National Tertiary Education Industry Union Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the provisions of the Workplace Relations Amendment (WorkChoices) Bill 2005

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1. About the NTEU

The National Tertiary Education Industry Union (NTEU) represents over 27,000 staff in tertiary education institutions around the country. Approximately 17,000 of our members are academic staff employed in universities, and around 10,000 are "general staff" employed in TAFE, universities and Adult Education.

The NTEU represents the professional and industrial interests of its members through:

- improving and protecting conditions of employment through industrial negotiations at local, state and federal levels;
- promoting the work of universities and colleges and, in particular, their independence and integrity;
- defending the rights of academic staff to teach, research and disseminate knowledge without fear or reprisal, and to defend the professional standing of general staff members;
- working with other stakeholders to lobby for a strong, publicly funded tertiary education sector, and participating in relevant policy debates.

The working conditions of NTEU members are regulated overwhelmingly through federal awards and agreements.

The NTEU welcomes the opportunity to make a Submission to the Inquiry. However, the complexity and detail of the legislation combined with the very short time allowed between the release of the legislation and the closing date for Submissions, means that the NTEU is not able to make the Submission which we would otherwise feel obliged to the Committee to make.

2. General Position

The NTEU calls upon the Senate to reject the Workplace Relations Amendment (Work Choices) Bill 2005 ("the Bill") in its entirety.

The Bill:

- Will not achieve higher productivity for the Australian economy;
- Is unfair and biased at every turn against employees and unions;
- Includes many manifest and brazen breaches of Australia's international treaty obligations;
- Will further weaken the position of those who are vulnerable in the labour market;
- Allows millions of employees to be unfairly dismissed;
- Is unsuited to the productive and efficient performance of professional and skilled work in education; and
- Deliberately undermines collective bargaining and union representation.

Given the breadth of the attack on employee rights and NTEU's desire not to repeat the submissions of other parties, the NTEU's submission will concentrate on certain aspects and likely effects of the Bill, which are perhaps less likely to be covered by others, or which are of special concern to NTEU members.

Despite this selectivity, we would wish here to emphasise our opposition to virtually all the changes to current legislation foreshadowed by the Bill.

In this regard, we fully support the general thrust of the Submissions being made by the ACTU and the International Centre for Trade Union Rights (ICTUR).

3. Academic and Professional Work and the Use of AWAs

It is clear from the terms of the Bill that it gives primacy to individual bargaining, by making AWAs operate to the exclusion of any type of collective agreement.

The claim of the Government is that AWAs will allow individual employers and employees to tailor conditions to meet their needs. This, of course, is false because overwhelmingly, AWAs are offered as a standard template, and the employer offers them on a take-it-or-leave-it basis, with no opportunity for negotiations. Already in higher education, the Government has developed what it describes as "template AWAs" for use by universities. Nevertheless, the likely outcome of the legislation is that, at many workplaces, some employees will be employed on a collective agreement, and others will be employed on different conditions covered by an AWA.

This gives rise to considerable difficulties when one is dealing with workplace-wide or industry-level issues.

For example, the NTEU has vigorously pursued an Indigenous Employment Strategy through collective bargaining at each university. This strategy, which has been praised by Education, Science and Training Minister Brendan Nelson, has sought, at the University level, to set targets for increasing the number and classification levels of indigenous employees in higher education, through Indigenous Employment Committees and targets. Through collective bargaining, this workplace issue is dealt with effectively. It is difficult to see how this could have happened through individual AWAs.

An individual employee is either indigenous or she is not. How could an AWA have an indigenous employment target number? What would it mean?

The same could be said for bargained policies of affirmative action or Equal Employment Opportunity. There mere inclusion of anti-discrimination clause in an individual AWA does not achieve the same result.

In professional workplaces, such as in education, effective work depends on effective collegial relationships. For example, the allocation of workloads amongst academic staff occurs through a process of discussion between colleagues, within a consistent

framework of regulation. Unless these arrangements are fair and consistent as between different employees, such arrangements are liable to break down.

4. Academic Freedom and the Use of AWAs

While Governments and employers declare their support for academic freedom from time to time, it is only given legal force in Australia by the actions of the NTEU in negotiating in Collective Agreements, essential elements of which make academic freedom a reality.

