Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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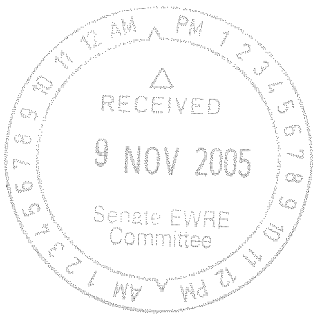

JC:MG

9th November, 2005

The Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Via Facsimile: 6277 5706

Dear Sir or Madam,

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

The Public Service Association is a union representing over 50,000 primarily NSW public sector employees. The Association is a registered organisation of employees under the provisions of the NSW Industrial Relations Act 1996.

The Association is deeply concerned about the time frame provided by the Senate for the making of submissions to this inquiry. This legislation is complex and involves a significant departure from the existing legislative framework for industrial relations. The text of the bill has been available for scrutiny for only five working days. This is an inadequate timeframe for anything but a superficial examination of the document. A proper consideration of the bill by the committee would require an extension of the time period for the making of submissions and further extensions to the time set aside for hearings.

The Association is opposed to the proposed legislation in its entirety.

The Association objects to the legislation on the following basis:

The legislation is unnecessary.

The current arrangements of coexisting state and federal systems are working effectively. Industrial disputation is at a historically low level and the economy continues to perform well with low inflation and unemployment.

The existence of multiple systems allows for innovation in industrial relations arrangements. Changes made in a state jurisdiction can be effectively trialled in one jurisdiction and then adopted in other systems if they are successful. This can occur without the changes involving massive adjustment across the economy. The incremental achievement of decentralised bargaining was achieved through this system. Other innovations may be stalled by the creation of a unitary national system.

The current award system as it operates in the NSW jurisdiction provides a simple means for business to establish appropriate base wages and conditions of employment. This is particularly the case where small businesses choose not to invest significant time and resources in workplace based negotiation.

The legislation is possibly unconstitutional

The bill relies substantially on the corporation's power as its source of constitutional authority. The original framers of the constitution gave particular consideration to the question of whether the Commonwealth should be assigned exclusive powers over industrial relations. They determined that it should not. The industrial relations power was framed in a very limited form. On six occasions the Commonwealth have submitted proposals to the people to amend the constitution to extend its powers in relation to industrial relations and each time the people have rejected this request.

The corporation's power was never intended to be used to engage in a hostile take over of the states legislative authority in industrial relations. The parliament should exercise caution in seeking to rely on a broad reading of this power.

The legislation is unbalanced

The bill in a number of areas fails to treat employers (and their representatives) and employees (and their representative) on the same terms. The legislation gives preferment to a particular type of bargaining namely individual agreement making through Australian Workplace Agreements. These prevail over collective agreements.

The pattern bargaining restrictions on collective agreement making, which require employee organisations to genuinely bargain, do not apply to an employer who is offering identical AWAs to their employees.

This unbalanced approach is also demonstrated by the provisions of the proposed section 104(6) This provision exempts an employer from the prohibition on coercion in agreement making where they seek to make the signing of an AWA a condition of employment for new employees.

Similarly the cumbersome arrangements in relation to taking protected industrial action by employees do not similarly apply to an employer seeking to lock out employees.

The legislation is unfair to employees

Underpinning the rhetoric of the legislation is an assumption of an equal power relationship between employees and their employer. This is a false assumption. In the vast majority of situations the bargaining power of employers relative to their individual employees favours the employer.

The legislation assumes that a buoyant labour market will allow employees dissatisfied with their employment condition the ability to exercise an individual right to leave and find alternative employment. But this assumption relies on a number of considerations that do not always exist in the circumstance including: that the employee has skills in relative demand; and that the labour market is always buoyant or buoyant in a particular geographic location.

The question is whether it is reasonable to limit an employee's options to this one avenue. This is what the legislation effectively does. The legislation places severe limitations on the capacity of employees to take protected industrial action. These provisions involve a cumbersome approval process and numerous pitfalls that would allow this right to be terminated. These restrictions effectively extinguish any alternative bargaining power an employee might possess.

When you consider that the bill will effectively allow for dismissal at will by an employer, for no reason if less than 100 employees or on the basis of sham 'operational requirements' if over 100, employees will lack the necessary job security to bargain effectively.

When these changes are coupled with the limitations on protected action the bill will lead to a massive shift in bargaining power to employers. Employees will be given the choice of "my way or the highway".

The legislation violates Australia's international treaty obligations

The legislation, in spirit and in deed, violates Australia's international treaty obligations. In particular the obligations imposed by ILO conventions 87 and 98.

Elements of the bill, including requirements for secret ballots before strike action and limiting the ability of unions to impose penalties on members who fail to observe industrial action duly agreed to in accordance with union rules, represent an infringement of rights conferred by Article 3 (1) & (2) of ILO Convention 87. This article guarantees unions the right to determine their own rules and administration free from interference by government.

