SUBMISSION TO THE FAIR WORK AMENDMENT BILL INQUIRY BY THE MARITIME UNION OF AUSTRALIA

INTRODUCTION

1. This submission to the Fair Work Amendment Bill Inquiry is provided by the Maritime Union of Australia (MUA).

2. The submission will not deal with all of the provisions of the Fair Work Amendment Bill 2012 (the FW Bill). This submission is directed to indentifying aspects of the Bill where the MUA has experienced difficulties with either the legislation, or the administration of the legislation.

3. The MUA also supports and adopts the submissions of the Australian Council of Trade Unions.

4. Informing our submissions to the Fair Work Act Review Panel earlier this year was a reconsideration of the Government's Workplace Relations Policy which it took to the 2007 Federal Election and also the Second Reading Speech of the Minister when presenting the Fair Work Bill to the Parliament in 2008.

5. In our view, the Fair Work Act, which ultimately passed both houses of Parliament and was enacted, has served the population of Australia as a whole satisfactorily and has attained the majority of its goals.

6. We believe the objectives set by the legislation have in large part been met despite the partisan criticism of certain sectors of the community who appear to hanker for a return to 'Work Choices' type workplace regulation which was overwhelmingly rejected by the electorate in 2007.

7. Whilst the MUA supports the legislative framework established by the FW Act and associated legislation, it believes that there are aspects of the legislation that should be reconsidered with a view to making those parts of the Act more effective. In some respects, the FW Bill addresses some of the MUA's concerns. In others, it raises additional concerns.

SCHEDULE 1 – DEFAULT SUPERANUATION

8. The MUA supports four yearly reviews of default fund terms in modern Awards. In particular, the MUA believes the publication of a default superannuation fund list by an independently selected Expert Panel of the newly named Fair Work Commission (constituted by both full time members and experts in finance, investment management and/or superannuation) is an appropriate mechanism to ensure an objective evaluation of fund benefits for Award employees.

9. The default superannuation fund list should comprise only of super funds that are representative of the industry a, which is the subject of the Award.

SCHEDULE 2 – EXPERT PANEL

10. Consistent with the above submission, the MUA supports the establishment of an Expert Panel within the Tribunal to exercise the assessment of default superannuation funds representative of the industry and industry employers for inclusion in modern Awards.

11. Whilst the Bill proposes that the Expert Panel will conduct the assessment of default superannuation funds and subsume the functions currently performed by the Minimum Wage Panel, the MUA notes and supports the inclusion of the President or his delegate Deputy President as Chair of the Expert Panel conducting the assessment of default superannuation funds, and the inclusion of the President and three Fair Work Commission members on the Expert Panel conducting the annual wage review (see Items 42 – 47).

SCHEDULE 3 – MODERN AWARDS

12. The MUA supports the amendment to section 160 of the FW Act to ensure that organisations that are entitled to represent the industrial interests of employees covered by Awards, but not necessarily covered by the award, are entitled to make application to vary such an Award to remove ambiguity or uncertainty.

13. Such technical amendment is consistent with the existing ability of an organisation to make application under section 158 of the FW Act to vary or revoke an Award for the purpose of achieving the modern award objective and remedies any perceived inconsistencies between sections 158 and 160 of the FW Act.

SCHEDULE 4 – ENTERPRISE AGREEMENTS

14. Whilst the MUA understands the rationale and logic underpinning the amendment to section 176 to provide that an organisation or an official of an organisation (whether acting in an official or private capacity) cannot be a bargaining representative for an employee where the official's employee organisation is not entitled to represent the employee, it disagrees with the restriction on an official to represent an employee as bargaining representative in her or his own private capacity.

15. As the MUA understands it, the philosophy underpinning the bargaining representative regime is that an employee should be able to be represented by a person or organisation of their own free choice.

16. Given the fundamental importance of freedom of association as enshrined in the ILO *Convention Concerning Freedom of Association and Protection of the Right to Organise*, we feel it inappropriate to restrict an employee's free choice of bargaining representative in the manner proposed by Item 2 of Schedule 4 to the FW Bill.

17. Whilst jurisprudence on the existing section 176 might be the subject of differing opinions, in our submission, the existing section should remain in its current form, and it should be left to the Tribunal and Courts to apply the provision in the individual circumstances which present themselves in disputes regarding the operation of existing section 176.

SCHEDULE 5 – GENERAL PROTECTIONS

18. In the MUA's submission, the existing sixty day time limit for applying to Fair Work Australia to mediate or conciliate a dispute about a dismissal allegedly in contravention of Part 3 – 1 is appropriate, and the limit should not be reduced to twenty one days (in line with the proposed increase in the time limit for unfair dismissal application from fourteen to twenty one days).

19. Unlike an unfair dismissal application, where failed conciliation may ultimately result in arbitration before the Tribunal, failed conciliation of a general protections dispute is a precursor to court action.

20. The considerations informing the decision to bring a general protections dispute application are therefore more complex, involving considerations of greater costs, lengthier and more formal proceedings and additional commitment and concomitant stress.

21. Ultimately, there is more at stake in a general protection dispute involving unfair dismissal.

22. Accordingly, the decision to bring a general protections dispute application is of a very different nature to the decision to pursue an unfair dismissal application in the Tribunal.

23. Such decision must be made in often trying circumstances following dismissal, especially where it is alleged that a dismissal is in effect for a prohibited reason in contravention of Part 3 -1 of the FW Act.

24. For the foregoing reasons, in the MUA's submission, the existing 60 day time limit for the bringing of general protection disputes involving unfair dismissals should remain unchanged.

