Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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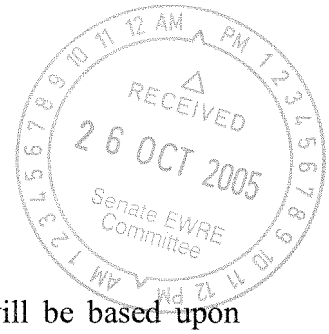

Work Choices: Failing the balance test

Summary

This submission suggests that a "fair go" for Australian workers will be based upon balancing the bargaining power of the parties in the workplace. The "Work Choices" legislation fails the balance test. Current legislation and the Office of the Employment Advocate reveal clearly the bias towards employers inherent in the Coalition's individualised IR system rather than upholding the individual's bargaining power. Negotiation is neither encouraged nor enhanced by the Act or the Bill. The Government accepts the principles of collective bargaining for small business, but by limiting union access and organising capacity it denies the same benefits to workers. The Bill is therefore discriminatory. At the same time, the Government advocates freedom of choice while denying workers accessible options in the workplace, thus enhancing managerial prerogative, limiting collective effectiveness in breach of international conventions, and perpetuating the individual worker's generally less powerful negotiating position. The Bill should therefore be re-drafted to satisfy the democratic principles of balancing the bargaining power of the individual employee

Introduction

This submission does not attempt to cover all the issues of concern in the Government's proposed "Work Choices" legislation. The submission goes to those matters of principle, which elected representatives in a democracy owe it to the body politic to guide their decisions on IR. It leaves all other such issues to other submitters. For example, it does not deal with the negative impacts of replacing the constructive roles of a transparent and accountable industrial relations tribunal with a part-time, bureaucratic "Fair Pay Commission" whose decisions will not be appealable.

The underlying premise of this submission is that in a democracy the relations between both the employer and the managers running the work organisation, on the one hand, and employees, on the other hand, ought to reflect in all respects the fundamental tenets of democracy. These go to questions of justice and equity, fairness and appropriate workplace behaviour, and the rights and responsibilities of the parties in the employment relationship[1]. Australians call this "a fair go".

In industrial relations "a fair go" will be reflected in how an industrial relations system balances the interests of employees and employers. Some of the principles that will drive a democratic industrial relations system are as follows. Whether the Coalition's IR legislation puts these into effect is also indicated. This is not meant to be an exhaustive list:

Characteristic Democratic Principle	**Coalition "Work Choices"**
Employee representation will be accessible in the workplace, affordable and built upon the principles of collective bargaining and freedom of association set down in international ILO Conventions;	Union access to workplaces is limited, impeding organising ability and individual employee access to representation; lack of collective representation and collective bargaining; costs of alternatives prohibit representation for low wage workers

The industrial relations system will provide individual employees with access to independent, altruistic and committed representation of their interests in dealing with the problematics that arise in the relationship between a worker and managers or employers;	Individual workers have to hire negotiating agents and representatives in the absence of union coverage, but in the end workers won't bother because of the requirements, the cost, and in fear of upsetting an existing or potential employer.
Agreement-making rather than "take-it-or-leave-it" ultimatums that the employee will characterise the determination of terms and conditions of employment and wages.	Employer-determined contracts are encouraged by sec 178LK of the existing Act, the Office of Employment Advocate, and Government propaganda.
Employees will have the benefit of the opportunity to either negotiate terms and conditions of employment and wages or accessible and affordable representation independent of the employer or management where there is an imbalance of knowledge, negotiating skills and bargaining power;	The Workplace Relations Minister and the Prime Minister argue, and their statements on bargaining power reveal, an assumption that the individual employee can negotiate on equal terms with the employer. This is a distorted perspective of the power relationship that has no bearing on real work organisations.
The interests of employees will never be subordinated to the interests of shareholders;	Present tendencies of businesses to adopt numerical flexibility as the principal avenue to profitability will be enhanced. The Government's focus on the ability to trade off conditions will lead to greater job insecurity, understaffing, job intensification, intermittent work, inflated casualisation of the workforce and a diminution of work benefits. These "flexibilities" undermine the financial stability of Australian workers and their families and, in the long run, productivity and the economic welfare of the nation.
The balance between work and the personal and family life of employees will be respected, and where working conditions impinge on that balance fair penalty rates should adequately compensate the employee for working in their time.	Compensation for the requirement to work in the worker's own time - at night, over weekends, more than 38 hours a week (recognised even by the Government's IR policy as the measure of appropriate ordinary working hours) – can be "traded off".

