Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

Submission no: 76

Received: 9/11/2005

Submitter: Mr John Allan
Federal Secretary

Organisation: Transport Workers' Union of Australia

Address: 52-56 Rouse Street
PORT MELBOURNE VIC 3207

Phone: 03 8645 3333

Fax: 08 9676 2669

Email: Linton.duffin@twu.com.au

SUBMISSION OF THE TRANSPORT WORKERS' UNION OF AUSTRALIA

WorkChoices - Whose Choice ?

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

INTRODUCTION

1. The Transport Workers' Union of Australia ('the TWU', 'the Union') welcomes the opportunity to address the Senate on this radical Bill.

2. The TWU represents approximately 82,000 members engaged in the road and air transport industries. The majority of our members are employed by companies in road transport although we represent a significant number of self-employed persons in the road transport industry. We are deeply concerned at the proposed legislation which represents the greatest alteration in the balance of power in favour of employers at the workplace in 100 years.

3. The TWU is deeply concerned that this Bill seeks to make wide ranging changes to our industrial relations system which will have long lasting and largely negative consequences for working people.

4. While the Government has repeatedly stated that it views the current labour market as over regulated, this Bill seeks to increase the level of regulation, both in terms of its reach (by seeking to override State IR systems), and in terms of the level of detailed prescription it will contain (in relation to a range of matters including agreement making, industrial action, consent awards and so on) and its intervention into the rights of parties to reach agreements on the terms they see appropriate.

5. It is difficult to see why such extreme policies are being pursued. Certainly the material provided to date, outside of the rather outdated rhetoric (the Government's comments

that "we cannot stand still. Standing still is to go backwards." invokes James Hacker in *Yes, Prime Minister*) has not even attempted to provide a meaningful rationale for the changes. It is difficult to think of another change with such profound ramifications for the Australian inter-Governmental relations, for Australian workers, for Australian society generally, which has been pursued with less evidential reasoning.

6. The Prime Minister suggests that these matters are an "article of faith" for Coalition members. This may well be true. But "faith" is not evidence. Were it otherwise the Flat Earth Society would still be advancing its cause with confidence. Ultimately the policies in this Bill represent a triumph of the will of a few in the Liberal Party without any meaningful justification. Ultimately the policies in the Bill may be rationalised but they cannot be justified.

7. The TWU notes that this Inquiry is to be undertaken within an extremely short time frame, and the Union expresses its disappointment that such an important Bill should be subject to such a limited examination by Parliament. This is particularly so given that the extreme nature and breadth of the proposed changes.

8. Indeed the TWU has not had the opportunity to properly consider all aspects of the Bill. These submissions are based on the material we have had the opportunity to consider. We may seek to provide the Committee with additional material prior to the hearing.

9. It is clear that most of these changes have not ever been the subject of debate in an election. The Coalition has never proposed these changes in the manner in which it campaigned on the GST. This policy was not debated prior to the last federal election, and as such the Government cannot reasonably hold a mandate for such a radical restructuring of one of our nations fundamental institutional systems.

10. This is even more so in relation to the issue of the Australian polity. The Government's policy is perhaps the first hostile takeover of an area of State responsibility. The Minister in his second reading speech invokes the areas of taxation and corporations law to demonstrate how federalism has involved the transfer of powers to the Commonwealth. However anyone with the slightest knowledge of constitutional history knows that the Government's arguments in this area are specious.

11. Co-operative federalism is dead in the Workchoices package. The Minister's statement in the Second Reading Speech that "When the Government first proposed our workplace reforms..." was of course omitting the fact that the Government did not take these changes to the people at the last election (or indeed any before that) and had no mandate for such changes when the Prime Minister made his statement in May 2005.

12. Ultimately the Government will seek to pass this legislation without any meaningful debate. It does this full in the knowledge that it has failed to persuade the population of Australia of the merits of its proposals (in spite of the use of millions of dollars of public money in the greatest propaganda exercise since Lord Haw Haw).

13. It is difficult, given the nature of the terms of reference, to provide a proper analysis of the Bill. The Bill is a complex piece of legislation where each part builds on another, and in each case further reducing the rights and entitlements of workers and their unions. The TWU intends to make its submissions holistically to provide members of the Committee with an overall summary of the Bill.

