MASTER BUILDERS AUSTRALIA

AMMA

Submission to
The Department of Education, Employment and Workplace Relations
on
Union Representation Rights Under The Fair Work Bill

January 2009

building australia

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1. INTRODUCTION

1.1 This submission is made by Master Builders Australia Inc (Master Builders) and the Australian Mines and Metals Association (AMMA).

1.2 Master Builders represents the interests of all sectors of the building and construction industry. The association consists of nine State and Territory builders associations with over 31,000 members.

1.3 The Australian Mines and Metals Association is the pre-eminent representative and lobbying body for employers in mining, hydrocarbons and associated industries, and the only industry-dedicated provider of advice for employers.

2. PREVIOUS LAW

2.1 There has been a longstanding requirement for a union to be bound by an award or certified agreement as a condition for workplace access. Right of entry was first legislated in the 1973 amendments to the *Conciliation and Arbitration Act*, 1904 (Cth). Prior to this time, right of entry was governed by industrial awards. The Award then set out the particular circumstances or the reasons for permitting entry.

2.2 The reforms made by the *Workplace Relations and Other Legislation Amendment Act* in 1996, and then the *Workplace Relations Amendment (WorkChoices) Act* in March 2006 were consistent with this approach to union rights of entry.

3. FAIR WORK BILL SPECIFICS

3.1 Under the *Fair Work Bill* (the Bill), union representation rights are no longer established by the terms of industrial instruments or awards. Instead, these rights will be governed by a requirement that the union is eligible to represent the industrial interests of relevant employees in accordance with its eligibility rules.

3.2 The following provisions of the Bill make specific reference to a union's capacity to represent industrial interests of employees:

3.2.1 Unions must be given notice of intention to make a Greenfields agreement. [cl.175]

3.2.2 Appointment of bargaining representatives. [cl.176] (particularly cl. 176(3)); [cl.177], obligations to recognise and bargain [cl.179], access to

majority support determinations [cl.236], scope orders [s.238], general rights of bargaining agents for orders [cl.229] enforcement [cl.234], and inferentially in relation to bargaining related workplace determinations [cl. 270(6)(b)]

3.2.3 Orders in respect of transfer of business. [cl.318(2)(d)]

3.2.4 Protected Action Ballot Orders [cl.437]

3.2.5 Entitlement of a union to have an enterprise agreement cover it [cl.183]

3.3 Consequently it is desirable that employers, employees and unions are certain of the circumstances under which the relevant employee organisation meets the test of being eligible to represent the interests of the relevant employees.

3.4 Employers will need this certainty for two main reasons. First, to determine their position about a request by a union official seeking right of entry (or related orders); and second, to assess the capacity of the particular union to request Fair Work Australia (FWA) to make a range of orders (including those arising from the applications of the provisions mentioned above).

4. POTENTIAL PROBLEMS FROM THE BILL'S APPROACH

4.1 The reliance on union eligibility rules, without regard to historical award coverage or agreement coverage, will result in a significant increase in overlap of union representation and thus increase the likelihood of union turf wars and demarcation disputes. This factor will be exacerbated by the creation of modern awards. Modern awards will merge industries and occupations and therefore disturb existing coverage arrangements.

4.2 The following examples are specific potential problems caused by the approach set out in the Bill:

4.2.1 A union which could not obtain a majority representation order, (perhaps at the expense of a competing union) could seek right of entry to undermine the approach of the competing union.

4.2.2 A union which was not a party to a pre-Fair Work Act agreement could seek right of entry in order to obtain a dominant position and compete with pre-existing union parties.

4.2.3 A union which had coverage but had not exercised it in the industry for a considerable period (perhaps because of another union's presence) could decide to become active and commence a recruitment campaign resulting in a major dispute between competing unions.

4.2.4 A union seeks right of entry to undermine a prior decision by employees to appoint another union to bargain or to challenge a decision not to appoint any union.

5. UNION 'REPRESENTATION ORDERS'

5.1 In a letter dated 8 January 2009 sent to representatives of Master Builders and AMMA, the Deputy Prime Minister proposed a solution to the problem of union representation rights through the making of representation orders by FWA. The solution proposed is to preserve current state and federal award-derived coverage rights.

5.2 The mechanism would be contained in a separate Act, which encompassed the current Registration and Accountability of Organisations Schedule of the Workplace Relations Act (to be renamed). The letter suggests both employers and unions would be able apply to FWA to obtain the 'representation orders.'

The balance of this paper responds to the proposal.

