Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Submitted via email; eewr.sen@aph.gov.au

9 January 2008

Fair Work Bill 2008

Dear Mr Carter,

The Local Government Association of Queensland Inc (LGAQ) is a statutory corporation established under the *Queensland Local Government Act* to advise and represent the interests of 73 Councils and other local government entities.

LGAQ acknowledges the mandate of the federal Government to amend or introduce new laws with respect to workplace relations, and that this formed a significant part of its pre-election campaign. We note that the Labor Party's Industrial Relations policy, "*Forward with Fairness*", proposed a single national industrial relations system for the private sector employers, including sole traders, partnerships and unincorporated entities. This, however, relies upon all the State Governments referring their powers to regulate industrial relations for these employers to the Commonwealth. This is neither evident nor provided for in the Fair Work Bill.

The "*Forward with Fairness*" policy also stated that, "State Governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees."

Queensland Councils operated in the federal workplace relations systems in respect of their professional, technical and administrative staff until 15 March 2008, when they were "de-corporatised" by the State Government for the express purpose to "*ensure that council workforces are covered by the state industrial relations system*."[1] Whilst one member council (Brisbane City Council) remains a trading corporation operating in the federal system, the speed and simplicity with which Councils were extracted from the Federal system could be reversed by State government referring its industrial relations powers to the Commonwealth[2]. On behalf of its members, therefore LGAQ maintains a strong interest in the proposed national framework for workplace relations and makes the following submissions, which are summarised below, for consideration by the Senate Committee.

---

[1] Hon RJ Mickel, Minister for Transport, Trade, Employment and Industrial Relations, Queensland Parliamentary Hansard 12 February 2008 3.39pm presenting a bill to amend the Industrial Relations Act 1999 and the Local Government Act 1993.

[2] Furthermore, current legal opinion indicates there is some doubt as to whether the de-corporatisation of councils alone will obviate or prevent Local Government's coverage under the Federal industrial relations system. Our sister organisation in NSW has received similar advice in relation to the recent de-corporatisation of councils in NSW.

The Federal Government also proposed to the electorate before the last election, in its "*Forward with Fairness*" policy that, "Fair Work Australia will have an inspectorate to monitor compliance, investigate complaints and prosecute breaches of Labor's industrial relations laws. Employers and employees can be assured that Fair Work Australia will have the power and resources to investigate complaints quickly because Fair Work Australia inspectors will be based in local offices throughout Australia, including in Darwin." In line with this commitment to properly regulate and enforce compliance with National Employment Standards, Modern Awards and Enterprise Bargaining Agreements, it seems unnecessary, inappropriate and contrary to privacy and an employee's choice to not be represented by a union, or a particular union, to give a union access to employment and pay records of a person who is not a member of that union.

LGAQ supports key features of the Bill, especially the focus on developing arrangements which suit the needs of employers and employees at the workplace through collective agreements made between employees and employers, a safety net of nationally consistent employment standards and industry-wide 'modern' awards, as well as provisions which allow for individual flexibility in the application of the package conditions in a modern award or enterprise agreement. The multi-employer form of agreement may be useful for employers such as smaller councils which do not have the resources and expertise to negotiate their own separate Agreements.

There are a number areas of the Bill to which LGAQ would draw the attention of the Committee.

A National System of Workplace Relations

1. The *Fair Work Bill* does not appear to provide for employers and employees in the State of Victoria which are not constitutional corporations, nor otherwise included in the definition of "national system employers", and for whom no state system for regulation of industrial matters has applied since the referral of powers by the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria. It is submitted that unless a reference similar to Part 21 of the *Workplace Relations Act 1996* is included in the Fair Work Bill, or perhaps through a *Transition to Fair Work Bill*, it is possible that many Victorian employers and employees may remain subject to the *Workplace Relations Act 1996.*
2. There does not appear to be any provision for the potential future referral of industrial relations powers by a State, especially in relation to private sector non-incorporated entities, as proposed by the government in its pre-election policy statement.
3. Complexity will continue with respect to constitutional corporation status, and application of national "Fair Work" system to local governments, charities, associations, educational and health institutions and other not-for-profit employers and, despite the recent decision of the Federal Court regarding the corporate status of Etheridge Shire Council[3], the situation remains unclear.

[3] Australian Workers' Union of Employees, Queensland v Etheridge Shire Council [2008] FCA 1268

4. The non-excluded items from State Industrial laws listed at section 27 (2) is so extensive that 'national system employers' will still need to be aware of, and operate in accordance with, these state laws.