These are:

- Statements of principle in support of academic freedom; and
- Protections against arbitrary dismissal, requiring allegations of misconduct or poor performance to be tested before peer review committees. There are protections also for arbitrary dismissal for medical incapacity or contrived redundancy before termination occurs.

There protections apply to all staff, or at least to all academic staff.

While these protections are important, academic freedom can only exist when all employees in an academic community enjoy it. Scholarly debate and discourse, whether it be in the Sciences, Business, Law or the Humanities, is not really unfettered l if some employees are covered by Agreements which limit free enquiry or free expression.

Over time, the new legislation, combined with the commercial pressures on universities, is likely to lead to the use of AWAs for some employees which either explicitly limit academic freedom or do not contain the provisions which underpin it.

The effect of this will be to undermine the quality of academic discourse.
For example, if the Head of an Academic Department has a confidential AWA which says that she will support the Vice-Chancellor and Dean's academic and research priorities at all times in the workplace, her colleagues will be mislead about her real views, any many believe that she supports, for example, a research proposal on academic grounds rather than because she is bound to.

Once this starts happening, the quality of academic discourse is undermined. Each member of an academic community should be able to know that all other members of that community enjoy the same academic rights.

Already, AWAs are being offered which do not include the provisions necessary for academic freedom.

The proposed legislation allows AWAs to be offered at any time, even after a collective agreement has been reached. This means that university staff have no way of effectively negotiating to protect, as a community, their academic rights, or other professional standards.

5. Comments on Specific Aspects of the Bill

NTEU emphasises that the limited times available means that it has not had the opportunity to properly scrutinise the provisions of the Bill, and apologises to the Committee that it cannot provide a considered and comprehensive response.

Prohibited Matters, Non-Allowable Matters and Ministerial Power

Despite the Government's rhetoric about being opposed to "third party" intervention in bargaining, the Bill allows the Minister by Regulation to:

- Declare any matter to be a "non-allowable" matter in Awards, or in a particular Award. This could apparently included any matter specifically currently listed in the Bill as an "allowable" matter and could even include a specific Decision or Order of the Commission which the Government does not like; and
- Declare anything to be a prohibited matter in a Workplace Agreement, notwithstanding the fact that the parties had agreed to it in bargaining.

Subject only to the unlikely disallowance of Regulations by the Parliament, this is an inappropriate delegation by the Parliament to a Minister. If the Parliament is retaining, even in a very limited way, an independent umpire (the AIRC) to decide Award conditions, the decisions of that Commission should not be able to over-ruled by the Ministerial fiat.

In relation to bargaining for workplace agreements, NTEU suspects the Government's motives in referring to a list of prohibited items in the WorkChoices booklet published in October, but not listing these in the Act.

Again, this provision gives the Minister the power to re-write, by Regulation, Agreements after they have been reached. This is an outrageous interference in the rights of bargaining parties.

The list of "prohibited items" included in the WorkChoices Booklet (eg. Trade Union Training Leave, Protection Against Unfair Dismissal) shows the real agenda of the Government.

The limitation on including remedies for unfair dismissal is outrageous. Australian Universities operate in the international market for academic staff, and would be able to use collectively negotiated enforceable remedies for unfair dismissal as part of the package of conditions available to staff whom they are trying to attract from overseas, most of whom will have such rights in other countries. Prohibiting parties from reaching an Agreement, including remedies for unfair dismissal (even if "operational reasons" were the reason for the dismissal) is a counterproductive policy.

Industrial Action

The package of amendments about industrial action is totally unbalanced – employees are hamstrung at every turn in taking protected action and employers are given assistance to stop industrial action by employees at every turn.

The restrictions on the rights of employees to take industrial action are onerous, arbitrary and, in at least one case, absurd. Especially under the regime proposed in the Bill, industrial action is the only means employees have of seeking fair conditions of employment in the face if employer resistance

Yet the right to take industrial action is being curtailed – almost to vanishing point.

In relation to this general point, the NTEU makes the following specific comment:

a) The combined operation of 107G(1) and 107G(2) leads to an absurd outcome. Take the following example:

Day 1: *The NTEU opens a bargaining period at XYZ University.*

Day 8: *The NTEU commenced proceedings for a protected action ballot.*

Day 14: *On proper notice, the employer;*

(i) *locks out all employees for one hour;*

(ii) sends an email to all staff saying it doesn't want to reach an Agreement and wont meet or negotiate.

