Submission

to

Senate Employment, Workplace Relations and Education Committee

Inquiry into the Fair Work Bill 2008 (Cth)

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This submission has been prepared on behalf of the Centre by

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1. Introduction

1.1 This submission is made to the Senate Employment, Workplace Relations and Education Committee by the Centre for Employment and Labour Relations Law at the University of Melbourne. The Centre is a leading academic research unit in Australia devoted to teaching and research in labour and employment law. The submission was prepared by members of the Centre engaged as academic staff in the Melbourne Law School.

1.2 In this submission we address several key aspects of the *Fair Work Bill 2008* (Cth.) ('the Bill').

1.3 Given the timing of the call for submissions for this Inquiry, coming at the end of an academic year and carrying over into the University's end of year recess, members of the Centre have had insufficient time to provide a detailed analysis of the provisions of the Bill. Instead, we make some brief comments about the major changes introduced by the Bill, and identify some discrete areas of concern based on members individual research interests.

1.4 We endorse the earlier submissions to this Inquiry by Centre Members Ms Anna Chapman and Associate Professor Beth Gaze.

1.5 The Centre's members and academic associates are available to meet with the Committee to elaborate on this submission, and would welcome the opportunity to do so.

2. Key Changes to the Australian System of Labour Relations under the Fair Work Bill

2.1 If enacted, the Fair Work Bill will replace the *Workplace Relations Act* 1996 (Cth) (WR Act) as the main source of federal regulation of working conditions and labour relations in Australia. The WR Act still contains many of the 'Work Choices' amendments to the WR Act made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

2.2 Work Choices had a significant and negative impact on the function of labour law in safeguarding the welfare of workers and empowering collective action and co-regulation.

2.3 Work Choices was a major extension and acceleration of what had already been significant changes in the character of federal regulation of labour over the previous decade in Australia.

2.4 There were two general themes to these changes. One of the most important themes is the extent to which Australian federal labour law

became more 'individualised', which represents a marked shift from the previous emphasis on collective methods of regulation and of dispute settlement.

2.5 The second theme is the extent to which the system has come to reconfigure the role of the state in enforcement or policing of labour law. For most of the last century, the role of the state in Australian labour law was to support a participatory model of collective action.[1]

2.6 Since the mid-1990s, and in particular after the WR Act, new lines were drawn between state regulation of labour relations and self-regulation by industrial actors. Federal legislation was used in a command and control fashion to mandate outcomes, and to exclude collectivism and co-regulation by restricting the ability of employees to deal as a group with individual employers. Extensive capacity for self-regulation was returned to employers, but subject to prescriptive regulation of the matters over which employers could cede to unions through collective bargaining.[2]

2.7 Academic research has shown that the negative impact of these changes on working conditions, job security and workplace participation and collectivism, especially for vulnerable workers, was extensive.[3]

2.8 We therefore welcome the general thrust of changes to the legislation, including its objects, the framework of National Employment Standards and Modern Award, the introduction of Good Faith Bargaining and the amended transmission of business arrangements.

2.9 We also welcome the greatly improved drafting of the legislation, including its more logical structure and its more concise and plainer language. This is a major advance on the convoluted nature of the Workplace Relations Act.

2.10 A more positive development brought about by Work Choices was is in relation to enforcement of the federal legislation and instruments made under it. The Work Choices legislation radically reshaped federal government compliance strategies. While federal government officials (inspectors) have played a role in enforcement since the 1930s, since Work Choices this role has become far more significant. Annual federal

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[1] B Creighton, 'The Role of the State in Regulating Employment Relations: An Australian Perspective' (1997) 2 *Flinders Journal of Law Reform* 103; J Howe '"Deregulation" of Labour Relations in Australia: Toward a More Centred Command and Control Model' in C Arup et al, *Labour Law and Labour Market Regulation* (Federation Press, Sydney, 2006).

[2] See J Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35 *Industrial Law Journal*; S Cooney, 'Command and Control in the Workplace: Agreement-Making Under Work Choices' (2006) 16 *Economic and Labour Relations Review* 147.

