

Standing Committee on Social Issues

# **Impact of the WorkChoices legislation**

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## Terms of Reference

1. That the Standing Committee on Social Issues inquire into and report on the impact of Commonwealth WorkChoices legislation on the people of New South Wales, and in particular:
  - (a) the ability of workers to genuinely bargain, focusing on groups such as women, youth and casual employees and the impact upon wages, conditions and security of employment
  - (b) the impact on rural communities
  - (c) the impact on gender equity, including pay gaps
  - (d) the impact on balancing work and family responsibilities
  - (e) the impact on injured workers and
  - (f) the impact on employers and especially small businesses.
2. That the committee report by Thursday 23 November 2006.

*This Inquiry was referred to the Committee by the Hon John Della Bosca MLC, Minister for Industrial Relations, on 28 March 2006 (Minutes of Proceedings, Legislative Council, 30 March 2006, Minutes No. 143, Item 10, p1927).*

## Committee Membership

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<b>Ms Jan Burnswoods MLC</b>	Australian Labor Party	<i>Chair</i>
<b>The Hon Robyn Parker MLC</b>	Liberal Party	<i>Deputy Chair</i>
<b>The Hon Dr Arthur Chesterfield-Evans MLC</b>	Australian Democrats	
<b>The Hon Kayee Griffin MLC</b>	Australian Labor Party	
<b>The Hon Charlie Lynn MLC</b>	Liberal Party	
<b>The Hon Ian West MLC</b>	Australian Labor Party	

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## Chair's Foreword

I present the report of the Committee's Inquiry into the impact of the Commonwealth *Workplace Relations Amendment (WorkChoices) Act 2005* on the people of New South Wales.

The Committee received a total of 52 submissions and conducted seven days of hearings, including a public forum at Penrith to provide an opportunity for members of the community to express their views directly to the Committee. A total of 71 witnesses provided evidence to the Committee and 11 witnesses spoke at the public forum. I would like to thank all those who contributed to the inquiry. The quality of submissions received and evidence given at the Committee's public hearings and at the public forum was very high. Rarely has a Committee heard such unanimity of criticism and such deep fear for the future.

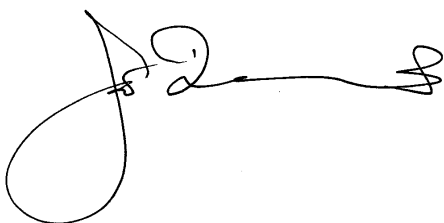
The WorkChoices legislation has dramatically extended the coverage of the federal industrial relations system: it is estimated that the federal system will cover some 75% of NSW employees. It has completely altered the bargaining position of employees and employers by removing the award safety net, abolishing the 'no disadvantage' test in negotiating workplace agreements, removing any compulsion on employers to bargain collectively with employees and exempting businesses with up to 100 employees from unfair dismissal laws.

The majority of the Committee rejects the WorkChoices legislation and the so-called vision behind it. Contrary to the claims of the Federal Government, the Committee believes that WorkChoices will exploit the most vulnerable in our community, leading to low pay work in a low productivity economy. It will exacerbate the skills shortage in Australia and lead to a reduction in workplace safety.

The Committee calls for the repeal of the *Workplace Relations Amendment (WorkChoices) Act 2005*. Failing that, the Committee calls on the NSW Government to continue the proud tradition of this State's fair industrial relations system by taking action where it can to ameliorate the effects of WorkChoices on the people of NSW.

I thank the Committee members for their work on this inquiry. In the Committee Secretariat, Merrin Thompson and Katherine Fleming did most of the early work, and Julie Langsworth and Stephen Frappell the final work on the report, and I thank them and the other staff.

As this is the Committee's final report during my period as Chair since 1998, I would like to thank all those members and staff who have helped to make the inquiries and reports of the Social Issues Committee a valuable contribution to the well-being of the people of NSW.



**The Hon Jan Burnswoods MLC**  
**Chair**

## Executive summary

This report examines the impact of the Federal Liberal/National Coalition Government's WorkChoices Legislation – the *Workplace Relations Amendment (Work Choices) Act 2005* – on the people of NSW.

WorkChoices incorporates two fundamental changes to industrial relations in this country.

First, WorkChoices has dramatically extended the coverage of the federal industrial relations system, primarily using the corporations power of the Commonwealth under section 51(xx) of the Australian Constitution. The Federal Government has estimated that the new federal industrial relations system will cover up to 85% of employees in Australia, although coverage will be lower in some states, including NSW, where it is estimated that the federal system will cover approximately 75% of employees.

The NSW Government, in company with various other parties including other states and territories, challenged the constitutional validity of WorkChoices and its reliance on the corporations power under Section 51(xx) of the Constitution in the High Court. In its decision dated 14 November 2006, the High Court rejected this challenge by a majority of five to two, Justices Kirby and Callinan dissenting.<sup>1</sup>

Despite this decision, the Committee does not support the Federal Government's wholesale 'takeover' of industrial relations in Australia. In the Committee's opinion, the Federal Liberal/National Coalition Government's move to impose its own industrial ideology on workers hitherto outside the federal industrial relations system is an unreasonable and unwarranted encroachment upon the jurisdiction of the states.

The Committee believes that the NSW industrial relations system has served this state well. For over a century it has provided a fair and cooperative system that has successfully balanced a secure safety net for employees with the need for employees and employers to create flexible and productive workplace arrangements.

The second fundamental change entailed in WorkChoices is a dramatic and indiscriminate reworking of the operation of the federal industrial relations system, breaking with over a century of evolutionary change in a radical paradigm shift.

As part of these changes, the Federal Liberal/National Coalition Government has completely altered the bargaining position of employers and employees in the workplace by:

- removing the award safety net and replacing it with minimum conditions of employment in the Australian Fair Pay and Conditions Standard which are simply not commensurate with those that existed under the award system
- abolishing the 'no disadvantage test' when negotiating workplace agreements, thereby permitting a reduction in the overall conditions of employment of employees

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<sup>1</sup> New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia [2006] HCA 52 (14 November 2006)

- removing any compulsion on employers to bargain collectively with employees if they do not wish to do so, while permitting employers to offer employees individual contracts on a 'take-it-or leave-it' basis
- exempting businesses with up to 100 employees from unfair dismissal laws.

The Committee acknowledges that many employees have skills and qualifications that mean they are in demand in the workplace and will not be significantly adversely affected by these changes.

However, as is borne out by the evidence examined in this report, the Committee is very concerned that the WorkChoices changes place workers who have limited skills, qualifications and negotiation ability in a very vulnerable position in the workplace. As the Committee details in this report, women, young people, people living in rural and regional areas, people from culturally and linguistically diverse groups, people with a disability and income support recipients are likely to be disproportionately affected by WorkChoices.

While the Committee acknowledges that most employers seek a cooperative and fair employment relationship in the workplace, and will not actively exploit the new WorkChoices laws in order to reduce the wages and conditions of their employees, the Committee is concerned that a minority of unscrupulous employers will seek to use WorkChoices to force down the wages and conditions of their employees, obliging ethical employers to do the same in order to remain competitive.

The Federal Government introduced the WorkChoices legislation with the stated aims of improving productivity, increasing wages, reducing unemployment, improving living standards and enhancing the balance between work and family life.

The Committee rejects WorkChoices as a means of achieving these objectives. In the Committee's opinion:

- WorkChoices aims to achieve productivity and employment growth by exploiting the labour of the vulnerable, leading to a profusion of low-pay, poor quality work in an economy characterised by low productivity.
- WorkChoices is likely to exacerbate the skills shortage in Australia by removing the incentives for certain employers to invest in employee training and development. Businesses will be forced to compete on the basis of cheap labour and will not have the resources to invest in employee training.
- WorkChoices is likely to lead to a reduction in workplace safety. In a competitive market where margins are tight and where workers are often casuals or contractors, lacking the education or bargaining power to raise issues of safety, a reduction in safety with consequential results in death and injury is inevitable.

