13 February 2009

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

Dear Mr Carter,

Inquiry into the Fair Work Bill 2008

I would be grateful for the opportunity to address the Senate Education, Employment and Workplace Relations Committee (**Committee**) in its inquiry into the *Fair Work Bill 2008* (**Bill**).

Introduction

I believe that the Bill streamlines what is a very complex body of law. I recognise that the Bill contains many positive reforms, including modern awards and flexibility arrangements. The Bill also preserves a number of crucial features of the current legislation; for example the retention of the secret ballot process.

I do not intend to transverse all aspects of the Bill, and my submissions are confined only to those areas of the Bill which I have identified as issues of concern, namely:

- Destabilisation of union / employer relationships;
- Amendments to the definition of a transfer of business; and
- Appointment of Commissioners to Fair Work Australia.

The focus of my submission is the practical impact of the proposed reforms in these areas. I also identify how the Bill could be amended to address each concern.

Background

In making my submissions, I draw on in excess of 35 years practical experience, working in, and advising on, employment and industrial relations matters.

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I am currently the principal of Stooke Consulting Group Pty Ltd, which provides industrial relations consulting services to the corporate sector and industry generally. During my 35 years of experience, I have worked extensively with the ACTU and its affiliated unions in the Oil and Hydrocarbons, Mining, Manufacturing, Construction, Transport, Maritime and Finance Industries, involving significant dispute resolution, negotiation and advocacy before the AIRC and various other tribunals. I attach as **Schedule 1** to this submission, a summary document outlining my practice and employment history.

Submissions

1. Destabilisation of union / employer relationships

I have identified a number of reforms in the Bill which I believe will lead to a destabilisation of union/employee and employer relationships. Based on my experience, the practical effect of this destabilisation will be increased levels of disputation at the workplace level.

The reforms are:

(a) Greenfields agreements

(i) Reform

The Bill introduces a requirement that all relevant employee organisations be given notice of an employer's intention to make greenfields agreements (s. 175(1) of the Bill).

(ii) Problem

The practical difficulty with this amendment is that an employer must identify, and then notify, all relevant employee organisations ("unions") to which an agreement may apply. For example, in the construction industry, it is often the case that there would be up to ten unions who are eligible to represent employees who will work at the particular site over the life of a project. The logistics, politics and cost, of coordinating with such a large number of unions is prohibitive to the agreement process, and will lead to cumbersome, extended and lowest common denominator results with none of the parties being satisfied. This was typically the circumstance prevailing in the Oil Industry prior to enterprise bargaining, when negotiations were conducted through a 'central forum' involving a broad number of unions. Consensus was

almost unachievable, the incidence of disputes was excessive, and none of the parties ultimately were satisfied with the result. The unions (under the auspice of the ACTU) and employers mutually agreed to abandon this process in favour of a direct negotiating relationship, where the parties (employer/ employees and the relevant union) had a history of relationship and commonality of interest through the collective of employees.

Existing relationships, between unions, their employee members and employers, will be threatened. The need to notify all possible unions ignores existing relationships and past-dealings. Unions will be competing for the interest of the same employees. Employees will invariably be confused and align with the union that can - at best, return the highest wages or particular conditions, and - at worst, exercise the most persuasive and undue and potentially intimidatory tactics, which has been common in many industry sectors, including manufacturing, mining, and construction. These are all significant income generating sectors and have the greatest potential to impact on the Australian economy. This is likely to occur regardless of the commerciality of the circumstance, or past allegiances between the employees and their union, with a particular employer. It is my strong view, that militant unions will be favoured through the proposed legislation, whereas constructive and pragmatic unions will be swept aside. As a likely consequence, upward pressure will be put on wages with no realisable return on productivity.

A significant consequence will be a heightened incidence of inter-union demarcations on a scale not seen since the 1970's and 1980's. It is my expectation, that demarcation hearings will be fought out to decide disputes between competing unions, and productivity will suffer. Notably, given the construction of the proposed legislation, such hearings will occur after a business and employees have been negatively impacted and not before.

(iii) Solution

Primacy must be given to existing relationships between unions and employers, which have some standing. Demarcation orders over many decades, together with award respondency and agreement relationships have

provided a stable environment which has prevailed in contemporary times. This level of stability should not be compromised.

Parties should be able to reach agreement with whichever employee organisation(s) they wish, much like an employee is given a right to freedom of association. One form of unionism should not be privileged over another. In the absence of consensus, FWA should be empowered to determine the most appropriate union in advance of any bargaining or representation. Such application should be resolved urgently and with a set period of no more than 7 days.

