Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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INTRODUCTION

UnionsWA is the peak body for the union movement in Western Australia. UnionsWA represents 43 affiliate unions and approximately 150,000 union members in Western Australia.

We support and endorse the submission made by the ACTU to this Inquiry. We do not intend to repeat in detail those submissions. We have a number of general comments to make about the WorkChoices Bill (the Bill), in particular on the transitional arrangements as they relate to "excluded" employers and employees currently in the federal system and employers and employees currently covered by State Awards and Agreements.

If we have not mentioned a specific matter, it does not mean that we support it or do not have concerns about that matter. For example, we have not made specific submissions on the restrictions on union right of entry or the right of employees to take industrial action. We condemn the restrictions on right of entry and industrial action as removing from unions and employees fundamental civil rights of freedom of association. We have also not specifically addressed the AFPCS about which we also have concerns.

Overall, we oppose the Bill and its provisions. We do not believe the Bill is in the best interests of Australian workers or the Australian community. The combined effect of the provisions of the Bill is to dramatically shift the balance of power in employment relations to employers at the expense of employees.

It is not sufficient to suggest that employees can rely on skills shortages or an aging population for bargaining power in the new regime. Only a portion of the Australian workforce can ever rely on such a circumstance to assist in balancing bargaining power. The rest of the workforce is left unassisted by the provisions of the Bill. The Bill, if legislated, will drop the bottom out of the safety net which vulnerable employees rely on for fair wages and conditions. Vulnerable employees will be left open to exploitation. The Bill is essentially unfair in that it leaves the most vulnerable employees exposed to reductions in their wages and conditions.

We fear for the impact this legislation will have not just on individual employees but on the fabric of our nation. We fear a growing underclass of the working poor. This will no doubt include vulnerable employees, such as youth, women, people from non-English speaking backgrounds, disabled workers and indigenous workers, working for low wages and poor conditions. We fear the slow breakdown of our communities with an ever increasing pressure to work harder and longer with less time for family and the broader community. We fear an ever increasing gap between rich and poor, the people that will inevitably benefit from these changes through increased profits and those that will suffer.

We believe government's have a duty to pass laws that protect the most vulnerable not laws that increase vulnerability and opportunities for exploitation. For these reasons we oppose the Bill.

GENERAL COMMENTS ON THE WORKCHOICES BILL

Overly complex and legalistic

The WorkChoices Bill ("the Bill") is neither simpler nor fairer than the system it seeks to change. The Bill's provisions are overly technical and legalistic and are not user friendly for either employees or employers who will have to apply them. Furthermore, the Bill is extremely prescriptive in curtailing the rights of ordinary employees.

A simple example of this overly technical approach is the Parental Leave Provisions starting on page 121 of the Bill. The Parental Leave provisions are 39 pages long. The Western Australian *Minimum Conditions of Employment Act* and WA State awards manage to draft parental leave provisions which are only 4-5 pages long. The Bill's parental leave provisions demonstrate a lack of trust in employees and employers and seek to cover a myriad of potential happenings in a legalistic manner rather than providing a simple framework for parental leave.

Another example of the complexity and confusion in the bill relates to determining applicable wage rates - a fundamental issue of importance for employees and employers alike. The wages provisions are extremely complex. The interrelationship between "preserved Australian Pay Classification Scales", "new Australian Classification Scales" and award or transitional agreements is confusing and even more so for people who change jobs. As with many of the provisions of the Bill the employees who will have the most difficulty in determining their wages rates under this scheme are the award-reliant employees or award free employees who by their very nature are some of the most vulnerable in the workforce. Such employees and their employers will have to navigate various parts of the new Act to determine one of the most basic terms of their employment, their wage rate.

We refer in more details to the confusing nature of the transitional provisions below.

Restriction in Agreement making

The Bill acts to restrict collective bargaining, a fundamental civil right under international law. The government has stated its intention is to encourage the use of AWAs and in doing so it places extraordinary restrictions on collective bargaining. Collective agreements can play an important role in protecting vulnerable workers and providing certainty for employers. We refer the Inquiry to the majority's Report on the Inquiry into Industrial Agreements and its findings that:

- Most employees are in a weak bargaining position;
- Employees on individual contracts have an inherently weaker bargaining position, and inherently weaker power, than workers on collective agreements; and
- Employees under collective agreements have higher wages and better conditions than employees on individual agreements.

