

# Submission

to

Senate Employment, Workplace Relations and Education  
Legislation Committee

## **Inquiry into the Workplace Relations Amendment (*WorkChoices*) Bill 2005**

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## Introduction

The Finance Sector Union of Australia (FSU) welcomes the opportunity to contribute to the Inquiry into the Workplace Relations Amendment (*WorkChoices*) Bill 2005.

The FSU submits that the *WorkChoices* Bill represents the most savage attack on employees ever perpetrated. In launching the attack, the Government has failed to make any sort of compelling case for the changes. Many of the purported 'protections' in the bill will be less than what currently exists. We also note that the timelines for reviewing and debating the massive amount of detail of the proposed amendments are farcical.

The FSU represents 60,000 members employed in the finance sector across Australia and exists for the purposes of providing a collective forum for them in pursuing fairness in their employment and improvements to their working conditions. Clearly, to achieve these ends, the FSU has a real interest in the proposed amendments.

Contrary to the stated purpose of the Bill, the FSU submits that the outcome of the proposed legislation will be to further concentrate power in the hands of already powerful employers, exacerbating the current power imbalance, further disempowering employees and undermining protections and entitlements won gained over one hundred years by Australian workers in the pursuit of a just and fair society to be enjoyed by all.

Our submission will discuss the following issues:

1. Background – characteristics of the modern finance sector
2. The power imbalance – Case studies in the finance sector
3. Effects of the proposed amendments
4. Skills investment
5. Balancing Work and Family and Hours of Work
6. Summary/Conclusion

## Background

Modern workplaces, particularly in the finance sector, are characterised by considerable power imbalances between employers and employees. Major employers in our industry are large corporate entities with massive economic, legal and human resources at their disposal. Over the last decade, the market capitalisation share of the finance and insurance sector has more than doubled from 17.9 % to 36.7%, now surpassing both resources and manufacturing in capitalisation and stock-market dominance terms.<sup>1</sup>

For over a decade, workers in the finance sector have been experiencing changes that have dramatically changed their working lives. Deregulation, technological change, globalisation and off-shoring have resulted in bank branch closures, mergers and takeovers, job losses, decreasing staff levels and increasing workloads. The effects of

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<sup>1</sup> The Financial Services Education Agency Australia  
(<http://fseaa.com.au/financialServicesIndustry.cfm>)

these changes on finance sector workers have been compounded by radical shifts in forms of employment and an increasingly deregulated industrial relations system.

Most finance sector employees are on low wages<sup>2</sup> with limited job security and low skills. Consequently they have very little workplace bargaining power as individuals when compared to employers such as banks and insurance companies. The notion of a 'level playing field' during negotiations between a major bank and an individual worker is illusory and illogical.

The FSU is fundamental in helping to address this power imbalance by providing a collective forum for employees. Through this collective, employees are able to negotiate, and be party to, awards and agreements that protect their conditions at work. Despite this, the sector continues to witness a growing trend by employers to try and contract employees out of award and collective agreement arrangements, through coercive and illegitimate means, which seek to reduce employment benefits. The continued push by many of the major finance sector companies to have employees sign AWA's will ensure that the power imbalance will be ongoing and will increase.

Many employees join the FSU as a form of insurance for their employment because they recognise the power imbalance inherent in the employment relationship. In recognition of this imbalance, most union members want access to paid union officials, not just for their expertise, but because they are not subject to the constraints of the employer-employee power relationship.

Unfortunately, we have witnessed the disregard adopted by employers in our industry for their employees, their customers and their community. The race to outbid one another, particularly in the banking sector during the mid to late nineties, on the number of jobs and branches they could shed to gain an immediate positive response from the 'market' was done without regard for the social impact of such decisions.

The finance sector continues to enjoy record profitability under the current IR regime and yet is ever anxious to engage in short term, cost cutting measures. A recent example of this was the NAB announcement in May that 2,000 Australian jobs would be shed despite delivering a first-half net profit to \$2.5 billion– this move was even questioned by the Federal Treasurer.<sup>3</sup>

Long hours of work, understaffing and increasing sales targets are all features of the modern finance sector workplace that make balancing work and family life increasingly difficult and underline the need for a strong safety net.

Given the disregard adopted by the finance sector for their employees we fully expect the proposed amendments to be used for further cost cutting through reducing terms and conditions and increasing the exploitation of workers in our industry.

Regulatory frameworks should aim to protect and promote the public good, and encourage good corporate behaviour – the FSU submits that the proposed Bill will achieve none of these outcomes.

It is clear to the FSU and its members that the measures proposed by these amendments will have dire consequences for finance sector workers and their families. The emphasis on individual agreements, the undermining of collective

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<sup>2</sup> Most bank tellers earn less than \$35,000 p.a.

<sup>3</sup> Sydney Morning Herald – May 12, 2005

bargaining and collective representation, the attack on award safety nets and the diminution of the role of the AIRC under the proposed legislation, will leave workers vulnerable. At worst, workers will be more at risk of exploitation by unscrupulous employers attempting to save costs by reducing wages and conditions, and at best, the right of all workers to access information, advice and representation, will be severely undermined.

## **The power imbalance – case studies in the Finance Sector**

The current IR framework already places a large amount of power in the hands of employers. The following examples demonstrate how this power has been used to circumvent negotiations or to prevent them taking place, and how difficult and protracted it can be to obtain remedies for employees under the current system – the proposed amendments will only grant employers more authority and make redress more difficult for employees.

The first three examples are from the Commonwealth Bank which employs approximately 29,000 employees in Australia. The majority of those CBA staff, (around 19,000) are employed under enterprise agreements collectively negotiated between FSU and the Bank. The FSU represents the majority of staff employed in Australia within the Commonwealth Bank Group.

