Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

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SUBMISSION

Introduction

1. The Australian Catholic Commission for Employment Relations ("ACCER") is an agency of the Australian Catholic Bishops Conference. ACCER provides the Conference, and Catholic employers, with advice, research and advocacy on matters affecting the employment relationship in Australian workplaces, within the context of Catholic Social Teaching. It does this at both the practical and public policy levels. It is for these reasons that ACCER makes the following submissions to the Australian Senate Employment, Workplace Relations and Education Legislation Committee.

2. On 26 May 2005 the Prime Minister and the Minister for Employment and Workplace Relations announced the principal features of the Commonwealth Government's proposed amendments to the *Workplace Relations Act 1996* ("the Act"). The rationale for the amendments is summarised in the following passage in the Minister's written statement of that date:

> "Australia needs a more flexible labour market to maximise economic growth and employment opportunities and to maintain and improve our standard of living in an increasingly globalized economy."

3. On 2 November 2005 the Government introduced the *Workplace Relations Amendment (Work Choices) Bill 2005* ("the Bill") into the House of Representatives.

4. The objective of the Bill is to make changes to the regulation of employment throughout Australia. The Government seeks to override the current State regulation of employment, as far as it is able to do so under the "corporations power" in the *Australian Constitution*, and establish a national system that is substantially different from that currently operating under Commonwealth and State legislation.

5. The principal ways in which the objective is to be pursued is by:

   - giving greater scope for the making of direct agreements between employers and employees;
   - having fewer mandatory matters and standards for inclusion in employment agreements;
   - changing unfair dismissal laws; and
   - reducing the capacity of the Australian Industrial Relations Commission ("the AIRC") and similar State tribunals to regulate aspects of employment.

6. The proposed amendments are intended to change the bargaining relationship between employers and employees and to limit the intervention of "third parties". It is claimed that the current arrangements inhibit economic growth, employment prospects and international competitiveness.

The ACCER Briefing Paper

7. In September 2005 ACCER produced *Briefing Paper No. 1 on the Commonwealth Government's Proposal to Reform Workplace Relations in Australia* ("the Briefing Paper").

8. The conclusions of the Briefing Paper are set out at paragraphs 187 to 191:

> "The Government has proposed a number of changes which could have an impact on the lives of many Australians, particularly on families. The Government's case is that these changes are needed to secure Australia's economic future.
>
> An informed discussion about the choices confronting Australia requires careful examination of the economic case for change and a proper consideration of the various means by which that change can be facilitated. Central to this discussion must be the recognition that social justice must be an explicit goal of government and that economic growth is an essential requirement for social justice."
>
> The results of our examination of the matters announced by the Government are concerns about particular aspects of the proposals: wage-fixing, unfair dismissals, minimum conditions and agreement making and the functions of the AIRC.
>
> ACCER is open to the introduction of a national industrial relations system, provided it is supportive of the essential values and principles necessary for cooperative employment relations.
>
> These values and principles are consistent with the achievement of the economic changes that are necessary to provide a strong economy for future generations. There is a need for balance in the relationship between employers and employees so that the objectives and needs of both are respected and supported through the establishment of a genuine partnership in the workplace. The values of society cannot be separated from the values of the workplace."

9. In particular, ACCER was concerned with the proposals to:

- Change the functions of the AIRC;
- change the wage-fixing system by introducing a minimum wage fixed by reference to the single adult employee;
- abolish unfair dismissal rights for employees of corporations employing 100 or less employees; and
- change the no-disadvantage test that is applied to the making of collective and individual agreements.

10. The essential task of the Briefing Paper was to provide information, identify the key issues for further consideration and to stimulate public discussion. It was accepted that a final assessment of the proposed changes would have to await the introduction of the legislation

The Senate Inquiry

11. The Bill was introduced into Parliament on 2 November 2005. A Senate Inquiry into the Bill was announced prior to that date and a deadline for the lodging of written submissions was fixed for 9 November 2005. The Bill comprises 687 pages and the Explanatory Memorandum comprises 569 pages. The volume and complexity of the legislation and the short time frame has imposed a particularly onerous task on ACCER and others. In particular it has meant that interested organisations have had an extremely limited opportunity to examine and consider the detail of the legislation to comment as appropriate. Furthermore, the limitations imposed on the content of submissions and the scope of the Inquiry will severely restrict Parliamentary review and public discussion about these very important matters.

12. Having regard to the time limitation these submissions concentrate on the major concerns identified in the Briefing Paper. These concerns were based on Catholic Social Teaching and the Church's collective and diverse experience as a major employer in Australia. We refer to aspects of that teaching in the following paragraphs. We ask those who would like a fuller appreciation of Catholic Social Teaching on work and related matters to read paragraphs 13 to 82 of the Briefing Paper.

Catholic Social Teaching

13. The Catholic Church has an established body of teaching on work and the employment relationship. The Church's standing and expertise to comment on the Government's proposals is also based on the fact that the Church, through its many agencies, is one of the largest employers in Australia. Many Catholics - clergy, religious and lay - have considerable expertise in managing enterprises where issues concerning workplace organization, co-operation, productivity and efficiency are central to their work. They are required to do this in accordance with Catholic Social Teaching.

14. The Church's social teachings are essential aspects of the Catholic faith. Catholic teaching on the spiritual, economic and social aspects of work in modern industrial societies has its genesis in Pope Leo XIII's 1891 encyclical *Rerum Novarum.* Pope John Paul II reflected on the same issues in a contemporary setting in his encyclicals *Laborem Exercens* in 1981 and *Centesimus Annus* in 1991.

15. Catholic Social Teaching on work and related matters is based on Christian beliefs and values and aims to bring about a good and fair society for the common good. These are unifying forces within the Christian community. Similar values are also found in other religions, including Judaism and Islam.

