Australian Lawyers for Human Rights

Submission to Senate Employment, Workplace Relations and Education Committee

Re: *Workplace Relations Amendment (Work Choices) Bill 2005*

Introduction

1. The Workplace Relations Amendment (Work Choices) Bill 2005 seeks to implement significant changes to the *Workplace Relations Act 1996* to amend the law in relation to work place relations between employers and employees, independent contractors and their representatives.

2. The Bill was released on 1 November 2005 and submissions to the Senate Legal & Constitutional Committee are due on 9 November 2005. Due to the constraints of time and the volume of the Bill (some 691 pages), Australian Lawyers for Human Rights (**ALHR**) proposes only to comment on a few aspects of the Bill. ALHR does not suggest, by our absence of comment on other aspects of the Bill, that those other aspects are, or are not, compliant with Australia's international human rights obligations.

3. ALHR wishes to draw the Senate Committee's attention to the following aspects of the Bill due to their impact on the protection of human rights in Australia:

   (a) The limitation on the availability of redundancy or severance pay;

   (b) The prohibition on the making of unfair dismissal claims where termination is for operational reasons;

   (c) The prohibition on the making of unfair dismissal claims where the employer employs less than 100 employees;

   (d) The ability of employers to make the entering of an AWA a condition of employment;

   (e) The penalty of 12 months imprisonment for the making of comments about Commission members; and

   (f) The restrictions on the conducting of ballots and taking of industrial action.

4. ALHR is concerned to protect the rights of Australians as enshrined in international instruments. ALHR is concerned that the Bill either expressly impacts on some rights or, by ambiguous terms or an absence of express terms, possibly renders many rights hollow or unenforceable.

Redundancy or severance pay

5. The Workplace Relations Amendment (Work Choices) Bill 2005 limits the availability of redundancy or severance pay to those employees who are employed by an employer of 15 or more employees and only where the term is included in the award or agreement.

6. Proposed section 116 sets out the terms that may be included in an award (allowable award matters). Sub-section 116(1)(i) provides that redundancy pay within the meaning of subsection (4) is an allowable award matter. Proposed subsection 116(4) provides that:

   "***redundancy pay*** means redundancy pay in relation to a termination of employment that is:
   (a) by an employer of 15 or more employees; and
   (b) either:
   (i) at the initiative of the employer and on the grounds of operational requirements; or
   (ii) because the employer is insolvent."

7. The Bill also deletes Subdivision D of Division 3 of Pt VIA of the *Workplace Relations Act 1996* which gave effect, *inter alia*, to Article 12 of ILO (No. 158) Termination of Employment Convention 1982. Section 170FA, which is presently found in Subdivision D, is the section under which applicants have been able to seek orders from the Commission for severance pay consistent with community or industry standards where such an entitlement was not provided for in the relevant award or agreement.

8. Further, the Bill, by proposed section 119A(4), limits the ability of the Commission to vary awards only in circumstances where the variation is essential to the maintenance of minimum safety net entitlements (which, under proposed section 89 does not include redundancy pay) and, relevantly, where the variation would provide only minimum safety net entitlements. Therefore, an employee, or representative, could not seek to vary its award to provide for redundancy pay, as was done for HIH employees.

9. The effect of these three amendments is that an employee is only entitled to redundancy pay if it is contained as a term in his or her award or agreement and if he or she is employed by an employer of 15 or more people. A practical example of this change is that the former employees of HIH could not have received their redundancy entitlements out of the liquidation pool as the majority of HIH employees did not have the entitlement to redundancy pay contained in their contracts or their award.

10. The rights of employees on termination of their employment are set out in the ILO Termination of Employment Convention 1982. Article 2, clause 4 provides that any arrangements between employers and workers which govern the terms and conditions of employment must provide protection which is at least equivalent to the protection afforded under the Convention. Article 12 of the ILO Termination of Employment Convention 1982 provides that a worker whose employment has been terminated shall be entitled to a severance allowance calculated on the length

of service and the level of wages or benefits from unemployment insurance or assistance or other forms of social security.

11. The absence of redundancy pay as a minimum safety net entitlement, together with the three amendments set out above, is in breach of Article 12 of the ILO Termination of Employment Convention 1982.

