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Submission

To

Senate Employment, Workplace Relations and Education
Legislation Committee

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

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1. Preliminary

The Workplace Relations Amendment (Work Choices) Bill 2005 ['Work Choices'] is 687 pages long, and the accompanying explanatory memorandum is 565, totalling 1252 pages. Work Choices was publicly released on 2nd November 2005. An inquiry by the Employment, Workplace Relations & Education Legislative Committee [the 'Committee'] is to be concluded by 22nd November 2005.

The closing date for submissions to this inquiry is 9th November 2005.

Work Choices is clearly a massive change to the Industrial Relations ['IR] framework of Australia and has been long promoted as such by the Federal Government. The Federal Government has also spent considerable money on advertising Work Choices to alleviate any concern in the general public and has condemned both the Opposition and the Union movement for 'scare mongering'.

It is completely at odds with the Federal Government's campaign in the lead up to the introduction of Work Choices to Parliament to:

a. only allow 7 days for the consideration of Work Choices and the preparation of a written submission.

b. to allow the Committee only 13 days to consider submissions, and 5 days of hearings.

c. not to carry out an information scheme to inform the public how they could comment also makes a mockery of the money spent on advertising Work Choices.

The restrictions imposed for the consideration of Work Choices in terms of time an as to content, as per the Senate motion of 12th October 2005, is a fundamental attack on the civil society and the democratic institutions of Australia.

We observe that the Bill did not have either a contents section or headers on pages, further restricting the ability to assess the contents.

We note that the government has stated that it will pay up to $4,000 for persons "unlawfully terminated". Given that the majority of employers employ under 100 people and that those employers are exempt from *unfair* dismissal provisions, this leaves only unlawful dismissal – something that it is already provided for under other Federal legislation and removed from this Bill in any event. Further, $4,000 is an inadequate sum of money to take a matter through a contested litigation event. This proposal for funding such matters is tokenistic.

As a general observation, this Bill has as part of its stated purpose increasing the productivity of Australia. We note that the existing Industrial Relations system has resulted in Australia having not only a strong economy at this point in time but also falling unemployment. No consideration has been given to providing "small business" with other incentives such as tax relief, as opposed to exemption from unfair dismissal. We further note that no consideration appears to have been given to the concept of "steady-state" economics, that a finite world cannot provide for infinite growth. We note that it would be morally, ethically and practically wrong for Australia to attempt to compete with industry in countries where there is little or nothing in the way of industrial laws, OH & S laws, environmental laws, and that Australia should be attempting to persuade such countries to introduce such laws. The proposed laws pander to a minority of Australians, not to the majority and, if passed, are an abnegation of the responsibilities of the elected representatives of a purportedly democratic society.

2. Restrictions and Presentation

Given the aforementioned time constraints this submission is necessarily limited. The ability to explore the intricacies and subtleties of Work Choices is curtailed and to consider ramifications is limited. Additionally we have made comment on unfair dismissal arrangements and the issue of right of entry. We have done this in a manner that enables them to be struck from our submission if the Committee so desires.

After our commentary on Work Choices we make recommendations.

Finally, we provide the background on our organisation.

3. Work Choices

a. s 3, p.17: definition of trade union includes an organisation of employees. Given the sweeping scope of the Bill with regard to unions, including rights of entry, representation etc., we are concerned about the broadness of the definition and its potential (mis) application;

b. s 7C, 7D, 7E pp 24-26 The exclusion of State and Territory Laws is clearly enunciated. We are concerned that:

   i. This will result in litigation concerning the Constitutional validity of the Bill;

   ii. The advertised purpose of this Bill is to remove 7 different IR systems and replace them with one. The exceptions will not do this.

c. Part IA, p 27 Australian Fair Pay Commission

   The Commission and directors are required to have a business and economics background. While the necessity for an understanding and influence from such perspective is understood, we are concerned that having such a mandated background for all such positions is very limiting in terms of the consideration of issues and outcomes. This biases against consideration of social factors such as those identified in the Henderson Poverty Report in the 1970's.

d. s 44L, p 51 Minister may cause a review of an award or order.

