Australian Greens' Dissenting Report

This legislation fails the Government own test of fairness, simplicity and choice. The bill has unfair consequences for many in our society, makes the industrial system in this country much more complex, and removes choice for hundreds of thousands of Australian workers.

The impacts of this bill include lowering the minimum wage and putting downward pressure on the wages of most Australian workers, and removal of their capacity to bargain effectively. It hands greater power to employers, undermines unions and collective bargaining, has significant implications for safety, and will impact most profoundly on those already vulnerable in our community. The Greens believe this is ideologically-driven reform that has a reckless disregard for the impacts on our community.

The manner in which this legislation has been unduly rushed is extremely irresponsible – especially given its far-reaching implications for the daily lives of millions of Australian workers and their families. There has not been enough time for public analysis and scrutiny of this complex legislation, limiting the opportunity for detailed analysis and submissions. With only 5 days of public hearings in Canberra, only a small proportion of those making written submissions were able to appear before the committee. While the committee attempted to present a balance of the range of voices for and against this legislation, this meant in effect that those supporting the legislation were over-represented in committee hearings, as the majority of submissions were critical of many aspects of the legislation.

Given the number of contradictions, loopholes and unintended consequences that emerged during this short time in committee, the logical conclusion is that the drafting of this complex legislation was also rushed through on an irresponsible timetable. With virtually all witnesses who appeared before the committee indicating that they had not had sufficient time to undertake a comprehensive analysis of this legislation, it would seem reasonable to expect that there are further as yet unspotted flaws in this legislation which are likely to emerge further down the track – with expensive consequences for the government and the economy, and tragic consequences for workers and small businesses.

The haste to draft and push through this legislation is not only irresponsible, it is unnecessary. If the intention was to undertake genuine reform of the Australian labour market to address skill shortages, work-family tensions, precarious employment and the need for ongoing productivity gains, the responsible course would be to engage all stakeholders in an open process of inquiry that gave the parliament and the public time to evaluate options and proposals – so they could draw out their implications for different sectors and develop a more comprehensive and thought-out approach. The fact that this dialog has not happened, and that consultation has been so severely limited to make it ineffectual, would seem to suggest that the government does not

have the best interests of all stakeholders at heart and are pursuing their own ideological agenda.

While it is our belief that this legislation is fundamentally flawed and should be rewritten, should the government continue to pursue it in its present form (as it has indicated it will) then there are a large number of amendments required to address the flaws, loopholes and unintended consequences discovered to date.

The timeline for the committee hearing has prevented the drafting of a comprehensive dissenting report. To this end this report will be limited to a brief overview of some of the key issues and failings of this Bill.

Impacts on the vulnerable and families

These amendments will impact most significantly on the most vulnerable in society – particularly those in low paid jobs, those with disabilities, Indigenous people, people moving from welfare, women, outworkers and those in casual and temporary work.

> Workers in the low-end of the workforce are already vulnerable. The absence of award protection will result in increased vulnerability. Low income households will be unable to protect the balance between family and work, leading to intergenerational disadvantage. Children growing up in households affected by low income, long and irregular hours, housing instability and lack of parental capacity to assist with education and physical development are more likely to have difficulty obtaining vocational skill and employment, or in forming successful relationships.[1]

The impacts on the vulnerable and families include:

- People will end up working longer, less family friendly hours
- Rather than improve the work family balance as claimed, many more families will find it harder to find family time, as it becomes more difficult to negotiate working hours and the pressure to work unsociable hours increases
- HREOC said the Bill is likely to '… significantly undermine the capacity of many, although not all employees to balance their paid work and family responsibilities.'
- The gender pay gap is likely to increase, as it did during the period of 'reforms' in Western Australia during the 1990s
- Women are more likely to be in part-time and casual employment and will suffer more impact from the removal of allowances and penalty rates
- Working mothers and family carers are less able to be flexible in their work hours and will be strongly disadvantaged by measures that encourage unsociable hours and allow employers to alter working hours at will

1 Redfern Legal Centre, *Submission* 75

- Previous parental leave provisions including a right to return to work on a part-time basis and an obligation on employers to communicate significant changes to the workplace to those on parental leave have been lost
- The legislation explicitly excludes parental leave provisions for people in same sex relationships (clause 94A), in contradiction of the many rules within the Workplace Relations Act 1996 which require non-discrimination on the grounds of sexual preference
- Young people entering the work force are disadvantaged by their lack of experience and skills and are less able to bargain and negotiate
- Young people bargaining from a position of less power are willing to accept lower conditions and trade away existing protections – which will ultimately drive conditions down for everyone
- Disadvantaged young people who are already marginalised are likely to be further marginalised and existing problems further exacerbated
- This legislation is likely to lead to the development of a permanent class of working poor in Australia
- There are limitations to the idea that 'any job is better than no job' – where employment does not lead to improved living standards
- We may well see the formation of a vicious cycle of double disadvantage – less support, and less incentive to try for employment with little monetary benefit, and a further marginalisation of people who are actually in need of government assistance.