SCHEDULE 6 – UNFAIR DISMISSAL

25. Conversely, for similar reasons to those forming the basis of for our opposition to the reduction in the time limit for bringing general protections disputes involving unfair dismissals, the MUA supports the proposed increase in the time limit for bringing unfair dismissal applications from within fourteen days of the dismissal taking effect to twenty one days.

26. Insofar as Item 2 of Schedule 6 to the FW Bill seeks to enable the Tribunal to dismiss an unfair dismissal application where it is satisfied that the applicant has unreasonably failed to attend a conference or hearing, failed to comply with a direction or order, or failed to discontinue the application after a settlement agreement has been reached, the MUA submits as follows.

27. Why has a corresponding amendment, allowing an applicant to have an employer's response struck out, not been included in the proposed amendment?

28. In this regard we note that under proposed new subsection 399A(2) the power of the Tribunal to dismiss an application is only exercisable on application by an employer.

29. So the proposed position is that where in the view of an employer, an employee has acted unreasonably, the employer can apply to the Tribunal for an application to be dismissed, but there is no corresponding ability of an applicant to have an employer's response to an application struck out for the same reason?

30. Such a regime is inconsistent with the rights of litigants in the courts who can seek to have a defence struck out and/or summary judgment entered.

31. Accordingly, in the MUA's submission, should the government proceed with the amendment proposed in Item 2 of Schedule 6 to the FW Bill, a corresponding power to strike out an employer's response on application by the applicant should be inserted into the FW Act.

SCHEDULE 7 – INDUSTRIAL ACTION

32. Whilst the MUA supports the introduction of an electronic voting option for protected action ballots proposed in Item 1 of Schedule 7 to the FW Bill, it queries whether the default protected ballot agent under the FW Act, the Australian Electoral Commission (AEC) will be willing to use such method?

33. Our understanding is that the AEC will not countenance electronic voting in any shape or form.

34. In this regard, the MUA would appreciate the advice of the Committee as to whether the AEC has indicated it will conduct electronic voting as protected action ballot agent.

SCHEDULE 8 – THE FAIR WORK COMMISSION

35. The MUA supports the proposed amendment in Item 7 of Schedule 8 to the FW Bill which requires the President to direct a Full Bench of the Tribunal to exercise a function or power in relation to a matter if the parties apply to the Tribunal to have a Full Bench perform or exercise a function or power in relation to the matter, and the President is satisfied that it is in the public interest to do so.

36. The MUA also supports the proposed new section 615C which will give the President the power to transfer a function or power to the President from a Tribunal member or a Full Bench where the President has given an earlier direction that a function or power be performed by a Tribunal member or Full Bench.

37. The Explanatory Memorandum at paragraph [223] identifies section 108 of the *Industrial Relations Act 1996* (NSW) and section 113 of the *Workplace Relations Act 1996* (Cth) as the genesis of the proposed amendment.

38. These sections gave the respective Tribunals' President the power to endeavour to settle an industrial dispute, even where a proceeding may have already been commenced before another Tribunal member.

39. The MUA supports the analogous power in proposed section 615C and notes that its experience is that the intervention of a Presidential member may help bring parties to a speedier and more beneficial resolution of disputes.

40. Insofar as Schedule 8 deals with proposals for new Presidential members of the Tribunal, acting Commissioners, and the proposed complaints handling process, save for noting that these institutional matters are the domain of the Tribunal, the MUA makes no submission in relation to them.

SCHEDULE 9 – CHANGE OF NAME FROM FWA TO FWC

41. The MUA welcomes a return to the inclusion of "*Commission*" in the name of the Tribunal.

42. However, the MUA supports calls for further amendment of the name to its natural form, "*Australian Industrial Relations Commission*".

43. The Commission has been and remains a cornerstone of a functioning Australian democracy and is renowned for its fair and efficient management of industrial relations following federation with the enactment of the *Conciliation and Arbitration Act 1904*.

44. As such, the Commission deserves a name that is recognised throughout Australia and should revert to its longstanding and accepted form.

SCHEDULE 10 – OTHER AMENDMENTS

45. The MUA supports the amendments proposed in Item 1 of Schedule 6 to the FW Bill which aim to overcome the difficulties encountered in *Construction, Forestry, Mining and Energy Union v CSBP No 2* [2012] FCAFC 64, in which the Federal Court held that section 570 of the FW Act (restricting costs orders to proceedings instituted vexatiously or without reasonable cause) did not apply as it was limited to proceedings in courts exercising jurisdiction under the FW Act, which the Court held did not include appeals from a decision of a single Judge of the Federal Court, being an appeal under section 24 of the *Federal Court of Australia Act 1976* (Cth).

46. The amendment to section 570 to restrict costs orders in relation to matters arising under the FW Act, as opposed to in relation to courts exercising jurisdiction under the FW Act, is wholly supported by the MUA.

SCHEDULE 11 – APPLICATION, TRANSITIONAL AND SAVING PROVISIONS

47. The MUA makes no submission in relation to Schedule 11 which proposes amendments of a technical nature only.

CONCLUSION

48. The MUA has confined its comments and suggestions to subject matter that experience has shown needs modification. Its views are based on improving an effective and fair tranche of legislation.

49. The submission is also made in the knowledge that the present FW Act has achieved most of the political objectives set by the government.

50. Any changes or alterations made by the FW Bill should acknowledge Government policy and the MUA urges the Committee and the government to work to ensure that those parts of the Bill enacted do not diminish the ability of ordinary working families to be able to protect and progress their economic interest, which must include fairness to all relevant stakeholders.