The Senate

Employment, Workplace Relations and Education Legislation Committee

Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005

November 2005

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Preface

Reference to the committee

On 12 October 2005, the Senate resolved that upon the introduction of the Workplace Relations Amendment (Work Choices) Bill 2005 in the House of Representatives, the provisions of the bill be referred to this committee for inquiry and report by 22 November 2005. The bill was introduced in the House of Representatives by the Minister for Employment and Workplace Relations, the Hon. Kevin Andrews MP, on 2 November 2005.

The motion for referral stated that the inquiry would not consider those elements of the bill which reflect government bills previously referred to, examined and reported on by the committee; namely those elements which 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 Workplace Relations Act 1996 (the WR Act); strike pay; reform of unfair dismissal arrangements; 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.

Conduct of the inquiry

The committee received 202 major submissions, a full list of which is at Appendix 1. In addition, some 5400 brief submissions were received as expressions of interest. For the reason of the large number of submissions and the short time frame for the inquiry, the committee was unable to individually acknowledge all submissions, most of which were orchestrated by way of an Australian Council of Trade Unions (ACTU) 'spam' pro forma widely advertised in workplaces and beyond. The committee thanks all those who made submissions. Five public hearings were held in Canberra between 14 and 18 November 2005. A list of the 105 witnesses who appeared at these hearings is at Appendix 2.

The conduct of hearings for this inquiry has been the subject of dissension and criticism from opponents of the bill. The committee determined that the best way to use the time available was to conduct five days of hearings in Canberra. During the course of the hearings, committee members had the opportunity to hear from a diverse and balanced group of witnesses, representing more than thirty organisations with a range of interests and views. As noted above, close to five thousand written submissions have been received by the committee. It is difficult to see how the committee's deliberations could have been better informed.

When referring this bill to the committee, the Senate resolved that the committee should direct itself to examining those issues which have not previously been the subject of inquiry. Although this would appear to be a matter of common sense and efficiency, it also drew criticism. It would seem that opponents of the bill, hoping to

delay introduction of the reforms for as long as possible, would seek to revisit matters examined by this and the EWRE References committee as recently as June 2005.[1]

The Government has been determined to introduce the legislation as soon as possible. The latest economic data, particularly relating to unemployment and productivity, strongly indicates the need for expeditious reform. As discussed in detail in chapter 3, the looming demographic challenge and productivity lag points to an urgent need for extensive labour market reform. The reforms contained in the bill will play a crucial role in reversing these trends and paving the way for continued economic success.

The Government party senators strongly support the legislation before the committee. However, following both oral and written submissions received during the course of the inquiry, the committee would like the Government to consider the following amendments to the bill:

- that outworker provisions in state awards be protected and not be able to be bargained away by employees entering into federal agreements;
- that prohibited content in pre-reform federal agreements and state agreements be limited to anti-AWA clauses only;
- that the 90 day notice by an employer to terminate an agreement under the bill only be given after the nominal expiry date of that agreement;
- that trainee/apprentice provisions in federal awards will override state trainee/apprentice laws to the extent of any inconsistency and traineeships be treated on the same basis as apprenticeships;
- that the averaging of hours provisions in the bill be examined to ensure that there are no unintended consequences as a result of the operation of these provisions;
- that a full time employee who works the hours required of them is guaranteed to receive 4 weeks annual leave; and
- that a full time employee who works the hours required of them is paid for at least 38 hours per week even if the hours required of them average less than 38 hours.

Structure of the report

This report examines the provisions of the Work Choices Bill. As noted above, the scope of the inquiry excluded those elements of the bill that had previously been the subject of inquiry and report by this committee.

The report is structured in 4 chapters. Chapter 1 outlines the policy background to the Work Choices Bill, previous workplace relations reforms, the reasons why further reform is needed, objectives of the bill and a description of the bill. Chapter 2 explores

1 *Unfair dismissal and small business employment,* EWRE References committee, June 2005

the historical context of the workplace relations system and the constitutional basis for the establishment of a national system. Chapter 3 analyses in more detail other issues of contention, while in Chapter 4 the committee majority draws its conclusions from the evidence.

The political and social context of workplace reform

This report outlines the reasons why Government party senators support the legislation before the committee. The details are in the chapters that follow. Some brief comments on the broader political context, not dealt with in the report proper, may be noted here. What is often described as an 'evolution' of workplace relations legislation is a legislative process which has taken place over the course of the last twelve years. It is often noted that the Keating Labor Government in the early 1990s grasped the nettle in recognising the connection between productivity and economic growth on the one hand, and the need for workplace bargaining, on the other. This was reflected in legislation which provoked some dispute and recrimination in the Labor Party at the time, especially in the trade union arm of the party.

In retrospect it is clear that the Labor Party has not advanced beyond the point at which it stood a decade ago. Arguably it has regressed. Labor has opposed the Workplace Relations and Other Legislation Amendments Bill 1996, and has continued to oppose, most notably in the Senate, most of the amendment bills to the WR Act which were subsequently introduced. The contrived scaremongering and extreme language being deployed by the Labor Party in 2005 are uncannily similar to that which it used to argue against the Government's initial workplace relations reforms in 1996.

In 1996 the Leader of the Opposition, Mr Beazley, argued that:

> The Workplace Relations and Other Legislation Amendment Bill strikes at the heart of the desire by all Australians for a fair as well as a productive society. If we pass this bill into law, we will return the workplace to the battleground it used to be….
>
> …the government is attacking the very basis of people's living standards… Attack wages, and you attack families.
>
> Another group marked down for special punishment by this measure is Australian women… the more wages are removed from the arbitrated system and into the decentralised system the greater the potential for wage injustice for women. The more the commission is crippled – it is the best friend that disadvantaged Australians have in industrial relations – the more this injustice is aggravated.
>
> … the kind of low wage, low productivity industrial wasteland we see in the United States and New Zealand where jobs can be bought at bargain basement rates… straight down the American road on industrial relations legislation, straight down the American road on wages justice, and that

> produces social dislocation more than anything else. At the end of the day, guns are a symptom of that process…[2]

This line of argument is essentially the same as that being used in 2005:

> The simple fact of the matter on Industrial Relations is this: the Government does not intend a fair outcome for ordinary Australians. The Government's objective with Industrial Relations is not reform but suppression of wages. That is what they want to do. That is how they've performed when they've handled minimum wage issues in the past. They don't want a package that is about improving the economy they want a package which is about oppressing wages. Now, as far as we're concerned we see the issues of Industrial Relations lying at the heart of our democracy. The ability of the average Australian to feel that they can stand up for themselves in the workplace and have their concerns seriously dealt with. The objective of the Government is to suppress that democratic sentiment in the Australian community and we're not for it.[3]

The current Shadow Minister for Workplace Relations, Mr Stephen Smith, argued prior to the 1996 election that:

> The Howard model is quite simple. It is all about lower wages; it is about worse conditions; it is about a massive rise in industrial disputation; it is about the abolition of safety nets; and it is about pushing down or abolishing minimum standards. As a worker, you may have lots of doubts about the things you might lost, but you can be absolutely sure of one thing: John Howard will reduce your living standards.[4]

Comments such as this are effectively no different to similar comments made ten years later:

> Firstly, these changes will be unfair, they'll be divisive, and they'll be extreme. And secondly so far as they impact upon Australian employees and their families they'll have the affect of reducing their wages, stripping their entitlements, and removing their safety nets…[5]

The Labor Party's early and continued opposition to AWAs, with only muted wavering on their acceptability in very recent times, indicates the party's difficulty in accepting the irreversible changes that might place its own structures and philosophies in jeopardy. The reforms that are at the heart of the Work Choices Bill will require trade unions to change the focus of their work as simply being employee representatives in a system built around their specific requirements and to accept a changing role if they are to maintain their relevance. Work Choices will create ample

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2 Hon. Kim Beazley MP, House of Representatives *Hansard*, 19 June 1996

3 Hon. Kim Beazley MP, Doorstop Interview, 23 May 2005

4 Hon. Stephen Smith MP, House of Representative *Hansard*, 17 October 1995

5 Hon. Stephen Smith MP, Doorstop Interview, 23 May 2005

opportunities for unions to maintain their relevance, and indeed importance, in the new system.

If unions fear marginalisation as a consequence of the passage of the Work Choices Bill, it is largely for the reason that the pace of economic and technological change, and changes in the workplace, has outstripped their ability to maintain a support base. There is a lament, voiced by some at the committee's hearings, about the decline of collectivism, in many social manifestations, as well as in union membership. The Australian labour movement's attitude and its reluctance to modernise sits in stark contrast to the views expressed by British Prime Minister Tony Blair, when he told the British Trade Union Congress in 1997 that:

> You should remember in everything you do that fairness at work starts with the chance of a job in the first place, because if we as a government and you as a trade union movement do not make Britain a country of successful businesses, a country where people want to set up and expand and a country that has the edge over our competitors, then we a re betraying those we represent…
>
> We are not going to go back to the days of industrial warfare, **strikes without ballots**, mass and flying pickets and secondary action. You do not want it, and I will not let it happen. I will watch very carefully to see how the culture of modern trades unions develops. **We will keep the flexibility of the present labour market, and it may make some shiver but, in the end, it is warmer in the real world…**

These are social changes to which workplace relations law must adapt, and the Coalition government finds itself in the position of needing to respond to the demands of the economy and the workplace and the changing relationship between employees and work. As the committee majority has noted in its previous reports, the workplace demand is now for increased flexibility. Legislation follows social and economic change: it does not drive it. Nor, in a liberal democracy, can laws prevent such changes from occurring. There is a strong case for introducing one set of national workplace rules across the country and updating the system to meet the needs of the modern workplace.

Acknowledgements

The committee thanks all those who made submissions to this inquiry, and who were available at short notice to give evidence over the five days of public hearings. It particularly acknowledges officers from the Department of Employment and Workplace Relations who spent an extended period of time before the committee to answer technical questions on the legislation.

Recommendation

Government party senators commend this report to the Senate and **recommend** that the Senate pass the legislation.

Senator Judith Troeth
Chairman

Chapter 1

Introduction

1.1 This introductory chapter places the Workplace Relations Amendment (Work Choices) Bill 2005 in an historical context and outlines the need for further reform. It states the objectives of the amendments and the contents of the bill. Certain aspects of the bill are discussed in more detail in following chapters.

Historical context

1.2 The Australian workplace relations framework has undergone significant reform in the past 20 years.[1] During that time, wage fixation has moved incrementally from a centralised model of awarding national wage increases to match increases in the cost of living, to a much more devolved system, where wages are primarily set at the workplace level, with wage increases often based on improvements in productivity.

1.3 These changes were prompted by a bipartisan recognition that a more flexible labour market was needed to maximise economic growth in the increasingly globalised economy. The shift first started to occur in 1987, with the Australian Industrial Relations Commission's (AIRC's) introduction of the Restructuring and Efficiency Principle.[2] This was reinforced (albeit at an industry level) by the Structural Efficiency Principle[3] which followed the development of the Enterprise Bargaining Principle in 1991.[4]

1.4 From this time, the Commission's decisions and legislative action (most significantly through the *Industrial Relations Reform Act 1993* and the *Workplace Relations and Other Legislation Amendment Act 1996*) have facilitated change from national and industry level wage fixation to workplace level wage fixation. Since then, a diminishing proportion of the workforce has directly relied on industry-wide awards for wage increases.

The Workplace Relations Act and subsequent amendments

1.5 The primary focus of the Howard Government's reform agenda since it took office in 1996 has been the establishment of a genuine safety net of minimum wages

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1 This summary of previous reforms is based on Senate Employment, Workplace Relations and Education References Committee, *Workplace Agreements*, October 2005, pp 1-8

2 National Wage Case Decision, Full Bench, Australian Industrial Relations Commission, 10 March 1987, Print G6800

3 National Wage Case Decision, Full Bench, 12 August 1988, Print H4000

4 National Wage Case Decision, Full Bench, 30 October 1991, Print K0300

and conditions, with actual employment conditions negotiated at the workplace through an agreement between employers and employees.

1.6 The *Workplace Relations and Other Legislation Amendment Act 1996* (the WR Act), which renamed and reformed the *Industrial Relations Act 1988*, made the first break with a basic assumption which had underpinned workplace relations management since federation and before: that conflict between employers and employees was inevitable. The amendments instead focused on achieving wage increases linked to productivity at the workplace level. The new name of the WR Act reflected this, as did provisions relating to negotiating and certifying agreements. The WR Act also introduced a new form of agreement, Australian Workplace Agreements (AWAs), which could be made between individual workers and employers.

1.7 Fundamental changes were made to the award structure. The AIRC's ability to make awards in relation to matters outside a core of 20 'allowable award matters' was restricted, and provisions were introduced requiring the AIRC to review and simplify awards to remove all provisions falling outside these 'allowable award matters' after a transitional period of 18 months. These provisions achieved what the AIRC had decided it could not do itself under the former legislation; that is, limit the content of the award safety net to a set of core minimum conditions.[5] The role of the AIRC , and that of its awards, has developed to reflect the increasing emphasis on setting wages and conditions by agreement at the workplace.

1.8 Other important amendments were implemented by the Workplace Relations Amendment (Genuine Bargaining) Act 2002, which specified factors to be taken into account by the AIRC when considering whether a negotiating party was genuinely trying to reach agreement, and which empowered the Commission to make orders in relation to new bargaining periods.

1.9 Associated reforms implemented by the Government since 1996 have included enshrining minimum entitlements of employees in Commonwealth legislation; for instance, arrangements to address unlawful termination of employment, equal remuneration for work of equal value, parental leave and freedom of association.

1.10 Since 1996 Australia has experienced higher wages, higher productivity, more jobs and fewer industrial disputes. Ultimately, the best protection for workers, and the best guarantee of job security and higher wages, is a strong economy. A modern workplace relations system is an essential component. A heavily-regulated workplace relations system in the 1980s failed to protect a million Australians from being thrown onto the unemployment scrapheap.

1.11 Since March 1996 over 1.7 million new jobs have been created, of which:

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5 Safety Net Adjustment and Review Decision, Full Bench, Australian Industrial Relations Commission, 21 September 1994, Print L5300, p.39

- 900,000 have been full-time
- 800,000 have been part-time

1.12 In contrast, between March 1989 and March 1996, 107,000 jobs were created of which:

- 188,000 were full-time
- 519,000 were part-time

1.13 Unemployment is presently 5.1 per cent and is steady at the lowest levels seen in 30 years, which is in stark contrast to the 10.9 per cent recorded at the height of the early 90s recession.

1.14 Real wages have increased by 14.9 per cent since 1996, compared to 1.2 per cent between 1983 and 1996, during which time the ALP and the ACTU embarked on a deliberate strategy of suppressing real wages. According to the Department of Employment and Workplace Relations, the minimum wage declined by around 5 per cent in real terms between 1983 and 1996. It was only this year that the Leader of the Opposition boasted that:

> We achieved 13 years of wage restraint under the Accord. The wage share of GDP came down from 60.1 per cent when we took office to the lowest it had been since 1968. We left office with the wage share of GDP at 55.3 per cent. [6]

1.15 Under the current *Workplace Relations Act*, industrial disputes have consistently remained at the lowest levels of strikes since records were first kept in 1913. In 2004 the level of industrial disputes was 45.5 working days lost per 1,000 employees. The yearly average rate of disputes in the 13 years from 1983 to 1995 inclusive was 192 wdl/1,000

1.16 In 1973, at the height of the system of compulsory arbitration and union power favoured by many current critics of the bill, the rate of industrial disputes was 1,273 wdl/1,000

1.17 The structural reforms implemented by the WR Act and associated legislation have contributed to reduced unemployment, higher real wages, rising productivity and economic growth. However, there are still fundamental problems with the current system that the Work Choices Bill attempts to address.

Why further reform is needed

1.18 While the changes described above have made the system more flexible and less prescriptive, further improvement is required to sustain continued economic growth and allow continued productivity growth. The Workplace Relations

6 Hon. Kim Beazley MP, Speech to Sustaining Prosperity Conference, 1 April 2005

Amendment (Work Choices) Bill 2005 will reduce complexity and contribute to productivity and economic growth, while retaining appropriate key elements of the current system and ensuring that the economic gains of the past decade are maintained and provide a foundation for future economic competitiveness and job creation . The reforms in the bill will also reduce unnecessary regulation and make progress towards implementing a simple and unified workplace relations system.

Problems with the current system

1.19 The costs of the current framework include an unnecessarily high regulatory burden, the wasteful duplication of state and Commonwealth arrangements and most importantly, the longer term costs to productivity and employment growth. For instance, some rigid award and enterprise agreement conditions prevent incentives being offered for productivity rises. Rather than forming a baseline to agreement making, the system provides an incentive for excessive award entitlements, which prevents employers taking on more people and puts up barriers to more unemployed people entering the labour market.

1.20 Problematic features of the current system include:

- the rights the conciliation and arbitration system confers on third parties while marginalising employers and employees;
- the promotion of dispute creation rather than dispute settlement;
- the barriers to direct relationships between employers and employees;
- the ad hoc and patchy coverage of the current Commonwealth award system; and
- the complexity, inefficiency and confusion created by six different and overlapping systems, over 130 different pieces of employment related legislation and over 4 000 different awards.[7]

1.21 The problems outlined above were recently noted by the International Monetary Fund, which made the following comment:

> Further reforms of industrial relations are needed to expand labor [sic] demand and facilitate productivity gains. Labor [sic] market reforms to date have substantially reduced rigidities, but centralised awards still set minimum working conditions in 20 areas through the requirement that conditions in collective and individual contracts not fall below those in awards – the no disadvantage test – and large employers face up to six different industrial relations systems at the Federal and State levels.[8]

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7 Commonwealth of Australia, *Workplace Relations Amendment (Work Choices) Bill 2005 Explanatory Memorandum* (hereafter Explanatory Memorandum), p. 4

8 International Monetary Fund (IMF), *Article IV Consultation with Australia – Staff Report and Public Information Notice on the Executive Board Discussion*, 24 August 2005

1.22 Many of these structural and procedural problems have resulted from the limitations inherent to section 51(xxxv) of the Constitution (the conciliation and arbitration power), upon which the Commonwealth's industrial relations powers are based. The cumbersome and costly procedures that have emerged to circumvent the constraints of the conciliation and arbitration powers, which are discussed in Chapter 2, are 'highly artificial, filled with legal fictions, and difficult to explain to those unfamiliar with the complex workings of the system'.[9]

1.23 As discussed in the following chapter, the problems outlined above cannot be overcome as long as the workplace relations system continues to rely on and be restricted by the conciliation and arbitration powers conferred on the Commonwealth by section 51(xxxv) of the Constitution. The amendments in the Work Choices Bill are based on a completely different heads of power. This will enable the establishment of a unified national system that will cover approximately 85 per cent of the workforce. The rationale for introducing a national system and the constitutional basis for its establishment are also discussed in Chapter 2.

Objectives of the bill

1.24 The expected benefits of specific aspects of the Work Choices Bill are many, but they are all underpinned by a fundamental objective: the attainment of a high, and sustainable, standard of living.[10]

1.25 The health of the economy is unarguably the most important pre-requisite to realising a more affluent society, and workplace relations is a critical determinant of the rate at which an economy will grow and prosper. There have been high increases in the standard of living in the past decade, largely as a result of the increases in productivity which have already been achieved, and the changes in the Work Choices Bill are a critical pre-requisite to its continued improvement.[11] The main impediment to the workplace relations system becoming more efficient, effective and modern is the lack of a cohesive framework through which a uniform national system may run. While this subject is dealt with in Chapter 2, it bears mentioning here as it forms the basis of the system to be introduced by the Work Choices Bill.

1.26 One of the key objectives of the new system is to enhance the strong employment growth of the past decade. While unemployment rates are at a record low, there remain over half a million people who are out of work, and a large additional number who are under-employed. There are approximately 690,000 children now living in jobless households. One of the primary obstacles to further employment is a lack of flexibility in the workplace relations system. The award

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9 J. Webb, *Industrial Relations and the Contract of Employment*, Law Book Company, Sydney, 1974, p. 93

10 Hon. Kevin Andrews MP, Second Reading Speech, House *Hansard*, 2 November 2005, p.12

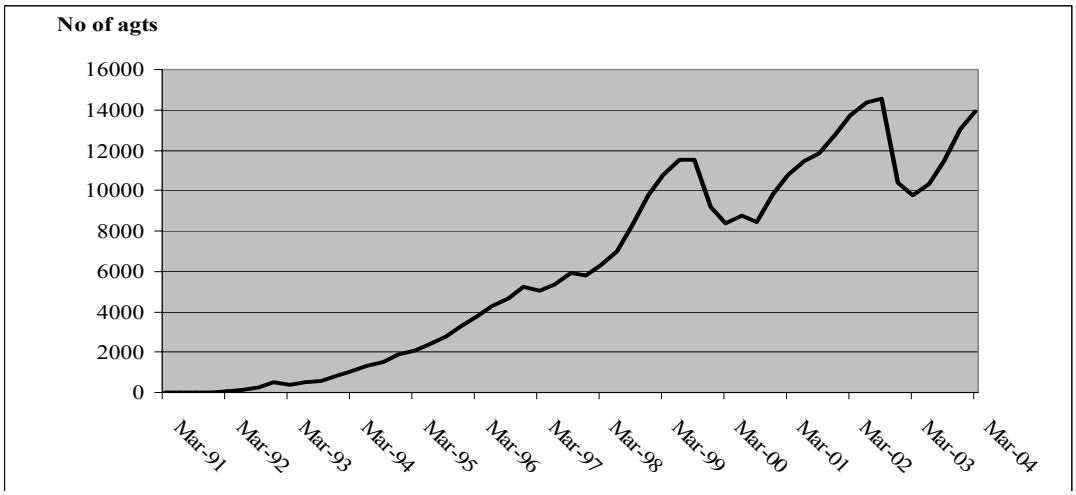
11 Australian Bureau of Statistics, Household Expenditure Survey 2003-2004, publication 6530, pp 1-5

system, through the complex, confusing and subjective 'no disadvantage' test, acts as a barrier to employees and employers deciding what is best at their workplace. The bill will remedy this situation by creating a national Fair Pay and Conditions Standard as the basis for agreement making. In pointing out this problem, the committee majority is also mindful of the need to promote reform in the related area of social welfare benefits, a matter which the Government is now attending to in its welfare to work policy development. Another related area is taxation rates adjustment, and its interaction with the award system, which is also referred to in some submissions to this inquiry, but lies outside the committee's terms of reference.

1.27 A corollary to the need to ensure continuing employment growth is the need to prepare the economy for future challenges, especially the need to make a significant leap in levels of productivity. Many international trading competitors are making great advances in productivity, which is driving strong economic growth and a healthy economy in other countries. While Australia is doing well economically, it is important to maintain the momentum, and extensive changes are needed to bring this about. Introducing a unitary system of industrial relations, combined with the ability for parties to exercise flexibility in the employment relationship, will give employers the confidence they need to grow their businesses and employ more workers. The economic growth which results from this will benefit all people, not just those in the labour market.

1.28 One of the further underlying objectives of the bill is to encourage the spread of agreement making. The passage of the WR Act has made it easier for workplaces to reach agreement with their employees at the enterprise level but the current system is far from perfect. While, collective and individual agreements continue to expand into the service industries and small business sectors where award coverage has been the norm (see graph below), the agreement making system requires significant reform if this trend is to continue.

Number of federal collective wage agreements current at the end of each quarter[12]



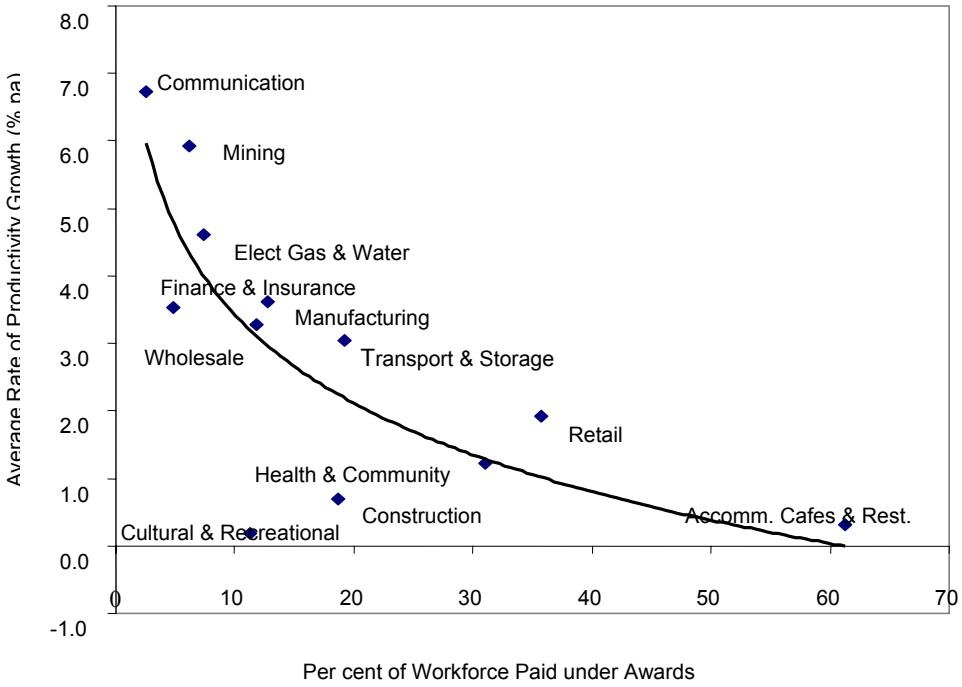
1.29 The reason why it is important to encourage the expansion of agreement making is that there exist a clear correlation between productivity growth and the use of workplace agreements (see graph below). A number of studies by the Productivity Commission and others confirm the positive association between workplace bargaining and productivity growth.[13] In the wholesale and retail trades, for example, industry representatives specifically identified the shift to enterprise bargaining as a significant contributor to labour productivity improvements.[14] The bill will replace the current complex, legalistic and adversarial process of reaching agreement with a lodgement only process which is designed to encourage the growth in agreement making and in turn drive increased productivity.

12 Department of Employment and Workplace Relations, Workplace Agreements Database 2004.

13 For information on these studies see Commonwealth Submission, Safety Net Review – Wages, 18 February 2004, Chapter 4.

14 Productivity Commission; *"Productivity in Australia's Wholesale and Retail Trade", Productivity Commission Staff Research Paper October 2000* - A. Johnston, D. Porter, T. Cobbold and R. Dolomare, pages xii, 63-65, 86

Award coverage as at May 2002 and labour productivity growth by industry June 1990 to June 2002



1.30 The experience of the shift to agreement making also demonstrates that it results in higher wages for employees. According to ABS data, workers on Australian Workplace Agreements clearly earn more on average than workers on both collective agreements and awards:[15]

Average weekly earnings: AWAs versus collective agreements:

All	$890.93 cf. $787.40	13 % higher
Private sector	$800.73 cf. $733.50	9 % higher
Public sector	$1378.47 cf. $878.50	57 % higher

Average weekly earnings: AWAs versus awards:

All	$890.93 cf. $444.55	100 % higher
Private sector	$800.73 cf. $442.72	81 % higher
Public sector	$1378.47 cf. $518.99	166 % higher

1.31 The ability for employees to reach a better balance between work and family life is another aim of the reforms. Current workplace arrangements too often make little or no provision for the individual needs of employees and workplace flexibility is inhibited by a lack of appropriate legal and industrial mechanisms to allow workers

15 ABS *Employee Earnings & Hours survey* (Cat No 6306.0), May 2004

to negotiate hours of work around their family responsibilities and other needs. Instances abound of employers and employees both requiring and seeking arrangements which are mutually beneficial, but not being able to bring them to fruition because of the arbitrary, outmoded provisions in awards and some collective agreements. The issue of family-friendly workplaces centres on the different needs of individual workers, and the standardised working conditions set out in a collective agreement cannot suit the diverse family situations of hundreds or thousands of employees. The reforms in the Work Choices Bill will enable agreements to be tailored to the needs of employers and employees and make it simpler to negotiate family-friendly working arrangements.

