Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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Submission to the Inquiry by the Senate Employment, Workplace Relations and Education Legislation Committee into the *Workplace Relations Amendment (Work Choices) Bill 2005* ("the Bill").

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CONTENTS

This submission by Australian Business Industrial addresses the inquiry being conducted by the Senate Employment, Workplace Relations and Education Legislation Committee into the *Workplace Relations Amendment (Work Choices) Bill 2005* ("the Bill").

Australian Business Industrial ("ABI") is a state organisation of employers, registered under the *Industrial Relations Act 1996* (NSW) ("the NSW state Act"), and approved as a peak council for employers under that Act. ABI is the industrial successor to the former Chamber of Manufactures of New South Wales. It participates and represents members in both the NSW and federal industrial systems, and it has done so for many decades.

This submission addresses a number of aspects of the Bill having regard to the committee's terms of reference.

THE CLIMATE

No recent workplace legislation has attracted as much attention and debate as the Bill, starting from the Prime Minister's announcement on 26 May. One would have to return to 1995-96 and the *Workplace Relations and Other Legislation Amendment Bill 1996* for a comparable level of attention and debate, and before that, perhaps the (then) Prime Minister's 1992 speech to the Institute of Company Directors.

This public attention can be seen as the normal and proper playing out of the democratic process but it provides a difficult climate. It is not unusual for the parliament to have to assess the case for legislative reform and make its decisions about possible change against the background of community concern, but not all concern is well informed, and such concern does not always assist balanced decision making.

In the case of workplace relations the public voice can often be louder. There is the added complication of sectional interests which are parties to the established system. Change brings winners and losers and this plays out all the time. However, a change to the rules confronts system players with the challenge of significant change for them. They are confronted with an imperative to alter or to lose relevance.

Yet on any measure the decentralisation of workplace regulation has been associated with positive outcomes. Viewed from the perspective of real wages, employment, productivity growth or levels of disputation Australia has been doing better over a period where workplace bargaining has increasingly determined local conditions.

Apart from the capacity under workplace bargaining to tailor local arrangements to business needs, it is also important because of the greater diversity of the labour force. Not only has the labour force diversified since the eighties but demographic shifts mean that there is a significantly greater range of needs and aspirations amongst those in the workforce. Encouraging employers and employees to develop appropriate local and individual arrangements to suit particular needs and wants increases the likelihood of best fit and maximises individuals' ability to participate in the labour force.

Higher participation rates mean better economic growth and greater social inclusion for individuals. Growing Australia's economic wealth underpins the prosperity of individuals and families. There is no other sustainable way to do this.

Public debate is also not assisted by the size of the Bill. On any view the Bill is large and detailed. Much of this complexity arises from the Bill's transitional provisions, rather than the provisions dealing with the operation of the *WorkChoices* system. Some complexity and detail is attributable to the fact that a number of states have not referred industrial power.

A NATIONAL SYSTEM

If the nation of Australia were inventing a workplace relations system today the case against a single national system of workplace relations would seem unarguable. It would seem impossible to justify on the basis of equity, efficiency or logic different employment and termination rights, different minimum wages, even different records keeping requirements because of accidents of jurisdiction.

Of course, Australia is not in that happy position. Its workplace relations system, itself comprised of several different systems, is the product of a nation grown from a colonial start. This makes a national system harder to establish and means that the new system must be built on the old, but it does not change the logic of why there should be a single system.

The operation of federal powers in the context of state powers differs for different areas of subject matter.

For example, occupational health and safety legislation is primarily state regulated and applies throughout a state except where displaced by commonwealth legislation (generally applying only to its own activities). Federal and state OHS legislation does not generally apply jointly or concurrently in the same workplace. Thus there are differences between the states, but within the state, with some federal exceptions (and some special industries) there is consistency of law within all workplaces.

The same generally applies for workers' compensation legislation. Nonetheless there are moves for greater consistency of safety/rehabilitation legislation between jurisdictions based on national efficiency and equity.

