SUBMISSION OF THE

SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION

TO THE

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES AND LEGISLATION COMMITTEE

INQUIRY INTO THE

WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005

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INTRODUCTION

1. The Association appreciates the opportunity of making a submission to the Senate Committee inquiring into the Work Choices Bill.

2. However the Association expresses its concern over the extremely short time that the Association was given to make a submission. In the case of this Bill which runs to 687 pages the Association has had access to the Bill for only 1 week before being required to file this submission.

3. A Bill of this magnitude simply cannot be subject to a serious and considered examination in relation to each and every clause of the Bill in such a short time.

4. The Association expresses its concern at the Governments approach of denying interested persons a real opportunity to properly consider the Bill before being required to make this submission.

5. We note that the Bill has been long in the making and that employer organisations and employer linked law firms have had a greater opportunity to consider aspects of this Bill during the drafting stages.

6. Notwithstanding this criticism the Association appreciates the opportunity to make a submission to a Senate Inquiry into the Bill.

7. The Association has not attempted to deal with every aspect of the Bill in our submission.

8. Rather the Association has concentrated in this submission on those aspects of the Bill which most concern the Association and its members and employees in the retail and fast food industries.

9. Our failure to comment on specific aspects of the Bill should not be construed as support for those provisions of the Bill.

10. Should the Senate Committee wish to know the views of the Association in relation top any aspect of the Bill which has not been specifically addressed in this submission the Association would appreciate the opportunity of making a supplementary submission on such matters.

AGREEMENT MAKING

11. Agreement making under Work Choices legislation is made significantly easier. However, it would appear that there is a very serious and significant cost to employees in the approach adopted by the Government in making it easier for employers to make agreements and have agreements operate.

12. The lengths to which the Government will go to make it easier for employers to get their way is clearly shown by the absurd concept introduced into Work Choices legislation of an "Employer Greenfields Agreement" as provided for in proposed Section 96D. It is both a legal fiction and a serious abuse of the English language for the Government to provide that an employer may make an agreement when there is simply no other party. An agreement, by its very nature, requires at least two parties to agree on certain matters. Under proposed Section 96D, an employer may talk to itself and make an agreement with itself about terms and conditions of employment which will apply to future employees.

13. In the true sense of operation of proposed Section 96D, there is no agreement. There is a unilateral declaration of terms and conditions of employment by the employer. Honesty would require the Government to retitle proposed Section 96D as "employers unilateral declaration of terms and conditions of employment on a greenfields site". Whilst this may be a bit cumbersome as a title, it at least identifies the true nature of the instrument that the Government proposes to allow employers to create.

14. Once properly categorised, it should be realised by the Senate that proposed Section 96D has no place in a part of the Workplace Relations Act dealing with workplace agreements. It is not, and never was intended, to be a provision about agreement making. If the Government wishes to insist upon the retention of the concept of an employer being

able to make a unilateral declaration as to terms and conditions of employment for future employees, then that should be clearly stated and clearly provided in a separate part of the Act. To maintain Section 96D within the workplace agreements provisions of the Act, diminishes the overall integrity of the Act. It is sleight of hand of the worst sort. It is dishonesty of the worst sort.

15. However, the presence of proposed Section 96D with the ill-named "Employer Greenfields Agreements" within the provisions of the Act dealing with workplace agreements, clearly identifies the Government's overall aims and purposes of the Work Choices legislation. It is clear that real choice is not a feature, and was never intended to be a feature, of Work Choices.

16. The fact that the Government has no difficulty incorporating provisions whereby an employer can make a unilateral declaration as to terms and conditions of employment in amongst provisions ostensibly dealing with agreement making, shows that the Government's real intentions in introducing the Work Choices legislation is to strengthen the hand of employers in deciding the terms and conditions of employment of employees and taking away real choice from employees.

17. Proposed Section 96D is on its own, an extremely objectionable provision. However, in conjunction with proposed new Section 95B which defines a new business, it is clear that the combination of 95B and 96D gives all existing employers the ability to use a greenfields agreement in relation to any new business that the employer undertakes.

18. The definition of 'new business' in proposed Section 95B is so broad that, for example, in the fastfood industry, if a fastfood operator was to establish a new outlet, even though it may be branded the same and selling the same products as other outlets, it would clearly fall within the definition of new business and the employer would, notwithstanding that its existing business may be covered by an enterprise agreement or an

award, be able to create a greenfields agreement (a unilateral declaration by an employer as to the terms and conditions of employment of employees) in relation to the new outlet.

19. It appears from the language of proposed Section 95B that to be a greenfields site requires nothing other than "newness". There is no requirement that the new business be distinct from previous existing businesses. As long as it is new, either a new business, new project or new undertaking, then it is sufficient to fall within the definition of new business in Section 95B and thus attract to the employer the power under proposed Section 96D to make a unilateral declaration as to terms and conditions of employment of employees at that new business.

Multiple Business Agreements

20. It has been an existing feature of agreement making within the Australian Industrial Relations context, that a multiple business agreement can be certified by the Commission. Multiple business agreements provide opportunities for a large number of very small employers who all have the same general operation to band together to have a single agreement. Often economies of scale permit small employers to utilise the process of a multiple business agreement to ensure that they can, as a collective group, negotiate a fair and effective agreement for themselves.

21. Multiple business agreements negotiated with unions often have the union as the prime mover in terms of making applications to the Commission for certification. This reflects generally the fact that unions are more able to carry the administrative costs of initiating all of the necessary paperwork for certification of a multiple business agreement. There appears to be no great difficulty with the way multiple business agreements have operated to date.

22. The Work Choices legislation makes a significant change to multiple business agreements which will adversely impact on employers.

23. Given that multiple business agreements will only be approved by the Employment Advocate, the Government has introduced a proposed Section 96F which requires that before a multiple business agreement can be made that the Employment Advocate must authorise the respective employers to enter into a multiple business agreement. In some respects, this is not contentious. What is contentious, however, is that the legislation will require that an employer, and only an employer, can apply to the Employment Advocate for an authorisation to make or vary a multiple business agreement.

24. There is no practical reason why an organisation of employees which is to be a party to a multiple business agreement, or a representative of a group of employees who are to be bound by multiple business agreement, could not make an application to the Employment Advocate for authorisation to make or vary a multiple business agreement. It would appear that the limitation on applications to the Employment Advocate is ideologically driven, rather than responding to any sensible, practical need.

25. The Association would strongly urge the Senate to amend Section 96F so as to enable an organisation of employees, which is to be party to a multiple business agreement, to make an application to the Employment Advocate for an authorisation to make or vary a multiple business agreement, and also to amend the Section to permit a representative of employees who are to be bound by a multiple business agreement, to make an application for the requisite authorisation.

26. Allowing any of the parties to a multiple business agreement to make the initial application for authorisation would reflect good industrial relations sense in allowing the parties to decide amongst themselves who has the best capacity to initiate the paper work trail that must be undertaken in

relation to a multiple business agreement. Placing the burden solely upon the employer is both unfair to employers and unfair to organisations of employees and employees concerned.

27. Work Choices legislation has replaced all of the provisions in the current Workplace Relations Act concerning the certification process for collective agreements and AWAs with a simple approach of lodging agreements with the Office of the Employment Advocate and having such agreements operate of their own accord.

28. Under the existing legislation, both the Office of the Employment Advocate in the case of AWAs, and the Australian Industrial Relations Commission in the case of collective agreements, had the responsibility of examining all documentation filed with them to ensure that the requirements for making an agreement had been met before the AWA could be approved or the agreement certified.

29. In this sense, both the Office of the Employment Advocate and the Australian Industrial Relations Commission had a role involving them in testing the compliance by the parties with the requirements of the Act. A failure of the parties to an agreement to comply with the conditions for making an agreement meant that neither the Office of the Employment Advocate or the Australian Industrial Relations Commission could approve an AWA or certify an agreement. Under Work Choices, there is no scrutiny of the conduct of the parties in making an AWA or a collective agreement.

30. The Office of the Employment Advocate has been reduced to being a mere repository of documentation. Under Work Choices, the Office of the Employment Advocate has no role whatsoever in checking any of the documentation filed by a party or parties, and has no role in commenting on the adequacy of any documentation filed. Under Work Choices, the sole role of the Office of the Employment Advocate in relation to

agreements, is to merely accept whatever the parties to the agreement file with the Office.

