Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

Submission no: 98

Received: 9/11/2005

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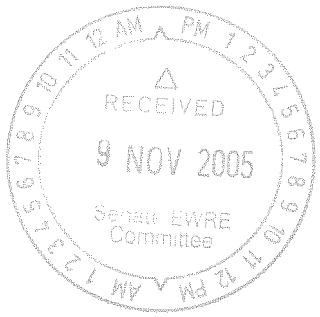

Submission of the

Construction Forestry Mining Energy Union

(Construction & General Division)

to the

Senate Employment, Workplace Relations and Education Legislation Committee

on the

Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005

November 2005

Introduction

The Construction, Forestry, Mining and Energy Union [Construction & General Division] ("CFMEU") is totally opposed to the *Workplace Relations Amendment (Work Choices) Bill* 2005 ("the Bill").

It is a matter of public record that the 687 page Bill was only publicly released on Wednesday 2 November, 2005. The present Senate inquiry received submissions on the Bill until only 9 November. That is a patently inadequate period of public exposure for what is the single largest overhaul of industrial relations in Australia since Federation.

This Bill is a fundamental attack on basic labour rights. It flies in the face of internationally recognized and accepted standards, it undermines the notion of a social safety net, it positively discourages collective bargaining and is designed to destroy effective unionism and freedom of association. If passed, it will have a wide-ranging negative impact on workers in every sector of the economy for years to come. The Government has refused to rule out that workers will not be adversely affected. Clearly they will be so affected.

The public rationale for these changes - the need for greater 'flexibility', 'productivity', the interests of the low paid and unemployed and so on - is little more than a smokescreen for a system of entrenched inequity, unfettered managerial prerogative and industrial extremism.

The terms of the Bill itself are amongst the most complex of any laws in the country. In some instances they are virtually impenetrable. No parliamentarian [let alone ordinary citizen] could claim to fully understand the impact of the changes, particularly those who have had to scrutinise the Bill in a mere 7 days. That reflects poorly on the Government's attitude to democratic processes.

Given the short time that the Parliament and general public have been allowed to examine the Bill, these submissions are necessarily brief, and address only a few of the many unsatisfactory aspects of the legislation.

Section 96D – Employer Greenfield Agreements

An employer greenfield agreement made under this section effectively allows an employer to make a collective agreement with him/herself before the employment of any of the employees who are to be covered by the agreement. That is a novel approach to collective agreement making.

It is surely a misdescription to call such an instrument an "agreement". Unlike other collective agreements there is no opportunity for employees or their representatives to negotiate the terms and conditions of an employer greenfield agreement. The only agreement the employees can make is to accept the terms and conditions that the

employer has unilaterally determined prior to their engagement. That is contrary to one of the principal objects of the Act:

> *3(d) ... ensuring that the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level;*

The abolition of the "no disadvantage test" makes it all the more desirable that greenfield agreements be negotiated by representatives of both the employer and employees. An employer cannot properly represent the interests of future employees. Negotiation cannot occur in these circumstances. Such an "agreement" is likely to disadvantage employees.

Section 100A – Relationship between AWA's and collective agreements

Indisputably, under the scheme of the Bill, primacy is to be given to secret individual contracts over collective agreement making. Section 100A(2) provides that a collective agreement has no effect in relation to an employee while an AWA operates in relation to the employee. This is obviously intended to undermine collective agreements, but it will also cause dissatisfaction and disputation in any workplace where there are significant differences between an AWA and the collective agreement.

The Bill provides no proper mechanism by which agreements of any kind are subject to scrutiny by an independent body before becoming legally effective and binding.

Section 101D – Prohibited Content

Section 101D provides that the regulations may specify matters that are prohibited content for the purposes of the Act. At the whim of the Minister, matters which were not prohibited at the time an agreement was made can suddenly become prohibited content. A term of the agreement would then become void to the extent that it contains prohibited content (s.101F). The balance of the bargain originally struck by the parties to the agreement would be upset.

Judicial decisions concerning "matters pertaining", together with legislative provisions restricting content of agreements, are pushing industrial instruments further and further away from the real world of workplace relations. Matters of utmost importance to employees, such as job security, are being taken out of their hands, and employees are unable to reach an agreement on these matters with their employer, even though the employer may be perfectly willing to do so.

Section 101D takes it to a new extreme, with the Minister having unprecedented powers to dictate the content of workplace agreements, and to override particular terms of an agreement made by the parties in good faith.

