

# Submission

to

Senate Employment, Workplace Relations and Education  
Legislation Committee

## **Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005**

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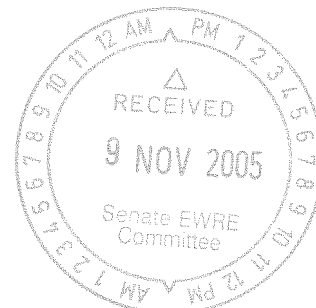
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**WORKPLACE RELATIONS AMENDMENT  
(WORKCHOICES) BILL 2005**

**INQUIRY OF SENATE EMPLOYMENT, WORKPLACE  
RELATIONS AND EDUCATION LEGISLATION  
COMMITTEE**

**SUBMISSION OF THE ASSOCIATION OF  
PROFESSIONAL ENGINEERS, SCIENTISTS AND  
MANAGERS, AUSTRALIA**



**INTRODUCTION**

1. The Association of Professional Engineers, Scientists and Managers, Australia ("APESMA") is an organisation registered under the Workplace Relations Act 1996 (the Act) representing over 25,000 professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers and transport professionals throughout Australia. We are the only industrial association representing exclusively the industrial and professional interests of these groups.
2. APESMA's members operate under a diverse set of work arrangements. Around 10 per cent of the current membership operate as self-employed contractors, and almost 2 per cent are currently engaged on international assignments. The Association's membership is dispersed across the public and private sectors and across a broad range of industries including the metal, transport, oil and gas, power, vehicle, local government, defence, airline operations, aerospace, water, telecommunications and government administration industries.
3. APESMA seeks to represent both the industrial and professional interests of its members. The services offered by APESMA to its members are a reflection of the unique needs of professional and managerial employees as compared with other industries and sectors..
4. Professional and managerial employees work under the industrial regulation systems of both the private and public sectors.. Employees in the public sector are usually covered by Section 170 LJ Agreements underpinned by the relevant award. In addition some agencies make use of Australian Workplace Agreements.
5. Typically, professional and managerial employees employed in the private sector have access to the award safety net and work under individual employment contracts.

In the private sector there are relatively fewer collective agreements that have application to professional and managerial employees.

6. In addition to the traditional role of industrial advocacy and negotiation on behalf of individuals and groups, APESMA also assists members through the provision of individual contract advice and is a leader in the conduct of remuneration surveys which support members in their individual salary negotiations with their employers.
7. In representing the professional interests of its members APESMA also seeks to influence public policy on such matters as measures to redress the current skills shortages, while at the same time in a practical way is committed to assisting professionals develop skills in short supply as a leading provider of management education through its MBA and short courses programmes.
8. In its representation of professional and managerial employees APESMA has traditionally adopted a cooperative and non-adversarial approach. This approach is in keeping with the needs and aspirations of professional and managerial employees and their desire to achieve industrial justice in a non-confrontational manner whilst maintaining harmonious relationships in the workplace.
9. Due to our extensive experience with professionals providing industrial services to members employed under individual as well as collective arrangements, across a diverse range of industries across the public and private sectors, APESMA is well placed to anticipate and comment on some of the possible ramifications of the proposed legislation.

#### **SCOPE AND DURATION OF INQUIRY**

10. APESMA expresses its serious concern with both the scope of the Inquiry and its brief duration. This situation is particularly unfortunate when what is being proposed represents the most fundamental changes to Australia's industrial relations system in over one hundred years. The legislation requires careful analysis and such changes should not be contemplated in the absence of a thorough Public Inquiry.
11. The restriction on discussing a number of highly relevant matters on the basis that these have been the subjects of previous Inquiries is also unacceptable as any legislation needs to be viewed and assessed in its totality. Further, whilst it is correct that some of the excluded matters have been the subject of previous Inquiries there is now a new context which by its very nature changes the character and impact of the

prohibited matters. Accordingly, APESMA submits that it is essential to consider the package of measures that is contained in the proposed legislation as a whole.

12. In addition the proposed changes in the operation of the unfair dismissal system whereby the capacity to make claims in respect of unfair dismissal will be limited to those employees working for enterprises that employ 100 or more persons is a radical departure from earlier proposals. Accordingly APESMA submits that this is a “new matter”. The definition of what constitutes a “small business”, and the case for an exemption from unfair dismissal provisions are matters that most definitely should be included in this Inquiry.
13. This Submission will therefore address the issues of the role of the AIRC, work/life balance, skills shortages for professionals, career paths, agreement making, AWA’s and the Award safety net, the AFPC, annual leave, protected award conditions, prohibited content in agreements and unfair dismissal.

