Senate Employment, Workplace Relations and Education References and Legislation Committee

Inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005*

CPSU (PSU Group) Submission

9 November 2005

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I. Introduction

1. The PSU Group of the Community and Public Sector Union ("CPSU") represents workers in the Australian Public Service ("APS"), the ACT Public Service, the Northern Territory Public Service, the telecommunications sector, call centres, employment services and broadcasting.

2. The CPSU has had the opportunity to read the ACTU submission, and supports and endorses that submission.

3. The CPSU estimates it has successfully negotiated and assisted members to negotiate well in excess of 1,000 workplace agreements since the inception of the *Workplace Relations Act 1996*. These include agreements made under s170LK (agreements made with staff), s170LJ (agreements made with unions) as well as agreements made under s170LL (greenfields agreements) and Australian Workplace Agreements ("AWAs").

4. The CPSU and its members have vast experience in industrial relations; in bargaining and agreement-making, in settling industrial disputes and individual grievances, in seeking the assistance of the Australian Industrial Relations Commission ("AIRC") in conciliation and arbitration and in promoting fair and safe work practices.

5. For the reasons set out below, the CPSU opposes the *Workplace Relations Amendment (Work Choices) Bill 2005* and asks that it be rejected by the Senate.

6. In preparing this submission the CPSU has relied on the experience and opinions of its members.

II. The Australian Public Service

7. The CPSU is the principal union representing employees of the APS and APS membership comprise between 65% and 70% of the CPSU's membership. Our members in the APS are diverse; they include security guards, policy advisers, border protection officers, tax officers, Centrelink customer service officers, customs officers, quarantine officers, scientists and lawyers.

8. The APS represents a unique form of employment. The genesis of the public sector was in the notion of a merit-based, politically neutral, professional career-service[1].

9. Whilst a private sector employee only owes a duty to his or her individual employee, a public servant owes a duty beyond that to the public at large.

[1] "Report on the Organisation of the Permanent Civil Service" presented to the House of Commons on November 23, 1853 by Stafford H. Northcote and C.E. Trevelyan

This duty is inherent in the very title that we use to describe public sector employees; servants of the public. This idea of the public servant and public service is not just some historical anachronism; it is an idea that still strongly resonates within the APS. It is evident today in our understanding of the role of the public servant: to provide frank and fearless advice; to help Ministers promote explain and defend government policy; and to implement government policy[2]. The Australian public expects their public servants to act ethically and in the public interest.

III. The Australian Public Service Values

10. This concept of public service manifests itself in the APS Values and Code of Conduct. Agency heads are bound through the Public Service Act to uphold and promote the APS Values, and APS employees are required, under the APS Code of Conduct set out in the same Act to behave at all times in a way which upholds the APS Values.

11. A breach of this duty can have very serious consequences up to and including termination.

12. The CPSU and its members believe that the proposed *Workplace Relations Amendment (Work Choices) Bill 2005* ("Work Choices Bill") and the Commonwealth Government's industrial relations agenda will seriously undermine these APS values and the traditional notion of public service upon which these values are based.

IV. The Politicisation of the Australian Public Service

13. A central tenet of the idea of public service and the APS values themselves is that employment decisions will be based principally on merit. Already we have seen this principle compromised by the Federal Government's industrial relations agenda.

14. Employment in a number of Commonwealth departments and agencies has been increasingly made conditional on signing an AWA, rather than merit. This policy, as practised in agencies such as the Department of Employment and Workplace Relations, Centrelink, the Department of Finance and Administration and the Prudential Regulatory Authority, disregards the notion of merit-based employment.

15. Not only does the Department of Employment and Workplace Relations have a "no AWA – no start" policy, it also makes project work for employees conditional on the employee leaving the collective agreement and signing an AWA. As this Department sets employment policy in Commonwealth bodies, it is inevitable that this policy will flow on to other departments and agencies.

[2] 'How to be a Civil Servant', Martin Stanley, http://www.civilservant.org.uk/

16. Increasingly it will not always be the best person who gets the job or the promotion; it will be the person willing to sign an AWA.

17. The way in which AWAs are used in the APS in relation to ongoing APS employees also undermines the important APS principle of merit.