   We consider the ability of the Minister to directly intervene in awards

   i is potentially constitutionally invalid as infringing the separation of powers,

   ii is a lamentable direct interference with the role of the Australian Fair Pay Commission, the Workplace, arrangements between employers and employees and working Australia.

e. S 44, p 53

   We are concerned that this section

   i may be constitutionally invalid;

   ii detract from the balance between the States and the Commonwealth.

f s 44Q, p 54

An organisation, interested person or the Minister may apply for the revocation and suspension of awards and orders.

Our comments as for (d) above apply.

g s 83BC, p 58

Minister may give directions to the Employment Advocate

Our comments as for (d) above apply.

h. Part VA, p 65

Australian Fair Pay Commission Standard

We note that an AFPC decision is to override a Workplace Agreement or a Contract if the AFCP provides a better outcome.

We are concerned that 'better outcome' is not defined, nor are criteria set: arguably a 'better outcome' is simply retaining your job.

i. s 90G, p 76

hours worked means hours worked by employee that they were required to work.

We are concerned that the inherent ambiguity in this section – what is meant by required - will lead to litigation and unfair outcomes for employees, particularly those in a poor bargaining position by reason of their employment conditions, their background, their education, their financial circumstances.

j. s 90ZB, p 89
APCS not affected by State/Territory boundaries

We are concerned that this may have significant and unfortunate outcomes for both employers and employees. It is well recognised that pay rates are higher in the Eastern States, but this is associated with the higher cost of living in those States.

Imposing a uniform pay classification for the country will

i. Potentially raise the pay rate in some areas, causing a loss of employment or productivity,

ii Potentially lower the pay rate in other areas of Australia causing significant financial impact with attendant social problems eg family breakdown, with is common with financial stress.

k. s 91C, pp 101-102
the maximum ordinary hours of work are 38 hours per week plus reasonable additional hours.

Additional hours are not defined, only factors for consideration have been detailed.

We are concerned that

i. there is significant potential for employer abuse.

ii there are significant OH & S implications

iii if significant overtime is regularly required, then there is an employment opportunity for another individual being squandered.

iv O H & S issues result in work place accidents which result in Workcover, loss of productivity, family impacts and social consequence.

l. s 92 ZE, p 106
Entitlement to cash out annual leave.

We observe that annual leave is not just an opportunity for employees to 'do their own thing' but is also an OH & S issue,. We are therefore concerned about the lack of limitations on the ability to exercise this entitlement, which while it might be an employee desire, may not be prudent.

We are further concerned that the potential for employer abuse. We further note that leave needs to be allowed for by an employer and that this has implications for staffing levels.

m. s93A, p 109
This definition does not include same sex relationships. It is potentially a breach of Federal Discrimination Laws, and potentially has constitutional problems with existing State Legislation.

n. s94A, p 121
Parental Leave – as for (m) above.

s94D, p 126
an employees entitlement may be reduced by the amount of parental leave taken by the employee's spouse. An agreement between an employee and employer should not be affected by any other agreement between a separate employee/employer.

Further, we note that this is an unwarranted interference with workers. The arrangement between the employer and employee is exactly that, and indeed under this legislation it has been extensively emphasised.

o. s98A, p 170
Employees may waive ready access re Workplace Agreements.

This relates to the requirement that an employee have 7 days to consider a Workplace Agreement. Given the changes to the IR system and the place of importance of Workplace Agreements it is vitally important for due consideration to be given to such agreements and therefore we are concerned about the ability to waive such a right.

p. s 98c, p 170
Workplace Agreements approved by the employer and employee signing.

Under the existing system for Australian Workplace Agreements (AWA's) the Office of the Employee Advocate (OEA) is required to approve an AWA. The OEA can only do this if the AWA meets the 'no disadvantage test' ie, the AWA is at least equal to if not better than the employee's existing award. This has been a vital safeguard for employees. It is of significant concern then that:

i. There is no requirement for an independent body to approve Workplace Agreements,

Ii The 'no disadvantage' test has been removed.

q. s101G, p 181-183
Prohibited content of Workplace Agreements.