The preferential status assigned to Australian Workplace Agreements is in conflict with our treaty obligations under Article 4 of ILO convention 98. This article requires signatories to encourage and promote the making of collective agreements.

The legislation exceeds the government's electoral mandate

The establishment of a unitary national system of industrial relation is not a policy which the government has taken to the people at an election. Elements of the proposed reforms may be consistent with the government's previous legislative agenda but the hostile take over of the state industrial relations systems was not foreshadowed by the government prior to the last election. Significant opposition exists to this initiative on both sides of the partisan political divide at a state level.

The legislation is overly complicated

The legislation does not accord with the claim that this is an exercise in simplification of industrial relations. The legislation imposes a significant number of new obligations on both employees and employers party to workplace level negotiations. These obligations have pecuniary penalties attached for non-compliance.

The bill itself is unintelligible in its presentation and is difficult to comprehend given the differentiation in numbering with the current legislation.

The legislation is overly reliant on punitive sanctions

The bill substantially increases the incidence of pecuniary penalties for non-compliance. When this is coupled with the abandonment of compulsory conciliation and arbitration of disputes the likely outcome will be a growth in litigation and imposition of punitive sanctions on employers and employees. This shifts the emphasis of workplace relations away from consultative dispute resolution to a reliance on litigation and other associated court action.

The legislation will not contribute to achieving the object of devolving agreement making to the workplace

Object 3(e) of the principle objects seeks to enable "employers and employees to choose the most appropriate form of agreement for their particular circumstances". The bill however constrains the choices available to employees. It does this by: limiting their capacity to take protected industrial action; by allowing an employer to make the signing of an AWA a condition of employment; by permitting an employer to enter into a greenfields agreement with themselves; by prohibiting particular content in agreements; and by undermining an employees bargaining power through the removal of unfair dismissal protection for a majority of employees.

The undermining of the award safety net through the provisions of Section 103L (which allows for the unilateral termination of agreements with notice) working in tandem with section 103R (which provides that the default condition on termination of agreements to be the FPCS and not the previously relevant award) will lead to a trend of conditions not being arrived at by agreement making in the workplace but through the unilateral determination of wages and conditions by the employer.

The legislation assigns too much authority and discretion to the executive arm of government

The legislation contains multiple provisions that assign regulation-making authority to the minister in the broadest terms. Much of the content of the regulations have already been contemplated in some detail by the government. For example the WorkChoices booklet specifically outlines content of agreements that would be prohibited. But this detail is absent from the bill and left to the minister to determine by regulation. If this detail is already contemplated then it should be submitted to the parliament as part of the legislation.

The legislation also provides the minister with the unprecedented ability to intervene directly in the bargaining process through a power to terminate a bargaining period. This will potentially politicise the bargaining process. Unlike the current process, which involves the AIRC giving transparent and reasoned consideration to the question of whether to terminate a bargaining period, no similar requirements are imposed on the minister's deliberations.

The legislation will be difficult and costly to enforce

The bill creates an expanded regime of penalties and sanctions. It assigns responsibility for enforcement to the inspectors of the Office of Workplace Services (OWS) as well as the traditional ability of employees and employee organisations to seek enforcement of instruments to which they are a party. At the same time the bill narrows the powers of right of entry for union permit holders to investigate breaches.

Given the massive expansion of the coverage of the system and without a massive consequential increase in the resources of the compliance capacity of the OWS many breaches will avoid detection.

The capacity of employees to detect breaches and to enforce their own rights and conditions will be further eroded by the prohibition on the inclusion of trade union training in agreements.

The establishment of the Fair Pay and Conditions Standard will politicise the setting of employment conditions

The establishment through direct legislation of a safety net of employment conditions represents a radical departure from the conventional approach to wage and conditions setting. Traditionally the Commonwealth government has been at arms length from this process. The reliance on the industrial relations power has meant that a direct role of the parliament in wage and conditions setting has been impossible.

The shift to reliance on the corporations power will mean the Commonwealth government will have a direct responsibility for wage and conditions setting. This will place enormous pressure on this and future governments by politicising this process.

The implementation of the legislation will create confusion and uncertainty

The hostile takeover of the state systems will result in a protracted period of confusion for employers and employees who will face uncertainty about what industrial instruments apply. This will undoubtedly result in a need for employers and employees to procure (at a cost) advice in relation to these questions.

In relation to the public sector the uncertainty is compounded by the constitutional uncertainty around the classification of various public entities as constitutional corporations. This question will need to be determined in the courts on a case-by-case basis and could lead to years of uncertainty in relation to the applicability of industrial instruments. This will have a detrimental effect on public sector employers and employees.

For the above reasons we submit that the senate should reject the proposed bill.

Yours sincerely,

JOHN CAHILL
GENERAL SECRETARY