    Employees willing to sign an AWA are often frequently paid more for doing the same work than those employed under the collective agreement. One member tells us:

> *Like many of my colleagues I pay dearly for not taking up an AWA – it is simply unfair to pay someone who is performing strongly (according to DEWR's own system) much less than someone performing at a lower lever under an AWA.*

18. Bonuses under Performance Pay arrangements are more likely to be available and awarded to employees on AWAs rather than those on collective agreements, thereby creating a two-tier remuneration system amongst public servants doing the same work.

19. Only 21% of employees on the certified agreement were eligible for a bonus in 2003 and of that 21% only 24% received a bonus. In contrast 62% of non-Senior Executive Service employees on AWAs were eligible for bonuses and 83% received a bonus.

20. Another worrying trend in relation to the payment of bonuses is that women at the higher classification levels in the APS, where it is most likely that bonuses will be paid, receive a lower average bonus than their male colleagues employed at the same level[3]. This unequal gender bias from individual negotiations will likely be further exacerbated under the Federal Government's Work Choices framework.

21. While public servants are expected to be apolitical, it appears that their employer, the Federal Government, will now be able to more legitimately politicise their workplaces through the Work Choices Bill.

V. The Federal Government Agenda for the Public Service

22. Every union in Australia has to deal with the Government's IR laws, but only the CPSU has to bargain with them regularly as an employer.

23. CPSU were alerted to the Federal Government agenda for the Australian Public Service via a confidential Cabinet Submission prepared by the former Employment Minister Tony Abbott that was leaked to the Canberra Times in December 2002. [See Appendix A]

Amongst other things, the Cabinet Submission recommended that:

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[3] *'State of the Service Report 2003-2004'*, Australian Public Service Commissioner, November 2004 p104, p223; available at www.apsc.gov.au

- Individual AWAs are be compulsory for all new public servants.
- All jobs be advertised on the basis that the successful applicant be offered an AWA.
- All promotions and transfers resulting from advertised vacancies be contingent on AWAs.
- Agency heads must offer AWAs to all employees.
- All certified agreements must be negotiated directly with employees under the non-union Section 170LK of the Workplace Relations Act.

24. This industrial relations agenda that the Government is pursuing through the APS is undermining the apolitical nature of the public service.

25. This politicisation will occur as increasingly, those employees seen as "onside" with the employer will be rewarded, and those not onside will be sidelined.

26. Centrelink is also currently making AWAs a condition of employment for new employees. [See Centrelink AWA at Appendix B].

27. This Centrelink AWA makes a whole range of entitlements that employees on the collective agreement currently receive as a legally enforceable right, conditional on the discretion of management. The following clauses appear in the Centrelink pro forma AWA:

> *<u>Allowances</u>*
>
> *The CEO may, from time to time, pay you an allowance where you are required to undertake particular activities to meet Centrelink's business requirements.*
> *…*
>
> *<u>Shift penalties</u>*
>
> *If you work in a recognised shift environment, the CEO may consider the payment arrangements for shift penalties as part of your remuneration package.*
>
> *<u>Overtime</u>*
>
> *Overtime will be paid in accordance with Centrelink's policy and guidelines on overtime.*
> *…*
>
> *<u>Public Holidays</u>*
>
> *You are entitled to national and local public holidays observed by Centrelink in the locality in which you work, unless* directed by the CEO to perform work on a public holiday.

28. In Centrelink, a delegate Paul Wilson who is a long standing employee in Centrelink was told that he would not be receiving his annual pay rise because of his activities as a union delegate. In this case, Centrelink made the rare mistake of putting this in writing to Mr Wilson. This case is currently before the Federal Court.

29. Centrelink has also blocked access for it's employees to the CPSU website [which is illegal in NSW], and access to the ACTU website.

30. The APS Values mandate a workplace relations ethos based on "communication, consultation, co-operation and input from employees." The CPSU has witnessed industrial relations value being seriously compromised by the Public Service Commissioner, Lynelle Briggs.

31. The Australian Public Service Commission is the government agency are charged with the statutory duty of upholding the APS Values. Despite this clear duty, Lynelle Briggs, is ignoring the APS values with her own staff. In current negotiations for a new certified agreement, APSC staff have requested the Commissioner hold a secret ballot to determine the type of agreement to cover their employment. The Commissioner is categorically refusing to hold such a ballot.