The situation is not so clear cut with equal opportunity legislation. In this area there is generally concurrent operation of federal and state legislation (subject to exemptions within each law) within single workplaces. Thus there are differences between workplaces in different states but not generally significant differences within single workplaces or within states.

In the case of workplace relations legislation there is joint, but not generally concurrent, operation of federal and state law. Thus, there are not only differences between states and within states but also within workplaces. There is virtually no private sector workplace in the non-consenting states that does not have employees differently impacted by the operation of federal and state workplace relations systems in that workplace.

Yet workplace relations legislation and instruments made under it are extremely detailed and pervasive. They assign rights, obligations and duties and condition the day to day organisation of work within the establishment.

WAGE SETTING

The Bill proposes to alter the current method of wage fixing in awards.

Currently award wages are varied by the AIRC, following applications to increase the wage safety net. These wage setting powers are found at Division 1, "Functions of the Commission generally", of Part VI, "Dispute Prevention and Settlement", of the Act.

Although circumscribed by objects specific to the Part and by statutory matters which the AIRC must consider, the AIRC's safety net wage fixation process (which gives rise to "Arbitrated Safety Net Adjustments") is rooted in the AIRC's dispute settlement function.

This is not a symbolic comment.

Indeed, ABI's own processes when a claim is lodged are instructive. Council determines a position in response to the claim. It discusses such matters as economic conditions, the need to avoid discouraging bargaining and the industrial circumstances of the claim to determine what amount of increase or whether an increase should be supported. In this way the ACTU's industrial claim is met by ABI's industrial response.

The AIRC's primary function is to prevent and settle industrial disputes so far as possible by conciliation, or by arbitration. In the case of wage setting conciliation is unsuccessful, although conciliation is, and has been, successful in developing wage fixation principles. (The principles are restrictions on the dispute settlement function applied to wage claims outside the generally arbitrated outcomes).

Safety net wage arbitration proceeds on the basis of claim and counter-claim requiring the AIRC's considered settlement. Expert evidence is subject to cross-examination and the capacity of skilful advocates to trip up the opponent's witness.

Then it is the turn of the states.

In NSW the *Industrial Relations Act 1966* (NSW) requires the IRCNSW to consider the national decision and to adopt the federal decision's principles or provisions unless satisfied that they are not consistent with the objects of the NSW state Act or that there are other good reasons not to.

ABI Council considers the federal decision and whether to support adoption of the federal increases and principles, or more correctly, whether to adopt any changes made to the federal principles. In the mid-nineties ABI adopted the policy that it should strive for uniformity of outcome unless there were exceptional reasons to not do so. However, this is not the approach of all industrial parties in the system.

The result of the different statutory constraints (and the processes arising) is that "flow" of the federal increases and principles is not guaranteed. In each state there are differences in the principles, and often in the timing of increases. These differences in wage fixing principles are not confined to compensating for differences between the *Workplace Relations Act 1996* and the particular state Act so as to bring about a uniform set of outcomes from the two sets of principles.

ABI Council and ABI members have become increasingly frustrated with the system of "minimum wages policy by dispute resolution" and the kaleidoscope of sectional wage adjustments. It and they support the move to a single minimum wage system and fixation by experts who would consider minimum wages from a broader perspective and away from the considerations and processes of dispute settlement. The capacity of the Australian Fair Pay Commission ("AFPC") to commission research, seek expert assistance and evaluate the impact of its decisions and the requirement on the AFPC to promote public understanding of matters relevant to its wage fixing functions are welcomed.

The principle of the Australian Pay and Classification Scales ("APCS") is also welcomed. The confusion and technical detail of the current myriad of classification definitions and rates means there is little transparency. Many employers and employees do not know the relevant award rates, nor the circumstances under which an award, or which of a federal or state award, applies.

A nationally consistent classification structure subject to a single review process can only assist transparency. Employers and employees and are both benefited by known minimum standards and so are their dealings with each other.