1.32 The most recent DEWR report on agreement making under the *Workplace Relations Act 1996* also contains specific figures on the incidence of family friendly measures included in AWAs. It shows:

- AWAs for women are more likely to include flexible working and family friendly provisions than those applying to men;[16]
- Over 70 per cent of all AWAs contained at least one family friendly provisions, relating to leave or flexible work arrangements; and
- Of these agreements, more than half had two or more family friendly provisions.[17]

Summary of major reforms

1.33 The main reforms to be implemented by the bill will:[18]

- simplify the complexity inherent in the existence of six workplace relations jurisdictions in Australia by creating a national workplace relations system based on the corporations power that will apply to a majority of Australia's employers and employees;
- establish an independent body called the Australian Fair Pay Commission (AFPC), to set and adjust minimum and award classification wages, minimum wages for juniors, trainees/apprentices and employees with disabilities, minimum wages for piece workers and casual loadings;
- enhance compliance with the WR Act;
- enshrine in law minimum conditions of employment (annual leave, personal/carer's leave (including sick leave), parental leave (including maternity leave) and maximum ordinary hours of work), which, along with the wages set by the AFPC, will be called the Australian Fair Pay and

16 *Agreement Making in Australia under the Workplace Relations Act 1996: 2002-2003*, p.100

17 *Agreement Making in Australia under the Workplace Relations Act 1996: 2002-2003*, p.94

18 This summary of the major reforms in the bill is reproduced from the Explanatory Memorandum, pp 1-2

Conditions Standard (the Standard) and will apply to all employees in the national system;

- place a greater emphasis on direct bargaining between employers and employees by replacing the certification and approval process for making agreements with a simpler streamlined lodgement only process;
- improve regulation of industrial action while protecting the right to take lawful industrial action by requiring the Australian Industrial Relations Commission (AIRC) to determine an application for an order to stop or prevent unprotected industrial action within 48 hours, requiring secret ballots before protected industrial action, expanding the grounds on which the AIRC can suspend or terminate a bargaining period, and creating a new power for the Minister for Employment and Workplace Relations to suspend or terminate a bargaining period in particular circumstances, such as where industrial action threatens life or personal health and safety and adversely affects the employer and possibly other employees, or where it threatens significant damage to the Australian economy;
- retain a system of awards that will be simplified to ensure that they provide minimum safety net entitlements;
- provide where employees move to a new employer on transmission, for the transfer of industrial instruments to a successor, assignee or transmittee employer, for a maximum period of 12 months (with the exception of Australian Pay and Classification Scales) and to oblige new employers to give notification to transferring employees. Additionally, to provide for the transfer of certain entitlements accrued under the Standard to a successor, assignee or transmittee employer;
- protect certain award conditions (public holidays, rest breaks (including meal breaks), incentive-based payments and bonuses, annual leave loadings, allowances, penalty rates, and shift/overtime loadings) in the agreement making process so that these conditions can only be modified or removed by specific provisions in an agreement;
- preserve specific award conditions (long service leave, superannuation, jury service and notice of termination) for all current and new award reliant employees, and permit other award conditions (annual leave, personal/carer's leave, parental leave) to apply to current and new award reliant employees if they are better than the conditions provided in the Standard;
- encourage employers and employees to resolve their disputes without the interference of third parties by introducing a model dispute settlement procedure that includes a range of dispute settling options for all award and Standard reliant employers and employees, and employers and employees covered by agreements that do not contain dispute settling procedures;
- improve protections for employers and employees by extending the compliance regime in the WR Act to cover the Standard, agreement making,

and State award and agreement reliant employers and employees that are brought into the national system; and

- put in place comprehensive transitional arrangements for employers and employees entering the federal system and employers and employees currently in the federal award system who will not be covered by the new federal system.

Description of the legislation

1.34 At its heart, this bill seeks to create an integrated national workplace relations system. At the present time, employers and employees must contend with confusing, unfair and expensive multi-jurisdictional arrangements, containing perverse incentives for parties to confect disputes that encourage acrimony and continuing disputes between employers and employees, often driven by a third party.

1.35 This legislation seeks to encourage a more direct relationship between employers and employees, based on mutual needs and desires and reflecting the importance of flexibility for both parties in the modern employment relationship. As it currently stands, the system is characterised by conflict, inflexibility, waste, and slowness, all of which have impeded employment and economic growth and development for many years.

Simplified agreement making and wage setting

1.36 This bill allows for the formation of a new and simplified wage setting system, which is discussed in more detail in Chapter 3 of this report. The AFPC which will be established under this legislation, will set and adjust minimum and award classification wages, along with minimum wages for juniors, trainees, apprentices, and employees with a disability. The Commission will also determine wages for piece workers and casual workers.

1.37 The AFPC will adopt a consultative evidence based approach rather than the existing adversarial and legalistic approach. The new system will have as its primary objective the promotion of economic prosperity. This will involve an assessment of what is required to encourage the unemployed and low paid to enter and remain in employment, which is the threshold issue if their circumstances are to improve.

1.38 Minimum and award wages will be protected at the level set after the AIRC's 2005 Safety Net Review. Minimum and award wages will not fall below this level, and the AFPC will decide the timing, implementation, frequency and size of future increases. This approach reflects the fact that the Fair pay Commission is an independent body, and the need for employment arrangements to remain responsive to changing economic conditions.

1.39 The legislation will simplify new awards, and remove from them provisions which are already provided for in other legislative entitlements, such as jury leave, superannuation, notice of termination, and long service leave. However, where these

conditions are in existing awards, they will continue to operate for both existing and new award covered employees. An Award Review Taskforce will be established to simplify award classifications so that they may be more easily understood by the people who need to work with them: employers and employees. Both of these measures aim to improve access to awards and to demystify their contents for those who rely on them.

1.40 One of the primary tenets of the bill is the simplification of agreement making between employers and employees, with a view to encouraging parties to negotiate to achieve the best and most efficient employment relationship possible in their individual circumstances. The agreement making process is discussed in Chapter 3.

1.41 The new system will allow for collective agreements and AWAs to be lodged with the Office of the Employment Advocate (OEA), together with a statutory declaration attesting that the agreement was made in accordance with the law. The agreements or AWAs will be valid immediately on lodgement. The committee majority notes a number of submissions from organisations supporting the bill which are critical of current delays in the implementation of AWAs. The committee notes that the provisions in providing for more streamlined processes will result in a vast improvement over the current time consuming and overly process-driven rules which govern the lodgement and approval of agreements. The new system will reduce delays and uncertainty for both employers and employees, and will ensure that once an agreement is lodged, the parties will have the employment relationship they really want. The OEA will be available to provide advice to parties during the negotiation process.

1.42 The improved compliance regime will ensure that employers meet the procedural requirements under the law, and meet the Australian Fair Pay and Conditions Standard. These rules will govern the negotiation, lodgement and content of agreements.

1.43 Agreements must reflect the minimum conditions of employment as set out in the Australian Fair Pay and Conditions Standard which provides for protection of annual leave, personal or carer's leave (including parental leave), parental leave (including maternity leave), and maximum ordinary hours of work. These, along with the minimum wage and award classifications to be determined by the AFPC will constitute the Australian Fair Pay and Conditions Standard.

1.44 Other employment conditions will be protected through the agreement making process, but can be the subject of bargaining between employers and employees. Unless specifically dealt with in an agreement, public holidays, rest and meal breaks, incentive based payments, annual leave loadings, allowances, penalty rates and shift/overtime loadings will continue to operate consistent with any applicable award.

Evolving role of the AIRC

1.45 Much has been made of the change in focus which this bill brings about for the AIRC. The objective of the changes is simple: to facilitate accessible, expedient

and consensual dispute resolution, and to lay primary responsibility for the satisfactory resolution of workplace problems at the feet of the parties directly concerned: the employer and employee.

1.46 While the AIRC will no longer exercise compulsory powers of conciliation and arbitration or wage setting, it will remain an important player in resolving disputes, should the parties desire it, during the negotiating process and during the term of an agreement. Parties will also have the opportunity to nominate a dispute resolution service other than the AIRC to have their grievance heard. The express consent of parties to the AIRC's involvement in a dispute is a key factor which characterises the AIRC's role into the future, and distinguishes it from the current arrangements.

1.47 In addition, the AIRC will remain empowered to act in respect of bargaining periods, and in stopping unprotected industrial action. The AIRC will be responsible for issuing a Workplace Determination where a bargaining period has been terminated on public interest grounds, such as for the purposes of preserving essential services or to prevent undue economic damage. It will also provide an initial conciliation service where an unlawful termination claim has been made.

1.48 The AIRC will also retain a role in respect of transitional awards. Importantly, it will be the role of the AIRC to implement award rationalisation measures once the findings of the Award Review Taskforce have been considered by government.

1.49 The committee majority identifies the alternative dispute resolution mechanisms as a particular strength of the legislation. Rather than relying heavily on the AIRC, awards and agreements will contain a model Dispute Settling Procedure (DSP) which will set in place a 'staged' process so that, wherever possible, disputes will be settled at the workplace level before they require involvement by formal bodies such as the AIRC. Nonetheless, where required and where nominated by the parties as the body of choice, the legislation provides that AIRC will provide dispute resolution services as it has done previously.

Unions and other registered organisations

1.50 The committee notes a certain amount of comment about the alleged 'anti union' tone to the Work Choices Bill. This is not an 'anti union' bill. This legislation will preserve the proper role of unions and other employee and employer organisations in the workplace. The Government recognises the important role played by unions and employer organisations. These functions will be preserved under the legislation. It will remain possible for unions to be appointed as bargaining agents on behalf of employees negotiating either collective or individual agreements.

1.51 Employees will continue to have the right to join, or not join, a union, and cannot be discriminated against for doing so. This right to freedom of association extends also to other freedoms currently enjoyed by employees, such as refusing to vote for or agree to a certified agreement, participating in proceedings under industrial law, and being a union official.

1.52 The Work Choices Bill will provide new functions for the Australian Industrial Registry[19], including approving right of entry notices, conducting 'fit and proper person' tests in relation to the issuing of a permit, keeping records relating to secret ballots and publishing the results of ballots. State registered organisations will be required to satisfy the Industrial Registrar that they are an existing state-registered organisation prior to being allowed transitional status as a registered body, and will be able to obtain full registration once they have fully complied with provisions of the WR Act within 3 years. Bodies which are substantially or effectively part of a body which is already federally registered will be disallowed from obtaining full registration.

1.53 Importantly, the grounds upon which a registered body may be deregistered have been expanded to include, for instance, breaches of court orders in relation to freedom of association provisions, financial reporting obligations, or conduct which seeks to prevent registration of a new organisation.

Unlawful termination

1.54 The jurisdiction and role of the AIRC with respect to unlawful termination will remain largely unchanged by the legislation.

1.55 Current remedies for unlawful termination will remain and be strengthened under the legislation. It will remain illegal to dismiss an employee based on temporary absence from work due to illness or family responsibilities, trade union membership, objection to signing an AWA, or pursuing a complaint against the employer. In addition, race, colour, sex and sexual preference, age, disability, marital status, religion, political opinion, social origin, pregnancy and family responsibilities will remain unlawful grounds for dismissal.

1.56 An important policy initiative for employees seeking redress for unlawful dismissal is the Government's provision of up to $4 000 for independent legal advice for eligible applicants who have a meritorious case and have exhausted conciliation options. The government is aiming to ensure that unlawful and unfair dismissals are minimised by investing $5 million in education and training for employers on fair and proper termination practices.

Transitional arrangements

1.57 The transitional provisions of the legislation are probably the most complex aspect of the bill. The committee was told that the full transition will take five years, but at the end of that time, a far more streamlined and 'slimmed-down' act would emerge. The legislation provides for two separate transitional systems. The first

19 The Australian Industrial Registry was established under the *Workplace Relations Act 1996* to act as the registry to and provide support to the Australian Industrial Relations Commission, and to provide advice and assistance to organisations in relation to their rights and obligations under the Act

concerns constitutional corporations moving from the state to the new federal jurisdiction. Current wages and conditions under state awards or agreements will continue to apply for up to the three year transitional period. In the case of both state awards and agreements, the terms and conditions contained would remain in effect until they expire or are superseded by a new federal agreement, although in the case of award pay and conditions that are inferior to the provisions of the new Fair Pay and Conditions Standard, the relevant provisions of the Fair Pay and Conditions Standard will prevail. In either case, parties will be free to negotiate a new federal agreement at any stage during the transitional period. In the event that state agreements or awards transit to the Commonwealth system and a new agreement has not been made, applicable Commonwealth award provisions will apply.

1.58 In the case of employers and employees currently in the Commonwealth system where the employer is not a constitutional corporation, a five year transitional period will apply to current federal collective agreements, during which period employers may incorporate, in which case a new federal agreement will be made at the end of the transition period. In the case that employers do not wish to incorporate, and the transition period expires, they will transit to the state system. In the case of awards, a similar transitional period will apply, and at the conclusion of that period any employer remaining unincorporated will transit to a state system.

1.59 The AIRC will retain a limited power to vary wage rates and other entitlements in awards being operated by unincorporated corporations during the transition period, but will be unable to bind new parties to the award.

Conclusion

1.60 The objectives of the Work Choices Bill, foremost of which is ensuring Australia's future prosperity, are consistent with the trend and intent of previous Government policies. The following chapters examine the benefits of the move to a unitary industrial relations system, and address matters of concern expressed to the committee during the inquiry.

Chapter 2

Creating a national workplace relations framework

2.1 Provisions for the transition from a federal to a national system of workplace regulation is perhaps the most significant feature of the Work Choices Bill. The bill will move Australia towards a national workplace relations system which is vital if Australia is to maintain its current level of economic prosperity. For over 100 years the federal framework for workplace relations has been based on the conciliation and arbitration power of the Australian Constitution.[1] The Commonwealth Workplace Relations Act is primarily, but not exclusively, based on section 51 (xxxv) of the Constitution, which provides that:

> The Parliament shall … have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

2.2 The inclusion of the conciliation and arbitration power was provoked by bitter memories of the strikes of the early 1890s. It was argued that this conflict, extending as it did beyond the borders of a single state, required the exercise of Commonwealth laws for protection of the national interest. Agreement, by a narrow majority, to the use of compulsory conciliation and arbitration powers to prevent and settle future conflict, and avoid its disruptive effects, resulted in the form of words contained in section 51 (xxxv).

2.3 By the time of federation, all states had established conciliation and arbitration tribunals or wages boards to deal with industrial disputes. However, delegates to the Constitutional Conventions of the 1890s considered that the states were poorly equipped to deal with interstate disputes, such as those that had occurred during the 1890s. It was felt that the Commonwealth should establish machinery to deal with such matters, subject to limitations, and without prejudice to the powers to be held concurrently by the states. Thus, the wording of the provision has been interpreted by the High Court to impose the following limitations:

- the Commonwealth Parliament cannot directly legislate on workplace relations, but can provide for third party tribunals;
- the tribunals set up by the Commonwealth can only use particular mechanisms (conciliation and arbitration) for particular resolutions

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1 Apart from quoted sources, this chapter has been informed by a number of published sources, most notably *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*, Commonwealth of Australia, October 2000, Discussion Papers 1-3, available at http://www.workplace.gov.au/NR/rdonlyres/48BB420E-C218-4676-B713-98C2C2030DA0/0/breakingthegridlock_casechangecase.pdf

(prevention and settlement) to particular types of disputes (which must be both 'industrial' and 'interstate' in character); and

- the Commonwealth's power is not comprehensive, and overlaps with that of the states.[2]

2.4 The limitations inherent in the provision have resulted in a number of undesirable outcomes, insofar as the Commonwealth is obliged to legislate alongside the states, giving no jurisdiction an opportunity to provide for a comprehensive, efficient and integrated system. One of the primary drawbacks has been the difficulty in ensuring widespread and effective safety net coverage and compliance.

Inconsistency of result

2.5 Concurrent powers have resulted in employees coming within either the Commonwealth or state jurisdiction in regard to awards and dispute resolution processes. Employees and employers can change from one award jurisdiction to another, if it is to the advantage of either. Problems arising from a multiplicity of awards are compounded by the multiplicity of systems and tribunals. This has meant that the field of workplace relations in Australia has been divided between interstate matters, which are the province of the Commonwealth, and intrastate matters, which by and large cannot be dealt with by the Commonwealth and must be dealt with by each state

2.6 Unsurprisingly, the existence of more than one body regulating the same broad subject matter is likely to bring about different outcomes. This situation can result from the nature of the submissions made, the guiding principles used or the perceptions and values of different parties, both presiding over and appearing before the body. The different outcomes can result in workplace relations difficulties, most notably unequal treatment of those appearing before the body, or at least the impression of this, and declining confidence in the overall system.

2.7 The practical effect of this disharmony between systems is that, within one workplace, it is not uncommon to find federal awards applying to some employees while state legislation and industrial awards apply to other workers. This creates added administrative expense for the employer, and makes the propagation of a united and harmonious workplace much more difficult to achieve, which in turn is harmful to productivity.

Duplication, complexity and cost

2.8 The obverse of this is the duplication and complexity involved in the operation of multi-jurisdictional systems. There are currently over 130 pieces of industrial legislation and almost 4000 awards across state and federal jurisdictions. It is therefore self evident that the maintenance of dual systems involves additional costs

2 George Williams, *Labour Law and the Constitution*, The Federation Press, Sydney, 1998, p.43

for taxpayers. According to figures provided by the Department of Employment and Workplace Relations, the various state industrial relations systems cost the following amounts to maintain per year:

NSW:	$39,146,000	(2004/05)
Qld:	$33,228,000	(2002/03)
WA:	$18,162,000	(2002/03)
SA:	$16,351,000	(2003/04)
Tas:	$2,075,000	(2002/03)

Based on these figures, around $109,000,000 per year is spent on state systems which replicate the role of the federal system.

2.9 Businesses face higher costs where they have to deal with multiple jurisdictions. Duplication and overlap adds to complexity and confusion. This undermines the effectiveness of the award safety net and creates difficulties for agreement making.

2.10 Determining which award applies to which employee requires an employer to be able to determine which of a number of overlapping factors prevails in law. These factors can include:

- geographic location of employment;
- class of occupation of the employee;
- industry basis of the employment;
- whether or not the employer has been roped into a federal award, for all or part of their workforce;[3]
- whether there is an applicable state or territory common rule award; and
- whether the employer is a member of a relevant employer association.

2.11 The conciliation and arbitration power is also built on the outdated notion that employers and employees must be in dispute before they can work out arrangements that best suit them. It creates non-existent disputes by legal fictions, in order to then solve them. For instance, the conciliation and arbitration power requires that there be a dispute (or at least a potential dispute) to settle, and this had led the parties to contrive disputes (known as 'paper disputes') in order to come within the federal system.

2.12 Professor Andrew Stewart has described the consequences in this way:

> …while the federal award system has assumed a much greater coverage than might have been expected by the framers of the Arbitration power, its

3 'Roping in' involves an order being made by the Australian Industrial Relations Commission with the express purpose of extending the coverage of an existing award. A roping in award may be a mirror image of the original award, or may vary the original award by adding to the list of respondents

> reach will always be limited if based only on that power. Since interstate disputes rarely occur spontaneously, federal award coverage is constantly dependent on unions manufacturing appropriate paper disputes. With some unions content to have state awards for some or all of the occupations or industries they cover, the result is a patchwork of regulation which causes particular inconvenience for employers who have workers covered by both federal and state instruments.[4]

2.13 Critically, the concept of arbitration, which is central to this power, requires that there be *identified parties* to a dispute. The practical consequence of this is that it has not been possible to make Commonwealth 'common rule' awards—awards which would bind every employer in an industry, whether named in the award or not. The inability to make common rule awards under the conciliation and arbitration power has created a range of significant problems. Most seriously, it has compromised the availability of safety net arrangements, and has also necessitated costly roping-in exercises, which can be bewildering to those unfamiliar with the system.

2.14 The existence of Commonwealth and state systems inevitably raises jurisdictional issues, which can be costly and difficult to resolve, and can result in delays in handling the real issues in dispute. The operation of more than one tribunal can also encourage 'forum shopping', where parties seek to gain from another tribunal what they have been denied or refused in their traditional area of industrial coverage. Such moves are also commonly associated with costly legal argument about jurisdictional issues.

2.15 Despite the progress that has been made, the workplace relations system remains very complex and further reform to make the system simpler, more accessible and more effective is hamstrung by reliance on the conciliation and arbitration power. Reliance on that power prevents the achievement of a more coherent national framework of laws. It also limits the Commonwealth government's ability to deliver an effective safety net with broader coverage. It is for this reason that the government relies predominantly on the corporations power as the basis for the legislation currently under examination by this committee.

The corporations power

2.16 In the *Pacific Coal* case Gaudron J said that she had 'no doubt' that the corporations power:

> … extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations. [5]

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4 Professor Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power', in ACIRRT Working Paper Series, and in papers from Industrial Relations Forum Proceedings, Business Council of Australia, Melbourne, 17 October 2000, p.32

5 *Re Pacific Coal; Ex Parte CFMEU* (2000) 203 CLR 346, [at 83]

2.17 In the *Electrolux* case, Kirby J (in dissent) referred to the capacity of the corporations power to provide a basis for regulating workplace relations under the current Workplace Relations Act, and said:

> Even more important is the signal given in s.170LI(1) that the relationship in question is one between an employee and an 'employer who is a constitutional corporation'. This makes it clear that the Parliament had decided to cut the Act loose from the controversies arising in the past from implied limitations considered inherent in the notions of an 'industrial dispute', as that phrase is used in s 51 (xxxv) of the Constitution, and to substitute new and additional reliance on the relationships of an employee with a corporation qualifying as envisaged by s 51 (xx) of the Constitution. In a stroke, a new constitutional foundation for federal regulation is created. It is no longer necessary to read into the resulting employment 'relationship' limitations, broad or narrow, adopted for constitutional reasons in past cases such as *Portus* and *Re Alcan*. The Parliament has thus embraced a new constitutional paradigm.[6]

2.18 Under the Government's proposal, it was estimated that around 800 000 employees not currently regulated by the federal system will be brought within an award system for the first time, and as many as 85 per cent of all employees will be covered by the national system. It was estimated by the Department of Employment and Workplace Relations in 2000, that under a system as proposed in the bill before the committee, the federal jurisdiction could expand from an estimated 30 per cent of employees to an estimated 80 per cent, or about 1.9 million employees, with the jurisdiction of states likely to contract to about 20 per cent (466 000 employees). It is estimated that South Australia would see 79 per cent of all employees the federal system, while about 76 per cent of Queensland employees, 80 per cent of Western Australian employees and 72 per cent of Tasmanian employees would, it was estimated, be covered by the new system.[7]

2.19 It was further estimated that over 90 per cent of employees in the industries of mining, manufacturing, wholesale trade, transport and storage, communication services, finance and insurance, and property and business services could be drawn into the proposed system. The new system will cover an estimated 6.1 million of Australia's 7.15 million (non-farm) employees. This is 85 per cent of the total population of (non-farm) employees. Of this, around 800,000 will be employees who are currently award or agreement free. This will leave approximately 15 per cent of employees under one of the remaining state jurisdictions, with the majority of those being in New South Wales and Queensland.[8]

2.20 Of course it would be open to states to follow the lead of Victoria and refer workplace relations powers to the Commonwealth, enabling the Commonwealth to

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6 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 [at 216]

7 *Breaking the Gridlock*, op cit.

8 See also Department of Employment and Workplace Relations, *Submission* 166, p.12

include all businesses and employees in the state in the one national system.[9] This would have the obvious effect of amplifying the benefits of a national system which have been outlined in this section. The committee notes that the transfer of state powers in Victoria by the Kennett Liberal Government was not reversed by the Labor Government which was elected in 2001. The resistance of state governments to the national system, and their apparent determination to challenge the legislation in the High Court probably owes more to the machinations of state political organisations than to anything else.

2.21 Importantly, the new national system will cover all employees of constitutional corporations, based on the status of the employer, rather than on the fact that an interstate dispute, actual or contrived, has arisen between an employer and employee. Instead, it will depend on the legal character of the employer, as a constitutional corporation, and the relationship of employees with the corporation. As a result after the transitional period employers and employees will, under the legislation, be located in either the federal system (corporations), or in the state system (non-corporations). A summary of the effect of the bill on both incorporated and unincorporated employers operating a under a variety of employment arrangements is contained at Appendix 6.

2.22 Another important benefit of a system based on the corporations power is in the capacity of the Commonwealth to legislate directly about minimum terms and conditions of employment. Essentially, the High Court has found that under the conciliation and arbitration power, the Commonwealth can only establish tribunals to arbitrate on terms and conditions between the parties. The Commonwealth cannot itself establish such conditions using that head of power. That function has to be performed by a third party. The corporations power is different. Using that head of power, the Commonwealth parliament will, under the legislation, directly legislate for the setting by the Australian Fair Pay Commission of minimum and award wages and the conditions of employment of all employees of constitutional corporations through the Australian Fair Pay and Conditions Standard.

2.23 The concepts of paper disputes, roping in and the ambit of a dispute, so bewildering to many employers and employees (especially in small business), will be rendered obsolete. The problems associated with the need to have identified parties to a dispute (and thus to an award) will disappear. In the longer term, awards will be capable of being made on a common rule basis. That is, they could be made to operate, not so they bound a list of thousands of employers and the thousands of employer members of a handful of employer associations, but so they bound all employers in an industry.

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9 At least one witness considered this a likely possibility. See, for example, Mr Peter Hendy, *Committee Hansard*, 15 November 2005, p.49

The question of constitutionality

2.24 Use of the corporations power in the industrial arena is now largely uncontentious and was approved by the High Court in connection with industrial matters in the 1990s in two leading cases involving challenges to the (then) Industrial Relations Act.

2.25 The *Workplace Relations Act 1996* relies on the corporations power and the 'constitutional corporation' concept, including in relation to freedom of association, the making of certified agreements and the institution of unfair dismissal claims.

2.26 The corporations power was used to underpin Enterprise Flexibility Agreements (EFAs) in the *Industrial Relations Reform Act 1993*. This move was supported by the ACTU, who also supported the Keating government's expansion of enterprise bargaining in this way, with the caveat that it was opposed to the introduction of non-union enterprise agreements.

2.27 In his second reading speech for the *Industrial Relations Reform Act 1993*, Laurie Brereton said that:

> Selective use in the federal jurisdiction of the corporations power will allow any matter pertaining to the employment relationship to be covered by agreement … [T]he operation of enterprise flexibility agreements will be supported by the use of the corporations power. This removes the requirement for an interstate dispute and makes the arrangements more accessible.[10]

2.28 In a country of Australia's size operating in the international economy it is utterly and profoundly irrational, not to say inefficient to seek to maintain six different systems of workplace regulation.

10 Hon. Laurie Brereton, Minister for Industrial Relations, *House Hansard*, 28 October 1993, p.2777

Chapter 3

Issues of contention

3.1 In May 2005 the Prime Minister and Minister for Workplace Relations announced that the Government intended to introduce further workplace relations reform. A large-scale public misinformation campaign was initiated by opponents of workplace relations reform. The claims about Work Choices made in Parliament and the media, particularly those made by some members of the Opposition and union representatives, have been baseless attempts at scaremongering.

3.2 This chapter identifies the main areas of the government's policy which have come under fire from opponents, and addresses the criticisms in turn. It corrects much of the misinformation which has surrounded debate on Work Choices, and places the policy in a realistic and factual context.

Background to the legislation

3.3 The Work Choices Bill has not materialised quickly. Since the passage of the Workplace Relations Act in 1996, the Coalition has attempted follow-up legislative reform through a series of amendments necessitated by experience in the 'bedding down' of the WR Act. It has had limited success. The extensive omnibus amendment bill introduced in 1999, the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, well-known by its shorthand title, MOJO, was the first attempt. This bill was eventually laid aside in the Senate and in later years was broken up into constituent areas of policy to be legislated for separately. A descriptive listing of bills submitted in this way is to be found in Appendix 5 of this report.

3.4 While the size and scope of the Work Choices Bill has provoked comment and criticism from a number of quarters, it should be recognised that the bill contains, among other provisions, the consolidation of nine years of previously debated legislation.

3.5 It is not therefore true that the provisions of the bill have been subject to restricted debate. While some provisions of the bill may be relatively new, the Government has previously introduced various bills into Parliament that dealt with many of the matters covered by the Work Choices Bill. There is no basis upon which to claim that most of the important reforms contained in Work Choices are a surprise. Those elements of the Work Choices Bill not the subject of this inquiry have been previously examined (at least once) by 14 separate Senate inquiries. In addition the Government has attempted to change the unfair dismissal laws in the WR Act at least 41 times since 1996.

3.6 Two elements of the legislation not previously seen are the provisions establishing the Australian Fair Pay Commission (AFPC) and changing the scope of operation of the Australian Industrial Relations Commission (AIRC). Yet the

Government's view of the need to revise the role of the AIRC, in relation to the setting of minimum and award classification wages, has been known for years. The establishment of the AFPC, loosely based on the UK Low Pay Commission (established in 1997), was first announced on 26 May 2005.

3.7 The most important element in the Work Choices Bill, and the most complex, is the set of provisions that create a national workplace relations regime, in place of six different state and federal regimes. The current federal system rests primarily on the concurrent powers in the Constitution in section 51 (xxxv), known as the conciliation and arbitration power. The basis for the national scheme rests on section 51 (xx), known as the corporations power. This change alone makes it the most important bill in the field of industrial relations since the passage of the *Conciliation and Arbitration Act 1904.* As responsibility for national economic policy is obviously a matter for the Commonwealth, it follows that labour policy, which is inextricably linked to economic policy, should be a matter which is regulated at a national level.

3.8 The committee concurs with the Australian Industry Group's views that while workplace reforms are necessary, they do not assume more importance than global economic trends in determining economic success. But there is strong evidence that productivity improvements come from workplace relations reform and deregulation. International bodies such as the Organisation for Economic Co-operation and Development (OECD) and the International Monetary Fund (IMF) have linked increased labour market flexibility to productivity growth.[1] This has been the commonly shared experience of OECD countries. The OECD commented that the Government's structural economic policy reforms in the last decade 'conferred an enviable degree of resilience and flexibility on the Australian economy' and resulted in a prolonged period of good economic performance.[2] Evidence from the Productivity Commission and a number of independent academic researchers also shows that the adoption of flexible workplace relations arrangements through previous reforms has led to improved productivity.[3]

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1 International Monetary Fund (IMF), *IMF Survey*, October 2005; IMF letter to the ACTU President Sharan Burrow, http://www.imf.org/external/np/vc/2005/102705.htm; Organisation for Economic Co-operation and Development (OECD), *Policy Brief: Economic survey of Australia, 2004.*

2 OECD, *Policy Brief: Economic survey of Australia, 2004*, p. 2.

3 Productivity Commission, *Microeconomic Reforms and Australian Productivity: Exploring the Links, Volume 2: Case Studies*, Research Paper, Ausinfo, 1999; *Productivity in Australia's Wholesale and Retail Trade*, Productivity Commission Staff Research Paper, Ausinfo, 2000; T. Fry, K. Jarvies and J. Loundes, *Are Pro Reformers Better performers?*, Melbourne Institute Working Paper, No.18/02, September 2002; Y-P Tseng and M Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, Melbourne Institute Working Paper, No.8/01, July 2001; G Connolly, A Herd, K Chowdhury and S Kompo-Harms, *Enterprise bargaining and other Determinants of Labour Productivity*, Paper presented at the Australian Labour Market Workshop 2004, University of Western Australia, http//www.clmr/uwa.edu.au

3.9 Despite the incontrovertible evidence that the labour market reforms implemented from the mid-1990s to the present have improved economic performance and resulted in higher real wages, some commentators continue to assert that further labour market reforms are unnecessary. Nor, they argue, will it lift productivity and hence the living standards of working people. The Government continues to take the view that further reform will produce worthwhile increases in efficiency, competitiveness, and living standards. It is clear to the Government, as it is to the committee majority, that there is more work to be done if Australia is to continue its enviable economic record.

