Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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November 2005

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Introduction

The Local Government Association of NSW and the Shires Association of NSW (the Associations) oppose the proposed federal workplace reforms. Their reasons for doing so have been communicated to the Prime Minister and the Minister for Workplace Relations directly, and where relevant these reasons have been referred to in this submission.

In this submission, the Associations outline their concerns relating to provisions of the *Workplace Relations Amendment (Work Choices) Bill 2005* (the Bill) and associated transitional arrangements from the perspective of employer associations party to a significant industry award and operating largely in the NSW industrial jurisdiction.

It is the Associations' view that for NSW Local Government, the Bill will not simplify industrial relations. Further, the Associations and member councils are facing an uncertain and complex industrial environment that requires navigation of the provisions of the federal government's "WorkChoices" document, the Bill and its Explanatory Memorandum, yet to be promulgated regulations and the outcomes of award simplification and review processes. The Associations note scope of this Inquiry will not include the operation of the Award Review Taskforce, award simplification and variation to unfair dismissals and hence, this submission will not address the Associations' concerns in respect of these matters.

Local Government in New South Wales

1. New South Wales Local Government is a $6 billion industry. In 2004 councils employed 51,600 people[1] and managed infrastructure assets worth $55 billion[2]. The total income in each council ranges from $4.1million to $185million per anum.

2. The challenges outlined in this submission reflect the perspective and concerns of one of the single largest employers within metropolitan, rural and regional NSW.

3. Currently there are 152 general purpose councils in NSW and 14 special purpose county councils (with functions such as noxious weed control, flood mitigation and water supply).

4. Pursuant to section 220 of the *Local Government Act 1993* (NSW), councils are bodies corporate with responsibilities to:

    - provide goods, services and facilities, and to carry out activities appropriate to the current and future needs of local communities and the wider public;
    - provide administration for some regulatory systems under the *Local Government Act 1993* (NSW);
    - provide a role in the management, improvement and development of the resources of their area; and
    - have regard to the principles of ecological sustainable development in carrying out their functions.

5. Under the *Local Government Act 1993* (NSW), a council's charter must have regard to:

    - community leadership,
    - multiculturalism,
    - planning and providing for the needs of children,
    - management, development, restoration and conservation of the area's environment,
    - the long term and cumulative effect of decisions,
    - trusteeship of public assets,
    - facilitating stakeholder's involvement in the improvement and co-ordination of local government,
    - exercising regulatory functions without bias,
    - informing the community and State Government about council activities, and
    - being a responsible employer.

[1] Australian Bureau of Statistics, *Employed Wage and Salary Earners, Australia: Original Series*, cat. No. 6248.0,various issues.

[2] Department of Local Government, *Structural Reform of Local Government in New South Wales*, September 2004.

6. Under Chapter 6 of the *Local Government Act 1993* (NSW), a council may choose to involve itself in the provision, management or operation of the following service functions: community services; public health services; cultural, educational and information services; sporting, recreational and entertainment services; environment conservation, protection and improvement; waste removal, treatment and disposal; pest eradication and control; energy production, supply and conservation; water, sewerage and drainage; fire prevention, protection and mitigation; land and property development; housing; industry development and assistance; and tourism development and assistance.

7. Under Chapter 7 of the *Local Government Act 1993* (NSW), councils are required to exercise regulatory functions issuing approvals and orders.

8. Council employees in NSW undertake a large range of functions including:

    - accounting, audit and administration;
    - rates and valuation;
    - human resources;
    - town planning;
    - health and building;
    - community services and facilities;
    - recreation and cultural amenities;
    - public parks and reserves;
    - engineering, civil and technical works;
    - emergency services;
    - water supply and drainage;
    - libraries and library services;
    - property, plant and stores;
    - regulatory; and
    - waste collection and management.

