Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

Submitter: Susan Hopgood, Acting Federal Secretary

Organisation: Australian Education Union

Address: Ground Floor, 120 Clarendon Street,
Southbank,
Victoria, 3006

Phone: (03) 9693 1800

Fax: (03) 9693 1805

Email: aeu@aeufederal.org.au

AUSTRALIAN EDUCATION UNION

SUBMISSION TO THE

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO WORKPLACE RELATIONS AMENDMENT (WORKCHOICES) BILL 2005

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Pat Byrne
Federal President

Susan Hopgood
Acting Federal Secretary

Australian Education Union
Ground Floor
120 Clarendon Street
Southbank VIC 3006

Telephone: 61 3 9693 1800
Facsimile: 61 3 9693 1805
e-mail:aeu@aeufederal.org.au

Introduction

1. The Australian Education Union (AEU) has a strong commitment to the provision of public education throughout the Commonwealth of Australia, and directly represents, protects and advances the industrial and professional interests of its members in each state and territory.

2. These members, whose number exceeds 165,000, are employed in a diverse range of educational workplaces, most notably in schools, TAFE colleges, early childhood centres and community centres for the disabled. Individually and collectively, they perform a fundamental public service within our society, and their welfare is inextricably linked to any qualitative assessment of the social and educational capital of the nation.

3. It is the firm conviction of the AEU that the employment conditions of our members will be inexorably eroded by the implementation of the legislative reforms provided for in the *Workplace Relations Amendment (WorkChoices) Bill 2005*. The virtual dismantling of the award system, and the privileging of individualised workplace agreements over those reached through collective bargaining, will both conspire to reduce or eventually eliminate hard-won, negotiated and measured improvements in minimum conditions of employment.

4. The present system of award variation and collective bargaining negotiations is subject to rigorous scrutiny by independent industrial tribunals, prior to any determination that adjusts wages and conditions. Final decisions of the various industrial commissions are informed by legal precedent and the broad experience of permanently appointed, independent commissioners who understand contemporary workplace dynamics. The reasoning processes of these men and women is mediated by the statutory obligation that rests upon them to promote the economic prosperity and welfare of the working people of Australia.

5. The whole process operates within the framework of transparent public forums. It is difficult to embrace the notion of an unrepresented employee, in a variegated and deregulated labour market being offered the prospect of commensurate rewards, especially where the arbiter is an isolated employer 'negotiating' with a hitherto casualised, junior employee, endeavouring to escape long-term unemployment.

6. The AEU rejects the assumption that a log of claims, traditionally bargained for by our union on behalf of employees, is somehow inimical to the principal objects of the new legislation. On the contrary, there is an internal inconsistency with stated objects that at once purport to encourage a flexible and fair labour market or mutually beneficial work practices, while effectively denying the long-term capacity of organised labour to assert these obligations on an industry-wide basis.

The changed arrangements for the setting of minimum wages and conditions of employment

7. In place of the current federal system of an annual review and safety-net adjustment to minimum wages, conducted by way of tri-partite hearings in the Commission, *WorkChoices* will impose the Australian Fair Pay and Conditions Standard (FPCS), unilaterally determined by a new Fair Pay Commission (FPC), whose decisions are not amenable to appeal. The Chair and his four commissioners are appointed by government under statute for fixed terms, for a period not exceeding five years or four years respectively.

8. Given that the wage-setting parameters of the FPC under section 7J of the Bill, already form an integral part of the AIRC's annual safety-net deliberations, the emasculation of the AIRC is clearly analogous to an act of sporting perversity that impels the replacement of one experienced umpire by another, more partisan, when the first delivers disagreeable rulings.

9. Section 88B(2) of the WRA provides that the AIRC 'must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:

    i. the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;
    ii. economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;
    iii. when adjusting the safety net, the needs of the low paid.'

    Section 90 also requires the AIRC to take into account the public interest when making its decisions.

