Submission

to

Senate Employment, Workplace Relations and Education Committee

Inquiry into Workplace Relations Amendment (WorkChoices) Bill 2005

Submitter: Paul Slape, National Secretary

Organisation: Australian Services Union

Address: 116 Queensberry Street
Carlton South, Victoria, 3053

Phone: 03 9342 1400

Fax: 03 9342 1499

Email: pslape@asu.asn.au

Table of Contents

Executive Summary 1

Terms of Reference 4

Introduction 5

The effects of WorkChoices on Awards and the Safety Net.....8

Effect of WorkChoices on Agreement making.....21

Corporations power issues.....37

Disputes settling procedures.....39

Minimum and Award Wage fixation.....41

Conclusions.....43

Appendix 1 43

Executive Summary

1. The Australian Services Union is one of Australia's largest Unions. It is a major participant in Australia's industrial relations system, in both the Federal and State tribunals. The ASU has established and maintained hundreds of Awards and bargained for thousands of enterprise agreements. The Union has represented members in tens of thousands of cases before the AIRC, in disputes settling procedures, unfair dismissals and other proceedings.

2. While the Union has achieved excellent results for members through the system, it does not believe that the system, as it has operated since 1996, means that employees get a fair go.

3. This situation will worsen considerably if WorkChoices is enacted, in the Union's strong submission. In fact, Australia will have an industrial relations regime in which outcomes are controlled by the Federal Government and which puts the bargaining power of Australian workers at its lowest level since Federation.

4. Although titled WorkChoices, the ASU believes that the proposed legislation actually reduces the choices available to both employers and employees in the system to the detriment of both parties and the public interest.

5. The creation of a so-called unitary system reduces choice for parties which wish to remain in a State system. Many employers prefer to conduct their industrial relations in a State system which is simpler, less legalistic and which suits their overall needs.

6. Not only will WorkChoices force employers which are corporations into the national system, it then limits their ability to make Awards and agreements which suit their needs. This is because of the limitation in WorkChoices on both Award and agreement making.

7. If enacted, the WorkChoices legislation will impact particularly severely on employees in particular sectors, and especially those in the social and community services sector where awards provide the basis for actual terms and conditions of employment as well as funding. Freezing Award conditions will impact detrimentally on employees and the ability of the sector to provide quality services to disadvantaged Australians.

8. Moreover, because many employers in this important sector are either not constitutional corporations [or their status is uncertain], the proposed legislation will result in confusion for many employers and ultimately divided industrial coverage for this sector and possibly no award or agreement coverage at all for some employees.

9. At the present time, most choice in the agreement making stream is employer choice – employees are generally required to bargain around the form of agreement preferred by their employer. Particularly when that choice is a non union or individual agreement, employee options and choices are limited. This will remain a major inequity under WorkChoices. The Union's arguments in support of this contention are set out in its Submission to the Senate Inquiry into Bargaining, which is attached as Appendix 1.

10. Employees confronted by the employer with a "take it or leave it" AWA on engagement have no choice of agreement at present. This will remain a major problem under WorkChoices.

11. Employees may be 'locked out' by employers to 'encourage' them to reach agreement on an AWA. This unethical and morally offensive practice will remain a major problem under WorkChoices.

12. In fact, in all three areas, the proposed WorkChoices Bill worsens the bargaining position of employees and creates more choice for employers. Apart from anything else, incentives for employers to seek and impose non union and individual agreements are increased by the substantial reduction in the level of the Award safety net to just four or five conditions in the so-called Fair Pay and Conditions Standard.

13. Further, problems related to the ‘Welfare to Work’ proposals of the Government mean that disadvantaged job seekers, including the long term unemployed and disabled workers will be forced into accepting jobs at below Award conditions or face losing unemployment or other benefit support. There will be no choice for unemployed and disabled Australians in the new system.

14. The Australian Services Union believes that the proposed WorkChoices Bill is unfair and designed to place excessive power in the hands of employers at the expense of ordinary working men and women. The Union calls upon the Senate to reject this harsh and oppressive legislation.

Terms of Reference

15. The Committee has been requested to inquire into the terms of the Workplace Relations Amendment (WorkChoices) Bill 2005, without having been given specific terms of reference. Some matters have been excluded from the Senate Inquiry.

16. This submission deals with a number of key issues of concern to the Australian Services Union, its Branches and members. These include:

- The effects of WorkChoices on Awards and the Award safety net
- The effects of WorkChoices on Agreements
- Issues relating to the use of the Corporations Power
- Disputes settling processes
- The punitive regime proposed by the Bill
- Minimum rates and Award rate setting by the Fair Pay Commission

17. These issues are addressed in the following pages.

18. The submission is authorised by the National Secretary of the Union.

Introduction

19. The Australian Services Union [ASU] is one of Australia's largest Unions, representing approximately 120,000 employees.

20. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social and community service workers, information technology workers and transport employees.

21. Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

    - Local government (both blue and white collar employment)
    - Social and community services
    - Transport, including passenger air and rail transport, road, rail and air freight transport
    - Clerical and administrative employees in commerce and industry generally
    - Call centres
    - Electricity generation, transmission and distribution
    - Water industry
    - Higher education (Queensland and SA)

22. The ASU has members in every State and Territory of Australia, as well as in most regional centres as well. As the principal local government union, amongst other sector and industry coverage, the Union has members in all local government authorities throughout the country.

23. The Union has approximately equal numbers of males and females as members, although proportions vary in particular industries.

24. The union has 11 Branches:

- NSW/ACT (Services) Branch
- NSW - United Services Union
- Queensland Services Branch
- Central and Southern Queensland Clerical and Administrative Branch
- North Queensland Clerical and Administrative Branch
- Victorian Authorities and Services Branch
- Victorian Private Sector Branch
- Tasmanian Branch
- South Australia/Northern Territory Branch
- West Australia Branch
- Taxation Officers Branch

25. The Union has offices in Australia's eight capital cities as well as in 15 regional centres including Cairns, Townsville, Rockhampton, Dubbo, Hay, Newcastle, Wollongong and Morwell.

26. The ASU has had considerable experience with regard to agreement making and Award creation. Since the introduction of enterprise bargaining the ASU has been involved in

- bargaining for literally thousands of union collective agreements under Division 2 and 3 of the Act in key industries and with key employers

- assisting members faced with employer proposals for non union agreements under s170LK
- assisting and negotiating on behalf of members offered Australian Workplace Agreements [AWAs] by their employer.

27. The ASU's array of Agreements is underpinned by a network of safety net Awards in both State and Federal Jurisdictions. In the Federal system, the ASU maintains about 200 underpinning Awards. Some of these Awards are enterprise-based, eg Airline Officers (Qantas Airways Ltd) Award and others have industry wide coverage, eg the Social and Community Services (Queensland) Award. In State jurisdictions, the Union maintains an extensive network of Awards, including major common rule Awards. ASU Federal Awards also operate as common rule Awards in Victoria, the ACT and the NT.

The effects of WorkChoices on Awards and the Safety Net

28. An Award free future?

29. Under the 1996 legislation, the existence and maintenance over time of an effective Award safety net was a key object of the Workplace Relations Act. The Award system also played a key role by providing the standard on which the 'no disadvantage' test was applied to all forms of agreements.