In the Committee's opinion, this is not a vision for Australia's future that should be pursued or supported.

Accordingly, the Committee calls in this report for the repeal of the *Workplace Relations (WorkChoices) Amendment Act 2005*. Failing that, the Committee makes recommendations in this report for the NSW Government to take action to ameliorate where it can some of the effects of WorkChoices on the people of NSW.

## Summary of recommendations

- Recommendation 1** **24**  
That the NSW Government call on the Federal Liberal/National Coalition Government to repeal the *Workplace Relations (WorkChoices) Amendment Act 2005* immediately.
- Recommendation 2** **39**  
That the NSW Government, in consultation with other states and territories, investigate whether it should provide additional resources to the Anti-Discrimination Board and the courts – notably the Chief Industrial Magistrate's Court – to deal with unfair dismissal claims.
- Recommendation 3** **54**  
That the NSW Government establish an Office of the Workplace Rights Advocate, similar to that in Victoria, as an independent statutory body to assist employees, employers and independent contractors to negotiate pay and conditions under the new federal industrial relations system and to monitor unfair and illegal industrial practices.
- Recommendation 4** **55**  
That the NSW Government consider the provision of additional resources to the Office of Industrial Relations in order to boost its inspectorate and to enable the Office to provide advice and training seminars, and information and resource kits for community legal centres. The Committee encourages the Office to target training, information and support to rural and regional New South Wales in order to increase the participation and skills of people living in these areas.
- Recommendation 5** **55**  
That the NSW Government should consider developing a longitudinal study tracking wages and conditions of work in NSW, and consult with other states about achieving a common approach to this study.
- Recommendation 6** **101**  
That in establishing an Office of the Workplace Rights Advocate, as set out in Recommendation 3, the NSW Government ensure that the Office pays explicit attention to the needs of disadvantaged groups.
- Recommendation 7** **101**  
That in examining the provision of additional resources to the Office of Industrial Relations, as set out in Recommendation 4, the NSW Government specifically consider the needs of disadvantaged groups.
- Recommendation 8** **102**  
That in considering the development of a longitudinal study tracking wages and conditions in NSW, as set out in Recommendation 5, the NSW Government also consider the capacity to monitor effects specifically in relation to disadvantaged groups.
- Recommendation 9** **102**  
That the NSW Government call on the Federal Liberal/National Coalition Government to amend section 151(2) of the *Workplace Relations Act 1996* to include people with a disability amongst the list of workers in a disadvantaged bargaining position.

## Glossary

AFPCS	The Australian Fair Pay and Conditions Standard
AIRC	Australian Industrial Relations Commission
APCS	Australian Pay and Classification Scales
AWA	Australian Workplace Agreement
CFMEU	Construction, Forestry, Mining and Energy Union
CID	Council for Intellectual Disability
LHMU	Liquor, Hospitality and Miscellaneous Union
MTA	Motor Traders' Association of NSW
OEA	Office of the Employment Advocate
OHS	Occupational health and safety
OWS	Office of Workplace Services
SDA	Shop, Distributive and Allied Employees Association
YAPA	Youth Action Policy Association

## Legislation referred to in the report

### Commonwealth legislation

- *Workplace Relations Act 1996* - previously the *Industrial Relations Act 1988*
- *Workplace Relations (WorkChoices) Amendment Act 2005* - referred to in the report as WorkChoices<sup>2</sup>
- *The Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005*

### NSW Legislation

- *Industrial Relations Act 1996*
- *Occupational Health and Safety Act 2000*

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<sup>2</sup> The *Workplace Relations (WorkChoices) Amendment Act 2005* amended the *Workplace Relations Act 1996*





# Chapter 1 Conduct of the inquiry

## Establishment of the inquiry

- 1.1 On 28 March 2006 the Standing Committee on Social Issues received a reference from the Minister for Industrial Relations, the Hon John Della Bosca MLC, for an inquiry into the impact of the *Workplace Relations Amendment (WorkChoices) Act 2005*.<sup>1</sup> The reference met with some controversy as to the legitimacy of a state government inquiry into a piece of Commonwealth legislation. The inquiry terms of reference sought to address this by focusing on the impact of the legislation on the people of New South Wales, and on specific matters of industrial relations for which states and territories are responsible, such as injured workers and occupational health and safety.
- 1.2 The terms of reference for the inquiry together with membership of the Committee are provided on pages iv and v of the initial section of this report.

## Conduct of the inquiry

### Advertising

- 1.3 The Committee advertised a call for submissions through the *Daily Telegraph* and the *Sydney Morning Herald*. In addition, letters seeking submissions were sent to a broad selection of government and non-government bodies, including State and Federal Government agencies, unions, employer organisations, welfare agencies and various peak bodies.

### Submissions

- 1.4 In response to the call for submissions the Committee received a total of 52 submissions to the inquiry. These were provided by major stakeholders including the NSW Government, a broad range of unions along with Unions NSW, a number of employer groups, several academics, welfare organisations, community legal centres, state and national peak bodies, along with a number of local service providers and grass roots community groups. Submissions were also received from a number of individuals. The full list of public submissions appears as Appendix 1.

### Hearings

- 1.5 The Committee conducted seven days of hearings with a total of 71 witnesses, representing a wide cross-section of organisations and groups. The Committee undertook two hearings off-site as part of the process of ensuring it would hear directly from community and local organisations about their views on the new legislation. The first was on 17 July 2006 in Penrith, and the second was on 27 July 2006 in Wollongong. Each attracted considerable local media coverage and provided fruitful evidence for the Committee's consideration. Appendix 2

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<sup>1</sup> Minutes of Proceedings, Legislative Council, 30 March 2006, Minutes No. 143, Item 10, p1927

contains the full list of witnesses. The transcripts of all hearings are available on the Committee's website at [www.parliament.nsw.gov.au/socialissues](http://www.parliament.nsw.gov.au/socialissues).

### **Public forum**

- 1.6** The Committee held a public forum followed by a public hearing on 17 July 2006 at the Theatre, Penrith City Library, to provide an opportunity for members of the community to speak directly to the Committee about their views on the impact of WorkChoices legislation. Attendance was strong, with numerous participants from the Penrith and Western Sydney areas, including 11 speakers. The evidence presented during the forum was very powerful in conveying the views of community members and is cited throughout this report. The transcript of the forum is available on the Committee's website and Appendix 2 contains a list of the speakers at the forum.

### **Participation of the Federal Government and employer groups in the inquiry**

- 1.7** The Committee was eager to incorporate the Federal Government's perspective into the inquiry and wrote to the Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, to invite him to make a submission and/or appear at a hearing. This invitation was declined.
- 1.8** In addition, the Committee sought to maximise the input of employer groups by writing to a broad range of both peak employer bodies and specific industry associations – over 40 organisations in total. The Committee also invited a number to provide oral evidence. In all, four submissions were received from organisations representing employers: the Local Government and Shires Associations of NSW, the Motor Traders Association of NSW and the Waste Contractors and Recyclers Association of NSW and the Catholic Commission for Employment Relations. Representatives from each organisation subsequently participated in a hearing.
- 1.9** The Committee notes that Australian Business Limited, incorporating the State Chamber of Commerce (NSW), did not participate in the inquiry. In a media release dated 3 March 2006, Australian Business Limited stated:

The six Member Committee includes three ALP members and a Democrat – with the majority view of the Committee already known. The referral to the Upper House excludes any reference to economic growth or job creation. Business supports WorkChoices because it will allow employers and employees to develop agreements that improve productivity and job satisfaction. WorkChoices is a fact of life and business does not intend to participate in an inquiry where the outcome is already known. Business continues to support WorkChoices and the need for NSW to refer its workplace relations powers to the Australian Government. ABL/State Chamber has nearly 30,000 members and is affiliated with over 150 Chambers of Commerce throughout NSW.<sup>2</sup>