[3] See, for example, D Peetz, *Assessing the Impact of 'Work Choices' One Year On*, Report prepared for Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, March 2007; A Forsyth, *Freedom to Fire: Economic Dismissals under Work Choices,* Report prepared for the Office of the Victorian Workplace Rights Advocate, 26 August 2007; B Pocock et al, 'The Impact of "*Work Choices*" on Women in Low Paid Employment in Australia: a Qualitative Analysis' (2008) 50(3) *Journal of Industrial Relations* 475.

funding allocated to enforcing workers' entitlements has more than doubled since the introduction of Work Choices[4] By mid 2007, the number of staff involved in enforcement had grown from 70 to 275 and the number of locations in which staff were based had increased from 4 to 26.

2.11 Further, in 2007, the legislative provisions relating to enforcement were substantially reworked. The Workplace Ombudsman was established (see Part 5A Workplace Relations Act) as a statutory officer with a broad range of functions related to securing compliance with federal workplace law. These functions included the appointment and direction of federal workplace inspectors. The Office of the Workplace Ombudsman was established as a statutory agency consisting of the Workplace Ombudsman and the inspectors. We are pleased to see that the Bill essentially retains these improved enforcement arrangements, albeit in a restructured form.

2.12 Our overall conclusion is therefore that the Bill should be passed. However, we do have concerns about some aspects of the legislation and have a number of suggestions for improvement. These are set out below. This is not intended to be an exhaustive list of concerns and suggestions. For example, we are concerned about the Bill's maintenance of significant restrictions on trade union activity and on the lawful taking of industrial action.[5] However, time constraints have prevented us from addressing these concerns in any detail.

3. **The National Employment Standards**[6]

3.1 We note that several difficulties with the NES were identified in our earlier submission to DEEWR after the NES Exposure draft was released in February 2008. Some of these (for example, in relation to recognition of same sex relationships, and, to some extent, the relationship between statutory and contractual entitlements[7] the) have been addressed. Two of the matters which have not been addressed we reiterate here:

Requests for Flexible Working Arrangements and extending the period of unpaid leave.

3.2 There are two provisions in the National Employment Standards that concern employee 'rights' to enhanced leave – one pertaining to

[4] See OWS Annual Report 2005-2006: 7 and Workplace Ombudsman Annual Report 2006-2007: 7.
[5] See, for example, the views expressed in J Howe and C Fenwick, 'Trade Union Security After Work Choices', paper presented to the 4th Australian Labour Law Association National Conference, Melbourne, 14-15 November 2008.
[6] Part 2-2.
[7] See the concept of 'safety net contractual entitlement'.

flexible working hours[8] and the other to extending parental leave.[9] Both of these provisions are deficient in that important aspects of them are unenforceable. It is not clear if they confer any effective rights or make a substantive change to the current position whereby an employer is generally free to refuse any employee request to change hours. The analysis here focuses on the flexible working hours provision, but it applies also to the extended parental leave clause.

3.3 The flexible working hours provision enables an employee who has responsibility for pre-school children to request a change in working arrangements.[10] An employer is required to consider the request but may refuse it on 'reasonable business grounds'. Were it not for the difficulties of enforcement, the provision would be welcome because it would facilitate the establishment of working time arrangements beneficial to the employee, her or his family, and the employer.

3.4 The provision is at first glance similar to one introduced successfully into the United Kingdom in 2002.[11] There is, however, an important difference: the UK provision is accompanied by an enforcement procedure preventing an an employer refusing the request on arbitrary grounds. The UK legislation provides that an employee may make a complaint to a tribunal where the employer has failed to deal with the application appropriately, or has based its decision on incorrect facts[12] If the complaint is well-founded the UK tribunal may make remedial orders.[13] These are an order that the employer reconsider the application and/or a compensation order.

3.5 In contrast, the Fair Work Bill has a very limited remedial provision. The requirement in Bill that an employer may refuse a request only on reasonable grounds is specifically exempted from the remedies applicable to other breaches of the NES. [14] It would seem that an order could be made against an employer who simply fails to provide a written response to a request, or who fails to provide any detailed reasons, although this is not explicit in the Bill; it is an inference from the way the Bill is drafted.[15] Importantly, no order can be made against, and no formal dispute be brought in relation to, an employer whose reasons for refusing are incorrect or arbitrary.