16. It is because of the nature and purpose of work that employees cannot be treated like other parts of an economic process, with their value assessed only in economic terms. Employees cannot be treated as commodities, nor can their labour be treated in purely economic terms. Their work has to be understood as part of God's plan. Their work is also vital to their relations with others. It is through work that men and women co-operate and support each other and achieve social progress. In particular, and at its most fundamental level, it is the means by which families are formed and nurtured.

17. The Church's teachings require that the importance of work to society and the dignity of the employee should lie at the heart of the regulation of workplace relations and employment law.

18. The "free market economy" is of value because it can serve the needs of society as a whole and employees in particular. But this is not always the case. In *Centesimus Annus*, Pope John Paul II, who was writing soon after the collapse of communism (in which he played no small part), wrote:

> "It would appear that, on the level of individual nations and of international relations, the *free market* is the most efficient instrument for utilizing resources and effectively responding to needs. But this is true only for those needs which are "solvent", insofar as they are endowed with purchasing power, and for those resources which are "marketable", insofar as they are capable of obtaining a satisfactory price. But there are many human needs which find no place on the market. It is a strict duty of justice and truth not to allow fundamental human needs to remain unsatisfied, and not to allow those burdened by such needs to perish. It is also necessary to help these needy people to acquire expertise, to enter the circle of exchange, and to develop their skills in order to make the best use of their capacities and resources. Even prior to the logic of a fair exchange of goods and the forms of justice appropriate to it, there exists *something which is due to man because he is man*, by reason of his lofty dignity. Inseparable from that required "something" is the possibility to survive and, at the same time, to make an active contribution to the common good of humanity." (*Centesimus Annus*, 34)

19. This passage reminds us that some employees come to the job market disadvantaged and that, for them, the labour market will not satisfy their fundamental human needs. Their dignity requires appropriate intervention and protection. There is a need for a "safety net", to use a contemporary term, to ameliorate some of the effects of an unrestrained labour market.

20. A major concern of Catholic Social Teaching is with the position of the poor and the vulnerable. There is a *preferential option for the poor*. In *Laborem Exercens* Pope John Paul II wrote:

> "In order to achieve social justice in the various parts of the world, in the various countries, and in the relationships between them, there is a need for ever new *movements of solidarity of* the workers and *with* the workers. This solidarity must be present whenever it is called for by the social degrading of the subject of work, by exploitation of the workers, and by the growing areas of poverty and even hunger. The Church is firmly committed to this cause, for she considers it her mission, her service, a proof of her fidelity to Christ, so that she can truly be the "Church of the poor". And the "poor" appear under various forms; they appear in various places and at various times; in many cases they appear as a *result of the violation of the dignity of human work:* either because the opportunities for human work are limited as a result of the scourge of unemployment, or because a low value is put on work and the

> rights that flow from it, especially the right to a just wage and to the personal security of the worker and his or her family." (*Laborem Exercens*, 8)

21. The foregoing passage is important because it identifies, at once, the scourge of unemployment, the need for a just wage and the need for security of the worker and his or her family. It would be wrong to emphasise one of these to the exclusion or detriment of the others. The interests of the unemployed, the underemployed and low paid employees should not be set against each other.

22. The Briefing Paper sets out Catholic Social Teaching on the right to just wages and support for the family, security of employment, the role of governments, the role of unions and other matters. They are interconnected. A feature of Catholic Social Teaching is its identification of the mutual rights and duties that link and unite individuals, society and the State. We observed:

> "Catholic Social Teaching, therefore, identifies interlocking obligations. There is an obligation on individuals to perform work where, and to the extent, they are able to do so. The obligation to work co-exists with the entitlement to receive a just wage. It is the duty of the State to ensure the payment of wages that are at least sufficient to meet the basic needs of the employee and the employee's family. The obligations of the State go further than ensuring the payment of minimum wages. The State also has a critical role to play in finding suitable employment that pays a wage sufficient to meet the basic needs of the employee and the employee's family." (Paragraph 75)

23. Catholic Social Teaching seeks to integrate economic and social objectives. It would be unfortunate in the debate about employment regulation if these two aspects were seen as simple or opposed alternatives. The common concern should be about growing and strengthening our economy in a way that will provide prosperity and economic security for all Australians. Economic growth is needed to enhance social justice. Social justice should be an explicit goal of government policy on economic growth so that burdens and benefits can be identified and considered. The pursuit of economic growth by means that impose unfair burdens on the poor and vulnerable and which impose burdens of struggling families should be resisted.

Wage-Fixing

24. The Commonwealth's initial announcement advised that the new system would introduce a "single adult minimum wage". That was a matter of some concern to ACCER because of ACCER's support for a "family wage".

25. ACCER has been involved in successive Safety Net Review Cases in the AIRC since the current wage-fixing procedures were introduced in 1996. In that time it has emphasised the importance of the family wage and the need for the Federal Minimum Wage to meet the needs of workers and their families. This aspect is explained at paragraphs 113 to 128 of the Briefing Paper. Those passages explain, in ACCER's view, why wages should be fixed by reference to the needs of families and should take into account taxes and transfer payments.

26. The family wage has a long history in Australia. From the early days of Federation, following the *Harvester* case in 1907, the "Living Wage" became a central feature of employment regulation in Australia and became part of the fabric of Australian life. Its expression was a product of the times: it was fixed by reference to the needs of the male breadwinner, his wife and three children. But its substance was fundamental and enduring. The Living Wage was important because it recognised the need to fix fair and reasonable wages, the need for employees to live in dignity and the need for the employee to be provided with a wage sufficient to support a family. This was done even though many employees were not the sole breadwinner in a family of five.