Such parity can be achieved by amending s.175(1) of the Bill to reflect the following:

> *"An employer that agrees to bargain, or initiates bargaining, for a proposed greenfields agreement must take all reasonable steps to give notice of its intention to make the agreement to one or more relevant employee organisation(s) in relation to the agreement and the potential employees to be covered by the agreement."*

Additional powers can be included to empower FWA.

(b) Right of entry

(i) Reform

The Bill removes the condition (found in the current s.747 of the *Workplace Relations Act 1996* (**Act**)) on a permit holder's right of entry to investigate alleged breaches, which requires there be an award, collective agreement or order of the Commission that is binding on the permit holder's organisation (s.481 of the Bill).

Similarly, the Bill removes the condition (found in the current s.760 of the Act) on a permit holder's right of entry to hold discussions with employees, which requires there be an award or collective agreement that is binding on the permit holder's organisation (s.484 of the Bill).

(ii) Problem

This reform significantly expands the rights of unions to enter workplaces. Entry will be contingent upon an 'employee organisations' coverage rules or a challenging interpretation of those rules to test the new legislation. Unions will be competing for the interest of the same employees, which is likely to lead to significant demarcation disputes and confusion. This will sanction officials of unions entering workplaces where they have no members, and where traditionally they have had no presence, despite established relationships or current agreements with other unions.

(iii) Solution

Retain the wording in the current legislation, or introduce wording into the Bill which requires there be a collective agreement or order of the Commission (whichever is relevant) that is binding on the employee organisation in order for that employee organisation to enter the workplace. Alternatively, entry by a union should not be permitted where a collective agreement has been made with another union, unless this is permitted under the terms of the collective agreement and supported by a majority of employees covered by the agreement.

The current situation is working, and this is evidenced by the low rates of industrial action across the board. Stability is the key to maintaining balanced relationships between unions, employees and employers. To disturb well founded relationships makes no sense where there is no apparent need to do so. Section 481(1(c) and s.484(d) should be amended to reflect the position above.

(c) Inspection of non-member records

(i) Reform

The Bill proposes to amend the current s.748(4) of the of the Act to allow an employee organisation to inspect or make copies of any document which is relevant to a suspected breach of an industrial law (s.482(1)(c) of the Bill). Such records may relate to employees who are not members of an employee

organisation. The determination of what is a relevant document will rest largely with the employer.

(ii) Problem

This is an intrusion on the privacy of employees who lawfully choose not to join an employee organisation. Putting the onus on the employer to make an assessment as to what records are relevant, in circumstances where they are not informed to make those decisions, will result in the inadvertent disclosure of the private information. It is appropriate that the disclosure of private information be subject to the scrutiny of a tribunal or the consent of the employee concerned.

(iii) Solution

Require the consent of an employee to the disclosure of their employment records, or give Fair Work Australia (**FWA**) the sole discretion to determine what records are relevant to a suspected breach.

I also advocate a further safeguard to protect the privacy of non-members, being an amendment to s.482(1)(c) of the Bill to exclude non-member records:

> *require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document* (other than non-member records) *relevant to the suspected contravention that…*

FWA should be empowered to determine any requests provided that the employee may also consent in writing to release the records if they so wish.

2. Amendments to the definition of a transfer of business

I have identified that the Bill amends the currently accepted definition of when a transfer of business occurs. I am of the opinion that the amendments will be detrimental to both employees and employers and the Australian economy at large. This is because industrial instruments will follow the transferring employee from their old employer to their new employer, even where the new employer operates a very different business that is unrelated to the business of the old employer.

(i) Reform

The Bill proposes to broaden the test of when a transfer of business occurs, so that it will capture situations where there is a mere transfer of employees (i.e. insourcing or outsourcing).

The current test (simplified) is that a transfer of business occurs when the assets of the business transfer from the old employer to the new employer, and that the new employer intends to use the assets for same or a substantially similar purpose to the old employer. In that case any relevant industrial instrument will transfer with the transferring employees. It transfers with the business.

At present a mere transfer of work (i.e. insourcing or outsourcing) does not amount to a transfer of business, and therefore the relevant industrial instruments do not transfer. This principle is supported by High Court authority in the cases of *PP Consultants Pty Ltd v Finance Sector Union* 201 CLR 648 and *Minister for Employment and Workplace Relations* v *Gribbles Radiology Pty Ltd* (2005) 222 CLR 194. Importantly this is because the new employer operates a different business from the old employer.

(ii) Problem

The new test does not have regard to whether or not the assets of the business transfer. It will mean that any industrial instrument(s) applicable to the old employer, will transfer with the transferring employees to the new employer, regardless of whether the assets of the old employer transfer to the new employer. It is not appropriate that the industrial arrangements of the old business should be automatically applied to the new business in these circumstances - the new employer may operate a different business without the benefit of the assets of the old employer. Further, the new employer will be faced with a duplication of terms and conditions.

