Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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To: the Senate Employment, Workplace Relations and Employment Committee

I make this short submission as someone who teaches public law and has published a considerable volume of research on the law of politics and democracy.

The constitutionality of this Bill as a whole, and elements of it, is of concern, and inevitably will lead to a marathon and intricate High Court case.

I simply to raise one aspect of the Bill's ramifications, if enacted, for constitutional and democratic principles.

The Bill's foundational method is to regulate what corporations do to/with their employees. It will impose for example a nationwide minimum corporate wage for various classifications, limit the content of agreements between corporations and their employees, and so on.

Thus, the Bill is based on a premise that the federal government can control, direct and regulate any activity of a corporation, even its internal dealings with its staff.

As a precedent, therefore, the Bill assumes that it would be entirely legitimate for a future federal government to control (by direct legislative fiat if it saw fit) wages. This has the potential to massively expand federal economic power, and would permit a 'command' style economy.

This runs counter to a century of constitutional understandings.

It also flies in the face of the 'will of the people' as expressed by referendum, and hence against the principle in s 128 of the Constitution of popular control. In 1973, the Whitlam government put separate referenda proposals for federal government control over incomes and prices. They failed in every state. In particular, the referenda failed more miserably in relation to incomes – of relevance to the 'Work Choices' precedent – than in relation to prices.

Some on this Committee may say: leave these considerations to the High Court. That would be a cop-out. There is every chance that a literalist High Court may approve the bulk of the 'Work Choices' Bill without seriously considering the wider ramifications for governmental power. I say that because the High Court will have a narrow focus on the incremental extension of legal doctrine in far less important prior cases on the 'corporations power'. Also the Court will be reluctant to invalidate the nationalisation of IR law if it means upsetting aspects of the current regime that enjoy consensus (eg the system of certified agreement making involving corporations). But there is a big difference between direct legislation of employment relationships that – the gist of the Work Choices Bill – and the economic control latent in, and current mechanisms, whether through conciliation and arbitration, or certified agreements or AWAs, that merely set up a framework for the parties.

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