Submission to the Inquiry of the

# Senate Employment, Workplace Relations and Education Committee

into the

# Workplace Relations Amendment (Work Choices) Bill 2005

on behalf of the Governments of

New South Wales

Queensland

Western Australia

South Australia

Tasmania

The Australian Capital Territory

The Northern Territory

9 November 2005

# 1. Introduction

This submission is filed jointly on behalf of the governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory (the Joint Governments).

The Joint Governments submit that the Workplace Relations Amendment (Work Choices) Bill 2005 (the Bill) will remove rights and protections for both employees and employers, with a disproportionate impact on those in small business and regional areas. The Bill proposes to:

- marginalise the independent umpire, the Australian Industrial Relations Commission, by taking away its power to set wages and approve agreements, slashing its unfair dismissal jurisdiction, and leaving it with residual dispute settling functions;
- give the federal government increased control over the setting of minimum wages by establishing an Australian Fair Pay Commission which is directly accountable to the Minister;
- destroy the already limited award safety net as the test for agreement making, replacing it with a bare five minimum conditions;
- remove safeguards that currently ensure that workplace bargaining, whether collective or individual, is not undermined by unequal bargaining power;
- remove the right to challenge unfair dismissal claims from employees who work for businesses with up to 100 employees, and create legal loopholes which will enable unscrupulous larger employers to also avoid unfair dismissal laws; and
- in the absence of voluntary referral of powers by the states, utilise the corporations power to its fullest extent to override state systems and remove the choice of many employers and employees to continue operating under successful state systems of industrial relations.

The Joint Governments oppose these changes because they will:

- reduce pay, conditions and protection for workers and their families;
- increase cost and complexity for employers; and
- cause irreparable harm to employment and family relationships for all Australians.

The federal government has failed to provide a case for change. There is no robust evidence that the Bill will provide economic or social benefits over current arrangements. Further, the Bill will not make the current industrial relations arrangements more efficient or effective.

The Joint Governments have chosen not to offer recommendations on how to improve specific sections of the Bill. While this is partly due to the time restrictions imposed on the parliamentary process by the Prime Minister and his Cabinet, it is the position of the Joint Governments that even if specific deficiencies were to be rectified, the fundamental principles of the Bill are flawed.

For this reason, the submission of the Joint Governments does not limit itself to the terms of reference as established by the Senate. It is necessary to consider the Bill in all its parts, and the interaction of each of those parts, to comprehend just how unacceptable the package is as a whole. For example, the removal of protection from unfair dismissal not only destroys the existing individual right of millions of Australian workers, it also makes each of those workers more vulnerable to unreasonable demands in bargaining and less likely to stand up and be heard on health and safety issues or other workplace concerns.

Further, it is impossible to assess the real impact of the Bill while so many important provisions are to be set in regulation at a later date. The Joint Governments oppose the proposed increase in the regulation making power of the federal Minister for Workplace Relations.

The federal government claims that these amendments will increase coverage of the federal industrial relations system to 85 percent of employees. The Joint Governments dispute this claim, and estimate that in some states coverage will be as low as 60 to 65 percent.

In any case, if passed the Bill will force a majority of workplaces into a flawed system that will not be national, will not be simpler and most of all, will not be fairer or more productive.

The Joint Governments respectfully ask the representatives of the States and Territories in the Senate to:

- reject the Bill in its entirety;
- recognise the shared responsibility for industrial relations between state and federal governments as provided for in the Constitution; and
- call for a sensible and genuine debate about better industrial relations outcomes at the national level.

## 2. The Bill is unconstitutional

The Constitution contains an explicit power concerning the regulation of industrial relations. That power makes it clear that industrial relations is an area in which the powers of the Commonwealth and the states are to be shared.

Section 51(xxxv) provides the Commonwealth Parliament with the power to make laws for 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.

In other words, the Commonwealth Parliament can deal with disputes that cross state borders, while the states are left with the power to deal with intra-state disputes.

In reality, generous interpretation of the Constitutional terms by the High Court has seen the expansion of the federal industrial relations system into many areas that might, on the face of it, appear properly to be the domain of intra-state disputation. In general, however, that has to date been acceptable in that the Commonwealth has not sought to compulsorily move persons into its system, nor to attempt to put an end to the operation of state laws.

That general understanding and acceptance of the respective roles of the two tiers of government is directly challenged by the present bill. The federal government seeks to legislate an industrial relations system based almost entirely on the corporations head of power, and by doing so, seeks to (a) compulsorily move all constitutional corporations into that new federal system (even if those corporations currently operate under state relations industrial systems and would prefer to stay in those systems) and (b) put an end to the operation of state industrial laws to the extent that they purport to bind any such constitutional corporations.

Given the failure to enter into meaningful discussions with the states about the need for any change to the way in which industrial relations works in Australia, this must be regarded as nothing less than a hostile takeover of the industrial relations powers of the states.

Further, this revolutionary shift in the constitutional basis of Australian industrial law will, in the words of Professor Ron McCallum, Dean of Law at the University of Sydney:

> lead inevitably and inexorably to the corporatisation of Australian labour law to the detriment of the dignity of working women and men of this country.[1]

This is because laws made on the basis of this power would be laws about the object of the power, the corporation, and not, as at present, laws about the industrial relationship between parties (employers and employees and their representatives).They would inevitably tend to focus on the needs and attributes of the corporation, and not upon the nature of the interaction between the parties and a proper consideration of the needs and attributes of each.

The Joint Governments are of the view that the Bill represents a fundamental misunderstanding of the federal compact and is an inappropriate use of constitutional power. Legal teams have been brought together to analyse the Bill and to identify grounds for constitutional challenge. All state governments party to this submission will be parties (or interveners) in that challenge.

[1] Fair go or Anything Goes? Conference transcript at www.fairgo.nsw.gov.au

# 3. What the Bill will do to industrial relations in Australia

## *3.1. It will be harder to bargain collectively*

It is already the case in the federal jurisdiction that employees have no positive right to determine what sort of agreement they wish to have: individual or collective, union or employee. In fact, even if the employees make a specific majority decision to the effect that they want, say, a collective union agreement, the employer is under no obligation to respect that view, and may offer AWAs or a collective employee agreement, or refuse to negotiate at all. This arrangement is well illustrated in the current Boeing dispute[2], and has been seen in the recent past in disputes such as that at G & K O'Connor's Abattoirs[3].

As Fenwick et al put it:

> existing employees in practice have only a negative capacity to select the appropriate form of agreement. They can refuse an AWA, or vote down an enterprise agreement (whether under s 170LJ or s 170LK), but the WR Act provides no mechanism for employees to deliberate and to express a positive choice about which form of agreement they would prefer[4]

No other OECD country takes this approach.

> The right for employees to choose to bargain collectively, and requiring employers to recognise this choice, is legally protected in all other OECD nations…
>
> In other nations with decentralised bargaining systems like ours – the United States, United Kingdom, Ireland and Canada – there is a ballot process to allow employees a genuine choice as to whether they wish to be represented by a union. If the ballot verdict is affirmative, the employer is required by law to respect their wishes and bargain with their chosen union representative. A legal guarantee of an employee's right to collective bargaining where that is their preference is standard practice internationally[5]

Against this background, it is hardly surprising that the ILO has criticised this aspect of Australian industrial relations regulation[6]. A detailed discussion of Australia's international obligations is included at section 3.12.

The Bill does nothing to establish a right to collective bargaining, instead it maintains and extends the current deficiency. In fact, the Bill provides an incentive for employers to offer individual workplace agreements at the expense of collective bargaining.

In the limited circumstances where employees are able to bargain collectively, the capacity for employers to unilaterally terminate an expired agreement means that employees will suffer a default to the minimum conditions and a sever loss of bargaining power.

It seems entirely rational for an employer to hold out against negotiations until they are able to at least threaten to terminate the existing agreement and extract the bargain they want from their employees. Such a tactic would not be confined to low skill/low pay workplaces and could be employed at any level of the labour market.

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2 PM shows his hand in Boeing dispute – Sydney Morning Herald 11 August 2005 p5

3 Briggs, C. Lockout Law In Australia: Into the Mainstream? ACCIRT Working Paper 95, pp19-21

4 University of Melbourne Centre for Employment and Labour Relations Law Submission to the Ministerial Review of the Workplace Relations Act 1996 December 2004. Colin Fenwick et al p 21, emphasis in original.

5 Briggs C, Cooper, R and Ellem, B Undermining Collective Bargaining - IR Changes Report Card, University of Sydney School of Business http://www.econ.usyd.edu.au/content.php?pageid=14896

6 ILO CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 1999

Under the Bill collective bargaining becomes an increasingly unattractive option with AWAs as the obvious alternative. Over time, as existing agreements expire, the planned result appears to be the withering away of collective bargaining and its replacement with AWAs, or perhaps even the absence of any agreement at all in cases where the AFPCS is considered by the employer to be sufficient.

The lowest skilled workers with the least bargaining power could be employed on the basis of the AFPCS with all other aspects of their employment subject to the whims of managerial prerogative.

## *3.2. Checks and balances will be removed from the agreement making process*

Part VB of the Bill sets out new processes for workplace agreements which remove the limited tests currently applied by the Office of the Employment Advocate (OEA) and the Australian Industrial Relations Commission (AIRC). These include:

- The no disadvantage test is removed;
- Agreements are 'approved' once they are signed;
- Agreements apply immediately upon lodgement with the OEA; and
- Termination of agreements apply immediately on lodgement with the OEA.

The AIRC's role in certifying collective agreements, applying the no disadvantage test, and varying/terminating agreements will simply disappear. Gone too will be the AIRC's power to decide whether or not a particular clause is a 'matter pertaining' to the employment relationship, and accordingly whether it is permitted.

Other changes to the bargaining process include:

- The reduction of the consideration period for all agreements for existing employees (from fourteen days to seven);
- Removal of the requirement for genuine consent;
- Capacity to remove award conditions in agreements with a simple exclusion; and
- Extending possible life of an agreement to five years.

### *Prohibited content*

The Bill provides for a class of matters that will constitute 'prohibited content' for the purposes of agreement making. It is impossible to know at this point in time what 'prohibited content' will be because it will be specified later by way of regulation. The WorkChoices booklet indicated that prohibited content will include clauses that mandate union involvement in dispute resolution and provide a remedy for unfair dismissal. However, the Bill very clearly does not limit the regulation making power to these types of matters, or any other type of matter. 'Prohibited content' will be whatever the Minister deems it to be, by regulation.

Prohibited content in an agreement is unenforceable. Under section 101G the Employment Advocate may vary workplace agreements to remove prohibited content either on its own initiative or on application by any person (whether or not they are party to the agreement). Seeking to include prohibited content in an agreement or lodging an agreement containing prohibited content is a civil offence with a maximum penalty of $33,000.

It is worth noting also that the Bill proposes to allow regulations to be made retrospectively, so content included in agreements may later be determined to be prohibited, with fines applying.

This will make agreement making a very risky business, particularly for small businesses and individual employees without up to the minute expert advice on what is or what might be prohibited content.

### *Unilateral termination of agreements*

The Bill provides that when an agreement is terminated and not replaced by another agreement, and an Australian Pay and Classification Scale (APCS) does not apply, the minimum terms and conditions of employment will be those in the Australian Fair Pay and Conditions Standard (AFPCS).

Agreements made under the Bill that have passed their nominal expiry date may be terminated unilaterally by any party to the agreement, simply by giving 90 days notice. Significantly, under the Bill the 90 days notice can be given prior to the expiry of the current agreement meaning that the agreement can be terminated immediately on expiration. This means that even though their has been notice that the agreement will terminate, protected industrial action cannot be taken in pursuit of a new agreement.

In this sense, there would be no need for the employer to bargain at all. This provision allows employers to simply reset pay and conditions to the minimum level at will.

### *Limited remedy if the process is abused*

Regardless of whether the correct processes have been followed by the employer when lodging or terminating an agreement, the lodgement or termination will still have effect (see for example subsection 100(2)).

The limited role of the OEA in the lodgement and termination process is made quite clear at sections 102J(5) and 103N(5) where the Bill states:

> The Employment Advocate is not required to consider or determine whether any of the requirements of this Subdivision … have been met …

The only remedy is for an affected party or a workplace inspector to initiate court action and seek to have the lodgement or termination annulled. Further, it appears that even if such action were successful, as the agreement was legal and enforceable despite the breach, there will be no capacity to seek recovery of any underpayment of wages that resulted from the employer's action.

Even if an affected employee begins court action, the Bill allows at section 105A for a workplace inspector to take over a proceeding at any time and decline to carry it on further. It is the position of the Joint Governments that this would seriously impair employees' capacity to enforce their legal rights.

## 3.3. It will be harder for unions to protect workers

The ability of workers and their unions to organise has been the subject of considerable legislative activity by the Howard Government since it came to power. Bills designed to regulate, to a greater or lesser degree, the activities of unions in the workplace have included the:

- Building and Construction Industry Improvement Bill 2003;
- Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004;
- Workplace Relations Amendment (Better Bargaining) Bill 2003;
- Workplace Relations Amendment (Codifying Contempt Offences) Act 2004; and
- Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004.

The Joint Governments believe that as the legitimate representatives of over two million Australian workers, unions have a constructive and positive role to play in facilitating productive and cooperative workplaces.

### *Right of entry*

Right of entry to workplaces is a long-standing feature of the Australian industrial landscape. It has consistently been part of the federal Workplace Relations Act 1996 and its predecessors, dating back to the original Commonwealth industrial statute the Conciliation and Arbitration Act 1904. Right of entry provisions have similar longevity in state legislation and industrial instruments.

Right of entry provisions flow from a recognition of the right of unions to organise and the crucial role played by representative organisations of employees in the operation of conciliation and arbitration systems. The ability of unions to represent their workers and to continue to be robust and dynamic organisations is contingent on regular and meaningful contact with their members, and potential members. In recognition of this, right of entry provisions must be seen as vital mechanisms which give practical effect to the right to organise.

The Bill (Part IX) will make it more difficult for unions to enter workplaces to assist their members by imposing heavy administrative and legal barriers to right of entry. Grounds to revoke right of entry permits will be expanded making it easier to exclude certain union officials or an entire union from entering workplaces.

Unions will have no right of entry for discussion purposes where all employees are on AWAs or at workplaces with non-union collective deals. When investigating a breach, union officials must provide details. Investigation of a breach of an AWA can only take place with the consent of the party to the AWA. Where entry is permitted, employers may also be able to specify where in the workplace a meeting is to be conducted and even the route that must be taken to the venue.

Effectively these provisions will severely limit the opportunity for unions to access and talk to their members and potential members and provide advice and assistance.

The implications of these new rules for workplace safety is discussed at section 6.7 of this submission.

### *Freedom of association*

Under section 97, a union can only be a bargaining agent for an employee under a workplace agreement if it has at least one member covered by the proposed agreement and constitutional coverage. This is not the case at present.

While token freedom of association clauses remain, they have been rendered almost meaningless in the absence of obligations on employers to recognise collective representation rights. The federal government actively promotes the use of individual agreements at the expense of the collective strength of workers. This approach ultimately results in 'negotiated' outcomes being largely determined unilaterally by the employer.

The Bill builds on the existing Act's intentional confusion of the concept of freedom **of** association with the idea of freedom **from** association. International conventions to which Australia is a signatory are clearly focused on the importance of promoting the rights of employees to organise and bargain collectively. This Bill (and the underlying Act) undermines those rights by instead promoting the notion of individual bargaining and isolating workers from contact with collective agreements. Further information about Australia's International obligations can be found at Section 3.12.

### *Prohibited content in agreements relating to unions*

The Bill (Part VB, Division 7, 101D) provides that the regulations may specify that certain matters are 'prohibited content' and will be void if included in a workplace agreement.

Although the Regulations are not yet available and 'prohibited content' not specified in the Bill, the WorkChoices booklet clearly states on page 23 that clauses in agreements that provide for a role for unions, for example, mandating union involvement in dispute resolution, or providing for union training leave is 'prohibited content'. This is irrespective of whether there is agreement or support for such terms by the employer. Under s101M, unions and members face fines of $33,000 and $6,600 if they even ask for these provisions to be included in an agreement.

This is further bolstered by proposed section 271 which provides that clauses in any document that deal with membership of an industrial association are void as being 'objectionable provisions'.

### *Transitional arrangements*

The Bill (Schedule 17) provides that state registered unions will be allowed into the federal system for three years as 'transitionally registered associations' but they can be expelled for an extremely broad range of reasons. A transitional association can have its registration cancelled if it or a 'substantial' number of its members:

- takes industrial action that interferes with a federal employer's activities or the provision of any public service by a government;
- takes industrial action that has a 'substantial adverse effect' on the safety or welfare of the community, or part of it; or
- fails to comply with court orders, including injunctions, interim injunctions and orders relating to strike pay or freedom of association.

A state-registered organisation cannot seek full (or non-transitional) federal registration if it is substantially or effectively the same as an affiliated federal organisation (or part of a federal organisation, such as a branch).

This is considered to be a mechanism to interfere in the internal affairs of unions and limit the ability of state registered unions to represent their members.

## *3.4. There will be increased unreasonable limitations on employees taking industrial action*

The Bill will introduce new and onerous obstacles before lawful industrial action can commence. Strict penalties will apply for non-compliance including the threat of court proceedings and a range of penalties from fines to deregistration. The Bill has little regard for the well established principles enshrined in international law, where the right to organise is viewed as a fundamental human right (see section 3.12 of this submission for more detail).

### *Protected action*

While protected industrial action may still be taken as part of the bargaining process, both the procedure for doing so and the overall legislative context in which such action can take place are to be extensively changed. The overall thrust of the package is to limit industrial action by unions and employees.

The Bill further limits what is defined as 'protected' industrial action. For example, industrial action cannot be taken in support of 'pattern bargaining' or 'prohibited content' in agreements without the threat of financial penalties and sanctions.

Cumulatively, the provisions of Part VC of the Bill have the effect of making it almost impossible for unions and employees to take lawful industrial action in support of legitimate bargaining claims.

### *Secret ballots*

For unions or employees to take protected industrial action under these proposals, notification of a bargaining period will be required, as is now the case. There the similarity ends. To take protected action, a secret ballot is required. The union(s) or employees must apply to the AIRC for such an order, and the AIRC must be convinced, inter alia, that 'the employees or union are genuinely trying to reach agreement with the employer'[7].