6. IMPACT OF DEMARCATION DISPUTES ON THE RESOURCES AND BUILDING AND CONSTRUCTION INDUSTRY SECTORS

6.1 The non-coal resources sector has for the past two decades enjoyed relative freedom from industrial disputation, having transformed itself from a high prevalence of industrial disputation to a culture of direct employee engagement. The sector is forecast to contribute $159 billion in minerals and energy exports in the 2008-09 financial year.

> *Building and construction industry gross value added was $77.7 billion in the year to the September quarter 2008, or 7.1 per cent of GDP. Employment in the building and construction industry totalled 993,800 in the November quarter 2008, or 9.3 per cent of the total. In the previous financial year (2007/08), the industry contributed 0.4 percentage points to overall economic growth of 3.7 per cent and 0.2 percentage points to total employment growth of 2.2 per cent. As a key driver in Australia's economy, the building and construction industry creates wealth and adds to the well being of its citizens.*

6.2 The existence of overlapping union coverage and the capacity for more than one union to represent employees will increase the likelihood of union turf wars and increase uncertainty in relation to union access and representation rights. This will put at risk the currently low levels of industrial disputation in both sectors.

6.3 Past demarcation disputes are representative of the risks the new system of union representation presents to the sector. For the building and construction industry, these are set out in detail in section 18 of Master Builders submission to the Senate Education, Employment and Workplace Relations Committee. [1]

6.4 In the non-coal resources sector, disputes include the *Comalco Weipa site Organisational Coverage Order 1991* (revoked in 2001), which involved a dispute between the AWU and CFMEU over representational rights over the North-West Shelf Gas Project. Similarly, in the mid 1990s the Energy Developments Limited Group of companies applied to the Australian Industrial relations Commission AIRC to obtain the *Energy Developments Limited Group of Companies Representation Order 1996,* and ensure the AWU had exclusive representational rights of its employees, to the exclusion of the ALHMWU, AMWU, CEPU, and CFMEU.[2]

6.5 The similarities between these two major disputes and those articulated by Master Builders are that one militant union has sought to impose itself in circumstances where another union had primary coverage. Such disputes are costly and ought to be avoided as a diversion of resources from productive efforts.

7. PROPOSED SOLUTION

Policy Intent

7.1 Employers must be certain about which organisations are 'eligible to represent the interests of the relevant employees.' They must be able to properly determine their position on the legitimacy of union officials seeking right of entry and be able to assess the capacity of the union to request FWA to make a range of orders (including scope, majority representation, good faith bargaining, workplace determinations, union coverage of agreement etc.).

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[1] Available at http://www.aph.gov.au/Senate/committee/eet_ctte/fair_work/submissions.htm (Submission 64).
[2] See also: *Mount Isa Mines Limited Lease Representation Order 2007*; *AWU and BHP and Ors Dec 1228/92* (1992); *Diamond Offshore General Company Demarcation Dispute Finding No. 36113 of 1997;* and *AWU, (NSW) v AMWU (NSW) (2002) NSW IRComm 245*.

7.2 End users must be provided with access to plain English information on union eligibility rules (both State and Federal). This information on eligibility rules should include geographic restrictions, areas excluded or included by demarcation decisions (where the decision does not form part of the union's rules) and copies of demarcation agreements that have been entered into by unions voluntarily. These latter documents should be open to challenge on the basis that they are detrimental to productivity or that they are not appropriate when taking into account the range of criteria to be applied by FWA when making decisions about demarcation (see below).

7.3 In order to evaluate the application of the rules, users must be provided with relevant information. This information should enable the employer or other union to be satisfied that the rules confer the rights, by specifying the nature of the work performed at a workplace or site and showing that the union is eligible to cover employees performing that work.

Plain English Rules

7.4 Ideally, existing union rules would be 'modernised' and expressed in plain English. It is expected, however, that such an approach would be time consuming and may engender disputes rather than assist with their solution. An alternative would be to use existing rules as the original document when disputes are at issue and to reference a plain English version for common usage. In the event of a dispute, the parties would be required to reference the registered instrument. This approach is used for the working of consumer insurance policies where complex agreements have now been reduced to plain English booklets which suffice for the majority of issues. Parties who relied on the plain English version in good faith would be immune from sanction in the event the authoritative version registered with a state or federal authority was found to produce a different outcome.

Compilation of Rules in single accessible location, variation of rules

7.5 FWA should be responsible for the collation and provision of internet based access to all existing union rules information (federal, transitional and state registered unions) and for their revision and publication in a plain English form. This would require an analysis of existing demarcation decisions and private agreements where rules were not varied as a result. Rules should

provide for the 'transfer' of employer specific demarcation decisions to related or successor entities.