LEGISLATION OVERVIEW

14. The proposed Bill seeks to radically alter the current industrial relations system, reducing basic protections for employees, and heavily weighting the balance in favour of employers in all workplace matters, but in particular in enterprise agreement negotiations. Further, the Bill seeks to promote individual contracts as the primary instruments for setting wages and conditions, as well as increasing the regulatory burden on both employees and their unions.

15. The proposed changes to our unique industrial relations system are directed to both the structure of the system and the rights of the parties within the system. The remainder of the submissions will address the issues of the rights within the system. This section addresses the structure of the system.

Constitutional aspects

16. The TWU is concerned about the dramatic alteration to the political structure which the Government is seeking to effect through the passage of this legislation.

17. Perhaps this is unsurprising. This Government more than any Government, including the Whitlam Government, has used section 96 of the Constitution to turn the State Governments into service providers. In particular, the Government's industrial relations policies have been pursued through the tied grants power in a manner which has been blatantly interventionist and partisan.

18. Some members of the Committee have previously indicated their support for a unitary industrial system. However, as indicated previously the Government has no explicit mandate for this change. No campaign has been effected to this purpose. By contrast the Commonwealth has sought to have direct powers to regulate national industrial relations policy by way of referenda on seven occasions. On each and every occasion the proposal has been defeated.

19. There is no question that if the Commonwealth Parliament wished to have a unitary industrial relations system it could pass an Act seeking to alter the constitution and put its proposals to the people. This is the course of legitimacy.

20. Legal commentators such as Professor Greg Craven believe that the changes to the structure of Australian governments which are embodied in this package are capable of damaging the entire basis of the Australian political settlement.

21. If the Government wished to pursue this reform there is of course an obvious means of doing this. Such changes could be made through referenda and appropriate political persuasion. By contrast the Government is seeking to ram its policies through Parliament and into the community without proper mandate, inquiry or in accordance with the constitutional division of powers.

22. This emphasises the importance of having the agreement of the State Governments to pursue such a fundamental restructuring of the powers in the Australian political landscape. To date there has been no effort to engage the State Governments, instead the policy pursued has been similar to those within the policy itself – on a take it or leave it basis, with all of the power with the offeror.

23. Indeed the existence of section 109 of the Constitution provides the Commonwealth with the balance of power in the relations with the States. In this sense the position is

directly analogous with the position of employers in the system who can determine the nature of the agreements between themselves and their workforce unilaterally.

24. The TWU opposes the hostile takeover of State jurisdictions.

General philosophical considerations

25. It is important to consider the overall rationale behind the changes. On their face the Government appears determined to emphasise choice.

26. However it is the Government's choice which matters, supported by employers. The Government seems determined to obtain its choice with respect to a low-wage economy, with individual agreements rather than collective agreements, with a higher labour-turnover economy and agreements which only include terms and conditions which the Government approves.

27. It is a strange thing for a Government to pursue an ostensibly deregulationist agenda by creating the most complex piece of legislation in industrial relations and which prescribes in great detail the most basic of issues at the workplace.

28. It is difficult not to conclude that the legislation embodies the greatest attempt to regulate the workplace in the image of a particular Government in Australian history and that deregulation is a furphy. The correct interpretation is that only the Government's model of regulation is what ought be pursued.

The Australian Fair Pay Commission

29. The Australian Fair Pay Commission (AFPC) is a new development which has never previously been considered in any of the Government's policy pronouncements. The TWU has a number of concerns with this Commission. These relate to its composition, its lack of any obligation to behave in a manner which would involve the provision of natural justice, and, ultimately, its purpose.

30. This Commission has been created, so the rhetoric goes, to emulate the British Low Pay Commission. In truth the emulation extends no further than the words "pay" and "commission" in the title.

31. The Low Pay Commission is a genuinely tripartite organisation which has equal numbers of representatives of employers and unions. The sham which the Government is pursuing in the composition of the AFPC emphasises the failure to engage with anyone other than intellectual fellow travellers.

32. Furthermore the Government in its policy pronouncements leading to the creation of the AFPC has misled the Australian people. To suggest that the AIRC has been anything other than an institution which front and centre has dealt with economic issues is to deny the entire history of wage regulation in Australia.

