Submission

to

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Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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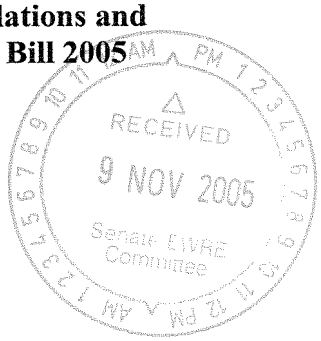

INTRODUCTION

1. This submission deals with three matters. First, what do the 'worst' jobs mandated by the Bill look like? Does the Bill permit the creation of employment that embodies the idea of decent work? Secondly, does the Bill create a system which will protect and promote quality employment, despite the low legal standards set for the very worst jobs? Thirdly, does the Bill permit the development of modern, productivity-enhancing labour standards through processes which are public, democratic and participative?

WHAT DO THE 'WORST' JOBS LOOK LIKE?

2. The WorkChoices system is designed to ensure that an as yet unknown number of workers have as their *only legal minimum entitlements* the terms and conditions set out in the Australian Fair Pay and Conditions Standard. I will call these the 'worst job standards'. For some workers, this new floor to legally regulated conditions will also be a ceiling for their actual working conditions. It is therefore important for the Senate to carefully consider what this kind of job looks like. In any civilised society, it is a proper function of the law to ensure that at an absolute minimum, the worst 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.

3. For the purposes of discussion, this section will consider the worker who is entitled to the full adult minimum wage. Some workers are even worse off – those under 21, workers with disabilities and some casual workers – but other submissions will specifically address the momentous issues which the Bill raises for groups.

4. The worst jobs in Australia under WorkChoices will have only five substantive legal entitlements, unless the worker can bargain for more or their employer gives them more for some other reason. There will be a minimum rate of pay (either the Federal Minimum Wage of $12.75 an hour, or an Australian Pay and Classification Scale) and four conditions of service. The first condition is an entitlement to four weeks' annual leave (or five if shift worker), two weeks of which the worker may agree to cash out. The Bill does not prescribe the monetary value to be accorded to the cashed out leave. The second entitlement is to personal/carers leave in terms and the third relates to parental leave. Both these conditions by and large reflect the existing minimum standards (excluding the 2005 AIRC Work and Family Provisions

Test Case). The final 'entitlement' is to a 38 hour week averaged over 12 months (or a shorter period if agreed between employer and employee). [1]

5. If a worker subject only to the worst job standards works in a firm covered by the Bill and with up to 100 employees, the worker's job security will be at the unrestrained whim of the employer. In all firms covered by the Bill, dismissals on 'operational grounds' will provide a wide arena of managerial discretion in which to institute employment at (the employer's) will. Common law rights in relation to wrongful termination of the contract provide no viable legal protection for workers who are unfairly dismissed. The remnant 'unlawful termination' elements of the Bill are limited to circumstances in which the worker is sacked for a prohibited, discriminatory reason (eg because they are a woman, or a parent etc) and therefore only provide a remedy in a very small range of circumstances.

6. WorkChoices essentially strips away all other legally mandated substantive employment rights from a person in the worst job, except for those they are able to bargain for. So in the worst job in Australia there are :

    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 WorkChoices, 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 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?

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[1] There is an additional statutory entitlement to a half hour break after five hours work.

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 exist 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 (WorkChoices has one week), parents miss out on a second year of parental leave (WorkChoice has only one year) and the right to return to work part-time after parental leave (WorkChoice 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**. WorkChoices 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 WorkChoices 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. WorkChoices makes it lawful for the employer to provide duress to the worker to place or keep them on an AWA. Very difficult for the worker even to contact the union while at work, because of the overly restrictive right of entry provisions.

l. **No voice in the new WorkChoices 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, WorkChoices doesn't require Professor Harper to take any account of anything he hears in these informal and private meetings.

WHICH WORKERS WILL GET THE 'WORST' JOBS?

6. The Government's rationale for permitting the retardation of minimum wages, stripping back workers' entitlements to substantive labour standards, weakening the role of trade unions and abolishing most of the functions of the independent Australian Industrial Relations Commission (and, effectively, the State tribunals) is that it will permit more workers to get a job than would otherwise be the case.