3.10 A concern often cited by opponents of reform is that the workplace relations changes implemented over the last decade have led to wider income disparity, and that the reforms in the Work Choices Bill will further increase inequality. In fact, the Household Income and Income Distribution report, released by the Australian Bureau of Statistics (ABS) on 4 August 2005, shows that there was no significant change in income inequality between 1994 and 2003-04.[4]

3.11 Furthermore, the OECD's *Innovations in Labour Market Policies – the Australian Way* also noted that during the 1980s (before the introduction of enterprise bargaining), real wages fell, particularly in the case of low-wage workers; while after workplace relations reform was started in the 1990s, real wages increased across the earnings distribution. There now exists an immediate need for further workplace relations reform in order to ensure that both corporate productivity and individual wealth can continue to expand into the future.

The economic imperative and the need for further reform

3.12 Although previous reforms produced significant improvements in economic indicators, Australia is beginning to fall behind in international productivity levels. In its 2004 economic survey of Australia, the OECD commented that productivity levels were well below those recorded in other OECD countries, as were participation rates among some working-age population groups.[5] In addition, data from the ABS show that productivity rates fell during the 2004-05 financial year for the first time in a decade.[6] In October 2005, labour force participation rates declined and unemployment increased. The productivity lag and looming demographic challenge must be addressed by more extensive labour market reform.

3.13 The OECD recommended that further reform was needed to make the labour market function more effectively. It recommended promoting the negotiation of wages and conditions at the enterprise and individual levels and removing disincentives to hiring, particularly of low skilled workers. Other recommendations included

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4 Australian Bureau of Statistics (ABS), *Household Income and Income Distribution 2003-04, Australia*, 2005; Australian Industry Group (AiG), *Submission 172*, p. 9.

5 OECD, *Policy Brief: Economic survey of Australia, 2004*, pp 2-3.

6 ABS, *Australian System of National Accounts 2004-05*, Cat. No. 5204.0.

improving education and training, and creating stronger incentives for workforce participation, particularly for older workers.[7]

3.14 Along with the OECD and the IMF, many other groups and commentators support further reform of the workplace relations system, including the Business Council of Australia, the Australian Industry Group (AiG) and the Australian Chamber of Commerce and Industry (ACCI).[8] ACCI's submission to this inquiry provides a comprehensive discussion of the economic evidence of the benefits of previous reforms and the case for further reform. ACCI cites 54 examples of Australian and international economic studies and commentaries supporting the type of reform proposed by the Work Choices Bill.[9]

3.15 A recent report produced by Access Economics for the Business Council of Australia entitled *Locking in or Losing Prosperity: Australia's Choice*, concludes that each Australian could be $70,000 wealthier if further change to workplace participation rates and economic change, including workplace relations reform, is undertaken.

3.16 The report argues that without previous reforms to the workplace relations system, unemployment would have averaged 8.1 per cent in 2003-04 rather than 5.8 per cent, and an extra 315,000 people would have been out of work. The report concludes that Australia faces the choice of being a low growth (2.4 per cent annually) or high growth (4 per cent) country.

3.17 Achieving 4 per cent 'would not require a program of radical reform', according to BCA chair Hugh Morgan. It would merely require an 'extension' of changes already put in place over the past 20 years.[10]

3.18 The Australian Industry Group provided evidence to the committee that the current framework is overly prescriptive and that changes are necessary 'to align the workplace relations system with the circumstances of modern industry'.[11] The AiG conducted a survey in mid-2005 regarding workplace relations reform. Of the more than 700 employers who responded, 68 per cent said that the existing system had no effect on their ability to improve productivity, 13 per cent said it had a negative effect and only 19 per cent said it had a positive effect on their ability to improve

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7 OECD, *Economic survey of Australia, 2004*, pp 2-3.

8 Mr John Kovacic, *Committee Hansard*, 14 November 2005, p. 9

9 ACCI, *Submission 153*, pp 7-21.

10 *Locking in or Losing Prosperity: Australia's Choice,* Business Council of Australia, August 2005

11 Ms Heather Ridout, *Committee Hansard*, 14 November 2005, p. 43; DEWR, *Submission 166*, p. 6.

productivity.[12] These results highlight the need for reforms that allow agreement making to drive productivity.

3.19 International authorities have also supported the need for further workplace relations reform. The Organisation for Economic Cooperation and Development (OECD) recently concluded that:

> Further unfinished business includes harmonisation of federal and state industrial relations and the streamlining of regulations which minimise the incidence of unlawful industrial action. Finally, the cost of dismissal procedures, including for employees who have been with firms for only a short period, is often cited by small businesses as a disincentive to hiring. The Government is now in a position to address these issues and should proceed as soon as practicable. [13]

3.20 Further reform is also needed to address ageing-related constraints on the future labour supply by removing barriers to greater participation in the workforce. Higher participation rates among people of working age will become more important as the population ages and the fertility rate remains below replacement levels. While there are currently about five times as many people of traditional working age as there are those over 65, projections indicated that in 40 years, there will be 40 people over 65 for every 100 people of traditional working age.[14]

3.21 It is clear that Australia needs a national workplace relations system which enables companies to remain highly adaptable and flexible to meet demographic challenges and remain competitive in the global economy.

Changed role of the AIRC

3.22 Under the Work Choices Bill, the AIRC will have responsibility for simplifying awards, regulating industrial action, registered organisations and right of entry, and a continuing role in relation to termination of employment. The AIRC will continue to resolve disputes and will have specific powers relating to that function. The Australian Fair Pay Commission, which is discussed below, will take on the AIRC's wage setting role.

3.23 The WR Act maintained the role of the AIRC which it inherited from the old Conciliation and Arbitration Commission, even though the Government at the time believed it was no longer appropriate to invest a dispute resolving body with wage fixing powers.

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12 Ms Heather Ridout, *Committee Hansard*, 14 November 2005, p. 44; AiG, *Submission 172*, p. 43

13 OECD *Economic Survey of Australia*, February 2005

14 AiG, *Submission 172*, p. 13; ACCI, *Submission 153*, p. 8.

3.24 Critics have interpreted the reduced role of the AIRC as an attack on the maintenance of award and minimum wages. But the establishment of the Fair Pay Commission and the changed role of the AIRC are designed to address problems with the current system. Witnesses from ACCI elucidated some of the shortcomings of the AIRC wage case process from an employers' perspective. The ACCI argued that the legalism and the adversarial characteristics of the quasi court case process of the AIRC is directly damaging to the outcomes for the individuals who are covered by minimum wages, those out of work, for the employers and for the economy generally.[15]

3.25 ACCI went on to say that the current system provides for legal arbitration, rather than economic analysis. ACCI's chief executive couched the situation in terms of conflict:

> Unfortunately, it is [a situation] where you have one group saying, 'The minimum wage should be over here,' and another groups saying, 'It needs to be there,' because the actual way that they make their decisions is by splitting the difference somewhere in the middle … With the Work Choices bill we are seeing a proposal which we have now been promoting for a number of years: we should have an economic analysis that takes into account, for example, the plight of the unemployed – some half a million or more people in this country who do not get a look in the minimum wage cases as they are run today.[16]

3.26 The National Farmers' Federation agreed, saying that:

> It is really two third parties that impact on how we operate on the farms. It is not only the AWU but, more importantly, it is the Australian Industrial Relations Commission. Particularly through national test cases they prescribe prescriptive provisions within all awards to make employers undertake certain work practices regardless of the needs of the individual workplace.[17]

3.27 The details of the Government's proposal demonstrate that the fears of critics are unfounded, as discussed below in relation to the Australian Fair Pay Commission. It is not the proper role of the AIRC to involve itself with wage fixation and awards, but rather to concentrate on its original purpose: solving industrial disputes.

The Australian Fair Pay Commission

3.28 The role of the AIRC in wage setting will be transferred to the Australian Fair Pay Commission. It will have responsibility for determining changes to the new Federal Minimum Wage (FMW) and award classification wages.

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15 Mr Scott Barklamb, *Committee Hansard*, 15 November 2005, p. 40.

16 Mr Peter Hendy, *Committee Hansard,* 15 November 2005, p.43

17 Mrs Denita Wawn, *Committee Hansard,* 15 November 2005, pp. 27-28

3.29 The objectives of the Fair Pay Commission will be to promote the economic prosperity of the people of Australia, having regard to a number of considerations laid down in the legislation. The first of these considerations is the capacity for the unemployed and low paid to obtain and retain employment. The Fair Pay Commission will ensure that the unemployed and low paid are not priced out of the labour market. This recognises the importance of being employed and of gaining experience and making progress in the labour market. To this end, the Fair Pay Commission will also be responsible for encouraging employment and competitiveness across the economy.

3.30 The Fair Pay Commission's central role will be the maintenance of a 'safety net' in the form of a set of minimum wages, not simply for the low paid, but for young workers, workers with a disability, and workers for whom training provisions apply.

3.31 These provisions are grounded in economic necessity. Employers are forced to compete against both domestic and international competitors, and operate in fluctuating markets. This means that, while recognising the critical importance of retaining a realistic set of minimum wages and conditions, consideration must also be given to maintaining the competitiveness of the variety of workers in the labour market and encouraging more unemployed people to join the workforce. This bill seeks to bring about measured change. It will establish a balance between ensuring that there exists the required flexibility and competitiveness within the labour market, while at the same time shielding those workers who require protection.

3.32 An important feature of the Fair Pay Commission, which distinguishes it from the AIRC is its method of inquiry. The practices of the Fair Pay Commission will enable a more consultative approach to pay setting in Australia. Wage reviews will be an inclusive process, and the Fair Pay Commission will be able to consult any interested stakeholders (for instance, the unemployed) rather than just those industrial players with a direct stake in the outcome. Importantly, the Fair Pay Commission will be able to undertake and commission research, and monitor and evaluate the outcome of its decisions. Adversarial quasi-judicial processes will disappear. Decisions will depend on the weight of evidence following pro-active investigation by the Fair Pay Commission, and reflect a more constructive evidence based approach to the determination of safety net wages and conditions.

3.33 The Fair Pay Commission will be an independent statutory body, and will not submit recommendations to government. It will set wages and conditions independent of the views of the government.

An enhanced agreement making framework

3.34 One of the primary intentions of the bill is the simplification of agreement making between employers and employees, by moving to a lodgement based system and removing procedural barriers to agreement making.[18] This will encourage parties

18 Mr Finn Pratt, *Committee Hansard*, 14 November 2005, p. 9.

to negotiate the best and most efficient employment relationship possible in their individual circumstances.

3.35 In addition to federal awards the Work Choices Bill provides for six types of individual or collective agreements: employee collective agreements; union collective agreements; Australian Workplace Agreements; union greenfields agreements; employer greenfields agreements and multiple business agreements. It will be up to employers and employees to determine which of the six types of agreements best suits their circumstances.

3.36 A great deal of the committee's time has been taken up with questioning about agreement processes. There has been much vilification of the concept of Australian Workplace Agreements, even though this instrument is in ever-increasing use across a wide range of jobs, from the most basic casual position to senior executives. Further, it is the view of Coalition Senators that well after the bill is passed, the predominant form of workplace agreement will remain union collective agreements.

3.37 Critics have complained that the new lodgement process, whereby agreements will take affect on lodgement with the Office of the Employment Advocate (OEA), will lead to agreements being made which contain terms lower than those in awards or which are not agreed to by employees.. To ensure the veracity of the agreement, a statutory declaration will be required to be lodged with it attesting that the agreement was negotiated in compliance with the law. The statutory declaration will replace the current slow, complex and legalistic certification and approval process. It will be an offence to provide false or misleading information in the declaration and significant penalties will apply. Changes contained in the Work Choices Bill will make the current process-driven system of agreement making far easier for all participants, while ensuring that agreements are genuine and accord with the legislation.

3.38 The process for varying or terminating agreements will be similar to that for lodging new agreements. Agreements will be able to be extended (up to a maximum of five years), varied or terminated where agreed between the employer and employee. A penalty regime will apply where agreements are varied or terminated without the consent of employees.

3.39 Agreements made under Work Choices that have passed their nominal expiry date may be terminated by any party to the agreement giving 90 days' written notice lodged with the OEA. If an employer terminates the agreement by 90 days' written notice, they can provide voluntary undertakings to their employees about the terms and conditions of employment above the Fair Pay and Conditions Standard that will apply when the agreement is terminated. Such undertakings will need to be in writing and lodged with the OEA. The voluntary undertakings will be enforceable by the Office of Workplace Services.

3.40 When an agreement made under the current system is terminated, the minimum terms and conditions of employment will be those of the Fair Pay and Conditions Standard and the relevant award, which will continue to protect

employees. Agreements made under the current legislation can only be terminated using the current rules for terminating agreements.

3.41 Claims have been made by the Opposition in Parliament and in the ACTU's media campaign that the Work Choices Bill will allow employers to force existing workers to sign Australian Workplace Agreements. This is not the case. The Department submitted that:

> …in respect of the negotiation of AWAs for existing employees, it is against the law for an employer to force an employee to sign an AWA. Those protections that are in the current legislation remain in the bill. It is also against the law for an employee to be dismissed for refusing to negotiate or to sign an AWA.[19]

3.42 In evidence to the committee, Mr Scott Barklamb of the Australian Chamber of Commerce and Industry articulated his understanding of the legislated protections:

> …employees will be protected from coercion. It is patently untrue to claim that employees will be coerced into signing workplace agreements under Work Choices. Protections will be retained and enforced by enhanced advisory and enforcement bodies.[20]

3.43 Despite claims made by some commentators, the committee majority emphasises that certain award conditions will be protected when new agreements are being negotiated. These protected award conditions, which can be the subject of bargaining by the employee/s and employer, are:

- public holidays;
- rest breaks (including meal breaks);
- incentive-based payments and bonuses;
- annual leave loadings;
- allowances;
- penalty rates; and
- shift/overtime loadings.

3.44 These award conditions can only be modified or removed by specific provisions in the new agreement. If these award conditions are not specifically referred to in the new agreement, these awards will continue to apply, and will not be lost to the employee. If employees and employers are satisfied with the relevant award conditions relating, for example, to public holidays and meal breaks and if they do not want to change these arrangements in the agreement they negotiate, the agreements would not include clauses on public holidays and meal breaks and would not contain a

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19 Mr John Kovacic, Group Manager, Workplace Relations Policy Group, Department of Employment and Workplace Relations (DEWR), *Committee Hansard*, 14 November 2005, p. 7.

20 Mr Scott Barklamb, *Committee Hansard*, 15 November 2005, p. 39.

clause to say that the agreement expressly excludes or modifies the conditions from the award. Conversely, agreements that want to exclude or change these protected award conditions must expressly state that the agreement intends to modify or exclude the relevant award conditions dealing with those matters.

3.45 States will continue to declare public holidays. In addition, the provisions in the bill reflect the Government's public comments that public holidays are ssacrosanct'. In addition, there are specific provisions of the bill (subsection 90G(2)) which provide that if employees would have worked on a particular day, had that day not been a public holiday, they must be paid at least the relevant rate of pay for each hour they would have worked. This will underpin workplace agreements and apply to all employees. Further all employees covered by new agreements will receive ward penalty rates for working public holidays unless the agreement explicitly modifies or removes them.

The rights of vulnerable workers

3.46 According to opponents of workplace reform, vast numbers of employees stand to receive lower wages and entitlements as a result of the Work Choices changes. Government party senators believe, on the basis of a reading of the legislation, that these assertions are baseless and that clarification is required of the many protections for vulnerable workers that are included in the Work Choices Bill.

3.47 Much criticism of the Work Choices Bill is based on the premise that employees are unable to negotiate effectively for themselves and that vulnerable groups of workers such as outworkers or young people will be at risk of exploitation. These criticisms are based on the false assumption that the majority of employers are oblivious to the needs of their employees, whose satisfaction is crucial to the success of a business.

3.48 The ability for workers to negotiate satisfactory wages and conditions is bolstered by the strong demand for labour which has characterised the economy since 1996. The committee heard from a number of employer groups that they were unable to locate sufficient employees to meet demand. For instance, Mr Christopher Platt of the Australian Mines and Metals Association (AMMA) had this to say to the committee in regard to circumstances in his industry:

> I have not seen any evidence whatsoever of competition driving wages down. In fact, I was on a workplace earlier this year—it was a construction site—where the peggy, who is responsible for keeping the sheds clean, making sandwiches and basically just keeping the guys happy, was on $100,000 a year. I was in Newman some months ago and there was an advert for a boilermaker at $38.50 an hour. I have not seen competition in the mining industry drive wages down. In fact, it is the reverse. We have difficulties in getting enough skilled employees and it is a worker's market. If you are not rewarding your employees and providing them with an appropriate environment, they will be gone.

3.49 Mr Corish from the National Farmers Federation also made the following point:

> **Senator Joyce** – Do you pay any of your employees the award or do you pay them all above the award?
>
> **Mr Corish** – In our own case, under our AWA system, they are all paid above the award.
>
> **Senator Joyce** – Do you think you would have any chance of employing someone if you offered them the award? I know that around St George you would not have a hope.
>
> **Mr Corish –** I can assure you that the chances of employing someone based on the award or at the award would be very slim, because there are opportunities for them elsewhere to get above the award.

3.50 The committee acknowledges that supply and demand factors in the labour market affect each industry differently, but the principles apply equally. It is in no employer's interest to neglect the work satisfaction levels of employees in the kind of labour market that exists now, and into the future.

3.51 This strong labour demand coupled with short supply can only result in higher wages and growth in workforce participation, which is promising for those seeking work, as well as for those seeking an improvement in their pay and conditions. It also renders improbable the danger to workers put about by opponents of the bill. As the AMMA told the committee in an earlier inquiry into workplace agreements:

> It is all well and good to say that the employer has the capacity to dictate in the same way that you have the capacity to do that for a new employee with an AWA but, if you do not pitch your job offer correctly, no-one is going to take it.[21]

3.52 As the SDA told the committee:

Senator Joyce—Thank you very much for coming in today and for your submission. You have a very strong union. What do you see as your role after this legislation goes through? What do you see would be the role of the union then?

> **Mr de Bruyn –** I think the union will continue what it has always done—that is, to negotiate with employers for the wages, working conditions and job security of employees and get as many agreements as we can; to represent employees at the workplace in terms of any grievances, issues or questions they put to us; and to go out there and invite employees of a company to join the union and then invite the employees to elect the delegates and then train the delegates—do all the things we are doing now.

3.53 Nonetheless, the committee recognises that the ability to bargain effectively is not shared by every employee. Workers will be able to appoint a bargaining agent to

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21 Mr Christopher Platt, *Committee Hansard*, Perth, 25 October 2005, p.51.

negotiate on their behalf. This agent could be a friend, a relative, a union representative or a professional bargaining agent. It should not be for the committee majority to suggest that unions have an important role to play in representation of employees in negotiations of AWAs. The rights of unions are guaranteed by legislation and it is up to them to work for the recruitment and trust of employees they consider most vulnerable in making workplace agreements.

3.54 The Work Choices Bill also provides a comprehensive set of terms and conditions for those workers who find themselves, for whatever reason, unable to strike a suitable bargain with their employer. The Australian Fair Pay and Conditions Standard guarantees a floor under which wages and conditions of every employee covered by the federal system (whether by award or agreement) must not fall. Many such workers will be employed under an award classification, which will usually offer significant improvements on the pay and conditions under the Australian Fair Pay and Conditions Standard, and which will be streamlined to bring about easier access and understanding for employers and employees.

3.55 Importantly, the Australian Fair Pay and Conditions Standard is an objective test; it refers to a quantifiable wage, and actual leave and other conditions. While opponents of the Work Choices Bill have criticised the removal of the 'no disadvantage' test which currently forms part of the industrial system, they fail to acknowledge the shortcomings which are inherent in the subjective, complex, legalistic and arbitrary 'no disadvantage' approach. These include significant difficulties for parties to the agreement, as well as the AIRC, in determining whether an agreement passes the test. While in some cases, conditions agreed to by parties are clearly superior to those offered by the relevant award, many other cases involving trade-offs of differing conditions, are not as clear-cut. This leads to administrative delay in implementing agreements which is associated with uncertainty and lack of focus in the workplace on the outcomes sought by the employer.

3.56 The ineffectiveness of the no-disadvantage test is also evident in situations where a bargained agreement reflects all parties' desire to substitute certain award entitlements with greater benefits in other award or non-award areas, such as, flexible working arrangements. The application of an inherently subjective test can bring about real disadvantage for some employees, in derogation of its core purpose.

3.57 Specific safeguards exist for the protection of employees who may be vulnerable due to their level of negotiating ability and market demand for their skills. These include, for example:

- The requirement that employers provide a consideration period of at least seven days before seeking employees' approval of an agreement.
- The requirement that employers provide an information statement from the Office of the Employment Advocate (OEA), ensuring that employees have information about the agreement making process and stipulating employee rights in relation to advice and assistance about agreement making from the

OEA. It will include the date and method of the vote for an employee or union collective agreement.

- Financial penalties on those who don't meet the procedural requirements for agreement making. A broader range of remedies will be available against any employer who lodges an agreement without obtaining employee approval, and against anyone who engages in false or misleading conduct, coercion or duress during the agreement making process. The sanctions will include compensation, financial penalties and injunctive relief.
- The availability of the OEA to provide advice to both employers and employees on agreement making. This service will be free and is similar to its current functions of providing advice and assistance to employers and employees on their rights and obligations. Appropriate advice will be provided to young people, and those from a non-English speaking background. Advice from the OEA would not replace or prevent employees and employers seeking their own legal advice and assistance.
- Employees retaining access to their union representative and to the right to appoint and consult with a bargaining agent. The bargaining agent will be able to assist in the negotiation process and act on the employee's behalf in relation to an AWA or a collective agreement.
- Employees under 18 who enter into an AWA will require the approval of a parent or guardian before the agreement can be lodged. It will be unlawful to dismiss a young person for refusing to consent to an AWA.
- Claims against anyone who breaches the requirements above will be able to be lodged with the Office of Workplace Services (OWS). The OWS will investigate the complaint, and if it believes the complaint is genuine, the OWS will prosecute for a breach of the Act.
- The Office of Workplace Services will increase the number of workplace inspectors from 90 to 200 who will work as both inspectors and also as advisors to employees and employers on their rights and obligations. The Office of Workplace Services will be a 'one stop shop' to ensure employees and employers know their rights and obligations and that these are fairly enforced.

3.58 These protections aim to ensure that employees' approval of the agreement is genuine. There will also be protections in the agreement making process to ensure that complaints are genuine.

3.59 The bill also prescribes a maximum number of 38 ordinary hours which may be contained in agreements, and awards after the transitional period. While employees are expected to work reasonable additional hours, under the Fair Pay and Conditions Standard, employees can refuse where to do so would be dangerous, or where the employee's personal circumstances would not allow it.

Implications for the work-life balance

3.60 The suggestion that the Work Choices Bill changes would see employees compulsorily lose recreation time with their families and friends is wrong. The bill actually seeks to improve on the very marginal gains made by awards and collective agreements in achieving a work-life balance. Attempts in awards and collective agreements to rectify the imbalance were described by the EWRE references committee in its Workplace Agreements inquiry as being a 'relative failure'.[22]

3.61 The Work Choices Bill offers employers and employees many of the opportunities needed to strike a better balance between work and family. The increased use of AWAs allows employers and employees to negotiate face to face on their respective needs, and to arrive at a mutually beneficial arrangement which is unavailable through most collective agreements and awards. For instance, it may provide for working mothers to take time off during school holidays, or for parents sharing care of their children to more effectively juggle time. Indeed, it might be argued that attempts to build flexibilities into many awards have resulted in the overly elaborate system with which parties are currently faced. Such complexities usually result from having to have such flexible arrangements approved by way of complicated processes.

3.62 Further, claims that the bill will widen the wages gap between men and women have no foundation, particularly as the bill includes provisions to ensure women are protected from pay discrimination and receive equal remuneration for work of equal value.

3.63 The Fair Pay and Conditions Standard provides full time employees with comprehensive leave entitlements, including paid personal, carer's, and compassionate leave, as well as up to one year's leave after the birth or adoption of a child. New parents may return to the same job, or one with identical terms and conditions. A new entitlement of two days unpaid leave for unforseen circumstances is available to employees.

3.64 Importantly, an entitlement to four weeks of annual leave remains. It has been claimed by some opponents to reform that employers will force employees to 'cash out' half of the annual entitlement, leaving employees with only two weeks leave. Such claims conveniently ignore the fact that workers are already entitled to cash out their annual leave in its entirety if they so desire.[23] Critics also ignore express provisions in the bill which allow cashing out of leave solely at the request of the employee, and prohibit coercion by employers to do so.

3.65 The provisions of the Fair Pay and Conditions Standard are based on current entitlements in the WR Act and cannot be bargained away during negotiations. Many

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22 EWRE Workplace Agreement report, October 2005, p.58

23 Ms Cath Bowtell, *Committee Hansard*, 16 November 2005, p.16

awards will already contain more generous entitlements than those contained in the Fair Pay and Conditions Standard, and these will be carried over to the new system. Parties seeking a workplace agreement are also at liberty to agree on additional entitlements.

3.66 Baseless scaremongering campaigns have also implied that workers will risk losing their jobs if they are unable to accept extra shifts at short notice. This is a fallacy, as a representative of the Department of Education and Workplace Relations demonstrated:

> There are presently provisions in the Workplace Relations Act which make it unlawful to terminate someone's employment on the basis of family responsibilities. Those provisions will remain in the act. They are untouched by this bill.[24]

Implications for training

3.67 Some critics have made claims that the provisions of the Work Choices Bill will have negative effects on training and apprenticeships. This is not the case. Rather, the ability of the Fair Pay Commission to set trainee and apprenticeship rates where there is no current classification under an award will remove barriers to implementing new types of apprenticeships and attracting more apprentices to areas of skills shortage. At present, award classifications and payments for new types of apprenticeships must be set through an application to an Industrial Relations Commission. If a union does not agree to the type of apprenticeship being offered, they can oppose the application. This delays, and in some cases prevents, the ready supply of skilled labour, and inhibits the healthy growth of industry.

3.68 Government party senators believe that decisions about training apprentices should not be based on industrial considerations, but rather on training considerations. The residential and commercial construction sector, for instance, have a skills shortage, and retention of apprentices is difficult. In a time of skills shortage, it is absurd that industrial awards should continue to contemplate placing quantitative restrictions on the number of building apprentices who can be employed. Apprentices are often trained in a way which is not relevant to the jobs they do. An apprentice, not wanting to be bound to training for a fixed four-year period irrespective of the level of competency that they have achieved, is less likely to complete the term of the apprenticeship. Unions have used the current system to prevent wage structures which facilitate more flexible training arrangements.

3.69 The Housing Industry Association submitted its support for the reforms:

> The Work Choices reforms will assist in the skilling of young Australians. HIA is strongly supportive of the shift for setting trainee and apprentice wages and wages in the awards from the Australian Industrial Relations Commission to the Fair Pay Commission. Training should be unshackled

24 Mr James Smythe, *Committee Hansard*, 14 November 2005, p. 11.

> from the industrial relations laws. It should suit the needs of those who are to be trained and those who are seeking to employ the trained worker. Training should not be blocked or impeded by industrial disputation through the AIRC to prevent the setting of appropriate classifications.[25]

3.70 The need for shorter, more flexible, and more accessible training has been recognised by the Western Australian Government. The Queensland Government has also recognised the need to move to competency-based training. The reforms contained in Work Choices will provide more flexibility for trainees and apprentices by making restrictions on the range and duration of training arrangements disallowable matters in awards. The legislation also recognises the major gaps which exist for trainees and apprentices under federal and state awards, and the limitation this places on the take-up of training opportunities. In lieu of in-adequate award coverage, the Fair Pay Commission, and other provisions in the legislation, will ensure that model award provisions apply to those undertaking new traineeships and apprenticeships.[26] These reforms will lead to easier access to skills-based training for those entering the labour market, and will provide a platform for easing the skills shortages which currently restrain growth in a wide variety of industries.

Will employees be worse off?

3.71 Myths and legends that workers will be worse off under Work Choices abound. Government party senators believe it is worth reiterating the falsity of many of the allegations that arose in the course of the inquiry process.

3.72 The inquiry was conducted in an environment in which highly hysterical and implausible claims were continually being made by opponents of the bill. There would be insufficient space in this report to do justice to the fully range of extreme claims being made by bill's opponents, however, the following were some of the more absurd that have been made:

3.73 The Leader of the Opposition, Mr Kim Beazley MP, argued that the enactment of the bill would increase the divorce rate:

> It is not good for the economy for workers to be unable to afford their holidays, their relaxation or a decent family life. Divorce is not good for the economy. Divorce is patently bad for the economy.[27]

3.74 A Victorian state Labor MP argued that the bill would provoke circumstances in which women and children could be murdered on picket lines:

> The history books show what happened in America. People on picket lines were murdered. Women and children were killed, and that is the road this Prime Minister wants to take us down. It is a disgrace. [28]

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25 Mr Scott Lambert, *Committee Hansard*, 15 November 2005, pp 9-10.