Local Government Association of New South Wales and Shires Association of New South Wales

9. The Local Government Association of NSW was established in 1883 and primarily promotes the interests of urban councils. The Shires Association of NSW was established in 1908 to promote the interests of rural councils. The Local Government Association of NSW and Shires Association of NSW (the Associations) are registered as industrial organisations of employers pursuant to the provisions of section 294 of the *Industrial Relations Act 1996* (NSW).

10. The Associations support and represent local councils by providing many specialist services including industrial relations, legal and policy advice, specialist publications and industry purchasing discounts. Through their activities, the Associations also promote and publicise the views of local government.

11. The Associations' policies with respect to industrial relations and employment are as follows:

> "Change
>
> Local Government remains committed to securing the benefits of competition and reform for councils, their employees and the communities they serve at the industry and workplace levels. Local Government recognises that such change is best implemented through consultation and cooperation.
>
> Local Government supports the development of human resource management initiatives and practices to introduce and manage change. Councils are encouraged to develop and formalise employment arrangements specific to their needs through enterprise bargaining and workplace reform, reward for performance and skill and the adoption of best practice.
>
> Training
>
> Local Government will continue to participate in national training reform initiatives to ensure that development training and education has relevance to the needs of the industry. Councils are encouraged to develop training plans that demonstrate their commitment to education, training and skill development and that provide employees with reasonable and equitable access to training.
>
> Local Government supports the integration of language, literacy and numeracy (LLN) in training programs.
>
> Labour Market Programs
>
> Local Government supports the maintenance and development of job creation initiatives that suit the needs of the industry and that training and skills development are integral to such initiatives.
>
> The Good Employer
>
> Local Government supports and promotes equal opportunity for all employees. Councils are encouraged to develop policies and strategies that recognise their obligations and address employees' needs with respect to redeployment and redundancy, family responsibilities and harassment.
>
> Councils are encouraged to develop, in consultation with their employees, a systematic approach to managing occupational health and safety, reduction in the risk of workplace injuries and the promotion of injury management and occupational rehabilitation."

12. At their respective meetings in August 2005, the Associations' Executives resolved to express their opposition to the Federal Government's proposed workplace reforms on the following basis:

    (i) the complexity and legal nature of the proposed reforms;

    (ii) the limitation of the dispute resolution powers of the Australian Industrial Relations Commission (AIRC); and

    (iii) the potential that councils may be exposed to an array of claims in other jurisdictions.

13. Further, at its Annual Conference held in October 2005 , the Local Government Association of NSW (the LGA) resolved to express opposition to the following aspects of the proposed reforms:

    - the use of the corporations powers as the foundation of the workplace relations legislation. It is the view of the LGA that the proposed reforms will lead to uncertainty and additional cost due to their complex and legal nature;
    - the diminished role of the Australian Industrial Relations Commission (AIRC) under the reforms. Councils will not have the benefit of assistance from a third party experienced in employment related matters due to the limitations placed on the AIRC's dispute resolution powers. As a result, it is expected that councils will be exposed to an array of claims in non industrial jurisdictions – such as common law, anti discrimination and occupational, health and safety claims;
    - the use of Australian Workplace Agreements and their potential misuse. The LGA supports the right of Australian workers, such as those employed by Boeing Australia, at the RAAF Base at Williamstown, to choose a collective agreement and to be represented by a trade union if the workers decide that it is in their best interests. Individual employees with less bargaining power will enter into agreements with reduced real pay and conditions and where these agreements will not be subject to scrutiny by the AIRC;
    - council staff may be transferred from a state to a federal award, limited in its scope to the allowable matters;
    - there will be an end to skills based career structures, annual salary progression and the ability to improve wages to recognise changes in work value and pay equity;
    - loss of job security and an increase in the casualisation of the workforce;
    - protection from unfair dismissal will not be available to employees in workplaces where less than 100 employees are engaged.

Transitional arrangements for State organisations

14. The *Workplace Relations Amendment (Work Choices) Bill 2005* provides for a new Schedule 17 that will allow State registered employer associations to represent members who are moving into the federal system. To that end the observations made in this section are founded upon the assumption that the Associations' members are constitutional corporations and will be moving into the federal system.