7. The government argues that the current regulatory framework requires this revolutionary change because it prices workers out of the labour market. It sets a minimum wage which is not reflective of the (potential) productivity of those who are unemployed and in 'churning' jobs at the bottom of the labour market, and thus is 'job destroying'. There is nothing new in this argument, of course. The concept of a trade-off between wages and employment has been the subject of expert consideration by the Australian Industrial Relations Commission (and its forerunners), and the State industrial tribunals for the better part of a century. That system, after all, also had to create its concept of 'worst job', but it is the gap between the two concepts which this submission is highlighting.

8. The government's rationale for the creation of the worst jobs only holds good so long as the Fair Pay and Conditions Standard is limited to those workers whose productivity is suitably low. The critical question is this : if employers are free to set wages and conditions for *any* worker at the level of the worst jobs, what is to stop the legally unprotected worst job sector extending beyond the genuine bottom of the market into other areas. How does WorkChoices operate to protect workers with higher skills and greater productivity from sinking to the level of the worst jobs?

9. The government's basic answer to this question is that market forces will do their work : more experienced workers and those with higher productivity will be able to command wages and conditions above the worst job standards through the processes of individual bargaining with their employer.

10. However, the labour market is not a market. There is no single, simple market in which Australian labour is bought and sold. Instead, there are multiple socially constructed environments in which work is offered and accepted. There are many barriers to the free flow of labour within and across these environments. Ideas about gender and work are important. Australia has a high level of occupation segregation based on gender. Has the government informed itself of the likely impact on women's work of the worst job standards? Geographical location and identity are also important in Australia. Will workers in regional areas be forced to take employment on the worst job standards even if they are have the skills and capacity to provide a higher level of service to their employer? Decisions about work aren't taken in isolation, and disadvantages multiply for people in rural and regional communities. Lack of access to the internet, for example, means that workers' knowledge of job opportunities in other places will be limited. And inherent problems of mobility, especially for workers with families (kids in school, parents in local nursing home) mean that a worker in Bendigo may be simply unable to answer the dictates of the market and take a better job in Brisbane or Perth.

11. How does WorkChoices operate to bring market forces to bear on the job choices of employers and employees? This question is not easy to answer, because the Bill's various regimes are enormously complicated and the legislation is not drafted in plain English. Generally, WorkChoices empowers employers to unilaterally fix wages and conditions at or above the level of the worst job standards, either unilaterally or through the creation of individual agreements. Of course, research shows that there is usually little bargaining around the terms of AWAs and employers are permitted to use duress to get workers to sign them so the notion of agreement is a rather hollow. WorkChoices creates other pathways by which workers other than new entrants at the bottom of the labour market might end up on the worst job standards. For example, workers covered by collective agreements may find themselves with only the Fair Pay and Conditions Standard as their sole legal protection if their employer unilaterally terminates their agreement, as permitted by the Bill. Even where there is an award 'standing behind' the agreement, the workers' legal rights plummet down not to the old award standards (which in terms of conditions if not pay are still significant) but to the worst job standards.

12. In other respects, the Bill works against market forces. A properly functioning market is predicated on the free flow of information. WorkChoices effectively destroys the system of public labour regulation, and replaces it with the worst jobs minima and a privatised system of individual bargaining. Punitive provisions are designed to protect the secrecy of AWAs, for example, so someone seeking to find out what another employee earnt might end up in jail for six months.

13. The Fair Pay and Conditions Standard will play a number of important functions under the WorkChoices system.

    a. First, an unknown number of workers will have the worst job minima as their actual working conditions : the legally binding minimum 'floor' will also be the 'ceiling'. **In my opinion, the worst job standards are not acceptable for any Australian worker in 2005 and beyond.** The Fair Pay and Conditions Standard and the WorkChoices system represent significant breaches of fundamental international labour and human rights. The new system will not contribute to the growth of decent work in Australia. The worst job standards are bad for workers with families, and those living in rural areas. Many of the substantive protections removed by WorkChoices are not costly or 'job destroying'. No clear policy case has been articulated for the mean-spirited and retrograde nature of these standards.

    b. Secondly, it will be possible (and perhaps necessary in some economic circumstances) for employers to place even highly productive workers on this very low standard. That is, **the Bill does not provide sufficient legal protection to stop the incursion of the worst job standards across the labour market generally.** The 'labour market' is not a market and it will not protect working conditions in the way the government suggests. People all over Australia, especially those in regional areas, need to the law to guarantee that the job they find in their local town is a decent one.