Unemployment and the minimum wage

The removal of 'fairness' as a criterion for setting the minimum wage and the focus on purely economic criteria (such as unemployment rates) will force the Australian Fair Pay Commission to take an extremely cautious approach to increasing income of the lowest paid workers.

- The minimum wage is likely to drop – as it did in Western Australia during the 1990s when similar (though less harsh) measures were introduced.
- There is no evidence to support the claim that pushing down the minimum wage will create more jobs (and a 40% increase in the minimum wage in the UK actually corresponded to an increase in employment for those on it).
- Using the minimum wage rate as an economic tool means that the lowest paid in our society bear a disproportionate burden of economic management.
- It has been suggested that for the minimum wage rate to have a noticeable impact on unemployment the rate would have to drop substantially – but this may also have the unintended effect of making unemployment benefits more attractive. Unemployment benefits would then be driven down – leading to a 'race to the bottom' and the development of a class of working poor.

- The interactions between the provisions of this Act and the 'Welfare to Work' provisions are of great concern, with the implication that those on unemployment benefits will be obliged by the unduly harsh 'breaching' regime to take jobs with below award conditions.
- Those on low wages spend a high proportion of their income on consumables – reducing their spending power will directly impact on the economy.
- In some industries it is likely competition will lead to a bidding war driving down wages – as experienced in Western Australia during the 1990s.
- Eliminating overtime and penalty rates will not increase employment but may in fact have the opposite effect – leading to longer and less sociable hours for potentially fewer existing employees.
- Higher hourly rates for overtime will no longer be an incentive to employers to properly manage workload or encourage hiring or more staff.
- Workers currently in an area of skill shortages with a good bargaining position are unlikely to suffer any immediate drop in wages – however they will become more vulnerable to future decreases when the economy inevitably slows down.
- The definition of 'standard working hours' (as an average of 38 hours per week taken over an entire year) does not comply with community expectations and leaves significant room for abuse and manipulation.
- The standard working week should be build around a community standard of 38 hours Monday to Friday during daylight hours, and appropriate compensation should be offered to those working unsociable hours.

Occupational Health and Safety

Inadequate attention has been paid to the safety implications of Work Choices, with a failure to adequately acknowledge the role that collective bargaining plays in ensuring safe work practices.

- The virtual impossibility of taking industrial action under the bill means that the final sanction of unsafe work practices by workers is practically unavailable, with the onus of proof on the workers to prove imminent personal threat
- The increasing emphasis on prosecuting people for alleged safety breaches makes it difficult to talk about safety in the work place
- Public safety is of particular concern, as under the bill industrial action is only permitted where workers can demonstrate immediate threats to their own personal safety – concern for the safety of others (such as patients, school children or the general public) does not constitute valid grounds for action
- Employee awareness and education about OH&S issues is a crucial factor in reducing the costs to businesses and the impacts of the well-being of workers.

- ‘Corporate knowledge’ of OH&S incidents is important in devising preventative measures, but individual workers are unlikely to have sufficient experience of risks and accidents to deal with this issue alone.
- In the past OH&S education and negotiation of best practice has been taken on by unions, who are increasingly excluded from this role under the bill
- The combination of decreasing workforce skills and experience, greater workforce turnover and increasing unsociable hours are likely to have severe impacts on OH&S
- The impact on the economy of time lost to OH&S problems versus time lost to industrial action is 20 to 1 – the minor gains this bill may have for reducing already low levels of industrial action will be overwhelmed by the potential OH&S costs

Bargaining and Industrial Action

This bill is purported to encourage bargaining in the workplace, however there are a number of provisions which work against and actively discourage it.