10. Noting the decline in percentage terms of the minimum wage from 1996 to 2004, relative to the median earnings of full-time adult employees, one respected commentator (and self-professed 'luke-warm' supporter of the government reforms), has remarked that:

> In some ways, the debate over whether the minimum wage should be set by the AIRC, or by the Fair Pay Commission envisaged by the Government, seems to be a cover for a debate about whether this trend should be accelerated or not…….many economists (myself included) believe that support for low-income earners is more appropriately provided through the income tax and social security systems than via the industrial relations system. In that context, I think it is unfortunate that the Government's *WorkChoices* proposals haven't been accompanied by reforms in these areas.[1]

11. This new body of hand-picked, contracted economists and business persons will set and periodically adjust;
    a. a single minimum adult wage for employees not presently covered by awards. (Unincorporated employers in particular, will not be slow to recognise the commercial attractiveness of this arrangement);

[1] Saul Eslake, 'Workplace Relations Reform' (Address to a conference sponsored by *The Australian Financial Review*, 25 October 2005) 10.

b. minimum wages for existing award classification levels. (Set without specific statutory reference to the notions of *fairness* and *no-disadvantage* that underpin the current regime);
c. a statutory minimum wage for apprentices, trainees, employees with disabilities, piece workers and casual loadings.

12. The new FPCS incorporates only five statutory minima;
    a. maximum ordinary hours of work to be set at 38 hours per week, which can be averaged over a 12 month period. (However employees may find that traditional overtime rates can now be absorbed by these arrangements, and 'reasonable' additional overtime at the *insistence* of the employer will become increasingly the norm);
    b. a minimum hourly rate of pay, with a casual loading of 20%.
       (There is no obligation to pay for each and every hour worked, only hours up to 38);
    c. four weeks annual leave, but five weeks for those working weekend shifts.
       (The fact that it has been made unlawful to coerce employees to 'cash out' up to two weeks of this standard, indicates the potential to exploit particularly vulnerable employees in this regard);
    d. ten days of personal and/or carer's leave per annum. Two days unpaid emergency/compassionate leave;
    e. Fifty-two weeks unpaid parental leave. This covers new awards, including those emerging from the proposed consolidation process, the initial inquiry into which purports to be concluded by the end of July 2006.
       (This 'standard' does not compare favourably with many existing award entitlements in relation to this matter - it is well short of the AIRC family test case provisions of 104 weeks, and the associated right to request part-time work on return from leave until a child reaches the relevant school age).

The position of the AEU in relation to these industrial relations developments

13. Over the past decade, the wages and conditions of the majority of our members have been enhanced through certified agreements and awards under existing state industrial laws, or through Part V1B, Division 2 agreements under the federal *Workplace Relations Act 1996* (the 'WRA'). Whilst agreements between employers and employees in some states, such as NSW, are conveniently formalised by way of an award, other jurisdictions do not place as much reliance upon safety-net adjustments and award variations *per se*.

14. However, the future of *all* current AEU agreement-making processes is in serious jeopardy, given the government's undisguised preference for uniform non-collective, Australian Workplace Agreements ('AWAs'). These agreements are to be negotiated against the background of a set of basic minimum conditions, varied from time to time by reference to some ill-defined and opaque adjustment formulae, arbitrarily applied by a Fair Pay Commission whose reasoning is not susceptible to close public analysis.

15. An indication of the government's disdain for union collective agreements is manifest in the creation of the s.96D 'employer greenfields agreement', one that unintentionally captures the true essence of 'workchoices', in that it essentially contemplates the employer agreeing with itself.

16. Short of a reversal of the established constitutional jurisprudence in the High Court, the use of the corporations power appears, at this stage, capable of covering the field in the regulation of workplace agreement-making between individual workers and body corporate employers throughout Australia. The proscription of state-based unfair contracts legislation 'pushes the envelope' in this regard.

17. In any event, a states' rights–based challenge to the proposed legislation will afford the High Court the opportunity to re-visit the whole question of the scope of intergovernmental immunities and its intersection with the corporations power. In broad terms the sweeping nature of these industrial relations changes might be characterised by the court as an impermissible attempt to reduce the original compact for the settlement of disputes, to an unworkable appendage of the corporations power.

