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Hon. Tom Barton MP
Member for Waterford

Queensland Government

Minister for Employment, Training and Industrial Relations

- 2 FEB 2006

Mr Peter Slipper MP
Chairman
Standing Committee on Legal and Constitutional Affairs
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Mr Slipper

I refer to your letter dated 7 December 2005 in which you requested supplementary submissions to the enquiry of the Legal and Constitutional Affairs Committee into the harmonisation of legal systems both within Australia and between Australia and New Zealand.

The Queensland Government supports, where appropriate, the co-operative harmonisation of legal structures. That cooperative approach is achievable within the present Queensland framework. It would facilitate simplicity and consistency in industrial relations whilst also retaining the best elements of a proven system that has the flexibility to deal with questions unique to this State. Since your last contact with the Department of Industrial Relations on this issue, the federal Work Choices legislation has been passed into law. By attempting to institute a national unitary system, without consultation or cooperation of the States, Work Choices will create complexity, confusion and instability. That type of rapid unilateral systemic change also discards the positive achievements that have been attained under the current State system. The Queensland Government strongly opposes Work Choices as being disruptive and unnecessary. It is the opposite of harmonisation.

Independent Criticisms of the "take over" of State industrial systems under Work Choices:

Academic Criticisms:

The recent Senate Employment, Workplace Relations and Education Committee Inquiry into the Work Choices Bill (November 2005) received numerous submissions on the issue of the interactions between State and federal systems of labour regulation. Importantly, many respected and independent academics were strongly critical of the approach taken by Work Choices, yet those same scholars were also strongly supportive of the notion of Federal State co-operation.

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Professor Andrew Stewart, School of Law, Flinders University, insisted that Work Choices "will not create a truly national system, and adopts the wrong approach in 'moving towards' that otherwise desirable objective." Essentially, Work Choices adopts a mandatory approach to nationalising the labour system. Contrary to the proposals of the Productivity Commission, employers have no choice as to whether they 'opt in' or 'opt out' of the system. Further, there is much uncertainty as to the extent of the business sector and the workforce covered by the new federal scheme. It is well known that the scope of the corporations power of the *Constitution* is not known and subject to High Court challenge. Other provisions of the Work Choices legislation are of unknown operation. For example, Work Choices purports to override State employment laws, but there are problems with the practical operation of such provisions. For instance, if the State passed laws on surveillance generally, including workplace surveillance, then those laws might be valid. However, if there was a specific State statute on workplace surveillance, then that might not be valid. Further, there are questions as to the limits of the applicability of Work Choices to state instrumentalities. Professor Andrews refers to the situation as a legislative "muddle" and concludes:

> "I am a longtime supporter of having a single, national system of regulation – but this is not, in my view, the way to achieve that goal. Given the peculiar constraints imposed by our Constitution, the only truly effective method is to seek the co-operation of the States, as has been done in many other areas of lawmaking. The problems with pushing the boundaries of heads of power such as s.51(20) were neatly encapsulated by the Hancock Committee back in 1985:
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> > *"We see considerable difficulties in this approach. First, there is some risk of invalidity: secondly, the move would undoubtedly be divisive and strenuously opposed by State government and State-based interests; and thirdly, there would be gaps in coverage...There are other means at the disposal of governments to redress the problems of multiple tribunals which are less divisive and speculative."*

These sorts of concerns are shared by the members of the Centre for Employment and Labour Relations Law at Melbourne University Law School. Those academics note that the approach taken by the federal Government in relying solely on the corporations power is "not the simplest way to establish a national labour law framework." In addition to the problems noted by Professor Stewart, the provisions of the Work Choices legislation are described as being "convoluted" and leaving legislative gaps on topics such as trade union governance.

Finally, Professor David Peetz of Griffith University, (along with a group of 151 Australian Industrial Relations, Labour Market, and Legal Academics) collaborated to remark that "the (Work Choices) Bill will have unjust, harsh and unconscionable effects on employees presently covered by State industrial laws in Queensland." A very high percentage of the Queensland labour force (approximately 70%) are currently covered by the Queensland State labour system. Around 30% of the workforce will move to the federal system. The rights of many of those workers to be dismissed fairly, for instance,

will automatically be lost on the commencement of Work Choices. Other extensive award entitlements will be whittled away over time. Of particular importance, the role of the Queensland Industrial Commission will be circumscribed even though the system over which it presides has seen a period of record growth and low industrial action. None of the parties covered by the Queensland system were consulted specifically about these changes.

Nationalising the labour system *to the exclusion of the State jurisdiction* also denies States a capacity to legislate on issues that may be peculiar to their State. The position of Queensland workers becomes less flexible when that State-based legislative capacity is removed.

Conclusion:

The above discussion demonstrates that extensive independent expert opinion favours the co-operative harmonisation of Australian industrial relations systems, rather than the unilateral take over of those systems (as is the case with Work Choices). Such unilateralism engenders legal and business uncertainty, potentially causes large compliance costs; and ameliorates the rights of workers. As reflected in the discussion of Professor Stewart (above) there are ample models on which harmonisation can be based if a co-operative approach is adopted as has been the case in areas such as some aspects of criminal, environmental and corporations law.

It is worthwhile to conclude by noting the excellent record of the Queensland economy, labour market and business sector under the present Queensland State industrial relations system. There is a low strike rate coupled with strong economic growth. The question, so far unanswered by the federal Government, is why, without mandate, they seek to discard a Queensland State labour system, which is so flexible and has generated so many positive outcomes.

Should you have any queries regarding my advice to you, please contact Ms Lou Floyd, Senior Legal Officer in the Department of Industrial Relations on (07) 3225 2316, who will be pleased to assist you.

Yours sincerely

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Minister for Employment, Training and Industrial Relations

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