18 December 2008

SENATE INQUIRY INTO THE FAIR WORK BILL 2008
EDUCATION, EMPLOYMENT AND
WORKPLACE RELATIONS COMMITTEE

Attention: John Carter, Secretary
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Canberra ACT 2600

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Dear John

The attached document is an outline of the VTHC's preliminary views and concerns in relation to the Fair Work Bill 2008.

It is our response to your invitation to make a submission to the inquiry dated 27th November 2008 (see Appendix 1).

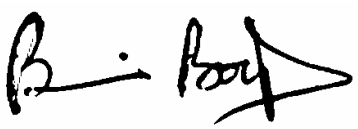
It is our intention to address only some key aspects of the framework of the new Bill as outlined in your correspondence.

We also wish to put on the record our views in relation to other aspects of the previous government's Industrial Relations legacy **not** directly addressed by the Fair Work Bill. In particular the operations of the Building Construction Industry Improvement Act 2005 and its creations the Australian Building Construction Commission (ABCC), Code of Practice and Guidelines.

It is our view that we can address this issue under dot point 4 of your invitation. By **not** addressing the added burden on FOA rights in the building industry, goes to the whole credibility of the Bill.

Please note we wish to be able to speak to our submission when the Inquiry is in Melbourne on the 17th February 2009.

Yours sincerely,



BRIAN BOYD
Secretary
Victorian Trades Hall Council

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ASPECTS COVERED

1. The VTHC believes the current draft of the Fair Work Bill 2008 does not adequately address the following issues:

- **Freedom of Association**

The ACTU Congress 2006 policy states:

Freedom of association is a universally recognised civil liberty and one of the most fundamental human rights of workers. Respect for the principles of freedom of association is vital for the proper functioning of a fair industrial relations system.

Congress notes that freedom of association is a fundamental principle that is protected and promoted by a number of ILO Conventions and Recommendations to which Australia is a

signatory as well as by the ILO Declaration on Fundamental Principles and Rights at Work of 1998.

Australian industrial relations legislation must effectively enshrine workers' freedom of association by:

- *Providing effective rights for all workers to join their appropriate union and to participate actively in their affairs;*
- *Guarding against anti-union discrimination or victimisation;*
- *Providing effective relief for workers who are denied freedom of association; and*
- *Including effective remedies that are sufficient to dissuade employers from engaging in anti union activities.*

Specifically the Freedom of Association provisions of the legislation should be amended to:

- *Supplement the penalty provisions of the Act which are enforced by the Court with a specific power for the Commission to make orders with respect to breaches of freedom of association;*
- *Include a fast track mechanism for hearing allegations of discrimination or victimisation on the grounds of union activities, and the provision for interim orders reinstating the status quo pending determination of the allegation;*
- *Recognise that freedom of association comprises the promotion of collective bargaining between workers and their employers and the right to strike. Conduct by an employer that is designed to, or has the effect of deterring workers from engaging in collective bargaining, taking part in protected industrial action, or*

relying on collective agreements should be prohibited conduct; and

- *Prohibit employers from offering inducements that are designed to deter, or that have the effect of, deterring workers from:*
  - *joining a union;*
  - *exercising the statutory representation rights that accompany union membership,*
  - *participating in collective bargaining,*
  - *taking part in protected industrial action or relying on a collective agreement; or*
  - *taking action by an employee in support of professional standards.*

❖ **Delegates' Rights**

The ACTU Congress 2006 policy states:

Strong, effective and representative unions are essential to a fair and just society. Unions provide the democratic organisation for working people to have a say in their workplace.

Representative workplace union delegates hold a vital position in the union. Union delegates represent the collective and individual hopes, aspirations and needs of their work colleagues. They are critical to the improvement of pay, employment conditions and health and safety.

Industrial legislation should recognise the role of delegates in representing workers in preparing for bargaining, during the bargaining process and in implementing the outcome of

collective agreements. The independent Industrial Relations Commission should be empowered to ensure delegates can perform these duties.

Authorised delegates should have legislated rights including access to and communication with workers, inspection of the workplace and documents, and the necessary paid time off to perform, and be trained in how to perform their representative roles.

