Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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Committee Secretary
Senate Employment, Workplace Relations,
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Dear Secretary

Please find attached the Independent Education Union of Australia's submission to the Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005.

Many thanks for your assistance.

Yours sincerely,

Lynne Rolley
Federal Secretary

1. The Independent Education of Australia (the IEU) has prepared this submission for the Senate Employment, Workplace Relations and Education Legislation Committee's Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005.

2. The IEU is a federally registered organisation pursuant to the provisions of the *Workplace Relations Act 1996* and operates in the non government education industry which comprises Catholic and other independent schools, pre schools and kindergartens, English and Business Colleges. The union's membership of approximately 65,000 consists of teachers, principals, teacher aides, education support staff, clerical and administrative staff and other ancillary staff such as cleaners and grounds and maintenance staff.

3. The IEU and its branches and Associated Bodies are party to numerous awards and certified agreements. The awards and agreements applying to schools in Victoria, the ACT and the Northern Territory are federal awards. Other federal awards to which the union is a party cover English and Business Colleges across most states and the ACT. The bulk of the education sector is covered by state awards and agreements, for the large part negotiated by consent between the parties.

4. The non government education sector is a significant and diverse one. In the schools area alone there are approximately 2,670 non government schools, of which approximately 1700 are Catholic Schools. There are approximately 1350 system and individual employing authorities. The sector employs approximately 80,000 staff (FTE). These staff vote and the most consistent message that the IEU has received from its members is that none of them who voted for the current federal government ever thought they were voting for such draconian legislation.

5. Given the radical overhaul proposed of the Australian Industrial Relations system and state industrial systems contained within the WorkChoices Bill, the scope and timeline of this Inquiry is a damning repudiation of proper democratic processes, information and debate. The IEU and its members urge this Committee to reject the Bill in its entirety. It is premised on unfairness, breaches of international obligations in respect to the exercise of democratic rights, no genuine safety net for the low paid, compulsion of the most disadvantaged into accepting inferior employment conditions, and destruction of any state based industrial instrument that may have provided more protection for Australians. Those that pass this Bill will be the architects of the dismantling of most basic freedoms and protections in Australia. For an elected government charged with representing the interests of Australians, not allowing this Bill to be properly scrutinised, analysed, debated, and amended is a failure of political duty.

6. The Committee is directed to not consider any elements of the Bill which have been previously referred, reported, and until this point of time rejected by the Senate. The IEU believes this is an inappropriate term of reference. The Bill in its entirety reflects a significant jigsaw of previously failed legislation, failed for the obvious reason that it was bad legislation. It is also inappropriate when the IEU considers that the Bill builds upon previous failures and goes further – this organisation has written several submissions over the years for example on attempts to exempt employers from the unfair dismissal regime. These submissions centred on the then see-sawing number proposed by the government of between 15 and 20 employees in a workplace. The number now proposed by the Bill of 100 employees affects almost every non-systemic school in Australia.

7. This can only produce substantial differences over time in the employment security of those staff employed in small schools and those employed in large schools. In Victoria alone, almost every catholic primary school will be affected by this provision, because of

the different employment relationship where the parish priest is the employer. The IEU predicts that the combined elements of this Bill will result in a ghettoization of some aspects of the teaching profession, in small non-systemic schools, in some schools that have been historically run by hostile employers, in some rural and remote schools, in non-unionised schools.

8. In addition, the Bill now seeks to exclude unfair contract claims under state laws. Further, if an employee is made redundant for "operational reasons" they would not be able to claim that any element of the process in targeting them was unfair. This is a repudiation of employees' basic rights in respect to the unfair dismissal regime. Both of these elements of the Bill have not been canvassed in earlier legislation by this government, yet they are expressly included from the scope of the inquiry. The IEU reiterates that the unfair dismissal regime is a fundamental and necessary protection for employees, and by artificially drawing a line that requires that there is a test in respect to the treatment afforded on termination in one workplace, and there is no test in a smaller workplace is unjust. The concept of a "fair go all round" is about to be legislatively removed in this country.