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<sup>2</sup> Australian Business Limited, 'Business does not intend to make submission to Upper House Inquiry', Media Release, 3 March 2006, cited at [http://www.australianbusiness.com.au/?content=/channels/Media\\_centre/\\_\\_\\_Media\\_releases\\_2006/03\\_2006\\_March/upper\\_house\\_inquiry.xml](http://www.australianbusiness.com.au/?content=/channels/Media_centre/___Media_releases_2006/03_2006_March/upper_house_inquiry.xml) (accessed 8 November 2006)

## Procedural issues

- 1.10** A number of noteworthy procedural matters arose during the inquiry.
- 1.11** Several submissions and witnesses made adverse comment against third parties during the course of the inquiry. In general, these involved an individual and/or trade union making allegations against an employer. Under parliamentary privilege, submissions and oral evidence before a Committee cannot be subject to legal action for defamation, so that participants are free to provide information freely and honestly. At the same time, the freedom of speech granted to participants is not intended to provide a forum for the making of inappropriate comments about others.
- 1.12** In keeping with parliamentary practice, the Committee considered the course of action to be taken to provide procedural fairness to those parties who were the subject of adverse comments.
- 1.13** In the case of a number of submissions, the Committee resolved to suppress the names of individuals against whom allegations were made. In addition, in the case of each adverse comment made during a hearing (four occasions in total), the Committee resolved to write to the party against whom the allegations were made, in order to provide the opportunity for them to respond to allegations by correcting any errors of fact that may have been made. Responses were provided by three parties, and the Committee subsequently resolved to publish each response on its website.
- 1.14** The response of one party was itself considered to contain adverse comments, and the Committee resolved to forward this to the witness concerned, to provide the opportunity to respond. A response was received and subsequently published.
- 1.15** The Committee also received correspondence from solicitors acting on behalf of another of the parties, indicating that they had commenced defamation proceedings against witnesses before the Committee in relation to matters raised during evidence. However, it was not clear to the Committee whether this action was directed at comments made during evidence before the Committee, which would be covered by privilege, or elsewhere, which would not. As a result, the Committee Director wrote to the solicitors of the third party to clarify that:
- Statements made by witnesses in proceedings before a parliamentary committee are protected by absolute privilege under s27 of the *Defamation Act 2005* (NSW).
  - Article 9 of the *Bill of Rights 1689*, as enacted by s6 of the *Imperial Acts Application Act 1969*, provides that: ‘the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’.
  - Erskine May’s *Treatise on the Law, Privileges and Proceedings and Usage of Parliament* states that: ‘Both Houses will treat the bringing of legal proceedings against any person on account of any evidence which he may have given in the course of any proceedings in the House or before one of its committees as a contempt.’<sup>3</sup>

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<sup>3</sup> Erskine May, *Treatise on the Law, Privileges and Proceedings and Usage of Parliament*, 23rd edition, LexisNexis Butterworths, London, p151

## Report structure

1.16 This report is in 13 Chapters:

- Chapter 2 provides a brief summary of the labour market changes introduced by the Federal Liberal/National Coalition Government through the *Workplace Relations (WorkChoices) Amendment Act 2005* - colloquially referred to as WorkChoices.
- Chapter 3 examines the extended coverage and 'deregulation' of the federal industrial relations system under WorkChoices.
- Chapter 4 examines the minimum entitlements for wages and conditions prescribed under the new federal industrial relations system following the passage of WorkChoices.
- Chapter 5 considers the impact of WorkChoices on individual and collective bargaining under the federal industrial relations system following the Federal Government's changes to minimum entitlements for wages and conditions, as discussed in Chapter 4.
- Chapter 6 studies the debate about the economic and social impact of WorkChoices, including concerns that WorkChoices will not deliver the economic benefits claimed, while also leading to greater inequality in society. The discussion of the social impacts paves the way for a detailed discussion of the impact of WorkChoices on specific groups in the following three chapters.
- Chapters 7 – 9 consider the human impact of WorkChoices on specific population groups. Chapter 7 examines the anticipated impact on women. Chapter 8 considers the anticipated effects of the legislation on children and young people, people from culturally diverse and Aboriginal communities, and people from rural and regional areas. Chapter 9 examines the impact on people subject to the Federal Government's Welfare to Work legislation and people with disabilities.
- Chapter 10 summarises the evidence available to the Committee on the impact of WorkChoices on employers in a number of specific industries and sectors.
- Chapter 11 examines the impact of the WorkChoices on workplace safety and the rehabilitation of injured workers.
- Chapter 12 examines the Federal Government's proposed independent contractors legislation which is designed to remove independent contractor relationships from industrial or labour law, thus preventing labour law from influencing the independent contractors' work arrangements.
- Chapter 13 provides a conclusion to the report.

## Chapter 2 Summary of the WorkChoices changes

This chapter provides a brief summary of the labour market changes introduced by the Federal Liberal/National Coalition Government through the *Workplace Relations (WorkChoices) Amendment Act 2005* – colloquially referred to as WorkChoices. It initially provides a summary of the federal and state industrial powers under the Australian Constitution and the Australian industrial relations system prior to WorkChoices. Subsequently, it provides an overview of the changes introduced through WorkChoices, notably the expanded coverage of the federal industrial relations system and the alterations to labour laws under the federal system. It also looks at recent changes to WorkChoices and the High Court challenge to WorkChoices, and places the legislation in the broader context of the Federal Government’s social and welfare changes.

This descriptive information sets the scene for the remainder of the report, in which the Committee examines the written and oral evidence it received on the impact of WorkChoices on the people of NSW.

The Committee notes that this chapter is based largely on research published by the NSW Parliamentary Library. The Committee acknowledges in particular the NSW Parliamentary Library Research Service Briefing Paper No 2/06 prepared by Mr Lenny Roth entitled ‘*The New Federal Workplace Relations System*’<sup>4</sup> and Mr Roth’s paper ‘Overview of the Australian Labour Law Reforms in 2006’<sup>5</sup>.

### The federal and state industrial powers under the Australian Constitution

- 2.1 When the six Australian colonies joined together at federation in 1901, they ceded some of their powers to the new Commonwealth Parliament. Those powers are predominantly contained in Section 51 of the Australian Constitution. There are 39 subsections to section 51, each of which describes a head of power about which the Commonwealth Parliament has the power to make laws.
- 2.2 Significantly, the Commonwealth’s legislative power is predominantly limited to those powers granted under section 51 of the Constitution, although some relatively minor additional powers are granted under sections 52 and 90. Powers not included in section 51 are considered residual powers, and remain the domain of the states.
- 2.3 The Commonwealth’s legislative power in respect of industrial relations nominally derives from Section 51 (xxxv) of the Australian Constitution. Section 51 (xxxv) states:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -

(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State; ...

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<sup>4</sup> Parliamentary Library Research Service, ‘The New Federal Workplace Relations System’, Briefing Paper No 2/06

<sup>5</sup> Mr Roth, ‘Overview of the Australian Labour Law Reforms in 2006’, Paper prepared for Norwegian delegates visiting NSW Parliament on 14 September 2006

- 2.4 This power has been used by the Federal Parliament to establish the federal industrial relations system.
- 2.5 Significantly, however, section 51(xxxv) does not give the Commonwealth power in respect of labour laws that do not pertain to the prevention and settlement of industrial disputes extending beyond the limits of any one state (ie interstate disputes). This residual power continues to rest with the states, and has been used by the six states to establish their own separate state industrial relations systems alongside the federal system. Historically, these systems have operated concurrently – generally the larger employers with cross-state businesses have operated under the federal system, while smaller employers have stayed within the state systems.
- 2.6 It is notable, however, that since federation in 1901, the Commonwealth Government has used a range of other powers under the Australian Constitution, other than the industrial relations power under Section 51(xxxv), in order to influence labour law in Australia. Those powers have included:
- the trade and commerce power under section 51(i) of the Constitution, which has been used to enact laws covering sailors, waterside workers and airline crew
  - the external affairs power under section 51(xxix) of the Constitution, which has been used to enable the Commonwealth Parliament to legislate in respect of the subject matter of an international treaty or convention that has been ratified by the Australian Government
  - the references of power provision under section 51(xxxvii) of the Constitution, which was used in 1996 when the Victorian Parliament referred its industrial laws to the Commonwealth Parliament
  - the corporations power under section 51(xx) of the Constitution, which was used extensively in 1996 by the Howard Coalition Government to uphold aspects of the *Workplace Relations Act 1996*.
- 2.7 The use of the corporations power to support industrial law is discussed later in this chapter.