An affirmative vote requires at least 50 percent of eligible employees to vote, and at least a 50 percent vote in favour. The union or the employees will be required to pay 20 percent of the cost of the ballot, and the federal government pays the remainder. Ballots will be conducted by the Australian Electoral Commission and 'authorised agents'.

The secret ballot provisions are complex and prescriptive. The federal government assumes that someone in the workplace will have the capacity and the time to make the application to the AIRC, arrange the conduct of the ballot with the Electoral Commission and advise the Electoral Commission of the names of eligible voters. The Bill does not entitle employees to any time off work to undertake these tasks, so employees will have to do this in their own time or seek permission from their employer to undertake the necessary steps in work time. This, together with having to pay 20 percent of the cost of the ballot, is likely to be a major dampener on employees' willingness and capacity to take industrial action as part of the bargaining process.

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7 Ibid, p27

### *Cooling off periods*

In addition to its current powers to suspend or terminate bargaining periods when agreement has not been reached (Workplace Relations Act ss170MW, 170MX), the AIRC will have the power to impose a 'cooling off suspension period' of unspecified length.

However, instead of being able to make an award as is currently the case, under s113C of the Bill, the AIRC will be able to make a 'Workplace Determination', which appears to be similar to an award currently made under s170MX. Such Workplace Determinations will have a nominal expiry date of five years, however they may be superseded by an agreement made during this period. Parties negotiating such an agreement are not permitted to engage in protected industrial action.

### *Essential services*

Part VC Division 7 of the Bill provides the Minister for Employment and Workplace Relations with an unfettered power to terminate a bargaining period. The Minister may make a written declaration terminating a specified bargaining period if satisfied that the industrial action is adversely affecting employers or employees or poses a threat to the personal safety, health or welfare of the population or where the action is likely to damage the economy. These grounds are identical to those which currently give the AIRC the power to stop the action. This raises the possibility that the federal Minister could use the power in a situation where the AIRC has refused to do so.

The WorkChoices booklet suggested that this power is intended for use in relation to 'essential services' (page 29). However, the Bill makes no such qualification.

The federal Minister has total discretion to determine when to revoke a bargaining period and to make directions specifying actions that must be taken by the negotiating parties, without the scrutiny of an independent umpire. Unlike the capacity for review of AIRC powers in such a case, there will be no hearing, nor any right of appeal in relations to the exercise of this executive power.

Such powers will drastically limit the ability of employees and their union representatives to take industrial action in support of bargaining claims even where such action is 'protected industrial action' and authorised by secret ballot.

In effect these provisions provide a sweeping power for the government to clamp down on any industrial action by claiming it to be contrary to the national interest. The Bill does not contain a process of checks and balances to safeguard any potential misuse of Ministerial power.

### *Third party intervention*

Third parties will be able to apply to have protected industrial action suspended if the action threatens to significantly harm them. This provision extends to disputes occurring in the state systems if the harm involves the business of a constitutional corporation. The Joint Governments strongly reject this interference in state industrial relations systems.

The AIRC will be required to suspend industrial action on this ground, for up to three months. Industrial action almost always affects third parties to a greater or lesser degree – for example, airline passengers are affected when baggage handlers or maintenance workers go on strike and commuters are affected when transport workers go on strike. These people will now be able to interfere in the legitimate bargaining processes of employees. It is unclear how 'significant harm' is to be assessed.

The above provisions do nothing to help settle disputes and are likely to exacerbate them.

***Penalties***

Unlawful industrial action can result in unions and individual employees being subject to a range of penalties, including fines of up to $33,000, and civil liability for damages to employers and anyone else harmed by the industrial action. The Bill surrounds industrial action and the circumstances in which it may be taken with such a minefield of technical legal requirements that unions and employees will always be at risk of inadvertently taking unlawful action. For example, the following matters are likely to render industrial action unlawful, even if it was permitted under the legislation to begin with:

- Missing one of the complex secret ballot steps;
- Taking industrial action simultaneously with other employees at different enterprises over the same issues; and
- Taking industrial action in the State system which has a substantial adverse effect on a constitutional corporation.

Other circumstances which will render industrial action unlawful are:

- Including a clause in an agreement containing a 'matter not pertaining' (whether something is a 'matter pertaining' is one of the most complex and uncertain areas in industrial law, with the AIRC, the Federal Court and the High Court holding different views);
- Taking industrial action during the life of an agreement, even if the agreement contains a clause expressly permitting the parties to do so;
- Taking industrial action in relation to an agreement which contains a clause prohibited by the legislation; or
- Taking action over health and safety issues if the employee cannot show he/she 'genuinely held' a reasonable concern about the issue (the current test is 'a reasonable concern').

Because of the high penalties to which employees could be exposed for taking unlawful action, they may well decide it is not worth taking the risk.

As with other provisions under the Bill, no evidence or analysis is provided to demonstrate the need for the proposed changes. It should be noted that these restrictions on industrial action are being enforced at a time when there has been a steady decline in the trend line for working days lost per one thousand employees since 1988 (from 264.9/1000 in 1988 to 45.5/1000 in 2004)[8]

[8] ABS, *Industrial Disputes*, Cat. 6321.0, June 2005).

### *Lockout provisions*

In contrast to the proposed new limitations on industrial action able to be taken by employees, provisions relating to industrial action by employers remain almost unchanged, with employers able to impose lockout action in a bargaining period with three days' notice.

Lockouts occur when an employer temporarily withdraws paid work from its employees to pressure them to accept the employers terms in a negotiation. Lockouts have become more common in recent years as employers pressure their workers to accept individual AWAs.

The Australian Centre for Industrial Relations Research and Training (ACIRRT) recently conducted a major study of lockouts in Australia. The research found that more than half of long disputes in Australia (over one month) are because of a lockout.

The number of lockouts has dramatically increased since the implementation of the Workplace Relations Act. The proportion of total working days lost in all disputes that can be attributed to lockouts has increased from 1.6% in 1994 -1998 to 9.3% in 1999-2003. The proportion of long disputes that are lockouts has increased from 7.7% to 57.5% over the same period.

Lockouts are most likely to occur in Victoria, which is governed by the federal industrial relations system. Approximately half of all lockouts occur in Victoria, which has 4 to 5 times the number of lockouts in New South Wales, Queensland or South Australia.

The ACIRRT research concludes that the increase in lockouts is due to government intervention and legislative change at the federal level. Lockouts remain extremely low in the state jurisdictions highlighting the effective nature of dispute resolution remedies currently available.

The Bill significantly expands to the range of lockout tools available to employers, by providing for the unilateral termination of agreements (see section 3.2 above). The ability to vary pay and conditions in this way is sometimes referred to as a 'partial lockout' in other jurisdictions where it is deployed, such as the US and formerly in New Zealand under the *Employment Contracts Act* 1991 (*ECA*). Indeed, the New Zealand experience clearly shows that the partial lockout was used to great effect by employers to secure their bargaining objectives, before being ruled to be outside the intention of the ECA and to not be a lockout within the terms of the latter[9] .

However, a key difference between partial lockouts under the ECA and termination of agreements under the Bill, is that under the ECA, the usual employer tactic was to remove a key condition or conditions, such as, for example, penalty rates, to create the desired effect on employees' income and thus obtain agreement[10]. By contrast, termination of an agreement under the Bill removes all conditions above or outside the AFPCS, and all pay above it.

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[9] Geare, AJ *New Zealand Industrial Law* in The Australasian Labour Law Reforms Nolan , Dennis R (Ed) pp46-47

[10] http://workers.labor.net.au/features/200412/b_tradeunion_isles.html , Geare p46.

## 3.5. Disputes will be longer and more difficult to resolve

One of the most striking features of the current federal jurisdiction, particularly in comparison to state jurisdictions, is the frequency and bitterness of lengthy bargaining disputes[11].

Recently released figures from the Australian Bureau of Statistics for the June Quarter, 2005, show that disputes are solved more quickly in New South Wales, compared to Victoria where disputes are more difficult to resolve, given the hostile and complicated federal industrial relations system. Looking at disputes lasting five days or more in 2004, Victoria accounted for over 17 percent of working days lost in Australia. New South Wales contributed just 12 percent.

The Bill proposes to further restrict the capacity of the independent umpire in resolving disputes by changing the way that industrial disputes are to be resolved (Part VIIA).

The Bill proposes to remove the existing conciliation and arbitration powers. These will be replaced with a system which rests primarily on conciliation and Alternative Dispute Resolution (ADR).[12]

Workplace agreements are required to contain a dispute resolution process (section 101A). Where they do not, the model dispute resolution process detailed in Part VIIA will apply.

Under this process, attempts must be made to resolve disputes at the workplace level in the first instance. Where the dispute is unable to be resolved at the workplace level the parties may either agree to refer the matter to an independent provider of ADR or seek to have the ADR process conducted by the AIRC.

If the parties refer the dispute to an independent provider however, it is up to the provider to decide whether it is appropriate for the parties to be represented and the role of those representatives (section 176Q). The Bill does not provide any guidance to a provider on what is reasonable representation.

Indeed, given that all industrial action during the life of an agreement is to be strictly prohibited, and that 'acts by employers, other than lockouts, are not industrial action'[13], it is difficult to see how the dispute resolution process envisaged by the Bill will be other than a process of appealing to an employer's better instincts.

### *Provisions for state awards and agreements*

Under the proposed Schedule 15 at sections 14 and 37, the Bill makes clear that any dispute resolution process that had previously been agreed to by parties to state instruments will be displaced by the model dispute resolution clause.

The Joint Governments strongly reject the imposition of a process that has been determined unilaterally by the federal government onto parties to state instruments.

The Joint Governments consider such an imposition to be in stark contradiction of the supposed objects of the Bill, in particular proposed object 3(d) which states that '… the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level'.

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11 See, for example, Briggs, C. Lockout Law In Australia: Into the Mainstream? ACCIRT Working Paper 95, pp10-15
12 WorkChoices explanatory booklet pp39-40
13 Ibid pp27-28

## *3.6. Wage setting will be removed from the parties and the independent umpire*

The federal government has consistently opposed pay increases that would sustain a reasonable living wage for a worker. If the federal government's views before the AIRC had prevailed in previous National Wage Cases, the minimum wage would be $50 a week less than it is today.

It is the view of the Joint Governments that the object of moving wage fixing away from the AIRC is to realise the federal government's desire to constrain minimum wage increases below cost of living increases and to have them reduce in real terms.

### *Wage setting and AFPC*

The Bill proposes to confer responsibility for setting minimum and award wages on the new Australian Fair Pay Commission (AFPC).

While the process is based on the United Kingdom (UK) model for the Low Pay Commission (LPC), the provision for parliamentary scrutiny of the recommendations of the LPC is strikingly absent from the model proposed in the Bill. The UK LPC was designed to address the needs of the low paid by giving them minimum protections for the first time. It has extended the field of labour regulation and recommended pay increases for the low paid above the level of inflation[14]. By contrast, the AFPC is being established in an environment where there is a long standing mechanism for setting minimum wages, but a federal government that has consistently sought vastly lower outcomes.

The decisions of the AFPC will be binding and authoritative, and the frequency, scope and timing of wage reviews will be a matter for the AFPC to determine.

### *No requirement to set 'special' Federal Minimum Wages*

The Bill at section 90F(3) excludes junior employees, employees with disabilities, and employees to whom a training arrangement applies from the Federal Minimum Wage (FMW).

At section 90S the Bill states that the AFPC **may** determine a special FMW for these workers. If the AFPC declines to exercise this power and no Australian Pay and Classification Scale (APCS) applies then no minimum wage will apply to employees who are classified as juniors or to employees with a disability.

A junior employee is defined at 90B as an employee who is under the age of 21, and an employee with a disability is defined as an employee who qualifies for a disability support pension, regardless of whether they claim it.

The Joint Governments strongly oppose the removal of protection for these vulnerable workers.

14Workers Online 2005, Howzat, 22 July

### *Australian Pay and Classification Scales (APCS)*

The AFPC will set not only a single minimum wage but also award classification rates and a casual loading. Currently, minimum wages and pay classifications are prescribed by state and federal awards negotiated by the parties and determined by the AIRC and state tribunals. The classification structures are built to fit the specific needs of the industry and/or occupation to which they apply, on the basis of the evidence and submissions of the industrial parties.

The federal government is set to remove this award based regime for pay setting and replace it with determinations of the AFPC to be known as Australian Pay and Classification Scales (APCS).

Employers and employees will have to navigate a complex system where the standard federal minimum wage, special lower federal minimum wages and pay rates, including piece rates, specified in various APCS coexist with pay rates fixed under collective and individual agreements. In some cases more than one APCS may apply to an employee.

Employees formerly under state awards will have their award wages incorporated into an APCS to be adjusted by the AFPC. An APCS may contain different casual loadings for workers employed in different classifications.

This complex and confusing process will replace the streamlined and simpler award regulated pay structures determined and regularly adjusted by the AIRC and state Commissions.

As indicated earlier, there may be more than one federal minimum wage. A minimum wage may apply to all junior employees or a class of junior employees. The Bill gives the AFPC the power to establish a special minimum wage for employees with a disability which may cover employees who have the capacity to do the job but are unfairly classified under this substandard minimum wage. It is our submission that the wages of employees will significantly decline in real terms under the workplace system to be established by the Bill.

### *Primacy of economic considerations and removal of fairness*

The federal government has emphasised the narrow economic parameters within which the AFPC will operate and, along with employer groups, have claimed that the AIRC has not taken adequately into consideration the likely economic impact of its decisions.

The fact is that under section sections 88B and 90 of the Workplace Relations Act 1996 the Australian Industrial Relations Commission (AIRC) is required to and does take into account the state of the national economy and the likely effects of its decisions on employment and on inflation. Under the AIRC's own wage fixing principles it is recognised that the award safety net would change in response to economic circumstances.

The removal of the word 'fair' from the objects of the Act in relation to the minimum wage is a good example of the federal government's attitude towards the lowest paid. The Bill is focused on economic considerations only, and has disregarded the notion of fairness for employees. Further details about the removal of the word 'fair' can be found at Section 6.1 of this submission.

The decision to shift the responsibility for minimum wage determination from the AIRC to the AFPC represents one of the most fundamental changes to the Australian industrial landscape. An evidence based process of wage fixing based on arbitration and the collective representation of workers and employers is to be replaced by the determinations of a part-time wages board handpicked to implement the federal government's policy of driving down the real value of minimum wages.

***Lack of transparency***

The federal government claims that the new wage fixing body will replace an adversarial, legalistic and outdated wage setting process. The problem is that the AFPC will lack the transparency and accountability of the AIRC. As an arbitral body the AIRC is required to adopt an appropriate standard of procedural fairness in the conduct of its hearings and allow all interested parties and stakeholders the opportunity to make submissions and be heard.

In a so called adversarial process, the evidence advanced by one side can be examined and tested by the opposing party. These procedural safeguards will not apply to the AFPC.

***The Western Australian evidence***

The Western Australian experience also provides evidence to gauge the likely impact of this change to minimum wage setting. Under the former Court Coalition government the minimum wage was set by the Minister.

The Coalition Government routinely ignored the recommendations of the Western Australian Industrial Relations Commission (WAIRC) when setting the minimum wage, and delayed the granting of adjustments.

In only a few years Western Australia's minimum wage was $50 a week below the rest of Australia. Perhaps not coincidently, this is the same disparity that would currently exist had the federal government achieved its desired outcome in recent National Wage Cases.

## *3.7. Current conditions will not be protected by law and will disappear for many workers*

*Removal of the no disadvantage test*

The Bill proposes to remove the need for agreements to pass a no disadvantage test. Currently the Australian Industrial Relations Commission (for collective agreements) and the Office of the Employment Advocate (for individual agreements) compare proposed agreements with the relevant award conditions to ensure there is no overall disadvantage.

The no disadvantage test has been a vital component of the move towards a system of enterprise bargaining that began in the 1990s. It has ensured a balance between the economic objective of providing flexibility in the agreement-making process and the social objective of ensuring there are proper protections of workers' wages and conditions.

It was the retention of the no disadvantage test that allowed the Prime Minister to make his guarantee in 1996 that no worker would be worse off. Conversely, the removal of the no disadvantage test from this Bill is the reason the Prime Minister is no longer able to make this guarantee.

Under the changes in the Bill, the no disadvantage test will be replaced by a set of five bare minimum conditions under the Fair Pay and Conditions Standard. Employers will be required to submit a statutory declaration when agreements are lodged stating that they meet this standard and they will be automatically approved by the Office of Employment Advocate. The AIRC will no longer have any role in scrutinising agreements.

The removal of the disadvantage test means there is no genuine protection for current terms and conditions in state or federal industrial instruments.

New agreements will be able to remove or modify key current award entitlements to public holiday pay, overtime/shift loadings, annual leave loading, incentive bonus and payments, allowances, and penalty rates, without any compensating benefits. Only if the agreement does not make any specific reference to these matters, will the relevant award provisions continue to apply.

If an agreement is terminated and not renegotiated, which can occur if either party gives 90 days' notice, the employee will revert to the minimum conditions. Currently, if an agreement is terminated, employees would revert back to their award conditions.

### *Australian Fair Pay and Conditions Standard (AFPCS)*

As well as the FMW set by the APFC, the Bill proposes to establish four minimum employment conditions which together with the FMW will comprise the AFPCS.

The federal government suggests that this standard will ensure minimum provisions are 'protected by law'. The Joint Governments submit that in reality, even these minimum conditions may be jeopardised.

### *Maximum ordinary hours of work*

The Bill specifies at 91C a maximum working week of 38 ordinary hours. The hours however can be averaged over a 12 month period.

This averaging process enables arrangements whereby employees could be required to consistently work weekly hours greatly in excess of 38 and, at times, very few hours at all.

The Bill provides no guidance to how or when averaging should occur, leaving this provision open to manipulation by unscrupulous employers. The Joint Governments are also concerned about the lack of provision for minimum weekly or daily hours and the right of employees to have some control over their roster. This gives little certainty or stability to workers who already find it difficult to balance work with other responsibilities.

Moreover, a guaranteed limitation of ordinary hours is ineffective in the absence of a prescribed entitlement to overtime penalty payments. Awards commonly provide that employees must not work in excess of or outside specified ordinary hours without the payment of overtime. This standard award protection is absent under the Bill.

There is also a lack of protection for employees who may be engaged on a 38 hour week, averaged over a period of twelve months, where their employment is terminated before the averaging takes place. In these circumstances the employee is likely to receive payment for only the 38 hour week, despite any provision in the Bill that states that employees must be paid for every hour worked.