One of the fundamental flaws in the government's rhetoric is the use of word "choice". Employees have no choice if they want a collective agreement. Only the employers under WorkChoices have a choice of which industrial instrument will cover their employees. There is no requirement on an employer to negotiate collectively with their employees if the employees wish to do so.

In fact section 103R provides that if an employee is covered by a workplace agreement, collective or individual, and that agreement ends, the employee falls back to the AFPCS. This provides an enormously powerful bargaining tool for the employer at the expense of the employee, particularly combined with section 103L providing for unilateral termination of an agreement after 90 days. An employer can simply refuse to collectively bargaining and their employees will either be left on the AFPCS or take an AWA if the employer is offering one.

The Bill's terms restrict collective bargaining in other ways including by restricting matters that can be included in a collective agreement (section 101D), and restricting the ability to refer to other employment instruments (section 101C). The Bill leaves the specific matters that are to be prohibited content for collective agreements to regulations. It is of great concern that such matters should be left to regulations. Regulations should not be used in such a manner, particularly given the penalties for even considering prohibited content for an agreement.

UnionsWA notes for the Inquiry's information that the WA legislation introduced in 1993 had similar provisions as to those proposed under WorkChoices. The WA legislation, similar to WorkChoices, established independent contracts that undermined award safety net provisions and stripped away employee entitlements to a range of conditions of employment including overtime, weekend penalties, public holiday leave or payment at public holiday rates.

Workers in the WA system saw over a 50% increase in hours. Over 54% of individual agreements eliminated penalty rates for evening, weekend and public holiday work and over 40% of agreements eliminating penalty rates for overtime. Furthermore, 87% of agreements did not contain any productivity incentives. The WA experience demonstrates that the system of agreement making in the Bill will disadvantage many employees.

<u>Destruction of award safety net</u>

The system of awards in Australia has played an important role in maintaining an effective safety net of wages and conditions for Australia's most vulnerable workers. The Bill removes the role of awards as a safety net of wages and conditions and effectively renders awards obsolete.

Most of the employees that currently are covered by awards, either federal or state, generally do not have the bargaining power to ensure fair wages and conditions in any form of agreement. These workers are thus vulnerable to having their wages and conditions reduced to the AFPCS, a significant reduction in conditions.

Section 103R mentioned above, signals the end of the award safety net for those who are in a weak bargaining position. If an employee who is currently

covered by an award becomes covered by a workplace agreement, either collective or individual, there is no going back to the award. As women make up over 60% of award reliant employees, the Bill will have the effect of severely reducing the wages and conditions of many women in the workforce.

The Bill as a whole

We do not propose to make submissions on the matters specifically referred to in paragraph 2 of the terms of reference for this Inquiry. However, the provisions of the Bill must all be considered as a whole and the relationships and combined effects of all the different provisions must be appreciated. For example, the agreement making provisions and the removal of unfair dismissal laws combine to disenfranchise employees with little bargaining power in protecting their wages and conditions. An employee with few skills or an employee from a non-English speaking background, for example, will be vulnerable to accepting an agreement with lower wages and conditions if they know their employment is not secure. Furthermore, despite legal protections against coercion, such an employee is unlikely to be able to access any remedies against such behaviour.

Another example of the interconnection of provisions of the Bill relates to the restrictions on collective bargaining discussed above in conjunction with the severe restrictions on unions accessing workplaces and the draconian limitation on the right to take industrial action, which all combine to disenfranchise employees from collective agreement making with union involvement.

Discriminatory implications

Western Australia has the worst gender pay gap in Australia at over 25%. That is on average women earn 25% less than men in WA. Nationally the gender pay gap is about 16%. Research has shown that the gender pay gap is not explained by the mining industry in WA. In the 1990s in WA when the then coalition government introduced similar legislation with respect to agreement making and the removal of the award safety net, the gender pay gap in WA grew significantly. It is likely that a similar experience will happen for women more generally with the provisions of this Bill. Furthermore, section 170BAC of the Bill rules out the most effective means of addressing pay equity, that is, through work value cases for low paid workers. The federal pay equity provisions have proved ineffective compared with some of the state provisions in any event and with the attempt to take over the State systems, women workers are left with no alternative to seek genuine pay equity.

The Bill is discriminatory in parts. For example, the Bill does not include the provision from the Work and Family test case to allow women to return to work part-time after a period of parental leave. In fact the non-allowable award matters specifically exclude such a provision from federal awards. A refusal to allow parents returning from parental leave on part-time basis is a form of sex discrimination. Furthermore, the AFPCS do not recognise same-sex relationship and as such same-sex couples in WA face losing entitlements such as parental leave.

