Submissions of
The Australian Workers' Union to the

Senate Employment, Workplace Relations and Education Committee

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

9 November 2005

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1. The Australian Workers' Union

1.1 The Australian Workers' Union is Australia's oldest general union and was formed in 1886.

1.2 Today, the AWU represents more than 130,000 members across Australia in a diverse range of industries. The AWU has the widest coverage of employees of all unions in Australia.

1.3 Our members build railways, work in underground mines, they mill paper and they asphalt roads. They also farm fish and grow tobacco. Some of the major industries in which our members work include: pastoral and agricultural, aluminium, aviation, oil and gas, mining, health, local government, manufacturing, chemicals, construction and steel. The AWU is the largest union outside metropolitan Australia.

1.4 The AWU is a federally registered union with 11 Branches, the AWU is also comprises state unions registered in Queensland, New South Wales, Tasmania, South Australia and West Australia.

1.5 The AWU employs 147 organisers, industrial officers and specialist staff and 78 administrative staff across 46 offices in every capital city and most regional centers.

1.6 The AWU is party to and responsible for 253 Awards registered under the *Workplace Relations Act 1996*.

1.7 Branches of the AWU are party to and responsible for:

- 170 Awards registered under the *Industrial Relations Act 1999 (Queensland)*

- 89 Awards registered under the *Industrial Relations Act 1996 (New South Wales)*
- 27 Awards registered under the *Industrial Relations Act 1984 (Tasmania)*
- 57 Awards registered under the *Industrial Relations Act 1994 (South Australia)*
- 94 Awards registered under the *Industrial Relations Act 1979 (West Australia)*

1.8 The leadership of The Australian Workers' Union are directly elected by all members of the union every four years. Members of the union elect the full-time and honorary office holders of the union and the governing bodies. The supreme governing body of the AWU is the National Conference which meets every two years and in-between Conferences the National Executive holds the powers of the National Conference. The current National Secretary of the union is Bill Shorten and the National President is Bill Ludwig.

2. Form of Submission

2.1 This submission is made on behalf of the National Executive of the AWU and is authorised by National Secretary Bill Shorten.

2.2 The submission contains two parts the first being the over-all view of the union on the components of the *Workplace Relations Amendment (WorkChoices) Bill*, the second being the views of the Branches of the AWU specifically looking into the effect of the abolition of the state industrial relations systems of employees who are members or are eligible to be members of the AWU and other general issues of concern to the Branches. Submissions from the Queensland, Victorian, Tasmanian, Greater South Australian and West Australian Branches of the union are included in the attachments to this submission.

3. General Comments

3.1 The AWU welcomes the opportunity to provide comment on the *Workplace Relations Amendment (WorkChoices) Bill*.

3.2 The AWU is disappointed and concerned that the closing date for submissions to this inquiry was only four working days after the legislation was released to the public and introduced into the House of Representatives. The fact that the Bill and Explanatory Memorandum was over 1200 pages long and the short period of time between the release of the legislation and the closing date for submissions made it very difficult for the union to provide and full and frank view on all aspects of the proposed Bill to the Committee. The AWU submits that the Committee should provide a further opportunity to the public to submit further submissions on the proposed legislation so all persons and organizations concerned have adequate time to fully investigate all aspects and potential implications of the Bill and are able to submit their views to the Committee.

3.3 The AWU notes that when the Government announced the WorkChoices package a detailed briefing was given both by the Prime Minister and the Minister for Employment and Workplace Relations to a large group of representatives from employer organisations. The AWU is disappointed to note that the Government did not invite any organisations representing employees to the briefing nor have they anytime since spoken to, communicated with the AWU regarding the legislation. This in the view of the AWU demonstrates a complete disregard by the Government to views of the community regarding the legislation except for the views of the Business community.

3.4 The AWU is concerned that the Inquiry will not be able to fully investigate the effect of the legislation on the Australian working population given that the Committee has only allocated four days for public hearings and also that the Committee is required to report back to the Senate within one working day after the conclusion of the public hearings.

3.5 Given that the Committee has been only allocated such a short period of time to report back to the Senate the AWU is concerned that the Government may view the outcome of the Committee's report as a "fait accompli".

3.6 It is the view of the AWU that the Inquiry into the legislation should be extended to ensure all Senators are able to fully investigate the effect of the legislation. The AWU notes previous Senate inquires into amendments to the *Workplace Relations Act 1996* have previously allocated a substantially longer period of time for investigation and public hearings[1].

4. Australian Fair Pay Commission (AFPC)

4.1 The Australian Workers' Union expresses its extreme concern regarding the provisions of Part 1A of the *Workplace Relations Amendment (Work Choices) Bill 2005*.

[1] The AWU refers to the following inquiries: Inquiry into the Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003 and the provisions of the Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003; Inquiry into the Workplace Relations Amendment (Protecting the Low Paid) Bill 2003; Inquiry into provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002; Inquiry into the Workplace Relations Amendment (Paid Maternity Leave) Bill 2002; Inquiry into the Workplace Relations Bills 2002; Inquiry into the Workplace Relations Amendment (Transmission of Business) Bill 2001; Inquiry into the Workplace Relations (Registered Organisations) Bill 2001; Inquiry into the Provisions of the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001; Inquiry into the Consideration of the Provisions of the Workplace Relations Amendment Bill 2000; Inquiry into the Workplace Relations Amendment (Unfair Dismissals) Bill 1998.

4.2 The AWU has many members particularly in the pastoral and agricultural industries which rely on the annual Safety Net Increases awarded by the Australian Industrial Relations Commission for improvements to their income.

4.3 The current system provides for a mechanism where Government, Business and Employee Representatives can make submissions on their views regarding what appropriate changes should be made to Award conditions and wage rates.

4.4 The AWU is concerned regarding Part 7K (1) of the Bill which empowers the AFPC to determine on its own accord the "*timing and frequency of wage reviews*". This provision abolishes any guarantee of any annual improvements to the incomes of the 2 million working Australians who are paid base Award wages. The Bill does not provide for any input by employee or employer organisations and representatives into the timing, scope or frequency of improvements to the Minimum wage. The end result of this section of the Bill if it is passed by the Senate will be the economic future of over 2 million Australians will reside solely in the hands of the four members of the AFPC.

4.5 The AWU is extremely disappointed regarding Part 7P if the Bill which states "*To be appointed AFPC Chair, a person must have a high level of skills and experience in business or economics*" This provision ensures that the a person with experience as an advocate for employees is unlikely to be appointed as Chair of the AFPC.

4.6 The AWU is concerned regarding the lack of provision in the legislation for any pay increase to keep up with the general cost of living or inflation which will result in those workers on the minimum wage experiencing a drop in their real wage over time with the potential to create a new class of workers living in

extreme poverty. (We wish to bring the attention of the Committee to points 3.1 to 3.25 of the Submission of the AWU Greater South Australian Branch located in “Attachment C” for further arguments on this issue).

4.7 The AWU notes that since 1996 if the submissions of the Federal Government were accepted by the Australian Industrial Relations Commission then the minimum wage would be $50 less per week than it is today.

4.8 The AWU is concerned that the AFPC has been established not to form a genuinely independent body to set the minium wage but rather to find a way for the Federal Government to be able to implement it’s vision for a low minimum wage which has been rejected over the last nine years by the current independent umpire.

5. Australian Industrial Relations Commission

5.1 The Government’s proposed amendments fall into three categories changing fundamentally the powers, functions and procedures, independence of the AIRC and the special conditions applying to Victoria. The main changes are summarised along with the impacts of the changes:

5.2 Powers, functions and procedures. New section 33. This item repeals section 33, which provides that the AIRC may exercise powers on its own motion or after an application by a specified party, subject to any limitation or restriction in the WR Act or Schedule 1B. Proposed section 33 serves to limit the jurisdiction of the AIRC.

5.3 Impacts of proposed change: There will be greater regulatory duplication and confusion between the various regulatory

stakeholders, including the AIRC, the Fair Pay Commission, the Employment Advocate and the courts. This will result in higher compliance costs, delay and confusion for stakeholders under the operative sections of the Act.

5.4 New section 44A – Commission to take into account the public interest. Proposed section 44A would require the AIRC to take into account the public interest when performing its functions under the WR Act or Schedule 1B to the Act. When considering the public interest, the AIRC would be required among other matters to have particular regard to:

- the state of the national economy and the likely effect that an order the AIRC is considering or proposing to make will have on the national economy, particularly the likely effects on the level of employment and inflation (proposed paragraphs 44A(1)(b) and 44A(2)(b)).

5.5 Impact of proposed change: The Government is aiming to ensure that the AIRC exerts downward pressure on wages and conditions in its review and appeal roles.

5.6 Subdivision B - Particular powers and procedures of the Commission. Proposed subdivision B would provide for particular powers and procedures of the AIRC. The powers and procedures contained in this subdivision are based upon the existing powers and procedures of the WR Act but have been modified, in part to make changes consequential to the changed constitutional underpinnings of the WR Act. That is, Commission will no longer have the power to certify agreements, but to only vary an award or workplace agreement.

5.7 Impact of proposed change: An historic shift in the balance of power in favour of employers at the expense of employees, equity and fairness. Unprecedented responsibilities for determining wages and conditions now vested with employers. Outcomes for employees will not be as a consequence of a bargain but prescription. That may lower employer costs in driving down wages and conditions, but by removing employee incentives do nothing to address declining productivity and the competitiveness of Australian industry.

5.8 Independence of the AIRC and section 44L Review on application by Minister. This section provides wide scope for the intervention of the Minister. The Minister may make such an application if it appears to the Minister that the award, order or decision is contrary to the public interest.

5.9 Impact of proposed change: Overrides the statutory independence of the Commission in undertaking its duties.

5.10 Items 28 to 31 would amend references to certified agreements to be replaced with workplace agreements and to persons bounded by certified agreements to an employer, employee or organisation bound by an award.

5.11 Impact of proposed change: Limits the efficacy of the AIRC to generating future growth, productivity and employment via CAs which have been the driver of growth, productivity and employment since the 1993 reforms of the Keating Government.

5.12 Impact on Victoria. Items 24, 30, 34, 35 and 36 make amendments to the provisions relating to Victoria. In particular, item 35 would repeal subsection 45(3A), which provides a Minister of Victoria with a right to intervene in certain AIRC proceedings. This provision would be replaced, in part, by

proposed subsection 504(2), which would require the AIRC to grant leave to intervene in an appeal against a decision of the AIRC under subsection 107G(1) in certain circumstances.

5.13 Impact of proposed change: To deny Victoria its current rights under existing legislation without any compensatory benefits from the legislation to Victoria. This is open to challenge on constitutional grounds.

5.14 Item 38 would repeal subsection 45(9), which relates to the hearing or determination of an industrial dispute to the hearing or determination of an appeal. The existence or otherwise of an industrial dispute will no longer be relevant to the AIRC's jurisdiction or powers.

5.15 Impact of proposed change: Increased uncertainty and compliance costs to participants.

6. Powers and Functions of the Employment Advocate

6.1 A list of those functions would appear in subsection 83BB(1). The major functions in that list include:

- promoting the making of workplace agreements;
- the provision of assistance and advice to employees and employers (especially small business) in relation to workplace agreements and the Standard;
- providing education and information to employees and employers in relation to workplace agreements;
- promoting better work and management practices though workplace agreements; and
- accepting lodgment of workplace agreements and notices about the transmission of instruments.

6.2 Impact of the proposed changes: Vests significant responsibilities on the Office of the Employment Advocate to improve workplace agreements which really means to promote AWAs. In this case, the Office will not result in positive growth, productivity or employment outcomes but serve as an agent of Government to wipe out collective agreements and collective bargaining.

6.3 Minister's Directions to Employment Advocate Under section 83BC, the Minister may direct the Employment Advocate in the exercise and performance of powers or functions.

6.4 Impact of the proposed changes: To remove any independence of the Employment Advocate in the performance of its functions. This will lead to Government activism and intrusion into the day-to-day operations of the industrial relations system to an unprecedented extent. It will lead to a major regulatory burden to business as the ultimate decision maker is not the Employment Advocate, but the Minister. In turn, the Government is taking on responsibility for delivering on the workplace agreements to business and employees alike. Budget impacts are likely to be very large in view of the Government's monitoring role.

7. Transmission of Business Provisions

7.1 One of the most significant proposed changes to agreements is new transition of business arrangements. These changes will vest significant (and unprecedented) obligations on employers in transferring of employees between the seller and purchaser of an existing business. The changes serve to diminish the oversight role of the Australian Industrial Relations Commission (AIRC). The changes will raise significant legal issues likely to be revisited by the High Court because they follow recent

amendments by the Government to transmission of business arrangements and decisions by the High Court prior to the introduction of the Work Choices Bill.

7.2 Existing arrangements: What does transmission of business mean and what does it cover? Currently, when a company is sold, employee entitlements are either paid out or rolled over into the new business. In other words, agreements currently 'transmit' with the workforce when a company is sold.

7.3 A sale of business means the work performed by the employee is no longer required by the former employer.[2] Effectively this means the employee is made redundant and only becomes an employee of the successor, if s/he accepts an offer of employment made by the successor. In addition to notice and payment in lieu of notice, many awards and agreements contain provisions requiring employers to pay severance when an employee's employment is terminated in a redundancy situation.

7.4 Depending on the redundancy provisions within the certified agreement or AWA, the former employer may have an obligation to pay severance pay, even where the employee has accepted employment with the new employer. For this not to be the case, the agreement must provide that there is no entitlement to severance pay where an offer of suitable alternative employment is made to the employee. Then upon an offer of the same/similar position under the same/similar terms and conditions by the successor, the former employer would have no

[2] The Government defines redundancy pay as occurring when an employer decides that they no longer wish the job the worker has been doing to be done by anyone, and this is not due to the ordinary and customary turnover of labour. This may happen due to operational requirements, the introduction of new technology, economic downturns, company mergers, take-overs or restructuring.

obligation to pay severance pay. An example of such a provision is:

> "The Company shall not be obliged to make a severance payment if the Company obtains suitable alternative employment for the employee, and the employee unreasonably rejects the offer of employment".[3]

7.5 Effectively this means that from the time of succession, the new employer “steps into the shoes” of the old employer and becomes the employer party to the CA, AWA or award.[4] The new employer however, if not located in Victoria, the Northern Territory or the Australian Capital Territory, must be a constitutional corporation at the time of succession. Whether or not the new employer is a "successor" to the business is a question of fact and law. *Amendments dealing with Transmission of Business have already been made….*

7.6 The changes are being made after tightening of the provisions pertaining to transmission of business have already occurred. The provisions of the Workplace Relations Amendment (Transmission of Business) Act 2004 commenced on 30 April 2004. The Act makes changes to the operation of section 170MB of the *Workplace Relations Act 1996* .[5]

7.7 The key change made by the Transmission of Business Act is to give the Australian Industrial Relations Commission (AIRC) a new power to make orders moderating the way a **certified**

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[3] http://www.oea.gov.au/text.asp?showdoc=/employers/awa_transmissionBusiness.asp

[4] ibid

[5] Section 170MB addresses who is bound by a certified agreement after a business, or part of a business, has changed hands. Broadly, section 170MB makes the new business operator a party to a certified agreement made by an earlier operator of the same business.

agreement applies to a business (or part of one) in the hands of a new operator.[6]

7.8 The Commission already has power under section 149(1) of the Workplace Relations Act 1996 to make orders that **federal awards** will not apply in instances of business transfers such as acquisitions, mergers, restructures or outsourcing, often referred to as a 'transmission of business'.

7.9 The change recognises that employment at a business that has changed hands may become regulated by multiple and possibly conflicting **certified agreements**. The stated benefit of the new power will allow the AIRC to assist employers and employees to solve many of the workplace issues that arise after a transmission of business. For example, where the business is in short-term crisis the capacity to streamline the operation of certified agreements may help the survival of the business (and jobs).[7]

7.10 The government has already introduced legislation[8] to overturn the 2004 decision of the AIRC to grant up to eight weeks **redundancy pay** to employees of small businesses who are made redundant where their employer employs less than 15 employees.[9] Yet, the reasoning of the Commission showed a

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[6] http://www.wagenet.gov.au/WageNet/templates/PageMaker.asp?category=FactSheets&fileName=../FactSheets/DataFiles/General/TransmissionOfBusiness.html

[7] When making an order about transmitted certified agreements, the AIRC must consider (among other things).

- whether any employees would be disadvantaged by the proposed order; and
- the employment conditions available to the workforce already engaged by the new employer, where an order is applied for before the business has changed hands.

[8] *Workplace Relations Amendment (Small Business Protection) Bill* 2004.

[9] *Redundancy Case* (2004) 129 IR 155, and see also *Redundancy Case Supplementary Decision* (2004) 134 IR 57

careful approach whereby the extension of redundancy payments to employees of small businesses was recognised as a necessary measure in a time of business restructuring and downsizing.

7.11 The High Court's Consideration of - Transition of Business. It is important to note that the changes are also being made on the back of the High Court's considerations and decisions made in March 2005 pertaining to transmission of business. The decisions confirm that there is already a very high hurdle to establish that: 1) transmission of business has occurred; and 2) that having occurred, liabilities pertain on the new business. Two recent cases illustrate the points[10]:

7.12 *The Minister for Employment and Workplace Relations and Gribbles Technology Pty Ltd, versus the Health Services Union of Australia .* The High Court found that the relevant federal award was not binding on Gribbles (which replaced MDIG as a service provider to Regent Dell (owner of medical clinics) regarding claims for severance pay because the transmission of business (for the particular services for which Gribbles was now the supplier) could not be established. Liabilities therefore under the award regarding severance entitlements did not transfer to Gribbles and did not apply.

7.13 The High Court also applies a wide interpretation of the nature of employment as a whole. In the *Amcor Ltd versus the Construction, Forestry, Mining and Energy Union* and following a corporate restructure and employment by another business in the group, the Court looked at the business as a whole in order to determine eligibility for redundancy (severance) and decided that it did not apply.

[10] http://www.emalegal.com.au/newsitem.php?pageid=993e334cea14fdfc0e1e0507bae474c0

7.14 On the back, therefore, of existing law and judicial precedent summarised above, which is already serving to constrain eligibility to (and liability for) workers' entitlements in the event of transition of business, the Government proposes a fundamental break with the existing arrangements under the Workplace Relations Amendment (Work Choices) Bill 2005. On first principles, this is unnecessary.

7.15 Division 1, proposed section 122 (**Object**) would outline the object of Part VIAA which is to provide for the transfer of employer obligations under those instruments contained in Divisions 3 – 6 (see below) when the whole, or a part, of a person's business is transmitted to another person.[11]

7.16 The proposed changes and outcomes are summarised here. Under the Bill transmission of business will now only last for 12 months. After the 12 months, the employer may choose the appropriate standards to apply including the 5 minimum standards.

[11] This would also encompass assignment of a business, or part of a business from one person to another and the succession of a business, or part of a business, to one person from another.

7.17 Proposed Division 2 – Transferring Employees: Proposed section 123A would create a definition of '*transferring employees*'. Subsection 123A(1) would provide that a person is a transferring employee if the person is employed by the old employer immediately before the time of transmission and the person ceases to be employed by the old employer and then becomes employed by the new employer within two months of the time of transmission.[12]

7.18 Subsection 123A(2) would provide that a person is also a **transferring employee** if the person:

> (a) is employed by the old employer at any time within the period of **one month** before the time of transmission; and
>
> (b) the person's employment is terminated because of, or for reasons that include, genuine '**operational reasons'**;[13] and
>
> (c) the person becomes employed by the new employer within **two months** of the time of transmission.