### *Annual leave*

At section 92D the Bill 'guarantees' four weeks annual leave; however the method of accruing this leave is complex and confusing for employers and employees, and is open to manipulation.

For example, at section 92D(2) the Bill states that annual leave is accrued every four weeks based on 1/13 of the number of nominal hours worked by the employee. The definition of nominal hours excludes any 'reasonable additional hours during that period that the employee both was required to work, and did work, for the employer'. It appears that this arrangement will allow a reduced amount of leave to accrue when combined with the averaging of hours over a 12 month period where the employee is required to work more than 38 hours in a particular week.

The Bill provides that employees on annual leave will be entitled only to their base periodic rate of pay. This will remove benefits currently enjoyed under many state instruments, for example New South Wales employees may receive annual holidays at a rate that includes weekend penalties, shift penalties and averaged commission or incentive payments. In Queensland, an employee being paid at a higher rate than the ordinary rate immediately before taking the leave must be paid at the higher rate when on leave.

Further, under the Bill incentive payments and bonuses are specifically excluded from the base periodic rate of pay, which will reduce annual leave payments for some employees. For example in New South Wales employees such as commercial travellers who are employed on a commission-based remuneration structure will lose their current entitlement to have their annual leave payments calculated by including an average of their commission payments.

The Bill provides at section 92E for the cashing out of up to two weeks annual leave upon agreement between the employer and the employee. While in theory this can only happen at the request of the employee, it is not difficult to envisage a situation in which employers create an expectation that employees should be willing to propose the cashing in of their own leave especially where a workplace agreement does not provide for regular wage increases or the employee has traded away all other entitlements in previous negotiations.

Another area of concern is the failure of the Bill to unequivocally require employers to grant annual leave to employees on a regular basis. An employee's right to take leave is based on the employer's obligation not to unreasonably refuse authorisation of leave. The employer is entitled to take the operational requirements of the business into account.

The provision also could result in an increase in the entitlements due to an employee in the event of employer insolvency, with an associated increase in taxpayer funding of these entitlements through schemes such as the Government Employee Entitlement Redundancy Scheme.

The Joint Governments submit that this is an inadequate protection of the employee's right to access annual leave and the employer's right to direct employees to take leave.

### *Personal/ Carers leave*

The Bill sets out at section 93E a minimum requirement for personal/carers leave. These provisions include:

- the accrual, crediting and accumulation rules;
- the rolling annual limit for paid carer's leave, and
- the different notice and documentation obligations relating to sick and carer's leave.

This introduces complexities for both employers and employees into commonly understood employment conditions that are already community standards.

The Bill also legislates a new right for employers to demand medical certificates from employees (93N). Currently, any such provisions are negotiated by the parties in the relevant award or agreement. This is an anachronistic and unreasonable requirement that does not reflect many people's experience of illness; it indirectly discriminates against workers in regional areas with more limited access to the medical profession; and it promotes distrust in the workplace.

If the employee fails to meet the documentary requirements of the employer, the Bill makes it clear that the entitlement to the leave lapses. It is not clear whether the absence from work is then considered to be unauthorised, breaking continuity of service.

Provisions in the Bill for unpaid carers leave (93J) allow an employee to take an additional two days unpaid leave for emergency caring situations. However it is not clear what the consequences are if more than two days are required. It may be again that continuity of service is broken, or protection from unlawful termination is no longer available.

### *Parental Leave*

The provisions for parental leave are set out in Division 6 of Part VA of the Bill.

The Bill fails to incorporate the right to request an extension of parental leave beyond 52 weeks and the right to request a return to work on a part-time employment basis. These rights were established in the recently decided Family Provisions Test Case. They recognise the need for flexibility in workplace arrangements to accommodate family and carers responsibilities and help preserve an appropriate work/life balance.

The Bill removes the entitlement of some employees to take adoption leave for children up to the age of 18 (94ZJ). This entitlement has been provided in New South Wales for example, to enable overseas adoptions.

### *Protected allowable award matters*

The Bill defines at section 101B protected allowable award matters as including:

- public holidays;
- rest breaks (including meal breaks);
- incentive based payments and bonuses;
- annual leave loading;
- allowances;

- penalty rates; and
- shift/overtime loadings.

This means that if a person's employment is subject to a workplace agreement and protected award conditions would apply, these protected award conditions are taken to be included in the workplace agreement. However, if the agreement explicitly contains a clause excluding them, then the award conditions will not be protected.

The federal government's claim that these conditions will be protected by law is false and misleading because employers will be able to specifically remove them from agreements and present these agreements on a 'take it or leave it' basis to employees.

If an agreement is terminated by the employer, employees are only entitled to the AFPCS and these entitlements are lost forever.

The implications of further reducing allowable matters is discussed in more detail at section 3.8 of this submission.

### *The Western Australian experience with individual contracts*

The changes proposed in the Bill have startling similarities to Western Australia's former system of workplace agreements. The No Disadvantage Test (NDT) underpinning federal agreements is set to be abolished, and replaced with a scant list of minimum conditions established as the Australian Fair Pay and Conditions Standard.

New agreements will be able to undercut a raft of core award conditions, including public holidays; rest breaks (including meal breaks); annual leave[15]; annual leave loading; allowances; penalty rates; and shift and overtime loadings.

This is exactly what happened under WA workplace agreements, which were able to drastically undercut awards and could be forced onto employees as a condition of employment. In Western Australia the spread of individual workplace agreements resulted in a gradual erosion of wages and conditions for employees in many industries.

This is evidenced by the independent report[16] produced for the Commissioner of Workplace Agreements by the Australian Centre for Industrial Relations Research and Training (ACIRRT). The ACIRRT report involved the examination of a sample of registered IWAs in four industries and a comparative analysis against the relevant State award in an endeavour to provide statistical information on the impact of IWAs for workers covered. The industries reviewed were contract cleaning; security services; shop and warehouse; and restaurant, tearoom and catering services. These industries represented a significant proportion of IWAs registered each year in WA.

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[15] Despite assurances to the contrary from the Prime Minister and Minister for Workplace Relations, there is no **express** provision at s 92E of the WorkChoices Bill to prevent prospective employees from being required to elect the cashing out of up to 2 weeks annual leave. It appears feasible for the "written election" required by s 92E(1)(b) to form part of a workplace agreement that can be a condition of employment, which was a common practice under the former workplace agreements system in WA. *The Minimum Conditions of Employment Act 1993* (MCE Act) was amended by the *Labour Relations Reform Act 2002* to expressly provide that such a requirement to cash out annual leave cannot be made a condition of employment – see s 8(2) of the MCE Act.

16 ACIRRT Report, A comparison of employment conditions in Individual Workplace Agreements and Awards in Western Australia, February 2002.

Of the agreements analysed:

- 74 percent provided no week-end penalty rates of pay;
- 67 percent provided no overtimes rates of pay;
- 56 percent provided an ordinary rate of pay below the award rate;
- 49 percent of full-time, part-time and fixed term agreements absorbed annual leave into the ordinary hourly rate of pay; and
- 75 percent of all agreements analysed were without a pay increase provision.

ACIRRT concluded that the content and detail contained in the IWAs analysed was quite basic with most effectively adopting a 'bare bones' approach to wages and conditions for workers. The industry analysis of agreements found that the comparable awards tended to be more comprehensive and provided for a range of detailed provisions relating to wages, employment conditions and other workplace related matters[17].

While many of the agreements analysed included very open-ended hours of work arrangements, under the guise of flexibility, an analysis of the loaded rates of pay for these workers did not appear to make up for the increasingly open and flexible hours of work arrangements. In short, the report found that workers were generally worse off under IWAs than under the comparable award.

A copy of ACIRRT's report and summary were attached to the Western Australian Government's submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into Workplace Agreements.

There are distinct similarities between the old Western Australian system of IWAs and AWAs, not the least of which is the ability for employers to offer the agreements as a condition of engagement. Many employees working in the lower skilled industries in which IWAs were, and AWAs now are, prevalent, are much less likely to hold the skills necessary to bargain individually with a prospective employer over employment conditions. They are also much less likely to be in a position to be able to refuse an offer of employment due to inferior wages and conditions.

Joint Governments are concerned that less scrupulous employers, who manipulated the IWA system to their advantage and their employees' disadvantage, may now use the AWA system to similar effect.

A recent ABS report revealed that WA employees on AWAs received $65.10 less per week than those on certified agreements, and $21.80 less per week than those on State industrial agreements.[18] More disturbingly, average weekly total earnings for AWA employees in the last two years have declined by $212.20 per week.

The Western Australian experience clearly demonstrates that in the absence of an adequate safety net of entitlements in individual agreement making, the door is wide open for employers to substantially reduce wages and conditions.

17 Ibid, p64.
18 ABS Employee Earnings and Hours (6306.0).

## *3.8. Allowable matters will be further reduced*

From 1 July 1998, the Workplace Relations Act 1996 required that all federal awards be simplified to a defined set of 20 allowable matters (s89A).

Since then awards have been subject to a rigorous award simplification process which may be more accurately defined as an 'award stripping' exercise.

Part VI Division 2 Sub Division A of the Bill proposes to further condense the number of allowable matters on the basis that they are provided for in specific legislation. The four provisions which will be eliminated include:

- long service leave;
- superannuation;
- jury service; and
- notice of termination.

It should be noted that the federal government has deemed the provisions currently contained in existing awards as 'preserved' entitlements. However, the Bill provides that superannuation provisions in notional agreements will only be preserved until 30 June 2008.

At Division 2 Subdivision A (116B) the Bill explicitly lists a number of matters which will be deemed 'not allowable' and will therefore be rendered unenforceable on commencement of the proposed legislation. The list includes a number of matters which are not currently considered prohibited content under the Workplace Relations Act 1996 including:

- transfers from one kind of employment to another kind for example casual conversion;
- restrictions on the use of independent contractors and labour hire workers;
- some allowances;
- union picnic days;
- trade union training leave; and
- tallies.

The removal of redundancy for employers with fewer than 15 employees is clearly an attempt to circumvent the redundancy test case ruling handed down by the AIRC on 26 March 2004. The decision partially removed the small business exemption from severance pay and created a separate scale of severance payments for small business.

These provisions represent one of the greatest attacks upon the living standards of working Australians. It is little wonder then that the Prime Minister, the Treasurer and the Workplace Relations Minister have all repeatedly refused to give the guarantee that no individual Australian employee will be worse off as a result of these radical changes.

It will not take Australian workers long to comprehend the damaging consequences of this invidious combination of reducing allowable matters and reducing the standard of the no disadvantage test. Federal Shadow Industrial Relations Minister Stephen Smith surmised the federal government's intent well when he said:

> The first fundamental is that these changes pay no attention whatsoever to fairness. On the contrary: the government and the minister, with the Business Council of Australia, quite openly stand up and say that fairness is not a public policy priority when it comes to this area.[19]

The Joint Governments reject the federal government's interference in determining the matters about which employers and employees may include in an award.

## *3.9. State awards will immediately no longer apply and federal awards will be 'rationalised'*

### *Assuming control of state awards*

The Bill proposes to capture state awards as they apply to constitutional corporations and re-badge them as federal instruments to be known as 'notional agreements'. Similarly, state agreements applying to constitutional corporations will be captured and re-badged as 'preserved state agreements'. This will occur immediately after the new system comes into effect.

A notional agreement will operate for three years unless the parties choose to negotiate new (federal) agreements prior to its expiration. Significantly, it will not be possible to vary notional agreements during their term.

In practical terms this means that the only way employees covered by a notional agreement will be able to obtain better conditions (including wage increases) during their three year term will be to sign an AWA or negotiate a new federal agreement. It is a very real possibility that these employees will not receive a wage increase or improved conditions for three years.

If the parties don't negotiate a new agreement prior to the expiration of the transitional period, employees currently covered by a state award will be transferred to a federal award considered 'appropriate for their industry' by the Award Review Taskforce.

If the Taskforce does not consider there to be an appropriate award then these employees will fall to the Australian Fair Pay and Conditions Standard, losing all protected award provisions. (The WorkChoices booklet did raise the possibility of a miscellaneous award to pick up award free workers, but this won't be known until it is considered by the award rationalisation taskforce.)

### *Residual state coverage*

State awards will continue to exist; however, they will only have legal force with respect to unincorporated employers who are not captured by the transitional provisions. State common rule awards will continue to be updated, but any variations made after the commencement of the new federal system will apply only to employees in the state system.

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19 House of Representatives Hansard Tuesday 14 June 2005

### *Non allowable matters*

Some clauses in state instruments will become inoperable under the federal system. These include matters that the federal government does not consider pertain to the employment relationship, such as payroll deduction for union dues and trade union training leave.

### *Matters to be amended*

Clauses in awards that will be changed under the Bill include:

- removal of public holiday clauses which refer to 'inappropriate' holidays such as union picnic days;
- removal of redundancy pay clauses except where they apply to 'genuine redundancy';
- insertion of clauses permitting the employment of regular part-time workers;
- removal of rates of pay for outworkers (to be transferred to the Fair Pay Commission) although awards will continue to be able to regulate outworkers' conditions;
- removal of any requirement that a majority of employees must agree to 'facilitative provisions' which allow employers and employees to agree how the clause will operate;
- removal of monetary allowances in particular circumstances, such as the reimbursement of an employee for actual expenditure; and
- replacement of dispute resolution clauses with the model dispute resolution process.

### *Review of Awards*

Section 118 sets out the Australian Industrial Relations Commission's award rationalisation function. The federal government has made it clear that the intention is to reduce the number of awards and the classifications within them over time, rationalising award classification structures to produce a 'simplified' wage rates system.

The classifications within awards are often based on increasing levels of skill and experience within an industry. As such they provide wage incentives for workers to develop their skills. The Joint Governments submit that these are important considerations, especially given the current skills shortages in many industries.

## *3.10. Remedies for breaches of the law and agreements will be difficult and costly to enforce*

### *Inconsistent penalties*

The penalties and remedies proposed in the Bill are disproportionately applied. For example, while disclosure of a party bound by an AWA may result in a criminal offence and six months imprisonment (s83BS), an employer who terminates an agreement without following due process is subject only to civil remedy provisions. The termination of the agreement will still take effect.

### *Compliance and enforcement*

Compliance activities currently undertaken by the Office of the Employment Advocate (OEA) will be transferred to the Office of Workplace Services (OWS).

Under the current system the federal government has shown no particular commitment to compliance issues. DEWR has advised that compliance activities will be limited to complaint based investigations at the expense of targeted compliance campaigns, at least in the short to immediate term.

Under the federal proposals, there are to be 200 inspectors across the whole of Australia. There are already 200 inspectors in New South Wales and Queensland alone.

In addition, the systems administered by the Joint Governments have a proven record of effective compliance using more sophisticated strategies than complaint based programs.

Targeted workplace compliance involves inspections which can deliver information and advice to those employers who would not otherwise access inquiry services. Targeted compliance also identifies non-complying behaviour where workers are unable or unwilling to report suspected breaches. This approach not only safeguards current employee entitlements, but also gives confidence to complying employers that non-compliance by competitors is monitored and redressed by the regulator.

As targeted workplace compliance focuses on current and emerging compliance issues, rather than remedial compliance work, it also has a long-term impact on reducing future claims.[20]

Further, under the terms of the Bill, should an employer breach the procedural rules relating to the approval, varying or terminating an agreement, the agreement is still operational (and legally enforceable) on lodgement. This would appear to prevent any claims for underpayment of wages in this circumstance, even if an appeal to the Court subsequently finds the employer to have breached the rules.

The Joint Governments do not believe there is a genuine commitment to industrial compliance from the federal government and doubts the efficacy of any future federal compliance regimes under the proposed Bill.

## *3.11. Termination of employment will no longer be required to be fair*

### *Unfair Dismissal*

The Joint Governments believe that sensible and balanced unfair dismissal protection should be an integral part of any fair industrial relations system.

The Bill exempts businesses that are constitutional corporations with up to 100 employees from the requirement that termination of employment is fair. Even employees of large businesses will be exempt if the employer claims the dismissal was for operational reasons.

The federal government has asserted that the current unfair dismissal laws are costly and restrictive for small and medium sized businesses and discourage employers from employing more staff. The Joint Governments reject this proposition.

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20 Workplace Relations Ministers' Council, Benchmarking of Commonwealth and State Workplace Relations Inquiry and Compliance Services date?, pp5-6

The Joint Governments submit that the proposed unfair dismissal provisions are neither fair nor just because they provide for a discriminatory unfair dismissal regime based on the size of the employer. Employees of large businesses will have greater rights than those who work for smaller businesses, effectively creating a two-tiered system.

The proposed unfair dismissal exclusion will also impact disproportionately on some jurisdictions. For example, the vast majority of businesses in the ACT private sector employ less than 100 workers. The ACT Government is particularly concerned that a large percentage of ACT workers will no longer have access to unfair dismissal laws, and will instead be forced into the far more expensive unlawful termination jurisdiction.

The implications of this extend beyond the workplace with reduced job security for all employees. Removing this protection will impact on employee bargaining power and will make employees less confident about raising workplace issues, in particular a willingness to speak up on issues of workplace health and safety. In the longer term, reducing employee bargaining power will detrimentally effect an productivity. It is also possible to envisage a situation where employees of small businesses are not approved for bank loans, for example, by virtue of the insecurity of tenure caused by the size of their employer's business.

The impact on small business may also be a reduction in the available pool of potential employees, especially where job security is of particular importance. These implications are discussed in more detail at section 4.7 of this submission.

### *Unlawful termination*

The federal government has claimed that protection from unlawful termination is an adequate alternate remedy for unfair dismissal.

Unlawful termination laws are narrow, confined to certain criteria related to discrimination. Claims can only be made for dismissals on the basis of such issues as race, ethnicity or religion, sex or sexual preference, marital status, pregnancy or family responsibilities. The federal government's proposed unlawful termination laws will not cover the majority of circumstances in which employees are unfairly dismissed.

According to official figures only 147 unlawful termination claims have been referred to the Federal Court since 1996. Over the same period the AIRC has processed more than 50,000 unfair dismissal applications.[21.]

Unlawful termination cases are complex and legalistic and must be heard in the Federal Court, where both employers and employees must be represented by legal practitioners. There are examples of cases that have taken nearly three years to be decided, and there have been just five unlawful termination cases decided by the Federal Court in the past three years.