In summary, democratic principles for designing an industrial relations system suggest that **the government's legislation should provide for balancing the bargaining power of the parties in the workplace and the "Work Choices" legislation outlined in Government documents fails the balance test**. The fundamental and realistic assumption here is that the individual employee is usually in a disadvantaged power relationship. IR systems in western democracies usually are developed on the basis of minimising the disadvantage that an individual employee faces in the absence of these kinds of enumerated protections and principles. This argument is further developed in the next section.

Work Choices is an unbalanced IR

The Government reiterates in Ministers' statements and in the guidelines for the legislation an unproblematic and ingenuous scenario for negotiations between individual employees and employers. However, the intent to provide an ill-balanced IR system is clear in the Work Choices Booklet (*Workchoices* 2005, p. 20):

> The process for making both collective agreements and AWAs will be simpler. *Prior to seeking employees' approval of an agreement*, employers will be required to provide a consideration period of at least seven days [emphasis added].

Negotiation and consequent agreement making is not conceived in the key document presented to the electorate in its advertising campaign as a joint process of both parties developing a contract through bargaining. The employer is presented with the upper hand in presenting the document for the employee's consent[2]. This is not a matter of nit-picking a particular statement out of context. The same orientation is clear in the provisions of the *Workplace Relations Act 1996* and in the orientation of the Office of the Employment Advocate (OEA).

The Government's record on negotiation

The Coalition in the *Workplace Relations Act 1996* legislation distorts the meaning of "agreement", providing employers with opportunities to introduce non-negotiated conditions on their workforce through Sec. 170LK of *The Workplace Relations Act* 1996. While the Act provides an opportunity for workers to vote against the imposition of any certified agreement, agreement cannot be said to be reached where there has been no representation of employees' collective interests in the development of the terms and conditions of employment. At best, such a provision promotes paternalism for well-meaning employers, not a characteristic that sits easily with democracy and participation. Of itself, voting does not constitute democracy as citizens of many authoritarian regimes can attest.

The Office of the Employment Advocate (OEA) reveals clearly the bias towards employers inherent in the Coalition's individualised IR system rather than upholding the individual's bargaining power. The advice page for employers makes no assumptions that negotiation has occurred:

> Give your employees a copy of the final draft of the AWA and ensure that they have had the required amount of time to consider the AWA before signing it[3].

When the OEA offers advice to employers about how to reach an agreement, assumptions about the power relationship are palpable:

> It may also be useful to manage employee expectations about the forthcoming agreement by providing parameters around which negotiations can take place. This may avoid an ambit log of claims (a "wish list") when negotiation commences[4].

The OEA's advice is about how the employer might control whatever bargaining might occur. This is about the business rather than individuals negotiating with employers on an equal basis. This emphasis on the business interest by the Employment Advocate continues in the Office's advice on drafting an agreement:

> **The draft AWA should clearly articulate the organisation's preferred position** in relation to the terms and conditions of employment, whilst taking account of the outcomes of staff consultations [emphasis added][5].

In one sense, that is fair enough: negotiation is about reaching a mutually satisfactory agreement and this advice addresses employers. But, this again emphasises employer control of what ought to be a balanced, joint process. Compare it to the detail of advice given to employees:

> A bargaining agent can assist or represent you in negotiating a proposed AWA. A bargaining agent can be a friend, relative, solicitor, trade union representative or any other person whose advice you can rely on. If you appoint a bargaining agent to assist you, this person may contact the OEA regarding any issues you may have with your AWA[6].

The OEA offers employees no corresponding advice to employees. There is little more than token recognition of workers as parties in agreement making for all the help it offers them in reaching agreements.

The Coalition's record under the *Workplace Relations Act 1996* has been both to work against "mutually acceptable arrangements" reached at through the democracy of negotiation and to encourage the culture of compliance of the powerless with employer initiated and employer determined terms and conditions of employment under AWAs rather than the commitment of the empowered.

Government record on collective bargaining

The Coalition's industrial relations policy militates against the established international rights to freedom of association and access to independent collective bargaining. There is no single provision which achieves this, but the Government openly advocates individual contracts for Australian workers as its preferred option.

ILO Convention 98, *Right to Organise and Collective Bargaining* is about the promotion of effective collective bargaining and collective representation, proscribing behaviour, which would prevent the benefits of honouring freedom of association, for example.