31. Given that the Office of the Employment Advocate has been reduced to being merely the 'receiving bin' for documentation on workplace agreements, it is surprising that there is no office or statutory body that has any role in checking to see whether or not the parties to a workplace agreement have complied with the provisions for making that agreement.

32. In this submission, we have separately dealt with the critical issue of a no disadvantage test for the purposes of making an agreement. In this section of our submission, we concentrate more on those procedural aspects relating to the lodging of documentation with the Office of the Employment Advocate and that certification process generally.

33. Given the total removal of a role for any independent person or body to examine the conduct of the parties to an agreement in relation to their compliance with the processes necessary to lead to a valid agreement being made, it is extremely surprising that there are no provisions in Work Choices which both encourage and strengthen compliance by the parties to the processes necessary to make an agreement.

34. In fact, Work Choices has specifically made it easy for an employer to completely ignore all of the processes for making an agreement and still have the agreement operate. This is achieved at two levels. Firstly, although the Bill provides in proposed Section 98 that employees should have at least 7 days access to the agreement and have at least access to an information statement, prior to the employee signing an AWA or voting on a collective agreement, the Government has introduced a provision at Section 98A whereby an employee may waive their right to an information statement and may waive their right to have access to an agreement before they either sign it or vote on it.

35. The introduction of the concept of an employee waiving their rights is objectionable in the extreme. It is very clear from the structure of Work Choices legislation, and particularly in relation to the provisions of proposed Section 104 of the Work Choices Bill, which deals with a prohibition on coercion and duress in certain circumstances, that it is the Government's very clear intention that an employer is permitted to both coerce and apply duress to an employee in relation to getting an employee to sign a waiver form under proposed Section 98A and proposed Section 102D.

36. The effect of a waiver under Section 98A and 102D is that any employer can go to an existing worker with a proposed AWA and say, "Sign it". The employee will not be required to be given a copy of the AWA in advance and will not be required to be given any notice as to the rights of the employee to have a bargaining agent. In such circumstances, the waiver effectively allows the employer the opportunity of presenting an existing employee with an AWA and giving them no time whatsoever to decide wether or not they wish to sign the AWA. Given the other pressures that can be put on an employee (and pressures which do not amount to coercion or duress in the legal sense of those words), it is very clear that the waiver provisions significantly increase the ability of employers to force existing employees onto AWAs.

37. Similarly, in relation to collective agreements, the existence of waiver forms signed by employees would permit an employer to go to the employees as a collective group on a particular day and simply ask them to express their approval or disapproval of a proposed collective agreement. This would be done on the basis that the employees would not have seen or have had access to the collective agreement, and would not have had access to a information statement advising them of their rights to appoint a bargaining agent. In such circumstances, an employer is in a powerful position to push employees to approve a collective agreement without them having had any opportunity to examine the contents of that agreement.

38. Given the very real benefits to employers of having an employee waiver under Section 98A and 102D, it should be expected that it will become a common feature of getting employment that an employee will be required to sign a waiver form under Section 98A and 102D as a condition of employment. This will arm employers with the right to ignore the practical operation of Section 98 of the Work Choices legislation and to ignore the practical issues flowing from giving employees reasonable access to proposed agreements and reasonable opportunities to appoint bargaining agents.

39. The fact that an employer will be entitled to apply coercion, duress or any other pressure to existing employees to get them to sign a waiver form, will lead to a rush of waiver forms being sought and gained by employers under Work Choices. The whole concept of introducing waiver forms is to effectively and deliberately undermine agreement making processes. If the Government was serious about employers and employees making genuine choices as to their terms and conditions of employment, a waiver form would not be tolerated.

40. Under the current provisions of the Workplace Relations Act, a minimum 14 days must be given to employees to consider the terms of an AWA or a collective agreement before voting on it or accepting it. Under Work Choices, the Government has slashed this time in half and has given employees no more than 7 days to consider the terms of an AWA or a collective agreement which will bind them in future.

41. Objectionable as the reduced time frame is, it has in any event made it significantly easier for employers to process agreement making in a workplace. There would appear to be no justification whatsoever for waivers to be granted when an employer only has to wait 7 days before requesting an employee to sign an AWA, or a group of employees to approve a collective agreement. It is clear that the introduction of waiver forms is not about simplifying and speeding up genuine agreement

making but is specifically designed to totally remove the concept of genuine agreement making.

42. A further major objection to the Government's approach in Work Choices is the notion that an employer will have the benefit of an AWA or collective agreement operating, even where the employer has deliberately ignored all of the requirements to make an agreement available to employees and failed to give them an information statement relating to an employee's right to have a bargaining agent.

43. Proposed Sections 100 in relation to new agreements, 102M in relation to variations to agreements, and 103Q in relation to termination of agreements all provide that the agreement variation, or termination will take effect even where there has been non-compliance by the employer with the statutory provisions relating to advising employees of the terms of an agreement and their rights to have a bargaining agent, the terms of a variation and their rights to have a bargaining agent, and the intention to terminate an agreement.

44. Collectively, these 3 provisions give a green light to employers to simply ignore any and all of the provisions which require the employer to genuinely advise employees and consult with them over making, varying or terminating an agreement. Although Work Choices legislation provides that non-compliance with certain provisions of the Act can lead to civil remedies being applied and although Work Choices legislation provides that the Federal Court or the Federal Magistrate's Court may make orders in relation to non-compliance with provisions concerning the making, varying or terminating of agreements, these processes provide little comfort to employees.

45. An employer will get the benefit of having an agreement operate even where he has quite deliberately and quite openly ignored the requirements in proposed Section 98 to provide employees with a copy of a proposed agreement, 7 days before the agreement is approved, and

where he has quite deliberately and quite openly ignored the requirement to give an information statement to employees prior to them approving the agreement.

46. In these circumstances, the employer gets the benefit of the agreement operating so that it would displace other industrial instruments. If the employer is caught and if the employee can find sufficient resources to take the matter to the Federal Court, then, and only then, would the Court be empowered to revoke or to declare the agreement void and impose a civil penalty.

47. Given the broad constraints on employees and their extremely limited resources, the likelihood of employers feeling worried about being caught out for ignoring the requirements in Work Choices to properly inform employees before making an agreement, varying it, or terminating it, are small indeed.

48. Work Choices legislation is clearly about empowering the employer to get what they want and when they want it and, as much as possible, to give benefits to the employer, even when they deliberately flout the provisions of the Work Choices legislation. Under the simplified system introduced by Work Choices, there are very few requirements placed upon an employer in relation to making, varying or terminating an agreement. Given that these requirements are so few and are not onerous, there appears no justification whatsoever to permit an agreement to operate where an employer has not complied with the very minimal conditions on agreement making in the Work Choices legislation. Sections 100, 102M and 103Q should be amended to provide that an agreement, a variation or a termination, can not take effect unless there has been compliance with the other procedures and requirements of the Workplace Relations Act.

CONTENTS OF WORKPLACE AGREEMENTS

49. The Government's publication *"Work Choices – A New Workplace Relations System"* issued by the Government as a precursor to the introduction of the Work Choices legislation into parliament, identified at Chapter 4.5 that there would be certain matters which would be prohibited from being contained in a workplace agreement.

50. Chapter 4.5 of Work Choices – A New Workplace Relations System, provides quite an amount of detail relating to the particular items which is intended will be prohibited content in relation to workplace agreements.

51. Work Choices – A New Workplace Relations System states that, *"a list of items that cannot be included in agreements will be provided so that parties are clear on what they can and cannot include in agreements"*. With this in mind, the Association is extremely concerned to find that the Work Choices Bill does not give any guidance whatsoever to what is or what is not prohibited content. Proposed Section 101D merely states, *"the regulations may specify matters that are prohibited content for the purposes of this Act"*. In other words, the Bill will not identify any of the matters which will be prohibited content, whilst the Work Choices Bill clearly identifies the consequences of having prohibited content in an agreement, the actual matters which constitute prohibited content are not to be dealt with in the Bill.

52. Given that the Bill provides at Section 101M that it is a serious offence for a party to even seek to negotiate a term which is prohibited content in relation to an agreement, then it should be incumbent upon the Parliament to specify, with great particularity and clarity, each of the items which it believes are to be prohibited content in workplace agreements.

53. What this Government appears to be doing, is to be creating quite serious consequences which will flow from the parties even negotiating over prohibited content, but then permitting the Minister to simply use a regulation making power to determine, on an ad hoc basis, what is or is not prohibited content.

