

Submission

to

**Senate Standing Committee on Education, Employment and
Workplace Relations**

**Inquiry into the Workplace Relations Amendment
(Transition to Forward with Fairness) Bill 2008**

Submitter: Ben Kruse , General Secretary

Organisation: United Services Union

Address: Level 7, 321 Pitt Street, SYDNEY NSW 2000

Phone: 9265 8211

Fax: 9261 2265

Email: bkruse@usu.rog.au



New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union

Ref: 20070711ANE01ME
Contact: Aaron Neal

28 February 2008

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

Dear Sir,

Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

It has come to the attention of the New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union (the "USU") that at the Workplace Relations Ministerial Council meeting of 1 February 2008 the New South Wales State Government failed to support a proposal put forward by the Queensland State Government for the making of transitional federal legislation immediately excluding councils from the federal industrial relations system.

This has meant that pre – election commitments by federal and State Labor Governments that local government employees would be excluded from the federal industrial relations system remain unfulfilled, leaving council workers exposed to the constitutional difficulties associated with the *WorkChoices* regime and in particular the question whether local councils are constitutional corporations.

This is even more concerning given the introduction of new legislation in Queensland by the employment and Industrial Relations Minister John Mickel which decorporatises local government ensuring that local councils are not classified as constitutional corporations.

.../2

Mr John Carter
Department of the Senate

Ref: 20070711ANE01ME
Contact: Aaron Neal

Unless urgent action is taken NSW councils and local government employees will be left in the uncertain position of not knowing which jurisdiction applies to industrial disputes, unfair dismissals and wage claims. Furthermore, the enforceability of wage increases due under the *Local Government (State) Award 2007* remains uncertain.

Accordingly it is our submission that in consultation with the New South Wales State Government, the federal Government should immediately enact urgent legislation, including any available and/or necessary subordinate legislation, to exclude New South Wales local government employees from the federal industrial relations system. In our submission, the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* presents a perfect opportunity to enact such exclusion.

In support of our submission we have attached our submission to the Inquiry into Options for a New National Industrial Relations System commissioned by the New South Wales State Government and conducted by Professor George Williams.

Finally, please note that the USU wholeheartedly supports the abolition of Australian Workplace Agreements.

Yours faithfully,



Ben Kruse
GENERAL SECRETARY

(AN/ip)



New South Wales Local Government,
Clerical, Administrative, Energy, Airlines and
Utilities Union

Level 7, 321 Pitt Street, Sydney 2000
Ph:92658211,Fax:92612265,mail:united@usu.org.au

Ref: INQ2007IRSystem

**Submission to the Inquiry into
Options for a New National Industrial
Relations System being conducted by
Professor George Williams**

Contact:
Ben Kruse
General Secretary
Or
Lyn Fraser
Research Officer

October 2007

Summary

The United Services Union prefers Option 3 in Professor Williams's options paper - State systems underpinned by national standards.

Within this model the USU strongly supports having the state public sector, broadly defined (including state owned corporations), and local government bodies (including local government boards, corporatised bodies, regional organisations of councils or other local government entities however so defined), the non-government community sector and the independent education sector remaining within the NSW state system.

The Union considers the NSW industrial relations system to be superior to others in delivering fair and equitable outcomes in the workplace by agreement or arbitration. Any national legislated minimum standards should focus on the strengthening of fundamental workers rights across the board, not trading off rights to achieve harmonisation.

The USU

The New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union (the United Services Union) is the principal union in New South Wales local government and in the clerical and administrative industry and in the Energy and Utilities sector. The Union is a registered organisation of employees under the NSW Industrial Relations Act. The largest proportion of our members are employed in the local government industry.