27. There is one notable aspect of the *Harvester* Living Wage that has been overtaken by the events of the last century. It is the reason why we cannot return to the *Harvester* formulation and the reason why we must have a contemporary Living Wage. In the early 20th Century the wage packet was required to provide for the *total* support of the employee and the employee's dependants. It was not supplemented by a welfare system. The wages system was made possible by tariff protection. The relative importance of the wage in the support of the family has declined as government transfers to families have increased, particularly in the last 20 years. The substantial increases in non-wage financial support to employees and their families, part of the "social wage" as it has sometimes been described, came about as a result of a change in government policy in the 1980s. It was initiated by a policy of wage restraint by unions and the adoption of "centralised" wage-fixing principles and procedures in the AIRC that resulted in carefully controlled wage increases. That centralised system has gone, but the legacy endures. There has been substantial bi-partisan support for the provision of family support payments by the Government. The contemporary Living Wage has to recognise government transfers.

28. Family assistance changes in the last two decades have been accompanied by significant economic change; arguably they have been required by, and have facilitated our adaptation to, that change. The high levels of tariff protection of the last century have gone. In general terms, for the best part of a century after Federation, the wages of Australian employees and Australia's employment levels were supported by tariffs. The costs of this support were borne by Australians as consumers. Now, the incomes of many employees and their families are being supported by Australians as taxpayers. A substantial part of the cost of supporting employees and their dependants has moved from the employer to the taxpayer, from the wage packet to the public purse.

29. At paragraph 129 of the Briefing Paper we refer to a submission made to a previous Senate Inquiry into the *Workplace Relations Amendment (Protecting the Low Paid) Bill 2003*, in which reference was made to the single person test:

> "If the AIRC were to formally adopt the single person criteria for the establishment of the Federal Minimum Wage it should only do so if it is satisfied that there are adequate mechanisms in place, by way of the taxation and welfare systems, that would guarantee the proper financial needs of the wage earner's dependants. Moreover, unless and until governments make commitments to the continuation and further implementation of policies for the support of dependants, the AIRC should not abandon the principle

> that a minimum wage should take into account the needs of dependants.
>
> Given the position of the Catholic Church on the need for wages to be sufficient to support the wage earner and his or her dependants, any support by the ACCER for the single person test for the purposes of wage fixation would only be conditional upon governments recognizing that wage rates must be fixed on that basis and they have an obligation to provide for the needs of dependent family members through the taxation and welfare systems." (*ACCER Submission to the Senate Employment, Workplace Relations and Education Legislation Committee*, 28 April 2003, paragraphs 36 and 37)

30. In the current legislation, family needs are taken into account, along with economic factors, by the terms of section 88B(2) which provides that the AIRC:

> "…must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:
>
> (a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;
>
> (b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;
>
> (c) when adjusting the safety net, the needs of the low paid."

31. We contrast this provision with that now proposed. The proposed wage-setting parameters for the Australian Fair Pay Commission ("the AFPC") are found in the proposed section 7J:

> "7J AFPC's wage-setting parameters
>
> The objective of the AFPC in performing its wage-setting function is to promote the economic prosperity of the people of Australia having regard to the following:
>
> (a) the capacity for the unemployed and low paid to obtain and remain in employment;
>
> (b) employment and competitiveness across the economy;
>
> (c) providing a safety net for the low paid;
>
> (d) providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market."

32. It will be seen that the proposed section does not refer to the earlier announced single person wage. ACCER welcomes this change, but it has not put the matter beyond doubt. ACCER has several concerns about the provision. First, it contains no explicit basis upon which it could be argued that the wages fixed by the AFPC should have regard to the needs of employees and their families. There should be

no ambiguity about this aspect. The needs of families should be recognised in the legislation.

33. The family wage/single employee wage issue has been before the AIRC. In the 2004 Safety Net Review Case, ACCER argued that the determination of the needs of the low paid should be made on the basis of the needs of a family of two adults and two children, with only one adult working. In its 2004 decision the AIRC referred to the discussion about the range of "household types" within Australia. It said:

> "Whilst a significant proportion of Australian families continue to rely upon a single wage as their sole source of income, the needs of single income families will continue to be relevant in connection with consideration of the needs of the low paid." (*Safety Net Review-Wages, May 2004,* Print PR002004, paragraph [275])

34. In the 2005 Safety Net Review Case, ACCER raised the matter in these terms:

> "The **Harvester** Living Wage was based on a family of three children. ACCER's submission is that, having regard to the number of children in contemporary Australian families, the figure should be two. Because the costs of raising children vary over the years a degree of averaging is required in order to cover age-related variations in costs.
>
> If one accepts (as one should) that the sole income earner within a family may be male or female (and that the parent earning the family income may change from time to time) there is no issue about the relative roles of men and women. The wage should enable the mother to work and the father to stay at home if they so wish or for both parents to share full time paid work between them.
>
> These are fundamental matters about the basis on which the needs of the low paid are to be fixed and about which there should be no ambiguity. If any party or intervener in this case contests that wages are to be assessed on any other basis to that set out above it should say so to the Commission and provide its reasons." (*ACCER 2005 Safety Net Review Submission,* paragraphs 77 to 79)

35. With the exception of the Australian Council of Social Services ("ACOSS"), no party or intervener claimed a position contrary to that of ACCER. The Commonwealth Government and the employers did not specifically respond, but their submissions make it clear that the existing award rates were not based on the needs of the single person. ACOSS made its submissions in support of the single person test on the basis that transfer payments should cover the costs of dependants.