No real 'choice' in agreement-making

18. **All** new agreements will now be overseen by and lodged (ie. registered) with the Office of the Employment Advocate (OEA), s.99-99D, thus displacing the *compulsory* conciliation and arbitration functions, and the associated certification practices of the AIRC in these matters. Checks on the process and content of workplace agreements are now to be 'self-assessed' by the parties.

19. The government will enact regulations applicable to all new agreements, s.101D of the Bill, which proscribe, among other things, clauses prohibiting AWAs, limiting labour-hire take-up, providing unfair dismissal remedies, allowing for industrial action during the term of an agreement, or even providing for a union role in dispute settlement procedures.

20. New workplace agreements commence operation upon 'lodgement' and may last for up to five years. After the nominal term of the agreement has passed, the employer can give 90 days notice to terminate the agreement. If no new agreement is lodged before the 90 day notice has expired, the employee's conditions revert to the five minima of the Fair Pay and Conditions Standard.

21. The Bill specifies, in s.103R, that at this point no award has effect. That is, once an employee has entered into a workplace agreement, that employee is permanently shut out of the award system, and is confronted with the appallingly low, minimal conditions of the FPCS, if no new agreement can be negotiated.

22. It is obvious to even the most disinterested observer that the unstated intention of the *WorkChoices Bill* is to systematically marginalise the union-sponsored collective agreements and awards that have for a long time provided the foundation for the fair wages and conditions of all employees in the educational sector. Awards themselves will now have a built-in obsolescence. This 'reform' is, of course, nothing short of a blatant attempt at neutering union influence within the labour relations system as a whole.

What are some of the consequences, if respondents to our current certified agreements decline to enter into similar arrangements in the future?

23. The recent disposition of grants and federal government funding for the TAFE sector, conditional upon the offer of AWAs to all new employees, signals the first step in enticing state labour governments to relinquish their continuing in-principle support for collective bargaining within the entire education sector.

24. To counteract these measures, public sector employees, like their private sector counterparts, ultimately need the guarantee of a *permanent right* to collectively bargain to determine their wages and conditions; a right that operates independently of the prevailing orthodoxies of the chance political configurations that happen to occupy the government benches during any particular parliamentary cycle.

25. The political agenda behind the TAFE sector developments, betrays a cynical abuse of the commonwealth's financial power and a presumption that improved standards and productivity naturally flow when unionists are diminished in industrial status, denied the capacity to collectively bargain effectively, and the right to legitimately consult with management on recurrent workplace issues.

26. It looks and smells like the eventual substitution of skilled, career-oriented *teachers*, by part-time sessional, casual, and contracted *vocational instructors*, stymied by their transient appointment in establishing an enduring pedagogical relationship with their students, and possessing little or no personal

identification with their institution or the industrial interests of their full-time colleagues. Although an improbable outcome for the schools sector, coalition operatives will already be planning for individualised contracts for *all* employees engaged in public education.

27. The subject of the offer of AWAs and their inappropriateness for regulating the educational workplace, has already been the subject of a detailed AEU Senate submission delivered in August this year. Although germane to the overall impact of the *WorkChoices Bill*, it is not intended to revisit these matters at any length in the present submission. The divisive nature of offering certain educational sector employees a package of benefits superior to other colleagues performing similar tasks, is a policy designed to fragment the workforce and to institutionalise disharmony in an environment where co-operative relationships are fundamental.

Common award or negotiated agreement conditions up for grabs?

28. That being said, on any reading of s.116B of the *WorkChoices Bill* adverse to the present entitlements of our membership, several conditions currently enjoyed via provisions in awards or certified agreements, could well be the subject of re-negotiation.

29. It is plausible that attempts may be made to exclude any number of them from an all-purpose educational AWA, offered by hostile employers finally enmeshed within a federal, unitary system, at the end of any three year transitional period.

