Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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1 INTRODUCTION

1.1 The ACTU opposes the Workplace Relations Amendment (Work Choices) Bill 2005 and calls for its rejection.

1.2 On any measure the WorkChoices legislation will be bad law.

1.3 In reviewing the legislative arrangements governing industrial relations in Australia the ACTU maintains that the objectives should be to provide for a cooperative framework of industrial relations which promotes economic prosperity and the welfare of the Australian people. The system should encourage high employment, improved living standards and employment security, better pay, low inflation and international competitiveness through productivity and a fair and flexible labour market.

1.4 To support continuing productivity growth and economic prosperity, workplace collective bargaining should be promoted and supported and be underpinned by a safety net of fair and relevant minimum standards of pay and employment conditions. The ACTU does not support the re-establishment of centralised wage fixing.

1.5 Whatever the constitutional underpinning of the legislation the framework should ensure fairness, flexibility and security. In our submission the Bill:

- Does not guarantee workers have a genuine right to bargain collectively, and a right to join and be represented by unions. The Bill does not meet the standards set by international instruments to which Australian is a party. It fails to ensure that fair and effective bargaining is the principal means for establishing pay and employment conditions.

- The Bill does not provide for an effective set of minimum wages and terms and conditions of employment which are able to be adjusted to ensure that those unable to bargain do not fall behind community standards, to ensure equal pay for work of equal value and to underpin bargaining.

- Under its provisions employees are denied access to fair and effective review mechanisms for employer decisions that are unfair or unjust, including access to conciliation and arbitration for the purpose of dispute resolution.

- The system does not promote secure, safe and healthy workplaces that are free of discrimination or harassment. Instead it will foster working arrangements that jeopardise the ability of workers to live secure and balanced lives; and

- The Bill does not enshrine the right of workers be consulted and informed of business decisions that affect them in their work.

1.6 The Bill undermines genuine freedom of association in that the only level of association that is given legitimacy is association at the workplace level. The ban on pattern bargaining, the need for prior approval to engage in multi-employer agreement making and prohibition of acting in concert undermine the capacity of employees to combine to pursue common interests.

1.7 The Freedom of Association Convention (ILO C87) is also offended by limits placed around the right to strike, the capacity for the Minister or the AIRC to ban strike action on economic grounds, and further limiting workers access to union advice and support in their workplace. The

freedom of association provisions in the Act, and the Bill protect the right to join a union, but not to be represented collectively. ILO Convention 98 is offended by restrictions on the subject matter of agreements, the provisions restricting action in support of bargaining to a single enterprise, "take it or leave it" AWAs and the precedence given to AWAs to override current collective agreements.

Overview

1.8 The Bill will not achieve the desired economic outcomes of higher employment, or improved productivity. It will extend inequality, and will place pressures on working families that undermine our social progress. And, as a regulatory instrument, it fails the accepted tests for the making of good regulation.

(i) The Bill will not simplify the current system. Rather, the federal system is made more complex, and the State systems are retained. For the transitional period many aspects of the pre-reform federal system are retained. Reliance on the Commonwealth's power to regulate corporations will create uncertainty and instability, especially in small businesses, as the extent of the Commonwealth's powers is determined.

(ii) The Bill will not lead to better pay. For vulnerable and low paid workers the transfer of responsibility for wage setting function to the Fair Pay Commission (FPC) under the parameters in proposed section 7J will lead to a reduction in the real value of minimum wages for low paid Australians and will not create new jobs.

(iii) The Australian Fair Pay and Conditions Standard will dramatically reduce the enforceable minimum conditions of workers, which will have an impact on the take home pay of low paid and vulnerable workers with limited bargaining capacity.

(iv) The Bill will not promote genuine workplace bargaining. It will promote the unilateral determination of wages and conditions by the employer at the workplace. It does this by enshrining "take it or leave it" AWAs in law; allowing AWAs to override collective agreements during their term; and allowing employers to reduce wages and conditions during the negotiation process. At the same time the Bill gives unprecedented power to the government to intrude into every agreement, by granting the Minister power to proscribe the matters that may be agreed, and to negate matters already agreed to by the parties at the workplace.

(v) The Bill restricts the right to take lawful industrial action. It limits the circumstances in which lawful action can be taken. Any action that is having an effect on the employer or a third party can be suspended. The prohibition on pattern bargaining limits employees' freedom of association by dictating that the only common interests that they may protect are those shared by employees at the workplace in which they work.

(vi) The system of awards retained by the Bill will see conditions of employment removed. The Bill abolishes the power of the AIRC to make awards, and circumscribes its power to vary awards. Award dependent workers conditions of employment are effectively frozen.

(vii) The new disputes procedure, which abolishes all arbitration except that agreed to as private arbitration, does not encourage parties to resolve disputes. It simply means that a party who is unwilling to participate in dispute resolution can refuse to do so. Without the prospect of an imposed resolution, employers will simply be able to refuse to participate to settle grievances.

(viii) The compliance regime is imbalanced. Employers can create and lodge a workplace agreement and there is no mechanism to

ensure that the employee(s) covered genuinely consent to the agreement, or that the agreement meets minimum standards. Access to arbitration to hear and determine disputes is abolished, except with the consent of the employer. And heavy-handed enforcement measures may be imposed, in breach of the ILO Conventions 87 and 98, on workers who combine to protect their common interests.

(ix) The transitional arrangements will create confusion and uncertainty.

The inquiry

1.9 The ACTU protests in the strongest terms to the truncated nature of this inquiry, and the inadequate time given to make proper submissions. The Bill represents far-reaching changes to our laws. Relationships at work are important and defining relationship in many people's lives.

1.10 The motion referring this Bill to inquiry seeks to exclude matters previously the subject of inquiry. The extent of the changes, set out in almost 700 pages, include within them many matters not previously the subject of inquiry. Issues that have been debated before are presented differently, with nuances that have ramifications across the Bill and in relation to the intersection with other laws. The Bill is not even indexed.

1.11 The haste with which this inquiry has been held, and the complexity of the legislation mean proper scrutiny and consideration of each proposed paragraph has not been possible.

1.12 This makes this inquiry less robust than it could otherwise have been, and it will lead to bad laws. In the short time that we have had to consider the Bill a number of drafting errors, ambiguities and mistakes have been identified. Inevitably more will be found over the coming weeks.

2 THE BILL WILL NOT ACHIEVE ITS PURPOSE

2.1 The proposed changes are not justified on economic grounds. There has been no evidence supplied to support the Government's assertions that the changes will benefit the Australian economy and the Australian people.

The changes will not create more jobs

2.2 In recent minimum wage cases the Federal Government and employer organizations have argued for no increases or increases less than CPI for the lowest paid and no increases for most award workers. This is unfair and unjustified. They all but categorise low paid workers as the undeserving not so poor. It is argued that award workers are not as productive or efficient as other workers and not deserving of an increase and go further by claiming that low paid workers don't need an increase. Both these propositions are incorrect.

2.3 These propositions are made in the context where the economy is strong and robust and where the economic fundamentals remain firm. Award workers have contributed to strong growth and productivity in a low inflation environment with unemployment at a 30-year low with participation rates increasing.

Wage rises do not cost jobs

2.4 Moderate increases in minimum wages do not price award workers or any other workers out of work. The facts are simple. Award rates in real terms have increased and unemployment has fallen, at the same time participation levels have increased. Each year employer groups warn of tens of thousands of job losses should the Commission grant an increase or state with certainty that tens of thousands of jobs will be

lost as a result of increases awarded by the AIRC. Not surprisingly, this did not eventuate. In fact the opposite has occurred.

2.5 Many thousands of pages in previous minimum wage case submissions have been devoted to this question, ie: whether demand for labour goes down when its price goes up, or in economic jargon the 'negative elasticity of employment'. There is a vigorous debate amongst economists regarding this matter. The Government simply can't accept any proposition other than the conservative economic dictum that where wages go up 1 cent a job somewhere is lost. There is no evidence to support the assertion that increases in minimum wages cost jobs. In fact the most robust of available studies have rejected this proposition.

2.6 In the last minimum wage case the Howard Government argued that the ACTU's claim for a $26.60 increase would result in a loss of 74,000 jobs. Interestingly, using the Commonwealths own methodology, the Commonwealths support for a limited $10 increase should have resulted in the loss of 11,000 jobs.

2.7 However, the awarding of a $17 per week increase has been associated with continued employment growth and higher participation rates. The position of the Government, used to justify proposed IR reforms, is simply wrong.

2.8 The economic model previously used to support the Government's claim has a built-in assumption that increases in wages result in job losses. These self-serving assumptions and the theory itself should be rejected.

No evidence to support Government claims

2.9 There is simply no evidence to support the claims that increases in wages reduce employment. In fact there have been studies that show the opposite. The Howard Government is rejecting the considered

views of the industrial umpire when they objectively find that moderate increases in the minimum wage do not have a negative economic impact. Or at the very least, should any impact exist, it is so negligible as not to justify the hardship that would be imposed on low paid workers should a reasonable increase be denied them.

2.10 In the last minimum wage case heard earlier this year the Government introduced a model to empirically show that increases in wages result in a reduction in employment. The model[1] demonstrated a negative elasticity of demand for labour. This is not surprising as the model assumes employment is reduced when wages are increased. The result is a forgone conclusion. The model even includes a 'Fudge' factor called RPFUDGE to resolve intrinsic problems with the model. The 'fudge factor's' job is to put square pegs in round holes, to adjust results to fit the stated theory and built in assumptions. This economic mumbo jumbo is portrayed as scientific fact.

2.11 Employer groups and the Government constantly rely on the theory espoused by a small group of conservative economists and the unsupported assertions of the IMF and the OECD who in turn rely on the work of the conservative economists. None of these "expert" predictions, provided with high degrees of certainty and probability, that wage increases will result in job losses each year have proved correct.[2]

2.12 Since 1999 the Government has argued that as a result of the awarding of minimum wage increases 146,000 jobs would be lost. In fact the result has been very different indeed. The number of

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[1] *By the Centre for Policy Studies (CoPS) at Monash University.*

[2] *The Commonwealth since 1999 has said that there would be 226,000 less jobs than otherwise would be if the ACTU claims had been granted. The ACTUs claims have never been granted therefore if we proportion the employment effect claimed by the Commonwealth to that of the SNAs to the claim we find that on the Commonwealth assessment there would be 146,000 less employed. From 1999 to 2005 there has been and the number of employed person's has increased by 1,231,490 and the employment to population ratio has increased from 58.7 per cent to 61.2 per cent (the second highest level since the 1978 the highest being 61.5 in August 2005).*

employed persons has increased following these increases by a massive 1.2 million. The facts speak for themselves. At the same time productivity is high, inflation is within the RBA's target range, growth continues to increase and profits are at a record high.

2.13 The OECD and the IMF have encouraged the Federal Government to deregulate the labour market by reducing award protections and reducing real wages whilst at the same time reducing pension entitlements to further increase the supply of labour and collective bargaining rights. These changes have the stated the aim of reducing the bargaining capacity of those supplying labour and improving the bargaining capacity of employers. It is assumed that this is an economic good and that whilst individuals may suffer, in the longer run the economy through increased profits is better off. The ACTU rejects this trickle down theory as economically crude, empirically unsupported and morally unjustified. It simply doesn't make good economic or moral sense.

2.14 Only 20 percent of Australia's workers rely on award conditions for their pay. Collective and other bargaining arrangements cover most workers. These workers in some cases earn double the award rate that is a bare safety net provision for those that are not in a position to bargain.

2.15 The ACTU has previously offered to participate in a tripartite study to establish some common ground on this issue of whether increases in minimum wages reduce employment opportunities. The Federal Government has regrettably rejected this. Never let facts get in the way of dogmatism and blind ideology.

2.16 Jobs growth in areas where the low paid rely on minimum award conditions has continued. With the exception of the mining industry, which can't produce enough to keep up with Chinese growth driven demand, employment growth in award dependent industries has

exceeded growth in the rest of the economy, despite increases in the minimum wage.

The changes will not lead to higher pay

2.17 Under present arrangements there is no limit on the capacity of firms and workers to negotiate higher pay. The only constraint – arising from the application of the 'no disadvantage test' – is on negotiating below minimum standards of wages and working conditions. The WorkChoices provisions will certainly lead to lower pay for many low paid workers, as explained elsewhere in this submission.

2.18 Aggregate productivity growth in Australia has been high over the past decade, reflecting award restructuring from the late 1980s, the subsequent embrace and spread of collective bargaining through the Australian economy, high levels of new capital expenditure and low inflation. This has supported growth in real wages, though at disparate rates across the wages distribution.

2.19 Some proponents of WorkChoices argue that it will lead to higher pay consequent on its delivering higher productivity. Productivity is a measure of output per unit of input; labour productivity is a measure of output per worker. Prime Minister Howard asserts that the primacy given to direct bargaining between individual employees and their employer under WorkChoices will deliver greater workplace productivity.

2.20 This claim has been demolished by Prof David Peetz and others, including Prof Mark Wooden. There is no evidence whatsoever that individual-level bargaining has any impact on productivity growth [Wooden and Sloan, RBA Conference series, 1995 comparing NZ, UK and Aust]. By strengthening the hand of employers in bargaining and undermining the bargaining position of employees, WorkChoices is

indeed likely to raise profits at the expense of wages. But it will not raise productivity.

2.21 There is ample credible evidence in the learned journals that unionised workplaces in combination with high-trust management, achieve the best productivity performance. There is no link at all between high-trust high-performance workplaces and individual contracts. The facts don't support the Government's claims.

Economic impact will be greater in regional and rural areas

2.22 The ACTU is concerned that the passage of the legislation will inevitably see a reduction in the disposable income of employees with little or no bargaining power. Many of these workers are located in regional and rural communities. The choices open to them of rejecting a job or changing jobs is limited if available at all. The inevitable result in many regional areas will be a reduction in spending and consequential multiplier impacts on small business and employment prospects in regional communities.

2.23 The impact on regional communities will be further exacerbated if employees are required to or choice to leave rural and regional communities to find work in larger cities.

The Bill will not Boost Productivity:

2.24 Much is made of the ability of this package of laws to affect productivity, as though labour laws are the sole driver of productivity improvements. In fact technology, skills training and infrastructure investment are required productivity measures in many industries; imperatives being ignored.

2.25 The argument advanced in respect of productivity falls under two heads: greater flexibility associated with de-regulation, and greater productivity associated with individual agreements.