7.19 Impact of the changes: There are two main issues of concern:

1) the vendor employer has an incentive to make workers redundant before the one month period prior to the transmission of business in order to avoid

[12] *Schedule 1 ~ Main Amendments, House of Representatives page 279 Workplace Relations Amendment (Work Choices) Bill 2005*

[13] Operational reasons is attributed with the same meaning as in proposed subsection 170CE(5D) of the WR Act (see item 112). Subsection 170CE(5D) would provide that the definition of operational reasons are reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to part of the employer's undertaking, establishment, service or business.

liabilities associated with the transmission of business; and

2) workers are made redundant on mass for operational reasons.

7.20 With the break in employment longer than one month, this would have the effect of precluding the employee from being a transferring employee for the purposes of Part VIAA even if genuinely made redundant and even if employed again within two months by the new employer. Again, the new employer my decide (**for operational reasons for example)** to not offer employment until after the two month transition period thereby avoiding obligations pertaining to transferring employees.

7.21 Proposed Division 3 – Transmission of AWAs. Contains the transmission of business provisions specific to the transfer of AWAs from an old employer to a new employer. Proposed subsection 124(1) would provide that where, immediately before the time of transmission, the old employer and an employee were bound by an AWA, and the employee is a transferring employee in relation to the AWA, the new employer becomes bound by the AWA.[14]

7.22 Subsection 124(2) would establish for how long the new employer is bound to the transmitted AWA and specifies events which would cause the new employer to no longer be bound by the transmitted AWA[15] and in particular:

[14] This means that a new employer who is a successor, transmittee or assignee to a business or part of a business, would be bound by the AWA that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within two months and the AWA is capable of covering the employee's employment with the new employer. Workplace Relations Amendment (Work Choices) Bill 2005, p281

[15] Workplace Relations Amendment (Work Choices) Bill 2005, p321

1) the transmitted AWA would no longer bind the new employer if the employee ceased to be a transferring employee in relation to the AWA. For example, this could occur where the transferring employee ceased to be employed by the new employer, or moved to another job while still working for the new employer that is not capable of being covered by the transmitted AWA; and

2) The transmitted AWA would no longer bind the new employer once the transmission period ends. This means that the maximum period for which a new employer would be bound by the transmitted AWA by force of subsection 124(1) would be12 months.

7.23 Impact of the changes: This amendment will expedite the transition of employees under AWAs which, in turn, will encourage employers to promote AWAs in preference CAs and Awards in their workplaces.

7.24 Proposed Division 4 – Transmission of Collective Agreements. Would contain provisions particular to the transfer of collective agreements from one employer to another upon a transmission of business. Proposed subsection 125B(3) would provide that a transmitted collective agreement could be replaced by another collective agreement even if the transmitted collective agreement has not passed its nominal expiry date.

7.25 Impact of the changes: This amendment would allow collective agreements to be torn upon transition of business. Employers would have an incentive to avoid the conditions and entitlements of a pre-existing CAs and replace them with a revised offer of a CA or AWA on transition. The amendment cuts across the existing role of the AIRC in streamlining the application of CAs

upon transition of business, dilutes entitlements and adds no value.[16]

7.26 Proposed Division 5 – Transmission of awards contain provisions particular to the transfer of awards from one employer to another upon transmission of business. Proposed subsection 126(1) binds the new employer to a pre-existing award if the award pertained to a transferring employee if employed within two months and the award is capable of covering the employee's employment with the new employer.

7.27 Period for which new employer remains bound. Proposed subsection 126(2) would establish for how long the new employer will be bound by the transmitted award. It would specify four events which would cause the new employer to no longer be bound by the transmitted award in its entirety. These are:

1) the transmitted award could be revoked (see proposed Part VI). The AIRC can revoke an award in limited circumstances (i.e. as part of award rationalisation, award simplification, or where the award is no longer applicable or is obsolete), so that it is no longer binding on the new employer;

2) the transmitted award would cease to bind the new employer when there are no longer any transferring employees in relation to the transmitted award. This is where all transferring employees for example, either cease to be employed by the new employer or move to

[16]http://www.wagenet.gov.au/WageNet/templates/PageMaker.asp?category=FactSheets&fileName=../FactSheets/DataFiles/General/TransmissionOfBusiness.html

another job while working for the new employer that is not capable of being covered by the transmitted award;

3) the new employer would cease to be bound by the transmitted award in respect of the transferring employees if a collective agreement comes into operation in relation to all of the transferring employees, or all the employees enter into AWAs with the new employer;

4) the transmitted award would not be binding on the new employer once the transmission period ends. This means that a new employer would only be bound by the transmitted award by force of subsection 126(1) for a maximum period of 12 months.

7.28 Impact of the changes: Assuming the transferring employee has a pre-existing award and is employed within 2 months, the employer would have an incentive to make job offers through AWAs to all transferring employees below award minima for wages and conditions. Awards would be replaced with AWAs less generous than the awards for transferring employees.

7.29 Proposed Division 6 – Transmission of APCSs would contain provisions particular to the transfer of *Australian Preserved Classification Scales* (APCSs) upon a transmission of business. APCSs would be established under Division 2 of Part VA (the Australian Fair Pay and Conditions Standard). Proposed subsection 127(1) would provide that where, immediately before the time of transmission, an employee's employment with the old employer is covered by an APCS, the employee is a transferring employee in relation to the APCS and the new employer would not otherwise be covered by the APCS, this section binds the new employer to the APCS in respect of the

transferring employee. APCS's are not subject to a transmission period.

7.30 Impact of the changes: Includes non-allowable award matters covering piece rate employees, casuals and juniors. Workers on APCS will for all practical purposes have few if any entitlements to either buy out or preserve under the Bill upon transmission of business.

7.31 Proposed Division 7 - Parental leave and other entitlements under the Australian Fair Pay and Conditions Standard Would contain provisions detailing what happens to an employee's parental leave and other entitlements arising under the Standard when there is a transmission of business. Proposed section 128A would provide for the transfer of accrued employee entitlements in relation to matters, other than parental leave, under the Standard, in certain circumstances. The provisions allow for new and old employers to agree to transfer particular employee entitlements to the new employer upon transmission of business. Where this does not occur, the old employer will remain liable for those accrued entitlements. The provisions intend to allow for a 'clean break' in relation to particular accrued entitlements (with the exception of parental leave).

7.32 Impact of the changes: Other than for parental leave, employers can agree on what, if any, employee entitlements transfer on transmission of business. This provision appears to operate independently of award or agreement terms and conditions apart from the minimum standard. In this case, accrued annual leave and sick leave could disappear upon transmission of business for transferring employees and for the old employer to pay them out. However, as this would be built into the sales terms, employees, rather than the employers' are subsiding this part of the transition of business valued at the discounted future

value of the entitlements. Even if the entitlements are established (see discussion below) it will mean that no employees' entitlements will ever be secure for longer than 12 months because they may change (be reduced) after 12 months in the event of takeover or change in corporate structure. That will lead to a further diminution of entitlements longer term. It will impact on employees in a range of ways, including the prospect of a risk premium demanded by lending institutions before lending for such financial products as mortgages and personal loans. In addition, income protection and mortgage insurance in the event of redundancy and illness is likely to become more expensive. This is indicative a symptom of the casualisation of the workforce. Unfair dismissal and unlawful dismissal protections do not cover casual employees. Employees cannot access unfair dismissal provisions unless employed for a minimum of 6 months in businesses with more than 100 employees.

7.33 Proposed Division 8 – Notification obligations Would deal with notification obligations for an employer who becomes a successor, transmittee or assignee to a transferring business, as well as lodgment of notices and civil remedy provisions relevant to the notification requirements. Proposed section 129 would create notification obligations for a new employer with respect to a transferring employee. The effect of the provisions would be to inform the transferring employee about the operation of transferred instruments and the nature of the instruments that could apply to the transferred employee and new employer in a transmission of business situation. The provisions are civil remedy provisions.

7.34 Impact of the changes: There is no obligation to consult, merely to inform.

7.35 Proposed Division 9 – Regulation making would enable regulations to be made to deal with additional transmission of business issues that may arise.

7.36 Impact of the proposed changes: Creates uncertainty as to the possible nature of future changes to the transmission of business (Part VIAA) of the Act.

7.37 Based on the above, businesses have incentives to exploit the proposed new laws in a range of ways: Under existing arrangements, when negotiating the terms of the sale of business, the previous employer may elect to pay employees their accrued paid leave entitlements upon termination of employment. Alternatively, the liability for accrued and contingent entitlements may be assumed by the buyer. Employee entitlements should be considered and form part of the contract of sale between the buyer and the seller.

7.38 However, with the proposed changes under Work Choices, cost avoidance strategies will be promoted resulting in opportunistic corporate behaviour, which in turn increases the likelihood of corporate malfeasance and lower standards of corporate behaviour. This will take away incentive to improve productivity, employment and growth, cutting across the basic stated purpose of the Bill, by among other things:

1) Businesses may be sold on to avoid the cost of paying out employee entitlements upon redundancy well prior to the transmission period commencing (i.e. before one month prior to transmission) on the expectation that the purchaser will pay a premium for an entity free of employee liabilities;

2) Businesses may be sold on by arrangement with a dummy purchaser (for a service fee) with employee entitlements in order to avoid the future cost of employee entitlements and to buy the business back by arrangement (for a fee) after the expiry of the 12 months transition period.

3) Businesses may rearrange their corporate structures to fall under the Bill's definition of a small business and avoid future possible unfair dismissal obligations.

8. Exclusion of State and Territory Laws

8.1 The submissions of the Branches of the AWU located in Attachments A, C and D outline the position of the union in relation to proposed Section 7C of the Bill. The submissions of the Victorian Branch located in Attachment B outline the negative effect of the abolition of the Victorian Industrial Relations system in 1993 had on workers in the state of Victoria.

8.2 The AWU has grave concerns regarding the future of the wages, conditions and employment status of the workers whose employment conditions are currently governed by the state industrial relations systems under the new system.

8.3 The AWU opposes the provisions of the new Section 7C in its entirety.

9. Unfair Dismissal

9.1 The AWU is opposed to the new section 170CA in the proposed legislation and believes that the right for employers to terminate the employment of their workers at will should not re-enter Australian workplace legislation.

9.2 The proposed subsection removing rights of workers employed in businesses employing less than 100 workers from making unfair dismissal claims will create a new form of discrimination never before seen in Australian workplaces. The AWU cannot see any argument of merit of why those workers should be discriminated against only because their employer employs less than 100 employees.

9.3 The AWU is concerned about the ability of large employers who do employ more than 100 employees being able to exploit the new legislation by creating series of “phoenix” companies to become the employing entity of workers and then ensuring that each of these “phoenix” companies employ less than 100 workers to avoid the ability of their workers taking unfair dismissal action against their employer if they are unfairly dismissed.

9.4 The ability of employers to be able to dismiss their workers for “operational reasons” without the workers being able to make a claim for unfair dismissal further grants all employers in Australia a further loop-hole that they can exploit so they will not be brought to account by the Australian Industrial Relations Commission if they do in fact dismiss their employees for unreasonable or harsh reasons.

9.5 The AWU has been and will continue to be active in ensuring that Australian industry expands to ensure our membership can always gain useful and well-paid employment. During these endeavours we on a regular basis meet with employers and their representatives to hear their views on what is needed to be done to ensure a strong economy. The current unfair dismissal procedures have never been raised with the union as a key factor in building a stronger economy instead issues such as tax

reform and investment in training have consistently been raised as the key factors holding our economy back.

10 Right of Entry

10.1 The AWU is extremely concerned regarding the possible comprising of confidentiality of individual workers' union membership with the new Right of Entry provisions contained in the Bill. In particular the AWU is concerned regarding the employment security of employees working in business where their employer may have a hostile attitude towards unions and union members. By empowering employers to direct where and when workers can meet with their union representatives we an employer could direct a union representative to conduct all meetings in front of a representative of the employer to monitor which employees meet with the union.

10.2 These new provisions coupled with the new Unfair Dismissal provisions could see union members targeted for dismissal after being identified through a process outlined above.

10.3 The provisions in the Bill regarding the inspection of time and wages records by union representatives could also lead to the issue outlined above. By being forced to identify to workers who have raised the issue regarding their pay union representatives will be in effect providing a map to employers who may seek to exploit loopholes in the legislation to terminate any union members in their workforce.

10.4 The provision removing right of entry for union representatives to workforces who are exclusively made up of employees on AWAs is just a blatant exercise of ensuring that workers on AWAs are kept in the dark regarding their employment conditions.

11 Workplace Agreements

11.1 The Workplace Relations Amendment (Work Choices) Bill 2005 ("the Bill") seeks to radically redefine the nature, scope and purpose of enterprise bargaining available to employers, employees and employee representatives, including trade unions.

11.2 The Bill provides the mechanism for the negotiation of six different forms of workplace agreements, namely:

a) Australian Workplace Agreements ("AWA's");
b) Employee Collective Agreements;
c) Union Collective Agreements;
d) Union Greenfield Agreements;
e) Employer Greenfield Agreements; and
f) Multiple-business Agreements

11.3 Each form of workplace agreement is underpinned by a legislative scheme that nominates, amongst other things, the procedures for the engagement of bargaining agents; the procedures to be employed prior to the lodgement of agreements; the lodgment procedure with the Employment Advocate; the operation and binding nature of agreements; the content of agreements (by inclusion or exclusion); the termination of agreements (unilateral or otherwise); and the effect of the termination of an agreement.

11.4 The Bill also specifies conduct that is prohibited with regard to the negotiation of a workplace agreement and, in this regard, provides for the imposition of civil remedies where the conduct of negotiating parties contravenes a provision of the Bill.

11.5 The proposed legislative scheme represents a savage attack on the protections afforded to employees prior to, during, and as a consequence of the operation of workplace agreements. Furthermore, the Bill fundamentally undermines the democratic right of employees to collectively negotiate in an industrially fair and supportive environment.

11.6 Section 96 of the Bill establishes the right of an employer to negotiate an AWA with an employee. Whilst this does not, of itself, represent a departure from the rights afforded employers pursuant to the *Workplace Relations Act 1996* ("WRA"), it confirms the right of an employer to offer an AWA as a pre-condition to employment[17].

11.7 Contrary to the assertions of the federal government, such a facility does not support the making of any choice by an employee, particularly those whose economic, educational or other circumstances place them in a weak bargaining position. The combined effect of this express facility, coupled with the government's welfare-to-work agenda (as but one example), will operate to force the unemployed and vulnerable into individual arrangements that have the real potential to significantly alter conditions of employment that would otherwise apply pursuant to relevant state or federal awards. Legislative arrangements with this effect represent a gross departure from Australia's international commitment to advance and support "the ***effective*** recognition of the right to collective bargaining"[18]. (emphasis added)

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17 Compare s.96(2) of the Bill and s.170VF(2) of the WRA.

18 ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998, Article 2(a). See also ILO Convention 98, Right to Organise and Bargain Collectively

11.8 Section 96D of the Bill proposes to vest an employer with the unilateral right to establish terms and conditions of employment relating to the establishment of a new business. The inherent danger of such a provision relates to the fact that the relevant benchmark against which such an agreement can be made is not the relevant award (whether state or federal), but rather the Australian Fair Pay and Conditions Standard ("the Standard"), which are limited to just five minimum conditions of universal application. Furthermore, the terms of an employer greenfields agreement may be constructed to wholly displace "protected award conditions" that would otherwise apply to the employment of persons proposed to be subject to the operation of such an agreement[19].

11.9 The situation with regard to an employer Greenfield agreement is further aggravated by the fact that the agreement is deemed to have been made upon the lodgment of the agreement with the Employment Advocate[20]. This particular facility affords employers the unprecedented power to devise terms and conditions of employment, without consultation, that have the effect of denying prospective employees adequate safeguards against the loss of core award rights such as penalty rates, overtime rates, shift loadings and rest breaks.

11.10 Of graver concern is the fact that the Bill will permit an employer to unilaterally terminate an employer greenfields agreement upon the giving of 90 days' notice of the intention to do so[21]. The consequence of such an election by the employer are staggering. If a replacement workplace agreement cannot be re-negotiated within the 90 day notice period, employees are

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19 Refer s.101B(2)(c) of the Bill

20 Refer s.96G and s.100(1) of the Bill

21 Refer s.103L of the Bill

liable to have their terms and conditions reduced to the Standard[22]. Common sense and industrial reality informs us that the mere threat of such a situation arising gives the employer the unparalleled power to effectively dictate new working arrangements to employees against a backdrop of conditions being fundamentally eroded should agreement not be forthcoming.

11.11 In the case of the negotiation and/or variation of workplace agreements (other than AWA's), the employer must give a duly authorised bargaining agent a "reasonable opportunity to meet and confer with the employer about the agreement"[23]. As a matter of construction, the "reasonable period" to which the Bill refers is a period of seven days[24]. The legislated limitation of time within which a bargaining agent is afforded the right to meet and confer about a proposed workplace agreement represents a gross infraction against the rights of employees to engage in effective collective bargaining[25]. The provision pre-supposes that bargaining can be adequately facilitated in such a short span of time. It does not to protect workers or their representatives from the manipulation of employers with regard to availability within the timeframe of seven days. As such, it offends against Australia's international obligations to properly legislate for the protection of fundamental human rights in the conduct of workplace affairs.

11.12 Section 98 of the Bill imposes an obligation on the employer to provide eligible employees with, or provide reasonable access

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22 Refer s.103R of the Bill

23 Refer s.97B(3) of the Bill

24 Refer s.97B(3)(a) of the Bill

25 ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998, Article 2(a). See also ILO Convention 98, Right to Organise and Bargain Collectively

to, the proposed agreement and an information statement at least seven days before a workplace agreement is approved. This provision manifests a significant departure from requirements currently operating in the WRA, where employees are given a period of at least 14 days within which to consider the terms of a proposed agreement[26]. There is no readily discernable policy rationale as to why the timeframe within which an employee may consider the terms of an agreement are to be reduced so significantly. The undesirability of this situation is exacerbated by the fact that a proposed workplace agreement may operate for a period of up to five years[27].

11.13 The lack of appropriate time within which an employee may consider the terms and conditions of a proposed workplace agreement is compounded by the removal of two important protections as they presently exist in the WRA, namely:

a) the obligation of an employer to explain the terms of the agreement to all eligible employees[28]; and

b) that in explaining the terms of the agreement, appropriate consideration is given to the needs and circumstances of any particular employee (eg. Women, persons from non-English speaking backgrounds and young persons)[29].

11.14 On its present construction, the Bill materially fails to take account of the needs of particular employees and removes a positive obligation on the part of the employer to satisfy an

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26 Refer s.170LJ(3) of the WRA (for example)

27 Refer s.101(b) of the Bill

28 Refer s.170LJ(3) of the WRA (for example)

29 Refer s.170LT(7) of the WRA

independent body that the terms of the proposed workplace agreement have been explained in an appropriate manner. This will render employees, particularly those that are vulnerable to exploitation, helpless in the face of employer demands that an agreement be approved. Additionally, the proposed facility to enable employees to waive the right to ready access will only increase the prospect of employer coercion against employees, without any adequate safeguards to protect the interests of employees that are not versed in industrial or contractual law and who may not possess the relative bargaining power to negotiate effectively and fairly with their employer[30].

11.15 Section 100(1) of the Bill provides that a workplace agreement comes into operation on the day that the agreement is lodged. Of critical concern is the fact that prior to taking on the character of a legally enforceable instrument, no transparent and public analysis or assessment need be made by the Employment Advocate to ensure that the terms of the workplace agreement do not offend minimum statutory entitlements or the provisions of the Bill. This is a most undesirable circumstance, which is further complicated by the fact that important matters of pre-lodgment process (eg. recognition of bargaining agents and provision of ready access material) need not be satisfied prior to an agreement taking legal effect.