TRANSITIONAL ARRANGEMENTS

This Bill will not create a national industrial relations system. The WA Department of Consumer and Employment Protection estimates at least 40% of WA employees will fall outside the scope of the Bill. Such a figure represents a significant portion of employers as well as employees.

We also note the attempts by the Bill to interfere with non-federal employees with respect to industrial action (section 111(2). Such incursions into the jurisdiction of the state industrial relations systems are unjustified and arrogant.

The transitional provisions both for "excluded" employers currently in the federal system and for State awards and agreements that fall within the new federal system are extremely complex. We believe that there will be enormous confusion for a number of years for these employers and employees as well as those who will be forced into the federal system.

The first question that needs to be considered by employers and employees alike is whether they fall within the definition of employer and employee in the Bill, that is, whether or not they are or are not employed by a constitutional corporation. It is no easy task to determine whether an employer is a constitutional corporation and falls within the definition of employer at section 4AB. Whether or not an organisation is a constitutional corporation is a question that occupies the minds of High Court judges on a not infrequent basis. It is a question which requires the application of a highly legalistic test. It is beyond the means of many employers and employees to make such a determination accurately. The question of what instrument covers your employment, or what system you should be in, should not be so complicated for so many.

<u>"Excluded" Employers and their Employees</u>

The provisions in the new Schedule 13 relating to transitional awards, particularly in relation to excluded employers are complex and confusing.

"Excluded" employers will potentially end up with different employment instruments in different jurisdictions covering different workers in their workforce. Under Schedule 13 new employees of an excluded employer will not come under the coverage of the transitional award. So there is the potential for not only inequity but confusion as to applicable conditions and rights for different workers for the same employer.

Section 5 makes it even more complicated to determine who is covered by the transitional award by providing, for example, that if an employee is covered by the award by virtue of membership of an organisation and leaves that organisation they are no longer covered by the award.

As well as the complication of determining who is covered by the transitional award, these awards are only able to be varied in limited circumstances which will be only to remove conditions. Essentially, employees under these awards will have their wages fixed for a period of up to 5 years and conditions unable to be improved in any way. The restriction on the powers of the Commission to

resolve disputes relating to the award are so restrictive as to ensure the award does not change except to remove non-allowable matters.

If an employer ceases to be bound by a transitional award pursuant to sections 58 or 59, it is questionable where that then leaves the employee and their terms of employment. The potential for confusion is huge.

State Awards and Agreements

For those employers and employees who are currently in the state system but will be forced into the federal system the situation is even more complicated. The first step is to determine whether they are covered by the federal system. Then there is the deeming of their State industrial agreements or awards as transitional or notional state agreements.

Employers and employee used to dealing with the state industrial relations system will find themselves faced with a massive new piece of legislation to try and understand and a new and very prescriptive industrial relations system.

Similar to “excluded” employers on preserved federal awards, employers covered by transitional or notional federal agreements are likely to have employees covered by more than one employment instrument. As the preserved state agreement or national agreement will only cover those employees whom it covered at the reform commencement and not new employees. New employees would be covered by other workplace agreements or the AFPCS. This is a recipe for confusion.

Employees covered by transitional or notional federal agreements will potentially have no wage increase for 3 years. Their conditions will also remain the same, except to the extent that conditions will be removed from these agreements.

Employees who entered into state agreements in good faith will lose conditions from those agreements when they become preserved state agreements (section 15). This shows contempt for the agreement making process between employers and employees at the state level.

Furthermore, the process for removing conditions of employment for employees under transitional and notional agreements is carried out as an administrative function by the Employment Advocate. There is limited scope for employees to make representation these matters. This represents a denial of natural justice in a circumstance where a person’s rights are being removed.

Employees under these transitional and notional agreements are after the period of three years then vulnerable, as are most employees in the new federal system, to being forced to accept inferior wages and conditions in new workplace agreements or dropping back to the AFPCS.

The Bill effectively abolishes award protection for all State system employees being forced in to the federal system.

CONCLUSION

Given the time frame provided to make a submission to this Inquiry and given the length and complexity of the Bill itself, our submission is not in any way comprehensive and can only deal with some of our issues of concern. There are many more issues of grave concern in the Bill. The Bill represents a dramatic change to the regulation of workplace relations in Australia. As such it deserves a comprehensive inquiry and the opportunity for all interested parties to be fully heard on their concerns.