3.6 If there is no way to ensure that the request is dealt with rationally, then it is a misnomer to describe it as a 'right'. All other provisions in the NES are enforceable. On the contrary, the Explanatory Memorandum contains no

[8] Clause 65.
[9] Clause 76.
[10] Clause 65
[11] See Employment Rights Act Part 8A.
[12] Id s.80H.
[13] 80I.
[14] S.44(2); 739(2) and 740(2).
[15] This interpretation is based on the Explanatory Memorandum at [265].

suggestion that analogous provisions which do contain an enforcement mechanism, such as the UK legislation, or the Victorian Equal Opportunity Act,[16] have proved unworkable or onerous.

3.7 We suggest that the exclusions be deleted. However, if the government wishes to retain them because of political commitments, they should be amened to make clear that an arbitrary refusal may be subject to the enforcement and dispute resolution procedures.

3.8 **The exclusions in 44(2), 739(2) and 740(2) should be deleted. Alternatively, these provisions should be amended to add the words 'unless an employer fails to provide written reasons which indicate that the refusal is based on reasonable business grounds'.**

Working hours

3.9 The maximum weekly hours provision in the Bill[17] is a substantial improvement on the current provision in the Workplace Relations Act, which, by virtue of the averaging provisions, may lead to an employee working an extreme number of hours in any one week.[18] The Bill provides that, all hours worked in excess of 38 hour standard (or pro rata equivalent) will be considered additional hours and subject to the reasonableness standard.[19]

3.10 Nonetheless, the NES still fails to provide a scheme which ensures that working Australians enjoy safe working hours. This is because it fails to specify:

- a right to rest for a specific number of hours in any day;
- a right to at least one day off per week; and
- a right to an in-work rest break in a full working day;[20]
- particular limitations on night work.

3.11 The reason for this failure appears to be that while maximum hours are dealt with in NES, arrangements for when work is performed are dealt with in modern awards. These matters were originally treated in an integrated manner in the award system. They are treated in an integrated manner in most other industrialised countries, and in particular in the European Union.[21] For example the United Kingdom's Working Time Regulations provide, inter alia:

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[16] Ss 13A, 14A, 15A, 31A Equal Employment Act.
[17] Part 2-2, Division 3.
[18] See S.Cooney, J.Howe and J.Murray, 'Time and Money Under Work Choices: Understanding the New Workplace Relations Act as a Scheme Of Regulation, (2006) 29 *University of New South Wales Law Review* 215-241
[19] See 62(3)(i).
[20] Compare Workplace Relations Act Part 12 Division 1.
[21] Compare the United Kingdom's *Working Time Regulations* (Statutory Instrument 1998 No. 1833, as amended), which implement the European Union's Working Time Directive 93/104/EC, 23rd November 1993.. See also D McCann, 'Regulating Working Time Needs and Preferences', in J Messenger (Ed), *Working Time and Workers' Preferences in Industrialized Countries* Routledge/ILO, London/Geneva, 2004.

- a right to 11 hours' rest a day;
- a right to a day off each week;
- a right to an in-work rest break if the working day is longer than 6 hours.
- a limit of an average of 8 hours work in 24 which night-workers can be required to work;

3.12 As we pointed out in our earlier submission, all of these matters concern an employee's health, and their capacity to maintain a viable life outside work. It is true that these matters can be dealt with in modern awards. But modern awards are of more limited application that the NES. We can see no basis for treating one matter as universal and mandatory (a limit on maximum hours) but the others (rest periods, days off) as sectoral and subject to exclusion in the case of high income employees. Although certainly an improvement on the AFPCS, the current draft NES perpetuates one of the major regressive aspects of Work Choices, namely a significant erosion of employee rights to reasonable working time.[22]

3.13 One possible objection to a universal standard extending to rest periods and days off is that industries have different requirements and therefore awards or enterprise agreements, being industry-sensitive, are a more targeted form or regulation. However, even if it is assumed that this is correct, it does not follow that there should be no universal standard. At most, this argument would justify a derogation from an underlying default standard, on the basis of specific industry contexts.