Unlike unfair dismissal claims, which are arbitrated in the AIRC and cost less than $10,000, unlawful termination claims will go before the Federal Magistrates Court, where rules of evidence apply. As pointed out by Slater and Gordon's Hayden Stephens:

> this will create a David and Goliath situation , with the employer spending up to $40,000 in a Federal Court hearing while the worker's funding would be exhausted just preparing their case.[22]

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21 AIRC Annual Report 2003/4

Therefore, the announcement of a scheme to provide $4,000 worth of independent legal advice to assist employees only in the $30,000 to $40,000 wage bracket provides a token relief only. It is an inadequate amount and is only available once the AIRC has exhausted conciliation options and a certificate has been issued.

### *Overriding state dismissal laws*

The Bill makes it clear that existing state laws that provide a remedy for unfair dismissal will be overridden. State unfair contract laws which give employees the capacity to seek variation of employment arrangements that have operated unfairly will also be overridden.

The impact on protections for injured workers and common law contracts that contain unfair dismissal remedies is not clear. Section 7C(3) of the Bill indicates occupational health and safety and workers compensation matters are not to be overridden by the Bill. However, it is unclear whether the current remedies available under some state jurisdictions for employees who are dismissed or victimised for matters relating to health and safety or workers compensation will remain.

## *3.12. Australia's international obligations will be further disregarded*

### *International Obligations Regarding Bargaining*

Australia is a founding member of the International Labour Organisation and has ratified many of its Conventions. Of primary importance is Australia's ratification of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (C87) to which Australia became bound in February 1973. C87 provides that workers' organisations are entitled to organise their administration and activities and to elect their representatives in full freedom (Article 3), and further that public authorities are to refrain from any interference with this right (Clause 2 Article 3).

The Bill is also at odds with repeated observations of the International Labour Organisation's Committee of Experts that Australian law does not meet the requirements of Conventions 87 (freedom of association) and 98 Right to Organise and Collective bargaining, particularly as they concern the right to strike. The attempt in this bill to further weaken access to protected industrial action will take Australian law even further from complying with these international standards.

Also relevant are:

- Workers' Representatives Convention, 1971 (No. 135) which Australia ratified on 26 February 1993 and the Workers' Representative Recommendation 1971 (No. R143). This Recommendation provides guidance on legislation and practice regarding the rights and responsibilities of workers' representatives; and
- the Collective Bargaining Recommendation, 1981 (No. R163) which suggests that governments should 'facilitate the establishment and growth, on a voluntary basis, of free, independent and representative employers' and workers' organisations'.

On 6 August 1997 the Australian Council of Trade Unions (ACTU) wrote to the ILO, setting out a number of concerns about the conformity of the WR Act with Convention No. 98 on the Right to Organise and to Bargain Collectively.

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22 Quoted in Priest, M 2005 Law Pits David against Goliath Australian Financial Review, 30 September.

The ACTU submitted that the WR Act gives clear preference to single-enterprise bargaining, as evidenced by the restrictions on multi-business agreements, and the fact that protected industrial action cannot be taken in relation to these agreements.

In March 1999, the ILO committee of experts published an observation in response to the ACTU complaint. The Committee was concerned at the level of discretion afforded to the federal Commission by section 170LC to determine the appropriate level of bargaining and concluded:

> The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining.

The Committee continued:

> ...the choice of bargaining level should normally be made by the parties themselves, and the parties 'are in the best position to decide the most appropriate bargaining level' (see General Survey on freedom of association and collective bargaining, 1994, paragraph 249). The Committee requests the Government to review and amend these provisions to ensure conformity with the Convention.

Not only will the Bill breach Australia's obligations under ILO Conventions, but it could jeopardise Australia's international trading obligations. For example, Australia has an obligation to abide by ILO minimum standards under the Australia-US Free Trade Agreement.

# 4. The Bill will increase cost and complexity, especially for small business

## *4.1. Employers will lose the right to choose the system that best suits their needs*

Currently most businesses can choose the industrial relations system that best suits their needs: either the state system or the federal system. In New South Wales, for example, two out of every three businesses have elected to stay in the state system because it is less complex and less costly. However, under the Bill, businesses will no longer have the capacity to choose the system that best suits their circumstances.

In future all businesses which are classed as an 'employer' under s4AB(1) of the Bill will immediately be drawn into the federal system. An employer will need to seek advice as to whether its legal status and business activities bring it within relevant parts of the definition of 'employer' under this provision. Businesses which fall outside the 'employer' definition but which use existing federal awards or agreements will be covered by the federal system for up to five years under confusing 'transitional arrangements' in Schedule 13, section 4 of the Bill. The federal system favours large corporations with specialist industrial relations and human resource expertise. Many employers, including small businesses, may face a compulsory move to the federal system which could be very complex and costly.

The complexity and costs of the Bill were recently noted by Professor Andrew Stewart:

> If you're a small or medium sized business, and you're affected by these changes, and that particularly applies to businesses who are currently covered by state awards, you are going to have a lot of difficulty making sense of what this means for you. .. You're probably going to need a lot of expensive legal advice just to understand the immediate impact, let alone what you might have to do or want to do in the future – simply unintelligible. [23]

Many businesses, especially small businesses, prefer the certainty of the state common rule award system. Common rule awards provide a legal framework for pay and conditions which can be automatically applied and which provide for over award payments to be offered to attract, retain and reward valuable staff.

Employers covered by state common rule awards can be certain that they are paying their staff a fair and reasonable wage and valuing their work appropriately.

The award system also provides a level playing field for competing businesses. This level playing field encourages businesses to compete on grounds other than wages, including quality, innovation, technology and efficiency.

This level playing field is supported by strong compliance services provided by the state governments, including the investigation of breaches, targeted compliance campaigns and state-wide education and information programs for employers and employees.

[23] Prof Andrew Stewart (2005), ABC Online, 4 November.

Although the federal government has claimed that it will expand the role of the Office of Workplace Services in compliance it is unlikely that this office can provide the same level of services as the state governments in both metropolitan and regional areas. In fact the federal government has only allocated funding for information and education programs on the changes up to July 2006[24]. This will mean that after this time employers will have to struggle through the complex federal system unaided, or pay for advice from other sources.

The Joint Governments firmly believe that the Bill will transform industrial relations for small business from a level playing field into a minefield of complexity and cost.

## *4.2. It will be costly for employers forced to negotiate individually with every employee*

The Bill seeks to encourage businesses to employ their staff on individual agreements. Consequently, employers, including small businesses, will be increasingly pressured to negotiate a workplace agreement with each individual employee.

Businesses negotiating agreements will need to have detailed knowledge of an increased range of laws and instruments, including but not limited to:

- the Australian Fair Pay and Conditions Standard (AFPCS);
- the protected award conditions set out in s101B(3): such as public holidays, rest breaks, incentive based pay, annual leave loading, allowances, penalty rates and overtime loading;
- the award from which any protected award conditions are derived;
- any applicable Australian Pay and Classification Scales (APCS); and
- any state instruments that continue to apply, such as occupational health and safety, long service leave and public holiday laws.

Businesses will also need to understand the provisions of the Workplace Relations Act itself. This will be particularly important to ensure that an employer does not attempt to negotiate an agreement that includes prohibited content.

Under section 101D, the Bill empowers the federal Minister to make regulations to restrict the content that is permissible in agreements and to outlaw certain content. While businesses will need to wait until the regulations are drafted to know what prohibited content may include, the federal government has indicated that clauses which prohibit the use of AWAs, restrict the use and pay of independent contractors or labour hire, provide for trade union training leave or bargaining fees, allow industrial action during the term of an agreement and provide a remedy for unfair dismissal will be prohibited.

Of serious concern is the provision that the federal government may add, alter or remove the definition of prohibited content at any time by way of regulation, and that these regulations may be retrospective, creating a situation where an employer may breach the law retrospectively.

[24] House of Representatives (2005), Workplace Relations Amendment (Work Choices) Bill 2005: Explanatory Memorandum, page 3.

These regulations on prohibited content restrict the choice for businesses. As a strategy to achieve a harmonious working environment, employers may wish to reassure their employees with provisions that provide access to unfair dismissal remedies or which promote good relations with unions. Under the Bill these provisions are likely to be prohibited in future workplace agreements and be unenforceable in current agreements and awards. Businesses may face fines of up to $33,000 for including a prohibited clause in an agreement (s101E).

For businesses without human resource expertise agreement-making will be a daunting and costly process under the Bill. Small businesses may also face additional costs in tailoring payroll and human resource functions to individual agreements.

## *4.3. The Bill will introduce complex and confusing transitional periods*

The transitional arrangements for transferring employers and employees to the proposed federal industrial relations system are unnecessarily complex and confusing. There will be little certainty for either employers or employees about jurisdictional coverage. The only certainty is that most corporate employers will be forced into the federal system, even if they prefer state arrangements.

Unlike the current Workplace Relations Act, which is built on the basis of the conciliation and arbitration power in the Constitution, the new provisions will be based almost entirely on the corporations power. Other powers will play only a supporting role, to ensure that the new 'corporatised' model is expanded to cover, for example, all employers in the territories and federal public servants.

This has raised significant problems for the federal government in its attempts to cover employers and employees who are unincorporated but who currently operate in the federal system by way of respondency to a federal award or agreement, and those who are incorporated but who currently operate in a state jurisdiction under common rule awards.

To address these issues the federal government has proposed a split transitional system comprising of:

- a three year transitional period for incorporated employers being compulsorily transferred from state awards or agreements into the new federal system; and
- a five year transitional period based on the conciliation and arbitration power for unincorporated employers who are currently covered by federal awards to allow them time to incorporate if they choose to do so.

### *Three year transition for corporations moving into federal system*

Of primary concern to the Joint Governments is the compulsory movement of all constitutional corporations into the new federal system. Many businesses currently enjoy the benefits of coverage by their local state common rule system, which ensures certainty and a level playing field. These factors are of particular importance to smaller businesses, which are relieved of the burden of having to establish what conditions are appropriate for their workers in order to ensure that they are not undercut by their competitors on the one hand, and can promote themselves as employers of choice on the other.

Where an employer currently covered by a state instrument, be it a common rule award, enterprise award, or an enterprise agreement freely entered into, is a constitutional corporation, that instrument will be deemed to be a federal agreement. However, unlike other federal agreements which can be varied during their nominal term, these deemed agreements will be left to stagnate. If these employers and their employees want to maintain or update their industrial arrangements (for example, to provide for increases in wage rates which might normally have come by way of the flow on to state awards of national wage increases), they will have to make new federal agreements, which will totally replace the state award or agreement. For these workplaces, award coverage will disappear over the next three years.

There is a residual provision for those who have not made other arrangements by the time the three years expire to be covered by an 'appropriate' federal award, but it is clearly the intention that there be as few of these as possible. Given that federal awards already contain fewer allowable matters than state awards and are to be further diminished through an award review process, and sometimes contain lower rates of pay, the move to an 'appropriate' federal award can only lead to a further reduction in entitlements. It is not clear from the Bill what will happen to employees and employers in situations where the Commission decides that there is no 'appropriate' federal award, however it is likely that the Australian Fair Pay and Conditions Standard (AFPCS) will apply.

### *Five year transition for non-corporate entities*

The second transitional period gives unincorporated employers five years in which to decide whether to incorporate and become part of the federal system. Incorporating is an expensive and complex process requiring the creation of two-tiered arrangements for members and directors and the adoption and registration of memorandums and articles. Incorporated businesses face increased compliance requirements including annual reporting and formal decision making procedures.

The conciliation and arbitration power will continue to be used during the five year transitional phase, so that federal awards will continue to cover those who are respondent to them but who are not incorporated. If parties wish to remain unincorporated, they will revert to the state jurisdiction at the end of the transitional period.

Many employers, particularly small businesses, are not incorporated. They may operate as sole traders or partnerships. Employers who do have corporate status may not undertake sufficient trading or financial activities to qualify as a 'constitutional corporation'. This could include, for example, certain charitable or other non-profit organisations.

These businesses will face significant confusion when determining which jurisdiction applies to their business. Legally, questions about jurisdictional coverage are likely to take many years to finalise.

## 4.4. The cost of the bureaucracy will increase

The federal Minister has recently claimed that up to $120 million could be saved by abolishing the state industrial relations systems. This is ironic considering the financial impact statement released with the Bill estimates that almost half a billion dollars will be spent implementing the provisions of the Bill over the next four years.

The federal industrial relations system is already unnecessarily expensive to administer: $138.9 million in 2004-2005. By contrast the cost to administer the New South Wales system in 2004-05 was $41.8 million and the cost to administer the Queensland system in 2004-05 was $31.8 million. These costs include the department, commission and public sector industrial relations.

Budget projections prior to the release of the WorkChoices policy and the Bill estimated that the cost of administering the existing federal system would increase by $55.1 million (39.6%).

Between 2001-02 and 2004-05, the cost of the federal system increased by $28.6 million (26%). The cost of the New South Wales system decreased by $10 million (20%).

The federal government has not realised savings despite increasing economies of scale, while the state governments have achieved savings through using technology and innovative compliance strategies to improve education, assistance and enforcement.

Approximately 4 million workers are covered by the federal system at a cost of $35 per head. The 2.5 million workers who receive protection under the New South Wales system do so at a cost of just $17 per head. The Queensland state system covers approximately 1.2 million workers resulting in a cost of only $26 per head. State systems are clearly administered more efficiently than the federal system.

The Joint Governments submit that the implementation of the Bill will result in an unnecessary burden on taxpayers and an unnecessary extension of the bureaucracy involved.

## 4.5. Employers will be forced to cut wages and conditions in order to remain competitive

The proposed changes to the award safety net in the Bill will remove the level playing field and will allow competitors to lawfully pay wages which are below the award.

Currently all employment agreements, including Australian Workplace Agreements (AWAs) and collective agreements, must meet a test to ensure that they do not disadvantage workers in comparison to the relevant award.

Under the Bill this protection will be removed and businesses will only need to ensure that their agreements meet the Australian Fair Pay and Conditions Standard (AFPCS) (provided that any allowable award matters are specifically removed from the agreement).

The AFPCS is far below many of the provisions contained in awards and will allow competing businesses to legally undercut on wages and conditions.

Despite the best intentions of providing good remuneration and working conditions for employees, businesses will be forced to reduce conditions in order to remain competitive.

## *4.6. It will be harder to find skilled workers*

Australia is experiencing national skills shortages in a range of trades and professional occupations including engineering, child care, nursing and heath specialists, hospitality, hairdressing, construction, electrical, metal and vehicle trades. Much unmet demand is for specialised skills.[25]

Small business will be disadvantaged in the recruitment of skilled staff in these industries in particular, as big businesses will be able to offer greater job security and protection from unfair dismissal. This is discussed in more detail at section 4.7 of this submission.

The Bill does nothing to address skill shortage problems. If anything, the Bill provides a disincentive for both employers and employees to invest in training.

### *Trainees and apprentices*

At section 90S, the Bill provides that the Australian Fair Pay Commission (AFPC) **may** determine a 'special' Federal Minimum Wage (FMW) for certain categories of workers, including employees to whom training arrangements apply.

There is no requirement that the AFPC exercise this power. In the event that these employees are not covered by an APCS and no special FMW is determined by the AFPC, they are specifically excluded from coverage by the standard FMW and it appears that no minimum rate of pay would apply.

In addition there is no specific requirement that any trainees and apprentices be paid for off-the-job training, for example attendance at TAFE. This may be a matter open for negotiation between the employer and the trainee/apprentice unless such a provision is included in an Australian Pay and Classifications Scale (APCS).

Further, award conditions that facilitate training, such as reimbursement of TAFE fees and tool and travel allowances may all be bargained away. Young workers often do not have the skills and confidence to bargain and are among the most vulnerable members of our community.

The removal of these award entitlements will make apprenticeships and traineeships less appealing to all workers and in particular adult apprentices who may be forced to train on junior wages. A recent study by the National Centre for Vocational Education Research highlighted that about 40 percent of apprentices do not complete their apprenticeships, and that low wages contribute to young people failing to complete an apprenticeship.

A recent report found that 50% or more of young people did not complete their training because of unsatisfactory conditions. Some 66% of trainees and 60% of apprentices cited no or poor quality training[26].

The Joint Governments submit that skill development is essential to future productivity and prosperity. The provisions of the Bill remove incentives for training and will worsen the current skill shortage.

The impact of these proposals on young workers is discussed in more detail at section 6.4 of this submission.

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[25] Department of Employment & Workplace Relations (DEWR), National and State Skills Shortages, December 2004.
[26] SA Unions (2005), Direct Cheap and Disposable, 7 September.

## 4.7. Unlawful termination will be costly for both employers and employees

### *Employer views on unfair dismissal*

The federal government has asserted that the current unfair dismissal laws are costly and restrictive for small and medium sized businesses and discourage employers from employing more staff.

Numerous surveys have been conducted to measure the concerns of business owners on the various issues which impact on their businesses. These surveys have variously been funded by employer and industry associations and universities.

Figures from the August 2005 Dun and Bradstreet Monthly National Business Expectations Survey show that when asked what impact the federal government's proposed unfair dismissal laws have on their recruiting practices, 19 percent of all firms claimed no impact on hiring and a further 65 percent confirmed they were not likely to employ new staff because of the proposed limitations of unfair dismissal.

The August 2004 Sensis survey found that unfair dismissal laws had absolutely no impact for almost half of small to medium sized businesses.

The December 2004 Sensis manufacturing survey prepared for Australian Business Limited found that skill shortages are the main issues currently faced by Australia's manufacturing businesses.

### *Disadvantaging small business*

The exclusionary aspect of the Bill also places small business employers at a distinct disadvantage in attracting quality and skilled employees.

Research shows that the unfair dismissal exclusion for small business and the prohibition on unfair dismissal protections in agreements will hinder small business employers from competing for valued workers. Those companies with less than 100 employees will be unable to compete on job security with larger firms who will be covered by unfair dismissal laws.[27]

Unlawful termination cases are complex and legalistic and must be heard in the Federal Court, where both employers and employees must be represented by legal practitioners. Recent cases have taken nearly three years to be finalised and cases can often cost as much as $30,000.

The Joint Governments' concerns about the unfair dismissal exemption and the unlawful termination provisions are discussed in more detail at section 3.11 of this submission.

## 4.8. Accidents in the workplace will increase

Employers will be under pressure to negotiate away conditions such as meal breaks, public holidays and two weeks annual leave in order to remain competitive. Unfortunately for many businesses the removal of these conditions could be detrimental in terms of occupational health and safety and workers compensation.