33. The fact that the AIRC has not, in every instance, agreed with the Government does not mean that economic factors were not taken into account. Contrary to the position put by the Government two of Australia's leading labour market economists have been members of the Commission until relatively recently.[1]

34. The simple fact is that the public nature of hearings of the AIRC, the need for unions to provide detailed submissions and material, which is capable of being tested by other parties and the Commission, has led to rigorous analysis.

35. It is doubtful that a Commission whose composition appears likely to represent right-wing think tanks and Liberal Party hangers-on, rather than the composition which is reflective of the truly tripartite Low Pay Commission, will engage in public inquiries in the manner of the AIRC.

36. Ultimately however the purpose behind the AFPC is to reduce the rate of increase in wages, and to reduce real wages over time for those at the bottom end of the labour market. This policy has been in existence throughout the life of the Howard Government.

37. The Government has relied on aggregate figures of wage growth over the period since 1997. However the evidence which has been detailed publicly in recent months which involved disaggregated figures demonstrated clearly that it was the workers at the top end (workers frequently outside the workplace relations system in any case) who

1 Keith Hancock and Joe Isaacs

received large wage increases, while workers at the bottom end (who are frequently those whose wages will be determined through AIRC or in the future the AFPC) whose real wage increases have been minimal.

38. This is made clear by the changes to the statutory regulation of the AFPC. The requirements that the AIRC consider living standards in the community generally, fairness and the needs of the low paid meant that the AIRC considered these issues in balancing the public interest.

39. The AFPC will not have any of these statutory considerations. The outcome seems obvious.

The Award System

40. Fundamentally, WorkChoices seeks to destroy the system of federal awards which have been a key feature of our unique industrial relations system since its inception in 1904, and which have acted a safety net for the low skilled and low paid.

41. However it goes beyond the mere destruction of federal awards. The intention of destroying awards regardless of which jurisdiction they operate in, which has not been advocated publicly in any election campaign is drastic and unwarranted.

42. The completely misleading "protected by law" statements reflect either how poorly the Government understands its legislation, or, more likely, how unwilling the Government is to truthfully defend its changes to the industrial relations system.

43. Awards contain terms and conditions that have been won by working people over 100 years. There are currently approximately 2,250 awards in current operation federally, many of which are employer specific awards.

44. The Government seems to ignore the fact that many awards were made by consent and with the complete involvement and agreement of the parties. Awards have operated in conjunction with certified agreements for the entire life of the Workplace Relations Act. Although the transport industry does not have a high number of totally award reliant employees it is often the case that agreements in the industry provide for little other

than a pay increase over the award, with the majority of conditions still provided for by the underpinning award.

45. This is undoubtedly the case in a large majority of certified agreements throughout the economy. This is largely due to the fact that the large number of awards reflects a degree of specialisation of those awards, such that the specific needs of workplaces covered by awards are usually incorporated into those awards. This is of course necessarily the case with the large number of enterprise specific awards.

46. The major change wrought by the proposed Bill is that awards will no longer act as the safety net, underpinning enterprise bargaining. The result is that awards will cease to have any relevance to the industries to which they apply, which is obviously the intention of the Bill given that the Australian Industrial Relations Commission ('AIRC') will be stripped of the power to vary awards for any reason other than to change the name of the award, or revoke it.

47. In place of industry specific awards, agreements will be judged against the Orwellian 'Fair Pay and Conditions Standard' ('FPCS'). While employees whose pay and conditions are totally governed by the relevant federal award will retain those conditions, any person who makes an agreement will see the end of their award conditions for good.

48. This puts the lie to the Government's misleading "protected by law" statements. There is of course no guaranteed protection to award conditions and standards. It would be helpful if the Government told the truth in this area.

The No Disadvantage test and the Fair Pay and Conditions Standard

49. One of the most far-reaching changes within the Bill is the demise of the no disadvantage test and its replacement by the FPCS.

50. The no disadvantage test has been one of the most successful mechanisms for ensuring that workers could bargain at the workplace full in the knowledge that although aspects of their conditions could be worsened, as a whole they would not be made worse off.

