Opposition Senators' Report

Conduct of the inquiry

1.1 Opposition senators begin this dissenting report into the Work Choices Bill by taking exception to the Government's mishandling of this inquiry. The decision to hold a one-week inquiry into a bill proposing the biggest legislative change to the law regulating workplace relations in Australia in over a century, is a subversion of the democratic process and effective law making. It is outrageous that only one week was allowed for the committee to receive submissions after the Work Choices Bill was introduced into the House of Representatives on 2 November. To make matters worse, hearings were scheduled in the week following the closing date for submissions, which did not allow enough time for the committee to properly consider the more than 5000 submissions received. Opposition senators were given only one hour on the last day of hearings to question officers from the Department of Employment and Workplace Relations (DEWR) about the bill. This is totally unacceptable, given that the department had earlier confirmed on the morning of the first hearing that the bill was different in many respects from the Work Choices information booklet which came before it. At the completion of the hearings the committee had only two working days to prepare and finalise its report for tabling. Opposition senators agree with the concerns of one academic who lamented: 'law-making under such-circumstances is a breach of the principles of good government'.[1]

1.2 Opposition senators highlight circumstances surrounding this inquiry which show how the Government has abused its Senate majority. Debate on a Senate motion which proposed that the time for the inquiry be extended, unfair dismissal be included in the inquiry's terms of reference, and the committee hold hearings in each of the capital cities was gagged before the deputy chair of the committee could even put on the public record the reasons behind the motion. The reasonable proposal to include unfair dismissal in the inquiry's terms of reference was inevitably rejected by Government senators. The Government did not even bother to contribute to the debate, which shows its arrogance towards this inquiry. Opposition senators believe it is an act of bad faith and legislative folly for the Government to be rushing this bill through Parliament. It is important to note in this context that in the 2004 Liberal Party election commitments, there was no mention of abolishing the no-disadvantage test (removing protection for penalty rates, overtime, leave loading and shift allowances); removing the setting of a fair minimum wage from the Industrial Relations Commission; or abolishing unfair dismissal protection from employees in workplaces of up to and including 100 staff. The fact is that it was only after the Government gained control of the Senate that the Prime Minister decided to ram through the Government's 1252 pages of extreme industrial relations legislation. Despite fighting the 2004 election on the economy, the Prime Minister now argues

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1 Dr Jill Murray, *Submission 65*, p.8

that his industrial relations changes, which the Opposition believes are extreme and divisive, are needed to maintain and build on Australia's economic performance.

1.3 In placing an unreasonable limit on the time for this inquiry, the Government has shown its disregard for the important scrutiny role performed by the Senate and its committees. It has shown no interest in taking this inquiry to the people and involving them in the work of the committee. The Government has shown bias in its handling of the inquiry by holding private briefings with peak employer organisations, to the exclusion of all other stakeholders, before introducing its legislation in Parliament. At nearly 700 pages and explanatory memoranda of some 560 pages, the Work Choices Bill is the largest amending bill ever considered by the Parliament. It is not only radical and controversial legislation, it is complex and far-reaching the implications of which will take many months if not years to fully grasp.

1.4 The approach of the Australian Chamber of Commerce and Industry (ACCI) in its submission illustrated the extent to which the Government and peak employer organisations have trampled on the concerns of ordinary citizens during this inquiry. ACCI clamed that it is not accurate to describe Work Choices 'in any way as rushed, or to claim that these propositions have not been before the Australian community for some time'.[2] ACCI has demonstrated during this inquiry that it is not to be taken seriously and that it behaves as an apologist for this extreme Government. Work Choices is a radical piece of legislation proposing historic and far-reaching changes. Employer organisations, including ACCI, should take note of the thousands of submissions which expressed anger, frustration and defiance at the scope of the inquiry and the ridiculously short time-frame which the Government allowed for evidence to be received and hearings conducted. Opposition senators fully support these sentiments.

1.5 A joint submission from 151 Australian academics with expertise in the field of industrial relations, labour markets and industrial law argued that the changes being proposed in Work Choices are profound, and are being introduced with untimely haste: 'They significantly rewrite the constitutional basis of industrial regulation as well as the terms of the century-old institutions like the…AIRC. They establish new institutions, remove rights, and amend a very complex body of legislation'.[3]

1.6 The approach taken by the ACCI submission symbolises the Government's disgraceful handling of the national debate on industrial relations. The Government treats with contempt perspectives which are contrary to its own. It frequently dismisses as wrong and irrelevant, or ignores altogether, the views of professional academics, union and church leaders and representatives of community organisations as if they had no respectable standing in the community. Opposition senators regret the obvious disdain by Government senators for the presence before the committee of Professor David Peetz. It demeans the Senate for its members to subject highly

2 Australian Chamber of Commerce and Industry, *Submission 153*, p.22

3 151 Australian industrial relations, labour market and legal academics, *Submission 175*, p.4

regarded scholars to reflections on their personal integrity. It is interesting to speculate on whether an academic witness expert in science, medicine or some esoteric branch of learning would be treated with the same contempt. Apart from the show of disrespect to Professor Peetz which is on the public record, Government senators had no intention of asking serious questions about the content of the joint academic submission from 151 academics which Professor Peetz submitted to this inquiry.

1.7 It is unacceptable for the Work Choices Bill to be rushed through Parliament before the committee has had the opportunity to properly examine its provisions. It is also unacceptable for employer groups to suggest that people should take the Government at its word on industrial relations reform. No one outside Government and some business circles is convinced there is an economic imperative mandating the Government's new industrial relations policy. It appears that the Work Choices Bill represents an article of faith for the Liberal Party, which does not provide satisfactory grounds for good law making. The Government is pushing ahead regardless of concerns that it has turned a blind eye to community standards in the pursuit of economic objectives, for which there is no evidence that they can or will be delivered. The substantial evidence before the committee points in the other direction: that the Government should be crafting innovative workplace changes that will deliver on economic *and* social outcomes. Opposition senators believe that the low-wage solution proposed by Work Choices is a missed opportunity to address the serious economic problems which lie ahead.

1.8 Government efforts to sell its Work Choices policy through a $55 million taxpayer-funded advertising campaign, is no substitute for proper parliamentary scrutiny and oversight. This bill should not have been before the Parliament until the committee had conducted a full and proper inquiry with hearings in capital cities and regional centres. Restricting hearings to Canberra meant that regional and local opinions could not be heard. The committee received a large number of submissions from small business and community organisations and local government expressing serious concerns about the legislation. Yet it was denied the opportunity to hear from them as well. The committee heard evidence from the Australian Industry Group and the Master Builders Association, but did not hear from the Australian Manufacturing Workers' Union or the CFMEU, both of which made valuable submissions to the inquiry.

1.9 Opposition senators believe that the Government's decision to rush the Work Choices Bill through the Parliament, conduct a short and inadequate inquiry and restrict debate on the bill before it was passed in the House of Representatives, was motivated entirely for political reasons. Public disquiet over growing and new substantial evidence that workers' wages and conditions would be hit hard by the legislation saw the Government scale-back its advertising campaign soon after the bill was introduced in the Parliament. Opposition senators are concerned by reports that of six million copies of a revised Work Choices booklet which the Government had printed, costing taxpayers an estimated two million dollars, only 178,000 have been

distributed. The remaining 5.8 million copies are gathering dust in a warehouse.[4] The Department also confirmed at an estimates hearing on 3 November 2005 that in addition to the six million copies printed, 458,000 items, including an unspecified number of booklets valued at $152,944, were pulped.[5]

Government interference with the work of the committee

1.10 Opposition senators are particularly concerned that decisions about the inquiry process, including possible terms of reference, hearing schedules and witnesses, which are the committee's responsibility, were dictated to the committee by the Government. Government senators were given little room to act independently during this inquiry. Their majority status on the committee was commandeered by the Minister, who appeared to be orchestrating the inquiry from the beginning. An initial plan to conduct panel discussions in Canberra over five consecutive days on some of the major aspects of the legislation is an example of the Government's attempt to interfere with the work of the committee. The original idea to hold a series of panel discussions on discrete policy areas was not only highly impractical: it was completely out of step with the committee's normal practice in these matters. Had it been followed, it would have resulted in a hearing format designed to pigeon-hole witnesses into two camps – either supporters or critics of the legislation – and polarise debate. Consultation with peak employer organisations about the Government's plan confirmed that it would have been an inefficient and impractical format for this inquiry. The hearings would probably have unravelled. It was clear that decisions about the inquiry were made by those who were unfamiliar with the proper processes for conducting a Senate committee inquiry.

Major provisions of the Work Choices Bill were excluded from the inquiry

1.11 No satisfactory explanation was provided for the Government's decision to restrict matters which the committee was permitted to inquire into. The motion to refer the Work Choices Bill to the legislation committee stated that the inquiry not consider those elements of the bill which reflect government bills previously referred to, examined and reported on by the committee. These matters relate to secret ballots, suspension or termination of a bargaining period, pattern bargaining, cooling off periods, remedies for unprotected industrial action, removal of section 166A of the WR Act, strike pay, unfair dismissal laws, right of entry, award simplification, freedom of association, amendments to section 299 of the WR Act and civil penalties for officers of organisations regarding breaches.

1.12 Opposition senators are critical of the Government's decision to exclude from the inquiry many controversial aspects of the bill, especially regarding termination of employment and unfair dismissal. Provisions of the bill relating to unfair dismissal

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4 Misha Schubert, 'PR blitz blunder is pulp fiction, scoffs labour', *Age*, 8 November 2005, p.3

5 Mr John Kovacic, *Estimates Hansard*, 3 November 2005, p.66, Employment, Workplace Relations and Education Legislation Committee

under the completely new form in which they appear in the bill have not been previously examined by any committee. These include the exemption of businesses with up to and including 100 employees; exclusion of employees engaged on a seasonal basis; and giving the AIRC power to dismiss applications without a hearing.[6] It is unacceptable that these issues were removed from the inquiry's formal terms of reference. Union submissions drew the committee's attention to the fact that under the unfair dismissal provisions of the Work Choices Bill, large companies such as Patrick and PBL will be able to lawfully avoid the new 100 employee threshold by moving employees into entities employing fewer than 100 workers.[7] This could, over time, dramatically increase the number of workers who have no protection from unfair dismissal. The Government's position, as described by DEWR, is that it is unnecessary to include a provision in the bill preventing large companies from restructuring to avoid the 100 employee threshold because the significant transaction and other costs involved in restructuring deter companies from doing this. Opposition senators believe that instances of companies restructuring to avoid the unfair dismissal provisions of the Workplace Relations Act have been brought to the attention of the legislation committee in past inquiries into bills amending the act. There is no reason to believe that this practice will not continue into the future. Indeed, the bill will encourage them to do so.