[27] Peetz, D in Workplace Express (2005), Unfair dismissal prohibitions constrain employers: Peetz, 17 October.

Rest breaks, meal breaks, public holidays and annual leave are vitally important for workers to remain healthy and productive. The removal of these provisions from agreements (under s101B(2)(c)) is likely to result in workers who are tired, fatigued or who have increased levels of illness.

Fatigued and tired workers pose a health and safety risk in the workplace and, as a consequence, are likely to increase the incidence of workplace accidents. Businesses may incur increased costs in sick leave and workers' compensation claims as a result. Businesses will also need to undergo the costs of developing and implementing a rehabilitation program for the injured worker on their return.

Occupational health and safety matters are examined in more detail in section 6.7.

## *4.9. Increased power to change the rules by regulation will increase uncertainty*

Some of the provisions that are yet to be determined or clarified by way of regulation include:

- the definition of a state or territory industrial law, and the state or territory laws that will be excluded (section 7C);
- the terms of an award or workplace agreement which remain subject to state or territory laws (section 7D);
- most functions and operational procedures of the Australian Fair Pay Commission (AFPC) (Part IA, see for example section 7N(3));
- the term of appointment and powers of workplace inspectors (Part V);
- the definition of a 'particular respect' under which the Australian Fair Pay and Conditions Standard is considered to provide more favourable outcomes for employees (section 89A);
- employees to whom the Australian Fair Pay and Conditions Standard does not apply (section 89C);
- which Commonwealth laws or instruments are included in the definition of pre-reform federal wage instruments, and which state or territory laws or instruments are included in the definition of pre-reform state or territory wage instruments (section 90B);
- exclusions to the definition of public holidays (section 90G(2));
- what may be included in an Australian Pay and Classification Scale (APCS) (section 90X(6));
- retrospective regulations relating to preserved APCSs, despite the provisions of the Legislative Instruments Act 2003 (section 90ZI);
- the definition of piece rate employees (section 92C);
- circumstances under which annual leave (section 92I) and paid personal leave (section 93T) do not count as full and continuous service;
- the qualifications a person must meet to be a bargaining agent (section 97);
- the extent to which a workplace agreement displaces prescribed conditions of employment specified in a Commonwealth law, and the definition of those prescribed conditions (section 100C);

- the award terms which are not considered to be protected award conditions (section 101B);
- industrial instruments to which a workplace agreement cannot refer (section 101C(6)(c));
- which matters constitute prohibited content (section 101D); and
- the form of a declaration envelope for the purposes of a secret ballot (section 109A).

It is clear that the Bill itself does not reveal the full extent of the federal government's plans, and the significantly increased regulation making power will only serve to increase uncertainty for employees, employers and state and territory governments.

Regulations are used to give effect to laws and help us understand matters of detail. They are facilitative by nature. Regulations should not be used to explain matters of principle, matters that rightly deserve the scrutiny of the Parliament.

The Joint Governments reject the overuse of regulation in defining the impact of the Work Choices package and the extended regulation making power of the Minister for Workplace Relations.

## *4.10. Costs will increase for state governments as an employer*

This Bill has the potential to force many public sector employers and employees from the state industrial relations systems into the highly regulated federal system.

The federal government's proposals are likely to create confusion for agencies and employees over whether they are entitled to continue operating in the state systems or whether they will be forced to follow the proposed federal law.

As noted by Justice Geoffrey Giudice:

> it is likely that after the new law takes effect there will be a significant period of uncertainty until the legislation, or at least the main features of it, are scrutinised by the High Court of Australia. It is clear that a national system will not be achieved at one stroke, but over a long transition period during which federal and state regulations will be brought into alignment. [28]

There will also be costs associated with working through this period of uncertainty which will take public resources that could otherwise be productively engaged.

As employers, the state governments have established consultative and cooperative industrial relations with their employees. In most cases this is underpinned by access to fair and independent tribunals, facilitating productive public sector service delivery.

The benefits to the sector of this approach are clear. The public sector in most states has enjoyed low incidences of industrial disputation and high levels of cooperation.

For example over the last 12 months the NSW Government and public sector unions have, between themselves, successfully reached negotiated outcomes in relation to wages settlements for a number of major public sector groups. Similarly in Queensland, the government and public sector unions successfully negotiated a whole of government agreement which provided for real wage increases and improved employment conditions with minimal industrial action.

[28] Australian Industrial Relations Commission, Annual Report: 1 July 2004 to 30 June 2005.

Where government and unions have not been able to come to an agreement, the role of the state tribunals and commissions has been invaluable in authoritatively and fairly determining the issue avoiding industrial action and disruption to vital services to the community.

For example, the NSW Industrial Relations Commission has assisted in re-establishing nursing and teaching as attractive careers by fairly and comprehensively assessing this work, taking into account such matters as changes in work over time and professional shortages whilst being mindful of the impact on the NSW economy.

Important and sensible award conditions for public sector workers will be threatened under the proposed federal law. For example, if nurses were covered by the proposed federal laws, reasonable workload provisions which protect against the running down of nursing numbers and overloading staff would be removed as non-allowable. It is protections such as these that ensure nurses can do their job of providing essential care to the community safely.

Furthermore incorporated state utilities, such as ports, rail and electricity services in Queensland, for example, may be affected by the proposed changes. If these utilities are to be absorbed into the federal system, this will potentially jeopardise the significant workforce reforms achieved by the Queensland Government.

Communication, information sharing and consultation has also been critical in achieving significant efficiencies in the sector through restructuring and workplace reform. Reducing the representational rights of unions and prohibiting such provisions as trade union training leave can only frustrate the achievement of such objectives.

The state public sectors have traditionally provided flexible work practices, leading to skilled and motivated workforces which deliver quality and efficient services to the community. This flexibility has been based on cultures that support the meeting of customer expectations whilst also assisting employees to balance their work, life and family needs in a genuine way without needing to trade away existing conditions.

Practices such as that in the Commonwealth public service which make the acceptance of an AWA a condition of appointment directly conflict with merit selection principles which ensure that the taxpayer is funding the best person for the job and that appointment decisions are transparent.

# 5. The economic justification for the change is unfounded

## *5.1. Importance of securing higher productivity*

In the Second Reading Speech to the Bill on 2 November 2005, the Hon Kevin Andrews MP stated that:

> Now is the time to secure the future economic prosperity of Australian individuals and families. That is what Work Choices is all about – securing the future prosperity of Australian individuals and families. Work Choices does this by accommodating the greater demand for choice and flexibility in our workplaces…
>
> (The reforms) rest on the simple proposition that the best guarantee of good jobs, high wages and a decent society is a strong and productive economy… The key to advancing prosperity and fairness together is higher productivity. Australia's economic strength and the living standards of our people depend, ultimately, on the productivity of our workplaces.

The Joint Governments concur with the federal Minister's proposition that industrial relations reform should be approached co-operatively, and with a view to advancing prosperity and fairness through higher productivity. However, the Bill will not advance prosperity or fairness, and will not enhance workplace productivity. Rather, the Bill is directed at restricting or destroying the very processes which can enhance labour productivity.

It is worth recognising that in the decade since the commencement of the *Workplace Relations Act 1996*, all state jurisdictions have undertaken significant industrial relations reform processes. With the exception of Victoria, these reform processes have achieved the twin goals of increasing prosperity and fairness through a third-party binding arbitration process which gives primacy to collective bargaining.

The Joint Governments therefore advance the propositions that:

- the recent history of Australia establishes a clear link between collective bargaining and productivity gains – the corollary of which is that the Bill will not deliver increased national productivity;
- the drivers of national productivity are not supported in the Bill; and
- the benefits of jurisdictional competition are real and will be lost.

## *5.2. The link between collective bargaining structures and national productivity*

### *Australia's recent productivity performance*

The federal government notes that average workers have enjoyed a real 14 percent pay rise since 1996. This is a misleading claim as the federal government's estimates are based on growth in *average earnings,* which is inflated by high incomes at the top end of the range. Table 5.2.1 shows a more accurate picture for real wage growth since 1996, which considers the growth in real wages for all non-managerial employees.

Table 5.2.1: Real growth in earnings: Non-managerial employees: 1996-2004

| Category | May 1996 | May 2004 | Real Wage Growth (%) 1996-04 |
|---|---|---|---|
| 10th percentile | $430.00 | $557.00 | 7.2 |
| 20th percentile | $481.00 | $624.00 | 7.3 |
| 25th percentile | $502.00 | $659.00 | 8.6 |
| 50th percentile | $625.00 | $829.00 | 9.7 |
| 75th percentile | $803.00 | $1,078.00 | 11.1 |
| 90th percentile | $985.00 | $1,366.00 | 14.7 |
| Average | $683.00 | $915.70 | 10.9 |

*Source:* Unpublished data, ABS Survey of Employee Earnings and Hours, Cat. No. 6306.0

Thus, it is fair to conclude the following about Australia's productivity performance between 1996 and 2004:

- on average, there was a 10.9 percent improvement for workers;
- this solid result cannot be solely attributed to the *Workplace Relations Act 1996* as State industrial relations jurisdictions have provided the driving force for productivity improvements, particularly in services and utilities industry sectors;
- the aggregated average disguises distributional and compositional differences within industries; and
- the federal government's estimate of 14 percent real wages growth is misleading as it incorporates data from high wage earners, who are unlikely to be covered by any industrial relations system.

### *Australia's productivity performance since 1964*

Taking a longer term view of the labour productivity, four distinct periods can be identified across the last four decades:

1. 1964 – 1982: growth averaged 2.6 percent per annum during the operation of the traditional award system;
2. 1983 – 1992: for a number of factors – not the least of which was the highly centralised wage fixing system of the Accord - growth in productivity slumped to 0.8 percent annually;
3. 1993 – 1998: during the shift to collective enterprise bargaining, productivity growth averaged 3.2 percent each year; and
4. 1998- 2004: in this period, where the dampening effect of the current *Workplace Relations Act 1996* has stultified collective bargaining somewhat, productivity has fallen to 2.3 percent growth per annum.[29]

It should be noted that the growth in multifactor productivity (improvements in the efficiency and effectiveness of resource use) of 1.8 percent per annum throughout the fourth period contributed the major proportion to this overall level of growth.

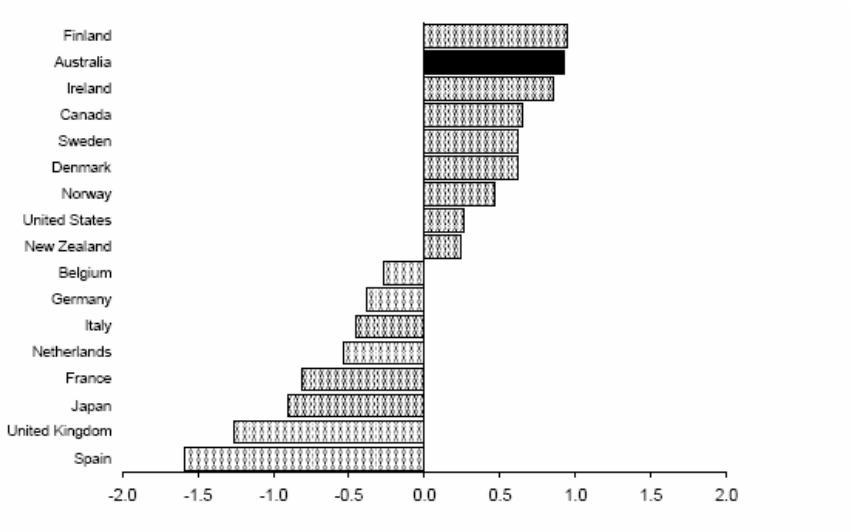
[29] Parham D (2002) 'Productivity Gains from Policy Reforms, ICTs and Structural Transformation', paper to: *IAOS Conference on the New Economy* London, 27-29 August 2002, Productivity Commission.

The nexus between the highest level of collective bargaining and the highest level of productivity is not coincidental. It makes a persuasive case for a primary focus of an industrial relations system to be collective bargaining arrangements, supervised in a strong third-party arbitration system.

### *An international perspective of Australia's productivity performance*

Australia's productivity growth rate during the collective bargaining period was also strong by international standards. In terms of trend multifactor productivity growth rates from 1980-89 to 1990-99, Australia outpaced all OECD countries except Finland.

Figure 5.2.1: Changes in average annual rate of multifactor productivity growth in OECD countries: 1980-89 to 1990-99




Source: Parham , 2002.

The strong growth in Australia's productivity as a result of collective bargaining drove up Australia's living standards between 1990 and 1999. As measured in Gross Domestic Product per capita, Australia's comparative ranking improved from 15th in 1990 to 7th in 2001.

Table 5.2.2: Australia's ranking on productivity, average income and labour utilisation levels among 22 OECD countries: 1950 - 2001

| | 1950 | 1960 | 1973 | 1990 | 2001 |
|---|---|---|---|---|---|
| **GDP per hour** | | | | | |
| Australia's rank | 4 | 5 | 10 | 15 | 14 |
| % of US level | 81 | 75 | 74 | 77 | 83 |
| **GDP per capita** | | | | | |
| Australia's rank | 5 | 7 | 9 | 15 | 7 |
| % of US level | 78 | 78 | 77 | 74 | 78 |
| **Labour utilisation[a]** | | | | | |
| Australia's rank | 16 | 17 | 7 | 7 | 5 |
| % of US level | 96 | 104 | 104 | 96 | 94 |

Source: Parham, 2002.
Notes: Labour utilisation is the number of hours worked per head of total population. It explains the difference between GDP per hour and GDP per capita.

The foregoing demonstrates that there is a clear linkage between industrial relations arrangements and productivity, and that the industrial relations model which best fosters the climate for productivity growth is one which gives primacy to enterprise and industry-level collective bargaining, within a third-party arbitration process.

## *5.3. The drivers of growth and national productivity*

### *The drivers of growth and productivity in Australia*

Economic growth can be achieved either by:

- *increasing inputs*, such as labour, capital, and the use of natural resources, and
- *increasing productivity*, principally of firms and workers.

Increasing inputs is an important source of economic growth and can have desirable outcomes, such as providing job opportunities. However this type of growth has attracted criticism because it is considered unsustainable in the longer term.

Sustainable economic growth, based around increasing worker and firm productivity, is an appropriate long-term economic objective. The key drivers of sustainable productivity growth are factors such as:

- *capital deepening* - providing workers and firms with access to greater amounts of investment and higher quality capital infrastructure;
- *efficiency improvements* - making better use of existing resources given current technology; and
- *technological progress* - driven by innovation, research and development (R&D) and improvements in the skills of workers.

The Productivity Commission has found that Australia's recent productivity growth surge is the natural outcome of a long-term policy reform strategy that provided the incentives to be more productive, principally by removing unnecessary barriers to competition and giving government business enterprises more autonomy and exposure to commercial disciplines.

Structural factors identified as underpinning this productivity surge include:

- the introduction and widespread take up of new technology-specifically information and communications technologies (ICTs);[30]
- the gains of microeconomic policy reforms - that is, the gains from resources shifting to where they can be used more productively (including in the labour market), and more flexibly;[31] and
- the increase in average education attainment and skills that would strengthen the skills of workers and promote innovation through the absorption and development of technologies and efficient business practices.

30 The role of ICTs as a driver of productivity growth has been markedly different in Australia, compared to its role in driving productivity growth in the US. The US is a major manufacturer and exporter of ICTs and expansion into the rapidly expanding markets in North Asia (in particular, China) is estimated to have contributed significantly to productivity growth in the US. Australia is not a major manufacturer or exporter of ICTs. In Australia, the role of ICTs in productivity growth is attributed to the widespread take-up and use of ICTs by businesses and households.
31 Parham, 2002, page 9

Research undertaken by the University of Queensland and Griffith University into productivity and regional economic performance in Australia found that key drivers of technological progress, such as innovation and human capital, have largely driven interstate differences in productivity growth and per capita income levels.

For example, growth in business research and development explains up to 60% of the variation in multifactor productivity growth across the states, and Queensland and Western Australia, which showed the strongest rates of growth of business R&D expenditure, also showed the strongest growth in multifactor productivity.

This experience cautions as simplistic any view that changes to industrial relations systems will produce a further productivity surge.

### *International evidence about the drivers of growth and productivity*

Internationally, the OECD has demonstrated that economic growth and productivity performance needs to be driven by a broad reform agenda. In its 2003 *Policy Agenda for Economic Growth*, the OECD examined the cross-country differences in economic growth performance over the previous decade.

The OECD identified that countries such as the United States, Australia, Canada and Ireland experienced much higher growth over the past few years than continental Europe or Japan. It identified two types of reasons for lagging GDP per capita growth:

- labour utilisation may be too low (for instance, weak participation in labour markets largely explains why GDP per capita in the European Union is well below that of the United States); and
- weak labour productivity and multifactor productivity.

The OECD's report brings into focus the need to implement the right degree of labour market regulation in order to increase labour utilisation and labour productivity.

Using OECD data, Aiginger examined the issue of whether labour market institutions were the chief cause of Europe's poor economic performance compared to the US, and to explain differences between EU countries.[32] He assessed labour market regulation against macro-economic policies: fiscal policy, monetary policy and macro-economic management, and policies for boosting investment into long-term growth: research, education and diffusion of technologies.

Aiginger identified that a one sided policy which focuses predominantly on making the labour market more flexible is risky and may take a very long time before it starts to boost growth. His analysis ascribes a prominent role to the dynamics of investments into research, human capital and new technologies.[33]

Aiginger's findings show the most successful countries pursued strategies to actively promote investment in the future, through R&D, education and information technology. Labour market deregulation was not, in itself, a significant determinant of higher productivity.[34]

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[32] Aiginger, K (2004) 'The Relative importance of Labour Market Reforms to Economic Growth: the European experience in the Nineties', Austrian Institute of Economic Research, Paper delivered at the *OECD NERO Meeting*, Paris 25 June 2004

[33] Ibid

[34] Ibid.