9. The issue of choice and protection of workers' entitlements has been a key theme of the advertising campaign run by the federal government. Both are starkly lacking in the Bill. The overall thrust of the Bill is to make secret individual contracts based on the barest mimima of standards rather than collective agreements the common mode of employment for Australians. Further, awards will continue to be stripped, resulting over time in one inferior benchmark for Australians' working conditions – the five standards in the Australian Fair Pay Commission. The protections historically afforded to workers are gone – the no disadvantage test, the scrutiny and participating in the bargaining process by the Commission, the development of minimum test case standards in awards that ensure that there is a safety net mechanism in place for all workers. Such major change is premised on

an assertion not backed by any empirical evidence that the removal of basic rights and conditions will lead to more productive workplaces and a stronger economy. It is the IEU's belief that the result of this legislation will be a race towards the bottom.

10. The rest of this submission will focus on the terms of reference outlined for this Committee, but the IEU refers the Committee's attention to previous submissions in which our position remains unchanged in respect to those aspects of the Bill that are regarded as somehow acceptable because they have been presented to Parliament before and been rejected. These include:

    (a) IEU 2002 submission into five bills being considered by the Senate
    The Genuine Bargaining Bill
    The Fair Dismissal Bill
    The Fair Termination Bill
    The Secret Ballots Bill
    The Compulsory Union Fees Bill
    (b) IEU Submission to the Committee Inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2002
    (c) IEU Submission to the Inquiry into the Building and Construction Industry Improvement Bill 2003
    (d) IEU Submission to the Inquiry into Workplace Relations Amendment (Protecting the Low Paid) Bill 2003
    (e) IEU Submission to the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004
    (f) IEU Submission to the Workplace Relations Amendment (Right of Entry) Bill 2004
    (g) IEU 2005 Submission to the Senate Inquiry into Workplace Agreements

Awards and their abolition

11. Federal awards have served as a safety net of conditions (albeit a rapidly diminishing one) for many IEU members, particularly in the area of teachers in private language colleges (ELICOS), the early childhood industry, and in a considerable proportion of independent schools in Victoria, the Northern Territory and the ACT. Further "simplification" of awards enacted by this legislation leaves awards unable to include rates of pay generally or classifications of employees and skill based

career paths. The education profession and its industrial instruments are characterized by detailed classifications that reflect the emerging skills and competencies of teaching and non-teaching staff. Such classifications are reflective of a highly skilled profession that recognizes that to become "expert" in this arena, skills and expertise are part of a continuing framework. The effective abolition of classifications and rates of pay generally based on emerging skill development threatens to leave a section of the teaching profession exposed to a single rate of pay regardless of their experience and skills. There is no rationale to justify this excision, other than to continue to make all awards unsustainable and obsolete in the long term.

12. Section 116B of the Bill deals with 13 broad ranging provisions that will no longer be allowable award matters including the maximum number of hours for part-time employees, restrictions on contractors, prohibitions on particular types of employment such as casual or fixed term, trade union training leave, dispute resolution training leave, and leaves scope for any new elements to be added to the regulations. The intersection of what will be deemed non-allowable in awards and non-allowable in agreements effectively strait-jackets the rhetoric about workplaces where employees and their employers are now free to strike better deals without the burdensome regulations that hitherto prevented them. This legislation has more, not less regulation of an interventionist and politically driven foundation.

13. Another indicator of the government's desire to effectively freeze and make obsolete awards is contained in Section 117F of the Bill. Any new employers subsequently bound by an existing award will not be bound by any "preserved" award terms such as annual leave and carer's leave that were more generous that the new Fair Pay Standard. There will be employees covered by some aspects of their previous award and some more generous entitlements, and there will be new workplaces within the same industry where the default

standard for such conditions will be the five minima set out in the AFPCS. There will be many workplaces characterized by two unequal sets of conditions – pre-reform and post-reform. It is difficult to understand how this will achieve harmony.

14. In the legislation awards are referred to as "pre-reform" instruments. The intention is clear – they will be rationalized, stripped, and the instrument that to effect replaces them with pay rates and classifications will be the Australian Pay and Classification Scale (ACPS). Pre-reform state and federal awards will be "preserved" ACPSs, but it is also clear that the coverage provisions and conditions of more generous industrial instruments such as state awards will not be maintained over time. The government is relying on a yet untested use of the corporations power to unilaterally force all state systems into an inferior, minimal system of industrial coverage and conditions. Whether it is successful remains to be seen, but the IEU believes that the long term impact of this Bill will be to create a more polarized labour force where the most vulnerable employees (including sections of the IEU's membership) will be the most disadvantaged.