### ***Case Study 1: Collective Bargaining: Commonwealth Insurance Limited***

Commonwealth Insurance Limited (CIL) is a wholly owned subsidiary of the Commonwealth Bank Group and employs around 150 staff. In early September 2003 CIL offered its employees a new non-union certified agreement pursuant to section 170LK of the *Workplace Relations Act 1996* (Cth) (WR Act).

In response to FSU member concerns regarding the terms and conditions contained in the draft certified agreement, FSU notified the Australian Industrial Relations Commission (AIRC) of its intention to seek a certified agreement with CIL pursuant to section 170LJ of the WR Act and initiated a bargaining period. On 15 October employees rejected the CIL offer of an LK Agreement by 51 votes to 41 with 61 employees abstaining.

On 27 October 2003 FSU wrote to CIL management with a petition signed by 95 of their employees (a clear majority of staff) requesting that they meet with their employees to discuss the terms and conditions to be included in any new certified agreement.

By mid November 2003 CIL management had failed to respond to their employee's request, consequently FSU sought the assistance of the AIRC through conciliation pursuant to the WR Act. At the conclusion of the conciliation conference, Vice President Lawler recommended that CIL management meet with its employees to discuss their terms and conditions of employment.

Shortly after the conciliation conference, FSU officials and employee representatives met with CIL management and requested that they enter into enterprise bargaining agreement negotiations with FSU. This request was consistent with CIL employees' rejection of CIL's non-union agreement; however CIL management refused to do so despite the clear wishes of its staff. CIL management agreed to not offer employees AWAs.

FSU entered negotiations on 1 April 2004 seeking an LJ agreement with CIL which provided CIL employees with terms and conditions equal to those enjoyed by their colleagues performing similar roles throughout the Commonwealth Bank Group.

On the first day of negotiations FSU became aware that CIL had offered every one of its employees individual agreements pursuant to clause 12 of the expired Commonwealth Insurance Limited Staff Partnership Agreement 2002 – 2003 indicating that signing the individual agreements was the only way in which employees would receive a pay rise and conditions more closely aligned with the CBA part of the Group.

Staff believed their only option was to accept the offer made by CIL management despite the clear preference they had expressed for a Union negotiated agreement

On 6 April 2004 FSU met with CIL management who indicated that their position had changed since the undertaking not to offer AWAs was given and that a majority of CIL employees had already signed the individual agreements.

### ***Commentary***

This case study demonstrates that despite the clear wishes of their employees to have their terms and conditions protected in S.170 LJ Collective Agreements, CIL unilaterally determined to discontinue bargaining. There remains nothing at law that employees or unions can do to compel companies to return to bargaining. The only option is protracted and disruptive industrial action – a course of action that FSU members are reticent to undertake given their commitment to customer service and knowing that their employer has almost unlimited reserves at their disposal to mitigate the impact of such action and because they cannot sustain the personal financial loss inherent in such action. The Bill before the committee does not address this issue, rather it will only compound this situation by offering no choice to employees.

### ***Case Study 2: Commonwealth Bank of Australia Enterprise Bargaining Negotiations 2004***

The majority of Australian CBA staff are employed under enterprise agreements negotiated with FSU that all nominally expired on 2 April 2004.

FSU commenced a comprehensive consultation process with its members in October 2003 to identify key issues to be addressed in any new agreements. The key issues identified by staff across the bank were staffing and relief, work targets and pay.

In February 2004, CBA issued a letter to all EBA covered staff advising of the Bank's intentions to commence negotiations with FSU on the basis of offering a 4% pay rise in 2004 and 2005, reducing the number of agreements that applied to staff, and the ability to purchase additional leave.

Negotiations commenced in April 2004 and FSU and CBA agreed to a timetable for negotiation of all aspects of a new agreement. Negotiations concluded in May with CBA formally rejecting every aspect of the staff claim on 6 May. CBA reiterated the position put to staff in February as the continued position of the Bank.

On 28 May 2004, in the absence of any movement from CBA FSU undertook a ballot of members – **96% of members participating in the ballot rejected the bank's**

**offer and endorsed industrial action if necessary.** CBA was formally advised of the outcome and again asked to negotiate.

On 16 June the Bank proposed some cosmetic amendments to the staffing clause but no movement in relation to any other key aspect of the staff claim. On 17 June FSU wrote to CBA advising that agreement was possible if CBA would address three specific outstanding matters. CBA responded indicating that agreement was not in prospect.

Consequently an industrial campaign was launched with a nationwide strike and stop work meeting held on 2 July 2004. At the stop work meeting members endorsed the commencement of an industrial, public and shareholder campaign to achieve improvements in staffing, targets and pay.

Following the meeting FSU formally wrote to the CEO and members of the Board advising of the resolution and again seeking that CBA commence genuine negotiation on the three outstanding matters.

FSU set up a meeting to determine whether the issues were resolvable without the need to commence a rolling industrial campaign; however CBA arbitrarily cancelled the meeting on the morning it was to occur and took no further action to set up a dialogue, consequently rolling industrial action commenced. All industrial action was properly notified in accordance with the requirements of the *Workplace Relations Act 1996*.

CBA continually asserted that the claims being pursued by FSU were not supported by the majority of staff. **FSU conducted a further ballot of members where again 96% of members voting rejected the bank's offer and called on the Bank to genuinely negotiate through their Union.** The outcome of this ballot was communicated to the Bank but was not responded to.

On 1 October CBA wrote to FSU indicating the Bank's formal withdrawal from EBA negotiations. The letter indicated that a significant reason for the decision was the alleged lack of staff support for the campaign being run by the Union.