- If you can't reach agreement there is no capacity to enter into arbitration to resolve the deadlock.
- Employers can manipulate the process to contrive a situation where they can end the bargaining process
- Employers and employees can only agree on terms prescribed by Government, which will discourage genuine agreement making
- Employees on AWAs have little bargaining power to help them integrate work and family
- Loss of the 'no disadvantage test' is a disincentive to bargain as employers can unilaterally terminate the bargaining period at any point with the result that a worker falls back on the five minimum conditions
- The mandatory requirement for the AIRC to suspend a union's bargaining period once the employer has gone to the AIRC will enable an employer to contrive a situation to force an end to protected industrial action (e.g. a lockout) – further reducing employees ability to negotiate
- Workers, even if not being paid, can be forced back to work by the AIRC
- Essential services provision in the legislation allows the Minister to stop bargaining and require workers to go back to work
- Employee Greenfields ‘Agreements’ effectively allow employers to unilaterally declare workplace pay and conditions for a ‘new’ venture without bargaining with anyone
- The definition of a new business, venture or undertaking is so broad as to encourage employers to quickly move out of existing arrangements by ‘restructuring’. The current provisions in the bill would allow, for example, a

franchise setting up a new outlet for a fast-food chain to declare it a new enterprise.

This legislation is clearly designed to disempower and disenfranchise unions in the way that it:

- Restricts the capacity of unions to represent workers
- Restricts the capacity of unions to bargain on the workers behalf
- Makes it easier to sue unions
- Restricts right of entry
- Is in contravention of International standards and our obligations as signatories to the ILO
- Contradicts OECD evidence of the role played by unions in both occupational health and safety and productivity gains.

One simple national system?

Work choices has been promoted on the basis that it will offer a simpler national system that will encourage flexible workplace agreements and convince employers to take on more staff. In practice the legislation is overly complex and difficult to interpret.

- Small businesses have concerns about their capacity to understand and enact these measures
- They may have to employ or buy in additional expertise to rewrite old agreements and ensure compliance with new measures
- The ability of the Minister to change the Act through regulation and to declare prohibited items could mean agreements will have to be rewritten on a regular basis
- While a unitary national system may simplify matters for larger organisations working across state jurisdictions, it reduces the number of choices to businesses currently able to compare federal and state systems and choose the one that best fits their enterprise requirements
- The use of corporations powers adds complexity to smaller businesses and third-sector organisations who do not easily fit the corporate model.

Corporations powers

The use of corporations provisions as a constitutional ‘back door’ method of overriding the constitutional role of the states in industrial relations creates additional complexities and leaves the door open for a constitutional challenge in the High Court.

- Section 51 of the Constitution is a clear indication of the intent for industrial relations to be managed by the states in the context of collective bargaining

- Using corporations powers means that small businesses and not-for-profit organisations will have to determine how they function as corporations and is likely to result in more complex compliance requirements
- Being or becoming a corporation is not a simple matter, and a push towards incorporation can have unintended consequences
- Submissions from farming organisations expressed reluctance to go down this path because of its implications for matters such as drought relief and tax breaks
- Corporations powers have been designed to suit a particular kind and scale of business venture – their use will disadvantage those who do not fit well into the model and possibly skew their efforts in perverse directions
- Ultimately the use of corporations powers and other one-size-fits-all measures within the bill force small businesses to compete on an unequal playing field with bigger corporations – where they lack the capacity to deal with the complexities and do not have the benefit of economies of scale.

Increased Executive Powers

This legislation conveys unprecedented executive powers to the Minister to make determinations, intervene in workplace agreements and disputes, and to alter the Act through regulation.

- A large number of items are left to Ministerial discretion (196 references to "the regulations")
- The Minister can amend or veto outcomes of the AFPC (sections 90Q, 90T & 130)
- The Minister can materially alter the Act without parliamentary scrutiny (Schedule 15, section 30 allows regulations to "apply, modify or adapt the Act")
- The Minister can unilaterally add 'prohibited items' which restricts the ability of parties to negotiate workplace conditions to increase productivity and improve work-family balance
- The Minister can declare particular enterprises as 'essential services' – thereby restricting bargaining periods and the possibility of industrial action, and allowing the Minister to force workers back to work
- This level of executive power is incompatible with the proclaimed spirit of the legislation of encouraging flexible bargaining and may act as a disincentive to employers and employees entering into discussions that may be limited by Ministerial decree or overwritten by Ministerial fiat.

Office of the Employment Advocate (OEA)

There are serious concerns about reducing the role of the OEA to a repository for the lodgement of AWAs, and the lack of any ability to examine and enforce compliance.