(a) Greater flexibility

2.26 It is argued that the Bill will remove the regulatory burden, which constrains employers from introducing more productive working arrangements. It is currently open to all constitutional corporations to enter into agreements that override awards, provided that the employees not be disadvantaged compared to their award. And remember the test is measured against awards that have been simplified, stripped back already, and are maintained as a safety net only. The only new flexibility introduced by the WorkChoices legislation will be to remove that test. The new laws will permit the making of agreements that do disadvantage employees compared to their award. Cutting labour costs does not improve productivity, it improves profitability.

(b) Productivity associated with individual arrangements

2.27 The second arguments relates to the notion that AWAs allow the individual tailoring that leads to high trust, high performance workplaces. The evidence about AWAs undermines this argument. In most AWA workplaces the AWA is uniform. In its recent review of workplace agreements the References Committee was unable to find evidence of a link between AWAs and high performance HR practices.

2.28 Those who advance this argument seem blind to the evidence that productivity is higher in highly unionised workplaces, where commitment to the union and commitment to the firm are strongly correlated.

The Bill will undermine social cohesion and a balanced life

2.29 The Bill will not promote more family responsive work practices. As the References Committee noted the decade of workplace bargaining has been associated with a growth of employer control over the allocation of working hours, and the spread of family hostile hours of work.

2.30 Working arrangements have an affect on employees' wellbeing. Researchers investigating the impact of working hours on family life have found that:

- When an employee works on a Sunday they forego 2 hours of time with their family. That time is not made up during the week, it is not shifted, and it is lost. (Bittman, M, 2004).

- Workers in the UK who worked non-standard hours have less time reading with their children, less capacity for doing homework together, and fewer shared meals. (Millward, C 2004).

- Lack of time together has displaced financial pressure as the most commonly cited cause of relationship pressure. (Relationships Australia, 2003)

- Young children of Canadian parents who worked night shift were more likely to have an emotional or behavioural problem than those working standard hours. This was true even after controlling for socio-economic status, work intensity (i.e. full or part time), demographic factors, and childcare use. (Strazdins, L et el 2004)

2.31 The Bill will foster the growth of insecure, irregular and family hostile working arrangements to the detriment of the community at large.

3 A UNITARY SYSTEM

3.1 The Bill fails to create a single national industrial relations system. Whilst the Bill seeks to dramatically extend the scope of the Commonwealth's industrial relations powers via the corporations and other heads of power, it cannot create a unitary system. The constitutional power to do so does not exist.

3.2 The ACTU estimates that between 22 and 25 percent of all employees within Australia will fall outside the scope of the proposed legislation. The table below shows the percentage of employees who remain within the jurisdiction of their respective State systems. Western Australia with 43 percent and Queensland with 42 percent clearly indicate the extent to which a dual system will continue to operate.

Estimated coverage of a new industrial relations system

	Coverage of federal jurisdiction		**Coverage of state jurisdiction**	
		No. non-farm		**No. non-farm**
	%	**Employees**	**%**	**Employees**
NSW	72.5	1968.5	27.5	746.7
VIC	100.0	2075.5	0.0	0.0
QLD	57.6	902.5	42.4	664.3
SA	57.3	338.5	42.7	252.3
WA	57.0	460.9	43.0	347.7
TAS	59.3	101.4	40.7	69.6
NT	100.0	86.0	0.0	0.0
ACT	100.0	161.0	0.0	0.0
AUST	74.6	6094.3	25.5	2080.6

Source: Unpublished data, ABS Survey of Employee Earnings and Hours (Cat. No. 6306.0) May 2004. ABS Labour Force (Cat. No. 6202.0)

Note that some employees in unincorporated business are currently subject to Federal Agreements. If these employees are included the estimate of Federal jurisdiction increases to approximately 78 per cent or 6.4 million non-farm employees with 22 per cent or 1.8 million employees remaining outside the scope of the federal system.

Confusion

3.3 The passage of the Workchoices Bill will result in significant confusion for both employers and employees. The implementation of changes from the passage of Workchoices will result in instability in the workplace and intended change which will result in dislocation in the labour market. The legislation places obstacles in the path of employers and employees who are employing or seeking employment by reducing the quality of the information known and certainty available to the parties.

3.4 These intended changes only exacerbate the difficulties encountered by employer and employees and will result in further unintended confusion. The haste with which the legislation is being dealt and scope of the change and the uncertainty regarding the scope of application of the legislation will inevitably result in inefficiencies in the labour market.

3.5 The transitional provisions for pre-reform State award and agreements are complex, and most employers and employers will be uncertain as to which industrial instrument applies, which jurisdiction they operate in and their industrial rights and responsibilities.

3.6 Some employees may continue to assume they operate under the auspices of the State system only to subsequently discover that their rights and responsibilities have been dramatically altered by the new legislation.

3.7 The fact that identifying there is not a precise tool available to ascertain whether a particular entity is a constitutional corporation creates enormous difficulties.

3.8 Take for example a not for profit company operating in Queensland, which assumes it is not a constitutional corporation, because it is not a trading company.

3.9 Its employees have their wages and conditions set by instruments of the Queensland IRC.

3.10 At some time in the future the entity decides to engage in a for profit unit, to subsidise its charitable functions, thus bringing it within the scope of the federal system. The State tribunal will not necessarily be aware of this, and will continue making awards covering the employees. However these awards will be unenforceable, due to the operation of proposed section 7C, and the employer can avoid their obligations under the State laws.

3.11 Some time later the company might abandon its profit making activities, and revert to a non-constitutional corporation, in which case any workplace agreements entered into under the federal system become unenforceable.

3.12 In addition there is considerable confusion concerning the ability of the legislation to impinge on certain activities undertaken by State Governments, particularly trading activities undertaken by State Governments. The legislation seeks jurisdiction over some sections of State Government activities whilst clearly having no or limited ability to directly regulate the industrial relations activities of the employing or controlling entity being the State Government.

State systems are working

3.13 There is no evidence that the State Industrial relations systems are failing to work properly or are impeding workplace innovation and reform. In fact the evidence is to the contrary. State industrial relations

systems are often more flexible and responsive to the needs of employers and employees and take a practical approach to dispute resolution.

3.14 State systems are traditionally more accessible, inexpensive and have considerable ability to provide a more localised resolution to industrial relations issues, including training and occupational health and safety related issues.

Duplication

3.15 In the event that the legislation is passed and survives a High Court challenge, each State system will continue to operate, albeit with a reduced jurisdiction.

3.16 The likely scenario will see:

- The AIRC continue to hold hearings to vary Transitional Awards.

- The State Commissions in New South Wales, South Australia, Queensland, Western Australia and Tasmania will continue to hear matters and vary awards.

- The Australian Fair Pay Commission will make declarations in relation to the Federal Minimum Wage from time to time.

3.17 Just in the award maintenance and related areas alone there will be considerable duplication within Australia. Currently various the State legislation requires the relevant State Commission to take account of the outcomes of the AIRC's test cases, including minimum wage cases. As the AFPC is not required to have an open consideration of its deliberations and the process in no way resembles a hearing, there will be no appropriate decision to flow on. Accordingly the State jurisdictions will each be required to have a full hearing to establish test

cases and minimum wages. The likely result will be varying outcomes and confusion amongst employers and employees alike.

3.18 Note that some employees in unincorporated businesses are currently subject to Federal Agreements. If these employees are included the estimate of Federal jurisdiction increases to approximately 78 per cent or 6.4 million non-farm employees with 22 per cent or 1.8 million employees remaining outside the scope of the federal system.

3.19 The Bill will not simplify the current system. Rather, in addition to the state systems the federal system is made more complex. Reliance on the corporations power will create uncertainty and instability as the extent of the Commonwealth's powers is determined.

Conclusion

3.20 The Provisions of the Bill that are designed to override State laws should be rejected.

4 THE WAGE FIXING REGIME AND THE FAIR PAY COMMISSION

4.1 The transfer of responsibility for wage setting function to the Fair Pay Commission (FPC) under the parameters in proposed section 7J will lead to a reduction in the real value of minimum wages for low paid Australians and will not create new jobs.

4.2 The AIRC is a statutory body, whose members are appointed by the Governor-General, and hold office until age 65. On appointment they are required to swear an oath 'to faithfully and impartially perform the duties of the office'. Notably, though the word 'fair' does not appear in its title, the AIRC is required by statute to dispense fairness when it sets minimum wages (and conditions of employment). The Act requires members of the AIRC to make their decisions according to equity, good conscience, and the substantial merits of the case before them [s110(2)(c)].

4.3 The Chair of the AFPC will be appointed for a 5-year term. Other members of the AFPC will be appointed for 4-year terms. Neither the Chair nor other members of the AFPC will be required to swear any oath or affirmation as a condition of their appointment.

4.4 The AFPC processes need not be transparent or responsive. It appears that its decisions will not be subject to judicial review, and its functions could only be enforced via the granting of prerogative writs.

4.5 There is no obligation on the AFPC to conduct its inquiries in public and the Chair has publicly indicated that private and confidential discussions will form part of the process. Despite assurances from the Chair about his desire to hear from employees affected by the decisions there is no statutory role for employees or the broader community.

4.6 For both the AIRC and the AFPC, the exercise of wage-setting powers is constrained by their enabling legislation. The relevant provisions for the AIRC are found in sections 88A and 88B of the Workplace Relations Act. Section 7J and section 90 of WorkChoices specify the corresponding parameters for the AFPC. It is instructive and illuminating to compare these provisions.

4.7 The AIRC is required by law to ensure that awards act as a safety net of fair minimum wages and conditions of employment. The AIRC must provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. In doing this it must have regard to economic conditions, and to 'the needs of the low paid'.

4.8 The AFPC is to determine minimum wages with the objective of promoting 'the economic prosperity of the people of Australia'. It will not determine minimum conditions of employment, only minimum wages. It will not have regard to living standards generally prevailing in the Australian community. Nor will it have regard to the needs of the low paid.

4.9 In setting minimum wages to promote economic prosperity, the AFPC will have regard to 'providing a safety net for the low paid'. There is no requirement that the safety net wage rates to be determined by the AFPC are fair in any sense – not fair in meeting needs, nor fair in the context of the rest of the community.

4.10 The AIRC was required by law to keep low paid workers in touch with the rest of the working community – to take into account living standards generally prevailing. The AFPC is unencumbered by any such requirement.

4.11 And whereas the AIRC was specifically required to take productivity and inflation into account when setting minimum wages, these considerations will not concern the AFPC.

4.12 In fact, in those sections of WorkChoices that concern wage-setting, there is no mention of the word 'fair' - except where it immediately precedes the words 'Pay Commission'.

4.13 Clearly, 'Fair' in the phrase 'Fair Pay Commission' qualifies 'Commission' and not 'pay'. Without any relevant statutory reference to fairness in the new charter, the AFPC will at best be a fair Commission to fix pay, and expressly not a Commission required to fix fair pay.

4.14 Proponents of the legislation have advanced reasons why the changes will boost employment.

4.15 Reducing real minimum wages and conditions it is asserted will price more low skilled workers into jobs. In theory, the effect of minimum wages on employment levels is ambiguous and cannot be deduced from theoretical first principles. The impact of any particular level of minimum wages on employment is an empirical question. [Alan Manning, Monopsony in Motion, Princeton UP at page 347 and elsewhere.]

4.16 The international evidence in support of this theory is decidedly lacking, and in inverse proportion to the vehemence of advocacy of the proposition by its proponents. [Card and Krueger, Myth and Measurement, Princeton UP, 1995]

4.17 Australia has topped the OECD league tables for employment growth for the past two decades. Throughout this period the ratio of Australian minimum wages to median earnings remained high relative to all other OECD nations. [Safety Net Review 2005; UK Low Pay Commission

(various); Blau and Kahn, At Home and Abroad, Russell Sage Foundation 2002 at page 82].

4.18 During the 1980s Australian jobs growth equalled or exceeded that recorded in the USA; during this time Australia had regular, moderate increases in minimum wages while the USA had a decade-long freeze on the federal minimum wage. This caused the US minimum to fall from its already low starting point relative to US median earnings. Australia's ranking on the jobs growth league tables has remained at the top during the 1990s and into the 2000s.

4.19 For about five years beginning in 1997, a group of 'five economists' [Peter Dawkins, John Freebairn, Chris Richardson, Michael Keating and Ross Garnaut] proposed a 4-year freeze on minimum wage increases to achieve an unemployment rate of 5% within 10 years. They wrote an open letter to the Prime Minister outlining their idea, and were supported by the Business Council of Australia. The plan was never implemented. Nonetheless Australia attained a 5 per cent unemployment rate in much less than ten years.

4.20 Since the 1996 inception of the Workplace Relations Act 1996, the AIRC has delivered regular, moderate, predictable increases in minimum wages, taking into account economic conditions, prevailing living standards, and the needs of the low paid. Real minimum wages have not declined over this period. There has been no discernible impact whatever on employment generally, nor in award-reliant industry sectors.

Conclusion

4.21 Wage fixing should remain a function of the AIRC and the provisions of the Bill establishing the FPC should be rejected.

5 AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD

5.1 The Bill is aimed at ending the central role still played by awards in the regulation of Australian workplaces. The Bill facilitates the displacement of awards, over time, by the Australian Fair Pay and Conditions Standard (AFPCS).

5.2 As a matter of principle, the question needs to be asked about the public policy justification for the parliament setting of minimum conditions. In its submission the University of Melbourne's Centre Law submitted that the AIRC has the following attributes of a responsive regulator:

- It involves a wide range of stakeholders in the determination of standards, which means that it is well-placed to balance competing interests;

- Its processes are public and transparent;

- It tends to avoid the overt politicisation that occurs when contentious matters are directly regulated by the state;

- It allows for new forms of regulation to emerge in response to social and technological change; and

- It has more recently encouraged decentralised implementation of standards through formulating workplace norms so that they can be adapted to local conditions.

5.3 Legislated labour standards are, on the other hand, open to politicisation. The significance should not be understated.

5.4 The conditions that are proposed in the standard were not always accepted as fair minimum conditions of employment. The (1979) maternity leave test case was roundly criticised in 1979, employers fought hard against the introduction of carer's leave in 1994 and 1995. In fact all the significant achievements for women, especially those with caring responsibilities over the past 30 years have been achieved through test cases; equal pay for work of equal value, maternity leave, parental leave, carer's leave, and the recent right to request part time work to care for young children. Every one of these was opposed, and at the time criticised as imposing too great a burden on employers. Over time, they have been accepted and become part of the accepted safety net.