Legislative Basis of Local Government

The Local Government Act 1993 provides the legislative basis for local government in New South Wales. This Act is an Act of the NSW State Parliament. The State Government retains the power to dismiss councils, following a public inquiry. The State Government maintains a supervisory control over local government in many areas. Many features of local government accountability have been transferred from the State Government. In addition, the operations and strategic direction of local councils are reviewed by the Department of Local Government, which is a state government department.¹

Most importantly, many employment arrangements arise from the Act and there is considerable inter-relationship between the Act and state industrial instruments. The Act does, for example provide: employment protection

¹ See: S. White, 'Introduction', Local Government Law and Practice Service New South Wales, Vol. 1, Thomson Lawbook Co.Sydney, p374f.

provisions for staff affected by council amalgamations or boundary changes; no forced redundancy provisions for staff for 3 years after transfer to another council and; other provisions concerning staff (ss 348-354)

Experience of the NSW Industrial Relations System

As participants in the NSW industrial relations system, the United Services Union supports the preservation of the operations and involvement of the NSW IR system, complete with enforcement functions and judicial arrangements.

The Industrial Relations Act 1996 (NSW) is the principal legislation covering workers in the state. This Act enabled the Industrial Relations Commission to deal with a full range of industrial issues and provide adequate powers to resolve issues for the industry parties. The IRC's principle of fairness has been important to the process of making and varying awards as well as in the resolution of disputes.

The state award system protects those with less bargaining power

The principle of fairness is the statutory mandate of the NSW IRC in its award-making and dispute resolution functions. As such, it has been the experience of the USU that since the consolidation of our local government awards in the early 1990s the Local Government (State) Award has secured decent wages and conditions for the vast majority of NSW council workers. There are a few places such as Sydney, Newcastle and Wollongong where sheer size and density demand enterprise specific arrangements.

There has continued to be a need for local variations to the state award through site agreements such as council agreements. However it is the common rule application of the state award that has delivered consistent employment and living standards for local government workers from Balmain to Bourke and Bega to Brewarrina.

The state award has facilitated significant improvements in important areas such as long service leave, redundancy, pay equity, paid maternity leave and penalty rates. Many of the changes to the award have centred on protecting and improving conditions for workers in vulnerable occupations or whose employment status is less secure.

State award negotiations have also contributed to increased gender equity in NSW local government. Between 1986 and 2001 the gap between male and female full-time earnings was reduced from 18.4% to 4.4% in NSW local government. In addition, the Union's 2004 Equal Hours Case led to the reduction of working hours for community services professionals from 38 to 35 hours per week, bringing this predominately female occupational group into line with male dominated professionals such as engineers, health surveyors and town planners.

The Award has also seen the gradual evolution of improved salary systems through initiatives such as the introduction of skill-based pay and the improvements resulting from the industry salary system dispute.

The certainty created as a result of the common rule industrial regulation not only resulted in equity improvements and protection for more vulnerable workers, but also allowed for workers to enjoy the portability of entitlements (such as long service leave and sick leave entitlements) when moving to new workplaces within the local government industry.

The far-reaching changes enunciated through the current federal government's industrial relations legislation aim to strip away the role of industrial regulation available through the state system. The Workchoices legislation will also remove any lasting protections to employment conditions other than the five basic minima set out in the 'Fair Pay and Conditions Standard'.

NSW system superior

The USU is of the view that the NSW system is superior in protecting the rights of working people and the maintenance of living standards. The Union is therefore not in support of referral options which would result in the withering away or weakening of this state system.

Below is a small selection of elements that make the NSW system superior.

- The general thrust of the principles contained within the ILO Equal Remuneration Convention are contained within the NSW Industrial Relations Act 1996 concerning pay equity or equal remuneration.
- With fairness as a statutory mandate of the NSW Commission in dispute resolution and the making of state awards, the system has the capacity to provide fair outcomes and protections for sections of the workforce that have little bargaining power.
- Workers have the ability to recoup unpaid or underpayment of wages through a timely, inexpensive and accessible process.
- Adequate 'right of entry' provision enabling unions to enter workplaces and conduct investigations.