26 Department of Employment and Workplace Relations, *Submission 166*, p.16

27 *House of Representatives Hansard*, 2 November 2005

3.75 The Transport Workers Union claimed in a radio interview that the bill would increase the road toll:

> Truckies have staged a mock crash at the front of Federal Parliament to highlight their concerns about the IR changes. They fear drivers will be forced to work longer hours to make ends meet. Truck driver Tony Upton is worried the added pressures could see lives lost on the roads.[29]

3.76 The News South Wales Industrial Relations Minister, Mr Della Bosca, claimed in evidence to the committee that the bill contained elements of fascism:

> while the rhetoric of the Commonwealth—both the Prime Minister and the Minister for Employment and Workplace Relations—has been around the issue of taking third parties out of industrial relations and out of the workplace, they have in fact inserted a third party with almost fascistic powers, and that will be the way in which a Commonwealth, as a state, will operate within the system…
>
> **Senator Joyce** – Mr Della Bosca, you just said fascistic powers. You honestly believe that there is a comparison between this and fascism. I think that is an emotive statement and ridiculous.
>
> **Mr Della Bosca** – I think this is emotional territory, Senator, and I hope you apply your emotions and sense of decency to the way you consider this in the immediate future. I am saying that the Commonwealth is attempting to insert itself into the employment relationship in a way which has not been seen in this country before. We have always taken the approach that there is free bargaining between employers and employees, either collectively or individually, and we have always taken the approach that the state, whether it be at a state level or at a Commonwealth level, provides a judicial or arbitral umpire. The Commonwealth is now completely rejecting that approach. It is one that has stood us in very good stead for 105 years, and yes, Senator, it is very close to fascism.[30]

3.77 These claims have formed part of a highly political campaign being run by opponents of the bill, in which factual information has been discarded in favour of political scaremongering designed to frighten voters into voting against the Government. The Secretary of the ACTU admitted as much in the week he announced its campaign when questioned about its objectives:

> **Interviewer**: To bring down the Government?
>
> **Greg Combet:** Well, the longer term position for working people to have decent rights in this country, means that **we need a change of Government**. And we need to change these laws. Now, we've confronted

28 Bob Smith MLA, Victorian Parliament Hansard, 4 October 2005

29 Tony Upton: This legislation is a direct threat to road safety in this country. (4BC Brisbane, 11am news, Monday, 7 November 2005)

30 *Committee Hansard*, 14 November 2005, pp.33-34

> *t*hat position in the past in our history. We're confronting it again now, and we'll work very hard to bring that change about.[31]

3.78 Witnesses have falsely submitted that sick and carer's leave is threatened by the legislation. In fact, a minimum of ten days paid personal or carer's leave is provided under the Fair Pay and Conditions Standard, and unlike now, cannot be cashed out or traded off in an agreement. It was also alleged that employees would be required to submit medical certificates every time they are away from work, even for a short-term illness. The Department has responded that, as is the case currently, there is no universal standard, and that the new provisions were modelled on what currently exists in many federal awards and under Schedule 1A of the WR Act. These came under no criticism from witnesses.[32]

3.79 Witnesses repeatedly alleged that employees would be put under duress by employers wanting them to sign an AWA. Officers from the Department reminded the committee that section 104(5) specifically prohibits duress being applied in connection with an AWA[33]

3.80 It was also alleged that employees will be forced to 'cash out' their annual leave, or at least part of it, and that work-life balance will suffer as a result. In fact, this bill allows for 2 weeks annual leave to be cashed out, but only when the employee instigates the request, and the employer agrees. Currently, the WR Act places no restrictions on leave being cashed out, and parties are free to cash out annual leave in its entirety. This bill actually requires the preservation of at least half of an employee's annual leave entitlements.

3.81 It was alleged that those seeking to include disallowable matters in their agreements would be sent to jail. The Department was able to clarify this point, too:

> No, it is not correct. The bill provides a prohibition on anyone seeking to include prohibited content in an agreement. That is at section 101M. That section provides that it is a civil remedy provision. If you turn to section 105D, it provides penalties for breach of a civil penalty provision. The breach of that particular provision attracts a civil penalty of 60 penalty units for a natural person or five times that amount for a body corporate. There is nothing in this bill that provides for the jailing of a person for breaching that section.[34]

3.82 The evidence presented to the committee by the ACTU was instructive of the highly misleading arguments being advanced by unions in relation to this issue:

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31 Sunday program, 29 May 2005

32 *Committee Hansard*, 18 November 2005, p.21

33 *Committee Hansard,* 18 November 2005, p.18

34 Mr James Smythe, *Committee Hansard*, 18 November 2005, p.21

> **Senator Nash** – Being a working mother, I am very well aware of needing to spend time with family. I want to revisit the annual leave part of this. Currently we can cash out four weeks annual leave and under the Work Choices bill we can only cash out two. Isn't that an improvement?
>
> **Ms Bowtell –** The **union movement has never supported the cashing out of leave**. It is true that there is no limit under the current provisions on the cashing out of leave, but if you look at the collective agreements compared to AWAs, the cashing out of annual leave is not common in collective agreements. The only arrangements in relation to cashing out that are common in collective agreements are cashing out of excess accrual. In fact, the union movement was involved in a significant case back in the nineties involving a company called Arrowcrest, where we opposed the capacity to cash out annual leave, and we opposed it on public interest grounds. That has always been our view. We were rolled in that case. That has continued to be available, but for additional compensation. But it is not something that unions go out and negotiate. **You see it in AWAs but you do not see it in collective agreements.**[35]

3.83 The evidence advanced by the ACTU omits any reference to numerous collective agreements currently in force which have been negotiated by unions and contain specific provisions to allow annual leave to be cashed out. For example, the *Wespine Industries Pty Ltd CEPU (Dardanup Site) Enterprise Bargaining Agreement 2004* (AG934958) contains the following provision:

> 17. CASHING OUT OF ANNUAL LEAVE
>
> 17.1 It is the intent of the parties that all employees should be encouraged to take their normal annual leave entitlement on an annual basis.
>
> 17.2 Notwithstanding the provisions of sub-clause 17.1, where it is agreed by both parties and where an employee has an accrued annual leave entitlement of four (4) weeks or greater, the employee may apply to take up to two (2) weeks of the accrued annual leave as a cash payment per year in lieu of taking the equivalent time off.
>
> 17.3 An application for cashing out of annual leave must be made and agreed to in writing.
>
> 17.4 Where an employee has 'cashed out" a portion of his/her accrued annual leave he/she is not then entitled to have the cashed out portion as time off at a later date.

3.84 The ACTU's evidence also overlooks the Western Australian industrial relations system, as amended by the Gallop Labor Government, which allows for the 'cashing out' of a portion of annual leave. Section 8 of the WA Minimum Conditions of Employment Act states:

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35 Senate Employment, Workplace Relations and Education Committee, 16 November 2005 – emphasis added

8. Limited contracting out of annual leave conditions

An employer and employee may agree that the employee may forgo up to 50% of his or her entitlement to annual leave under Division 3 of Part 4 if –

the employee is given an equivalent benefit in lieu of the entitlement; and

the agreement is in writing.

An agreement referred to in subsection (1) is of no effect6 if the employer's offer of employment was made on the condition that the employee would be required to enter into an the agreement.

3.85 Parental leave was another area prone to misinformation. The bill preserves parental leave, and adds extra protections. Up to fifty two weeks parental leave, shared between the parents, the right to return to a job with the same terms and conditions, and the extension of benefits to casual workers, are all included in the bill.

3.86 There is a general tendency amongst critics to see employers as inherently untrustworthy and employees as inherently vulnerable. Yet demand for labour is strong, real wages continue to grow, and the changes in the Work Choices Bill will enable productivity increases that will continue to raise the standard of living of employees. Employees are currently in a strong position to negotiate the wages and conditions that best suit them. This position arises from labour shortages at nearly all levels, including unskilled workers. For instance, the National Farmers Federation gave evidence to the committee that due to the shortage of workers in rural areas, many farmers negotiate employment packages with their workers that are well above award rates and provide many extra conditions not accommodated under the award system.

3.87 This situation is common through many industries in many parts of the country. Work Choices will allow more flexibility to incorporate those benefits that the employee wants and the employer wants to provide.

3.88 The interaction between agreements, award rates and the Australian Fair Pay Commission will also ensure that an effective safety net is in place. No employee will have a rate of pay that is lower than a rate they currently enjoy under an award. The large number of workers not covered by awards will also be protected by the provision that ensures the minimum classification wages will never fall below the level set by the Safety Net Review 2005. There is every reason to conclude that workers will enjoy the ability to negotiate improvements to their pay and conditions.

Conclusion

In Appendix 4 of this report is a list of all the reports produced by the legislation committee on amendments to the Workplace Relations Act since the first inquiry into the original WR bill in 1996. Appendix 5 provides a list of amending bills which passed the Senate, and those which did not. These details provide evidence of that the Government's determination to press ahead with workplace reform has been continually frustrated over the course of the previous 9 and a half years. The Work Choices Bill is more comprehensive than the 1999 MOJO Bill, and while it is true that the passage of six years and the changing workplace experience over that time has affected the nature of the current legislation, it should be recognised that Work Choices is as complex as it is because of such long delays in the reform process and the transitional arrangements needed to create a national system in the absence of a referral of powers by the states.

Aside from the transitional and remedial elements in the large number of previously rejected amendments that find their way into the Work Choices Bill, the more substantial changes reflect more rapidly evolving policy. These are the transfer of wage-fixing powers from the AIRC, with these being vested in the Fair Pay Commission; and the creation of a national workplace relations regime. These reforms have not emerged from nowhere. The wage-fixation role of the AIRC has long been regarded as inappropriate, and changes may have been made to this in 1996 had Senate concurrence been secured. The issue of a national workplace relations system based on the corporations power in the Constitution has been talked about for years, and has been supported in principle, and at different times, by practitioners in the field of workplace relations across the political spectrum. The difficulties of establishing such a system were always understood. Not for the first time, a government has taken the bold stroke in deciding to press ahead in the expectation that the bill will be within power. Over the next five years it is expected that unincorporated businesses will recognise the benefits of incorporation.

The committee majority has made the case for passage of this legislation without substantial amendments in regard to policy. In preceding chapters it has looked at the evidence and concluded that the changes that are proposed for workplace regulation, and the encouragement of a new workplace relations culture, will see an ongoing improvement in productivity and employment opportunities. There are important reasons why these objectives are becoming crucial to the social and economic future of the country.

The first of these has to do with demographic change. Critics of the legislation have attempted to paint a scenario featuring impoverished and overworked employees constantly under threat of dismissal. The one law that transcends the amended WRA will be the immutable laws of the labour market. The predictions of doomsday have no foundation for the simple reason that the great majority of employees will notice no change in their working conditions. Of those who are affected by the legislation, the majority will include those who will be finding employment, perhaps for the first time

in years. The legislation will not guarantee employment: it will simply bring about the kinds of conditions in the workplace which will make more jobs possible. The legislation will not necessarily improve employment conditions for all employees: it will only make it more likely that people will find jobs. If there is a 'bottom-line' it is that the committee majority believes it is better to have people in useful employment at basic rates of pay and conditions than to have a much larger number of those people unemployed. No member of this committee would argue with the proposition that in the demographic circumstances of a diminishing supply of labour, it is essential to have everyone making a contribution. In the circumstances of a diminishing labour supply, fear of the creation of a national 'sweatshop' is ludicrous.

The second, and related, reason for workplace reform has to do with the need for a more skilled and better qualified workforce. This is a matter of general agreement, and is also incompatible with the notion of 'wage slavery'. Witnesses from industry associations who appeared before the committee stressed that the future of exports and of industrial and primary products lay with high value goods and products, because even 'sweatshop' rates below the worse imaginings of union organisers would be to no avail in competing with China and India. The Work Choices Bill alone will create the circumstances for improved training and apprenticeships. Associated with other training reforms, we can expect considerable improvement to the rate and scope of training.

The third element to workplace reform, even though it may seem to be the most significant in an historical context, is the efficiency that will follow from the creation of a national framework of industrial laws. The gains and savings will be considerable, especially for companies which employ people in different states. The committee majority notes that the most vehement opposition to a national system comes from the remnants of the old 'industrial relations club' of vested interests in maintaining elaborate and legalistic structures for both award making and managing industrial disputes. In particular, state labor councils find their raison d'etre in the perpetuation of state industrial regulatory structures, along with state government industrial relations departments. Their dismantling will result in considerable cost savings, and will help accelerate a cultural change toward workplace and enterprise focussed agreement processes.

In conclusion, the effect of the passage of the Workplace Relations (Work Choices) Bill 2005 will be more noticeable over time than in the short term. It is highly unlikely that the employment conditions and agreement processes will change for the vast majority of workers, especially during the period of transition to a national system. Even then, the changes will reflect the absence of past practices more than the imposition of new practices, which is what deregulation means. This bill is an important step in the modernisation of the economy through a transformation of the attitude to work and to productive employment.

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.
>
> …
>
> **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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> …
>
> **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.
>
> 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.

Australian Democrats' Minority Report

Introduction

The Australian Democrats on the whole support the concerns addressed in Labor's Minority Report. We regret that we cannot give the complexity and importance of the *Workplace Relations Amendment (Work Choices) Bill 2005* (Work Choices Bill) the response it deserves, but the Coalition have forced a process and timeline on us that have made it very difficult for us.

The Australian Democrats join with Labor in criticising the way the examination of the 678 page Work Choices Bill has been handled. We agree with their statement that:

> 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."

The Democrats believe that this critical legislation introduces fundamental changes to the industrial relations system which will have major impact on Australians and their families, and will transform six systems into one, against the wishes of the states. Unlike other transference of powers to the Commonwealth under corporations and tax law, this is the first time in the history of the federation that we are faced with a hostile takeover by the Commonwealth of state systems.

The Government is wrong when they say the Senate has previously examined many elements of the legislation such as unfair dismissal, secret ballots, right of entry and cooling-off periods. The Senate has not looked at them in terms of how they apply in the context of this Work Choices Bill, how they apply in state systems, and the consequences for business in state sectors. The Senate EWRE Committee has not looked at them with respect to their interaction, and likely effect with the bill's other provisions.

There were also significant changes to some of the quarantined provisions that the committee could not examine, for example extending the unfair dismissal exemption to 100 employees; and expansion of the definition of the capacity for employers to lawfully dismiss workers for 'operational reasons', which are defined as economic, technological, or structural in nature.

Whether there is cross-party support for legislation or not, the committee process has always been valuable in identifying mistakes, identifying unintended consequences, and improving flawed legislation.

I note that the Minister for Workplace Relations had said that there was little point in conducting this inquiry, because he knows exactly where the Labor Party stands, yet even before the inquiry ended the Government had conceded that as a result of issues raised during the inquiry they would make amendments.

On the last day of the inquiry, Mr Pratt, the Deputy Secretary, Workplace Relations, Department of Employment and Workplace Relations, summarised the areas where the government is considering amendments to the bill:

> Protections for outworkers; when a notice of termination can be given after the nominal expiry date of an agreement; and, as indicated by Senator Abetz at the recent estimates hearing and reiterated during the course of this week, the averaging of hours issue.[1]

There was almost unanimous agreement that the Bill was complex and technical, and that few witnesses, if any, admitted to understanding the legislation in its entirety. The Democrats are concerned that there are other issues, technical mistakes and unintended consequences that the Government and the Senate will miss.

Dr Jill Murray in her submission argued that:

> The risk of unintended consequences is very high. We have already pointed to clauses in the Bill which do not reflect the governments stated intentions…No doubt there are more errors not yet identified.[2]

Similar sentiments were stated by Law Professor, Andrew Stewart on behalf of 151 academics:

> This is extraordinarily complex legislation that is being rushed through parliament before there has been a proper attempt by independent experts to analyse it with anything like the care that it deserves. We understand that the bill is likely to go through. We have attempted in our submission to suggest that it is rushed and, indeed, fundamentally flawed. Nevertheless, recognising the reality that the bill will probably go through parliament in something like its current form and in offering an addition to the formal submission we have put forward, we do want today to highlight some of the more important areas in which the bill might be amended so as to address some of its more serious defects.[3]

The disregard for the Senate as a house of scrutiny may appear remarkable from a Government whose Prime Minister promised to use its numbers wisely and not provocatively. On that basis you would expect executive arrogance or the heady hubris of numbers would not get in the way of good law making. The reality is that the Prime Minister was saying what the Australian public wants to hear, and not what he believes. He intends to use his power decisively and deliberately. He wishes to get it over with precisely because his government is using the power of the state to have their way, to attack the institutional foundations of the workplace, and against ordinary Australians and their way of life.

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1 Mr Pratt, *Committee Hansard*, 18 November 2005, p.54

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

3 Professor Stewart, *Committee Hansard*, 17 November 2005, pp.39-40

Once the Work Choices Bill has passed then he can use long political acumen and experience to implement it and to shore up its defence.

One good consequence arising from the Work Choices Bill

If there is one good consequence arising from the Work Choices Bill it is that it will force all political parties to recognise that the Work Choices Bill is a radical change. They cannot go on accepting the status quo, but critiquing elements of it. They will each have to reassess their vision and solution for relationships at work in the 21st Century.

This is because with the Work Choices Bill the Liberal and National parties are assaulting the cultural, economic, social, institutional, legal, political and constitutional underpinnings of work arrangements in Australia.

Occasional bitter and protracted fights over the direction and nature of law and regulation governing work and industrial relations in Australia do not contradict the broad social political and governmental consensus there has been in this area. Neither do the many situations where no more than lip-service has been paid to elements of the consensus.

The broad consensus I refer to has been that the standards of an advanced progressive first-world liberal democracy should apply in Australia with respect to wages and conditions and the organisation and management of work.

Much as conservatives and organised capital disliked the movement, there was nevertheless a broad acceptance that the organised collective expression of labour rights through the union movement should be respected and supported.

That broad consensus accepted that our workplace law should reflect the social contract that growing national and individual or entity wealth should be accompanied by rising living standards and a comprehensive safety net for the disadvantaged and powerless in our society. Low or inadequate wages were to be supported by a sufficiently comprehensive welfare system to ensure family stability and sustainability.

Although conservative Australian federal and state Governments have been slippery on these matters, it was expected that our laws should reflect the commitment made as a result of our ratification of international conventions and treaties governing the rights of the working population.

That broad consensus meant that wages and conditions of work should bear the family more than the individual in mind; that governments and parliaments should determine law and regulation, but that enterprises unions and tribunals should determine the detailed content and decisions of workplace relations; that independent specialist tribunals were preferred for conciliation, arbitration and determination rather than the courts; that collective labour and collective capital had primacy over individual arrangements; that statute was the dominant determinant of collective arrangements at

work and common law the dominant determinant of individual arrangements; that industrial relations should be a multiple federal system not a single national system; that it was justifiable to subordinate the economic to the social in the workplace by ensuring the living standards of the worst off should be consciously and deliberately raised; that health and safety and compensation for accidents or negligence should be a primary feature of workplace law.

When I say that with the Work Choices Bill the Liberal and National parties are assaulting the cultural, economic, social, institutional, legal, political and constitutional underpinnings of work arrangements in Australia, I am certain that these two conservative parties are determined to radically alter our work systems and values.

Control of the Senate allows for the exercise of authoritarian conservative power. The Coalition is determined to fundamentally change the Nation. This may not be fully grasped by the backbench but there is no doubt of the Prime Minister's determination.

It is why I have consistently said that this is going to turn into a battle of the Government against the people. In that battle the Prime Minister has the cards heavily stacked in his favour.

He and his Ministers have been successfully using double-speak to conceal the true nature of these changes. 'Small l' liberal words like 'choice', 'flexibility', 'freedom' disguise the heavy authoritarian micro-management and restrictions on collective labour – the unions - and the dismantling of the architecture and infrastructure of our workplace relations system.

They have already shown they will use all the financial and other resources of the state to advertise and 'sell' their policy. Capital – big business and employer organisations in particular – support the heavy re-balancing of a system designed to lift the profit-share at the expense of the wages-share and to give collective capital – the market – primacy. And for those looking for strong media opposition - big business media owners and shareholders have already voiced their support for Mr Howard's proposals.

The counter-argument will need to be put out through advertising, traditional media and other mediums, but in resource terms, opponents of the governments policies are minnows to a shark.

Industrial relations' concepts and law is already complex and not well understood. Australians have grown used to the reality that others translate that complexity into the understood wages and conditions they enjoy. So they do not readily understand that complex statutory changes will have significant and very basic effects on them and their families. It is only when employers start to exercise their new powers detrimentally that full understanding will dawn.

That is not to forecast that everyone will be affected equally or negatively. Labour that is well represented and resourced, or in short supply, will find itself naturally quarantined from negative effects.

The Coalition Government can rely on most Australians not grasping what is happening until long after it has happened. Evidence to the Committee made it clear that the full effects of the legislation will not be felt until after the next election in late 2007. Not only will 25 to 30% of all workers remain under state systems until then, but the transitional arrangements and the continuing validity of many existing agreements that only expire in 2008, means that for large numbers of Australians the effects will only be after the next election. That is what Mr Howard is counting on – that, and the expectation that they will remain in effective control of the Senate for two more elections, after which it will be very difficult for these changes to be reversed.

In a nutshell, the fundamental changes Mr Howard's Government seek to introduce will be the antithesis of many of the previous consensus items that I outlined above. A national system forced onto resistant states; the individual to be fostered over the collective; an individual wage and conditions fostered over the family wage and conditions; disputes going to the courts instead of the tribunals; capital and business given freedom, and labour and unions' rights and freedoms heavily restricted. Unwisely, unprecedented ministerial intervention will replace a sensitively balanced system where politicians were kept at an arms-length from work arrangements and disputes. The safety net shrunk by three-quarters; the withering away of the award; the decline in real terms of the minimum wage; the loss of most statutory conditions.

From hostile Coalition questions to academics and union officials in the Inquiry it has been obvious that there is also a strong political motive in play. The Coalition are fierce political competitors and will do whatever they can to weaken their main competitor – the Australian Labor Party. Consistent references in Parliament make it clear that the Coalition see the Union movement as politically synonymous with the Labor Party. Whatever the legitimate criticisms that can be made about the relationship of parts of the union movement with Labor[4] it is immoral to target the interests of working Australians for political gain.

It is apparent that the Work Choices Bill will disadvantage the ALP, the Coalition's main competitor. There are several elements of the Bill that will ultimately weaken the union movement and quite possibly see a decline in union membership. Given that unions are one of the ALPs largest donors, any reduction in union membership will impact financially on the ALP, as well as negatively affecting their organisational and political campaigning ability.

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4 See for instance the Australian Democrats' Supplementary Remarks to the Joint Standing Committee on Electoral Matters Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto: September 2005.

The startling thing is how economically reckless the Coalition are being. Their economic argument is faith-based but boils down to this – lower wages, many fewer conditions, more power to employers all equal more jobs. That is the mantra, endlessly repeated in various ways, but unsupported by credible empirical evidence.

If it deserves to be taken seriously as a proposition, it needs to be supported by specific evidence. The need for further IR reform might indeed be apparent, in general, but the merits of this specific proposal have not been persuasively argued.

The Australian Democrats have unfavourably contrasted the Coalition's GST and New Tax System with the Coalition's unconvincing workplace relations campaign. The GST was the centrepiece of the 1998 election campaign. In contrast, the Coalition's radical IR agenda was a sideshow in the 2004 election, hidden by the interest-rate smokescreen.

Very detailed Government documents argued the case for the GST and the New Tax System, complete with all the modelling, tables, graphs and cameos that were necessary. In contrast this radical IR assault on Australians working lives got a six-page announcement in May, and has been lightly amplified since.

The GST was agreed to and supported by the States. This IR package is opposed by them. The GST's economic and financial benefits were credibly contrasted to a failing federal/state funding system. In contrast, the Coalition agrees our present IR system is not broken and that it makes a very positive contribution to Australia's economy and society. The Coalition agree that Australia now has lower unemployment, low interest rates, higher productivity, higher real wages and very significantly lower levels of industrial disputation than in the past. They agree the system works well overall. Yet amazingly, the Government proposes to trash the current *Workplace Relations Act* (WRA). On the evidence before me, the Work Choices Bill is likely to threaten our economy, productivity and society. For what?

The Australian Democrats' Vision for Australia's IR system

The core mission of a political party is to offer an alternative vision to other political parties on key public policy issues. I would be derelict in my duty if I merely criticised the new Coalition policy without offering the Australian Democrats alternative.

In summary, the Australian Democrats believe that, vital as it is, work is not just about economics, productivity, efficiency, and competitiveness – it is a fundamental feature of our nation-state as a society, our way of life, our place among nations.

The Democrats recognise that Australia has to keep reacting to economic, trade, technological, domestic and global realities. We recognise that society, enterprise and work are continually changing. We believe that changes to our system are necessary, but they should be contiguous and in continuity with our social and cultural heritage, and our values. Foremost among those is the 'Fair-Go' principle.

The Democrats workplace vision requires that to make it happen, this vision should be negotiated between commonwealth and state governments, industry, union, and employee representatives.

The Democrats support and propose a workplace relations system as follows:

- a **unitary single national IR system** that is negotiated between the states and federal government, to provide simplicity and common rights and obligations, and to improve efficiency, domestic and international competitiveness, and productivity;
- a well-resourced **national independent workplace relations regulator** to properly regulate and oversee a national unitary system. Other sectors of the economy have regulators like ASIC, APRA, the ACCC – and so should work arrangements;
- a **strong, independent well-resourced and principled tribunal** in the Australian Industrial Relations Commission (AIRC). This umpire must facilitate agreement-making at the enterprise, as well as overseeing the industry-wide award system. It must conciliate, arbitrate and facilitate mediation in specified circumstances; it must settle industrial disputes; it must maintain the minimum wage, and in doing so it must take into account the interests of the unemployed, protect the interests of low paid workers and the disadvantaged, and protect small employers in a weak bargaining position. We believe that the capacity of the AIRC should be improved not weakened;
- the **1996 *Workplace Relations Act*, as amended to June 30 2005**. We believe that while this Act could be improved, but overall it works well and does not need radical change. We believe the federal system as it currently stands should be left intact, with only moderate change as the need arises;
- genuine bargaining in good faith;
- a **genuine safety net** underpinned by an award system that can be altered through the AIRC;
- **collective and individual agreements** including AWAs, but AWAs must be underpinned by the safety net of a no-disadvantage test against the award, negotiations must be genuine, and there should be mechanisms to ensure that employees are not coerced. We would support tightening the current AWA system;
- **freedom of association** and the right to join a union or employers' organisation, without duress or compulsion;
- **collective bargaining as an inalienable right**, and the legitimate role of unions in protecting the interests of workers who wish to be represented by them; and,
- the **right for all employees to be protected from (tightly defined) unfair dismissal.**

In trying to quell the genuine concern of the public over these industrial relations changes the Government often draw a comparison with their 2005 plan with their 1996 proposals. They say the strong concerns expressed then were unfounded and that 'Australians clearly benefited with more jobs, higher wages and a stronger economy.' In John Howard's words, 'the sky did not fall in.'

The sky did not fall in because of the intervention of the Australian Democrats. The reason the 1996 reforms worked is because of the Democrats success in moving 176 amendments that ripped the ideology out of that 1996 package, and made the law socially acceptable while keeping it economically effective.

It is a nonsense to suggest (as some do) that IR has stood still since then. No fewer than 18 significant amending bills have passed the Senate since then. We have used our balance of power and our honest broker role over the last 9-plus years, passing sensible law changes, often after moderating the original aggressive proposals. Although we pride ourselves on not being beholden to unions or business, we have been sympathetic to the legitimate and practical needs of both. We have operated on the values and principles of progressive liberal democracy, and those values and principles have stood us in good stead.

As a result the Democrats can rightly claim to have played a key part in ensuring that federal workplace relations law has made a major positive contribution to Australia's economy and importantly Australia's society. Australia now has lower unemployment, low interest rates, higher productivity, higher real wages and very significantly lower levels of industrial disputation than in the past.

The Democrats are not opposed to IR reform; so long as it is moderate, steady, considered and fair, and that it delivers productivity efficiency and competitive gains that accord with the values and goals of a civilised first-world society.

The Democrats support an industrial relations system that operates within a framework that takes into account social impacts as well as economic considerations. In this context we support a system that provides for the orderly regulation of employment practices in a way that maximises and balances productivity, jobs growth and job security while ensuring fair and just pay and conditions and treatment. We support a system that builds on the strengths of Australian values – the fair go, an egalitarian society, one that fosters equality community and mateship, and one that rewards enterprise and ‘having a go’.

The Australian industrial relations system has been built on a foundation of social justice and fairness, centred around a safety net of pay and conditions to protect the most vulnerable in our society. This foundation has fostered our egalitarian society.

The 1907 landmark Harvester case which instituted a basic wage for men, established an industrial relations system in recognition of the need to legislate the welfare of 'family' over profits and productivity. Harvester placed the welfare of the family at the centre of social and economic policy from the beginnings of Federation.

I remain unashamedly of the view that the basic wage and conditions must allow a decent living standard for a family, and that that task must not be left to the welfare system, whose safety net can never fully compensate for a family standing on its own feet through work.

The AIRC has played a critical role in maintaining this philosophy. This sentiment was reflected in the submission by the 151 academics:

> Australia's industrial relations system has also had as a central plank an independent umpire with the capacity to weigh up arguments about industrial standards (such as minimum wages, work and family provisions and other general standards) and to arbitrate upon them with due attention to the research evidence and fairness.[5]

In particular the AIRC has played a critical role in protecting the low paid and those with weak bargaining power.