5.5 It is by no means certain that these would have been endorsed by the Parliaments of the day in the face of vigorous employer opposition

The operation of the Standard

5.6 The ACTU notes with concern the provision of proposed section 89A(3) that will allow the Minister to exclude certain employees from the application of the standard, and to make regulations to amend the standard. The provision gives no limited guidance as to the scope of the amendment open to the Minister. Employees may be excluded from the regulations if their employment does not have sufficient connection to Australia.

5.7 This potentially excludes backpackers or students on temporary visas, and even the proposed overseas apprenticeship classification.

5.8 There is no access to arbitration in respect of disputes about the Australian Fair Pay and Conditions Standard. All disputes regarding the Australian Fair Pay and Conditions Standard are resolved through the model dispute settling procedure. The only available enforcement

mechanism is an application to the courts. This is an inappropriate remedy to enforce breaches, especially when the matter might involve non-financial issues. For example if under the annual leave Standard an employer acts capriciously in withholding permission to take annual leave, it is inconceivable that Court action will be taken to enforce the Standard. Similarly, the notion that employees will initiate court action to enforce the right to refuse unreasonable hours beyond an average of 38 per week is either naive, or reckless as to whether the standard is enforceable.

Wages

5.9 The ACTU opposes the new wages structure, which disconnects the adjustment of the absolute minimum wage with minimum rates for an employees skill based classification scale.

5.10 The focus on the federal minimum wage, to the exclusion of the pay classification scales will unpick the link between skill acquisition and wages. The reforms of the 1990s established broad-banded classification structures, with career progression linked to the attainment of skills. Even the government's supporters acknowledge that this was key to the productivity surge of the 1990s, and an essential platform upon which to base enterprise bargaining. It was also a vehicle to align work of equal value, and ensure relativities between the minimum rates across industries were appropriately benchmarked. This was significant in terms of equal pay for work of equal value.

5.11 Award dependent employees are employed in the hospitality, retail and health and community service sectors. Just under half are casually employed. Sixty percent are female. They are more likely to be low paid.

5.12 The new regime envisages that classification scales above the federal minimum wage could be frozen, or decline in value relative to the minimum wage.

5.13 The proposed legislation fails to guarantee that wages will be adjusted at all, because of the Fair Pay Commission's Charter. But beyond that it fails to guarantee any further adjustment in rates of pay above the federal minimum wage. While existing employees are guaranteed no reduction below their current wage, new entrants or employees who change jobs enjoy no such guarantee, as the new Australian Pay Classification Scale could be lower than the preserved scale.

5.14 An example is the decision to adjust the childcare industry and aged care nurses award rates. These rates were increased to reflect the value of the work undertaken by these workers. In the child care case the largest adjustment was made, not to the entry level rate, but to the rates applying to workers with diploma level qualifications and above.

Workers with disability wages

5.15 The Bill does not appear to preserve the current wages for the classes of employees, whose future wages will be the subject of a special minimum wage.

5.16 The Workplace Relations Act 1996, contains at s.88B(3):

> (c) the need to provide a supported wage system for people with disabilities;

5.17 This provision in referring to a supported wage system invokes reference to the Supported Wage System and therefore its eligibility provisions which makes explicit that not all workers with disability are eligible to be paid under the system:

> Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity **and** who meet the impairment criteria for receipt of a Disability Support Pension. [emphasis added]

5.18 The Workplace Relations Amendment (Work Choices) Bill 2005 provides for wages for employees with a disability in multiple sections including: s.90B (definition), s.90F, s.90O, s.90P(1)(b), s.90S(b), s.90T, s.90U, s.90V, s.90ZE (3) and s.90ZP.

5.19 In contrast to the existing Act none of these provisions refer to a, or the, Supported Wage System and its qualifying eligibility definition. The ACTU is concerned that this lack of reference leaves open the potential for errors in application of the proposed provisions.

5.20 We base this concern on the definition of employee with a disability in proposed Part VA – The Australian Fair Pay and Conditions Standard, Division 2 – Wages section 90B:

> An employee who is qualified for a disability support pension as set out in section 94 or 95 of the Social Security Act 1991, or who would be so qualified but for paragraph 94(1) or 95(1)(c) of that Act.

taken together with, for example, proposed sections 90P and 90S which provide that the AFPC may determine that a special FMW applies to all employees with a disability:

> 90P(1) There is an FMW for an employee if the employee is not:
>
> (b) an employee with a disability;

90P(3) There is an FMW for an employee with a disability (other than an APCS piece rate employee) if the AFPC has determined a special FMW that applies to **all employees with a disability**, or to a class of employees with a disability that includes the employee. The FMW for the employee is that special FMW. [emphasis added]

90S the AFPC may determine a special FMW for any of the following:

(b) **all employees with a disability**, or a class of employees with a disability; [emphasis added]

5.21 Clearly, the existing eligibility criteria for the SWS do not contemplate that all employees eligible for receipt of the DSP are eligible to be paid under the SWS. Many employees with a disability who are eligible for a DSP work at full award wages.

5.22 We hold these concerns despite the reference in s90F(4) - Guarantee of special FMW, to the employment of an employee that is not covered by an APCS.

Payment of wages

5.23 While the standard obliges payment of wages for hours worked, it is silent on the timing and frequency of payment of wages. This is a serious defect as the employee's only recourse in the event of a delay in payment is the Courts.

Complexity

5.24 The wages provisions are extremely complex. The clauses preserving employees' current minimum wages comprise 32 pages of legislation.

Complex definitions of pre reform wages instruments, derived wages, preserved APCS's, and notional adjustments will make understanding a wage entitlement more complex that understanding the taxation system. The Bill cannot serve the needs of business or employees in this form. Regulations must be easy to understand and enforce. The Bill fails to meet this objective.

Hours of work

5.25 The Bill provides that workers cannot be required to work more than an average of 38 hours plus reasonable additional hours. This includes authorised leave.

5.26 Reasonableness is assessed and includes: the effect on health and safety; the employees personal circumstances; the requirement of the business; the notice given by the employer of the need to work additional hours; and the notice by the employee of his/her intention to refuse additional hours.

Long, unsocial and irregular hours of work

5.27 The hours guarantee does not protect employees against long, unsocial or irregular hours of work.

5.28 As part of the Work and Family case the AiGroup made application to vary Awards to provide for hours to be averaged over 12 months. The claim was resisted by the ACTU on that ground that, far from assisting workers balance work and family commitments, it would enhance the capacity of employers to roster long, unsocial or irregular hours.

5.29 As part of the evidence before the AIRC, the ACTU examined the awards that Wageline indicate are the "Top 100" awards, and considered a number of aspects of hours of work within those awards.

5.30 The awards contain a number of levels of flexibilities in the operation of hours of work.

5.31 The first level of flexibility is at the enterprise level. The span of hours within which ordinary hours may be worked is extensive. The span varies between awards and, it can be reasonably assumed given the variety in the span, has been developed to meet the needs of the industry covered by the award.

5.32 Of those awards that specify a span of ordinary hours the majority set a span of 11-12 hours. The span of hours within which ordinary time can be worked is extensive.

5.33 The second level of flexibility in hours of work goes to the maximum number of ordinary hours an individual may work within the span of hours specified in the award. This figure varies from award to award but where it is not expressed as an average number of hours across a week (ie: an average of 38 hours per week) it appears to be 10 hours per day, ranging from 7.6 hours per day to 12 hours per day. The number of ordinary hours per day coupled with the span within which the hours can be worked within the framework of a 38 hour week indicates a level of flexibility exists for the looking.

5.34 The third level of flexibility that exists within the award structure is the averaging of hours over a number of weeks. This averaging is, in the majority of the awards considered by the ACTU, conducted over a four-week period although in the case of the Metal, Engineering and Associated Industries Award 1998 this period may be as long as three months. This capacity to average, along with the span of ordinary

hours and the number of ordinary hours to be worked on any one day further enhances flexibility in hours of work.

5.35 The ACTU submits that the hours of work provisions in awards are a more appropriate guarantee, which better balance the needs of employers for temporal flexibility, and the need of employees for safe, regular and predictable hours of work.

Hours averaged across 12 months

5.36 Unless otherwise agreed, hours are averaged over a 12-month period. If the employee has worked less than 12 months the hours are averaged over the employment period. Employees and employers can agree an alternative period. There is no guarantee that this must be recorded or formalised in any way, making enforcement subject to evidentiary problems.

No guarantee of additional payment for long hours of work

5.37 The hours of work Standard does not protect workers against long hours of work. An employee could legitimately be rostered to work 16 hours per day for 6 months of the year and the employee would not have breached the standard.

Irregular hours

5.38 Nor does it guarantee certainty in rostering. As noted above predictable and regular hours are critical for workers with family responsibilities. An employee could be rostered their 1824 hours per annum in any combination across the 48 weeks of the working year.

Annual leave

5.39 The Bill proposes an annual leave standard of 4 weeks, with an additional week of annual leave for regular weekend shift workers.

5.40 The additional week for shift workers

5.41 Many awards currently provide that shift workers are entitled to an additional weeks leave, to compensate for loss of social and family time. The Bill limits this to employees engaged on enterprises in which shifts are continuously rostered 24 hours a day for 7 days per week and who regularly work weekends.

5.42 This is a very restricted definition of employees who should be compensated for working unsocial hours. An enterprise that operated Tuesday to Sunday (such as restaurants and hairdressers) would be exempt, even though the employees might work every Saturday or Sunday. A shop that is open every day 6.00am to midnight (such as chemists or newsagents) would be exempt.

5.43 The definition of eligible employee also excludes other shift employees. In most awards the entitlement to an additional weeks' leave accrues to night shift employees. There does not appear to be any public policy ground to grant the leave to weekend workers but not night shift workers, who are also penalised in terms of family and community time.

5.44 Cap on single days.

5.45 There is no cap on the number of periods in which leave can be taken. As the employer's authorisation is subject to operational requirements, it is possible that an employer could permit the employer, on operational grounds, to only grant short periods of annual leave. It

would be possible under proposed section 92H(2) that an employee can never take a block of annual leave.

An employee can cash out 2 weeks leave

5.46 The proposed section 92E provides that 2 weeks leave can be cashed out. This option only appears open to employees covered by a workplace agreement. While the employer must not require or exert undue influence on an employee in relation to a decision to forego leave, there does not appear to be any penalty for breaching this provision.

Personal and Carers' leave

5.47 The ACTU supports the leave standard as an appropriate minimum standard, subject to review of the definition of family to ensure that it is not discriminatory.

5.48 The Committee should note that this standard arose form the much criticised adversarial system, whereby claims made by the ACTU led to a national agreement between peak employer and union bodies about the need to revise the safety net.

Proof

5.49 The ACTU opposes proposed sections 93N and 93O, which would mandate that, in the event the employer required proof of illness, an employee must produce a medical certificate. This removes the common award entitlement for employees to choose between whether to provide a medical certificate or statutory declaration. Take the example of a parent whose child suffers form asthma. Currently that parent is not required to incur the cost of a medical visit each time the child is unfit for

care or school. If the employer wishes to challenge the validity of the leave taken, the employee can provide a declaration to the employer.

5.50 In fact the way the proposed provisions operate, an employee will need to get a certificate in every instance just in case their employer subsequently challenges the leave, because a medical practitioner is not able to provide a certificate after the illness has past.

Parental leave

5.51 The ACTU notes with extreme disappointment that the government has not seen fit to update the parental leave provisions. The drafting remains complex, and outmoded notions of "confinement" of pregnant women remain enshrined in the Bill. This is a lost opportunity to simplify and modernise these provisions.

5.52 Even more disappointing is the failure of the government to incorporate the right to request a longer period of parental leave and the right to request part time return to work after parental leave. These rights would impose upon employers the obligation to consider and not unreasonably refuse longer leave or part time work. Like the reasonable hours guarantee contained in proposed paragraph 91C(5) in making the decision the needs of the business would be balanced against the needs of the employee.

Conclusion

5.53 The AFPCS is an ill-considered and inadequate standard. The provisions dealing with its establishment should be rejected.

6 WORKPLACE AGREEMENTS

6.1 The ACTU opposes the sections of the Bill that amend the provisions governing the operation of workplace agreements, and the procedures that govern making, varying, and terminating agreements. The key areas of opposition are:

(i) the removal of awards as the basis for the no disadvantage test;
(ii) allowing AWAs to override other agreements at any time;
(iii) restrictions on the content of agreements;
(iv) extending, through legislation, the capacity for employers to legally coerce workers to sign an AWA by applying duress to employees
(v) the procedural requirements that fail to guarantee that an agreement has been genuinely made;
(vi) the new termination provisions; and
(vii) the establishment of employer greenfields agreements.

The removal of awards as the basis for the no disadvantage test

6.2 The EM described this amendment as no more than removing a layer of complexity from agreement – making.

6.3 Contrary to the suggestion in the EM the change does not enhance employees' choice and flexibility to make agreements beyond the minimum conditions. This is because there is no limit now on bargaining above the minimum conditions.

6.4 The proposed replacement test is inadequate and could see workers take-home pay reduced. The EM acknowledges that this change is a cost to employees. In fact, for vulnerable employees, it will come at significant cost.

6.5 As the ACTU has recently argued before the Employment, Workplace Relations and Education References Committee, the experience of agreement making in Western Australia during the late 1990s illustrates the impact of agreement making underpinned by a small number of minimum conditions and a guaranteed wage.

6.6 The main difference between the proposed government AFPCS and the WA minimum standard is that the minimum wage in WA was the legislated minimum, while the government proposes that the current award rate of pay for the employees' classification (the preserved APCS) or the new APCS will form the wage rate against which agreements will be tested under the AFPCS.

6.7 The Western Australian experience demonstrates the gradual erosion of entitlements through individual bargaining.

6.8 A survey of 200 IWAs in four industries was conducted whereby the IWAs were examined against the relevant award. The IWAs examined covered cleaners, shop assistants, catering workers and security officers. The report found that:

- The ordinary hourly rates of pay for IWA workers varied from $4.72 below the award to $5.60 above award. 56 per cent of IWAs provided for a rate of pay below the award hourly rate.

- A further 28.7 per cent of agreements paid less than $1.00 per hour above award. Only a quarter of IWAs provided for a wage increase. Those that provided for a measurable increase provided for a 1 per cent per annum wage rise.