36. Our second concern with the proposed section 7J is that it contains no reference to fairness, as there is in the current legislation. It will be noted that fairness in the current legislation is fairness in the context of economic factors so that the AIRC is to properly balance the various factors when fixing wages. Unless fairness is

one of its parameters it may be said that it has no obligation to consider fairness. We see no reason why fairness cannot be an explicit consideration and a guiding principle for the AFPC, especially given that it is named the Australian *Fair* Pay Commission. Fairness would also require the safety net to be fixed "in the context of living standards generally prevailing in the Australian community", as is presently the case under section 88B(2).

37. The third concern that we have with the proposed section 7J arises out of our discussion in the Briefing Paper about the importance of taxation and transfer payments to workers and their families. These are important considerations in contemporary wage-fixing and about which ACCER has been concerned. They arise whether wages are to be fixed on the basis of the single employee or on the basis of an employee with dependents.

38. The Briefing Paper addresses the need to integrate wages, taxation and family transfer policies and the importance of a public debate about the respective contributions of the wage packet and the public purse to family incomes. We have recognised that income tax imposed on the low paid is in effect a cost on employment and that transfer payment can have the effect of reducing the costs of employment.

39. Since the publication of the Briefing Paper, ACCER has produced a document entitled "Discussion Paper: The Tax Debate and Wages Policy" ("the Discussion Paper") on the integration of wages, taxation and transfer polices and the need for the reform of taxation rates imposed on low paid employees. That Discussion Paper is attached hereto. In particular, we refer to the following paragraphs 6 to 8 and 16 to 18:

> "The relationship between wages policy and the Commonwealth Government's budgetary policy hasn't only emerged with this proposed change to wage-fixation. For some years there has been a debate about the respective merits of tax cuts and wage increases. Employers have regularly told the Australian Industrial Relations Commission ("the AIRC") that tax cuts are a better way of meeting the needs of low paid employees. The proper target of this argument is the Commonwealth, but to date it has not engaged in the development of co-coordinated and adequate wages and welfare policies for working families.
>
> The Commonwealth Government claimed in the AIRC's 2005 Safety Net Review Case that safety net wage increases "are a poor means of addressing the needs of the low paid". The only alternatives to these wage increases are in the Commonwealth's own hands: i.e. taxes and transfer payments. It has not responded to the implications of its own position. The 2005 Budget delivered across the board tax cuts of $6.00 per week, not enough to cover the bracket creep of recent years.
>
> The Commonwealth should address wages, tax cuts and transfer payments in the course of the tax debate. The taxation debate should consider the capacity of tax relief and improved transfer payments to provide an alternative to wage increases. The other

> political parties, employers and the union movement should state also their positions on this aspect.
>
> ….
>
> The relationship between wage levels and employment prospects in an economy is a vexed question amongst economists. To the extent that there is a negative relationship between the level of minimum wages and employment prospects, the Commonwealth's taxation of low paid employees is a factor that is detrimental to employment prospects. Those who argue that minimum wage levels are too high or that arbitrated wage increases are excessive should also address the consequences of taxation rates on low paid employees. Governments must address the economic impact of their own taxation policies.
>
> The progressive reduction of this tax burden would tend to reduce the costs of employment, stimulate employment and assist Australia in maintaining its international competitiveness. There is an economic case for increasing the amount of government transfers to low income working families so as to reduce their reliance on wages. This point is not a novel one: it is the basis of the past claims by employers that tax reductions are to be preferred to wage increases. There is also an economic case for moving towards zero taxation for minimum wage employees. This might be achieved by tax offsets for low income earners, earned income tax credits, changes to taxation thresholds or by a combination of these and other measures. The tax debate should address these measures.
>
> The tax debate should also address the balance between the respective contributions of the public purse and the wage packet in meeting the needs of low paid working families. The wage packet alone is presently insufficient to meet the needs of low paid working families. The substantial amount paid by way of family payments is evidence of that. There needs to be debate about the appropriate balance between the wage packet and the public purse in meeting the needs of an employee's dependents. It should recognise that this kind of welfare provides economic value to the country as well as meeting the ongoing needs of working families. That debate will involve economic and value judgements."

40. These paragraphs demonstrate the importance of avoiding an ambiguity as to whether wages are to be set on the basis of the single person or not and the importance of a full and proper consideration of taxation and transfer payments by the AFPC.

41. We note that the proposed section 7K enables the AFPC to undertake a range of research on matters affecting its wage-setting function under section 7J. ACCER welcomes this initiative. In past Safety Net Review Cases, ACCER and other organisations have submitted that the AIRC should conduct an investigation or

inquiry into the needs of the low paid for the purpose of fixing the Federal Minimum Wage. At paragraph 138 of the Briefing Paper we said:

> "It is critical that research be undertaken into the financial needs of low-income families. Furthermore, there is a need to investigate the impact of taxation and family benefits on wage levels and the impact of all of these on the labour market and the economy. The results of these kinds of research and analysis will assist in the setting of wages and the formulation of the most appropriate taxation and transfer payment policies for families."

42. There is a role for the AFPC to facilitate research and to make recommendations to the Commonwealth as to the ways in which taxation and transfer policies can be better integrated with wage-setting policies. The AFPC could also assist in the identification of other labour-market related policy measures to promote economic growth. In this regard we have in mind the kinds of policies identified by the Director-General of the International Labour Organisation, Juan Somavia, in a 2004 report on globalization, part of which is reproduced at paragraph 182 of the Briefing Paper. In commenting on this passage the Briefing Paper referred to the threat of reductions in wages and other conditions of employment:

> "It is evident from this passage that labour market flexibility is only part of the raft of policies that must be pursued by national governments in their response to changing economic circumstances. Importantly for the current discussion in Australia, labour market flexibility should not require the reduction of wages and other conditions of employment. If that were to occur, the burden of economic adjustment could fall on many employees, particularly the poor and the vulnerable. There should be more appropriate means of adapting to the new economic circumstances. We hope that the forthcoming discussion will address these kinds of issues, including the relationship between wages, taxation and government transfer payment policies." (Paragraph 183)

Proposed Changes to Section 7J

43. Having regard to the foregoing matters, ACCER proposes the following amendments be made to clause 7J:

(a) Amend subclause 7(c) so as to read "providing a fair safety net for the low paid in the context of living standards generally prevailing in the Australian community".