30. The Government has made no secret of its intention over the years to reduce the number of employees whose wages and conditions are governed by Awards by encouraging bargaining, both collective and individual.

31. Under WorkChoices, it is clear that the Government seeks to almost completely remove Awards as a cornerstone of industrial regulation. While the Government says that Award conditions will be protected by law, this is not the case in fact.

32. Firstly, there are further limitations on the matters that can be included in Awards, and changes to those that remain, eg prohibition on 'union picnic days'.

33. Secondly, the AIRC's ability to make new Awards or to vary existing Awards is severely limited:

- Where uncertainty or ambiguity exists or to remove discriminatory provisions,
- to reflect changes in names of persons bound by Awards,
- as part of the Award rationalisation process (as directed by the Award task Force and the Minister), and

- "where the variation is considered to be essential and necessary to the maintenance of a minimum safety net…"

34. The WorkChoices Bill provides at Schedule 1 Subdivision B s.17 and ff[1] what matters may or may not be included in transitional Awards. However, at s.28 and following sections[2] in Division 2, the Bill limits the Commission's power to vary transitional Awards to a small number of pay and allowances related matters. These matters are essentially the same money related matters that are within the purview of the Fair Pay Commission. The Commission must have regard to decisions of the Fair Pay Commission in making any such variations.

35. Hence, apart from matters contained in this section, and those in the fair Pay and Conditions Standard, Award conditions are to be frozen forever. To access conditions better than or different from those in the frozen transitional Awards, employees will be forced to negotiate agreements and thus lose the protection of their Awards.

36. This will occur if employees seek wage rates above any minimum standard that might be set by the AFP Commission. Thus in the normal course of events, most employees will need to negotiate agreements and leave the protection of their Awards.

37. The WorkChoices Bill therefore effectively ends 100 years of the use of Awards of the AIRC and its predecessors in setting comprehensive minimum standards of wages and conditions tailored to the needs of particular industries independently determined on the basis of the substantial merits of any particular case.

38. Currently, each and every Award provision is important because it forms part of an employee's safety net. This is as it should be since the Award is a minimum conditions document, set by an independent tribunal taking into account social standards and providing a base above which employers and employees can bargain. Under WorkChoices, only those conditions in the

[1] Page 531 ff
[2] Page 539 ff

Fair Pay and Conditions Standard have any real importance as a social safety net. Every other condition in an Award is vulnerable and is not taken into account as a benchmark at the time of approval of an Agreement.

39. It is clear from the Government's explanatory materials that Award coverage for employees will only be protected while employees remain on those Awards. As soon as employees move off those Awards in any way, the protection of the Award system will be lost and may never be regained (the most likely - if not inevitable - outcome).

40. Outside of the core conditions set out in the Fair Pay and Conditions Standard, all other Award conditions are now at risk. So long as an Agreement specifies that a certain Award condition is over-ridden, it loses any effect whatsoever.

41. Apart from anything else, this means that the incentive for employers to move employees onto other forms of agreement is now greatly increased and it can be expected that many employers will attempt do so quickly.

42. Workers, especially those without effective bargaining power, will now be forced to bargain just to retain their existing rights, which the Government has said are protected by law, but which are not.

43. Employees will soon be working under the terms of 'agreements' that are below Award conditions, as occurred previously in Western Australia under a similar legislative regime. There is no justification for forcing employees to bargain and establish agreements at below Award standards, especially for those employees, including job applicants, who have no effective bargaining power.

44. Under the 1996 Act, employees were prevented from being forced to bargain away conditions in circumstances where they did not have the power to resist. Now the Government is encouraging employers to seek and obtain unequal treaties with employees.

45. Under the current no disadvantage test, the Award always remained relevant. Each subsequent agreement had to be tested against the underpinning Award. If an agreement was set aside after its nominal expiry date, employees were entitled to fall back under the terms of the Award.

46. Under WorkChoices, employers can give 90 days notice of their intention to cancel an expired agreement and when this has occurred employees will only be entitled to the provisions of the Fair Pay and Conditions Standard. Their Award entitlements, rather than being 'protected by law' will have vanished and a new, lower, standard of wages and conditions will be established.

47. In these circumstances, Awards will cease to have relevance, whether or not some remain in existence. For practical purposes, most Australian workers will become Award free over time and the Award will have no relationship to their work conditions.

48. Impact on employees under State Awards

49. There are important issues for employees currently covered by state Awards. Under WorkChoices, these become transitional federal agreements with a life of up to three years.

50. During this time, these transitional agreements will contain largely the same terms and conditions as before (certain provisions objectionable to the Federal government will become unenforceable) and will not be able to be amended.

51. This means that unless these Awards provide for wage increases in this time, employees will not be able to access any wage increase for a period of up to three years. This is clearly unfair and will have a major impact on employees currently on State Awards. The Bill says that such employees will be able to make new federal agreements [but employees will not be able to exercise any rights to take protected industrial action in support of such an agreement] at any time.

52. This has the effect – in the face of a three year wage freeze – of forcing employees to make a new Federal agreement. In other words, they are being frozen out of their State Award entitlements and pushed into the new system. When they do, their entitlement to their old Award safety net will evaporate, for ever, and they will be rendered Award free.

53. Such employees will be required to bargain to maintain their conditions of employment or go without wage increases. However, there is no obligation on their employer to bargain. The employer can legally refuse to bargain and the employees can do nothing about it.

54. Since employers have all the bargaining power (and the power to refuse to bargain at all) it is to be expected that employers will be able to succeed in either driving real wages down or conditions or both. This is unfair and unconscionable.

55. At the end of the three years, employees still covered by old State Awards [transitional agreements] are to be bound by an appropriate federal Award for their industry – yet to be determined. By that stage, current State Awards will effectively have been stripped back twice – once to the 20 allowable matters in the Federal Act that currently applies and secondly to the newly amended list of allowable matters in WorkChoices Bill.

56. Significant conditions of employment and wage and classification matters will be lost from State Awards in this process. Thus there will be a significant cut in conditions for employees on State Awards.

57. Reduction in the level of the Award safety net to the Fair Pay and Conditions Standard.

58. The Government's advertising of the WorkChoices package advises the public that certain conditions of employment will be "protected by law" in the new system. Of course, this is misleading the Australian public, to say the least, since currently all Award and certified agreement conditions have the force of law and are protected by law.

59. In the future, in fact, only a small number of conditions of employment – plus a wage rate to be established by the Fair Pay Commission - will be protected by law. Thus the number of conditions protected by law will fall dramatically and millions of Australian workers stand to be worse off under the new system.

60. As noted above, under the no disadvantage test in the 1996 legislation, each term and condition of an Award was important and the test was a global one, that is, it applied equally to all forms of agreements and was administered and applied in the same way.

61. The limited extent of the new Fair Pay and Conditions Standard means that many fewer conditions of employment have any real meaning. Other than the pay and conditions in the new standard, all other Award conditions can be swept away by one line in a new agreements which will only be tested against the Fair Pay and Conditions Standard.

62. Impact on particular sectors, eg Social and Community Services, where Awards are the going rate

63. The Government's apparent desire to remove workers from Awards, including State Awards, and to put them on agreements of one form or another, does not reflect the realities facing many employers and employees in particular sectors.