- Three quarters of security guards, and 60 per cent of shop assistants paid on IWAs received less than the award rates of pay.

- A higher proportion of juniors were earning below award, although when adults were earning below award rates they appeared to earn well below the award. This may have been due to junior rates being closer to the State minimum wage.

- 77 per cent of casuals were paid below award rates, compared to 25 per cent of permanent employees.

6.9 The only conclusion available on this evidence is that, at least in certain industries, the abolition of the no disadvantage test leads to a race to the bottom.

6.10 Critics of the no disadvantage test argue that it is complex, and that parties to agreement making, particularly employers seeking to make AWAs, have difficulty meeting the test.

6.11 This is at odds with the OEA data that less than 1 per cent of AWAs lodged are refused on grounds that they fail to met the test, and that just over one in ten require the employer to make an undertaking in order to be approved.

6.12 And, if simplicity is a genuine goal of the government, the current Bill fails that test.

Changes to the operation of agreements that allow AWAs to override other agreements

6.13 Proposed section 100A (2) provides that a collective agreement has no effect while an AWA operates.

6.14 This is an assault on every worker's right to collective bargaining and be collectively represented.

6.15 The purpose of collective bargaining is to reach agreement about the terms and conditions that will be paid at the workplace.

6.16 Such a change would mean that the employer could purport to make a collective agreement to which the employees had given their genuine consent, and that the very next day the employer could begin to offer AWAs to new employees and existing employees who were susceptible to pressure. These AWAs could provide wages and conditions lower than those set out in the certified agreement. Such a situation would put enormous pressure on employees covered by the certified agreement who did not wish to sign an AWA, and wished to continue to be collectively represented.

6.17 Allowing an AWA to operate to the exclusion of a certified agreement prior to the latter's expiry date means that collective agreements would remain relevant only as long as this meets the wishes of the employer. It means that a deal is never a deal.

6.18 The government has, in the past, resisted criticism in relation to its failure to promote collective bargaining by arguing that it's position is neutral. It has argued that, as no agreement could override a current agreement, it is not favouring AWAs vis a vis collective agreements. Its argument has been that it has simply required parties to abide by their agreement for its term.

6.19 Proposed section 100A (2) abandons that principle. While it provides that a collective agreement has no effect while an AWA operates, proposed section 100A (3) provides that parties to a collective agreement are bound during its life, and cannot, even by agreement override a current agreement with a subsequent agreement.

6.20 If the were any public policy ground to support the change and allow a subsequent agreement can override a current agreement during its life,

then neutrality would demand that any subsequent agreement could override a previous agreement regardless of form.

6.21 But of course this Bill is not about neutral treatment. The Bill not only fails to promote collective bargaining, it discriminates against collective bargaining, affording collective instruments less status that individual instruments. In doing so it discriminates against union members, because the primary purpose for the establishment of unions is the combination of employees to advance common industrial interests.

Restrictions on the content of agreements

6.22 The principle position that the Committee should start from is that parties to an agreement should have the right to determine for themselves the matters about which they will bargain and reach agreement. This is subject only to ensuring an adequate safety net.

6.23 The International Labour Organisation places great significance on the importance of parties being free to negotiate their conditions of employment. For instance, the Freedom of Association Committee has held that:

> *"In keeping with the principles of freedom of association, it should be possible for collective agreements to provide for a system for the collection of union dues, without interference by the authorities."3*

6.24 Where a union and an employer have reached agreement on matters which they believe are relevant, the role of Government should be to ensure that these agreements are valid and enforceable.

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[3] Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO 4th edition ILO Geneva 1996 para. 808

6.25 The ACTU opposes the proposed amendments that constitute a restriction of the matters that the parties may agree, as they offend ILO Convention 98, and are an unwarranted intrusion into the parties right to bargain.

6.26 It is also audacious to claim that the proposed Division 7 of Part VB fosters agreement making at the workplace. It is regulatory intervention in the workplace.

6.27 The effect of section 101E is to confer on the Minister the power to invalidate part or all of an agreement. It is proposed that this could occur to agreements in force and is not limited to future agreements.

6.28 The parties entering into negotiations do not know in advance under what rules they are participating.

6.29 And, and once an agreement is made, the deal is never settled. While the parties themselves are aware of the balancing, concessions and trade-offs that resulted in them accepting the deal, invalidating some or all of an agreement un-picks the settlement reached by the parties in good faith.

6.30 Neither the Bill not the EM suggest what matters will be prohibited. However the government's information booklet cited trade union training, paid union meetings, anti AWA clauses, clauses relating to the agreement of a successor collective agreement; and unfair dismissal clauses.

6.31 These foreshadowed matters prevent employers voluntarily supporting unions at their workplace, despite a growing body of evidence that union workplaces are associated with higher productivity, lower labour turnover, and greater employee commitment.

6.32 It is noteworthy that not one of the flagged matters is directed at protecting vulnerable employees. The obvious intent of this proposed section is to criminalise union activity, and this Inquiry should recognised it as such.

6.33 If there is an argument to prohibit certain matters on public policy grounds (such as the current prohibition gag-clauses (?) in AWAs) these should be included in the Bill, so that parties know in advance what matters are banned. Any new matters should only apply prospectively.

6.34 The penalty associated with placing a prohibited matter on the bargaining table found in proposed section 101M, or making misrepresentations about whether a matter is a prohibited matter, is offensive on a number of ground, not least because it will inhibit informal bargaining. Delegates will be reluctant to be involved in agreement making, as they will not keep up to date with disallowable instruments. It is not clear what standard of recklessness will be imported by the provision.

Legalising coercion

6.35 The ACTU is concerned that the Bill proposes to enshrine in law the much criticised interpretation of the current Act, and expressly provide that an employer may offer employment conditional upon signing an AWA.

6.36 In its 2005 Observation the ILO's Committee of Experts on the Application of Conventions and Recommendations was highly critical of AWAs being offered on a "take it or leave it" basis at the time of recruitment.

> The Committee also notes, however, that the abovementioned sections do not seem to provide adequate protection against

> anti-union discrimination (at the time of recruitment, during employment or, for certain wide categories of workers, at the time of dismissal) to workers who refuse to negotiate an AWA and insist on having their terms and conditions of employment governed by collective agreements, contrary to Articles 1 and 4 of the Convention….
>
> According to both the ACTU and the Government, the courts found that an employer offering new employees a job conditional on signing an AWA did not apply duress, as, in that case, there was no pre-existing relationship between the parties (Maritime Union of Australia v. Burnie Port Corporation Pty. Ltd. (2000) 101 IR 435), while the Employment Advocate has repeatedly held that where an employee is offered a position with a new employer conditional upon entering into an AWA this will not, without more, amount to duress under section 170WG(1) of the WR Act.
>
> The Committee recalls that the protection provided for in the Convention covers both the time of recruitment and the period of employment, including the time of work termination (see General Survey of 1994 on freedom of association and collective bargaining, paragraph 210). The Committee considers that sections 170WG(1) and 298L of the WR Act and the relevant national practice do not appear to afford adequate guarantees against anti-union discrimination at the time of recruitment and cannot be considered as measures to promote collective bargaining.

6.37 Instead of taking this opportunity to overturn the decision in *MUA v Burnie Port Corporation*, the government has chosen to give it statutory force, through proposed subsection 104(6).

6.38 We ask the committee to note the views of Marshall J in *ASU v Electrix* who said:

> It's also my view that the conduct of Mr McLeod, in effectively saying to meter readers "it's the AWA or your job", is unconscionable conduct which no employee in a humane, tolerant and egalitarian society should have to suffer.

6.39 The Bill also enshrines the capacity of employers to take proactive lockout action against their employees. The effect of proposed section

104(2) is to exempt employer lockouts from the definition of coercion or duress. Thus, it remains legal for an employer to simply send a worker or a group of employees home and refuse to pay them until they sign an agreement. This should have no place in our labour laws.

No guarantee that an agreement has been genuinely made

6.40 The ACTU opposes the insidious provisions of proposed section 100 that provides that agreements come into effect upon lodgment.

6.41 Section 99B(5) confirms that the OEA has no obligation to consider whether the agreement meet any standards in terms of the making or content of the agreement. Section 100(2) also confirms that agreements are operative even if none of the pre-lodgment requirements have been met.

6.42 This means an employer could lodge a purported agreement with employees without the employees' knowledge. The "agreement" would be operative.

6.43 It is entirely possible, and indeed the EM anticipates that an agreement can be "lodged" and therefore "in operation', despite not having been "approved' (98C), and therefore not "made"(96G). That is, an "agreement" can come into effect and be enforceable despite there having been no agreement, and without the knowledge of the party. If not for the very real potential for abuse, it would be comical.

Unilateral termination

6.44 In the Majority Report of the recent Inquiry into Workplace Agreements (October 2005) the References Committee noted that the balance of

power between employers and employees is an important determinant of bargaining outcomes.

6.45 The proposal to permit unilateral termination of agreements after 90 days notice hands the employer significant bargaining power, because of the effect of proposed section 103R. This proposes that, on termination of an agreement the only enforceable wages and conditions will be the AFPCS.

6.46 In practical terms this means that, after an agreement has reached the nominal expiry, there is a 90-day period during which the employees/union and the employer can bargain with a secure status quo. After this time, the employer can withdraw some or all of the benefits applying at the workplace, provided they do not withdraw matters governed by the AFPCS.

6.47 This could mean a loss of more than half an employee's take home pay. For an employee on average weekly earnings, a reduction to the federal minimum wage constitutes an 54.3 per cent drop. For a tradesperson to drop to the (current) relevant APCS would constitute a drop of 45.5 per cent.

6.48 If the employees wish to enhance their bargaining power by taking industrial action, the action must be authorised through a ballot. If a postal ballot is ordered the process could take around three weeks, during which the notice of termination continues.

6.49 An employer can "string out" the negotiations, while the notice period continues.

6.50 This proposal grants employers a huge threat that can be held over their employees' head during bargaining. In many workplaces, employees will be forced to accept wages and conditions below their current agreement. Alternatively, bargaining will be waged on a

"winner take all" basis, with consequences for the parties and the community.

Employer greenfields agreements

6.51 Section 96C establishes the employer greenfields agreements. The ACTU opposes this proposal. The proposed instruments are not agreements. Nor are they necessarily related to greenfield sites.

6.52 Section 96G(e) confirms that an employer greenfields agreement is made when it is lodged. Unlike other agreements there is no counter-party with whom the employer must reach agreement.

6.53 The definition of new business includes a new business, project or undertaking, or new activities that are proposed to be undertaken by the employer. The Explanatory Memorandum explains that this provision is designed to include new undertakings which are of the same nature as the employers' current business.

6.54 Thus, an employer could treat a new contract or client as a new business and unilaterally determine the conditions to be offered.

Other matters

6.55 We offer the following detailed comment on sections of the Bill.

Multiple employer agreements

6.56 Section 96E and 96F provide that, in order to make a multi employer agreement, the OEA would have to authorise the employer(s) to make such an agreement. It is an offence to lodge an agreement that covers more than one employer without the authorisation.

6.57 While the provision is new it suffers from the same defects as the current restriction on multi-employer agreements.

6.58 Firstly, it offends the ILO Convention 87 on Freedom of Association, as it prevents employees from joining together in pursuit of common interests.

6.59 Secondly, it imposes a restriction on the ability of the parties to determine the level of agreement making that suits them, and constitutes an unwarranted interference in their right to collectively bargain.

6.60 Finally, the requirement in section 96F for pre-authorisation replaces the current post agreement authorisation process in the AIRC, and continues to restrict the freedom of parties to collectively bargain.

6.61 As the OEA will determine the process for making an application, presumably including whether and how interested parties are heard, there is no guarantee that interested workers will be able to be heard.

6.62 This is objectionable. If the provision is to stand it should, at a minimum, be open to employees or unions to make application and assert the public interest in multi-employer bargaining.

6.63 Multi-employer bargaining is particularly suited to small business who do not compete with each other due to geographic or other factors, who employ small numbers of employees, and who do not have industrial relations expertise. Independent grocers, kindergartens, disability services, and country newspapers have used the current provisions of the Act.

Bargaining agents

6.64 The government has placed significant emphasis on the ability of workers, especially vulnerable workers, to appoint a bargaining agent of their choice.

6.65 However the Bill does not provide for this. A person's choice of union as agent is limited by the qualifications contained in proposed section 97(3).

6.66 The effect of subsection 97(1) is that an employee will not be able to appoint their parent, neighbour or other person unless that person meets the requirement that a bargaining agent must be qualified. This is a new proposal that has not been before the committee before.

Pre lodgement procedures

6.67 The provisions of Division 4 provide an unreasonably short period for consideration of an agreement.

6.68 Under the proposed Division an employer could provide access to the proposed "agreement", and at the same time provide the required information.

6.69 The employee has only 7 days to read the proposed agreement, identify and engage an agent if they wish, and for the agent to contact the employer. Notification that a bargaining agent has been appointed or a request to meet and confer does not "stop the clock". While an employer must recognise the bargaining agent there is no requirement to bargain in good faith.

6.70 The Bill heightens the need for proper scrutiny of agreements, as agreements can "lock in" conditions for 5 years. They will inevitably become longer and more complex due to the effect of proposed section

100B that an agreement ousts the operation of an award. Seven days is clearly inadequate time to ensure for informed consent.

6.71 Proposed section 98A, providing for waiver of ready access is opposed. For many workers with a disability, young workers or other new entrants there is a risk of undue pressure.

6.72 Proposed section 100 provides that agreements come into effect upon lodgment. Section 99B(5) confirms that the OEA has no obligation to consider whether the agreement meet any standards in terms of the making or content of the agreement. Section 100(2) also confirms that agreements are operative even if none of the pre-lodgement requirements have been met.

6.73 This means an employer could lodge a purported agreement with employees without the employees' knowledge. The "agreement" would be operative.

6.74 With a union collective agreement there is no requirement that unions sign agreements (they are made when the terms are agreed, not on execution of the document). An employer could lodge a "union collective agreement" without the union's knowledge.

6.75 Civil (or criminal) remedies are an inaccessible remedy.

Agreements oust the operation of awards

6.76 While the option to oust the operation of awards by agreement has been available to the parties since 1994, few agreements do so. Comprehensive agreements are not the norm in Australia. Fewer than

three in ten certified agreements are comprehensive [4]. Most AWAs are single-issue agreements.