1.13 A significant change brought about by Work Choices is the capacity for employers to lawfully dismiss workers for 'operational reasons', which are defined as economic, technological and structural in nature. It is simply wrong for Minister Andrews to have claimed that the Work Choices bill will 'retain the *current* law on this issue'.[8] Under current law, the AIRC, in reaching a decision about whether a dismissal was harsh, unjust and unreasonable, may take account of whether a dismissal was for genuine operational reasons. This is very different from saying that a case is automatically excluded if a broadly defined operational reason is only part of the reason for the dismissal. Opposition senators are concerned that under Work Choices it is possible for workers to be dismissed in harsh, unjust and unreasonable circumstances, by a firm of *any size*, if the firm successfully argues that the dismissal was partly for operational reasons. The worker would be unable to lodge a complaint about unfair dismissal.[9]

1.14 The farcical nature of this inquiry, and the seriousness of the unfair dismissal issue, was illustrated during the public hearing on 17 November when Government senators on the committee insisted on asking questions of witnesses on matters which were ruled were out of order for the inquiry. It is instructive that Senator Guy Barnett asked Professor David Peetz a question about comments he had made in a radio

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6 Ms Anna Chapman, Melbourne Law School, *Submission 78*, p.4

7 151 Australian industrial relations, labour market and legal academics, *Submission 175*, p. 11

8 'Dismissal for Operation Reasons', Media release KA335/05, 3 November 2005 (emphasis in original)

9 151 Australian industrial relations, labour market and legal academics, *Submission 175*, p.11

interview on 3 November about there being nothing in the Work Choices Bill which would prevent an employee being dismissed for 'chewing gum'. It is instructive not only because the Government unilaterally declared the issue of unfair dismissal as 'out of bounds', but also because the correct answer given by Professor Peetz to Senator Barnett's question highlighted why unfair dismissal is a sensitive issue for the Government and why further public debate about the proposed changes would more than likely harm the Government's case for reform. The answer given by Professor Peetz was not what Senator Barnett expected, as the following extract from the Hansard record clearly demonstrates:

> **Senator Barnett**—You say there is a provision that says that, for employers of any size, if you are dismissed and part of the reason for your dismissal is to do with operational reasons…or to do with the structure or technical requirements…of the organisation, then you can be dismissed. You can be targeted for dismissal because the boss does not like the way you chew gum or whatever. You have no recourse for unfair dismissal. You then went on to say that you cannot even lodge a claim. I put it you that that is entirely incorrect. With respect to chewing gum, I am not sure if it was a joke—or do you wish to withdraw that statement.
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> …
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> **Professor Peetz**—If you are a firm with fewer than 100 employees, then you can be sacked for any reason whatsoever unless it is an unlawful termination. Unlawful termination relates to discrimination…Chewing gum is not a discriminatory reason covered by the unlawful termination provisions. Therefore, if you are in a firm with fewer than 100 employees, you could be sacked for chewing gum. I am not saying that an employer would sack you for chewing gum; I am saying what is possible. In firms with more than 100 employees—where operational reasons apply—if you are precluded from making a claim because of what the bill defines as operational reasons, then it does not matter what other aspects of your dismissal were relevant to your dismissal. You cannot make a claim. So if the employer is able to create a situation in which you are covered by economic, structural, technical or similar reasons for dismissal as part of the reason for dismissal, then you can be dismissed.
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> …
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> **Senator Barnett**—I hope you know that what you are saying is wrong, and that you have recourse to the Australian industrial Relations Commission.[10]

1.15 Opposition senators note that during the public hearing on 18 November, officers from DEWR confirmed that Professor Peetz's assessment was right and Senator Barnett's wrong.[11] Workers can be dismissed for chewing gum or for any other reason concocted by an employer that does not meet the narrow test of unlawfulness. It is a major concern that Government senators on the committee have

10 *Committee Hansard*, 17 November 2005, pp.44-45

11 ibid., pp.50-52

not been able to grasp the impact of the Work Choices Bill and have wilfully misrepresented key provisions which have the potential to affect hundreds of thousands of workers.

1.16 Earlier that day, the chair of the committee, Senator Judith Troeth, responded to a claim by Mr Linton Duffin, a legal officer representing the Transport Workers Union, that workers with families can be sacked for not being able to work extra shifts at short notice, by drawing attention to the unlawful termination provisions of the Workplace Relations Act, which are carried over to the Work Choices Bill. The chair, who pointed out that employers who terminate an employee for unlawful reasons are liable for fines, penalties and compensation under the act, asked Mr Duffin to acknowledge that the wording of the act provides a truthful recognition of the Government's intentions. The response from Mr Duffin illustrates, yet again, the complexity of provisions relating to unfair and unlawful dismissal and the extent of the gap between what is stipulated in the act and what actually happens in workplaces across many industries, including in the transport sector:

> There's many a slip betwixt cup and lip, with all due respect, Senator. What may be an unlawful termination is very easily characterised—and is almost invariably characterised—as being something entirely different in practical terms. If the Senate, and indeed the government, really believes that the unlawful termination jurisdiction is likely to resolve these issues with a speedy, cost-effective mechanism, then perhaps it ought to go back and have a look at Federal Court decisions and cases over the past decade. Even putting the most 'good faith' hat on that I can, which is that the government truly believes this, it can only truly believe this if it has not actually looked at the material.[12]

1.17 Opposition senators believe that the committee should have had the opportunity to reconsider a number of contentious issues, including unfair dismissal, in light of the Government's new Work Choices policy and to examine the interaction, and likely effect, of the bill's provisions which relate to them. The ACTU submission pointed out that a number of issues which have been debated before are presented differently in the Work Choices Bill, with nuances that have effects across the bill and in relation to how they intersect with other laws.[13] Opposition senators believe that the committee should have examined the bill in its entirety.

Work Choices: flawed policy, flawed legislation

1.18 This section revisits and expands upon the critique of the Government's approach to industrial relations reform contained in the majority report of the references committee's inquiry into workplace agreements. That inquiry focused in part on the economic and social effects of the system of agreement-making contained

12 Mr Linton Duffin, *Committee Hansard*, 17 November 2005, p.33

13 Australian Council of Trade Unions, *Submission 171*

in the Workplace Relations Act. It looked in particular at the practical effect of AWAs on the wages and conditions of workers.

1.19 The Government's industrial relations policies, including Work Choices, are the focus of eleven papers by seventeen academic researchers, which were published in June 2005 as a 'report card' on the effect on workers and workplaces of polices introduced by the Coalition Government since 1996. In their collective view, Government policies have undermined employee rights; specifically, the narrowing of awards and collective agreements and the promotion of individual contracts have significantly enhanced managerial prerogatives, diminished the independence and choice available to employees and denied them access to collective agreements.[14] A coordinator of the 'report card', Professor Bradon Ellem, expressed the view that the narrowing of awards and promotion of individual contracts has enhanced managerial prerogatives – that is, the right of management to unilaterally determine the pay, working hours, duties and employment conditions of workers. This is a view supported by a number of studies.[15] Employees on individual contracts have an inherently weaker bargaining position, and inherently weaker power, than employees under collective agreements.[16] This is one of the largest differences between individual and collective agreements, a point which was driven home in evidence to this inquiry by the Finance Sector Union.[17] Opposition senators take this argument one step further by noting that under the Work Choices Bill the primacy of managerial prerogative will be restored in all matters pertaining to the employer-employee relationship.

1.20 Coalition governments have a history of intense interventionism in employment relations. Far from pursuing a policy of deregulation, the general thrust of the industrial relations policies of the Howard Government, especially its promotion of AWAs, has been to re-regulate the labour market to enhance managerial regulation of the workplace, known as 'command and control'. This has involved a significant power shift away from external regulation by third parties, particularly the industrial relations commissions, towards the internal regulation of organisations by management.[18] It is essentially a process which encourages employee commitment to one kind of collective, namely the corporation, while reducing the role of other collectives, namely unions. This trend is set to continue under the Work Choices Bill which will involve profound state intervention mandating a very particular vision of

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14 *The Federal Government's Industrial Relations Changes: Report Card on the Proposed Changes*, June 2005

15 R. Mitchell and J. Fetter, Human Resource Management and individualisation in Australian Labour Law, *Journal of Industrial Relations*, vol.45, 2003

16 David Peetz, *Individual Contracts, Collective Bargaining, Wages and Power*, Centre for Economic Policy Research, Discussion Paper No.437, September 2001

17 Mr Rod Masson, Communications Manager, FSU, *Committee Hansard*, 15 November 2005, pp.60-62

18 Professor Bradon Ellem, *Committee Hansard*, Sydney, 26 September, pp.26-27

working life. Nowhere is this clearer than in the unprecedented power which the minister will have to step into any workplace and strike down an agreement under the 'prohibited content' provisions of the bill.

1.21 Opposition senators want to make it clear that the Government is not planning to deregulate the labour market to allow employers and employees to negotiate mutually beneficial terms and conditions, so much as re-regulate it with an overlay of complicated rules and regulations which are likely to be costly.[19] One conservative economic commentator sympathetic to the legislation described Work Choices as having been drafted to try and cover every contingency and to regulate in the smallest detail every possible decision-making process.[20] Opposition senators agree with the view of Professor Andrew Stewart that the claim that the new federal system will operate in a simpler fashion can only be maintained by someone who has either not read the bill or is peddling misinformation:

> The Bill would create a system that is a mish-mash of the old and new, overlaid by heavy-handed and partisan intervention that at every turn authorises the government to step in and prevent parties from conducting their relations in ways of which the government disapproves.[21]

1.22 Opposition senators are extremely concerned about the effects of the Government's proposed changes on the ability of workers to negotiate and bargain, both individually and collectively, with employers. The Work Choices Bill gives employers almost unlimited scope to impose on workers individual agreements, even in workplaces where collective agreements exist and the majority of employees elect to bargain collectively. The bill undermines internationally accepted practices which are designed to protect workers from exploitation and to ensure that labour market competition occurs above a platform of basic rights. It appears that Work Choices represents an historic and radical shift in the balance of labour regulation to the employer. The range of concerns held by Opposition senators about the power shift to employers is captured in the joint submission from 151 academics:

> Individual contracts such as AWAs represent a weakening of the bargaining power of employees and those with little bargaining power have difficulty in integrating work and family responsibilities. This applies particularly to women in part-time and casual work, and adversely affects equal pay.
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> The individualisation of industrial relations has implications for equity and equality. Where an industrial relations system fails to address bargaining power for workers, through the primacy of collective bargaining, equality in treatment of employees and equity of outcomes are necessarily compromised.[22]

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19 Brad Norington, 'Yawning gap between rhetoric and reality', *Australian*, 3 November 2005, p.5

20 Alan Wood, 'IR bill isn't ideal, but its going to work', *Australian*, 2 November 2005, p.12

21 Professor Andrew Stewart, *Submission 174*, p.12

22 151 Australian industrial relations, labour market and legal academics, *Submission 175*, p.7

1.23 Consideration of the Work Choices Bill inevitably centres on the contentious issue of AWAs. Few would dispute that the main purpose of AWAs is to individualise the process of agreement making between employers and employees, rather than the outcome of negotiations. This is why AWAs operate increasingly as pattern agreements which are offered to workers in the same classification across like industries. A number of case studies have confirmed the use of standardised or pattern AWAs. Opposition senators believe that the essential aim of Work Choices is to allow businesses to unilaterally determine the pay and employment conditions of workers, free of interference from unions, collective bargaining, awards, industrial tribunals and workers themselves.

1.24 The issue of workers under collective agreements experiencing duress and being forced on to an AWA was raised in evidence on a number of occasions during the inquiry. Opposition senators believe that DEWR was unable to properly answer questions on this issue at a public hearing. The drafting of section 104(6) enables an employer to require new *and existing* employees to make AWAs a condition employment without this being termed duress under the legislation. Duress includes bullying, brow beating, intimidation, coercion, or forcing a person to enter into agreement against his or her will. Even DEWR acknowledged on 18 November that section 104(6) was ambiguous in this respect.[23]

1.25 Opposition senators also note that there is a large difference between the intention behind section 104(6) and what actually occurs to many employees in the workplace. What is being proposed in the Work Choices Bill misses the important point: it is not difficult for employers to develop ways and means of applying pressure on current employees who are reluctant to sign an AWA, without being in technical breach of the legislation. This is the stark reality of the employment relationship where bargaining power is heavily on the employer's side. An obvious situation would apply to casual workers or people who want a promotion or a wage rise. It would be easy for an employer to say: 'if you want a promotion or a wage rise, here is the instrument you have to sign'. Obvious problems arise with the processes involved in making and approving AWAs. Critics of AWAs raised a number of concerns, including the capacity for AWAs to provide a standard for setting wages and employment conditions which is lower than the award system, and the ability of employers to offer AWAs on a 'take it or leave it' basis.