3.14 Another possible objection is that the existing provision indirectly covers the omitted matters through its 'reasonable additional hours' touchstone. However, this terminology is too vague to secure bottom line rights, such as a right to a weekly day of rest.

3.15 **Clause 62 should be amended. A minimum formulation, which focuses on daily and weekly rest only, and allows for derogation, follows:**

62(5) For this purposes of this section, and subject to subsection
62(6) Additional hours are taken to be unreasonable if they require an employee to work without:
a) at least 11 hours of rest each day;
b) at least one day off each week;

62(6) Subsection (5) is subject to any contrary provision in a modern award, enterprise agreement or workplace determination.

[22] I Campbell, 'Long Working Hours in Australia: Working-Time Regulation and Employer Pressures' (2007) 17 *Economic and Labour Relations Review*, 37-68.

3.16 We also endorse the Submission to this Inquiry by Centre Member Associate Professor Beth Gaze

4. Enterprise Agreements: Bargaining Arrangements

4.1 The agreement making arrangements in Part 2-4 of the Bill are a considerable improvement on the Work Choices regime and we support them, with some reservations set out in this section.

4.2 We especially welcome the Division 8 provisions giving Fair Work Australia (FWA) an important role in facilitating bargaining. These provisions go a considerable way towards establishing an effective system of collective bargaining in Australia. This brings Australia:

- into line with all other advanced industrial democracies; and
- into closer conformity with international instruments obliging this country to give effective recognition to the right to bargain collectively.[23]

4.3 We support the remedial action that may be taken by FWA to deal with recalcitrant parties that refuse to engage in good faith bargaining. In particular, we support the powers of FWA to make serious breach determinations[24] and bargaining related workplace determinations.[25] While we would hope that those powers are cautiously exercised, their availability provides a crucial incentive to parties to comply with their bargaining obligations.

4.4 Our greatest reservation with this Part of the Bill concerns cl. 253(1)(a) which stipulates that a term of an enterprise agreement is of no effect if it is not a term about a permitted matter.[26] While the scope of 'permitted matters' is broader than under Work Choices, the Bill nevertheless perpetuates the objectionable practice of unduly confining the content of agreements.

4.5 The 'permitted matters' concept is, insofar as it prevents lawful content forming part of enterprise agreements, objectionable because:

- it has no obvious rationale;
- it imposes a restriction on agreement making which does not exist in common law agreement making;
- it requires reference to the arcane case law on 'matters pertaining' to the employment relationship – case law originating under

[23] This right is set out, inter alia, in the International Covenant on Civil and Political Rights (art 22), the International Covenant on Economic Social and Cultural Rights (art.8) and the International Labour Organization Convention on the Right to Organize and Collective Bargaining (Convention 98), one of the ILO's core conventions..
[24] Cl. 235.
[25] Part 2-5 Division 4.
[26] Permitted matters are defined in cl 172.

constitutional issues superseded by use of the corporations power - , and is likely to generate expensive litigation;

- it has no equivalent in any other advanced liberal democracy of which we are aware.

4.6 It is sufficient to prevent enterprise agreements containing unlawful terms.

4.7 **Clause 253 should be amended to delete cl. 253(1)(a).**

4.8 We note that Professor Andrew Stewart has made similar criticisms of the 'permitted matters' concept in his submission. We endorse his comments and also support his proposed amendment in relation to the effect of including 'non-permitted' matters in a claim on industrial action.

4.9 A second concern we have relates to the appointment of employee bargaining representatives in firms without union representation. While the Bill requires an employer intending to enter into an enterprise agreement to give employees notice of the right to be represented by a bargaining representative,[27] it does not make clear how employees may choose or communicate with that representative.

4.10 Employees who are not unionised but wish to choose an employee representative should be able to do so or the agreement making may become effectively unilateral.

4.11. Further, since a bargaining representative has considerable powers (including applying to FWA for bargaining orders and majority support determinations) not to mention considerable responsibilities (formulating the terms and conditions of employment of the persons she or he represents), there ought to be a transparent process enabling employees to select their representative.

