NSW Legislative Assembly Hansard
Extract from NSW Legislative Assembly Hansard and Papers Tuesday 24 October 2006.

Second Reading

Mr DAVID CAMPBELL (Keira—Minister for Water Utilities, Minister for Small Business, Minister for Regional Development, and Minister for the Illawarra) [11.58 p.m.], on behalf of Mr John Watkins: I move:

That these bills be now read a second time.

It gives me great pleasure firstly to introduce the Industrial Relations (Child Employment) Bill, to protect children in New South Wales from the harsh impact of WorkChoices. This is another example to families in New South Wales of the benefit of having a State Labor Government in power. Let us be very clear: those on the other side would leave working children unprotected from what we now know is the very unfair and unbalanced Federal Workplace Relations Act 1996. I will address the cognate bills after I have made some comments about the Industrial Relations (Child Employment) Bill.

The New South Wales Government has drafted the Industrial Relations (Child Employment) Bill to provide a safety net of minimum conditions to protect children from substandard wages and conditions if and when they enter into workplace agreements or other arrangements. The bill also gives children who are unfairly dismissed remedies that are no longer available under the Workplace Relations Act 1996. Section 16 (3) (e) of the Federal Workplace Relations Act 1996 clearly states that State child labour legislation is a non-excluded State law. In other words, child labour remains a matter with respect to which the States may legislate. This Government has independent legal advice to that effect. Minister Andrews has confirmed that the States can make these laws, so that is what we are doing.

Before WorkChoices it was not regarded as necessary to make child-specific labour laws in this State. General industrial relations law applied to children and continues to do so. State industrial relations instruments continue to provide appropriate wages and conditions for children at work. The problem that this bill seeks to remedy is that the Federal Workplace Relations Act generally applies to children employed by a constitutional corporation. If the New South Wales Government had not used its initiative to propose these new child labour laws those children would remain in the wilderness of WorkChoices without the safety net of properly maintained award protections.

Employees under 18 years of age are likely to lack the knowledge, skills and ability to directly negotiate their wages and conditions of employment with an employer. The only safeguard that WorkChoices offers a child when presented with a take-it-or-leave-it individual workplace agreement is that the child's parent or guardian must authorise the agreement. As there is no real choice and little scope for bargaining, rather than protecting a child this forces parents and guardians to be accomplices to what, in many circumstances, will be substandard wages and conditions of employment.

Requiring an adult to sign a child's individual agreement is an admission that the general protections under WorkChoices are inadequate. It is certainly no replacement for the "no disadvantage test", which previously operated to ensure that employees in the Federal system could not be offered deals that would make them worse off than the relevant award. What is not clear is why the Federal Government and the Opposition cannot admit to this and why the Federal Government has not made laws that take this into account.

The Industrial Relations (Child Employment) Bill sets out clear and simple rules for employers in constitutional corporations to follow when establishing wages and conditions of employment for children under workplace agreements. Unlike the Federal Government's approach to labour relations, this is a 17-page bill, not a 687-plus wall of legislation for employees and employers to grapple with. Employers will have to reach only for a State award and apply a few pieces of legislation to work out appropriate minimum wages and conditions for children. Most importantly, this bill protects children employed in constitutional corporations from being capriciously dismissed from employment. Quite deliberately, WorkChoices provides little or no protection from unfair dismissal. Again, the State Government has taken responsibility to protect our children from the harshest aspects of WorkChoices. If the State Opposition had its way it would take the WorkChoices path and leave children unprotected.

Importantly, it will be seen that this bill does not introduce new and unnecessary red tape that may burden an employer deciding to engage a child. The emphasis in this bill is an appropriate amount of regulation to ensure the wellbeing of a child at work. There are at least 150,000 children formally employed in New South Wales under 18 years of age. The bill will introduce a consistent approach to wages and conditions for all employers if they offer Federal workplace agreements in particular industries, for example, in the retail and the hospitality

industries, where the majority of children are employed. Hopefully, it will end the situation where an employer will try and gain a competitive advantage with another business by simply reducing the wages and conditions of children on individual and collective Federal workplace agreements.