Unfair Dismissal – operational reasons

12. The Workplace Relations Amendment (Work Choices) Bill 2005 proposes the addition of subsection 170CE(5C). The subsection proposes to prohibit applications being made under section 170CE for relief against unfair dismissal on the ground that termination was harsh, unjust or unreasonable if the employee was terminated for genuine operational reasons or reasons that include genuine operational reasons.[1]

13. "Operational reasons" is defined in proposed subsection 170CE(5D) as reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business or part thereof..

14. Under proposed section 170CEE, the Commission must hold a hearing to deal with the operational reasons issue before taking any further action in relation to the application. If the Commission is satisfied that the operational reasons relied on by the employer were genuine, the Commission must dismiss the application.

15. Article 4 of the ILO Termination of Employment Convention 1982 does allow for termination on the basis of operational requirements. However, ALHR submits that this article should be read in conjunction with articles 9 and 13 of the Convention. Article 9, clause 3 provides that in cases of termination stated to be for reasons based on operational requirements, the Commission should be empowered to determine whether the termination was indeed for these reasons. It further provides that a country can determine the extent to which a body such as the Commission shall also be empowered to decide whether these reasons are sufficient to justify that termination.

16. ALHR expresses concern that the drafting of proposed section 170CEE is ambiguous and open to interpretation that breaches Australia's obligations under the ILO Termination of Employment Convention 1982. Firstly, proposed s.170CEE is open to interpretation that the Commission is not empowered to enquire whether the termination was for reasons of operational requirements, in breach of article 9. One reading of the section suggests that the Commission's power is solely to determine whether the operational reasons were genuine subject only to a respondent moving for the dismissal of an application on the grounds that termination was for operational reasons or to an appearance to the Commission on the face of the materials that termination may have been for operational reasons. That is, that the Commission must act without proper inquiry into whether or not termination was truly for operational reasons. Secondly, the

[1] ALHR notes that the subsection does not apply to other grounds on which relief for termination may be claimed under s.170CE or, for example, s.170CK. ALHR would strongly oppose any limitation being placed on an employee's ability to apply for relief under s.170CK as it would clearly contravene article 5 of the ILO Termination of Employment Convention 1982.

meaning of "genuine" is unclear. On the one hand it could exclusively mean that the employer honestly believed there was an operational reason for the termination. It could also mean that the operational reason did truly exist. Or it could mean that the operational reason did truly justify the termination.

17. ALHR further expresses concern because proposed s.170CEE allows an application for unfair dismissal to be dismissed where an operational requirement was but one of many reasons for the employee's dismissal. If, for example, the employee's alleged conduct or performance was the main reason for termination and the operational reason was a minor reason, unless the employee can make an application under a different ground, the employee will have no recourse to challenge the dismissal even if the employee was not afforded an opportunity to defend himself or herself or could prove that the allegations relating to their conduct or performance were untrue. This would offend articles 7 and 8 of the ILO Termination of Employment Convention 1982.

18. For the above reasons, ALHR suggests that the provisions of the Bill be amended to clearly provide that the Commission can only dismiss or void an application for unfair dismissal based on s.170CE(1)(a), being the harsh, unjust or unreasonable ground, under proposed s.170CEE, if the Commission is satisfied that:

    (a) The employee was terminated substantially for the reason of operational requirements;

    (b) The operational requirements relied upon did exist at the time of the termination, or were very likely to exist in the near future; and

    (c) The operational requirements did justify the employee's termination.

19. ALHR further expresses concern that the proposed amendments in relation to "operational requirements" are not in compliance with article 13 of the ILO Termination of Employment Convention 1982. By section 144 of the Bill, Subdivision D of Division 3 of Part VIA is deleted from the *Workplace Relations Act 1996*. This subdivision allowed persons to apply to the Commission for orders giving effect to Article 13 of the Convention. ALHR submits that the retention of Subdivision E, with the insertion of proposed subsection 170GA(2A), is not sufficient to comply with Article 13.