32. Not only has the Public Service Commissioner flouted the APS Values this agency is charged with upholding; it has also undermined the very legitimacy of these Values. In a recent hearing before the Australian Industrial Relations Commission counsel for the Commissioner contended on her behalf that the APS values:

> *really fall into that rubric of aspirational, attitudinal or value statements which were not intended to be able to be enforced*[4]*.*

The Public Service Commissioner is contending that the APS values are optional. Such a contention undermines the very essence of what it means to be a public servant and the notion of public service.

VI. Government double standards

33. There is a strong contradiction between the rhetoric surrounding the Work Choices Bill and what the Federal Government is practising in the APS with regards to industrial relations.

34. The Work Choices Bill proposes to make it impossible to take protected industrial action in pursuit of pattern bargaining claims. However, the prohibition on pattern bargaining is at odds with the way the Commonwealth negotiates collective agreements in the APS.

[4] *CPSU v APSC* AG2005/4798 C2005/4479 at paragraph 108

35. The Department of Employment and Workplace Relations [DEWR] sets Policy Parameters which all Commonwealth departments and agencies must abide by in industrial negotiations; for example no department or agency can have an agreement that improves redundancy provisions. Essentially, DEWR is negotiating common wages and conditions for multiple collective agreements across the public service.

36. The Department of Employment and Workplace Relations vets every agreement and must approve any deviation from the Policy Parameters. This often results in ridiculous situations; parties agree in principle to an agreement and the Department, not a party to the agreement, sends them back to the bargaining table because they are not satisfied.

37. Currently the CPSU is in negotiations with the Australian Communications and Media Authority, an agency recently created by the merging of the Australian Broadcasting Authority and the Australian Communications Authority. The two authorities had different redundancy entitlements prior to the merger and the parties negotiated a compromise position for the new agreement. Despite being fairly negotiated, the proposal was rejected by DEWR.

38. Increasingly and inevitably with the Federal Government as their employer, the APS is becoming a vehicle for the implementation of the Federal Government's industrial relations agenda. Not only does that undermine the choice that this legislation is supposed to advocate, it undermines the very essence and principles that underlie the public service.

39. In the experience of the CPSU and its members, the Federal Government does not support fair and effective choice in industrial relations for its employees.

VII. Choice

40. The CPSU and its members believe that the proposed legislation gives APS Agency Heads unilateral control over the employment arrangements at the expense of employee input.

41. The Explanatory Memorandum asserts that "employees will benefit from the enhanced choice"[5]. However, for many employees this proposed legislation will offer them only one choice: accept the job and the conditions that go with it, or find yourself another job.

42. The CPSU believes that both employees and employers should be given choice over the type of agreement that is to govern the terms and conditions of employment. In Canada, the US and the UK, a right to collectively bargain is enshrined in law when a majority of workers in a

[5] *Workplace Relations Amendment (Work Choices) Bill 2005*: Explanatory Memorandums page 15

workplace support union bargaining and an employer must recognise that right and negotiate with that union. That is a fair system.

43. However, the Work Choices Bill actively undermines collective bargaining, giving Australian employees less rights than those in these comparable countries.

44. In recent negotiations for a replacement agreement in the Department of Employment and Workplace Relations, employees had to campaign for almost 18 months to get the Department to recognise their wish to have the union negotiate a collective agreement on their behalf.

45. In the experience of the CPSU, many employers fail to even acknowledge the importance of affording employees choice over their form of agreement.

46. This is not fair, it is not democratic and it is certainly not an efficient or responsible way for an employer to manage industrial relations. Yet this is likely to be the future for many public servants on collective agreements.

47. In the experience of the CPSU, many employers fail to even acknowledge the importance of affording employees any say over their form of agreement. In the recent AIRC hearing with the Public Service Commissioner, mentioned earlier, the Commissioner told the AIRC that the form of the certified agreement:

> *is too important an issue to be determined by a majority rule approach*[6].

48. Whilst the proposed legislation continues to allow employers to stipulate the type of agreement employees are to be employed under, employees are not afforded any say. For example Centrelink are currently refusing to include a clause in their replacement agreement that would allow the union to be involved in negotiations for the next agreement.