Take for example a bank, which outsources its call centre function but does not transfer its assets. Under the Bill those employees that transfer to the new employer will carry over the terms and conditions they were subject to under their employment with the bank. The non-transferring (existing and future) employees of the new employer will be subject to standard award

conditions, or the agreement in place at the time (if any), which (for a call centre) is commonly less favourable than bank conditions. The new employer will be under pressure to negotiate a fresh agreement (to cover all employees) in which the transferring employees, existing employees and future employees, are on comparable terms and conditions. The result is that wages are driven up leading to wage inflation. It is often the case that the new employer (i.e. a call centre) is working from a lower cost base than the old employer (i.e. a bank), and cannot sustain the higher wages, resulting in redundancies or closure of the business.

To avoid the restrictions imposed by the transfer of business reforms, employers will seek to delay the transfer of employees, or in the worst case scenario, not take on any of the transferring employees. Cost conscious enterprises will look to outsource work overseas, where they will not be subject to the same economic impost, and some businesses will simply avoid commercial transactions that involve the transfer of employees, or withdraw from the activity. This will be destructive to jobs either way.

New enterprises will gain a significant advantage over existing enterprises, as they will not be subject to transferring industrial instruments. This, in my view, will lead to a significant destabilisation of particular industry sectors and threaten employment for people who otherwise would be employed labour. The labour cost restrictions imposed by the proposed law will render Australian firms less able to deal with market change than their international competitors who will have considerably more flexibility. Australian companies engaging award/agreement based employees will have less capacity to restructure and maintain a competitive advantage. The proposed law is also likely to increase the casualisation of industry and create an aversion to directly employ as permanent labour. This is not a preferred social model for an innovative and inclusive society.

(iii) Solution

Retain the current test which requires that there be a transfer of assets for a transfer of the business to have occurred.

I also support a role for FWA in making orders relating to instruments covering new employer and transferring employees, however, I believe that s.318(2)(a) of the Bill should be extended to permit an application to be made by old employers also:

> *the new employer, the old employer or a person who is likely to be the new employer;*

3 Appointment of Members to Fair Work Australia

I consider there are deficiencies in the process proposed for appointing members to Fair Work Australia (**FWA**).

(i) Reform

The proposed process is unduly bureaucratic and is not necessarily informed by the range of interests relevant to industrial relations matters.

(ii) Problem

Whilst supporting that the decision is ultimately in the hands of the Minister of the day, the appointments need to be supported by a credible selection process that avoids the potential for the politicisation of appointments, whereby quality candidates are often overlooked. In recent decades, personnel who have been appointed are not universally respected and in some cases have demonstrated incompetence in the performance of the task to which they have been assigned. This problem is not unique to any particular government, as it has prevailed under governments of various persuasions.

(iii) Solution

The Bill should develop a process whereby candidates are selected and scrutinised by a triparted body, made up of representatives of the Department of Employment and Workplace Relations, the Australian Council of Trade Unions and peak employer groups. This will ensure an open and fair process, and the appointment of the best possible candidates. Informally, this process prevailed for many years and was regrettably jettisoned in the 1980's.

Conclusion

Overall, I believe the Bill reflects a generally workable position for employees, unions and employers. However, the above matters are fundamental and will have a substantial negative impact on industrial relations if they are not amended. I urge the Committee to reflect on the areas I have highlighted as issues of concern, and to consider recommending the solutions I have put forward.

I would be pleased to address any aspect of my submissions at a public hearing in Melbourne on Monday, 16 February 2009.

Yours sincerely

B. Warren Stooke
Stooke Consulting Group Pty Ltd

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B. Warren STOOKE

Career Profile

STOOKE, B. Warren; B.Ec (Syd), Dip.Ed, Dip.HRM; AFAHRI

b April 13, 1950; *ed.* University of Sydney and Monash University.

Warren is currently the Principal of Stooke Consulting Group, which specialises in industrial relations. The consulting practice is an extension of Warren's significant career in industrial relations and human resource management with the Shell Group of Companies, both in Australia and Internationally. Warren was employed by Shell for 26 years and held the position of General Manager Indust rial Relations and Canberra Representative prior to establishing his own consulting business in April 2001.