FSU sought the assistance of the Australian Industrial Relations Commission to attempt to reopen dialogue with the Bank. At the conciliation conference in an effort to secure new collective agreements FSU put a revised position to the Bank. This was formally communicated to CBA the following day on 20 October.

No response was ever received to this offer so it was determined to proceed with industrial action on 5 November in which a delegation of NSW based employees attended the AGM to show that staff did support the campaign for better staffing, targets and pay. At the AGM staff members called on Mr Murray and the Board to listen to staff concerns and re-enter negotiations for a new agreement. Negotiations have never recommenced.

CBA paid EBA staff a further 4% pay rise on 1 July 2005 but continues to reject any approach by the Union to update the pay rates in the expired EBAs. This means legally enforceable minimum rates at the Bank are now 8% lower than actual rates being paid to some staff within the organisation.

### ***Court action***

At the 2004 AGM, in accordance with the requirements of section 249N of the *Corporations Act*, a resolution was proposed that would require the Bank to measure the impact of restructuring programs on customers and staff. The resolution was proposed by FSU, a shareholder in the Bank, and supported by more than 900 ordinary and employee shareholders and ultimately received more than 47,000,000 votes in favour or 11% of the vote.

In 2005 CBA took the unprecedented decision to sue the FSU in the Federal Court for all of the industrial action taken by staff between 2 July and 5 November 2004, arguing the bargaining period was never initiated validly, that industrial action was in pursuit of claims that did not pertain to the employer/employee relationship and that this conduct was designed to coerce them into making an enterprise agreement.

In the proceedings they argued that FSU writing to members of the Board and the resolution itself was an attempt to coerce them into making an Enterprise Agreement with their staff. They have brought this action using the *Workplace Relations Act*. There has never been any suggestion that our resolution did not meet the requirements of the Corporations Law. The Judge's decision has been reserved.

The Bank's assertion that it was inappropriate for employees as shareholders to raise these issues with other shareholders is inconsistent with corporate governance principles of respecting the rights of all shareholders.<sup>4</sup> The Bank's subsequent decision to sue FSU for writing to the Board and raising a resolution is an unprecedented attack by a major corporation on the rights of employees as shareholders to raise issues with other shareholders in the Bank.

### ***Commentary***

Case Study 2 again demonstrates how employers can reject the choices made by staff and illustrates the extent to which employers will go to deny employees effective collective bargaining. It highlights the enormous power imbalance that already exists in our industrial relations system. What other option is available to staff to convince their employer of their desire for a collective agreement than taking industrial action?

The litigious response by CBA against the FSU is a further effort to frustrate attempts to secure employees preferred industrial instrument. The Bill before the Committee with its further draconian measures of fines and custodial sentences will further rob employees of genuine choice with regard to their working conditions.

### ***Case Study 3: AWAs and Individual Agreements at CBA Group***

Since 2000 CBA has been systematically rolling out AWAs across the organisation. 1 in 3 workers at the Commonwealth Bank group is on an AWA. The benefit of AWAs to the Bank is flexibility around hour's arrangements in that staff are required to work the hours reasonable and necessary for the performance of the job and more flexibility to be able to shift employees from their existing position to any other position within the Group or its related entities without triggering redundancy protections.

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<sup>4</sup> ASX and OECD principles of corporate governance include respect for the rights of all shareholders and recognition of the contribution of all stakeholders.

CBA has developed superior bonus arrangements that are only available to staff if they take up an AWA. The potential to earn large bonuses is the main attraction for members when considering an AWA. However, the arrangements are absolutely at the discretion of the Bank who can alter any aspect of the performance requirements, the payments, whether the payments will be made in cash or at all

Another feature of the CBA AWAs is that staff do not enjoy the certainty of annual across the board pay increases. The AWA requires that a staff members' remuneration be reviewed annually but there is no requirement that any adjustment be made. This effectively means that AWA staff have no guarantee that they will even receive cost of living increases.

In addition to AWAs, CBA has also developed and promoted alternative individual contracts known as Individual Agreements. These contracts have been facilitated via non-union agreements that allow for the making of contracts that wholly replace the operation of the underpinning non union EBA. These arrangements have been used extensively in Colonial First State, Commonwealth Insurance Limited and CommSec.

CBA prefers these contracts as they are administratively easier to offer and to process than other contracts and unlike AWAs they do not require the same amount of supporting documentation or approval by a third party.

These contracts have most recently come under the spotlight due to successful Federal Court litigation run by FSU against the Bank. The case arose as a result of a decision by CBA to no longer be the employer of employees in its premium services business unit. In May 2002 it decided that all future employment would only be available through its wholly owned subsidiary CommSec. In order to effect this decision, lawyers for CommSec developed a non-union agreement that provided for the offering of individual agreements. The non-union agreement was purported to only apply to clerks and was underpinned by the NSW Clerks Award. The Commission certified the agreement in 2002 and the CommSec contract regime was born.

In late 2002 FSU became aware that CBA staff in relationship manager and assistant relationship manager roles were being offered CommSec contracts and requested to resign from the Commonwealth Bank. FSU sought details from the Bank about these contracts and the underpinning Clerks Award. CBA refused to properly consult the Union as required by our enterprise agreements and refused to stop offering the contracts to their staff.

FSU launched Federal Court proceedings in April 2003. It was argued that CBA was discriminating against its employees on the basis of being covered by Union negotiated arrangements; that they breached the FSU EBAs due to their failure to consult; and that the CommSec non union agreement was invalid and had no application to finance sector professionals.



