms of opportunities for collective bargaining to improve productivity and delivery of security services, although the industry is labour intensive, new electronic security systems could, if agreements reflected new competencies and provided for relevant training, allow for improved work methods. The LHMU believes that enhanced access to the assistance of Fair Work Australia in bringing employers, employee and their unions together to explore and discuss industry issues will have the potential to develop meaningful initiatives to address high turnover, casualisation of the workforce, skills and training deficiencies and a less than optimum

¹² ABS Cat. No. 6306.0 Employee Earnings and Hours, Australia, May 2006 (Reissue), p. 1 & 12.

¹³ IBISWorld Cafes and Restaurants

¹⁴ IBID

¹⁵ IBISWorld Industry Report, June 2008 – *Security and Investigative Services in Australia: L7864*

¹⁶ ABS EMPLOYEE EARNINGS AND HOURS 6306.0 MAY 2006, p. 28

public profile of the industry. The LHMU believes that there are many industry issues which can be assisted by the development of industrial relations initiative through a focussed forum for collective bargaining as is now proposed by the Bill.

- 5.5** The LHMU supports views expressed by IBISWorld that factors likely to improve the success of the Security Industry would include a highly trained workforce without reliance on casual and/or under-award paid staff as well as the provision of quality training to staff either on-the-job or through TAFE or equivalent¹⁷.

6. The Children's Services Industry

- 6.1** Childcare services range from small, single-entity crèches servicing a highly specific region (and possibly age group of children), to large firms with multiple establishments nationwide that offer services for all ages of children and all levels of education. The recent insolvency scenarios of a number of large child care operators likely to see an increase in the number of smaller operators in the industry.
- 6.2** IBISWorld notes that "[t]he industry is highly labour intensive with wages accounting for a forecast 65.7% of revenue in 2007-08. However this figure is consistently falling year to year. The average industry wage is well below the national wage average of \$35,250. It is generally accepted that levels of formal qualifications in the industry should be increased. The high level of part-time and casual employment is a barrier to significantly improving skills and qualifications in the industry."¹⁸
- 6.3** The LHMU believes that improved access to collective bargaining could facilitate improvements in productivity and the delivery of childcare services through education and training arrangements. Such improvements were demonstrated in the ABC Developmental Learning Centres LHMU Multiple Business Agreement 2006¹⁹.

7. Aged Care

- 7.1** According to IBISWorld, the level of industry concentration is low with the top four operators accounting for 14% of industry revenue²⁰.

¹⁷ See 14. above.

¹⁸ IBISWorld Industry Report, 31 January 2008: *Child Care Services in Australia*: O8710 p. 12

¹⁹ Agreement Number: 071444391

²⁰ IBISWorld Report, 29 August 2007: *Accommodation for the Aged in Australia*: O8721

7.2 A Prospectus for Babcock & Brown Communities Group (June 2007) stated that labour costs account for at least 60% to 70% of a residential aged care operator's cost base. The "Review of Pricing Arrangements in Residential Aged Care" (published in 2004 and commissioned by the Commonwealth Government) found that labour costs and on-costs represented an average of 61% of total expenses for providers of low care (albeit ranging from 49% to 65%), an average of 72% for providers of high care (albeit ranging from 68% to 77%), and 66% for providers of mixed care (albeit ranging from 58% to 77%).

7.3 Aged care workers are paid an average \$250 per week less than workers with similar skills in the health sector. The LHMU believes that the aged care sector of the health industry can benefit from providing a forum for industry issues to be raised, discussed and negotiated between employers, employees and their unions. No such forums which can provide assistance to the parties in developing a positive collective bargaining agenda currently exist. The possible involvement of funding providers within a bargaining framework is a welcome initiative in the Bill.

7.4 Around 60% of employees are engaged in direct service provision and there are less opportunities to utilise technology to reduce labour costs than other sectors. Attracting and retaining staff and increasing opportunities for training provide opportunities for improvements in productivity and the quality of the service.

8. Catering

8.1 Catering can be segmented into three areas - industrial, commercial and personal catering²¹. The net profit margins in catering tend to be low, with a high and increasing level of price-based competition.²²

8.2 Catering contracts are increasingly being won as part of a combined services package – that is, the contract for catering, security and cleaning (all low-paid types of work) for a particular site, event or business will be 'packaged' (the top 4 players in the industry account for over 55% of market share²³). However the barriers to entry into the industry are low and allow many small businesses to operate in the industry²⁴. As with hospitality employees, the large number of small businesses in the industry reduces the capacity of catering employees to bargain collectively at an enterprise level.

²¹ IBISWorld Industry Report, May 2008 - Caterers and Food Service Contractors in Australia, p.

6.

²² Ibid., p. 13.

²³ Ibid., p. 13.

²⁴ Ibid., p. 17.

