Submission from

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

To

Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the Fair Work Bill 2008

New South Wales Local Government, Clerical, Administrative,
Energy, Airlines & Utilities Union
(United Services Union)
Level 7, 321 Pitt St. Sydney NSW 2000
Ph: 02 9265 8211
Fax: 02 9261 2265

December 2008

Authorised by Ben Kruse, General Secretary

INTRODUCTION

The United Services Union is a State registered Union based in New South Wales with some 33,000 members working in local government, the energy sector, utilities, and private sector, white collar employment including the airlines industry. As the result of the introduction in 2006 of WorkChoices employees in all areas of USU industry coverage were adversely affected through these changes to workplace laws. In particular, our members in smaller, private sector, vulnerable workplaces suffered through the use of Australian Workplace Agreements. Further, the system of federal bargaining associated with the use of strikes, fines, lock-outs, prohibitions and penalties put downward pressure on employment outcomes in terms of wages, conditions and job security.

While the system of industrial relations associated with *Forward with Fairness* and *Fair Work Australia* constitutes a significant improvement on WorkChoices, in many respects, the Federal industrial jurisdiction under Fair Work Australia, will continue to disadvantage those workers who would otherwise be employed under the New South Wales industrial relations jurisdiction. This submission identifies several key concerns of the United Services Union in that regard.

LOCAL GOVERNMENT AND THE PROBLEM WITH CONSTITUTIONAL CORPORATIONS

Under WorkChoices, the former Federal Government sought to rely on the constitutional corporations power to establish a national industrial relations system. From the outset difficulties were identified in roping local councils (together with church bodies and charitable institutions) into the proposed national system on the basis of this head of power. Councils, from time to time, may or may not be constitutional corporations. The uncertainties associated with the use of the constitutional corporations power was accepted by the Commonwealth Solicitor General during the High Court Constitutional challenge and was highlighted in the *Etheridge Case* heard by the Federal Court in Queensland.

While the United Services Union has always held the view that Councils were not captured by WorkChoices, significant disputes arose about this issue within the industry. Throughout 2006, 2007 and much of 2008 local government was placed in a no man's land of jurisdictional uncertainty causing difficulties for employers and employees alike. This led to major disputes about the application of State Award and AFPC increases, together with a threatened wage freeze in late 2007.

Like WorkChoices *Fair Work Australia* is also based on the corporations power in the Constitution. Without a referral of state powers, *Fair Work Australia* cannot establish a unitary system of industrial relations except within the corporate private sector. The USU will resist the referral of NSW industrial relations powers to the Commonwealth. In our view, *Fair Work Australia* does not constitute a best practice system of industrial relations in comparison with the NSW system of industrial relations where industry award bargaining is supported by means of conciliation and arbitration.

Prior to the November 2007 Federal election, in recognition of these difficulties, the then leader of the Opposition, Kevin Rudd, gave an undertaking that local councils would be excised from the Federal jurisdiction at the request of State Premiers. Excising NSW councils from the *Workplace Relations Act* is necessary and will end the uncertainty about jurisdictional coverage.

DECORPORATISATION

In November this year the New South Wales government passed the *Local Government Amendment (Legal Status) Bill* establishing councils in New South Wales as bodies politic of the State, decorporatising these authorities and removing them from Federal industrial relations coverage.

Further, in September this year the New South Wales Premier, Nathan Rees, wrote to Prime Minister Kevin Rudd requesting the excising of New South Wales Local Government from the Federal industrial relations system.

Attached to this submission are copies of relevant items of correspondence from the New South Wales Premier, from the United Services Union together with a copy of the Prime Minister's undertaking of November 2007.

Decorporatisation provides an interim, or band aid solution for NSW local government. However, the federal government now needs to act and excise NSW councils from the Workplace Relations Act to overcome any uncertainty.

ASSOCIATED COUNCIL ENTITIES

Since decorporatisation it has become apparent that some NSW councils may seek to avoid state award coverage by adopting service provision models exploiting the use of associated corporations or other separate entities. Employees who are transferred into local government corporations or other entities face the loss of employment security as they lose their status as local government employees, including rights under the Local Government (State) Award. Employees engaged by associated entities may be forced onto inferior federal agreements and lose access to the NSW Industrial Relations Commission for the purposes of dispute resolution and in respect of unfair dismissal hearings. The USU is currently taking action in respect of corporations at Penrith City Council, Hawkesbury City Council and in respect of a proposed corporation at Tamworth.

In excising councils from the *Workplace Relations Act* such amendments need to include reference to the excision of both councils and associated corporations and other entities.