In a decision handed down in 2005 Judge Merkel agreed. In a damning decision he found that CBA discriminated against its employees for a prohibited reason, that they breached their consultation obligations under FSU negotiated agreements, that they misled the Commission when they certified the CommSec agreement and that the agreement was invalid.

*“CBA’s scheme, which is essentially an industrial regulation avoidance scheme, possesses an ingenuity that is reminiscent of the tax avoidance schemes of the 1970s.”<sup>5</sup>*

In his decision the Judge indicates that he is unsure how widespread the use of these individual agreements would be, but in an environment where industrial arrangements are to be further deregulated he believed it was in the public interest to clearly identify that the scheme put in place by the Commonwealth Bank was unlawful. The Judge is yet to decide the penalties to be paid by CBA for their unlawful conduct and is also to determine the Orders prohibiting their ability to continue to offer these contracts and the basis upon which they will be required to reoffer employment to the CBA employees they induced onto the contract arrangements. Final hearings are scheduled for December.

The CBA has continued to promote these contracts to a wide range of staff within the large Premium and Business Services Unit. FSU has demanded, and received, confirmation that they will cease to offer the illegal contracts to any more employees. For those staff employed on these individual agreements their legal status is uncertain. FSU has been attempting to make an Award and Agreement to apply to all employees of CommSec for almost 2 years with CBA and CommSec frustrating our efforts at every opportunity.

### ***Commentary***

In this case study we see a major corporation refusing to acknowledge even basic industrial relations responsibilities. It would appear that CBA knew the requirements of the law, however they chose to ignore these requirements and focus on their business priorities to decrease costs. It again demonstrates how the employer is able to coerce individual employees to forgo their conditions and/or accept inferior ones. The *WorkChoices* Bill will only exacerbate this unfair practice. This example highlights how major, powerful employers will take advantage of any new legislation to pay lower wages and remove terms and conditions creating a race to the bottom amongst competitors.

### ***Case Study 4: ANZ and the removal of Rostered Days Off***

The ANZ Bank employs approximately 16,000 employees in Australia. The FSU represents almost half of these staff. The nineteen day month (a 38 hour working week with 13 rostered days off per year) was won for bank employees in the 1980’s following protracted industrial action across the banking sector.

The monthly RDO is a highly valued condition of employment amongst bank workers, frequently identified by them as integral to balancing work and family and as

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<sup>5</sup> Finance Sector Union Of Australia V Commonwealth Bank Of Australia And Commonwealth Securities Limited - 9 September 2005. For a full copy of the judgement see [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2005/796.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/796.html)

an opportunity to refresh and recharge themselves away from the daily pressures of their employment.

In 2001 the ANZ began to take away the 38-hour week and RDO's by applying an Award clause, which allowed highly paid specialists to work 40 hour weeks, to all categories of staff.

ANZ provided contracts to new employees, or current employees being offered new positions in the bank, that removed their right to a rostered day off each month. The new employment conditions were based on employees either working a 152 hour four week cycle (38 hour week) across 20 days without an RDO, or, to work a 160 hour four week cycle (40 hour week) across 20 days without an RDO with single time payment for extra hours.

The contracts were not open to negotiation and the removal of the RDO entitlement was done without agreement or choice. (*See the affidavit at Attachment 1*)

In 2003, FSU filed a dispute in the Australian Industrial Relations Commission seeking that all ANZ employees who had been contracted out of their Award conditions, have those conditions reinstated and be compensated for the loss of their RDO.

ANZ opposed the FSU application, arguing that the Commission did not have jurisdiction to hear the matter. The ANZ's obstructive tactics forced the FSU to launch a prosecution against the ANZ in the Federal Court. Following lengthy delays by the ANZ, the Federal Court scheduled proceedings in early 2005 – at which time the ANZ sought to have the matter referred back to the Commission. The Commission heard five days of evidence and argument then at the end of proceedings, the ANZ asked for time to discuss the matter between the parties.

In October 2005, the parties agreed to a resolution of the matter with the key elements being the reinstatement of ANZ employee's right to resume taking RDOs on a monthly basis or choose to continue working without RDOs.

### ***Commentary***

This case highlights the difficulty for new employees or employees seeking promotion/transfer to have any capacity to negotiate or maintain conditions. Employees in this position are not provided with choice about their arrangements, with employment conditions offered on a 'take it or don't take the job' basis. The case also highlights the obvious dangers inherent in the new Bill when consideration is given to subordinating Awards and Collective Agreements to AWAs, allowing AWAs to be 'agreed' even during the life of Collective Agreements and removal of Awards and their extensive protections from the no-disadvantage test.

If the same circumstances were to unfold after the Bill before the Committee became law, thousands of ANZ employees would lose their right to their RDO, with all the predictable consequences for work and family balance.

### **Effects of the Proposed Amendments**

Under the current legislative arrangements conditions are theoretically protected from being undermined through individual employment arrangements by Collective Agreements and strong Awards. Unfortunately finance sector companies have shown

they are willing to expend considerable resources to establish ‘avoidance schemes’ and find other avenues to attempt to deny employees their entitlements (as shown in the previous case studies).

The Bill before the Committee does nothing to address the power imbalance or to provide genuine choice for finance employees. It does not compel employers to bargain in good faith, or even bargain at all, even where the clear majority of employees have nominated that process as their preferred option.

Instead, the Bill seeks to further undermine the capacity of employees to protect conditions through legally enforceable Award safety nets and to make, sustain and retain collective agreements.

### ***Agreements – AWAs and Collective***

Many large finance sector employers have shown their preference for having employees on individual contracts – this gives the employer greater flexibility around hours arrangements in that staff are required to work the hours for the performance of the job and more flexibility to be able to shift employees from their existing position to any other position within the Group or its related entities without triggering redundancy protections.