The current legislation undermines collective effectiveness in the workplace by establishing a plethora of choices regarding the establishment or retention of unions, and promoting the fiction of individual bargaining for AWAs, because together they fragment and diffuse employee representation. The effect of this will be exacerbated by Coalition plans to make union access to workplaces more difficult than in those provisions already set down in Sec. 285A of *The Workplace Relations Act 1996.*

The Minister for Workplace Relations proposed a number of further limitations in legislation introduced into the Federal Parliament in December 2004, which are to be incorporated into the legislation. For example, the Bill proposes to limit union entry for recruitment to once every six months. This would actively prevent effective workplace organising for unions, undermining collective representation.

Government inconsistency on collective bargaining

While denying workers in the nation a system, which **facilitates** collective bargaining, the Government has introduced legislation to facilitate collective bargaining for **farmers**. The former Minister for Agriculture Fisheries and Forestry, Hon. Warren Truss, speaking on behalf of the Government on 24 June 2005 recognised that some parties do not share equal bargaining power, offering to strengthen the hand of farmers, fishers and foresters in dealings with big business including the supermarkets by establishing collective

bargaining arrangements which would give them a stronger bargaining position in negotiations with big business[7]. Employees in those same supermarkets have no less a need for collective arrangements.

Senator Ron Boswell lauded the collective bargaining rights for small business: "Importantly, the new legislation enables collectives access to boycotting that will give some teeth to those groups of small businesses who choose to negotiate collectively"[8]. Not only does the Leader of the Nationals in the Senate support collective bargaining, but he also supports the imposition of boycotts, rights which the Coalition Government has denied workers since 1996.

The Treasurer, Hon Peter Costello and the Minister for Small Business, Hon Fran Bailey issued a joint statement on 10 March 2005, endorsing the principle of collective bargaining for small business[9]. The Minister for Small Business and Tourism said in the joint statement, "The new collective bargaining notification process is a win for small business making it easier for small businesses to negotiate fairer contract terms with larger businesses". The individualisation of employment entrenched in the Work Choices proposals would deny workers that benefit.

The Department of Prime Minister and Cabinet on its website under the heading, "Creating a Fair and Competitive Operating Environment", says that collective bargaining for small business under the Trade Practices Act will "enable collective negotiation on prices and other terms and conditions. It will also be available to enable, in appropriate cases, agreements by the small businesses to collectively refuse to deal should negotiations break down. The process will also allow third parties to lodge a notification on behalf of small businesses - allowing the valued assistance of representative groups". On the same web page, information about simplifying workplace agreement making highlights the benefits to small business from speedier access to individualised contracts (AWAs) rather than facilitating collective workplace negotiation and agreements[10].

Liberal Party policy makes its argument against collective bargaining for workers unambiguously: "allowing third parties to intervene in your workplace" will "destroy jobs and reduce flexibility"[11]. Third party representation in the workplace is clearly anathema to the Government, but not for small businesses. Third parties are described as providing valued assistance and representation in the Prime Minister's department. Mr Howard himself said in a joint press conference with the Treasurer that "We think it's good reform [of the Trade Practices Act]. I mean one of things in it is a collective bargaining proposal for small business"[12]. The anti-union provisions of Coalition Government legislation discriminate against effective trade union organising and collective representation of workers and are inconsistent with its promotion of collective bargaining in order to deal with the lack of bargaining power of individual small businesses.

The impediments of the legislation are real. What manager in a small or medium sized business will have the patience with some third party agent hired by an employee if they are using AWAs to get away from the "intrusion" of third parties (ie., unions)? What employee or job applicant is going to go to the trouble of formally appointing in writing a bargaining agent as the Act requires? And, what employer is going to appoint a job applicant who insists on a bargaining agent negotiating their employment contract?

The Coalition's IR system is not designed to satisfy the democratic characteristics of good faith bargaining and the principles of employee representation. In denying workers a system that facilitates rather than impedes collective representation, the proposed

legislation is inconsistent with a democratic ethos and discriminatory and should be rejected by the Senate on that ground alone.

Denial of choice

One of the prominent rights that Government members have enunciated for workers is the right to choose. It is a key philosophical element entirely consistent with a democratic IR system and was spelt out in the Liberal Party's IR policy in 1998[13]. However, such a principle is meaningless if the individual worker has no access to options.

In its flawed concern to address individual liberty in the workplace, this Government fails to address the contradiction of establishing a legislative regime that effectively props up managerial prerogative, limits collective effectiveness in breach of international conventions, and perpetuates the individual worker's generally less powerful negotiating position. These characteristics are clearly at odds with democratic models of the workplace.