It is of great concern that, according to the Office of Employment Advocate, 598 individual workplace agreements were offered by employers to children under the age of 15 between July of last year and May 2006. It is just as concerning that employers have sought to reduce conditions of employment on 7,779 occasions under individual Australian workplace agreements for children between 15 and 18 years of age. According to the Office of Employment Advocate almost half of individual workplace agreements do not include rest breaks. Half of the individual agreements entered into remove penalty rates, annual leave loading, shift allowances, overtime loadings, skills payments and public holiday pay. That is the brave new world of WorkChoices that the Federal Government and its supporters opposite are happy to foist on children and the rest of the work force. It is important to note that this bill does not prevent employers and employees from choosing what type of industrial instrument they should enter into. It merely provides an appropriate safety net, and that safety net will continue to be monitored and set by an independent umpire, the New South Wales Industrial Relations Commission.

The Government has consulted widely about this bill by releasing an exposure draft for comment. Arguments raised about the effects of the bill are as unconvincing and unsubstantiated as the arguments the Federal Government continues to make about the removal of unfair dismissal laws on job creation. There is simply no evidence that removal of unfair dismissal laws has created jobs. Reading some of the submissions I have received about the bill only confirms that making these laws is a necessity. Indeed, those organisations with children's best interests at heart—the Commission for Children and Young People and the Youth Action Policy Association—support the bill in its entirety. It is important to note that incentives such as penalty rates and shift loadings for apprentices should not be overridden by individual workplace agreements. In all the confusion about individual contracts, the bill will provide some certainty for children taking up apprenticeships that important conditions of employment established by the New South Wales Industrial Relations Commission will be safeguarded.

Part 1 of the Industrial Relations (Child Employment) Bill defines the terms used in the bill. Unlike the WorkChoices legislation, there are very few new definitions for employees and employers to understand. A child is defined as a person under the age of 18, as has long been the case at common law. Words like "employer" and "conditions of employment" have the same meanings as in the New South Wales Industrial Relations Act. Clause 4 of the bill sets out when minimum conditions contained in State law apply to a child. Under clause 4 (1) a child is protected by minimum conditions if employed under an agreement or other arrangement entered into after 27 March 2006. The employer must be a constitutional corporation that is not bound by a State industrial instrument. There must also be a State award that covers employees performing similar work to the child, which does not bind that employer.

The bill does not apply to child employees who are already covered by State awards and enterprise agreements. They continue to be directly protected by those instruments. Nor does the bill apply to child employees covered by Federal awards, pre-WorkChoices agreements, notional agreements preserving State awards or preserved State agreements under WorkChoices. All of those instruments were tested against a "no disadvantage" or "no net detriment" test before they came into operation. We do not seek to interfere with their continued application to employer-employee relationships.

Instead, the minimum conditions defined in the bill apply to child employees who enter into an individual or collective Federal workplace agreement or when wages and conditions of employment are set by a common law contract of employment and the child is employed by a constitutional corporation. These new Federal instruments and arrangements are no longer tested for a disadvantage or detriment and are, therefore, liable to result in a child missing out on important protections. The bill's effect is to reintroduce a safety net. Such an employer must ensure that a child is provided with minimum conditions of employment for a child. An affected employer must provide at least the minimum conditions of employment contained in a comparable State award and the legislation that would have applied if that child were covered by that State award.

Importantly, if the conditions of employment provided for the child are different to those minimum conditions I have referred to, the conditions of employment must not, on balance, result in a net detriment to the child when compared with the comparable State award and legislation. In other words, an employer in a constitutional corporation can choose simply to provide a child with at least the wages and conditions contained in a comparable State industrial award. If an affected employer decides to offer a child employment under an individual or collective Federal workplace agreement with different conditions to the State award, the conditions of employment provided to the child must not, on balance, result in a net detriment to the child.