We note that the Employment Advocate may remove prohibited contents from a Workplace Agreement and that such content may be detailed by regulation. We are concerned that there is no requirement on the Employment Advocate to remove such content, nor is there an indication as to what that content might be.

r. s103, p 192
Termination of Agreement.

This may be done unilaterally by the employer. We are concerned that this can be done unilaterally.

s. s103M, p 199
In the event of the termination of a Workplace Agreement, the employer may made undertakings to employees about their conditions of employment.

We are concerned that this is an option only, having the potential to create significant uncertainty in an employee and in a Workplace.

t. s103R, p202
Consequences of termination of agreement application of other industrial instruments.

In such an event, awards and Workplace Agreements have no effect.

We are concerned about the potential for employee and Workplace uncertainty and a concomitant loss of productivity.

u. s116B p288
Matters not allowed in Awards

Effectively means that an internal transfer is a new job requir8ing a new negotiation. It also means that the implementation of this legislation will be accelerated.

The overall effect of the section means that employers can have a number of part time staff, thus creating competition between employees and thus diminishing an employees bargaining power.

The obligation of an employer to provide adequate training is diminished. Be removing restrictions on the engagement of independent contractors and labour hire staff, there is a further diminution of the bargaining power of employees.

We are disappointed with the removal of the default role of unions in a dispute process, removing an important protection.

We are concerned, that the Minister can exempt employees or employers from Awards.

v. s116E, p290
Right of Entry not to be included in an award.

We are concerned with the removal of the right of entry per se.

w. s116H, p 290

We are concerned about the provisions which allow an employer and employee to agree about how a term of an award is to operate and that this may cause a significant power imbalance and the loss for the employee of their rights and detrimental to OH & S.

x. ss 170AA & 170 AB, p 341
Meal breaks

S170AA specifies meal breaks, however, s170AB states that s170AA does not apply if there is a Workplace Agreement, award or prescribed industrial instrument. We are concerned for the potential for meal breaks to be waived by 'consent'

y. Additionally we are concerned with the exemption of unfair dismissal laws for small business. We are concerned about the restrictions placed on litigants in respect to decisions being made without a hearing. We are concerned with the broad scope of the basis for dismissal on 'operational grounds'.

RECOMMENDATIONS

1. That the time for submissions be extended.

2. That the inquiry be extended both in time and in scope. Significant changes require adequate consideration and consultation. Parliament exists for the people.

3. That the definition of a trade union remove 'an organisation of employees'.

4. That the mandated requirement for qualification/experience in business and economics for all the positions in the AFPC be reduced.

5. That direct Ministerial influence be removed.

6. That 'better outcome' (Part VA) be defined or refined.

7. That 'hours worked' be refined or defined.

8. That APCS consider State/Territory boundaries.

9. That a limit be imposed on the maximum number of hours worked.

10. That limits be imposed on the entitlement of an employee to cash out their annual leave.

11. That same sex relationships be recognised and included in definitions specifically with regard to personal leave, carers leave and parental leave.

12. That the ability of an employee to waive ready access with regard to a Workplace Agreement be removed, is no waiver.

13. That the Employee Advocate retain the ‘oversight’ function regarding Workplace Agreements, and that the ‘no disadvantage’ be retained.

14. That there be no right of unilateral termination of an Workplace Agreement.

15. That there be no exemption from laws relating to Unfair Dismissal for an employer regardless of its size.

16. That a realistic sum be provided for contesting breaches of the proposed legislation.

17. That alternative means be sought for assisting small business.

Northern Community Legal Service Incorporated

The Northern Community Legal Service Inc is a dynamic, community based organisation. It has a demonstrated record of delivering services to people in need effectively and in ensuring that the needs of these clients are recognised in appropriate venues.