In addition proposed section 104(6) states it is not coercion to make an AWA a condition of employment; however in an employment setting this is probably the ultimate form of coercion. An individual seeking work has virtually no bargaining power in this situation – they could go somewhere else but there is no guarantee they will face any different circumstances with another employer. This, in effect, legalises coercion of employees to accept lower conditions. Inevitably this undermines the employment conditions of exiting employees creating a race to the bottom.

A free market for wages and conditions will drive them down for most employees – the American system is a frightening example of this phenomenon.

### ***Limitations on agreements***

The Bill imposes limitations on what parties matters can include in an agreement, even if the matter pertains to the relationship between requisite employer/employee relationship.

Further, the Bill provides that the regulations may prescribe prohibited content: this means that Minister can add to the list of prohibited content without recourse to Parliament.

If a matter becomes prohibited, the prohibition applies to agreements made under the current Act and to future agreements. In the case of current agreements, any matter prescribed as prohibited content will become void and will not be enforceable. This means that an agreement negotiated between the parties, and endorsed by staff, in good faith may be undermined by an action of the Minister: the parties will have no recourse. In the case of future agreements, to include or even to seek to include a prohibited content matter in an agreement will attract a civil penalty of \$33,000.

As the Bill strips the Industrial Relations Commission of any role in the making or operation of agreements, the only avenue for enforcement will be through the courts, a much more legalistic and costly process for employees, unions and employers alike.

### ***Operation of agreements***

Under the Bill agreements made under the current Act will continue to operate until or unless they are either terminated or replaced by a new agreement. AWA's and collective agreement will override any award that would otherwise be applicable to those employees.

Currently agreements are measured against the appropriate award to ensure that certification of the agreement would not result in a reduction in the employees' overall wages and conditions. The Bill significantly changes the safety net of the no disadvantage test, by requiring that agreements would only be measured against the Australian Fair Pay & Conditions Standard.

The Bill further provides that, upon giving 90 days written notice, a party to an agreement can unilaterally terminate the agreement after the agreement has passed its nominal expiry date. If an agreement is terminated a workplace agreement or an award that would otherwise apply to those employees will have no effect. Instead, those employees will only be covered by the 5 matters provided for by the Australian Fair Pay & Conditions Standard.

This means that, in the finance sector, many employees who have a long history of being covered by a comprehensive collective agreement could face a drastic reduction in their conditions to the 5 legislated minima.

The Bill imposes a further limitation on the continued operation of agreements with the changes to the Transmission of Business provisions, which are addressed in more detail later in this submission.

## ***Awards***

### *No disadvantage test*

Under the present legislation Awards play an important role as a meaningful safety net of fair minimum wages and conditions of employment.

The FSU is currently party to or bound by over 100 collective certified agreements. Each of those agreements has been measured against the relevant award to ensure that certification of the agreement would not result in a reduction in the overall terms and conditions of employment for employees. That is, the no disadvantage test is applied against the employees' own wages and condition to which they would otherwise be entitled to under their award.

The Bill proposes to replace the current meaningful no disadvantage test with an artificial set of minimum conditions provided under the Australian Fair Pay & Conditions Standard, and to limit the no disadvantage test to those 5 conditions.

This removal of the role of awards in the no disadvantage test removes yet another safeguard from the agreement making process and effectively ensures that several (if not all) employees will be disadvantaged by agreements made under the proposed new legislation. Finance sector employees particularly stand to lose with the removal of this safeguard. Many employers in the finance sector have already shown they are keen to increase their profits by not increasing (and in some instances decreasing) their employees' wages. The 5 minimum conditions afford less protection than presently exists.

### *Award wages & conditions*

Under the current legislation, awards also play an important role as a safety net of fair minimum wages and conditions of employment. But for thousands of finance sector employees working in medium to very small companies where there are no collective agreements or AWAs in place, awards are relied upon for their actual wages and conditions of employment.

Of the 79 federal awards to which the FSU is party, the overwhelming majority are enterprise/employer specific awards: few are industry awards. Sections of the finance sector including insurance, credit unions, trustee companies, finance companies, (some) labour hire firms, banking agents and agribusiness are covered by industry awards, but neither the banking or banking services sections are covered by an industry award.

All of our awards were significantly overhauled as a result of the award simplification process. A small number of our awards that were obsolete were set aside under that same process or as a result of reviews into the operation of awards conducted under s.151 of the Act.

The Bill proposes that awards must undergo further review by the Australian Industrial Relations Commission to simplify, remove non-allowable matters and to otherwise ensure compliance with regulations. The Bill also proscribes a reduced list of those terms which may be included in awards, and a more extensive list of specific matters which would not be allowable. This means that the role of awards as a safety net of fair minimum wages and conditions of employment, for the many thousands of finance sector employees who derive their actual wages and conditions from the award, will be further eroded.

The Bill further proposes that the Award Review Task Force conduct a review of awards and make recommendations to Government ways of rationalising awards. The comments made by the Minister and other Government members to date have indicated a concern with a so called proliferation of enterprise specific awards in recent years. As indicated above, few of the awards to which the FSU is party are industry awards. Historically, the making of enterprise specific awards as part settlement of industrial disputes between an employer and the FSU has been the preferred approach of the majority of employers in the finance sector. Enterprise specific awards continue to be the preference of the majority of new employers with whom we seek to make awards.

In the event that the Award Review Task Force recommends the rationalisation of enterprise specific awards, and notwithstanding the proposed provisions regarding “*preserved award terms – employers bound after reform commencement*”, finance sector employees reliant upon their enterprise specific award for their wages and conditions of employment particularly could see a further reduction in the safety net value of their award.