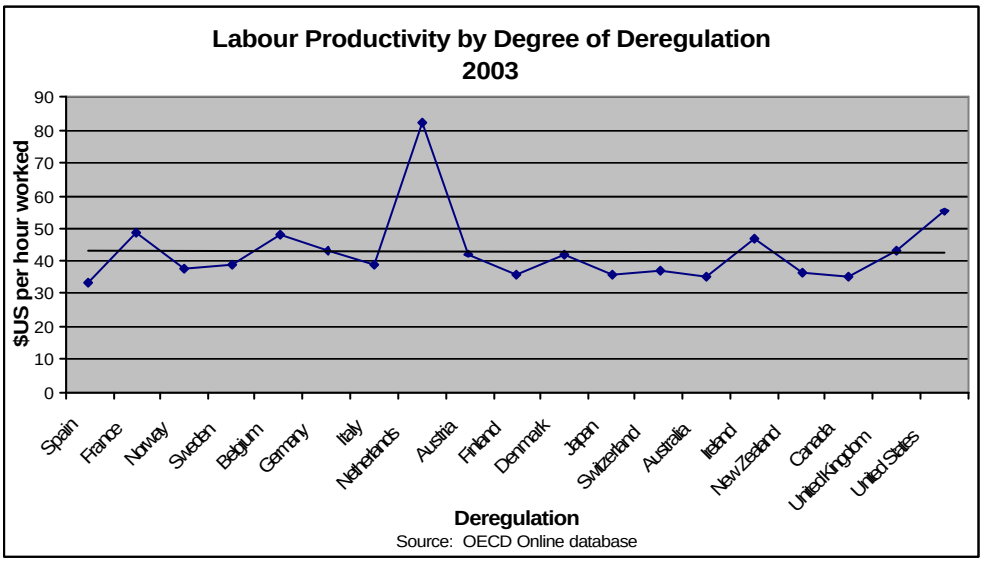
Aiginger's study at an international level is aligned with the findings of the Productivity Commission outlined above. Both suggest that there are a range of factors which will drive productivity, and the federal government is placing undue, and quite misguided, emphasis on industrial relations reform providing the crucial difference.[35]

### *Labour market regulation/deregulation and productivity*

To the extent that industrial relations arrangements have some impact on productivity, it is clear from international evidence that the approach contained in this Bill will be of little benefit. Across a broad range of countries, the OECD has consistently found that there is only a small and tenuous link between national economic performance and types of industrial relations systems.[36] In particular, deregulation is not a precondition for economic success with research indicating a range of different industrial relations systems are capable of producing similar macro-economic outcomes.

Using OECD data to compare output per hour worked and the amount of deregulation across a range of countries, no evidence is found to support the federal government's view that deregulation improves productivity. In fact, highly regulated labour markets such as the Netherlands, Norway and Sweden recorded similar productivity levels to those countries with much less regulation such as New Zealand, Canada and the United Kingdom, as is shown in the next chart.

Figure 5.2.2: Labour productivity by degree of regulation



Source: OECD Online database

The experience in New Zealand is particularly illuminating in examining the link between labour market deregulation and improved productivity. As with Australia, New Zealand has had a long history of industrial regulation based on conciliation and arbitration.

This framework started to unravel during the 1980s as policy-makers complemented the deregulation occurring in other areas – particularly in product markets and the financial system – by decentralising industrial relations towards the enterprise level.

However, demands for further reform from business continued and in 1991 the incoming government introduced the Employment Contracts Act 1991 (ECA).

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[35] Ibid.

36 OECD Employment Outlook, 2004

The ECA abolished industrial awards, ended the official recognition of unions and established a system to impose individual contracts.

For proponents of labour market deregulation, this was the opportunity to showcase all the benefits of freeing up the labour market and removing the stifling effect of regulation on economic performance. In particular, labour flexibility and labour productivity were the areas where it was claimed that deregulation would have its biggest positive impact.

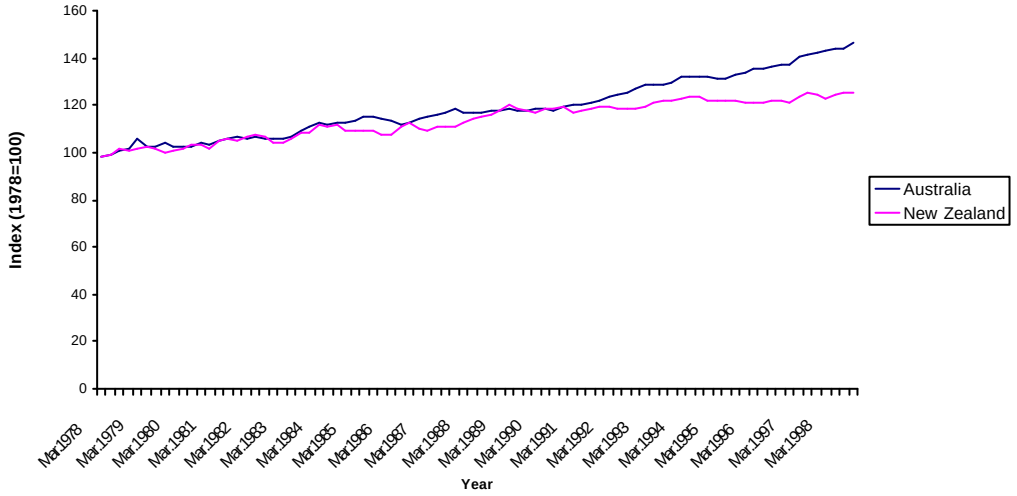
The results of New Zealand's ECA were disappointing, with average labour productivity growth below one percent through the 1990s.[37] Productivity levels in New Zealand languished well behind most developed countries in the 1990s and well below levels achieved in New Zealand in the 1980s. As Goulter notes:

> There appear to be two fundamental reasons why the ECA failed to produce the productivity surge it was designed for:
>
> - the ECA was specifically designed to make labour cheaper and therefore to make firms more profitable – but in fact that incentivised the wrong employer behaviour and as a result investment actually fell away in the areas of technology, plant and workforce skilling; and
> - the ECA led to a collapse in social capital, the matters around trust, loyalty and good faith in the workplace. Essentially, the social contract was broken.[38]

The chart below shows clearly the divergence in productivity performance between Australia and New Zealand coinciding almost precisely with the introduction of the ECA. Figure 8.1 illustrates that labour productivity increased at similar rates from the late 1970s and 1980s when the systems were broadly similar. When they diverged, Australia's performance was demonstrably superior.

Figure 5.2.3: Labour productivity, Australia and New Zealand

**Figure 8.1: Labour Productivity, Australia and New Zealand, 1978-1998**




[37] Goulter P, 2005. Paper presented to the National Industrial Relations Conference 'Fair Go or Anything Goes'. 13 July 2005, Sydney

38 Ibid.

Barry and Wailes concluded that:

> These findings suggest that either labour market regulation is not the only factor which determines labour productivity or that neo-liberal arguments about the relationship between individual contracting and productivity are flawed. In any event, the New Zealand case demonstrates that further erosion of arbitration in Australia is unlikely to produce the productivity breakout that the government and groups like the BCA have predicted[39]

The ECA legislation did not deliver productivity gains to New Zealand, and it did not increase labour flexibility. Allen, Brosnan and Walsh conducted a comparative analysis examining employers' use of internal and external labour hiring options in Australia and New Zealand during 1995. It showed that there was little difference in the propensity of workplaces to employ internal and external forms of labour adjustment.

These results suggest that the flexibility benefits to employers of the New Zealand model are overstated. In short, moderately regulated industrial relations systems, such as Australia's, do not hamper employers' capacity to respond flexibly to changing market circumstances. This raises the question of why policymakers would seek to deregulate further for little economic benefit, but potentially greater social costs.

The New Zealand ECA legislation also did not increase labour flexibility or workplace consultation.

It became apparent that this new system failed to encourage effective consultation at the workplace. Harbridge (1993) showed that 88 percent of individual contracts were initiated by management, with 56 percent being presented to employees without consultation. Rasmussen showed that in 39.3 percent of ECA contracts, no negotiations had occurred. Rasmussen also identified that those who were not involved in negotiations were far more likely to be part-time on lower incomes and younger employees.[40]

The Joint Governments consider that the New Zealand ECA experience demonstrates that it is difficult to achieve co-operative, productive working relationships based on a 'take it or leave it' approach.

Turning to the impact of individual bargaining on productivity, the federal government appears to proceed on the assumption that productivity at individual workplaces can be improved *only* by operating in an environment where agreements made on an individual basis can be made without third-party interference from trade unions and industrial tribunals.

This assumption ignores the substantial body of research and evidence that shows workplaces with active union involvement and collective bargaining structures have some of the best productivity results. Studies have found a positive relationship between collective unionism and workplace productivity growth. For instance:

- Tseng and Wooden have found that firms with higher rates of union membership are 5 to 7 percent more productive than firms with no union members[41];

39 Barry, M & Wailes, N, 2004, 'Contrasting systems? 100 years of arbitration in Australia and New Zealand', Journal of Industrial Relations, v.46, no.4, Dec 2004, pp 430-447

40 Barry M, Wailes, N (2004) 'Contrasting systems? 100 years of arbitration in Australia and New Zealand', *Journal of Industrial Relations*, v.46, no.4, Dec 2004, pp 430-447

41 Loundes J, Tseng Y, Wooden M (2003) 'Enterprise bargaining and productivity in Australia: what do we know?', *Economic Record*, v.79, no.245

- Peetz found that average labour productivity growth rates during various productivity cycles since 1964 to 65 have been higher under more centralised labour markets[42];
- Hull and Read (NSW project) have researched the area of working arrangements and representation with the purpose of identifying excellent workplaces and 'analys(ing) the basis for their outstanding performance' – finding that '(s)ome of our excellent workplaces are strongly unionised, with a history of industrial conflict…(y)et such workplaces have changed considerably and are now considered excellent, from both the business and work environment perspective'[43];
- Mangan[44] found a positive and significant relationship between active unionism and increased innovation, investment activity and process innovation leading to improvements in productivity
- Lynch and Black from the US Federal Reserve Bank and Tufts University revealed that productivity is impacted negatively by high employee turnover, especially for the non-manufacturing sector[45]. Their study of productivity also revealed that the method, content and implementation of human capital investments in the workforce are the most significant factors for improving productivity.

The evidence above suggests that there is a range of factors which will drive productivity, and the federal government is placing undue, and quite misguided, emphasis on industrial relations reform providing the crucial difference. Furthermore, even to the extent that industrial relations arrangements do have some impact on productivity, a further deregulatory approach will be of little benefit. This is demonstrated by the international evidence.

### *Labour utilisation and economic growth*

The Joint Governments consider that removing unfair dismissal protection for most Australian workers, as is proposed in the Bill, will not be a fundamental catalyst for increased employment.

We note that the Prime Minister and the federal Minister for Employment and Workplace Relations have publicly claimed removing unfair dismissal protection for small business will be the key to reducing unemployment to below 5 percent and therefore creating 77, 000 new jobs.

No empirical evidence is provided by the federal government to support this assertion, nor the assertion that unfair dismissal laws deter employers from hiring. The absence of empirical evidence was outlined by Professor Stewart in his Senate submission to Workplace Relations Amendment (Termination of Employment) Bill 2002 Senate Inquiry (at p 4).

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[42] Peetz, D 'Is individual contracting more productive? Paper submitted as part of Academic Report on Federal IR Proposals, University of Sydney, 21 June 2005.

[43] Hull D, Reid V (2003) 'Simply the Best: Workplaces in Australia' *Working Paper 88*, ACIRRT, University of Sydney, NSW.

[44] Mangan, J (2005), *Shifting Industrial Relations Jurisdiction from the Queensland Government to the Commonwealth Government: Some Potential Implications*, University of Queensland.

[45] Black SE, Lynch LM (2000) 'What's driving the new economy? The benefits of workplace innovation' *NBER Working Paper 7479*, National Bureau of Economic Research, Cambridge, MA.

Professor Stewart's evidence to the Senate links with Oslington and Freyens' conceptual modelling. It showed that, for employers, the main barrier to the recruitment of workers is lack of work, not the existence of current unfair dismissal laws. [46]

Also contradicting the rhetoric from the federal government, OECD assessments consistently show that Australia's employment protection legislation is one of the least restrictive in the OECD area. According to the OECD's *2004 Employment Outlook*, only the United States, Canada, the United Kingdom, Ireland, and New Zealand have less restrictive employment legislation.[47]

The report on Australia released this year, dated December 2004, states:

> Finally, disincentives to hiring should be kept as low as possible through policies which contain the cost of dismissal procedures, without abandoning substantial social and economic benefits of employment protection legislation.

The OECD's 2004 Economic Outlook report has also developed an index of employment protection, designed to measure 'the strictness of employment protection legislation' for each of these countries. The index takes account of regulations governing the terms and conditions of permanent contracts in case of individual dismissals, layoffs and regulations governing the possibility of hiring on temporary contracts.

Browne notes that a comparison across 16 OECD countries produces an 'an interesting pattern… and it doesn't offer much support to the (federal) government'[48]. He notes that:

> I suspect that the (federal) government thinks that labour market deregulation is an easy way to generate employment, regardless of the potential costs. But the figures show that if the government really does want to create jobs, it can do so without joining the race to the bottom of the job protection league table. The performance of Switzerland, the Netherlands, Norway, Denmark and Sweden shows that alternative policies can be just as successful in providing jobs.

The OECD has also identified that higher employment protection tends to reduce firings during economic downturns and thus increases job stability. This is likely to promote workers' effort and willingness to be trained, which may have positive implications for aggregate employment and economic efficiency.[49]

The danger that lies within the Bill is that the true characteristics of sound labour market competition will be compromised. Ethical employers will be competitively disadvantaged because the way is left open for those less honourable to compete in the market place on the basis of lower wages and conditions. Those principled employers will be forced into unfair practices in order to survive competitively. In short, the level playing field for employers will be eroded.

The Joint Governments reject the Bill's removal of unfair dismissal protection for the majority of Australian workers, and reject the notion that such steps can be justified on an economic basis.

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46 Paul Oslington & Benoit Freyens, 'How Many Jobs Will Removing Unfair Dismissal Provisions Create?', University of New South Wales, 31 August 2005

47 Organisation for Economic Cooperation and Development (2004) *OECD Employment Outlook 2004*, OECD

48 Browne Peter (Editor), 2005. *Government's IR Figures only Tell half the Story* Australian Policy on Line 3 November 2005 para 9.

49 Ibid.

## *5.4. The benefits of jurisdictional competitiveness will be lost*

The Joint Governments consider that there is merit in retaining the current state industrial relations systems for the majority of Australian employers and employees who wish to operate within such systems. The reality is that, for over a century, employers have been able to organise their workplace affairs in such a way as to attract the jurisdiction of either the federal or a state industrial relations system.

The Joint Governments also consider that significant economic benefits arise from the existence of state and federal industrial relations systems. This view is supported by the Productivity Commission in its 2004 Annual Report, which considered the plans of the federal government to unilaterally impose a unitary workplace relations system.

The Productivity Commission report makes the observation that consumers and businesses will have less choice and poorer services under a centralised (unitary) system. The Commission further observed that another mechanism for advancing workplace relations reform could entail the development of a more broadly based arrangement.

Under this arrangement a national alternative regime would operate in parallel to the existing state systems, enabling employers to opt out if they chose. This approach would enhance the scope for beneficial jurisdictional competition.

In the Commission's view:

> …some overlap may be beneficial if it expands choices or promotes improvements to service delivery over time such that the benefits outweigh the associated costs. 50

The Joint Governments are prepared to discuss the Productivity Commission's recommendations with the federal government, using the Workplace Relations Ministers' Council framework for inter-governmental liaison.

50 Australian Productivity Commission, 2005 Annual Report 2004-2005 at p 9.

# 6. The Bill will result in unfair outcomes, particularly for vulnerable workers

## *6.1. Impact on low paid workers*

For more than 100 years minimum wages in Australia have been set, reviewed and adjusted by an independent body, the Australian Industrial Relations Commission (AIRC) and its predecessors. This system ensures that low paid workers and their families are not left behind.

Minimum wages are adjusted by way of an annual wage case initiated by the ACTU, designed to assist those workers who are not able to achieve wage increases through bargaining. Every year since coming to power, the Howard Government has opposed the minimum wage claim. If the Commission had been convinced by the submissions of the federal government, employees earning the minimum wage would be $50 per week worse off.

The concept of the 'Living Wage' was first articulated by Higgins J in the Harvester case (Ex parte HV McKay (1907) 2 CAR 1). That case involved a determination under the then Excise Tariff Act, the issue being whether an employer should be granted certain excise exemptions on the ground that wages paid to his employees were 'fair and reasonable'. In extrapolating guidelines for the term 'fair and reasonable' in this context, Higgins J focused on the 'normal needs of the average employee, regarded as a human being living in a civilised community'.

The removal of the word 'fair' from the objects of the Act in relation to the minimum wage is a good example of the federal government's attitude towards the lowest paid. The Bill proposes to replace:

> 3(d)(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment

with

> 3(c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act

This amendment makes it clear that the Bill is focused on economic considerations only, and has disregarded the notion of fairness for employees, despite what a brochure may say on its cover.

The removal of awards as the safety net, along with the no disadvantage test that checks to make sure employees are not worse off, will reduce the bargaining position of the lowest paid to just the five components of the Australian Fair Pay and Conditions Standard (AFPCS).

The federal government has repeatedly refused to guarantee that the real value of minimum wages will be maintained under the new system. They have 'guaranteed' that the minimum wage will not fall below the current rate of $12.75 per hour, however the combination of a reduced bargaining position of low paid workers, rising inflation and the need for employers to cut wages to stay competitive will undoubtedly reduce the real value of wages for the low paid over time.

The Bill also proposes to override any minimum conditions currently provided for in state legislation. For example, employees in Queensland are protected by a set of legislated minimum conditions, including a minimum wage, which will almost certainly be more generous than the standard set by the AFPCS. Employees who rely on these legislated minimum conditions will be immediately worse off.

Given 25 percent of jobs held by indigenous people are unskilled compared to 9 percent for the rest of the population, Aboriginal or Torres Strait Islander workers will be further disadvantaged by the federal government's industrial relations and welfare-to-work changes.

Migrant workers also face particular challenges in the job market. Due to language difficulties or lack of formal education, many people from non-English speaking backgrounds work in those sectors of the economy that lack the industrial muscle or the opportunities for productivity increases to secure improved conditions through enterprise bargaining. These people are entirely dependent upon the award conditions currently determined by the Australian Industrial Relations Commission which see them overrepresented in sectors with low pay and limited security.

The Joint Governments believe that the removal of a fair and decent safety net will be devastating for the lowest paid and will result in the creation of an American style working poor in Australia.