54. A very real problem arises with delegating such an important function to a regulation. If prohibited content is specified in an Act of Parliament, then the Bill which identifies the prohibited content would be subject to debate and scrutiny by the Parliament, with the ability of members of Parliament to amend the legislation. However, where prohibited content is to be declared through a regulation, the role of Parliament is significantly constrained. Whilst either House of Parliament may move to disallow a regulation, the disallowance process is significantly different from the process of debating the contents of a Bill.

55. Disallowance is a blunt instrument, as it either allows or disallows the entire regulation. Bills, however, are subject to amendment in relation to any aspect of the Bill.

56. In the Association's very strong submission, the importance that this Government attaches to prohibited content, should mandate that Section 101D should specify each and every matter of prohibited content and prohibited content should not, under any circumstances, be left to the mere process of regulation making.

57. Notwithstanding that prohibited content has not been identified in the Bill, the Association does make submissions in relation to what is expected to be prohibited content based upon the material in Work Choices – A New Workplace Relations System.

58. One of the specific matters which has been identified in Chapter 4.5 of Work Choices – A New Workplace Relations System as a prohibited

matter for workplace agreements is any clause that provides a remedy for unfair dismissal.

59. A clause in a workplace agreement in either of the following terms would be strictly prohibited under the criteria outlined in Work Choices – A New Workplace Relations System.

> **"The employer will not act unfairly in relation to any employee in connection with the engagement of the employee, the employment of the employee or the termination of the employee."**
>
> **"The employer will at all times act fairly, justly and reasonably in relation to each employee, including both in relation to the engagement and termination of employees."**

60. The mere discussion of such a clause in relation to the making of a workplace agreement is illegal and would subject both the employer and the employees or union to a fine of $33,000.00.

THE IMPACT ON FAMILY LIFE

61. One of the objects of the new Work Choices legislation is set out in the new Section 3 (l) "assisting employees to balance their work and family responsibilities effectively through the redevelopment of mutually beneficial work practices with employers".

62. Unfortunately, the reality of the Bill is that it will have a seriously detrimental impact upon workers and their family life. Although Pope John Paul II in his famous encyclical “Laborem Exercens” stated ":a very important conclusion of a mythical nature; however true it may be, that man is destined for work and called to it, in the first place, work is 'for man' and not man 'for work'..", the Governments Work Choices package appears to directly provide the opposite.

63. Under Work Choices man is for work and not work is for man.

64. The mere provision of minimum entitlements, whether it be by way of a set of legislative minima, as will be done under the Work Choices legislation, or whether it is a set of minima contained in an Award, does nothing to guarantee that an employee will be able to effectively balance his/her work and family commitments or that a worker will have any genuine ability to have a meaningful family life.

65. What is important in ensuring that workers do have a meaningful family life and are also able to balance their work and family responsibilities, is the provision of sufficient detail in the process in accessing an entitlement contained in a set of minima.

66. The Government has proudly proclaimed, that through Work Choices, it is providing, as rock solid legislative guarantees, certain minimum conditions of employment.

67. One of these minimum conditions is set out in Division 3, of Part VA of the amended Act.

68. Proposed Section 91C provides a guarantee that

"an employee must not be required by an employer to work more than an average of 38 hours per week over the employer's applicable averaging period the reasonable additional hours".

69. Whilst this sounds reasonable as a guarantee, the implementation of this guarantee can and will have significant adverse impact upon workers and their families.

70. The structure of this "guarantee" is that nothing more is offered than an average 38 hour week.

71. The sting in the tail of this guarantee is that there is no legislative protection offered to employees in relation to how the 38 hour week will be implemented.

72. In fact, the structure of proposed Section 91C enables the employer to average the 38 hours a week over a full year in the case of a permanent employee.

73. There is no guarantee that:

- Any worker will only work five (5) days out of every seven (7);
- A worker will have any day off in any week;
- Workers will have a right to have weekends off;
- Workers will be able to have public holidays off;
- Workers will have their hours of work set in single shifts each day;

- Preventing the employer from rostering workers to work several shifts on the same day;
- Preventing an employer from requiring a worker to work different shifts on different days so as to totally destroy a person's normal sleep patterns;
- An employee will have a regular roster;
- A worker will have a standard pattern of hours of work over a one (1) year cycle;
- Preventing an employer from requiring an employee to work 84 hours in some week (i.e. seven shifts of twelve (12) hours each) whilst then rostering an employee, in other weeks, to work seven (7) hours (i.e. one (1) hour per day each day) over an applicable averaging period.
- Where an employee has a dispute with their employer about how the 38 hours per week is to be worked over a one year cycle that such a dispute can be resolved by an independent third party, making a binding decision which has regard to the needs of the worker and his/her family, and the needs of the business.

74. The litany of what is not contained in the guarantee shows that what is guaranteed is quite limited.

75. The Government condemns the structure of Awards as being too prescriptive and condemns the Industrial Relations system as developed over the last 100 years for providing too much detail in Awards.

76. However, the Governments own approach of specifying mere minimum entitlements at their most base level highlights the fact that, unless a minimum entitlement is expressed, both in relation to the substance of the entitlement and the procedures relating to accessing the entitlement, then the entitlement has little real value.

77. The preservation of a genuine entitlement to balance work and family life commitments and to enable workers to be contributors to the broader social community through voluntary activities on weekends and outside work hours can only be achieved if there is a clear pronunciation of the key parameters concerning accessing an entitlement to an average 38 hour week.

78. The Governments approach attacks most of the fundamental rights of workers in accessing a 38 hour week in a manner which provides genuine and real benefits to the worker and enables the worker to have meaningful non work time with their families and with their broader community.

79. Whilst the Government will no doubt proclaim that issues of detail are best left to the employer and the employee to be negotiated at the workplace, the reality is that such detail is simply not a feature of negotiations in many cases.

80. The Association is already concerned about the use of AWA's and Non Union Agreements which have removed employee entitlements to such fundamental provisions as having a guaranteed weekend off every three or four weekends, or having guaranteed consecutive days off work each week or guaranteeing any days off each week, within Agreements operating in the retail industry.

81. If employers are already attempting to use existing provisions of the Workplace Relations Act to remove basic entitlements of workers to be able to balance their work and family life, then the approach of the Government through Work Choices, will significantly enhance the ability of the employers to remove all entitlements of workers to have an effective family life outside of work hours.

82. Work Choices legislation, with its statutory minima, is designed to attack the fundamental rights of workers in the workplace and to reverse the notion that work is for man and not man for work.

THE CHANGE IN THE "NO DISADVANTAGE" TEST

83. There are a number of changes contained in the Government's package which cannot be justified as fair or reasonable or just under any circumstances, and six of these principal matters are set out below:

84. At the present time, any union agreement, non-union agreement or Australian Workplace Agreement can only be certified if it passes a "No Disadvantage" Test. This Test means that the proposed agreement is compared with the State or Federal award which, in the absence of the agreement, would apply to the worker or the enterprise as the case may be. The Test means a comparison is made between the wages and the working conditions in the award and those in the proposed agreement. If it is clear that the agreement is overall at least equal to the award, the agreement will be certified and become legally operative.

85. The Howard Government proposes to change the "No Disadvantage" Test so that instead of comparing a proposed agreement with the award which would otherwise apply, the comparison instead is made against a single rate of pay for the work that is performed by the person under the agreement and against four conditions of employment yet to be legislated by the Parliament.

86. The rate of pay against which the agreement is tested has yet to be determined but is likely to be simply a base hourly rate of pay for the work in question. Higher rates of pay for skill, responsibility and the conditions under which work is performed maybe omitted.

87. The four conditions of employment to be legislated by the Parliament are as follows: -

(i) Annual Leave (the standard 4 weeks) - The Government has said that 2 weeks of leave can be bought out each year.

(ii) Personal Leave, which is to include Sick Leave, Carer's Leave and Compassionate Leave. Recently, the Government announced 10 days of Personal/Carer's Leave after 12 months of service, and two days of Compassionate Leave per occasion. The Compassionate Leave entitlement is below Award standards.

(iii) Parental Leave, including Maternity Leave and Adoption Leave. This will include only up to 12 months of leave and therefore not include the recent Family Provisions Test Case Standard.

(iv) The maximum ordinary time hours of work, being an average of 38 per week. Many awards of course already prescribe less than 38 hours per week, some providing a 36 hour week and others providing a 35 hour week.