6.77 This is a reflection that undermining awards is not, and should not be, a priority in productivity bargaining. The architects of the current bargaining system envisaged that the focus of bargaining would not be cutting employee conditions, but rather work organisation and workforce development.

6.78 The effect of section 100B is that an award has no effect in relation to an employee while an agreement operates. This means that, unless an agreement provides a comprehensive set of conditions, the employee will lose these conditions.

6.79 This will immediately add complexity to what has, until now, been a relatively informal process in most workplaces.

Redundancy pay provides an example

6.80 The so-called protection offered by section 101B (protected award conditions) omits a number of current employee entitlements including redundancy pay. It is easy to imagine an agreement entered into in good times in which the parties fail to address redundancy pay. Four years later, there is a downturn.

6.81 Under the current law, where an agreement is silent on redundancy pay, the award entitlement underpinning the agreement operates. Under section 100B the employee will have no redundancy entitlement.

6.82 Under the proposed law, unless the parties address the issue, there is simply no redundancy pay.

[4]Mitchell R. and Fetter J., The Individualisation of Employment Relationships and the Adoption of High Performance Work Practices Final Report, Centre for Employment and Labour Relations Law, University of Melbourne, p.11.

Content of Workplace Agreements: Protected award matters

6.83 Section 101B is described as deeming certain award matters into agreements.

6.84 However the so-called protection has effect "subject to any terms of the workplace agreement that expressly exclude or modify all or part of them" (101B(2)(c)).

6.85 The protection is illusory, and can be removed by a simple line in an agreement.

6.86 The ACTU opposes the existence of this provision in favour of retention of the current no disadvantage test, and our comments on the Bill should be read in that light.

6.87 The government propaganda asserting that this proposed section protects in law penalty rates, overtime, meal breaks or other listed conditions is exposed as a deceitful by proposed subsection 101B(2)(c).

6.88 A scan of AWAs on the OEA website revealed the following examples of clauses in AWAs. Presumably, if these have been sufficient for the OEA purposes to date similar clauses will be sufficient exclude or modify all or part of the award conditions.

Example 1

Upon registration of the Agreement, no award provisions or any award shall form a part of the contract of employment between the parties

Example 2

The provisions of this Agreement shall replace the provisions of the [award, this has been blacked out] and any State of Federal Acts other

than those governing workers compensation rights and occupational health and safety except where specifically provided for in this Agreement.

Example 3

This Agreement superseded all negotiations and prior agreements including all enterprise bargaining agreements and contracts, whether registered or unregistered, whether written or oral relating to the employment of the Employee with [blacked out]

6.89 Presumably after the Commencement Date, any conflict between this Agreement and State Law will be resolved in favour of this Agreement.

Calling up content of other instruments

6.90 The ACTU opposes proposed subsections 101C(5) and (6). No public policy justification is given for prohibiting negotiating parties from voluntarily agreeing to reference State awards, deeds or other instruments in their agreements. While the EM indicates (at paragraph 1009) that the intention is to encourage comprehensive agreements this objective is undermined by the capacity of the parties to call up company policies.

Conclusion

6.91 The provisions relating to workplace agreements should be rejected.

7 AWARDS

7.1 Awards remain an important source of employment protection for many workers. One in five employees relies on the award to set their wages and conditions and many more rely on awards to underpin the agreements that govern some of their working arrangements.

7.2 Changes to the award system will disproportionately affect employees in the hospitality sector, in retail, personal services and health and community services. (ABS 6303.0 May 2004). These workers are generally casual, often women and generally low paid.

Award variation and revocation

7.3 Divisions 5 of proposed Part VI of the Bill would, if enacted, reduce the effectiveness of awards as a safety net for employees, both through the removal of matters from awards and by curtailing the AIRC's powers to adjust the conditions in response to changed circumstances.

7.4 Under the proposals awards are no longer made in, or apply as, settlement of industrial disputes. This new constitutional underpinning removes the inbuilt dynamic for change that characterises the current system. The AIRC will have no real role is setting a safety net of fair minimum award wages and conditions. It will be for the parliament to periodically update the safety net to reflect community standards.

7.5 The effect of proposed section 119 is that the AIRC may only make awards as a result of award rationalisation, but that it cannot make any other awards. This means for example that when new industries emerge (such as the call centre industry) no new award can be made in relation to that industry.

7.6 The Commission's role is limited to changing the name of the parties, and removing discriminatory or ambiguous clauses. Proposed section 119A confers on the AIRC the ability to adjust an award "if it is essential to the maintenance of minimum safety net entitlements".

7.7 Presumably this extends to the adjustment of those allowances in awards that will survive the simplification process. If not, certain expense related allowances would, over time, fail to compensate the employee for the expenses incurred in the course of their work. However this set of words has no jurisprudence.

7.8 The EM suggests the purpose is to include in awards model clauses that arise from a national test case. This seems odd, as there does not seem to be any capacity to make application for adjustments to conditions to create new test case standards.

Simplification

7.9 The ACTU has made submissions to the Committee on a number of occasions in relation to award simplification, and the ACTU relies largely on the submissions we have made in the past. The ACTU notes that last time this issue was before the Committee the Democrats Minority Report noted:

> *"Submissions from both industry groups and unions indicate there is lukewarm support for the Bill. Both the Australian Chamber of Commerce and Industry (ACCI) and Australian Industry Group (AiG) expressed lack of support for the removal of some of the allowable maters proposed in the bill". (Report of the Inquiry into the Workplace Relations Amendment (Award Simplification) Bill 2002 page 30).*

7.10 It is therefore surprising that the proposal comes forward again.

7.11 The ACTU suspects much of the criticism leveled at awards reflects the views of people who have not taken the opportunity to read any current federal awards. Perceptions of rigidities in awards bear little resemblance to the simplified awards that exist today. There is considerable flexibility built into most major industry awards.

7.12 The simplification process of the 1990s was extensive, and in some cases had significant detrimental effect on the labour market. In particular, the removal of ratios of part-time and casual hours to full-time employees, and the removal of minimum and maximum hours for part-time employees is likely to have contributed to the growing casualisation of the workforce, and the growing number of employees who are dissatisfied with their hours of work.

7.13 The removal of provisions regarding consultation, education and training has sent entirely the wrong message to the workplace in an environment where working cooperatively, and focusing on education and training are vital to our economic position in a competitive world, particularly given the greater attention being given to these issues in Europe, including the UK.

7.14 While there is value in dealing with these matters at the workplace level, the reality is that in many cases they will not be, and to remove provisions setting out minimum requirements in these areas simply reinforces the idea that they are an optional extra.

7.15 The ACTU is strongly opposed to any further restrictions on what matters may be included in awards.

7.16 Since 1997 employer organisations and unions have devoted enormous resources to the award simplification process, which has achieved, in practice, nothing other than removal of significant award entitlements and a lowering of the safety net.

Allowable matters

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7.17 The effect of proposed sections 116-116F is to significantly reduce the scope of the protection offered by awards, and to provide that awards may only provide minimum safety net entitlements.

7.18 The following matters will no longer be allowable, and will be removed from awards:

- Provisions granting a union an automatic role in any dispute procedure, unless the union has been chosen by the member;

- Transfer from one form of employment to another (this covers casual conversion clauses, and also excludes the right to convert to part time employment after parental leave);

- Restrictions on the number or proportion of employees that an employer may employ in a particular type of employment;

- Restrictions on the minimum or maximum hours worked by part time employees;

- Restrictions on the range or duration of training arrangements;

- Restrictions on the use of independent contractors and labour hire;

- Union picnic days, tallies, dispute resolution training leave and trade union training leave;

- Any clause that has the effect of according re preference or otherwise contravene Part XA (Freedom of Association);

- Any clause that has the effect of providing right of entry;

- Any clause that has the effect of including an enterprise flexibility provision; and

- Any additional matter prescribed by the Minister in regulations.

7.19 A copy of the relevant section of our previous submission in relation to the effect of the removal of certain matters from awards is attached as appendix 1 and a copy of relevant sections of our submission in respect to the limitation of redundancy pay to employees in workplaces of fewer than 15 employees in attached as appendix 2.

7.20 Instead of addressing each item to be removed from awards, the ACTU asks that the Committee consider the logic behind the differential treatment between the various items; which ones are removed from awards, which are removed but preserved; which are preserved if more generous than the AFPCS.

7.21 Their only logic is political expediency.

7.22 Jury service, long service leave, superannuation and notice are preserved award matters, not because they are more or less important to the overall adequacy of the safety net than say accident compensation make up pay, but because the government announced their removal in May 2005, and was subject to intense community criticism.

7.23 Had the removal of accident compensation pay been announced in May 2005, and had the community had the opportunity to consider the effective drop in take home pay that this means for workers who suffer an injury requiring them to be off work for more than 6 months, then no doubt the community would have expressed its concern about this item. Following the government logic, it too would be a preserved award matter.

7.24 Simply, all award matters should be preserved award matters.

Specified non-allowable matters

7.25 The proposed new subsection 116B contains a number of matters which are declared to be non-allowable. A copy of the relevant section of our previous submission is attached at appendix 1.

Award Rationalisation

7.26 The ACTU challenges the need for award rationalisation. The rationalisation process is in part driven by the desire of the government to take over the State systems, which is addressed in section 3.

7.27 It is also based on the rather simplistic criticism of the number of awards in Australia. The ACTU understands that about 20 current federal awards cover about 80 per cent of federal award workers. Many of the remaining awards are single company awards, which were the predecessors to certified agreements and arose from the desire of a company to tailor the award to their circumstances. In this context, 4000 awards is miniscule compared to the number of companies in Australia.

7.28 If the burden of multiple award coverage was as crippling to business as the government would have us believe, it could have promoted more vigorously the benefits of certified agreement making, which are a simple solution to multiple award coverage that been available to all employers party to an industrial dispute since 1994, and to all constitutional corporations since 1996.

7.29 The process envisaged under proposed section 118(3) confers power on the Minister to direct the principles underpinning each rationalisation. It appears to confer on the Minister the absolute power to direct the work of the Full Bench, subject only to the general guidance that the taskforce is required to establish industry awards and to avoid terms and conditions that are established by reference to State boundaries. The Commission's role as an independent authority will be further undermined.

Preserved award matters (grandfathering)

7.30 The effect of proposed new Part VI, Division 3 is to preserve an entitlement for employees who are currently entitled to certain provision, and an obligation upon employers who are currently obliged to provide certain terms into the future.

7.31 Workers continue to be entitled to the grandfathered provisions while they remain employed by the employer. Employers remain obliged to provide the terms of the current award to both current and new employees.

7.32 The matters are: annual leave, personal carers leave, parental leave, LSL, jury service, notice and superannuation (until 2008).

7.33 In respect of annual, personal and parental leave, only those matters that are more generous to the employee are preserved. The meaning of more generous will not always be obvious. For example some

awards deal with particular aspects of leave which direct when leave can be taken. Whether this is a generous provision guaranteeing leave each 12 months, or an onerous provision restricting flexibility over when leave can be taken is in the eye of the beholder.

7.34 The preserved award matters provision is a complex provision that does nothing to deliver simplicity.

7.35 Trying to apply the rules, in conjunction with the allowability and simplification provision s to a hypothetical example highlights that the provisions are so complex as to be unenforceable.

Example: A childcare worker is employed under the terms of the Children's Services Award in Victoria, which contains the right to request part time return to work after parental leave, as provided for in the recent Family Provisions Case.

Is the clause allowable?

7.36 The clause may be classified as either a parental leave matter, or a term related to the transfer from one type of employment to another.

7.37 Potentially the clause is not allowable because it is a part of parental leave, which is a matter governed by the AFPCS and is not included in the list of allowable matters.

7.38 However it also arguable that deals with deals with part time employment and is allowable. If is does deal with part time employment, arguably it is not allowable because it is also a term related to conversion from one type of employment to another (Subsection 116B(1)(b)).

7.39 The answer will depend upon the simplification process, and the AIRC has until 2009 to complete the process.

7.40 However, before this is settled, the worker has a baby, and wants to know her rights.

7.41 If the term is not allowable because it offends proposed section 116B, then its ceases to have effect on the day of the reform, and she has no right. If the term is simply not included in the allowable award matters, but is considered part of parental leave it is preserved.

7.42 If the matter is preserved then she remains entitled to the right to request provided she does not change employer.

7.43 Her remedy is to use the new model dispute procedure. If her employer refuses to accept that it has an obligation under the award, the AIRC, or the alternative mediator, cannot even make a recommendation unless the employer has agreed that a recommendation may be made.

7.44 However, if she changes jobs, she will only be entitled to the right to request provided her new employer was, at the date of the reform, respondent to the Children's Services Award. The new rationalised national award covering child care workers will need to identify the employers, by name or class, who are covered.

7.45 And, if the centre has changed hands in that time, she will need to understand Part VIIA of the Act.

Conclusion

7.46 Awards have been simplified and streamlined. There is no need for further amendment of awards except on the application of the parties. The AIRC should retain the power to make and vary awards. The provisions of the Bill dealing with awards should be rejected.

8 TRANSMISSION OF BUSINESS

8.1 The ACTU is opposed to the proposed new Part VIAA dealing with transmission of business, which are even less fair to employees than previous suggestions by the government related to transmission.\

8.2 The Bill, if enacted would allow employers to avoid their obligations under awards and agreements through simple corporate restructuring.

8.3 It should not be acceptable for employers to use methods such as assignment or contracting out of functions to reduce the wages and conditions of current or future employees.

8.4 Instead legislation should ensure that arrangements such as privatisation and outsourcing do not leave employees doing exactly the same work for the benefit of the same people or organisation but at greatly reduced wages and conditions.

8.5 Employers should not be able to outsource or privatise is to reduce employees' wages and conditions, this is the type of arrangement which the transmission of business provisions in the Act should prevent.

8.6 The Bill would permit an employer to outsource work to a related entity, and escape its obligations to its employees either immediately or at the end of 12 months. If there is no agreement at the workplace the employees are entitled to no more than the five minimum conditions in the ASPCS would apply.

8.7 The government has argued that employers should not be bound by agreements that they did not make. Yet transmission of business involves the assignment of liabilities. Imagine the uproar if

transmission of business allowed a lessee to avoid the obligations of a lease.

8.8 The effect of the Bill is that employees can have no certainty. When a collective agreement is entered into by an employer and its employees, both parties are entitled to certainty about the future operation of the agreement.