The industrial legislation should ensure that accredited union delegates have the right to:

- *be treated fairly and to perform their role as union delegate without any discrimination in their employment;*

[Extra comment: this means free from victimization ie via FOA so the delegate can ensure proper union functioning and representation]

- *formal recognition by the employer that endorsed union delegates speak on behalf of union members in the workplace;*
- *bargain collectively on behalf of those they represent;*
- *be consulted and have access to relevant information affecting the workplace, the workforce and the business;*
- *paid time to represent the interests of members to the employer and industrial tribunals;*
- *reasonable paid time during normal working hours to consult with union members;*
- *reasonable paid time off to participate in the operation of the union; to attend union meetings and to undertake accredited union and health and safety education;*
- *address new employees about the benefits of union membership at the time that they enter employment;*
- *reasonable access to telephone, facsimile, post, photocopying, internet and e-mail facilities for the purpose*

- *of carrying out work as a delegate and consulting with workplace colleagues and the union;*
- *place union information on a notice board in a prominent location in the workplace; and*
- *take reasonable leave to work with the union.*

[Extra comment – specifically FOA should provide strong protection for delegates at all times, not just during bargaining.]

Information and consultation

- *Workers must have a right to be consulted and informed of business decisions that affect them in their work. The legislation should require that awards and agreements include provisions giving employees the right to be consulted on a regular and comprehensive basis including the right to attend a minimum of two paid meetings of workers in any year.*

- *In particular there should be a requirement for the provision of information to unions and workers on the company's overall strategy and planning, with particular reference to employment-related issues, including new technology, products and processes, the company's future planning, future labour requirements and proposed changes to work organisation.*

- *While the full detail of consultative mechanisms required in awards and agreements should be developed through a broad debate, key requirements for unions include:*

  - *enterprise level consultative mechanisms not having a role in collective bargaining;*

  - *where there is union representation in existence at the workplace, this being recognised as representing employees for the purpose of consultation;*

- *employers being required to provide all relevant information on issues including the economic and financial position of the business, its likely development, probable employment trends, the introduction of new working methods or technology, and substantial organisational changes.*

❖ **Right of Entry**

The ACTU Congress 2006 policy states:

Congress also notes unions play an important role in enforcement and compliance of the law. Training for union delegates and an effective right of entry for union officials to inspect suspected breaches of the law should be part of an effective compliance regime.

Congress notes that the provisions of the Act severely restrict union access to members' records inhibit effective compliance, and effectively require the disclosure of unions' membership records to employers. These provisions must be repealed.

Congress also believes that effective unfettered freedom of association (as per ILO Conventions) and the right to recruit and bargain collectively depend upon workers having access to advice and information in the workplace. The right of entry provisions of the Act must facilitate collective bargaining by ensuring workers have access to advice and representation. Meetings with workers should be expressly allowed to take place in meal rooms and the requirements for 24 hours' notice should be removed.

Extra Comments:

- The proper functioning of FOA is via Right of Entry. Employers must facilitate entry, especially where there are 'remote access' issues.

  Right of entry is a proper function of FOA – provisions to inspect all work and records covered by an Award or EB for suspected breaches of Awards, EB's or the Act requires the ability to discuss such matters with employees and the employer. In turn access to work areas and areas where workers go is very important.

- On the 29 November 2008 the Australian newspaper published an article by Paul Kelly entitled: "IR reforms asking for trouble". In the article Kelly described the right of entry provisions in the then recently tabled Fair Work Bill 2008 as "extraordinary and unacceptable in a democracy".

This is an outrageous characterisation of what is proposed. Not only is the proposed new right of entry provision quite restrictive

and similar to the WorkChoices regime but falsely and mischievously calling in Australia's democratic traditions is also dishonest.

The industrial history of Australia has always had the right of unions to enter workplaces. It was only since the latter part of the Howard years was such a right dramatically curtailed.

The ILO conventions to which Australia is signatory, has also underscored this right for many decades. Why Mr Kelly misrepresents this history in his article is for him to answer.

But it is important to emphasise the historical facts. The employer associations in particular, when pushing back against the conservative processes of right of entry on offer in the Bill under inspection in this Inquiry, like to try to blur past practice.

The Freedom of Association – the right of a worker to join with other workers and freely associate in a union – is recognised as a fundamental human right, deeply rooted in international and Australian law. It is a right that is recognised in almost every Charter of Human Rights, including the UN Declaration of Rights, the European Convention of Human Rights, the US Constitution and the Canadian Charter of Rights and Freedoms. It is also a fundamental principle in various ILO conventions ratified by Australia.

The ILO's Freedom of Association Committee has stated that: "The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade union represents.

There are no circumstances that justify maintaining measures against collective representation, such as complex right-of-entry provisions.

Unions should be given access to potential and current members so they can understand these workers' aspirations and grievances. Unnecessary restrictions in this area represent a practical repudiation of freedom of association.

Right of entry and associated provisions are logically linked to the right of workers to be effectively represented.

Under the Act unions should be given reasonable access to the workplace without the need for technical administrative procedures. Facilities should be made available to enable unions to promptly and effectively carry out their responsibilities. Access should include the ability to post and distribute union notices.