51. The demise of the no disadvantage test, contrary to the statements made by members of the Government, is not for the purpose of making agreements easier to assess. This assertion was one of the most pathetic made by the Government in the lead up to the Bill. As statistics released by the OEA have demonstrated they are not finding it overly onerous to approve the vast majority of agreements proposed (including agreements which could not possibly on any fair reading of whether workers are disadvantaged be actually approved – but this is another story).

52. Again some intellectual honesty from the Government would be helpful. The end of the no disadvantage test and its replacement by the FPCS can only be for the purpose of reducing wages and conditions.

53. It is possible, although improbable, that the Government actually believes that the demise of the no disadvantage test and its replacement with the FPCS will lead to increased wages. It is more likely that the Government has chosen to repeatedly dissemble on this question because they know that a fall in wages (either real or nominal) will occur for many workers.

54. The FPCS provides the bare minimum of standards, and frequently standards which do not meet the minimums provided by awards. For example, in relation to casual employees other than a minimum level of benefit, there are none of the protections which exist in the Federal system.

55. The absence of guarantees for shift penalties, overtime penalties and allowances can only be for the purpose of ensuring that rates of pay move downwards. It is intellectually dishonest to ascribe any other purpose to this.

56. The Government seems determined to pursue the low-wage low-productivity model which arose in New Zealand following the passage of the Employment Contracts Act. If this is what is sought why not be prepared to say this.

57. The Government should be proud enough of its policy not to dissemble. If it believes that the policy is good it should shout it from the rooftops. It should be strong enough to say "We expect some people's wages and conditions to be reduced. We think that this is necessary for the good of employers."

58. At least the electorate would then be aware of exactly what the Government stood for.

Enterprise Bargaining

59. WorkChoices makes fundamental changes to the enterprise bargaining process, which serve to limit the matters that parties may wish to include in agreements, as well as allowing agreements to fall below the community standards contained in the relevant federal award.

60. The nature of the agreements reached in the industries covered by the TWU is largely determined by the nature of the industry itself. The road transport industry is highly competitive industry characterised by large numbers of competing companies. Companies compete extensively on price and to a lesser degree on quality of service. This dynamic is what leads to the extensive price competition in the road transport industry.

61. There are relatively few costs over which transport companies have control. The cost of fuel is outside their control, the cost of the vehicles is largely fixed, and the costs of financing vehicles is largely fixed. Wage costs are one of the few variables under the direct control of transport companies, and as such it comes under the most competitive (and generally downward) pressure.

62. The Government's policy of making statutory individual agreements have precedence over any other agreement in the industrial relations system is designed solely to individualise employment law back to the 19th century master and servant relationship.

63. There is no acknowledgement in any publication by the Government of the reality that individual workers are at a disadvantage when negotiating with management. This arises from a purely power based arrangement (as acknowledged by writers as diverse as Adam Smith and Sydney and Beatrice Webb), an information asymmetry (as acknowledged by almost any economic commentator), an asymmetry in resources such as access to lawyers, consultants, knowledge of the workplace and the internal management structures.

64. Instead all that is heard is rhetoric about the present labour market being a workers' market.

65. Of course the fact that the labour market is a workers' market (which may or may not be the case as there is more than one labour market in existence) means that any worker's bargaining power relies on "exiting" the workplace rather than voicing criticism. There is any number of economic analyses of workplaces with union involvement which demonstrate that they exhibit higher productivity, higher morale and greater efficiency arising from the capacity for unions to "voice" worker concerns rather than just allow workers to exit the workplace.

66. Once again the Government is choosing a low-productivity and high turnover approach to workplace relations as its default option. Of course this is an easier option for lazy employers who will now have the opportunity to individualise all employment relations and rely upon the lower wage costs to effect increased profits. This will do nothing for productivity but at least has the benefit of effecting a transfer of income in society from wages to profits.

67. The TWU remains concerned that choice of agreement in the current system is determined by one party in the system, namely the employer, and one party external to the system, namely the Commonwealth Government.

68. Dealing firstly with the Commonwealth Government. The Government when it came to office emphasised the importance of choice for the parties. However its more recent pronouncements suggest something other than choice. Regardless of whether it is in relation to the activities of Commonwealth public sector employment, in small businesses, what is to be included in agreements or what form of agreement workers can choose to have, the Government appears determined to ensure that its choice shall be what prevails.