This will result in a lack of adequate review of AWAs, and leave no reason for the OEA to examine whether AWAs are in fact compliant or whether an employee has genuinely consented to an agreement.

- Under existing arrangements there have been numerous examples of agreements not being lodged with the OEA, not being signed by employees, and not complying with the regulations.
- There will not be adequate scrutiny of agreements to ensure compliance – as the role of OEA has effectively been downgraded to lodgement of agreements which immediately come into force.
- An employer will immediately have the benefit of a non-compliant AWA or collective agreement operating as soon as it is lodged – even when they have ignored all the requirements.
- The same applies to terminations and variations of agreements – a termination or variation will take effect even when there has been non-compliance by the employer with the statutory provisions to inform employees
- In effect employers can ignore all provisions requiring genuine advice and consultation in making, varying and ending agreements

Productivity

The case that these changes are required to increase productivity has not been made, and there are indications that any minor short-term productivity gains will be far outweighed by longer term negative impacts.

- There is no hard evidence to suggest that productivity will increase under these reforms, with the Department of Employment and Workplace Relations (DEWR) relying on dubious economic modeling and ignoring relevant international studies.
- The claims rely on IMF and OECD studies which have been discredited
- The claims ignore evidence from New Zealand of a drop in productivity (and a growing gap with Australian figures) after the introduction of similar measures
- The only way that these changes will increase business 'productivity' is through driving down wages to reduce inputs relative to outputs – this will not increase the productivity of individual workers
- Shorter, more uncertain employment increases labour turnover costs and decreases 'corporate knowledge' and the incentive to invest in training and human resource development
- International evidence suggests that the biggest productivity gains are linked to collective bargaining
- The bill does not encourage team work and shared decision making that promote collaboration, communities of practice and dynamic learning – which

are important aspects of the innovation and creativity that drives sustained productivity gains

- Reducing awards, dropping wages and conditions could lead to cost cutting measures that reduce employers incentives to invest in training, innovation and upgrading capital stock - which in the long run will have adverse implications for productivity

Skills Shortages

The current skill shortage crisis is supposedly another imperative for this legislation, however the bill only specifically addresses this issue through school based apprenticeships and piecemeal comments about vocational education and training.

- Shorter and more uncertain employment will potentially exacerbate existing skill shortages
- Australian data relating to skill shortages in nursing suggest that the problem is actually related to job quality – with many qualified nurses opting not to work in unattractive positions where they are unable to deliver quality care.
- International evidence suggests greater collaboration between stakeholders is needed to address skill shortages in highly skilled and dedicated professions – by undermining unions these changes will exacerbate the problem
- Solutions to 'job quality' issues often involve sector-wide solutions (like mandated nurse-patient ratios) to improve work quality – which cannot be achieved by any one employer in isolation because of competition pressures
- The fundamental design principle of this bill makes multi-employer agreements impossible – which undermines the capacity to establish industry-wide skill sets and training standards
- There has been under-investment in training, with declining on the job training, exacerbated by increasing casualisation – these reforms do not address these areas
- Changing career structures and increasing workplace insecurity have meant that personal investments in education and training are more uncertain and likely to deliver reduced returns

Conclusion

Analysis of the proposed legislation in the light of available data on labour markets suggest that the Workplace Relations (Work Choices) Amendment Bill 2005 will:

- Undermine workplace rights and conditions
- Deliver flexibility to employers at the cost of employees
- Add unnecessary levels of complexity to the regulation of industrial relations that will disadvantage smaller businesses
- Create additional problems for those trying to balance work and family

- Disadvantage those already most marginalised in our society – including women, young people, Indigenous Australians, those with disabilities, the low paid, and those in part-time or casual work
- Widen existing disparity in wages and entrench inequalities
- Create an underclass of 'working poor'

This is badly flawed legislation with a raft of serious intended and unintended consequences that will impact on the daily lives of most Australians. This legislation is being pushed through with unnecessary haste when in reality there is an urgent need for more time to properly assess and evaluate its impacts. The best approach would be to abandon this draft and start again. Failing that, a number of major amendments are needed to improve a range of unintended and perverse effects. It is the considered opinion of the Australian Greens that enacting this legislation will have widespread deleterious effects for the Australian way of life and will ultimately undermine productivity and innovation and foment an undercurrent of workplace unrest.

Senator Rachel Siewert