11.16 Matters of process that lead to the creation of legally enforceable industrial instruments that could conceivably last for up to five years must be given paramount importance, particularly where the rights of employees to effective representation are concerned and, more so, where particular employees may be vulnerable to the manipulation or coercion of an employer. In this regard, the provisions of the Bill do not

[30] Refer s.98A of the Bill

adequately realize the importance of proper process, nor do they address the needs and fundamental rights of employees to be protected from unscrupulous employers.

11.17 Section 101C(6) of the Bill has the effect of declaring void that part of any workplace agreement that purports to incorporate terms from a state award or agreement, or an agreement, arrangement, deed or memorandum of understanding that regulates the terms and conditions of employment and was created by a process of collective negotiation.

11.18 Firstly, the blanket prohibition against the incorporation of such content will operate to deprive employees with state registered instruments any protection against loss of entitlements, where they exist, that are superior to the minimum entitlements permitted by the Bill. Secondly, the blanket prohibition of such content will deny employees and employers the opportunity to enforce, through the terms of the agreement, any form of mutual consensus about terms and conditions of employment that may, by reason of commercial or industrial sensitivity, be more appropriately excluded from reference in a workplace agreement, but which are nevertheless fundamental to the overall industrial arrangements deemed desirable by employees and the employer.

11.19 The significance of such a series of measures cannot be overstated. This is an attempt by the government to micro-manage those matters that employees and employers should otherwise be freely able to negotiate and agree upon in a democratic society. Who are the government to determine what should, or should not be, included in an industrial instrument reached by mutual consensus after appropriate negotiation? This is a gross intrusion on the rights of employees and

employers to determine the arrangements that are best suited to the business, operation or undertaking of the employer.

11.20 Similar objection can be directed at the provisions of the Bill that relate to "prohibited content", particularly where the Bill imposes substantial civil penalties against those persons that willfully, or recklessly, seek to include prohibited content in an agreement[31]. Apart from the objections already outlined, the attraction of any sanction against the exercise of free speech (particularly in the context of matters concerning industrial relations, as opposed to national security) is a gross infraction against fundamental, democratic rights that all Australian citizens should enjoy.

11.21 Section 103L of the Bill proposes to vest an employer with the unilateral right to terminate a workplace agreement after its nominal expiry date and on the giving of 90 days' notice. This proposed facility is in stark contrast to existing provisions in the WRA that provide for the termination of workplace agreements where the Commission has approved the termination of the agreement after obtaining the views of the persons concerned and forming a view as to whether the proposed termination is in the public interest[32].

11.22 The right of the employer to undertake this course of action is not without significant consequence for the relevant employees. If an agreement is to be terminated on the giving of 90 days' notice, and a replacement agreement cannot be re-negotiated (for whatever reason), the employee's terms and conditions may automatically revert to the Standard, and not to the award that would otherwise apply[33].

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31 Refer s.101M of the Bill

32 Refer s.170MH of the WRA

33 Refer s.103R of the Bill

11.23 In essence, the combined effect of these provisions places the employer in a significantly better bargaining position than any employee. The threat of loss of entitlements, coupled with the need to re-negotiate a replacement agreement within the limit of 90 days, has obvious potential to permit an employer to employ stalling tactics in negotiations (if there are any) and to present employees with a clear ultimatum – "take what I offer, or lose everything else". This is hardly a system that supports effective and fair bargaining and is squarely designed to place employees and their representatives in a completely unfair position with regard to the negotiation of terms and conditions of employment.

12 Industrial Action

12.1 The submissions of the Branches of the AWU located in attachments A, B, C and D spell out in detail the problematic and dangerous provisions located in Part VC of the Bill in regards to industrial action.

12.2 Specifically the AWU believes that an explosion in civil litigation will occur once the new provisions of the Act become operative.

12.3 Also the reduced powers of the Australian Industrial Relations Commission to conciliate and arbitrate industrial disputes before industrial action takes place will lead to an increase in industrial action.

12.4 The AWU is extremely concerned regarding the provisions of Section 112 of the new Bill which empowers the Minister for Workplace Relations to terminate a bargaining period and therefore remove the rights of the workers covered by that bargaining period to take industrial action.

12.5 The grounds under which the Minister for Workplace Relations can terminate a bargaining period are in practical effect the same as those to which the Australian Industrial Relations Commission can terminate or suspend a bargaining period. The AWU is extremely concerned that this provision is designed not to ensure essential services are protected but rather to give the Government unprecedented powers to intervene into industrial disputes when the Government is not satisfied with the decision of the Australian Industrial Relations Commission. These provisions coupled with the Minister's ability to order workers taking industrial action back to work arbitrarily represents the most severe attack on the right to take industrial action since Federation and it is the view of the AWU that these provisions breach the 1948 International Labour Organisation Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively[34].

13 Other provisions

13.1 Other provisions of the Bill regarding the Australian Fair Pay Standard, the new Award system, Registered Industrial Organisations and Miscellaneous are commented on in the submissions of the Branches of The Australian Workers' Union located in the attachments to this submission.

14 Conclusion

14.1 The entire process associated with the introduction of this Bill has been has been so undemocratic that the AWU is concerned that the procedures and spirit of public and parliamentary debate on issues of national significance and importance that have

[34] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098

guided the development and nature of our democracy since 1901 have been thrown out the window.

14.2 The severe limitations imposed by the Coalition Government on the terms and length of the Senate Committee Inquiry has made it near impossible for any organisation or individual to fully digest the entire legislation before the closing date of submissions.

14.3 The AWU is concerned that if the Senate does not re-open public submissions and extend the time for the Committee to investigate the legislation then the future of the Senate as the "House of Review" will be thrown into question and will weaken the Commonwealth as a Federation.

14.4 If the Senate does not extend Inquiry then the AWU submits that the Bill in its entirety should be rejected by the Committee and not passed by the Senate.

Attachment A

Submissions of
The Australian Workers' Union,
Queensland Branch

Authorised by
Bill Ludwig
Queensland Branch Secretary

INTRODUCTION

The Australian Workers Union of Employees, Queensland is the largest State registered union of employees in Queensland with over 50,000 members employed in the State. Of all unions in Queensland, the AWU(Q) has the broadest coverage of employee's across different industries, and one of the broadest ranges of coverage of all Unions in Australia.

This unique position puts the AWU(Q) in an ideal position to understand the working conditions and industrial arrangements of Queensland workers across a vast array of workplaces and industries in the State.

Below is a list of industries in which the AWU(Q) is either the principle union, or a significant union representing workers in that industry in the State of Queensland.

- Private hospitals, nursing homes and aged care
- Non-government disability and community services
- Laundries
- Life saving
- Dairy industry generally including manufacturing
- Local Government Authorities
- Racing Industry
- Hotel motel and club industries
- Café and restaurant industry
- Fast food industry
- Tourism and resort industry
- Theme parks industry
- Casinos convention centres and events
- Hospitality industry generally
- Recreation industry
- Boarding houses and schools
- Clothing industry
- Veterinary industry

- Pest control industry
- Hairdressing and beauty
- Ferries and boating operators
- Sugar industry
- Primary and rural industries generally
- Agriculture industry
- Agriculture Food (food processing, coffee, aerated waters, etc.)
- Pastoral industry
- Feed lots industry
- Tallow industry
- Retail industry (including garage service stations and van salesmen)
- Warehousing industry
- Rubber and plastics industry
- Fruit and vegetable growing industry
- Horticulture and nurseries industry
- Cold storage industry
- Building and construction products (incl. Cement & concrete, clay, forestry)
- Forestry services and timber industry
- Quarries industry
- Bitumen and asphalt industry
- Transport industry
- Passenger vehicles industry
- Construction and mining construction industries
- Manufacturing industry
- Metalliferous Mining industry
- Oil, Gas & Hydrocarbons industries
- Electricity industries
- Ports/Bulk Handling industries
- Refining industry
- Chemicals industry
- Explosives industry
- Fertilizer industry

- Gas Reticulation industry
- Shipping building industry
- Public hospitals and public nursing homes (State Government)
- Department of Disability Services Qld (State Government)
- Department of Families (State Government)
- Queensland Motorways (State Government)
- Department of Main Roads (State Government)
- Environmental Protection Agency (State Government)
- Department of Primary Industries (State Government)
- National Parks

Because the AWU(Q) has such a breadth of involvement with workers across the workforce generally the AWU(Q) has a good understanding of the likely impact on Queensland workers of the proposed Workplace Relations Amendment (WorkChoices) Bill 2005.

The AWU(Q) states at the outset that the proposed changes to the existing legislation in the Bill will have an overwhelmingly negative impact on the rights, and terms and conditions of employment of Queensland workers working in callings covered by the AWU(Q). The general impact of the Bill will be to depress wages, and substantially weaken the future bargaining position of workers in the above listed industries if the proposed legislation becomes operative at some time in the future.

The proposed laws will dramatically strengthening the bargaining position of Queensland employers. This will occur to the point that in most instances genuine bargaining over conditions will no longer actually occur at workplaces in Queensland at all, and over time the principle form of employment contract reached between workers and their employers will be reached on a “take it or leave it” basis. This is not the manner in which the employment relationship in Australia has been conducted for the better part of the last 100 years.

This dramatic shift in the balance in the employment relationship will occur to workers working in many callings covered by the AWU(Q) in the above list of

industries because the many of these workers do not come to the relationship with their employer holding skills or qualifications that are in great demand, or for which a major shortage currently exists in the Queensland labour market. Many of these workers also live and work in regional, rural, and/or remote areas where alternative employment opportunities are limited or non-existent, if the present or prospective employer was not refuse to bargain fairly or at all for reasonable conditions of employment.

This fact is made even more alarming because for most workers represented by the AWU in these industries, it is generally the view that in historical terms the current labour market is a good market for employee's at this point in the economic cycle with unemployment at comparatively low levels.

When the economic cycle turns to a less favourable employment market (as it inevitably will) workers who do not hold skills or qualifications in demand will be subject to irresistible pressure to accept employment conditions which are well below traditionally acceptable community standards in Queensland and Australia. The mechanisms built over the life of this nations history that humanise and protect the workforce generally, and those in the weakest position to bargain in particular, will be removed.

Since the beginning of the last century Australia as a nation has developed on a general national political consensus that Australia is committed to the value of "a fair go", particularly when it comes to fair and decent minimum working conditions for workers. Industrial conditions have steadily improved throughout the last 100 years (with certain brief periods of exception, for example the period of the Great Depression).

This steady improvement continued during the period the Australian economy was achieving rapid productivity growth throughout the 1990's. Significant increases in investment in new technologies and a focus on skills development was a feature of this period of growth. This period also coincided with increased co-operation between workers and managers with the advent of enterprise bargaining underpinned by a safety net of Industrial Awards for such bargaining. The Federal Government has

claimed that these latest proposed industrial changes in the Work Choice Amendment Bill are required as there are signs of a slow down in productivity in the economy. This slow down also coincides with a drop in investment in skills development and training.

The AWU(Q) believes these proposed changes reflect a view on the part of the Government that the Australian workforce and its managers are not capable of competing internationally on the basis of skill, innovation and creativity. To the contrary the Governments proposed bill effectively abandons the traditional Australian ethos of the last 100 years that rejects exploitation of employees as an acceptable means to achieve competitiveness, or to improve productivity.

The proposed laws walk away from the Australian tradition and surrender to a widely understood American tradition that accepts a low wage underclass economy that Australians have always rejected, in order to prop up an economy that has failed to adequately invest in education, training, skill development and innovation.

It is in this context that the AWU(Q) will argue in this submission against the proposed amendments in the bill. The AWU(Q) will argue it is not to late for the government to turn back from heading down a path which the clear majority of the Australian community rejects.

INTERNATIONAL COMPARISON

Australian Society has for a century maintained an independent, transparent and fair industrial relations system at both State and Federal levels. This system balances fair wages and conditions for workers with business needs based on reasonable community standards.

The Federal WorkChoices proposal will fundamentally change the standard of living for working Australia. This will also lead to a change in the international image of the country. Australia risks being known as a country that considers capital above all else. The proposed system will create a poor nation by significantly increase the working poor in the country.

We have in the past decade, changed the system to adopt isolated provisions from similar nations such as the United States, Canada and the United Kingdom. This process has been destructive and deleterious in that the changes have brought flexibility for business but failed to bring adequate protection for workers. Having said this, the proposed legislation will see Australia surpass those nations that are perceived as having draconian legislation, such as the US.

The US allows –

- closed shops through bargaining fees in more than 50% of the States;
- make it compulsory at union sites for management to provide information about business activities and operations at the request of union members;
- does not have individual agreements;
- makes collective agreements final and legally binding through the Labor Relations Board;
- most importantly as collective agreements are the primary mechanism for delivering wages and conditions, there in no prohibitions or limitations on what the agreements can contain.

In comparison, in addition to the Australian Government having already made bargaining fees unlawful, the new WorkChoices Bill –

- removes genuine recognition of the role of unions at the workplace and the right to reasonable access to union representation;
- undermines the objective of collective agreements being final and binding by allowing AWA's to be enforced over the top of the agreements, while in operation;
- denies parties the right to collectively bargaining for all of their workplace needs by prescribing a range of unlawful provisions.

The Bill also –

- undermines States rights by removing State workers from jurisdictions that have recorded less lost time in strikes, higher business investment, lower unemployment and overall a better performing economy;
- removes the safety net of wages and conditions that underpins the industrial relations system.

The award and agreement structure proposed creates a two tier system in Australia by guaranteeing future workers a lower level of entitlements to those allegedly protected by savings provisions within the Bill. This is obviously an attempt to deceive workers under existing fair State and Federal Awards and Agreements into thinking that they are not going to be disadvantaged. This is clearly misleading as to its actual implementation.

AUSTRALIAN FAIR PAY COMMISSION

The AWU(Q) believes that the perception and the reality of the proposed Australian Fair Pay Commission is that it will not have the respect, independence or impartiality that the AIRC has been noted for in the role of wage setting. The very fact that reference to the term "fairness" has been expressly removed from the wage setting parameters of the AFPC, compared to the AIRC is a clear indicator of the true intent behind the establishment of the AFPC. The AWU(Q) submits the wage fixing role should not be removed from the AIRC

The process set out in section 7K of the Act places no requirement on the AFPC to have regard to the views any particular persons or organisations that will be directly affected by its deliberations. Further the legislation makes no requirement that the AFPC must make wage determinations with a particular frequency. Because there is no requirement for the AFPC to deal with an application as the AIRC had to, there are no guarantees at all about wage increase decisions being handed down in future years.

The wage-setting parameters set out at Division 2, 7J of the draft Bill have been drafted in such a manner that the Fair Pay Commission must in reaching its determination place employment at the centre of any determination. This shifts the balance from the current emphasis where equal weight is placed on the interests of those in employment (now numbering in excess of 10 million nationally) and those unemployed, currently approximately 5%.

No significant body of research can be relied on to show a reduction in the wages of the low paid in the community will lead to a significant consequential improvement in employment figures. This change introduces for the first time in Australian industrial law the concept that the cost of wages should be held down to the point that employers are prepared to pay.

The AWU(Q) rejects the attacks that has been directed at the manner in which the AIRC has determined national wage cases as not being rigorous enough. To the contrary the extent of economic analysis has always been significant in these cases and evidence has always been lead by the applicants going to the question of impact

on employment. The AIRC has relied on independent expert evidence on such questions. As a party to the proceedings before the AIRC, the government has always been able to introduce greater economic rigour into the case by way of evidence if it saw the need.

It has been argued that the proportion of the workforce directly affected by the outcome of national wages cases historically (and state wage cases that adopt the outcome of national wage cases), has been steadily dropping with the spread of enterprise bargaining across the workforce. This perception has been guided by the statistics showing the falling proportion of employee's being paid on the awards only.

This perception is misleading. In the experience of the AWU(Q) the majority of enterprises that negotiate enterprise agreements still have regard to the outcome of wage case decisions when determining the pay increase the employer regards as reasonable in the particular climate. It may not be the only factor but it is almost always one of the major factors.

In some industries, for example aged care, retail and hospitality there is often a very close correlation between pay increases negotiated in enterprise bargaining agreements and the wage outcomes in national wage case decisions. It is common for many wage increases in certified agreements in these sectors to be expressed as being the equivalent of the wage case decision granted in that year by the Commission. This is often agreed to between the parties on the basis that a small differential is maintained between the award rate of pay and the current rate paid at the enterprise in the industry, with the enterprise rate being marginally higher.

What this means is that it is incorrect to assume because a minority of the workforce are paid on the award only, that a lower outcome in wage increases flowing from the AFPC on the basis of a changed emphasis in wage setting parameters will not have a wider impact on wage outcomes in areas that have a history of achieving enterprise agreements.

The reality is lower wage outcomes from the AFPC will have a direct impact on the wage outcomes in enterprise bargaining agreements for a significant proportion of the

workforce that use national wage case outcomes as a form of benchmark in enterprise bargaining wage outcomes.

The AWU(Q) asserts that seeking to argue that the breadth of the impact of lower wage increases flowing from the AFPC is narrow on the basis it will only impact on the low paid (those on awards only) is misleading. It will have a direct impact on the wage outcomes achieved in agreement making across the wider workforce as well as those on awards.

Seeking to justify lower wage increases flowing from the AFPC on the basis that lower wages will create higher employment is not supported by clear evidence, and is not a rational basis for directly lowering the wages of millions of Australian workers.

POWERS OF THE EMPLOYMENT ADVOCATE

When the proposed new section 88BB is compared to the current 88BB dealing with the functions of The Employment Advocate the proposed change in role is dramatic. It is well understood for those that work on a regular basis in the industrial relation's field that the OEA has a reputation under the current act as being a rubber stamp for AWA's filed in it's office, regardless of whether those AWA's comply with the requirements of the Act (i.e they pass the "no disadvantage test") or not. Numerous examples of AWA's being approved by the OEA that do not pass the no disadvantage test are on the public record.

The past performance of the OEA highlights the obvious question that if the OEA has manifestly failed to fulfil it's current and extremely important regulatory function of policing the legitimacy of AWA's, why then would a Government greatly extend the OEA's current responsibility beyond AWA's to now cover all types of agreements covering Australian workers.

And further if the OEA has failed to properly regulate AWA's, why would a government deliberately loosen the current regulatory functions of the OEA to the extent that it is really now only an office to oversee a lodgement based process where there appears to be no statutory requirement that the OEA enforce any standard when receiving agreements.

This is all the more frightening because this office is now charged with the administration of all types of agreement making. Whereas previously all certified agreements, whether between employers and unions or employers and employees had to demonstrate to the AIRC through a certification process they in fact complied with the Act and did pass the "no disadvantage test" (which in many instances requires some level of expertise and enquiry to determine). It will now be assumed that all agreements comply and will be approved on filing. This is an extraordinarily irresponsible approach to protecting the rights and entitlements of the Australian workforce.

The AWU(Q) understands that the process of enforcement will be moved to the Office of Workplace Services. The obvious flaw in the proposed model is that there is no mechanism or safeguard to prevent agreements of all types (collective or AWA) being approved and commenced in operation in an illegal form.

It then falls to the staff of the OWS to "cure the disease" of agreements that are illegal after the event. This will only ever occur if someone (presumably an employee) complains, and the OWS commences a prosecution against an employer. Such a complaint based system will become very unattractive for employees under the proposed bill, as complaining about the actions of the employer will be very risky indeed, particularly if the employer has less then 100 employees (which is over 95% of employers). The only option available to an employee to enforce their legal entitlements under this proposed law is court action. This will be costly, time consuming and not viable for the great majority of the workforce.