Section 103L – Unilateral Termination with 90 days Written Notice

After the nominal expiry date, an employer, or a majority of employees, or a union bound by an agreement may terminate the agreement by giving 90 days written notice to the other parties. An employer may give an undertaking as to the terms and conditions of employees who were bound by the agreement just before it was terminated (s.103M). An award has no effect once the agreement is terminated, and an employee falls back to the Fair Pay & Conditions Standard until a replacement agreement is made (s.103R).

This gives the employer an unfair advantage in any negotiations for a replacement agreement, as the employees could lose whatever reasonable pay and conditions they had become accustomed to receiving under their current agreement, and would then receive a bare minimum until such time as they were able to reach a new agreement with the employer.

Fairness requires that, apart from protected industrial action, there be no disturbance to the status quo while the parties are trying to reach an agreement.

Section 106B – Meaning of "pattern bargaining"

In general, a course of conduct is pattern bargaining if it involves seeking common wages or conditions for two or more proposed collective agreements [s.106B(1)(b)]. However, it is not pattern bargaining if the negotiating party is genuinely trying to reach an agreement for the single business or part [s.106B(3)]. Six factors are specified as being relevant to working out whether the negotiating party is genuinely trying to reach an agreement, but the inquiry is not limited to those six [s.106B(4)]. The specified factors generally require a preparedness to negotiate an agreement which takes into account the individual circumstances of the business, and to bargain genuinely.

This fails to take into account the genuine need of some sectors of industry, such as the construction industry and its sub-sectors, to have a practical means of negotiating pay and conditions for large numbers of smaller employers.

It is not possible for the construction industry to conduct agreement making in the same way as other industries such as steel making, vehicle manufacture, banking, etc., where there are vastly fewer single businesses than in the construction industry. Therefore, the "one size fits all" approach in section 106B is impractical.

The underlying premise behind these provisions is to equate "genuineness" in bargaining with bargaining exclusively at the level of the individual enterprise. That ensures that every employee is forced to bargain at the level at which their bargaining power is weakest. The level at which bargaining occurs should properly be a matter determined by the parties to the bargaining process themselves. Thus if parties determine to bargain at an industry or sub-industry level, that should be permitted by the Act. This is consistent with a range of adverse findings made by the ILO's Committee of Experts in relation to the current bargaining system. The changes envisaged by this Bill will compound Australia's non-compliance with international labour standards and conventions to which we are signatory.

The Act should enable various employee and employer organizations in the construction industry to negotiate and reach agreement on common wages and conditions for their members, and to have those agreements certified.

Section 107J – Significant Harm to Third Party

Section 107J requires the Commission to suspend a bargaining period where industrial action is causing significant harm to a third party. Application under this section may be made by an organization, person or body directly affected by the action (other than a negotiating party), or the Minister. The section contemplates that an application could be made by an employee [s.107J(2)(a)]. In determining whether the action is causing significant harm to a third party, the Commission may pay regard to any matters it considers relevant, including:

> *107J(2)(c) the extent to which the action threatens to:*
>
> *(i) damage the ongoing viability of a business carried on by the person; or*
> *(ii) disrupt the supply of goods or services to a business carried on by the person; or*
> *(iii) reduce the person's capacity to fulfil a contractual obligation; or*
> *(iv) cause other economic loss to the person.*

As most single businesses in Australia are dependent upon others for services and supplies, this provision has the potential to nullify virtually all protected industrial action. If it is accepted that protected industrial action is a legitimate means of achieving a bargain, it must be accepted that third parties are likely to be affected. There are obvious exceptions, such as danger to life or limb, and disruption to essential services. However, mere inconvenience and economic loss to a third party should not be sufficient grounds for the suspension of a bargaining period. Otherwise, the right to take protected action will simply be a sham right.

Division 4 – Secret Ballots on Proposed Protected Action

This new Division purports to establish a "transparent process" which allows employees to choose, by means of a "fair and democratic" secret ballot, whether to authorize industrial action in support of a proposed workplace agreement.

Layer upon layer of administrative red tape and other requirements are imposed upon an applicant for a secret ballot. The fact that there is a vast number of enterprises in the construction industry will ensure that protected action will be accompanied by inordinate delays and unwarranted costs.

It is not necessary to hold a secret ballot in a workplace in order to achieve a fair and democratic result. Nothing could be more transparent than a show of hands, as is the case in Parliament.

These secret ballot provisions are clearly intended to hinder the negotiation of collective agreements, and to protect employers rather than the industrial action.

Section 114 – Payments in Relation to Periods of Industrial Action

An employer must not make a payment in relation to any industrial action (whether or not protected action). The minimum deduction of wages must be 4 hours on any day, even if the total duration of the action on that day is less than 4 hours [s.114(2)].