88. The critical factor in this new "No Disadvantage" Test is the significant standard award entitlements which are missing which include:

(a) The entitlement to work the standard hours over a maximum of 5 days per week. It will be permissible for ordinary hours to be spread over 6 or 7 days per week, every week.

(b) Provisions for rostering a worker, including a maximum number of ordinary hours on a day, provision for consecutive days off in a week, a guaranteed minimum break between ceasing work on one day, or shift, and commencing again on the second day or shift, and so on.

(c) An entitlement to a day's pay when an employee takes a day off on a public holiday. (Christmas Day, Good Friday, Easter Saturday, Anzac Day, etc).

(d) Provision for meal breaks and tea breaks.

(e) The 17 ½% annual leave loading (equal to 70% of a week's pay each year).

(f) Provision for penalty rates and shift loadings for working at unsociable times, including Saturdays, Sundays, Public Holidays, evenings and nights, or for working extended hours (say, in excess of 8 or 10 hours on a single day or shift), or for working under extraordinary conditions (such as heat, cold, noise, etc).

(g) Provision for the type of employment, such as part-time, full-time and casual, and any loading in the hourly rate for casuals (in lieu of such employees receiving standard provisions for leave and public holidays). In the absence of a definition of permanent employment, everybody is a casual !

(h) Redundancy provisions including notice and severance pay to cover a person for a period until a new job is found.

89. The significance of this new "No Disadvantage" Test is that employees may be required to work under conditions where some or all of the above provisions are missing.

90. There will be no requirement to compensate the employee for any benefits which are missing.

91. There will be no obligation to trade improved benefits for the employee in return for the removal of other benefits.

92. All the entitlements I have just listed above can be missing from an agreement, and it can still be certified by the employer under the Government's plans.

93. As it stands today there will be a powerful economic incentive on an employer to force his employees into a new agreement containing only the Government's five basic entitlements, in order to gain a competitive advantage in lower labor costs over that employer's competitors. Once one employer does this, the competitors will be forced to follow suit. This creates in each industry a "race to the new bottom" provided by the Government. Eventually, all workers are worse off, having lost many of their basic entitlements.

94. In 2003, retailers argued that moving shop assistants in Victoria from "Kennett Contracts" to the retail award would involve a 25% increase in labour costs. Since the new "No Disadvantage" test is almost identical to the Kennett Contracts, the potential reduction in labour costs in the retail industry on the employers' evidence is therefore 20%. This means a "productivity increase" will be recorded, based on the reduced value of the remaining entitlements of each worker.

95. We need to understand that these basic conditions of employment are not outrageous entitlements extracted from vulnerable employers by an avaricious workforce, or imposed by an unreasonable Industrial Relations Commission.

96. They are in fact the result of 100 years of continuous painstaking work by trade unions, usually in negotiations with employers in seeking decent entitlements for work in a variety of industries. Generally speaking, employers consent to these entitlements in the modern work environment. For a Government to legislate these entitlements away, across the board, is an unprecedented and outrageous interference in the workplace and an unacceptable abuse of power.

97. Since many of the entitlements that may be lost are monetary (e.g. penalty rates, shift loadings, the annual leave loading. Payment for a Public Holiday, the casual loading, work and expense-related allowances, etc), there will be a real wage cut for affected workers.

98. This is simply unacceptable for an Australian worker in our current environment and cannot be justified under any reasonable argument.

99. In the Work Choices Book the Government confirmed this pessimistic analysis by giving the example of "Billy" getting a job in a retail store.

100. This is what the Government said: -

"Billy is an unemployed job seeker who is offered a full-time job as a shop assistant by Costas who owns a clothing retail store in Canberra. The clothing store is covered by a federal award. The job offered to Billy is contingent on him accepting an AWA.

"The AWA Billy is offered provides him with the relevant minimum award classification wage and explicitly removes other award conditions.

"As Billy is making an agreement under WorkChoices the AWA being offered to him must at least meet the Fair Pay and Conditions Standard.

"The AWA Billy is offered explicitly removes award conditions for public holidays, rest breaks, bonuses, annual leave loadings, allowances, penalty rates and shift/overtime loadings.

"Billy has a bargaining agent assisting him in considering the AWA. He understands the details of what is in the AWA and the protections that the Fair Pay and Conditions Standards will give him including annual leave, personal/carer's leave, parental leave and maximum ordinary hours of work. Because Billy wants to get a foothold in the job market, he agrees to the AWA and accepts the job offer."

101. In other words, Billy loses basic award entitlements upon commencing his new job, even if other employees in the store are still receiving these entitlements under the Award.

102. Billy takes a job with sub-standard conditions, even though there's every prospect that his new employer is profitable company well able to afford the full award entitlements.

The Promotion of Individual Contracts

103. In its original Industrial Relations Legislation in 1996, the Howard Government provided that an individual contract between a worker and his/her employer known as an Australian Workplace Agreement, or AWA, was introduced for the first time as a new industrial instrument. The AWA was given a privileged position, in the sense that it could override any other State Award or Agreement, or Federal Award that would otherwise apply. The only industrial instrument that could not be overridden by an AWA was a federally certified agreement which was still current.

104. The introduction of AWAs or individual contracts for the first time was a new development. It provided a legal opportunity for an employer to deal individually with each of his employees and made the work of a union in protecting an employee from such individual bargaining much more difficult than before.

105. The Legislation introducing AWAs was specifically designed to discourage the involvement of unions.

106. An AWA was to be certified by a new Government- appointment public servant, known as the Employment Advocate. Although the Employment Advocate was required to ensure that the AWA passed the No Disadvantage Test, this process is done in private by the Office of the Employment Advocate without any public hearing or process whereby interested parties could become involved and make submissions.

107. Furthermore, the Legislation provided that the contents of Australian Workplace Agreements were to be kept secret between the employer and each individual employee. In other words, unions or other interested parties are not permitted to examine the terms of an AWA in order to satisfy themselves that it properly passes the No Disadvantage Test.

108. As a result of these secrecy provisions, some hundreds of thousands of Australian Workplace Agreements have been certified by the Employment Advocate, and it is extremely difficult to ascertain the extent to which individual employees have been ripped off in the process.

109. There is no doubt that certain individual employees who have significant ability or skills, or are in short supply, have an ability to negotiate their wages and conditions with a prospective employer, and this has typically been done over the years by professionals such as engineers and others.

110. However, the notion that an ordinary wage employee is able to rise to the occasion and bargain with his/her employer on an equal basis when the employer determines whether the employee has a job and decides on the days on which the employee works, the starting times and finishing times of work on each day, the times when meal breaks and tea breaks are taken, the way in which the work is to be performed or not performed, is absurd.

111. This is particularly the case when one examines the instance of vulnerable workers, including people who are still aged below 18 years, individual workers such as women who are completely dependent on their job for their livelihood, and also older workers or those with a disability who understand their employment security is precarious.

112. In the recently announced changes, the Government intends to promote Australian Workplace Agreements even further. It proposes that Australian Workplace Agreements may be entered into at any time, even if a federal collective agreement is already in place. This means that workers might negotiate a collective agreement at a workplace for their wages and conditions for a period of years, yet still be vulnerable to individual approaches from the employer for an individual contract, whose terms might be significantly worse than the collective agreement,

but still be certifiable because it passes the Government's diminished No Disadvantage Test, as described earlier.

113. Opportunities to abuse these processes and thereby disadvantage workers are already clearly available to employers today.

114. The courts have already ruled that it is legal for an employer to offer employment to a prospective new employee on the basis that the employee signs an individual contract as a condition for obtaining the job. In other words, an employer can introduce unwanted Australian Workplace Agreements into a workplace simply using natural attrition of labour as the mechanism for signing all new employees on to the undesirable instrument.

115. In the future, an employer with less than 100 employees can invite each employee to sign an AWA and, in the event of a refusal, dismiss the person for a concocted reason, knowing that the employee no longer has access to the Unfair Dismissal provisions of the Workplace Relations Act.

116. A recent case in South Australia found that a 15 year employee had been subject to "manifest disadvantage" on her AWA made with her employer, Bakers Delight. A Judge of the South Australian Industrial Relations Court, Justice Peter McCusker, found that the employee was paid 25% less than her minimum award entitlement. Because the employer could not produce the filing receipt from the Office of the Employment Advocate, the Judge found that the AWA was not legally effective, and accordingly he was able to find that the award still applied to the employee and he ordered Bakers Delight to pay over $1400 in back pay to the employee.