Until now, the system that has operated since the introduction of enterprise bargaining in the early 1990's has required agreements to satisfy the requirements of the Act **before** being allowed to operate.

Preventing agreements from applying before underpayment starts is clearly preferable to allowing all agreements to apply regardless of whether they comply with the act or not. Simply leaving it to the OWS to hopefully pursue a very small proportion of non-complaint agreements after they have been underpaying for a period of time is vastly inferior to the current system of needing to demonstrate an agreement complies at the outset. It will be only a small minority of cases where employees who have been underpaid will take the risk of complaining. Such a system is completely unfair, and places all of the risk and responsibility for enforcement at the feet of the employee, and little or none at the feet of the employer. What it will undoubtedly achieve is a dramatic increase in the incidence of underpayment of employees.

A. FAIR PAY AND CONDITIONS STANDARD – PART VA

The FPCS will over time completely replace the comprehensive award safety net with only 5 basic minimum entitlements.

(a) Basic rates of pay and casual loading

The basic rate of pay will not be like the award rate of pay as we now know it. Award rates currently move up across the board following wage case decisions and the AIRC has to varying degrees maintained recognition of pay relativities in classification structures developed by parties to awards. This will no longer occur and the basic rates of pay, while increasing by smaller amounts due to the changed parameters of the Fair Pay Commission decisions, will still eventually render awards irrelevant as they are frozen in time.

(b) Maximum ordinary hours of work.

The proposal to have maximum ordinary hours of an average of 38 over a period which is not guaranteed, except to say it shall be no greater than 12 months, is a complete removal of any safeguards for employees with regard to rostered hours of work. The other obvious outcome is the end of the concept of overtime. This is for two clear reasons. Firstly the employer can manipulate the rostered hours of an employee at anytime in a calendar year to work additional hours when the set hours the employee understood they would be working are not enough from the perspective of the employer. Secondly, because proposed clause 99C (1)(b) includes the requirement that employees must work (in addition to an average of 38 hours per week over any period required by the employer) reasonable additional hours. The employer has open slather to require an employee to work additional hours to the average of 38, whatever that may be in any given work cycle, and any additional hours as well. None of these hours attract overtime. It is very difficult to imagine any circumstances where employers will be required to pay overtime at all if the hours of work arrangements apply as set out in clause 91.

Employees are in no position to negotiate of course because there will be no avenue for review or appeal of a dismissal if it is because an employee does not agree to a roster as proposed by the employer. As the employer has full control of the destiny of the employee, if the employee does not accept the hours of work as sought by the employer, there can be no real negotiation if a disagreement exists.

(c) Annual Leave

The proposal to allow the cashing out of annual leave is a retrograde step that weakens further the opportunities for families to have sufficient time together. The end result of this cashing out provision in combination with the broader impact of this proposed bill will be that those on higher incomes will have the luxury of being able to afford the retention of existing leave entitlements, while those on low incomes who lose a significant proportion of their income through the abolition of entitlements like penalties rates, overtime and weekend rates (that have in many cases provided around 25% of employees wages) will be forced to cash out annual leave just in order to try and recoup some of the lost income through the introduction of these proposals. The migration from 4 weeks annual leave to 2 weeks annual leave will occur primarily amongst the low paid and shift workers, and will not occur by choice. It will primarily be a decision taken out of financial necessity by workers who simply cannot afford the significant wage reduction imposed by the loss of other industrial entitlements.

(d) Personal Leave

Section 93N has introduced for the first time a requirement on employees to produce a medical certificate to their employer if the employer requires one. The generally award standard protection that a certificate may be required after 2 days sick leave has been overridden. This means any employer need only state it is the policy of the employer that for any sick leave entitlement to be recognised an employee must produce a medical certificate. This will undoubtedly happen. Or in the alternate, an employer may require it of certain employees the employer determines should always provide a certificate, while not requiring it of others.

The result will cause many thousands of visits to general practitioners that are unnecessary because employees will be well aware they have for example a heavy cold or flu symptoms, that render them unfit for work on that day, but have no need to see a doctor and will receive no treatment from a doctor when they visit one. What the employee will receive is a bill for $50 for a medical appointment that was unnecessary and an overloading of the Medicare system.

There will be a more sinister consequence of this ill-considered reduction of the community standard in Awards from a 2 day period before an employer could require a doctors certificate to any leave period. That consequence will be that employees on low incomes who simply cannot afford to pay $50 for a medical consultation that is unnecessary despite there having a genuine illness, will not stay home when they are sick but will in fact report for work in an unfit condition endangering their own health and safety and the health and safety of their fellow workers as a result. This will occur because the employee who cannot afford an extra $50 dollar expense is the same kind of employee who cannot afford to lose a days wages if the employer refuses to pay for sick leave that is not accompanied by a medical certificate.

(e) Parental Leave

The provisions included in the bill with regard to parental leave have included none of the provisions of the AIRC's *Family Provisions Test Case* decision. Not to reflect the outcome of this decision in the legislation is very disappointing and will inevitably mean the benefits of the decision of the AIRC will be completely negated, denying families access to the protections and entitlements that were determined as appropriate on the basis of rigorous evidence.

The entitlement arbitrated by the AIRC for employees to have a right to request a return to work on a part-time basis until a child goes to school will be an entitlement barred as a non-allowable award matter in section 116B(1)(b). This will be a large step backwards for parents trying to balance work and family responsibilities.

B. WORKPLACE AGREEMENTS – PART VB

The overall proposed agreement process under the bill is flawed. There is no genuine basis to move from an open transparent process that allows relevant parties to be heard on issues of disadvantage, to a closed secretive process that allows little to no reasonable assessment of fairness.

The most blatant example of disadvantage is the proposed right of employers to entering into non-union Greenfield agreements. Greenfield agreements are for workplaces that do not have workers employed at the time of making the agreement. Presently, the two parties are the union/s and the employer. The role of the union is to ensure that the agreement protects the rights of workers and provides reasonable wages and conditions for the future workers at that site. By removing the union from the process, employers are being allowed to entering into agreements with themselves. This is contrary to all of the known principles of contract law. An agreement cannot be made with only one party. Any attempt to argue that the other party is the "future employees" is erroneous and silly. As they are yet to be employed they cannot accept the terms of the agreement at the time of making and filing with the Office of the Employment Advocate.

The obvious ability of employers to reduce wages and conditions through either collective or individual agreements can only lead to pressure being put on workers. This pressure will extend to their families and their ability to provide the education and health coverage that they desire. In addition, with reduction of take home pay by removal of allowances and penalties, workers may be required to work longer hours or obtain second jobs. This will put pressure on society's social structure. At a time when workers are working more hours than ever, either one or both parents may be required to spend more time away from the home. This will put further strain on the childcare needs in communities. Australia is already at crisis stage with a lack of affordable and quality childcare. This legislation will only add to this ongoing problem.

It has been stated by the Government that the current agreement process is administratively prohibitive. The Bill is an extreme solution to an administrative

deficiency. To leave the protection of an independent umpire and the ability of the parties affected to raise concerns prior to approval and to place it in the hands of a Government entity that promotes individual contracts and has been proven to be deficient itself, cannot be reasonably explained. Not since before the introduction of the Industrial Conciliation and Arbitration Act 1916 has the imbalance of bargaining power been so extreme.

Section 98 provides for an information statement to be provided and at least a 7 day consultation period, however, the information statement is not required to spell out changes in the employee's conditions of employment under the proposed agreement. The role of bargaining agents is limited. Under section 97A, an employee can appoint a bargaining agent to represent them in the making of an AWA. There are no guidelines as to what a bargaining agent means in relation to section 97A. An employee may appoint a bargaining agent under section 97B in the making of an employee collective agreement under section and section 97B(1) suggests that this is limited to 'meeting and conferring with the employer'. Bargaining agents must meet the criteria set out in the regulations (section 97) however, there is no guidance as to why bargaining agents require qualifications or what qualifications are necessary.

There are contradictory processes proposed for the making of agreements, for example sections 96G and 98C relating to the making of agreements. While the process for making an AWA requires that the employee sign the agreement, for certified agreements, the process under section 98C(2)(b) contemplates either a ballot or some other process which is ill defined (compare this to sections 109 through to 109ZR setting out detailed procedures for secret ballots on proposed protected action!). There are no safeguards for making employee collective agreements in relation to the approval process where a ballot is not adopted. It could simply be a show of hands in the presence of the employer.

The Bill proposes that there be deemed 'protected award conditions' covering breaks, loadings, allowances etc, as set out in section 101B. While these conditions may be

varied, however, there is no requirement that employees be made aware of these protected conditions in an information statement prior to considering an agreement.

Section 98 refers to a requirement that employees be given ready access and an information statement. Subsection (6) refers to the requirement that a workplace agreement may incorporate terms from an industrial instrument referred to in section 101C(2). Section 101C(2) sets out how such an industrial instrument will apply, but it will be up to the employer to know which instrument applies and relate this information to the employee.

Section 100B of the proposed Act states that an award has no effect in relation to an employee while a workplace agreement operates in relation to the employee, whether it be an AWA, collective union agreement, collective non-union agreement or Greenfield agreement.

Under the current industrial system it is generally understood that currently only 20% of the workforce rely solely on awards. The overwhelming majority of the remainder of the workforce are paid under collective agreements that operate in conjunction with an existing award. Under the current law where the collective agreement is silent on a condition of employment the award condition continues to apply at all times.

At the moment in the case of collective agreements, such agreements cannot be certified by the Industrial Commission if they do not pass the no-disadvantage test against the relevant award, so that if an agreement sought to operate to the exclusion of the relevant award it still has to pass the no-disadvantage test. The no-disadvantage test requires that the proposed agreement on balance does not lead to a reduction in the overall terms and conditions of employment.

The no-disadvantage test is to be abolished under this proposed legislation. The protection against a reduction in the overall terms and conditions of employment under agreements will be removed. Instead all agreements of any form whether they be an AWA, collective union agreement, collective non-union agreement or Greenfield agreement will now only need to meet the minimum conditions in the Fair

Pay and Conditions Standard. All other conditions will be theoretically subject to negotiation.

That "so called" negotiation process will be so completely tilted in favour of the employer that, as stated earlier in this submission, in most instances, with the passing of time genuine bargaining over terms and conditions previously but no longer protected by awards, or the no disadvantage test for agreements, will not actually occur at workplaces in Queensland. The principal form of employment contract reached between workers and their employers will be made in the form of a "take it or leave it" offer from the employer being imposed without genuine choice.

The proposed legislation will overtime completely block out the operation of awards. Section 103R **'Consequence of termination of agreement – application of other industrial instruments'**, achieves this by requiring that any form of workplace agreement (an AWA, collective union agreement, collective non-union agreement or greenfield agreement), or an award has no effect in relation to an employee once an employee is covered by any form of agreement, and once that agreement has been terminated.

Sections 103K through to 103Q deal with the issue of terminating agreements. The total imbalance in the employment relation being imposed in favour of the employer is best demonstrated by section 103L of the bill. Section 103L provides that an employer can terminate an agreement of any form with 90 days notice following the expiry of any form of agreement and there is nothing an employee or an employees representative can do to stop that happening. This provision will over-ride any provision in an agreement governing how an agreement can be terminated. At the moment under law the termination of any collective agreements requires the approval of an independent umpire, being the Industrial Commission, to ensure the impact of such a termination would not have grossly unfair consequences. The proposed Section 103L allows an employer to lodge a declaration under section 103N seeking to terminate an agreement within the nominal period of an existing agreement. This means that if the declaration is lodged well before the nominal expiry date of the current agreement employees will lose all of the conditions under a current agreement

and be reduced to the 5 APCS conditions before the formal bargaining period for a replacement agreement has even begun.

The power being handed to employers under sections 103L and 103R has a monstrous knock on effect. Firstly the Act removes any operation of an employees Award through Section 100B once they become a party to any form of agreement. Then once the award has been permanently knocked out of operation forever, an employer can then at a time of their choosing also knock out the effect of the agreement that replaced the award by terminating it through the provisions in section 103 without any avenue for appeal available to the employee.

In summary an employer can completely remove all an employees entitlements except for the 5 conditions in the Australian Fair Pay and Conditions Standard by two simple steps. First the employer enters any form of agreement with an employee, and then at the expiry of the agreement the employer exercises it's right to withdraw from it giving 90 days notice, but the 90 days can commence well before the expiry of the current agreement.

The Bill dramatically curtails so called 'pattern bargaining' and section 106B defines it narrowly as including seeking 'common wages or conditions of employment' with 2 or more proposed collective agreements, excluding those conditions determined by the AIRC decision establishing national standards. This would in effect catch in the net most state based standards such as long service leave improvements, particular public holidays and various leave provisions etc that the AIRC has not traditionally set national standards. The test is simply too broad under section 106B.

New provisions concerning initiating new bargaining periods are more onerous. For example, clause 107F provides that the AIRC may prevent a party from initiating a new bargaining period if a previous bargaining period has ended or another party wants to withdraw. This may be used as a ruse to simply prevent legitimate bargaining from occurring. This is particularly important as clause 108 onwards sets out in detail limits on what constitutes protected action. The proposals limit the extent to which protected action may occur. Section 109 onwards provides minute detail on how secret ballots for protected action are to occur.

Section 104 sets out conditions that prohibit coercion and duress when making, lodging, varying etc an agreement Section 104(6) but as stated earlier excludes duress in relation to making an AWA a condition of employment for new employees. As the role and significance of awards are reduced and the provisions that 'protected award conditions' may be varied in an agreement, there is considerable likelihood that a new employee will become more vulnerable to a reduction in employment conditions as there is no bargaining at the point of engagement in such circumstances.

Currently, employers can make signing an AWA a condition of offer of employment as found by a Full Bench of the Federal Court in *Burnie Port Corporation Pty Ltd vs the MUA (FCA 1768, 6th December 2000*) which determined that the current section 298L(1)(h) prohibiting an employer from refusing to 'employ a person because the person 'is entitled to the benefit of an award'…. applied only to a current benefit rather than a prospective entitlement to the benefit of an industrial instrument. However, under the Bill, the current 'No Disadvantage Test' is removed thereby reducing considerable the ability of employees to have access to an AWA which is a fair bargain.

Another way this bill provides for the removal of entitlements of an employee under a collective agreement is to put them onto an AWA with inferior terms and conditions. This can be done through the operation of section **100A Relationship between overlapping workplace agreements,** which provides that a collective agreement has no effect in relation to an employee while an AWA operates in relation to the employee.

A supporter of the proposed bill may seek to make an argument that AWA's override collective agreements under the current legislation. One of the critical differences however is that AWA's cannot be approved under the current legislation if they do not pass the no-disadvantage test against the award. Under this legislation that is not necessary. Further under the current legislation many collective certified agreements have made it a term of the agreement that the employer will not seek to negotiate AWA's during the life of the agreement, thus providing employees with some sense

of certainty at least for the life an agreement recently finalised. The inclusion of such a clause in a collective agreement will be illegal under the proposed bill.

The effect of 100B and 103L together mean that employers will have an unfettered ability, with no recourse for employees, to completely remove all but 5 basic employment conditions.

Under section 100 workplace agreements come into operation on the day that it is lodged with the Employment Advocate. This will occur regardless of whether the steps required under legislation of bargaining agents are fulfilled or not.

Section 101D Prohibited content has left open the door for the Government to elect to make any terms or conditions that employees (or employers for that matter) wish to include in agreements prohibited from being included. This is achieved by legislating that the regulations may specify matters that are prohibited at some later time of the Governments choosing. The bill is seeking to provide the apparatus of the State complete control over the affairs of employers and employees by dictating what employers and their employees may agree on between them in the Australian workplace. The government as a third party could at anytime interfere in agreements of any form and strike a red pen through any clauses agreed to between employers and their employees.

Section 101M seeking to include prohibited content in an agreement makes it a contravention of the Act merely to seek to include a clause in a workplace agreement that contains prohibited content. For example if a union sought to negotiate an arrangement with an employer with less than 100 employees that gave an employee a right to an independent review of a decision by the employer to terminate them, the union is exposed to massive civil penalties as set out in Division 11 of Part VB of the Act.

The absurdity of providing substantial civil penalties against persons who dare to ask for a particular condition in a workplace agreement is very clear evidence that this bill is being driven by ideological objectives and not common sense solutions to

workplace relations. Such law would be unacceptable in any other western democracy.

The Australian workplace culture has fortunately not been primarily characterised or defined by fear in recent generations. New legislation in the form of section 101M seek to change that. What precedent can be pointed to in Australian industrial law that provides that an employee representative (or unrepresented employee for that matter) who attempts to negotiate a beneficial term or condition of employment will be subject to massive fines ? This proposition seeking to control the freedoms and liberties of Australians in their dealings with one another in the workplace will be flatly rejected by the Australian community. The proposed bill makes it illegal, and imposes civil penalties in the order of $33,000 for seeking to negotiate,

- Training leave for elected employee representatives seeking to better understand how to negotiate with their employer and understand industrial laws,
- Paid time for employee organisations to meet with employees to explain employees rights, entitlements and obligations under the law,
- A role for employee organisations in disputes at the workplace,
- That the employer commit to negotiating with their employees on a collective basis rather than as individuals,
- That the employer will not seek to negotiate AWA's immediately after settling a collective agreement with employees,
- That employees be afforded some agreed form of protection from unfair dismissal.

While implementing imposing civil penalties merely for proposing any of the above items, on the other hand the bill specifically allows employers to apply duress to employees to make an AWA, by making the entry into an AWA as a condition of employment. This is expressly provided for in section 104(6). The difference in the manner the bill proposes to treat employers and their interests, as opposed to the interests of Australian employees is breathtakingly biased.

The rhetoric of choice used in connection with this bill is no more clearly exposed as a misrepresentation of the truth then section 104(6). In relation to AWA's your choice as an employee consists of one choice, take it or leave.

INDUSTRIAL ACTION – PART VC

The proposed legislation will make lawful industrial action almost impossible. The effective use of the right to strike as a legitimate bargaining tool will be so compromised so as to be rendered useless in most cases. The obstacles intentionally placed in front of a legitimate desire of employees to take industrial action are so cumbersome and difficult to traverse that the bill, if enacted, will frustrate most attempts by employees to exercise rights that until now have existed and were reasonably straight forward to exercise. This change, in conjunction with the ease with which an employer can terminate a bargaining period will prevent concerted industrial campaigns from gaining any traction or momentum, again dramatically strengthening the hand of the employer.

Section 109 of the Act sets out exhaustive requirements for a union requiring it to apply to the AIRC for a secret ballot to authorise industrial action. The union will need to notify the employer this is happening. Currently a union or employer can notify the other party with 3 days notice of an intention to take industrial action if the appropriate paper trail commencing a bargaining period is in order and the current agreement has been expired for the requisite period. It would be estimated under the process proposed under the bill that an employer would have at least one months warning before any action could be commenced.

The AIRC, if it decides to grant an application for a secret ballot now required under the bill, will direct a service provider (AEC or another provider) to conduct a ballot and the ballot need only be concluded in 10 days. Employers and any employees who wish may make submissions to the AIRC to oppose the granting of the application for the conduct of a secret ballot may do so.

In order for the ballot to be carried it requires 50% of the workforce to vote, and then 50% plus 1 of those who voted to vote in favour. Then if the ballot is successful the Union has a window of 30 days to take protected action and then the order expires. The Union is still required to give 3 clear days notice of the action.