#### **OVERALL IMPACT OF THE PROPOSED LEGISLATION**

14. It is mainly because of contract law’s historical failure to deliver fair outcomes to employees and protect them from the consequences of a power imbalance in the employment relationship, that a remedial system of industrial law based around organised labour developed in industrialised countries. For the reasons that will be advanced in this submission APESMA believes that the proposed legislation will result in the diminution of fair and accessible mechanisms for employees and the removal of fundamental rights for professional and managerial employees, both individually and collectively, in Australian workplaces. This will be seriously detrimental to the social fabric of Australian society as a whole.
15. The stated principle rationale for the package of legislation, that less labour market regulation – particularly for protection from Unfair Dismissal - results in more jobs, does not stand up to international scrutiny.
16. APESMA believes that the WorkChoices legislation provides choice for employers only, is inimical to the Australian ethos of a “fair go” and will result in hardship and the imposition of industrial injustice on professional and managerial employees including those who are currently employed as well as new entrants into the labour market.
17. In addition the proposed legislation will make it even more difficult than it already is for professional and managerial to achieve a healthy work/life balance.

## **ROLE OF INDUSTRIAL RELATIONS COMMISSION**

18. The capacity to refer matters to the Australian Industrial Relations Commission has provided an indispensable mechanism for resolving disputes in a conciliatory manner. APESMA is therefore very concerned at the diminution of the role of the Australian Industrial Relations Commission. As has been recognised by many eminent legal, socio-economic and political observers from a range of political orientations, the Australian system of conciliation and arbitration has provided a mechanism for the resolution of industrial disputes that has been unique throughout the world. The existence of this mechanism has meant that Australia has been relatively free from many destructive industrial disputes that have occurred in other countries. Where disputes have been serious, the Commission through the use of its powers has often been able to play a role in minimising their impact.
  
19. As a union representing members who have always desired and practiced a conciliatory approach to the resolution of workplace issues APESMA was concerned about the limitations that were placed on the role of the Commission as a result of the Workplace Relations Act 1996. The restrictions on provisions that could be contained in awards in accordance with Section 89 of the Act has already served to undermine the award safety net, particularly amongst occupational groups that have little bargaining power. Many professional and managerial employees fall into this category. In addition the capacity to enter into collective agreements has been affected by a failure through legislative impediments faced by the Commission being able to require the parties to bargain in "good faith".
  
20. Notwithstanding the limitations that have existed, the Australian Industrial Relations Commission has on balance provided an effective mechanism by which APESMA has been able to protect its members and advocate on their behalf. The capacity to do this has been instrumental in the resolution of industrial disputes leading to the promotion of workplace harmony.

## **LABOUR MARKET REGULATION AND JOBS**

21. The most reliable measure of the success of national labour markets is the proportion of the working age population who have a job.
  
22. The OECD provides these figures – and it also has an index of the strictness of employment protection legislation for each member country.

23. Prior to the proposed legislation, Australia is already in the bottom half of the job protection range (1.5 in an index that ranges from 0.7 USA ] to 3.1 [Spain].Australia is only slightly above average on the employment scale.
24. Five OECD countries with higher levels of employment than Australia (Switzerland, Netherlands, Norway, Sweden and Denmark) also have significantly higher levels of job market regulation.
25. Of the six OECD countries with the highest levels of employment, only one (USA) has less employment protection than that which currently applies in Australia.

