December 31, 2008

Mr John Carter,
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
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Federal Senate Inquiry into the Fair Work Bill 2008.
Disputes Resolution Procedures.

Dear Senators,

1. 1. I write in my capacity as a private citizen who pays his taxes and I wish to state my serious concerns as a private citizen with this Bill in respect to its emphasis on **voluntary disputes resolution processes**.
2. *2.* Of specific concern is the proposed wording in the sub-clauses that are proposed to be in all Federal Awards in the year 2010 onwards which propose to state :

9.2

If a dispute about a matter arising under this award or a dispute in relation to the National Employment Standards is unable to be resolved at the workplace, and all appropriate steps under clause 9.1 have been taken, a party to the dispute may refer the dispute to the Commission.

9.3

*The parties **may agree** on the process to be utilised by the Commission including mediation, conciliation and **consent arbitration**.*

3. 3. From the year 1904 to the advent of the Howard Government's WorkChoices legislation on March 27 2006, the Australian Industrial Relations Commission and it's predecessors, always had **compulsory conciliation and arbitral powers**.
4. 4. The *Conciliation and Arbitration Act* 1904 of the Commonwealth, was built on the constitutional power in s 51(xxxv) of the Australian Constitution.
5. 5. In 1956 in the *Boilermaker's Case*, the High Court of Australia ruled that judicial functions and powers could not be vested in the former Arbitration Court, only conciliation and arbitral powers.
6. 6. As such subsequently in the year 1957 the Commonwealth Conciliation and Arbitration Commission was established which had **compulsory conciliation and arbitral powers**, although not judicial powers, as did the subsequent Australian Conciliation and Arbitration Commission established in 1973 and the subsequent Australian Industrial Relations Commission established in 1988.
7. 7. The constitutional power in s 51(xxxv) of the Australian Constitution **does not preclude** the Federal Government from re-conferring "**compulsory" conciliation and arbitral powers** to the Australian Industrial Relations Commission, which the Howard Government took away with its WorkChoices legislation in March 2006. The constitutional power in s 51(xxxv) of the Australian Constitution vests in the Commonwealth the power to **resolve industrial relations disputes.**
8. 8. Commissioners earn packages around $250,000 a year. The Annual Report of the Australian Industrial Relations Commission confirms that taxpayers of Australia contribute **over $50 million dollars annually** for the operation of the Australian

Industrial Relations Commission. I do not believe that **over 10 million Australian tax payers** would want an **institution that costs taxpayers over $50 million a year to only have voluntary disputes resolution processes**.

9. 9. It is an **inefficient use** of $50 million of taxpayers monies spent annually to have an Australian Industrial Relations Commission that only has **voluntary disputes resolution processes**.

10. 10. It will also **excessively disadvantage the industrially weak and the vulnerable, including and in particularly women from indigenous and non English speaking backgrounds**, from the industrially strongly, such as multi-national and or international corporations, who since March 27,2006, have had and will under this proposed legislation, continue to have the right **to say no** to participate in **disputes resolution processes** of the Australian Industrial Relations Commission to resolve industrial relations disputes, which are lodged by the **industrially weak and the vulnerable,**

11. 11. The now retired former Hon. Justice Michael Kirby AC CMG in his "Sir Richard Kirby Lecture" to the Victorian Industrial Relations Society in Melbourne on November 20, 1996, said the following: "*It would be an irony if, at the very moment that an efficient and responsive industrial relations body was being created in South Africa, modelled on the Australian experience, we denuded our national body of its relevance, prestige and capacity to act speedily and to safeguard the basic rights of the industrially weak and the vulnerable. I am hopeful that the federal legislation, in its reformed content, will strike the median course - reforming and modernising; but keeping the best of a peculiarly Australian institution harmonious with our society and its history."* It would indeed also be an absolute irony and tragedy in my view if the current Federal Labor Government that promised to dismantle the excesses of the extreme WorkChoices legislation, and was given a mandate to do so by the Australian voters in November 2007, now instead decides upon **voluntary disputes resolution processes** of the Australian Industrial Relations Commission, established by the former Howard Government's WorkChoices legislation, to carry on to continually and excessively disadvantage the industrially weak and the vulnerable.

12. 12. It is **harsh, unjust and unfair** on the **grounds of costs** to have the industrially weak and the vulnerable to have to refer their industrial relations disputes to the Magistrates or Federal Court which would cost in the tens of thousands of dollars and require the use of solicitors because the Australian Industrial Relations Commission now only has **voluntary disputes resolution processes**.

13. 13. It is also important in my view that this legislation **must give more clear and unambiguous direction to the Australian Industrial Relations Commission in its role, powers and functions in resolving industrial relations disputes.** Not to do so will create **vast inconsistencies** and different Commissioners will take vastly different and **inconsistent approaches** in the dispute settling processes. To highlight this I have provided the following two examples which have occurred in the Australian Industrial Relations Commission in the Northern Territory in recent times:

Example One.