Section 109ZG requires that the applicant for a ballot order is liable to pay the cost of holding the ballot. Section 109ZH provides that 80% of the cost will be met by the Commonwealth if the ballot is conducted by an authorised ballot agent, or if the ballot is conducted by the AEC, the applicant is discharged from liability to pay 80% of the cost. In practice this means that unions will now have to pay 20% of the cost of conducting secret ballots by organisations other than the union itself. Unions incur no such expense now.

PATTERN BARGAINING

The prohibition against pattern bargaining is again designed to weaken the bargaining position of employees. Section 106B(5) of the proposed bill places the burden of proof on the party (which will almost always be the relevant union) that is seeking to show they are not pattern bargaining to provide that is the case by reliance on section 106B(3).

ORDERS AGAINST INDUSTRIAL ACTION

The AIRC has been given a wider range of reasons under which it can make orders suspending or terminating bargaining periods, or restricting the ability to initiate bargaining periods, which can then restrict the ability to engage in protected action.

A much more radical proposal is found at section 112 of the Bill. Under this section the Minister will be given the authority to terminate a bargaining period if the Minister is satisfied of the grounds set out in the section to do so. The grounds set out in section 112 for which the Minister can act are in almost identical terms to those found at section 107G(3) dealing with the powers of the AIRC to suspend or terminate a bargaining period. The Minister need only satisfy him or herself to exercise this power. This layer of direct Government influence and control in the affairs of Australian workplaces is new, and usurps the independent role of the AIRC. The Government proposes to give itself the power to over rule the AIRC or act in a different manner to that of the AIRC at any time of its choosing.

Under the bill the AIRC must terminate a bargaining period if any of the grounds in the section are made out, however the power of the AIRC to arbitrate in these circumstances has been removed in this bill. The real impact of this change is that the AIRC has been given power to stop employees conducting industrial campaigns but stripped of the power to resolve the issues in dispute once it has stopped employees pursuing an outcome. The only circumstance where the AIRC can arbitrate is where the bargaining period is terminated due to impact of the action on the safety of the population or the economy.

In the event the Government is dissatisfied with a decision of the AIRC in this regard it can act to stop an industrial campaign it determines should be stopped, despite a different view from the AIRC. The Minister will also have the power under section 112 to order workers return to work and cease action, as well as remove protection from industrial action.

Under section 106A of the bill the burden of proof will be on the employee if employees cease work on Occupational Health and Safety grounds. Employees will

be required to prove that their action does not constitute industrial action because it was motivated by reasonable concern of an imminent risk to their health or safety.

AWARDS – PART VI

It appears that it is not sufficient for the government to attack the agreement process and allow employers to have free reign to coerce workers and reduce working entitlements. The award system that has served this country for 100 years is also under attack. For decades both businesses and unions have worked to develop comprehensive career paths that recognise national training qualifications. The Bill seeks to "simplify" the wage classifications. This will undermine the work done to build the skills in Australia --- skills that are seriously needed at a time when skills shortages are a key issue with businesses.

A reduced system of federal awards will be retained, but an Award Review Taskforce will be established to simplify them and reduce their number (new Division 4). Any specific provision in an agreement will modify or remove award conditions according to the terms of the agreement. This means that award provisions that are more generous than the Fair Pay and Conditions Standards will continue to apply, though they can be subject to negotiation if employees move to agreements in the future, or reduced under an AWA offered to a new employee as part of the employment offer. There will be a new list of allowable matters in awards (clause 116) as follows:

- ordinary time hours of work
- incentive-based payments and bonuses
- annual leave loadings
- ceremonial leave;
- public holidays
- monetary allowances
- loadings for working overtime or for shift work
- penalty rates
- redundancy pay, within the meaning of subsection
- stand-down provisions

- dispute settling procedures
- type of employment, such as full-time employment, casual or part-time employment and shift work
- limited conditions for outworkers.

Moreover, all awards must contain a clause permitting the employment of regular part-time workers, and are encouraged to include "facilitative" provisions (clause 116H), that is, provisions allowing agreement at the workplace or enterprise level (as opposed to running to the courts or commission) on how a particular term is to operate. There is no guidance on how such facilitative provisions will operate. Certain matters will not be allowed in awards (clause 116B) including:

> (a) rights of an organisation of employers or employees to participate in, or represent an employer or employee in, the whole or part of a dispute settling procedure
>
> (b) transfers from one type of employment to another type of employment;
>
> (c) the number or proportion of employees that an employer may employ in a particular type of employment;
>
> (d) prohibitions (whether direct or indirect) on an employer employing employees in a particular type of employment;
>
> (e) the maximum or minimum hours of work for regular part-time employees;
>
> (f) restrictions on the range or duration of training arrangements;
>
> (g) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;
>
> (h) restrictions on the engagement of labour hire workers
>
> (i) union picnic days;
>
> (j) tallies;
>
> (k) dispute resolution training leave;
>
> (l) trade union training leave;
>
> (m) any other matter prescribed by the regulations.

The AIRC will not be given the power to create any new awards unless it is to rationalise existing ones. While the AIRC may also still vary awards, it is only as long as any variation is consistent with Fair Pay Commission decisions, part of the award simplification process and promotes agreement-making at the workplace level. The role of awards as a safety net will be eliminated. The Bill proposes that there will be certain preserved conditions in awards that are preserved in agreements. These include:

- public holidays
- rest breaks (including meal breaks)
- incentive-based payments and bonuses
- annual leave loadings
- allowances
- penalty rates, and
- shift/overtime loadings.

However, these conditions are only "preserved" (see clause 117) if they are not specifically referred to in the agreement. They can be the subject of bargaining by the employee(s) and employer. A collective agreement or AWA will be able to modify or remove these conditions by indicating in the agreement how they will be either changed or removed. In the case of new employees under AWA's, they can be removed altogether. It opens the way from a gradual erosion of employee entitlements.

Section 116(3) explicitly states that an Award may include allowable award matters only to the extent that the terms provide minimum safety net entitlements only. This section could only be included with the express purpose of preventing awards from keeping pace with the industrial conditions and standards prevailing in the industry in which the award applies. Such a provision in the Bill is designed to freeze awards and to speed up the process of making awards irrelevant.

Section 116(4) is seeking to limit entitlement to redundancy to deal only with circumstances where an employee is genuinely redundant, which appears to mean if someone who has traditionally been entitled to redundancy where they have accepted an alternative position on lower pay rather then ending the relationship completely will be made ineligible for redundancy.

TRANSMISSION OF BUSINESS – PART VIAA

The transmission of business provisions completely rewrite the way such arrangements apply to the detriment of employees who will have the misfortune of working for a business that changes owners if this bill becomes law. This area of industrial law has been the subject of several major test cases in recent years where Court rulings have clarified the circumstances in which a transmission occurs and employee's entitlements are preserved where transmission occurs. The legislative changes will undermine existing legislative entitlements that have been upheld in the Courts. The bill by statute will completely over-ride the protection of entitlements that have been upheld in the important Court decisions referred to earlier.

Under the proposed legislation conditions in awards and agreements will not transfer to a new employer from an old employer if no employees accept employment with the new employer. The transmitted awards, collective agreements and AWA's will only apply to the transferred employees at the new business. Other employees working at the business who did not transfer across from the previous owner can be employed on completely different arrangements to workers alongside them performing the same work who transferred from the old employer.

Following the transmission of a business a transmitted collective agreement, AWA's and award provisions that did apply will have a maximum period of 12 months to continue to apply. After 12 months employees will be covered by whichever instrument is capable of applying to them.

What this new system clearly allows for is the dragging down of the conditions of an existing workforce at an existing workplace if they work for an employer who sells the business. What the new law does is make it much easier to have a workforce performing the same work for the same employer at the same workplace on completely different terms and conditions.

A hypothetical example could be, an employer who owned and operated a laundry has a collective agreement with 10 employees at the laundry that are paid a pay rate of

$16 per hour, and long service leave accruing at 1.3 weeks per years of service in addition to other standard conditions. The owner sells the laundry to a new owner.

The new owner is required to observe the existing conditions of employment only for the pre-existing 10 employees but all new employee who commence from that point can be employed on a lower pay rate (for example $12.75 per hour) and will accrue long service leave at a less generous rate (for example at .86 weeks per year instead of 1.3 weeks) for performing the same work alongside the rest of the workforce at the same laundry. After 12 months because the business changed hands the pre-existing 10 employees will cease to be entitled to the conditions that had always applied at their workplace, and the employer can drop the whole workforce back to the inferior conditions.

Under this bill, unlike the current law, whenever a business changes hands and a genuine transmission of business occurs, after 12 months all employees who continued in employment following the transmission will go backwards and lose the right to all entitlements provided previously in agreements and awards. There will no longer be a requirement on the purchaser of a business to observe the pre-existing employment conditions for future employees. This is a one step forward two steps back approach to employee's terms and conditions of employment, and will only lead to fracturing and disharmony in workplaces for very obvious reasons.

UNFAIR DISMISSAL

Again in the area of Unfair Dismissal employees will suffer a massive erosion of existing rights. The concept of a "fair go" referred to as being lost in the introduction of this submission is no better demonstrated then in this part of the bill. As has been well documented nearly all employers in Australia fall into the category of employing less then 100 employees.

The proposition that those excluded from the unfair dismissal jurisdiction of the Industrial Relations Commission can still pursue unlawful dismissal before the Court system if they have been terminated for a prohibited reason completely misleads the broader public who are not familiar with the meaning of these expressions. In the various state industrial jurisdictions and in the federal system, unlawful dismissal applications only represent a tiny proportion of applications filed. Perhaps 1 or 2 in every 100 applications filed.

The overwhelming majority of dismissals that are contested by employees are contested because they were unfair, not because they were unlawful as defined by the legislation. Unlawful dismissal applications under this system will require the bringing of an action in the Federal Court. This is clearly beyond the scope of the overwhelming majority of employees. The $4000 proposed Government assistance in this regard is merely to provide advice about the prospects of a case, it does not fund the running of such a case which could easily run into tens of thousands of dollars.

The bill knocks out the capacity of approximately 4 million Australian workers from any form of redress if they are unfairly dismissed. For those employers with more than 100 employees who still may access the jurisdiction, the system of processing unfair dismissal applications has been changed to allow for the AIRC to deal with applications on the papers if it chooses.

Further to this, even larger businesses with greater than 100 employees will be exempt for all employees with less than 6 months service. Seasonal workers will also be excluded altogether.

Dismissals based on operational reasons of the company will be exempt. This means that an employee will no longer have the opportunity to argue that they were unfairly selected for redundancy.

The changes to the unfair dismissal laws are contrary to ILO conventions that require society to provide fair and reasonable remedies to harsh and unreasonable termination of workers by employers. There is no justification to target businesses of 100 or less employees. Even those left within the system have their exclusion period doubled to six months. No evidence has been produced that supports contentions that such changes will increase employment. Even if the Government's rhetoric is to be believed that companies have not been employing workers because of the unfair dismissal laws, it is equally probable that companies have been avoiding down sizing businesses for fear of unfair dismissal claims. These companies may now freely dismiss their workers without any fear of recourse to claims. On this basis, Australia may see an increase in dismissals instead of an increase in employment.

The reality is that the primary goal of business is to increase profit. If there is reduction in labour costs through cheaper wages and conditions, employers are not of a matter of course going to increase labour. It is more likely that the additional savings will be put into profits.

Overall these provisions will lead to increased job insecurity, additional strain on social needs, a lower cost of living creating more working poor. How can Australia promote itself as a progressive, innovative country when it seeks to introduce laws that have proven to be destructive to workers in the countries we seek to mirror, countries that have significant unemployment and people living in poverty. Reasonable minimum wages and conditions are fundamental to Australia, to attack these is to take this country into a future of uncertainty and insecurity that has never been seen before. Which even at the most basic level will effect family income leading to a reduction in disposable income and eventual effect on the economy.

RIGHT OF ENTRY

s.221 of the draft bill has included wording regarding right of entry for discussion purposes. That right is restricted to where an employee “carries out work on the premises which is covered by an award or collective agreement that binds the permit holder’s organisation; and is a member or eligible to be a member off the permit holder’s organisation”. This would effectively rule out any possibility of a union getting right of entry to a workplace to talk to employees who wish to speak the union, and are in fact even members of the union if the workplace is covered by a non-union agreement. This is a completely unacceptable curtailment of the most basic rights in a democratic society.

Unions face much tougher right of entry requirements under the bill and permits will only be available to those who pass a "fit and proper" test, though no guidance is given here on what constitutes ‘fit and proper’ (section 203). No right of entry for "discussion" purposes will apply when all employees are on Australian Workplace Agreements (AWAs). A union will only be able to enter a workplace to investigate breaches of AWA conditions with the written consent of the relevant employee. When investigating breaches of workplace laws, union officials will have to provide employers with specific details about their inquiry (clauses 208-209). This will jeopardize an employee’s ability to confidentially have breaches of employment conditions investigated. Employers will be able to specify that meetings or interviews will occur in a particular room or areas of the workplace, and even nominate a specified route to the location and unions must comply with all reasonable employer requests on this matter thereby reducing the capacity of the official to investigate breaches, especially if the designated meeting area is ‘just outside the managers door’!. Important and onerous sanctions are imposed:

- revocation of the union's right of entry permit
- suspension of the union's right of entry permit
- placement of limiting conditions on right of entry as determined by the AIRC. .

REGISTERED ORGANISATIONS

Under the new Bill, there are 2 options for state registered unions to participate in the new IR system. State based unions that are substantially the same as their federal counterpart will in the future appear to be limited to regulating state awards and instruments covering unincorporated organisations.

These types of unions will gradually have their coverage weakened or lost. State based unions could potentially,

(a) amalgamate with their federal counter part and potentially lose differing State coverage, or
(b) remain separate during the transitional period and during the 3 year transition period, seek to show that they are different in character from their Federal counter part and are therefore eligible to become Federal unions.

The AWU(Q) believes that the test for a state registered organisation to be granted full registration as a federal organisation on the basis that it is not substantially the same as an affiliated federal organisation needs to be a liberal one.

The AWU(Q) has, jointly with the Queensland Branch of the AWU, employed and elected staff and officials, and has certain other organisational similarities, however, there are significant differences in the eligibility rules and list of callings between the State registered AWU(Q) and the AWU Queensland Branch.

Differences between the organisations include eligibility for membership of a wide range of workers in Queensland who traditionally have been represented by the AWU(Q). While the federal AWU has some coverage similar to AWU(Q) callings, this is limited. The AWU(Q) has for example, traditionally and independently represented a range of industries and callings, this list is not exhaustive but examples include:

- health industry: public hospitals, private hospitals, aged care, hostels, in home care, and disability care,

- a range of state government departments including work in youth detention and national park rangers and the department of primary industries,
- the broader hospitality and tourism industry, caravan parks and eco tourism
- fast food industry
- boarding houses and boarding school accommodation,
- shop assistants, van and travelling salesmen,
- sugar industry workers generally in both crushing and non crushing seasons,
- all workers in the local government industry,
- employees in the entertainment, and theatrical and film industries,
- rubber and plastics industry,
- dairy industry,
- timber and timber products industry,
- warehousing and distribution industry, transport including cold storage,
- all forms of bulk handling,
- transport industry,
- all general labour including builders labourers in the building industry,
- prisons,
- lifesaving,
- cleaners and watchmen
- veterinary and animal husbandry
- paper and cardboard manufacturing

These industries and callings represent a substantial component of AWU(Q) membership and activity. The probability of demarcation concerning overlapping coverage remains a significant possibility if existing coverage arrangements in State jurisdictions are not reflected in a significant shift from the State jurisdiction to the Federal.

If State unions such as the AWU(Q) and Federal unions such as the AWU (and other unions perhaps) maintain the de facto status quo of union coverage, upon a transfer to the Federal system, the potential for demarcation disputes will be greatly diminished. This will ensure that membership will continue to remain industrially represented by

unions and officials that have historically represented these employees industrial interests.

CONCLUSION

Currently in the United States, Walmart, one of that country's worst employers for its anti-union behaviour and poor wages and conditions, is calling for an increase in the minimum wage. This call is made because Walmart has noticed that its customers do not have sufficient disposable income to buy non-core items.

This is Australia's future, a Bill that guarantees a minimum wage that will not drop below the 2005 rate. The minimum wage in the US has not increased in 8 years. It is currently $5.15 per hour. For those workers in the service industries that receive gratuities, the minimum wage is $2.13 per hour.

The similarities between the US system and the Government's proposal is more than a coincidence. The reduction in underpinning minimum standards, the reliance on agreements, the removal of unfair dismissal laws and the removal of fair and reasonable access to union representation. The difference is that the Government's proposal goes further as outlined above. The restrictions on what can be bargained, the ability to do individual agreements and the undermining of the principals of contract law by allowing AWA's to override the collective agreement.

It is not difficult to see the future direction of the Government. The US has a body that controls the minimum wage and on a national level regulates the collective agreement process and enforcement. Minimum standards being the minimum wage and hours of work are prescribed by the Fair Labor Standards Act. Any improvement on these wages and conditions are solely delivered through bargaining agreements. No remedies to unfair dismissals exist, only unlawful dismissals.

Unlike the US system however, Australia is proposing even harsher labour laws through AWA's. The Bill seeks to shift the minimum wage system, limit awards and standards, limit access to unfair dismissals and have bargaining agreements as the primary mechanism for wages and conditions, but with significant restrictions.

The most significant difference is however, as harsh and anti-worker as the US laws are and the unequal bargaining power that exists, Australia will be much more

detrimental through limiting what bargaining agreements can contain and allowing such agreements to be overridden by individual contracts. Australians will not be able to freely negotiate with their employer for all of their employment needs. This includes prohibiting pattern bargaining, a right that exists in the US. By limited collective agreement terms, common law contracts that fail to provide average workers easy access to deal with grievances and enforcement, will be the only option to deal with the prohibited issues. This is not sustainable.

The more beneficial provisions of the US have of course been ignored in the development of this Bill. Such provisions as compulsory bargaining fees upon obtained 51% unionised workers at a workplace, the ability to require businesses to produce operational documents and the ability to have these rights enforced by the Labor Relations Board.

The AWU does not promote or support the US system in the selective manner adopted by the Government. A thorough analysis of what is suitable to the Australian working culture and economic stability is required before any political party in Australia should consider replacing a system that has served Australia well for 100 years. The Union brings the similarities with the US to the attention of the Senate for the purpose of giving a glimpse of where this country is heading if common sense and a thorough consideration of all factors is not adopted. Australia is risking its social structure by adopting and extending the most anti-worker detrimental laws of the US system. This is not a future that the Government should be wanting for Australia. This can only promote Australia on the international stage as a poor nation and lacks foresight into the promotion and protection of its own workers. The gap between the wealthy and the poor will only increase under the proposed system. The Government's vision is not unique, Australia needs to learn from the mistakes of other countries not copy them.

The AWU submits that the Senate should ensure extensive public hearings are held throughout Australia to allow adequate opportunity for all interested community, union and business groups to be heard. A system that has been in place for 100 years should not be replaced without proper regard being had to all submissions and public appearances. To do so would be at the detriment of the democratic political system

that Australia seeks to promote. There is an obligation, traditionally held by the Senate to ensure proper consideration into matters of such importance.

Attachment B

Submissions of
The Australian Workers' Union,
Victorian Branch

Authorised by
Bill Shorten
Victorian Branch Secretary

SUBMISSIONS OF VICTORIAN BRANCH - AWU

CONTENTS:

LESSONS FROM STATE – FEDERAL TRANSFER (Vic experience)

Prior to 1993 The Australian Workers Union Victorian Branch operated in both the Victorian Industrial Relations System and the Federal Industrial Relations system. The AWU was party to 38 common rule awards that operated under the Victorian Act.