Workers' representatives should be given prompt access to representatives of the employer, who have the capacity to resolve disputes, so that they can properly carry out their functions.

The fact is that right of entry was never really an issue until the Howard government.

- **Scope of Collective Bargaining/Freedom of Association**

The ACTU Congress 2006 policy states:

ILO principles and overseas practice recognise the importance of bargaining parties being free to agree to negotiate collective agreements at the workplace, enterprise, multi-employer or industry level, and for employers and unions to pursue common claims and outcomes in single business agreements. The constraints on collective bargaining in Australia would not be tolerated in other democratic societies. For these reasons Congress believes that there is a need for

greater flexibility in the scope and the level at which bargaining occurs in Australia.

While collective agreement making will predominantly continue to be at the level of a single business, employer, or a group of related businesses bargaining as a single business (commonly described as enterprise bargaining) Congress calls for a greater capacity for the parties to pursue bargaining at different levels.

Where a multi-employer agreement is proposed but the claim for such an agreement is contested, the Commission should have the power to determine whether a multi-employer bargaining process should process, and determine who the bargaining parties will be. The Commission should apply the following criteria when authorising a multi-employer bargaining process:

- *ILO conventions and principles, and the freedom of the parties to determine the level at which they bargain;*
- *The community of interest of the employees;*
- *The community of interest of the employers;*
- *A collective multi-employer agreement covering a site or project involving multiple employers engaged in the same undertaking (e.g. a construction site) should clearly be available without limitation;*
- *The desirability of promoting collective bargaining, particularly where the employees or the employers lack the capacity to bargain at the single business level, or the size or number of workplaces in a particular industry or industry sector mitigates against collective bargaining at the single business level;*
- *The needs of lower paid workers and the desirability of promoting bargaining and lifting living standards;*
- *The history of bargaining; or*

- *Any potential, demonstrable and long-term negative impact on the viability of a single business.*

'[Extra Comments – Mandatory flexibility clauses should be null and void if they are shown to reduce rights at work; the Act should ensure the bargaining unit is based on custom and practice for transitional arrangements (eg Awards to collective agreements) to prevent sham arrangements;

In bargaining Agreements must provide for workable outcomes regarding disputes and grievances that develop during the life of an agreement;

In bargaining – parties to be free to bargain on any matter and have such agreed matters included and enforceable in Agreements. Bargaining claims must not affect protected action;

In Bargaining – Multi employer bargaining to include a definition of entity, based on 'effective control' and provisions to have access to funding agency to bargain. Multi employer bargaining should not exclude the ability of workers to take protected industrial action;

When making agreements the ability to contest or intervene in the certification of the agreement process to ensure 'genuine agreement' and 'appropriate' tests are important.

- **Industrial Action**

  Industrial action is integral to bargaining, as it provides the means to balance the economic power of the bargaining parties.

  Industrial action in pursuit of an agreement to cover a single business (including the pursuit of common claims and outcomes at more than one single business) should be available without recourse to the Commission. Where a multi-

employer agreement is being pursued, industrial action should also be available.

Industrial action should be available to employees during bargaining, without the need for a secret ballot. It is a matter of good union practice that industrial action is democratically endorsed.

Industrial action should not be able to be undermined by use of replacement labour.

Industrial action by employers (lock-outs) should not be automatically available. ILO jurisprudence does not support an automatic right to employer industrial action.

The law should also enable the conduct of meetings to prepare for bargaining, actions top promote the social or

economic views of workers, fair provisions re OHS, and allow workers to protest breach of statutory duties. Industrial action should also be available during an agreement where the employer proposes significant organisational changes, breaches agreements or where workers wish to participate in wider political, social and economic issues that affect them and society at large.

- **Trade Practices Laws**

The ACTU Congress 2006 policy states:

All provisions of the Trade Practices Act applicable to unions and employees should be repealed. The independent Industrial Relations Commission should deal with industrial action as part of its general powers in relation to the bargaining process.

- **Securing Workers' Entitlements**

The ACTU Congress 2006 policy states:

Congress does not believe that the GEERS scheme addresses the principles of being employer-funded and guaranteeing 100% of entitlements. The GEERS scheme suffers from a number of major deficiencies, including that:

- *many employees are unable to claim although their employer has closed down operations, because a liquidator or administrator has not been appointed;*
- *it does not include superannuation;*
- *it does not cover the total of employees' redundancy entitlements;*
- *it does not cover entitlements such as untaken RDOs, untaken accrued sick leave or unremitted employee deductions such as union fees and health fund fees;*
- *there are long delays in processing claims; and*

- *as an administrative scheme, GEERS is subject to limited scrutiny or review of its operations, administration and decisions.*

Congress calls on the Federal Government to give priority to 100% of employee entitlements above secured creditors and only to recover its own expenditure once employees' claims have been satisfied in its own expenditure once employees' claims have been satisfied in full.

