Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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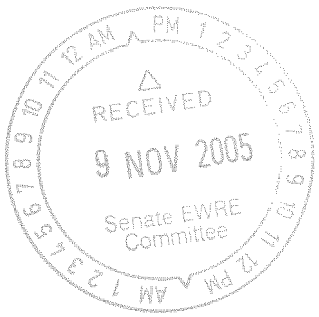

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

QUEENSLAND COUNCIL OF UNIONS SUBMISSION TO THE INQUIRY INTO THE PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (WORKCHOICES) BILL 2005

9 NOVEMEBER 2005

INTRODUCTION

1. Workers and employers in Queensland are principally subject to the Industrial Relations Act 1999 (Queensland). This legislation in its current guise was prepared subject to tripartite endorsement through a review Taskforce chaired by Professor Margaret Gardner, and involving senior representatives from Commerce Queensland (ACCI's state counterpart) and the AIGroup. Professor Ron McCallum was also a member of the Taskforce. Its deliberations were far reaching and in the context of a tripartite activity, broadly inclusive of agreement for the changes that are now a feature of the Queensland system.

2. Indeed that broad agreement reflects the constituency of those organisations, who have maintained an alliance with a state industrial relations system; and recognition that a substantial proportion of Queensland employees are engaged by non-ioncoproated entities. Preliminary data points to around 27.3% of Queensland employees engaged by non-incorporated private businesses; plus 12.8% engaged by the state government and 2.3% engaged by local governments. Excluded from the data are 3.3% engaged by statutory authorities and 2.3% engaged by the federal government. This results in 42.4% of Queensland employees engaged by non-incorporated entities.

3. Within the 27.3% of non-incorporated private businesses, almost 50% of those businesses engage less than 20 employees, with almost 83% engaging less than 100 employees. When this data was collected Queensland working population stood at 1 874 800 which would have resulted in 794 915 employees remaining within the state system. Recent statistics point to the employed workforce breaking the 2 million mark. Thus the current estimate is that 848 000 employees are reliant upon the state industrial relations system.

4. The greatest proportion of employees engaged by unincorporated private businesses is in the property and business services sector (43.5%); with the retail trade sector; health and community services sector; cultural and recreational services sector, and personal and other services sector all around 35%. Accommodation, café and restaurants (26.8%) and construction (30%) sectors also have substantial proportions of employees engaged by non-incorporated private businesses.

5. The type of industrial instrument regulating the employment conditions of employees engaged by unincorporated private businesses is primarily an award, at 41.2%. As such, a system that is designed to devolve industrial responsibility from the award structure to an agreement focus is not one supported by Queensland businesses. Those businesses have had access to an enterprise bargaining focus since the early 1990s, along with the capacity to adopt Queensland Workplace Agreements (QWA), and those businesses have chosen not to do so.

6. For those businesses that are incorporated but operate within the state jurisdiction, either by relying upon the award structure, or negotiating a certified agreement, have also had an opportunity to opt into the federal system. In the main those employers have not chosen to do so. They have had exposure to a streamlined, efficient and effective state system which has enabled them to settle industrial disputes, and to have matters dealt with expeditiously within a principally non-legalistic environment. This gives certainty to businesses that see simplicity as a prerequisite to effective business acumen.

7. They have taken the award system as their preferred system. It gives them certainty and structure. It enables them to operate efficiently and effectively with their employees. A proposition that is designed by stealth to cut away that award system is to say to Queensland businesses, we do not trust your judgment or your preference, and we will create any mechanism possible to deny you your choice.

8. As Wooden[1] claims *the proportion of businesses affected by multiple systems of regulation is almost certainly quite small, and restricted mainly to the well-resourced large multi-state businesses.* Wooden then refers to work by Briggs and Buchanan[2] where the complexity of the federal system compared to the state systems is highlighted and asserts *a single unified system could thus actually create more problems for employers, especially small employers than it solves.*

9. Wooden[3] identifies that around 20% of Australian employees are now reliant on award rates of pay. This is almost a 50% reduction in a period of 15 years with the estimated figures in 1990 being 68% award reliance. However the figures also identify that around 38% of employees have their rates determined by collective agreements with the figure being 24% for the private sector only. (Registered collective agreements within the public sector are at 91.8% of all employees.)