49. Under the Work Choices Bill such a clause would be unenforceable and any party seeking to have it included could be fined up to $33,000.

VIII. Bargaining Power: Negotiating with the State

50. The fundamental purpose of Australian labour law throughout the last century has been to correct the imbalance in bargaining power between employee and employer. To deny this basic tenet of industrial relations law is at best naïve and at worst it is to turn a blind eye to the gross abuse of power that may be visited upon individuals in the labour market. Nowhere is this imbalance of power more apparent and this principle of labour law more necessary, than when negotiating employment arrangements with the state. The very essence of negotiation implies that there is some parity

[6] *CPSU v APSC* AG2005/4798 C2005/4479 at paragraph 75

of power between parties; fundamentally this is not true for employees, fundamentally this is not true for our members.

51. The CPSU has been extensively involved in providing assistance and negotiating for union and non-union certified agreements and AWAs. In the next six months, agreements that affect 70% of our members are up for renegotiation. These agreements will be negotiated under a radically different legislative framework.

52. In our experience employees are in a better bargaining position when they are able to collectively negotiate with their employer. In most circumstances, an individual employee cannot negotiate in any meaningful manner with their employer; this is particularly apparent for our members who have to negotiate for their wages and conditions with the Commonwealth Government.

53. The bargaining power of employees is also enhanced by the involvement of union organisers and delegates in negotiations. Union organisers and delegates bring experience and expertise to a negotiation which allows for greater bargaining parity and ensures that wages and conditions are not lightly traded off. The same cannot be said of individual agreements which often radically reduce employees' entitlements such as the attached Centrelink AWA amply demonstrates.

IX. Individual agreements

54. In the experience of the CPSU and its members AWAs are often used to reduce employees' entitlements, deunionise the workforce and undermine employees' bargaining power. A fitting example of the way in which this works is to be found at Telstra. The sick leave clause in the standard Telstra AWA reads:

> *Payment for sick leave will be at the discretion of your manager, taking into account all the relevant circumstances, including:*
>
> - *The circumstances surrounding your employment at the time that you commence sick leave;*
> - *How much sick leave you take or have taken during your employment with Telstra;*
> - *Any patterns in your sick leave;*
> - *Telstra's desire to promote the health and fitness of its employees and to minimize the period of any illness;*
> - *Any medical reports received by Telstra concerning your health;*
> - *The degree to which you co-operate in any applicable return to work program organized for you; and*
> - *The degree to which you, subject to proven medical restrictions, maintain communication with your manager about your employment.*
>
> *Your manager is able to make a decision whether to pay you for any sick leave taken. You need to assist your manager to*

understand the basis upon which your sick leave was taken and you must submit a sick leave form.

55. Earlier this year one of our members collapsed at work as a result of a severe respiratory illness. She was rushed to hospital where she remained for two days. Prior to this incident, the member had had to take a number of days of sick leave. Telstra told her that she would not be given anymore sick leave and, as a single mum, she was forced to go back to work. She collapsed at work again and was hospitalised for a further five days. Despite the seriousness of this situation, Telstra refused to grant the member sick leave for the time in which she was in hospital and her recuperation. It was only after the involvement of the CPSU and adverse media attention that Telstra relented. Unfortunately this is not an isolated incident; we can provide many more examples where sick leave has been unreasonably refused at the expense of the health and welfare of workers.

56. This AWA and how it has operated in the circumstances of this individual demonstrates the way in which AWAs are used by aggressive employers to undermine conditions. Whilst some conditions will be covered by the Australian Fair Pay and Conditions Standard (AFPCS), AWAs such as those used by Telstra will undercut all unprotected conditions.

57. Individual employees negotiating individual agreements have a very limited ability to protect themselves or their interests. To suggest that an individual employee has bargaining power is fallacious. The legislation and its supporters suggest that AWAs are agreements individually tailored to the needs and wishes of both employee and employer[7]; however this assertion has no grounding in the experience of CPSU members. Employers roll out uniform AWAs and employees are told the terms are non-negotiable. A CPSU member in Centrelink tells us that:

Some staff in my section decided to accept an AWA and tried to negotiate their conditions eg a 3% annual salary increase. They reported that they were told no conditions were negotiable, they accepted the proforma AWA or not.

