SUBMISSION ON THE *WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL* 2005

TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

BY THE

ETU NSW

Introduction

1. The Electrical Trades Union of Australia, New South Wales ("the ETU"), is an industrial organisation of employees registered pursuant to the terms of the *Industrial Relations Act* 1996 (NSW) ("the IRA"). It is not an organisation or part of an organisation registered under the *Workplace Relations Act* 1996 ("the WRA"). The ETU operates solely in the industrial relations system of New South Wales.

2. In this submission, the ETU is mindful of the terms upon which the Bill was referred to this Senate Committee. It is an extremely complex and large piece of proposed legislation. In addition, given the very short timeframe that has been provided for submissions to be made (only one week), the submission of the ETU will of necessity be brief and will not cover the full range of concerns and issues the ETU has with the proposed legislation.

Background

3. Most of the employers the ETU has dealings with do not operate across State or Territory borders but operate solely within NSW and, even more often, only conduct business within a small part of the State. Even with some larger organisations with operations in more than one jurisdiction, these are mostly wholly separate businesses or enterprises, often conducted through separate legal entities. In such cases, the stated rationale for making everyone transfer to a new federal industrial relations system does not apply.

4. The ETU notes with concern the drastic and pervasive effect the Orwellian-sounding WorkChoices laws will have, if enacted and subsequently held to be valid.

5. The proposed new system will cause enormous uncertainty to the industrial community within NSW, a jurisdiction where harmony and co-operation have been a hallmark of industrial relations under the IRA.

6. The proposed legislation is neither simpler nor fairer than the current WRA. The Bill and its Explanatory Memorandum cover more than 1200 pages. The Bill is

overly complex, legalistic and just badly drafted. To meet the needs of industrial parties and the economy, the legislative framework needs to be simple, easy to understand and easy to use. The system proposed in the Bill has none of these key features. It compares very unfavourably with the IRA and the State system which meets the needs of the industrial parties with efficiency and fairness.

7. Recently released figures from the Australian Bureau of Statistics (ABS) for the June Quarter 2005 show that the NSW industrial relations system is one that is good for workers and businesses. Comparisons with Victoria, where only the federal WRA applies, indicate the industrial relations outlook under the proposed WorkChoices legislation.[1]

8. For the June 2005 quarter, NSW accounted for just 13 per cent of working days lost due to industrial disputation in Australia. Victoria contributed to nearly 50 per cent.[2]

9. NSW also compares well with the number of working days lost per thousand employees. This is a figure that allows for comparison between states and territories. The national average was 5.9 working days lost due to industrial disputation per thousand employees for this Quarter. Victoria lost 11.6 working days per thousand employees – almost twice the national average. NSW lost only 2.5 working days per thousand employees – less than half of the national average.[3]

10. The construction industry in NSW, where the ETU has significant membership, for the June Quarter accounted for less than 7 per cent of the nation's working days lost compared with Victoria's 41 per cent.[4]

11. This just a snapshot of industrial relations in NSW, but one that illustrates clearly the benefits of a simple, easy to use legislative framework that combines efficiency with fairness and has led to co-operative relations between the parties.

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[1] NSW Office of Industrial Relations, *Yours Workplace Online* Issue 23 October 2005
[2] Ibid
[3] Ibid
[4] Ibid

12. This will be placed at risk by the proposed WorkChoices legislation which places the emphasis on coercion, sanctions and depriving parties of choice.

13. The proposed legislation is an assault on the working rights or ordinary Australians. While using the language of choice, there will be no real choice. State awards and agreements will disappear within 3 years and federal awards will become outmoded. The only choice will be to sign agreements or be unemployed.

14. While industrial action will be unlawful in relation to “prohibited content” there is no indication what will constitute such content.