## **The Australian industrial relations system prior to WorkChoices**

- 2.8 The following is a summary of the main features of the federal and NSW industrial relations system prior to the introduction of the WorkChoices changes in 2006.

### ***Industrial relations tribunals***

- 2.9 Both the NSW and federal industrial relations systems have traditionally relied upon compulsory conciliation and arbitration for the resolution of industrial disputes. At federation, state and federal industrial tribunals were established by all the states and the Commonwealth to undertake conciliation and arbitration. The federal tribunal is now known as the Australian Industrial Relations Commission (AIRC). The state tribunal in NSW is now known as the NSW Industrial Relations Commission.

### *Trade unions and employer organisations*

**2.10** Trade unions and employer organisations have traditionally been significant players in Australia's industrial relations system. Australia has historically had a very high rate of union membership by world standards. However, there has been a large decline in trade union membership over the last 20 years, to the point where only 23% of employees were members of a trade union in 2003. Employer organisations in Australia include Australian Business, the Australian Chamber of Commerce and Industry, the Australian Industry Group and the Business Council of Australia.

### *Awards*

**2.11** The pay and conditions of workers in both the federal and state industrial relations systems in Australia have traditionally been regulated by a system of awards, set by both the federal and state industrial relations commissions. Awards have traditionally set minimum standards of employment such as minimum wages for full and part-time employees, penalty rates, overtime, apprentice rates and so forth. In 1990, federal and state awards covered 31% and 47% of employees in Australia respectively.

**2.12** On its election in March 1996, the Federal Liberal/National Coalition Government made significant changes to the *Industrial Relations Act 1988*, henceforth renamed the *Workplace Relations Act 1996*. The Federal Government limited the range of employment conditions that may be dealt with in awards to 20 'allowable matters'. However, common conditions of employment in awards continued to include:

- maximum ordinary hours of work
- overtime and shift work loadings
- penalty rates for work on weekends and public holidays
- sick leave and carer's leave
- annual leave and leave loading
- long service leave
- parental leave
- redundancy pay.

### *Adjustment to minimum wages*

**2.13** Under the award system, minimum wages in federal awards have traditionally been adjusted on an annual basis in accordance with wage decisions of the federal industrial tribunal. These cases involved applications by unions to the federal industrial tribunal to increase award wages. The Australian Council of Trade Unions represented trade unions, while employer organisations, such as the Australian Chamber of Commerce and Industry, represented employers. The federal and state governments generally also made submissions to these wage cases. The tribunal was required to have regard to certain criteria when deciding whether to increase award wages.

**2.14** Award wage increases at the federal level generally flow on to NSW awards via wage decisions of the NSW tribunal.

***Legislation setting minimum conditions***

**2.15** In addition to the minimum employment conditions contained in awards, federal and state governments have also passed legislation in relation to conditions of employment. The NSW Parliament has legislated minimum conditions of employment in relation to:

- annual leave
- long service leave
- parental leave.

**2.16** These conditions apply to all employees in NSW.

**2.17** NSW legislation also requires the NSW Industrial Relations Commission to make an award containing minimum conditions in relation to the following matters if it receives an application to do so:

- maximum ordinary hours of work
- sick leave
- equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.

**2.18** The Federal Parliament has also legislated minimum conditions of employment in relation to:

- parental leave
- notice of termination
- superannuation.

**2.19** These minimum conditions apply to all employees in Australia.

***Enterprise bargaining in the 1990s***

**2.20** In the early 1990s, major changes were made to both the federal and NSW industrial relations system partly in response to economic recession and problems with Australia's balance of payments.

**2.21** In 1993, the Keating Federal Labor Government enacted the *Industrial Relations Reform Act 1993* which allowed for the making of certified agreements setting the wages and conditions of employment for all employees in a single business or part of a single business. Where a certified agreement did not specify conditions of employment, the relevant award continued to apply.

**2.22** Certified agreements could be made between an employer and either:

- a majority of employees who were to be subject to the agreement or
- one or more unions, provided that a majority of employees approved the agreement.



- 2.23** On approval from the AIRC, certified agreements prevailed over federal awards to the extent of any inconsistency. They also prevailed over state awards, state enterprise agreements and state laws (except those relating to workers compensation and occupational health and safety), to the extent of any inconsistency.
- 2.24** However, in order to be approved, certified agreements needed to pass the ‘no disadvantage test’. A certified agreement would not pass the ‘no disadvantage test’ if it would result, on balance, in a reduction in the overall conditions of employment of the employees concerned, compared with applicable federal and state awards and legislation.
- 2.25** In NSW, the Greiner Coalition Government enacted enterprise bargaining laws in 1991, later modified by the Carr Labor Government in 1996. The modified state enterprise bargaining laws were very similar to the federal laws.
- 2.26** Other changes were introduced around the country. Of particular note, in 1992 in Victoria, the Kennett Liberal-National Government introduced the *Employee Relations Act 1992* which broke radically from the collective bargaining model by cutting access to tribunals and abolishing Victorian awards.

### ***Industrial action***

- 2.27** Until 1993, it was generally unlawful to engage in industrial action (ie strikes and lockouts). However, under the *Industrial Relations Reform Act 1993*, it became lawful for unions and employers to take industrial action in support of a new federal workplace agreement as long as several conditions were satisfied. For example, industrial action could only take place during a bargaining period, and before engaging in industrial action the relevant party must genuinely have tried to reach an agreement.

### ***Unfair dismissals***

- 2.28** Unfair dismissal laws were also introduced in the 1990s. They allowed employees who had been dismissed to apply to the federal industrial tribunal for relief on the grounds that their dismissal was ‘harsh, unreasonable or unjust’. The tribunal could grant relief in the form of reinstatement or compensation. In making a decision, the tribunal was required to have regard to a number of factors, including whether there was a valid reason for the dismissal and whether the employer followed fair procedures.

### ***Australian Workplace Agreements***

- 2.29** The Federal Liberal/National Coalition Government’s new *Workplace Relations Act 1996* retained the main elements of the 1993 certified agreement provisions. However, it also quite controversially introduced a new form of workplace agreement: Australian Workplace Agreements (AWAs).
- 2.30** AWAs, which continue to be available today, are agreements between an employer and an individual employee. This contrasts with enterprise agreements, which are collective agreements in the sense that they are made with a union or a group of employees. They are approved by the Office of the Employment Advocate (OEA) rather than by the AIRC.

- 2.31** As they were introduced in 1996 in the *Workplace Relations Act 1996*, AWAs also had to pass the 'no disadvantage test' in order to be approved by the OEA. Once approved, AWAs operate to the exclusion of federal and state awards and legislation and also to the exclusion of certified agreements.
- 2.32** A survey published in May 2004 showed that 38% of employees had the main part of their pay set by a federal or state approved collective workplace agreement and that 2% had their pay set by an approved AWA. The remainder were on awards (20%), individual contracts of employment (31%) or were working proprietors of incorporated businesses.

### The passage of the Workplace Relations Amendment (WorkChoices) Bill 2005

- 2.33** The Workplace Relations Amendment (WorkChoices) Bill 2005 (Cth) was introduced into the Australian House of Representatives on 2 November 2005 by the Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP. In his second reading speech, the Minister stated:

Today I am introducing the Workplace Relations Amendment (Work Choices) Bill – a bill that moves Australia towards a flexible, simple and fair system of workplace laws.

Australians have come a long way by improving the way they work. Because of this, we now have one of the strongest economies in the world. We have created over 1.7 million new jobs. Australia's unemployment rate has been markedly reduced, reaching a 30 year low and interest rates are at historically low levels.