20. Article 13 of the ILO Termination of Employment Convention 1982 provides that where an employer contemplates terminations for reasons of economic, technological, structural or similar nature, the employer must give notice in good time to relevant representatives and provide an opportunity for consultation. While the remaining subdivision E allows persons to apply to the Commission if this does not occur, sub-section 170GA(2A) significantly limits the types of orders that the Commission can make on such an application. ALHR suggests that the limitation is to such an extent that breach by an employer of article 13 for failing to give notice or consult will be met with no real sanction and will provide no real deterrence to employers. The subdivision, if amended as proposed, will do no more than provide lip service to article 13 of the Convention. ALHR submits that the Bill should be amended to either reduce the limitations placed on the orders

available to the Commission or, alternatively, to impose a civil penalty on employers who breach the section.

Unfair Dismissal – 100 employees

21. The Workplace Relations Amendment (Work Choices) Bill 2005 further proposes the addition of subsection 170CE(5E). The subsection proposes to also prohibit applications being made under section 170CE for relief against unfair dismissal on the ground that termination was harsh, unjust or unreasonable if the employer employed 100 employees or fewer at the time the employee was given a termination notice or when the employment was terminated, whichever happened first.

22. Proposed section 170CEA(5)(c) provides that the Commission must void an application if it is satisfied that subsection 170CE(5E) applies. Under proposed s.170CEA(6), the Commission is not required to hold a hearing before taking such action. The section does not provide the evidence upon which the Commission can take such action or where the onus of proof lies.

23. The prohibition under proposed subsection 170CE(5E) offends articles 8 and 9 of the ILO Termination of Employment Convention 1982. Article 8 provides that an employee who considers that his or her employment has been unjustifiably terminated shall be entitled to appear against that termination to an impartial body. Article 9, clause 1 provides that the impartial body, being the Commission in Australia, shall be empowered to examine the reasons for termination and other circumstances relating to the case and to render a decision on whether the termination was justified. ALHR submits that no exemption based on the size of the employer is permitted under the Convention.

24. Further, ALHR suggests that proposed subsections 170CEA(5) and (6) may breach article 9, clause 2 which provides that the burden of proving the existence of a valid reason for the termination shall rest on the employer. If the exemption under s. 170CE(5E) remains in the Bill, ALHR submits that s.170CEA(5) and (6) should be amended to clearly provide that an employer has the onus of proving the number of people employed by them and that the employee has an opportunity to dispute that matter.

Entering into AWA's and the right to collectively bargain

25. The Workplace Relations Amendment (Work Choices) Bill 2005 provides, under proposed section 104, that a person must not do, or refrain from doing, certain things with the intent to coerce another person to agree or not agree to enter into a collective agreement, nor shall a person apply duress in connection with an AWA. Proposed sub-section 104(6) provides that an employer does not apply duress to an employee merely because an employer requires an employee to make an AWA as a condition of employment.

26. Section 170CK(2)(g) provides that an employer cannot dismiss an employee for refusing to sign an AWA. However, notably, proposed section 254 does not list refusal to sign an AWA as a prohibited reason for the purposes of section 253. Proposed section 253 provides that an employer must not dismiss an employee

and, *inter alia*, refuse to employ a person, for a prohibited reason. As a result of the combined effect of proposed section 104 and 254, an employer will be entitled to refuse to employ a person on the basis that the person refuses to sign an AWA, for example because they wish to sign a collective agreement.

27. This clearly offends the right to collective bargain. Article 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work enshrines the right to collective bargaining.

28. ALHR suggests that the Bill should be amended as follows:

    (a) Proposed section 253(1)(d) should read: "refuse to employ a person as an employee"; and

    (b) Proposed section 254(1) should include a subsection that provides that conduct is for a prohibited reason if it is carried out because a person refuses to sign an AWA or insists on signing a collective agreement.

Freedom of expression

29. Proposed section 299(5) makes it an offence if a person publishes a statement, the statement implies or expressly states there was misconduct by a member of the Commission in relation to the performance of the functions of the Commission, there was no such misconduct and the publication is likely to have significant adverse effect on public confidence in the Commission.