15. While industrial action will be unlawful in relation to pattern bargaining, there is nothing to stop employer only offering “pattern” terms and conditions of employment in AWA’s or even collective agreements. Once an agreement expires workers will have no legally enforceable rights, only the so-called Fair Pay and Condition Standard that will be so low as to provide no real protection. Employers will have strengthened bargaining power under this legislation without having to engage in any industrial action.

16. The new laws about protected industrial action with easier provisions for employers to terminate terminating bargaining periods, means that employees, no matter how strong and united they are, will have their bargaining power severely restricted.

17. Industrial action will be protected only if approved by a secret ballot. The provisions requiring notice to be given to employers, the timeframe for conducting a ballot and the requirement for 50% of eligible voters to vote, outside of working hours, are all significant obstacles to legitimate industrial action being taken.

18. In short, this legislation does nothing more than strip away the hard-won conditions that Australians have built up over the last century. There is no evidence at all that these reforms will even have any positive effect on the economy. But there is plenty of indication they will cause severe hardship for working people.

Destruction of State Systems of Industrial Relations

19. The stated objective of the provisions in Schedule 15 of the Bill is to preserve for a short time the terms and conditions of employment set by State awards or State employment agreements or a State or Territory industrial law as at the point in time that the WorkChoices law comes into force and effect.

20. State employment agreements will become "a preserved State agreement".[5]

21. When a term or condition of employment of a person is regulated under a State award or a State or Territory industrial law immediately before the reform commencement and no term or condition of employment is regulated by a State employment agreement then a *notional agreement preserving State awards* ("preserved State awards") is taken to come into operation on the reform commencement in respect to the business or that part of the business that was at the commencement of the reform subject to the award or the law[6]. The effect is that the notional agreement has effect according to its terms but only the terms as are in force and effect as at the reform commencement.[7]

22. A preserved State agreement will have effect according to its terms but only insofar as it is a preserved State agreement within the meaning of this legislation.[8]

23. State awards and agreements will be precluded from being enforced under the law of any State.[9]

24. While a preserved State agreement is in operation an award will have no effect.[10]

25. The terms of a preserved State agreement are taken to include the terms of the original agreement as in forced immediately before the reform commencement.[11]

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[5] *Workplace Relations Amendment (Work Choices) Bill* 2005, page 600, clause 3
[6] Page 615, clause 31
[7] Page 618, clauses 34 and 35
[8] Page 602, clause 6 (1)
[9] Page 602, clause 6 (3); page 618 clause 34 (3)
[10] Page 602, clause 7
[11] Page 603, clause 11

26. The expiry date of preserved agreements is either the day on which their nominal period expires under the relevant State or Territory law or three years, whichever is sooner.[12] A notional agreement preserving a State award expires after three years.[13]

27. However preserved State awards can cease to have effect earlier if an employee whose terms and conditions of employment are set by a preserved State award is covered either by a workplace agreement[14] or a federal award.[15] The Bill contains provisions enabling the AIRC to join employers, employees and unions to federal awards.[16] Transmission of business situations may also end the efficacy of preserved State instruments earlier than three years after the reform commencement.[17]

28. State instruments will only be able to be varied to remove ambiguity, remove discrimination or to remove *prohibited content* (which is not defined in the Bill).

29. Functions conferred by a preserved State agreement or a preserved State award upon a State industrial authority must not be performed and must not be exercised by the State industrial authority on or after the reform commencement. However the parties bound by the preserved State agreement made by agreement confer such functions or powers on the AIRC within the qualifications provided.[18]

30. This is a significant attack on the powers and responsibilities placed in State Industrial Relations Commissions. Those bodies are properly empowered under State law to fulfil their functions and are required to by law. The proposed Bill, if enacted, would compromise the legislative power of the States in a way that is contrary to the *Constitution*.