FAIR WORK AUSTRALIA DOES NOT PROVIDE ACCESS TO INDUSTRY BARGAINING

In New South Wales local government, negotiations for wages and conditions occur (on average) once every three years through the negotiation of a state wide award. This award regulates general wage increases and employment conditions for the vast majority of workers in the industry. The state award is established though a process of conciliation and arbitration and has resulted in significant improvements in conditions of employment and wages. For example, between 1986 and 1996, the pay equity gap between full-time female workers and full-time male counterparts in local government reduced from 18.4% to 6%. Preliminary findings of more recent USU research shows that this gap has narrowed even further in the intervening decade. The process of industry award based bargaining has also seen the equalisation of working hours on the grounds of pay equity. Substantial improvements have been achieved in the areas of occupational health and safety, skills based salary systems and paid maternity leave. Importantly, industry level campaigns encourage the participation of employees with unions and have the capacity to achieve wage and employment outcomes that are fair and equitable.

The USU has a major concern that should local government employees, including those employed by associated entities, be forced to bargain under the Fair Work Australia system then a range of more vulnerable workers may suffer including:

- Those engaged in smaller workplaces and distant work locations (eg workers based in parks, gardens, childcare centres, libraries, smaller councils and council corporations).
- Employees engaged in female dominated occupations;
- Employees engaged in rural and/or regional areas.

The diversity of types of employment in local government requires an industry approach to bargaining to maximise fair and equitable outcomes for employees. The USU is not satisfied that the Fair Work Australia system offers as best practice alternative in comparison with industry based collective bargaining. The proposed federal multi employer bargaining stream does not offer a solution. As we understand the proposed legislation, multi- employer agreements will only be available for local government on a voluntary "opt in" basis, with no recourse should employers refuse to engage in this bargaining stream.

LACK OF ACCESS TO DISPUTE RESOLUTION

Of major concern to the United Services Union is that the Fair Work Australia system does not provide proper access to the conciliation and arbitration of industrial disputes outside of identified bargaining periods. A major issue in many areas of employment, both public and private sector, is the issue of organisation restructures. It is not uncommon for employers to engage in improper "spill and fill" arrangement contrary to law and/or proper industrial practice. These types of issues require access by unions to a well resourced, but nevertheless relatively informal industrial jurisdiction where lay union advocates can seek immediate redress by way of dispute orders. Hearings by way of conciliation and arbitration need to be conducted on short notice in rural and regional areas as well as major metropolitan centres.

The proposed movement of several aspects of the dispute resolution procedures under Fair Work Australia to the Federal Magistrates Court is of concern, particularly given the increased level of formality of such proceedings and the likelihood that arguments over costs will act as a disincentive for lay persons to appear before such tribunals.

UNFAIR DISMISSALS

The United Services Union understands that a time limit of seven days is proposed for the filing of unfair dismissals! This is an extremely harsh reduction in legal rights. Fifty percent of USU members are located in regional and rural areas. While our head office is in Sydney, the Union maintains offices in Hay, Wagga, Armidale, Grafton, Dubbo, Port Macquarie and Bathurst together with operating by way of an agency agreement with the Barrier Industrial Council in Broken Hill. These regional offices are open only intermittently as officials operate largely in the field. Industrial services are limited to Sydney, and to a lesser extent in the major centres of Newcastle and Wollongong. Apart from the pressure on employees in rural and regional centres, employees working in small public and private sector workplaces, including those without on-site union delegates, will have great difficulty in obtaining advice and the necessary industrial support within seven days. The situation for employees at non-unionised sites will be worse still.

Under the present arrangements, the USU is pressed to file applications within the current 21 day time limit. Applications for extensions of time are not uncommon. The move towards a 7 day time limit is impracticable and must be removed.

ASU SUBMISSIONS

Our Federal body, the Australian Services Union will also make submissions to the Inquiry. Other than with respect to those matters contained in this submission, we support the submissions of the ASU, particularly with regards to the private sector clerical area and the failure of award modernisation. We also note that a number of state unions have encountered jurisdictional issues with respect to constitutional trading corporations. Other state unions have major concerns about the lack of industry bargaining, particularly in light of the restrictions on gaining entry to the multi-employer bargaining stream.

CONCLUSION

The issues outlined in this submission are of major concern to our membership. The Union seeks leave to appear before the Senate Inquiry in Sydney on 18 February 2009 for the purposes of illustrating our concerns with respect to the impact of the legislation on Councils and associated entities and other matters contained in this submission.