1.26 Opposition senators believe that workplace collective bargaining should be promoted and underpinned by a safety net of fair and relevant minimum standards of pay and employment conditions. A legislative framework for agreement-making should ensure fairness, flexibility and job security; provide an arbitral role for the Industrial Relations Commission to ensure that parties to a dispute enter negotiations in a reasonable and proper way; and require employers and employees to bargain in good faith. The Work Choices Bill does not meet any of these basic requirements. Opposition senators are concerned that the bill:

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23 *Committee Hansard*, 18 November 2005, p.59

- denies workers the right to collective bargaining and to join and be represented by a union;
- does not provide for an effective set of minimum wages and conditions of employment to ensure that workers who are unable to bargain do not fall behind community standards;
- denies workers access to a fair and effective review mechanism for employer decisions that are unfair and unjust, including access to conciliation and arbitration for the purpose of dispute resolution;
- does not promote secure, safe and healthy workplaces that are free of discrimination or harassment. Instead, it fosters working arrangements that jeopardise the ability of workers to live secure and balanced lives;
- does not protect the right of workers to be consulted and informed of business decisions that affect them in their work; and
- severely retards the employees' ability to take industrial action and severely increases the penalties for doing so.[24]

Poor legislative drafting has put vulnerable workers at risk

1.27 At the beginning of this report, Opposition senators expressed concern that the Government has denied Parliament the opportunity to examine and improve the Work Choices Bill. It is inevitable that legislation of this magnitude will contain provisions with consequences, both intended and unintended, which will be realised only in the years ahead. Opposition senators are concerned that written submissions and witnesses who appeared before the committee identified provisions which will have unexpected consequences for many individuals and families, especially low-paid and low-skilled workers.

1.28 The committee heard alarming evidence from FairWear about the confusing and contradictory nature of provisions in the Work Choices Bill which will have an adverse effect on the employment conditions of outworkers. The submission from DEWR stated that under section 116(1)(m) of schedule 1 of the bill, outworker conditions will continue to be allowable in awards and agreements. However, section 116B(1)(g), entitled 'Matters that are not allowable award matters', states that 'restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement' cannot be an allowable award matter. Opposition senators are concerned that a large number of category 2 regulatory protections for outworkers fall within this section.

1.29 A member of FairWear, Ms Kathryn Fawcett, told the committee that the current protections for outworkers, which are provided by both wages and conditions and the regulation of supply chains, will be dismantled if the Work Choices Bill is passed in its current form. Opposition senators appreciate that an essential part of

24 Australian Council of Trade Unions, *Submission 171*, pp.1-2

protecting outworkers from exploitation is monitoring and regulating the supply chain. State and federals awards and a voluntary industry code ensure access to work records and supply chain lists through the contracting chain. Ms Fawcett explained how state and federal awards underpin the monitoring and regulation of the supply chain:

> …an employer has to register if it is going to give out work; an employer has to provide lists of who work get given out to; and an employer has to keep detailed work records, give them to the worker and have them available for inspection. They provide that a contract cannot be made below the conditions under which an outworker should be paid. They provide for a facility for outworkers to claim unpaid wages up the contracting chain, not just from the party they are directly employed with or related to.[25]

1.30 It appears that Work Choices will comprehensively dismantle the suite of state and federal laws which underpin protected award conditions for outworkers in the clothing industry.[26] It will no longer be possible to effectively monitor the supply chain, opening the door to further exploitation. The submission from the TCFUA recommended that a new provision be created to provide certainty for outworkers and maintain their current protections under both state and federal laws. The Human Rights and Equal Opportunity (HREOC) submission argued that the Work Choices bill does not go far enough in providing protections for outworkers. Specifically, it proposed that further provisions be developed which allow deeming of outworkers as employees, provide right of entry for unions in the textile, clothing and footwear industry, restrict the use of AWAs for outworkers and provide mechanisms for recovery of unpaid wages up the supply chain to assist in preventing false contractual arrangements.[27]

1.31 Opposition senators believe that while the Work Choices Bill is too flawed a piece of legislation for it to be considered by Parliament, were it to be passed and enacted the most vulnerable and disadvantaged workers should be offered protection. The bill therefore should be amended to reflect the principles raised in evidence by FairWear, the TCFUA and HREOC. These principles are included in Appendix 1. While Opposition senators were heartened by the positive response from the department at a public hearing regarding possible amendments, they await the outcome of this development when amendments to the bill to protect outworkers are debated in the Senate.

1.32 Other submissions identified clauses in the bill which do not reflect the Government's stated intentions; for example, those relating to the definition of 'operational grounds' in the termination of employment section of the bill. It is likely that many other drafting anomalies are buried in the legislation and will remain

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25 Ms Kathryn Fawcett, *Committee Hansard*, 16 November 2005, p.74

26 Textile, Clothing and Footwear Union of Australia, *Submission 88*, p.5

27 Human Rights and Equal Opportunity Commission, *Submission 164*, p.8

concealed until after the bill has been passed into law. This is an unsatisfactory situation, the responsibility of which rests with the Government.

1.33 Opposition senators believe that more time is required to seek clarification from the Government about the effects of the legislation, and identify and have drafting errors removed by amendment. This process requires an extensive period of debate and scrutiny in the Senate chamber, which the Government is unlikely to consider. There is no reason why the Work Choices Bill has to be passed before the end of the December sittings. It is not time-sensitive legislation. Officials from DEWR told the committee at an estimates hearing that it is unlikely the legislation, once passed into law, will come into effect before March or April next year. Regulations which will accompany the act have not even been drafted, and these also are expected to run to many hundreds of pages. A more sensible date for reporting would have been February or March 2006, at the earliest.

Productivity growth, economic performance and profits

1.34 A central justification for the Government's Work Choices legislation is that it is necessary to boost productivity and make Australia's economy internationally competitive. The Government and employer groups claim that only through further industrial relations reform will the economy grow and employment rates increase. The Work Choices Bill states that its first objective is to encourage the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market. The Prime Minister acknowledged during an ABC Four Corners interview on 26 September 2005 that increasing the spread of individual contracts across workplaces, more than any other Government policy for IR reform, will generate the 'biggest single productivity boost' to the economy.[28]

1.35 Opposition senators repeat the finding of the majority report of the references committee's inquiry into workplace agreements: economic evidence to support the Government's assertion linking individual contracts to productivity does not exist. The research by Professor David Peetz is important in this regard. He rejects the Government's argument and bases his critique essentially on a comparison of labour productivity over the various productivity cycles since 1964-65 and the various institutional arrangements that applied at the time. The analysis shows that under the award system that operated before the prices and incomes accord of the 1980s, productivity growth was between 2.4 and 2.9 per cent per annum. It fell to 0.8 per cent following the introduction of a centralised accord. With the shift to enterprise bargaining in the mid-1990s, productivity growth peaked at 3.2 per cent. The current productivity cycle, which commenced in 1999-2000, has seen a fall in annual productivity growth to just 2.3 per cent per annum. According to Peetz: 'this is even below the rate of labour productivity growth that applied during the traditional award

28 Four Corners, Monday 26 September 2005, Brave new workplace: investigation into proposed industrial relations reforms, transcript, pp.3-4

period. It is despite the fact that average union density, at 53 per cent, was over twice the rate of union density that has applied in the current cycle'.[29]

1.36 The figures on multi-factor productivity tell a similar story.[30] They show that during the most recent cycle, which has taken place under the Workplace Relations Act, the rates of multi-factor productivity growth have been below the average that applied during the traditional award period.

1.37 Opposition senators find it difficult to align the goal of productivity growth to the Government's Work Choices policy because productivity is a function of many factors such as enhanced skills and technical progress. It is not a product of workplace flexibility and labour re-regulation.[31] According to Peetz, the rate of technical production won't come to a halt because a system of individual contracting has not been introduced or unfair dismissal laws for workers in firms with less than 100 employees have not been abolished.

1.38 The Australian Manufacturing Workers Union (AMWU) submission challenged the Government's claim that the most dynamic and productive economies in the world are the most deregulated. The Government stakes its claim to the economic performance of countries such as the United States, the United Kingdom and New Zealand. The AMWU submission referred to OECD data which shows productivity levels in Belgium, Ireland, France, Luxembourg, the Netherlands and Norway higher than in the Unites States. Countries which are criticised for being over-regulated and union-dominated, including Germany, Japan, Belgium and France, also have productivity levels which are above the OECD average.[32]

1.39 Opposition senators believe that the Government's proposals are designed to increase short-term profitability rather than productivity, principally by driving down the cost of labour. It is true that profits can be increased by gains in productivity, as ACCI pointed out, but it is easier for firms to increase their profits by cutting employees' wages by reducing or abolishing penalty and overtime rates, which is already a common feature of AWAs. The committee notes that a reduction in employee entitlements is often dressed up as productivity. Employers in the hospitality industry, for example, may claim that abolishing penalty rates for night or weekend work increases labour productivity. But it does not. All that happens is that the wage cost per meal is reduced while profits increase. Productivity, however, is unchanged.[33] The same would apply to waiters in cafes and restaurants. Cutting their

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29 Professor David Peetz, *Is Individual Contracting More Productive?*, August 2005, p.3

30 Multi-factor productivity refers to all inputs into the production process, such as machinery and computer equipment as well as person-hours of labour. A thorough measure of multifactor productivity includes the amount of input divided by *all* the inputs.

31 'PM's bid for voters' trust: Explaining workplace reform', editorial, *Sydney Morning Herald*, 10 October 2005, p.10

32 Australian Manufacturing Workers' Union, *Submission 84*, p.14

33 Kenneth Davidson, 'IR changes put profit before productivity', *Age*, 13 October 2005, p.15

penalty rates would not result in more plates being carried out per hour, but in a reduction in pay. Peetz concluded his study by stressing that productivity is not what corporations seek: 'it is profitability they seek'.[34]

1.40 The other avenue open to firms to increase profits is to increase the hours of work, which is a central feature of many AWAs. Two of the biggest changes that have taken place in the services sector and in manufacturing are an increase in the number of employees on 12 hour shifts and an increase in the length of their working day to 12 hours. Changing the hours of work is not a measure of productivity but a way for companies to increase profits by getting more value for labour than was previously the case, and without any long-term strategic planning to improve the nature of the organisation. Research by Professor Richard Mitchell shows that much of the productivity growth of the past decade is because people are working harder, their employment puts working lives under more pressure and there is greater employer control over people's working lives and people are doing more tasks.[35]

The economic assumptions behind the bill are unsound

1.41 It is remarkable that the weight of empirical evidence is solidly against the arguments in favour of the bill. There is evidence which suggests that the states are experiencing an increase in the number of collective agreements, and an aversion to individual agreements. Opposition senators agree with evidence from the Western Australian Government that three critical ingredients are driving workplace productivity and industry productivity: workplace reform, technological change and skills development. The experience of Western Australia confirms what most academic experts have also found: that there is no evidence that individual contracts are better at driving workplace productivity than are collective agreements.

1.42 Opposition senators note that the critique presented by Peetz in his submission to the workplace agreements inquiry is endorsed by 151 academics in a joint submission to this inquiry. The joint submission states categorically:

> The justification for Work Choices rests in part on claims that it will lift productivity. How this is supposed to happen has never been explained; it has merely been asserted. There is no persuasive evidence systematically linking industrial relations systems and industrial relations changes to productivity improvement. There are many reasons why productivity grows but industrial relations legislative changes are *not* generally a source of productivity growth across OECD countries.[36]
>
> Given the tenuous link between bargaining forms and workplace productivity it is unlikely that the proposed legislation will generate further

34 Professor David Peetz, *Submission 33*, p.29

35 Employment, Workplace Relations and Education References Committee, *Workplace Agreements*, October 2005, p.48

36 151 Australian industrial relations, labour market and legal academics, *Submission 175*, p.19 (emphasis in original)

> productivity growth. On the contrary, the legislation is likely to see an increased casualisation and increased turnover and a corresponding decline in employer support training.[37]

1.43 Opposition senator's rejection of the Government's primary economic justification of its Work Choices policy would be incomplete without a response being provided to the ACCI submission. Under a heading entitled 'there is an economic case in favour of workplace reform', ACCI provided selective quotes from domestic and international sources and referred to many dozens of research papers, most of which are published abroad. However, no attempt was made by ACCI to synthesis and analyse the material referred to in the submission and argue a case. Nor was there an attempt to address criticisms that Professor Peetz and others have made of Government policies. The so-called 'evidence' was simply lumped together under the banner of economic reform. Opposition senators are unable to accept as anything other than a baseless assertion ACCI's claim that there is an unambiguous case in favour of the workplace reforms outlined in the Work Choices Bill. Again, ACCI has demonstrated that it is not to be taken seriously and that it behaves as nothing more than a cheer squad for the Government on industrial relations.