(b) Insert a new subclause: "providing for the needs of employees and their families".

(c) Insert a new subclause: "relevant taxation and government transfer payments."

44. Consistent with the proposal to make fairness explicit the word "fair" should be included in paragraphs (c) and (g) the proposed section 3, a provision that sets out the principal objects of the legislation.

45. Given the important tasks conferred on it, the AFPC should have an explicit obligation to comply with the rules of natural justice when exercising its power. The proposed section 7K should be amended by the addition of a new subsection:

> "In the exercise of its wage-setting functions the AFPC is obliged to observe the rules of natural justice, including giving relevant parties the opportunity of being heard and disclosing to relevant parties the material upon which it may make its decisions."

46. In concluding our remarks on the proposals for a new wage-setting system, it is appropriate to reinforce a central view in our Briefing Paper: it is not morally acceptable to seek to reduce unemployment or to promote economic growth by letting wages fall below the level at which employees can sustain a decent standard of living.

Minimum Conditions and Agreement-Making

47. The Government has proposed that the Australian Fair Pay and Conditions Standard ("the AFPCS") be the new standard for the purposes of approving collective and individual agreements. This standard would replace industrial awards for the purposes of determining whether or not an agreement may have legal effect. It would be, in effect, a new safety net, replacing the current award safety net, above which employees and their employers would be able to bargain. The proposed safety net is *lower* than the current one.

48. The government's justification for the proposed changes is set out at pages 14 to 18 of the Explanatory Memorandum, the two summaries of which read:

> "Introduction of the Fair Pay and Conditions Standard will result in a significant simplification of the agreement making process by replacing the current complex and confusing NDT [No-disadvantage test]. Business and employees would benefit from this simplified process which would create a genuine minimum safety net."
>
> and
>
> "Simplified agreement approval processes in the new system will significantly reduce the amount of time and level of bureaucracy associated with agreement making. This will particularly benefit small businesses, which generally lack the capacity of their larger counterparts to absorb the costs of highly prescriptive regulation, such as, by allocating a dedicated human resources infrastructure."

49. The Bill provides that the AFPCS will comprise the appropriate minimum wage rate (fixed by the AFPC) and other specified matters: annual leave, personal leave, parental leave (including maternity leave) and maximum ordinary hours of work. That standard is to replace the current award safety net. To understand these points it is necessary to refer to the current award system.

50. The current Federal award system is a safety net award system of fair minimum terms and conditions. Section 88B(2) of the Act provides that the AIRC "must ensure that a safety net of fair minimum wages and conditions is established and maintained". The present Government introduced this requirement in 1996. In

compliance with its statutory duty the AIRC has reviewed its awards and has maintained wages, overtime rates, shift penalties, casual loadings and various other provisions as it is permitted to do under the "allowable matters" provisions in section 89A of the Act.

51. One of the objects of the Act is the encouragement of bargaining at the enterprise. Safety net awards of fair minimum terms and conditions of employment provide the basis upon which employers and employees bargain. At present, approximately 20% of employees are "award only" or "award dependent" i.e. the terms and conditions of their employment are those in the relevant award. They are mostly employed in the lower paid classifications.

52. Typically, award only employees do not have the capacity to bargain above the safety net. As the AIRC said in its decision in the Safety Net Review Case decision in 2004, "Bargaining is not a practical possibility for employees who have no bargaining power." (*Safety Net Review - Wages,* May 2004, Print PR002004, paragraph [325]) Those who have an agreement above the safety net may also be very dependent upon the safety net to obtain their bargained benefits. This is especially so for those who have benefits only slightly above the award safety net.

53. Employees are at present protected from bargaining away their award safety net entitlements. This protection is provided in the form of the no-disadvantage test under section 170XA of the Act. This test is applied to both individual and collective employment agreements. An agreement fails the no-disadvantage test if it would result, on balance, in a reduction in the overall terms and conditions of employment of employees covered by the agreement when compared with the award. Safety net entitlements may be converted into other benefits, subject to the agreement meeting the no-disadvantage test. For example, the entitlement to overtime rates can be included in a higher wage rate if the extra amount paid reflects the amount of overtime worked.

54. The current legislation requires the agreements to be approved by the Employment Advocate (in regard to individual agreements) or by the AIRC (in regard to collective agreements). The legislation requires the test to be applied by reference to an award, either a "relevant" award or a "designated" award, and any other relevant law. The Act specifies the way in which the Employment Advocate identifies the "relevant" award in regard to individual agreements (AWAs) and the AIRC identifies the "designated" award in regard to collective agreements.

55. The proposed use of the AFPCS test has the potential to erode the benefits that are at present in the award safety net, but which are not to be included in the AFPCS. The result is that there would be no need to take into account overtime rates, shift penalties, limitations on the spread of hours of work, weekend and public holiday penalties and other allowances fixed in awards.

56. Employees who have no better terms and conditions than those prescribed in their award are unlikely to have any ability to bargain in these new circumstances. The fact that approximately 20% of the workforce is employed on minimum award rates is evidence of their exposure to a bargain that would be below the current safety net, but which would be in conformity with the AFPCS. The exposure to such bargains would extend to, at least, some of those who are presently on rates that are marginally above the award rates.