RECOMMENDATIONS

1. ***That the Inquiry note the concerns held by the USU about Fair Work Australia, particularly with regard to failures in the areas of jurisdictional coverage, modern awards, industry bargaining and dispute resolution.***

2. ***That the Inquiry recommend the amendment of the Fair Work Australia Bill to excise New South Wales Councils and associated corporations and other entities from jurisdictional coverage under the Fair Work Australia Bill.***

3. ***That the federal system include access to a well resourced no cost industrial jurisdiction enabling the conciliation and arbitration of industrial disputes between bargaining periods.***

4. ***That the 7 day time limit for the filing of unfair dismissals be removed and that the present 21 day time limit be retained, with the capacity for employees and unions to make application for extensions of time.***

BEN KRUSE
General Secretary
United Services Union

December 2008

USU
United Services Union

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

Ref: 20081023BKR01ME
Contact: Ben Kruse

4 November 2008

The Hon. Kevin Rudd MP
Prime Minister
Post Office Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

By facsimile: 02 6273 4100
And by Email: Kevin.Rudd.MP@aph.gov.au

Dear Prime Minister,

Excising of New South Wales Local Government from the Workplace Relations Act

Local Government in New South Wales has a proud history of State Award regulation. While changes to industrial relations are occurring across Australia, Councils, Unions and employees in New South Wales continue to regulate industrial relations via a comprehensive state Award and industrial system which has provided long term benefits for the industry.

In the run up to the 2007 election industry unions, the Local Government Association and the New South Wales Government were all supportive of obtaining cooperation from a Rudd Government in resolving uncertainties concerning the industrial regulation of New South Wales Local Government.

On 16 November 2007, you wrote to our National union (the Australian Services Union) confirming that you would work with State Premiers to resolve this issue:

> *"It is not the intention of Federal Labor to take over the industrial regulation of local government employees. Indeed Labor's industrial relations policy contains an express commitment that State Governments, working with their employees will be free to determine the appropriate approach regulating the industrial relations arrangements of their own employees and local government employees."*

:.2

Mr Kevin Rudd
CANBERRA

Ref: 20081023BKR01ME
Contact: Ben Kruse

The New South Wales Government is currently in the process of passing legislation (the Local Government (Legal Status) Bill 2008), to decorporatise councils in an effort to implement an arrangement to protect employee rights to general state award increases, dispute resolution powers and other rights. Nevertheless, there are some concerns in the industry that uncertainties remain and it is now appropriate that the Federal Government, in passing the new Forward with Fairness Legislation, take steps to excise New South Wales Local Government from the operation of the Act.

On 25 September 2008, the Hon. Nathan Rees, Premier of New South Wales, wrote to you taking up your pre-election promise concerning the excising of our industry from federal industrial regulation. Premier Rees refers in his correspondence (copy **enclosed**) to the fact that "given ongoing concerns about the State v Federal jurisdiction issue... it would ... be preferable for the Commonwealth Government to resolve the continuing uncertainty for Local Government by excluding it from the operation of the Workplace Relations Act as soon as possible." The Premier urges the Commonwealth to take steps to resolve this issue as soon as possible.

We understand that the Forward with Fairness Legislation is due to be introduced shortly into the Federal Parliament. We would be pleased to meet with you or the Minister for Workplace Relations to provide such further information as you may need regarding this issue or, in the alternative, would be pleased to receive confirmation that the Forward with Fairness Bill shall be amended in accordance with your pre-election commitment.

If you have any enquires, please do not hesitate to contact me on 0419 623 984.

Yours faithfully,

Ben Kruse
GENERAL SECRETARY

(BK/mt)

16 November 2007

Greg McLean
Assistant National Secretary
Australian Services Union

By email: gmclean@syd.asu.asn.au

Dear Mr McLean

Thank you for your letter received on 30 October about the implications of the Work Choices amendments to the *Workplace Relations Act 1996* (Work Choices) for your members employed by local governments.

Federal Labor is aware of the jurisdictional difficulties Work Choices has created for many Australian employers and employees, including members of the Australian Services Union (ASU).

In particular, Labor understands there remains a lack of clarity about whether local government employees fall within the federal or state industrial relations jurisdiction.

The Federal Workplace Relations Minister Joe Hockey has failed to provide a definitive statement about whether Work Choices applies to local government employees.

Comments by Julia Gillard, Labor's Deputy Leader and Shadow Minister for Employment and Industrial Relations, referring to High Court proceedings are a reference to the fact that some local governments have found they have no other choice but to seek clarification of their jurisdictional position under Work Choices through legal proceedings.