1.44 Most of the works referred to in the ACCI submission fit the mould of the neo-liberal orthodoxy which holds that deregulated labour markets improve economic performance. It is hardly surprising that this is the economic *raison d'etre* of organisations such as the IMF and the World Bank. Opposition senators are more cautious in how they approach debates on macro-economic policy. There is a growing body of research which has challenged the evidentiary base on which the new neo-liberal orthodoxy rests. A recent paper by Harvard University Professor, Richard Freeman, for example, described as 'non-robust and ill specified; and as 'more sawdust than hardwood' the belief that deregulating labour markets and weakening trade unions will cure employment and spur economic growth.[38]

1.45 At the committee's hearing on 17 November, Professor Peetz gave a detailed rebuttal to ACCI's submission, drawing particular attention to the various works cited in the submission which support the assertion made by employer organisations that a strong empirical economic case exists for Work Choices. He questioned the relevance of many of the works referred to in the submission, including those by Access Economics, the Business Council of Australia, the IMF, the OECD and the Reserve Bank. The following comments give the flavour of what Professor Peetz said about the ACCI submission's attempt to support its assertions with empirical evidence:

> When you look at those studies that are referred to by ACCI, very few of them actually refer specifically to the sorts of things that are directly related to the impact of the bill upon productivity. In particular, the most important aspect of the bill is the promotion of individual contracting at the expense

37 ibid., p.21

38 Ross Gittins, 'More slant than substance in jobs reform ideology', *Sydney Morning Herald*, 8 October 2005, p.42

> of other methods of wage determination. A lot of the studies that are referred to are not about productivity at all.[39]

1.46 An economic case for the Work Choices Bill has not been made. The Government has failed to make the case that the proposed laws will create jobs, lift productivity or improve living standards. It has not even done any economic modelling to underpin the contents of the bill. It is significant that all of Australia's leading academic researchers of industrial relations who gave evidence to the inquiry do not accept the economic assertions by either the Government or employer organisations.

Employment outcomes

1.47 Another of the Government's economic justifications for introducing this legislation is that by lowering the floor of minimum wages and conditions, more people will be able to enter the labour market. As with productivity gains, the link between the changes proposed in Work Choices and employment are asserted, not demonstrated. The joint submission from 151 academics notes that the link between real wage cuts and employment is contested, especially regarding the size of the cuts required to be effective.[40] Opposition senators agree with this assessment, but take the issue one step further. Economists who support the Government's policies rarely admit that the minimum wage might have to fall by a significant amount before any effect on employment is felt. According to one assessment, 'we don't know how much the many people already on the minimum wage would have to lose in wages to permit more people to get jobs'.[41]

1.48 The assumption behind the Government' assertion is that low paid and award-reliant workers already receive wages which are too high by international standards, which has the effect of pricing too many people out of the labour market. The objective of the Government's proposal to abolish the no disadvantage test and establish a much lower benchmark of wages and conditions through the Fair Pay and Conditions Standard appears to be a reduction in the wages of low-income and women workers, and poor and disadvantaged people. An official from DEWR told the committee: 'The overriding objective, certainly from this government's perspective, is to maintain competitiveness for employees and for young people generally'.[42] This is bureaucratic code for reduced wages and conditions. It is the main reason why the Government and employer organisations have consistently argued for no wage increases, or for increases below the CPI, for low paid and most award workers. The lowest paid employees would have been at least $50 a week worse off had the AIRC

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39 Professor David Peetz, *Committee Hansard*, 17 November 2005, p.46

40 151 Australian industrial relations, labour market and legal academics, *Submission 175*, p.19

41 Ross Gittins, 'Howard's WorkChoices isn't as bad as all that', *Sydney Morning Herald*, 24 October 2005, p.19

42 Ms Louise McDonough, Assistant Secretary, DEWR, *Committee Hansard*, 14 November 2005, p.5

accepted the Government's position since the Government came to office. Opposition senators are philosophically opposed to any policy which attempts to generate employment by slashing the wages and conditions of the most vulnerable workers.

1.49 The Government's claim that its workplace reforms will lift the employment rate has been brought into question by independent researchers. It has been pointed out that under the Work Choices Bill, the Government is only guaranteeing that the nominal value of the last adult safety net wage increases given by the Commission will be preserved. Yet there is no proposed indexation of the present minimum wage to ensure that its real value is maintained. It is the Government's belief that this new 'Fair Pay' Commission is necessary to create more jobs. Yet, Opposition senators believe that the scope for increasing employment by reducing the minimum wage will be limited. This is because, as one commentator put it: 'the more wages are cut, the closer they come to bumping up against welfare benefits and the less incentive people have to take jobs'.[43] This is a conclusion shared by Professor Peetz. He told the committee:

> If your strategy to increase employment is to reduce real wages, then you pretty soon run into labour supply problems. If you reduce wages too much, then there is no incentive at all for people to enter the labour market, because they receive in effect a subsistence income from unemployment benefits and with the high effective marginal tax rates on unemployment benefits then it is not worth doing. So if that were your strategy, then you would in turn have to lower unemployment benefits in order to create the incentives for people to move into employment.[44]

1.50 The ACTU submission criticised the Government for characterising low paid workers as the 'undeserving not so poor'. Opposition senators reject the Government's proposition, which is contradicted by recent experience. The evidence shows that moderate increases in minimum wages do not price award workers and other low skilled workers out of the workforce. Increases made to award rates have coincided with a fall in unemployment and higher workforce participation rates. There is no empirical economic evidence from Australia or abroad to support the assertion that increases in minimum wages costs jobs. The ACTU submission made the valid point that the effect of minimum wages on employment levels is ambiguous and cannot be deduced from theoretical first principles:

> Employer groups and the Government constantly rely on the theory espoused by a small group of conservative economists and the unsupported assertions of the IMF and the OECD who in turn rely on the work of the conservative economists. None of these "expert" predictions, provided with

43 Mike Stekette, 'The wages gap is about to get a whole lot wider', *Australian*, 13 October 2005, p.12

44 Professor David Peetz, *Committee Hansard*, 17 November 2005, p.51

> high degrees of certainty and probability, that wage increases will result in job losses each year, have proved correct.[45]

1.51 The other side to the Government's claim about jobs growth hinges on the current unfair dismissal laws and their presumed impediment to employment in small and medium sized businesses. One of the Government's more contentious claims is that removing the existing provisions for unfair dismissal from businesses which employ up to and including 100 employees will generate up to 77,000 jobs, especially in the small business sector. Opposition senators refer to the findings of the references committee majority report into unfair dismissal and small business employment, which was tabled in June 2005. It found that there is no empirical evidence or research to support the Government's claim. The Government's proposition is breathtaking for its lack of logic and empirical support. The report showed conclusively that claims by the Government and employer groups are based on wishful thinking and fuelled by misinformation instead of objective appraisal of the facts.

1.52 Opposition senators also take issue with the provisions of the bill at section 96D, entitled 'Employer Greenfield agreements', where employers in effect can make an agreement with themselves in company time as part of the agreement-making process. Opposition senators find this one of the more absurd provisions of the bill. It is likely that under any such agreements, employees would be provided with only the basic minimum entitlements leaving them much worse off than if they were employed by that employer under the terms of the award. It is also ridiculous that the Government is considering extending the life of employer Greenfield agreements to a maximum of five years.[46]

Wages and conditions of employment

1.53 Evidence to this inquiry supports the findings of the majority report of the references committee inquiry into workplace agreements, which tabled its report in October 2005. The report found that claims by the Government, DEWR, employer groups and the office of the Employment Advocate that workers on AWAs received wages which are on average 13 per cent higher than workers under collective agreements is not supported by any evidence. Figures sourced from the Australian Bureau of Statistics show that wage increases for non-managerial workers since 1998 are concentrated in the top 10 per cent earnings percentile (see Table 1). The figures demonstrate the extent to which the Government has been dishonest in its representation of the figures on wages outcomes. Studies by Professor David Peetz and others have identified serious flaws with the OEA's research findings. The workplace agreements report found that unions and union-based collective bargaining create higher wages and better employment conditions for workers. Australian Workplace Agreements create poorer pay and conditions, especially for low-paid and low-skilled workers in a weak bargaining position in the workplace.

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45 Australian Council of Trade Unions, *Submission 171*, p.9

46 Mr Joseph de Bruyn, *Committee Hansard*, 16 November 2005, pp.21-22

Table 1: Increases in full-time AWE of non-managerial by distribution of earnings, 1998–2004[47]

Earnings percentile	Real % change 1998-2004
10	1.2%
20	1.2%
25	2.0%
30	2.3%
40	3.1%
50	2.6%
60	1.9%
70	2.3%
75	3.2%
80	4.8%
90	13.8%
AWE	**3.6%**

1.54 Opposition senators stress that under the Workplace Relations Act there is no limit to the capacity for workers to negotiate higher pay with employers. The only constraint is not being able to negotiate below minimum standards of wages and working conditions under the global no disadvantage test. The assumption behind the Work Choices Bill is that it will lead to wages growth resulting from higher productivity. Opposition senators believe that the legislation will have the opposite effect. It will certainly lead to lower take-home pay for many vulnerable workers with limited bargaining capacity. The Australian Fair Pay and Conditions Standard will reduce the enforceable minimum conditions of workers.

1.55 The committee heard evidence from academics and unions that the Work Choices bill will probably result in an immediate reduction in the terms and conditions of employment, especially for award-reliant employees and those in competitive industries, such as contract cleaning, hospitality, and retail, where there is a high degree of labour cost competition between employers. This will have a particularly detrimental effect on workers in the transport industry. Opposition senators are concerned by evidence which shows how competitive pressures in the transport industry lead to fatalities on the road. It is likely that any downward pressure on wages and conditions in the transport industry resulting from this legislation will seriously compromise the health and safety of workers in the industry. A representative of the Transport Workers Union told the committee:

47 ACIRRT paper entitled 'Real earnings trends by income distribution'

> This legislation will allow employers to deregulate wages, allow them to pay less. In 2000 a House of Representatives parliamentary inquiry report…showed there is a link between what you pay people and the level of safety in road. As I say, two people a week currently are killed. If that was in a trade in the building industry, electricians perhaps, there would be an inquiry into why people were being electrocuted on the job. In our industry, it is called a road accident. Those people are at work. It is a workplace injury and it is a death.[48]

1.56 Opposition senators note evidence from Restaurant and Catering Australia and the Council of Small Business Organisations of Australia which confirms that many employer organisations believe that the level of wages is currently too high and that the Work Choices Bill will enable them to flatten out wages and remove some loadings such as penalty rates. The argument is that for many small businesses to survive in this so-called '24/7' world, there needs to be an opportunity to flatten wages across the week and allow small businesses to offer services at any time to meet customer demand.[49] This is a frank admission that many employers are waiting for the opportunity provided in this legislation to provide wages and conditions which are below the award rate.