69. The Government appears determined to ensure that its preferred model of agreements – AWAs - prevail. The most obvious example of this is relates to the current policy of overriding any collective agreement which prevents the employer from offering AWAs during the life of the certified agreement. This system currently provides to employees the certainty of knowing that their collective agreement will not be undercut nor that their

employment rights will be sacrificed on the altar of individual contracts.

70. However the Government's policy is to subvert this level of employee choice. The TWU submits that this approach to agreement making indicates that employee preferences are to be accorded a lower order of priority than Government priorities. This is particularly odd given that the Government came to power using the rhetoric of removing unwanted third party interference. It appears third party interference is only unwelcome when it is of any hue other than the Government's.

71. Furthermore the Government now seems determined to say what matters can be included in agreements and perhaps more accurately what matters can't be included. It appears to be the case that the Government will restrict or prevent agreements dealing with superannuation, AWAs, labour hire employees, right of entry entitlements, and union recognition rights. The fact that this list is capable of increasing through regulations from the Minister demonstrates what a perversion of the word "choice" is being adopted by the Government.

72. The speed at which the Government appears determined to substitute its judgement for the employer's and employees' judgement is striking. We clearly are not far away from an industrial dictatorship where the Government will impose its model of agreement upon all persons in the industrial field.

73. The approach of the Government and the rhetoric it espouses seem to place any individual above the workforce. Unfortunately this is the case even where the majority of the workforce have agreed to a collective agreement. The employer can still, in these circumstances, make it a condition of employment that any new starters sign AWAs at rates which dramatically undercut the collective agreement.

74. A further issue concerns the level of bargaining. It is, except in extremely rare cases, unlawful to negotiate on a basis beyond a single workplace. Indeed Government efforts to prevent pattern bargaining are legend. However, ought this not be an issue for the parties to determine ?

75. Pattern bargaining is of course rife. However it is rife in a Government approved program. The OEA provides template AWAs to be used in a range of industries.

Employers when offering AWAs do not permit, except in rare circumstances departures from their chosen model.

76. Choice clearly resides with the employer. However the employee is left to accept what is offered or lose employment or conditions. Other employees cannot assist new starters – to do so will breach the industrial action provisions and the fact that their terms and conditions are embodied in a collective agreement can be undercut at any time by the employer. Is it any wonder that the policy did not originally have the word "fairer" in the documents produced by the Government ?

77. Choice must be about more than Government coercion. The Government appears to espouse choice through its rhetoric but its practices frequently involve the use of taxation or subsidies to ensure that its choice is the one adopted by the community. So much is clear with the involvement of the OEA in workplace relations.

78. However when it comes to the workplace what the majority of employees want is subsumed by what the Government says they should have. Choice is a mirage of the Government's making, a Clayton's choice.

79. The Government' position is worsened by the nature of bargaining in the Federal system and the absence of any recognition rights for collective bargaining in the system.

80. The TWU has on a number of occasions represented members who sought a collective union agreement at AWA workplaces. In most such cases management indicated it had drafted the agreement that it thought worked best at the workplace and had no intention of altering this.

81. Indeed on a number of occasions the TWU has been the representative of members who were covered by a collective agreement at a workplace who had lost a contract. The workers were informed that there would be no employment at the successful contractor unless an AWA was signed.

82. The power granted to the employer to determine the nature of the agreement to apply at the workplace is contrary to the rhetoric espoused by the Government and any sort of recognition of employees as equal parties in the industrial relationship.

83. Indeed, contrary to much of the philosophical basis of groups such as the Institute of Public Affairs, the very nature of who chooses the form of agreement to apply at a workplace demonstrates the inequality of bargaining power at the workplace. The party which has the bargaining power determines what form of agreement the other party is to accept.

84. The TWU believes that the Government must immediately put in place mechanisms to ensure that choice is available to the parties in the system, and not limit choice artificially to those choices which fit its pre-conceived notions of what is acceptable.

Unfair Dismissal

85. WorkChoices seeks to remove the protection from unfair dismissal from employees who work for companies who employ less than 100 people. These rights have existed for many years at a State level, and informally have been dealt with as disputes within the Federal system. These rights will be abolished by this legislation.