Labor believes one of the hallmarks of any successful industrial relations system must be simplicity in jurisdictional boundaries.

Labor's industrial relations policy, *Forward with Fairness*, states that a Rudd Labor Government will create a truly national industrial relations system for Australia's private sector. As Labor's policy states, this will be achieved by a Rudd Labor Government using all Constitutional powers available to it and by working cooperatively with the States.

It is not the intention of Federal Labor to take over the industrial regulation of local government employees. Indeed Labor's industrial relations policy contains an express commitment 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*.

In my view these arrangements will ensure Labor's industrial relations system removes the current jurisdictional confusion for local governments, employees and their representatives

I have attached for your reference a response provided by Federal Labor to the ASU for publication in the ASU's next *Industry News Member Update* which also clarifies Labor's position on the matters you raise. My understanding is this will be sent to your members in the coming days.

I look forward to continuing consultation between Federal Labor, local government employees and their representatives, including the ASU, to ensure all employees are clear about where they stand under Federal Labor's new industrial relations system.

Thank you for your correspondence.

Yours sincerely

Kevin Rudd
Federal Labor Leader
Member for Griffith

Attachment

Federal Labor response to ASU Questionnaire to be published in *Industry News Member Update*

In some industries like the social and community services industry, the use of the corporation's power by the Government has given rise to total confusion as to whether or not workers are covered by the Federal or State Industrial Relations systems. Some parties have agreed to allow local government and public sector workers to remain in the state system. Will your party commit to allowing the social and community services industry to remain in the State system so this confusion is removed?

Only a Rudd Labor Government can work with the States to deliver a uniform national industrial relations system for Australia's private sector.

A Rudd Labor Government will rely upon all of the Constitutional powers available to it in government to legislate national industrial relations laws. Labor will also work cooperatively with the States to achieve national industrial relations laws for the private sector. This will remove much of the current confusion about the overlap between federal and state jurisdictions.

Current arrangements for the public sector and local government can continue with many of these workers regulated by State industrial relations jurisdictions.

Labor will continue to consult with community services sector employees and their representatives to ensure these employees are clear about where they will stand under Labor's new national industrial relations system.

Premier of New South Wales
Australia

25 SEP 2008

COPY

The Hon. Kevin Rudd MP
Prime Minister
Parliament House
Canberra ACT 2600

Dear Prime Minister

I am writing to advise you about the continuing adverse impact of the Work Choices regime on New South Wales local government employees.

I urge you to resolve this issue as soon as possible by taking steps to clarify that the local government sector is subject only to State industrial relations laws.

As you would be aware, Queensland has already put in place complex new legal arrangements for local government to protect council workers from the impact of Work Choices. Before these changes were made, local councils in Queensland were incorporated entities, as they still are in New South Wales and elsewhere in Australia. Queensland has now taken the significant step of "de-corporatising" councils to ensure that the *Workplace Relations Act* cannot operate to force council workers into the federal sphere.

It would clearly be preferable for the Commonwealth Government to resolve the continuing uncertainty for local government by excluding it from the operation of the *Workplace Relations Act* as soon as possible. As you would be aware, the Local Government Association of NSW has also been calling for such action since Work Choices was enacted. In the absence of a resolution by the Commonwealth, however, the NSW Government has decided that a legislative response along the Queensland lines must also be implemented in this State to protect council workers as soon as possible.

To this end, amendments to the *Local Government Act* are being prepared for introduction into the NSW Parliament in October. The aim of the legislation will be to allow the councils to continue to function in the same way as previously, with councillors offered a similar level of legal protection from personal liability, but to ensure that they are not caught by the scope of the Commonwealth's power to legislate in respect of corporations.

I am aware that there has been a recent Federal Court decision that an incorporated Queensland local council was not subject to the *Workplace Relations Act*. While this

LEVEL 39, GOVERNOR MACQUARIE TOWER, 1 FARRER PLACE, SYDNEY 2000, AUSTRALIA
TEL: (02)9228 5239 FAX: (02)9228 3935 URL: www.premiers.nsw.gov.au G.P.O. BOX 5341, SYDNEY 2001.

is encouraging, the NSW Government does not consider that the decision entirely resolves doubt about whether some NSW councils may still be corporations and therefore covered by the *Workplace Relations Act.*

This uncertainty for local government employees should be resolved by Commonwealth action without the need for State legislation that is necessarily a compromise measure. I urge the Commonwealth to take steps to resolve this issue as soon as possible.

Yours sincerely

Nathan Rees MP
Premier