#### *Continued operation of awards*

The Bill provides that existing awards will continue to operate, notwithstanding various other provisions including the matters that will become non-allowable award matters, further award simplification and the rationalisation of awards.

However, awards will only be able to be varied in order to remove any ambiguous, discriminatory or objectionable provisions or to bind additional employers.

The replacement of all dispute settling procedures in awards with the Bill's model disputes procedure means that employees will lose the protection of having disputes arising from their awards arbitrated in the event the matter can't be resolved through conciliation.

The continued operation of awards under the new legislation will be largely illusory for many employees in the finance sector.

Under the proposed Bill, entering into an AWA or collective agreement will result in any award that would otherwise be applicable to that employee/s will be overridden by the new agreement and will have no application in relation to that employee/s for the life of the agreement.

The Bill further provides that, upon giving 90 days written notice, a party to an agreement can unilaterally terminate the agreement after the agreement has passed its nominal expiry date. If an agreement is terminated a workplace agreement or an award that would otherwise apply to those employees will have no effect. Instead, those employees will only be covered by the 5 matters provided for by the Australian Fair Pay & Conditions Standard.

This means that, in the finance sector, many employees who have a long history of being covered by a comprehensive collective agreement and a comprehensive safety net award could face a drastic reduction in their conditions to the 5 legislated minima upon the unilateral action of their employer.

### ***Balancing Work and Family and Hours of Work***

The importance attached to being able to have a degree of control over hours of work cannot be overstated for finance workers. The vast majority of employees are not the multi-million dollar earning executives, well compensated for the extra hours they may put in. They are people earning average or below average wages, struggling to make ends meet, trying to meet the needs of families and community.

In 1996, the FSU characterised the concerns of its members around the following changes occurring in the sector:

- decreasing staff levels and increasing pressure on remaining staff;
- lack of a structured approach to workplace changes, including lack of consultation;
- threat of forced redundancies and branch closures;
- negative effects of workplace changes on consumers;
- threat of mergers and takeovers;
- increase in the amount of unpaid work;
- shifts in job roles and responsibilities;
- lack of adequate training – particularly amongst part-time and casual workers (the numbers of which are growing); and

- lack of certainty around career paths, career path progression/promotions and the effects of performance based pay.<sup>6</sup>

Over time, the above developments have impacted all facets of finance sector employees' work, and severely limited their ability to achieve a balance between their work and home lives. These effects include:

- working excessive and generally, unpaid overtime;
- difficulty in accessing annual, sick or personal carers' leave entitlements;
- difficulty in obtaining genuine mutual agreement around hours of work – flexibility which suits both employees and employers;
- diminishment of notice periods around rostering and changes to rosters
- understaffing and use of untrained, temporary staff;
- increased stress and fatigue (resulting from a new sales culture in the sector - pressure to achieve sales targets, excessive performance monitoring, combined with excessive hours and work intensification);
- increased casual and temporary staff;
- outsourcing;
- decreased job security, and
- poor management practices.

Data from the ABS<sup>7</sup> shows a disturbing amount of overtime, especially unpaid overtime, being worked in the finance sector:

- In 2000 there were approximately 985,000 hours of overtime worked per week in the finance sector.
- In 2003 there were approximately 1,171,000 hours of overtime worked per week in the finance sector.
- 55,000 (42%) of workers were not paid for their overtime – this equates to approximately 490,000 hours of overtime not paid for in any way.

What is continually made clear by finance employees is their desire to have some level of control over their working hours.

The FSU recently conducted an Hours of Work Survey amongst its membership receiving nearly 6000 returns. The findings support the need for greater protection and control over hours of work:

- 26% reported that their personal lives were suffering because of the hours they currently worked.
- 47% consistently worked hours that they were not compensated for.

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<sup>6</sup> *The Finance Sector Union: Second Submission to the Financial System Inquiry (The Wallis Inquiry)*, FSU, (1996).

<sup>7</sup> *Working Arrangements (Supplementary Survey)*, ABS, (unpublished).

- 92% felt that weekend work should be voluntary and attract appropriate penalties.
- 98% believed it was important for hours of work and any related benefits (i.e. penalties and overtime) to be protected in awards and enterprise agreements.
- 81% were concerned that the Government's proposed IR changes would undermine their existing hours of work arrangements.

These findings illustrate the need for employee's hours of work, input into rostering arrangements and associated penalties to be given greater protection – not less.

FSU contends that the Bill before the Committee will only further erode finance workers capacity to balance their work and family life by having some control over their hours of work.

FSU is currently party to many awards and agreements which provide employee input into variation of hours. Members view these provisions as essential to their working lives – they are protected from managerial prerogative over variation in hours and notice periods and are able to balance their personal needs with those of the business. Most importantly, FSU members know that without some say over their hours of work, the range of “family friendly” provisions available under their agreements are meaningless. Their day to day work can become a juggling exercise which sees access to accrued time off, rostered days off or carers' leave, sacrificed by the need to work excessive hours and/or the inability to control variations in hours

FSU submits that under the *WorkChoices* Bill the removal of provisions around span of hours, variations to hours of work and rostering will leave workers more vulnerable to unpredictable hours, less control over hours and a diminished ability to balance work and family. The absence of penalty and overtime rates from the AFPC Standards will compound this vulnerability.

The Bill will also allow agreements to prevail over awards, meaning the provisions therein, built up over years, will be up for grabs in the agreement making process. There is plenty of evidence in our industry of individual contracting, individual packaging and AWAs, that seek remove safeguards around hours of work for employees.