To provide guidance on what is a net detriment, the bill requires the Full Bench of the Industrial Relations Commission to set no net detriment principles within six months of the commencement of the Act. In determining the no net detriment principles the Full Bench of the commission is to have regard to pertinent issues surrounding the employment of a child, including the provisions of any State award or industrial relations legislation that are particularly important for ensuring the wellbeing of children at work. The legislation ensures

that all industrial organisations will be consulted and that they can have their say about the setting of the no net detriment principles. Industrial organisations will be able to make submissions to the Full Bench on setting and reviewing the principles.

To ensure that employers and children are aware of the relevant minimum conditions, employers will be required to exhibit a copy of the comparable State award at the workplace. For each child, employers will be required to keep records consistent with the requirements under the Workplace Relations Act and the New South Wales Industrial Relations Act. Under division 2 of the bill industrial inspectors may issue compliance notices where an inspector is of the opinion that minimum conditions of employment for a child have been contravened. This will provide an employer with the opportunity to remedy the contravention without suffering penalty. Compliance notices will provide valuable guidance to employers on how to ensure they do not contravene the requirements of this legislation.

Where an employer disputes a compliance notice, that dispute can be taken to the Industrial Court, which will determine whether the notice should be varied or revoked. A failure to provide the child with appropriate conditions of employment will be a civil penalty offence, just like a breach of an award or enterprise agreement under the Industrial Relations Act. Prosecutions for such an offence will be able to be brought only by an inspector in an Industrial Court. In determining the amount of a pecuniary penalty against an employer, natural justice is introduced by allowing the Industrial Court to take into account whether or not the employer has made a reasonable effort to provide the child with the minimum conditions of employment. Importantly, the court may also take into account whether the child understood and consented to the provisions that the employer had provided to the child.

The bill provides that the tried and true mechanisms that already exist under the New South Wales Industrial Relations Act will be available for recovery of remuneration and other amounts. The Government has never hidden behind rhetoric in its opposition to the Federal Government's removal of unfair dismissal remedies, particularly where that right has been removed from persons who are vulnerable in the labour market. That is why members of the Opposition will not be surprised that the New South Wales Government has introduced, under part 3 of the bill, provisions restoring the right of a worker less than 18 years of age the ability to seek remedies where he or she has been unfairly dismissed by a constitutional corporation. These will be the same remedies as those available under the New South Wales Industrial Relations Act. All employers, regardless of size, will have to ensure that they exercise their power to dismiss child employees in a fair manner.

The bill introduces new provisions only where it is necessary, given the new unfair provisions under the Workplace Relations Act, and the bill is designed to balance employers' needs with the need to protect the welfare of children at work. Employees under the age of 18 years should not be subject to take-it-or-leave-it conditions of employment, and they should not be subject to capricious dismissal by a corporation. It has been left up to the New South Wales Government to take responsibility for the welfare of children and to return fairness to the industrial relations system. That is what the Government seeks to achieve by this bill. I commend this bill to the House.

I deal now with the second bill, the Industrial Relations Further Amendment Bill, which aims to counteract the destructive effects of the Federal Government's WorkChoices legislation. In introducing the bill I make the very important point that, unlike the Federal Government, the State Government does not consider it to be responsible public policy to contemptuously and arrogantly foist unannounced and untested new legislation onto the people of New South Wales. To that end, on 19 September 2006 the New South Wales Government released an exposure draft of the bill for consideration. It circulated the draft to key stakeholders and invited submissions from other interested parties, a testament to the fact that it encourages the public to play a genuine and meaningful role during the legislative process.

In contrast to the Howard Government, the Iemma Government values public comment and feedback. That feedback has now been considered and, where appropriate, incorporated into the bill. The Industrial Relations Further Amendment Bill aims to deliver stability and comfort for business owners and workers throughout the State by introducing five key measures. These measures are protection of injured workers, protection for raising legitimate occupational health and safety issues at work, alternative dispute resolution services delivered by the New South Wales Industrial Relations Commission, joint sittings of the New South Wales and interstate tribunals, and electronic publishing of the industrial gazette. There are also minor clarifying amendments to other provisions of the Industrial Relations Act 1996.