Warren has held numerous positions with Australian business, community and government bodies, both in a professional and voluntary capacity, including:

Member of the Victorian Government Board for Adult, Community and Further Education (2001 to present)

Member, Labour Relations Committee and Council, Australian Chamber of Commerce and Industry (Oil Industry Representative) (1995 to 2001)

Member, Employee Relations Policy Committee, Victorian Employer's Chamber of Commerce and Industry (1995 to 2001)

Member of the Board of Governors, National Institute of Labour Studies (1999 to 2001)

Member of the Business Reference Group established by the Minister for Workplace Relations, Employment and Small Business (1999-2001)

Alternate Board Member, Australian Mines and Metals Association Inc (1998 to 2001)

Director, The New National Committee for the Development of Youth Employment (April 1997 to 2006)

Director, Austin Hospital and Eastern Health Care Network Board (April 1994 - May 1996)

Member – Award Review Taskforce Reference Group, Australian Federal Government (2005 to 2007)

Warren has had extensive experience in working in difficult environments where change has been required and where relationships have needed to be enhanced to achieve the required success. His leadership skills were recognized whilst on assignment with Shell in the United Kingdom by being selected and developed as a volunteer Tutor with the Leadership Trust (the premier leadership development organisation in the United Kingdom). Warren has also represented the Organisation of International Employers at the International Labor

Organisation in Geneva. In this capacity Warren was the employer's spokesperson for the International Oil Refining Sector. These representations delivered a tripartite set of conclusions and resolutions supported by all participants.

Warren has presented widely on matters of Workplace Reform and Change and is a strong advocate of extracting the potential out of organisations by using cooperative and constructive management processes, which address the needs of all the stakeholders.

A highlight of Warren's career with Shell was the measurable success he achieved in reforming industrial relationships in the Oil Industry. In this regard, Warren negotiated the first 'enterprise agreement' with the National Union of Worker's, which led to the consent break-up of the Oil Industry/ACTU centralized industrial award structure and the transition to enterprise awards and agreements within Shell and the industry.

Warren also led negotiations delivering a significant change in the Maritime Industry through the implementation of extensive shipping reform. This included the securing of an agreement with the MUA to relinquish the Seaman's Engagement System and to support the introduction of enterprise based company employment. This was achieved during the same time period as the Patrick's dispute but without dislocation and by agreement with the MUA, AIMPE and AMOU.

Warren recently secured a consent 'greenfields' agreement with the CFMEU, AMWU and ETU to build the new $680m gas fired power station in Victoria's western district, which included the resolution of significant inter-union issues regarding terms and conditions to be applied to the project. The agreements have established a clear demarcation of work, based upon the traditional constitutional and award coverage of the unions, which will ensure appropriate productivity on the project. This initiative was also supported by the Victorian State government following representations to the Premier and senior cabinet members.

Stooke Consulting Group

Warren's consultancy company has performed work for a broad range of Australian and International "Blue Chip" corporations, including Shell Australia, Trident Shipping Services, GlaxoSmithKline, Toyota, ARACO, Chevron, ANZ, BMW, Baulderstone Hornibrook, Bilfinger Berger Australia, BOC, Santos, Australian Paper, Alcoa, OneSteel and National Bus.

The Group has successfully undertaken a number of complex and difficult assignments in a broad range of industries, including Oil and Gas, Automotive, Manufacturing, Transport and Warehousing, Construction and Civil Engineering, and Financial Services.

Publications and Presentations

Work Place Reform - A Changing Environment for Enterprise Negotiations - Australian Mines and Metals National Conference, May 1992

Australian Mines and Metals Association - International Study Mission to the United Kingdom and Canada - 1992

Enterprise Bargaining - Oil Industry Transport Reform - Shell Australia Distributor Conference, July 1993

Enterprise Bargaining - Enterprise Agreement Seminar - Australian Human Resource Institute, 5 September 1995.

Workplace Relations Act - Australian Corporate Lawyers Association, Melbourne, 1996.

Practical Effects of the Workplace Relations Act on Industrial Relations in the Service Sector - Trade Union Training Authority, 18 December 1996

Changing Labour Markets: Prospects for Productivity Growth, Commonwealth of Australia, Productivity Commission, Melbourne, 20 February 1997. pp. 243-249.

Strategic Management and the Workplace Relations Act - MTIA National PIR Group Conference, Canberra, 7 April 1997.

Strategic Management Seminar - Australian Graduate School of Management, Sydney, 2 June 1997.

ILO - International Employers Spokesperson - Oil Refining Sectorial Meeting, Geneva, February 1998.

Workplace Relations Act and Management Strategies - Victorian Automobile Chamber of Commerce, Melbourne, July 2000

Workplace Relations and Strategic Management - Australian Contractors Association/Australian Industry Group, Sydney November 2000

Workplace Relations Act 1996, Australian Senate Committee, Submission, May 2000.

Industrial Relations Strategy and Practice – Melbourne University Faculty of Chemical Engineering, May 2003

Industrial Relations Seminar – Human Resources Week, Australian Human Resources Institute, September 2003

Australian Higher Education Industrial Association Conference – "Managing Unions", April 2005

Managing the Union Relationship – Australian Higher Education Industrial Association Annual Conference, Brisbane April 2006