31. The legislation contains provisions excluding from operation the laws of the States and Territories that apply to employment generally and in, particular, on

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[12] Page 604 clause 12
[13] Page 617 clause 33(1)
[14] Defined as being either an AWA or a Certified Agreement: *Workplace Relations Amendment (Work Choices) Bill* 2005, clause 4 page 18
[15] Page 617, clause 33(3) and 33(3).
[16] Page 310, clause 120
[17] See the Transmission of Business Rules, pages 317 to 340
[18] Page 604, clause 13; page 619, clause 36

industrial laws as defined, of which the IRA is one.[19] Not content with this, the legislation specifies that laws in relation to equal remuneration, unfair contracts and trade union right of entry (other than for OH&S purposes) shall (to the extent not already covered in clause 7C (1) (a) and (b)) be excluded from operation by proposed clause 7C (1) (c) (d) and (e). The combined effect of these provisions, if valid, is the destruction of almost the whole of State systems of regulating industrial relations.

Government to make laws without Parliament

32. If these provisions discussed above should somehow not cover everything, or if the States and Territories develop some way around this at a later point in time, clause 7C (4)[20] provides a regulation making power by which the government can legislate by proclamation rather than by Parliament and specify other laws that shall be excluded from operation.

33. In addition, to the extent that a preserved State agreement or a preserved State award contains "prohibited content" that instrument is void.[21] This is also the case for AWA's or certified agreements.[22] There is no definition in the proposed legislation as to what constitutes "prohibited content". This is left to the regulations.[23]

34. John Howard and Kevin Andrews are trying to set themselves up as the ultimate third-party interference between the industrial parties. At any time, they will be able to decide to take away rights working people have in their industrial instruments, take away the protections they have enjoyed under State awards, take away things that employers, employees and unions have agreed to just because they decide to. And they will not have to come back to Parliament to do this. The government does not have the courage to tell the community what conditions will be "prohibited".

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[19] Page 24 clause 7C
[20] Page 26
[21] Page 604, clause 15; page 619, clause 38
[22] Page 181, clause 101F
[23] Page, clause 101D

35. The Government could decide that leave entitlements, shift allowances or loadings, superannuation contribution levels or any other matter can be "prohibited content" to the extent they provide for benefits greater than the so-called Fair Pay and Condition Standard in the Bill. In relation to preserved State awards, the Minister could even decide that rates of pay are "prohibited content" to the extent they provide for more generous pay levels than the so-called Fair Pay Commission's Federal Minimum Wages.

36. If the regulation making power should be more restricted than this and be able only to wholly exclude subject matter, the consequences could be even more drastic.

37. In addition, there is a broad regulation-making power to alter the definitions of "employer", "employee" and "employment" in the legislation. These are very important concepts in the Bill upon which the constitutional validity of the legislation may turn. This power purports to even permit the amending of the legislation itself.[24]

38. There is a regulation-making power so the government can confer upon the Fair Pay Commission" any other functions conferred upon [it] by regulations made under this Act or any other Act.[25] While the Bill purports to confer power on the FPC to determine its own procedures and generally fulfil its functions, there is another regulation-making power allowing the government to direct the Fair Pay Commission how and when to do its job.[26] Then there is the fact that members of that Commission will not have tenure but will be appointed for limited terms. Whatever else the Fair Pay Commission may be, it will not be independent.

39. There will also be a regulation-making power to enable the amendment of the WRA or any other Act that is "related to" the amendments contained in *WorkChoices*.[27]

[24] Page 518, clause 5
[25] Page 28, clause 7H (c)
[26] Page 29 clause 7K; page 30, cl 7N
[27] Page 674, Schedule 4 clause 2

40. These are extraordinarily wide powers to be conferred upon the government to legislate without further reference to, or proper scrutiny by, Parliament or the community.

Purpose of legislation to force everyone onto agreements only

41. In case there should be some doubt about this, it should be remembered that the proposed law is clearly directed to coercing people out of preserved State awards, State employment agreements and even federal awards and into federal agreements. There will be no choice.

42. If this Bill becomes law, these instruments become frozen, unable to be amended, modernised and renewed. Over time, the benefits they confer will become antiquated and their financial and other value devalued to the point where everyone will have to enter federal agreements.