But we must not make the mistake of assuming that our future prosperity is assured and inevitable.

Now is not the time for self-congratulation or back-slapping. Now is the time to secure the future prosperity of Australian individuals and families. That is what Work Choices is all about – securing the future prosperity of Australian individuals and families.<sup>6</sup>

- 2.34** The Bill passed through the House of Representatives on 10 November and was introduced into the Senate later that day. The Bill was passed, with amendments, by the Senate on 2 December 2005 by a vote of 35-33.
- 2.35** The Bill received the Royal Assent on 14 December 2006 and became the *Workplace Relations (WorkChoices) Amendment Act 2005*. The Act amended the *Workplace Relations Act 1996* – entitled in full the *Workplace Relations Act 1996*, Act No. 86 of 1988 as amended. The majority of the provisions of the *Workplace Relations (WorkChoices) Amendment Act 2005* were proclaimed by the Governor General to come into effect on 27 March 2006.
- 2.36** The Minister for Employment and Workplace Relations released the first set of WorkChoices regulations on 17 March 2006.

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<sup>6</sup> Hon. Kevin Andrews MP, Minister for Workplace Relations, Second Reading Speech, Workplace Relations Amendment (Work Choices) Bill 2005, cited at <http://www.workplace.gov.au/NR/rdonlyres/89F786BA-FCDC-4AF2-B642-210D40CB52C5/0/wrawcbill20052rs.pdf> (accessed 17 October 2006), p1

- 2.37** WorkChoices contains two fundamental changes. The first is that the Federal Government has dramatically extended the coverage of the federal industrial relations system so that it covers most corporations and their employees in Australia. The second is a dramatic reshaping of labour law under the federal industrial relations system. These changes are described below.
- 2.38** As noted in chapter 3, the legislation is complex and lengthy, and comprises 1,400 pages of regulation. As stated somewhat dryly by Ms Alison Peters, Deputy Assistant Secretary of Unions NSW:

If I can just give a graphic illustration: the New South Wales Act weighs in at 400 grams, the old Workplace Relations Act weighs approximately 800 grams, WorkChoices weighs 2.2 kilograms. So we are dealing with weighty matters here all round.<sup>7</sup>

### **The expanded coverage of the federal industrial system under WorkChoices**

- 2.39** Traditionally, the federal industrial relations system has relied on the industrial relations power – section 51(xxxv) of the Australian Constitution – for its constitutional validity, although as noted, other powers have been used increasingly in recent years.

- 2.40** However, WorkChoices has departed from this tradition by basing its constitutional validity on the corporations power in Section 51(xx) of the Constitution. Section 51(xx) states:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth; ...

- 2.41** Constitutional corporations for the purposes of section 51(xx) are defined as:

- trading or financial corporations formed within Australia
- foreign corporations.

- 2.42** By basing WorkChoices on the corporations power, the Federal Government has significantly expanded the coverage of the federal industrial system. Most corporations, including many non-commercial corporations, come within the definition of ‘trading’ or ‘financial’ corporations. In addition, the federal industrial relations system now also applies to state government corporations and their employees, subject to the limitations of the *implied immunity* principle under the Constitution.

- 2.43** The federal system also continues to be based on certain other powers in the Constitution so that it continues to apply to the Commonwealth public service, all employers and employees in Victoria and the two Territories, as well as flight crew officers, maritime employees and waterside workers.

- 2.44** State industrial laws, awards and workplace agreements generally no longer cover these employers and employees. However, some state industrial laws will continue to apply to

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<sup>7</sup> Ms Peters, Evidence, 19 June 2006, p28

employers and employees who move into the federal system, for example laws on workers compensation, occupational health and safety, long service leave, child labour, and trainees and apprenticeships.

- 2.45 The Federal Government has estimated that the new federal industrial relations system will cover up to 85% of employees in Australia, although coverage will be lower in some states. The NSW Minister for Industrial Relations, the Hon John Della Bosca MLC, has estimated that the federal system will cover approximately 75% of employees in NSW.

### *Transitional arrangements*

- 2.46 Under the transitional provisions of WorkChoices, an employee's wages and conditions of employment under state industrial laws, state awards and state workplace agreements will continue to operate for a certain period of time after the changes commence. To summarise briefly:

- If an employee is covered by a state award and is not covered by a state workplace agreement, the award and legislative minimum conditions will continue to operate for three years unless a workplace agreement is made under the new federal system before then. After three years, if no workplace agreement has been made, the employee will move to an appropriate federal award.
- If any of the employee's conditions are covered by a state workplace agreement, conditions in the workplace agreement, and any conditions under a state award or state legislation that operate together with the agreement, will continue to operate until a workplace agreement is made under the new federal system.

### *Some employees and employers will move into the state systems*

- 2.47 Employers and employees currently covered by the federal system will not be covered by the new federal system if the employer is not a constitutional corporation. However, under the transitional arrangements, these employers and employees will have a five-year transitional period to move into the relevant state system. Alternatively, an employer may decide to become a corporation in order to remain within the coverage of the federal system.

## **Changes to labour laws under WorkChoices**

- 2.48 In addition to broadening significantly the coverage of the federal industrial relations system, WorkChoices introduced major changes to the operation of the federal industrial relations system. The principal changes are discussed below.

### *Abolition of compulsory conciliation and arbitration*

- 2.49 The federal system of compulsory conciliation and arbitration, which had existed since federation, has been abolished. The AIRC is now only a voluntary dispute resolution body – industrial parties can instead agree to refer disputes to private dispute resolution services.

*Adjustments to minimum wages*

- 2.50** The AIRC is no longer responsible for adjusting minimum wages. That responsibility has been given to a new body known as the Australian Fair Pay Commission. The Fair Pay Commission will operate according to different parameters – it is expected to undertake research and consult with relevant stakeholders before adjusting minimum wages, rather than arbitrating in the context of competing claims by unions and employer organisations. On Thursday 26 October 2006, the Fair Pay Commission brought down its first decision on wages under the WorkChoices legislation. The Commission’s decision had three elements:
- an increase of \$27.36 per week in the standard Federal Minimum Wage
  - an increase of \$27.36 per week in all Australian Pay and Classification Scales (Pay Scales) up to and including \$700 per week
  - an increase of \$22.04 per week in all Pay Scales above \$700 per week.<sup>8</sup>
- 2.51** According to the Commission’s website, ‘the increases flow on to junior employees, employees to whom training arrangements apply, employees with disabilities and basic piece rates of pay’.<sup>9</sup>
- 2.52** The increases take effect from 1 December 2006. The Commission’s next decision will be handed down in mid 2007.

*Legislated minimum conditions*

- 2.53** As implemented on 27 March 2006, WorkChoices legislated four minimum employment conditions covering ordinary hours of work, annual leave, personal/carer’s leave and parental leave. These four conditions, along with minimum wages, comprise the Australian Fair Pay and Conditions Standard (AFPCS). These standards apply to all employees covered by the federal industrial relations system. Employees who are covered by an award will continue to be entitled to their award conditions for an interim period if they are more generous than the AFPCS.

*Workplace agreements*

- 2.54** Workplace agreements, including AWAs, no longer need to pass the ‘no disadvantage test’. They only need to comply with the minimum wage and minimum conditions prescribed in the AFPCS.

*Industrial action*

- 2.55** Employees and unions will not be able to take lawful industrial action when negotiating a workplace agreement unless this has been authorised by a majority of votes cast by employees in a secret ballot. In addition, there are more grounds upon which the AIRC can suspend a bargaining period, making any further industrial action during negotiations unlawful. The Minister for Workplace Relations now also has the power to prevent or stop industrial action.