    c. Thirdly, **those workers who try to improve their labour market position through maintain collective labour relations will be bargaining in the shadow of the worst job standards.** The Fair Pay and Conditions Standard a disciplinary device through the government empowers employers in their dealings with organised labour. Workers under WorkChoices agreements will always be subject to unilateral termination of that agreement and descent to the worst job standards. Bargaining under these circumstances will be a matter of the employer telling workers what s/he wants, and the workers agreeing. Of course, in most workplaces, enormous upheavals of this kind will be avoided by employers. However, even the most sensible employer will have to respond to product market pressures (from within Australia and abroad) and all employers will be aware that at any time they can cut their labour costs and remain within the law.

LABOUR STANDARDS AS AN INPUT TO ECONOMIC DEVELOPMENT

14. The independent industrial tribunals at State and Federal levels are the major source dynamic labour standards in this country. Trade unions and their peak body have most commonly been the initiators of change. The processes by which new standards are set – in working hours, adaptation to change and

consultation and work, maternity leave, parental leave and so on- are rigorous, flexible and public. The fact that representative organisations, some of whom represents many thousands of Australian citizens, are heard in these cases links the independent tribunal system to the bigger picture of Australian participative democracy. Workers who joined a trade union could shape the input of these cases, and be heard either through their union representative or even directly if they chose to give evidence to the tribunal in support of the claim. Similarly, small employers who might never get the opportunity to sit down and read the latest research on training, or productivity or work/family balance are able to directly participate in the setting of new standards via their representative bodies. Anyone with an interest in such cases could attend the hearings and many other institutions, organisations and individuals have participated in them over the century the system has operated.

15. WorkChoices will abolish this system. It is replaced by a new institution, the Australian Fair Pay Commission. As many have noted, the Australian Fair Pay Commission is not required to be fair. Long-standing legal obligations on the AIRC (for example to create a fair and enforceable minimum safety net and that decisions be made having regard to the public interest) are abolished by the Bill. The Australian Fair Pay Commission will operate in private and in accordance with a procedure which it will establish. It is not required to hold public hearings, although presumably the Head of the Fair Pay Commission could chose to do so if he wished. It is not required to hear from the representatives of employers and employees. Most importantly, it is not given the job of fixing labour standards other than the minimum rates of pay. (Many other elements in the Bill reinforce the private nature of regulatory power instituted under WorkChoices. For example, AWAs must simply be 'lodged' and they will be legally binding, even if they do not meet the criteria spelt out in the Bill. But who will know, except the letterbox in the Office of the Employment Advocate?)

16. The government is abolishing the federal regulatory capacity to shape labour standards through formal institutional process. Bargaining may produce change, but it likely to be sporadic and not subject to the rigorous testing which proposals for test cases are subject to in the tribunal system. I urge the Senate to consider that labour standards are not merely an impost on employers : they can be a positive input to economic development and to the full productive use of Australia's labour resources. Without further innovation and support for them at the workplace level, the reconciliation of work and family will remain stressful for families. Australia is already out of step with legal developments in similar countries, including New Zealand and the UK. If we want to take the 'high road' to economic prosperity, I believe some institutional capacity of a public, participative nature is needed to work with businesses and workers to develop dynamic labour standards.

NOTE

17. It has not been possible for me to read and understand the entire Workplace Relations Amendment (WorkChoices) Bill 2005 (hereafter the Bill) and the Explanatory Memorandum (EM).

18. May I express my deep concern that my experience may in fact be shared by members of the Senate? I do not see how anyone other than the architects of the legislation could become fully conversant with its terms (and therefore its scope and likely impact) in the time available. In my opinion, law-making under such circumstances is a breach of the principles of good government.

19. The risk of unintended consequences is very high. We can already point to clauses in the Bill which do not reflect the government's stated intentions. For example, the definition of 'operational grounds' in the termination of employment section does much more than cover redundancies, which the Minister says is the purpose of this provision. Many situations not leading to redundancy are caught in the current concept of 'operational grounds' as the Bill is drafted. Indeed, there is nothing in the Bill which would stop an employer sacking workers on 'operational grounds' then rehiring other workers to do their jobs. This is the antithesis of a redundancy. It would be wrong to pass the Bill when it so clearly fails to reflect that government's intentions in many respects. No doubt there are more errors not yet identified.

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