Australia's industrial relations system has been modified overtime to meet new social, technical and economic conditions. However, within these changes the system has maintained the core framework: the provision of a safety net to protect the vulnerable, and that balances community expectations and individual circumstances.

Any reforms must build upon the strengths of the current Australian system. Elsewhere I have written extensively on the subject. Suffice to say here that the Democrats support a unitary single national IR system that is negotiated between the states and federal government, to provide simplicity and common rights and obligations, and to improve efficiency, domestic and international competitiveness, and productivity.

We have a small population, yet we have nine governments and a ridiculous overlap of laws and regulations. We need common human rights across Australia. We need easily administered and understood rules and laws that support efficient, competitive and productive enterprise. We need to end the complexity and confusion of enterprises having to deal with six systems across state borders, or even of one enterprise in one state having two right of entry regimes, two unfair dismissal regimes, two award systems, all in the same business.

But in introducing a single national unitary system we need safeguards that a particular federal government cannot pervert the system for ideological reasons. That is why a unitary system should be created in consultation with the states and by referral of powers to the Commonwealth by the States.[6]

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5 151 Australian industrial relations academics, *Submission 175*, pp.6-7

6 Further information on why the Democrats support a national unitary system can be found at http://www.democrats.org.au/docs/2004/WORKPLACE_RELATIONS_A_Unitary_System_of_Industrial_Relations.pdf

Once again, elsewhere I have written extensively on the subject. Australia needs a well-resourced national independent workplace relations regulator to properly regulate and oversee a national unitary system. Other sectors of the economy have regulators like ASIC, APRA, the ACCC – and so should work arrangements.

The AIRC needs to be complemented by a National Regulator with specific powers of monitoring and enforcement. There needs to be better enforcement of and compliance with the WRA. Unions and employers need help to ensure that people do not defy court and commission orders, and ignore awards and agreements. Like competition law, tax law, finance law, and corporations law - that each have their own national regulator - IR should too.[7]

In IR the existing regulators are federal and state departmental inspectorates, the employment advocate, state and federal taskforces, and so on. These diverse regulators are diffuse, dispersed, under-resourced, ineffective, and importantly, insufficiently independent. One properly resourced national regulator to enforce national workplace law would be a significant improvement on the existing situation. The Office of the Employment Advocate should be abolished and its tribunal-like powers reconstituted in the AIRC and its regulatory powers in a National Regulator.

The Democrats believe in a strong, independent well-resourced and principled tribunal in the AIRC. This umpire must facilitate agreement-making at the enterprise, as well as overseeing the industry-wide award system. It must conciliate, arbitrate and facilitate mediation in specified circumstances; it must settle industrial disputes; it must maintain the minimum wage, and in doing so it must take into account the interests of the unemployed, protect the interests of low paid workers and the disadvantaged, and protect small employers in a weak bargaining position. We believe that the capacity of the AIRC should be improved not weakened;

The capacity of the AIRC needs to be improved, specifically:

- provide the AIRC with powers to make 'good faith' or genuine bargaining orders;
- increase its capacity to resolve disputes on its own motion and increase resources to ensure timely resolution of disputes; and,
- remove limits on some of the subject matters on which the AIRC can make determinations.

The Australian Democrats strongly believe that a mix of agreement making - collective bargaining (union and non-union), collective awards and individual agreements provides necessary flexibility in a modern economy, but all agreements

7 See Australian Democrats Minority Report, *Beyond Cole: The future of the construction industry: confrontation or co-operation?,* Employment, Workplace Relations and Education References Committee, June, 2004, pp.203-66

must be fair to both employees and employers, and there must be an adequate safety net for employees' wages and conditions.

The Democrats' view is that collective agreements and awards under the existing Federal Act are often better for workers overall than individual agreements, but we recognise that individual agreements are a common[8] and necessary part of working life, and statutory provision must be made for them.

The following should be in place to support the agreement making system:

- an awards system that is comprehensive, up to date, simplified and useable; overseen by the AIRC;
- all agreements (collective and individual) be underpinned by awards;
- a national well resourced independent regulator be established to monitor compliance with industrial laws and agreements;
- a requirement for employers and employees to bargain in good faith be included in the Act; and,
- genuine choice is built into the system.

The Democrats support a safety net that reflects and keeps up with community standards. To this end the Democrats support an awards system that is comprehensive, up to date, simplified and useable, overseen by the AIRC.

Underpinning this system is the need to update standards to deal with important evolving issues, including the need to:

- develop a fairer balance between work and family responsibilities;
- properly regulate redundancies and job shedding;
- address the growth in precarious and atypical employment – which has meant that increasingly, legitimate workers are being excluded from conditions such as security of employment, leave entitlements, superannuation and recourse to the unfair dismissal system - by providing a definition of employee in the Act; and,
- ensure reasonable hours and measures that prevent employees working consistently long or unreasonable hours, except in emergency situations.

The Democrats support the maintenance of the minimum wage and the AIRC to maintain minimum wage decision making. The Democrats also support an increase in

8 A large number of agreements are individual agreements, with 31.2 per cent of all forms of agreement making being unregistered individual agreements and 2.4 per cent being registered individual agreements (AWAs).

the tax-free threshold to at least $10,000[9] and indexing the minimum wage. This would also take the pressure off the AIRC as having the sole responsibility of increasing the disposable income of the working poor.

The Democrats support work of equal value and would like to see a key role played by the AIRC, and the Commonwealth funding of test cases to identify means of closing the male/female wage gap.

The Democrats support a fair balance between the rights of employers and employees (irrespective of the size of the employer) on unfair dismissal claims, with low cost, non-legalistic and prompt resolution of disputes. We believe that unfair dismissal should be tightly defined and have long been critical of lax state unfair dismissal regimes.[10]

The Democrats support freedom of association and the right to join a union or employers' organisation, without duress or compulsion. We view collective bargaining as an inalienable right, and the legitimate role of unions in protecting the interests of workers who wish to be represented by them. We support the legitimate role of unions in protecting workers, in particular their role in bargaining on behalf of workers, protecting rights and conditions and occupational health and safety.

We believe a strong case can be made out for non-members paying 'fee for service' if they wish to work under conditions negotiated by a union or employers' organisation.

Why We Oppose the Work Choice Bill

> It is overly complex, too punitive, one-sided and interventionist.[11]

No economic justification

The 151 Australian industrial relations, labour market and legal academics cited lack of evidence as one of their key concerns with the Bill:

> The Bill is based on a series of premises about the impact that further individualisation of the employment relationship will have on productivity and, through it, on employment and national welfare. These assumptions, while repeatedly asserted, are not supported by evidence, and are contradicted by much of the empirical evidence that is available. Fundamental changes such as these should not be made simply as a matter

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9 See Senator Andrew Murray, 'Tax-Free Thresholds – a tax issue we must confront', Opinion Piece, October 2005: http://www.andrewmurray.org.au/documents/441/Tax-free%20thrshlds%200905.doc

10 See Senator Andrew Murray, 'Federal Unfair Dismissals: A Briefing Paper', September 2004: http://www.andrewmurray.org.au/documents/403/UFD%20Briefing%20Note%20Sept%202004.pdf

11 Dr Cooney, *Committee Hansard*, 18 November 2005, p.8

> of faith. Indeed, the available evidence indicates that, if anything, the longer term impact on labour productivity will be perverse.[12]

The Democrats agree with the concerns raised by the academics cited above and by many of the other submissions to this inquiry.

It must be remembered that the sweeping 1993 and 1996 IR reforms occurred at a time when the economy needed picking up. We then had high unemployment, low productivity, high inflation, and high interest rates.

This is not the case now. Australia is doing quite well. In last year's Global Competitiveness Report, Australia was ranked 14th of 104 countries. In terms of competitiveness Australia has one of the lowest Government debts in the OECD; we have a relatively low unemployment rate, low interest rates, and low inflation.

The Government argue that Australia's labour market is over regulated and the OECD and IMF have encouraged the federal Government to deregulate the labour market. There is the obvious caution that the chief advisers and suppliers of information to the OECD and IMF organisations on these matters is the Australian Government. However, while the OECD and IMF may make a valid case for continued reform, as indeed do the Australian Democrats, they make a general not specific case.

In any case, Professor Petz argued that much of the assertions from OECD and IMF are not based on empirical research:

> There is reference to evidence from the IMF, the OECD and the Reserve Bank. A lot of the comments from these bodies are not actually based on empirical research, particularly the annual economic surveys that are done by the OECD or the IMF. They are not based upon original empirical work within those bodies, so whatever claims are made in there are really more matters of faith. What happens with those reports is that the OECD officers or the IMF officers come out to Australia and talk to a few people—mainly from Treasury - and then they write a report that is not unlike something that Treasury would be writing if it were not writing under its own name.[13]

It is also worth noting that the February 2005 OECD Economic Survey said that 'OECD studies consistently rank Australia as one of the countries with the least restrictive employment protection legislation.' In other words, Australia's IR system is employment friendly. This is contrary to claims that Australia's market is too highly regulated and needs radical deregulation.

Professor Peetz also argued that many of the other studies cited by Australian Chamber of Commerce (ACCI) in their submission talked about broader labour market reform but did not provide empirical evidence to support particular provisions in the Work Choices Bill.

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12 151 Australian industrial relations academics, *Submission 175*, p.7

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

The Democrats know about the *assertion,* but what *evidence* has the Government produced to justify radical change to the federal system?

In contrast, the GST had huge documents, graphs, tables, cameos, and substantive arguments offered to justify their case, and a non-Government controlled Senate subjected the New Tax System to five months of rigorous examination, and produced four reports from four committees. As a result the package passed by the Senate was much improved to reflect community needs.

In this case we've got a seven-page announcement in May, a 68 page book of rhetoric in October, a 20 day Senate review process, and the Prime Minister and various other ministers popping up every now and again to beat out bushfires.

Where is the modelling? Where are the cameos, graphs and tables? Where is the empirical evidence that radical change is needed?

The only item of reform that the Coalition have even tried to make an economic link for is the exemption of business with less than 100 employees from unfair dismissal claims. Even this argument is fatally flawed.

We have over 10 million employed, 1.7 million jobs have been created this decade, and there are only 15 000 unfair dismissal applications under the state and federal unfair dismissal regimes. Those 15 000 would reduce by a third if lax state systems were replaced by the tight federal system.

The most comprehensive research undertaken to date by Senior Lecturer Paul Oslington and PhD student Benoit Freyens at the University of NSW School of Business found that ending unfair dismissal laws for employers with fewer than 100 employees would create only 6,000 jobs, not the 77,000 claimed by the Howard Government.

In the 2001 Hamzy case the expert witness for the Federal Government, Professor Mark Wooden, agreed with the statement that "the existence or non-existence of unfair dismissal legislation has very little to do with the growth of employment and that it is dictated by economic factors."

In justifying the IR changes the Government argues that to be competitive we need to be more like the UK, US and NZ. Yet the Government refuses to compare Australia with other OECD nations like the Scandinavian countries.

Of course the values of one country can not easily be transferred to another. Contrast the aggressive anti-union nature of many Australian enterprises. Denmark for instance is heavily unionised. The Confederation of Danish Industries refers to unions as their 'social partners' and are strong supporters of the values represented by that phrase.

The economic evidence shows that the Scandinavian countries are actually out performing the UK, US, Australia and NZ. The Scandinavian countries have higher

regulation of IR than Australia, but they are better at creating jobs, are more productive and are wealthier than we are.

On the World Economic Forum's 2005 Global Competitiveness Ranking, Australia is ranked the 10th most competitive country in the world compared to Finland No 1, Sweden No 3, Denmark No 4, Iceland No 7, and Norway No 9.

On average the Scandinavians do better on jobs than Australia. Australia's unemployment rate is 5%, Norway's 4.6%, Sweden's 6.3%, Denmark's 4.8% and Iceland's 3.0%. Norway Iceland and Sweden all have lower long-term unemployment rates than Australia.

If Australia wishes to learn from other countries, or to adopt some of their workplace values, Scandinavia seems a more attractive workplace model than countries like the USA, whose industrial relations policies have contributed to much larger numbers of working poor, higher income inequality, higher levels of crime, and major social problems.

Rather than be of benefit, there is evidence from New Zealand, and the Victorian Kennett and Western Australian Court Governments, to suggest that the similar Work Choices Bill reforms will have a negative impact on disadvantaged Australians and on Australian society overall.

By the end of the 1990s, New Zealand was a less equal society than ever before, in terms of income distribution, it had a lower full-time participation rate, lower real wages, and flatter productivity, with a diaspora of up to a quarter of its population, many of them in Australia earning considerably higher rates of pay than they could at home.[14]

The Victorian Government in their submission argued that the participation rate was likely to decline under the Work Choices Bill:

> Victoria's evidence is that workers' wages will decrease steadily over time, as will their living standards. Work and family has been a high priority for the Victorian Government and this submission details the extent to which Work Choices will impose hardship on family life. Without the award protection governing how ordinary hours of work are to be managed including minimum notice periods before changes in hours operate, notice of roster changes etc, working families will be at the mercy of their employers. Instead of responding to the needs of the labour market, these industrial relations changes will lead to declining participation rates. Poor pay and conditions are not incentives for youth, older people capable of working, and women interested in re-entry to join the workforce. Declining wages and conditions are not incentives for workers to stay in the

14 151 Australian industrial relations academics*, Submission 175*, p.22

> workforce. In a time of increasing need for workforce participation, Work Choices may effectively reduce participation rates.[15]

A number of submissions asserted that productivity would in actual fact decrease as a result of the Bill:

> By reducing the number of allowable matters in awards and by permitting employers to reduce wages and conditions, the Bill will permit cost minimization strategies in which employers are unlikely to invest in firm-specific training or upgrade their capital stock. While labour utilization rates might increase as net unit labour costs fall, productivity is likely to fall as a consequence of reduced capital investment. The Bill thus provides incentives for low wage and low skill employment and an increase in the labour intensity of production. This is the way to reduce productivity growth in the long term.[16]

The Democrats believe that this Bill is based on old ideology, an ancient dislike of unions, and not enough of the proposed changes are based on real evidence or on widespread problems, and in actual fact could have a negative effect on the economy.

Philosophically flawed

Unless an economy is genuinely in dire straits and needs radical surgery, economic reform is not more important than social cohesion. Both are important. Academics have long argued that the preservation of social capital is crucial to economic and social success in the long run.

In their submission the Australian Catholic Commission for Employment Relations in citing a speech from Pope John Paul II, argued that human rights must take precedence over the market:

> It would appear that, on the level of individual nations and of international relations, the free market is the most efficient instrument for utilizing resources and effectively responding to needs. But this is true only for those needs which are "solvent", insofar as they are endowed with purchasing power, and for those resources which are "marketable", insofar as they are capable of obtaining a satisfactory price. But there are many human needs which find no place on the market. It is a strict duty of justice and truth not to allow fundamental human needs to remain unsatisfied, and not to allow those burdened by such needs to perish. It is also necessary to help these needy people to acquire expertise, to enter the circle of exchange, and to develop their skills in order to make the best use of their capacities and resources. Even prior to the logic of a fair exchange of goods and the forms of justice appropriate to it, there exists something which is due to man because he is man, by reason of his lofty dignity. Inseparable from that required "something" is the possibility to survive and, at the same time, to

15 Victorian Government, *Submission 136*

16 151 Australian industrial relations academics, *Submission 175*, p.24

> make an active contribution to the common good of humanity. (Centesimus Annus, 34).[17]

The Democrats argue that it is important that we balance employee and employer rights. If employers have all the power then what we would see in many cases is a race to the bottom where wages will be driven down, people will be forced to work longer for less and job security will be non existent. The social contract would move from cooperation to opposition and conflict.

Employment, wages and working conditions directly affect the standard of living and quality of life of individuals and their families. Thus, while it is important that labour market arrangements foster the efficient use of labour and promote participation in the workforce, they also need to recognise that labour is a distinctive 'input' to production, and that wider social objectives and relationships are involved - including the relationships between work, leisure and family, providing safe workplaces and the role of workers in society at large.

The mark of a civilized successful first world liberal democracy is surely not just high living standards and equitably shared wealth, but an egalitarian society that respects and protects the working poor, and the disadvantaged, and that has advanced working conditions.

Our nation Australia *is* our people. It is our *people* that count, so the social perspective is the one that really counts - reform that accords with Australian values and has broad community support.

The social perspective suggests that reform that is not seen to produce a 'fair go' and a fair and productive outcome will simply be unwound in time, as has occurred in New Zealand.

On the Economists' world wide quality of life index, which included measures of job security, gender equality , and family relations, Australia is ranked 5th out of 111 countries compared to the USA which is ranked 13^{th,} and New Zealand which is ranked 15th.

The more radical components of the Governments IR reform will threaten our standing on measures such as quality of life index. And for this cost, what is the measurable benefit?

The legislation aims to reduce both the role of the independent umpire – the AIRC, and the unions. From a political and social perspective a civilised first-world progressive democracy works best with checks and balances. The Commission and the Unions are a valued part of that mix. These two institutions are an essential part of Australia's socially progressive society.

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17 Australian Catholic Commission for Employment Relations, *Submission 110*, p.4

A number of submission raised concerns that there are a number of human rights implications of some of the elements of the Bill, including with respect to freedom of association and limitations on the right to strike in contravention of the International Covenant on Economic, Social and Cultural Rights.

At its core the Work Choices Bill is philosophically flawed, it puts labour as the only unit of production at its foundation and ignores the wider social and human rights implications. Rather than building on the strength of the current system it aims to dismantle it. For these reasons we are philosophically opposed to this Bill.

Move to unitary system messy, complex and incomplete

Professor Andrew Stewart in his submission eloquently and comprehensively outlined why the Bill will not create a truly national or unitary system, and adopts the wrong approach in 'moving towards' that otherwise desirable objective.[18]

Professor Stewart outlines four areas of concern in his submission:

> Firstly, there is no clear and readily ascertainable demarcation between those employers that are to be covered by the new federal system and those that are not. The operation of the new regime, as triggered by the definition of "employer" in proposed s 4AB, primarily hinges (at least outside Victoria and the Territories) on how the courts interpret the term "trading corporation". On the current view, most incorporated bodies fall within that term. Even not-for-profit bodies such as local councils, universities and a range of community organisations qualify, on the basis that they have "significant" trading activities. But the scope of the new regime is vulnerable here to the High Court choosing at some point to adopt a stricter view of what constitutes a trading corporation. While there is no imminent prospect of that, it cannot be ruled out. It will never then be certain that such bodies are properly subject to federal regulation…
>
> My second area of concern relates to the provisions in proposed s 7C as to the exclusion of State laws in relation to "federal system employers". These provisions are both ambiguous and arbitrary in their effect. Proposed s 7C sets out the Commonwealth's intent to have the Workplace Relations Act 1996 operate to the exclusion of certain State or Territory laws, at least so far as they apply to employment relationships covered by the new federal system. The main exclusion is of any "State or Territory industrial law". This is to be defined in s 4(1) as including five named Acts (the main industrial statutes in each State that still has an arbitration system); plus any other statute that "applies to employment generally" (a term that is itself separately defined) and that has as its "main purpose", or one of its main purposes, any one of a list of objectives. These include "regulating workplace relations" and "providing for the determination of terms and conditions of employment". There is also scope for laws to be prescribed by regulation as falling within this category…

18 Professor Andrew Stewart, *Submission 174*, pp.2-5

> It will not be a national regime, because of the employers omitted from its coverage. The government has repeatedly claimed that the expanded federal system would cover at least 85% of the workforce. But it has never revealed the figures on which that estimate is based. By contrast the Queensland Government has published data that suggests total coverage of 75% at best, and less than 60% in States such as Queensland, South Australia and Western Australia…
>
> Nor will the new legislation create a unitary system of regulation for the employers covered by it. They will still be subject to important State and Territory laws in areas such as workers compensation, occupational health and safety and discrimination. Indeed there is a great potential for confusion and disputes as unions and workers seek to find new ways of using those laws to regain ground lost through the changes to the federal legislation.[19]

The issue of coverage raised by Professor Stewart is an important one. Mr John Hart, Chief Executive Officer, of Restaurant and Catering Australia told the committee that about 29 per cent of their members are not incorporated and are not in Victoria or the territories.[20]

It is apparent that level of coverage in the new federal system will depend greatly on the industry. In a response to a question on notice, the National Farmers Federation indicated that approximately 90% of farmers are not incorporated. A large majority of farmers currently operate under the federal system but will be forced into the transitional area or forced to remain in the state system if they do not incorporate.

The two tables below were included in the NFFs response to the question on notice and are insightful in demonstrating the effect of the Work Choices Bill on what are regarded as core Coalition constituents, with respect to coverage.

Table 1 - Jurisdictional Coverage before Work Choices[21]

State	***Federal Jurisdiction***	***State Jurisdiction***
Queensland	0%	100%
NSW	75%	25%
Victoria	100%	0%
Tasmania	80%	20%
South Australia	70%	30%
Western Australia	70%	30%
Northern Territory	100%	0%
ACT	100%	0%

19 Professor Stewart, *Submission* 174, pp.2-3

20 Mr Hart, *Committee Hansard,* 15 November 2005, p.7

21 NFF, *Answer to Question on Notice*, 15 November 2005

Table 2 - Jurisdictional Coverage immediately after commencement of Work Choices (these figures will change after farmers incorporate over a period of time).[22]

State	*Federal Jurisdiction*		*State Jurisdiction*
	Work Choices	Federal Transitional Awards	
Queensland	10%	0%	90%
NSW	10%	70%	20%
Victoria	100%	0%	0%
Tasmania	10%	75%	15%
South Australia	10%	65%	25%
Western Australia	10%	65%	25%
Northern Territory	100%	0%	0%
ACT	100%	0%	0%

The ACTU provided the Committee with a table (below) that supports claims made by Professor Stewart and Mr Hart, and which demonstrates that a dual system will prevail.

The ACTU estimate that between 22 and 25 percent of all employees within Australia will fall outside the scope of the proposed legislation. The table below shows the percentage of employees who remain within the jurisdiction of their respective State systems. Western Australia with 43 percent and Queensland with 42 percent clearly indicate the extent to which a dual system will continue to operate.[23]

Table 3 - Estimated coverage of a new industrial relations system

	Coverage of federal jurisdiction		**Coverage of state jurisdiction**	
		No. non-farm		**No. non-farm**
	%	**Employees %**		**Employees**
NSW	72.5	1968.5	27.5	746.7
VIC	100.0	2075.5	0.0	0.0
QLD	57.6	902.5	42.4	664.3
SA	57.3	338.5	42.7	252.3
WA	57.0	460.9	43.0	347.7
TAS	59.3	101.4	40.7	69.6
NT	100.0	86.0	0.0	0.0
ACT	100.0	161.0	0.0	0.0
AUST	74.6	6094.3	25.5	2080.6

Source: Unpublished data, ABS Survey of Employee Earnings and Hours (Cat. No. 6306.0) May 2004. ABS Labour Force (Cat. No. 6202.0) [24]

22 NFF, *Answer to Question on Notice*, 15 November 2005

23 ACTU, *Submission* 171, p.15

24 ibid., p.15

As outlined earlier, the Australian Democrats strongly believe that Australia needs one industrial relations system and not six, for human rights and efficiency and productivity reasons. Clearly the evidence shows that the Work Choices Bill before us will not create an effective single national unitary system.

The Democrats would argue that to be successfully bedded down, a national system needs to be consistent and continuous with the past. Based on Victoria's attitudes, the Democrats believe that the present federal law can win through as the national system.

Instead this Government has chosen to radically alter the industrial relations system, in a way that is not palatable to the States. Rather than a negotiated referral of powers, the Government has been forced to attempt a hostile and messy takeover of the state systems.

And which is the greater prize? A federal system well accepted now, and therefore (even if imposed) more likely to be accepted by the states as the unitary system, or an aggressively new federal system dictated by ancient ideological passions, which might therefore be rejected or overturned in time?

For the reasons outlined above therefore, despite our long and persistent advocacy of a single IR system, the Australian Democrats cannot support the Governments move towards a national unitary system as determined in this Work Choices Bill.

Inadequate safety net and protections

> A society is only as stable and strong as its most fragile.[25]

As outlined earlier, the Australian industrial relations system has been built around a framework that provides a safety net for the most vulnerable and a balance between community standards and individual needs. The need for such a system was articulated by the Mr Ryan from the Australian Catholic Commission for Employment Relations:

> Some employees come to the job market disadvantaged and that, for them, the labour market will not satisfy their fundamental human needs. Their dignity requires appropriate intervention and protection. There is a need for a "safety net", to use a contemporary term, to ameliorate some of the effects of an unrestrained labour market.[26]

It is unlikely that this Work Choices Bill will have a detrimental effect on all Australians, although we believe it will erode conditions over time, or at a minimum, prevent the widespread take-up of new community standards. The Democrats do believe that this Bill will have a detrimental impact on vulnerable or disadvantaged employees and jobseekers and that rather than fair, this Bill is profoundly unfair. The Bill undermines the foundations of Australia's industrial relations system, by:

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25 Ms Goward, *Committee Hansard*, 17 November 2005, p.17

26 Australian Catholic Commission for Employment Relations, *Submission 110,* p.4

- abolishing the "no disadvantage test";
- effectively abolishing the awards system;
- taking away the wage setting role of the AIRC, and further reducing its role in other areas;
- abolishing unfair dismissal protection; and
- unfairly and unnecessarily increasing the bargaining power of the employer.

No disadvantage test

The Democrats believe that one of the worst proposed changes in the Bill is the abolition of the no disadvantage test, which the Democrats insisted be put in when negotiating the 1996 Workplace Relations Act.

The Work Choices Bill reduces the safety net in three major ways – by severing the connection between agreements and awards over time, by reducing the conditions that agreements reference to, from at least 20 (more in the state systems) to 5, and by removing the no disadvantage test. The Bill replaces the no disadvantage test based on the award system which has 20 allowable matters, with five minimum conditions:

- A minimum hourly rate set by the Australian Fair Pay Commission;
- 10 days sick leave;
- 4 weeks annual leave (2 of which can be bought out);
- unpaid parental leave; and
- working hours (provided the 38 ordinary hour week average is achieved over a 12 month period).

Many submission expressed concerns that certain award matters were being excluded. HREOC for example expressed concern about the following being excluded:

- Loadings for working overtime or shift work;
- Public holidays;
- Annual leave loadings;
- Penalty rates; and
- Outworker conditions.[27]

HREOC also lamented the exclusion of the provisions awarded under the recent Family Provisions Test Case decision, which will be discussed a greater length further below.

27 HREOC, *Submission* 164, p.4

The Australian Federation of Disability Organisations argued that the minimum conditions leaves out many conditions that are important to people with disability obtaining and retaining employment, especially:

- limits on when a person can be required to work

While there will be a limit to the number of hours a person can be asked to work, there will be no rostering limits on when the person can be asked to work the hours. This is problematic for many people with disability including those who are reliant on formal and informal personal assistance to get prepared for work and those who are reliant on public transport to get to and from work; and

- penalty rates and overtime

For the reasons outlined above, engaging in work outside non-standard hours can lead to a substantial increase in the costs incurred by people with disability working.

Case study 5

Thea relies on a personal carer to get ready for work every morning. Her personal carer is not available before 7am, meaning that Thea cannot start work before 9:30am. In special circumstances, Thea can arrange an alternative personal carer to arrive earlier, but she must pay higher rates to the agency.

Case study 6

Luciano has a psychiatric condition that requires fortnightly injections. The days prior to and after the injection are difficult for Luciano, so he has negotiated with his employer to have these days off work. Recently, his employer has demanded that Luciano only take one day off per fortnight. Luciano is physically unable to comply with this demand.[28]

A number of submissions argued that the abolition of the no-disadvantage test would see wages and conditions fall below current award standards.

> The AFPCS is the latest and most significant weakening of protective regulation in Australian decentralised bargaining. The impact of the AFPCS must be measured by examining the new standard in the context of a bargaining environment where there is no or reduced access to unfair dismissal remedies, where there is a right for employers to unilaterally replace agreements with the AFPCS after the former have expired and where Australian Workplace Agreements (AWAs) prevail over collective agreements and awards In this context, weekly wages may fall subject to the condition of the labour market, the human resource strategies of employers and their willingness to incur turnover costs. In industries and

28 AFDO, *Submission 39*, pp.5-6

> workplaces where labour is plentiful and turnover costs low, it is very likely that wages and conditions will fall below award standards.[29]

At present that majority of individual agreements are common law agreements[30], which are underpinned by an award and generally provide above award conditions.

Of interest is the fact that common law agreements will continue to be underpinned by awards, where as AWAs, will be underpinned by the 5 minimum conditions.

Senator MURRAY – That is good. If I interpret that to mean you are going to amend it, I am delighted. Turning to the general principles that surround the Work Choices bill, I want to refer to agreement making. In all cases, I am referring to new agreements after the Work Choices bill has been passed. Dealing with individual agreements first, a common law individual agreement enforceable in the courts and not registered under the act would still have to comply with the minimum wage and the five standard conditions. That is correct, isn't it?

Ms James – Proposed section 89A deals with the interaction between the Australian fair pay and conditions standard and agreements. What it—

Senator MURRAY – I do not need detail; I just want to know whether that is correct. But a common law agreement—in all cases, of course, I am talking about it being under the federal act—on that basis would not default to any award provision, would it? I am talking about a new common law agreement.

Ms James – What do you mean when you say 'default', Senator?

Senator MURRAY – Default is well understood on your side of the table and on mine. It means that, in the event of an agreement being silent, by default if you want to refer to a provision you go to that award. The question is: if a new common law agreement applies, does it default to an existing award or is it just governed by the minimum wage and the five conditions?