### **CAREER PATHS FOR PROFESSIONAL EMPLOYEES**

26. The existence of skill based classification structures in awards is of particular importance to professional and managerial employees. Their proposed removal from future awards of the Australian Industrial Relations Commission and their uncertain future as a consequence of the Award Review Taskforce will add to the insecurity experienced by professional and managerial employees. As an example, broadbanding or the reduction of skills based career paths in the case of Professional Engineers may lead to “de-engineering”. De-engineering occurs when positions which should be occupied by Professional Engineers are filled by management staff with no engineering background resulting in the neglect of the technological and technical aspects of the position. This process is likely to occur alongside employers filling engineering roles with technical or other inappropriately qualified staff in response to the lack of available skilled professional engineers.
27. Skill based classification structures covering professional employees establish a very important safety net of minimum salaries. In fact the first union for technology based professionals, the Association of Professional Engineers, Australia (APEA), was formed primarily because it was understood that the status of a Professional Engineer was linked to the level of remuneration. Throughout its history APESMA has been successful in achieving skill based classification structures with minimum rates for a diverse range of technology based professionals employed in both the public and private sectors of employment. Further, in some instances these rates operate not just as a minimum but for some professions they approximate the rates that are actually paid. Examples of professions in this category include Architects and Professional Surveyors who are professional employment categories largely employed by small business. APESMA is concerned that if rates for these occupations disappear and there is no comprehensive classification structure then

there will be difficulty attracting persons into these professions with the result that professional standards will suffer.

28. Award skill based classifications structures promote the recognition of professional work particularly in new and emerging professions. An example of this was in the creation of the Information Technology Industry (Professional Engineers) Award 1999 and the Information Technology Industry (Professional Employees) Award 2001. These awards were the first industrial instruments applicable to IT Professionals working in private sector employment. Although these awards were eventually made by consent there was initially strong opposition by employers to the APESMA claim. Part of the opposition on the part of some employers was to question the “professional nature” of IT work. After extensive evidence from academic and other specialists the Commission rejected these arguments.
29. The removal of skill based classification structures from their awards coupled with their uncertain future under the Award Taskforce Review have the potential to “de-professionalise” particular occupations. Under existing current classification structures professional career paths are well established. For example in most APESMA private sector awards there is a 4 level structure and the definitions of what constitute professional duties are linked to entry requirements/qualifications standards that have been established over time by professional learned societies. These award-based classifications are complemented by individual employer arrangements.
30. The absence of skills based classification structures would in many instances result in a wide range of inconsistent single employer based definitions of professional work. There would likely be differing entry requirements with the result that the very term “professional employee” could become ambiguous. In short professional standards themselves, apart from the limited number protected by statutory requirements, could be eroded.

#### **AUSTRALIAN WORKPLACE AGREEMENTS AND THE AWARD SAFETY NET**

31. Individual employment contracts have been a common feature of the employment of professional and managerial employees in the private sector. Accordingly, APESMA provides an extensive advisory service for its members who are employed under these arrangements. This includes legal advice, the provision of market rate salary information, job evaluation assistance, model clauses etc.
32. Most of the individual contracts that are offered by employers contain uniform provisions that are standard in the particular workplace. Occasionally, if a particular

- individual has skills that are difficult to obtain elsewhere then there may be some capacity to negotiate. However, most professionals in what is a very unequal power relationship simply acquiesce if the employer refuses to negotiate.
33. However, in most instances the terms and conditions of an employee's individual contract of employment is underpinned by an award, which operates as a safety net. Therefore professional employees will often opt to avoid any conflict with their employer that could undermine their working relationship by agreeing to a particular employment contract secure in the knowledge that in the event of a conflict with the provisions of an award and/or certified agreement that the latter industrial instruments will prevail.
  34. Similarly, the relatively small number of professional employees presently subject to Australian Workplace Agreements (AWA's) are protected, albeit to a lesser extent, by the No Disadvantage Test.
  35. However under the proposed legislation this safety net will be removed. The capacity for AWA's to exclude both awards and certified agreements and to be introduced at anytime will inject a new level of insecurity into the workplace.
  36. Further, the assertion that aggrieved employees, in a time of relative low unemployment, can easily find other work is largely a myth. While this may be the case for a limited number of workers with skills in high demand, there is no evidence to suggest a nexus between job mobility and maintained conditions and pay for workers generally. Most employees wish to have a genuine right to negotiate without the pressure of accepting unsatisfactory terms and conditions of employment in order to preserve a harmonious working relationship with their employer.

#### **AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD**

37. The proposed introduction of the Australian Fair Pay and Conditions Standard (AFPCS) consisting of 4 legislated minimum employment conditions will result in a reduction to the safety net that currently applies. This is because the proposed existing award "protected provisions" will be able to be overridden by agreement. As indicated elsewhere in this submission the concept of "agreement" under the proposed legislation will be in reality largely fictional because of the differential bargaining power of the employee and employer.
38. Therefore, considered overall, the 4 legislated minimum standards will deliver inferior protection than what is currently the case.