The Federal Government has claimed that occupational health and safety matters and workers compensation matters will continue to be regulated by the States and Territories. To ensure that certain occupational health and safety matters, and workers compensation matters continue to be appropriately regulated by New South Wales the bill adopts and transfers protections for persons raising occupational health and safety concerns, and injured workers from the Industrial Relations Act 1996 to the Occupational Health and Safety Act 2000 and the Workers Compensation Act 1987 respectively.

The bill seeks to ensure that remedies for employees making health and safety complaints or carrying out health

and safety functions in the workplace are appropriately contained within occupational health and safety legislation. The bill amends the Occupational Health and Safety Act 2000. Under the bill new section 23A provides for reinstatement of a worker, or compensation, where that worker has been dismissed in contravention of section 23 of the Occupational Health and Safety Act 2000. Section 23 provides that it is unlawful for an employer to dismiss an employee for making an occupational health and safety complaint, or for being a member of an occupational health and safety committee or an occupational health and safety representative and exercising functions in those capacities.

These protections are an essential part of the occupational health and safety framework of this State. Employees must have the freedom and confidence to raise health and safety concerns in the workplace. People participating as members of occupational health and safety committees or occupational health and safety representatives should be encouraged to accept those roles and be supported in those roles. There should be no threats to job security for anyone functioning in these important roles, or, indeed, threats to any person doing the right thing by his or her workmates and employers by raising health and safety concerns. Everyone needs to be able to raise health and safety issues in the workplace as and when they arise. That is in everyone's interest.

The protections for employees raising health and safety concerns are vital to the occupational health and safety regime in this State. It is appropriate that the bill provides for these protections to sit within the Occupational Health and Safety Act 2000. The bill also transfers the injured worker protection provisions contained in chapter 2 part 7 of the Industrial Relations Act 1996 to the Workers Compensation Act 1987. Those provisions provide an injured worker with the remedy of reinstatement if that worker is dismissed from employment because he or she is not fit for employment because of that injury. The provisions also create an offence when an employer dismisses a worker because that worker is not fit for employment because of the injury and dismissal takes place within six months of the worker becoming unfit for employment.

The injured worker protections contained in the bill are an integral part of the workers compensation scheme to get injured workers back to work and to ensure employers are engaged in this process. The duties of employers to find injured workers suitable duties, to commence workplace rehabilitation programs, and develop return-to-work programs would become meaningless if an employer was simply able to dismiss the worker to avoid these obligations. The protections for injured workers in the bill are an essential element of the workers compensation scheme in this State. It is appropriate that the bill provides for these protections to sit appropriately within State workers compensation legislation. These initiatives will guarantee that these important remedial provisions live on, providing reassurance to employers and their workers regarding their rights and responsibilities, given the current climate of confusion.

As honourable members will be aware, various disputes can arise in the workplace from time to time and sometimes the industrial parties require the assistance of an independent body to help them reach a resolution. WorkChoices makes dramatic and far-reaching change to the processes of dispute resolution, gutting the role of the Australian Industrial Relations Commission [AIRC] and attempting to kick-start State commissions off the field altogether. Instead, WorkChoices provides for alternative dispute resolution by a body that the industrial parties nominate or, in other cases, the AIRC.

Many employers and employees want that nominated dispute resolution provider to be the New South Wales Industrial Relations Commission—a thumbs up to the prompt and fair manner in which our commission operates. The New South Wales commission has supervised Australia's largest State industrial jurisdiction for over a century. The merits of our commission are most clear upon examination of its role in resolving a number of high-profile disputes. People all around the State are telling us that they want the well-qualified and experienced members of the New South Wales Commission to continue to provide conferencing, mediation, conciliation and arbitration in the wake of the Federal Government's radical industrial agenda. This bill ensures that can happen.

If employers and unions in the Federal system wish to do so, they can include in their Federal workplace agreements terms that identify the Industrial Relations Commission of New South Wales as their preferred provider of alternative dispute resolution. The expertise and impartiality of our commission's members has won the respect and confidence of employers, employees and their representatives who value its flexibility and responsiveness, and appreciate that it conducts its activities with a minimum of legal technicality. By introducing this bill, the New South Wales Government is ensuring that the accumulated wealth of knowledge and experience of our commission will not dissipate and, importantly, that this well-respected tribunal continues to have an ongoing public role in the resolution of disputes.