Some of the Victorian common rule awards mirrored existing Federal Awards. An example of this was the *Victorian Excavation and Road Workers Award*, which mirrored in most parts the Federal *Australian Workers Union Construction and Maintenance Award*. As a result all road construction workers in the State of Victoria received the same minimum conditions of employment.

Other State Awards that mirrored Federal Awards included the following:

State Common Rule	**Federal Award**
Shearing Industry	Pastoral Award
Agricultural and Pastoral	Part of the Pastoral Award
Cement Articles	Cement and Concrete Prod
Tar and Bitumen	Asphalt and Bitumen
Excavation and Road Works	AWU Construction & Maint
Fruit Growing	Federal Fruit Growing
Wharfs and Jetties	AWU Construction & Maint
Pre Mixed Concrete	Concrete Batching Plants

Many other Victorian common rule awards did not have Federal counterparts, these included awards such as:

Cement	Nurserymen's
Cemetery Employees	Poultry Farm Workers
Sugar	Quarry
Dairy Farm Workers	Sandpit
Garden Employees	Salt Workers
Lime Burners	Sportsground Maint
Mineral Earths	Undertakers

Mineral Prospecting Vegetable Growers

Following the election of the Kennett Liberal Government all common rule awards were abolished in March 2003 and replaced by industry sector rates. The whole Victorian system was then abolished and industrial relations powers handed over to the Commonwealth.

Employees previously covered by Victorian State common rule awards were covered by Schedule 1A provisions of the *Workplace Relations Act 1996.*

DISADVANTAGE FOR THOSE EMPLOYEES UNDER SCHEDULE 1A

Schedule 1A employees were clearly disadvantaged compared to employees engaged under Federal Award conditions. Schedule 1A only provided for 5 minimum conditions of employment they are:

- Minimum wage for industry classifications
- Four weeks annual leave p.a
- Personal leave (5 days sick leave + 2 days bereavement)
- Parental Leave (unpaid)
- Notice of termination

The situation for Schedule 1A employees resembles the government proposal for 5 statutory minima.

All other conditions are removed including overtime rates, shift penalties and allowances. More than 300 000 Victorian workers traditionally covered under State common rule awards lost conditions over night. As a result the following occurred:

No Paid Overtime.

Employees who under the award received time/half and double time for working after eight hours or in excess of 38 hours per week were now only paid at single time for any over time worked. For many years schedule 1A employees received no paid overtime at all. In some instances employees working an average 10 hours overtime a week were $150.00 per week worse off. Employees could not refuse overtime as working reasonable overtime was part of their contract of employment.

No penalty rates for work on weekends, nights and/ or public holidays.

Employees in the sportsground and venue presentation sectors often were **required to work** on weekends and public holidays. Over night some employers refused to pay penalty rates which resulted in employees take home pay being significantly reduced. Although employers refused to pay penalty rates they still forced employees to work weekends and public holidays.

With no award to fall back on, employees were disadvantaged in a number of other ways:

Lower rate of pay compared to award employees (particularly in higher, more skilled classifications)

No accident make-up pay while on WorkCover

Award employees received between 26 to 52 weeks accident make up pay. With the removal of the Awards this was reduced to the minimum Workers Compensation Act standard.

Other disadvantages include:

No additional loading for regular night or afternoon shifts
Minimal regulation of employer record keeping and pay slips
No redundancy pay

HOW PEOPLE FELL THROUGH THE NET EVEN AFTER PROCESS OF COMMON RULE APPLICATION

Following the hand over of the Victorian system to the Commonwealth, the AWU (Victorian Branch) embarked on making new Federal Awards or roping companies into existing Federal Awards to protect the wages and conditions of our members. Employers within these industries have constantly opposed the making of new awards to cover those employees still on schedule 1A provisions. This is clearly because the financial advantage currently available to them by providing non-award conditions would be removed. Consequently, employer associations saw the opportunity to negotiate reduced standards. It was only in the largely unionised industries the AWU was able to transfer employees to Federal Awards.

In 2004 the Bracks' Labor Government reached an understanding with the Commonwealth to reintroduce Common Rule Awards in Victoria. These common rule awards would operate in the federal system and be based on existing Federal Awards. This was a massive exercise. It took nearly one year in dealing with procedural issues to make approximately 30 Awards apply by common rule in Victoria.

Even after having large numbers of awards declared common rule many thousands of Victorian workers are still only covered by Schedule 1 A conditions. These are mainly in areas where there was no existing Federal Award coverage. These include:

- Gardeners
- Flower and plant growers (nurseries)
- Dairy workers
- Poultry
- Exhibition/entertainment
- Fishing

For employees relying on Schedule 1A conditions rather than commonly applied federal awards, it means the following:

- No paid overtime

- Lower rate of pay compared to award employees (particularly in higher, more skilled classifications)
- No penalty rates for work on weekends, nights and/or public holidays
- No accident make-up pay while on WorkCover
- No additional loading for regular night or afternoon shifts
- Minimal regulation of employer record keeping and pay slips
- No redundancy pay

In 2002 the AWU did a comparison of the terms and conditions of Schedule 1A employees compared to equivalent federal award employees. This information was prepared as part of submissions presented to the AIRC for an amount higher than the safety net adjustment to flow on to these employees. The information is instructive because the proposed statutory minima mirror the Schedule 1A matters. There is clearly a significant financial disadvantage to minima employees when compared to their federal award counterparts. **NOTE: the following figures applied in 2002**. The gap has not been rectified.

PROVISIONS	**FEDERAL AWARD - *gardener***	**INDUSTRY SECTOR**
WAGES	**Sportsground Maintenance and Venue Presentation (Victoria) Award 1995**	**Cultural & Recreational Services [AW774566]]**
1. Routine gardener 2. Exp. gardener 3. tradesperson	1. 437.20 / 11.50 2. 483.90 / 12.73 3. 507.20 / 13.35	1. 11.05 2. 11.50 3. 13.34 (level 5)
PART TIME		
1. 2. 3.	1. 12.65 (part timers receive +10%) 2. 14.00 3. 14.68	1. 11.05 2. 11.50 3. 13.34
CASUAL		
1. 2. 3.	1. 14.38 2. 15.91 3. 16.69	1. 13.81 2. 14.38 3. 16.68
JUNIOR		
1. 16 yr old 2. 17 3. 18 4. 19	1. 8.63 2. 8.63 3. 8.63 4. 11.50	1. 6.47 2. 7.76 3. 9.07 4. 10.36
PENALTY RATES		
	• All work after 38 OR outside spread OR in excess 8 paid at penalty rate • Part timers paid penalty rates for all work outside written agreed hours	No penalty rates No overtime pay

PROVISIONS	FEDERAL AWARD - *gardener*	INDUSTRY SECTOR
	• x 1.5 for first 2 hours then double time • double time on Sunday • x 2.5 public holidays	
REGULATION OF HOURS		
	• 30 mins no later than 5 hours or paid 1.5 • Right to 1 RDO pmth • Paid 10 mins twice each day rest break & paid crib break of 20 mins if working overtime • Right to 10 hr breaks between work or paid double time • Part timers: minimum 8 full days off per month & can only work maximum 10 days in succession without an RDO	• 30 mins no later than 5 hours
	• Min engagement casual 4 hrs • Min engagement part timer 3 hrs	No minimum engagement
TERMINATION		
	• Notice • One day's time off during each week of notice to seek employment • Redundancy (TCR)	Notice only
ALLOWANCES		
	Leading hands (10.90 – 23.40 pwk); Tractor (14.70 pwk); Curator allowance (27 pwk); Tool (9.60 pwk); Meal (6.70 p meal) First aid (9.60 pwk) Total potential allowances pwk (excluding meals) **84.30**	No allowances **0**
	Full reimbursement for protective clothing & equipment	No clothing reimbursement
	Accident make-up pay for 39 wks	No make-up provision
LEAVE		
	• 4 wks annual leave • shift workers: 7 days extra • leave loading 17.5%	4 wks annual leave
	• 7 days 1st year sick leave • 10 days subsequent years	5 days sick leave
	2 days bereavement leave	No bereavement leave
	5 days carer's leave	No carer's leave
	12 months unpaid parental leave	12 months unpaid parental leave
	Paid jury service	No paid jury leave

PROVISIONS	FEDERAL AWARD - *gardener*	INDUSTRY SECTOR
<u>Example</u>: part time level 1 gardener usually works 25 hrs. ***Agrees to work 3 hours overtime.***	***316.25*** ***379.50 + 6.70 meal = 386.20***	***276.25*** ***309.40***
<u>Example</u>: casual who does 10 hrs labouring work one-off (day). ***Performs same work by night.***	***158.18*** ***273.22***	***138.10*** ***138.10***

PROVISIONS	FEDERAL AWARD – *agriculture, nursery*	INDUSTRY SECTOR
WAGES **PERMANENT**	**Horticultural Industry (AWU) Award – (as it applies to schedule B&C respondents – mostly Shepparton area)**	**Agricultural, Forestry & Fishing Industry [AW767376]**
1. picker 2. packer & sorter 3. forklift operator 4. quality control 5. tradesperson	1. 10.88 (413.40) 2. 11.32 (430.10) 3. 11.76 (446.80) 4. 12.36 (469.70) 5. 13.35 (507.20)	1. 10.88 2. 10.88 3. 11.04 4. 11.59
1. picker 2. packer & sorter 3. forklift operator 4. quality control 5. tradesperson	1. 12.78 2. 13.30 3. 13.82 4. 14.52 5. 15.68	1. 12.78 2. 12.78 3. 12.97 4. 13.62
PENALTY RATES		
	• ordinary hours averaged 152 over 4 wks within 6-6 Monday to Friday. Beyond this is overtime. • Overtime is x1.5	No penalty rates No overtime pay

PROVISIONS	FEDERAL AWARD – *agriculture, nursery*	INDUSTRY SECTOR
	• Sunday work x2 (except during harvest: x1.5) • X2 public holidays	
	• Afternoon & night shift 15% loading • All overtime x1.5	
REGULATION OF HOURS		
	• 30 mins no later than 5 hours • paid 10 rest break each morning	• 30 mins no later than 5 hours
	• Min engagement casual 2 hrs	No minimum engagement
TERMINATION		
	• Notice • One day's time off during each week of notice to seek employment • Redundancy (TCR)	Notice only
ALLOWANCES		
	Leading hands (13.50 – 28.25 pwk); wet work (4.45 p day); Meal (8.15 p meal) First aid (10.10 pwk); travel time paid & accommodation costs for work-related travel Total potential allowances pwk (excluding meals) **60.60**	No allowances **0**
	Accident make-up pay for 26 wks	No make-up provision
LEAVE		
	• 4 wks annual leave • shift workers: 7 days extra • leave loading 17.5%	4 wks annual leave
	• 7 days 1st year sick leave • 10 days subsequent years	5 days sick leave
	2 days bereavement leave	No bereavement leave
	5 days carer's leave	No carer's leave
	12 months unpaid parental leave	12 months leave
<u>Example</u>: Casual fruit packer works regular 40 hr weeks, no RDO.	***2,021.60 + 159.60 (OT) = 2,181.20 p.mth (545.30 pwk)***	***2,044.80 p.mth (511.20 pwk)***

PROVISIONS	FEDERAL AWARD – *agriculture, nursery*	INDUSTRY SECTOR
Permanent fruit packer works regular 40 hr wk, no RDO.	***1,720.40 + 135.84 (OT) = 1,856.24 p.mth (464.06 pwk)***	***1,653.76 p.mth (413.44 pwk)***
Example: trades qualified nursery horticulturalist.	***507.20***	***440.42***
Supervises 2 employees & has first aid certificate.	***530.80***	***440.42***
Example: permanent forklift operator on shift.	***513.82***	***419.52***

PROVISIONS	FEDERAL AWARD – *dairy worker*	INDUSTRY SECTOR
WAGES **PERMANENT**	**NO EXISTING FEDERAL AWARD** **- regulated by State Awards** **cf. DAIRYING INDUSTRY EMPLOYEES (STATE) NSW**	**Agricultural, Forestry & Fishing Industry [AW767376]**
1. Support 2. General 3. Specialist	1. 11.32 (430.20) 2. 11.55 (438.90) 3. 13.35 (507.20)	2. 10.88 (413.44) 3. 11.04 (419.52) 5. 11.68 (443.84)
CASUAL		
1. Support 2. General 3. Specialist	1. 13.02 + 1.08 annual leave = 14.10 2. 13.28 + 1.11 = 14.39 3. 15.35 + 1.28 = 16.63	2. 12.78 3. 12.97 5. 13.72
PENALTY RATES		
	• ordinary hours av 38 pwk. Beyond this is overtime. • Overtime is x 1.5 for two hours then x 2 • All ordinary time on Saturday x 1.25 • All ordinary time on Sunday x 1.5 • x 2.5 public holidays	No penalty rates No overtime pay

PROVISIONS	FEDERAL AWARD – *dairy worker*	INDUSTRY SECTOR
REGULATION OF HOURS		
	• Min engagement casual 2 hrs • Minimum engagement for call back 2 hrs	No minimum engagement
TERMINATION		
	• Notice • One day's time off during each week of notice to seek employment • Redundancy (up to 20 wks depending service)	Notice only
ALLOWANCES		
	Meal (6.60 p meal) First aid (8.25 pwk); travel time paid; travel allowance (0.41 pkm); overnight allowance (34.90 p.night)	No allowances
	Provision of protective clothing & tools	No provision
	Accident make-up pay for 26 wks	No make-up provision
LEAVE		
	• 4 wks annual leave • leave loading 17.5%	4 wks annual leave
	• 5 days 1st year sick leave • 8 days subsequent years	5 days sick leave
	2 days bereavement leave	No bereavement leave
	May use any sick leave as carer's leave	No carer's leave
	Paid jury service leave	No paid jury leave
	12 months unpaid parental leave	12 months unpaid parental leave
<u>Example</u>: full time experienced dairy farmer works 50 hours pwk	***(10 hr days; OT @ x 1.5 and RDO monthly) 947.75 incl. meal allowance 980.75***	***443.84***
<u>Example</u>: casual support does 2 hrs milking every morning (7 days)	***141.00 + 77.55 penalty = 218.55***	***178.92***

PROVISIONS	FEDERAL AWARD – *piggery worker*	INDUSTRY SECTOR
WAGES PERMANENT	**PIG BREEDING AND RAISING AWARD 1992 [P1562]**	**Agricultural, Forestry & Fishing [AW767376]**
1. non experienced 2. skilled 3. formally trained 4. 2 yrs experience	1. 11.32 (430.00) 2. 11.91 (452.60) 3. 12.46 (473.50) 4. 12.88 (489.60)	2. 10.88 (413.44) 2. 10.88 (413.44) 3. 11.04 (419.52) 5. 11.68 (443.84)
CASUAL		
1. 2. 3. 4.	1. 13.58 2. 14.29 3. 14.95 4. 15.46	2. 12.78 2. 12.78 3. 12.97 5. 13.72
PENALTY RATES		
	• ordinary hours av 152 per month; 8 p.d within 6-6 Monday to Friday. Otherwise overtime. • Ordinary Saturday is x 1.5; overtime Saturday is x 1.5 for first two hours then x 2 • Overtime is x 1.5 for two hours then x 2 • Sunday x 1.5 • x 2.5 public holidays	No penalty rates No overtime pay
	Afternoon & night shift 15% loading	No shift penalty
REGULATION OF HOURS		
	• Min engagement 3 hrs • Paid overtime break of 30 minutes	No minimum engagement
TERMINATION		
	• Notice • One day's time off during each week of notice to seek employment • Redundancy (up to 20 wks depending service)	Notice only
ALLOWANCES		
	Meal (8.00 p meal) First aid (1.65 p day)	No allowances
	Provision of protective clothing & tools	No provision
	Accident make-up pay for 26 wks	No make-up provision
LEAVE		
	• 4 wks annual leave • additional 7 days for shiftworkers • leave loading 17.5%	4 wks annual leave
	• 5 days 1st year sick leave	5 days sick leave

PROVISIONS	FEDERAL AWARD – *piggery worker*	INDUSTRY SECTOR
	• 8 days subsequent years	
	2 days bereavement leave	No bereavement leave
	May use any sick leave as carer's leave	No carer's leave
	Paid jury service leave	No paid jury leave
	12 months unpaid parental leave	12 months leave
Example: casual 6 months experience, skilled, works 38 hrs	***543.02***	***485.64***
Example: permanent employee, completed piggery apprent'p works afternoon shifts; first aid quals.	***571.29***	***443.84***

There are many lessons we can learn from the schedule 1A experience.

Overnight employees required to work overtime or on weekends had their take home pay substantially reduced. Other Award conditions that had existed in excess of twenty.

The AWU recommends that the Awards remain comprehensive in content, represent the minimum conditions of employment and apply by common rule. Should an employee not be covered by an agreement or an agreement is terminated then the Award should become the applicable minimum standard.

AUSTRALIAN WORKPLACE AGREEMENTS

Under the new Work Choices legislation AWAs will exclude both collective agreements and Awards. Even where employees and employers are party to a collective agreement, an AWA will override and exclude existing agreements.

In most circumstances this will **completely undermine an employees right to collective bargaining**. If some employees are covered by collective agreements and some by AWAs with different expiry dates protected industrial action by the workforce at a particular establishment will be come impossible. Employers could have their entire workforce covered by AWAs with different expiry dates, which in renders impossible collective bargaining or protected action. Even where a collective agreement exists new or existing employees could be put onto AWAs with worse wages and conditions.

AWAs will offer no protection for new or industrial weak employees. The position of many employers shall be “here is the offer - take it or leave.”

The AWU submits that choice needs to be based on genuine consent and genuine options for employees. Employers have substantially greater bargaining capacity. The law should compel employers to genuinely bargain with the employee/union and reasonably consider options put by the employer as to the preferred form of an agreement.

AWAs by their nature make collective negotiations near impossible. The AWU has increasing experience of disgruntled employees who seek union assistance about the employers desire to make an AWA or their own desire to get off their AWA.

The following are two recent examples the Victorian branch has with how AWAs operate to disadvantage employees.

Example 1 – nursery industry: employer not employee choice

There is no federal award for nurseries. These employees are still covered by old Schedule 1A provisions. These are minimum wage employees.

The employees got together (before calling the union) and signed a petition saying they would rather have a single collective agreement. More than 80% of the employees signed in support. The employer continued to push for AWAs and circulated individual documents. The Union was called in and we notified of our status bargaining agents for approximately half the employees. The employer refused to speak to us about that group of employees as a whole. Instead we conducted some 40 meetings to discuss each employee separately.

Three problems arose from this:

1. This is a costly, time consuming and inefficient way to address site-wide employment issues. No particular advantage could be gained given the nursery workers tended to perform one of 4-5 jobs.
2. The employer’s clear intention was to NOT negotiate the content of these agreements. The delays meant that union members who wanted to negotiate (preferably collectively) were $1 per hour worse off than those who accepted the agreements without question. Despite union attempts to expedite the process, in the face of employer reluctance, this delay extended some 8 months.
3. The negotiation framework worked to naturally disadvantage employees in negotiations. A core issue for members was the creation of a skills based classification structure with clear duties and attached transparent pay scales. This claim of members was effectively defeated by the very nature of negotiations themselves. No nursery-wide claim could be discussed. This framework was essentially prejudicial to employee interests. No agreement about a classification system was reached.