The transitional processes are complex. This is because of the Bill seeks to provide minima for a diversity of different employment circumstances. The Bill starts from the base of the current award wage.

The APCS starting point is the employee's current federal award classification and rate, or piece rate. Employees under federal agreements retain their agreement classifications and wages until it is replaced or terminated. Employees under state awards retain their current classifications and rates, as do those under state agreements. These classifications and rates are preserved as the employee's initial APCS.

Finally, the proposed Federal Minimum Wage ("FMW") commencing at $12.75 per hour (the current federal minimum adult wage) applies as a floor for those not under these preserved APCS rates.

AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD

ABI supports the concept of single statutory minima. Multiple standards operate to obscure what actual entitlements individual employees and employers have. Under the proposed Australian Fair Pay and Conditions Standard ("AFP&CS") universal maximum weekly ordinary hours and minimum annual leave, personal/carer's leave and parental leave standards would apply.

One intention of the AFP&CS is to remove these conditions (excepting maximum ordinary hours) from awards so as to provide single national minimum standards which provide a floor to negotiated arrangements. In some cases existing award standards will continue because they are more generous. This is supported.

The hours standard provides for a standard average 38 hour week. Whilst this is a widespread standard in awards, it is not universal. There are many employees who do not have prescribed

ordinary hours. Employees outside the award system do not usually have externally prescribed hours but this is also true of some award employees.

Not all awards are average 38 hour awards. Indeed, in NSW, the state Act provides that awards can be made with a maximum of 40 hours ordinary time averaged over 12 weeks or 1 year for seasonal work. (Until a recent amendment in Queensland, commencing 1 September 2005, that state Act also provided that awards could provide up to 40 ordinary hours per week).

The proposed annual leave minimum standard has two aspects attracting comment. First it provides an additional 1/52nd per annum for 7 day continuous shift workers who are regularly rostered to work Sundays or public holidays. ABI understands that component of the standard to apply to the existing award standard for continuous shift industries.

Second, the hours standard provides for cashing out of up to 2 weeks' annual leave in any one year. The capacity to cash out annual leave (and long service leave) is not new and already exists in some state Acts. Cashing-out is also found in certified agreements, including union certified agreements, as well as AWAs. The proposed cashing-out standard is subject to a workplace agreement and requires the employee to request cashing-out in writing.

The personal/carer's leave standard provides 10 days' accrual of personal leave per annum and uncapped accumulation of untaken accrued leave. This standard is a considerable advance on many existing award standards. In NSW the state Act requires that awards contain a minimum sick leave standard of not less than one week on full pay and accumulation of untaken entitlements for three years. Most, if not all, awards provide in excess of this minimum but there is a widespread standard of 5 days' in the first year of service and eight days thereafter in both state and federal awards

Up to 10 days' personal/carer's leave per annum may be taken for caring purposes and there is an entitlement to additional unpaid carer's leave for unexpected emergency, illness or injury of a family or household member on a per occasion basis. This is a new federal standard arising out of the AIRC's recent *Family Provisions* decision, but not yet generally in awards.

Compassionate leave is a separate minimum of 2 days' paid leave per occasion. The separation of compassionate leave from personal/carer's leave is welcomed and, this, too, emerged from the *Family Provisions* decision. Compassionate leave has a wider reach than the more usual entitlement to bereavement leave.

On any reading the proposed personal/carer's leave minimum standard is generous and represents a considerable increase to the minimum entitlement currently applying to many employers and employees. It is clearly aimed at providing an enhanced capacity for employees with family demands to reconcile these with their work demands. The policy objective of helping household members to maximise their participation in the labour force is supported.

Broadly, the proposed parental leave standard replicates the current standard. The most significant difference is that the current federal standard applies where there are lesser standards either in state entitlements or awards. The result is a quite complicated

jurisdictional interaction. The new standard, because of its direct application, will overcome this complication, and this is welcomed. More generous award entitlements will remain.