64. One of these sectors is the social and community services sector. This sector is characterised by a number of employers with a variety of legal forms, including corporations (usually not for profit), registered charities, trusts, incorporated and unincorporated associations, individuals, churches and collectives. Many, if not most, of these organisations will not be considered to be constitutional corporations, even under the broadest possible definition – see further below for other implications of this.

65. In this sector, enterprise bargaining is relatively rare. This is usually because the sector has no capacity whatsoever to bargain above Award rates and conditions. Employers in this industry are almost totally reliant on

Government funding from State and Federal sources under a variety of programs. Funding for staff salaries is usually based on Award provisions since these are accepted as a fair standard for funding purposes. In this regard, the Federal Government itself generally refuses to fund any wage rates in this sector in excess of those set by awards. Any wage rates or increases set by agreement between the parties above the Award rates will not be funded by the Federal Government. Some time ago, the Federal Government even refused to fund wage increases flowing from improvements in a NSW social and community sector award, causing the NSW State Government to have to fund these increases.

66. Employers have little or no capacity to raise funds to pay for wage increases above the level of Awards. Where they exist, the proceeds from private fund raising are normally applied to programs and facilities operated. In these circumstances, the Award standard is the going standard for both wages and conditions of employment.

67. Funding organisations, especially government, rely on the existence of an Award standard for funding. Enterprise bargaining in this sector is not only difficult but is inefficient in a sector which is characterised by voluntary committees of management who employ small numbers of employees in a not for profit organisation. It is therefore essential that realistic 'industry wide' Awards be maintained for this sector.

68. 'Across the board' Awards are of vital importance to the industry and to employees. It is completely unrealistic to seek to force employees onto workplace agreements where there is no capacity in the sector to have them. Equally, it is unfair and unreasonable to deny workers in this minimum rates and conditions sector of the capacity to continue to have the protection of a living Award system.

69. In this sector, improvements in working conditions can only be realistically achieved through industry/sector Awards. Freezing those Awards by attempting to impose a flawed private sector agreements model onto a not for profit sector is unfair and unjust. Employees in this sector will have no capacity modify, improve or up date significant conditions of employment

over time. There is no justification for the Government's position on this issue.

70. In any case, breaking up sector wide Award coverage into individual agreements will be unhelpful and counter-productive. Properly fixed minimum Award rates and conditions are the key to a successful and efficient operation in this important industry sector.

71. The forced transfer of State social and community sector Awards to become federal transitional agreements will severely impact on employees in this sector and on the sector itself. Where those transitional agreements do not provide for wage increases over their life, employees will have no capacity to bargain for wage increases and there will be no other mechanism for providing wage increases. Employees do not have the capacity now to bargain and will not have in the future under WorkChoices.

72. Thus social and community sector employees face a double jeopardy situation. Those on State awards which become transitional federal agreements may have no access to award wage increases at all for up to three years since there is no capacity to bargain above award rates and no prospect that any such wage increases would be funded if they were bargained for. Social and community sector employees under Federal Awards will have significant conditions of employment frozen for all time but may have some access to Award wage increases, but only if the Fair Pay Commission determines it since bargaining is also not available for these employees in any practical way.

73. In addition, the wages and conditions of social and community sector employees employed by non constitutional corporations that come into existence after the commencement of the WorkChoices legislation may become completely award free since there is no capacity for the Federal system to cover new non constitutional corporations. There may or may not be a capacity for residual State coverage but in a number of States there are no appropriate State awards covering workers in this sector.

74. One of the more serious implications of these changes may be that, for the first time, wage competition may be introduced into this sector through the emergence of award free employers or simply from employers covered by transitional federal agreements which do not provide for wage increases. Work in this sector is increasingly subject to tendering and thus employers who can tender at lower rates based on lower wage bills will have an advantage and thus lead a drive to the bottom in this sector.

75. The social and community sector works with some of the most disadvantaged people in Australian society. They rely on the provision of government funding and the care and compassion of organisations and staff working with them and on their behalf. The majority of workers in this sector are women and the impact of these changes will fall predominantly on a group of employees which is already disadvantaged in the workplace. WorkChoices will contribute to the widening of inequality and pay differentials in this important service sector.

76. Moreover, any measures which reduce the ability of this sector to engage and retain quality, qualified and committed employees can be expected to significantly impact on the provision of services for disadvantaged Australians. The ASU strongly believes that the WorkChoices legislation will affect not only existing employees who are not well paid as it stands, but will also affect the ability of employers to engage sufficient or appropriately skilled staff in the future. Shortages of skilled employees in this sector are already apparent and will worsen if pay and conditions decline relative to other employees.

77. Dedicated and effective staff are vital to the successful work of this sector. Social and community sector Awards normally contain skills based classification structures designed to encourage the acquisition and use of high levels of skills and to reward the use of those skills appropriately within the limits of funding.

78. Loss of skills based classification structures through the imposition of minimum rates Federal Awards stripped of skills based classification

structures will exacerbate this situation. Skilled based structures cannot be efficiently replicated in enterprise agreements for the reasons stated above.

79. The WorkChoices Bill is based on the use of the Corporations Power in the federal constitution. This will have the effect of dividing industrial relations regulation in this sector for the reasons set out below.

80. Award rationalisation – one size doesn't fit all

81. As the Government has noted, there are a substantial number of Awards in effect at the National and state levels. The Government assumes that this is a bad thing, but there is no evidence advanced that the current number is not appropriate.

82. The Government has regularly argued that employers and workers should be free to establish wages and conditions appropriate to the needs of their industries and enterprises. This continues to be an objective in the proposed new Act.

83. Awards that meet the needs of employers and employees have emerged in the process of Award making over the years although not all parties would agree with each and every outcome in particular cases.

84. Awards currently fall into a number of categories:

- Common rule Awards applying to all employers and employees in a particular industry or occupation – these are typically found in State jurisdictions but also in Victoria, the ACT and the NT.

- Industry wide Federal Awards applying to a limited number of employers in a single industry covering all or some employees

- Enterprise based Awards. Applying to all or some employees of one particular employer.

85. The history of the emergence of these various forms of Awards reflects the desires of the parties to them.

86. Outside of State jurisdictions (other than in Victorian in recent years as a result of the referral of powers), Federal Awards were initially primarily industry wide Awards, that is, they applied to a range of named employers in a particular industry. For example, the Clerks' Vehicle Industry Award applied to the employment of clerical employees employed by all vehicle manufacturers. Similar Awards applied in the oil industry, breweries industry, aluminium industry and airline industries, amongst others.

87. In the 1980s and later periods however, as a result of applications by employers in the main, industry Awards were broken up. This reflected the emergence of enterprise bargaining and a focus on individual enterprises. Employers sought enterprise or company Awards applying to a single business.

88. In some cases, Awards were even further disaggregated with separate company Awards applying to various company sites, locations or geographical areas [eg particular States]. One Clerks Vehicle industry Award became several different Awards applying to Holden (which was then split into two Awards reflecting two major parts of the Holden business), Ford, Toyota, Nissan, Mitsubishi, ChryslerDaimler, etc.