Example 2 - Factory making manufacturing parts: **No independent check on managerial abuse of process**

Employees (about 40) are low-skilled and low-waged migrant employees. It is a highly ethnically diverse workforce. All communications require several language translations. The work is heavy, hot and tedious.

The employer is adamant about shifting all employees from the *Metal Engineering and Associated Industries Award* and onto AWAs. Employees rang the union, 100% signed as members within one week and all expressed their desire to stop 'negotiations' about AWAs in preference for a union negotiated agreement. We contacted the OEA to request that those three or four (3-4) who had signed not be approved. At that point we discovered that in fact some 60% of the workforce had already 'signed'. The employer lodged applications electronically. Only 3 employees had received letters from the OEA inquiring as to their consent. The following problems emerged:

- Electronic filing does not require demonstration of signature. No effective statutory scrutiny occurs. In this instance, most employees were not aware to having agreed to anything. The OEA was not able to confirm whether agreement had in fact been reached. An investigation is currently being undertaken.
- All employees had been called to a mass meeting with management and AWAs were circulated. Employees were told (in English) that these were their agreements. They should sign them and return them either immediately or the next day. No explanation of the agreement was offered. Few employees properly understood what was going on. No special consideration of their particular circumstances was given by the employer. Those who signed at the meeting (a breach of the statutory requirement for 14 days consideration time) were aware they had 'agreed' to something. No employee at that workplace has ever received a copy of these AWA. Any copies remaining in the hands of employees are simply those initially circulated at that meeting.
- No adequate enforcement or compliance mechanism exists. The OEA has undertaken to investigate, but this occurs laboriously (because individually despite the employer using a collective process) and retrospectively. No independent check on managerial conduct exists throughout. Had the union been involved in the process, management would have been accountable for a fair process and employees assisted.
- The OEA had consistently incorrect information about names and addresses of employees, relying as it is on employer-provided information. Information sheets were apparently sent to the wrong locations in all but 3 instances.

The OEA has been formally cooperative. Again we face the difficulty and inefficiency of dealing with each individual case, despite their jobs as machine operators being substantially identical. Each member has to prepare individual statements in a foreign language. An investigation into each individual circumstance has commenced. This is an absurdly inefficient method, given the collective nature of the process.

The problem here is that the OEA relied solely on information supplied to them by the employer. No independent check in the system was able to prevent employer abuse. Our next steps are to establish this abuse of process in relation to each individual

employee, make application for reconsideration of approval and have the AWAs overturned. We expect this to take several months. Meanwhile, employees are prohibited from taking protected industrial action to pursue a collective agreement and the employer is refusing to negotiate.

UNION PROVISIONS - RIGHT OF ENTRY

The new right of entry provisions prevents Union Officials from meeting with employees in a manner that would ensure privacy and confidentiality for members. The proposals in fact will **destroy the anonymity of members** which is essential for workers whose employment is precarious or whose employer is hostile to unions. Employers will be able to dictate where employees can meet Union officials. If a manager so desires he could request that meetings take place in full view of other employees or even outside the bosses office.

Unions will be forced to **dob** in a member we believe to be under paid. No longer will we be able to check all wage records but have to specify the employees who placed the complaint. This exposes union members to victimisation. Given the difficulty and expense of unlawful termination proceedings, it is more effective to build in protections from victimisation for union members for the duration of their employment.

The AWU submits the:

- **Proposals destroy the anonymity of members. Members will suffer repercussions contrary to the spirit of freedom of association**
- **Location of meeting important, should be lunch room**
- **Need to broaden record keeping requirements on employers re non-award employees**

FURTHER AWARD SIMPLIFICATION

Award simplification affects the conditions of the most disadvantaged

Our estimate is that about 30% of the industries that The Australian Workers' Union (Victorian Branch) cover do not have any enterprise agreements in place.
They include:

- fruit growing and packing
- horse training
- exhibition construction and servicing
- shearing
- fun parlours, fairs, entertainment
- sportsgrounds
- landscape gardening
- nurseries
- dairy
- ski resorts
- some catering facilities
- labour hire companies

Workers in these industries are the most vulnerable of Australian workforce. They are difficult to assist (working in small, isolated workplaces) and union/employee interaction tends to occur only when problems arise. Because of this, employees in the above industries depend heavily on the goodwill of their employer and any safety net decisions made by the Australian Industrial Relations Commission. This group is not in a position to bargain for pay increases. The bulk of our work for this group involves unfair dismissals and award variations. Any changes to the award system directly effects their working lives.

Specific problems with removing proposed items

Superannuation – Of the above list, superannuation is contained in the *Horse Training Industry Award, Sportsground Maintenance & Venue Presentation Award, Horticultural Award, Pastoral Industry Award, Exhibition Industry Award, Catering (Victoria) Award.* There are also a number of specific superannuation awards covering these industries, for example, *The Industrial Catering And Cleaning (AWU and LHMU) Superannuation Award* 1988.

That is, all of the industries most heavily reliant on award conditions have superannuation provisions in their awards. Each of these will provide arrangements ***superior*** to the legislation. In the Pastoral Award for example the superannuation provisions address the particular work arrangements in place for contract shearers. These industries do NOT tend to have enterprise agreements. This means that these superior superannuation entitlements will be lost.

Legislation provides that the definition of ordinary time earnings contained in an industrial instrument will prevail over the legislation. In oil and chemical industries AWU awards contain superannuation provisions. Some of these define OTE to include certain allowances. Living away from home allowances make up some 50% of our members take home pay. Until now these employees have superannuation contributions on their entire pay as a right. Now this will depend on employer agreement. The financial difference for employees is significant.

Skills based career paths – it is extraordinary to the AWU that the government would seek the removal of these provisions. They are mutually advantageous for employers and employees: increasing productivity, job satisfaction and employment security in the industry. For example, skills based paths exist in the *Wine Industry Award*. Competencies were developed through industry discussions. These discussions included peak representatives of the wineries, union and experts in competency developments (eg Swineburne University). They resulted in an agreed package which was included in the award. The AWU submits that all parties to the award would agree that these competencies have played a key part of the development of the Australian wine industry. They have enabled up-skilling, heightened employee productivity and increased the international (and domestic) competitiveness of the industry as a whole.

Trade Union training – The AWU runs a range of course (EO, safety, industrial), many externally accredited. Should these provisions be removed only our strong well, unionised sites will have access to paid training. Ironically, this is not the part of the workforce in greatest need of union representation. Union training is clearly a matter

that, if left to employer discretion, is unlikely to granted voluntarily. The AWU submits that this removal will leave numerous workplaces less informed about their industrial entitlements, less trained in negotiations and less able to fax disputes at a site level. We also note that a significant proportion of AWU training course deals with compliance with the law. Removing access to this information means delegates will not be trained in how workplace disputes should properly and lawfully be handled.

Long Service Leave – the Victorian Long Service Leave Act has just been amended to provided LSL at a rate equal with most AWU long service leave award provisions, effective January 2006. However, in two ways employees are still disadvantaged by the removal of LSL from awards:

- In oil and petro-chemical industries the *entitlement* and *access* to LSL is superior to the amended state legislation. For example many provide LSL access after 5-7 years.
- Even in those industries which provide the same substantive entitlement to LSL as the amended state legislation (13 weeks after 10 years), they calculate the entitlement retrospectively. The legislation is only effective from January 2006.

The AWU urges the Senate Inquiry to retain superannuation, skills based career paths, trade union training and Long Service Leave in awards.

REMOVAL OF DISPUTE RESOLUTION POWERS OF AIRC

This is an extremely bad move for Australian industrial relations.

The current system of industrial relations has operated in excess of a century. It is based on the principle that parties register, can seek Commission assistance in dispute resolution and are bound by any ruling of the Commission. The system provides both protections and controls.

The 1996 Act effectively removed most public arbitral powers. Except for national wage cases and award variations confined to s89A matters, very little public arbitral power has since been exercised by the Commission. Disputes are dealt with only by conciliation. However, while the AIRC could not impose a settlement on disputing parties, it could compel conciliation. To give effect to the exercise of conciliation power, the Commission is able to require attendance of certain parties, summon witnesses, compel the production and inspection of documents, issue procedural directions, recommendations and orders, conduct inspections (s111(1)). These powers have been used routinely for a century. In the experience of the AWU, there has been a rising disinclination to exercise such powers over the past decade. However, they remain a core part of public dispute resolution.

In the AWU submission it is absolutely essential that the Commission retain the power to compel parties to comply with certain procedural steps (attend conferences, produce relevant documents, refrain from or engage in certain conduct). We accept that in instances these powers will be used to compel AWU conduct. While on certain occasions we may object to the exercise of such power, in general it is essential for the effective resolution of disputes.

Consequently, the AWU recommends the:

- Arbitral functions of the Commission be restored
- Powers to compel conciliation be retained
- Commission members be expanded to meet workload requirements and that appointments reflect the diverse background of employee/employer interests
- Good faith bargaining requirement be restored in the Act
- Expansion of government Inspectorate to investigate complaints regarding Award/Act breaches. This should include compliance with record keeping regulations
- Restoration of prosecution capacity for government Inspectorate in circumstances of underpayment or breach.

CHANGES TO PROVISIONS REGARDING INDUSTRIAL ACTION

The AWU submits that as the Commission powers to resolve disputes are reduced, the incidence of unprotected industrial action will increase.

In relation to the Bill's proposals regarding industrial action, the AWU makes the following submissions:

- Without the Commission, industrial relations will becoming increasingly strike prone
- The Bill will result in rising civil litigation
- Current provision for protected industrial action works well and do not require reform. In any event requiring unions to bear part of the costs of secret ballot is unfair.

Without the Commission, industrial relations is becoming increasingly strike prone

There have been a decline in strike activity in the Australian Workers' Union (Victorian Branch) in the past two years. Prior to this saw a period of particularly high levels of industrial action, more in one year than in the past 10 years combined. This is not (despite the opinion of some) seen as desirable in our organisation. Industrial action is a symptom of unresolved tensions between employee and employers. The weakened role of the Commission outlined above means that it no longer represents an effective forum to resolve industrial relations issues.

The explosion of Civil Litigation

Section 166A of the Act was intended to slow down pursuit of civil proceedings by requiring 72 hours conciliation and an AIRC issued certificate. This is not what happens in practice.

The Australian Workers Union (Victorian Branch) has been subject to three such applications this year. On two occasions the applications were deliberately lodged at 5.00pm Friday night (despite protected industrial action having commenced several

days earlier) and the 72 hour period then expired 5.00pm Monday. There was no residual discretion available to the Commissioner to extend the deadline in order to conciliate. In both cases the industrial action was protected, and therefore ostensibly immune from civil liability according to 170MT. However, once the 72 deadline passes, the Commission *must* pass the matter over to the civil courts. The courts then deal with the threshold argument of whether the industrial action is 'protected'.

In the third case, conciliation occurred and the matter was resolved. Proceedings did not commence in the court.

There are three problems with this process:

- It makes a mockery of the notion that protected action is immune from civil liability
- There is no role for the Commission in enabling or forcing negotiations. Despite what may have been the intent of the section, there is no interim, cooling down period where parties must negotiate.
- It rapidly escalates the stakes. Industrial relations becomes increasingly expensive, adversarial, and couched in common law terms of master/servant.

The AWU submits the period of compulsory conciliation entailed in s116A applications is beneficial if used to resolve the dispute. It should be retained and discretion available to the Commission to extend the period if appropriate (eg if the timing of lodgement did not enable conciliation).

Protected Action is proving effective

The right to take protected industrial action (within a narrow time frame and given certain procedural constraints) represents a compromise position between the competing interests of employers and employees. In the experience of the Australian Workers Union it is fair, balanced and effective. What this means is:

- The employer is provided with adequate notice and precise details of the industrial action to be pursued. This provides employers with preparation time and the opportunity to reflect upon the seriousness with which their employees view the issues. *In the majority of cases*, the serving of notice acts to initiate a new round of discussions and the industrial action is not pursued. In such instances the Act is granting power resources to employees in a way that does not damage the interests of employers.
- Protected industrial action acknowledges that employees have the right to withdraw labour and express opposition to managerial action. However, by narrowing that right to bargaining periods it acknowledges employers right to not confront unreasonable disruptions to work. In balancing these two rights it provides a framework in which legitimate industrial action may be pursued and therefore the conflict is likely to remain ordered and reasonable

In our submission, this is one of the few positive elements of the first wave industrial relations reforms. It balances the needs of both parties and provides a procedure for

both expressing and containing conflict. The procedural requirements are already sufficiently robust. Some of the constraints are:

- A total of 10 days notice (7 for initiating bargaining then 3 for industrial action) must be given.
- Precise details of the action must be included or it is not protected.
- Picketing remains tortious and therefore outside the protected scope.
- No other contract must be interfered with.
- The action must not result in personal injury or damage to property.
- The welfare of part of the population must not be endangered
- It must not cause significant economic damage

These combine to adequately protect employer interests. They also provide the framework by which our members may legally stop work. This is a fair, balanced and effective expression of an employee's right to with draw labour under certain circumstances.

Problems with proposals

Industrial action will be harder to take and easier to overturn. The AWU submits:

- Current procedural steps are adequate to protect employer interests
- Overturning industrial action in the event a party is not “genuinely bargaining” should be matched with the introduction of a general requirement to bargain.
- Certain examples of “pattern bargaining” should be enabled. For example it is entirely legitimate for industry or market standards (not merely national ones) to be pursued in bargaining.

Recommendations:

- Section 166A should contain residual discretion to Commissioner in issuing certificate and impose prior obligation to genuinely bargain
- 'Protected' industrial action must carry a real immunity from civil litigation (except in extreme circumstances)
- The current notion of 'protected industrial action' balances the needs of employers and employees and should be retained in its existing form.

TRANSMISSION OF BUSINESS

The AWU has witnessed galloping levels of labour market fragmentation over the past decade. Once large workplaces have become segmented into in-house employees and contractors. In general the AWU has not opposed this process where it is driven by business competitiveness or the need for specialised skills. We have been involved for years in ensuring that entitlements are protected, the process of redundancy selection is fair and severance calculations correct. Employees’ interests are rarely at the forefront of consideration when businesses are bought and sold. Likewise, when projects are tendered for, the existing workforce is not privy to negotiations which have may profound effect on their future livelihood. In an era of constant waves of corporate restructuring, job security is becoming increasingly precarious.

One core protection however has existed until now. Employees bought and sold could at least ensure their terms and conditions remained protected. This is no longer the case.

This provision, together with the following (90 days notice of termination) will render entirely precarious the employment conditions of all employees. This idea is abhorrent.

AUTOMATIC TERMINATION OF AGEREMENT ON 90 DAYS NOTICE

The AWU submits this will have a severely detrimental impact on security of employment and employee capacity to bargain.

This provision is likely to be used by employers in the following manner:

- Upon expiry of the agreement, employers will routinely file a notice of termination of agreement. Employees may respond by commencing the process of initiating protected industrial action. This is likely to require:
    - Day 1 employees decide to take industrial action, union notifies Commission
    - Day 4 listed in Commission. Estimate day hearing to determine whether statutory test of 'genuine bargaining' etc made out. Ballot ordered.
    - Day 14 results received (a 10 day period is included in the Bill)
    - Day 15 union notifies the employer of successful outcome
    - Day 19 industrial action can commence (or four days later if the employer applies for extension of notice period)
- By contrast the employer may notify of termination ***prior*** to expiry rendering futile the above steps.
- Even assuming the employer notifies of an intention to terminate at the same time as the union – only 90 days of bargaining are available.
- More importantly, what negotiating capacity do employees have when the best alternative to a negotiated outcome (BAFNA) is the total removal of existing conditions. This is clearly intended to completely neuter any bargaining capacity of employees.

The provisions amount to the effective end of bargaining. Employers may now unilaterally determine the conditions of employment at that workplace.

The current federal minimum wage is $484.40.
Our members average weekly earnings falls between $800 and $1200. The high-income section of the labour market generate these wage outcomes primarily from overtime, penalties and allowances. For example, in the off-shore oil industry, the Living Away from Home (LAHA) allowances contributes roughly 50% to take home pay. A proportion of weekly rates includes compensation for working continuous 12 hour shifts.

This Bill allows employers to unilaterally remove in excess of 60% of an employees wage. The AWU expresses absolute horror at this proposal for the following reasons:

- It is deeply unjust. Employees have established their work conditions through decades of collective bargaining, skill enhancement and sheer hard work. To

render these conditions entirely subject to managerial discretion reflects an inherent prejudice toward employers. Employees have a right expect their existing terms and conditions will be protected. The AWU may be sympathetic to reducing conditions in certain exceptional cases. However this Bill enables employers to unilaterally remove the bulk of benefits to employers ***unfettered*** and without need for justification.

- This proposal is radically contrary to the public interest. Enabling employees to substantially drive down labour costs to this extent, acts as an incentive for businesses to compete on the basis of a 'race to the bottom'. Employers attempting to produce a high value-added product or service will be forced to compete on the basis purely of reduced labour costs. This is detrimental to the quality of the product. It is also extremely damaging to the interests of employees.
- Additionally, the public interest is undermined by the probability that industrial warfare will erupt should opportunistic employers seek to remove 60% of employees conditions. The response is likely to range from mere resentment, exodus and low morale to sabotage and wildcat industrial action. We ask you to consider whether you might in fact be sympathetic should an employee engage in unprotected industrial action when confronted with a pay-cut worth 60% of their pay. A law which enables such industrial disharmony in the Australian labour market is not in the public interest.

Attachment C

Submissions of
The Australian Workers' Union,
Greater South Australian Branch

Authorised by
Wayne Hanson
Greater South Australian Branch Secretary

The Role of the Senate

1.1 The role of the senate is to operate as the "State's House" and as a house of review.

1.2 Since the *engineers case* the role of the senate has become exceptionally significant. The States possess reserve, accordingly should the states wish to protect an area of legislative control from the Commonwealth parliament the appropriate protection would be the senate.

1.3 However, as a matter of history the senate has never acted in the role of 'state's house', rather (due ostensibly to the election system for the senate) it has been a house of minority parties and accordingly acted as a house of review.

1.4 This is not the correct role for the senate (although it is not a role necessarily in contrast to its ordained role.) rather the senate should protect the interests of the states as representatives of those respective states. If the states claim that an area of legislative control is being removed by hostile means, the Senate should reflect on the impact that this will have on State – Federal relations.

1.5 With a Constitution which promotes parliamentary sovereignty over individual or communal rights, it is also important to exercise the review mechanisms.

1.6 Having now established the role of the Senate clearly. The current IR reform has two main problems:

1.6.1 It is in itself draconian, in that it interferes with collective bargaining and is replete with conferral of power onto the executive.

1.6.2 It is a removal of a legislative power held by the state governments since federation.

Problems with the new reform

2.1 The government has recently sought to paint any opposition to its new reforms as rhetoric which will stop Australia from moving forward economically. The government has recently hatched a multi-million dollar media campaign against any opposition at tax payer expense. It goes without saying that these tax payer dollars would have been better spent helping the Australian economy through aiding tax reform or the skills crisis which began almost a decade ago.

2.2 It is important to isolate problems with the reform, these fall into three categories:

2.3 First, the removal of Award safety nets, will ultimately affect those unable to protect themselves. This is particularly disastrous considering the growth of employees in casual positions who are particularly vulnerable to being underpaid or overworked.

2.4 Second the removal of trade union power, undermines the ability to collectively bargain. Collective bargaining being a fundamental right which is maintained across all western economies.

2.5 Third the removal of remedies for unfair employment practices increases the likelihood of unfair employment practices and health problems at work.