    It is submitted by the AEU, that education workers could stand to lose:

    i. access to the private arbitration powers of the AIRC under s. 170LW of the WRA in order to finally determine or resolve disputes. (A model dispute settlement procedure will operate in all awards from the commencement date of the new legislation. The procedure will also operate as a default clause for all manner of agreements, in situations where the parties choose to

neither voluntarily engage the AIRC's arbitral services, nor specify their own dispute resolution clause.)

ii. access to employees at workplaces by trade union representatives, currently authorised by Part 1X of the WRA;

iii. industry-specific employee classification structures and related translation tables; salary loading allowances; allowances and incentives to assist in the attraction and retention of staff in unfavourable locales;

iv. stipulations and terms relating to the application of the principles of merit and equity in matters pertaining to an employee's transfer, promotion and movement within pay scales and/or classifications;

v. formal staff consultative structures; agreed processes for the identification of employees subject to redundancy and re-deployment decisions; generalised issues relating to the effect of workloads;

vi. transfers between educational workplaces on compassionate grounds, or as a result of an employee's vindication in disciplinary findings;

vii. limitations on the range or duration of professional development and/or training arrangements;

viii. restrictions on the engagement of sessional or casual employees, and the entitlement to conversion to on-going secure employment after a specified period under fixed-term contract;

ix. the capacity to access lists of fixed-term vacancies on behalf of members deemed to be 'eligible employees' for conversion purposes;

x. trade union training leave; release time during term to attend union council meetings; cultural and ceremonial leave as applied to the special needs of Indigenous employees;

xi. a non-discriminatory definition of carer's leave, to cover all bona fide domestic relationships;

Which educational groups are particularly vulnerable?

30. *WorkChoices* is a misleading epithet to bestow upon an industrial relations system which effectively erects significant impediments to the free choice of terms to be included within a collective agreement, underpinned by long-standing, allowable award matters.

31. In the short term, the negative effects of the reforms will be disproportionately borne by those educational workers least able to resist, especially those unable to employ countervailing industrial muscle through the use of a union bargaining agent. The 28,000 TAFE teachers currently employed on a casual or hourly-based arrangement, and substantially non-unionised, are now technically susceptible to being offered the 'carrot' of a species of continuing fixed term contract, in consideration for agreeing to forego conditions normally attaching to permanency.

32. Another salient example of the practical effect of the government's introduction of a regressive wages and conditions policy, can be seen in the case of early childhood workers and field officers in those states where the members do not benefit from inclusion within a department of education classification structure.

33. Despite our union organising beneficial multi-employer collective agreements on their behalf, as a group they remain largely captive of a system that accords them scant professional status and accordingly, modest remuneration and allied conditions. The relatively isolated nature of the workforce also makes it a particularly difficult sector in which to recruit and organise potential members.

A decline in wages and conditions may be the least of their problems

34. In the State of Victoria, for example, where most industrial relations powers have been referred to the Commonwealth since 1996, the AEU's early childhood membership is currently a party to three separate multi-employer

agreements (MECAs), covering around 1,000 respondents throughout the state.

35. Were these geographically-dispersed employees to be deterred from choosing a collective agreement at their often isolated workplaces, the ever-changing management committees in community and private pre-school and childcare centres would be free to administer the going 'market rate' for their services, no doubt wedded to the basic offerings of the FPC.

36. As these members are typically employed in business entities, incorporated or otherwise, of significantly less than 100 employees, they will have negligible power to redress either a capricious or *unlawful* termination of their employment. Conversely, as the economist Mark Wooden has pointed out,[2] laws prohibiting harsh, unjust or unreasonable termination are unlikely to have much impact on large business entities. Compared with the small employer at an early childhood learning centre, organisations of over 100 employees have a greater capacity to screen out unproductive employees, and indeed may have appointed a dedicated human resources manager, who will be familiar with the legal obligation to afford substantive and procedural fairness in termination of employment matters.