86. Of course this of itself drastically understates the reduction of rights. For example the legislation encourages the restructuring of corporate entities to employing entities of less than 100 employees. The result is that while for most purposes (reporting requirements under the Corporations Act, offsetting tax losses within corporate entities) related corporations operate in a single manner, for the purpose of unfair dismissal rights a company operates solely.

87. The result is that for many employees employed in individual companies within a larger corporation will lose rights, rights which in many cases have existed for many years. Further it is difficult to see what the policy rationale is for treating such companies as individual entities. They will generally have access to group human resources, corporate employment policies and management structures. To equate this group of companies with small businesses is bordering on the ridiculous.

88. Of course there is no objective basis for the 100 employee exemption. The Government noted as much when the policy was announced. However it does create an incentive for firms not to hire additional employees as they grow. So much is acknowledged by the

statements by Professor Mark Wooden.

89. Equally the exclusion of large numbers of employees from the numerical count of employees at a company because they are not casual employees with regular and systematic employment is a direct encouragement for employers to employ such workers. Again the incentive for firms of less than 100 employees is to hire additional employees as casuals thus minimising the rights of workers at the workplace.

90. Furthermore the Government's proposal to exclude employees from arguing that they have been unfairly dismissed in circumstances derived from operational reasons, defined in the broadest manner possible, is an unjustifiable restriction on an employee's legitimate rights to have some decisions reviewed by an independent party.

91. Of course none of this was advocated before the last election. The Prime Minister uses an interesting mandate theory to suggest that because in 1996 the Government advocated the abolition of unfair dismissal rights (in the Federal system !) it can say that their abolition in companies of less than 100 employees in 2005 regardless of which jurisdiction the corporation operated in has been mandated.

92. The TWU opposes the changes to the unfair dismissal regime in its entirety.

Unfair contracts

93. One of the little known provisions in the Bill is the deletion of unfair contract jurisdictions for employees in State systems.

94. Again no attempt was made prior to the 2004 election to advocate this position. Indeed the extent of the position was the "so-called" independent contractors policy which suggested that independent contractors would not be deemed to be employees.

95. These provisions which have allowed some recourse to employees in situations where the contract did not provide fairness and reasonable terms and conditions.

96. Contrary to the position of the Chief Executives of Big Business including those Chief Executives in the Business Council, whose contractual entitlements can lead to obscene "golden handshakes", many employees are forced to accept whatever contract

is placed before them.

97. The unfair contracts jurisdiction provided employees, in some circumstances, with the scope to have a third party review the contract for matters which, while close to traditional equity grounds, extended the scope of review.

98. The removal of these rights again demonstrates the intention of the Government to do away with the rights of workers.

Industrial Action

99. While the terms of reference exclude secret ballots the TWU again indicates its opposition to such detailed prescription of the right to take industrial action. The Government policy as embodied in this Bill will make it virtually impossible for employees to take protected industrial action.

100. However even in the event that they do manage to jump through the hurdles, there is the likelihood that they will face third party actions suggesting that the bargaining period be terminated or suspended because of possible impacts elsewhere.

101. The restrictions preventing workers from upon taking protected industrial action are extensive and unfair. The truth is that this legislation will make the right to take protected industrial action a hollow right.

102. The Government should stand condemned for an action which has more in common with a third world dictatorship than a first world democracy.

Transmission of Business

103. The Government, for reasons which appear to be based solely upon perceived detriments to business by employer groups, has sought to dramatically alter the laws relating to transmission of business. However the position of the Government (and those self-same employer groups) does not appear to have been particularly well thought through.

104. The existing transmission of business rules provide that, in the event that a company or part of a company, transmitting to another company that the industrial instruments

which apply, unless the Commission makes an order to the contrary. Although there has been extensive litigation about what is meant by the term "business" and what is meant by the terms "transmit, acquire, succeed" the fundamental principles are well understood. A new employer performing the same work where there is a transfer of assets will be bound by the existing agreements and awards which apply to the former employer.