117. The Judge found that it was "troubling" that more than 50 AWAs had been approved in the same terms as the one with which he was dealing and, as they had been certified by the Employment Advocate, they were now legally binding.

118. Not only was the entitlement under the AWA 25% less than the minimum award entitlement, it also purported to cash out annual leave, the annual leave loading and sick leave. As the ACTU Secretary, Greg Combet said at the time, this is one of the most graphic examples of how the Government's AWAs are already used to exploit workers, particularly young people. If it is this bad now, just imagine how bad it will be when the Government's radical Industrial Relations Laws are passed.

119. The case also reflects badly on the secret approval process conducted by the Office of the Employment Advocate. If an AWA which is so demonstrably below the standards set by the under-pinning award can be passed by the Employment Advocate, then one can have no confidence in this secret approval process conducted at the behest of the Government.

120. What are the motives of the Government in promoting its policy of secret individual contracts ahead of the well-established alternative of collective instruments covering workplaces ? It is no wonder that unscrupulous employers have been quick to seize the opportunities provided by the Government.

121. Another example of an Australian Workplace Agreement that was below standard was explained by an employee of Krispy Crème in a submission to the Senate Employment, Workplace Relations and Education Committee on the 5th August this year.

122. The employee, Ms. Thea Birch Fitch aged 21 years at the time, said that she did not wish to be employed on an Australian Workplace Agreement but had been compelled to sign the agreement.

123. She said that in July 2003, she told the company that she preferred to remain on the award rather than sign the proposed agreement. Management then told her that if she didn't sign the AWA, she had no

chance of being promoted to be manager, a position in which she had expressed an interest, and that there would be no guarantee of hours of work in the future. She was also promised that if she signed the AWA, she would be offered full-time hours of work.

124. The employee sought the advice of the SDA, and following our examination of the document, we strongly recommended that employees refuse to sign. The Union said that the proposed AWA would cut weekend and evening penalty rates and remove rostering conditions, loadings, allowances and other award entitlements. We said that the employees would be better off staying under their existing award.

125. The Union then met with the company seeking improvements in the AWA in order to make it acceptable. The company refused to make any changes.

126. Most of the employees involved were 15 – 18 years of age and did not fully understand their rights or what was at stake. Most of them signed the agreement. Most employees were too apprehensive to authorise the Union to represent their interests, even though the employees were by now aware they would be paid less on weekends when most of them were available to work.

127. When the deadline for signing the agreement arrived, the employee in question said she did not want to sign the agreement. She sat in the manager's office in tears while she was told that she had to sign the agreement or she would not get any hours of work, and would not be promoted. She told the Senate Committee that she felt she had been left with no choice and so she signed the agreement.

128. The Union's assessment was that the employee was, on a best case scenario, $58.62 worse off per week, or more than $2,800 worse off in a year, under the Australian Workplace Agreement compared with the award.

129. In a worst case scenario, the employee was $319 per week worse off, or $15,000 a year worse off, under the individual contract.

130. Once again this sub-standard AWA was certified by the Employment Advocate using his secret process as enacted by the Howard Government.

THE NEW MINIMUM CONDITIONS OF EMPLOYMENT

131. The bottom line for every employer and employee will be the minimum conditions of employment set out in the Work Choices legislation. Because the minimums contained in the new Part VA-the Australian Fair Pay and Conditions Standard of the Work Choices legislation constitute the bottom line in relation to terms and conditions of employment of employees, then employees can ultimately expect no more than these bottom line conditions of employment and employers cannot be required to pay more. Although the government titles Part VA as being "*the Australian fair pay and conditions standard*", the standards are certainly not fair and nor is the pay fair. In many respects it is "un-Australian".

132. One of the key minimum conditions is the attempt by the government to guarantee a minimum rate of pay. This will either be a federal minimum wage or a wage rate set by an Australian pay classification scale. Importantly, the guarantee for a basic rate of pay as contained in proposed Section 90F of the Work Choices Bill, significantly excludes junior employees from this guarantee. Whilst the Work Choices legislation makes clear that the Australian Fair Pay Commission will be able to set junior rates of pay, there appears to be no statutory guarantee that junior employees will receive a guaranteed basic rate of pay. Junior employees are already the most vulnerable group in the workforce and their vulnerability will now be increased by virtue of removing junior employees from the guarantee provided in Section 90F of Work Choices legislation.

133. One of the guarantees given by the government in relation to the Work Choices legislation and minimum rates of pay is a guarantee of casual loadings for casual employees. However, the default casual loading percentage identified in proposed Section 90I is only 20%. Within the last decade, industrial tribunals both at the federal level and state level have, after exhaustive examination of the factors which constitute a

casual loading, determined minimum casual loadings of 23%-25% as being at the lowest level to compensate a casual employee for the exigencies of being casual.

134. The government, through this legislation, is deliberately slashing 3%-5% off the casual rate of pay through the device of creating a guaranteed default casual loading percentage of 20%. There is no justification or rationale for striking a 20% casual loading when industrial tribunals have set a casual loading at either 23½% or 25% as the minimum.

135. The government's approach in Work Choices legislation appears to be nothing other than catering to the demands of employers to cut real wages of employees.

Maximum Ordinary Hours of Work

136. The Association has made particular comment in relation to the maximum ordinary hours of work guarantee within Division 3 of Part VA of the Work Choices legislation in relation to our submission on *Balancing Work and Family Life*. There are, however, other aspects of the proposed legislation which need comment.

137. In particular, the guarantee in proposed Section 91C is that an employee must not be required by an employer to work more than an average of 38 hours per week over the employee's applicable averaging period and reasonable additional hours.

138. The notion or concept of guaranteeing *"an average of 38 hours per week over the employee's applicable averaging period"* contains within it significant and severe disadvantages to employees. The Association has had experience with an employer who has used an averaging period of one year in order to guarantee an average 38 hours per week for full time employees with a pro-rata guarantee in relation to part time employees.

139. Where an employer has used a one year cycle to average out the 38 hours a week, this has meant that in some weeks workers have worked in excess of 50 or 60 hours per week whilst in other weeks they have had minimum hours per day. The Association first encountered utilisation of this annual averaging process in an agreement proposed by Bunnings to its employees in 1995. The Association opposed the annual averaging concept within the retail environment and attempted to ameliorate the impact of this in our negotiations with the company. However, Bunnings insisted that any agreement, whether with the union or without the union, would contain a provision allowing the averaging of hours of work over a full year cycle. In the Bunnings Agreement, this was contained within a set of provisions which referred to a "bank of hours", the bank being the way in which workers and the employer maintained an accurate count of the hours worked by an employee in any one week and how those hours were then averaged over the full year cycle.

140. Bunnings, in selling this proposal to its workers, did so on the basis of proclaiming the benefits of an annual averaged hours concept. While workers would work large numbers of hours in busy periods, they would have genuine, meaningful time off work in slower periods. Thus, it was sold as a means that would significantly assist employees to have more meaningful time, and over longer periods, with their families.

141. As with the government's rhetoric on Work Choices legislation, the rhetoric was far from the reality in the case of Bunnings.

142. Bunnings applied the annual average hours concept in a way which created severe difficulties for employees attempting to manage their work, family life, and social responsibilities. Workers would regularly work 50, 60 or more hours per week in all of the busy periods that Bunnings had. These busy periods were also periods where workers could not use their average hours approach to have meaningful time off work. In other words, portions of the year were effectively blocked out by the employer as periods when leave could not be taken. This coincided

with the peak trading periods for a hardware distributor such as Bunnings.

143. Whilst workers built up a large number of excess hours, that is, hours above an average of 38 hours a week, the employer achieved the average in the one year cycle by dictating to employees that in some weeks, the worker would come to work either every day or on alternate days to work a minimum shift of 2 or 3 hours. Workers seldom, if ever, received large blocks of meaningful time off work as a result of the operation of the annual averaged hours concept. The Association was involved in numerous disputes representing employees with Bunnings management, over trying to achieve a fair and equitable system of annual averaging of hours of work.

144. Although the Association in the second Bunnings Agreement was able to make some minor improvements to the implementation processes for the annual averaging of hours of work, the system, as used by Bunnings, still contains significant flaws. It permits excessive hours of work to be worked each week without the payment of overtime for hours worked in excess of 38 hours in any one week. The employer gains the very real benefit of having workers work very large numbers of hours without any additional cost that would occur if such hours were overtime hours.