15. A transitionally registered association would have three years to become registered under Schedule 1B of the *Workplace Relations Act 1996*. During the three year transitional period, the activities of the transitionally registered association would continue to be governed by the relevant State registration regime and not Schedule 1B of the federal Act.[3]

16. Save for Schedule 1B, the remaining provisions of the *Workplace Relations Act 1996* would apply to associations that are granted transitional registration. According to the Explanatory Memorandum[4] transitionally registered associations would be conferred the same rights and obligations as federally registered organisations.

17. The Associations express concern about the operation of clause 4 of the proposed Schedule 17. Clause 4 provides that regulations may be made enabling the AIRC to make orders in relation to the right of transitionally registered associations to represent the interests of particular classes or groups or employees.

18. The uncertainty caused by this proposed amendment stems from the fact that a transitionally registered association will have ongoing obligations in the State and Federal jurisdictions. In the absence of drafted regulations, the Associations remain unable to asses the impact of the regulations upon our operations, resources and structure.

19. The proposed clause 6(b) and (c) of Schedule 17 provides that an association's transitional registration would cease when the association is registered under Schedule 1B or alternatively three years after the commencement of Schedule 17.

20. As such to preserve their 'transitional' rights under the *Workplace Relations Act 1996* it is imperative that a transitionally registered association become an organisation that is registered under Schedule 1B.[5]

21. The Associations express concern that there may be difficulties associated with the registration of both Associations under Schedule 1B. On the reading of the Associations it appears that the proposed clause 7 of Schedule 17 may contradict the expectations and assurances afforded to the Associations in relation to the 'conveniently belong rule'.[6] It has been the expectation of the Associations that the 'conveniently belong rule' would not apply to transitionally registered associations seeking registration under Schedule 1B.

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[3] Explanatory Memorandum of the *Workplace Relations Amendment (Work Choices) Bill 2005*, at paragraph 3736.

[4] See paragraphs 3747 and 3748 of the EM.

[5] See paragraph 3761 of the EM.

[6] See *WorkChoices: A Workplace Relations System*, Commonwealth of Australia, 9 October 2005, page 48; and paragraphs 3762 & 3763 of the Explanatory Memorandum.

22. According to the Explanatory Memorandum[7] the intent of clause 7 is to provide regulations that would make it a criterion for registration that a transitionally registered association is not substantially or effectively the same as a federal organisation. The effect of the proposed regulations upon the Associations is akin to the 'conveniently belong rule' that the Government had promised would not apply in that only one Association will be able to be registered under Schedule 1B.

23. The Associations note that the uncertainty over whether councils in NSW can be viewed as 'constitutional corporations' may require that the Associations have dual registration in both the State and federal jurisdictions.

[7] See paragraph 3764 of the EM.

Constitutional Corporations

24. Section 4 of the *Workplace Relations Amendment (WorkChoices) Bill 2005* defines an Australian employer as:

> *(a) an employer that is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or*
>
> *(b) an employer that is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or*
>
> *(c) an employer that is the Commonwealth; or*
>
> *(d) an employer that is a Commonwealth authority; or*
>
> *(e) an employer that is a body corporate incorporated in a Territory; or*
>
> *(f) an employer that carries on in Australia, in Australia's exclusive economic zone or in, on or over Australia's continental shelf activities (whether of a commercial, governmental or other nature) whose central management and control is in Australia; or*
>
> *(g) an employer that is prescribed by the regulations for the purposes of this definition.*

25. While the Associations can with certainty observe that their members are not Australian employers through the operation of items (b) – (f) above, the same cannot be observed with respect to (a) and (g).

26. There is at present some conjecture as to whether all councils engage in trading activities and are as such constitutional corporations.