10. With these figures there may be a presumption that the rest of the Australian workforce have their terms and conditions of employed regulated by workplace agreements (AWAs and the like). However this figure is only around 2.4%. As such the remaining 39% of Australian employees are "apparently" covered by individual contracts. Whether this figure is realistically that high is questionable. A component of the statistical data available on Australian employees factors in owner/managers who should not be categorised as employees.

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[1] Wooden, M (2005) ibid
[2] Briggs, C and Buchanan, J (2005) Work, Commerce and the Law: a New Australian Model? *Australian Economic Review 38*
[3] Wooden, M (2005) op cit

11. Of important note in relation to the award reliance for rates of pay, are the types of businesses, and therefore employees, which rely upon an award and not agreement settlement, whether collective or individual. Wooden refers to ABS data which shows less than 10% of small business (employing less than 20 employees) in 2004 were covered by collective agreements. ... *conditions of small business employees tend to be much more closely tied to awards.*

12. The evidence of confusion for those businesses is strewn across the WorkChoices Bill and perhaps no more evident than in the transitional arrangements

TRANSITIONAL ARRANGEMENTS

13. The transitional arrangements set out in the WorkChoices Bill provide that the greatest impact of the bill be on constitutional corporations operating under the state system by way of state awards or state agreements, non-constitutional corporations that have federal awards or federal agreements, and unincorporated entities that have federal awards or federal agreements. And this in itself creates a mire of confusion for Queensland business.

14. Employers who are constitutional corporations entering from the state system will have a three year transitional period. Their current state agreements and awards will become transitional agreements. The terms and conditions of their current state awards will not change unless the conditions in the AFPCS are better. If the AFPCS is more generous those provisions apply.

15. An existing state agreement is preserved state agreement. Although the preserved state agreement can continue until it is terminated (Schedule 15 s.21), the agreement also ceases to operate if a workplace agreement or workplace determination comes into operation (Schedule 15 s.5). Once this occurs than the agreement can never operate in relation to the employee again. The award underpinning the agreement would also not operate, as s.7 provides that an award has no effect in relation to an employee while the term of the preserved state agreement operates in relation to that employee. The reversion would be then to the AFPCS as the underpinning minima (Schedule 15 s.8).

16. Any preserved state agreement that contains prohibited content is void to the extent of that content (schedule 15 s.15). The Employment Advocate (EA) can remove the prohibited content.

17. Workplaces currently covered by state awards would be subject to a "notional" agreement. A notional agreement would comprise not only the terms and conditions of the workplaces' existing awards, but would apply to some state statutory conditions.

18. Which statutory laws would apply is difficult to establish, and would themselves be subject to the "prohibited content" rules. While there are three-year transitional arrangements for state awards and agreements, if the awards review taskforce in the interim recommended a new federal award replace a state award, and that recommendation was adopted, then the federal award would apply.

19. Employers in the federal system that are not constitutional corporations will have a transitional period of five years. This means that current agreements and awards for these employers and their employees will continue for up to the five year period. Employers currently in the federal system that are not constitutional corporations will not be able to amend the current agreements. After a five year transitional period non-constitutional corporations will cease to be covered by the federal legislation. They will then revert to the state system.

20. The transitional system involves the ongoing limited operation of conciliation and arbitration powers in relation to employers who are not constitutional corporations. The AIRC will have the ability to set aside or revoke transitional awards and make orders to enable parties to opt out of the transitional system in limited circumstances. These limited circumstances are if the AIRC is satisfied that the parties have genuinely not been able to conclude a state agreement or if there is a genuine industrial dispute between the parties which the AIRC is not able to resolve utilising the powers it will have in the transitional system.