With regard to equity issues, it should be noted that the institutions established by law to set standards and regulate employment are critical in determining pay equity.²

² This is a point which has been argued by Baird, Cooper and Oliver of the University of Sydney in their report "Down and Out with Work Choices: The Impact of Work Choices on the Work and Lives of Women in Low Paid Employment" commissioned by the NSW Office of Industrial Relations and

In regard to system based advantages of the NSW industrial relations system, the Honourable Justice Walton noted the following four advantages:

Simplicity – Despite the Commission’s adherence to the formalities commensurate with a court-based system for the resolution of disputes, it performs the actual function of dispute resolution in an informal way with a heavy emphasis on conciliation. Indeed, most industrial disputes are resolved by conciliation. The present rate of success of conciliations in unfair dismissal matters is well in excess of 80 percent and , with general industrial disputes, the rate is even higher.

Accessibility – Access to the Commission’s dispute resolution function is affordable and straightforward. Access is not hindered by constitutional problems. Further, the institution has a genuine state-wide reach providing dispute resolution and unfair dismissal functions to all regions of the State.

Timeliness – All industrial dispute and unfair dismissal processes work to short timeframes. Unfair dismissal matters receive their first listing within 21 days and industrial dispute matters are generally listed well under five days of notification and in more urgent matters, virtually immediately. The process involved is generally speedy.

Practicality – The system is geared to produce common sense and practical outcomes to industrial and employment problems. This can be achieved as the Commission is made up of members with substantial practical experience across a broad range of industries, professions, dispute resolution and wage-fixing processes.”³

By contrast Workchoices has proved to be an overly complex and confusing system which strips away the rights of working people and access to decent the pay and conditions.

Uncertainty for local government under Workchoices

The United Services Union has been of the view that councils are not constitutional corporations and that the Local Government (State) Award is still the appropriate industrial instrument covering local government in NSW. This is still our formal position.

undertaken by the Women and Work Research Group, < <http://wwrg.econ.usyd.edu.au>> (accessed 11 Oct 2007).

³ The Honourable Justice M. Walton, “The New South Wales Industrial Relations System: 1998 to the Workplace Relations Amendment (WorkChoices) Act 2005”, *University of New South Wales Law Journal*, Vol 29, No. 1, 2006, p53f.

Nevertheless, in the industry doubts remain with respect to the application of the federal government's industrial relations legislation to local government. During the proceedings of the High Court, The Commonwealth Solicitor-General suggesting they may not apply to local councils.⁴ Joe Hockey, the current federal Minister for Workplace Relations and Jim Lloyd, the federal Minister for Local Government have made a series of inconsistent statements about the application of WorkChoices to local government. Major litigation and industrial disputation is now underway in Queensland adding to the state of uncertainty.

In the meantime the Local Government Association (the employer association) has approached Hockey seeking exemption from Workchoices, but his spokesperson advised they can't just opt out of Workchoices. It is interesting to note that whilst the Local Government Association voted to approach the Minister on this matter, the Shires Association was unwilling to formulate a policy position until after the Election – indicating the different views from within the two branches of the employer body. (See Attachment 1 'Chronology of complexity, confusion and chaos').

The complexities and uncertainties of the federal industrial relations system raise significant problems associated with the payment of general wage increases. Great financial uncertainty awaits councils in contemplating the possibility of federal jurisdiction being confirmed.

Whilst the Department of Employment and Workplace Relations (DEWR) has published summary pay scales derived from the Local Government (State) Award, the Local Government and Shires Association is in dispute with respect to these published rates.

USU research indicates that less than 7% of council workers received any of the AFPC increase and most of these only received a small proportion of the increase determined by the AFPC. As the Union is of the view that local councils are not constitutional corporations, the DEWR pay scales are considered by the union to be irrelevant. Nevertheless uncertainty around the issue is having an adverse effect on the flow-on of Award increases. This is despite endeavours by the industry parties to take account of equity issues and have a 'common sense' approach. Not only is the current uncertainty making it difficult for the industry parties, it is naturally causing some anxiety for workers and increasing budgetary uncertainty for local councils.