37. It follows as a matter of logic that legislative protection of employees will be most needed in much smaller, typically non-metropolitan worksites, where the opportunity for despotic managerial conduct is likely to be less frequently monitored or corrected. (Acceptance of this fact by the government can be discerned in the hasty provision of $4,000 to help assess the legal remedies of the illegally sacked, indigent employee.)

38. Moreover, where a business operating as an early childhood centre is *transmitted* to a new owner, the obligation to comply with existing awards and agreements, is *not* transferred to the new owner, unless the current employees

[2] Mark Wooden, 'Australia's Industrial Relations Reform Agenda' (Paper presented at the 34th Conference of Economists, Melbourne, 26-28 September 2005) 12.

also transfer. This provision is likely to create a strong incentive on an employer purchasing an existing business *not* to re-hire current employees.

The 'choice' to remain employed is reduced to a one-way street

39. The new provisions which allow large-scale employers to dismiss employees for 'operational reasons', justified by economic, technological or restructuring considerations, serve to reduce the capacity of those employees to scrutinise the validity of these assertions. The new s.170CE(5C) of the WRA specifically excludes the making of an application under Part 1VA, Division 3, *based on reasons that include genuine operational reasons*.

40. But it goes further than this. For those managers averse to any increase in unit-labour costs by way of labour protection regulations, there is another 'choice' now available. As Professor Wooden remarks:

> There is now an economic disincentive for businesses to grow beyond the 100 employee threshold. We can also expect some opportunistic behaviour on the part of firms, engaging in organisational restructuring in an effort to avoid unfair dismissal provisions. ….The opportunity to engage in such behaviour is certainly much greater when the size threshold is 100 employees as compared with 20 employees.[3] (The latter number was the preferred figure in proposed amendments to the *Workplace Relations Amendment (Fair Dismissal) Bill, 2002*, prior to the government's wresting control of the Senate in mid-2005.)

41. Under s.170CG(3)(a) of the WRA, for example, even if the federal commission is persuaded that operational reasons for dismissing an employee are genuine, their application in the circumstances might still be characterised as harsh, unjust or unreasonable. This distinction appears to have met the same fate as the principle of the 'fair go all round', once applied in a disinterested manner irrespective of the size of the employer's workforce.

42. Without strong union representation and a collective agreement, these same vulnerable employees are likely to be further compromised by the proposed activities of the *Award Review Taskforce* (ART).

43. This new body plans to rationalise award wage and classification structures on an industry sector basis, setting up ‘new awards’, whose content will be the first to be purged of any reference to superannuation, long service leave, jury service or notice of termination provisions. The remaining 16 allowable matters will only be ‘preserved’ in the interim for workers who are respondents to current awards, and new employees covered by those same awards.

44. Industry sector awards are simply too broad to be of lasting relevance. It is fanciful to promote the virtues or efficacy of a single award covering all employees in the education ‘industry’ sector. This was the unhappy experience in Victoria, under industry-sector awards that operated briefly prior to the 1996 referral of powers legislation.

Conclusion

45. The Australian Education Union is opposed to the philosophical thrust, the detail and the practical effect of the *WorkChoices* legislation. The provisions disclose a deep-seated antipathy towards the system of collective bargaining between employees and employers, that has been successfully advanced, examined and regulated in quasi-judicial tribunals and courts of law for the best part of a century. The so-called ‘reforms’ detract from this rich historical, legal and social legacy, and they spring from a crudely disguised, ideological impulse to get rid of trade unions from the entire labour relations system, root and branch.

46 he dismembering of the federal industrial relations commission, particularly through the excision of its arbitral functions in relation to the determination of awards and workplace agreements, has the potential to seriously undermine the notions of *fairness and equity* that have hitherto served to bind and nurture

[3] Wooden, above n 2, 13.

productive workplace relationships, wherever they are located in the Australian community. State tribunals will be left to wither on the vine.

47. The concept of a fair go in the interplay of the forces of labour and capital, has evolved organically within an industrial relations system largely derived from an express constitutional provision for the settlement of workplace disputes throughout the nation. Those who drafted section 51(xxxv) of the constitution did not intend to provide for its demise in the corporatisation of labour.