21. Section 57 of Schedule 13 provides that if a transitional employer bound by a transitional award makes a state employment agreement with the transitional employee then the employer ceases to be bound by the award and cannot be bound by that award again.

22. The employer can also cease to be bound by the transitional award if they have made "genuine" efforts to make a state employment agreement (with the transitional employees) but have been unable to do so. The commission must make the order if "satisfied" that genuine efforts have been made (see Schedule 13 s.58).

23. A similar provision exists if an industrial dispute has been unable to be resolved (see Schedule 13 s.59).

24. It is possible that those currently covered by a state agreement may find that upon the new system commencing their 'transitional agreement' can be terminated at the end of the nominated period with the result that they become essentially award free, losing all the conditions that have governed their employment, except those contained in the standard.

25. If a state law or state award is inconsistent with, or deals with a matter dealt with in, a transitional award then the transitional award prevails (see s.60).

26. For the 42.4% of Queensland employees who are engaged by non-constitutional entities, the state system will remain. But the intent of the legislation is clear. Those businesses should be "encouraged" to exit the state system for the federal jurisdiction. And for those businesses that operate as constitutional corporations but have chosen the state system for their award or agreement coverage, they must be compelled to adopt the federal system, and the complexities that go with it.

TRANSMISSION OF BUSINESS

27. Under the proposed changes, transmitted federal awards and agreements (along with preserved state agreements and notional agreements) will only apply to the employees of the new business who worked for the former employer and they will only apply for a maximum 12 month period. After that time, the employer can make either a new agreement or do nothing, in which case the AFPCS will apply. The new employer and the transferred employees will be able to negotiate a new agreement at any time within the 12 month period and this will oust the operation of the transferred award or agreements. If no employees transfer to the new business, the new business will not be bound by any awards or agreement that bound the old business. Instead, it can make its own new agreement or if it does not, the AFPCS will apply to any employees who are hired.

28. The nature of the transferring employee's employment with the new employer would require the transferring instrument to be capable of applying to that employment (s.123B).

29. If a collective agreement applies then the employer remains bound by that agreement until the agreement is terminated or there ceases to be any transferring employees in relation to the collective agreement (s.125). If there is an existing and transmitted collective agreement then the transmitted collective agreement applies (s.125A). However, the transmitted collective agreement ceases to operate (prior to expiry) if it has been replaced by another collective agreement (s.125B).

30. There is also a requirement that the new employer agrees in writing before the transmission to assume liability for the entitlements accrued or to transfer the service accrued: see s.128A. Although the "old" employer will remain liable for the accrued entitlements, if the employee has insufficient leave entitlement to access then there is no liability. Potentially an employer may never access an entitlement if the business was transmitted on an ongoing basis and no agreement to transfer the entitlements was reached.

31. A corporate employer could also exploit the new transmission of business provisions by simply moving all its employees from one legal entity to another (a different company), which will then mean that any new employees taken on can be engaged on the minimum legislative conditions; or alternatively an employer establishing a new business could make an agreement with itself, an employer greenfield agreement, that will regulate working conditions to the exclusion of any award.

32. In Queensland if a business is bound by an award or agreement and the business, or part of the business, is sold or restructured the new employer is still bound by the award or agreement binding the previous employer. This ensures that employees retain their terms and conditions of employment upon a restructure and that employers cannot avoid their awards and agreements simply by restructuring.

AUSTRALIAN FAIR PAY CONDITIONS STANDARDS (AFPCS)

33. The continuation of the undermining of the award system is evident in the operation of the Australian Fair Pay and Conditions Standards (AFPCS). This standard provides for:

    a. basic rates of pay and casual loadings (Division 2)
    b. maximum ordinary hours of work (Division 3)
    c. annual leave (Division 4)
    d. personal leave (includes sick leave and carer's leave) (Division 5)
    e. parental leave (Division 6).

34. The AFPCS prevails over a workplace agreement or contract of employment that operates in relation to an employee to the extent that the AFPCS provides a more favourable outcome for the employee (s.89A).