At the present time, negotiations are continuing between the Unions and the LGSA. Attempts are being made for the parties to reach an understanding so that the LGSA can recommend the flow through of the 3.2% award increase (which is due on the first full pay period on or after 1 November 2007) regardless of the status of councils as constitutional corporations. However, Workchoices has made this process increasingly problematic and at the time of writing this report, there are threats of a wage freeze. The employer's

⁴ See *State of New South Wales & Ors v Commonwealth (AKA Workplace Relations Challenge)* [2006] HCATrans 233 (10 May 2006).

(LGSA) dispute with DEWR regarding the AFPC pay scales has led the LGSA to provide the following advise to councils in the *Local Government Weekly*:

“In view of the uncertainty about the appropriate pay scale, it may be prudent for councils to defer consideration of granting a wage increase until the AFPC has published the Local Government pay scales”.⁵

This situation is having an enormous impact for the day-to-day living standards of employees. With Award increases due in a couple of weeks, Workchoices is threatening cost of living increases.

Powers conferred on IRC by Agreement

Section 146A of the Industrial Relations Act provides the NSW Industrial Relations Commission the power to exercise certain functions conferred on it by agreement. In the uncertain legal and jurisdictional environment, S146A has provided an opportunity for the Union and councils to take a responsible and practical approach to resolving industrial issues at the local level. The current uncertainty over wages is a reason why it has been particularly important for councils to enter into referral agreements and collective common law agreements at the present time. Where a dispute does arise, referral agreements provide a forum where issues can be resolved quickly, simply and without costly Federal Court and High Court litigation.

At the time of writing this report 95 councils had signed referral agreements (see Attachment 2). Whilst this is a commendable outcome, the fact that a number of councils remain uncommitted to signing referrals indicates the extent of the complexity and confusion caused by Workchoices.

But of greater concern than the confusion and lack of certainty, is the potential loss of entitlements, rights, conditions and commitment to fairness currently available through the NSW industrial relations system.

The USU would support a future Rudd Labor government establishing an industrial relations system which preserves the superior NSW system but also provides strong protections and entitlements to workers in other areas, states, jurisdictions.

Establishment of national legislated minimum standards

The establishment of national legislated minimum standards would not be opposed by the USU. They could be established through the use of a combination of constitutional heads of power including the external affairs power and a minimal referral of powers from the states. The external affairs

⁵ LGSA, *Local Government Weekly*, Issue 37, Item 9, 14 September 2007

power can be used for legislating in order to meet standards under ILO conventions to which Australia is party.

The establishment of the national legislated minimum standards must not weaken the NSW system or result in the adoption of a lowest common denominator safety net. The USU would not want to see the ability for the State commission to conduct test case proceedings for awards removed.

Any national legislated minimum standards should focus on the strengthening of fundamental workers rights across the board, not trading off rights to achieve harmonisation. Indeed the best elements of the state system should also be available for workers across the nation. The concept of "minimum" should mean no less generous than the best state system – not a system that will undermine the best state system.

The USU is strongly of the view that any referral of powers must not be associated with a general handing over of power by the State.

In relation to a harmonised national system of industrial relations, in agreement between the State and the Commonwealth, federal legislation should also allow for utilisation of the NSW IRC for purposes of conciliation and arbitration of disputes through the disputes settling procedures in Federal collective agreements.

The USU has particular concerns that federal models being contemplated, (including those put forward by national bodies within the union movement), contain strong policy differences as compared to state union bodies, such as our own. In this regard we wish to strongly put the position that a new industrial relations system should maintain the ability to make comprehensive common rule Awards and not focus on enterprise level collective bargaining as a preferred model.

Resolution

A separate and viable NSW state industrial relations system must be maintained.

The USU submits that state public sector, broadly defined (including state owned corporations), and local government bodies (including local government boards, corporatised bodies, regional organisations of councils or other local government entities however so defined) should remain within the NSW State jurisdiction.

The USU also supports the submission of Australian Services Union of NSW in stating that the industry of social and community services should also remain wholly within the jurisdiction of the State.