89. This process was replicated in other industries leading to a vast expansion in the number of Awards. This was not normally sought by unions but was pursued and achieved by employers. For example, major airlines such as Qantas have their own company Awards, as do major local government authorities, such as the Brisbane City Council, one of Australia's largest single employers. Why would such employers be forced into industry wide Awards when their policy has been to break out of such Awards. Company Awards are specifically tailored for the needs of such employers and reflect going rates and issues affecting those enterprises and can and are supplemented by enterprise agreements. In 2004, Qantas 'start up' company Australian Airlines could have become respondent to an existing

industry Award – the Overseas Airlines Award – but chose to negotiate its own Award with the ASU. Many other employers choose to do the same.

90. Smaller employers rely on general industry Awards which are minimum rates and conditions Awards. They, too, can be supplemented by various forms of agreements.

91. In some cases, usually by agreement, occupational Awards applying to various groups of employees were amalgamated into a single employer Award. This also typically occurred in the vehicle industry as well. Thus rationalisation of Awards has been carried out by the industry parties themselves where they have desired it. There is no need for Government driven Award rationalisation for the sake of it.

92. "One size fits all" is not a formula driven by industry demand but by an ideological motivation which seeks to drive wages and conditions to an arbitrarily determined lowest common denominator. Awards and the conditions in them have been established by processes which examine the needs of each industry sector and the needs of employers and employees, as noted above.

93. The Government cannot claim to support a policy on the one hand that says that employers and workers should be free to establish wages and conditions of employment that suit their needs and on the other force industry parties to have a one size fits all Award imposed on them.

94. The unrealistic nature of the Government's proposals are illustrated well by issues with regard to Award classification structures.

95. Award classification issues

96. The general issue with regard to Award rationalisation also applies to Award classification issues. Whatever the structure of Awards, classification structures have emerged to reflect the actual nature of work performed in industry and for particular employers and groups of employees.

97. With extremely rare exceptions, if any, employees are not trained to work in an industry but in a particular occupation with that industry. There is no such thing as a general airline industry worker for example. The travelling public wants to know that airline pilots have been specifically trained to fly aircraft not to be a jack of all trades in the industry.

98. Each occupational group within the airline industry [as well as other industries] and, with rare exceptions, no occupational group can do the work of any other safely or efficiently. Call centre employees do not double as pilots who do not work as baggage handlers who do not roster flight crew or prepare flight documentation.

99. Award classification structures, on which considerable work has been done over the past 10-15 years, reflect the occupational characteristics of the employees necessary for the successful operation of any enterprise. Restructured Awards, whether industry, occupation or enterprise based all reflect these developments and have been subject to continuous improvement processes.

100. Again, these structures have been developed to meet the real needs of industry and of particular employers and their employees. There is no justification for imposing a particular classification structure on industry by a third party. Parties have been undertaking this work for years for and by themselves at no cost to the taxpayer, other than with the assistance of industrial tribunals where appropriate.

101. The Government's plans in this regard have no merit and should be rejected by the Senate. Parties should remain free to establish and maintain awards suiting their particular purposes containing award classification structures appropriate to their needs without third party intervention by the Government of the day.

Effect of WorkChoices on Agreement making

102. **Prohibited matters in agreements – why**?

103. Industrial parties were supposedly free to freely negotiate agreements above and beyond the Award safety net via enterprise bargaining. This remains an objective in the WorkChoices Bill but is to be observed largely in the breach in the proposed new system.

104. The choice of parties to freely negotiate agreements has been limited into two ways:

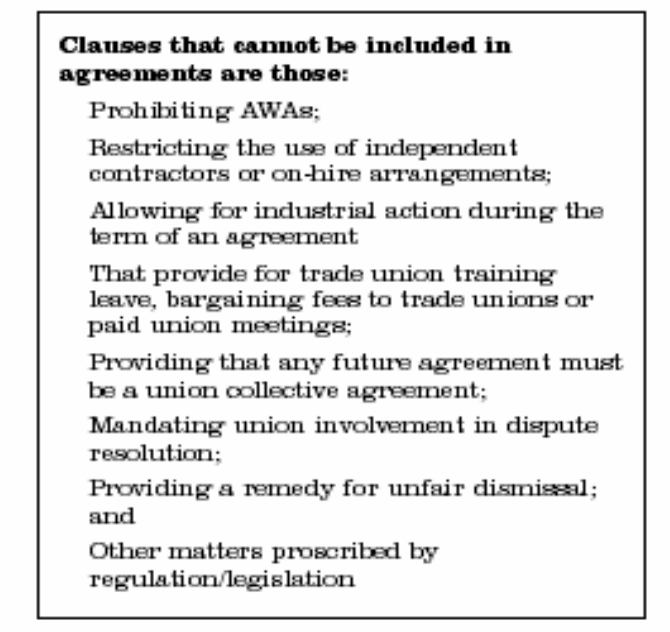
- The High Court's definition of the meaning of 'matters pertaining' to the employer-employee relationship, and

- Existing and planned legislative limitations on the matters about which the parties can bargain, for example, with regard to bargaining agents fees (existing) and limitations on bargaining re contractors and labour hire (planned) despite such latter clauses being approved by the Commission as meeting the employment relationship test.

105. In the submission of the ASU such restrictions are contrary to the objectives and stated intent of the current Act and proposed Bill. It is also contrary to principles of natural justice and Australia's international obligations with regard to protection of the right to collectively bargain.

106. In effect, Australia now has a system of State-regulated bargaining not one designed to suit the freely expressed will of the parties. This will be exacerbated under WorkChoices which further limits the ability of workers and employers to bargain.

107. The WorkChoices booklet described the Government's intentions to prohibit certain content as follows:



Clauses that cannot be included in agreements are those:

- Prohibiting AWAs;
- Restricting the use of independent contractors or on-hire arrangements;
- Allowing for industrial action during the term of an agreement
- That provide for trade union training leave, bargaining fees to trade unions or paid union meetings;
- Providing that any future agreement must be a union collective agreement;
- Mandating union involvement in dispute resolution;
- Providing a remedy for unfair dismissal; and
- Other matters proscribed by regulation/legislation

108. Almost without exception, this list contains matters that are and have been found by independent tribunals and Courts to pertain to the relationship between employers and employees. Why then, does the Government propose that employers and employees should be banned from including such matters in their agreements? What business is it of an external third party to dictate what employers and employees what they can agree in respect to their employment relationship.

109. Extraordinarily, the list of prohibited content as described in the WorkChoices booklet does not appear in the WorkChoices Bill. Rather proposed new section 101D – Prohibited content – simply reads: "The regulations may specify matters that are ***prohibited content*** for the purposes of this Act"[3]. Prohibited content is not other wise defined in the Bill other than by reference to proposed s101D.[4]

110. This Bill therefore gives extraordinary power to a Government which commands a majority in the Senate to prohibit any clause or clauses from workplace agreements. It is clear that the Government is not content to publish a full list of what it seeks to prohibit parties including in agreements for fear that parties will find other ways to express the terms of their

[3] Bill, page 180.
[4] Bill, s. 95A, page, 160

agreement. The Government wants to be able to ban certain concepts and clauses from agreements on an on-going basis.