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<sup>8</sup> [www.fairpay.gov.au/fairpay](http://www.fairpay.gov.au/fairpay) (accessed on 27 October 2006)

<sup>9</sup> [www.fairpay.gov.au/fairpay](http://www.fairpay.gov.au/fairpay) (accessed on 27 October 2006)

### *Unfair dismissal*

- 2.56** Businesses with up to 100 employees are now exempt from unfair dismissal laws. In addition, employees in businesses with more than 100 employees cannot bring an unfair dismissal claim if the employee was dismissed for genuine operational reasons, defined as reasons of an economic, technological, structural or similar nature. No changes have been made to the unlawful dismissal laws, as such.

## **The High Court Challenge to WorkChoices**

- 2.57** In May 2006, the NSW Government, together with the governments of Western Australia, South Australia, Queensland and Victoria, and also with the Australian Workers' Union and Unions New South Wales, challenged the validity of the *Workplace Relations Amendment (WorkChoices) Act 2005* in the High Court. The state of Tasmania, the Australian Capital Territory and the Northern Territory intervened in the case, but were not parties.
- 2.58** Hearings of substantial matters began on 4 May 2006 and concluded on 11 May 2006. The NSW Government and accompanying parties argued amongst other things that the Australian Constitution contains an explicit power concerning the regulation of industrial relations – section 51(xxxv) – which makes it clear that industrial relations is an area in which the powers of the Commonwealth and the states are to be shared. They also argued that the use of the corporations power – section 51(xx) – as the basis for the WorkChoices legislation extends that power in a way not intended by the drafters of the Constitution.<sup>10</sup>
- 2.59** The High Court handed down its decision on 14 November 2006.<sup>11</sup> By a majority of five to two, Justices Kirby and Callinan dissenting, the High Court rejected the challenge to the constitutional validity of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and found that the corporations power should be read to give it its full and literal meaning:
- The majority rejected the distinction between 'external and internal relationships of corporations' (an example of an 'internal relationship' is the relationship between employers and their employees) as a limit to the legislative power conferred by s 51(xx) 'as an inappropriate and unhelpful distinction'. The distinction was said to find 'no reflection in the Convention Debates or the drafting history of s 51(xx) and, in any event, is unstable'.<sup>12</sup>
  - The majority also rejected any reading down of the corporations power by reference to the conciliation and arbitration power in s 51 (xxxv) on the basis that s 51(xxxv) does not contain a 'positive prohibition or restriction', of particular or general application, that would require s 51(xx), or indeed any other paragraphs in s 51, to be construed as subject to the limitation. It was pointed out that previous High Court cases had upheld the validity of laws regulating industrial relations, under other heads

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<sup>10</sup> Submission 37, NSW Government, p30

<sup>11</sup> New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia [2006] HCA 52 (14 November 2006)

<sup>12</sup> Ibid, para 197

of power, including the defence power, in a fashion other than as required by s 51(xxxv).<sup>13</sup>

**2.60** Underlying these and other arguments was ‘the federal balance’ issue, by which the plaintiffs contended that there is a need to confine the operation of the corporations power because of its potential effect upon the (concurrent) legislative authority of the States. These submissions were rejected by the majority, as were arguments referring to the failure of successive referendums to alter s 51(xx) and s 51(xxxv).

**2.61** By contrast, in his dissenting judgement, Justice Kirby found that the ‘unnuanced interpretation’ of the corporations power adopted by the majority ‘has the potential greatly to alter the nation’s federal balance’ by risking the intrusion of direct federal lawmaking into areas of legislation which, since federation, have been the subjects of State laws. He continued:

By this decision, the majority deals another serious blow to the federal character of the Australian Constitution. We should not so lightly turn our backs on the repeatedly expressed will of the Australian electors and the wisdom of our predecessors concerning our governance.<sup>14</sup>

**2.62** In his dissenting judgement, Justice Callinan argued that the corporations power has nothing to say about industrial relations or their regulation by the Commonwealth, and that to the extent that s 51(xx) might otherwise appear to confer such power, it must be subject to the implied negative restriction imposed by s 51(xxxv).<sup>15</sup>

## Amendments to WorkChoices

**2.63** On 22 September 2006, the Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP, introduced the Workplace Relations Amendment Regulations 2006 (No. 3) to amend the Workplace Regulations 2006 in relation to the AFPCS.<sup>16</sup> These amendments sought to ameliorate some aspects of the operation of WorkChoices, in response to cases in the media. In particular, one case involved workers being fined for calling in sick to work.

**2.64** Subsequently, on 13 November 2006, the Minister for Employment and Workplace Relations introduced further amendments to the *Workplace Relations Act 1996* and the Workplace Regulations 2006 to:

- protect the redundancy pay entitlements of employees by providing that agreement based redundancy entitlements continue to operate for 12 months after an agreement is terminated
- cap the accrual of annual and personal/carer’s leave under the AFPCS, so that paid leave will not accrue in respect of hours worked above 38 hours per week

<sup>13</sup> *Ibid* at paras 219 - 221

<sup>14</sup> *Ibid* at paras 611-612 per Kirby J

<sup>15</sup> *Ibid* at paras 913(v) per Callinan J

<sup>16</sup> This followed reports that employees were being fined for being absent from work due to illness, discussed more in Chapters 4 and 5.

- allow employers to stand down employees without pay if they are left idle due to factors outside the employer's control (eg. a natural disaster or industrial action)
- allow employees to cash out sick leave or carers' leave, provided they are left with certain minimum levels of sick leave and carers' leave (at least 15 days for full-time employees)
- streamline the record-keeping requirements for employers, including removing the requirement that employers record all hours worked by an employee (henceforth employers will only need to record those hours for which an employee is entitled to overtime or other penalty rates).<sup>17</sup>

## Other inquiries into WorkChoices

**2.65** The Committee notes that a number of other inquiries into the WorkChoices legislation are currently being conducted or are set to be conducted around Australia:

- The Queensland Industrial Relations Commission is conducting an inquiry into the impact of WorkChoices on Queensland workplaces, employees and employers. The Commission released an interim report on 21 September 2006, available on the Commission's web site at [www.qirc.qld.gov.au](http://www.qirc.qld.gov.au).
- The ACT Parliament has established a Select Committee on Working Families in the ACT, which published an interim report in March 2006. More details are available on the Committee's web site at [www.parliament.act.gov.au/committees](http://www.parliament.act.gov.au/committees).
- The Committee understands that the Tasmania Parliament will establish a cross-party WorkChoices Scrutiny Committee in the next session of Parliament.<sup>18</sup>

## Broader context to the industrial relations changes

**2.66** The Federal Liberal/National Coalition Government's changes to the federal industrial relations system through WorkChoices should also be seen in the context of other changes to Australia's industrial and social systems. Along with WorkChoices, the Federal Government has recently introduced two other significant pieces of legislation:

- The *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005*, which amended the *Social Security Act 1991 (Cth)*. The Act implements several changes to welfare payments, welfare eligibility and compliance mechanisms in Australia, designed to address the perceived high levels of welfare dependency in Australia and low workforce growth over the past decade.

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<sup>17</sup> The Hon Kevin Andrews MP, 'Amendments to Workplace Relations Legislation and Regulations', Media Release, 13 November 2006, cited at <http://mediacentre.dewr.gov.au/mediacentre/MinisterAndrews/Releases/AmendmentsToWorkplaceRelationsLegislationAndRegulations.htm> (accessed 13 November 2006)

<sup>18</sup> Graeme Sturges, MHA, 'Workers won't be fooled by Howard's IR Tampa', cited at <http://www.media.tas.gov.au/release.php?id=19019> (accessed 12 October 2006)



- The Independent Contractors Bill 2006, which is designed to move contractual relationships as far as possible from the realm of employment and to place these relationships as far as possible under commercial regulation.

**2.67** Both of these pieces of legislation and the effects that flow from their dovetailing with WorkChoices are examined in more detail later in this report.

## Chapter 3      The extended coverage and ‘deregulation’ of the federal industrial relations system

This chapter examines the extended coverage and ‘deregulation’ of the federal industrial relations system under the *Workplace Relations (WorkChoices) Amendment Act 2005*. It initially examines the ‘takeover’ provisions in section 16 of the amended *Workplace Relations Act 1996* and the interaction between the federal and state industrial relations systems under WorkChoices. Subsequently, the chapter examines the claim that WorkChoices, rather than deregulating the labour market, has in fact regulated and prescribed the labour market’s operation.