URGENT ACTION

Workchoices is having a devastating impact on the payment of general wage increases in NSW. There is also continuing jurisdictional uncertainty about important matters such as dispute resolution and unfair dismissal.

Labor's '*Forward with Fairness*' policy makes it clear that a Rudd Federal Labor Government will give the Australian States a choice as to whether to keep local government within the State industrial relations systems.

The USU urges the lemma state government to work with a newly elected Rudd Government to take urgent action to clarify the jurisdictional arrangement for NSW councils and restore/reconfirm state industrial coverage for NSW local government. This needs to occur at the very earliest opportunity by way of emergency transitional legislation.

Further, the USU urges government to work to ensure that the best elements of the NSW state system are also made available to workers across the nation.

Chronology of complexity, confusion and chaos

2005

26 May

Federal government announces the WorkChoices package — a major shift in the industrial relations landscape of Australia.

November

2 November, Federal Minister for Local Government, Jim Lloyd, indicated councils may not come under the federal system as they are “not constitutional corporations which means they will remain under the NSW system....”

Workplace Relations Minister, Kevin Andrews supported application of Workchoices to local government, particularly ‘city councils’.

2006

March

27 March - commencement of the federal government’s WorkChoices legislation. Disputation concerning that status of Awards as NAPSAs.

May

10 May Solicitor-General for the Commonwealth, D M J Bennett told the High Court that Workchoices laws may not apply to local councils, charitable institutions and religious organisations.

November

Local Government (State) Award 3% increase becomes effective on 1 November amid ongoing certainty about constitutional validity of Workchoices and whether local councils are captured by the federal legislation.

14 November High Court of Australia⁶ hands down decision upholding the constitutional validity of the WorkChoices laws. However doubts still linger about which workplaces it is to apply to. The High court did not decide whether or not the federal laws apply to local councils, leaving it up to a further legal challenges to decide whether or not councils and a range of other organisations fall under the laws.

December

First Australian Fair Pay Commission decision becomes effective as of 1 December - \$27.36 per week increase to pay scales up to and including \$700 per

week and increase of \$22.04 per week in pay scales above \$700 per week (based on 38 hour week). But few councils pay any of the increase.

2007

March

14 March Australian Workplace Relations Summit in Sydney, the new Workplace Relations Minister, Joe Hockey said "Our advice is that it really depends on the structure of the council and the vehicle that is being used for employment purposes.... Councils were essentially creatures of the states."

But within 2 weeks told The Australian he "strongly supported the push" by councils in Queensland to operate under WorkChoices.

April

16 April Minister for Employment and Workplace Relations, Joe Hockey MP writes to Mayors of Councils advising that "Only councils not constitutional corporations remain covered by their State industrial relations system" and that "Most councils will be covered by the federal WorkChoices system".

27 April Hon Paul Lynch MP, Minister for Local Government (NSW) writes to Mayors and Deputy Mayors of NSW councils encouraging them to enter an agreement under Section 146a of the NSW Industrial Relations Act "by which they can remain in the NSW industrial relations system".

September

14 September, LGSA stated in the *Local Government Weekly*:

"In view of the uncertainty about the appropriate pay scale, it may be prudent for councils to defer consideration of granting a wage increase until the AFPC has published the Local Government pay scales".

21 September, the Presidents of the Local Government Association of NSW announced they would write to Joe Hockey to say NSW local government wants to be exempt from Workchoices.

Spokesperson for Joe Hockey stated that there is no question of councils opting out - "Councils cannot choose which system they are covered by." Nevertheless, uncertainty remains.

USU Bi-Annual Conference approves Local government (State) Award 2007. LGSA Executive approve State Award increase but some doubts linger as to whether it will actually be paid.

October

2nd AFPC pay increase effective as of 1 October 2007 - \$10.26 per week increase to pay scales up to and including \$700 per week and increase of \$5.30 per week in pay scales above \$700 per week (based on 38 hour week).

November

1 November, Local Government (State) Award 3.2% increase due to be paid – but at the time of writing this report, ongoing uncertainty creates doubts about whether workers will be paid the Award increase.