4.12. One way of enabling non-unionised employees to choose a bargaining representative would be to amend the Bill as follows;

Insert in clause 174:
(6) The notice must explain that the employer will provide employees with a reasonable opportunity of consulting in order to choose a bargaining representative.

(7) Failure of an employer to comply with sub-section (6), or to provide the reasonable opportunity referred to in that sub-section, constitutes a violation of the good faith bargaining requirements referred to in section 228.

[27] Cl 173.

4.13 This proposal has the merit of reducing the potential number of bargaining representatives, given that employers must bargaining with multiple representatives[28] and employees can appoint themselves.[29]

4.14 One apparent problem with the formulation in 4.11 is that an employee bargaining representative needs to be in place to trigger the intervention of the FWA in the event of an employer failure to enable employees to select their representative. This seems to put the cart before the horse, but the problem is not a practical one. This is because any employee who wanted to complain about the failure of an employer to allow consultation could appoint themselves a bargaining agent and then complain of breach of proposed section 178(6).

4.15 Partly to enable the FWA to deal with a failure of an employer to enable employees to select a representative, but also to deal with unreasonable employer obstruction of employees seeking to communicate with their bargaining representative (once chosen) during the bargaining process, the following amendment is desirable:

Insert in clause 231:
(2) (e) an order that an employer allow employees a reasonable opportunity to meet and confer.

5. Enterprise Agreements: Workplace Consultation

5.1 We commend the government for providing that a consultation term must be included in an enterprise agreement in the *Fair Work Bill 2008* (Cth) *(*cl 205). This provision has the potential to bring Australia's workplace relations system into line with good information and consultation practices in Western European countries

5.2 We also commend the government on providing that if an enterprise agreement does not include a consultation term, the model term is to be adopted. The model consultation term for enterprise agreements is to be prescribed in the regulations but these have not been attached to the draft bill. The provision of a model term is critical. It is not only a default provision but will offer useful guidance for employers and employees in drafting their own consultation terms.

5.3 Guidance is vital for consultation provisions to be effective. Former Keating Government legislation establishing employee consultation provisions was criticised for the absence of guidance.[30] The provisions were criticised as:

[28] Cl. 179.
[29] Cl 176(4).
[30] (See Sections 170MC(1)(d) and 170NC(1)(f) of Commonwealth Industrial Relations Reform Act 1993).

- Vague and failing to give any guidance on the frequency or make-up of this 'process';[31]
- Not prescribing the means (structure or processes) for such consultation;[32]
- Not providing any explanation for how employees were to be represented in this process.[33]

5.4 This lack of guidance has given rise to practical problems.[34] Most importantly, in non-unionised workplaces, a lack of guidance can mean that greater reliance is placed on management's ability to implement processes of change. This is likely to involve a considerable investment of management time and resources.

5.5 We recommend that the model consultation term should be used as a guide for employers and employees to draft their own consultation provision. The model consultation provision should therefore include the following:

- Information, consultation and 'major workplace changes' should be defined
- Representatives' security of tenure should be guaranteed
- Confidential business information should be carefully defined and not be so wide so as to preclude provision of information necessary for meaningful consultation.

5.6 If a representative committee structure is adopted, as is our preferred model based on the Australian experience with joint consultative committees, the following additional minimum conditions should be specified:

- The composition of the committee
- The frequency of meetings
- The topics for discussion
- The powers of the committee (clearly described)
- The election or appointment of representatives[35]

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[31] Mitchell, R., Naughton, R. and Sorensen, R. (1997), 'The Law and Employee Participation — Evidence From the Federal Enterprise Agreements Process', *Journal of Industrial Relations*, vol.39, pp.196-217, at 204.
[32] Ibid, at 203.
[33] P.J. Gollan and G. Patmore "Transporting the European Social Partnership Model to Australia" (2006) 48 The Journal of Industrial Relations 217 – 256.
[34] Evidence of these problems was revealed by a review of joint consultation provisions in federal certified agreements: (http://www.wagenet.gov.au/WageNet/Search/Search.asp? Render=All) See P.J. Gollan and G. Patmore "Transporting the European Social Partnership Model to Australia" (2006) 48 The Journal of Industrial Relations 217 – 256.
[35] We have assumed that consultation over change is different from work councils/co-determination. In making this suggestion we understand that the Government is intending to provide for consultation rights over change at work, not broader rights, such as; co-determination by work councils as occurs in some European countries.