1.57 Another underhand provision of the bill which will leave many casual and part-time workers in a vulnerable situation is that which relates to maximum ordinary hours of work. Subdivision B provides for a maximum of 38 hours per week to be averaged over an employees' applicable averaging period, which can be up to an including 12 months. This can result in employees being required to work longer hours during peak periods, such as Christmas and Easter, and shorter hours during quiet periods. The committee heard evidence from the National Secretary of the Shop, Distributive and Allied Employees' Association, Mr Joseph de Bruyn, about one large hardware chain, Bunnings, which had already averaged the hours of its employees over a 12 month period. According to Mr de Bruyn:

> …the employees found this to be one of the most awful of their whole rostering arrangements because the individual employees quickly in any 12-month period lost track of where the hours were that they owed the company or the company owed to them compared with a standard 38 hours. When they got to a quiet time they were given time off. The tendency of the company was to give them, say a one- or two-hour later start on a day or a one- or two-hour earlier finish on a day, rather than giving them the time off in useable amounts such as whole days off. There was also no regard by the company as to when the employee might like to take the time off in the quiet times. The company simply dictated when it suited them, and that would not necessarily suit the employees.[50]

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48 Mr Mark Crosdale, *Committee Hansard*, 17 November 2005, p.29

49 Mr Antony Steven, COSBOA, *Committee Hansard*, 16 November 2005, p.59

50 Mr Joseph de Bruyn, *Committee Hansard*, 16 November 2005, p.22

1.58 The submission from Dr Jill Murray, Law School, La Trobe University, argued that the system designed by Work Choices, where an as yet unknown number of workers will be covered only by legal minimum entitlements, creates a 'worst job standards'.[51] This is because Work Choices strips away all legally mandated substantive employment rights, except for those which workers are able to bargain for. A 'worst job' under these conditions will be characterised by no minimum or maximum weekly hours, no entitlements to a stable income each week, no meaningful entitlement to overtime payments, no entitlement to higher rates of pay for unsociable hours, no legal entitlement under the bill's terms to certainty of scheduling, no right to collective bargaining and little or no job security. The submission from Dr Murray questioned whether any civilised society should be lowering the floor of minimum legally regulated working conditions to the extent proposed by Work Choices:

> In any civilised society, it is a proper function of the law to ensure that at an absolute minimum, the worse jobs are ones which we are not ashamed to have in Australia. These should be jobs that we are comfortable seeing our fellow Australians doing and, if it comes to that, doing ourselves.[52]

1.59 A report prepared by Dr Barbara Pocock for the Victorian Government on the impact of the Work Choices on working families is critical of the Government's proposals for reasons similar to those outlined by Dr Jill Murray.[53] The report concludes that AWAs on the whole are not family friendly and their promotion by the Government is a retrograde step for workers and their families. Women, part-time and casual workers fare especially badly under AWAs. Dr Pocock's research shows that only 12 per cent of AWAs registered between 1995 and 2000 have any work and family provisions, 25 per cent have family or carers leave and only eight per cent have paid maternity leave. To make matters worse, some 58 per cent of workers on AWAs are denied long service leave and the majority of AWAs lack penalty rates. Opposition senators are concerned by these figures, which are supported by evidence received by the committee from a number of people employed on a casual and part-time basis in the retail and hospitality industries.

1.60 There does not appear to be any mechanism in the Bill for low paid women to pursue equal pay for work of equal value. The Industrial relations Commission is denied the capacity to award increases in women's wages if the rate under review has been set by the Fair Pay Commission, or the result of the review would be to disturb a determination of the Fair Pay Commission. The Fair Pay Commission is not obliged to consider special cases for a review of wages. It is also hard to see how an organisation representing a female dominated occupation could bargain for improved wages based on the undervaluation of work, as they are prohibited form seeking a

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51 Dr Jill Murray, *Submission 65*, p.1

52 ibid.

53 Dr Barbara Pocock, *The Impact of The Workplace Relations Amendment (Work Choices) Bill 2005 (or "Work Choices") on Australian Working Families*, November 2005

common claim across two or more workplaces by the prohibition on pattern bargaining.

1.61 An important contribution to this debate was made by the Human Rights and Equal Opportunity Commission submission. It raised a number of significant concerns with Work Choices Bill, including that it significantly undermines the capacity of many employees to balance their work and family responsibilities, and fails to ensure equal pay for equal work of value. The Commission is particularly concerned that the bill fails to protect vulnerable employees with little individual bargaining power, particularly those with a disability, indigenous people and people moving from welfare dependency.[54]

The risk of social and economic dislocation

1.62 The committee believes that the Government is moving into uncharted waters with its new Work Choices Bill. It has not satisfactorily explained how it will address the social consequences of radical change and the slowdown in productivity. Nor has it explained how it will create more jobs, alleviate the labour and skills shortage, ease work-family tensions and address the growth of low-paid and precarious employment. The committee is not even sure that employers and business are convinced of the Government's rhetoric that the industrial relations system is so outdated that a complete re-write of the WR Act is needed.

1.63 Nowhere is uncertainty over the consequences of the Government's proposals clearer than on the issue of skills shortages. The Government is now arguing that individual contracts will help repair the current shortage of skilled labour. The argument appears to be that individual contracts offer workers more flexible working hours which will encourage people, especially women, back in to the workforce. It is a view which Opposition senators do not support. Individual agreements will more than likely make labour shortages worse, at least in the short term. Lower wages under AWAs will mean fewer people will want to enter the workforce. Women in particular will not think it worthwhile to get a job when minimum wages under Work Choices fall steadily behind the current award rate.

1.64 The Government has failed to come up with solutions to the significant labour market and workplace challenges which lie ahead. Dr Ron Callus and Dr John Buchanan from ACIRRT have argued that a new approach is needed to remedy major problems affecting an increasing number of workers: 'More than a third of part-timers want more hours of work. More than half of those working more than 50 hours a week want to work less'.[55] In Dr Buchanan's view, WorkChoices has failed the challenge. It is a policy that will deepen rather than solve the major problems facing workers:

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54 Human Rights and Equal Opportunity Commission, *Submission 164*

55 Ron Callus and John Buchanan, 'What the Government should do to solve the problems of the labour market', *Sydney Morning Herald*, 20 October 2005, p.17

> Problems in work-life balance, skills shortages and productivity growth are real. They require the creative blending of standards for flexibility, not an erosion of standards in the name of flexibility. The changes proposed by WorkChoices will become part of the problem, not part of the solution.[56]

1.65 The debate over whether AWAs are necessary for productivity growth leads the committee to speculate on the relationship between enterprise bargaining and factors external to the workplace, such as the effect of a strong economy, low unemployment and demographic change on the demand for skilled and unskilled labour. The committee is particularly concerned by forecasts that Government policy is taking Australia down the New Zealand path of low skills and low wages, which will see the terrible social and economic consequences of its failed deregulation policies revisited across the Tasman. It is clear that this Government has abandoned the high skills and high wages route to economic success and improved productivity. Opposition senators fear that this will result in higher levels of poverty and economic deprivation with corresponding threats to social cohesion. Isolated pockets of skilled labour surrounded by unskilled and low-paid workers comprising women, young and casual workers and persons from non-English speaking backgrounds will be created. One commentator has argued that many of the harsher provisions of Work Choices will come into play in a recession, especially for new employees. In this scenario, employers will be laying-off workers or threatening to do so unless employees agree to cut back on their conditions.[57] There is also a risk that consumer confidence will slide as a result of penalty rates being stripped away without the protection of awards.

Work Choices: A view from the state and territory governments

1.66 The committee received a 'joint governments' submission on behalf of all the states and territories, with the exception of the Victoria Government which made its own submission to the inquiry.[58] Opposition senators believe that the states, especially Victoria and Western Australia, and the territories, are well placed to comment on the effect of a highly deregulated labour market on the wages and conditions of workers. The 'joint governments' submission strongly opposed the Work Choices Bill on the basis that the principles underpinning it are fundamentally flawed. It recommended that the Senate reject the bill in its entirety and called for a 'sensible and genuine debate' about how to achieve better industrial relations outcomes at the national level. It argued that the Government has failed to provide a case for change, there is no robust evidence that economic or social benefits will result from the proposed changes, and the bill will not make the current industrial relations arrangements more efficient or effective. Instead, the bill will remove the rights and protections of employers and employees, especially operators of small business in rural areas,

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56 John Buchanan, 'Workchoices: a hostile takeover', *Sydney Morning Herald*, 11 October 2005, p.13

57 Ross Gittins, 'The changing shape of workplace muscle', *Sydney Morning Herald*, 12 October 2005, p.17

58 Joint Governments, *Submission 160*; Victorian Government, *Submission 136*

increase cost and complexity for employers, reduce the pay and conditions of workers and their families and cause irreparable harm to employment and family relationships. Opposition senators believe the 'joint governments' submission is an important contribution to the inquiry because the states are united in their opposition to the Work Choices Bill.

1.67 Opposition senators note a report by the Australian Centre for Industrial Relations Research and Training (ACIRRT) into the Government's Work Choices Bill which identifies a significant body of experience with labour market deregulation in award systems. The report refers specifically to the award systems in Victoria, Western Australia and New Zealand which were replaced with bargaining systems underpinned by statutory minimum standards. The report found that the outcomes across these deregulated award systems have been remarkably consistent. The overwhelmingly majority of individual agreements were narrowly focused on changes to earnings and working hours; large groups of employees lost penalty rates, overtime rates, shift penalties and other allowances; and labour market deregulation was associated with the growth of low-wage jobs, especially in regional areas and particular sectors including hospitality, recreation and personal services and mining and construction.[59] Some of these issues are considered in more detail in the sections which follow.

Lessons from Victoria

1.68 The deregulation of the Victorian labour market during the 1990s under the Kennett Government saw the comprehensive system of state awards abolished and the state's industrial relations powers referred to the Commonwealth in 1996. Victoria remains the only state covered entirely by the federal jurisdiction. Under this process of deregulation, some 356,000 (or schedule 1A) workers who were not covered by federal awards and agreements were left with five minimum conditions. Workplace bargaining did not occur for these workers due to their poor bargaining position, resulting in their pay and conditions falling further behind workers covered by the award safety net who were in a much stronger bargaining position. Opposition senators believe that the lessons of the Kennett Government's industrial relations policies are important to this inquiry because workers in that state experienced the realities of living under the microscope of policies which closely resemble Work Choices.[60]

1.69 In Victoria, awards were replaced by five minimum conditions of employment which are similar to those included in Work Choices legislation. They comprised the minimum hourly wage rates and casual rates for each industry sector, four weeks annual leave, one week sick leave, unpaid parental leave and notice upon

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59 *Federal IR reforms: The Shape of Things to Come,* ACIRRT, University of Sydney, November 2005, pp. 23-41

60 Victorian Government, *Submission 136*, p.8

termination of employment.[61] The Kennett Government promoted a deregulated market to encourage individual agreement-making. All of these changes were justified on the basis that employers and employees would be free to negotiate agreements that meet their individual needs.

1.70 The industrial relations minister for Victoria, Hon Rob Hulls MLA, told the committee:

> …the Kennett Government deregulated the Victorian industrial relations system in ways that are eerily similar to the current coalition proposals. Victorian workers and their families were indeed the guinea pigs for what many would describe as a cruel and indecent industrial relations model. Their experiences are evidence of what will no doubt occur under the federal coalition's proposals. On behalf of Victorians, I can tell you that the happy ending of employers and employees sitting down together and agreeing on fair wages and conditions was nothing more than a cruel hoax.[62]

1.71 The evidence before the committee shows that the changes implemented in Victoria during the 1990s resulted in a two-tiered system of wages and conditions: award employees protected by a decent safety net and schedule 1A workers with only minimum statutory protections. This resulted in an underclass of low-paid jobs which had a particularly adverse effect on regional Victoria. Schedule 1A workers were nearly twice as likely to be low paid compared to employees on awards; 75 per cent were not paid penalty rates for working weekends, 65 per cent were not paid annual leave loadings and only six per cent were paid shift allowances.