### The ‘takeover’ provisions in section 16 of the *Workplace Relations Act 1996*

**3.1**      As indicated in Chapter 2, the WorkChoices legislation is based on a bundle of constitutional powers, however at the heart of the changes is the use of section 51(xx) of the Constitution – the so called corporations power. By basing WorkChoices on the corporations power, the Federal Government has been able to significantly expand the coverage of the federal industrial system.

**3.2**      The provisions of the *Workplace Relations Act 1996* purporting to extend the coverage of the federal industrial relations system are set out in section 16 of the Act as follows:

#### **16 Act excludes some State and Territory laws**

(1)      This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:

- (a)      a State or Territory industrial law;
- (b)      a law that applies to employment generally and deals with leave other than long service leave; ...

**3.3**      The term ‘a State or Territory industrial law’ is specifically defined at section 4(1) of the *Workplace Relations Act 1996* as follows:

#### ***State or Territory industrial law* means:**

- (a)      any of the following State Acts:
  - (i)      the *Industrial Relations Act 1996* of New South Wales;
  - (ii)     [ ... ]
- (b)      an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:

- (i) regulating workplace relations (including industrial matters, industrial disputes and industrial action, within the ordinary meaning of those expressions);
  - (ii) providing for the determination of terms and conditions of employment;
  - (iii) providing for the making and enforcement of agreements determining terms and conditions of employment;
  - (iv) providing for rights and remedies connected with the termination of employment;
  - (v) prohibiting conduct that relates to the fact that a person either is, or is not, a member of an industrial association (as defined in section 779); or
- (c) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or
- (d) a law that:
- (i) is a law of a State or Territory; and
  - (ii) is prescribed by regulations for the purposes of this paragraph.

**3.4** However, section 16(2) does make specific exceptions to the coverage of the *Workplace Relations Act 1996*. It states:

- (2) However, subsection (1) does not apply to a law of a State or Territory so far as:
- (a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or
  - (b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or
  - (c) the law deals with any of the matters (the non excluded matters) described in subsection (3).
- (3) The non excluded matters are as follows:
- (a) superannuation;
  - (b) workers compensation;
  - (c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);
- ...

**3.5** As indicated in Chapter 2, the Federal Government has estimated that the new federal industrial relations system will 'capture' up to 85% of employees in Australia, although coverage will be lower in some states. The NSW Minister for Industrial Relations, the Hon John Della Bosca MLC, has estimated that the federal system will 'capture' approximately 75% of employees in NSW.<sup>19</sup>

**3.6** The Committee notes that in its submission, the NSW Government specifically commented on the Federal Government's 'takeover' of industrial relations law in NSW and other states:

The NSW Government rejects this attempted hostile takeover of the state industrial relations jurisdiction which has provided a fair and cooperative industrial system for over a century. The NSW industrial relations system has provided a strong safety net and a level playing field while providing employees and employers with the opportunity to create flexible and productive workplace arrangements.<sup>20</sup>

### **The interaction between the federal and state systems under WorkChoices**

**3.7** The significant extension of the coverage of the federal industrial relations system under WorkChoices has inevitably changed fundamentally the interaction between the federal and state industrial relations systems.

**3.8** In her evidence to the Committee, Ms Pat Manser, Deputy Director General of the NSW Office of Industrial Relations, noted that one of the rationales of the WorkChoices legislation was the implementation of a unitary national industrial relations system. However, she argued that this has not been achieved. For employers and business owners, Ms Manser noted that there are still several important pieces of NSW legislation that continue to affect employment law under WorkChoices. They include the *Annual Holidays Act 1944 (NSW)*, the *Long Service Leave Act 1955 (NSW)*, the *Occupational Health and Safety Act 2000 (NSW)* and related workers compensation legislation.<sup>21</sup>

**3.9** Ms Manser subsequently noted that prior to WorkChoices, employers made a decision whether to operate within the state or federal industrial relations systems: as indicated in Chapter 2, generally the larger employers with cross-state businesses operated under the federal system, while smaller employers stayed within the state system. In effect, employers worked through one system or the other. However, following the implementation of WorkChoices, Ms Manser argued that employers now have to work through a plethora of different arrangements at both the state and federal level. At the federal level alone, there are 13 different agencies dealing with industrial relations and at least six alternative dispute resolution agencies.<sup>22</sup>

**3.10** This evidence was reiterated in material prepared by the Office of Industrial Relations and tabled by Ms Manser during her evidence on 15 September 2006. The Office of Industrial Relations argued that under WorkChoices, the task for employers negotiating working

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<sup>19</sup> Parliamentary Library Research Service, 'The New Federal Workplace Relations System', p11

<sup>20</sup> Submission 37, NSW Government, p7

<sup>21</sup> Ms Manser, Evidence, 15 September 2006, p19

<sup>22</sup> *Ibid*

conditions with their staff has become very complicated. An employer needs to have knowledge of the Australian Fair Pay and Conditions Standard, the Australian Pay and Classification Scales (APCS), any preserved award terms applying to their employees, together with other award and legislative provisions dealing with public holidays, rest breaks, incentive based pay, annual leave loading, allowances, penalty rates and overtime loading.<sup>23</sup>

- 3.11** The Office of Industrial Relations also indicated that it has received a large number of phone calls from employers who are confused about the WorkChoices changes and who are having difficulties getting accurate information on WorkChoices from the Federal Government.<sup>24</sup>
- 3.12** Finally, on a related matter, the Office of Industrial Relations noted the difficulty faced by employers in determining whether they are a constitutional corporation for the purposes of the WorkChoices legislation. This is particularly the case for not-for-profit businesses and businesses in the social and community services sector.<sup>25</sup>

### The ‘deregulation’ of the industrial relations system

- 3.13** Alongside the purported extension of the federal industrial relations system to form a truly ‘national’ system, the WorkChoices legislation was promoted by the Federal Government and other advocates on the basis that it ‘deregulated’ the industrial relations system and promoted flexibility in the workplace.
- 3.14** The Committee notes that various parties throughout the inquiry referred to the so-called ‘deregulation’ of the industrial relations system under WorkChoices. However, the Committee notes evidence that the use of the term ‘deregulation’ is misleading. In his evidence to the Committee, Dr John Buchanan, Acting Director of the Workplace Research Centre at the University of Sydney, observed that the legislation is far more prescriptive than that in other countries with deregulated industrial relations systems. He stated to the Committee:

It is not actual deregulation. This is actually very deliberate regulation designed to lower labour standards ... This is an attack on publicly defined labour standards. The legacy of the Howard Government will be to weaken Australia’s standing as a civilised nation as defined by labour standards. So it is not whether you deregulate or not regulate, what we are seeing is a shift to market forms of regulation and highly prescriptive forms of market regulations.<sup>26</sup>

- 3.15** Dr Buchanan continued:

This could only happen in Australia. When we talk to researchers overseas they are actually shocked at the degree of detail and prescription that is written into an Act. The Kiwi Act was 100 pages.<sup>27</sup>

<sup>23</sup> Tabled document, Office of Industrial Relations, *Experience of Business under WorkChoices*, September 2006, p5