57. It is important to appreciate that the AIRC has fixed fair minimum wages and conditions. They are included in the current awards consistent with its obligation to establish a fair safety net. The proposal to change the safety net puts at risk a number of these entitlements. For many employees these extra entitlements are a substantive and necessary source of income. Many employees who are currently employed and, especially, those who will be offered work in the future will be at risk.

58. Catholic Social Teaching is concerned with just remuneration in the workplace. Its concern is not limited to minimum pay levels. It is also concerned about the protection of employees who are vulnerable and at risk of pressure to agree to that which is not just. The poor and vulnerable should be protected against bargaining that would have them employed below the current safety net.

59. We return to the Government's justification for its proposals. The fundamental changes and consequences are justified on the basis quoted earlier: the current no-disadvantage test is said to complex and confusing and can act as a hindrance to agreement-making. This is the process introduced by the current Government in 1996 and it has been in operation for over eight years. ACCER does not accept that the current legislation is a substantial cause of uncertainty and a hindrance to agreement-making.

60. The AFPCS does not constitute a *fair minimum standard* for the purpose of workplace negotiations. The departure from the current safety net would expose many low paid and industrially weak employees to inequitable bargaining that will impact on their terms and conditions of employment and, consequently, their ability to support themselves and their families. This change will impact on low paid breadwinners, on parents who work part-time to supplement the family income, on young people new to the workforce, on those in rural and regional areas with limited job opportunities and mobility and on many unskilled migrants.

61. It is incumbent upon the Parliament to fully consider these consequences before enacting legislation. We do not accept that these consequences can be justified by the claimed benefits as set out at pages 13 to 18 of the Explanatory Memorandum.

Proposed changes to the AFPCS

62. Two of the most important aspects of the remuneration of workers that are currently covered by the safety net and the no-disadvantage test, but not covered by the proposed AFPCS, are overtime and shift, weekend and public holiday penalty rates. Rest breaks within and between shifts are also important, especially for health and safety reasons.

63. The potential impact of the AFPCS on employees with limited or no bargaining power can be ameliorated, but not removed, by a change to the Bill. The three categories of current award entitlements can be added to the AFPCS items listed in the proposed section 89(2) by the addition of three paragraphs. All of these entitlements can be fixed by reference to an award because the identification of an applicable award is already provided for within the proposed legislation.

64. There is a further aspect to the proposed agreement-making provisions that we wish to comment on. The Bill proposes that the agreements (whether individual or collective) are deemed to be valid upon their lodgement and that they can only be set aside by a Court (the Federal Court or the Federal Magistrates Court) following

litigation. The object and effect is to remove anything but the most cursory scrutiny on lodgement. The lodgement process cannot be considered outside that litigation. Allegations of coercion, duress, misleading and deceptive, unconscionable behaviour and the like cannot be considered by the Office of the Employment Advocate which receives the applications. This creates the potential for uncertainty and time-consuming litigation. Defects of these kinds should be capable of being considered by the Office of the Employment Advocate and/or the AIRC (especially in regard to collective agreements) without having to initiate expensive litigation. ACCER proposes that amendments permitting this kind of process should be considered.

Unfair Dismissals

65. There have been unfair dismissal laws in the States for many years. National unfair dismissal legislation was introduced in 1994 by the then Commonwealth Labor Government. The jurisdiction to hear and determine claims was given to a new court, the Industrial Relations Court of Australia. That legislation was replaced by the current Government in 1996 and jurisdiction was given to the AIRC. The scheme is similar to the State schemes. A dismissed employee ordinarily lodges a claim in the tribunal that made the award under which he or she was employed. Because Victoria has referred most of its industrial powers to the Commonwealth, employees in Victoria now lodge their claims in the AIRC.

66. The new scheme introduced by the Government in 1996 was described in the Government's Explanatory Memorandum to the amending legislation:

> "Its principal effect is to introduce a new unfair dismissal scheme which provides employees with access to a fair and simple process of appeal against dismissal, based on the principle of a 'fair go all round', is fair to both employee and employer, ensures legal costs are minimised and discourages frivolous and malicious claims, and is consistent with Australia's international obligations." (*Explanatory Memorandum, Workplace Relations and Other Legislation Amendment Bill 1996*, p.37)

67. It is this scheme that the Government now wishes to amend, by withdrawing its application to trading and financial corporations employing up to 100 employees and by limiting its effect in respect of other firms when terminations are wholly or partly for operational reasons. Furthermore, the proposed legislation seeks to override the States in their coverage of those corporations that are not currently covered by the Government's scheme, thereby effectively removing the unfair dismissal rights presently conferred by State legislation. The Bill would exclude the great majority of the Australian workforce from making an unfair dismissal application.

68. The Government's proposal involves a fundamental departure from its policy described in the 1996 Explanatory Memorandum. It would deny employees the right to a "fair go all round". It would also be contrary to the international obligations that are referred to in the Explanatory Memorandum. Australia is a signatory to the *Termination of Employment Convention*. A copy of the Convention is reproduced in Schedule 10 of the Act. The Convention does not permit such an exclusion of employees from the operation of domestic legislation.

While the Commonwealth is not bound by Australian law to implement the terms of the convention, it does contain "obligations", a matter that was recognised in the Explanatory Memorandum.

69. Several points should be made about the current unfair dismissal provisions. An applicant has to show that the dismissal was "harsh, unjust or unreasonable". (The term "unfair dismissal" is generally used to describe these three terms.) In Australia, a major question, but not the decisive question, is whether the employer had a valid reason for the dismissal. The AIRC must have regard to various matters, including whether there was a valid reason for the dismissal related to the capacity or conduct of the employee or to the operational requirements of the employer's business. A *bona fide* redundancy is an example of a valid reason. The legislation makes it plain that other matters may be relevant. A probationary period is available to an employer and an employee who is dismissed in that probationary period cannot make an unfair dismissal claim. The procedures and remedies for the consideration of termination of employment applications are intended to ensure that a "fair go all round" is accorded to both the employer and employee; see section 170CA of the Act.