Ms James – If the award on its terms bound the employer in question, then that award would apply.

Senator MURRAY – A new award or the existing award?

Ms James – Any award.

Senator MURRAY – So are you telling me that the 16 allowable matters will apply to a common law agreement?

Ms James – Yes.

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29 151 Australian industrial relations academics, *Submission 175*, p.9

30 31.2 per cent of all forms of agreement making being unregistered individual agreements and 2.4 per cent being registered individual agreements (AWAs)

Senator MURRAY – Turning to new AWAs, do the same terms apply? Does a newer AWA simply have to comply with the minimum wage and the five standard conditions?

Ms James – That is correct.

Senator MURRAY – And the same conditions apply for the award? If there is no provision in those five minimum conditions and the minimum wage covered by the AWA then, by default, they will refer to be applicable award?

Ms James – The award will not apply in that case, although the protected award conditions provisions do impose requirements on the employer with respect to certain elements of the award not applying. But if the protected award conditions provisions are complied with—in other words, if those award conditions are expressly modified by the AWA—then the AWA will prevail over the award and the award will not operate.

Senator MURRAY – So could you get greater potential protection from a new common law individual agreement than you would from a new AWA under this bill? You would get more conditions that apply?

Ms James – It is an unusual situation, or it is not really comparing apples with apples, in that most common law agreements are well above award conditions. They are usually in areas covering managers or professionals. So, while in theory my answer before was correct about the award applying, it is not usually relevant.[31]

We will have a situation were some individual agreements will have far superior conditions than others.

The Democrats believe that if the Government truly believes in a fair system then the current no disadvantage test should prevail as it more appropriately represents community standards and ensures *all* workers have access to first world civilised standards. Of course from this Bill it is quite evident that the Coalition Government do not truly believe in a fair system for workers. Their new system is heavily and unnecessarily biased to employers.

Undermining the Award System

The shift away from awards as the central underpinning of the Australian industrial relations system is also of great concern. As noted by the ACTU:

> *Awards remain an important source of employment* protection for many workers. One in five employees relies on the award to set their wages and conditions and many more rely on awards to underpin the agreements that govern some of their working arrangements.
>
> Changes to the award system will disproportionately affect employees in the hospitality sector, in retail, personal services and health and community

31 *Committee Hansard*, 18 November 2005, pp.31-32

> services. (ABS 6303.0 May 2004). These workers are generally casual, often women and generally low paid.[32]

While the Government have gone to great pains to suggest that the award system will still play a key role in the Australian industrial relations system, Law Professor Andrew Stewart argues that the way the Bill as written actually points to a calculated attempt by the Government to destroy the award system and prevent it from functioning as any meaningful form of safety net.[33]

> Once you have worked your way through the provisions of the bill and worked out how the transitional arrangements apply to a particular business and sorted out which state laws do or do not apply, it is true that there are some relatively simple steps that can be taken to become award free. In some cases, that may be a matter simply of waiting. One of the issues that I have highlighted in my submission is that there is no guarantee in the bill, and therefore there will be no guarantee in the Act if the bill is passed in its current form, that workers or businesses currently covered by state awards will ultimately become subject to federal awards. So one option will simply be to wait out the loss of award coverage.
>
> But there are other ways of achieving an award-free workplace: making an agreement then terminating it; using a transmission of business from one company to a related company; or setting up a new project or undertaking and making a greenfields agreement. It is true that many of those steps are fairly simple.[34]

The Democrats believe that the awards system has played a valuable role in ensuring community standards are included in working conditions for all employees irrespective of their bargaining position, that awards should remain, and that the AIRC should retain the power to make and vary awards.

Minimum Wage – driving down real wage increases

The Committee heard evidence from workers and unions representing workers from low paid industries that workers dependent on the award rely on minimum wage increases for pay increases.

The Bill seeks to replace the role of the AIRC in minimum wages setting and establish the Australian Fair Pay Commission (AFPC) to determine basic rates of pay and casual loading.

The Democrats are concerned with a number of aspects with this proposal, including:

- The independence, composition and tenure of the AFPC;
- The wage setting parameters;

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32 ACTU, *Submission 171*, p.53

33 Professor Stewart, *Submission 174*, p.5

34 Professor Stewart, *Committee Hansard*, 17 November 2005, p.49

- The frequency of wage and other reviews; and,
- The ability to make submissions.

The Democrats share the concerns of the 151 academics, who have little confidence in the independence of the AFPC;

> The Australian Industrial Relations Commission (AIRC) has determined minimum wages in Australia for one hundred years. It has determined the safety net since its inception. The AIRC consists of independent persons, that independence being assisted by the terms of appointment to that tribunal. The Bill seeks to replace this important role played by the AIRC with the Australian Fair Pay Commission (AFPC). Members of this body are appointed for limited periods – no more than five years in the case of the Chair, and no more than four years in the case of Commissioners. These short term appointments will not allow the AFPC to develop an 'institutional memory'. Further, the term of appointment will make members less independent of Government wishes in relation to standards. Many parties will have little confidence in the independence of these short term appointees. Further these processes will lack transparency or the opportunity for open consideration of relevant research evidence.
>
> In view of the important social consequences of minimum standards, the reduction of the AFPC to little more than an economic tribunal can have significant societal outcomes. The only criteria for appointment of the Chair is 'high skills in business or economics'. These areas of skill are marginally broadened in the case of Commissioners.[35]

The Democrats also share the concerns of many submitters that the Fair Pay Commission will be far from fair. Professor Stewart points out that the Bill removes any statutory reference to establishing "fair and enforceable minimum wage conditions."[36] This point is further made in the submission by the 151 academics:

> The parameters challenge the notion of a 'Fair' tribunal. The notion of fairness, at least as it relates to wages, has to do with fair comparisons. These comparisons also involve evaluations of fairness in terms of community standards. The present Act requires the AIRC to ensure that awards act as a safety net of fair minimum wages and conditions of employment and that the AIRC provides fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. No such requirement is imposed on the AFPC. [37]

Specifically the Bill excludes the requirement previously included in the Act, to take into account that *"need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian Community"*. The Democrats believe that the exclusion of this clause points to the Governments true

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35 151 Australian industrial relations academics, *Submission 175*, pp.13-14

36 Professor Stewart, *Submission 174*, p.5

37 151 Australian industrial relations academics, *Submission 175*, p.14

objective, which will be to undermine the minimum wage system and keep minimum wages down.

This is also evidenced in the Governments past behaviour. In their submission the ACTU noted that "In recent minimum wage cases the Federal Government and employer organisations have argued for no increases or increases less than CPI."[38]

At the last minimum wage case the Federal Government argued that the ACTU's claim for a $26.60 increase would result in a loss of 74,000 jobs. There was a $17 increase and as the ACTU correctly notes: *"award rates in real terms have increased and unemployment has fallen, at the same time participation levels have increased".*

The 151 Academics in their submission noted that the Australian Fair Pay Commission is modelled on the British Low Pay Commission but that the objectives of the two are very different:

> The AFPC is said to be modelled on the British Low Pay Commission (LPC). Analysis of the activities of the British LPC in the wider context, make it clear that this is a very different model to that proposed for Australia, and claims of similarity are incorrect. The British national minimum wage (NMW) was introduced on the recommendation of the Low Pay Commission (LPC) in April 1999; its purpose was to introduce and increase the national minimum wage (NMW). The British NMW sits firmly within a wider social agenda, underpinned by an array of social protections and minimum standards, including a statutory process for trade union recognition. The function of the Australian Fair Pay Commission (AFPC) and the context within which it will sit is a very different one, which will have very different outcomes for Australia's low paid. It is difficult to reconcile the suggestion that the AFPC is modelled on the LPC with the observations that, since 1999, the minimum wage in the United Kingdom has increased by over 30 per cent and the Government's persistent view that the AIRC has been too generous in safety net cases, bearing in mind that the AIRC increased minimum wages by only 18 per cent between 1999 and early 2005.[39]

The Democrats do not doubt that the shift to the AFPC will see real wages drop.

Loss of unfair dismissal protection

While not included in the terms of reference, the exemption of employers with less than 100 employees from unfair dismissal laws, coupled with the loss of the no disadvantage test and the pronounced push towards statutory individual agreements, will further exacerbate the situation for disadvantaged employees and jobseekers.

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38 ACTU*, Submission 171*, p.7.

39 151 Australian industrial relations academics, *Submission 175*, p.15

In addition to the exemption, the Bill includes a new definition of dismissal for operational reasons which include 'economic, technological, structural or similar' reasons.

Professor Peetz explained to the Committee just how easy it was going to be to unfairly dismiss someone under this Bill:

> 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.[40]

In their submission the Australian Federation of Disability Organisations expressed their concern about the loss of protection:

AFDO is concerned about a range of dismissal related changes contained in the Bill that are likely to disproportionably disadvantage people with disability, such as:

- the abolition of unfair dismissal protection for people working in workplaces with less than 100 staff;
- the change to workplace agreements such that they do not have to contain minimum award redundancy standards; and,
- workers who are dismissed on the basis of 'operational requirements' of a business not being able to claim unfair dismissal, no matter what size their workplace. AFDO is further concerned that employers' ability to use "operational requirements" as a cover-all for dismissal may lead to a sharp increase in the dismissal of people with disability, particularly those who acquire their impairment while in the workforce.[41]

The Democrats believe that employees should have protection from being sacked unfairly. The Bill's provisions will not only create unequal human rights depending on the size of the employer, but will create job insecurity and vulnerability. There is no

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

41 AFDO, *Submission 39*, p.4.

evidence to support the notion that abolishing unfair dismissal laws will create substantial employment.[42]

No genuine bargaining or genuine choice for employees

The Committee heard overwhelming evidence that this Bill tips the balance very much further in favour of employers. In their submission the 151 academics argue that the Government are hypocritical in the way they apply their policy:

> The Government recognises that an imbalance of bargaining power is inherent in commercial arrangements between small operators and big business, and has legislated to facilitate collective bargaining for small business. It does not, however, apply these principles to the workplace.[43]

The Bill will strengthen the employers' hand still further by:

- Encouraging AWAs, which can be administered on a take it or leave it basis.
- Allowing employers to create and lodge a workplace agreement, but there is no mechanism to ensure that the employee covered genuinely consented to the agreement, or that the agreement meets minimum standards.
- Giving the employer the ability to unilaterally terminate an agreement after the expiry date of the agreement, reverting to the 5 minimum standards.
- Restructuring the organisation to set up a Greenfield site[44]

No alternative protection

As identified by HREOC Sex Discrimination Commissioner, Ms Pru Goward, not only does the Bill dismantle the safety net and other protections, but the Government have offered no alternatives to protect the disadvantaged.

> *HREOC does have grave concerns about the implications of dismantling or removing any* significant planks of a social, legal and economic contract in Australia which has evolved over 100 years and around which a variety of institutions, policies, cultures and government programs have grown up. Unless careful adjustments are made to surrounding institutions, laws and policies, inevitably that whole contract is challenged.[45]

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42 For further evidence please see the Democrats initiated Senate Committee report on unfair dismissal. http://www.aph.gov.au/Senate/committee/eet_ctte/unfair_dismissal/report/report.pdf

43 151 Australian industrial relations academics, *Submission* 175, p.8

44 *As I read this provision, the effect of this will enable any business to engage in a corporate restructuring exercise. I am not suggesting that all employers will be doing this or even many employers, but some will certainly be advised to think about this. Businesses will be able to restructure their arrangements, regardless of what awards or agreements they currently have in place, set up a greenfields agreement for a new project or a new undertaking and therefore clear the way entirely of any previous award or agreement conditions* (Professor Andrew Stewart, Committee Hansard, 17 November 2005, p. 54.

45 Ms Pru Goward, *Committee Hansard*, 17 November 2005, p.14

Sex Discrimination Commissioner Ms Pru Goward told the Committee of HREOCs concerns about the impact of this Bill on vulnerable Australians:

> Finally, HREOC is concerned that the bill fails to adequately protect vulnerable employees and job seekers, particularly workers with disabilities, Indigenous people, people moving between welfare dependency and paid work, and those in low-paid wage jobs, for which there are many competitors and who consequently have little individual bargaining power. The capacity for more vulnerable employees to bargain effectively and to choose their employment arrangements is impinged upon by the existence of so-called 'take it or leave it' individual bargaining arrangements. Allowing employers to make employment conditional on an employee taking up an AWA, for example, means that that choice of employment arrangements, especially for those on minimum wages, is extremely limited. The consequences are felt not only by workers but by their children and families. HREOC has serious concerns that, once an agreement is terminated, neither that agreement nor an award is in operation, with employees presumably to be covered only by the standard. This means that an employer can terminate an agreement unilaterally after the nominal expiry date of the agreement and that all employees covered by the agreement revert to the standard. This provides employers with a great deal of leverage over the terms and conditions of any new agreement.[46]

Dr Jill Murray in her submission argued that the system has been designed to ensure that an as yet unknown number of workers have as their only legal minimum entitlements, five minimum conditions, unless they are able to bargain for it.[47] Dr Murray goes on to describe the lack of rights for those in what she calls 'the worst job':

(a) **No minimum or maximum weekly hours**, provided the 38 ordinary hour week average is achieved over a twelve month period.

(b) **No entitlement to a stable income week by week**. Indeed, the concept of weekly wage is abolished, replaced by an hourly rate for time worked and complete hours flexibility. Under Work Choices, you could work 80 hours in one week, then 10 the next, with your income fluctuating accordingly.

(c) **No meaningful entitlement to overtime payments**. The 38 hour week averaged over twelve months is said in the Bill to be 'ordinary hours'. That is, even in a week of 80 hours the worker is still engaged in 'ordinary hours', provided that some time over the year the employer brings the average down to 38.

(d) **No entitlement to higher rates of pay for unsociable hours**. The employee can be required to work at any time in the 24 hour span, or on any day of the year at any time without an entitlement to penalty rates. An hour worked at 9.00 am and an hour worked at 3.00 am are paid the same basic rate. An hour worked on Christmas

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46 ibid., p.16

47 Dr Jull Murray, *Submission* 65, p.1

Day is paid the same as an hour worked on any other day. In fact, the tenth hour worked at 3.00 am on Christmas Day attracts the same hourly rate as working at 9.00 am on any Monday morning.

(e) **No legal entitlement under the Bill's schema to certainty of scheduling**, because hours flexibility is virtually total, and wholly in the hands of the employer. Workers who are parents, or who care for the elderly or disabled, or who are studying to improve their labour market prospects or who have a second job are going to be vulnerable to sudden changes of scheduling at the initiative of the employer. Who can afford to object to such scheduling whims, when they can be sacked for any reason or none if the boss decides to?

(f) **No legal entitlement to a written statement of employment status** and conditions of employment on engagement. **No legal entitlement to pay or hours records.** The worker in the worst job will not know until a twelve month period has elapsed whether or not the employer has breached the hours protection of the Bill. Without an accurate and agreed record of the hours actually worked, the worker will not be able to pursue the matter further. Without a legal right to employment information (as exists in the European Union and within the United Kingdom), and with no protection against unfair dismissal, it is unlikely workers will seek to enforce their bare right to a 38 hour week averaged over the year.

(g) **Little or no job security.** Most 'worst jobs' will be in the sector of firms with up to 100 employees and workers can be sacked for any reason or none without recourse. All workers are vulnerable under the broad 'operational ground' exemption.

(h) **No access to the modern work and family standards** created by the AIRC earlier this year in its Family Provisions Test Case. So, fathers miss out on the right to request eight weeks at home with their new baby and its mother (Work Choices has one week), parents miss out on a second year of parental leave (Work Choice has only one year) and the right to return to work part-time after parental leave (Work Choice is silent on this in the Fair Pay and Conditions Standard, and awards are no longer permitted to include provisions relating to a worker shifting from full-time work to part-time, and vice versa).

(i) **No rights to receive information about changes at work, or be consulted about such issues**. Work Choices abolishes the 2005 Test Case standard which stated that employees on parental leave should be consulted about major workplace change. This right was agreed between the parties during the AIRC's conciliation of its Family Provisions Test Case, but now every individual worker in the worst jobs will have to try to negotiate for it by themselves. Most workers and employers will not give a thought to the matter of consultation at the time of engagement. Most workers won't consider it vital until, in the worst case, they lose their job while away from the workplace on parental leave due to major restructuring.

(j) **No access to a legally mandated career structure.** It is common for workers to gain skills, qualifications and confidence as they spend time in a job. Over time,

some workers take on duties which, under the old system, would entitle them to be re-classified at a higher level in the legally mandated career structure. However, for those on the worst jobs, there is no more career path, just the bare minimum wage. Requests for re-grading must be purely individual and personal matters, with no external description of the various grades of work in that industry to refer to. The employer will benefit from the increased productivity of the worker without any legal obligation to increase his/her remuneration or status at work. The economic impacts of this particular change should be carefully studied before it is implemented. Will Work Choices create a disincentive for workers to undertake vocational training, at a time when there are critical skills shortages?

(k) **No right to collectively bargain** with other people at the workplace unless employer gives it to the worker. Work Choices makes it lawful for the employer to apply duress to the worker to place or keep them on an AWA. Assistance from a union may be difficult to find, even if the worker is a member. The new right of entry provisions governing union officials' attendance at workplaces are very restrictive.

(l) **No voice in the new Work Choices wage setting process.** There is no vehicle for the worker or his/her representatives to be heard in the process of wage fixing, unless the Head of the Fair Pay Commission decides to meet with this particular individual. Professor Harper has indicated he intends to get to know the unemployed and low paid through his Church networks, but has given no guarantee that he will 'consult' the organised labour movement. In any event, Work Choices doesn't require Professor Harper to take any account of anything he hears in these informal and private meetings.

The 151 academics in their submission argued that the lowest paid are being required to bear a disproportionate burden of economic management. [48]

Detrimental impact on women and work and family balance

The Democrats believe that women and employees trying to balance work and family will be hardest hit by the Governments proposed industrial relations changes.

Workers with family responsibilities need job security; predictable common family time; protection from excessive hours; and, flexibility. Yet Australia already lags behind other countries on several of these measures, including working hours and policies to assist employees juggle their work and family lives. Evidence for the inquiry suggest that the Work Choices Bill will exacerbate this.

HREOC argued that family friendly arrangements are more likely offered to better trained and highly skilled employees and therefore regulation of family friendly measures was important to ensure all employees have access to the provisions:

48 151 Australian industrial relations academics, *Submission 175*, p.14

> It is crucial that the Government retain sufficient regulation of workplace relations to ensure that the important work of integrating a family friendly approach to paid work continues. OECD evidence is that where the provision of family friendly conditions is left to the market, they tend to favour high to middle income earners and those in the public sector. In Australia, for example, employer provided paid maternity leave is more available to high and middle income earners and public servants. By comparison paid maternity leave is almost unheard of in the hospitality or retail sectors.[49]

The Victorian Government submission outlined how this Bill will have a detrimental impact on employees' ability to balance work and family:

- The five components of the Fair pay and conditions standard represent a retreat on national work and family standards by incorporating only basic family leave provisions and failing to incorporate the right for parents to request extended parental leave, part-time work or more shared parental leave.
- The right to 'sell' two weeks annual leave will reduce common family time, with negative effects on children and parents. This effect may well compound disadvantage in lower income households.
- The capacity to set aside key award conditions in AWAs (public holidays, rest breaks, annual leave loadings, allowances, and penalty, shift, and overtime loadings) will be especially disadvantageous for families. This is a pernicious change, which will see both long and unsocial working hours increase. The international evidence about the negative effects of these work practices for workers and children is extensive and robust.
- Working carers have limited bargaining power. Like unemployed 'Billy' in Work Choices, there will be many 'Beths' – mothers returning to work – who will lack effective capacity to refuse terms which are, by any test, family unfriendly. The employment standards of many women and carers will only be as strong as prevailing minimum legal standards and no stronger. This will advantage the 'careless' worker. Where margins are tight, employers who would like to offer more family friendly provisions, will be forced into a race to the bottom, so that even good employers cut conditions and the legal standard becomes both maxima and minima.
- The AIRC has been the source and forum for all recent general advances on work and family standards. Under Work Choices, it will lose this role. It is hard to see where future general advances on work and family provisions will now come from. This will especially affect those outside collective agreements and the most vulnerable in the labour market, who are least able to win advances alone.
- Further, the loss of the arbitral power of the AIRC will reduce the capacity of employees to contest their employer's application of work and family

49 HREOC, *Submission 164*, p.13

provisions. This has been an active function of the AIRC in recent years. Finally, the AIRC's past role of taking account of family responsibilities in industrial regulation will be lost.

- A secure, living wage is vital to family well being. The primary weight placed on economic objectives in the work of the Fair Pay Commission is likely to see falls in real wages, which will especially affect those on low pay. It will also be fostering further income dispersion and inequality in Australia. International research shows that inequality has significant negative effects on social well being.
- Work Choices will see an expansion in individual agreements. Existing evidence shows that non-managerial employees on AWAs, relative to those on collective agreements, face lower pay rates, lower pay rises, longer, unsocial hours, and less time autonomy. Women fare especially badly as do part-timers and casuals, who have disproportionate responsibility for families.
- AWAs are less family friendly. They have less access to annual leave, long service leave, and sick leave. These are fundamental requirements of working carers. Only 12 per cent of AWAs registered between 1995 and 2000 had any work and family provisions. Only small proportions of AWAs in 2002 and 2003 had family or carer's leave (25 per cent), paid maternity leave (8 per cent), or paid parental leave (5 per cent).
- Those who need such provisions have least access. Only 51 per cent of women on AWAs had access to annual leave (62 per cent men) in 2002 and 2003. Fourteen per cent less women than men had access to any general work and family provisions.
- Work Choices will foster growth in unsocial and long hours, given that loadings for overtime and unsocial hours are not protected. Control of working time, avoidance of unsocial hours and protection of common family time are key issues for families. Work Choices further compromises each of these in a situation where almost two-thirds of Australians already work sometimes or often at unsocial times. International evidence of negative effects on marital stability, and on workers' and children's well being, is compelling.[50]

The Governments hypocrisy on work and family issues is astounding. The Government argues that Australia is too highly regulated in comparison to the UK yet, the UK has greater work and family protection than Australia. The UK has legislated for six months Government-funded paid maternity leave as well as the right to request flexible work hours. These measures have been embraced by business and have had a positive effect on productivity.

50 Victorian Government, *Submission 136*

Among other measures HREOC recommended that the Government include the provisions granted by the recent Family Provisions Test Case decision, which included:

1. The right for employees to request up to 24 months unpaid parental leave after the birth of a child, representing a doubling of the current 12 month entitlement.

2. The right for employees to request part-time work on their return to work from parental leave and before their children are at school.

3. The right for employees to request to extend the period of simultaneous unpaid parental leave up to a maximum of eight weeks.

4. A new Personal Leave entitlement which allows up to ten days of paid leave a year for the purpose of caring for family members or for family emergencies - double the former five day provision.

5. A new right for all employees, including casuals, to take up to two days unpaid leave for family emergencies on each occasion such an emergency should arise.

6. A duty on employers to not unreasonably refuse an employee's request for extended parental leave or return to work part-time.[51]

HREOC also argued for greater research and monitoring to ensure that the Government's objectives of increased flexibility to better balance work and family are being met, including more extensive research from the Office of the Employment Advocate to conduct and publish more research on agreements.[52]

Women working fulltime earn $155 a week less on average. One of the critical gender pay equity issues is that women tend to be in low paying feminised occupations. Further a large number of submissions argued that because women are in and out of the workforce for family reasons they generally have lower bargaining power.

One of the concerns of low bargaining power is that women will be more easily forced on to AWAs. During the Court Government's period of labour deregulation in Western Australia, the gender wage gap increased and WA women fared worse than women nationally. In February 1992 the WA gender pay gap was 22.5 per cent, by May 1995 it had increased to 27.8 precent.

In their submission to the inquiry HREOC argued that the Bill does not provide adequate or appropriate mechanisms for equal remuneration to be achieved between men and women; their concerns and recommendations are outlined below:

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51 HREOC, *Submission 164*, p.5

52 ibid., p.10

> While the proposed s 90ZR requires the AFPC to "…apply the principle that men and women should receive equal remuneration for work of equal value…", the Work Choices Bill provides no guidance about how this is to be applied. HREOC regards the existing equal remuneration provisions of the Workplace Relations Act 1996 (the Workplace Relations Act) - and the previous Industrial Relations Act 1988 - as having been singularly unsuccessful in achieving pay equity and is concerned that the Work Choices Bill will not address this issue.
>
> State industrial tribunals have been more successful in addressing the historical undervaluation of women's skills and in assessing the work value of occupations traditionally carried out by women employees. HREOC is concerned that the restriction of State industrial jurisdictions will remove an important avenue of redress for women employees seeking equal remuneration.
>
> HREOC recommends that the Australian Government seriously consider introducing equal remuneration provisions similar to those in NSW or Queensland.
>
> HREOC regards it as essential for gender pay audits and work value tests to be conducted before the FMW is set by the AFPC, and recommends that the Work Choices Bill be amended to require this.
>
> The reduction of the number of wage classifications may well mean that pay inequities remain low for low paid workers, but the Work Choices Bill should require the AFPC to conduct cross-classification comparisons to ensure outcomes that are equitable for men and women. The AFPC should be required to take account of structural problems in the classification rates that may affect pay equity.

HREOC further recommends that:

- the AFPC be required to establish a specialist unit to develop and monitor pay equity mechanisms;
- provision be made for individual complaints of pay inequities to be made, similar to the provisions in the UK Equal Pay Act 1970, which include that advice and assistance be provided to complainants in proceedings; and
- simplified procedures for pay equity claims similar to those in the UK Employment Act 2002 be introduced.

Additional recommendations for improving pay equity include:

(a) requiring the Equal Opportunity for Women in the Workplace Agency (EOWA) to conduct workplace pay equity audits similar to those contained in the Canadian or UK legislation;

(b) requiring pay audits and/or action plans to be carried out by employers as part of enterprise bargaining under the Work Choices Bill;

(c) requiring the Employment Advocate or the Office of Workplace Services (OWS) to investigate, research and regularly publish pay equity outcomes for all individual and collective agreements;

(d) requiring the Employment Advocate to conduct specific employer pay equity audits of AWAs lodged by individual employees;

(e) requiring Workplace Inspectors to conduct pay equity paper reviews during site visits;

(f) conducting broad reaching education campaigns targeting employers and the general public;

(g) providing incentives such as tax breaks for employers who comply with voluntary pay equity audits and action plans;

(h) developing stronger contract compliance regulation with regard to pay equity.[53]

The Democrats believe that this Bill will lead to an increase in the gender pay gap and support the calls by HREOC outlined above and other submissions to put in place mechanisms to not only ensure the gap doesn't widen, but to narrow the gender wage gap.

Interaction with Welfare to Work

While not permitted as part of the Inquiry's terms of reference a number of submissions and witnesses expressed their concern with the interaction between the Work Choices Bill and the Government's welfare to work legislation, and the detrimental effect it will have on an already disadvantaged group of Australian's. HREOC sex discrimination Commissioner, Ms Pru Goward:

> The Work Choices bill, particularly in conjunction with the Welfare to Work changes, represents a wholesale change to the way Australian workplaces operate and, as a consequence, will have major implications for the Australian community more broadly.[54]
>
> The additional pressure that is placed on Indigenous Australians, sole parents and people with disabilities to move to employment in the context of changes to Welfare to Work arrangements and CDEP changes will potentially affect their ability to bargain effectively and achieve fair conditions of employment. This is particularly the case in rural and remote areas, where there are limited job opportunities.[55]
>
> I think you will find there are sectors of the work force where there is a surplus of workers, particularly with the welfare to work reforms meaning

53 HREOC, *Submission 164*, pp.3-4

54 Ms Goward, *Committee Hansard*, 17 November 2005, p.14

55 ibid., p.16

> that there is now going to be an increase in that group of workers down at that end of the labour market, where negotiating those flexibilities will in some senses be more difficult.[56]

The Democrats agree with the concerns raised by HREOC and other witnesses and believe this Bill coupled with the Work to Welfare legislation will see those vulnerable members of our society severely disadvantaged.

Greater regulatory power to Departments

The Democrats have been concerned with the failure of the OEA – the promoter of AWAs - to properly apply the no-disadvantage test and to police duress.

Although the Government does plan to take away the OEA's compliance function, it intends to hand it to the low-profile Office of Workplace Services, thus making the Department of Employment and Workplace Relations a much-enlarged but far-from-independent regulator at the direction of the Minister. There is the obvious danger of partisan decisions being made.

As mentioned earlier, the Australian Democrats believe that there should be a national, well-resourced independent regulator for workplace relations.