Day 15: The University commences action for suspension or termination of bargaining period on the grounds set out in 107G(2)

The NTEU's reading of 170G(1) is that the Commission "must, by order suspend or terminate [the] bargaining period" in this example. This means that an employer, by taking what would be unprotected industrial action, establishes the jurisdictional basis for the mandatory suspension or termination of the union's bargaining period. Whether this absurdity is inadvertent or intentional is not within the knowledge of the NTEU.

c) The previous point is illustrative of a broader issue. The removal of the Commission's discretion not to make orders under Section 107G(1) and Section 111 is likely to lead to grossly unfair outcomes. For example, while it is accepted law that a work-to-rule can be industrial action and could give rise to orders to stop industrial action under the current Act. Nevertheless it is currently a discretionary matter whether such an order would be made. The following example illustrates this point;

Employees at ABC TAFE Institute have been directed for months by their employer to work 42 hours a week, and the employer refuses to pay them for hours in excess of 38, despite being required to do so under the terms of their collective agreement, which has not reached its expiry date. The union writes to the employer demanding that this cease. The employer refuses to respond or even to meet with the union. Union members at a meeting resolve that they will not continue to work the excess hours unless the employer pays them in accordance with the Agreement.

In these circumstances the Commission must order the industrial action to cease. i.e. that they employees continue to work the extra four hours per week. Each employee, and the

union is also liable for significant penalties if they refuse to continue to work in breach of their agreement.

This absurd and outrageously unfair outcome is not only permitted by the Bill, it is mandated by the Bill. The removal of the Commission's discretion to make orders about industrial action without any regard to the merits of the case will bring the Commission into disrepute.

d) The Minister's power to terminate a bargaining period is arbitrary and unfair. Given the legal armoury at the disposal of the employers under the rest of the Bill, it is hard to imagine what purpose is served by this, other than the making of arbitrary political decisions. The Bill would seem to permit the Minister to make an application to the Commission under Section 107G(1) specifically on the grounds for terminating the bargaining period under subsection 107G(3), have the Commission dismiss the application as without foundation, then immediately issue a declaration under Section 112 and Directions under 112A on exactly the same grounds as have been rejected by the Commission. The Minister should not possess these arbitrary powers. There is no right for parties to be heard by the Minister, no requirement even to issue reasons, and no right of appeal. Section 112A is even more outrageous. There would seem to be nothing in Section 112A to prevent the Ministers Directing under 112A including:

   a. That no party criticize the making of an order under 112;
   b. That the union not communicate with its members about the matter in dispute; and
   c. That the employer dismiss specific employees from their employment.

6. The Higher Education Workplace Relations Requirements (HEWRRs) and The Skilling Australia's Future Act 2005

The context in which the Bill is being considered is also worth noting. The Government is now using funding mechanisms to dictate the terms of workplace agreements.

In universities and in TAFE, the Government is requiring that employers offer Australian Workplace Agreement (AWAs) to all employees, and in universities it is requiring that certified agreements must have particular provisions, and must not have other provisions.

Particularly in relation to the latter, the NTEU is very concerned that the HEWRRs are a rehearsal of those matters which are likely to be made, by Regulation, "prohibited matters" in all workplace agreements. These include:

- Restrictions on the use of types of employment;
- Facilities for union delegates; and
- Requirements for consultation or any staff rights to negotiate about certain types of workplace change during the Agreement. (For example, a provision which says "*there will be no forced redundancies during the life of the life of this agreement"*).

If this fear is well-founded, it provides additional grounds why the Senate should not pass any Bill which allow the Minister to determine that matters are "prohibited matters" in Agreements.

Dispute Resolution Process

The new Act provides for a mechanism of dispute resolution under a Workplace Agreement. This is limited from the current Act to prevent the Commission making orders. Such a limitation is not warranted.

Despite the Explanatory Memorandum detailing to the contrary (paragraph 2350), the plain meaning of the words under 176L(2)(c) is that the *parties to the dispute* **must** sign the application and agree on the matters in dispute prior to enlivening the

Commission's jurisdiction. Any employer which does not want the dispute to be dealt with by the Commission, despite having agreed to processes which empower the AIRC to deal with the dispute in a Workplace Agreement, would simply have to refuse to sign the application.