Promotion of Collective Bargaining and Agreement-making

5. The 'modern awards objective" referred to in part 2 of the *Fair Work Bill* includes [S134 (b)] "the need to encourage collective bargaining, and" [S134 (d)] "the need to promote flexible modern work practices and the efficient and productive performance of work". S159(c) of the *Fair Work Bill* refers to, "if the modern award is named employer award…". Enterprise awards preceded award flexibility clauses of the early 1990s and enterprise bargaining, were often created by consent (agreement) to provide specific arrangements for an enterprise and to exclude other parties [i.e. competing unions] from a business or location. The Award Review Taskforce Report on Award Rationalisation in July 2006 noted that Enterprise Awards were a function of the previous legislation due to its reliance on the industrial relations power in the Constitution and the need to establish the interstate nature of a dispute to give the commission authority to make an award determination[4]. The Report also states,

   > …a commitment to the retention of the [respondency-based] award system appears inconsistent with the primary focus of the workplace relations system on agreement-making at the workplace level.[5]

   Furthermore, the Taskforce Report noted in Principle 6. Enterprise Awards;

   > An enterprise specific award should be subsumed by a rationalised award unless the parties to that award can demonstrate to the AIRC that there are compelling grounds for this not to occur. If the AIRC is satisfied that compelling grounds exist, it may allocate a sunset date for that award of not more than three years from the date of the rationalisation request.

   It is submitted, therefore, that 'named employer awards', previously known as enterprise awards, have no place a in new national system designed to encourage collective enterprise bargaining. Employer or enterprise specific arrangements should be captured in Enterprise Bargaining Agreements, not named employer modern awards. Existing Enterprise or named employer awards could be redefined as 'subsidiary enterprise agreements' and given a limited life until a new EBA is certified or 1 July 2012 (i.e. 3 years as per the Taskforce' recommendation), whichever is the earlier.

---

[4] The large number of federal awards reflects the constitutional underpinning of the pre-reform legislation. In particular, prior to the commencement of the Work Choices Act, the AIRC could only make awards in settlement of interstate industrial disputes. This meant that the scope of awards was largely respondency-based and involved named parties, rather than reflecting industry or occupational parameters. This meant that irrespective of whether a federal award applied on an industry or occupational basis, it was required to operate on a respondency basis. Under the pre-reform legislation it was essential that unions be among parties upon whom an award was binding because the award was, by definition, a part resolution of an existing dispute involving the union. Awards have historically assisted in the demarcation of work between unions and in the determination of right of entry arrangements. In many cases unions have mapped out demarcation boundaries through award respondency. The removal of the pre-existing boundaries raises the prospect of unions seeking to expand coverage and membership. Concerns about the possibility of demarcation disputes arising as a consequence of award rationalisation is a significant issue as these disputes can cause a high level of disruption at the workplace level.
Award Review Taskforce Report on Award Rationalisation July 2006, Chapter 4, Paragraphs 99, 107,108, 156, 157, 158

[5] Ibid, paragraph 124

6. There appears to be no provision in S172 (2) (a) of the *Fair Work Bill* to make a collective agreement with part of a workforce, either on an occupational groupings, business unit or geographical basis, as provided previously in S322(3), S327 and S328 of the *Workplace Relations Act 1996* [although S 186 (3) of the *Fair Work Bill* does appear to recognise that an agreement may be made with part of a single employer's workforce].

Role of unions in the Fair Work system

7. Regulatory responsibility for compliance appears to have been surrendered to unions (employee organisations), with no provision for the privacy of an employee who chooses to not be member of that union. Nor is there a requirement for the employee or union member to authorise inspection of their confidential personal records.

8. An organisation of employees with a single member in a workplace can apply to be covered by an Agreement giving it rights to access information, be consulted and enforce provisions of the Agreement, even if this is against the wishes and to the disadvantage of the remainder of the workforce covered by the Agreement.

9. Disruptive competition between unions for membership may be a consequence because the Bill allows any union with potential coverage of one job in a large organisation to enter a workplace, inspect employment and pay records, speak with employees, conduct union business and participate in bargaining.

10. Multiplicity of unions and outdated rules of coverage will compound the above situation where an employer may be exposed to bargaining claims and rights of entry from more rather than fewer unions.

11. S175 of the *Fair Work Bill* requires that an employer "must make all reasonable steps to give notice of its intention to make the [greenfields] agreement to each employee organisation that is a relevant organisation in relation to the agreement." It is highly probable that an employer will, by intention or error, fail to notify a union which potentially has coverage of at least one job which will be subject to the Agreement. The provisions of S175 and S179 of the *Fair Work Bill* create potential for unions with peripheral interest, or in competition for members with other notified unions, to delay and obstruct the making of a greenfields agreement, thereby delaying investment and employment which may then withdrawn or reallocated to other opportunities overseas.

Unfair Dismissal

12. The provision of a "Minimum Employment Period" and "Fair Dismissal Code" are strongly supported. It is submitted, however, that the definition of a small business employer in Section 23 of the *Fair Work Bill* is too narrow. And should be adjusted to apply to employers of "100 employees or less" which both better reflects the nature of small business employers in this country and the size at which a small business employs suitably qualified and experienced human resource officer. Many family businesses in the retail, hospitality and tourism industries in particular, as well as building, manufacturing, agricultural and horticultural industries employ between 20 – 80 employees, including seasonal and casual workers, and are better suited to application of the 12 month minimum employment (probationary) period and Fair Dismissal Code than more complex recruitment, performance management, disciplinary and unfair dismissal processes expected of larger employers.