1.72 The Industrial Relations Taskforce established by the Bracks Government provides a snapshot of working conditions for schedule 1A workers under the five legislated minima. It found a disproportionately large low wage sector concentrated in small workplaces, especially in regional Victoria. According to the Victorian Government submission, the Taskforce also found there had been no significant increase in jobs growth compared with the national average.[63]

Lessons from Western Australia

1.73 Evidence to the committee from the Parliamentary Secretary for Agriculture and Forestry in Western Australia, Mr Anthony McRae MLA, reinforced the message that proposals contained in the Work Choices Bill will result in lower wages and conditions of employment for many workers. Mr McRae told the committee that the Work Choices Bill is not a new experiment because Western Australia, like Victoria, also provides a stark example of a failed attempt to deregulate a labour market and introduce individual contracts. A system of registered individual workplace

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61 ibid., p.9

62 Hon Rob Hulls MLA, *Committee Hansard*, 14 November 2005, p.22

63 Victorian Government, *Submission 136*, p.6

agreements (IWAs), introduced in 1993 under the *Workplace Agreements Act 1993*, were not used to facilitate mutually rewarding workplaces. They were used instead to strip awards and drive down wages and employment conditions. This caused industrial unrest and social dislocation, and began a process of inter-generational disadvantage. Mr McRae described the effect of the 1990s reforms on the industrial relations scene in Western Australia:

> There is very clear research based evidence that will show and demonstrate…that the process of establishing individual workplace contracts, with the removal of awards as an underpinning basis for fairness and standards across industry, creates circumstances in which there becomes a downward bidding in economic terms amongst enterprises and amongst employees. That is the inevitable and guaranteed outcome of what the national parliament is considering…and you have Western Australia as a stark and failed example of that.[64]

1.74 Reports prepared by ACIRRT in 1996, 1999 and 2002 on the effects of IWAs provided concrete evidence that the system which promoted individual contracts over collective agreements did not provide a fair and equitable safety net of wages and conditions. The first two reports were commissioned by the then Trades and Labour Council of Western Australia (UnionsWA).The reports found that most individual workplace agreements did not provide penalty rates for weekend, holiday or overtime work, discouraged the formal pursuit of grievances and were used by employers to pursue pattern bargaining.[65] The 1996 report concluded that 'deregulation may simply result in reduced accountability in the settlement of wages and working conditions and not the development of dynamic, innovative agreements that meet the particular needs of the individual parties involved'.[66]

1.75 The 2002 ACIRRT report prepared for the Commissioner of Workplace Agreements compared employment conditions in 200 IWAs across four industries against the relevant state award. The report overall found that workers were generally worse off under IWAs than under the comparable award.[67] It concluded that IWAs were basic documents adopting a 'bare bones' approach to hours of work and hourly rates of pay. The agreements invariably provided open-ended hours of work under the guise of flexibility, with management and business needs being the key drivers

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64 Mr Anthony McRae, *Committee Hansard*, 14 November 2005, p.25

65 *Understanding Individual Contracts of Employment: An exploratory study of how 25 workplace agreements compare with relevant award entitlements*, ACIRRT, University of Sydney, February 1996; *An Exploratory Study of Western Australia s30 Workplace Agreements: Emerging Trends*, ACIRRT, University of Sydney, October 1999

66 *Understanding Individual Contracts of Employment: An exploratory study of how 25 workplace agreements compare with relevant award entitlements*, ACIRRT, University of Sydney, February 1996, p.13

67 *A comparison of employment conditions in individual Workplace Agreements and Awards in Western Australia*, produced for Commissioner of Workplace Agreements, ACIRRT, University of Sydney, February 2002

determining hours of work. A common approach was to expand the ordinary working time arrangements and thereby reduce penalty costs that would have previously been paid for working outside ordinary hours.[68] The report found that while it appeared that workers on IWAs received a significantly higher rate of pay relative to the award, a closer analysis found that the 'loaded hourly rate' which absorbed entitlements such as leave and penalty payments did no make up for the increasingly open and flexible hours of work.[69]

New Zealand under the Employment Contracts Act

1.76 During the hearings for this inquiry, a number of witnesses drew comparisons between New Zealand's failed experiment with individual contracts under the Employment Contract Act (ECA) of 1991, and the proposals contained in the Work Choices Bill. Opposition senators believe the New Zealand experience provides salutary lessons which the Government has chosen to ignore. The ECA removed all state support for collective bargaining by abolishing the system of awards and making individual contracts the main way of setting wages and conditions. Assessments of the effect of the ECA show that many individual contracts did not included overtime and penalty rates, and were presented to workers on a 'take it or leave it' basis. Wages also fell for many workers. A study of supermarket workers found that earnings (including overtime) fell by almost 12 per cent in real terms between 1991 and 1997. According to one submission, studies show that by the end of the 1990s New Zealand was a less equal society in terms of income distribution, had a lower full-time participate rate, lower real wages, flat productivity and a diaspora of up to a quarter of the population, many of them in Australia earning considerably higher rates of pay than they could at home.[70] In summary, the ECA's industrial relations experiment was a disaster for jobs, wages and productivity growth, which dramatically increased the numbers of 'working poor' as many jobs were casualised, reduced to part-time hours or were contracted out.

1.77 The committee heard compelling evidence from Mr Andrew Casidy, General Secretary of FinSec, New Zealand's equivalent of the Financial Services Union in Australia, about the effect of the ECA on workers in the finance sector:

> What we saw in the finance sector in the 1990s was…fear. It was a race to the bottom…largely prompted by the competitive fear that employers in the finance sector have of each other. We saw across workers…significant attacks on overtime and penalty rate payments. We saw significant attacks on pay systems and a movement towards performance or sales target incentive type pay systems. We saw significant attacks on redundancy provisions…We saw a concerted attack on workers' conditions and a spiralling downwards in employment conditions.[71]

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68 ibid., p.64

69 ibid.

70 150 Australian industrial relations, labour market and legal academics, *Submission 175*, p.19

71 Mr Andrew Cassidy, FinSec, *Committee Hansard*, 15 November 2005, p.68

1.78 Mr Casidy also addressed some of the long-term social effects of New Zealand's failed experiment under the ECA. He lamented, for example, a situation where high school children are entering the workforce with no understanding of the concept of collectivism, as it applies either in the workforce, in churches or in sports clubs. The ECA succeeded to the extent that an ethos of collectivism has been replaced by a cult of collectivism.

Work Choices Bill: some areas of concern

1.79 In this section of the report, Opposition senators take issue with provisions of the Work Choices Bill which have will have the greatest detrimental effect on the wages and conditions of workers and on the ability of workers to choose and negotiate the form of agreement-making which best suits their needs. When the Prime Minister announced the Government's agenda for workplace relations reform in the Parliament on 26 May 2005, high on the list of proposals was a simplified process for agreement-making. Among the key principles underpinning the reforms were greater freedom and flexibility to employers and employees to negotiate at the workplace level, and providing people with the 'choice' of remaining under the existing award system or entering into workplace agreements. It was claimed that the current process of agreement-making is long and frustrating for employers and employees, preventing them from making their own arrangements at the workplace. The Prime Minister indicated that a 'streamlined, simpler and less costly agreement-making process' would be introduced where all collective and individual agreements will be approved on lodgement with the OEA.[72]

1.80 The submission from DEWR stated that the central objective of the Work Choices bill is to encourage the further spread of workplace agreement in order to lift productivity and the living standards of workers. It is the Government's belief that the current system imposes a costly regulatory burden on employers and employees, inhibiting both productivity performance and employment opportunities.[73] The centrepiece of the Work Choices Bill is the creation of a national industrial relations system, a new wage setting body, a new safety net comprising five minimum conditions of employment and a simpler agreement-making system. Opposition senators focus on the following controversial proposals contained in the Work Choices Bill:

- creation of a national industrial relations systems using the corporations head of power provided in the Constitution;
- creation of a new wage setting body, the Australian Fair Pay Commission (AFPC), whose main task will be to set and adjust a single minimum wage, minimum award classification rates of pay, and minimum wages for juniors, trainees and employees with disabilities;

72 Hon John Howard MP, Workplace Relations Reform, House of Representatives, *Hansard*, 26 May 2005, pp.38-43

73 Department of Employment and Workplace Relations, *Submission 166*, p.6

- abolition of the 'no-disadvantage test' and creation of a new minimum legislative standard – the Australian Fair Pay and Conditions Standard – comprising five conditions including annual leave, personal/carer's leave (including sick leave), parental leave (including maternity leave) and maximum ordinary hours of work of 38 hours per week;
- creation of a so-called 'simplified' agreement-making system, which will substantially change existing processes for the lodgement, variation and termination of agreements; and
- provision for the minister to prohibit from agreements matters which will be specified by regulation only.

1.81 Most of the evidence to this inquiry argued that there is no evidence that the Work Choices legislation will meet any of bill's stated objectives. Submissions from unions, academic experts and state and territory governments argued that the bill will not simplify the current system but will create more uncertainty and instability especially for small business. It was argued that the bill will not lead to better pay, promote genuine workplace bargaining or encourage employers and employees to settle disputes. Instead, the legislation will lead to a reduction in the real value of minimum wages for low paid workers, promote the unilateral determination of wages and conditions by employers, and encourage employers to refuse to participate in procedures to resolve workplace disputes.[74]

1.82 A number of academics challenged the philosophical basis of the Work Choices Bill and, for this reason, recommended that the bill should not proceed through Parliament in its current form. At the committee's hearing on 17 November, witnesses representing the submission from 151 academics argued that the Work Choices Bill consists of a rushed and fundamentally flawed package of reforms. However, given that it was likely the bill would be passed through Parliament in roughly its current form, the witnesses tabled a list of possible amendments to the bill which highlighted some of the more important defects of the bill. The five areas covered by these proposed amendments are listed at Appendix 2.

1.83 A large number of submissions and expert commentary raised concerns about three proposals contained in the legislation which will radically change agreement-making between employers and employees: abolishing the no disadvantage test and replacing it with a fair pay and conditions standard; having individual and collective agreements take effect from the date they are lodged with the OEA; and enabling employees to bargain away a range of award conditions when new workplace agreements are 'negotiated', including penalty rates, shift/overtime loadings, allowances, public holidays, meal breaks, annual leave loadings, incentive-based payments and bonuses.

74 Australian Council of Trade Unions, *Submission 171*, pp.3-5

A unitary system

1.84 The constitutional issues surrounding the Government's proposal to use the corporations head of power under the Constitution to introduce a national industrial relations system are complex. The Government's legislation seeks to compulsorily move all constitutional corporations into the new federal system, and end the operation of state industrial laws to the extent that they are binding on any such constitutional corporations. Evidence before the committee has questioned the Government's repeated assurances that its Work Choices Bill is constitutional. Commentary on the constitutional basis of a national industrial relations system has identified several negative consequences. These include that many employers and employees will be excluded from the coverage of the new system; the states system are only partially displaced and to an uncertain extent; and many provisions are complex and difficult to understand.[75]

1.85 The evidence from the National Farmer's Federation (NFF) provided an illustration of this complexity. The Government's proposed five-year transition period will provide access for farmers – primarily unincorporated partnerships or sole traders – to the federal system. However, at the end of this period farmers will either have to incorporate or return to the state industrial relations system. The NFF indicated to the committee that it will advise larger farms to consider partial incorporation to enable access to the federal industrial relations system, whilst retaining access to tax benefits such as Farm Management Deposits.

1.86 The 'Joint Governments' submission from state and territory governments argued that Work Choices represents a revolutionary shift in the constitutional basis of Australian industrial law which will result in the corporatisation of labour law to the detriment of workers. Laws made on the basis of this power will inevitably focus on the needs and attributes of corporations, not on the nature of the interaction between employers and employees at the level of the workplace: 'The Joint Governments are of the view that the Bill represents a fundamental misunderstanding of the federal compact and is an inappropriate use of constitutional power'.[76] The submission indicated that a number of state and territory governments are in the process of identifying grounds for a constitutional challenge, and will be parties in that challenge.