111. This is an extraordinary Act by any Government.

112. Moreover, It will be an offence for an employers to lodge an agreement 'recklessly' [whatever that means] which contains prohibited content[5].

113. However, the position is even worse if it is considered that not only does the Government intend to ban parties from making agreements about certain matters but it intends to make it an offence for parties to even talk about such matters in proposing or negotiating an agreement, in a 'reckless' manner, whatever that means[6].

114. It is not clear why the Government proposes to ban industrial parties from talking 'recklessly' about agreements that may contain prohibited content. However, the intentions of the Government in imposing a punitive regime on parties clearly contrasts with the situation that applies currently under the 1996 Act.

115. Under the current Act, certain content is required in Agreements [i e: a nominal expiry date, dispute settling provision, etc] and certain content is prohibited [discriminatory clauses or those contravening freedom of association]. However, there is no penalty for applying to certify such agreements and no offence is created with respect to talking about matters which may not be allowable in a certified agreement.

116. In complete contrast to the Government's proposals in WorkChoices, the current approach of the 1996 Act is completely facilitative. If parties apply to certify an agreement which contains a defect of any sort (other than a fatal flaw in the *process* of making an agreement), the Commission will draw the attention of parties to such defect and the Act provides that rather than the Commission simply refusing to certify an Agreement, the parties are given

[5] Bill, section 101E, page 180
[6] Bill, proposed sections 101M and 101N.

the opportunity to rectify problems by making undertakings or in other ways[7].

117. Where undertakings cannot resolve the issue, the agreement may need to be re-drafted and voted upon again by employees covered by the proposed Agreement. However, there is no offence created under the Act for parties making a mistake and no penalty imposed for making an error.

118. The question remains: why has the Government decided to impose a penalty regime on employers and unions about negotiating and proposing agreements for approval? By removing the AIRC from the process of scrutinising and approving collective agreements and transferring this function to the OEA the Government is in effect de-regulating this process. In the place of facilitative assistance by the AIRC – a body without an agenda in agreement making – the Government is turning to a penalty regime designed to punish offenders [presumably after the event].

119. It is more than likely that small to medium businesses will be the main victims of such penalty regimes since they are less likely to be aware of the detail of this complex legislation and therefore more likely to be guilty of proposing agreements with prohibited content or lodging such agreements. This proposed regime is unprecedented in Western democracies in the context of industrial relations – effectively penalising employees and employers for discussing workplace issues and engaging in negotiation.

120. It would also appear that the Government has little confidence in the processes of the OEA to note the existence of prohibited content in agreements lodged [which may be well justified] or does not want to provide the resources to adequately staff this function. Rather, it will seek to make an example of employers or others who offend.

121. Increasingly, in the new environment, workers and employees will be forced to rely on non enforceable ‘side agreements’ as part of their relationship. In some cases, these additional agreements are reflected in enterprise’s HR

[7] 1996 Act, section 170LV

policies which are changeable at the employer's discretion and generally unenforceable. This is unlikely to be satisfactory to any of the parties involved.

122. The ASU proposes that the unrestricted bargaining on matters of interest to employees and employers, in accordance with the Objects of the current Act, be restored.

123. Employer choice of type of agreement.

124. As noted above, Australia's system of agreement making allows the parties to make agreements only within the confines of Government sanctioned bargaining parameters and those imposed by relatively narrow legal interpretation.

125. Moreover, although one of the key objectives of the system is agreements that meet the needs of both employers and employees, in reality the employer has all the options. Employees are forced to bargain, in effect, for the form of agreement chosen by the employer. This will be exacerbated under WorkChoices.

126. Under the 1996 Act, if both sides agree, an agreement may be negotiated under s170LJ (in respect to constitutional corporations) or Division 3 (based on a dispute finding). However if the employer does not agree, employees cannot force an employer to bargain for a union agreement except by the use of protected industrial action. However, if an employer proposes either a non union collective agreement or an individual agreement, employees have virtually no choice but to negotiate on these terms.

127. The same is also true, but is even worse, with regard to AWAs, where the employer has maximum flexibility to divide and conquer, but with additional difficulties for employees. While this position does not change under WorkChoices with regard to AWAs it must be noted what power employers already have.

128. Firstly, employers may link acceptance of an AWA in particular terms that suit the employer to the offer of a job to a new employee. That is to say: refusal to accept the terms of the AWA may and can lead to the employer legally refusing the prospective employee a job, for this reason and this reason alone.[8] This is clearly contrary to the objective of free agreement making of the parties' choosing and should be made unlawful.

129. Secondly, while employers cannot force existing employees to accept an AWA in particular terms, they can in fact legally lock out an employee in a effort to 'encourage' that employee to reach agreement on the terms of an AWA. That this is legal in Australia is unconscionable but employers have exercised these rights.

130. There is little difference to an employee between getting sacked for refusing to sign an AWA [which is unlawful] and being locked out for any period of time [which is lawful]. In these circumstances, many employees 'choose' to sign an AWA. This is not the making of an agreement of the choice of the parties. It is coercion.

131. The use of lockouts against individuals as well as against unorganised workers is shameful and puts Australia in an almost unique situation in the industrialised world. Lockouts are offensive in any situation but as a response to protected industrial action by organised workers is recognised in a number of jurisdictions around the world. But to allow employers to use 'offensive' lockouts to pressure workers who as individuals or as unorganised workers have absolutely no defence is indefensible. It is not agreement making by the choice of the parties and the Government's advertising on this point is at least misleading as most Australians are unlikely to understand the fine distinctions between the situations.

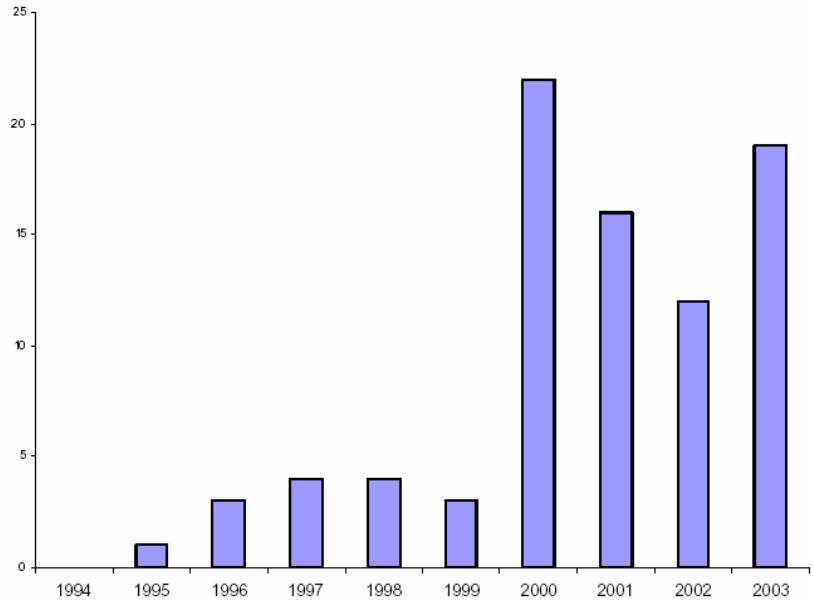
132. It has been argued that:

[8] Burnie Port Corporation Pty Ltd v Maritime Union of Australia [2000] FCA 1768 (6 December 2000)

"Solicitors and employer representatives deny any need for change or argue that any changes to the Workplace Relations Act should be applied equally to strikes and lockouts. The notion that strikes and lockouts should be treated equally is intuitively appealing but ultimately misguided. Other nations have rejected equal treatment of lockouts and strikes because an equal right to lockout is inconsistent with other legal principles such as freedom of association, the right to collective bargaining and strike. If employers through lockouts have such effective defences against individual preferences for union representation and strikes, the formal legal rights of employees are meaningless in practice"[9].