5.7 Guidance in drafting the model provision may be drawn from Australian experience and EU Directives. We recommend that attention be given to the following EU Directives:

- European Parliament and Council (2002), *A General Framework for Informing and Consulting Employees*, Council Directive 2002/14/EC, 2002 OJ (L 080). [36]
- European Parliament and Council (1997), *European Works Council*, Council Directive 97/74, 1998 OJ (L 010). (*'EWCD'*).

5.8 Reference may be made to these directives in defining the meaning of key terms, as well as providing guidance on committee structures. We also note that the Information and consultation directive contains a right to consultation over substantial changes in work organization.[37]

5.9 **Thus, we recommend that the model consultation term over major workplace change contain detailed information providing guidance for employers and employees on best workplace relations practices consistent with standards in EU countries.**

5.10 **Additionally, that the Senate consider adopting an amendment to cl 205. Cl. 205 (3) states that: [t]he regulations must prescribe the *model consultation term* for enterprise agreements.**

5.11 **We recommend that a new clause 205(4) could be inserted into the bill, stating:**
"(1) That the model consultation provision prescribed in the regulations must include:

(i) a definition of information, consultation and 'major workplace changes';
(ii) That representatives' security of tenure be guaranteed;
(iii) That confidential business information is protected but not so far as to preclude provision of information necessary for meaningful consultation.

(2) If the model consultation term includes provision for a representative committee, that it includes additional minimum conditions, specifying the:

(i) composition of the committee;
(ii) frequency of meetings;
(iii) topics for discussion;

[36] Assistance on the use of EU consultation Directives as a model for Australian legislation can be found in P.J. Gollan and G. Patmore "Transporting the European Social Partnership Model to Australia" (2006) 48 The Journal of Industrial Relations 217 – 256.
[37] For an earlier Australian anaylsis of workplace change see also the *Termination, Change and Redundancy Case* (1984) 26 AILR 256; (1984) 294 CAR 175; (1984) 8 IR 34.

(iv) powers of the committee;
(v) means for election or appointment of representatives."

6. Unfair Dismissal

6.1 We endorse the earlier submission to this Inquiry by Centre Member Ms Anna Chapman

7. Compliance and Administration

7.1 Notwithstanding the improvements in enforcement provisions under *Work Choices,* there were still a number of inadequacies in the powers held by the Workplace Ombudsman and inspectors. Some of these have been addressed in the Bill. In particular, we support the following provisions of the Bill relating to the powers of inspectors: Persons Assisting Inspectors, cl.710; Enforceable Undertakings, cl.712; Compliance Notices, cl.716.

7.2 We also support the inclusion of cl. 712 concerning notice to produce documents and records, save for the following observations.

7.3 Under s819(2) of the WRA Act a person subject to a Notice to Produce (NTP) may claim they do not possess the relevant document and therefore have a 'reasonable excuse' for not complying with the Notice. Clause 712(4) of the Bill mirrors this provision. The Bill does not provide inspectors with additional powers to pursue the matter in cases where the inspector believes the excuse is false.

7.4 This stands in contrast to similar provisions of the *Australian Securities and Investments Commission Act* 2001. Under s35 of that Act, ASIC staff may apply to a magistrate for a warrant to seize books not produced in accordance with a NTP. Other agencies, including the ACCC and state OH&S agencies have the power to apply for a search warrant.

7.5 Accordingly, we would recommend the introduction of provisions allowing an inspector to apply for a search warrant in terms similar to those found in the *Australian Securities and Investments Commission Act* 2001 as follows:

Application for warrant to seize documents or records not produced:

(1) Where the inspector has reasonable grounds to suspect that there are, or may be within the next 3 days, on particular premises in Australia documents or records:

a) whose production has been required under this Division; and

b) that have not been produced in compliance with that requirement;

he or she may:

c) lay before a magistrate an information on oath setting out those grounds; and apply for the issue of a warrant to search the premises for those documents or records