Ministerial Discretion

The Democrats are extremely concerned about the inclusion of Ministerial discretion in this Bill. The Democrats agree with the ACTU that the use of Ministerial discretion goes against the objective of the Bill and stated Government policy that bargaining should be between and employer and employee with no third party interference:

> 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 democratic world—anywhere. What it is really saying is that you can cut a deal—and I did two last week for unions with an employer—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.' We saw that a little bit in the NTEU experience with the Higher Education Act just recently. When the NTEU worked with employers to try and get around what were the most authoritarian laws I had seen, the minister virtually on a day-by-day basis was putting out a new list. This could mean that people never have certainty about bargaining and certainly cannot be guaranteed that you have closed a deal and it will be respected, like any contract should be, for the period up until its expiry….It is

56 ibid., p.24

> certainly contrary to the stated objective of the bill, which is to devolve responsibility for agreement making to the parties at the workplace, when in fact the government has the capacity to then impose a term by removing a matter that people have agreed to… It makes a mockery of their claim that the best workplace relations are those that operate directly between employees and employers .[57]

The ACTUs concerns were echoed by others, including Dr Cooney, Senior Lecturer, for the Centre for Employment and Labour Relations Law, Law School, University of Melbourne:

> One of the most striking examples of that is the provision that enables the Minister to effectively void provisions in negotiated enterprise agreements. That is a power which I understand is going to be exercised through regulation. It is rather disturbing, particularly from an international perspective, to see something like that emerging. That capacity for the Minister to intervene in that way does not seem to be subject to many criteria that would restrain it. I would say that is one of the most striking and somewhat extraordinary powers that is included in this bill. It is interesting to contrast that with the notion of private ordering, where people can agree between themselves without having a government jump in and cancel at large what people have negotiated.[58]

Mr Bill Shorten for the Australian Workers Union argued that the Ministerial discretion in defining 'essential services' would be fraught with difficulties, and that there could be a backlash:

> The definition of 'essential services' has been litigated over many years, but the legislation is completely woolly, or imprecise, on it. What minister of what government wants to be called upon when an employer says: 'What I do is valuable to the economy. Stop this strike'? As soon as the minister makes a decision either way, there are going to be unhappy parties. That is why we have the Industrial Relations Commission. The centralisation of decision making about essential services is far too severe a tool just to rest with a minister in terms of industrial relations. The right to strike—there is no question in my mind—is being narrowed down to an infinitesimal speck upon an easel or a picture. It is going to be very difficult for people to exercise the basic right to strike…
>
> Minister Kevin Andrews is buying himself a whole world of difficulty in this legislation with the provision of the minister reserving the right to decide what an essential service is, for instance. There are so many unintended consequences in this action that in fact there will be a backlash.[59]

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57 Ms Burrows, *Committee Hansard*, 16 November 2005, p.9

58 Dr Cooney, *Committee Hansard*, 18 November 2005, pp. 10-11

59 Mr Shorten, *Committee Hansard*, 17 November 2005, pp.11-12

Further, Schedule 15, section 30, which allows for Regulations to 'apply, modify or adapt the Act' would appear to provide the Minister with the capacity to materially change the *Bill* (and its outcomes) without parliamentary scrutiny.

The Democrats believe that it is inappropriate for the Minister to have the powers prescribed in this Bill, and will be opposing such provisions.

Other Areas of Concern

Due to time constraints it is difficult to discuss all the areas the Democrats have concerns with in this Bill. Some of the areas have not been mentioned in depth but the Democrats believe they will have a detrimental effect on the industrial relations system, and our egalitarian society. Many of these we have opposed in previous Bill and our position can be found in various committee minority reports. The areas include:

- Restrictions on protected action;
- Restrictions on right of entry;
- Reduction of the role of the AIRC in dispute settlement and other matters.

Productivity can be achieved by other means

Much is made of the ability of this package of laws to affect productivity, as though labour laws are the sole driver of productivity improvements. The Democrats are concerned that the Government is using IR reform to address problems that could be more effectively dealt with by other means.

The 2004 World Competitiveness Report referred to earlier showed that Australia was well behind on education, training and R&D investment. Employers find skilled labour harder and harder to find. We are a poor high technology exporter and we spend relatively little on R&D.

In February this year in their report on national competition the Productivity Commission argued that further IR reforms will not deliver significant national improvements - that efficiencies and productivity increases are better sought in education improvements and reforms to the health system - and in other changes.

The Democrats also believe that greater productivity can be achieved through energy efficiency. A study undertaken by the Warren Centre found that total energy consumption for Australia is 3000 petajoules per annum and is estimated to cost A$40 billion annually. Industrial energy consumption is 40%, giving an energy bill of A$16 billion per year. Although many firms now achieve impressive economic returns by using energy more efficiently, numerous studies continue to uncover significant potential. Experience in Australia and overseas has demonstrated that it is possible to save 10 to 15 % of this over a 5 year program. This would result in reduced costs of up to A$2 billion annually, strengthening Australian industry and making it more competitive in world markets.

Tax reform is another key area. For example the focus on changing the decision makers of the minimum wage award from the AIRC to the Low Pay Commission is a diversion from the real problems.

The Treasurer and the Minister for Workplace Relations have argued that increases in minimum wage puts pressure on wages and therefore interest rates. Interest rate increases are caused by a combination of issues and wages are not the main culprit.

For instance in some industries the building pressure for wage rises is largely a result of a skills shortage which the Government has not effectively addressed.

Secondly, the Government's tax concessions have created an investment driven housing boom and has massively increased personal debt, consumer spending and asset price inflation. Here is a major cause of interest rate rises.

Both the Productivity Commission and the Reserve Bank have said that tax incentives for property investment should be reviewed. Despite this advice, the Government remains committed to the overly generous tax system including negative gearing and the capital gains tax concessions.

The issue of the minimum wage is not that it contributes to inflation or higher interest rates; it is that it is a very ineffective way of producing significant increases in the disposable income of the lower-paid. For an employer a wage increase is compounded by higher payroll taxes, superannuation, worker's compensation and other on-costs. For the employee, for every dollar increase in wages, low-income workers can lose 70 cents in welfare benefits.

What is needed is reform of the tax and welfare system.

The Democrats have been advocating tax reform for low and middle income earners for years. It is pleasing to see members of the Liberal and Labor parties catching up.

It is ridiculous that people earning as little as the minimum subsistence level of $12 500 a year are paying income tax on half their wages. Australia needs a much higher tax-free threshold.

Increasing the tax-free threshold would take the pressure off the AIRC (and now the Fair Pay Commission) as having the sole responsibility of increasing the disposable income of the working poor.

Conclusion

The Democrats have supported sensible government reforms in the past but importantly stopped reforms that impede key rights of employees and unions.

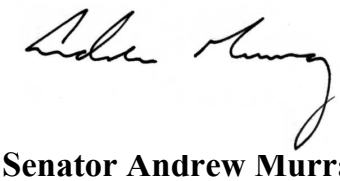
In this case the Democrats are opposed to the Work Choice Bill. This Bill is based on ideology, and it will excessively tip the balance of workplace relations to favour employers, leaving many workers vulnerable.

Any redeeming features of the Bill are overwhelmed by the negatives. The Prime Minister has failed to provide any empirical economic evidence to support these changes. He has failed to provide genuine choice, and he refuses to give a guarantee that no workers will be worse off because he knows that poor, disadvantaged or powerless workers will be worse off.

Recommendation 1 - Oppose the Bill in its entirety

However, given that the Government has control of the Senate and the Bill will pass, our duty to the Australian people is to try where we can to influence the Government to ameliorate the worst aspects of the Bill. We persistently argue that the Senate is a house of review and it is the Senate's duty to make every effort to address injustices, anomalies, mistakes and unforeseen consequences in the bills before us. We cannot argue that case and then just step aside, vote against and let the bill pass without trying our best to effect change.

We will move key amendments accordingly, but will be unable to attempt to correct all the problems with this Bill.



Senator Andrew Murray

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

Appendix 1

List of submissions

Sub No:	From:
1	Loris Erik Kent Hemlof, SA
2	Mrs Burnett, Qld
3	Dr Keith Abbott, Faculty of Business and Law, Deakin University
4	Mr Jim McDonald, Qld
5	Mr Craig Maynard
6	Mr Richard Swinton, NSW
7	Ms Janine Smith
8	Mr Damian Lund, NSW
9	Mr Jeff Petersen, NSW
10	Mr Ben Blackburn, NSW
11	Mr Mathew Kiem, NSW
12	Ms Catherine Wallace
13	Ms Bettina Quatacker
14	Dr David Edwards, Vic
15	Illawarra Legal Centre Inc
16	Combined Pensioners and Superannuants Association of New South Wales Inc
17	SANE Australia
18	Mr Alan Dircks, Vic
19	Mr Blair Trewin, Vic
20	Maybanke Association Inc Maybanke Accommodation Crisis and Support Service
21	Mr Denzyl Hein, Vic
22	Mr James Sin, NSW
23	Welfare Rights Centre, Qld

24	NSW Ethnic Communities Council
25	Mr Laurie Gillespie, Qld
26	Ms Katrina Milbourne, ACT
27	Bishop Philip Huggins, Vic
28	Ms Paula Goodwin, ACT
29	Transport Workers Union, NSW Branch
30	NSW Nurses' Association - Concord Hospital Branch
31	Job Futures
32	Mr David Risstrom, Vic
33	Mr Abraham Schaffs, SA
34	Mr Alastair Richards, Vic
35	The Association of Superannuation Funds of Australia Ltd
36	Rio Tinto
37	Social Action Office
38	Mr Guy van Enst, Vic
39	Australian Federation of Disability Organisations
40	Ms Kristy LeMilliere, NSW
41	Mr Martin Wynne, NSW
42	Mr Neville Pearson, NSW
43	Ms Tanya Barton, NSW
44	Ms Narelle Rich, NSW
45	The Business Council of Australia
46	Welfare Rights Centre
47	Ms Beth Spencer, Vic
48	Construction Forestry Mining and Energy Union, Construction and General Division – NSW Branch
49	Blue Mountains Community Legal Centre
50	The Small Business Union

51	Ms Serena O'Meley, Vic
52	Ms Rosemary Owens, SA
53	Good Shepherd Sisters
54	Curtin University of Technology
55	Australian Young Christian Workers
56	Liquor, Hospitality and Miscellaneous Union
57	Mr James Macken
58	Australian Political Ministry Network
59	Uniting Church in Australia – Queensland Synod
60	Families Australia
61	Physical Disability Council of Australia LTD
62	NSW Council for Civil Liberties
63	Queensland Nurses' Union
64	University of Western Australia
65	Dr Jill Murray, Vic
66	Mr Peter Gringinger, Vic
67	Mr Paul Vernon, NSW
68	ACROD Limited
69	Ms Julia Graczyk, ACT
70	ACT and Region Chamber of Commerce and Industry
71	The Australian Licenced Aircraft Engineers Association
72	Womens' Electoral Lobby Inc
73	Australian Services Union
74	Australian Nursing Federation
75	Redfern Legal Centre
76	Transport Workers' Union of Australia
77	Australian Christian Lobby

78	Centre for Employment and Labour Relations Law
79	National Retail Association
80	National Association of Community Legal Centres
81	Association of Professional Engineers, Scientists and Managers, Australia
82	Gippsland Community Legal Centre
83	Blind Citizens Australia
84	Australian Manufacturing Workers' Union
85	Queensland Council of Unions
86	Queensland Teachers Union of Employees
87	United Services Union
88	Textile, Clothing and Footware Union of Australia
89	New South Wales Teachers Federation
90	Independent Education Union of Australia
91	Ms Jeannette Hope, NSW
92	Taree Branch of the ALP
93	Northern Rivers Community Legal Centre
94	Australian Greens Victoria
95	Fair Wear
96	Centre for Employment and Labour Relations Law
97	Community and Public Sector Union – SPSF Group
98	Construction, Forestry, Mining and Energy Union Construction and General Division
99	Students' Association of the University of Adelaide
100	Uniting Church in Australia Justice and International Mission
101	Uniting Church in Austtralia WA Synod
102	NT Legal Aid Commission

103	What Women Want Consortium
104	The Australian Workers' Union
105	Media, Entertainment and Arts Alliance
106	Unions NSW
107	ETU Queensland
108	Transport Worker' Union Victorian/Tasmanian Branch
109	University of New South Wales Student Guild
110	Australian Catholic Commission for Employment Relations
110A	Australian Catholic Commission for Employment Relations
111	University of Western Sydney Students' Association Inc
112	Progressive Labour Party
113	The Uniting Church in Australia
114	Ethnic Communities' Council of Victoria
115	Young Workers Advisory Service
116	Australian Lawyers for Human Rights
117	Restaurant and Catering Australia
118	Group Researching Organisations, Work, Employment and Skills
119	Unions WA
120	Young Workers Advisory Service Qld Working Women's Service
121	Finance Sector Union of Australia
122	National Tertiary Education Union
123	Australian Education Union
124	Launceston Community Legal Centre
125	Tenants Union of Victoria
126	Ms Ruth Harland, Vic
127	Shop, Distributive and Allied Employees Association

128 Catholic Justice and Peace Commission of the Archdiocese of Brisbane

129 Mr Chris White, ACT

130 Uniting Church in Australia, NSW Synod

131 Chamber of Commerce and Industry of Western Australia

132 Agribusiness Employers' Federation

133 People with Disability Australia

134 Mr Dan Dwyer, NSW

135 Inner City Legal Centre

136 Victorian Government

137 Community and Public Sector Union

138 Youth Affairs Council of WA

139 Ms Kelly Everson, NSW

140 Ms Anna Szwec, NSW

141 Mr Peter Rattenbury, NSW

142 Ms Hujung Kim, ACT

143 Jessica Dolan, NSW

144 Ms Kate Lester, NSW

145 University of Western Australia

146 Electrical Trades Union, NSW Branch

147 National Farmers' Federation

148 Health Services Union

149 Australian Mines and Metals Association

150 Public Service Association and Professional Officers' Association Amalgamated Union of NSW

151 Mr Shane Prince, NSW

152 The Law Society of NSW

153 The Australian Chamber of Commerce and Industry

154	The Australian Workers' Union NSW Branch
155	Mr Don Willis, Qld
156	Police Federation of Australia
157	Australian Business Industrial
158	Northern Community Legal Service Inc
159	Local Government Association of NSW and Shires Associate on NSW
160	Governments of New South Wales, Queensland, Western Australian, South Australia, Tasmania, Australian Capital Territory and the Northern Territory
161	United Firefighters Union of Australia
162	Australian Federal Police Association
163	Master Builders Australia
164	Human Rights and Equal Opportunity Commission
165	Recruitment and Consulting Services Association
166	Department of Employment Workplace Relations
167	Victorian Automobile Chamber of Commerce
168	Women Lawyers' Association of NSW
169	Housing Industry Association
170	Government of South Australia
171	Australian Council of Trade Unions
172	Australian Industry Group
173	Enterprise Initiatives
174	Professor Andrew Stewart
175	Professor David Peetz (Group of 151 Australian Industrial Relations, Labour Market and Legal Academics
175A	Associate Professor Boni Robertson
176	Combined Community Legal Centres' Group NSW Inc
177	Mr Michael Hull, Vic

178	Mr Christopher Puplick
179	Amalgamated Manufacturing Workers Union – Retired Members Association, Sydney
180	Federation of Ethnic Communities Councils of Australia – Women's Steering Committee
181	Career Industry Council of Australia
182	Government of Tasmania
183	Multiple Sclerosis Australia
184	Dr Graeme Orr, Qld
185	International Centre for Trade Union Rights
186	Mr Roy Harvey, ACT
187	Australian Medical Association
188	Job Watch Inc
189	Christian Science Committee on Publication Federal Representative for Australia
190	Adoptive Families Association of the ACT Inc
191	Law Institute Victoria
192	Council of Small Business Organisations of Australia Ltd
193	Minerals Council of Australia
194	Presentation Sisters Wagga
195	Transport Workers' Union of Australia, Qld
196	Australian and International Pilots Association
197	CFMEU, Qld
198	Transport Workers' Union of Australia – WA Branch
199	Huntor Labor Regional Assembly
200	IR Australia Pty Ltd
201	Volunteering Australia
202	Anglican Church, Diocese of Sydney

Appendix 2

Hearings and witnesses

Monday, 14 November 2005

Department of Employment and Workplace Relations
Mr Finn Pratt, *Deputy Secretary*
Mr James Smythe, *Chief Counsel, Workplace Relations Legal Group*
Mr Les Andrews, *Acting Assistant Secretary, Wages and Conditions Policy Branch*
Mr David Bohn, *Assistant Secretary, Legislation Reform Branch*
Mr Peter Cully, *Assistant Secretary, Legislation Reform Branch, Workplace Relations Legal Group*
Mr David De Silva, *Assistant Secretary, Legislation Policy Branch*
Mr John Kovacic, *Group Manager, Workplace Relations Policy Group*
Ms Louise McDonough, *Assistant Secretary, Wages and Conditions Policy Branch*
Ms Dianne Merryfull, *Assistant Secretary, Legislation Reform Branch*

States and Territories Ministers
Hon Thomas Barton MLA, *Minister for Employment, Training and Industrial Relations, Queensland Government*
Dr Chris Burns MLA, *Ministger for Public Employent, Northern Territory Government*
Hon John Della Bosca MLC, *Minister for Industrial Relations, New South Wales Government*
Ms Katy Gallagher MLA, *Minister for Industrial Relations, Australia Capital Territory Government*
Hon Rob Hulls MLA, *Minister for Industrial Relations, Victorian Government*
Mr Anthony McRae MLA, *Parliamentary Secretary for Agriculture and Forestry, Western Australian Government (representing the Minister for Consumer and Employment Protection)*
Ms Lin Thorp, *Member of the Legislative Council, Tasmanian Government (representing the Minister for Industrial Relations)*
Hon Michael Wright MHA, *Minister for Industrial Relations, South Australia*

Australian Industry Group
Ms Heather Ridout, *Chief Exective*
Mr Stephen Smith, *Director, National Industrial Relations*
Mr Ron Baragry, *Legal Counsel, Workplace Relations*

Enerprise Initiatives
Mr Rob Thompson, *Founding Director*

Uniting Church in Australia
Reverend Dr Rodney Drayton, *President, National Assembly*
Reverend Dr Ann Wansbrough, *Senior Policy Analyst, UnitingCare, New South Wales and the Australian Capital Territory*

Tuesday, 15 November 2005

Restaurant and Catering Australia
Mr John Hart, *Chief Executive Officer*

Housing Industry Association
Mr Scott Lambert, *Executive Director, Industrial Relations and Legal Services*
Ms Elisabeth Greenwood, *Assistant Director, Business Tax and Legal*
Ms Marie Brown, *Assistant Director Industrial Relations and Legal Services*

Association of Professional Engineers, Scientists and Managers, Australia
Mr Geoff Fary, *Acting Chief Executive, Industrial Relations*
Mr Eric Edwards, *Workplace representative, CASA*
Mr Russell Noud, *Director*

National Farmers Federation
Mr Peter Corish, *President*
Mrs Denita Wawn, *Workplace Relations Manager and Industrial Advocate*

Australian Chamber of Commerce and Industry
Mr Peter Hendy, *Chief Executive*
Mr Scott Barklamb, *Assistant Director, Workplace Relations*
Mr Chris Harris, *Senior Adviser, Workplace Relations*

Victorian Automobile Chamber of Commerce
Ms Leyla Yilmaz, *Manager, Industrial and Employee Relations*

Finance Sector Union
Mr Paul Schroder, *National Secretary*
Mr Rod Masson, *National Campaign Officer*
Ms Ingrid Geli, *Union Representative*
Mr Andrew Casidy, *General Secretary, Finsec*

Australian Services Union
Ms Linda White, *Assistant National Secretary*
Ms Vivien Voss, *NSW Services Branch*
Mr Neville Pearson, *Member*
Mr Ben Kruse, Manager, *Legal and Industrial, United Services Union*
Ms Tanya Barton, *Delegate, United Services Union*

Wednesday, 16 November 2005

Australian Council of Trade Unions
Ms Sharan Burrow, *President*
Ms Cath Bowtell, *Industrial Officer*

Shop, Distributive and Allied Employees' Association (SDA)
Mr Joe de Bruyn, *National-Treasurer Secretary*
Mr John Ryan, *National Industrial Officer*
Ms Nicole Kim

ACROD
Dr Ken Baker, *Chief Executive*

Australian Federation of Disability Organisations
Mr Robert Altamore, *Vice President*
Ms Collette O'Neill, *National Policy Officer*

Job Futures
Ms Sheridan Dudley, *Chief Executive*

Australian Nursing Federation
Ms Coral Levett, *Federal President*
Mr Nicholas Blake, *Federal Industrial Officer*
Ms Clare McGinness, *Victorian Branch President*
Ms Katrina Milbourne, *Member*

COSBOA
Mr Tony Stephen, *Chief Executive Officer*
Mr Bob Stanton, *Chair*

Small Business Union
Mr Graeme Haycroft, *General Secretary*

FairWear
Ms Debbie Carstens, *Chairperson, NSW*
Ms Annie Delaney, *Campaign Co-ordinator, Vic*
Ms Bich Thuy Pham, *Vietnamese Community Worker and Interpreter*
Ms Hui Juan Liu, *Chinese Interpreter*
Ms Lillian Nguyen, *Member*
Ms Helena Chong, *Member*
Ms Kathryn Fawcett, *Member FairWear and National Industrial Officer, Textile Clothing and Footwear Union*

Thursday, 17 November 2005

Australian Workers Union
Mr Bill Ludwig*, National President*
Mr Bill Shorten, *National Secretary*
Mr Andew Herbert, *Legal Adviser*

Human Rights and Equal Opportunity Commission
Ms Pru Goward*, Sex Discrimination Commissioner*
Ms Sally Moyle, *Director, Sex Discrimination Unit*
Ms Jo Tilly*, Senior Policy Officer, Sex Discrimination Unit*
Mr Jonathon Hunyor*, Senior Legal Officer*

Transport Workers Union
Mr John Allan, *Federal Secretary*
Mr Linton Duffin, *Federal Legal Officer*
Mr Mark Crosdale, *Newcastle and Northern Sub-branch Secretary*

Professor David Peetz, *Head, Department of Industrial Relations, Griffith University*

Dr Barbara Pocock, *Queen Elizabeth II Research Fellow, University of Adelaide*

Professor Andrew Stewart, *School of Law, Flinders University*

Ms Robyn May, *Research Fellow, Royal Melbourne Institute of Technology*

Australian Catholic Commission on Employment Relations
Mr John Ryan, *Executive Officer*
Mr Michael McDonald, *Acting Chair*

Master Builders Association of Australia
Mr Wilhelm Harnisch, *Chief Executive Officer*
Mr Richard Calver, *National Director, Industrial Relations and Legal Counsel*

Recruitment and Consulting Services Association
Mr Charles Cameron, *Policy Adviser*
Mr Chris Burrell, *Member, Workplace Relations Committee*

Friday, 18 November 2005

Australian Mining and Metals Association
Mr Christopher Platt, *National Industry Manager*

University of Melbourne Law School
Dr Sean Cooney, *Senior Lecturer*
Ms Anna Chapman, *Senior Lecturer*
Dr Jill Murray, *School of Law and Management, La Trobe University*
Mr Glenn Patmore, *Law School, University of Melbourne*

Department of Employment and Workplace Relations
Mr Finn Pratt, *Deputy Secretary, Workplace Relations*
Mr James Smythe, *Chief Counsel, Workplace Relations Legal Group*
Mr John Kovacic, *Group Manager, Workplace Relations Policy Group*
Ms Natalie James, *Assistant Secretary, Legislation Reform Branch*
Mr David Bohn, *Assistant Secretary, Legislation Reform Branch*
Ms Diane Merryfull, *Assistant Secretary, Legislation Reform Branch*
Mr Peter Cully, *Assistant Secretary, Legislation Reform Branch*
Mr David De Silva, *Assistant Secretary, Legislation Policy Branch*
Ms Louise McDonough, *Assistant Secretary, Workplace Relations Policy Group*
Mr Les Andrews, *Acting Assistant Secretary, Wages and Conditions Policy Branch, Workplace Relations Policy Group*
Ms Lucy Keogh, *Director, Legislation Reform Branch, Workplace Relations Legal Group*
Ms Liesl Centenera, *Director, Legislation Reform Branch, Workplace Relations Legal Group*

Appendix 3

Tabled documents, additional information and answers to questions on notice

Tabled documents

Hearing: **Canberra, Monday, 14 November 2005**

State and Territory Ministers:

Hon Rob Hulls MLA, Minister for Industrial Relations, Vic

- Pocock, Barbara: *The Impact of the Workplace relations Amendment (WorkChoices) Bill 2005 (or "Work Choices") on Australian working Families* – a paper prepared for Industrial Relations Victoria, November 2005

Hearing: **Canberra, Tuesday, 15 November 2005**

National Farmers Federation

- *Labour Shortage Action Plan* – 21 September 2005

Australian Services Union

- Rights at work worth fighting for: *NSW Local Government (State) Award: WorkChoices Impact Analysis*
- Media Release: *WorkChoices will not harm councils: Minister.* Minister for Local Government, Territories and Roads, the Hon. Jim Lloyd MP, L126 05 Wednesday 2 November 2005:

Hearing: **Canberra, Wednesday, 16 November 2005**

Shop, Distributive and Allied Employees' Association (SDA)

- Publishing and Broadcasting Limited: Notes to the Financial Statements for the year ended to June 2005 - 31 Investment in Controlled entities
- Statement by SDA – 16 November 2005; and attachment - SDA – Myer Stores Certified Agreement 2004 operative on and from 30 November 2004 through to 30 September 2006

Hearing: **Canberra, Thursday, 17 November 2005**

Senator Barnett:

- Information supplied – Australian Industrial Relations Commission Australian Integration Management Services Corporation Pty Ltd and Transport Workers' Union of Australia (AG838456 PR955262re: cashing out annual leave

Professor Andrew Stewart

- Possible amendments to the Work Choices Bill.

Hearing: Canberra, Friday, 18 November 2005

Department of Employment and Workplace Relations:

- AW781502 – Finance Sector – AMP Asset Management Employees' Award 1996

Answers to questions on notice

Hearing: Canberra, Monday, 14 November 2005

Answers to questions on notice received:

Western Australian Government: Mr Anthony McRae MLA

The Hon John Della Bosca, NSW Minister for Industrial Relations

Hearing: Canberra, Tuesday, 15 November 2005

National Farmers Federation:

- Tabled supplied - *Jurisdictional Coverage of Agricultural* - answer to Senator Murray's question as to what percentage of those employees who fall under your aegis will not transfer into the new system because they will remain under the state and territory systems?

Finance Sector Union:

Australian Services Union

Australian Chamber of Commerce and Industry

Hearing: Canberra, Wednesday, 16 November 2005

Australian Federation of Disability Organisations

Hearing: Canberra, Thursday, 17 November 2005

Australian Catholic Commission for Employment Relations

Master Builders Australia

Human Rights and Equal Opportunity Commission

Additional information

Hearing: Canberra, Monday, 14 November 2005

Australian Industry Group

- Paper – Reforming the Federal Workplace Relations System – Industry Views: The findings of an Australian Industry Group survey of manufacturers, May 2005

Hearing: Canberra, Tuesday, 15 November 2005

Association of Professional Engineers, Scientists and Managers, Australia

- Appendix A - Professional Engineer Remunerations Survey Report – June 2005
- Appendix B – 2004 Member Satisfaction Survey Report
- Appendix C – National and State Skill Shortage Lists Australia, 2004
- Appendix D – Skills Shortages, Various, 2005

Finance Sector Union

- Hours of work – Salary packaged mangers

Hearing: Canberra, Wednesday, 16 November 2005

Small Business Union

- Mr Graeme Haycroft - email – Form of wording for old AWA form lodgement dated 14 November 2005

FairWear

- The Clothing Contracting Chain

Hearing: Canberra, Thursday, 17 November 2005

Master Builders Australia

- Building a safer future: Master Builders Occupational Health and Safety Policy Blueprint – 2005-2015

These documents are held on Archive files.

Appendix 4

EWRE Committee Workplace Relations Reports

This is a chronological list of reports tabled by this committee relating to amendments to the *Workplace Relations Act 1996.*

Report	Date tabled
Workplace Relations Amendment (Unfair Dismissals) Bill 1998	15 February 1999
Provisions of the Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999	29 November 1999
Provisions of the Workplace Relations Amendment Bill 2000	5 June 2000
Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000	7 September 2000
Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000	7 September 2000
Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000	7 September 2000
Workplace Relations Amendment (Terminations and Employment) Bill 2000	7 September 2000
Workplace Relations (Registered Organisations) Bill 2001	18 June 2001
Workplace Relations (Transmission of Business) Bill 2001	18 June 2001
Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001	19 September 2001
Inquiry into the Workplace Relations Bills 2002:	15 May 2002
Workplace Relations Amendment (Fair Dismissal) Bill 2002 Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002	
Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002	
Workplace Relations Amendment (Genuine Bargaining)	

Bill 2002	
Workplace Relations Amendment (Fair Termination) Bill 2002	
Inquiry into the Workplace Relations Amendment (Improved Protection for Victorian Workers) Bill 2002	15 November 2002
Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002	26 March 2003
Inquiry into the Workplace Relations Amendment (Protecting the Low Paid) Bill 2003	19 June 2003
Inquiry into Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003, Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003 and Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002	30 October 2003
Inquiry into Workplace Relations Amendment (Award Simplification) Bill 2002, Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 and Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004	17 June 2004
Inquiry into the Workplace Relations Amendment (Agreement Validation) Bill 2004	29 November 2004
Provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004	14 March 2005
Provisions of the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004	14 March 2005

In addition, the references committee has undertaken two inquiries into workplace relations matters:

Beyond Cole, The future of the construction industry: confrontation or co-operation
tabled June 2004

Workplace Agreements
tabled October 2005

Appendix 5

Amendments to the Workplace Relations Act[1]

An historical synopsis of the legislation complied by the Parliamentary Research Service

The *Workplace Relations and Other Legislation Amendment Act 1996* is the principal legislation which amended and renamed the *Industrial Relations Act 1988* as the *Workplace Relations Act 1996* (WR Act) amended other legislation and contained transitional provisions, for example, reducing award matters in pre-existing federal awards so as to comply with allowable award matters under the WR Act. Having passed the Senate, the bill was returned to the House of Representatives where it was passed (read for a third time on 21 November 1996) and included amendments made in agreement with the Australian Democrats. Its provisions (schedules) commenced from December 1996 to May 1997. (Senate Economics Committee report)

Workplace Relations and Other Legislation Amendment Act (No.2) 1996: This act reflected the Commonwealth's obligations under an inter-governmental agreement (11 November 1996) between the State of Victoria and the Commonwealth to refer most of the Victorian industrial jurisdiction to the Commonwealth. The referral also hinged on legislation passed by the Victorian Parliament (the referral can be retracted). The administration of the Victorian employee relations legislation is transferred to the Commonwealth (in Schedule 1A of the WR Act). This act provides most Victorian employees access to the Commonwealth dismissal legislation while giving WR Act provisions additional effect in Victoria. For example, Australian workplace agreements and certified agreements can be entered into with non-incorporated businesses. The act came into effect on 19 December 1996.