8.9 In the event that a transmitted agreement is not appropriate to the needs of the workplace, or is in conflict with an already existing agreement, it is open to the parties to agree to vary the transmitted agreement.

8.10 The transmission of business provisions of the Bill are both unfair to employees, are inconsistent with the rules governing all other forms of contractual obligations and constitute a mechanism for the avoidance of commitments given by an employer. They should be rejected.

9 INDUSTRIAL ACTION

9.1 The ACTU opposes the thrust of the Bill, which is to promote legal remedies to unprotected industrial action rather than resolution of the underlying dispute.

9.2 The effect will be to escalate industrial tension, and to promote a "winner take all" approach to dispute resolution.

9.3 The Bill would make it virtually impossible to take protected industrial action in support of claims being pursued throughout an industry or in the workforce generally, even though a separate agreement is negotiated at each enterprise.

9.4 Effective bargaining is impossible without an entitlement to take lawful industrial action because employers would know that the employees and their unions had no means to put pressure on them.

9.5 The Bill would put Australia in even further breach of international law regarding collective bargaining. No other comparable country prohibits industry-wide or multi-employer bargaining.

9.6 Industry-wide bargaining is the most effective way of pursuing issues of common concern and general relevance, while not precluding enterprise-specific negotiations.

9.7 A legal requirement for decentralised bargaining is not linked to high productivity or lower unemployment. It is a transparent and nasty effort to fragment collective bargaining and decentralize bargaining to isolate those employees with the least bargaining power.

Definition of industrial action

9.8 The definition of industrial action in proposed section 106A imposes on employees who cease work due to an imminent risk to their health or safety the onus of proving that their concern was reasonably held.

9.9 This proposed section could engender in workplaces a culture of "safety second". This is particularly so when read in conjunction with proposed Division 9 of this Part, which mandates that an employer must dock wages for a minimum of four hours. It is simply unconscionable that workers could be placed in a situation where they hesitate to act in the face of a risk; for fear that their action would be considered industrial action.

Pattern bargaining

9.10 Nowhere else in the developed, industrialised world are there restrictions on industry-wide agreement making as exist in Australia.

9.11 Industry-wide bargaining is the general model in most European countries. In the UK and the US bargaining is more often at an enterprise level (although in the UK it may cover groups of employees from the same craft or occupation). However, in neither of these countries is there a prohibition on multi-employer bargaining or on industrial action associated with it.

9.12 In the UK multi-employer industrial action has occurred in a number of industries. The Blair Government has legislated to make it easier to organise pre-strike ballots for multi-workplace action.

9.13 In the US construction industry, bargaining occurs at the local and regional as well as the industry level. Enterprise bargaining coverage is greatest where there is industry-wide bargaining.[5]

9.14 In New Zealand legislation allows multi-employer bargaining, if union members employed by each employer agree to go into the multi-employer negotiations.

9.15 The restrictions on the negotiating parties to choose their own level of bargaining under Australian law has been strongly criticised by the ILO's Committee of Experts.

9.16 The definition of "pattern bargaining" would catch almost all union collective bargaining. Effective bargaining requires enabling unions and their members to campaign around issues of concern in their industry.

9.17 Pattern bargaining, or the pursuit of common interests, is what unions do.

9.18 Unions are not merely a collection of groups of workers who relate only to their own workplace. Workers come together in unions because of concerns, which they have in common as employees in particular industries, and as participants in the workforce as a whole.

9.19 Unions survey members, identify themes, hold discussions and meetings at workplaces, hold conferences of democratically elected delegates and identify priorities for bargaining.

9.20 Neither unions nor employers approach enterprise bargaining with blank minds and empty pieces of paper. Neither group have the resources to do this. The enterprise bargaining process is based on

[5] G Bamber et al "Collective Bargaining" in R Blanpain & C Engels *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* Kluwer Law International 1998

sharing of collective knowledge and experience, and using this in a cumulative way, rather than re-inventing the wheel on each occasion.

9.21 Employers, as well as employees, rely on assistance from unions and employer organisations in relation to claims and agreements, including model agreements. The OEA provides industry sample AWAs on its website. OEA partners provide pattern agreements across industries.

9.22 Employers frequently engage in pattern bargaining. AWAs are a clear example of pattern bargaining.

9.23 The definition of pattern bargaining is problematic. It appears to include in the definition claims made on employers who are related as defined in the Corporations Law; it applies to common claims on employers in respect of employees employed on a single site, and it includes an essentially unrebuttable presumption that campaigning for common claims is contrary to the objective of encouraging agreements to be genuinely negotiated between parties at the workplace or enterprise level.

9.24 The onus on the party taking the action to prove they are not pattern bargaining is virtually impossible to discharge, especially in light of proposed section 111A which envisages injunctions in relation to proposed or threatened pattern bargaining.

Removal of the discretion of the AIRC in relation to suspension of termination of industrial action

9.25 The Bill proposes to remove from the ability of the AIRC the discretion to refuse to act in the face of pattern bargaining, or when faced with action where a party is not genuinely trying to reach agreement; the industrial action is endangering public safety or damaging all or part of the economy, or in the face of action taken by a union that does not have coverage at the workplace or in respect of a demarcation dispute.

9.26 This is consistent with the government's approach to deal with the effect of industrial disagreements, rather than deal with the causes. It encourages a legalistic approach, and does nothing to encourage the parties to develop harmonious industrial relations.

9.27 This approach means that, long after the dispute which triggered the action has passed, litigants are thrown into an adversarial role again, which fosters poor and unproductive relationships between employees, their unions and employers.

Ministerial Declarations

9.28 The Bill confers power on the Minister to make a declaration terminating a bargaining period in the face of industrial action is endangering public safety or damaging all or part of the economy.

9.29 This goes well beyond an essential services power.

9.30 In its 1999 Observation the ILO's Committee of Experts on the Application of Convention and Recommendation (the "CEACR") was critical of the current Act because it restricts of the right to strike beyond essential services to those strikes that affect the economy.

9.31 The CEACR also noted with concern the continued existence of sections 30J and 30K of the Crimes Act which permit the Governor-General to ban industrial action in essential services by proclaiming the existence of a serious industrial dispute "prejudicing or threatening trade or commerce with other countries or among the States" (section 30J), and prohibiting boycotts resulting in the obstruction or hindrance of the performance of services by the Australian Government or the transport of goods or persons in international trade.

9.32 In its 2003 report the CEACR noted that nothing had changed and again called for legislative reform. The Committee said:

> *Prohibiting industrial action that is threatening to cause significant damage to the economy goes beyond the definition of essential services in the strict sense of the term. In the case of the latter restriction, however, the Committee has considered that, in order to avoid damages which are irreversible or out of proportion to the occupational interests of the parties to a dispute, as well as damages to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in services which are of public utility rather than impose an outright ban on strikes. The Committee requests once again the Government to amend the provisions of the Act, to bring it into conformity with the Convention.*

9.33 The proposed Work Choices provision would entrench and exacerbate Australia's breaches of fundamental labour standards.

Cooling off periods

9.34 The ACTU opposes the introduction of cooling off periods, and is particularly opposed to suspension of the bargaining period on the application of third parties. Industrial action is, by its nature, disruptive.

9.35 Although the current version purports to do no more than give discretion to the Commission, the reality is that it can have no effect other than to restrict further the taking of industrial action in the context of a legislative regime, which already falls short of international standards.

9.36 The effect of the proposed amendment would be for bargaining periods to be suspended even when the party taking the action has behaved

within the law. It should be noted that the Commission already has the power to suspend the bargaining period where a party has not tried or is not genuinely trying to reach an agreement. To provide for suspension of bargaining periods to "cool off" is simply to remove the employees' bargaining strength while leaving the employer free to continue to refuse to negotiate genuinely, or at all.

9.37 The ability of the Commission to suspend the bargaining period if the industrial action is threatening to cause significant harm to a third party has the potential to apply to a significant proportion of industrial action. The very nature of industrial action is that there will be some harm to third parties, including proprietors of businesses who are reliant on the business involved in the industrial action. The Federal Court has held that:

"It is inevitable, in my view, that action engaged in directly by unions against very many kinds of employers will, by disrupting the business operations of those employers, also have a direct or indirect impact on the business and other activities of third parties." [6]

9.38 To allow anybody claiming to be affected by protected industrial action to apply to the Commission for suspension of the bargaining period is to facilitate involvement in industrial disputes by all kinds of persons, including ideologues, mischief makers and busybodies, while doing nothing to resolve the actual dispute.

Secret Ballots

9.39 The ACTU supports the right of union members to vote on whether or not to take industrial action, and believes such votes are generally taken. It shouldn't need to be pointed out that a union that calls a strike that is not supported in the workplace is unlikely to be effective. While

[6] *FH Transport Pty Ltd v TWU [1997] 567 FCA per Cooper J*

the most common practice is for members meetings to authorize action, it should be noted that a number of unions routinely use secret ballots prior to taking industrial action.

9.40 The ACTU notes that secret pre-strike ballots are available when requested by employees under the current section 136 of the Act, and that it is also possible under section 135 for the Commission to order that a secret ballot be conducted if it considers that this would be helpful in resolving a dispute, if industrial action is pending, or to ascertain whether an agreement has been genuinely made.

9.41 Although there is no specific provision for an application for a secret ballot to be made by an employer party to the dispute, another affected party or the Minister, there is no bar on any of these persons making submissions to the Commission that a ballot should be ordered.

9.42 The ACTU submits that existing provisions are generally not utilized, not because they are difficult to access, but because in the face of an actual dispute, parties and other affected persons have not taken the view that a ballot would be effective in preventing industrial action or resolving the dispute.

9.43 The proposal for compulsory secret ballots also highlights the inconsistency in the government's approach to collective negotiations.

9.44 While a ballot is required to prove that there is majority support for the claims being advanced, and the taking of action in support, the government does not recognise the validity of majority support for other purposes. Surely if a democratic process is necessary and sufficient to endorse action, then a democratic process is necessary and sufficient to endorse a claim for a collective agreement, which must then be recognised and respected by the employer.

9.45 The Committee should note that no corresponding obligation is placed on employers to obtain shareholder approval to lock out employees.

9.46 The Government's proposals for a system of compulsory secret ballots cannot be seen as anything other than an attempt to further restrict the ability of Australian unionists to take protected industrial action, bearing in mind that this right is already more restricted than in most other developed countries.

The process

9.47 The process for obtaining and implementing an order for a secret ballot set out in the Bill adds additional time-consuming complexity to the taking of protected industrial action.

9.48 Although proposed section 109H provides that the Commission must act as quickly as possible when it receives an application for a ballot order, and, as far as possible, must determine an application within two days of its being made, employers and others wishing to delay the action will be able to argue a number of issues before the Commission, such as the validity of the bargaining period and whether or not the union has genuinely tried to reach agreement. In addition, procedural issues, such as who should conduct the ballot, the roll and the timetable are all issues for debate, which can be used for delay.

9.49 With the potential of appeals, which would presumably delay the holding of a ballot, it is impossible to predict how long the period between the application for a ballot and its commencement would take, but weeks and even months is a certainty.

9.50 To this must be added a period of around two to three weeks for the Electoral Commission or the authorized ballot agent to actually conduct a postal ballot, followed by three days notice to the employer before the action can take place.

9.51 This provision is particularly odious when read in conjunction with the ability for employers to unilaterally terminate an agreement, and the fact that the notice of termination is not suspended during the ballot period.

The ballot paper and subsequent action

9.52 The Bill leaves open the question to be put on the ballot paper. While this is an improvement on previous iteration of this proposal, it remains open to the AIRC to pose questions in a way which limit the capacity of the employees to escalate or scale back action in response to the progress in negotiations. It is not uncommon during periods of industrial action for employees and employers to agree to certain types of work continuing, in a modified fashion. Employees may agree to alter the way action is implemented as a show of good faith as negotiations continue. Unless the question put is sufficiently flexible this type of activity risks the action becoming unprotected.

The quorum

9.53 The Bill proposes that in order to authorise industrial action, a quorum of at least 50 per cent of eligible voters must cast a vote, of which more than 50 per cent must approve the action. [s109ZC]

9.54 The ACTU submits that it is inequitable to require a quorum. The ILO Freedom of Association Committee has held that while:

> *"the obligation to observe a certain quorum.....may be acceptable.....The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises".* [Freedom of Association Digest, 4th (revised) edition, paras 507&510]

9.55 There is simply no justification to require more than a simple majority of valid votes cast, and indeed the quorum requirement may mask the true level of support for industrial action. Two examples should be considered, both involving workplaces of 100 employees. In the first, 49 employees in the ballot vote, all in favour of strike action. In the second, 50 employees vote, 26 of them in favour of strike action. In the first example, strike action would not be authorised, while in the second it would, even though it would appear that there was substantially greater active support for the strike in the first example.

Cost of the ballot

9.56 The long-standing principle in Australia is that where the Government determines who shall run a ballot, it pays the costs, as is the case with union elections. It is completely unfair to impose requirements on private organisations to have ballots run by a government body, and then require the organisation to pay the costs.

Conclusion

9.57 The requirement for a secret ballot will not assist resolve disputes, but rather prolong them.

Payments in relation industrial action

9.58 The Committee's attention is drawn to the proposal to require that the minimum period of pay that must be withheld during a period of industrial action is four hours.

9.59 Like other provision of the Bill this is a dispute-making not dispute-solving clause. If work is resumed, pay should be resumed.

9.60 It is ironic that the government sees fit to enshrine penalty rates in relation to the withholding of wages.

Legalising the response to industrial action

9.61 The Bill will impose on the AIRC the requirement to hear and determine s127 orders within 48 hours, or to impose interim orders. The Commission is already obliged to act quickly. Imposing a deadline is simply designed to remove the Commission's discretion. The Bill will remove the role of the AIRC in certifying that action is unprotected.

9.62 Again these provisions focus on the symptom of the dispute rather than its resolution and should be rejected.

10 MINIMUM ENTITLEMENTS OF EMPLOYEES

Meal breaks

10.1 The ACTU welcomes the intent behind this provision, which is to ensure all employees who do not have access to a meal break in their award or agreement are provided with a minimum break of 30 minutes after 5 hours work.

10.2 This intention of course is not delivered through the operation of proposed section 101B(2) which allows agreements to operative without any guaranteed meal break.