Whereas non-compliance with a provision of the dispute resolution process in a Workplace Agreement would constitute a breach of the Agreement and therefore compliance with 176M(b) could theoretically be achieved, an employer could disempower the AIRC from any capacity without recourse to a court by not complying with 176L(2)(c).

The requirement to conduct the dispute resolution process in private is new and provides a greater lack of scrutiny of such processes. The precedent value of arbitrated matters will be undermined by this new limitation. The fairness and openness of public scrutiny will be lost.

Deletion of Previous s111(1)(e) Powers

Under the Workplace Relations Act 1996 and previous legislation the AIRC was empowered to make orders against parties which flagrantly violate orders, directions and the like. Such orders made breaches of such orders a new breach each day the behaviour continued.

The new Act provides no such provision to help ensure compliance with the Act.

Unfair Dismissal and Operational Reasons

Despite comments made by the Minister on Lateline (ABC 3/11/05), the actual provisions of the proposed Act do not empower the AIRC to determine whether a valid, fair or reasonable operational reason applies. In fact, the new Sections 170CE(5C) and (5D) provide for a very wide ambit of what constitutes an operational reason.

It is important to draw the distinction between the ambit of operational reasons and genuine redundancy. A reason which is economic or structural in nature and simply relates to a part of the employer's business will constitute a basis for denying unfair

dismissal claims, even if the reason is a very minor reason in the context of other reasons applying.

The AIRC will be prevented from exercising any review of whether the operational reason is fair, or whether, given the potential minor or miniscule nature of such a reason, the other reasons for termination in fact constitute unfair termination. The following examples illustrate the point.

> ***Example 1:*** *Dave works full-time as a chef in a University cafeteria and signed an AWA. He is fired without notice or any explanation. His union applies for unfair dismissal but the employer simply says one of the reasons he was fired was operational. It was economic and structural – another chef accepted a lower wage on a worse AWA. Under the Bill his case would headed for failure.*
>
> ***Example 2:*** *Mary has been involved in a lengthy academic debate with her Department Head, Dr Smith, about the effect of global warming on Australian agriculture. She discredits much of Dr Smith's research at a Conference. The next day, Dr Smith, decides that the subject option she teaches "Desert Climatology" is "no longer required", and she is dismissed. This would appear to be an "operational reason". Her unfair dismissal case would seem to be doomed.*

Unfair Dismissal, Restructuring & Transmission

The definition of the limit of an employer to 100 employees for bringing unfair dismissal applications should be expanded to ensure employers who:

- have two or more related businesses, or,
- who restructure their business in any manner which reduces their number of employees (such as by casualising or establishing numerous businesses) below 100,

cannot use the provision to prevent unfair dismissal applications being made.

Pre-Reform AWAs and Certified Agreements

The proposed Act provides that those employees whose AWAs are terminated will fall to the FPCS minima until a new workplace agreement comes into effect. This is

new as currently employees on AWAs will fall to the certified Agreement or Award when their AWA is terminated. An example illustrates the problem with this:

A Certified Agreement is made on 15th December 2005 which will go for 3 years. Mary accepts an AWA on July 4th 2006 because it pays $5000 more than the EBA but it has a nominal expiry of 2 weeks. Her boss then gives notice of termination the day after it is lodged and the AWA terminates on the 4th October 2006. The certified Agreement has more than 2 years to run but Mary will only get the FPCS 5 minima unless she signs another AWA, which can, of course, be as low as the FPCS itself.

Of even greater concern is that the new Act is silent in the event of a pre-reform AWA being terminated – not explicitly providing for the certified Agreement or Award to be their industrial instrument in the event of such termination. This is not what a worker would have understood when entering into a pre-reform AWA.

7. Conclusion

As stated above, the NTEU considers the Bill to have nothing to do with “choice” for employees, unless the choice is to abandon rights to collectively bargain, and to accept inferior conditions.

The Bill is manifestly unfair, both in its general provisions and in virtually all of the specific changes it makes to the current law.

For the reasons stated the Senate should reject the Bill.