15. The long term effect of this agenda within the non-government education profession will be to create a two-class system of wages and conditions for staff in our schools – those with the benefit of an orderly, open, understood and collective approach of adherence to a principle of consistent employment conditions, and those who will become part of a fragmented, individualistic collection of schools. This latter category already exists, and its expansion threatens to ghettoize aspects of the teaching profession. This should be of significant concern to this Inquiry. It would be expected, the IEU believes, that regardless of the size or religious ethos of the school parents send their child to, the general conditions that staff work under would be consistent.

Workplace Agreements

16. The bottom line of the legislation is this: if you are unable to be part of a comprehensive collective agreement, your wages and conditions are protected by only a very few basic entitlements. Yet if you want a collective agreement, you will not necessarily get one because there is no requirement for an employer to agree to one. If you are in a workplace covered by a collective agreement, your employer can still undercut this by making it a condition of employment for any new employee to accept an AWA. This will not constitute duress or attract any of the sanctions reserved primarily for unions in the legislation. And if you are lucky enough to be covered by a collective agreement, as soon as it expires, there will be no underpinning industrial instrument protecting your rights other than the Fair Pay Standard. Where is the choice that this legislation is supposed to enshrine? The rhetoric of enabling more flexibility in the workplace is exposed when you consider that there will be an exhaustive list of matters that will be deemed non-allowable in both awards and collective agreements. The penalties applicable to organizations and individuals who seek to negotiate in good faith protective clauses in relation to the way employees will be treated in a workplace exposes them to fines of up to $33,000.

17. Approval of five of the six types of workplace agreements (the exception being a multiple business agreement) is fast tracked in terms of employers' requirements to notify employees, and there is no scrutiny of workplace agreements when they are lodged with the Employment Advocate – there are simply deemed legally enforceable, with the only relief available in the event of a breach of the legislation being the Federal Court or Magistrate's Court. Of concern also to the IEU is that it is very easy for employees to agree to waive their rights when making or varying agreements. These provisions will once again impact on the most vulnerable and disadvantaged categories of employees.

18. The IEU reminds the Committee that the current system of making agreements must by nature be an adversarial one if a group of employees wishes to be covered by a collective agreement, and an employer does not want them to be. Because of the lack of any mechanism also in the legislation to require good faith bargaining, the only recourse employees have in a protracted dispute is to take industrial action. The IEU considers the even more detailed definitions of industrial action outlined in this Bill, the requirement for secret ballots, the ease with which any industrial action can be halted by third party intervention, the extended "cooling off" periods that can be authorized, as a combined and ongoing assault on the premise that workers are able to have any equality at all in both their bargaining position and their bargaining outcomes.

19. Of further concern is the fact that the Bill will make illegal even asking for certain protections in an agreement, and will heavily penalize unions or employees that ask for them. The evidence that this law is based on an extreme ideology rather than a purportedly fairer and easier system is glaringly obvious. It will be illegal for employers and employees to agree that union training should be part of an agreement. Why should the government determine that such an agreed outcome in the bargaining process will be illegal? The IEU and its Branches are party to a number of agreements that provide for paid union training. The benefit is demonstrable – where workplace representatives are trained in understanding their industrial rights and conditions, in dispute resolution processes and in effective representation, the potential for issues to be resolved expeditiously and in a well informed way is much higher than where there is no such knowledge.

20. In addition, the IEU has always promoted a broad range of union training – including in professional areas for example applying for advanced skill/experienced teacher promotions positions, dealing with difficult students in the classroom, induction programs for beginning

teachers, hazardous substance handling by laboratory technicians, and negotiation skills in bargaining. That such areas of valuable professional and industrial skill enhancement will be deemed illegal for inclusion in enforceable legislation in Australia staggers belief.

Rights of entry

21. The proposed provisions in the Bill dealing with rights of entry are unfortunately again modelled on failed legislation. The curtailing of union officials' rights in respect to the investigation of suspected breaches, the elimination of any meetings for discussion purposes where employees are covered entirely by AWAs or by the AFPCS, the inspection of only members' records, and the potential termination of all right of entry permits in a union based on a complaint, are extreme limitations on the freedoms associated with belonging to a union.