At best, the Coalition's concept of "freedom to contract" has more to do with the employer's choice than the worker's because it does not acknowledge the power relationship at work. It stretches credibility that workers would willingly agree to see their conditions become less generous, their benefits reduced, their working days extended and jobs become more intensive while their extra efforts are unrewarded. Yet, Mitchell and Fetter (2002, p. 27) found that the chief purpose of almost a half of Australian Workplace Agreements was about recovering "managerial control over work organisation through flexibilities that are not available under award or through union-based agreements"[14].

Only empowered workers have choice, workers who are in a position to negotiate or be represented by their independent union. Elizabeth Wynhausen, who has first hand experience of the general powerlessness of workers in relatively low skilled jobs, calls the scenario promoted by the Coalition and employer groups of individual workers negotiating with employees on an equal footing risible[15]. The Business Council of Australia (BCA), which has praised the proposed changes, but criticised the Government for not going far enough, has long promoted an industrial relations system that neuters employee bargaining power. The BCA has promoted denial of choice for workers for years:

> There will be no gains to enterprises in leaving employee representation arrangements to chance, allowing employee choice to be determined willy nilly and potentially undermining common purpose. Unlike the current arrangements, employees will have a choice of representation and the arrangements we propose will enable managers to influence that choice, just as they do with many other aspects of employees' work[16]

The Government delivers on this example from 1993 of fundamentalist managerialist utopianism. Freedom of choice is mentioned widely in the government's propaganda for the legislation but it is an illusion, a trick. The BCA's cynical approach to representation and choice is embedded in the Coalition's policy.

There is cruelty in the Government's provisions for casual workers and part-time workers who'd rather have a decent full-time job so they can support their families with dignity. The Coalition's model of industrial relations will exacerbate the stress and poverty of workers kept on a string by employers who give workers two or three hour "rosters" on indefinite, and often short, notice (what Wynhausen calls "the zone of

intermittent employment"). Negotiation is not an option for most workers facing individual contracts and choices are a fiction for employees with low levels of formal education and with low status in the workplace whether that is as a service worker cleaning floors or a clerical position in an office. Most workers in non-management positions will find that choices are elusive under the Work Choices model.

Few will be in the labour market position of being able to negotiate on account of high demand skills in a low supply situation. Minister Andrew's assertion that workers are in a strong bargaining position because of high labour demand is glibly misleading. Rather than being able to capitalise on their labour, workers individually find themselves in increasingly precarious employment, losing the conditions that make work more bearable, having their family's financial stability threatened by job insecurity.

Conclusion

Democratic ethics would suggest that a government could never have a mandate to legislate an IR system that tips the balance of power one way or the other. The OEA's focus provides a practical example for Senators of how a system based on the primacy of individual contracts will subvert the rights of individual employees to representation and collective bargaining.

The Government's model of industrial relations will lead to an inevitable diminution of wages and conditions as employers re-establish nineteenth-century models of managerial prerogative. Vulnerable employees will have no real choice but to go along with diminished wages and conditions in order to stay in work or get a job in the name of "flexibility". If the IR proposals are not about dragging down wages, reducing labour costs, then that will be the effect at the expense of Australians at work. But another Minister let that agenda slip. Hon. Ian Macfarlane, Minister for Industry, Tourism and Resources, revealed the Government's real agenda is lower wages, when he urged, "We've got to ensure that industrial relations reform continues so we have the labour prices of New Zealand."[17]

The Government somehow imagines that its framework will generate productivity. The more likely scenario is that short-term, cost-cutting strategies will provide short-term profitability, long-term employee disengagement and long-term productivity decline (as has already occurred under the present regime) at the expense of productivity enhancing efficiencies accompanied by employee commitment[18].

A sense of fairness would dictate to Senators that the Government has blatant double standards on collective bargaining and, rather than being a Bill for all Australians, the "Work Choices" legislation reduces freedom of choice and discriminates against the workers of Australia.

The Workplace Relations Amendment (WorkChoices) Bill 2005 should, therefore, facilitate collective bargaining, acknowledge, and compensate for, the low bargaining power of most workers when they are individualised, and be re-drafted to reflect a democratic balance in the regulation of relations at work.

