Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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Submitter: Mr John McIntyre
President

Organisation: The Law Society of NSW

Address: 170 Phillip Street
SYDNEY NSW 2000

Phone: 02 9926 0333

Fax: 02 9231 5809

Email:

9233 7146

The Law Society
of New South Wales
ACN 000 000 699

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BY FAX: (02) 6277 5706

Senator the Hon Judith Troeth
Chair
Senate Employment, Workplace Relations and
Education Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

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

I refer to your Inquiry into the provisions of the Workplace Relations Amendment (Work Choices) Bill 2005. The Law Society's Workplace Committee is concerned about the fundamental change to and erosion of long-established and prescribed rights held by citizens of this country, as proposed by the Bill. Enclosed is a submission prepared by the Law Society's Workplace Committee which elaborates its concerns.

The Society's Workplace Committee is comprised of New South Wales legal practitioners who specialise in employment and workplace relations law, and its members are solicitors who act for employers, employees, unions, or a combination of one or more of those categories of clients. I commend their submission to your Inquiry.

Yours sincerely

John McIntyre
President

170 Phillip Street Sydney NSW 2000
DX 362 Sydney Phone: (02) 9926 0333 Fax: (02) 9231 5809
www.lawsociety.com.au

THE LAW SOCIETY OF NEW SOUTH WALES
WORKPLACE COMMITTEE

WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005

SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

9 November 2005

OVERVIEW

The massive size of the Workplace Relations Amendment (Work Choices) Bill (the "Bill") is compounded by its complexity. The Bill is drafted as a 687 page set of amendments to the existing principal Federal statute, the Workplace Relations Act 1996 (Cth) (the "Federal Act").

As a matter of principle, the Law Society of NSW, through its Workplace Committee, protests most strongly on behalf of all its members and the citizens of NSW that such a large, complex and monumentally significant piece of legislation should be rushed through Parliament in the proposed fashion. That is, where public submissions to the Senate Inquiry have to be lodged within one week of the Bill being tabled in the House of Representatives. The failure to provide a complete index to the Bill, or a "mark up" of the Federal Act, is further evidence that the Government is unwilling to foster informed debate about its proposed workplace relations legislation.

The major vice of such a process is that the citizens of this country (whether as individuals or as members of any one of a myriad of interest groups) do not have proper opportunity to scrutinise the Bill to ensure that drafting deficiencies and unintended injustices (not being policy driven provisions) are corrected prior to the Bill being passed. As a consequence, injustice never intended by the Parliament may be visited on citizens without any public purpose.

The Law Society's Workplace Committee therefore requests that the Bill's passage be delayed at least until March 2006, so that proper scrutiny of this historic legislative initiative can be undertaken.

EROSION OF ESTABLISHED RIGHTS

The Workplace Committee is concerned about the fundamental change to the regulation and prescription of established rights proposed by this Bill. The Committee makes the following particular submissions in this regard:

Unfair Dismissal

While the Bill retains the right of employees to bring claims under the Federal Act in relation to "unlawful" termination (e.g. a claim that termination has occurred by reason of a prohibited factor such as race, sex, religion, disability, family responsibility, pregnancy etc), the rights of most employees to challenge a dismissal by an employer on the general ground that the dismissal was "unfair" or "harsh, unjust or unreasonable" have been eradicated or severely restricted.

It appears that the effect of the Bill (bearing in mind its stated intention to exclude unfair dismissal claims in State industrial tribunals by employees of "constitutional

corporations") will be that the right to bring such a claim will be restricted to a relatively narrow class of employees, being those employed by a "constitutional corporation" employing more than 100 employees, where the employee concerned is earning not more than the "specified rate" or cap on eligibility (currently $94,900 per annum). And, of course, the rights of even this narrow class of employees are also restricted, most importantly by the provision that exempts an employer from an unfair dismissal claim where dismissal has occurred by reason of, or where one of the reasons for dismissal is genuine "operational requirements" of the business (eg redundancy).

The following matters stand out as matters of particular concern in relation to individual rights:

1. Section 7C purports to totally exclude unfair contract claims by employees – paragraph (d) of Section 7C(1) provides that the legislation will apply to the exclusion of a State or Territory law "providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a Court or Tribunal finds is unfair". This matter is further commented upon below.
2. Section 170CE(5E) introduces the restriction on unfair dismissal claims to employers with more than 100 employees, and specifies how that number is to be worked out. Surprisingly however, there is no provision to capture what might be called "corporate groups", that is, situations where a corporation has its operations split into a number of entities. This deficiency in the Bill's drafting is obvious, and will allow subterfuges, for example where a corporation has somewhere between 100 and 200 employees. The corporation could split its workforce into two corporations, both controlled by the holding company.
3. While an employer who terminates an employee by reason of redundancy of the position occupied (ie "operational reasons") is exempted from an unfair dismissal claim (section 170CE(5B)), the Bill does not guarantee that the employee who was made redundant will receive any redundancy pay. This is because redundancy pay is an award entitlement that need not be retained in any AWA. This appears to contradict the example of the application of the "operational requirements" exemption set out on page 52 of the Government's Work Choices booklet. Moreover, it is clear that an employer can take advantage of this exemption even where there is a number of reasons for dismissal of the employee (eg sub standard performance or personality conflicts with supervisors) as long as one "genuine" reason for the dismissal is restructure of positions to eliminate that of the employee concerned. Proving a dismissal is not for "genuine" operational reasons will be difficult for the employee.