145. The employer gets the benefit of being able to require (not ask or request, but require) workers to work rosters made up of excessively large hours in peak trading weeks. This guarantees to the employer that they have all of the staffing that they require in its peak trading periods. The employer also gets the benefit of being able to require staff to have time off work at the employer's choosing. The time off work, whether it be in blocks of days or weeks, or whether it be by way of reduced shifts on particular days, is at the employer's discretion. Employees seldom get time off work at times which provide them with maximum benefit for themselves and their families.

146. The degree to which the Bunnings system operates to give any meaningful benefits to employees has occurred solely because the Association has an agreement with Bunnings and the Association is active in representing the interests of individual workers who have particular problems with the annual averaging system.

147. The position at Bunnings for employees has improved over the three agreements that the Association has now entered into with Bunnings. However, the position is far from ideal from the Association's point of view. However, the involvement of the Association and the presence of the Association in bargaining with Bunnings over the contents of the agreements applying to the Bunnings' employees has enabled the worst aspects of an annual averaging system to be ameliorated.

148. The guarantee in Section 91C of the Work Choices legislation provides no assurances whatsoever to any employee that they will be able to achieve what it has taken the Association over six years to achieve in the case of Bunnings. The guarantee in Section 91C of Work Choices contains no provisions which ensure that the worst aspects of an annual averaging system can be ameliorated by an employee or by any independent third party. No single employee would be able to achieve what the Association was able to achieve together with a strong and educated workforce in Bunnings.

149. The second aspect of the guarantee in Section 91C also causes extreme concern for the Association.

150. The ability under Section 91C for an employer to require an employee to work reasonable additional hours, and these are in addition to the average of 38 hours per week over the employee's applicable averaging period, creates real and substantial difficulties for any employee.

151. The Association has outlined how the averaging process already will permit an employer to require an employee to work 50-60 hours a week

in some weeks, so long as over a one year cycle the average is 38 hours per week.

152. In the case of the Association's experience with Bunnings, the structure of the clause in the certified agreement means that if at the end of the one year cycle a worker has worked more than 1,976 hours (52 weeks @ 38 hours per week, including 4 weeks annual leave), then the employer is required to pay the employee overtime rates for all of those additional hours.

153. The structure of Clause 91C is that because the guarantee for an employee is that they can be required to work 38 hours a week over an average period, plus reasonable additional hours, then an employer can not only use the annual averaging period, but when it gets to the end of the annual period and finds that a worker has worked in excess of the average of 38 hours per week, the employer can avoid paying overtime rates simply because Section 91C provides the employer with the right to require reasonable additional hours to be worked. The overtime rate is not a matter which is contained anywhere within the Australian Fair Pay and Conditions Minimum Standards.

154. The structure therefore of Section 91 C means that an employee can be required to work in excess of an average of 38 hours each and every week over a one-year cycle, without recourse to overtime payment and without recourse to the right to refuse to work more than an average of 38 hours per week.

155. A further problem which arises from the structure of Section 91C of the Work Choices legislation is that there is no constraint upon an employer utilising the provisions of Clause 91C to construct a regime of hours of work which has the effect of avoiding the entitlements to annual leave, as are provided in Subdivision B of Division 3 and the entitlement to paid

personal carers leave as provided in proposed Section 93F in Subdivision A of Division 5 of Part VB.

156. The entitlement of annual leave and paid carers leave only arises in relation to hours of work which are not reasonable additional hours as described in paragraph 91C(1)(b). The structure of proposed Section 91C does not require any minimum number of ordinary hours before reasonable additional hours can be worked. Thus it is clearly possible, given the wording of this guarantee, that an employer can have a person working an effective 38 hour week where the average ordinary hours of the employee over the applicable averaging period may be as low as 5 hours per week, with the remaining 33 hours a week being reasonable additional hours.

157. Whether or not hours are going to be reasonable would probably depend upon a number of factors, not least the capacity of the employee to work the hours. Thus an employee who wants to work 38 hours a week could be presented with a contract of employment where the 38 hours is based upon a very small number of ordinary guaranteed hours under Section 91C(1)(a) and a very large number of reasonable additional hours under Section 91C(1)(b). The employee would work such an arrangement simply in order to obtain a 38 hour week. However, by structuring the hours with the preponderance of hours being reasonable additional hours, the employer can avoid the requirement to pay annual leave or paid carers leave for all of the additional hours worked.

158. In a scenario where an employee had 5 hours a week as their set hours under Section 91C(1)(a) of 5 hours per week, with the remaining 33 hours a week as reasonable additional hours, the entitlement to annual leave and personal carers leave only arises in relation to 5 hours per week. This means effectively that at the end of the year the annual leave entitlement for such an employee would be only 1/7th of a normal four week paid holiday.

159. The employer is encouraged by the structure of the government's so-called guarantee in Section 91C to structure a working relationship with its employees so as to minimise, if not avoid nearly in its entirety, any obligation to pay annual leave and personal carers leave.

160. As the minimum guarantee provided in Work Choices legislation does not guarantee an overtime rate for reasonable additional hours but merely requires that all hours be paid at the minimum rate set by the federal minimum wage or the appropriate Australian pay and classification standard, then there is no additional cost to the employer in structuring the hours of work of an employee so as to minimise those hours of work which attract paid leave entitlements and maximising those hours of work which don't attract paid leave entitlements.

Annual Leave

161. Division 4 of Part VA provides a further guaranteed statutory minimum entitlement for all employees of annual leave. This entitlement is for all employees other than casuals. The entitlement, as set out in proposed Section 92D is for four weeks annual leave. The first weakness of this so-called guarantee of annual leave arises from the definition of *"nominal hours worked"* in Section 92A.

162. As discussed above, annual leave is accrued only in relation to those hours of work which exclude reasonable additional hours that the employee has worked.

163. The second fundamental weakness with this guarantee is that in conjunction with the guarantee on minimum wages, workers will, under the minimum conditions of the Australian Fair Pay and Conditions standards, have a package of entitlements significantly less than they currently receive under awards of the Australian Industrial Relations Commission or awards of the respective State Industrial Relations Commissions.

164. The consequence of this will be that even where employers have not abused the hours of work provisions, as they are entitled to do under Section 91C, and where the employer provides maximum hours under Section 91C as ordinary hours of work which attract an entitlement to paid annual leave, the pressures on employees will force many to seek to cash out part of their annual leave merely to replace lost income. In other words, whereas at the moment an employee, in taking a period of annual leave, will receive the 17½% annual leave loading, the removal of the loading will create significant pressures on employees when taking annual leave. These pressures will be alleviated by the employee taking less actual annual leave and funding their annual leave through cashing out the remainder of their annual leave.

165. A further factor which will significantly encourage employees to cash out annual leave is that the provisions in the legislation relating to the taking of annual leave effectively favour the employer in all respects. Under proposed Section 92H, which sets out general rules relating to the taking of annual leave, Section 92H(4) provides, *"an employer must not unreasonably: (a) refuse to authorise an employee to take an amount of annual leave that is credited to the employee; or (b) revoke an authorisation enabling an employee to take annual leave during a particular period."*

166. Quite clearly, any refusal by an employer to authorise an employee's request to take annual leave will never be "unreasonable". Thus, this provision in the Work Choices legislation is effectively meaningless in providing any guarantee to an employee that the employee will get annual leave when it is of greatest value to the employee.

167. Employees required to take annual leave where an employer exercises their rights under Section 92H(5) may find themselves taking annual leave at a time which provides no real benefit to them because their family members are either engaged in other paid employment or at

school. In these circumstances, the employees may elect to cash out as much annual leave as they possibly can, so that they get at least some real benefit for at least part of their annual leave entitlement.

168. Rather than being required to take four weeks annual leave at a time when the employee is left sitting at home idle because his/her partner is at work and their children are at school, the employee may elect to cash out half of their annual leave entitlement so that they at least have the money which can then be spent on their family in other circumstances. The entire structure of Subdivision B of Division 3 of Part VA is designed to undermine the fundamental principles that an employee who works 48 weeks of the year should be entitled to a genuine, meaningful break of four weeks annual leave.

169. This government is deliberately encouraging a situation where the norm for annual leave will be reduced to two weeks of actual holidays with two weeks being paid out. This presupposes, of course, that employers have not already abused the system, as they are entitled to do, under Section 91C to reduce the entitlement of an employee to annual leave by the manipulation of hours of work.