35. The provision is designed to provide a guarantee minimum entitlement to wages and conditions for award-free and agreement-free employees; and to underpin workplace bargaining. The AFPCS will be the standard relied upon after a workplace agreement expires or is terminated. There will be no reversion to an award structure.

36. The complexity is heightened by the fact that some conditions in existing federal awards will prevail over the new AFPCS for ongoing award workers. These are referred to as "preserved award terms". However, these conditions are limited to (see s.117)

    a. annual leave,
    b. personal/carers' leave,
    c. parental leave,
    d. long service leave,
    e. notice of termination,
    f. jury service
    g. superannuation (until 30 June 2008).

37. Award conditions that are more generous than the AFPCS will be preserved for existing employees on the award. When award provisions are less generous than the new AFPCS, the new AFPCS (and its five conditions) will apply. Matters covered by the AFPCS will not be included in new awards.

38. These "preserved" conditions will not form part of the AFPCS for the making of new agreements, meaning the agreement could therefore undercut them.

39. These "preserved conditions" will continue to apply only for those existing employees after award rationalisation, but will have not impact on new employees (see s.117A).

40. Whether preserved award entitlements currently contained in state awards are to be treated in the same way as federal awards is yet to be determined by the new Award Review Taskforce.

41. Newly "preserved" award conditions could still be traded away in agreements, awards would also be eroded because an employer need only make a collective agreement or AWAs under the new system and terminate it or those by notice after the nominal expiry date, and the employees concerned will not revert to award conditions, but rather the five minimum AFPCS.

42. State awards and agreements will continue to exist, although they will only have legal force with respect to non-corporate employers. State common rule awards will continue to be updated, but changes made to them after the commencement of the new federal system will apply only to those employed by non-corporate employers.

43. Within the context of a state common rule award, where employers could be both incorporated and non-incorporated, and wherein the make-up of Queensland businesses is principally one engaging fewer than 20 employees (insert stats) the administration and application of the award will be fraught with confusion.

44. If no other agreement is entered into, then after three years those currently covered by a State award are to move to the appropriate federal award for their industry. It appears that transitional agreements made from state awards will contain matters that are 'non-allowable' and some will contain 'paid rates' (ie actual rates rather than minimum rates) or at least rates in excess of the 'minimum' rates found in simplified federal awards (this will usually be the case in respect of enterprise-specific consent state awards). Given that all federal awards are minimum awards and cannot contain non-allowable matters, it will be difficult, if not impossible, for there not to be a diminution in benefits at the three year mark when those currently covered by a state award move to the 'appropriate federal award'.

45. It is not clear what is proposed to occur where, after three years the rates of pay in a 'transitional agreement' are (still) higher than the rates contained in the relevant federal award. There are two possibilities. The employees might just have their award entitlement cut. Alternatively, in order to achieve the commitment that 'benefits will not be cut', the ex-state award rates could be 'grandfathered'. If they were 'grandfathered' this might mean a further period, perhaps of some years, before such employees become entitled to a wage increase. This would mean that there could be employees who would not be entitled to a wage increase for more than 3 years after the introduction of the new system.

AUSTRALIAN FAIR PAY COMMISSION (AFPC)

46. Employers and employees in the Queensland jurisdiction have relied upon the wage setting powers of the Queensland Industrial relations commission QIRC). The QIRC increases wages and allowances every 12 months, and for almost the past decade have with the agreement of the employers done so using a "general ruling" power. This enables all state awards in Queensland to be adjusted at the same time (1 September). Rather than creating rigidity this process ahs been endorsed by all involved as an effective mechanism to ensure certainty. This process will need to retained for the 848 000 employees engaged by non-constitutional corporations.

47. With the low level of take-up for AWAs, but the preference by the federal government for industrial regulation to be via that instrument, how can the government redress the level of disinterest in these arrangements. The answer lies in the changes proposed to the minimum conditions underpinning AWAs, and the atrophying of the industrial relations' tribunals and the award system.