Northern's vision is developmental in nature and operates from a philosophy that wherever possible clients are actively involved in the resolution of their difficulties and problems. The vision is to enhance service delivery through co-operative action in the promotion of justice and fair and equitable conflict resolution in the community.

The Community Legal Service was incorporated in 1989 as the Para Districts Community Legal Service and provides a range of services in the legal, financial counselling, employment and child support fields. Funding for these services has been granted by the Commonwealth and State Attorneys General, the Office of the Employment Advocate and the Commonwealth Department of Family and Community Services. Both paid staff and volunteers are involved in the provision of these services.

The organisation is run by an active voluntary Management Committee whose members bring to the Community Legal Service a valuable variety of skills and experience in government and the professions. The staff and volunteers are highly skilled and qualified and have a high level of commitment to the organisation. Their qualifications include law, social work, economics, public administration, social science, financial counselling and others.

Northern Community Legal Service has the vision, experience and drive to effectively and efficiently provide services to the people of the north.

Overview of CLC's in Australia

Community Legal Centres (CLC's) are independent non-profit organisations which establish their goals and priorities in response to the legal and related needs of the communities they serve.

CLC's primarily target their services to people who are ineligible for legal aid and who are unable to afford the services of a private lawyer. Centres aim to provide services to people who are Centrelink recipients, those on low incomes or those who have difficulty in accessing legal services, including people with disabilities, women, young people, aboriginal people and people from non-english speaking backgrounds.

The communities that each Centre services vary in terms of socio-economic and cultural factors, access to other legal services and elated welfare and government services, and the size and growth rate of the community.

Assistance is provided to about 500,000 people annually. Types of service provided vary across Centres and include:

- Advice and minor assistance including telephone and outreach services.
- Casework including assistance through telephone and outreach services.
- Community development

- Education and training services
- Legal and administrative reform at local, state and national levels, including the development of legislation.

There are three main types of Community Legal Centre:

1. Generalist CLC's
2. Specialist community CLC's, and
3. Specialist Law CLC's.

Generalist CLC's operate across a broad range of legal areas within a particular geographic community.

Specialist Community CLC's provide services to a particular community such as women, people with disabilities, children and young people, people with HIV/Aids and the Aged.

Specialist Law CLC's provide services in particular areas of Law such as Centrelink, Tenancy, Consumer Credit, Environmental Law, Disability Discrimination and Immigration Law. Many generalist centers incorporate specialist programmes and projects.

The development of Community Legal Centres and their services has traditionally grown out of community concern and activism about the well-being of particular groups whose legal needs are not adequately met.

Regular planning in CLC's include community members, staff, management and volunteers. These planning processes, together with community development strategies identify unmet needs within the CLC's constituent communities. In this way planning and ordering the priority of strategies to meet the communities needs best reflects the ideas and capacities of service deliverers and the ideas and needs of service recipients.

CLC's adopt a multi disciplinary holistic approach to the client whose needs may or may not be primarily legal. Many CLC's employ social workers, tenancy workers, domestic violence workers and community legal educators in offering a broad range of preventative legal services, such as community legal education and the development and provision of information. For example many CLC's train community and social workers in other government and community agencies in legal issues which are pertinent to their clients. CLC's produce a wide range of community legal education materials such as books, booklets, leaflets, information and teaching kits and audio and video programmes. They also contribute to television documentaries, current affairs and drama programmes.

CLC's value community involvement and consultation when planning their services.

Community Legal Services are community based and controlled organisations providing free accessible and easy to understand legal services to their communities. The communities of some centres are defined by reference to geographic boundaries, whilst other centres define their community by reference to community interest, mental health, tenancy, women, young people, refugee status and consumer issues.

The services provided by CLC's range from direct representation in Court, advice and negotiation, community legal education, publishing plain English guides to the law, conducting research into community legal issues through law reform

campaigns and policy work. The mix and extent of work conducted by CLC's in these service areas varies widely depending upon variables such as community need, level of funding, volunteer and staff expertise and changes in government policy.