BARGAINING AND RELATIONSHIPS BETWEEN INSTRUMENTS

The Bill provides for a simplified bargaining and approval process. Except in the case of greenfields agreements employees must approve an agreement applying to them. This is the case under the current Act although the new provisions make employee agreement clearer and more certain. Under some state Acts it is not always the case that employees must approve a union collective agreement applying to them.

The proposed bargaining regime makes better provisions for employees to be informed about their rights and conditions when bargaining. This is because of both the requirement to provide prescribed information and access to advice and also because of the move towards single national minimum standards under the AFP&CS.

The Bill proposes to provide a maximum nominal life for greenfields agreements of 1 year. Currently greenfields agreements are treated in the same way as other agreements, that is, they may have a life of up to 3 years. ABI does not support this departure. If the reason for treating the nominal life of greenfields agreements differently from other agreements arises from the introduction of employer greenfields agreements, then ABI submits that these new greenfields agreements could be differently treated, rather than all greenfields agreements being given a nominal 1 year life.

Of particular concern is the implication of 1 year agreements for projects such as social and economic infrastructure construction and factory/plant construction or expansion. Large projects of this kind inevitably involve unions, and unlike ongoing operations which have to adjust their running costs as they continue, the size and certainty of the initial capital investment is an important determinant of the investment decision. One year agreements can only encourage the development of short-termism identified by the Building Industry Royal Commission.

ABI submits that the Bill should at least provide for greenfields project agreements which operate for the life of the project subject to a maximum of 5 years.

The Bill provides a new process of unilateral termination of a workplace agreement made under the post-commencement Act. A party to a collective agreement or AWA can, after its expiry, give a minimum of 90 days' notice to the other party or parties, and, if the employer, this may be accompanied by any undertakings about conditions applying following the agreement's termination.

Termination of expired agreements, as opposed to their replacement by another agreement, is not widespread. In the case of certified agreements, where this occurs, termination is typically accompanied by undertakings. Undertakings continue until replaced by a workplace agreement or AWA. In any case 90 days' notice provides sufficient time for the employee or employees concerned to obtain advice and to negotiate a new agreement should they wish. 90 days is consistent with similar notice periods elsewhere (for example, three months' notice is required under the NSW state Act an can be given prior to the agreement's nominal expiry date).

The Bill proposes that only one agreement can apply to an employee at any one time. This means that parties must consider what arrangements they wish applying to the relationship when they enter into agreements, although they can achieve this in part by calling up existing conditions within relevant instruments.

That requirement, and the capacity given employees to enter agreements at any time so as to address their particular needs, are welcomed. It is timely recognition that not all employees within a workplace are the same.

TRANSITIONAL PROVISIONS

The Bill introduces, so far as the federal Parliament is able without the assistance of some states, a single uniform national workplace relations system. This is a major undertaking and a major achievement. Such an undertaking cannot but disturb existing arrangements and this would be so, whether or not the Parliament was able to use referred state power.

The transitional arrangements are complicated, but are properly understood as not disturbing current employment arrangements by the introduction of the legislation. Rather, the *status quo* is generally retained and workplace parties are given time to ease themselves into the new system.

Agreements made under state Acts ("preserved state agreements") are treated as agreements under the national system. State awards generally apply on a common rule basis and many employers currently employing under federal awards and those who will be covered by the national system have employees employed under state awards. These state awards ("notional agreements preserving state awards") will be treated similarly to

federal awards under the national system. The range of conditions provided by such awards and "state industrial law" are subject to the AFP&CS, (excepting hours which remain those provided by the state award until it is replaced). Conditions in notional agreements preserving state awards can be called up into a workplace agreement which replaces the notional agreement.

The opportunity to move significantly towards a single integrated national workplace relations system which supports and encourages workplace parties to modify conditions to suit their needs and individuals to organise their work to best suit their needs in the context of the business' needs should not be lost. Nor should the benefits.