[Extra Comment: Generally securing workers' entitlements when an employer goes out of business should be a priority under the new Act]

❖ **Independent contractors and labour hire workers**

The ACTU 2006 Congress states:

The Independent Contractors' Act 2006 should be repealed.

Congress rejects the notion that contractors should be regulated solely through the Trade Practices Act, as if individuals earning their income primarily through their own labour and frequently from one source should be prevented from protecting their interests as workers. Individuals in this position are indistinguishable in practice from employees and should not be subject to laws designed to apply to corporations and other businesses.

While making it easier for employers to use contract arrangements to avoid employment obligations, the legislation does not effectively address wide-spread abuse of this form of arrangement to avoid tax, superannuation payments and workers' compensation.

The Act does nothing to address the real issues caused by the explosion in the employment of so-called "independent" contractors, while stripping them of access to the protection,

however limited, available under state legislation. The Act also fails to address the serious issue of the application of occupational health and safety standards for independent contractors and labour hire employees.

While the legislation claims to maintain and extend protection for outworkers – some of the most exploited workers in the country – the reality is that it significantly reduces protection by overriding relevant state laws.

The legislations should protect all workers, whether they are employees or self-employed.

[There should be an unfair contract jurisdiction to protect such as independent contractors.]

- **Unfair Dismissal**

The ACTU 2006 Congress states:

All workers should have access to a fair, cost effective, non-legalistic and speedy process for determining claims that a dismissal is unfair. Where a dismissal has been found to be unfair, reinstatement should be the primary remedy.

Congress believes that all employers, large or small, should adopt fair and clear procedures in dealing with employees in order to avoid the need for termination of employment and, where this does occur, to avoid possibility of challenge.

The unfair dismissal provisions of the legislation should ensure a fair go all round, and the Commission should be empowered to consider all the circumstances of a dismissal including the conduct of the parties and the resources available to the employer and employee involved.

[Extra comment: specifically unfair dismissal remedies should be equally accessible to all workers, regardless of workplace size and type of employment.

- **Transmission of business/Transfer of business**

  The ACTU 2006 Congress states:

  Congress believes that when a business takes over an existing business that has an award or current enterprise agreement in place, the incoming employer must be obliged to honour the terms of the award or enterprise agreement. The legislation should provide that incoming employers inherit the obligations of outgoing employers and that workers should not be disadvantaged by changes in company ownership. Legislation should enshrine an obligation on a new business to recognise the commencement date of employment of an employee with the old business for the purposes of all accrued and contingent entitlements.

The Commission should have responsibility for determining disputes about the coverage of each award or the ongoing application of agreements, and the system should guard against artificial arrangements designed to reduce the award entitlements of employees.

Agreements should continue unless and until they are replaced by a newly negotiated agreement, or unless the employees covered by it agree to its termination.

- **Building and Construction Industry Improvement Act 2005**

  Continued existence of the Australian Building Construction Commission (ABCC)

The VTHC calls for the immediate abolition of the ABCC and the repeal of the Australian Building and Construction Industry Improvement Act.

Freedom of Association and the Building and Construction Industry

The Fair Work Australia Bill 2008 has been referred to the Senate Standing Committee on Education, Employment and Workplace Relations to inquire into whether the Bill as drafted will achieve its stated purpose. Its purpose is to 'create a new framework for workplace relations' to achieve particular human and workplace rights objectives.

One such objective to be inquired into is whether the Fair Work Australia Bill will, 'recognise the right to freedom of association and the right to be represented in the workplace.' The Bill itself in its "Objects of this Act" states that it will be "for all Australians".

The VTHC believes that the Bill cannot meet its purpose or objectives whilst the Government refuses to repeal the Australian Building Industry Improvement Act (ABII Act),

continues with the Building Industry 'Code of Compliance' and the powers granted to the Australian Building and Construction Commission. These laws provide additional and excessive restrictions and penalties on building workers and their unions that are not in accordance with universally accepted principles of freedom of association and the Conventions to which Australia is signatory.

The Fair Work Australia Bill does not address the legislative framework under which building workers are denied basic rights to freedom of association such as the right to meet without intimidation, the right to take legitimate Industrial action, the right to be represented by a union and the right of a union to operate in an environment that allows it to function freely. These requirements necessary to exercise freedom of association rights are all subject to harsh civil and criminal sanctions and undue interference

by the State or authorities and do not apply to any other workers in Australia.