## WORK/LIFE BALANCE

39. APESMA is very concerned regarding the effect that the proposed industrial relations changes will have on the ability of professional and managerial to have control over their hours of work and the resultant adverse effect on family life.
40. Currently in most professional awards there are flexible hours of work provisions that define the ordinary hours of work as those applicable in the industry, usually 38, and provide for remuneration for working excess hours. The level and method of remuneration is also flexible. This provision has already provided much flexibility, often to the detriment of employees struggling with work/life balance issues.
41. The proposed requirement that an employee can be required to average their 38 hours per week over a 12 month period coupled with the requirement that reasonable overtime can be worked with no stipulation of compensation may result in both long term and short term excessive hours of work. This is likely to exacerbate the "long hours culture" which is a feature of the working life of professional and managerial employees.
42. The working of excessive hours of work is an issue of major importance amongst professional and managerial employees. According to the *APESMA Member Satisfaction Survey Report 2004* the issue of work/life balance was rated as "very important" by 51.4 per cent of all respondents. Further, the *2004 APESMA Women in the Professions Survey Report* found that 17.5 per cent of full-time respondents indicated that they were working more hours than compared with a year earlier. However, the women surveyed want to work fewer hours and are more likely to work part-time where such work is available.
43. The *2004 APESMA Women in the Professions Survey* also found that 60 per cent of the female respondents thought that the most important issue facing women was access to flexible work arrangements, followed closely by career development and training, at 57.6 per cent. 45 per cent expressed a preference to be working hours. 36.8 per cent perceived workplace culture as the major obstacle to their career.
44. According to the same survey, only 12.3 per cent of women members surveyed worked part-time, despite their desire for accommodating work arrangements.
45. KPMG data indicates that some 74,000 professionals have departed Australia permanently in the last three decades.

46. Significantly at a time of an emerging acute shortage of skilled professionals in Australia, our survey data shows that 35% are planning a career change in the next three years - many are contemplating moving to positions offshore; greater work-life balance available in more regulated labour markets is often cited as being a key attraction.
47. Two recent test case decisions of the Australian Industrial Relations Commission have gone some way towards making Australian workplaces more responsive to Work/Life issues.

### **WORKING HOURS CASE**

48. The first of these was the *Working Hours Case* decision of July 2002. This decision established a right to refuse to work unreasonable overtime based on certain defined criteria and served to clarify the long held industrial principle that an employee could be required to work a reasonable amount of overtime. The decision came after a case conducted by the ACTU, on behalf of affiliated unions, including APESMA that involved extensive evidence and submissions
49. The positive benefits of this decision will now be lost when employees are forced to rely on the AFPCS, which does not include this provision.

### **FAMILY PROVISIONS DECISION**

50. The second decision of significance is the August 2005 *Family Provisions Decision*. This decision will allow an employee to request a further period of unpaid parental leave and/or return to work on a part-time basis until the child reaches school age. The capacity to make such requests would be of considerable benefit to professional and managerial employees as many employees, particularly women, would be able to balance their family responsibilities and working life. It is a matter of profound disappointment that this landmark condition of employment may have little application due to its failure to be included into the AFPCS. This is likely to have major ramifications in terms of attracting and retaining quality female staff into the workforce in what is going to be increasingly a time of critical skills shortage.

### **ANNUAL LEAVE**

51. The capacity to cash out 2 weeks leave every 12 months, has in APESMA's view the potential for adverse effects on work/life balance and also for occupational health and safety. In sectors of the economy where technology based professionals are in short

supply there is likely to be pressure placed on employees, already working long hours, to forego a portion of their annual leave. This provision is likely to impact significantly again on families who struggle to juggle existing leave entitlements to provide for supervision of school-aged children in school holidays.

### **PROTECTED AWARD CONDITIONS**

52. APESMA considers that the notion of Protected Award Conditions as contained in the legislation is largely illusory. Whilst existing employees will have a greater capacity to retain existing conditions of employment, new employees will have virtually no bargaining power and therefore will be unable to access many award rights that currently exist. These award provisions are likely to be undermined to the extent that over time they will, in practice, largely disappear in many industries and workplaces.
53. Amongst the existing provisions contained in APESMA awards that are at risk include public holidays, rest breaks, allowances, and shift and overtime loadings.