27. The Associations note that in *R v Trade Practices Tribunal; ex parte St George County Council (1973)*, 130 CLR 533 a majority of the High Court held that a county council, established under the then *Local Government Act 1919* (NSW) for local government purposes, was not a trading corporation. In this instance the High Court held that the activities of St George County Council were to supply and install electrical fittings

28. In this decision, *Menzies* J observed that the county council in question was a corporation for local government purposes. In fulfilling its local government function the High Court determined that the county council had defined trading powers. *Menzies* J went on to hold that while the councils of many municipalities engage in trade, they are not 'trading corporations'[8] and therefore not constitutional corporations.

29. While the *St George County Council* decision has not been directly overturned, the Associations note that subsequent case law has broadened the scope of the corporations' power so that the purpose for which a corporation is formed is no longer the sole or principal criterion of its character as a trading corporation.[9] Rather the character of an entity is to be ascertained by reference to its established activities. If trading is a substantial, as opposed to peripheral activity, then the corporation in question, under this 'broad' approach may be deemed to be a trading corporation.

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[8] *R v Trade Practices Tribunal; ex parte St George County Council (1973)*, 130 CLR 533 at 552 – 553.

[9] See *R v Federal Court of Australia; ex parte WA National Football League*, (1979) 143 CLR 190; *State Superannuation Board v Trade Practices Commission*, (1982) 150 CLR 282; *Commonwealth v Tasmania*, (1983) 158 CLR 1; *E v Australian Red Cross Society*, (1991) 27 FCR 310; *Re University of Wollongong (Academic Staff) Enterprise Agreement*, (1997) 74 IR 308; and *Burrows v Shire of Esperance*, (1998) 86 IR 75.

30. Given the precedent established by the *St George County Council* and that emerging case law has not clearly determined the level of trading activity required to characterise a trading corporation there appears to be an argument that some councils are not trading corporations and therefore not constitutional corporations.

31. This view is supported by the federal Minister for Local Government, Territories and Roads. In a press release dated 2 November 2005, the Honourable Jim Lloyd MP observed that:

> *"Councils may not come under the new system as they are not currently constitutional corporations which means that they will remain under the NSW system under their existing NSW award and there will be no change"*

32. It is the Associations' view that this would be an undesirable outcome. The operation of NSW Local Government in two separate industrial jurisdictions will mean that the *Workplace Relations Amendment (Work Choices) Bill 2005* fails to fulfil the objective outlined at section 3(b). That is, to establish and maintain a simplified national system of workplace relations.

33. Further, far from simplifying industrial relations for the Associations' members, the complexity and confusion that abounds in the question of whether councils are constitutional corporations is expected to generate litigation in the form of jurisdictional disputes.

History of regulation of terms and conditions of employment in local government

Current Award Regulation

34. There are three industry specific awards covering employees in NSW Local Government at the present time, viz:

    - *Local Government (State) Award 2004* (350 IG 471);
    - *Local Government Electricians (State) Award*, (291 IG 594);
    - *Local Government Engineers Senior Staff (NSW) Award 2005*, PR963000, (AW787459).

35. The *Local Government (State) Award 2004* (the 2004 Award) covers the vast majority of council employees undertaking the range of functions referred to in paragraph 8. Councils' senior staff, including general managers, as defined by section 332 of the *Local Government Act 1993 (NSW)*, are excluded from award coverage.

36. At the council level, conditions of employment are governed by the relevant award, council and/or enterprise agreements and in the case of senior staff as referred to above, contracts of employment.

History

37. In 1992, NSW Local Government commenced a comprehensive programme of Award Restructuring under the Structural Efficiency Principle of Wage Fixation. As a result, a number of classification based awards (containing over 400 classifications) were rationalised to form the *Local Government (State) Award 1992* (272 IG 696). The 2004 Award retains a single, skill based structure within which positions are broadbanded into levels according to six, generic skill descriptors. At the council level, positions are evaluated for placement in the award structure according to skills applied. This skill based structure removed impediments to multi skilling and progression and broadened the range of tasks that employees could be required to perform.