133. ACIRRT has noted the unusual situation Australia is now in with regard to employer lockouts of workers in comparison to similar countries. In fact, according to ACIRRT's research, through their increasing use of lockouts, Australian employers are now responsible for a majority of long running disputes in Australia, not unions.[10] The use of lockouts has increased significantly in recent years, as the table below shows[11]:

Figure 1: Number of Lockouts, 1994-2003



Source: Lockouts in Australia Database (LAD).[1]

[9] Briggs, C, Lockout Law in Australia: Into the Mainstream?, ACIRRT, working paper 95
[10] Ibid.
[11] Ibid

134. The ability of employees to make any form of choice about the form of agreement that will cover them will worsen under WorkChoices, for several reasons. These include:

- An additional form of agreement is possible, namely "employer greenfield agreements', one of the more extraordinary provisions of the proposed Bill[12].

- The Award safety net is greatly weakened providing greater incentive for employers to seek non union and individual agreements

- Independent scrutiny of and involvement in the agreement making process is further weakened or eliminated.

- The ability of employees to exercise bargaining power is severely limited by the provisions of the WorkChoices Bill.

- The Bill limits the ability of employees to reach agreement about the forms of agreements which may be proposed and implement during the life of a collective agreement.

135. These and other matters affecting the ability of employees to achieve fair outcomes are dealt with in more detail below.

136. Employer greenfields agreements

137. The notion of the creation of employer greenfields agreements is extraordinary. Under the 1996 Act, greenfield agreements were possible with the involvement of a Union negotiating party. This was considered necessary to allow for 'start up' agreements which were necessary to be put in place prior to certain projects or operations commencing.

138. There was some justification in allowing the facilitation of such agreements for operational and business reasons and the ASU has been a party to

[12] Bill, proposed section 96D

some such agreements. Such agreements were subject to certain safeguards, including:

1. The involvement of a negotiating party, that is a union, which would not wish to see standards lowered

2. The protection of the full Award safety net for no disadvantage test purposes

3. Scrutiny by the Commission in the certification process.

139. However, there were also dangers in this process since it facilitated the making of so-called sweetheart arrangements in which the employees to be engaged under the terms of the agreement had no say in it. Greenfields agreements depended in part on the integrity of the parties negotiating the agreements, but subject to the Agreement meeting the full no disadvantage test as adjudged by the independent AIRC.

140. Under WorkChoices there is the ludicrous situation of an employer being allowed to negotiate with itself and then lodge the proposed agreement with the OEA, whose only task is to check that the Fair Pay and Conditions Standard is met. This provision will effectively allow employers to put all workers on the minimum standard and makes a mockery of enterprise or workplace bargaining. The potential for abuse of this provision is enormous. Proposed new section 96D does not define an 'employer greenfields agreement' other than as one relating 'to a new business that the employer proposes to establish, or is establishing, when the Agreement is made'. The agreement can thus relate to a new business entity that can be crated for the purpose – the greenfields business does not have to be at a separate or new site and the provision is thus open to abuse by existing businesses. Unless the OEA is to check each such agreement it is unlikely that any abuse will be detected. In any case, such an agreement would be legal.

141. Reduction in safety net for agreements

142. As noted above, the no disadvantage test for agreements now becomes the Fair Pay and Conditions Standard. In fact, there is no 'no disadvantage' test in the WorkChoices Bill. It is simply provided that no agreement can exclude the Standard or any part of it[13] .

143. Accordingly, this Standard is the only test as to content that an agreement must pass. Certain Award conditions are preserved but only to the extent that they are not extinguished by a workplace agreement, which is simply done by including words to that effect in a workplace agreement.

144. Thus employee rights that have been built up over 100 years can be extinguished with a few strokes of the pen. Enterprise bargaining, as originally contemplated, considered bargaining to be above and beyond the minimum standards established by Awards as tailored to meet the needs of a particular enterprise.

145. The Howard Government's version of enterprise bargaining is bargaining downwards from the level of the previous social safety net or bargaining to retain that level of conditions. A lucky few may be able to retain benefits above the Award or at the level of existing agreements, but this is unlikely to include new starters, workers under greenfields agreements, non union workers or those on AWAs.

146. That this is likely to be the outcome is shown by the experience of workers in West Australia under a similar regime – West Australian Workplace Agreements during the 1990s. Proper statistical data and these agreements was published twice in 1994 and 1998. According to these studies, by the time of the second survey, a quarter of all workers under AWAs in WA were working for a wage rate <u>less</u> than that provided for in their underpinning Award and a majority were also working for reduced penalty rates. [14]

[13] Bill, section 89B
[14] Ibid

147. Since it is will now be possible to make agreements that undercut Award terms and conditions, it can be assumed that employers will seek to do so. Once one group of employers in a particular industry does so, it is to be expected that others will follow suit and there will be a race to the bottom in wages and conditions. How low the wages and conditions can go will become the determinant of the success of a business, not the merit of the business plan or the skill or acumen of the business managers or owners. In fact, the reverse will occur as the reduction in wages and conditions will become the focus of profit-making not innovation, productivity gains or skill.

148. This is neither in the interests of Australian workers nor in the public interest. It serves only the private interest of some employers and ideological interests of the Government.

149. Encouragement of below Award agreements – bargaining for employees without bargaining power

150. Allowing – in fact, requiring, workers to bargain below Award standards is unacceptable where workers in fact have no bargaining power. Currently, about 20% of employees are Award dependent, that is, they have no agreement providing terms and conditions of employment. As noted by the Australian Catholic Commission for Employment Relations:

"Typically, Award only employees don not have the capacity to bargain above the Safety Net. As the AIRC said in its decision in the safety Net Review Case decision in 2004, "Bargaining is not a practical possibility for employees who have no bargaining power". [15]

151. The Award safety net protected such employees with a minimum but comprehensive standard of employment entitlements set on the merits of arguments put to an independent tribunal.

152. Employees without bargaining power include not only those currently dependent on Awards, but new starters who are in no position to bargain, employees on non union agreements, those forced onto AWAs by lawful

industrial action by employers and, under WorkChoices, those employees who cannot effectively exercise the bargaining power they theoretically have under the Bill [see below].

153. Social and employment justice demands that a full Award based social safety net be retained to provide a decent floor under enterprise bargaining for all workers.