70. There is a distinction between unlawful terminations and unfair dismissals. (The distinction between a "termination" and a "dismissal" is not significant.) In Australia, unfair dismissal applications are usually heard in an industrial tribunal and are based on an allegation that the dismissal was harsh, unjust or unreasonable. Under the current Commonwealth legislation it is the AIRC that hears and determines unfair dismissal claims. If it is established that a dismissal was unfair, a civil remedy is available. It does not involve a finding that there was a breach of the law. On the other hand, unlawful terminations are terminations that are contrary to an obligation imposed by law. They are claims that are heard and determined in the courts. Employment and anti-discrimination laws usually prohibit termination by reason of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction and social origin. Termination for one or more of these proscribed reasons would be unlawful.

71. The Bill provides that all employers will be bound by the unlawful termination provisions. There have been very few unlawful termination claims prosecuted in the courts under the current legislation. One reason for this is that the unfair dismissals provisions also cover the kind of conduct covered by unlawful termination provisions; for example terminating an employee because she is pregnant would be unjust or unreasonable. Applicants who may have a claim under each kind of provision will nearly always choose an unfair dismissal claim in the AIRC in preference to court enforcement. The higher cost of court proceedings can also be a disincentive to the initiation of unlawful termination claims.

72. One of the difficulties of litigating unlawful termination claims is the need to identify the reason or reasons for the decision to dismiss. For example, was a female employee terminated because she was unable to work a changed shift or because she was unable to work a changed shift because of her parental responsibilities? The reason for the decision may only be found in the mind of the decision-maker. The truth of the matter may not become apparent until a full hearing. The same problem arises when the dismissed employee has reason to

believe that his or her age, gender, race, nationality or religion may have been a reason for the decision to dismiss. (Under unlawful termination provisions it is not necessary to show that the prohibited reason was the only reason for the dismissal.) The fact that there have been very few unlawful termination applications in the past (when unfair dismissal claims have been available) is not an indication of the likely number of future claims of unlawful termination. Indeed, employers may find themselves accused of unlawful termination, or responding to anti-discrimination claims in other tribunals, in circumstances where they would otherwise have been responding to unfair dismissal claims.

73. There have been amendments to the unfair dismissals legislation since it was introduced in 1996. The Senate has rejected some of the proposals. ACCER has been before Senate inquiries into these matters.

74. In a Senate Inquiry into the *Workplace Relations Amendment (Termination of Employment) Bill* 2000 ACCER supported the introduction of amendments that would require the AIRC to have regard to the position of small businesses which do not have access to internal human resource skills. It was an amendment designed to assist small business. Subsequently, legislation was passed requiring the AIRC to have regard to:

> "(da) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
>
> (db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination…" (*Workplace Relations Act 1996*, section 170CG (3))

75. Further proposed amendments in the *Workplace Relations Amendment (Fair Dismissal) Bill, 2002* sought the exemption of those employed by employers who engage less than 20 employees. This is the kind of exemption now being proposed by the Government in respect of employers who engage up to 100 employees. The Bill was rejected by the Senate after an inquiry. ACCER made submissions to that Senate Inquiry. ACCER wrote:

> "…the exemption of small business from the unfair termination of employment provisions is not supported by the ACCER, as it would create injustice and an imbalance in the employment relationship between employers and employees."

76. ACCER's view of the justice of the working relationship was based on Catholic Social Teaching. This justice does not depend upon the size of the employer's business. The size of the business is an arbitrary touchstone for the determination of whether or not the benefits and burdens of unfair dismissal remedies are to apply.

77. Security of employment is a matter of fundamental importance to the security of the family. Families need to be able to plan and to have confidence that the breadwinner will not lose his or her job by an unwarranted dismissal. Employees should be protected from arbitrary and unwarranted dismissals. This is especially so for the low paid and for those who do not have the skills to readily obtain new

employment. The loss of a wage that is barely sufficient to meet day-to-day living expenses will usually have dire consequences for the employee and his or her family.

78. The value of unfair dismissal laws is not only measured in the ability of the dismissed employee to obtain a remedy. Many employers are capable of observing and applying fair procedures even without the threat of legal remedies, but some will not do so unless there are such remedies. The protection that comes from the cultural change in firms that know that they may face an unfair dismissal application should they dismiss an employee harshly, unjustly or unreasonably should not be underestimated. To remove this accountability from an employer, managers and others who have the right to hire and fire, is to put at risk the legal incentive for some firms to undertake fair and just treatment of their employees.

79. It has been claimed that small businesses are inhibited from employing employees because of the difficulties in terminating them when there is a downturn or when they are found to be unsuitable. This misunderstands the provisions of the legislation, including its provisions for engaging employees under a period of probation, and the capacity of employers to engage employees as casuals on short term contracts or as casuals where there is uncertainty about future business operations. The research on the employment impact of unfair dismissals is contentious and not persuasive.

80. There is a further consideration of the kind we referred to earlier in dealing with the minimum wages proposals. As with those proposals, the Government's justification for changes to unfair dismissal laws is the claim that employment opportunities would increase if those changes were introduced. The justification imposes the burden of job creation on those who are in work. Those in work, especially the poor and the vulnerable, should not be required to carry a disproportionate or unnecessary burden in the promotion of employment opportunities. There are other and more just ways of promoting employment by small and medium businesses. Justice for those in employment should not be compromised except in very clear and compelling circumstances. Those circumstances have not been established.