Workplace Relations and Other Legislation Amendment Act 1997: This act clarified the operation of key provisions of the WR Act in respect of: the role of the Employment Advocate, its staff and their investigation powers, provided for the disamalgamation of registered organisations (such as unions and employer associations), the removal of preference clauses from agreements, the role of the Australian Industrial Relations Commission (the Commission) in selecting a 'designated' award to assess agreements against, the role of State awards and laws in relation to dismissal and the application of transmission of business provisions under the Victorian referral arrangement. The act came into effect in December 1997.

Bills not passed

Workplace Relations Amendment Bill 1997: This bill was the first of the bills designed to exempt small business (small businesses then employing 15 or less employees) from legal actions contesting a dismissal which the employee perceived to be harsh, unjust or unreasonable. The Government had earlier attempted to secure this exemption by way of a regulation to the WR Act which the Senate rejected on 26 June 1997. The bill was introduced to the House of Representatives on 26 June 1997. A report on the bill was made by the Senate

1 Compiled by the Parliamentary Research Service, Parliamentary Library, April 2005

Economics Legislation Committee on 20 October and the bill was negatived on 21 October 1997 in the Senate.

Workplace Relations Amendment Bill 1997 [No.2]: As with its predecessor, this bill sought to exempt small business from dismissal actions of employees. It was introduced in the House of Representatives on 26 November 1997. The bill was introduced into the Senate on 5 March 1998 but failed to pass the Senate on 25 March 1998. The bill thus became a 'trigger' for a double dissolution of both houses of Parliament. Where there is disagreement between the Senate and the House of Representatives, section 57 of the Constitution allows for the resolution of the disagreement by the dissolution of both houses by the Governor-General (presumably acting on advice from the Prime Minister) and the calling of an election.(1) A specified period between the bill failing the first time in the Senate and its reintroduction in the House is required (three months), where the bill fails to pass a second time, a double dissolution may (or may not) ensue.

Workplace Relations and Other Legislation Amendment (Superannuation) Bill 1998: This Bill was introduced into the House of Representatives on 4 December 1997 and was passed on 23 June 1998. It sought to remove superannuation as an allowable matter in federal awards. Provisions of the Bill were referred to the Select Committee on Superannuation which made a report on 26 May 1998. The bill lapsed at the end of the 38th Parliament.

Bills passed as Acts

Workplace Relations Legislation Amendment (Youth Employment) Act 1999: This amendment exempts junior rates of pay from the operation of the WR Act's anti-discrimination provisions and promotes the inclusion of junior rates of pay in awards and agreements. Agreement to pass the Act followed an extensive research report on junior pay rates for the Parliament prepared by the Commission. The bill was introduced into the House of Representatives on 24 June 1999 and passed the Senate on 2 September 1999.

Workplace Relations Amendment (Tallies) Act 2001: This act was introduced to the House of Representatives as the Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000 on 29 June 2000. Similar (but more extensive) award matter reduction provisions were included in the Workplace Relations Amendment (More Jobs Better Pay) Bill 1999. The act removed tally systems as allowable award matters for the purposes of federal awards. It passed the Senate on 5 March 2001 and the House of Representatives on 7 March, without reference to union picnic days. It was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee which made a report on 7 September 2000.

Workplace Relations Amendment (Termination of Employment) Act 2001: The bill was introduced to House of Representatives on 27 June 2000 as the Workplace Relations Amendment (Termination of Employment) Bill 2000. The act amends the WR Act's termination of employment provisions, contains provisions which discourage speculative or unmeritorious dismissal claims and inserted a 3-month qualifying period before new 'permanent' employees could access the dismissal provisions. The bill passed the Senate on 8 August 2001. The bill was reviewed by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee (report, 7 September 2000). The House of Representatives agreed to amendments proposed by the Senate on 9 August 2001.

Bills not passed

Workplace Relations Legislation Amendment (Youth Employment) Bill 1998: This bill sought to exempt junior rates of pay from the operation of the WR Act's anti-discrimination provisions and promote the inclusion of junior rates of pay in awards and agreements. It was introduced to the House of Representatives on 26 November 1998 and to the Senate on 15 February 1999, and was negatived there on 8 March 1999.

Workplace Relations Amendment (Unfair Dismissals) Bill 1998: The bill sought to insert a 6-month qualifying period of employment before new 'permanent' employees (other than apprentices and trainees) could access the unfair dismissal remedy; and to exclude new employees of small businesses (15 or less employees) from the unfair dismissal remedy. The bill was introduced into the House of Representatives on 12 November 1998 and introduced into the Senate on 3 December 1998. The bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee which made a report on 15 February 1999. The bill was negatived on 14 August 2000.

Workplace Relations Amendment (Unfair Dismissals) Bill 1998 [No.2]: As with its predecessor, this bill sought to insert a 6-month qualifying period of employment before new 'permanent' employees (other than apprentices and trainees) could access the unfair dismissal remedy and to exclude new employees of small businesses (15 or less employees) from the unfair dismissal remedy. This bill was introduced to the House of Representatives on 29 November 2000 and into the Senate on 7 March 2001 where it was negatived on 26 March 2001. This bill became a double dissolution trigger (discussed above).

Workplace Relations and Other Legislation Amendment (Superannuation) Bill 1998: As with its predecessor the bill proposed to remove superannuation as an allowable award matter for the purposes of federal awards and preclude the Commission from making an "exceptional matters order" about superannuation. It was introduced to the House of Representatives on 3 December 1998, and it passed on 17 February 1999 but was adjourned in the Senate on 8 March 1999. It lapsed at the end of the 39th Parliament.

Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999: The bill proposed to change the name of the Commission to the Australian Workplace Relations Commission; change the AWRC's structure; extend conciliation by the Commission; introduce voluntary use of mediation in industrial disputes; reduce the role of industrial awards; introduce procedural changes to the termination of employment provisions and unfair dismissal applications; reform the certification of agreements and the making and approval of Australian Workplace Agreements (AWAs); clarify rights and responsibilities relating to industrial action; reduce allowable award matters; restrict union right of entry provisions; review the freedom of association provisions; provide for expanded operation of WR Act provisions in Victoria and reform the Federal Court's role concerning contracts made with independent contractors. The Bill was introduced into the House of Representatives on 30 June 1999, and into the Senate on 14 October 1999. The Senate Employment, Workplace Relations, Small Business and Education Legislation Committee made a report on the bill on 29 November 1999. The bill lapsed at the end of the 39th Parliament.

Workplace Relations Amendment Bill 2000: The bill sought to define "pattern bargaining" and provide for defined consequences where it occurs; enhance the Commission's power to issue orders that unlawful industrial action cease or not occur; provide access to cooling-off periods in relation to protected industrial action; protect rights to pursue common law remedies in response to unlawful industrial action in Supreme Courts without additional litigation (anti-suit injunctions) being sought from or issued by the Federal Court. The bill

was introduced into the House of Representatives on 11 May 2000. Similar provisions can be found in the WRA 'More Jobs Better Pay' Bill 1999. The Senate Employment, Workplace Relations, Small Business and Education Legislation Committee made a report on the bill on 7 September 2000. The bill lapsed at the end of the 39th Parliament.

Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000: The bill required that, in order to be protected action under the act, industrial action must be preceded by a secret ballot process overseen by the Commission. The bill was introduced to House of Representatives on 26 June 2000. Similar provisions can be found in the 'More Jobs Better Pay' Bill 1999. The Senate Employment, Workplace Relations, Small Business and Education Legislation Committee made a report on the Bill on 7 September 2000. Senate debate on the Bill was adjourned on 31 August 2000. The bill lapsed at the end of the 39th Parliament.

Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000: The bill sought to simplify procedures and approval processes in relation to Australian Workplace Agreements. Similar provisions were contained in the WRA 'More Jobs Better Pay' Bill 1999. The bill was introduced to the House of Representatives on 28 June 2000. The Senate Employment, Workplace Relations, Small Business and Education Legislation Committee made a report on the Bill on 7 September 2000. Senate debate on the bill was adjourned on 9 October 2000. The bill lapsed at the end of the 39th Parliament.

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001: The bill sought to prevent the inclusion of clauses in certified agreements which require the payment of fees for the provision of bargaining services and prohibit action by unions to collect such fees which have not been agreed to in writing in advance. The bill was introduced into the House of Representatives on 23 May 2001. Debate on the bill was adjourned in the Senate on 6 August 2001, but a report on the bill by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee was made on 19 September 2001. The bill lapsed at the end of the 39th Parliament.

Workplace Relations Amendment (Transmission of Business) Bill 2001: The bill sought to empower the Commission to make an order that a certified agreement does not bind a new employer as a result of a transfer of a business, or only binds the new employer to a specified extent. The bill was introduced into the House of Representatives on 4 April 2001. It was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee which made a report on 18 June 2001. The bill lapsed at the end of the 39th Parliament.

Workplace Relations (Minimum Entitlements for Victorian Workers) Bill 2001: The bill provided minimal improvements to minimum entitlements for employees in Victoria not covered by federal awards or agreements, that is those workers employed under 'Schedule 1A' conditions (discussed above). The bill was introduced into the House of Representatives on 9 August 2001. It lapsed at the end of the 39th Parliament.

Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001: The bill sought to ensure that the workplace relations system would take into account the circumstances of employers and employees in small business; that new employees in businesses of less than 20 employees (instead of 15 or less previously(2)) could not bring an unfair dismissal claim; it proposed to reform the role and rights of unions in small business matters and amend the *Trade Practices Act 1974* to allow the Australian Consumer and Competition Commission to bring representative actions in relation to secondary boycotts. It was introduced into the House of Representatives on 30 August 2001

The bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee (which did not report). The bill lapsed at the end of the 39th Parliament.

Workplace Relations (Registered Organisations) Bill 2001: The bill was to incorporate into a separate piece of legislation provisions of the WR Act which relate to the registration, amalgamation and internal administration and regulation of registered organisations (employer associations and trade unions). The bill also proposed to amend those provisions, particularly in relation to financial accountability and disclosure and democratic control and penalties for breaches of the proposed act. It was introduced into the House of Representatives on 4 April 2001 and the Senate on 30 August 2001. The bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee which made a report on 18 June 2001. It lapsed at the end of the 39th Parliament. The provisions of the bill were reintroduced in 2002 as a schedule to the WR Act (see below: Acts of 40th Parliament)

Workplace Relations (Registered Organisations) (Consequential Provisions) Bill 2001: The bill proposed to preserve the registration of registered organisations when the existing registration provisions of the WR Act were repealed. It contained transitional and savings provisions for the transition to the proposed *Workplace Relations (Registered Organisations) Act 2001*. It was introduced into the House of Representatives on 23 May 2001, and the Senate on 27 August 2001 where debate was adjourned on 30 August 2001. The bill lapsed at the end of the 39th Parliament (Senate report as per above).

Bills passed as Acts

Workplace Relations Legislation Amendment Act 2002: The act amended the: *Safety, Rehabilitation and Compensation Act 1988*, *the Seafarers Rehabilitation and Compensation Act 1992* and *Seafarers Rehabilitation and Compensation Levy Collection Act 1992* and effected the transfer of operational responsibility for the Seafarers Safety, Rehabilitation and Compensation Authority from the Department of Employment and Workplace Relations to Comcare. It made a number of amendments to WR Act concerning certified agreements. It made minor and technical amendments, including removing the requirement for ministerial approval of contracts over $500 000 and delegation of rehabilitation powers and functions by the Chief of the Defence Force; amended the National Labour Consultative Council Act 1977 to rename the Council as the National Workplace Relations Consultative Council. It was introduced to the House of Representatives on 26 June 2002 and passed the Senate on 5 December 2002.

Workplace Relations Amendment (Genuine Bargaining) Act 2002: The act specifies factors to be taken into account by the Commission when considering whether a negotiating party is not genuinely trying to reach agreement and empowers the Commission to make orders in relation to new bargaining periods. It was introduced into the House of Representatives on 20 February 2002. The bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which made a report on 15 May 2002. The Senate passed the bill on 25 September 2002 with amendments, some of which were agreed to by House of Representatives on 16 October 2002, and others were not insisted on by the Senate (19 November 2002).

Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002: (Previous title: Workplace Relations (Registration and Accountability of Organisations) Bill 2002). The act amends the WR Act in relation to the registration, amalgamation and internal administration and regulation of registered organisations,

including election processes, duties of officers and employees of those organisations, financial accountability and disclosure, democratic control and penalties for breaches. The bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which reported on 18 June 2001 (report on the predecessor bill). The bill was introduced to the House of Representatives on 21 March 2002, and to the Senate on 15 October 2002 and passed 16 October 2002.

Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002: Further to the Workplace Relations Amendment (Registration and Accountability of Organisations) Bill 2002, the bill makes consequential amendments, including the repeal of certain provisions of the WR Act and contains transitional and savings provisions, notably preserving the registration of registered organisations and also amends the WR Act to: correct errors and omissions, remove obsolete references and makes consequential amendments to 20 other Acts. The act was also introduced to the House of Representatives on 21 March 2002 and passed the Senate on 16 October 2002.

Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003: This Act was introduced as the Workplace Relations Amendment (Improved Protection for Victorian Workers) Bill 2002) to the House of Representatives on 21 March 2002. The act extended safety net entitlements for employees in Victoria not covered by federal awards or agreements (under Schedule 1A of the WR Act); provided access by Victorian employees to the federal award system not provided by its 2001 predecessor bill; provided minimum pay rates for Victorian contract workers in the textiles, clothing and footwear industries and annual leave entitlements for Victorian employees. It was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which made a report on 18 November 2002. It passed the House of Representatives on 26 November 2003 and the Senate on 5 December 2003.

Workplace Relations Amendment (Fair Termination) Act 2003: The act amended the WR Act's termination of employment provisions by excluding certain classes of employees, including short-term casual employees from making dismissal applications; validated the operation of regulations purporting to exclude short-term casual employees (following a Federal Court decision invalidating these regulations) from the time the regulations were made to the commencement of the new termination provisions in this bill; and provided for the payment, and indexation, of a filing fee for termination of employment applications and amended workplace relations regulations to repeal now invalidated provisions excluding certain classes of employees from termination of employment provisions. The bill was introduced into the House of Representatives on 20 February 2002, and to the Senate on 12 December 2002 with amendments. The bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which made a report on 15 May 2002. The House of Representatives agreed to certain amendments on 16 September 2003.

Workplace Relations Amendment (Protection for Emergency Management Volunteers) Act 2003: The act made it unlawful to dismiss emergency management volunteers who are temporarily absent from the workplace on voluntary emergency management duty. The bill was introduced into the House of Representatives on 6 March 2003, and passed the Senate on 26 June 2003.

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003: The act amended the certified agreement and freedom of association provisions and nullified clauses in certified agreements that purport to require payment of bargaining services fees and prohibited conduct designed to compel persons to pay such fees. The bill was first introduced

into the House of Representatives on 20 February 2002, and to the Senate on 19 June 2002, where it was passed with amendments on 21 August 2002. A report on the predecessor bill by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee had been made on 19 September 2001. The House disagreed with the Senate's amendments on 28 August 2002 but the Senate insisted on these on 28 August 2002. The House set the bill aside on 18 September 2002.

The bill was re-introduced into House of Representatives on 4 December 2002. It was introduced to the Senate on 3 March 2003 and it was passed on 24 March 2003. The House of Representatives accepted certain of the amendments on 25 March 2003, and the Senate did not insist on its remaining amendments on 26 March 2003.

Workplace Relations Amendment (Codifying Contempt Offences) Act 2004: The act amends the WR Act in relation to the giving of evidence to the Commission provides compliance powers (requiring requested information to be produced etc) in relation to the building industry; increases the quantum of penalties; provides additional grounds for disqualification from holding office in a registered organisation and provides 'whistleblower' protections for members, officials and employees of registered organisations. The bill was introduced into House of Representatives on 26 June 2003, and into the Senate on 20 August 2003, where it was negatived on 3 March 2004. The bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which made a report on 30 October 2003. The bill was 're-committed' to the Senate on 21 June 2004, and the amended bill was passed by both houses on 26 June 2004.

Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004: The act ensured that applications for orders to prevent unprotected industrial action are dealt with quickly and that, in dealing with applications, the Commission takes into account the undesirability of unprotected action. It was introduced into the House of Representatives on 26 June 2002, and into the Senate on 11 September 2003. It was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which reported on 30 October 2003. The Bill passed the Senate on 2 March 2004 with amendments which the House accepted on 3 March 2004.

Workplace Relations Amendment (Transmission of Business) Act 2004: The act empowered the Commission to make an order that a certified agreement does not bind a new employer as a result of a transfer of a business, or, only binds the new employer to a specified extent. The Bill was introduced to the House of Representatives on 21 March 2002, but did not pass until 25 June 2003. It was introduced to the Senate on 26 June 2003 and passed with amendments on 13 August 2003. The House of Representatives agreed to certain amendments on 2 March 2004. It's predecessor bill had been referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee which made a report on 18 June 2001.

Bills not passed

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002: The bill sought to amend the WR Act's certified agreement and freedom of association provisions and nullify clauses in certified agreements that purport to require payment of bargaining services fees and prohibited conduct designed to compel persons to pay such fees. The bill was first introduced into the House of Representatives on 20 February 2002, and to the Senate on 19 June 2002, where it was passed with amendments on 21 August 2002. A report on the predecessor bill by the Senate Employment, Workplace Relations, Small Business and

Education Legislation Committee had been made on 19 September 2001. The House disagreed with the Senate's amendments on 28 August 2002 but the Senate insisted on these on 28 August 2002. The House set the Bill aside on 18 September 2002. (The bill was reintroduced and passed).

Workplace Relations Amendment (Choice in Award Coverage) Bill 2002: The bill sought to provide all businesses with information about their rights and the processes involved with logs of claims; limit the ability of unions to involve small businesses which employ no union members into the federal jurisdiction; and require the Commission to inquire into views of unrepresented small business employers potentially affected by a log of claims. The bill was introduced into the House of Representatives on 13 November 2002. The Bill was passed as the Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 on 11 February 2004. The bill was introduced and adjourned in the Senate on 1 March 2004. The Senate Employment, Workplace Relations and Education Legislation Committee reported on the bill on 17 June 2004. The bill lapsed at the end of the 40th Parliament.

Workplace Relations Amendment (Award Simplification) Bill 2002: The bill sought to limit and clarify allowable award matters and make related changes to the award making powers of the Australian Industrial Relations Commission. The bill was introduced to House of Representatives on 13 November 2002 and passed the House of Representatives on 1 April 2004. It was introduced to the Senate on 11 May 2004 and a report was made by the Senate Employment, Workplace Relations and Education Legislation Committee on the bill on 17 June 2004. The Bill lapsed at the end of the 40th Parliament.

Workplace Relations Amendment (Fair Dismissal) Bill 2002: The bill sought to exempt small businesses (less than 20 employees) from the unfair dismissal provisions (except in relation to apprentices and trainees) and require the Commission to order that an unfair dismissal application is invalid if it relates to a small business employer. The bill was introduced to the House of Representatives on 13 February 2002, and into the Senate on 11 March 2002. It was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which reported on 15 May 2002. The House of Representatives disagreed to amendments proposed by the Senate on 28 June 2002, and the bill was laid aside.

Workplace Relations Amendment (Fair Dismissal) Bill 2002 [No 2]: The bill sought to exempt small businesses (less than 20 employees) from the unfair dismissal provisions (except in relation to apprentices and trainees) and require the Commission to order that an unfair dismissal application is invalid if it relates to a small business employer. It was introduced into the House of Representatives on 18 September 2002 and into the Senate on 23 October 2002. The House disagreed with Senate amendments on 5 March 2003. The Senate again insisted on its amendments. The House laid the bill aside 25 March 2003. The Bill became a double dissolution trigger.

Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002: The bill required that, in order to be protected industrial action under the act, such action must be preceded by a secret ballot process overseen by the Commission and allows protected industrial action to be taken without a secret ballot after a cooling-off period and provides for the recommencement of protected action after the end of a suspension of a bargaining period. The bill was introduced into House of Representatives on 20 February 2002, and into the Senate on 24 June 2002 where it was negatived on 25 September 2002. The bill had been reviewed by the Senate Employment, Workplace Relations and Education Legislation Committee (report of 15 May 2002).

Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 [No 2]: As with its predecessor, the bill sought to require that, in order to be protected industrial action under the Act, such action must be preceded by a secret ballot process overseen by the Commission and to allow protected industrial action to be taken without a secret ballot after a 'cooling-off' period and provided for the recommencement of protected action after the end of a suspension of a bargaining period. The bill was introduced into the House of Representatives on 13 November 2002, and into the Senate on 5 March 2003, where it was negatived on 24 March 2003. The bill became a double dissolution trigger.

Workplace Relations Amendment (Termination of Employment) Bill 2002: The bill sought to extend the operation of the federal unfair dismissal system to all employees of constitutional corporations and to prevent employees from accessing remedies under comparable State unfair dismissal schemes and to make other amendments to the operation of the unfair dismissal system. The bill was introduced into the House of Representatives on 13 November 2002. It was introduced into the Senate on 16 June 2003. The bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which reported on 26 June 2003. The bill was negatived in the Senate on 11 August 2003.

Workplace Relations Amendment (Termination of Employment) Bill 2002 [No 2]: As with its predecessor, the bill sought to extend the operation of the federal unfair dismissal system to all employees of constitutional corporations; prevent employees from accessing remedies under comparable state unfair dismissal schemes and make amendments to the operation of the unfair dismissal system. The bill was introduced on 6 November 2003 to the House of Representatives and to the Senate on 11 February 2004 where it was negatived on 22 March 2004. The bill became a double dissolution trigger.

Workplace Relations Amendment (Better Bargaining) Bill 2003: The bill proposed to restrict access to industrial action before the expiration of an agreement; provide more ready access by employers to cooling-off periods; allow third party suspensions of industrial action and limit union access to protected and unprotected industrial action. It was introduced into the House of Representatives on 6 November 2003 and into the Senate on 1 March 2004. The Bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which reported on 17 June 2004. The bill lapsed at the end of the 40th Parliament.

Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003: The bill sought to codify offences that amount to contempt of the Commission; create a new offence prohibit the giving of false evidence to the Commission; update certain penalties and insert legislative notes after certain provisions. The bill was introduced into House of Representatives on 26 June 2003, and into the Senate on 20 August 2003, where it was negatived on 3 March 2004. The bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which made a report on 30 October 2003.

Workplace Relations Amendment (Protecting the Low Paid) Bill 2003: The bill sought to ensure that the primary focus of the award safety net is to address the needs of the low paid. It also required the Commission to recognise this primary focus when performing its functions and exercising its powers in relation to awards. It was introduced to the House of Representatives on 13 February 2003, and to the Senate on 6 March 2003. The bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which reported on 19 June 2003. The bill lapsed at the end of the 40th Parliament.

Building and Construction Industry Improvement Bill 2003: The bill provided a workplace relations regulatory framework for the building and construction industry. It would establish the Australian Building and Construction Commission, impose limits on pattern bargaining

and strike action, and impose substantial constraints on union organising rights and activities in the industry. The bill was introduced to the House of Representatives on 6 November 2003 and to the Senate on 10 February 2004. An inquiry into the construction industry was undertaken by the Senate Employment, Workplace Relations and Education References Committee which reported on 21 June 2004. The bill lapsed at the end of the 40th Parliament.

Building and Construction Industry Improvement (Consequential and Transitional) Bill 2003: The bill was introduced with the Building and Construction Industry Improvement Bill 2003. The bill made consequential amendments to the WR Act and technical amendments to 8 other Acts. It also contained application, saving and transitional provisions and a regulation-making power. As with the main bill, it was introduced into the House of Representatives on 6 November 2003 and lapsed at the end of the 40th Parliament.

Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003: The bill required officers and employees of registered organisations to comply with orders and directions of the Commission and the Federal Court and provided sanctions for failure to comply. It was introduced to the House of Representatives on 13 February 2003, and introduced to the Senate on 14 August 2003. The bill was referred to Employment, Workplace Relations and Education Legislation Committee which reported on 30 October 2003. The bill was negatived at third reading 8 March 2004.

Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2004: The bill sought to amend the freedom of association provisions of the WR Act and to extend the federal prohibition on bargaining service fees clauses to State employment agreements to which a constitutional corporation is a party. The bill was introduced into the House of Representatives on 11 August 2004 but lapsed at the end of the 40th Parliament.

Workplace Relations Amendment (Fair Dismissal) Bill 2004: The bill sought to exempt small businesses from the unfair dismissal provisions (except in relation to apprentices and trainees) and require the Commission to order that an unfair dismissal application was invalid if it related to a small business employer (which had less then 20 employees). The bill was introduced to the House of Representatives on 3 June 2004, and into the Senate on 30 August 2004, where it was adjourned. The bill lapsed at the end of the 40th Parliament.

Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004: The bill sought to restore the exemption for small business from redundancy payments by overturning part of the decision of the Commission (26 March 2004) to impose redundancy pay obligations on small businesses. The bill was introduced into House of Representatives on 26 May 2004. It was introduced into the Senate on 3 August 2004 and was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which made a report on the successor bill on 14 March 2005. The bill lapsed at the end of the 40th Parliament.

Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004: The bill sought to simplify certified agreement-making at the workplace level; reduce the delays, formality and cost involved in having an agreement certified; prevent interference by third parties in agreement-making and provide for the extended operation of certified agreements of up to five years. It was introduced into the House of Representatives on 26 June 2002 and was passed on 12 February 2004 as the Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004. The bill was introduced to the Senate on 1 March 2004 and was referred to the Senate Employment, Workplace Relations and Education Legislation Committee which reported on 17 June 2004. The bill lapsed at the end of the 40th Parliament.

Appendix 6

Summary of effects of Work Choice changes on employers

Incorporated Employers

Award/ Agreement Coverage - Current	Effect of New Legislation	Employer entering into new Agreement	If Employer does nothing
State award (common rule or single enterprise)	Deemed a transitional federal agreement (Part 5A) Terms except those below AFPCS and prohibited content federally enforceable 3 year nominal expiry date (Part 5A)	Can be replaced by new federal agreement before expiry date. existing agreement cannot be varied or extended. (part 5B)	Move to most appropriate federal award after expiry date of transitional federal agreement. AIRC to determine appropriate federal award coverage.
State agreement (eg NSW enterprise agreement)	Deemed a transitional federal agreement terms except prohibited content federally enforceable retain nominal expiry date (Sch 15)	Can be replaced by new federal agreement before expiry date subject to Australian Fair Pay and Conditions Standard (AFPCS) existing agreement cannot be varied or extended.	Continue in effect until replaced or terminated but subject to AFPCS after nominal expiry date
Federal award	Continues to apply. 4 allowable matters (jury service; superannuation; notice of termination and long service leave) not able to be put into new awards or varied. superannuation continues until 30/06/08 only wages set by AFPC annual, personal carers and parental leave removed unless more generous than AFPCS (Part 6)	May enter collective or individual agreement subject to AFPCS some award conditions continue to apply unless explicitly excluded by agreement agreement lodged with OEA agreement commences when lodged (Part 5B)	Award continues to apply

Federal agreement (Div 2 or 3 Certified Agreement; Australian WA)	Continues to apply and retains current nominal expiry date. Current terms apply (Sch 14)	May enter new collective or individual agreement subject to AFPCS some award conditions continue to apply unless explicitly excluded by agreement, eg personal leave agreement lodged with OEA. Agreement commences when lodged (Part 5B)	Agreement continues to apply after nominal expiry date unless replaced or terminated relevant conditions subject to AFPC minimum
Award free	No change may seek federal award coverage	May enter agreement subject to AFPCS (Part 5A) agreement lodged with OEA agreement commences when lodged	Contract of employment continues to apply state and federal legislation continue to apply

Unincorporated Employers

Award/Agreement Coverage - Current	**Effect of New Legislation**	**Employer entering into new Agreement**	**If Employer does nothing**
State award (common rule or single enterprise)	No change – state system continues to apply	Agreement made under state rules	State award continues to apply
State agreement (eg NSW enterprise agreement)	No change – state system continues to apply	Agreement made under state rules	Agreement continues in effect subject to state laws
Federal award	Deemed transitional award and allowable matters continue to apply (Part 6) superannuation continues until 30/06/08 only AIRC able to vary wages, allowances in transitional award having regard to AFPC	May negotiate state agreement or decide to revert to state award(s) may apply to AIRC to be released from federal system if intractable industrial dispute	Transitional award expires and coverage reverts to state system

	decisions		
Federal agreement (Div 3 CA)	Deemed transitional agreement (Sch 13) 5 year nominal expiry date	May negotiate state agreement or decide to revert to state award(s). May apply to AIRC to be released from federal system if intractable industrial dispute	Transitional agreement expires and coverage reverts to state system
Award free	No change	May enter state agreement subject to state rules	Contract of employment continues to apply. State and federal legislation continues to apply

Source: Dick Grozier, Director of Industrial Relations, Australian Business Industrial, www.WorkplaceInfo.com.au, (provisions of supplied by the Parliamentary Library