Jim McDonald

[1] Other papers on these issues I have written are: McDonald, J. 1997, "Is the 'New' Industrial Relations Ethical?", in A. Alexandra, M. Collingridge, and S. Miller, (eds), *Proceedings of the Third National Conference of the Australian Association for Professional and Applied Ethics*, KEON Publications, Wagga Wagga, pp. 158-69; McDonald, J. 1997, "How Ethical is the Australian Workplace Relations Act?", in T. Bramble, B. Harley, R. Hall, & G. Whitehouse, (eds) *Current Research in Industrial Relations*, Proceedings of the 11th AIRAANZ Conference, 30 January - 1 February, Brisbane, pp. 232-240; Thorpe, M. & McDonald, J. 1998, "Freedom of Association and Union Membership", *Labour and Industry*, December, pp. 23-42. There are a number of commentaries on the Government's current IR policy on the IR Policy website at http://www.hotkey.net.au/~jimmcd/recon.htm and at ON LINE Opinion. See "IR reforms: evolutionary claims fudge fundamental differences"(http://www.onlineopinion.com.au/view.asp?article=2749); "Will workers have Moore's or less bargaining power?" (http://www.onlineopinion.com.au/view.asp?article=3614); "Will workers have Moore's or less bargaining power?" (http://www.onlineopinion.com.au/view.asp?article=184).

[2] This is the only respect in which the Government's claim that its changes are an extension of the Keating Government's reforms has any credence. Enterprise Flexibility Agreements (EFAs) provided for employer initiated and developed "agreements" to be put to non-unionised workforces. However, the comparison ends there: EFAs were collective agreements protected by award minima. The Howard Government's thrust is primarily the individualisation of the employment contract.

[3] Office of the Employment Advocate, http://www.oea.gov.au/graphics.asp?showdoc=/employers/default.asp, accessed 19 August 2005

[4] Office of the Employment Advocate, http://www.oea.gov.au/graphics.asp?showdoc=/employers/bwmp_best_practice.asp, accessed 19 August 2005

[5] Office of the Employment Advocate, http://www.oea.gov.au/graphics.asp?showdoc=/employers/bwmp_best_practice.asp

[6] Office of the Employment Advocate, http://www.oea.gov.au/graphics.asp?showdoc=/employees/info_statement.asp&Page=1

[7] Hon. Warren Truss, Former Federal Minister for Agriculture, Fisheries and Forestry, "Coalition beefs up farmer, fisher and forester bargaining power, slashes red tape", http://www.maff.gov.au/releases/04/04175wt.html, accessed 25 October 2005.

[8] Senator Ron Boswell, B2004/80, - "Collective bargaining a vital tool for small business" http://www.ronboswell.com/m2004.80.html, accessed 25 October 2005

[9] Hon Peter Costello Treasurer, Hon Fran Bailey MP Minister for Small Business and Tourism, Joint Media Statement, "Government progressing Trade Practices Act reforms", http://www.treasurer.gov.au/tsr/content/pressreleases/2005/013.asp, accessed 25 October 2005.

[10] Department of Prime Minister and Cabinet, "Creating a Fair and Competitive Operating Environment", http://www.pmc.gov.au/publications/small_business/operating.htm, accessed 25 October 2005

[11] Liberal Party, 2004, "Flexibility and productivity in the workplace: the key to jobs" http://www.liberal.org.au/default.cfm?action=plaintext&id=416, accessed 25 October 2005

[12] Transcript of the Prime Minister the Hon John Howard MP, Joint press conference with the Treasurer, the Hon Peter Costello MP, Parliament House, Canberra, http://www.pm.gov.au/news/interviews/Interview1626.html, accessed 25 October 2005.

[13] Liberal Party 1998, "More Jobs, Better Pay", http://www.liberal.org.au/documents/1998_election/workplace/ workplace.html, accessed 25 October 2005.

[14] Mitchell, R. & Fetter, J. 2002, "Human resource management and the individualisation of Australian industrial relations", Working Paper No. 25, Centre for Employment and Labour Relations Law, University of Melbourne.

[15] Wynhausen E., 2005, *Dirt Cheap: Life at the wrong end of the job market,* Pan Macmillan, Sydney.

[16] The Employment Relations Study Commission of the Business Council of Australia 1993, *Working relations a fresh start for Australian enterprises*, The Business Library, Melbourne, p. 110.

[17] Nick O'Malley, *The Age,* 24 August 2005, "Minister urges lower wages costs"

[18] Curtain, R. & Mathews, J. 1990, "Two Models of Award Restructuring in Australia", *Labour & Industry*, **3** (1), pp.58-75.