81. The Bill proposes a provision (section 170CEE) whereby an unfair dismissal application must be dismissed if the dismissal was for "genuine operational reasons or for reasons that include genuine operational issues". The term "operational reasons" is broadly defined. This is a provision that will affect the unfair dismissal rights of employees of employers employing more than 100 employees. We have three responses to this proposal. First, under the present law, operational reasons are already taken into account, but those factors are not decisive if other matters are relevant to the determination of the question of whether or not a termination was harsh, unjust or unreasonable. Second, matters other than operational reasons may be relevant. In some cases the termination would not have occurred but for another, non-operational, reason. In some cases an operational change in an organisation is used as an opportunity to dismiss a particular employee or employees. Third, even where there is a termination for operational reasons the termination practice may be so inadequate that the termination should be regarded as unfair. Employees made redundant may not be entitled to any redundancy payment or may only be entitled to an inadequate redundancy package. For these reasons ACCER does not support the proposed

limitation on the making of claims against employers employing in excess of 100 employees.

Proposed changes to unfair dismissal laws

82. There is a case for the making of some procedural changes to the current federal unfair dismissal laws that will reduce the costs of that litigation for employers and employees. We mention two. Many of the claims made to the AIRC are, in substance, claims for relatively small amounts of compensation, which are sometimes associated with claims for unpaid wages or outstanding leave entitlements. These claims can be dealt with in a different way to reinstatement claims and claims for the maximum compensation available under the Act. If these smaller claims can be identified at an early stage they could be heard by way of a "small claims" procedure without the involvement of lawyers or paid agents. This procedure could apply to claims under, say, $10,000. This procedure would present obvious advantages to employers, especially in the minimisation of the costs. Changes could also be made to the requirements for the lodging of applications. In order to facilitate the hearing of claims and to dissuade the lodgement of claims seeking "go-away" money, applicants could be required to file a document setting out a *prima facie* case. In its role as an employer representative ACCER is aware that unfounded claims are made on occasions for the purpose of obtaining "go-away" money. The misuse of the system by people making these kinds of claims should not deny other employees the opportunity to seek redress when they are unfairly dismissed.

The Proposed National System

83. The Bill seeks to establish a national system of employment relations based on the exercise of the corporations power in the Australian Constitution. In this regard the Brief Paper concluded:

> "ACCER is open to the introduction of a national industrial relations system, provided it is supportive of the essential values and principles necessary for cooperative employment relations.
>
> These values and principles are consistent with the achievement of the economic changes that are necessary to provide a strong economy for future generations. There is a need for balance in the relationship between employers and employees so that the objectives and needs of both are respected and supported through the establishment of a genuine partnership in the workplace. The values of society cannot be separated from the values of the workplace." (Paragraphs 190 – 1)

84. The National System proposed by the Bill does not rely on the conciliation and arbitration power in the Australian Constitution, save for various transitional arrangements. The AIRC, established pursuant to that power, will continue in existence but will no longer be dependent upon it. Critically, it has lost the power to conciliate and arbitrate the kinds of industrial disputes and determine industrial matters that it, and its predecessors, have had for over a century.

85. It is proposed that the AIRC will lose its award-making powers in respect of the remuneration for work. The remuneration for work is a subject at the heart of the power to resolve workplace disputes. Moreover, in the exercise of its remaining

functions, the AIRC will be subject to Ministerial direction of a kind that it has never had before. For example, in the proposed section 118 the Minister may specify to the President of the AIRC the time and manner of an award rationalisation process. In this process the Minister is able to give effect to the proposals of the Award Review Taskforce, a body mentioned in the proposed section 90A of the Act, but not otherwise covered by its terms. At page 18 of the Explanatory Memorandum it is stated that "the Government will establish the Award Review Taskforce to examine and report to Government on an approach to award rationalisation…". The Taskforce's functions also extend to the work of the AFPC. Under the proposed section 90A the AFPC is to have regard to any relevant recommendations of the Taskforce when exercising its powers. Among the AFPC's powers is the power to determine new pay and classification scales (proposed section 90ZJ). At page 3 of the Explanatory Memorandum it is stated that the estimated cost of the Award Review Taskforce for 2005-06 is $7.4m.

86. The proposed system confers substantial powers on the government of the day and excludes a role in these important matters for the parties most directly involved: the employers and the employees.

87. The conciliation and arbitration system has been an important part of Australian economic and social life for over a century. It has been an independent umpire, subject to control by the High Court, and obliged to observe the rules of natural justice in resolving disputes between employers and employees. The value of the Australian system of dispute resolution was recognized by Pope John Paul II in a speech made on his visit to Australia in 1986:

> "Australia has a long and proud history of settling industrial disputes and promoting co-operation by its almost unique system of arbitration and conciliation. Over the years this system has helped to defend the rights of workers and promote their well being, while at the same time taking into account the needs and the future of the whole community." (Address to workers at the Transfield factory, Parramatta, 26 November 1986)

88. In 1993 the Bishops Committee for Industrial Affairs made the following observation on that passage:

> "Whatever changes need to be made to the mechanics of the conciliation and arbitration system, it should be ensured that these principles are preserved." (*Industrial Relations - The Guiding Principles*, page 5)

89. As we have noted, ACCER has been open to the introduction of a national industrial relations system, provided it is supportive of the values and principles necessary for cooperative industrial relations. Such a system must provide a fair and proper balance between employers and employees. It must also provide fairness and protection for the poor and the vulnerable, whether employed or unemployed, for working families and for young persons. We have considered the major features of the Commonwealth's proposals for the purpose of determining whether they meet these criteria. We are not satisfied that they do.