Equal pay

10.3 The Bill proposes to restructure, and severely restrict the equal remuneration provisions of the Act.

10.4 These provisions have not been used extensively. However this is because the AIRC's general powers to adjust award rates of pay to ensure equal pay for work of equal value has been the primary vehicle for addressing the under valuation of work. For example earlier this year the AIRC awarded a $64.50 per week increase in the weekly rate of pay for child care workers. While the case was not run alleging direct or indirect discrimination, is was run on behalf of an overwhelmingly female occupation, and the value of the work was assessed against the trade rate in the overwhelming male dominated Metal manufacturing industry.

10.5 Work value cases have been the most effective means of closing the gender pay gap for female dominated occupations in recent years. In

recent years aged care and preschool teachers in NSW have been awarded wage increases of in excess of 20 per cent in recognition that their work has been undervalued compared to the award rates of pay.

10.6 There is no corresponding avenue for the FPC to receive applications on behalf of female workers to address the under-valuation of women's work.

10.7 In the absence of those provisions the Equal Pay provisions will assume greater significance.

10.8 However the Bill proposes to restrict the ability of the AIRC to hear applications from low paid women. Proposed section 170BAC prohibits the AIRC from hearing an application if the comparator group is being paid a wage set by the FPC, enforcement of the order would alter a rate set by the FPC, or the order applied for would be inconsistent with a decision of the FPC.

10.9 The effect of this proposal is that an application could not be made to adjust an Australian Pay Classification Scale, nor could an application be made to bring the women workers' pay into line with a classification under which work was performed mainly by men.

10.10 This goes further than simply preventing the AIRC from making orders that adjust wages set by the FPC.

10.11 For example, if a group of women employed on a workplace wished to benchmark the value of their work against the APCS rate set by the FPC applying to carpenters they would be unable to do so.

10.12 In addition the reference to a comparator group of workers infers that equal pay applications must be made on the basis of direct discrimination. If this interpretation were upheld, this would constitute a

further restriction on the ability of women workers to achieve equal remuneration.

10.13 This is a backward step for Australia. In NSW, Queensland, and Tasmania the IRC have the capacity to adjust award rates of pay to ensure gender pay equity. The Western Australian and Victorian governments have recently completed inquiries into closing the gender pay gap in their States. Each inquiry has highlighted the important role Industrial tribunals have to play in addressing the under-valuation of women's work.

Termination of Employment

10.14 The ACTU acknowledges that the existing termination of employment provisions are far too complex, involving a number of discrete stages, in which there is excessive scope for jurisdictional points to be argued, directing attention and resources away from the substantive issues of the termination.

10.15 The ACTU would support measures which would make access to the unfair dismissal jurisdiction quicker, simpler and less legalistic, but not if this would involve any diminution of employees' rights to challenge an unfair or unlawful termination.

10.16 However the proposals in the Bill do not address the weaknesses in the processes, but avoid these by exempting employers. The Bill does not tackle law reform; it simply provides employers with ways to avoid the law.

10.17 It should come as no surprise to this Committee that the ACTU submits that the Bill's proposals in relation to termination of employment are entirely focused on restricting applicants' access to a remedy for unfair treatment, rather than to providing more efficient and effective

procedures to ensure that the Government's stated objective of "a fair go all round" is achieved in practice.

10.18 The government has, in its advertising, sought to blur the concepts of unfair dismissal and unlawful termination. Senators of course are well aware that they are two distinct concepts, although unlawful dismissals are also tainted by harshness or injustice. The ACTU has obtained estimates from a number of law firms who quote an average cost of $30,000 to litigate in the Court. Applicants bear their own costs. As compensation is capped at 6 months wages, its not surprising that fewer than 50 cases have been heard since 1996, compared to the 15,000 or so unfair dismissal applications across Australia Simply, unlawful termination is not an adequate alternative remedy to harsh, unjust or unfair dismissal.

10.19 The ACTU opposes the amendments in their entirety. They will not create more jobs, but will simply permit employers to arbitrarily or capriciously deny an employee their livelihood.

Excluding employees from making claims

10.20 The proposed provisions 170CE(5E) and 170CE(5F) will exempt employees employed at workplaces employing fewer than 100 permanent or long term regular casual employees at the time of the dismissal from making unfair dismissal claims.

10.21 The government has constantly asserted that this change will create jobs. The Committee, as members are well aware, has, along with other parties, contested this assertion. In July this year the References Committee reported its assessment of the evidence, stating, *"The Committee believes that there continues to be no evidence of a causal link between unfair dismissal laws and employment growth in the small business sector*".

10.22 In rejecting the existence of any link, the committee relied on evidence from the OECD, which had not only found no strong correlation between strict employment protection legislation and net levels of employment, but had also found that, when compared with other OECD nations, Australia' laws were amongst the most relaxed.

10.23 The Committee noted that, like it, the Full Court of the Federal Court of Australia had also looked at the evidence in *Hamzys* case, and found the link unproven.[7]

10.24 Perhaps most damning of the government's argument is that the academic research upon which the governments claim that 77,000 new jobs will be created has been discredited by its author.

10.25 Commenting on the government's reliance on his preliminary estimates, Harding stated:

> "… *I think both sides have failed miserably in getting the research done that can give us an informed answer to this problem*." [8]

The definition of 100 employees

10.26 As the References Committee has noted a definition of this type will exempt employees engaged by different entities despite those entities being identically owned and controlled. The Committee also noted that ascertaining how many employees are employed at a particular time would create winners and losers if firm size fluctuates around the threshold. (Report of the Employment, Workplace Relations and Education References Committee, Unfair dismissal and small business employment June 2005, p.23 and 24)

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[7] *Hamzys v Tricon International Restaurant Trading as KFC [2001] FCA 1589 (16 Nov, 2001)*
[8] *Dr Don Harding, Unfair Dismissal, Wednesday 7 September 2005, Breakfast Radio National presented by Fran Kelly.*

Seasonal employees

10.27 The proposed new section 170CBA(1) would exempt seasonal employees from making an application for unfair dismissal. This provision is designed to address a decision of the AIRC (Christopher Esam and SPC Ardmona Operations Ltd PR957497) in which Full Bench decided that the contract of employment that applied at the company disturbed the prima facie assumption that seasonal employees are engaged for a specified task, and are already caught by the exemption in s170CC(1)(a). The amendment is unnecessary, as the case turned on the peculiar facts at the company.

6 Months qualifying period

10.28 The proposed amendment to section 170CE(5B0(a) will increase the qualifying period which must be served before an employee may lodge an application. This is different to probation. An employee may have satisfied their probation, but still be excluded from making an application.

10.29 We draw attention to two surveys conducted by the Sex Discrimination Commissioner. One was of people who complained to HREOC of sexual harassment, the other was of randomly sampled employees. It found that almost three-quarters (71 per cent) of sexual harassment complainants in the survey of complainants reported that the sexual harassment commenced within the first 12 months' of their employment, compared with 44 per cent of the targets of sexual harassment in the telephone survey. The Sex Discrimination Commissioner noted the vulnerability of employees in the first 12 months of employment.

> *Twenty-three per cent of employees in the Australian labour force in November 2002 had been with their current employer for less than 12 months Complainants of sexual harassment in A Bad Business are over-represented in this category by as much*

as three times the general population, and targets of sexual harassment in the telephone survey almost double this proportion.

The data in A Bad Business suggest that "new-starters" are particularly susceptible to sexual harassment, whereas the telephone survey suggests that the experience of workplace sexual harassment is more evenly spread across the range of the period of employment. (20 Years On: The Challenges Continue…Sexual Harassment in the Australian Workplace, HREOC 2004).

10.30 Removing access to unfair dismissal rights will make it harder for young women to complain. The unlawful termination provisions do not protect the employee, unless she makes a complaint to an external body. While there are remedies under the Sex Discrimination Act, these cases are heard in Federal Magistrates' Court and parties bear the risk of having costs awarded against them.

Operational grounds

10.31 The ACTU also opposes proposed subsection 170CE(5B), which prohibits the making of an application if a ground, or part of the ground for termination relates to the operational requirements of the business. It appears that operational grounds need only form part of the reason for the termination. Even if other harsh factors were in play, this would provide a complete defense to the application.

10.32 This means that the scope of unfair dismissal is limited to whether the employer had a valid reason based on the conduct or performance of the employee. All other dismissal is deemed fair.

10.33 This would exclude all employees terminated allegedly for redundancy, whether or not the circumstances were fair to that employee.

10.34 Under the system a redundancy typically involves two decisions; first, that retrenchments will be made and, second, which employees will

have their employment terminated. If the second decision is made on grounds that are unfair, an employee should have a right to a remedy.

10.35 Secondly, if the proposed Bill is enacted, redundancy pay will no longer form a part of the safety net. In this circumstance the presumption that retrenchment pay will be paid is removed.

Applications out of time

10.36 The effect of proposed section 41I is to remove from the AIRC the power to extend any prescribed time limit in the Act. This would remove the ability of the AIRC to extend time limits. The principles currently applied by the Commission in determining applications for extension of time were established in Kornicki – and – Telstra Network Technology Group (Print P3168) and can be summarised as follows:

- Prima facie, the time limits should be complied with.

  - Primary consideration should be given to:
  - Whether there is an acceptable explanation for the delay;

- The merits of the substantive application.

  - Depending on the circumstances of the case, regard may be had to:
  - Whether the applicant actively contested the decision to terminate;
  - Prejudice to the respondent caused by the delay.

10.37 The effect of the proposed amendment to is to alter the current requirement to show that it would be unfair to reject an application to a positive finding that it would be equitable to do so. The proposal to revise section 170CFA(8) would the remove an employee's ability to apply for an extension of time to lodge an election to proceed either in

the Commission or the Court. It is submitted that the criteria relating to such an application should be the same as those applying to an application for an extension of time to lodge the application itself.

Shock, distress and humiliation

10.38 The proposed new subsection 170CH(7A) is another example of the Government's desire to reduce the Commission's discretion in relation to unfair dismissal, and many other matters. Given the limitation under subsection 170CH(7) on compensation exceeding six months remuneration, there cannot be an issue of excessively high compensation resulting from consideration of shock, distress or humiliation caused by the manner of the termination.

10.39 This proposal would appear to be a response to the decision of a Full Bench of the Commission in Liu – and – Coms 21 Limited (Print S3571) which held that there was power to award compensation for shock, distress or humiliation, although an appeal against such an award was upheld on the basis of the facts of the case itself. The Full Bench adopted the approach of the Industrial Relations Court in Burazin v Blacktown City Guardian Pty Ltd [(1996) 142 ALR 144], in which the Full Court concluded:

> *"There is an element of distress in every termination. To ensure compensation is confined within reasonable limits, restraint is required. But in this case there were unusual exacerbating circumstances that make it appropriate to include in the compensation an allowance for the distress unnecessarily caused to Ms Burazin.*
>
> *These circumstances include Ms Burazin having to suffer the humiliating experience of being escorted from Blacktown's premises by the police. Having regard to these circumstances,*

the compensation assessed by the trial judge should be increased by the sum of $2,000, to $5,000."

10.40 It is proposed to impose a similar limit on the court in respect of unlawful termination applications. Given that the few unlawful termination cases that have proceeded to determination on the merits have involved disgraceful employer behavior, this limit is completely unjustified. It removes the ability of the Court to provide proper compensation.

10.41 One of the few unlawful termination cases that have been run since 1996, involved the applicant Mr Vickery who, according the the court:

"is profoundly deaf, intellectually disabled and dyslexic. He can read and write very basic printed words. Mr Vickery's disabilities have not prevented him from working. By all accounts he is both a hard worker and keen to work. Since completing school he has held numerous labouring jobs. This case is concerned with the termination of his last job. Mr Vickery had been employed by the respondent in a car wash business. The employment came to an end when he was dismissed without notice"

10.42 Following a complaint by the applicant's mother about underpayment of wages, the employer taunted the applicant, and eventually sacked him. In finding the termination was harsh the Court said:

I am in no doubt that the respondent terminated Mr Vickery's employment because of his physical or mental disability. He did this when he discovered that he could no longer exploit Mr Vickery on account of his disabilities. At first the respondent exploited Mr Vickery's work ethic and keenness to work by making him work long hours without appropriate pay. He probably thought that he could get away with this because of Mr Vickery's disabilities. Perhaps he thought that no one would

know that he was exploiting Mr Vickery or that no one would believe Mr Vickery's account of the long hours that he worked. When Mr Vickery's mother and DEAC became involved things moved quickly. Within ten days, Mr Vickery's employment came to an end. There is no suggestion that his employment was terminated because he could not perform his work. These are the circumstances which lead me to conclude that Mr Vickery's employment was terminated on account of his disabilities. Vickery v Assetta (with Corrigendum dated 7 May 2004) [2004] FCA 555 (4 May 2004)

10.43 Finkelstein J awarded $5,000 compensation for mental distress. The total amount of compensation was within the statutory limit. If the Bill is enacted Mr Vickery would have been $5,000 poorer.

Conclusion

10.44 The amendments proposed for the operation of unfair dismissal and unlawful termination should be rejected.

10.45 The proposal in fact dismantles an already inadequate transmission of business provision which will further encourage the types of contracting out and corporate restructuring, which we have seen can have such an unfair effect on employees.

11 DISPUTE SETTLEMENT PROCEDURES

11.1 The proposed Part VII provides for how disputes are handled. It provides that disputes about the application of the Australian Fair Pay and Conditions Standard; the application of awards; the application of agreements where the agreement doesn't otherwise provide; workplace determinations; and some of the minimum entitlements in Part VIA (meal breaks and parental leave) cannot be referred to arbitration. The AIRC cannot compel a person to do anything; arbitrate; determine rights or obligations; make awards or orders; or appoint a board of reference. It cannot do these things even if the parties agree. The AIRC can only make a recommendation at the parties' request.

11.2 The Part also removes any effective role for the AIRC in facilitating the making of agreements. It cannot make orders, or compel a person to do anything. It may only make a recommendation if the parties request that it do so. It is at best a process for attempting to resolve disputes.

11.3 The AIRC (or another provider) can exercise greater powers under the dispute clause in an agreement, but only if the parties to an agreement expressly confer these power on the Commission.

11.4 The AIRC's role in private arbitration is confined to roles expressly conferred upon it by the parties.

11.5 The philosophy underpinning this approach is to remove third parties from the workplace, encouraging employees and employers to settle issues directly. It is ironic then that the same Bill would grant the Minister power to un-pick agreements, override terms and conditions agreed in workplaces, and order striking workers (outside essential services) back to work.

