Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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SUBMISSION

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1. I am a Senior Lecturer in the Law School at the University of Melbourne, and a member of the Centre for Employment and Labour Relations Law, a specialist research and teaching group within the Law School. I have written extensively on Australian anti-discrimination law, unfair dismissal law and labour relations law. My research activities and publications can be accessed through: http://www.law.unimelb.edu.au/db/expertise/search/extranet-search.cfm

2. I make this submission in relation to two areas of the Work Choices Bill – the provisions regarding unpaid parental leave in the Australian Fair Pay and Conditions Standard, and the termination of employment provisions. I would have hoped to provide a fuller investigation and submission on the Bill, but due to the ridiculously short timeframe between the second reading of the 687 page Bill and the closing date for submissions, this was not possible.

Unpaid Parental Leave

3. Unpaid parental leave of at least 52 weeks at the time of birth or adoption of a child is one of five minima that comprise the proposed Australian Fair Pay and Conditions Standard.

4. In this submission I make three comments on this minima standard of unpaid parental leave.

5. First, this minimum standard of unpaid parental leave has its origins in a 1979 award test case, in which 12 months unpaid maternity leave for female employees with at least one year's service was established.[1] This was later extended to apply in relation to adoption,[2] and in 1990 the award entitlement was extended to male employees as parental leave, allowing fathers/spouses up to 12 months unpaid parental leave, provided that no couple takes more than 12 months leave between them.[3] In a 2001 decision these award entitlements were extended to many, but not all, casuals with more than 12 months' service.[4] It is a sad indictment of Australia's legal framework that the minimum standard of unpaid parental leave has not increased since 1979. Almost thirty years have passed since this first test case, and yet

[1] Maternity Leave Test Case (1979) 118 CAR 218. A statutory right to unpaid maternity leave has existed in the federal public sector since 1973: Maternity Leave (Commonwealth Employees) Act 1973 (Cth).
[2] Adoption Leave Test Case (1985) AILR 322.

[3] *Parental Leave Case* (1990) 36 IR 1; *Parental Leave Case (No 2)* (1990) 39 IR 344. See also *Supplementary Award Simplification Decision* (1998) 44 AILR 3-893.
[4] *Parental Leave Casual Employees Decision* (2001) 50 AILR 4-452. The casual employees to whom parental leave was extended are those who have been employed on a regular and systematic basis during a 12 month period, and who would have a reasonable expectation of ongoing employment, but for the pregnancy or adoption.

the federal government in the Work Choices Bill proposes no increase in the length of unpaid parental leave. Notably, the recent Family Provisions Test Case granted a right to employees to request an extension of unpaid parental leave to 2 years.[5] The Bill's new legislative framework of unpaid parental leave minima is running well behind community and industrial expectations, and the demands of industrial justice.

6. The second matter that I comment on is that the new legislative minima relating to parental leave at the time of birth or adoption in the Australian Fair Pay and Conditions Standard fail to pick up other rights formulated in the Family Provisions Test Case.[6] The test case gave employees a right to request a return to work on a part-time basis after parental leave, until their child reaches school age. Employers needed to have reasonable grounds in order to refuse such a request. The test case also extended the period of parental leave that parents can simultaneously take to a maximum of eight weeks. In addition, the test case imposed an obligation on employers to take reasonable steps to communicate with employees on parental leave about significant changes at the workplace. These rights, representing community standards and expectations, and the demands of industrial justice, are not included in the scheme of minima proposed by the Bill. In excluding these rights the Bill is a backward step for both sex equality in the labour market and balancing work and family responsibilities. Notably, the exclusion of these rights, already won through the Family Provisions Test Case, undermines the stated objectives of the new legislation to respect and value the diversity of the work force, to assist in giving effect to Australia's international standards, and to assist employees to balance their work and family responsibilities (clauses 3(m), (n) and (l)).

7. The third matter that I comment on is the heterosexist assumptions that underlie the parental leave minima in the Australian Fair Pay and Conditions Standard. Maternity leave is stated to be for mothers in respect of their pregnancy or who have given birth (clause 94C(1)) and paternity leave is specified as being an entitlement of a male employee in relation to the birth of a child by "his spouse" (clause 94T(1)). Spouse is defined to include a former spouse, a de facto spouse, and a former de facto spouse (clause 94A). De facto spouse is defined to explicitly exclude same sex relationships (clause 94A). The Bill contemplates a heterosexual family with a maximum of two adults involved in the day to day care of a baby. Same sex families, and families with more than two adults performing parenting functions, lie outside the Bill's legislative entitlement to parental leave.[7] The discriminatory dimension of these rules is inconsistent with the stated objectives of the new

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[5] *Parental Leave Test Case 2005* (2005) 143 IR 245. See further Jill Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18 *Australian Journal of Labour Law* 325-343.

[6] *Parental Leave Test Case 2005* (2005) 143 IR 245.

[7] A similar argument is made in relation to the existing parental leave provisions in Anna Chapman, 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship' in J Murray (ed), *Work, Family and the Law*, Federation Press (forthcoming).

legislation to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of sexual preference, to assist in giving effect to Australia's international standards, and to assist employees to balance their work and family responsibilities (clauses 3(m), (n) and (l)). It also flies in the face of the many rules in the Workplace Relations Act (as amended by the Work Choices Bill) that require non-discrimination on the ground of sexual preference (see, eg, current s 170CK(2)(f) on unlawful termination).

Termination of Employment Provisions

8. Although the amended motion for referral of the Work Choices Bill indicates that "reform of unfair dismissal arrangements" will not be examined in this inquiry, as these proposals have been examined on previous occasions by the Committee, this assertion is not plausible. Many aspects of the Work Choices Bill regarding termination of employment and specifically unfair dismissal have not been examined previously in Committee inquiries, including:

- the exemption of medium sized enterprises with up to and including 100 employees (clause 170CE(5E), (5F));
- the exclusion of employees engaged on a seasonal basis (clause 170CBA(1)(g));
- giving the AIRC power to dismiss applications without a hearing, on a range of grounds including that the situation is covered by an exemption, or that the application is frivolous or vexatious (ie, clause 170CEA(5), (6), clause 170CEB);
- the exclusion of a component for shock, distress or humiliation, or analogous hurt, from damages awards for unfair dismissal (clause 170CH(7A)).

9. I provide a brief comment on the exemption of small to medium sized businesses from the unfair dismissal regime. The stated policy basis for this exemption is that unfair dismissal laws inhibit job growth in small to medium sized employers. The Explanatory Memorandum relies on two studies in order to justify this claim. These are the Sensis Business Index (August 2005) and the MYOB Australian Small Business Survey (September 2005).[8] The Sensis study examines businesses with up to 199 employees, whilst the MYOB study examines enterprises with fewer than 20 employees. Neither accordingly is directly on point regarding the proposed exemption of enterprises with up to an including 100 employees. Perhaps more importantly, I note that the most recent rigorous academic research indicates that the employment impact of enacting a small and medium business exemption to the unfair dismissal laws is likely to be "minimal".[9]

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[8] Explanatory Memorandum, p 24.

[9] Benoit Freyens and Paul Oslington, 'Dismissal Costs and their Impact on Employment: Evidence from Australian Small and Medium Enterprises' (Aug 2005) 23,