30. The penalty for the proposed offence is imprisonment for 12 months.

31. Article 19 of the International Covenant on Civil and Political Rights (**ICCPR**) provides:

    "1. Everyone shall have the right to hold opinions without interference.
    2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
    3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    (a) For respect of the rights or reputations of others;
    (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

32. ALHR suggests that the proposed offence unjustifiably restricts a person's right to freedom of expression. Firstly, there is already sufficient protection for members of the Commission either via defamation laws or contempt laws. In addition, ALHR suggests that before a person's right to freedom of expression can be restricted, clear and unambiguous language must be used so that every person knows the exact limits placed on their freedom. The term "misconduct" is ambiguous and undefined and should be clearly defined if the offence is to remain in the Bill.

Restrictions on conducting of ballots and industrial action

33. The Workplace Relations Amendment (Work Choices) Bill 2005 provides for a differential treatment in the conducting of ballots.

34. Proposed section 98C(2) provides that for an employer to get a collective agreement approved, an employer must give all persons who will be subject to the agreement reasonable opportunity to consider the agreement and then obtain majority approval by vote or otherwise. There is no restriction on the way in which the employer can obtain majority approval. In particular, there is no requirement that the employer conduct a secret ballot to obtain such an approval.

35. In contract, proposed Division 4 of Part VC requires a union to obtain approval by secret ballot before industrial action can be considered protected action under the Part. Proposed Part VC imposes further lengthy requirements before industrial action will be protected action.

36. ALHR expresses concern that the lengthy requirements, when considered with the differential treatment given to employers who require employees' approval, infringe on the right of trade unions to function freely and the right to strike, both of which are found in Article 8, clause 1 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

37. Proposed section 108A provides that industrial action is not protected action if it is engaged in to support or advance claims to include prohibited content in the collective agreement. Prohibited content is not defined in the Bill and section 101D provides that it will be defined under regulation. ALHR is unable to comment on the as yet unreleased regulation, but ALHR expresses concern that the proposed section may also infringe the right to strike.

38. Proposed section 108C provides that industrial action is not protected action if it is engaged in in concert with persons who are not protected persons, or organised other than by persons who are solely protected persons. Proposed subsection 108C(3) defines protected persons to include those organisations of employees who are negotiating the collective agreement with the employer. The provision may prevent federations of unions from assisting in organising industrial action. ALHR suggests that this proposed exclusion from protected action infringes on the right of trade unions to establish national federations or confederations, the right of trade unions to function freely and the right to strike, all found in Article 8 of ICESCR.

39. Further, proposed sections 101 and 110 and 110A, in combination, essentially prohibit strikes for 5 years after the entry into agreements (other than greenfields agreements). Proposed s. 101 provides that the nominal expiry date for agreements (other than greenfields agreements) is either the nominal expiry date agreed or the 5th anniversary of the agreement. Proposed sections 110 and 110A provide that industrial action cannot be taken until after the nominal expiry date has passed. These provisions also clearly offend the right to strike contained in Article 8 of ICESCR.

Miscellaneous

40. ALHR expresses concern that the minimum safety net entitlements are not sufficient to adequately protect the right of every person to the enjoyment of just and favourable conditions of work as protected by Article 7 of ICESCR. It is concerning that provisions such as protecting the regularity of rest breaks or public holidays are not provided for in the minimum safety net entitlements.

41. In addition, ALHR expresses concern that proposed section 116B prohibits awards from setting restrictions on the duration of training arrangements. ALHR is concerned that this may allow employers to employ youth under a training arrangement for unreasonable periods. This may breach Article 10(3) of ICESCR which recognises that children and young persons should be protected from economic and social exploitation.

In summary

42. ALHR encourages the Senate Committee on Employment, Workplace Relations and Education to carefully consider the full impact of the Workplace Relations Amendment (Work Choices) Bill 2005 on the rights of Australian workers as protected under international law.

43. We attach to the back of this submission the full text of the articles referred to in the submission.

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9 November 2005

International Covenant on Economic, Social and Cultural Rights

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

ILO Declaration on Fundamental Principles and Rights at Work
86th Session, Geneva, June 1998

Article 2

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

C158 Termination of Employment Convention, 1982

Article 2

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5

The following, inter alia, shall not constitute valid reasons for termination:

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;

(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

(e) absence from work during maternity leave.

Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term ***the workers' representatives concerned*** means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

International Covenant on Civil and Political Rights

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.