1.87 The committee received compelling evidence from academic experts and state and territory ministers that the Work Choices Bill will not create a truly national and simplified industrial relations system.[77] It also adopts the wrong approach in moving towards this objective.[78] It is estimated that between 20 and 25 per cent of all employees will fall outside the proposed legislation, increasing to 40 per cent in some

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75 Centre for Employment and Labour Relations Law, *Submission 96*, p.4

76 Joint Governments, *Submission 160*, p.5

77 Professor Andrew Stewart, *Submission 174*

78 ibid.

states. The extent to which the state systems will continue to operate is indicated by the estimate that 43 per cent of workers from Western Australia and 42 per cent of workers from Queensland will continue be covered by state industrial relations laws. The Minister for Industrial Relations in New South Wales, Hon John Della Bosca MLC, told the committee that the Government's first objective with Work Choices – achieving a unitary system – will fail because it cannot be achieved:

> In terms of employment relations, at least two million employees in Australia, perhaps more, will still be outside the ambit of this bill. They will include, to the best of my advice, all crown employees of the various state governments, arguably many municipal employees and all of those people employed by partnerships and unincorporated associations and, very dangerously for the National Party's own constituency, those employed by trusts.[79]

1.88 Three other areas of concern were raised in evidence about the Government's proposal for a unitary industrial relations system. First, it was argued that the bill will create confusion for employers and employers, instability at the workplace and dislocation in the labour market. The Minister for Industrial relations in Queensland, Hon Thomas Barton MLA, expressed his concern that the legislation will create confusion for small businesses which will need to hire industrial relations consultants to negotiate their AWAs, at a considerable cost. This is in contrast to the current situation in Queensland where the award system provides certainty to small business operators because they know that their competitors offer the same wages and conditions as they do.[80]

1.89 The ACTU submission supports this line of argument, noting that the changes proposed under Work Choices will:

> …only exacerbate the difficulties encountered by employer and employees and will result in further unintended confusion. The haste with which the legislation is being dealt…and the uncertainty regarding the scope of application of the legislation will inevitably result in inefficiencies in the labour market.
>
> The transitional provisions for pre-reform State award and agreements are complex, and most employers and employees will be uncertain as to which industrial instrument applies, which jurisdiction they operate in and their industrial rights and responsibilities.[81]

1.90 Second, the state and territory ministers made the valid point that there is no evidence that the state industrial relations systems are failing to work properly or are impeding workplace innovation and reform. Opposition senators believe that the state systems are accessible, inexpensive and responsive to the needs of employers and

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79 Hon John Dell Bosca, MLC, *Committee Hansard*, 14 November 2005, p.18

80 Hon Thomas Barton MLA, *Committee Hansard*, 14 November 2005, p.20

81 Australian Council of Trade Unions, *Submission 171*, p.16

employees, and take a practical approach to dispute resolution. It is not surprising that the states have been angered by the Government's attempt at a hostile takeover of their industrial relations powers, without the Minister for Employment and Workplace Relations, Hon Kevin Andrews MP, consulting with his state and territory counterparts about the need for change.

1.91 Third, the Work Choices Bill is a highly prescriptive piece of legislation that attempts to regulate every aspect of the employer–employee relationship. Opposition senators agree with the view that this bill is the culmination of Government efforts to re-regulate the industrial landscape. All the rhetoric about cutting red tape and simplifying agreement making conceals the effect that this legislation will have. It will add more layers of regulation and complicate national industrial relations law. Academic experts believe the legislation will complicate workplace life and foster industrial litigation. Opposition senators agree that the arrangements provided for in the bill are more complex, not less; and there is more regulation, not less.[82]

Australian Fair Pay Commission

1.92 The transfer of responsibility for wage setting from the Australian Industrial Relations Commission to the new Australian Fair Pay Commission (AFPC) will lead to a reduction in the real value of minimum wages for low paid workers. Opposition senators have a number of concerns about the role and function of the AFPC. Under the terms of the Work Choices Bill:

- the AFPC will determine minimum wages with the objective of promoting 'the economic prosperity of the people of Australia'. However, it will not determine minimum conditions of employment or have regard to living standards which exist in the community;
- there is no requirement for the AFPC to have regard to 'fairness' in providing a safety net for the low paid, either fairness in meeting needs or fairness in the context of community standards;
- there is no obligation for the AFPC to conduct its hearings in public, and it is unlikely that employees and the wider community will play a role. The newly appointed chair, Professor Ian Harper, has stated publicly that private and confidential discussions will form part of the process;
- the AFPC will not be subject to judicial review.[83]

1.93 The committee received evidence that the bill will adversely affect ethnic workers and new migrants, many of whom are employed in low-skilled, low-paid jobs or receive Government welfare payments. Many people from non-English speaking backgrounds are entirely dependent upon basic awards conditions, such as public

82 151 Australian industrial relations, labour market and legal academics, *Submission 175*, pp.4-5

83 Australian Council of Trade Unions, *Submission 171*, pp.20-23; Centre for Employment and Labour Relations Law, *Submission 96*, pp.11-12

holidays, rest breaks, penalty rates and overtime loadings. There is concern that the AFPC will not provide these workers with the minimum wages necessary to maintain a reasonable standard of living. The only conclusion that Opposition senators are left with is that the AFPC is being established to deliver wage outcomes which are below the current wage outcomes set by the Australian Industrial Relations Commission. There can be no other logical reason for the Government's decision to take away this wage-setting power from the Commission.

1.94 Opposition senators note that the widespread public discussion on the role of the Fair Pay Commission, and speculation about its stance on protecting the interests of the lowly paid, has attracted the attention of church organisations. There is much in the Work Choices Bill to alarm advocates of social justice and family-friendly conditions of work within mainstream denominations.

1.95 Advocates for the bill have not been impressed by these concerns. The views of Opposition senators may reflect a degree of irritation with comments made by Professor Harper, the prospective Fair Pay Commissioner, who is reported to have stated that he would be praying for divine guidance. While it may be agreed that in doing so Dr Harper will be following a practice common among privately devout holders of public office, such public comment is always ill-considered in relation to public policy. What is so gauche about this statement is its suggestion that decisions in relation to Fair Pay issues may be based as much on divine inspiration as on interpretation of legislative instruments and sound public policy processes. As the committee heard from Uniting Church leaders:

> I would actually prefer that the guidelines of the Fair Pay Commission gave him quite explicit directions. Is it appropriate that, in fact, a Christian is actually calling upon God in a multicultural and multifaith society? I think that raises more questions than it answers.[84]

1.96 The point was clarified by another Uniting Church witness who confirmed that Minister Andrews had told her that he and the Fair Pay Commissioner designate had an 'understanding' in relation to awarding a minimum wage increase:

> It was along the lines that, yes, there would be a review next year. I cannot remember the date. It does not seem to me to be my role to describe undertakings of the minister and the chair. Our concern is that the fact that he relied on the concept of there being a private undertaking seemed to us to be very poor public policy. I think that is also the point that Dr Drayton is trying to make about a chairperson relying on prayer. We would endorse everyone praying. That is not a problem. The problem is when it becomes the basis for making a decision as the head of a statutory authority. Prayer cannot be a substitute for putting things in the legislation that clarify that whoever is in that position, whether a person of faith or not, has certain responsibilities. Similarly, when the reviews take place ought to be in the legislation and not a matter of private understandings, given that politics

84 Reverend Dr Rodney Drayton, *Committee Hansard*, 14 November 2005, p.78

> involves change and ministers come and go from particular portfolios. Public policy cannot rely on those sorts of understandings. It needs to be clear in the legislation what the public policy is.[85]

1.97 Opposition senators point out that two issues are involved here. The main issue, to be dealt with later in this section of the report, is the extraordinary discretionary power of the Minister. The interesting point that remains is the curious intrusion into the workplace relations debate of such comment from a leading participant in the process of minimum wage setting. The parading of populist American-style evangelism in relation to what is essentially a challenge for secular policy-making, is stretching tolerance too far. It is the context, and not the belief, that would make such a statement ring strangely, even to the ears of the devout.

Abolishing the no disadvantage test

1.98 The Work Choices Bill will abolish the no disadvantage test and replace it with a new Australian Fair Pay and Conditions Standard (AFPCS). This is one of the most controversial changes included in bill. Under the no disadvantage test, employees could expect that workplace agreements would be compared with the totality of award pay and conditions, including penalty rates, overtime provisions and allowances. Under the AFPCS, agreements will be measured only against a minimum ordinary pay rate and a few leave provisions. The new minimum standard will comprise the relevant award wages and four other legislated entitlements including annual leave, personal/carer's leave (including sick leave), parental leave (including maternity leave) and maximum ordinary hours of work.

1.99 A major consequence of this new standard is that there will be widespread potential for reductions in employees' weekly pay as it will be easier for employers to reduce or cut penalty rates, overtime rates, leave loading, shift allowances and all other items of remuneration not covered by the 'fair' standard. The Government appears to have responded to this criticism by including in the bill a requirement that while these conditions can be the subject of bargaining, they can only be modified or removed by specific provision in an agreement approved by the employee. The Work Choices policy booklet states: 'If these conditions are not mentioned in the new agreement under Work Choices these award conditions [penalty rates, overtime rates and so on] will continue to apply'.[86] Section 101B of the bill states that the protected award conditions are taken to be included in a workplace agreement: '…subject to any terms of the [the agreement] that expressly exclude or modify all or part of them'. This begs the question: what do the words 'expressly exclude or modify' mean in practice? Opposition senators sought to clarify this issue with officers from DEWR and the Office of the Employment Advocate at an estimates hearing in November 2005, without much success. It appears that an agreement which included the five minimum

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85 Reverend Dr Ann Wansbrough, *Committee Hansard*, 14 November 2005, p.79

86 *WorkChoices: A New Industrial Relations System*, Australian Government, 2005, p.22

standards and which stated that these are the only terms and conditions of employment that apply, would be consistent with the wording of section 101B.

1.100 Opposition senators believe that the provision enabling employees to agree to trade away their entitlements is a smoke screen to give the appearance that an employee will actually have a direct say in the wording of an AWA. To argue that award conditions are 'protected by law', as Government advertising has made out, is a deception. The idea that employees will either be able or willing to negotiate away entitlements defies the reality of AWAs, most of which are offered on a 'take it or leave it' basis. The Ethnic Communities' Council of NSW submissions stated: 'While the laws may require employers to lay down on the negotiating table the award conditions that will be stripped away, this will make little difference in reality'.[87] It is a ridiculous proposition to suggest that employees, especially those with no bargaining power, will have any say in this, let alone be aware of what they are signing up to.

1.101 Abolishing the no disadvantage test is a cruel and retrograde step which will result in many new AWAs being registered even where they push total earnings below award levels. Many submissions expressed concern that the AFPSC represents the most significant weakening of protective regulation in the system of decentralised bargaining.[88]

Lodgement, enforcement and termination of agreements

1.102 Under Work Choices, all agreements will commence on lodgement with the OEA. The Employment Advocate has confirmed that the Work Choices Bill establishes a lodgement-only process for AWAs and certified agreements. The onus is placed on the employer to attach to each AWA a statutory declaration attesting that all the legal requirements for the negotiation, lodgement and content of the agreement have been met, including that an employee has genuinely consented to the agreement. The role of the OEA will be to confirm that, when AWAs and collective agreements are lodged, the declaration has been made correctly and is attached to the agreements as lodged. It will not check that employees have consented to an agreement, nor will it check for duress after agreements are lodged. Opposition senators are concerned that this lodgement-only process provides workers with no guarantee that an agreement is lawful. The OEA is under no obligation to check statutory declarations to ensure that workplace agreements comply with the law. It is possible that many unlawful AWAs which have been lodged with the OEA will remain undetected. This is an unsatisfactory situation which places many workers, especially those who are pressured into signing an AWA, at a serious disadvantage.