58. Another member reports that:

I have been on an AWA since 4-9-2001. Back then, when I requested a clause in my AWA be removed (concerning the possible re-location of my workplace to another capital city), I was told that I was being offered a standard Agreement and nothing could be changed.

59. This is not just individual comments made by errant managers; it is company and government policy. An AWA information pack given to new staff in Telstra states:

[7] *Workplace Relations Amendment (Work Choices) Bill 2005*: Explanatory Memorandums page 8; page 15

Can I vary the wording in the AWA?
No. The wording in the body of the AWA must not be changed in any way.

X. Collective agreements

60. It is the experience of the CPSU and its members that collective agreements negotiated with the involvement of the union deliver the best outcomes for workers. Many supporters of individual agreements and the proposed legislation assert that AWA workers are higher paid than workers employed under a certified agreement. However, when managerial employees are excluded this assertion does not hold true. Non-managerial AWA workers earn up to 2% less per hour than those on collective agreements and for women on AWAs earn up to 11% per hour less than their counterparts on collective agreements[8].

61. The incidence of collective agreements in the APS demonstrates employees' preference for collective agreements. As of 17th October 2005, there were 101 certified agreements covering about 126,000 federal public servants. Only 11,481 individuals were covered by AWAs at 30th June 2005; 1,966 at Senior Executive Service level, where AWAs are compulsory, and 9,515 non-executive level staff.

62. This snapshot of employment agreements is indicative of the Australian workforce. After 9 years of the *Workplace Relations A*ct, only 2% of Australian workers are employed on this basis of an AWA[9]. This is despite the push for AWAs that the CPSU has witnessed in the Commonwealth's own employment arrangements. Australian employees and employers are quite simply choosing not to be employed under AWAs.

63. The proposed Work Choices Bill provides further incentive for using AWAs, by reducing the no-disadvantage test and the cost in administering these agreements. Given the reluctance with which AWAs have been taken up and the apparent preference for collective agreements; the real question has to be why?

64. As current collective agreements expire, it would be expected that many employers in the APS will have no choice but to seek to replace these agreements with individual agreements.

65. It is of great concern that under the Work Choices Bill, certified agreements can be terminated on expiry by providing 90 days notice, which can be provided before the actual expiry date. In such a situation employees will fall back onto the AFPCS and the relevant award if the agreement was made under the *Workplace Relations Act*. When

[8] *6306.0 Employee Earnings and Hours, Australia Nov 2004*, Australian Bureau of Statistics published in May 2005 available at www.abs.gov.au
[9] *The Workplace Context*, Dr John Buchanan, acirrt Annual Labour Law Conference, 8 September 2005

agreements made under the proposed legislation are terminated, the employees will fall back to the AFPCS.

66. Many of our members, particularly those employed in the APS, currently enjoy conditions well above those in the AFPCS or the relevant award. If they were forced onto the AFPCS these employees would lose a whole range of entitlements, including redundancy entitlements, allowances, penalty rates and access to classification, redeployment and family-friendly provisions.

67. In an environment where an employer is refusing to negotiate a replacement collective agreement or unnecessarily drawing out negotiations for a replacement collective agreement, the employer will be able to force employees onto AWAs to retain conditions comparable to those to which they are accustomed.

XI. Removal of No-Disadvantage test

68. The Work Choices Bill proposes to remove the requirement that new agreements, be they individual or collective, pass the no-disadvantage test. The inescapable result of this will be that some employees over time will lose the wages and conditions that they currently enjoy.

69. The removal of the no-disadvantage test is of greatest concern for workers employed on individual agreements. Unfortunately the CPSU sees individual agreements like that offered by Telstra, where sick leave is discretionary; like that offered by Centrelink, where allowances, shift penalties, working hours and public holidays are discretionary, everyday.

XII. Awards

70. A number of CPSU members are employed solely on the basis of the Award. For example, CPSU members employed in call-centres contracted to provide switchboard services to major corporations such as Telstra are generally employed under the *Telecommunications Service Industry Award* or the *Contract Call Centre Award*.