This amendment is in addition to, and does not derogate from, section 146A, which was inserted into the Act earlier this year. That section gives the Industrial Relations Commission jurisdiction to deal with disputes where the parties make private agreement to refer any disputes between them to the commission. The bill also provides a mechanism to promote co-operation and comity between State and Territory tribunals, enabling the New South Wales Commission to share resources and convene joint sittings with its other State counterparts. Joint sittings would provide an effective alternative avenue to achieve consistent, sustainable wage increases and the consideration of the development of new national community standards through test case proceedings.

After this, binding decisions could be made by each State commission in accordance with their respective governing statutes.

The bill also aims to put the publication of industrial matters—awards, orders, enterprise agreements and contract determinations—on a more modern and accessible footing. To this end, the bill provides for the online gazettal of official documents. This will also have the added benefit of decreasing the registry's printing production costs. Hard copies of the gazette will continue to be published, albeit less frequently, for the benefit of people who do not have online access. The bill will also amend section 127 (8) to extend the current offence to include any person who knowingly provides a false statement to a principal contractor regarding the payment of remuneration to employees of subcontractors. This amendment will cover any person, whether or not authorised by a subcontractor, and is intended to reduce reliance on statutory declarations by principal contractors when accepting statements given by any persons on behalf of a subcontractor.

In relation to outworkers, the bill will include an additional paragraph in the definition of "industrial matters" in section 6 covering the mode, terms and conditions under which work is given out to be performed by an outworker in the clothing trades. This provision is intended to put beyond doubt that the giving out of work to clothing outworkers and the regulation of such work within a supply chain are industrial matters under the Industrial Relations Act for the purposes of award coverage and the resolution of disputes. Other amendments relating to the outworker provisions under part 11 of the Industrial Relations Act will make it clear that constitutional corporations that give out clothing trades work or any work in the manufacture of clothing products are required to comply with the statutory conditions applied under section 129B.

This will also extend to the keeping of records and disclosure of information relating to the giving out of work by constitutional corporations. Finally, the amendments will make it clear that the conditions of employment applied under section 129B of the Industrial Relations Act to outworkers engaged by constitutional corporations are minimum employment entitlements for those outworkers that cannot be contracted out of. The contents of the Industrial Relations Further Amendment Bill 2006, in concert with legislation passed earlier this year, form the basis of the New South Wales Government's commitment to ameliorate the negative effects of WorkChoices in our State. This is not all that we will do. Let me assure honourable members that the New South Wales Government will continue to examine and implement sensible strategies to circumvent the devastating practical effects of WorkChoices.

I now turn to the Workers Compensation Amendment (Permanent Impairment Benefits) Bill 2006. The bill gives effect to the Government's decision to increase compensation benefits for seriously injured workers. This increase has been made possible by the Government's workers compensation reform program and the resulting sustained improvement in the overall performance of the WorkCover Scheme and is in advance of the outcomes of the WorkCover Board's work in reviewing the workers compensation benefit regime. The bill provides for a 10 per cent increase in dollar terms to the lump sums paid to workers for permanent impairment under section 66 of the Workers Compensation Act 1987.

The increased benefits will apply to workers who suffer a permanent impairment from an injury sustained on or after 1 January 2007. By increasing section 66 payments, the Government is also encouraging injured workers to utilise statutory benefits rather than pursuing expensive and uncertain common law claims. Sound financial management, improved claims handling and hard work have returned the scheme to surplus. As well as benefiting injured workers, the much-improved financial position of the scheme will benefit employers through a further 5 per cent reduction in workers compensation premiums, bringing total premium reductions to 20 per cent in just 12 months. Employers will also benefit from the Government's new Growing Our Skills: Apprentice Incentive Scheme, which will exempt apprentices' wages from the calculation of an employer's premium. I commend the bills to the House.