Minimum Conditions Generally

170. It is very interesting to note the difference between the approaches to the various minimum conditions outlined in Part VA.

171. The two minimum conditions of employment which have the greatest impact upon employees are Division 3 - Maximum Ordinary Hours of Work and Division 4 – Annual Leave.

172. Division 3 – Maximum Ordinary Hours of Work is comprised of four sections of the Bill covering just less than three pages. Division 4 – Annual Leave is comprised of ten sections covering just over six pages. In stark contrast to this, Division 6 – Parental Leave is comprised of 55

sections spread over 39 pages. To a very large extent, the Parental Leave provisions reflect the provisions originally designed by the Australian Industrial Relations Commission in creating parental leave entitlements for employees under the award system. These same provisions were generally adopted by the government as a Schedule to the Workplace Relations Act in relation to the minimum conditions of employment for persons employed under Schedule 1A of the Workplace Relations Act, in other words, workers not covered by awards in Victoria.

173. The rules relating to accessing and taking parental leave are rather detailed and complete, whereas the Australian Industrial Relations Commission's approach to defining hours of work clauses in awards as basic, standard conditions of employment, and its approach to defining standard annual leave clauses in awards, has simply been ignored by this Government in the structure of the Work Choices legislation. If the Government was serious about establishing proper, fair and effective standards as minimum conditions of employment, in relation to both hours of work and annual leave, then this Bill should have incorporated the standard provisions developed by the Australian Industrial Relations Commission and other state Industrial Relations Commissions over many years for those two topics.

174. This is not a big ask. The templates for standard clauses and terms and conditions of employment relating to hours of work and annual leave, are readily available. Their omission from this Bill attests to the fact that it is the clear intention of this Bill to remove, as far as possible, those basic entitlements relating to how a worker can access and be guaranteed fair and effective minimum conditions of employment in relation to both hours of work and annual leave.

TERMINATION OF EMPLOYMENT

175. The Association notes that pursuant to the Motion for Referral to the Committee that "the inquiry not consider those elements of the bill which reflect government bills previously referred to, examined and reported on by the committee; namely those elements which relate to…..reform of unfair dismissal arrangements"

176. Previous Bills dealing with "reform of unfair dismissal arrangements" have all had as a common element the removal of the unfair dismissal provisions in relation to employers employing less than 20 employees.
No Bill has yet been considered by he Committee which seeks to give an exemption to employers employing less than 100 employees.
Thus the Association understands that the Committee has competence within the terms of the motion for referral to consider that element of the Workchoices Bill which relates to exempting from unfair dismissal provisions employers employing more than 20 but less than 100 employees.
Given the structure of the Bill in defining the class of employees to be counted in relation to determining the 100 employees it is clear that the actual number of employees can be significantly greater than 100.

DEFINING WHO IS THE EMPLOYER

177. The particular problem of these Bills is that by providing an exemption to employers who employ fewer than 100 employees is that the concept of ***employer*** would appear to comprehend **only** the legal entity which is the employer of the employees involved in the termination of employment.

178. A practical application of the Bill would be that where **a business** was operated through a series of separate constitutional corporations each of which would be the technical legal employer for their relevant employees, then the Bills would allow the business to be able to avoid the application of the unfair dismissal provisions if each of the constitutional corporations, as individual employers, each employed fewer than 100

employees. That a business may operate through several separate constitutional corporations is common.

179. A recent matter in the Australian Industrial Relations Commission in which the Association was involved shows the way in which the Bill would enable employers to use the provisions of the Work Choices Bill to avoid being effected by the unfair dismissal provisions, even where the total business clearly employed more than 100 employees.

180. In a Matter No. AJ2004/8846, an application for certification of the Jasbe Petroleum Certified Agreement 2004, the application sought to have an agreement certified covering a number of separate companies. The companies were:

Jasbe Baullkan Hills Pty
Jasbe Cranbourne Pty Ltd
Jasbe Editvale Pty Ltd
Jasbe Frankston Pty Ltd
Jasbe Holdings Pty Ltd
Jasbe Investment Pty Ltd
Jasbe Malvern Pty Ltd
Jasbe Multi Pty Ltd
Jasbe Normanhurst Pty Ltd
Jasbe Oakes Pty Ltd
Jasbe Plantation Pty Ltd
Jasbe Roxby Pty Ltd
Jasbe Seaford Pty Ltd
Jasbe Supremacy Pty Ltd
Jasbe Westernport Pty Ltd
Jasbe Willoughby Pty Ltd

181. Each of these companies form a group known as Jasbe Petroleum. Jasbe Petroleum operates a number of petrol retail outlets in the South East suburbs and in the Mornington Peninsula areas of Melbourne.

182. The application for certification of the agreement was filed on the basis that it was an agreement covering a single business. The employer relying upon the definition in Section 170LB(2), which provides:

"**170LB(2) [Single employer**] For the purposes of this Part:

(a) if 2 or more employers carry on a business, project or undertaking as a joint venture or common enterprise, the employers are taken to be one employer; and

(b) if 2 or more corporations that are related to each other for the purposes of the *Corporations Act, 2001*, each carry on a single business;

(i) the corporations may be treated as one employer; and
(ii) the single businesses may be treated as one single business."

183. Under this provision it was clear that each of the separate employers were to be treated as being a single employer by virtue of the operation of Section 170LB(2), in that Jasbe Petroleum constituted a single business even though there were 16 separate constitutional corporations making up Jasbe Petroleum.

184. For the purposes of certifying an agreement, the Workplace Relations Act treats all 16 of these separate employers as constituting a single employer, thus enabling Jasbe Petroleum operating through 16 separate employers to have a single enterprise agreement covering its combined operations.

185. However, this approach to treating Jasbe Petroleum as a single business for the purposes of making a certified agreement will not extend to treating Jasbe Petroleum as a single business for unfair dismissal purposes under the provisions of the proposed Bills.

186. In the Association's very strong submission, if the Workplace Relations Act already recognises the concept of having numbers of separate constitutional corporations acting together as related companies being treated as a single business, or a single employer, then a similar approach should be required to be met and adopted in relations to exempting businesses with less than 100 employees from unfair dismissal laws. In other words, if there is to be an exemption for employers employing less than 100 employees, then that exemption should only operate where the total business is looked at.

187. It should be necessary to have regard to the number of employees of all related companies and associated entities under the Corporations Act, and to have regard to the number of employees employed by one or more employers who carry on a business project or undertaking as a joint venture or a common enterprise. If its good enough to have groups of employers treated as being a single entity for the purposes of certification of agreements, it should be good enough to apply the same rule to exempting employers from their requirements to pay redundancy pay.

188. To put this particular aspect of the Submission in context, we draw attention to several provisions of the Corporations Act which deal with the concept of associated entities and related companies. Division 6 – Subsidiaries and Related Bodies Corporate of Part 1.2 – Interpretation of the Corporations Act deals with the issue of subsidiaries related bodies and associated entities in Corporations Law. Section 46 of the Corporations Act discusses and provides for the concept of a subsidiary of a body corporate, Section 50 deals with related bodies corporate and Section 50AAA deals with the concept of associated entities to a body corporate.

189. It is important, in our Submission, for the Senate to have regard to the fact that the Corporation's Code has quite comprehensively dealt with the concept of bodies corporate having relationships with other bodies corporate and other entities in such a way that they form a complete

whole. This approach in the Corporations Act is designed to ensure that those who own and have constructed the Constitutional Corporations are not able to avoid their obligations under the Corporations Act by simply having such a large raft of related companies, subsidiaries or associated entities that they can effectively bypass their obligations in relation to the normal operation of the Corporation Act. By creating clear statutory provisions relating to subsidiaries, related bodies corporate and associated entities, the Corporations Act is making very clear that it intends to ensure that where groups of companies are operating together, that they are treated essentially as single entities for different purposes of the Corporations Act.

190. In the Association's very strong view, only if the concepts of subsidiaries, related bodies corporate and associated entities were incorporated into the Workplace Relations Act approach to identifying an employer employing less than 100 employees would the Work Choices Bill both operate consistently with the approach of the Corporations Act and also operate in a manner which was genuinely fair to the all employers and employees.