38. Excepting for trainees and apprentices, the 2004 Award establishes entry level rates of pay which are complemented by a salary system at the council level.

39. Further, conditions of employment (including hours and leave) and allowances have been rationalised with obsolete and discriminatory provisions removed.

40. NSW Local Government has expended considerable time and resources pursuing orderly industrial reform and improved productivity at the industry and council level. There is a strong desire to maintain the benefits that flow from having simplified and common employment conditions. The single and rationalised industry award provides a platform against which councils can review their operations and negotiate specific enterprise and council agreements when and if required.

Transitional treatment of State Awards and Award Rationalisation

41. The *Workplace Relations Amendment (Work Choices) Bill 2005* proposes to insert a new Schedule 15 into the principal Act.

42. The purpose of Schedule 15 is

> *"…to preserve for a time, certain terms and conditions of employment which apply to employers and employees and which arise under State or Territory industrial laws and State or Territory instruments that regulate terms and conditions of employment made under those laws,, as they were immediately prior to the reform commencement. These preserved terms would be contained in transitional instruments"*.[10]

43. Clause 31 of Schedule 15 provides that if the terms and conditions of employment of employees are regulated by a State award then a ***notional agreement preserving State awards*** is taken to come into operation on the reform commencement.

44. It is noted that a notional agreement preserving a State award will not operate as one distinct instrument that regulates different employers in a particular industry but rather between individual employers and their employees at the enterprise level.[11] Further, a notional agreement preserving a State award will not come into operation if any term or condition of an employee's employment with an employer is regulated by a State employment agreement at the reform commencement.[12] This approach represents a departure from long established arrangements in NSW Local Government where employment conditions have been regulated by an industry award underpinning enterprise or council agreements that provide for council specific conditions.

45. Notional agreements preserving State awards will, according to the proposed clause 33 of Schedule 15, cease to be in operation:

    (a) at the end of a period of three years beginning on the reform commencement;
    (b) if a workplace agreement comes into operation;
    (c) if an employee becomes bound by an award.

46. Clause 35(1) of Schedule 15 proposes that the terms of the *Local Government (State) Award 2004* would be taken to be terms of the notional agreement.

47. There are however some terms of the *Local Government (State) Award 2004* that will not transmit to the notional agreement. They are:

    (a) Those clauses of the current Award that make reference to the Industrial Relations Commission of New South Wales;[13]
    (b) The grievance and dispute resolution clause found at clause 30 of the current Award;[14]

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[10] Explanatory Memorandum of the *Workplace Relations Amendment (Work Choices) Bill 2005*, at paragraph 3373.
[11] Em at para 3443.
[12] See proposed clause 31(b) of Schedule 15 and EM at para 3446.
[13] See clause 36 of Schedule 15 of the *Workplace Relations Amendment (Work Choices) Bill 2005*.
[14] see clause 37.

(c) Any clauses that contain prohibited content of a prescribed kind;[15]

(d) The clause and table outlining the rates of pay in the current Award.[16]

48. The Associations express concern that the *Workplace Relations Amendment (Work Choices) Bill 2005* has failed to define prohibited content as it appears in the proposed clause 38 of Schedule 15. The proposed section 101D provides that the "*…regulations may specify matters that are* ***prohibited content*** *for the purposes of this Act.*" This approach creates uncertainty over which, if any, of the *Local Government (State) Award 2004* Award terms will not transmit to the notional agreement or which clauses may, pursuant to the proposed clause 42, be removed at the discretion of the Employment Advocate.

49. On the Associations' reading of the Bill, the terms of the *Local Government (State) Award 2004* that relate to the regulation and setting of wages will not be incorporated into the subsequent notional agreement. The Associations believe that this amendment will be problematic as the *Local Government (State) Award 2004* establishes increases in wages applied periodically over the life of the award. The next award instalment is due in November 2006. These increases were negotiated by the award parties in good faith, to reflect consideration of work value changes, productivity improvements, local government reform and community movements. The Associations' commitment to the scheduled increases to the minimum rates of pay prescribed by the *Local Government (State) Award 2004* remains unchanged. However, where rates of pay are not a feature of a notional agreement, the mechanism for implementing the increases at the council level remains unclear.