105. It is important to remember what happens to employees as a matter of employment law when a company is purchased by another company. In every situation where the assets are sold (that is it is a sale of aspects of the company rather than a sale of shares) the employee's employment is terminated. All of their existing entitlements which derive from their service cease at that point.

106. An employees accrued annual leave is paid out, existing sick leave entitlements cease, service benefits associated with policies at the workplace cease. In short an employee's employment is terminated.

107. But the fact that there has been a transfer of assets from one company to another should not lead to an employee's position being disadvantaged. It is not their choice that the company has been sold – indeed often the first they hear about it is when they receive a letter advising that their employment has been terminated and that there will be some efforts to find them alternative employment, adequate or otherwise.

108. Currently the only guarantee in the system is that an employee knows that in the event that they are hired by the new company they will be hired on the same terms and conditions. This occurs because of the transmission of business principles. However it also occurs because existing employers seek to avoid making redundancy payments to their transferring employees.

109. In practice what happens is that the new company will employ the existing employees on the same conditions and with a recognition of the service with the previous employer. This involves the existing employer providing a discount in the sale price to account for accrued service, outstanding leave entitlements and so on.

110. The changes to the transmission of business provisions provide that there is an

incentive upon the incoming employer to refuse to engage any existing employees from the existing employer. To hire such employees would lead to the transmission of agreements, which might possibly be perceived to be contrary to the incoming company's interest.

111.The result will be more companies refusing to hire the existing employees. This has detrimental ramifications for existing employees whose expectation would have been to be employed with the new business on their existing terms and conditions. After all why should they be made redundant merely because of a change of ownership.

112.However, this is even worse when one considers the AWA provisions. The explicit guarantees associated with the transmission provisions which provide for a twelve month protection are rather hollow when new employees can be made to sign AWAs measured against the FPCS and not the transmitted collective agreements.

113.The protections embodied in the transmission of business provisions, such as they are will be greatly reduced through a combination of the demise of the award system, redundancy entitlements, and AWAs. Collectively these mechanisms will render the transmission of business benefits nugatory where an employer wishes this to be so.

Model Dispute Resolution Process

114.One of the stranger aspects of the proposed Bill is the model dispute resolution process.

115.The apparent purpose of providing the model dispute resolution procedure is to provide the parties with alternative dispute resolution. Yet by any way of reckoning this is precisely what the AIRC currently does.

116.Almost all disputes in the Commission follow a process similar to that in the legislation. However what is clearly contemplated by the legislation is an attempt to stop the AIRC from being involved in any dispute. The extraordinary delay by way of the consideration period will encourage disputes rather than resolve them The introduction of alternative dispute resolution based on alternative mechanisms is an encouragement to those with

the deepest pockets rather than those with the most righteous cause.

117. Proposed section 176 places all obligations upon the employee rather than the employer by directing that the employee work in accordance with the contract of employment rather than the status quo. The point is that the dispute may be over what is legitimately within the contract of employment (for example, has the contract been varied by custom and practice, by oral statements or are implied terms broad enough to cover all issues). It is of course nonsensical to then say that the employee must continue to work in accordance with the contract of employment.

118. These statutory obligations of course place every emphasis on the employee (like every other provision in the Bill) rather than the employer. For example there is no statement that indicates that the employer continues to act in accordance with the contract of employment. By contrast the power to direct an employee to perform other available work may actually be contrary to the terms (express or implied) of the contract.

119. However even upon giving the Commission a jurisdiction to resolve disputes after the consideration period, sections 176D(4) and 176D(5) then introduce a rather strange limitation. For example 176D(4)(a) provides that the Commission cannot compel a party to do anything, but 176D(5) then indicates that the parties even where they agree to the Commission exercising powers (which of course raises a question about whether the Commission is actually compelling anything) the AIRC cannot act.

120. This raises the rather odd situation that where the parties to an agreement may jointly seek resolution to their dispute in an agreed manner, the Government for purely ideological reasons, prevents them from exercising this choice.

121. Given that the Principal Object of the Act includes paragraphs 3(d) and (e) which provide that the primary responsibility for determining matters rests with the employer and employees, and to enable the parties to choose the form of agreement that best suits their particular circumstances, it seems particularly odd that the Government should prevent the parties in the model dispute procedure from agreeing to provide the Commission with whatever powers they want it to use.