154. Impact of changes in certification processes

155. Under the 1996 Act, collective agreements are certified by the AIRC while AWAs are approved by the OEA. The AIRC processes, subject to certain limitations as to who may appear and be heard in certification hearings, are open and transparent and decisions published. The Commission's role in Agreement making is limited to facilitation where parties request it but otherwise limited to ensuring that the provisions of the Act relating to Agreement making have been observed. This means that proposed Agreements have been made in accordance with the processes and protections of the Act and meet the standards imposed by the Act and in particular that the no disadvantage test is met. Other than ensuring that the law is complied with, the AIRC has no 'agenda' with regard to any particular form of agreement.

156. The OEA, which is proposed to approve all agreements in future operates in a different manner in approving AWAs. This process is carried out behind closed doors, away from public scrutiny. The OEA is obliged to ensure that Agreements meet the provisions of the law and refer doubtful agreements to the Commission for determination, but the process lack transparency.

157. Moreover, any objective view of the role of the OEA would conclude that it is part of the function of the OEA to promote individual agreements and encourage the maximum utilisation of them. Thus the OEA, unlike the AIRC, has an institutional interest in the approval of AWAs. This can lead to

[15] ACCER, Briefing paper No 1, par 162 and AIRC Print PR002004.

a conflict of interest and a perception that the OEA is not as rigorous in examining AWAs as it should be.

158. The case of the Bakers Delight AWA in South Australia – in which one AWA was found to have resulted in the substantial underpayment of a junior employee is a case in point. While the technical reason why the employer was required to reimburse the employee was that there was no evidence that the particular AWA had been lodged or approved, the employer's defence that dozens of other agreements in the same terms had been approved is of serious concern. It would appear that none of the other approved AWAs would have properly met the no disadvantage test. This case resulted in the Minister himself expressing concern that the approval process had no been properly applied and, presumably, to a provision in the WorkChoices Bill that an appropriate adults had to be involved in the process of making an agreement involving a junior employee.

159. Allowing the OEA to approve all agreements is likely to result in less public confidence in the agreement approval process. It is in the public interest that agreement making be both fair and reasonable and be seen to be fair and reasonable. This will not be the case under WorkChoices and the public will not have confidence that Baker's Delight experience will not be repeated.

160. The Government's objective in transferring all agreement approval to the OEA is most likely designed to avoid union involvement in the process of scrutiny of doubtful agreements. In de-regulating this process, the Government has opted for a penalty regime to seek to enforce compliance with the law, rather than an open, public and facilitative process as operated by the AIRC under the 1996 Act. This is a policy and legislative error which is likely to result in less confidence in the process and outcomes.

161. Tipping the balance of power even further in favour of employers – protected action

162. Since 1996, Australia's agreement making processes have not been the free exercise of parties desire to make agreements about matters that

concern them, but about the use of “raw economic power” to force each other to agree.

163. Employees have been able to take protected industrial action in the form of strikes, bans and limitations and employers can lockout workers. Both have been required to notify each other of their intention and give three clear days warning.

164. The notice provisions are clearly intended to allow employers sufficient time to take action to minimise the effects of the employee protected action. Employers have a significant capacity to do so.

165. Employees have had virtually no capacity to protect themselves against the effects of lockouts.

166. Moreover, employers can take action which can almost completely minimise the impact of protected action by employees. The ASU is aware of one situation, for example, involving protected action at a warehouse in support of a new agreement. After a short time, the employer simply moved their warehouse operations to a warehouse operated by a third party. While this undoubtedly involved extra expense and inconvenience, the protected action was defeated. The Unions were prevented from taking any on-going action against the third party’s warehouse since this was considered to constitute a secondary boycott under the Trade Practices Act.

167. Employees have no similar ability to defeat employer lockouts as they simply do not have the resources to be able to withstand the economic effects of a lockout.

168. Theoretically however, there was under the 1996 Act a ‘balance of coercive powers’ provided to both parties and in some cases employees could exercise effective bargaining power as contemplated by the Act.

169. However, the ability of employees to take protected industrial action is being whittled away by this Government and WorkChoices to further limits

employees scope of action and its impact on employers to the point where employees, whether organised or not will have no effective bargaining power.

170. This is because in order to take protected industrial action in the future, employees will need to obtain the approval of the AIRC for a ballot, 50% of employees will have to vote in the ballot and a majority of those voting will have to support the proposed action. Moreover, employees will be forced to foot the bill for 20% of the cost of the ballot.

171. These provisions are clearly intended to weaken the ability of employees to take protected industrial action and thus exercise the powers on which bargaining was predicated in the 1996 Act. Non union workers [and individuals] will never exercise these rights. Union members may seek to exercise them, but any impact will be limited by the timelines and procedures involved.

172. At the same time the bargaining or coercive powers employers are not being so limited and the potential for third parties to defeat protected action is being strengthened.

173. By contrast, despite the growing use of lockouts by employers, no legislative action is being taken. Australia already has the most liberal lockout laws in the OECD.[16] Under the new amendments, unions will have to undertake an extensive process before protected industrial action can be taken, "whilst employers will be free to lockout their employees on three days notice, no questions asked". [17] This in inequitable, to say the least, and is clearly designed to hamper the ability of unions to take effective protected action while not hindering the employer's ability to pressure employees.

174. Strike breakers remain an option for Australian employers and are threatened or utilised in a variety of ways and situations.

[16] Briggs, C and Buchanan, J, *Work Commerce and the Law, A new Australian Model?*, The Australian Economic Review, vol 38, No. 2 pp 182-91 at 187.
[17] Ibid.

175. The early notion that “all’s fair in love and war” when it comes to enterprise bargaining is quickly being replaced by the notion that the only action employees can take is action that has little or no effect on employers. The ‘balance of coercion’ is no longer even in notional or statutory balance. The Government has clearly decided to tip the balance of power in favour of employers.

176. As noted above, protected industrial action was predicated on the warring parties being left alone to wear each other down. The absence of third party intervention and assistance is regrettable and anachronistic.

177. The bargaining provisions of the Federal Act are already complex and are becoming increasingly so. Commentators have already observed that the 1996 Workplace Relations Act is complicated, especially in comparison with many state Acts. Professor Andrew Stewart has noted that the Federal Act in its current form is ‘bloated, convoluted and, in parts, unintelligible’.[18]

178. If the Government really intended parties to be free to bargain with each other as they please, it should allow this without hindrance. If not, third party intervention and disputes settlement should be allowed in bargaining, in the public interest.

[18] Stuart, A., CCH Industrial law News, July 2005.

Corporations power issues

179. Restricted potential for creation of a unitary system.

180. The Government has based the new Bill on the corporations power with some transitional arrangements for non constitutional corporations currently covered by Awards made using the conciliation and arbitration power.

181. The ASU has members employed by non constitutional corporations, especially in the social and community services sector, but in other areas as well, including some local authorities which are not or may not be considered to be constitutional corporations.

182. The ASU does not believe that the Government will achieve its objective of introducing a unitary system of industrial regulation. On the contrary, the Union believes that many sectors in which it operates will be divided between two systems, whereas at the moment, based on the conciliation and arbitration power, they all have the potential to be in the one system.

183. While coverage of these sectors is partly in State systems and partly in the Federal system, the fact is that normally the whole of the sector in each state or territory operates fully in either the State or the Federal system. This means that there is little or no actual overlap in particular jurisdictions. To the extent that overlap exists, ie coverage by different state or Federal awards in a number of jurisdictions in the case of a national employer, this can be addressed under existing legislation by the making of a comprehensive agreement, using either Division 2 or 3 of the 1996 Act. This is commonly done.