It seems ludicrous that the Bill should effectively prescribe that industrial action will be for a minimum period of four hours on any day. There are numerous circumstances under which industrial action would last for less than four hours. Yet the Bill provides that a minimum of four hours pay must be deducted. That will certainly ensure that any action will not cease until the full four hours has elapsed.

Part IX – Right of Entry

Prior to the enactment of the current entry provisions in 1996, right of entry was a relatively uncomplicated matter, and the rights of employers and unions were evenly balanced. By a combination of legislation and industrial instruments, union officials were entitled, at reasonable times, to enter the premises of an employer in their union's industry, for the purpose of interviewing employees and inspecting books, documents, works, etc.

A body of case law had evolved which provided clear guidance to unions and employers. Any disputes or instances of unreasonable conduct by union officials and employers could be dealt with expeditiously by the Commission.

The entry provisions of Division 11A of the *Workplace Relations Act 1996* started the process of upsetting the balance which had been carefully struck between the rights of union officials and the rights of employers in regard to entry of premises.

The WorkChoices Bill tips the balance completely in favour of employers, particularly those employers that are hostile towards trade unions. The Bill obviously seeks to counteract various decisions of the Federal Court and the Commission concerning right of entry. In other words, when the Government loses a case, it introduces legislation to substitute its decision for that of the court or tribunal.

If Part IX is enacted in its present form, and subsequent court rulings displease the Government, further legislation will no doubt be introduced to counteract "wrong" decisions. The right of entry provisions will become lengthier and more complex, and even more incomprehensible to ordinary permit holders and employers.

Further restrictions upon the right of entry of union officials will hinder the resolution of disputes. When a dispute arises on a construction site and the workers seek the assistance of an official, it is essential that the official be able to enter the site and attend to the matter as quickly as possible. It is far more important to resolve disputes quickly than to satisfy administrative "red tape" requirements. Moreover, the timely presence and advice of an official will greatly reduce the possibility of individual workers breaking the workplace relations laws.

In any discussion about right of entry, it should be remembered that employers have the opportunity to put their point of view on industrial relations to employees at any time during working hours, without any union official being present or even knowing that a discussion (which may well concern the union) has occurred.

Even if there were no restrictions whatsoever on union rights of entry, no union would ever have the same opportunity as an employer to discuss industrial matters with the employees. Managerial and supervisory staff are interacting with employees throughout working hours every day of the week. Union officials obviously are not.

The right of employees to have access to their chosen representative is an integral feature of the right to freedom of association.

Moreover, as the vast number of successful claims for underpayments show, many employers routinely breach awards and agreements. The active policing of awards and agreements by unions is a proven means of ensuring that the greatest number of employees will receive their proper entitlements. This Bill seeks to drastically reduce that activity and to swing the balance completely in favour of those employers that set out to cheat their employees. That disadvantages employers who do meet their legal obligations to their employees.

Worse still, the Bill seeks to restrict right of entry for occupational health and safety purposes. Additional conditions on right of entry pursuant to State or Territory OHS legislation have been imposed. Current limitations and obligations on permit holders under State/Territory OHS laws continue to apply.

Section 217 provides that an official of an organisation who has a right of entry under an OHS law must not exercise that right unless the official holds a permit under the Work Choices legislation and exercises the right during working hours.

Any right to inspect employment records under an OHS law cannot be exercised unless at least 24 hours' written notice is given to the occupier of the premises, stating the intention to exercise the right and the reasons for doing so (s.218). A permit holder must not enter, or remain on premises under an OHS law unless that person produces the entry permit for inspection if requested by the occupier. The permit holder must comply with an OHS requirement that applies to the premises (s.219). The cumulative effect of these requirements is to slow down and hinder union officials who seek to exercise their rights under State and Territory OHS laws.

It is an unchallengeable fact that unions in the construction industry have played a crucial role in the prevention of accidents, and the policing and enforcement of OHS laws. To appreciate the positive work that has been, and continues to be, carried out by unions in this field, one only has to think of asbestos eradication and safe working at heights. There are numerous other hazards which have been reduced or removed by the actions of unions in this particularly dangerous industry which kills over fifty workers every year.

It is outrageous that the Government is seeking to curtail that activity. Sections 216-220 are an unwarranted intrusion upon State and Territory regulation of OH&S matters, and will further assist those employers who have a reckless disregard for their duty of care in the workplace.

Conclusion

This Committee should unreservedly recommend the rejection of the Bill.