These laws have been extensively criticised by the International Labor Organisation **Committee on Freedom of Association** and **Committee of Experts on the Application of Conventions and Recommendations.** There have been repeated requests to the Australian Government to amend industrial relations laws in Australia to bring them into conformity with International Labor Law Conventions 87 and 98 to which Australia is a signatory. (See attachment titled 'Proceedings in the ILO relating to Australian Industrial Relations Legislation in the Building and Construction Industry – A short Chronology'.)

The Fair Work Australia Bill will not 'recognise the right to freedom of association, and the right to be represented in the workplace' for all working Australians'.

The ILO Committee on Freedom of Association has advised both the previous and current Federal Government that current laws do not recognize freedom of association for building workers.

The ILO Committee of Experts on the Application of Conventions and Recommendations in February 2008 requested the current Federal Labor Government to report in detail on its legislative revision to ensure conformity with Freedom of association conventions.

Fair Work Australia Bill does not address the ILO concerns and freedom of association breaches as follow:-

1. Unlawful action as defined in the building industry is subject to “excessive impediments, penalties and sanctions against industrial action”;

2. determination of the bargaining level should be left to the discretion of the parties and not imposed by law, by decision of the administrative authority..;
3. the Building Code and the Guidelines restrain collective bargaining. They contain financial penalties and incentives linked to provisions on restricting freedom of association;
4. the Australian Building and Construction Commissioner and inspectors functions allow for interference in the internal affairs of trade unions;
5. introduction of criminal law with jail sentences for not complying with a request to provide documents or give information to the ABCC;

Local comment

There is increasing evidence that the authority (the ABCC) responsible for overseeing industrial relations in the Building and Construction industry is impenetrably biased

against workers and their unions. It actively works against principles of freedom of association.

This is demonstrated by comments made by various Federal Court Judges recently after hearing evidence in cases brought by the ABCC.

In December 2008 Justice Shane Marshall issued a judgement in which he found “the interviewer's (ABCC inspector) approach to be biased against the respondent and her tone to be avidly anti-union," Justice Marshall described the interview as producing "unsatisfactory evidence and (was) inherently unreliable".[1]

In an earlier case brought by the ABCC before the Judge, he stated in his judgment that, “The case as brought and as evidenced by the evidence yesterday was misconceived,

[1] ‘The Age’, Article by Ben Schneiders 2/12/08

was completely without merit and should not have been brought.

He stated further that, "The evidence in the case establishes that the managing director of Underground was a foul mouthed industrial cowboy. If the evidence admitted by solicitors for the applicant (the ABCC) that was engaged in by the Managing Director ….had been uttered by …..a union official it would be extraordinary if that were not the subject of serious investigation and prosecution." (By the ABCC).[2]

In fact the ABCC is so biased against building and construction workers and their unions that it has shown itself incapable of providing accurate objective statistical data and research.

[2] Federal Court of Australia (Qld Registry) Steven Lovewell and Bradley O'Carroll and Others 8/10/08

It is submitted that this bias stems not from the manner in which agents of the ABCC choose to perform their tasks, but from the foundations laid in the BII Act itself. The terms of the Act mandate and require its implementation in a manner which must offend any fair-minded observer. Undoubtedly, this explains why the courts have struggled to enforce the legislation and why the ABCC, through Mr Lloyd, has publicly disagreed with both judges on their findings.

The main reason proffered for persisting with the ABCC and the ABCII Act is that there has been a significant increase in productivity and reduced costs in the industry. However the Econetech reports the ABBC commissioned and relied upon by the ABCC have also been shown to be self-serving and unreliable.

Professor Peetz from Griffith University co authored a report – "*Constructing figures: The mythology of productivity in the Australian building and construction industry*." In which the same original data used by the ABCC report was re analysed. This report found that the data "demonstrates no major savings or economic benefits" in the construction industry over the period since the ABCC was established.

Professor Peetz comment in his submission to the Wilcox enquiry that "If ever there was an example of how economic modelling results are driven by assumptions and not data, this is it."

The Fair Work Australia Bill cannot meet the purposes for which it was introduced if additional ,separate legislation and regulation remains that demonstrably represses

freedom of association principals. even if it is only for building and construction workers.

The Fair Work Australia Bill cannot hope to meet the purposes for which it was introduced if separate legislation and regulation which is superimposed over the Workplace Relations Act and demonstrably represses freedom of Association principles is allowed to remain in place for building and construction workers.

See Appendices 2 and 3