1.103 To make matters worse, under the Work Choices Bill the OEA will have no role to play regarding the enforcement of compliance. The OEA's current enforcement responsibilities will be handed over to the Office of Workplace Services (OWS). This

87 Ethnic Communities' Council of NSW Inc., *Submission 24*, p.1

88 151 Australian industrial relations, labour market and legal academics, *Submission 175*, p.8

raises a number of areas of concern. There is no evidence that the current enforcement policy and practice of the OWS will be revised to ensure that employers comply with the law, or that it will not adopt the OEA's current practice of ignoring employers who break the law.[89] Opposition senators believe that the enforcement provisions of the bill will cause further injustice and harm to employees.

1.104 Opposition senators have serious reservations about provisions relating to the termination of agreements. It will be possible for employers to terminate a workplace agreement unilaterally after the nominal expiry date of the agreement. Employees covered by that agreement will then revert to the minimum standard. The provision which states that employment conditions revert to the minimum allowable 90 days after the expiry of a certified agreement, will encourage employers to engage in stalling tactics so that workers' wages and conditions will revert to the fair pay and conditions standard. The provision will effectively allow the conditions of a certified agreement to lapse by simply refusing to negotiate.[90] This will provide employers with leverage over the terms and conditions of any new agreement. Opposition senators believe that even best practice employers will be tempted to introduce new terms and conditions below the standard of the terminated agreement. The legislation should not provide employers with incentives to refuse to negotiate or draw up new agreements which contain below award conditions.

Ministerial powers and prohibited content

1.105 Another controversial aspect of the bill concerns the powers which the bill gives the workplace relations minister to prescribe by regulation matters that are prohibited content. The ACTU believes that section 101E confers on the minister the power to invalidate part or all of an agreement, including agreements which are currently in force.[91] Opposition senators believe that these are unprecedented powers contrary to the stated objective of the bill, which is to devolve responsibility for agreement-making to the parties at the workplace. A representative of the Transport Workers Union told the committee: 'the idea that a minister can say what parties can even discuss, let alone put into an agreement, is to our way of thinking the most perverse and micromanaging form of government involvement in what was supposed to be agreement making between the parties'.[92] The powers make a mockery of the Government's claim that the best workplace relations are those that operate directly between employees and employers. It is unacceptable to have employers and employees to enter into a workplace agreement when the Government has the capacity to impose terms by removing a matter the parties have agreed to. In practice, this will mean that the goal-posts of agreement-making are constantly shifting as the parties entering into negotiations do not know in advance the rule under which they are

89 ibid., p.19

90 Mr Blair Trewin, *Submission 19*, p.2

91 Australian Council of Trade Unions, *Submission 171*

92 Mr Linton Duffin, Transport Workers Union, *Committee Hansard*, 17 November 2005, p.28

participating. Unions are particularly concerned by the on-sided nature of these powers. It will be possible for the business community to analyse the content of agreements and lobby the minister to strike out matters they do not like the look of.

1.106 Neither the bill nor the explanatory memorandum describe what matters will be prohibited. Yet the Government's information booklet referred to trade union training, paid union meetings, anti-AWA clauses, clauses relating to the agreements of a successor collective agreement, and unfair dismissal clauses. At the committee's public hearing on 16 November, ACTU President, Ms Sharan Burrow, summarised the concerns with these powers, which are shared by Opposition senators:

> We find this an incredible situation. It is not only a serious conflict in terms of the separation of powers; it is actually the most authoritarian act I have seen anywhere in the world—anywhere. What it is really saying is that you can cut a deal…and two things can happen: one is that, first and foremost, the provisions mean that the deal is not necessarily a deal anyway, something that employers would never put up with in contract law. An employer can simply entice people out of a collective agreement either by the use of individual contracts with the bribery of higher rates or better conditions or indeed by intimidation…and secondly…the Minister can decide that he does not like something in the deal and simply say, 'No, we're not having that'.[93]

Conclusion and recommendation

1.107 Opposition senators believe that the Government is taking an unnecessary risk with the economy with its Work Choices Bill. It has failed to make an empirical economic case for its industrial relations reforms. It has failed to explain why a large unprotected underclass of workers and a widening gap between skilled and unskilled labour must be the price for its narrowly conceived vision of improved economic performance. The committee is concerned by the prospect that Work Choices will be a blueprint for undoing the economic gains made over the last 15 years and will seriously threaten the quality of life and Australian society.

1.108 The focus of this report is the Government's so-called policy justification for Work Choices and some of the main contentious provisions of the bill. Earlier sections of the report emphasised that the time-frame for this inquiry left no time for the committee to canvass a wide range of views. The debate on industrial relations reform so far has been narrowly conceived and couched almost exclusively in economic terms. The Government has failed to provide a convincing economic case for its proposed policy. There is no compelling economic evidence to show that the proposed laws will create jobs, lift productivity or improve living standards. There is no evidence that the industrial relations system has hindered national economic performance either. Opposition senators note that there has been sustained productivity and employment growth for the better part of a decade, industrial

93 Ms Sharan Burrow, *Committee Hansard*, 16 November 2005, p.9

disputes are at an historic low, and the profit share of the economy is at a record high. The hearings for this inquiry gave an insight in to the social costs for low-paid workers that will inevitably follow after the Work Choices bill becomes law. The experiences of Western Australia, Victoria and New Zealand under highly deregulated industrial relations environments provide practical examples of what is currently being proposed in Work Choices.

1.109 Opposition senators believe that the Government's Work Choices Bill is a wasted opportunity to address economic priorities such as investment in education and skills, research and development, leadership in social and economic infrastructure investment, the need to reduce dependence on domestic debt and consumption as drivers of growth, and the importance of savings.[94]

1.110 Much of the rhetoric used to promote the bill, such as 'choice', 'flexibility', and a 'simpler' industrial relations system is couched in Orwellian language which disguises the real intent and effect of what is being proposed. During the references committee's inquiry into workplace agreements, a representative from the Shop, Distributive and Allied Employees' Association made the perceptive observation that the industrial relations system operating under the WR Act does everything opposite to what it says it will do:

> I quibble with the fact that the current system does everything opposite to what it says it will do – it is not fair, it is not free, it is not effective bargaining, there is no employee choice and everything is done in secret. People only do evil things in secret. If people do good things, they want to boast about it from the rooftops; if you want to do something evil, you go and hide.[95]

1.111 Opposition senators agree, and believe that the Orwellian language of the Work Choices Bill masks a range of nasty intended and unintended consequences for workers. Although Opposition senators were given only one week to consider this legislation, the evidence to the inquiry from a range of stakeholders raised many areas of concern. To conclude this report, Opposition senators find that:

- the purpose of the Australian Fair Pay Commission is to reduce real minimum rates of pay over time;
- the bill is going to enshrine unfairness by shifting power overwhelmingly to employers;
- employers can concoct any reason to dismiss workers. The practical application of the bill means that the Government's assurance that workers will be protected by unlawful termination provisions and from duress is a hollow promise. Workers can be sacked for 'chewing gum' or

94 Greg Combet, 'Under IR you like it, or lump it', *Herald Sun*, 7 November 2005, p.23

95 Employment, Workplace Relations and Education References Committee, *Workplace Agreements*, October 2005, p.20

any similar reason, and they will be denied the option of workplace collective bargaining;

- paid public holidays are not protected under the new minimum Fair Pay and Conditions Standard;
- the bill does not contain any family-friendly provisions. On the contrary, a range of entitlements currently protected by awards, such as penalty rates and maternity leave, will not be protected in the bill;
- any gradual real reduction in minimum wages will have an adverse effect on the rate of the pension;
- the bill is clearly designed to take unions out of the workplace and reduce workers' bargaining power; and
- no empirical evidence has been provided by the Government and employer groups in support of the bill.

1.112 The overwhelming evidence to this inquiry suggests that the Work Choices policy will have the opposite effect to the objectives which are stated at the front of the bill. Is it any wonder the Government insisted on holding only a one week inquiry which prevented the legislation committee from properly examining this far-reaching piece of industrial relations legislation.

Recommendation

The Work Choices Bill is so fundamentally flawed that any number of amendments will only marginally mitigate the intended and unintended consequences. Therefore, Opposition senators recommend that the bill be rejected in its entirety.

Senator Gavin Marshall
Deputy Chair

Appendix 1

Principles underpinning proposed amendments to the *Workplace Relations (Work Choices) Bill 2005* to protect outworkers

1. A separate Part should be included in the bill to deal with the regulation of outwork in the clothing industry. This part should override any conflicting provisions in the remainder of the bill.

The objects of the part should include:

- The elimination of exploitation of outworkers in the clothing industry;
- To provide protection for what has universally been recognised as a class of extremely vulnerable workers;
- To provide for uniform rights for outworkers as employees and obligations upon those who engage outworkers, irrespective of the "label" given to the particular contractual arrangement of an outworker;
- To provide for the continuation of regulation, inspection and enforcement of the provisions through right of entry powers and prosecution rights for the TCFUA; and
- To prevent the avoidance of obligations through sham contractual arrangements by making provision for outworkers to recover unpaid monies from parties further up the contractual chain.

The new Outwork Part should contain the following:

2. Provide a definition of outworker involving the performance of clothing work in a private residence or other non-commercial premises, and which does not contain a requirement that an outworker be an employee, and which does not require that a person perform work for someone else's business as part of the definition. For example:

> "Outworker" means a person engaged, in or about a private residence or other premises that are not necessarily business or commercial premises, to perform clothing work.

Definitions will also be required for "clothing work", "employer" and other terms.

3. Deem all outworkers to be employees for the purpose of the Bill and other Federal and State laws.

4. Incorporate the existing Federal Award provisions and ensure that they apply to all persons in the clothing industry who directly or indirectly engage people to perform clothing work. The Part should provide that there is no capacity for a person to contract out of these provisions, and no other industrial instrument, either during its life or upon its expiry or termination, can diminish these provisions.

5. Include existing TCFUA rights of entry and inspection in relation to outworkers under existing federal and state laws and awards.

6. Preclude entering into an AWA with an outworker.

7. Provide that outworkers' terms and conditions of employment are no less favourable than those currently contained in the Federal Clothing Trades Award, including any improvements in wages and conditions granted through the Australian Fair Pay and Condition Standard.

This includes maintaining the no-disadvantage test for any collective workplace agreement covering an outworker, along with a transparent process of scrutiny prior to the collective workplace agreement coming into effect.

8. Include provisions like those in Victoria, NSW, Queensland and South Australia providing for recovery of unpaid monies up the contracting chain, and providing for the monitoring of the industry by an Ethical Clothing Council, and providing for the development and implementation of a mandatory industry code of practice.

9. Explicitly preserve state laws relating to outworkers and provide that the federal laws are complimentary.

Appendix 2

Possible Amendments to the Work Choices Bill suggested by Barbara Pocock, David Peetz, Robyn May and Andrew Stewart

1. Incorporated businesses should not be forcibly transferred into federal system, hence giving employers more choice and avoiding the need for complex and burdensome transitional provisions.

2. The minimum standards in the AFPCS should be strengthened by:

    a. making the working hours standard subject to an overriding requirement for the employer not to require *or request* unreasonable hours;

    b. incorporating the AIRC's decision in the Work and Family Test Case.

3. The integrity of the award system as a "safety net" should be preserved by:

    a. ensuring that workers presently covered by State awards remain covered by awards if they choose not to make workplace agreements;

    b. removing the provision for employer greenfields "agreements";

    c. retaining the existing rules on the application of awards in the event of a transmission of business;

    d. providing that awards "revive" if a workplace agreement is terminated.

4. Ensure the integrity of genuinely negotiated agreements, by:

    a. making collective agreements genuinely binding on employers, by preventing them offering individual agreements on less favourable terms;

    b. specifying "prohibited content" in the Act rather than in regulations, and confining it to provisions which would breach laws on discrimination or freedom of association.

5. If there are to be exemptions from unfair dismissal laws:

    a. the exemption should be confined to *small* businesses;

    b. related corporations should be counted as a single business;

    c. the overly-broad "operational reasons" exemption should be deleted.