7.6 FWA should have power to amend rules to resolve ambiguity and resolve demarcation disputes and additionally to amend rules to delete specific coverage provisions where a union has repeatedly breached the Act and another union also has coverage. Such FWA discretion should be based on a range of criteria including:

- Historical union coverage
- The proportion of valid fully paid up members of competing unions at the workplace
- Views of the employer, including the effect of the order on the employer's business
- Views of the employees
- History of enterprise agreement making
- Impact on productivity and efficiency
- Conduct of the parties
- The consequences of not making an order; and
- Any other relevant matter.

Provision of information to establish eligibility

7.7 Employers must be able to quickly and efficiently evaluate a union's standing to represent certain classes of employees. There should be a standardised document, prescribed by the regulations, which would be required to be completed by the eligible union and which would also detail the particulars of entry where the form was used as a means to prove right of entry to premises.

7.8 The document would contain details of the eligibility rule relied upon and set out particulars of the facts relied upon, to confirm that work performed by the relevant employees fell within that particular eligibility rule. The provision of this information is a pre-requisite to an employer making an informed decision about a union's legitimate right to enter premises or its capacity to make an application for FWA orders.

7.9 False or reckless representations would be the subject of a range of sanctions, including fines, loss of right of entry permit and in severe cases alteration of the offending union's eligibility rules, to preclude that union from exercising those rights in a sector where abuse had been detected.

8. DETERMINATION OF ELIGIBILITY

8.1 A system for the determination of a union's eligibility to represent the industrial interests of relevant employees is proposed. There would be two main options to achieve this end.

Option 1

8.2 A union could approach FWA to seek a certificate confirming its right to represent the industrial interests of a specific category of employees at a particular workplace. The union would be required to provide FWA with a copy of the standard document which detailed the basis for its entitlement. FWA would be required to determine the question of the union's eligibility. The employer would be notified of the union's application and given the opportunity to be heard as part of the determination process. FWA would issue a certificate upon being satisfied that the union did possess the required eligibility. This would be an advance representation order.

Option 2

8.3 Here, the union would elect not to obtain a certificate described above. In this circumstance, the union would serve the right of entry notice or application in respect of a proceeding on the employer with the standard document. The employer would then have a limited period to raise any objection by notifying the union and FWA. Upon receipt of the notification FWA would review the union's right to represent the industrial interests of the employees taking into account the employer's ground of objection. FWA's determination would be binding on all parties and stand as a representation order. In the period prior to the determination, the right of entry or proceeding would be stayed. If necessary, FWA should be empowered to make an interim order that would be required to be published within 21 days from the date of the application.

8.4 The required standard form should be carefully drafted. At the least it should:

8.4.1 Identify the relevant industrial instrument and classifications of employees as described in the instrument, and

8.4.2 declare that one or more persons in the relevant classifications etc are engaged in work at the premises, and

8.4.3 Identify the relevant eligibility rule or rules.

8.5 It is expected that the second option would be used in almost all cases. Where the union believed there would be opposition to its intended exercise of power, option one could be used to guarantee access or the conduct of the proceedings. The orders should be in force for an indefinite period subject to changes in the circumstances that were relied upon by any party. Accordingly, on application by an affected party, FWA would be required to review the order where there had been a material change in the circumstances that founded the order.

9. REGULATION VIA AGREEMENTS

9.1 Currently whether or not a union is party to an agreement may trigger an ability to enter a workplace. For example under Division 6 of the *Workplace Relations Act* there is a right to enter a workplace to hold discussions with current or potential union members during breaks from work. The right arises when the employees are performing work that is covered by an award or agreement binding on the union. Master Builders and AMMA believe there should be similar rights and restrictions conferred upon unions in relation to whether or not they are covered by an enterprise agreement. Currently, however, the architecture of the Bill does not generally facilitate being covered by an agreement as a means of regulating union representation rights. This is particularly the case given the entitlement of a union to have an enterprise agreement cover it conferred by clause 183.

9.2 Master Builders and AMMA will provide further material to DEEWR in a separate submission on the issue of how agreements may or may not potentially regulate union representation rights.

10. CONCLUSION

Master Builders and AMMA submit that the introduction of these proposals will provide the necessary certainty to avoid damaging disputes about union turf wars.[3] We also understand that the approach proposed is supported by ACCI.

MBA and AMMA contend that the adoption of these proposals will provide the balance required between the twin factors of necessary competition between

[3] Steven Scott *Workplace Reform May Lead to Union Turf Wars* Australian Financial Review 22 January 2009 p 7

unions and the prevention of the exercise of those rights where they might damage productivity.