11.6 Removal of the AIRC's power to, at the end of the day, determine a dispute will change the dynamics of the dispute settlement process. The fact that conciliation takes place in the 'shadow' of arbitration provides a persuasive power and authority in the conciliation process. Negotiating outcomes to disputes in the shadow of arbitration forces the parties to make an assessment of the risks of losing control over the outcome and encourages them to reach a compromise agreement rather than risk losing in arbitration.

11.7 It is naïve to believe that many employers will subject themselves to what is an essentially voluntary process. The Victorian Employee Relations Act established a system of mediation and voluntary arbitration. The former head of the Employee Relations Commission was critical in her assessment of the system. She claims that the system was ineffective because:

- Placing mediation within a formal system of applications mitigated against the effectiveness of the exercise of the power by the ERCV and the establishment of a Mediation Service within the ERCV.

- the consent process exacerbated disputes and distracted the attention of the parties into a debate about the nature and scope of the consent being given to the exercise of powers by the ERCV.

- industrial disputes remained unresolved because one or more parties refused to consent to the exercise of any power by the ERCV.

11.8 She concludes:

> *"Although it established a process for mediation and conciliation, there was no requirement that the matter be submitted to arbitration by the ERCV or any other third party for resolution. The process was best described as a procedure for attempting settlement of a matter or dispute and not a dispute settlement procedure. (our emphasis)*

A mediation service was created within the ERCV. Parties were able to nominate their preferred Commission member for the purposes of mediation. Further, parties were provided with an opportunity to nominate their preferred venue for mediation.

The question of whether the exercise of dispute resolution powers is voluntary, compulsory or a mix of both, is a policy matter. However, the scheme of the ER Act and its processes did not provide the most effective means of access to a voluntary process of mediation, conciliation or arbitration."

(Zeitz, S. Report on the industrial and employment law system applying under the Employee Relations Act 1992 as at 31 December 1996, 2000).

11.9 ADR is encouraged or mandated in many jurisdictions because they lack the very flexibility that is inherent in the way the AIRC operates. It can act quickly, informally, is not bound by the rules of evidence, is comfortable with and caters for unrepresentative parties, and can move quickly between conciliation/mediation and arbitration/determination. The Government would do better to build on the strengths of the AIRC rather than suffocate it.

12 RIGHT OF ENTRY

12.1 The ACTU has recently made submissions to the Committee regarding many of the provisions in this Bill, and we rely in large part on those submissions.

12.2 In it we argued that the Bill offends the principle of freedom of association and the right to organise by:

- placing onerous and unnecessary barriers to union representatives' access to the workplace;

- sanctioning and encouraging employer monitoring and interference in the discussions between employees and their representatives by requiring permit holders to specify particulars regarding the reason for their entry on to a workplace, and making the validity of the entry conditional upon the entry being only for that purpose;

- removing the capacity of employers and employees and their unions to agree to enforceable right of entry provisions that are appropriate to the enterprise;

- restricting entry onto a premise for the purpose of recruitment to once every six months.

12.3 The Bill, by limiting right of entry to inspect documents relating breaches of the Workplace Relations Act 1996 or an award or certified agreement to records relating to union members only, undermines the long established role of unions as parties principle to awards and agreements.

12.4 The proposed provisions for the granting of, and revocation of entry permits are unnecessary. The introduction of new requirements for the granting of permits will cause delay and impose administrative and bureaucratic hurdles in the path of unions. The provisions for revocation of permits and the prescription of mandatory disqualification periods may operate to deny an official their livelihood without regard to the seriousness of the breach.

12.5 The ACTU also submits that the attempt to create a national uniform code is misplaced, constitutes an unwarranted intrusion into an area which is already adequately regulated by the States and will create uncertainty and confusion. This will particularly affect smaller enterprises where the reach of the Commonwealth's corporations power is uncertain.

12.6 However there are two new objectionable provisions in this Bill.

12.7 The previous Workplace Relations Amendment (Right of Entry) Bill 2004 preserved a permit holder's right to enter a premise where work was being carried on under an award to which the union was bound. The government introduced an amendment to exclude workplaces where all employees are on AWS on grounds that the award no longer operates.

12.8 The changes to the operation of awards under this Bill, whereby agreements are no longer underpinned by awards but instead oust their operation, has an impact on the scope of a right of entry. The effect is to remove the right of entry in respect of workplaces covered entirely by AWAs, employee collective agreements or the Australian Fair Pay and Conditions Standard. This would effectively exclude unions from workplaces where they are not already organised.

12.9 It will inhibit workers, especially those in workplaces where there are few members of the union, from accessing the information and support.

12.10 This is a direct assault on employees' freedom of association, more so than all other provisions relating to this Part IX. It does not place hurdles and barriers to entry; it excludes potentially thousands of workplaces from right of access.

12.11 The proposal needs to be read in conjunction with the provisions for unilateral termination of workplace agreements, that allow the employer to terminate the agreement to which the union is bound, and thus oust the operation of the award. This gives the employer the ability to not only reduce pay and conditions, but also prevent the organiser from entering the workplace during negotiations discus possible claims, and to report back on negotiations.

12.12 The second new and objectionable provision relates to health and breaches. The Workplace Relations Amendment (Right of Entry) Bill 2004 exempted health and safety inspections from the requirement for a permit.

12.13 Under this Bill entry for OHS reasons (including under state law) is only permissible for federal right of entry permit holders but is not limited to award/union agreement sites. The ACTU opposes provisions in Division 5, Part IX of the Workplace Relations Amendment (WorkChoices) Bill 2005, which link state occupational health and safety right of entry laws with federal industrial relations right of entry provisions.

12.14 Further, the Bill will require a permit holder who is on site for a health and safety inspection to give 24 hours notice of inspection of documents. The public policy ground for this is unclear, as it would provide an opportunity for documents to be tampered with.

12.15 The proposal also poses difficulties if an official is on site inspecting the premises in relation to a suspected breach and it come to light that documents will be required. The way the Bill is worded it is an offence to ask for the documents without having given 24 hours notice. A simple request turns a lawful entry into a trespass, and exposes the permit holder to a civil penalty.

13 PART XA: FREEDOM OF ASSOCIATION

13.1 The freedom of association provisions in the Bill are similar to the provisions in the current Act as they do not protect the real rights of employees to be members of a union – the provisions protect bare membership only, rather than the benefits and consequences of membership.

13.2 This is equivalent to allowing someone to have a home insurance policy which gives no right to make a claim on that policy.

13.3 The primary purpose of unions is to facilitate collective bargaining. Yet the Bill – and the freedom of association provisions of the Bill – give employees no right to engage in collective bargaining if their employer refuses to do so.

13.4 Employees have no automatic right to even be represented by their union in individual discussions and negotiations – they have to separately appoint their union (or anyone else) as their bargaining agent. Many employees are intimidated by having to take this step – as evidenced by the rarity of any such appointments since the 1996 legislation was enacted.

13.5 This Bill does therefore not support freedom of association in any meaningful way. The provisions should be substantially expanded to protect the rights of employees to give effect to their choice to become a union member.

14 SCHEDULE 1B: REGISTRATION AND ACCOUNTABILITY OF ORGANISATIONS

14.1 The provisions of the proposed section 5 of Schedule 1B are designed to ensure the registration and accountability of organisations are underpinned by the corporation's power. It does this by providing that the Schedule is founded on Parliament's belief that:

- the relations between Federal system employers and their employees will be enhanced, and any adverse effects of industrial disputation reduced, by the registration of organisations of employers; and

- this outcome will be achieved by ensuring organisations meet standards of accountability and representativeness, and in order to gain access to the rights and privileges accorded them in the Act.

14.2 The ACTU queries the extent that this has been achieved.

Prohibited conduct

14.3 The Bill provides that an organisation may have its registration cancelled if a substantial number of its members have engaged in conduct contrary to the objects of the Act or this Schedule. This means the consequences of industrial action are broadened to include the other constitutional heads of power relied upon in registering organisations.

14.4 The new basis for deregistering organisations includes breaches of freedom of association provisions, breaches of some interim injunctions, failure to comply with financial reporting, and

contraventions in relation to withdrawal from amalgamations provisions. An additional basis of deregistration is where a Federal Court order relating to financial type reporting has been breached.

14.5 The ACTU opposes these provisions.

General duties in relation to orders and directions

14.6 This new Part is described as dealing with "the general duties of officers and employees in relation to orders or directions of the Federal Court of the Commission". Officers and employees must not have or be "involved" in their organisations breaching a Federal Court or AIRC order. The definition of "involved" includes aiding and abetting, inducing or being in any way knowingly concerned with or conspiring in a contravention.

14.7 The effect of the Bill would be to make union officials personally liable for the actions of their members or their employees, where the official has been in any way knowingly concerned in or party to a contravention. The words "concerned in" are not defined. The words suggest that an official may be caught by the provision if they unknowingly are party to a contravention.

14.8 This completely misunderstands the relationship between union officials and their members. It is entirely possible that, in those unions that operate along Divisional lines, that an officer of one Division would be oblivious to orders made against another Division.

15 TRANSITIONAL PROVISIONS AND OTHER MATTERS

15.1 As the ACTU opposes the basis upon which the Bill overrides the States we do not propose to make comment on the policy position underlying the transitional provisions.

15.2 The proposed transitional arrangements are confusing and overly complicated and create a further layer of complexity which create barriers to an effective and efficient industrial relations environment.

15.3 It is suggested that the level of complexity is such that the average small business will have little chance of clearly and unequivocally determining what the new arrangements and laws that apply to them are.

15.4 If a small business is incapable of determining what its rights and responsibilities are, an employee has almost no chance. An unrepresented employee must by necessity take their employer's advice on what the new arrangements and conditions of employment are.

15.5 Both employer and employees are at a serious risk of civil penalties if they fail to correctly identify how the new arrangements apply to them. The legislation imposes significant penalties in certain circumstances, these prohibitions and associated penalties may or may not apply to an employer or employee depending on the impact of the transitional arrangements.

15.6 The failure to correctly identify the affect of the transitional arrangements could easily expose employers and employees to penalties. It should be recognised that a reckless misrepresentation

regarding rights or responsibilities can result in penalties being imposed.

Interrelationship with Corporations Law

15.7 There appears to be no consideration within the Workchoices legislation of the implications when companies become insolvent. The significant change in the manner which agreements, individual and collective come into operation have the potential to allow the order of priority for payment to creditors to be potentially circumvented.

15.8 The proposed s100(1) provides that a workplace agreement comes into operation at the time of lodgement and s100(2) provides that the 'agreement' comes into operation, even if the requirements of Division 3 and Division 4 are not meet. Similar arrangements apply to variation and termination applications.

15.9 This ensures that it is open to an employer to unilaterally change the operative employee entitlements despite the employers' failure in accordance with s97B(3) to provide an opportunity for the employee/s to consult with their bargaining agent or to ignore the pre-lodgement procedures found in Division 4 which require access to the agreement and information statement.

15.10 The legislation deliberately facilitates a position where it is open to an employer to abuse the normal requirements of the legislation and to be rewarded with an operative agreement.

15.11 Whilst it could be argued that such an act would be a flagrant breach of the requirements in the legislation, nonetheless the wrong is automatically accepted and would require overturning.

15.12 The failure of an employer to follow the requirements found in Division 3 and 4 in some instances could result in pecuniary penalties flowing

from a successful action s105D or the other remedies found in Sub-division C, which include ss105E – 105K. Section 105K allows the Court to grant an injunction.

15.13 It is also arguable that the *Crimes Act* would also be breached in the event that the employer provided false declarations to the employment Advocate, if indeed there is a requirement to provide a declaration to facilitate lodgement and instantaneous operation.

15.14 There is little doubt that such an action would also be in contravention of several provisions within the *Corporations Act 2001*, including section 588G(1A). Section 588(1A) prohibits an 'uncommercial transaction'[9] by a company director and can be relied upon to void the transaction to impose civil penalties. In addition the company and that directors may be personally liable.

15.15 The essential point is that despite fraudulent activities and breaches of the Corporations Act, any new agreement will come into and remain in force until such time as an employee, insolvency practitioner or other party with standing takes action in the Federal Court.

Potential to effectively change priorities and employee entitlements in the event of insolvency

15.16 The legislation opens a path for unscrupulous employers whereby they can bring into operation a new workplace agreement. This agreement in itself does not change the order of priority or ranking of payments applying under the Corporations Act.

15.17 However, by changing the employee entitlements that apply at the time the company goes into administration, the employer may free up

[9] Section 588FB defines an uncommercial transaction as a transaction that a reasonable person in the company's circumstances would not have entered into having regard to the benefits and detriment to the company of entering into a transaction and the respective benefits to other parties to the transaction.

access to other funds which remain payable to unsecured or other lower priority creditors or alternatively avoid administration for a limited period of time.

15.18 This is possible because at the time the company is placed in the hands of an insolvency practitioner the entitlements that apply at the time are those that are recognised under the act. It is possible that entitlements to leave and redundancy may be removed through the new operative industrial instrument.

15.19 It is far from clear that insolvency practitioners would seek in the initial stages of a company's insolvency to go behind such transactions and to recognise claims by employees that according to the Workchoices Act, no longer exist.

15.20 This may have profound implications on the early stages of any administration where initial rights are recognised and important decisions made.

15.21 In the absence of any immediate action by an administrator or receiver, employees would be required to seek an injunction in the Federal Court against the insolvency practitioner. A highly unlikely scenario.

15.22 It is also unclear how any of the remedies available under Sub-division C of Division 11 would be available to an employee when the employees company is in administration. It is probable that an employee would be required to seek the leave of the Federal Court to utilise these remedies. In the interim any rouge employer can utilise the Workchoices legislation to circumvent the entitlements owed to employees in favour of other creditors, possibly including related entities.

15.23 A related issue arises from the operation of the General Employee Entitlement Scheme operated by the Federal Government.

Entitlements under GEERS arise from the enforceable industrial instrument that applies as of the date of insolvency. In the scenario provided above these entitlements would reflect the new fraudulently lodged industrial instrument.

16 CONCLUSION

16.1 The Bill fails to meet the tests of good law making. It will not achieve its purpose. It is complex. It is difficult to enforce. It is not integrated with other laws. It is heavy handed and overly prescriptive. It should be rejected on policy grounds and it should be rejected on technical grounds.