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act, 1996
WR 99 Notification of industrial dispute
Australian Municipal, Administrative, Clerical & Services Union
And

Qantas Airways Limited
(C No. 2002/696)

DEPUTY PRESIDENT LEARY *DARWIN 22 FEBRUARY 2002.*

RECOMMENDATION

[1] This is a notification of dispute by the Australian Municipal, Administrative, Clerical & Services Union (ASU) which relates to an alleged dispute with Qantas Airways Limited (the company) at Darwin Airport and is related to the application of clause 29.6 of the Airline Officers (Qantas Airways Limited) award 1992 (the award).

[2] Clause 29.6 provides:

29.6 Rostered Day Off Falling on a Public Holiday

29.6.1 If a shift worker is rostered off on a public holiday, the shift worker is entitled to a day off in lieu, to be paid at ordinary time.

29.6.2 The shift worker must apply to the Company for the day off in lieu. The day off must be on a day agreed between the Company and the shift worker. The day or days off may accumulate up to the time the employee takes annual leave. When the employee takes annual leave, the day or days may be added to the period of annual leave, or may be paid for at single time rate of pay. Where the Company and employee agree, the employee may add some of the accumulated days to the period of annual leave and have the rest paid out.

[3] The Commission is not able to interpret its own awards. However in an attempt to resolve the dispute between the parties I am prepared to provide a view as to the application of the award prescription.

[4] The ASU referred to a company directive which stated, where relevant, the following:

"there will be no authorisation of DIL (day/s in lieu) days to be taken in conjunction with annual leave;

any outstanding DIL at time of annual leave will be paid out as per award."

[5] The ASU argues that the company directive is in contradiction of the award provision as it removes an employee's right to choose an option as to how DILs are acquitted and as provided by the award.

[6] The award provides that an employee MUST make application to the company for access to a DIL. It then provides that the DIL MUST be a day agreed between the company and the employee. Accordingly there MUST be some agreement reached as to which day the DIL will be taken. (This appears to refer to a request for a single day acquittal.)

[7] The award then provides options available to an employee as to how he/she may acquit the DIL entitlement. These options are:

· the day or days off MAY accumulate up to the time of annual leave and

MAY:

1. be added to the annual leave entitlement, or

2. be paid for at single time rate of pay.

Further, if agreed between the company and the employee an election MAY be made that some of the accumulated days be added to the annual leave entitlement and the balance paid out at single time.

[8] The language used in the award provision implies a difference in how the entitlement is to be applied.

[9] MUST (Collins English Dictionary) "to express obligation or compulsion - to indicate necessity'.

[10] MAY (Collins English Dictionary) "past tense of might - expressing theoretical possibility - to express a strong wish".

[11] In the context of the award provision it seem that the entitlement allows a choice for an employee to acquit DIL (Other than as a single day absence) as the acquittal provision is expressed as MAY rather than MUST. Accordingly the company directive unilaterally removes an award entitlement to select an option therefore be outside the award provision.

[12] The employees the subject of this dispute notification accept that operational requirements MAY make it difficult for them to exercise their individual choice if that choice is to add their DIL entitlement to their annual leave. Their argument however is that the company cannot remove their entitlement to choose even though it may be refused for operational requirements.

[13] Nevertheless the company should give consideration to each application made and approval or rejection should be based on the merits of the particular application and the operational circumstances prevailing at the time. There should not be a unilateral and permanent rejection of the application of an award entitlement.

[14] Likewise I am of the view that the company is unable to unilaterally pay out any DIL entitlement without the agreement of the employee. The award allows payment as an option not as a right.

[15] The second last and last line of 29.6 appears to provide the same entitlement which require agreement between the company and the employee as to exercise of the option. A rewording of the provision could remove any perceived ambiguity or confusion.

[16] It could be argued that the award prescription imposes impracticable and impossible restrictions for both the company and the employees. Accordingly each party needs to consider it's respective position and seek to discuss and negotiate a practical solution to resolve the problem.

[17] The Commission is available to assist, if necessary, in any discussions or negotiations.

BY THE COMMISSION.

DEPUTY PRESIDENT.

Example Two.

http://www.airc.gov.au/documents/Transcripts/220904c20041445.htm

AIRC C No. C2004/1445 – 22 September 2004. Darwin Northern Territory – Transcript extracts:

PN37

THE COMMISSIONER: Mr Matarazzo, these matters of underpayment of wages or breaches of the award, can I ask you why are you here? You know full well that this Commission can't enforce, or issue orders of enforcement but the local magistrate certainly can. There is nothing to prevent you from going there.