International evidence shows that greater wage deregulation leads to increased wage dispersion and inequality. In the US where the minimum wage is $5.15 an hour, the highest ten percent of earners earn more than four and a half times that of the lowest 10 percent. Compare this to Australia where the highest ten percent earn three times that of the lowest 10 percent.

This evidence is confirmed in work conducted by Sloan and Wooden[51] across New Zealand, Australia, and also the UK. Over the past decade or so, the degree of earnings dispersion increased, broadly in line with the extent to which the different countries have decentralised bargaining structures.

The data shows a modest increase in wage disparity in Australia after 1991, as enterprise bargaining was introduced, but a much larger increase in NZ with its more radical deregulation. The larger increase in wage disparity in Australia came after the introduction of the Workplace Relations Act in 1996.

Evidence from the United States shows that up to 70 percent of users of homeless shelters are engaged in full time employment – able to afford low cost, below average apartment housing only after working 80 hours per week on the minimum wage.

The proposals contained in the Bill will result in the low paid working longer hours to make ends meet, a reduced bargaining position for the low paid, reduced learning and training opportunities and perhaps most importantly, a loss of human dignity.

## *6.2. Impact on families*

### *Role of the Commission*

Over the years, the Australian Industrial Relations Commission (AIRC) has played a crucial role in establishing important protections for working parents. Conditions such as the right to 52 weeks unpaid maternity leave granted in 1979, and the right to five days paid carer's leave to care for a family or household member granted in 1995, are now established community standards.

[51] Sloan,J & Wooden,M. (1998), 'Industrial Relations Reform and Labour Market Outcomes: A Comparison of Australia, New Zealand and the United Kingdom', Proceedings of a Conference: Unemployment and the Australian Labour Market June 1998, Reserve Bank of Australia & Centre for Economic Policy research Australian National University, Sydney, August, 192-6.

The AIRC recently continued along this socially responsible path through its decision to provide women with a right to request an additional 12 months maternity leave and part-time work when they return to their former job

Unfortunately, this may be the last decision of its kind, with Commission test cases becoming a thing of the past under the federal government's changes. It will be up to disempowered workers to negotiate new family friendly provisions.

Further, the federal government has decided not to include the new award standard for parental leave in their minimum conditions. Indeed, the Bill under s116B actually proscribes one of the new work and family award provisions, the right to request part time employment, by making 'transfers from one type of employment to another type of employment' a 'not allowable matter'.

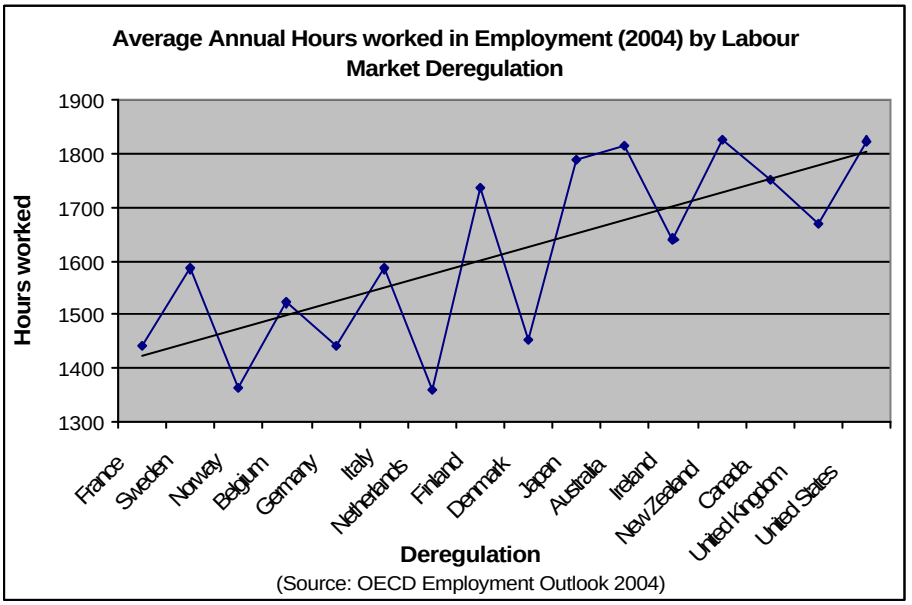
### *Individual bargaining*

The provisions of the Bill, especially those that promote individual contracts based on minimum conditions at the expense of collective bargaining, will have a devastating impact on families. A loss of control over rosters and hours of work, through averaging provisions and provisions which allow the employer to direct reasonable additional hours without notice, will make it even harder for families to spend time together and make reliable caring arrangements. This Bill legislates for unpredictability for employees not flexibility.

The impact of the averaging provisions may also be financially devastating for families where they are used by the employer to unilaterally vary hours and pay each week. A secure weekly income, not merely an hourly rate, and secure days of work, not just a vague assertion of a maximum average, are vital for an employee trying to organise a child care place and pay the rent.

The impact of the Bill will be that employees will have to work cheaper and longer. The evidence shows that countries with deregulated systems have the highest levels of annual hours worked, with the United States up the top but with Australia not too far behind.

Chart 6.2.1: Average Annual Hours Worked (2004)



(Source: OECD Employment Outlook 2004)

A Parliamentary Library research paper on 'Work and family policies as industrial and employment entitlements,' published in 2004 confirms that AWAs are likely to result in increased working hours, claiming the idea that 'AWAs enhance work and family policies seems based on patchy evidence, instead AWAs are more likely to be used to extend work hours'.[52]

Add to this evidence the additional pressure which will be experienced under the 'fire at will' unfair dismissal exemptions, and the capacity for balancing work and family responsibilities rapidly recedes into the distance.

Research conducted by the Department of Employment and Workplace Relations (DEWR) shows that Australian Workplace Agreements (AWAs) do little to assist workers balance their work and family responsibilities.[53]

This research shows that in 2004, 93 percent of private sector employees on AWAs had no additional family friendly rights in their individual agreement. Only 11 percent of AWAs included maternity leave, paid or unpaid. Ironically women were least likely to get any family friendly entitlements, with 14 percent fewer women then men having access to any family leave arrangement in their individual contract.

***Interaction with welfare to work proposals***

In the 2005 Budget, the federal government announced the 'welfare to work' changes directed at increasing workforce participation at the expense of vulnerable Australians. It features strategies to coerce welfare recipients into the workforce, with a focus on parents, the disabled and the long term unemployed. The package will require people with a disability and parents in receipt of income support to undertake work of at least 15 hours a week.

Under the proposed 'welfare to work' compliance regime from 1 July 2006 an eight week non-payment penalty period will apply to those who, without good reason… refuse a job offer or leave a job voluntarily.[54]

The combined effects of these legislative changes will result in welfare recipients, who have little or no bargaining power, losing their benefits if they refuse to enter into a sub-standard AWA, even if it removes conditions necessary to balance work and family.

The changes will result in a recipient of a parenting payment being forced to accept a job which only provides for the minimum conditions of the Australian Fair Pay and Conditions Standard (AFPCS).

The Joint Governments strongly reject the proposals contained in the Bill which will make it impossible for workers to effectively balance their work and family needs.

## *6.3. Impact on women*

The federal government's Bill will adversely affect women who are as a group more likely to be award dependent and less likely to have bargaining power to achieve fair and decent outcomes.

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[52] Parliament of Australia Parliamentary Library (August 2004) Work and family policies as industrial and employment entitlements, Research paper No 2, p 11, Canberra.
[53] Department of Employment and Workplace Relations and Office for the Employment Advocate, 2004.
[54] http://www.budget.gov.au/2005-06/overview2/download/overview_welfare.pdf

Women still carry a disproportionate responsibility for caring, family and household responsibilities. When women are forced to bargain from the reduced position of the Australian Fair Pay and Conditions Standard (AFPCS) they will face the prospect of being forced to trade away pay and other conditions to obtain conditions such as leave for family purposes or flexible hours.

As a package, the Work Choices Bill will render women more isolated and precariously placed than ever before. Awards are the primary mechanism for establishing pay for 24 percent of all female employees. Through the deliberations of the AIRC, the majority of employees not only have access to minimum wage increases annually, but also to the improved conditions delivered through test cases. It is through test case decisions that current social and industrial measures are introduced, such as the recent Family Provisions Test Case decision.

Offering an AWA on a 'take it or leave it' basis does not constitute a choice, especially if rejecting a job will result in cuts to welfare payments.

Research clearly shows that women are worse off under AWAs.[55] Women on AWAs are paid 20 percent less than men on AWAs, and women on AWAs are paid 11 percent less than women on collective agreements. Casual employees, many of whom are women, on AWAs are paid 15 percent less than those on collective agreements, and part-time employees on AWAs, again many of whom are women, are paid 25 percent less than those on collective agreements.[56]

The ACT Government is particularly concerned about the impact the Bill will have on the ACT workforce which is made up of 48 percent women, and has the highest female participation rate in the country. The increased use of AWAs will clearly have a negative impact on female workers in the ACT. As the percentage of women with children under four years of age in the ACT is also 10 percent above the national average, the protections of test case decisions such as the recent Family Provisions Test Case are vital.

### *Pay equity*

The New South Wales Government has led the way in pay equity in Australia since it established the Pay Equity Inquiry in 1996, resulting in the Industrial Relations Commission of New South Wales establishing the landmark Equal Remuneration Principle in 2000. Queensland followed soon after with its own initiatives to ensure pay equity, including a legislative requirement that awards and agreements provide equal remuneration for work of equal or comparable value. Inquiries have also been held in Victoria and Western Australia.

The federal government's Bill has removed any prospect for pay equity for women by removing the states' systems of industrial relations, by eroding awards as benchmarks for providing pay and conditions and by altering the minimum wage setting system.

Indeed the Bill explicitly excludes state courts and tribunals from making equal remuneration for work of equal value orders (s7C). The Australian Fair Pay Commission (AFPC) has no capacity to hear equal remuneration or work valuation applications, although it must take equal remuneration for work of equal value into account under s90ZR. There will be no method to consider the systemic sources of gender pay gaps, only an individual complaint based process.

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[55] David Peetz 2005, The Impact of Australian Workplace Agreements and the Abolition of the 'No Disadvantage Test, pp. 11-12

[56] Ibid.

The removal of the mechanism to achieve pay equity has been dealt with in a previous submission by the New South Wales Government to the Standing Committee on Employment, Workplace Relations and Education Committee Inquiry into Workplace Agreements (para 127) .

***Interaction with income support changes***

Employees with caring responsibilities, predominantly women, who leave a job or are dismissed because of a mismatch between employment conditions and their obligations as carer, will not be able to access income support for two months. This will place significant financial pressures on households and also on government funded community services that families will turn to.

It should also be noted that the federal 'welfare to work' policy, commencing on 1 July 2006, actually creates disincentives to participating in paid work for some groups of women, such as sole parents and women with disabilities. The effective marginal tax rates for these groups will increase sharply, reducing their disposable income once they have commenced work.[57] These groups will have less income to meet the additional costs of work, such as child care and transport costs. The simultaneous introduction of industrial relations changes and income support changes is going to impact most heavily on these marginal workers.

The Joint Governments rejects proposals that remove pay equity principles from the wage setting process and urge the Committee to recognise the disproportionate impact the Bill will have on women.

## *6.4. Impact on young people*

The Joint Governments believe that the Bill will make young workers more vulnerable and remove many of the protections that exist to ensure fair and equitable workplace outcomes.

The steady erosion of award conditions and the replacement of the no-disadvantage test with the Australian Fair Pay and Conditions Standard (AFPCS) as the benchmark for agreement making will have a particularly detrimental impact on young employees in the workforce.

Young and inexperienced workers are more likely to be casual and reliant on awards and minimum wage increases, as they predominantly work in industries such as the retail trade and accommodation, cafes and restaurants.[58]

Because of these characteristics, young people often fall outside the bargaining stream and less likely to have the bargaining power to achieve pay and conditions above the minimum, or arrangements that allow them to balance work with other responsibilities.

The Queensland Government is currently acting to address these issues. During 2002-2004 the Commission for Children and Young People and Child Guardian (Children's Commission) conducted a review of child labour in Queensland. The Commission considered issues such as the vulnerability of young workers to exploitative and harmful work practices and the need to provide increased employment protection to this group of workers.

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[57] NATSEM, The distributional impact of the Welfare-to-Work reforms upon sole parents, 2005

[58] ABS – 6305.0.55.001, Employees Earnings and Hours, May 2004 & ABS – 6291.0.55.001, Labour Force, August 2005; and ABS Australian Social Trends, 4102.0, 2005.

Based on the findings of this review the Queensland Government is currently drafting legislation to deal specifically with the employment of children in Queensland.

The NSW Commission for Children and Young People has undertaken research into the working lives of 11,000 children in NSW in years 7 to 10 and in June 2005 released a report titled Children at Work. The report and related research shows that a quarter of children in NSW aged 12 to 16 years are in formal, paid employment.

A recent report undertaken by SA Unions into youth employment in that State titled Dirt Cheap and Disposable uncovered high levels of unpaid overtime, under award payments, bullying and sexual harassment. The report found that:

- 30 percent of those surveyed were paid less than the award;
- 36 percent were pressured to work overtime without pay;
- 42 percent were forced to work through meal breaks;
- 22 percent were dismissed for reasons they felt unfair; and
- 17 percent were dismissed or lost shifts after a birthday.

The report also found that casualisation rates were on the increase over the last decade and the trend towards individual contracts was growing.

The Young People and Work Survey 2005 undertaken by ACIRRT surveyed 5000 young people aged between 12 and 25 and found that young people are a vulnerable group in the workforce, having a limited knowledge of their fundamental employment rights and conditions and a restricted capacity to defend their interests. The survey revealed the following:

- 50 percent of respondents who thought they were ongoing employees received no paid leave;
- 50 percent of respondents had not received any written information from their employers about pay, hours of work or safety when starting their jobs; and
- 12 percent of respondents had worked an unpaid trial at the start of their current job.

Young people who did unpaid work trials were also more likely to have further bad experiences at work such as:

- work unpaid hours;
- be bullied on the job; and
- be injured at work.

The survey demonstrates that even with the protection of a state based safety net young, vulnerable employees are in no position to negotiate their overtime, penalty rates and other working arrangements. As young people have a limited understanding of their rights they will be one of the categories of employees hardest hit, particularly with the no-disadvantage test about to be abolished under the Bill.

### *Special Federal Minimum Wages*

Under the Bill, minimum wages for school based trainees are set out at section 555 and the method for calculating pay for school based apprentices is at section 552.

However junior employees and other employees to whom a training arrangement applies are specifically excluded from the Federal Minimum Wage (90F(3)(b)).

At section 90S, the Bill provides that the Australian Fair Pay Commission (AFPC) **may** determine a 'special' Federal Minimum Wage (FMW) (presumably a rate lower than the standard FMW) for these categories of workers, however there is no requirement that that the AFPC exercise this power.

In the event that these employees are not covered by an APCS and no special FMW is determined by the AFPC it appears that no minimum rate of pay would apply to their work.

A fair and productive industrial relations system must consider the needs of young workers and provide an adequate safety net. The Joint Governments strongly reject the potential removal of minimum rates of pay and award conditions for young workers.

The impact of the Bill on training arrangements is further detailed at section 4.6 of this submission.

## *6.5. Impact on outworkers*

The Bill and other legislative measures mooted by the federal government will have a significantly detrimental impact on outworkers, particularly those home-based in the clothing and textile industry.

The exploitation of home-based workers in the textile, clothing and footwear (TCF) industry is a serious industrial and social problem in Australia. Typically, outworkers are women from immigrant communities, especially South East Asian communities, disadvantaged by language barriers and discrimination.

The conditions under which clothing outwork is performed have been considered over the last 10 years by a number of state and federal government and Industrial Relations Commission Inquiries. In 1996 the Senate Economics References Committee reported on *Outworkers in the Garment Industry.*

These Inquiries have consistently found that clothing outworkers work under conditions which are inferior to their statutory and award entitlements. Among these conditions are low piece rates, late or non-payment of wages and long and exhausting working hours without penalty rates.

The federal government claims that it will retain protections for outworkers in the Work Choices Bill. It says that provisions designed to ensure the registration of clothing outworkers and award compliance along the chain of supply will be read into all agreements involving outworkers.[59]

The federal government, however, is intent on stripping basic entitlements from awards as part of an ongoing process of so-called award simplification. There is no guarantee that these provisions will remain a mandatory part of the bargaining process. In any case outworkers lacking bargaining power will not be in a position to enforce these requirements and there does not appear to be a specific mechanism to ensure their inclusion.

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[59] Commonwealth of Australia 2005, WorkChoices October p32.

The federal Workplace Relations Minister, Kevin Andrews has in fact indicated that the federal government's approach to the protection of outworkers is on an individual worker basis. [60] This approach, even if it was more than empty rhetoric, is inadequate. What has been shown to be effective in redressing clothing outworker exploitation is the adoption of an industry wide approach. This has been the basis of the successful Behind the Label compliance and education strategy implemented in New South Wales and similar initiatives in Queensland and Victoria to reduce the exploitation of home - based clothing workers.

The Bill does not provide any protection for the pay and conditions of clothing outworkers as an identified group of disadvantaged workers. Like all other employees, pay rates for outworkers will be set by the Australian Fair Pay Commission. The Commission is a body handpicked by the federal government to implement its policy of driving down the real value of minimum wages.

The federal government has claimed that it has provided protection of award conditions for outworkers in the Work Choices Bill. It says that provisions designed to ensure the registration of clothing outworkers and award compliance along the chain of supply will be read into all agreements involving outworkers.[61] These conditions are an important part of an effective strategy to ensure outworkers receive their lawful entitlements. The Bill does not entrench these provisions. They can be excluded or modified by any express terms in the agreement (Schedule1 s.101B).

Important conditions of employment such as overtime, rest breaks and penalty rates are liable to be signed away as part of an unfair bargaining process where the genuine protection offered by the no disadvantage test has been removed. Outworkers will be pushed on to individual workplace agreements. Employers will be able to take advantage of the clothing outworker's inferior level of bargaining power and lack of access to collective representation. An exacerbating factor for workers with poor English or poor literacy skills is that the Bill removes the current requirement for employers to explain the terms of agreements and AWAs to their employees in a way that the employees will understand.