### **UNFAIR DISMISSAL**

54. APESMA considers that the restrictions on access to the unfair dismissal jurisdiction for employees working for business that employ up to and including 100 employees to be an outrageous attack on the rights of the individuals in the workplace. To establish a "right to dismiss" in this manner and to remove the legal obligation to behave justly and fairly is to encourage a culture of chronic insecurity and lack of accountability. Further, there has been little or no evidence that has been adduced to show the economic benefits of such a proposal.

### **AGREEMENT MAKING**

55. APESMA believes that the proposed changes are designed to maximise the rights of employers at the expense of employees, are therefore lacking in balance and fundamental industrial justice.
56. Employees should have the right to bargain collectively with their employer and be represented by their unions. Further, APESMA believes that Australian Workplace Agreements should not be able to override and exclude collective agreements. In fact APESMA submits that collective agreements should be capable of including provisions that regulate the operation of AWA's at a particular workplace.

57. APESMA also anticipates that in certain industries employers will seek through the offering of AWA's to further exclude many professional and managerial employees from accessing the benefits of collective agreements enjoyed by their blue and white collar colleagues in the workplace.
58. An unwarranted restriction on the content of certified agreements is the designation of certain issues as "prohibited matters". APESMA believes that the content of certified agreements should be a matter of agreement between the parties. To declare unlawful the inclusion of such matters, as unfair dismissal remedies is a denial of the "freedom of choice" that the legislation purports to uphold. Further, to include severe financial penalties for even making claims in respect of prohibited matters is a fundamental denial of civil and political rights.
59. The proposed changes in the procedures to be followed in making, lodging, varying and terminating an agreement will reduce the level of scrutiny and accountability that currently exists. For instance, the capacity to waive a 7-day waiting period during which the agreement is considered will potentially lead to abuse, particularly in small workplaces. Again, as is the case in respect of most elements of the proposed legislation, employees will have little choice if an employer wishes to hasten the process of ratification.
60. The proposal that for the termination of a collective agreement all that is required is the giving of notice in writing to the Office of the Employment Advocate is more likely to impact adversely on employees rather than employers. This is due to the fact that professional and managerial employees are less prepared than other groups to take industrial action and are therefore more vulnerable to employers who do not wish to negotiate.

## **CONCLUSION**

61. The proposed legislation is underpinned by a premise that in APESMA's view is based on a fiction - that is that there is an equality of the bargaining relationship between the employer and employee. APESMA rejects this proposition and believes that the enactment of this legislation will result in the removal of rights for the overwhelming majority of professional and managerial employees.
62. The proposed legislation will facilitate the growth of employment types which undermine existing conditions and lead to generally poorer working conditions. The objective of the legislation is purportedly to provide flexibility to employers but this will be at the expense of employees and the Australian community generally. It is

APESMA's view that the legislation will operate as an impediment to further developing and modernising Australian industry and the Australian workforce, and will produce complex and far-reaching problems for workers, families and communities as well as for the employing enterprises themselves.

#### **RECOMMENDATION**

63. **APESMA believes the proposed industrial relations changes will have a major impact on the social fabric of Australia, and that the changes require careful analysis. The Association recommends a comprehensive Public Inquiry process in an effort to deal with the potential ramifications of the proposed legislation with appropriate time to consider fully the implications for workers including professionals and their families.**

#### **SUBMISSION PREPARATION**

64. This submission was prepared for APESMA by National Senior Industrial Officer Michael Butler, Executive Director Industrial Relations Geoff Fary, National Information Officer Kim Rickard. and National Research Officer Jackie Wise.

#### **FURTHER CONTACT**

65. If the Committee seeks clarification of any of the points raised in this Submission or evidence of the facts and issues presented, contact should be made with APESMA's Executive Director Industrial Relations Geoff Fary. Mr. Fary is available by telephone on 03 9695 8800, by fax on 03 9696 9320, by email at [gfary@apesma.asn.au](mailto:gfary@apesma.asn.au) or by mail at APESMA, GPO Box 1272, Melbourne, Vic. 3001.
66. The Association would welcome an opportunity to appear before the Committee.

**GEOFF FARY  
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**DATE: 9 NOVEMBER 2005**