43. In any case, preserved State awards and agreements expire within three years. At present under State law such instruments continue beyond their nominal period of operation until one party or the other terminates them. In the proposed legislation they will simply disappear after three years, even if the parties want them.

44. The AIRC will lose its power to make new awards other than consequentially upon the report of the Award Review Taskforce (to report by the end of January 2006) to merge existing awards into a much smaller number and with fewer allowable matters.[28] The AIRC will only retain power to make variations within tightly restricted parameters.[29]

[28] Pages 299 to 305
[29] Page 306, clause 119; page 307 clause 119A; page 307-309 clause 119B

Legislation really aims to prevent industrial action

45. Only organisations registered under the WRA can engage in protected bargaining.

46. The Bill provides that a union or an officer must not organise or engage in industrial action affecting an employer bound by a preserved collective agreement[30] whether or not that action relates to a matter dealt with in the agreement during the period beginning on the reform commencement and ending on the nominal expiry date.[31]

47. Employers bound by preserved collective State agreements are also prohibited in engaging in industrial action against an employee whose employment is subject to the agreement. There are several penalties for breaching these provisions.[32]

48. The Bill likewise prohibits industrial action by employers bound by and party to preserved individual State agreements.[33]

49. Breach will expose a party to injunctions and severe money penalties. There are counterpart provisions in relation to awards and agreements made under the WRA.

50. This is reflective of the wider policy in the Bill that, in effect, seeks to make industrial action illegal.[34]

51. Industrial action is permitted only if it takes places during a bargaining period and is not otherwise proscribed by the legislation (i.e. industrial action in support of prohibited content). The provisions dealing with the initiation and termination of bargaining periods[35] indicate that the thresholds for termination at the instigation of an employer or by the AIRC have been significantly lowered

[30] Page 602, clauses 9 and 10 define *preserved collective State agreements* and *preserved individual State agreements*.
[31] Page 610, clause 23
[32] Clause 24 (1)
[33] Clause 24 (2)
[34] See pages 229 to 240, clauses 108 to 108M; page 232, clause 108E; pages 266-269, clauses 110 and 110A
[35] Pages 213 to 228, clauses 107 to 107K

to the point where it could well seriously limit the usefulness to employees and unions of industrial action in support of bargaining. This is no doubt its purpose.

52. By this means, the one significant lever employees have in bargaining with their employer, the withdrawal of labour, could be effectively removed or at least seriously weakened. Even in industries where employees have significant bargaining power this will tip the balance in favour of employers.

53. In particular, the requirements that industrial action is not protected action unless it is authorised by secret ballot presents serious logistical barriers in the way in which the provisions are framed. The industrial action must be authorised under the rules of an industrial organisation[36], there must be an application to the AIRC in the prescribed form, which must be provided to the employer[37] (effectively providing an employer with a month's notice), and approved only if stringent conditions are met.[38]

54. There is then very cumbersome provisions regarding the machinery of conducting any ballot[39] (for which the applicant must pay[40]), and what information should be put to those voting. Voting will be by postal ballot unless otherwise ordered and, if voting is by attendance, it must be in non-work time or outside working hours.[41]

55. A ballot will only validly authorise protected action if fifty percent of eligible voters in fact vote and more than half vote in favour.[42] There are other restrictions.

56. While there is provision for individual employees to make application for a ballot, the cost impost alone will prevent any from taking up the option.