2.6 Over the course of the history of Australia employees and employers interests have been balanced with that of the national interest. Factors such as the award safety net and the ability of employees to bargain in good faith has given them the opportunity to improve the standard of living in Australia. The presence of an independent commission to adjudicate disputes has allowed the arguments of employers to be heard. It is not rhetoric to seek to have safeguards which protect the basic rights of employees. It is not rhetoric to seek to have a balanced approach to the Australian economy.

The Removal of a Safety Net

3.1 A decent job paying a fair amount of remuneration is the best possible method of preventing poverty and giving Australians the best possible chance at a better life.

3.2 Currently most employees in Australia are covered by an industrial instrument. These are either Awards or Enterprise Agreements. These instruments outline the minimum package that an employee can receive.

3.3 It has been argued that the current system creates two much inflexibility, and that a party who employs someone has to go under an amazingly difficult task to determine their terms and conditions.

3.4 It has been said that someone must turn to the Award, determine whether it is a state or federal Award, then turn to see whether there is an enterprise agreement, and whether it is state or federal enterprise agreement, and then see whether they are under an AWA.

3.5 This has been said to be a complicated exercise, it is not a complicated exercise, it is rhetoric, the sentence could be rephrased more truthfully as “someone must determine what instrument covers their employees and then apply that instrument.”

3.6 In any event a professional business should have professional advisors, both accounting, financial planning and legal, if this is too complicated for the industrial legal advisors they should leave the jurisdiction.

3.7 More importantly, business ease is never a factor to determine public policy over business confidence. Employees can never be seen simply as units of labour that can be whipped into more efficient and productive means. Employees are humans who consist of flesh and blood and cannot be manipulated like machines. The view that employees can be made more efficient and productive by taking away

their basic rights to a fair wage and employment protections is tantamount to viewing humans as mechanical robots or tally markets on a production graph.

3.8 Leaving aside the "supposed benefits" of removing safety nets, what the law intends to do is to remove "safety nets". It will do this in three different ways;

(i) The limitation of Award matters, and the creation of the Australian Fair Pay Commission

(ii) The removal of State Award coverage over employees

(iii) The removal of the No Disadvantage Test.

3.9 It is important to recognise that the people who rely on this safety net are not in the position to bargain, a safety net or a minimum wage is to protect those who cannot protect themselves.

3.10 The Australian Fair Pay Commission's criteria does not refer to inflation. Money has no innate value, it is valued at how much it can be exchanged for in terms of assets and how much interest it can receive if loaned.

3.11 Accordingly if a person receives a pay increase below the Consumer Price Index they have actually been given a pay cut.

3.12 Accordingly, although wages are paid in dollars, they reflect buying power, and are ultimately used to consume.

3.13 As we live in a consumer economy, with high debt levels, disposable income is in fact currently an economic positive.

3.14 Accordingly, by raising the amount of disposable income in the community, Unions have assisted a number of businesses as they have inadvertently increased consumer spending.

3.15 In any event, a wage which can provide for a "decent standard of living" is a requirement of a fair and equitable society.

3.16 The Award system allowed for this as it allowed both sides and all the information to be used in the decision making process.

3.17 Also one of the major achievements of the 1980's was the accord linking wages to inflation or better. As stated above the Australian Fair Pay Commission will not make decisions according to the Consumer Price Index. In the new system this will not be a factor.

3.18 This may not be considered a problem, when Australia has just come off a period of low inflation, nor may high inflation or "hyper inflation" seem likely considering our economic circumstances, yet should inflation increase (due to oil prices for example) the Australian Fair Pay Commission cannot look at the Consumer Price Index.

3.19 From an economic perspective this makes no sense and is a flaw which one can only assume is a deliberate attempt to reduce real wages.

3.20 The removal of the arbitration system, not only disempowers those who are directly interested in the process but its replacement does not contain the necessary statutory criteria to make a sensible decision.

3.21 Further the removal of State Awards has the same effect.

3.22 Of significance is the removal of the no disadvantage test. This test necessitated that the entire terms of a Australian Workplace Agreement or Enterprise Bargaining Agreement cannot make an employee worse off than what they were receiving under the Award.

3.23 Basically this means that previous to the new legislation you cannot contract out of the Award.

3.24 Now that you can contract out of the Award, you can say, "*I want to be disadvantaged from the safety net, please disadvantage me*".

3.25 The proposal that this is better for the economy and employees than the previous Award system which has enabled Australia record levels of economic growth in the past decade is pure nonsense.

The removal of collective bargaining

4.1 The right to collectively bargain is a *fundamental right at work* according to the International Labour Organisation; (note this is consistent with clause 18 of the US – Australia Free Trade Agreement)

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

4.2 *'Freedom of association and the effective recognition of the right to collective bargaining';* requires three things:

(i) Right to start negotiations.

(ii) Right to reject employment offer.

(iii) Right to be effectively represented by an organisation.

(iv) Right to strike or take industrial action.

4.3 It goes without saying that the rights mean that one can do this without penalty.

4.4 It is the case that Australian Workplace Agreements do not allow for an employee to initiate collective bargaining.

4.5 This is because you cannot initiate collective bargaining throughout the life of the AWA.

4.6 For example take an employer with 12 employees, lets say that each employee takes an Australian Workplace Agreement at a different month, by the time that one employee's Australian Workplace Agreement is up for renegotiation (which is in theory the time that they could seek a collective agreement) the other 11 will be unable to negotiate as they will be bound by the Australian Workplace Agreement.

4.7 Therefore Australian Workplace Agreement's seriously restrict the right to bargain collectively.

4.8 Further the curtailment of Right Of Entry entitlements, seriously prohibits any union's ability to represent their members.

4.9 Further the provisions which move the union's to register under the Corporation head of power requires that union's amalgamate with their respective national union's.

Unfair employment practises

5.1 Dismissal at will should not be allowed back into employment law in Australia.

5.2 In a recent appraisal of the Australian Economy the OECD noted Australia consistently ranked as one of the countries with the least restrictive employment

protection legislation. The OECD went even further by recommending that disincentives to hiring should be kept as low as possible through policies which contain the cost of unfair dismissal procedures without abandoning social and economic benefits of employment protection.

5.3 The right not to be terminated unjustly, is the fundamental starting point for all rights in employment.

5.4 Additionally employees must be protected in situations where they are displaced when employers become insolvent. Employees must not be robbed of their entitlements in such situations.

5.5 The mechanism is as much the issue as the allowable law, the Federal Court of Australia is not an ideal mechanism for this. If it is the case that a decision requires judicial power based on Chapter III issues, then the parliament should make an unlawful dismissal court of Australia.

Other unfair employment practises exist, without the ability to rectify them in Awards or EBA's their needs to be another mechanism.

Attachment D

Submissions of
The Australian Workers' Union, Tasmanian Branch

Authorised by
Ian Wakefield
Tasmanian Branch Secretary

Submissions of AWU Tasmania Branch

The Australian Workers' Union in Tasmania is a general union representing the industrial interests of Blue Collar employees across a broad range of industries. Approximately 2'500 workers are active members of the Union. Approximately 70% of the union's members and those eligible to be members are regulated by the Tasmanian State Industrial jurisdiction, with the remaining 30% being regulated by the Commonwealth Jurisdiction. The Tasmania Branch is a respondent to 27 State Awards, and 25 Commonwealth Awards, which have application to Tasmania. The industries which have higher union membership density include:

- Metalliferous Mining and Mineral Processing, including smelters;
- Forestry, including silviculture;
- Infrastructure Construction, Construction Materials and Road Maintenance;
- Food Processing, including Fish, Aquaculture and Marine Products, The making of Milk, Cheese and Butter; Poultry Meat Processing,

- Horse Racing Industry, including the formation and maintenance of tracks and grounds
- Horticulturists
- Shearers, Shed Hands, Wool Pressers and Wool Classes.

The regulation of members in terms of State verses Commonwealth regulation in those industries is as follows:

Industry	State	**Commonwealth**
Metalliferous Mining and Processing	70%	30%
Smelters	85%	15%
Forestry	60%	40%
Infrastructure Construction	20%	80%
Construction Materials	50%	50%
Road Maintenance	10%	90%
Food Processing Fish, Aquaculture and Marine Products **Milk, Cheese, Butter** **C. Poultry Meat**	 100% 100% 100%	
Horse Racing Industry	80%	20%
Horticulturalists	80%	20%

Shearers, Shedhands, Woolpressers, Woolclassers (endeavouring to move to 100% State)		100%

LABOUR INTENSIVE AND CONTRACTING INDUSTRIES

The Tasmania Branch is particularly concerned about changing the no disadvantage test against the award to the proposed Fair Pay and Conditions Standard. This concern is best illustrated by the circumstances of our members engaged by Shearing Contractors and Silviculture Contractors.

Silviculture Contractors

There are approximately 20 Silviculture Contractors in Tasmania. The size of those businesses vary from small family businesses with 1 or 2 employees up to businesses which engage 70 to 80 employees. The silviculture contractors provide services such as planting, pruning, fertilising, and spraying to forestry companies such as Gunns, Forest Enterprises Australia, and Forestry Tasmania. The employment is regulated by a State Award known as the Silviculture and Afforestation Industry Award. The predominant level in the Award that covers the majority of work performed is Grade 2. The current award rate is $593.85 per week (15.62 per hour). If just one contractor applies the proposed new FPCS to an AWA as a condition of obtaining employment the effect is that the contractor will engage labour at $484.50 per week

[the minimum rate under FPCS] compared to the award rate of $593.85, a difference of $109.35 per 38 hour week, per employee. In a labour intensive industry a 18.5% reduction in the cost of labour for the contractor, will provide that contractor with a significant advantage over the other contractors. In the face of loosing work to the contractor who has applied the FPCS, other contractors will be compelled to do the same in order to remain competitive. The outcome ultimately is that large businesses such as Gunns, Forest Enterprises Australia and Forestry Tasmania achieve a significant cost reduction in the silvicultural aspects of their business at the direct cost to the employees who perform the work. The work is hard physically arduous and supports the livelihoods of approximately 300 people who live in regional Tasmania. Those employees and their families in the marginal seats of Braddon and Bass who depend on silviculture for their livelihoods will not forgive a government that reduces their already modest earnings by 18.5%.

Shearing Contractors

Like silviculture contractors, the shearing contractors rely upon the award to set rates of pay and labour costs. The effect of award reliance is to ensure a level playing field. There are approximately 9 shearing contractors in Tasmania who employ a total of approximately 300 employees in the shearing industry.

Like silviculture contractors it will take only 1 shearing contractor to apply the FPCS to their workforce, and the other contractors will be compelled to follow suit in order to remain competitive. Shearers are paid piece rates based on a formula which assumes the average shearer will shear 500 sheep per week. The Award weekly total for casual piecework shearer with own hand piece is $1049.54. Applying the proposed minium rate of $484.50 and assuming a casual loading of 20% the FPCS results in a rate of $581.40 per week. This means a shearer can loose $468.14 per week, a reduction of earning by 44%. The effect on shedhands, woolpressers and woolclasses is equally dramatic. Again these employees and their families who depend on the current level of earnings live in regional Tasmania. The proposed new system operates to the advantage of woolgrowers at direct expense of those that perform the physically arduous work.

Effect of Illustration

Silviculture and shearing are only two examples of the many labour intensive and contracting industries which operate in Tasmania and Australia. All labour intensive and contracting industries will be faced with the same competitive pressures, as silviculture and shearing contractors if the proposed new system is

implemented. For example in these industries a real reduction in actual earning is a very likely outcome of the proposed new system.

COMPULSORY ARBITRATION

The Tasmania Branch is a strong proponent of the rule of law in industrial relations. The inability of an independent umpire to impose outcomes on parties in dispute, undermines the integrity of the rule of law in Industrial Relations. The Tasmania Branch believes that the proposed s113 is too narrow in its application and should be expanded to include a new 113(c) as follows:

> *"(c) on the ground set out in subsection 107J"*

In addition the Union believes that the proposed 107(3)(b) should read

> *"(b) that industrial action is adversely affecting or would adversely effect the employer or employees of the employer; <u>or</u>"* (underlining added)

In its current form s107G(3)(b) by ending with the word "and" rather than "or" is too restrictive. By adding the word "or" the capacity for orderly resolution of industrial action is broadened.

The Branch urges the committee of inquiry to recommend those relatively modest amendments proposed above.

In addition Division 8 – Workplace determinations is too restrictive in that it requires the involvement of a Full Bench at first instance. The Tasmania Branch believes such an approach is not practical. Accordingly we believe the following amendments should be made:

113C(2) delete current proposed and insert the following:

"The workplace determination can be made by a single member of the Commission".

113C(3) delete reference to "*full bench"* and insert in lieu thereof the words *"Commission".*

113D(1) delete reference to "*full bench"* and insert in lieu thereof the words *"Commission".*

113D(5) delete reference to "*full bench"* and insert in lieu thereof the words *"Commission".*

113D(5)(i) delete current provisions and insert (i) any other factors considered relevant by the Commission"

113D(6) at the end of the proposed provisions *insert "unless the parties have agreed to the Commission inserting into the workplace determination an alternative dispute resolution process"*.

113D(5) insert a new 113D(5)(j) as follows:

"(j) any matters agreed between the parties"

113D(5) insert a new 113D(5)(k) as follows:

"(k) movements in wages and earnings in the community"

176N(2) insert at the end of the proposed provision:

"unless the workplace agreement provides otherwise"

176I(5) Delete the proposed provision and insert in lieu thereof the following:

"The Commission does have power to do any of the things mentioned in subsection (4) if existing workplace agreement authorises it to do so".

The Tasmania Branch submits that protracted industrial action results in hardship and economic loss for both employer and employees alike. In its current form the Bill does not have a practical approach to the resolution of industrial action. The amendments proposed above maintain the thrust of the Bill's intention but amend it to provide practical mechanisms to resolve disputes and industrial action in an orderly manner. The Tasmania Branch submits that such an approach is the best interest of employees, employers, and the community at large, and urges the Committee to recommend the amendments to the Bill proposed above.

DEMARCATION PROVISION

A significant feature of the proposed Bill is that previously State registered unions may obtain interim federal registration. The practical effect of this is to substantially move state registered organisations into the federal sphere. Each of the State jurisdictions contain a mechanism for ensuring that where there is a competing claim by employee organisations for representational rights of a particular class of employees, an orderly process is available to resolve those competing claims. Given that the

Commonwealth is now seeking to cover the field occupied by those State jurisdictions the Tasmania Branch believes there should be a balance struck between the objectives of the Bill as it relates to freedom of association, and the traditional demarcation provisions and mechanisms found in the State jurisdiction. The Tasmania Branch believes that if the proposed Bill is to go forward to enactment the Bill 118A of the current Act and replacing it with a provision similar to s294(2) of the *Industrial Relations Act 1996* (NSW).

Such an approach balances the right for an employee to join a union with the traditional mechanism for ensuring that the orderly conduct of industrial relations is not compromised by more than one organisation of employees attempting to represent the industrial interests of the same class of persons. In summary such an approach balances the right to join a union whilst preserving the integrity of the "Conveniently Belong" rule, which is a significant aspect of employee organisation registrations.

VALIDITY OF THE BILL

The Tasmania Branch is concerned that the proposed Bill may not in fact be valid. If in fact it is determined by the High Court that the Bill (upon enactment) is invalid then a great deal of uncertainty by

employers and employees will occur about their respective rights and obligations. Underpinning the concern about the Bill's validity is that it appears to be based on s51(xx) of the Constitution and employment law was considered by the Full Court of the High Court of Australia in *Dingjan and Ors Exparte Wagner and Another (1995)* 183 CLR 323. At paragraph 8 of his Decision McHugh J discussed that relationship in the following manner;

> *"Thus a law that sough to regulate the remuneration of employment contracts made by financial analysts would not be a law with respect to s51(xx) corporations even if the work of the analyst was entirely based upon the business activities of corporations. Laws that seek to regulate such contracts are laws with respect to employment contracts, but they are not laws with respect to corporations"*

In addition given that the effect of the proposed enactment would be to substantially override the operation of State Industrial Systems, the Tasmania Branch is concerned that such proposal is unconstitutional, as 51(xxxv) specifically restricts the Commonwealth to *"(xxxv) conciliation and arbitration for the*

prevention and settlement of industrial disputes extending beyond the limits of any one state."

Attachment E

Submissions of
The Australian Workers' Union,
West Australian Branch

Authorised by
Tim Daly
West Australian Branch Secretary

The Australian Workers' Union West Australian Branch Industrial Union of Workers is an industrial union of workers registered with the West Australian Industrial Relations Commission.

The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA. is also an industrial union of workers registered with the West Australian Industrial Relations Commission.

The above two unions though separately registered in the W.A. Commission, combined act as the West Australian Branch of the Australian Workers Union.

The Industrial Relations Act 1979 (the State Act) contains very strong provisions which are written to minimise the prospect or opportunity for demarcation disputes or disputes over overlapping coverage of membership between unions.

The relevant provisions are found at Section 55 of the Act, particularly sub-section (5) of Section 55, which prohibits the registration of new unions or the extension of the eligibility for membership rule of unions where such registration or extension of the eligibility rule will lead to overlapping of coverage unless there is good reason in the view of the Full Bench of the Commission to do so.

Sub section (5) of Section 55 of the West Australian Act states:

"Notwithstanding that an organisation complies with section 53(1) OR 54(1), THE Full Bench shall refuse an application by the organisation under this section if a registered organisation whose rules relating to membership enable it to enrol as a member some or all of the persons eligible, pursuant to the rules of the first-mentioned organisation unless the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in section 6, to permit registration."

Both the Australian Workers' Union West Australian Branch Industrial Union of Workers and the Forest Products Furnishing and Allied Industries Industrial Union of Workers, W.A. has wider eligibility for membership rules in some respects than the counterpart federal body, the Australian Workers Union West Australian Branch.

It is vital in considering the proposed changes to the Act that the Unions' eligibility rules are maintained. A failure to do so will lead to competition for membership, confusion among workers and industrial unrest.

The situation is further complicated in relation to the Timber Industry in W.A.

The AWU, The Forest Products Furnishing and Allied Industries Industrial Union of Workers and the CFMEU have coverage of the timber industry in W.A.

The eligibility for membership in the State jurisdiction has been well served by the separation between the CFMEU representing workers within 45 kilometres of the Perth GPO and the AWU and FPFAIIU representing workers in the South West Land Division.

It should also be noted that in W.A. that the AWU has coverage of the Metal Industry on a national basis. However the Metal Industry Award does not apply in W.A. This has avoided competition for coverage in a significant industry for the state.

There have been good historical reasons for the divisions of eligibility for membership in the State.

Workers in the Furniture and Timber Industries in W.A. consciously determined to link themselves to the AWU rather than the CFMEU in 1991.
The views and wishes of these workers should be respected.

The Union has been extremely active in all areas of industry involvement including the negotiation of enterprise bargaining agreements, training issues and occupational health and safety issues. The vast majority of employees in the timber industry's conditions of employment are determined by enterprise agreements negotiated with employers.

The Forest Products Furnishing and Allied Industries Industrial Union of Workers WA have exclusive coverage of the furniture, cabinet making and soft furnishings industry in Western Australia. This is a small industry in WA which has worked hard to grow and develop in the face of increasing competition.

It would be unhelpful to allow for competition for membership in an industry that has been well served by the current arrangements for over a century.

I strongly recommend that any changes to the Act allow for the historical coverage in state unions be allowed to be absorbed into their federal counterpart federal body.

A failure to do so will raise the very strong likelihood of competition for membership; inter union disputes and confusion among workers.

This is the very good reason Section 55(5) was placed into the State act in the first place.