50. Further, the 2004 Award's provisions with respect to rates of pay has provided councils with a framework of fair entry level rates around which each council can design a single salary system to suit its specific organisation structure and budget the range of work undertaken and skills applied. The removal of this integral award provision will have a negative effect on councils' management of salary budgets during the transitional period and at least until there has been significant progress in settling the detail of the Fair Pay and Conditions Standards and the Award Rationalisation process.

51. The proposed section 90A provides that the new Australian Fair Pay Commission is to have regard to any relevant recommendations made by the Award Review Taskforce. The Associations note that this is the only reference to the Award Review Taskforce in the entire *Workplace Relations Amendment (Work Choices) Bill 2005*.

52. At paragraph 1675 of the Explanatory Memorandum to the Bill, it is explained that the Award Review Taskforce will make recommendations to the Government on how to rationalise awards:

- on an industry basis;
- to permit general coverage of employers and employees (and appropriate organisations of employers and employees) according to relevant industry sector based awards; and
- to address coverage of award free employers

53. The Associations express concern that guidelines about how the Award Review Taskforce is to operate and how it is to be advised have yet to be detailed.

54. As a party to a State award that covers the majority of employees and council workplaces in NSW, the Associations believe that a single federal award addressing the unique needs and experience of NSW Local Government is to be preferred.

[15] see clause 38.

[16] see clause 44 and the EM at para 3470.

55. To that end the Associations note that *Workplace Relations Amendment (Work Choices) Bill 2005* does not make provisions for the making of a federal award where an industry has been covered by a single State award.

56. It appears to the Associations that the only way that their preferred option of a single federal award covering councils in NSW can be pursued is through the Award Rationalisation process. That entails a recommendation of the Award Review Taskforce to the Minister who in turn pursuant to the proposed section 118(2) makes a request to the AIRC for the making of an award to give effect to the Award Rationalisation Process.

57. The Associations express concern that the legislation does not make explicit provisions for the involvement of interested parties, such as the Associations, to contribute to the Award Rationalisation Process.

58. The Associations would welcome the opportunity to make submissions to both the Award Review Taskforce and the Minister prior to the making of a request pursuant to the proposed section 118(2) for Award Rationalisation.

Federal Minimum Wage and the Australian Pay and Classification Scale

59. The Associations wish to express concern at the proposed section 90Q that sets the Federal Minimum Wage (FMW) at $12.75 per hour. The Associations assert that the FMW should be maintained and reviewed on an annual basis.

60. The Associations note that pursuant to the combined operation of sections 90W(2)(a) and 90ZD that a preserved Australian Pay and Classification Scale (APCS) will apply to the Associations' members.

61. The proposed section 90ZD provides that a pre-reform wage instrument such as a State Award that contains provisions determining rates of pay will from the reform commencement be taken to be a ***preserved APCS***.

62. An APCS is a set of provisions that relate to pay and loadings for employees [section 90W(1)]. Pursuant to the proposed section 90X an APCS must contain:

    - Rate provisions determining basic periodic rates of pay;
    - Provisions describing the relevant classifications; and
    - Coverage provisions

63. The proposed section 90X(3) provides that rate provisions in an APCS must not include provisions for automatic rate increases.

64. Once again the Associations note that the current *Local Government (State) Award 2004* provides for increases in wages applied periodically over the life of the Award. The next and final award instalment is due in November 2006. The Associations agreed to these in good faith and remain committed to them. Such increases in rates of pay cannot be guaranteed to existing local government employees, with the removal of the increases from the APCS.

65. The consistency and harmony achieved through a framework of fair entry level rates of pay that are consistent across all NSW councils as a result of the consolidation process undertaken by the stakeholders in 1992 will be undone.