57. These provisions limit the capacity for employees and their unions to take industrial action in support of attempts to negotiate with employers about the full range of industrial matters. At present, under the IRA, a State union may

[36] Page 237, clause 108K
[37] Page 244, clause 109E
[38] Page 248, clause 109L
[39] Page 254 to 266, clauses 109X to 109ZR
[40] Page 259, clause 109ZG
[41] Page 249, clause 109N (2); page 250 clause 109N (4)
[42] Page 256, clause 109ZC

notify an industrial dispute with an employer and, until the NSW Commission issues a certificate of attempted conciliation, a union and its members are immune from civil actions in tort. So while a State registered union may take industrial action that is permitted by the law of the State without penalty, this new federal law will expose unions and their members to a very severe range of penalties – up to $33,000.00 for a union and $6600.00 for a member per infringement.[43]

No Savings or Transitional Provisions

58. Schedule 4 – Transitional and Other Provisions provides that regulations may be made dealing with matters of a transitional, saving or application nature relating to amendments made by the proposed legislation. The regulations may also make amendments to *Workplace Relations Act 1996* consequential to the passage of the Bill.[44]

59. However, there is nothing in the proposed legislation that provides that matters before State industrial tribunals that have not been finalised at the reform commencement are permitted to continue and finalised in accordance with State law or indeed that they are permitted to be finalised at all. If not remedied, this will create an enormous amount of doubt and uncertainty regarding the legal efficacy of determinations of State industrial tribunals and courts.

60. This will only promote litigation and delay finalisation of matters for a considerable period of time. The ETU would urge the Parliament and government in the strongest of terms to provide some certainty and make clear transitional provisions part of any legislation.

[43] Page 611 clause 23 (6); page 612 clause 24 (5)
[44] Page 674

Conclusion

61. The ETU opposes the proposed legislation. It is too complex, legalistic and restrictive. It is also badly drafted, despite the invocation of the word “choice” it in fact will narrow the choices available to employers and employees.

62. It also fails to provide a proper, civilised mechanism for the resolution of industrial disputes between employers and employees when they cannot resolve matters themselves. This is contrary to the public interest.

63. Employees will not have any real choice to remain on State awards and agreements, or even federal awards. Within three years the former will have evaporated (assuming one of the many ways in which their operation can be ended sooner is not invoked!) while the latter will over time lose its value and there will no mechanism to ensure federal awards remain relevant.

64. There is also no guarantee in the legislation that minimum wages will maintain their real value over time or even be set at a fair and reasonable rate to enable people to live on.

65. There is no real choice given to employees to bargain collectively or have the benefit of collective instruments as employers will be able to offer employment (even to existing employees) on AWA’s only. The only “choice” will be to refuse employment, a luxury most do not have.

66. The proposed legislation is ideologically driven and many of its provisions are unworkable in a practical sense, although that may be the intended consequence; for example, in relation to protected action.

67. The ETU believes many provisions of the legislation do not meet internationally accepted standards as set by the ILO. The provisions of the Bill certainly do not meet concepts of fairness and equity as it has been understood and accepted in Australian industrial law.

68. The proposed legislation has many omissions to be filled in at a later date by regulation with no guidance or indication as to what that content will be. In this category are: the powers to be exercised by the Fair Pay Commission; what is “prohibited content”; and the exclusion of State laws. In addition, there is the

broadest regulation-making powers, to alter the definitions of “employer”, “employee” and “employment”, very important concepts upon which the constitutional validity of the legislation may turn. These power purports to even permit the amending of the legislation itself[45] as well as “any other Act” as long as the amendments are “related to” the amendments made by the Bill. What does this mean? Will the government use this power to amend by regulation (not Parliament) the Anti-Terror laws to further restrict industrial action by workers, to provide for their arrest and detention upon suspicion of planning industrial action?

69. This approach is not consistent with an open, democratic approach to law-making and undermines public confidence in the process. Furthermore, the powers purportedly conferred upon the Executive are so wide as to be invalid in that it seeks to delegate the substantive law-making function of the Parliament.

70. There are many, many other shortcomings and problems associated with this Bill, too numerous to go into in detail in the very limited time provided for this Senate Committee.

71. The ETU believes the legislation needs much more consideration. The ETU requests that when the Bill reaches the Senate debate on it be adjourned so the community can be properly informed about the content of the proposed legislation and can make its views known to its elected representatives before any new law is enacted.

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[45] Page 518, clause 5