191. Simply because the approach of the Work Choices Bill relating to unfair termination is so different from the approach adopted in the Corporations Act, it is clear that the Work Choices Bill, would provide a benefit to employers who were employing more than 100 employees. As the Jasbe example clearly indicates, businesses employing several hundreds of employees can, through the very simple device of creating subsidiaries, related companies or associated entities, be able to take advantage of a statutory provision which the government has publicly proclaimed is only for the protection of small businesses.

192. Not only does this mean that large businesses who clearly have the capacity to properly deal with and comply with unfair dismissal laws, will be able to be exempt from the operations of those laws by the simple device of restructuring their businesses through using multiple

constitutional corporations, each employing no more than 100 employees, but it also effectively removes the perceived advantage being given by the government to businesses genuinely employing less than 100 employees.

193. Given that the Government has specifically identified the Corporations Power in the Constitution as the power upon which it relies for much of the Work Choices Bill then the Government should at the very least adopt a consistent approach to defining the nature of businesses.

194. The above discussion focuses on 2 Bills currently before Parliament but in doing so we highlight the need for this Senate Inquiry to have a clear and concise definition as to what constitutes a small business.

195. One aspect of the need for a clear definition of the concept of who is the employer is to determine the numerical value to be given to the identifier, which appears to be (by default in the absence of debate about qualifiers) the number of employees.

196. If the number of employees is to be the numeric qualifier then the Association makes the very strong submission that all employees must be counted. The Governments approach to date in relation to earlier Termination of Employment Bills introduced into Parliament which had the stated aim of protecting small business all start from the premise that some employees are not to be considered when calculating the cut-off for being a small business.

197. Whilst the Government may have felt that in dealing with small businesses employing less than 20 employees it was necessary to exclude casuals who were employed for less than 12 months, such an exclusion seems totally unjustified and without any merit when dealing with employers employing less than 100 employees.

198. In the retail and fast food industries it is not uncommon for employers to employ high number of casuals in proportion to permanent staff.

199. Thus an employer employing 90 permanent staff would likely have 400-500 casual employees.

200. In this sense the employer, their competitors and the public would consider the employer to be an employer employing more than 100 employees. To refer to such an employer as one who employs less than 100 employees and who is entitled to be exempt from unfair dismissal provisions is to strain credulity beyond reasonable limits.

201. In order to give some practical substance to this issue we draw attention to one of Australia's larger corporations: PBL Ltd.

202. According to the Annual Report of PBL Ltd and to the Financial Accounts of PBL Ltd there are 202 separate companies which are 100% owned by PBL Ltd. (See Note 31 to the Financial Statements for PBL Ltd for the year ended 30 June 2005).

203. This means that PBL Ltd could employ 99 permanent employees in each company and avoid the operation of the unfair dismissal laws.

204. In total PBL Ltd could employ **20,097** full time, part-time and permanent casual employees and an unlimited number of short term casuals with all of the 21,000 employees being exempt from the unfair dismissal jurisdiction.

205. Similarly, Patricks Corporation has 108 controlled entities in which Patricks has 100% control. (See Note 40 to the Financial Report of Patricks for the year ended 30 June 2005).

206. This means that Patricks can employ **10,791** permanent employees across these controlled entities and have every permanent employee exempt from the unfair dismissal provisions of the Act.

207. The Association makes the very strong submission that any approach to the proper identification of an employer for the purpose of the "Unfair Dismissal Exemption" should be predicated upon acceptance of the following criteria:

> ***1 If 2 or more corporations are related to each other for the purposes of the Corporations Act 2001 the corporations are to be treated as one employer; or***
> ***2 If 2 or more employers are associated entities for the purposes of the Corporations Act 2001 the employers are to be treated as one employer***
>
> ***3 If 2 or more corporations are a single business for the purposes of S 17095A of the Workplace Relations Act the employers are to be treated as one employer.***

CHANGES IN WAGE FIXATION

208. At the present time, the rates of pay in awards around Australia are increased in the annual National Wage Case, which is mounted by the Australian Council of Trade Unions.

209. Under the existing Workplace Relations Act, the Australian Industrial Relations Commission is required to take economic factors into account in making its decisions. The case commences with an application from the ACTU and employer associations, together with State and Federal Governments and other institutions such as the Treasury and the Reserve Bank, are able to make submissions on the claim. Following the hearing of all submissions, the Commission makes a decision.

210. In recent years, the Commission has provided for pay rises ranging from $17 to $19 per week and representing approximately 3.5% to 3.8% increases for people on the minimum wage or the award rate. During the same period, the level of inflation has remained low, and the level of unemployment has continued to decline. There is no sound economic argument that the decisions of the Commission have caused economic dislocation or serious impairment to the enterprises of employers.

211. The Federal Government, however, has consistently argued that wage rises ought to be kept at approximately $10 to $12 per week. The effect of this would be to provide increases below the rate of inflation, thereby reducing the living standards of people on award rates of pay.

212. Under the Legislative changes announced by the Howard Government last month, the task of the Industrial Relations Commission to hear the annual wage case is to be removed. The task will instead be performed by a “Fair Pay Commission” consisting of a small number of people appointed by the Government who would make decisions on award rates from time to time but not necessarily on an annual basis.

213. The clear intent of this provision is to reduce the rate of wage increases, and perhaps even to keep the growth of award rates of pay below the rate of inflation, so that the purchasing power of award rates is reduced over time.

214. The table below illustrates the Government's view of wage rises over the past 9 years compared to the Commission's decisions. It reflects the extent to which workers on minimum wage will be worse off if the "Fair Pay Commission" follows the Government's preferred view in the future.

Year	**Government's Submission (increase per week)**	**Commission's Decision (Increase per week)**	**The Gap (Per Week)**
1997	$8	$10	$2
1998	$8	$14	$6
1999	$8	$12	$4
2000	$8	$15	$7
2001	$10	$13	$3
2002	$10	$18	$8
2003	$12	$17	$5
2004	$10	$19	$9
2005	$11	$17	$6
Total			**$50**

215. Given the fact that past decisions of the Industrial Relations Commission have not had any significant adverse impact on the economy and have always taken into account all the economic submissions made by the various parties, this change in the Wage Fixing System designed to lower the levels of wages over time is not justifiable.

216. The lower the level of wages in Australia, the greater the burden on the Government providing people with social security payments and the greater the burden on charities such as St. Vincent de Paul assisting people who cannot make ends meet.

RIGHT OF ENTRY

217. The Association expresses its concerns over one aspect of the proposed provisions relating to right of entry of union officials into workplaces.

218. Proposed Section 221 of the Work Choices Bill deals with Right of Entry for the purposes of holding discussions with employees. Right of Entry under this provision can only be exercised by an organisation if an employee is an eligible employee as defined in Section 221. Eligible employee means, *"any employee who:*

(a) on the premises, carries out work that is covered by an award or collective agreement that is binding on the permit holder's organisation; and

(b) is a member of the permit holder's organisation or is eligible to become a member of that organisation."

219. Both the terms "award" and "collective agreement" are defined in Section 4 of the Work Choices Bill. The Right of Entry under Section 221 is limited to only those workplaces which are covered by awards or collective agreements. What this means in practice is that workplaces which are covered by state awards or state agreements will not be able to be subject to Right of Entry by an organisation official, even where employees in those premises are members of the organisation or are eligible to become members of the organisation.

220. Given that the Government has rewritten the industrial relations legislation for Australia and is taking over, quite deliberately, the industrial relations systems of the various states, it appears that the Right of Entry provisions simply have not kept pace with the significant changes occurring.

221. In the Association's very strong view, proposed Section 221 should be varied so that wherever an employee is either a member of an organisation, or is eligible to become a member of the organisation, then Right of Entry should be enabled to that organisation for the purposes of holding discussions with employees.

222. The Association notes that under the current provisions of the Workplace Relations Act, if a workplace is covered by AWAs, so that every employee is on an AWA, then a union does not have a Right of Entry to hold discussions with employees. If this limitation on Right of Entry was carried over into proposed Section 221, but with all other circumstances allowing Right of Entry by an organisation to hold discussions with employees who are either members of the organisation or eligible to become members of the organisation, then at least the worst aspects of proposed Section 221 would be ameliorated.

223. As it stands, proposed Section 221 constitutes a very serious attack on the ability of organisations to offer themselves to employees who may wish to join them. There appears to be no rationale for the broad exclusions from Right of Entry to hold discussions with employees, other than a deliberate attack on the ability of trade unions to offer a relevant service to employees who may need that service.