184. In the future, however, since only the corporations power is to be relied upon, this will not be possible and the industrial coverage of non constitutional corporations will have to be divided between State and Federal systems. This is a retrograde step which will not serve the needs of

either employers or employees in sectors in which there are currently employers who are both constitutional and non constitutional corporations.

Disputes settling procedures

185. The model disputes settling power in Awards under WorkChoices will not include or allow an arbitral outcome.

186. The model disputes settling power in Agreements under WorkChoices will not include an arbitral outcome unless specifically inserted by the parties. The default clause will only include mediation or conciliation.

187. For 100 years, the Australian has taken it as a given that it wanted industrial relations to be governed by the rule of law, rather than by the 'cruel and unscientific methods of strikes and lockouts'. The rule of law has not always applied or been observed by all at all times but this has been a consensus social expectation and policy.

188. The Howard Government proposes to effectively abolish this unique Antipodean practice. Why? The Government says that its wants disputes to be resolved in the workplace by those directly concerned with them. This would of course be desirable but flies in the face of two centuries of experience to the contrary.

189. Since the time of the industrial revolution [and from even earlier times] the resolution of conflict between employers and employees has been a major social and economic issue in all advanced industrial societies. Industrial and social history, including that in Australia, has provided many examples of social and economic dislocation and hardship occasioned by industrial disputes fought our without social involvement.

190. It has been part of the Australian social settlement since the days leading up to Federation that the State had an important role to play in providing for means of resolving industrial disputes which otherwise had serious effects not only for the parties directly involved but also for society as a whole.

191. It is naïve in the extreme to believe that socially appropriate outcomes can be left to the market place to be produced and it will be economically disastrous for Australia to attempt it, even with all the restrictive and punitive

measures put in place by the WorkChoices Bill. The State has an important role to play in providing for the resolution of industrial disputes and this does not just extend to placing all effective power in the hands of one side of the industrial divide.

192. The Howard government knows these facts of history and cannot be serious in its stated belief that employers and employees can always resolve matters of concern unaided. In the past conservative governments and employers supported arbitration and appealed to unions and employees to "obey the umpire". However, the radical approach of the current Government simply reflects a prevailing view in some political and employer circles that all effective industrial power should be given to employers who should be allowed to determine industrial rules and outcomes unilaterally and in their own narrow interests, without any role for independent scrutiny or, effectively, the rule of law or the public interest.

193. Stripped of its rhetoric, this is clearly the intention of the Government. The AIRC can no longer effectively exercise the powers of arbitration contemplated by the founders of Australia and the authors of the Constitution.

194. The Government has retained the possibility of arbitrated outcomes under Agreements, but only where both parties agree to insert such dispute settling powers in Agreements. This means, of course, that if one party does not agree that the AIRC should be given the right to arbitrate to settle a dispute, then that power will not exist. Thus one party has the power of veto from the outset.

195. The Government either wants disputes to be resolved only by the exercise of industrial muscle, or, more likely given the restrictions now placed on the exercise of industrial action by employees, to give employers a free hand to impose outcomes of their choice without regard for the interests of employees of the public interest. In either case, the Government's intentions are not in the interests of the Australian people or Australian society but in a narrow ideological and employer interest.

Minimum and Award Wage fixation

196. In the submission of the ASU, the Government's proposed changes to the system of wage fixation under WorkChoices, and especially, minimum wage fixation will only serve to worsen wage inequality in Australia and reduce the real value of minimum wages. The AIRC has played an important role in keeping the floor in wage fixation at a reasonable standard, without adverse economic effects. It is unlikely the mooted Fair pay Commission will do the same, since the Government is clearly unhappy with the outcomes of the AIRC processes on this issue.

197. There can be only one conclusion from the Government's decision to remove wage fixing powers from the AIRC and transfer them to the new Fair Pay Commission. That is that the Government believes that the AIRC has set minimum and Award wage levels to high. The Government has consistently argued for wage outcomes at a level below those set by the Full benches of the Commission in annual National Wage safety net cases.

198. Despite setting the legislative framework under which the AIRC operates, the Government is obviously unwilling to accept the fact that the independent tribunal has come to a different conclusion based on the evidence put before it by the Australian Government, State and Territory governments, employers, the ACTU and others.

199. The 2005 Safety Net decision closely analysed both the law that the Commission has been asked by the Australian Parliament to apply, the evidence presented on which the 2005 and earlier decisions has been based and the outcomes of this and previous decisions. To an unbiased reader, it is clear that the Commission has applied the law as it stands and made decisions based on the evidence presented and the substantial merits of the case. There appears to be no basis for the Government's dissatisfaction with the outcomes, other than an unwillingness to accept the

decision of an independent umpire which has acted with integrity in a transparent manner and in accordance with legislative requirements.

200. The decision to take wage fixing powers and give them to another body which will operate with significantly less public involvement therefore has no basis in merit and is not in the public interest or in the interests of employees. While the procedures to be adopted by the proposed Fair Pay Commission are not yet certain, it is likely to proceed on a completely different basis in which the public interest as expressed by interested Government and non Government organisations is unlikely to be as prominent.

201. Giving the power to set minimum and award wages to a Commission whose members are appointed for relatively short periods means that the influence of the Government of the day is likely to be significantly increased when compared to the power being in the hands of independent Commissioners appointed until retirement age.

202. Moreover, the Bill provides no guidance as to the frequency of wage determinations and workers will have little confidence in processes and outcomes in which they have little formal involvement.

203. In addition, removing the power of the AIRC from the wage fixing process means that the Commission's power and ability to resolve disputes [allegedly a prime function of the AIRC in the future] is limited. Many disputes involve wages or wage related issues since this is a prime industrial issue. The Fair Pay Commission is clearly not intended to have a role in dispute resolution but the AIRC is apparently to be expected to resolve disputes with one, if not two, hands tied behind its back.

204. In the immediate future, involvement in wage and condition fixing, including classification structures and award rationalisation, is to be split and spread amongst at least three bodies. This is hardly a simpler system: on the contrary it is likely to be confusing to many smaller employers. The AIRC today effectively operates as a 'one stop shop' for Awards, collective agreements, dispute resolution, unfair dismissal, etc. In the future, a myriad

of bodies will have a role to play in these processes leading to uncertainty, confusion and variable outcomes. This is not in the interests of employers, employees or in the public interest.

Conclusions

205. The attack on the rights of employees under the WorkChoices Bill is fundamental. It does not, in reality, seek to do any of the things that the Government's advertising says that it is intended to do. It provides less choice for all parties but, in particular, is designed to place greater power in the hands of employers at the expense of the rights and living standards of employees.

206. It is not possible to propose amendments to this Bill which would render it acceptable to employees. There is, in this Bill none of the notional equality of power between employers and employees [although in practice it rested with employers]. There is no pretence of fairness to employees except in the Government's advertising.

207. In conclusion, therefore, the ASU believes the WorkChoices legislation is unfair and unreasonable and totally unacceptable and should be rejected by the Senate.

Appendix 1

Appendix 1 is attached.