22. The IEU has a number of members in particular schools who would not like their employer to know that they belong to a union. To date, the Union is able to act on behalf of all members of a workplace in relation to a suspected breach of the Act. This has protected more vulnerable members from being identified. It is clear that the requirement to only inspect members' records will enable employers to determine who is and who is not in a union. Similarly, prescribing the meeting place and even the designated route that a union official must take in order to hold a workplace meeting can clearly be used by some employers to intimidate employees into not attending a meeting. A not uncommon scenario would be being the secretary to a principal and finding out that your union organiser's visit will be held just outside the principal's office. There is no convincing rationale for these regulations, they are designed to make it difficult for unions to effectively represent their members.

The dismantling of the Commission

23. Previous submissions from the IEU have argued that one of the most important roles the Commission has is in its role as an independent arbitrator. This ranges from its current obligations via the annual minimum wage setting process to provide a "fair" safety net of conditions for the low paid and equal consideration of the needs of the economy, to its capacity to act as an independent arbitrator in dispute resolution. In these roles, the Commission has a quasi judicial role with processes and rights of appeal that are transparent. The new Fair Pay Commission is not to be composed with similar jurisprudence. Appointments are fixed term, directions relating to how it must arrive at its decisions are suitably vague, nor is there any detail regarding how often and how it should conduct itself. There is also no requirement for the AFPC to act in the public interest or to have regard to the principle of a "fair" safety net for the low paid. The IEU shares the broader concerns of employers such as the Catholic Church (one of the largest employers in Australia), community organizations and the wider community that the real effect over time of this body will be to lower the wages and therefore the living standards of many Australian employees.

24. The proposed default dispute resolution processes contained in S176 of the Bill are woefully ineffectual. Should the AIRC be allowed to hear a dispute, it does not have the power to arbitrate the matter in dispute, to determine the rights or obligations of parties to the dispute, to make an award in relation to the matters in dispute or to appoint a board of reference. It is left with the capacity to arrange a conference for the parties to confer, but can not even make a recommendation unless both parties agree. This, in the IEU's view, effectively makes redundant the AIRC's vital role in the hearing of and settlement of disputes about the operation of awards and agreements.

25. In effect, the AIRC which has been founded on unique conciliation and arbitration powers in this country for more than 100 years, no longer has any real powers – to make awards, to settle disputes, to hear

special cases based on work value, to have regard to the needs of the low paid in determining the minimum wage. There has been no convincing argument presented by any stakeholder or organization as to why this radical change to the industrial relations system is necessary.

Transitional arrangements/uncertainty

26. The Workplace Relations Act is based on the arbitration and conciliation powers, and the WorkChoices Bill is premised on a successful and compulsory takeover of state based industrial systems by relying on the corporations power of the Constitution. It is a certainty that without the co-operation of state and territory governments in doing so, a High Court challenge will be mounted. Regardless, there will be three to five years of uncertainty for many companies and organisations working out where they fit into such a system. The proposed new "unitary" system already fails to capture 15% of Australian employees at the very least. Even if a High Court challenge were unsuccessful, there will still not be one clear, fair, simple unitary industrial system achieved in Australia.

27. The ACCER[1] Briefing Paper 1 makes a number of relevant points about the need for any system to be defined and based on values of fairness and balance. It expresses concerns about the proposed industrial reforms and their impact on low paid workers and their families, on the rights of workers to be represented and to act collectively, and the right to "a fair go all round". The IEU shares the ACCER's concerns that this Bill can not deliver any real balance in bargaining power between vulnerable employees such as the young, the low paid, those who enter the market with no real power. The laws that are proposed to underpin Australia's industrial relations system are inherently wrong laws, and they should be rejected. They rely on a

[1] Australian Catholic Commission for Employment Relations

hostile takeover of more generous state based systems. They are not based on any evidentiary premise that they will protect workers' rights or bring about a more productive economy. They herald a divisive chapter in Australia's history, and they should be and will be opposed by this union and its members unrelentingly.

28. The IEU urges the Committee to reject the Bill. No amount of minor amendments can alter the fact that it is based on inequity and contrary to any principles of fairness and balance.