71. These workers typically work in call centres and are almost always employed on a casual basis; so they are entitled to only one hours notice, they receive no annual leave, no sick leave, no public holidays and no redundancy payment, and they are only paid $19 per hour. These workers are already threatened; they lack job security, entitlements and are not highly paid.

72. Awards such as these have been developed over a number of with the assistance of the Australian Industrial Relations Commission.

73. Given the advent of certified agreements and individual agreements, the level of wages in awards have often failed to keep track with wages and

conditions in agreements. This means that not only have employees such as those in call centres failed to gain any improvements in their wages and conditions, they have failed to retain in real terms their wages and conditions.

74. The Work Choices Bill proposes to further reduce the number of allowable award matters[10]. This means that these already vulnerable workers will face a further assault on their wages and conditions. By reducing the number of allowable award matters, the proposed legislation will effectively remove an Award-employee's ability to access a number of entitlements.

75. In addition to excluding these entitlements from Awards, the Bill also proposes to reduce the entitlements employees receive under the current system. For example, it is proposed that all award conditions are to be made basic minimum entitlements, only public holidays declared by the relevant State or Territory government will be recognised and redundancy pay is not allowable if a lower paying position was offered and refused.

76. In undermining the safety-net provided by Awards, the Work Choices Bill leaves these workers open to exploitation. The AFPCS guarantees in the legislation are of little relevance to these causal employees, as it is only the wages guarantee which will apply to them.

77. The CPSU and its members are also concerned that agreements can expressly exclude or modify the "key" Award provisions[11]. The Work Choices Bill allows for these provisions to be removed without any compensation in the agreement. This section effectively abolishes the safety-net. No longer in Australia can a worker be assured that his or her conditions, beyond the very basics provided in the AFPCS, are assured.

XIII. Australian Industrial Relations Commission

78. The Work Choices Bill proposes to remove most of the powers currently exercised by the AIRC. The CPSU and its members support the AIRC and believe that this institution, as the independent umpire, still has a very important role to play in Australian industrial relations.

79. In the experience of the CPSU the AIRC has been a relatively quick, easy and effective mechanism by which a whole array of industrial matters and disputes have been resolved. It conducts itself independently and impartially, with due consideration to notions such as fairness, equity and good conscience.

80. The CPSU and its members are concerned that the Work Choices Bill will render the ARIC powerless in conciliating matters arising during negotiations. The Commission will now only be able to conciliate if all parties agree to this process. In our experience it is precisely when parties

[10] *Workplace Relations Amendment (Work Choices) Bill 2005* s116
[11] *Workplace Relations Amendment (Work Choices) Bill 2005*: Explanatory Memorandums page 16

cannot reach agreement on how to proceed with negotiations that the assistance of the AIRC is needed. By proposing to make this process voluntary, the Work Choices Bill makes the AIRC's powers in relation to bargaining meaningless.

81. The Work Choices Bill also seeks to limit the capacity of the AIRC to resolve disputes. Under the proposed legislation dispute settlement procedures in agreements do not have to provide a mechanism by which a dispute can definitely be settled. Many industrial disputes will not be solved by voluntary processes and the Work Choices Bill prohibits the use of coercive powers under the model dispute resolution clause[12].

82. The Work Choices Bill proposes to offer the services of private dispute resolution providers in competition with those of the AIRC. The CPSU believes that this will encourage parties to forum-shop; parties will push for a provider who they feel is most likely to deliver the most favourable results for them. Many employers will be able to use their superior bargaining power to ensure that their choice of dispute resolution provider will succeed.

83. The CPSU and its members see no reason for the privatisation of dispute resolution as advocated by this bill. Private providers lack legitimacy; they cannot claim to be impartial and independent arbiters or observers when they are essentially chosen on their credentials. The lack of legitimacy that will inevitably surround these providers will result in greater disputation over their procedures, a greater reluctance to accept their findings and overall a less effective dispute resolution mechanism.

84. The CPSU and its members support a dispute resolution system with legitimacy; we support a system that provides fair and effective resolutions in an independent and impartial manner. The CPSU and its members believe that we have such a system in the AIRC and oppose the proposed amendments to its operations.

Stephen Jones
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[12] *Workplace Relations Amendment (Work Choices) Bill 2005* s176D (4)