PN38

MR MATARAZZO: We say the Industrial Relations Commission has been established to seek to settle disputes. And we say this is a dispute. And we are here today because, as the Commission full well knows, it takes somewhere between 9 to 12 months to get matters dealt with even to a conciliation conference in the Magistrates Court in the Northern Territory. And our members who have had - who alleging to us that they've had their hours cut, their take home pay cut, and not being paid penalty rates, we submit should not have to wait 9 to 12 months to have their matters dealt with.

PN39

Further other issue is there has been allegations of non-payment of callouts. And generally, an alleged - an allegation to us that the employer is not seeking - for reasons unbeknown to us - following the award. So we find today is a process, hopefully, an attempt to try and get some understanding in a conciliation conference setup where there is no need, hopefully, to run off to Magistrates Courts and to try and nip things in the bud. And hopefully all these jurisdictional issues and complications can be put to one side for the time being. The parties are all here today and we're seeking to address these issues and not have to need to go to Magistrates Courts. I mean, the union won't go into a lengthy citation, but we say it is unfortunate if we have a society where every time an individual worker has some issue, they'd have to go to the Magistrates Court. I don't think our forefathers in 1904 when they established the Conciliation and Arbitration Commission - that is the reason why they did it so that lay workers could have access to a tribunal to assist them in their disputes.

PN40

So we're seeking with the couple of the employees here today to go through issues in a conciliation conference in a hopeful manner to seek to resolve some matters that remain outstanding in their view. May it please the Commission.

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PN75

MR MATARAZZO: Thank you, Commissioner. I just wanted to put on record the position of the union that we contest the statement that salaried employees are not covered by this award.

PN76

THE COMMISSIONER: Look, you will have an opportunity to do that but you will have to prove those sorts of contentions. Salaried employees are salaried employees. If they are classified by the employer as a salaried employee, and they have a common law contract of employment, they are probably not covered by the award. How do you prove it to the contrary?

PN77

MR MATARAZZO: With the greatest respect, Commissioner, we say the Chamber of Commerce today have asserted that some employees are salaried employees.

PN78

THE COMMISSIONER: That is right.

PN79

MR MATARAZZO: They have not proved that. We are saying there is an eight tier classification structure in this award that allows for clerical and administrative occupations, which these alleged salaried employees are performing. What we are suggesting is there maybe a case where employers - and they do it continually - not just this employer - they think that simply by calling somebody a salaried - - -

PN80

THE COMMISSIONER: Mr Matarazzo, we are not talking in generalisations. You come here often and you speak in generalisations about the employment relationship between Northern Territory employers and Northern Territory employees at large. I'm not interested in listening to that. You are here representing employees said to be in dispute with this specific employer. Confine your submissions to those issues.

PN81

MR MATARAZZO: I certainly will.

PN82

THE COMMISSIONER: I'm not interested in your political comments about employment relationships generally.

PN83

MR MATARAZZO: Thank you, Commissioner. But I will state that there are employees who are in this employment where it has been stated that they are salaried employees and not covered by this award. They dispute that. They believe this is the employer's way of getting around paying them penalty rates on weekends. That is a very serious allegation which we think should be taken on board. And simply because an employer decides to save - allegedly to save some money by saying, "well, we will just call them a salaried employee, therefore they are a salaried and I don't have to pay them penalty rates".

PN84

That is of major concern to a number of our members. And we say that there is no proof that these employees are not covered by this award. May it please the Commission.

PN85

THE COMMISSIONER: Thank you. Mr Humphreys, you have been challenged on one of your submissions. What evidence do you have, or have you seen that these employees - who you say are salaried employees - are in a position not covered by the award and have common law contracts of employment that exceed what their award entitlements would be?

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PN89

THE COMMISSIONER: Yes, okay. Thanks, Mr Humphreys. I'm prepared to adjourn the proceedings into private conference but it is not going to be a slanging match between those representing the employees and those representing the employers. What I'm interested in knowing is are there facts which support each sides' contention about the matters that are said to be in dispute. And if there are facts that can be supported, what is the conclusion that follows from those facts. And

is there substance to the matters that are said to be in dispute, or is it merely in people's imaginations.

PN90
Conversely, is the employer properly compliant with its obligations to pay employees in accordance with the relevant awards. They are the real issues of concern here. And if there is a contest over facts, let me put it to you very clearly - unless you can persuade me one way or the other - I am in no position to bridge the gap in your dispute. And you can trot off down to the Magistrates Court and slug it out there and work out who is being paid and who is not being paid in accordance with the award.

PN91
And if that takes 9 months to get before the local Magistrates Court, I'm sorry, that is your problem. If people are not willing to participate in Commission conciliations proceedings with good intent to try and find answers to the issues that are said to be in dispute, then we are all wasting our time. However, I will give you every opportunity to try and persuade me with the respective positions that you're taking on these matters are the correct positions. I will adjourn the proceedings now into private conference.

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