These range from ‘employment agreements’ (*see ANZ example at Attachment 2*) that fail to disclose or reference employee rights as governed by awards and collective agreements, which claim that the employer, “at its discretion” can change hours of work.

Employment Agreements, provided by Westpac (*see example at Attachment 3*) to certain groups of staff on a ‘take it or leave it basis’ also seek to undermine protections around hours of work. They include such provisions as:

“Where necessary, you must also work outside the usual hours of business” and “Generally, you will work the usual business hours of 38, however you agree to work the hours necessary to discharge your duties.”

The practical reality of such ‘agreements’ is that these employees, in order to discharge their duties, frequently work excessive hours during the week and on weekends and are required to be contactable by phone 7 days a week, 12 hours a day. This group of employees receive a fixed package of \$45,000.



At RACV, Finance Sales Representatives, were placed on AWAs removing them from award provisions, specifically overtime, in 1999. The Hours of Work provisions of the AWA stipulate that:

*“Ordinary hours of work shall not be less than 76 hours per fortnight but may increase up to 90 hours per fortnight.” and “Work performed on Saturday and Sunday will be paid at ordinary rates without loadings.”*

FSU and its members harbour major concerns that the Bill will further erode the capacity of workers to have input into their work hours and to be able to balance their work and family commitments.

While the Federal Government (and employers in the finance sector) stress the importance of family and the need to ensure that workplaces address work/family or work/life balance, we submit that *WorkChoices* will demonstrably lead to less control over hours of work, meaning the Government will in practise jeopardise its observance of the ILO Convention on Work and Family Responsibilities.

### ***Right of Entry***

Under the proposed amendments there is no right of entry at workplaces covered entirely by AWAs, employee collective agreements or the Australian Fair Pay and Conditions Standard.

Entries for investigating suspected breaches is limited to breaches involving members of that union, and the particulars of the breaches being investigated have to be included in the entry notice. The onus is on the permit holder to show reasonable grounds of suspicion of a breach. This effectively means that a union has to have details of a breach before being allowed to investigate it– this leads to a circular situation that makes it more likely breaches will go undetected.

One of the principal reasons for conducting an investigation is to substantiate a suspicion. Suspected breaches are often based on verbal advice from members who do not wish to be identified by putting their concerns in writing or from documents that have been supplied confidentially.

Right of entry permits are only granted following satisfaction of a “fit and proper person” test, which includes consideration of right of entry training and any previous industrial offences.

There is no evidence to suggest that introduction of a ‘fit and proper person’ test is necessary to improve the current right of entry regime. The more likely outcome of such a provision would be an increase in bureaucratic procedures and workload with no resulting gain for all stakeholders.

### ***Unfair Dismissals***

Some of Australia’s largest companies employing several thousand employees operate within the finance sector. However, the majority of employers operating within the sector range from medium size operations to extremely small single site operations, all employing fewer than 100 employees.

Under the Bill, many thousand employees working in credit unions, merchant, foreign and trading banks, general and life insurance, insurance broking and dealing,

superannuation and wool broking would no longer be able to seek remedy in the event they are unfairly dismissed.

This exemption from the unfair dismissal process will result in a further power imbalance between an employee and their employer in the event they are 'negotiating' a new AWA or collective agreement. The Prime Minister has publicly commented that an employee can't be forced to sign an agreement they're not happy with, because they option to resign and get a job with another employer. Such an assertion is overly simplistic at best, and totally false and misleading at worst. Most finance sector employees are on low wages, with limited job security and with low or limited work skills in an industry constantly shedding jobs. If faced with the options of a substandard agreement that reduces their current wages and/or conditions versus resigning and getting a job with another employer, there is little real choice available to the employee other than to signing the substandard agreement.

The fact that the employee would only have the greatly expensive and extremely untimely option of pursuing an unlawful termination if they were dismissed for refusing to sign such an agreement is neither a fair or realistic remedy.

Of further concern with the Bill's proposed changes to the unfair dismissal provisions is the lack of clear definition of a business employing more than 100 employees.

As mentioned in more detail elsewhere in this submission, the finance sector is in almost a constant state of change with companies takeovers, corporate mergers, outsourcing of work, off shoring of work, and other corporate restructuring an every day reality for finance sector employees.

The finance sector has already witnessed employers who have sought to increase profitability by attempting to restructure themselves into new subsidiaries and transfer employees under a 'new' employer in order to avoid the wages and conditions their employees are entitled to under industrial instruments to which the 'original' employer is bound.

This practice could become far more common under the new legislation, if companies are to structure themselves in such a way as to declare various parts of the one corporate structure as a single employer, each of whom employee 100 or fewer employers and thereby exempting employees who would otherwise have been eligible to pursue an unfair dismissal action if they are unfairly dismissed.

The Bill's further exemption to access to the unfair dismissal provision for those employees who are dismissed for operational reasons is of grave concern to our members. The constant changing nature of the finance sector means that any finance sector employee could be dismissed for the stated reason of operational requirements, and would not have access to the unfair dismissal provisions, even if the termination was not a bona fide redundancy.

The Prime Minister's comment that the intent of this further limitation was to avoid employees double dipping by receiving a retrenchment severance payment and seeking compensation through an unfair dismissal action. This overlooks the fact that the Commission currently discounts any compensation in lieu of lost wages by the amount of any severance payment received. It also completely overlooks the fact that many employees do not, or will not, have an entitlement to a retrenchment severance payment in the event they are dismissed for operational reasons. Nor does the Australian Fair Pay and Conditions Standard include a retrenchment severance payment. Contrary the Prime Minister's assertions, this provision of the Bill is likely

to have a double jeopardy effect on finance sector employees, who could find themselves out of a job as a result of operational requirements of their employer, with no remedy available and without access to a severance payment.