48. Strident criticism has been levelled against the AIRC over recent years in regard to wage case outcomes, and the addressing of contentions interpretative issues surrounding the operation of the federal *Workplace Relations Act.* When considering the targeting of the industrial relations institutions by the federal government, and the attempt to suffocate those institutions, individual agreement outcomes in preference to award regulation becomes even clearer.

49. The President of the AIRC, Justice Geoffrey Guidice in a recent presentation to the Industrial Relations Society of the Northern Territory[4] indicated that *there had been criticism is some quarters that the commission has not taken employment effects sufficiently into account. Even a casual reading of the Commission's decision will reveal that the criticism to be false. I urge anyone who is in doubt to read the decision.*

50. The growth in average weekly earnings has outstripped growth in the minimum wage by a significant margin; and there is a continuing divergence between the minimum wage and award wages generally and average weekly earnings.

[4] Guidice, G (2005) Minimum Wage Fixation Paper Presented to the Industrial relations Society of the Northern Territory

51. Justice Guidice[5] undertook a comparative wage exercise and in doing so confirms the following: between 1983 and 2004 the tradesperson rate dropped from 78% of average weekly earnings to 59%. The minimum wage dropped from 61% to 49%. Guidice contends that this shows the extent to which market rates have diverged from award rates since 1996; and indeed without identifying it, the disadvantage award workers have over workers regulated by collective union agreements.

52. It is starker when you consider that the average weekly earnings have increased by 47.7% since 1996, a real increase of 20%. In the same period the minimum wage has increased by 38% in nominal terms and 13% in relative terms.

53. Brosnan[6] confirms those figures. In incorporating the outcome of the recent national wage case decision this percentage increases to about 48%, but is still less than half of the mean.

54. With that type of contractions between nominal and real term increases, it may seem bizarre that the tribunal would be criticised by the federal government. As Guidice[7] states: *Proposals to alter the method of fixing minimum standards are within the prerogative of the legislature, subject to the Constitution. The removal of the power to fix minimum wages from an institution with a 100 year track record will be applauded by some and derided by others. ... There is no doubt however that these fundamental changes will raise important questions about the nature of any body which is given the power to fix minimum wages.*

CONCLUDING COMMENTS

55. The federal Government relies upon, in WorkChoices, on the corporations power to support its legislation, with only minor exceptions such as transitional provisions (which will rely on the conciliation and arbitration power), unlawful dismissal and freedom of association (which will rely on the external affairs power).

56. A federal system reliant primarily on the corporations' power would have the following limitations:

    a. it would not cover unincorporated employers;

    b. it would not cover corporations that are not trading, financial or foreign corporations;

    c. it would not cover unincorporated independent contractors, except insofar as they contract with constitutional corporations;

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[5]Guidice, G (2005) ibid
[6] Brosnan, P (2005) Can Australia Afford Low Pay?
[7] Guidice, G (2005) op cit

d. the federal system may not be able to cover all aspects of the regulation and settlement of industrial disputes, other than disputes containing an interstate element (which would be supported by the conciliation and arbitration power).

57. The Queensland industrial relations system has stood the test of time. It has provided to a majority of business, whether incorporated or unincorporated, a state award system that has provided certainty. It has been Queensland businesses choice to remain in the state system.

58. By stealth the federal governments seeks to undermine that choice and to impose an outcome not supported in Queensland. If democracy is a reflection of the people's voice then Queenslanders have spoken. There is no majority support for what is being proposed. This Senate Committee should reject the direction pursued if they themselves are advocates of the basic tenet of a democratic government, which is the capacity to chose, not the imposition of ideology.

POSTSCRIPT

59. The Queensland Council of Unions (QCU) supports the submissions made by the Australian Council of Trade Unions (ACTU), which transgresses in greater detail, all components of the Bill.

60. Due to time constraints the QCU may provide additional material by way of annexure to this submission. If we do so we will advise the Committee accordingly and forward such material no later then the 10 November 2005.

61. The QCU is available to present oral evidence but would wish to do so in Brisbane.