   Accordingly, there should be, in fairness, a "reverse onus" provision in the legislation to require the employer to positively establish, on the balance of probabilities, that the dismissal was genuinely by reason of "operational requirements".

Employees who do not fit into the narrow "class" of employees who can bring an unfair dismissal claim are left to their common law rights (such as they are) and any unlawful termination rights.

Unfair Contracts claims

As noted above, the Bill seeks through paragraph (d) of section 7C (1) to eradicate unfair contract claims by employees under any State legislation. This would impact immediately on the jurisdiction of the Industrial Relations Commission of New South Wales under Section 106 of the Industrial Relations Act 1996 (NSW), as well as the equivalent (although rather more limited) jurisdiction of the Queensland Industrial Relations Commission under its Industrial Relations Act 1999 (Qld).

Section 106 of the New South Wales Act has long been a controversial provision, and the extent to which the jurisdiction of the Commission under that section has expanded in relation to employee claims (particularly for executive and professional employees) has attracted considerable judicial scrutiny as well as New South Wales State legislative intervention to limit claims. Currently, there are two matters before the High Court of Australia which are due to be heard very soon, pursuant to grants of special leave, in relation to the scope of the NSW section.

Notwithstanding its controversial nature, the step that the Government is seeking to take, namely to totally eradicate the availability of relief under section 106 in respect of any person employed by a "constitutional corporation", is quite extraordinary and indeed goes well beyond what was foreshadowed by the Government in its Work Choices booklets. In that booklet it was pointed out that the legislation to be introduced would prevent the bringing of unfair contract claims in relation to unfair dismissal matters (see page 51). However, Section 7C(1)(d) eradicates <u>any</u> possible claim by an employee of a constitutional corporation pursuant to these unfair contract provisions. That means that claims totally unrelated to the termination of employment (e.g. claims that relate to commission or incentive schemes, or which are unfair in some other respect but not in any way relating to termination) are not available.

The Bill in this regard is consistent with the Government's policy of eradicating State industrial jurisdictions totally except in certain defined areas (eg superannuation, workers' compensation, occupational health and safety, child labour, long service leave etc). However, the initiative it has now taken in relation to unfair contract remedies in the New South Wales and Queensland jurisdictions demonstrates just how far the Government seems to be intending to go to restrict employee rights.

Removal of long established rights of NSW citizens

It is important to remember that the NSW "unfair contracts" jurisdiction has been on the State's statute books since 1959 and claims by employees under it have been arising for at least the last 20 years. In relation to unfair dismissal claims, the NSW industrial tribunals have possessed, in some form or other, "unfair dismissal" jurisdiction for over 100 years (albeit restricted to union initiated claims until 1991). To exclude State industrial tribunals in these areas in relation to the vast majority of NSW citizens who are employees, and then provide no alternative remedy for most of them (because of the restrictions on the class of employees who may bring actions under the Federal Act) is unjust in the extreme.

Maternity Leave

Maternity leave seems to be under pressure in that the new provision appears to oust the operation of the NSW Act. Section 94R(5) of the Bill could have the effect of a woman returning from leave being forced to take any position in that she could be "qualified and able to work" either in another position or one (if more than one) that is nearest in status and remuneration to the former position. The current NSW State

provision (section 66(2) Industrial Relations Act 1996) provides for the employee to be entitled to a position "as nearly as possible comparable in status and pay" to the employee's former position. The proposed test is very different to the NSW test and means a significant weakening regarding rights on return for women in particular.

Annual Leave

Annual leave provisions seem heavily weighted in favour of employer. It is not clear that there is an absolute right to take the annual leave owing to an employee. Section 92H enables the employer to refuse the taking of leave as long as the employer does not unreasonably refuse. The pay rules also mean inevitably the loss of leave loading once State awards expire under the Bill. It also appears that commissions are not part of ordinary earnings (see section 92G and the definition of "basic periodic rate of pay" in section 90B).

In effect, 60 years of law regarding ordinary earnings and annual leave entitlements under the Annual Holidays Act 1944 (NSW) have been swept aside by the Bill.

REGULATION MAKING POWER

The breadth of the regulation-making powers is of great concern to the Workplace Committee. Substantive amendments to the Act will be able to be made by regulation, not just matters of "transitional, saving or application nature" as specified in Schedule 4. For example, section 101D enables regulations to specify matters that are "prohibited content" in a workplace agreement.

Matters dealt with by regulation, which can extend to substantive amendments to the Act made by regulation, may be retrospective – see Schedule 4 sections 1(2) and 2(2).

It is the Committee's view that substantive amendments to legislation should only be effected by Act of Parliament, not by regulation.

IMPACT ON PART HEARD MATTERS/TEST CASES IN STATE COURTS

The Bill does not specify what is to occur in relation to matters already commenced (and whether part heard or not) in any tribunal affected by the fundamental changes wrought by the Bill. This means that citizens, organisations and businesses have no certainty at the current time as to whether they should commence or pursue matters under existing law or not. Such matters may well have provided valuable precedent by settling important points of law or jurisdictional issues.

It should not be left to guesswork whether section 8 of the Acts Interpretation Act 1901 (Cth) will determine such issues, or whether they will be dealt with in the regulations yet to be drafted.

It is submitted that these questions should have been dealt with in a Schedule to the Bill, so that all stakeholders know the position with any matter commenced or about to be commenced. Adequate provisions should be included to cover part heard matters in State jurisdictions other than unfair dismissals, as for example section 106 unfair contract claims under the Industrial Relations Act 1996 (NSW).