8.3 Employees in catering are traditionally reliant upon awards for their wages and conditions, with 57.2% of all employees having their pay set only by an award²⁵. Only 8.8% of employees have their pay set by a collective agreement²⁶. Catering is a labor- intensive industry, with a large proportion of unskilled and lower-skilled workers, with many casual employees working in the event- specific sector of commercial catering²⁷. This contributes to the low wages paid to catering workers as their hours are uncertain and fractured.

9. LOW-PAID BARGAINING

9.1 The LHMU welcomes the policy underpinning the low-paid bargaining stream set out in Division 9 of Part 2-4 of Chapter 2 of the Bill. In our view, there are sufficient safeguards (notably those contained in section 243) to ensure that the making of a low-paid authorisation by Fair Work Australia will be confined to the circumstances and to the classes of employment for which and for whom such authorisations are intended.

9.2 We note that FWA will become involved only upon application by either a bargaining representative, or by an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement. (s. 242). The application cannot be general – it must specify the employers and employees intended to be covered by the proposed agreement (s. 242(2)) and it cannot relate to a “Greenfields” site (s. 242(3)). These sections are not a mechanism for industry wide bargaining but rather a facility for multi-employer low paid bargaining.

9.3 We further note that the making of a low-paid authorisation by FWA is subject to an over-riding public interest test, and that that test is linked to 10 matters that FWA must take into account (s. 243 (2) and (3)).

9.4 In our view, section 243(4) is also an important safeguard as it allows for FWA to modify the bargaining authorisation to adjust the number of employers and the classes of employees, having regard to arguments and submissions that may be made to it. That is, FWA will not be constrained by the scope of the initial application. Section 244 also allows for employers to make application to FWA to be removed from or added to the authorisation.

²⁵ ABS EMPLOYEE EARNINGS AND HOUR S 6306.0 MAY 2006, p. 28.

²⁶ IBID, p. 28.

²⁷ IBISWorld Industry Report, May 2008 – Cafes and Restaurants in Australia: H5731 p18.

- 9.5** Another important feature of the Bill is that it allows for an employer to be removed from the low-paid authorisation if and when the employer makes an enterprise agreement with its employees. Thus employers and their employees in low-paid industries who have been brought into the low-paid bargaining stream may decide to consider the other options they have for exiting the stream for example that of pursuing a multi-business settlement if that is appropriate for their circumstances, or outside the low paid bargaining process that is more appropriate. It must be remembered that arbitration is seen as a last resort, not a first resort.
- 9.6** It is our view that there is scope for further refinement of the procedures surrounding the low paid bargaining stream which would fall within the bounds of Regulations rather than the body of the Act itself.
- 9.7** The first area we feel deserves more detailed articulation in FWA Regulations is the mechanism by which FWA deals with applications made to it to make a determination. It is of concern that there are currently no means by which interested parties are made aware of an application that is before FWA and therefore have no scope to contribute to any settlement, curtaining the effectiveness of the public interest test and the ability of relevant Unions to represent their members.
- 9.8** We suggest the inclusion of a requirement for FWA to publicise details of all applications made for a determination or a consent bargaining order.
- 9.9** We believe the coercion test in 186(2)(b) ii) is unfairly wide and the definition of 'person' should be more narrowly defined as a 'person under the control and acting with the authority of one of the bargaining parties'. In its current form, the definition of person puts the bargaining process at risk by reason of the actions of a third party. With this amendment, parties genuinely committed to a bargaining process can continue to make an agreement.
- 9.10** We feel the application process could be improved if FWA is able, in certain circumstances, to correct applications that may be superficially defective as they list an incorrect employer name where the applicant's intention is otherwise clear. For example, if an application lists " Joe's Childcare Centre Summer Hill", and the true employer entity is 'Joe's Childcare Summer Hill Pty Ltd', FWA should be able to substitute the correct entity and not require a second application provided all other tests are satisfied. This correction process would be particularly useful in circumstances where employment relationships may be unclear.
- 9.11** We believe the low paid bargaining stream can provide productivity benefits to employers. The low paid bargaining stream will allow

employers and employees to create solutions for more productive workplaces. These may include:

- introducing dispute settlement procedures, to allow for fair and transparent resolution of workplace issues;
- introducing training agreements – particularly important in those industries where skilled staff are identified as a key factor of industry success;
- introducing consultation processes to encourage communication about issues affecting the way in which work is performed;
- enhancing job security through more regular point in time/full time employment in the enterprise;
- encouraging initiatives to address work, family and lifestyle interactions;
- examining initiatives to improve work methods, use of new technology, rosters of work, minimum hours and overall work planning.

9.12 All such inclusions in agreements would address the one of the key issues for businesses in the industries the LHMU represents, namely staff turnover with its associated costs and skill losses.

9.13 We are supportive of FWA's ability to provide assistance by directing third parties to attend bargaining conferences, as set out at Section 246 (3) of the Bill. In many of the industries the LHMU covers, this will remove a key impediment to bargaining, namely that the employer is funded by a third party. In aged care and contracting industries (such as cleaning and catering) this provision will be fundamental to bargaining.

DATED: 9 January 2009