Low Paid Bargaining Determinations and Minimum Wage Adjustments

13. The provisions for low-paid bargaining in S 241-246 and S 260-265 appear to serve no useful purpose other than regressing to compulsory arbitration or excessive ambit claims increasing union access and profile potentially increasing labour costs for employers and consequently decreasing employment opportunities for lower-skilled employees in lower paid occupations. The low-paid industries or occupations are not described nor defined. It is submitted that the periodic reviews of minimum wage rates and modern awards are the appropriate processes for addressing employment issues, and individual flexibility provisions in modern awards will allow employers and employees to deal with productivity and personal issues without the further encumbrance of 'low-paid bargaining.'

Proposals and Recommendations

The following proposals and recommendations are suggested to address the issues raised above without altering the general tenor of the *Fair Work Bill* or the commitments given to the electorate before the last election.

1. That the *Fair Work Bill* be amended to make provision for employers in the State of Victoria to be included as "national system employers", and for employees of Victorian employers to therefore be "national system employees.
2. That the *Fair Work Bill* be amended to make provision for referral of powers by the States, as provided by Section 51 (xxxvi) of the Constitution, in relation to all industrial and workplace relations matters for employers and employees, other than those engaged directly by the State as public servants("employees of the Crown") and local government employees subject to State industrial relations laws at the date the *Fair Work Bill* [27 November 2008] was introduced, unless otherwise determined by the State.
3. That the Senate, as representatives of each State, shall use whatever means available to it to encourage all State Governments to refer powers in relation to all industrial and workplace relations matters for employers and employees, other than State public servants and local government employees as described above.
4. That the *Fair Work Bill* be amended to include provision for an employer to develop and maintain a number of agreements with various parts of its workforce, based upon occupational groupings, business units or sub-units, geographical region or location or any other grouping of employees that is fairly chosen in the context of that enterprise, as previously provided through S322(3), S327 and S328 of the *Workplace Relations Act 1996*.
5. That the *Fair Work Bill* be amended to provide that "Fair Work Ombudsmen" Inspectors, as well as company officers and external auditors, as well as an employee in relation to their own records, be the only persons authorised to inspect time and wage records, and other personnel records.
6. That the *Fair Work Bill* be amended to provide that where there is a reasonable suspicion that an employer is not paying an employee correctly, has not paid a current or former employee correctly or is otherwise breaching the relevant industrial instrument, a union or employee can make a report to the "Fair Work Ombudsman" who may, upon receipt of evidence or upon its own initiative, commence and investigation including the inspection of records by an authorised "Fair Work Ombudsman" inspector.

7. That the *Fair Work Bill* be amended to provide that a union official, in addition to being accredited by the union and holding a permit from *Fair Work Australia*, shall obtain and present to the employer written consent from an employee who is a member of the union before being given access to that employee's time and wages records. Further, that a union official may not access the time and wages records of any person who is not a member of that union at the time the request is made and/or who was not a member for the period covered by the request.
8. That the *Fair Work Bill* be amended to provide that an employer is only obliged to bargain with one union which has the majority of members in an occupational group, business unit, region or location, or with a principal union which represents a significant proportion of the workforce (eg more than 20%) which will be subject to the Agreement. [Alternatively, that a principal union or the peak council of unions may represent members of other unions in bargaining with an employer.]
9. That the *Fair Work Bill* be amended to provide that an employer is only obliged to grant entry to a union, which has coverage of an occupation or the employer's industry, to hold discussions with or inspect the records of a specified employee who is a member of that union.
10. That the provisions for low-paid bargaining and determinations in S241-246 and S260-265 be deleted from the *Fair Work Bill*.
11. That the definition of Small Business Employer in Section 23 (1) of the *Fair Work Bill* be amended to state;

    "(1) A national system employer is a *small business employer* at a particular time if the employer employs 100 employees or less at that time."

Review Schedule 1 of Workplace Relations Act 1996

It is further submitted that Schedule 1 of the Workplace Relations Act 1996, which is referred to and is likely to become a Schedule to the "Fair Work Act", be fully revised with the intention of aligning coverage rules or organisations with industries and groupings as described in modern awards, and to require all industrial organisations and associations of employers, employees and independent contractors corporations subject to the corporations law. By addressing the overlaps and inconsistencies in coverage rules, which has been compounded by the inclusion of state organisations with transitional registration, rationalising and reducing the number of employee organisations and representatives with whom an employer must deal and bargain, the relationship between employers and organisations of employees may be improved.

These amendments and reviews will, it is submitted, support a national workplace relations system for employers and employees, and recognise the appropriate role for unions and employer associations in a fair system.

Yours faithfully,

Greg Hallam
Executive Director