### ***Transmission of Business***

Company takeovers, corporate mergers and the outsourcing of work are an every day reality for finance sector employees. In most instances, employees are transmitted across to the new employer along with their work. They have little choice in this matter as, if they refuse employment with the new employer, they will not have access to the safety net of a retrenchment severance payment.

Many of our members who transmit with their work to a new employer derive their pay and conditions of employment from comprehensive certified agreements underpinned by awards. Those members who are not covered by certified agreements most often derive their pay and conditions of employment from a comprehensive safety net award.

Under the current legislation, employees transmitting to a new employer still have the benefit of their industrial instruments transmitting with them. Section 149(1), makes an award covering those employees and/or their work binding on the new employer: and s.170MB makes a certified agreement covering the employees binding on the new employer.

The changes the Bill seeks to the Transmission of Business arrangements will significantly reduce this protection for our members caught up in future takeovers, mergers or outsourcing, with their conditions only guaranteed for a maximum period of 12 months from the date of the transmission [ss. 125 & 126].

At the end of the 12 months transmission period, the new employer would no longer be bound by these industrial instruments, and employees would no longer derive their wages and conditions from their certified agreement and/or award. Instead, they could be forced to accept an inferior set of wages and conditions in a collective agreement or AWA, only measured against the Australian Fair Pay and Conditions Standard under the new 'no disadvantage test. In the absence of a new agreement, these employees would then only be entitled to the 5 minimum conditions under the Australian Fair Pay and Conditions Standard.

The exception to this would be if the employer was already bound by another collective agreement, which could then cover the terms and conditions of the transmitting employees. The Bill's proposed new Employer greenfield agreements [s.96D] gives little comfort that such an agreement would be either fair or reasonable.

And even the operation of their industrial instruments for the first 12 months of employment is not guaranteed absolutely. A transmitting certified agreement and/or award can be overridden by the making of a new AWA or collective agreement between the new employer and the transmitting employees at any time, including during the 12 month transmission period.

It is very common in the finance sector that, once a new employer has familiarised themselves with the work resulting from a transmission of business, they then 'rationalise' the number of staff they require to do that work, and retrenchments result. Many of our members have an entitlement under their certified agreements to

severance payments in the event they are retrenched; whilst many others have access to the TCR Test Case severance payment under their award.

However, in the future, members caught up in a transmission of business who are retrenched after the 12 months transmission period, will no longer have access to the severance retrenchment payment under their certified agreement or award. Nor would there be a legislative safety net, as the proposed Bill does not include a retrenchment severance payment in the Australian Fair Pay & Conditions Standard.

### ***Skills Investment***

The FSU agrees that Australia needs to continue to increase productivity and has been at the forefront of a productivity boom in our industry. However, FSU does not believe that legislation facilitating lower labour costs and increasing ‘flexibility’ for employers is the best way to achieve this. The measures in this Bill will increase corporate profits in the short term, but they will be unsustainable. Cost cutting inherently does not promote the long term development of skills and careers within Australian industry which is already experiencing skill shortages. This trend is likely to continue if the trend towards a lower paid and more ‘flexible’ labour market continues.

Training and skill development are critical to Australia’s social and economic well-being. They enable employees to deal with change, build on existing capabilities and help to provide a more flexible and productive workforce, making the country more globally competitive.

Global competition on wages and conditions will inevitably lead to a ‘race to the bottom’. To help prevent Australia losing out in such a race it is crucial that industry invest in skill development and training. A useful first step in this process would be a tri-partite forum involving Government, the finance sector industry and the FSU to establish an industry plan for the future. This could also help with establishing Australia as a financial hub in the Asia/Pacific region.

Under *WorkChoices*, skills based classification structures will no longer be allowable – with the AFPC responsible for either adjusting “preserved” Australian Pay Classification Scales or making new classifications rates.

Under the current system, the Commission is able to consider skills-based classification structures and award relativities which are industry and in some cases, workplace specific. For some 15 years the parties to awards and agreements, the Industrial Relations Commission and national training bodies have contributed to classification structures based on fair relativities linked to industry training and skills development. The removal of skills based classification structures is an invitation to employers to take an arbitrary approach to classification and promotion, and to ignore investment in skills-based training.

This has particular consequences for workers in the finance sector. A significant feature of the Finance Sector is the degree of labour mobility within the sector – turnover is traditionally high, but employees tend to move between employers within the sector. For example, ABS Labour Mobility figures in 2004 showed that 15% of finance sector employees had been in their current job for less than one year.

The degree of labour mobility in the sector clearly justifies a cohesive approach to training and skills development, in order to equip workers for the demands of the

modern industry workplace, and to ensure that experienced workers are not lost to other industries. The removal of skills-based classification structures therefore stands to affect workplace productivity and growth, as well as the remuneration and development of individual employees. The non-allowability of relevant skills based classifications structures also stands to affect minimum earnings over time, with the real chance that future employees will have their pay scale set at a lower rate by the AFPC.

## **Conclusion**

The FSU submits that the Bill represents the most savage attack on employees ever perpetrated and does not believe it should be passed for the following reasons:

1. All the provisions in the *WorkChoices* Bill provide employers with greater power and flexibility at the cost of employee's rights and protections.
2. There has not been adequate consultation or time for debate about these lengthy and detailed changes.
3. The changes appear to be a major step towards a "free market" for labour where average workers have little choice but to accept lower wages and less protection or face unemployment.
4. The Bill will systematically undermine all notions of fairness in the Australian workplace which, as a consequence, will inevitably lead to lower living conditions and the destruction of Australian culture and community.