Tellingly, the ability to enforce minimum conditions for outworkers will be significantly constrained by excessive restrictions on a union's right of entry to workplace premises to ensure award compliance

Any purported award protection for outworkers will be rendered worthless, however, by legislation mooted by the federal government to override deeming provisions in New South Wales legislation that give protection and legal recognition to the employment status and entitlements of outworkers.[62] An unfair onus will be placed on outworkers to prove they are employees.

Many outworkers will be thrown on to so-called independent contracts and again subjected to sweatshop conditions of labour. It is widely recognised that intermediaries in the clothing chain of supply put pressure on outworkers to establish themselves as separate business enterprises (independent contractors) in order to circumvent award obligations and cut payments to home-based clothing workers.

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[60] 'Outworkers to lose all protections in Industrial Relations Reforms', FairWear IR Briefing Notes - September 2005, at www.FairWear.com.au.
[61] Commonwealth of Australia 2005, WorkChoices October p32.
[62] Ibid. See also Workplace Express 27 October 2005.

## 6.6. Impact on regional employers and employees

The promotion of individual contracts at the expense of collective bargaining is significant issue for employees in regional Australia where mobility between jobs is restricted. It is incorrect to assume that workers in regional areas operate in the same labour markets as workers in metropolitan areas.

Levels of incorporation are also lower in industries that dominate regional areas. In some parts of the country more than half of employers are unincorporated.

The farming sector provides an example of how the proposals will impact on regional industries. There are 120,000 family farms in Australia that will be forced to navigate through the Bill's complex, confusing and costly transitional provisions until they incorporate. If they do not incorporate, they will cease to be covered by the federal jurisdiction after five years, again being forced to move to another jurisdiction and review their employment arrangements.

Incorporation is not cheap, costing $2000 up front and $1000 per year, according to estimates by the National Tax and Accountants Association. If farmers do decide to incorporate, they will also likely be disadvantaged through taxation arrangements.

The federal government's attempts to 'fix' this problem for small businesses such as farmers by establishing the transitional provisions will result in incomplete and inconsistent coverage, increasing confusion, cost and uncertainty.

Local businesses and their workers will have fair and easy to use state awards stripped away, and will have to negotiate complex and costly agreements with individual workers.

One of the strengths of the existing state industrial relations systems is their responsiveness to regional needs. State industrial tribunals regularly sit in regional areas, supported by comprehensive education and compliance campaigns.

These are services that will be lost to regional businesses forced into the federal system. Further, the Department of Employment and Workplace Relations (DEWR) has confirmed in a discussion with state departments that the current level of regional presence provided under the state jurisdictions is unlikely to maintained.

The Joint Governments also strongly support the principle of equity of access for employers and employees in regional areas.

## 6.7. Impact on safety in the workplace

The federal government has claimed that occupational health and safety matters and workers compensation matters will continue to be regulated by the States and Territories. This apparent protection is however undermined by significant incursions. The Bill does not deliver on this commitment to preserve State occupational health and safety laws and workers compensation laws.

### *The exclusion of State and Territory laws under the Bill*

The Bill provides that State laws dealing with occupational health and safety matters and workers compensation matters are not to be overridden by the provisions of the Work Choices Bill under clause 7C(3).

However, clause 7C of the Bill only deals with the subject matter of occupational health and safety and workers compensation. It is far from clear under what circumstances a provision of a state law will be characterised as an occupational health and safety matter or a workers compensation matter.

This does not necessarily mean that existing state workplace safety, workers compensation and workplace injury management legislation will be preserved. The protection will only apply to provisions in an Act that deal with an occupational health and safety matter or a workers compensation matter. In the absence of a clear definition it will be up to the courts to determine how wide this protection is, creating significant uncertainty in the meantime.

Clause 7C(4) of the Bill contains a power to override any state law by prescribing that state law by regulation. This clause gives the federal government wide powers to allow provisions of the Bill and the Workplace Relations Act 1996 (Cth) to prevail over state legislation. It is possible that this regulation making power could be used to exclude occupational health and safety and workers compensation laws.

Clause 7C(3) of the Work Choices Bill indicates that it will not override State laws dealing with occupational health and safety matters. However it is unclear whether rights and remedies currently available under some state jurisdictions for employees who are dismissed or victimised because they made a health and safety complaint will remain. This concern equally applies to protection from dismissal while an employee is receiving a workers compensation payment.

### *'Industrial action' and occupational health and safety*

The definition of 'industrial action' under the Bill will create a significant disincentive for employees to voice health and safety complaints. The Bill provides only limited scope to protect health and safety complaints.

Under the Bill an employee will bear the burden of proving that actions based on health and safety concerns were made on reasonable grounds; were a risk to his or her safety; and that risk was imminent. If an employee does not prove this, those actions may constitute 'industrial action'. The consequences for an employee engaged in industrial action could be a loss of wages and the employee could be subject to orders made by the AIRC to stop that action.

There is no protection under the proposed definition of industrial action for employees expressing health and safety concerns about other work colleagues or potential risks as opposed to 'imminent risks'. This seriously compromises safety in the workplace. Employees should not be inhibited by sanctions from expressing health and safety concerns in the workplace.

### *OHS right of entry provisions under the Bill*

The right of entry provisions for union officials under state occupational health and safety legislation could be circumscribed by the right of entry provisions under Part IX of the Bill. This is despite clause 7C(3) of the Bill stating it will not override State laws dealing with occupational health and safety matters.

The drafting of the Bill does not make it clear how it will operate to the exclusion of the state provisions, although the federal government could possibly prescribe by regulation state occupational health and safety laws for the purposes of Part IX (Right of Entry) of the Bill.

Union officials with rights of entry under state OHS laws will potentially have to apply for a permit. That permit will be subject to the applicant undergoing a fit and proper person test. The union official's right of entry under a state OHS law will also be limited by specific provisions under the Bill relating to occupational health and safety, including having to give occupiers 24 hours notice to inspect employment records.

Subjecting the state right of entry provisions under OHS law to the right of entry provisions under the Bill seriously impedes the effectiveness of authorised representatives to act quickly and effectively to ensure workplace safety and will have negative implications for workplace safety.

Businesses may also face occupational health and safety risks from extended work hours resulting from individual bargaining. This problem was recently noted by industrial relations specialist, Kathryn Heiler. Heiler commented on the offering of individual agreements in the Tasmanian mining industry which provided for a 56 hour working week, largely underground, as a condition of employment. She noted that:

> There were subsequently two fatalities, there ended up being three within a twelve month period at that pit and the inquiry came on the back of that. There was no question in my mind, no question that individualised bargaining in that sector given the deterioration of that industry and the very poor capital and plant and equipment was compromising safety, there was no question about that. The workforce was frightened, they were intimidated and they were frightened to raise issues.[63]

[63] Heiler, Kathryn (2005), Speech to Fair Go Conference, 13 July.

# 7. The federal government's overall policy agenda

As stated in the introduction, this submission does not limit itself to the terms of reference as established by the Senate. The Joint Governments believe that it is necessary to consider the Bill in all its parts, and the interaction of each of those parts, to understand just how unacceptable the package is as a whole.

Further, the Joint Governments urge the Senate to consider the impact of the Bill in the context of its interaction with the federal government's overall policy agenda.

### *Building and Construction Industry*

The federal government's Building and Construction Industry Improvement Act 2005 ('BCII Act') was assented to on 12 September. The Act is draconian, adds unnecessary complexity and takes a punitive approach to building industry participants. This legislation encroaches upon the state industrial relations jurisdictions by overriding state regulation where a constitutional corporation is affected. The Joint Governments have repeatedly raised concerns about the Act in submissions to a number of Senate Inquiries. [64]

The supposed rationale for industry specific legislation was the Report of the Cole Royal Commission into the Building and Construction Industry which found that the industry was characterised by 'lawlessness' exhibited through breaches of criminal and workplace relations law. In justifying industry specific legislation the federal government relied on Commission findings:

> (that) demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular.[65]

Now, with no rationale, punitive elements of the BCII Act have also been imported into the Bill for application to all other industries, for example, broadening the scope of unprotected industrial action (section 108) and provisions allowing third parties to intervene in the bargaining process (section 107J). A detailed analysis of these provisions is provided in Section 3.4.

The Joint Governments believe the provisions are unbalanced, punitive and heavy handed. There is no justification for these provisions to be extended across other industries. They are clearly designed to limit the capacity of employees and unions in all industry sectors to organise collectively and take industrial action to advance bargaining claims.

### *Skilling Australia*

The federal government's Skilling Australia's Workforce Act 2005 came into effect on 24 August 2005. Clause 12 of the Act makes federal funding for state TAFEs conditional on the Joint Governments agreeing to offer AWAs to TAFE staff regardless of the states' view that AWAs are not the most appropriate form of industrial instrument.

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64 Senate Employment, Workplace Relations and Education Legislation Committee Workplace Relations Amendment (Termination of Employment) Bill 2002, Building and Construction Industry Improvement Bill 2003, Workplace Relations Amendment (Right of Entry) Bill 2004 and Building and Construction Industry Improvement Bill 2005

65 Cole Royal Commission Final Report, Volume 1, p6

With thousands of TAFE employees this requirement places an unnecessary and bureaucratic burden on the Joint Governments and interferes in their role as an employer. However, failure to agree to this condition would see the Joint Governments lose nearly $5 billion in funding over the next three years with a devastating impact on TAFE, adult and community education and apprenticeship programs.

### *Skills development*

Australia is experiencing national skills shortages in a range of trades and professional occupations including engineering, child care, nursing and heath specialists, hospitality, hairdressing, construction, electrical, metal and vehicle trades. Much unmet demand is for specialised skills.[66]

The Joint Governments' view is that instead of cutting wages and conditions, jobs for the unemployed and low-skilled could be created through improving education and training opportunities and outcomes. To this end the Joint Governments are participating in the Council of Australian Governments (COAG) Skills Working Group established to assess the barriers to achieving a national vocational education system. The Working Group is currently examining a number of measures to streamline skills qualification across Australia including shortening the duration of apprenticeships and the availability of school based apprenticeships. The Working Group will report in December 2005.

The Joint Governments are concerned that the Bill will undermine national skills development by decreasing the attractiveness of apprenticeships and traineeships. Concerns include low rates of pay and loss of award conditions. Further details of the impacts on young people are provided in section 6.4.

### *Impact of non-standard forms of employment*

Another fundamental impediment to the development of a skilled labour force is the growth of non-standard forms of employment including casual, part-time, labour hire employees and independent contractors. Many of the industries experiencing skills shortages are areas where non-standard forms of employment are prevalent. Research confirms that these categories of workers tend to receive less structured training opportunities than permanent and especially, full-time permanent employees. [67]

The Joint Governments see the COAG Skills Working Group as the most appropriate vehicle to address these issues in a nationally consistent and cooperative framework.

### *Tertiary sector*

The federal government has recently introduced the Higher Education Legislation Amendment (Workplace Relations Requirements) Bill 2005. This Bill makes funding to universities conditional on Higher Education Workplace Relations Requirements (HEWRRs) which, amongst other things, requires all universities to offer all new staff AWAs with all existing staff to be offered AWAs by 31 August 2006.

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66 DEWR National and State Skills Shortages (December 2004)

67 Watson, I Buchanan, J Campbell, I & Briggs, C (Chapter 10) Fragmented Futures: New Challenges in Working Life, The Federation Press 2003.

This unprecedented interference by the federal government in the tertiary education sector will decrease the flexibility and autonomy of university employers and staff to choose the form of employment arrangements that best suit them. The Australian Vice Chancellors' Committee has expressed the view that:

> …the focus should be on desired outcomes, rather than specific industrial processes and particular industrial instruments.[68]

Similarly to the imposition of HEWRRs, the real agenda behind the Bill is to give force to the federal government's objective to reduce conditions of employment and collective bargaining rights for employees, most notably by requiring the offering of AWAs.

### *Voluntary Student Unionism*

The federal government is also proposing 'Voluntary Student Unionism' legislation to make payments for a student organisation, union or guild that provides non-academic amenities, facilities or services optional.

Although student unions provide different services to those offered to their members by trade unions, the proposal may also be seen in the context of the federal government's ideological attempt to weaken unions, limit dissent, and undermine collectivism and rights to representation both on campus and in the workplace.

### *Trade Practices Act*

Recent amendments to the Trade Practices Act 1974 (Cth) streamline the approval process for small businesses seeking collective bargaining rights, but deny unions the right to represent them by rendering invalid a collective bargaining notice from a trade union (sections 93AB (9) and (10) of the Trade Practices Legislation Amendment Act (No.1) 2005).

These amendments appear to prevent unions from acting as bargaining agents in contract negotiations undermining, for example, the role played by the Australian Workers Union in representing chicken growers or the Transport Workers Union which undertakes collective bargaining in the transport industry on behalf of owner-drivers.

In the New South Wales and Queensland jurisdictions, legislation provide a framework to address the inferior bargaining position of owner drivers and remedy for those subject to unfair contracting practices.[69] The Bill will override these provisions without good reason and will undermine existing settled and productive relationships in the transport industry. It seems highly inconsistent that a government which purports to promote freedom of association has legislated to exclude independent contractors from exercising their freedom to choose a union as their bargaining agent.

The Joint Governments also note that it is highly inconsistent that the federal government recognises the imbalance of bargaining power that exists between small business and large business and therefore the need for collective bargaining in the trade practices legislation, but denies that the same imbalance exists in most cases between an employer and an employee.

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68 AVCC Submission to Senate Employment, Workplace Relations and Education Legislation Committee September 2005

69 Chapter 6 of the Industrial Relations Act 1996 (NSW) and Section 276 of the Industrial Relations Act 1999 (Qld)

### *Welfare to work*

The federal government's 'welfare to work' changes are directed at increasing workforce participation at the expense of vulnerable Australians. The changes feature strategies to coerce welfare recipients into the workforce, by requiring people with a disability and parents in receipt of income support to undertake work of at least 15 hours a week. Under the proposed 'welfare to work' compliance regime from 1 July 2006 an eight week non-payment penalty period will apply to those who, without good reason refuse a job offer or leave a job voluntarily. [70]

The combined effects of these legislative changes may result in welfare recipients, who have little or no bargaining power losing their benefits if they refuse to enter into a sub-standard AWA. These concerns are shared by a broad range of welfare and community organisation and churches. The Salvation Army has stated that the organisation is used to dealing with desperate people who would sacrifice anything to get a job.[71] Effectively the changes will result in an unemployed person being forced to accept a job which only provides for the minimum conditions of the AFPCS.

### *Superannuation*

The Bill has a number of implications for superannuation entitlements currently provided by state awards.

*Award entitlements*

The Bill provides that superannuation provisions will not be included in new awards because they are provided for in specific legislation. Part VI, Division 3, 117(4) of the Bill provides that superannuation provisions in preserved awards will continue to apply to existing and new employees covered by these awards until 30 June 2008 only. The AIRC will not be able to vary or adjust non allowable matters in preserved awards.

The Superannuation Laws Amendment (2004 Measures No. 2) Act 2004 (Cth) provides that from 1 July 2008 ordinary time earnings as defined by the Superannuation Guarantee (SG) legislation will be the earnings base for determining SG liability for all employees. Accordingly, award specified earnings bases for superannuation purposes will cease to have effect from that date. Removing superannuation provisions from awards will have the effect of reducing enforceable entitlements for employees where the award provides for a notional earnings base for SG purposes greater than ordinary time earnings unless those provisions are included in bargaining for collective or individual agreements.

70 http://www.budget.gov.au/2005-06/overview2/download/overview_welfare.pdf
71 Skulley M. 2005, Salvos and church condemn IR changes Australian Financial Review, 19 October.

*$450 threshold and annualised hours*

Under the Superannuation Guarantee Charge Act 1992 an employer is not required to make contributions for employees who earn less than $450 per month. Typically such employees are in casual employment working irregular hours.

Some awards make provisions for superannuation contributions for employees who earn less than $450 per month. For example, the NSW Miscellaneous Workers' Kindergartens and Child Care Centres, &c. (State) Award [72] provides for contributions to be made on behalf of part time or casual employees who earn $200 or more per month. Removing superannuation provisions from awards will have the effect of reducing enforceable entitlements for these employees.

The Bill provides for ordinary hours to be averaged over a period of up to twelve months. This will provide greater opportunities for employers to require employees to work irregular hours with potential impacts on the superannuation entitlements of those employees who work less hours in a particular month and do not meet the $450 threshold.

*Superannuation choice*

The Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004 provides employees with the right to choose their superannuation fund. Under the legislation, employers do not have to offer choice of fund to employees employed under an AWA (s32C (6)) or where contributions are made in accordance with a state award (s32C (8)).

In some state jurisdictions [73] legislation overrides state award provisions to provide for choice of superannuation fund simply by agreement between an employee and employer. As the Bill provides that for constitutional corporations state awards will become transitional federal agreements, employees covered by such arrangements will no longer have access to these provisions. It is not clear what the impact on choice of fund will be for those employees.

Employers do not have to offer choice of fund to employees on AWAs. As one of the key objectives of the Bill is to promote a move of employees from award coverage to AWAs, it is anticipated that fewer employees will have access to choice of fund. Employees cannot compel an employer to make contributions to a specified fund when negotiating an AWA. Employers may offer AWAs to employees to sign with a pre-selected fund.

Often the nominated superannuation fund specified in state awards is the relevant industry fund. Independent research indicates that industry funds often provide higher returns for workers and generally have lower cost and fee structures when compared to private funds. [74] By both removing superannuation provisions from awards and shifting employees on to AWAs, employees may lose the choice to remain with an industry fund.

72 Clause 31 Miscellaneous Workers' Kindergartens and Child Care Centres (State) Award

[73] s124 NSW IR Act 1996, s405 Qld IR Act 1999, s49C WA IR Act 1979

[74] Chant West January 2005.

# 8. Conclusion

This submission has outlined the concerns of the Joint Governments as follows:

- the Bill is unconstitutional;
- the Bill will negatively impact on industrial relations in Australia;
- the Bill will increase cost and complexity, especially for small business;
- the federal government has failed to provide economic justification;
- the Bill will result in unfair outcomes, especially for vulnerable workers; and
- the Bill should be understood in the broader context of how it interacts with the federal government's overall policy agenda.

The Workplace Relations Amendment (Work Choices) Bill 2005 does not improve choice. It maintains and extends the failures of the current system and is complex and incomprehensible for the people who will need to use it.

The Joint Governments believe that the Bill is not only unconstitutional, but that it breaches fundamental human rights and the dignity of workers.

The Joint Governments call on the Senate to reject the Bill in its entirety.