<sup>24</sup> *Ibid*, p2

<sup>25</sup> *Ibid*, p5

<sup>26</sup> Dr Buchanan, Evidence, 28 July 2006, p41

<sup>27</sup> Dr Buchanan, Evidence, 28 July 2006, p41

- 3.16** Professor Ron McCallum, Dean of the Law School at the University of Sydney, called the legislation 'extraordinarily lengthy' and suggested that the reason the legislation is so complex and extensive is that the Federal Government had 'gone for broke' and 'wanted to do everything in a big bang'. He further observed that legislation introduced in such a fashion never works effectively, and predicted that the legislation is 'doomed to perpetual patchwork and repair work'.<sup>28</sup>
- 3.17** Ms Manser of the Office of Industrial Relations noted that the legislation comprises 1,400 pages of regulation. As noted, it is administered by no less than 13 different agencies dealing with industrial relations and at least six alternative dispute resolution agencies. She described it as 'microregulation, with the choices removed'.<sup>29</sup>
- 3.18** The agencies and schemes include:
- the Department of Employment and Workplace Relations
  - the Office of Workplace Services
  - the Office of the Employment Advocate
  - the Australian Industrial Relations Commission
  - the Award Review Taskforce
  - the Australian Fair Pay Commission
  - alternative dispute resolution providers funded under the Alternative Dispute Resolution Assistance Scheme
  - the Unlawful Termination Assistance Scheme
  - the General Employee Entitlements Redundancy Scheme
  - the WorkChoices Employer Assistance Program
  - the Australian Building and Construction Commission
  - various courts
  - the anticipated Service Contract Review Scheme for independent contractors.
- 3.19** The NSW Office of Industrial Relations noted that over the next four years, administration of the WorkChoices scheme alone is expected to cost almost half a billion dollars.<sup>30</sup>
- 3.20** The Committee notes in this regard that the explanatory memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005 indicated that the estimated financial cost associated with the changes from 2005-06 through to 2008-09 was \$489.6 million.<sup>31</sup>

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<sup>28</sup> Professor McCallum, Evidence, 20 June 2006, p46

<sup>29</sup> Ms Manser, Evidence, 19 June 2006, p2

<sup>30</sup> Tabled document, Office of Industrial Relations, *Experience of Business under WorkChoices*, September 2006, pp2-3

## Conclusion

- 3.21** The Committee does not support the extension of the federal industrial relations system under WorkChoices. Despite the majority decision of the High Court in *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia*<sup>32</sup> dated 14 November 2006, the Committee regards the Federal Government's wholesale 'takeover' of industrial relations in Australia as an unreasonable and unwarranted move by the Federal Liberal/National Coalition Government to encroach upon the jurisdiction of the states and to impose its own industrial ideology on workers hitherto outside the federal industrial relations system.
- 3.22** The Committee joins the NSW Government in condemning the Federal Government's 'takeover' of the state industrial relations system. For over a century, successive NSW governments have provided a fair and cooperative industrial relations environment. The NSW industrial relations system has successfully managed to balance a secure safety net for employees with ensuring there is the capacity for employees and employers to create flexible and productive workplace arrangements.
- 3.23** The Committee is also concerned that the Federal Government's 'takeover' of industrial relations has been accompanied by significant regulation and prescription of the labour market. Far from 'deregulation', the Committee believes the degree of complexity, paperwork and bureaucracy built into the federal industrial relations system by WorkChoices is surely unique in the developed world.
- 3.24** The issue of 'deregulation' is explored further in chapters 4, 5 and 6. As discussed in these chapters, instead of seeing the 'deregulation' of the industrial relations system under WorkChoices as providing greater flexibility and choice, many witnesses to this inquiry saw it as deregulating labour standards and removing the protection for employees. As Dr Chris Briggs, Senior Lecturer at the Workplace Research Centre at the University of Sydney argued, the result of the deregulation of labour standards is growth of wage dispersion and inequality.<sup>33</sup>
- 3.25** While one of the Federal Government's stated aims in introducing WorkChoices was to improve productivity, the Committee does not believe the way to generate strong sustainable productivity growth is by reducing minimum wages and creating a large pool of low-paid jobs. As demonstrated in the following chapters, international evidence suggests that by attempting to make labour cheaper, such 'deregulation' may in fact remove incentives to businesses to increase productivity through innovation and skill development. The Committee shares the concerns expressed by many of the witnesses to this inquiry that WorkChoices, while failing to boost productivity and innovation, will result in disparity and inequity in wages, an increase in the number of low-paid jobs and more underprivileged people.

<sup>31</sup> Explanatory Memorandum, WorkPlace Relations Amendment (Work Choices) Bill 2005, cited at <http://www.workplace.gov.au/NR/rdonlyres/D5BBE0D6-A1C9-4342-B97A-9FE1DFB8B7BA/0/wrawcbill2005em.pdf> (accessed 9 October 2006), p3

<sup>32</sup> [2006] HCA 52 (14 November 2006)

<sup>33</sup> Dr Briggs, Evidence, 28 July 2006, p35

- 3.26** As noted in this report, the Committee recognises that it will take several years for the evidence on the final impact of WorkChoices to reveal itself. However, based on the evidence available to date, the Committee believes that WorkChoices is unjust and will have a detrimental impact on our future society and economy.
- 3.27** Accordingly, the Committee believes that it is appropriate to call up-front in this report for the Federal Liberal/National Coalition Government to withdraw its unfair WorkChoices legislation.

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### **Recommendation 1**

That the NSW Government call on the Federal Liberal/National Coalition Government to repeal the *Workplace Relations (WorkChoices) Amendment Act 2005* immediately.

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## Chapter 4 Minimum entitlements and unfair dismissal law under WorkChoices

This chapter examines the minimum entitlements for wages and conditions prescribed under the new federal industrial relations system following the passage of the *Workplace Relations (WorkChoices) Amendment Act 2005*. Specifically it examines the Australian Fair Pay and Conditions Standard (AFPCS), and the minimum wages and conditions of employment prescribed under WorkChoices. The chapter also examines the changes to the unfair dismissal laws under WorkChoices.

### The Australian Fair Pay and Conditions Standard

- 4.1** As indicated in Chapter 2, the pay and conditions of workers in both the federal and state industrial relations systems in Australia have traditionally been regulated by a system of awards, set by both the federal and state industrial relations commissions. Awards have traditionally set minimum standards of employment such as minimum wages for full and part-time employees, penalty rates, overtime, apprentice rates and so forth.
- 4.2** However, under WorkChoices, the AFPCS now sets out the minimum wages and conditions of employment that apply to employees in the federal industrial relations system, which as noted previously, is expected to ‘capture’ approximately 85% of employees in Australia. The minimum conditions of employment are:
- a maximum of 38 ordinary hours of work per week
  - four weeks of paid annual leave (with an additional week for shift workers)
  - ten days of paid personal/carer’s leave (including sick leave and carer’s leave), with provision for an additional two days of unpaid carer’s leave per occasion and an additional two days of paid compassionate leave per occasion
  - 52 weeks of unpaid parental leave (including maternity, paternity and adoption leave).
- 4.3** Some entitlements under the Standard do not apply to casual employees. Generally, casuals have no entitlement to annual leave, personal/carer’s leave, compassionate leave or parental leave. However, unpaid parental leave may be available to casual employees if they are eligible. Casuals are also eligible for unpaid carer’s leave. In return for having no annual leave or personal leave entitlements, casuals are guaranteed a minimum casual loading percentage, which is currently set at 20%.<sup>34</sup>
- 4.4** On 22 September 2006, the Federal Government introduced the Workplace Relations Amendment Regulations 2006 (No. 3) to amend the Workplace Regulations 2006 in relation to the AFPCS. Specifically, amongst other measures, the amendment:

<sup>34</sup> Wikipedia, ‘Australian Fair Pay and Condition Standards’, cited at [http://en.wikipedia.org/wiki/Australian\\_Fair\\_Pay\\_and\\_Conditions\\_Standard](http://en.wikipedia.org/wiki/Australian_Fair_Pay_and_Conditions_Standard) (accessed 12 October 2006)

- sought to clarify that the AFPCS does not apply (for a five year transitional period) to personal or carer's leave entitlements that accrued before the Standard applied to an employee
- restricted the operation of terms in workplace agreements and contracts of employment that penalise employees in circumstances of absence from work due to illness, injury or emergency<sup>35</sup>
- sought to clarify that a term of an agreement that provides for the cashing out of annual leave, other than at the discretion of the employee, is prohibited content.<sup>36</sup>

**4.5** The AFPCS (as amended on 22 September 2006), together with preserved Australian Pay and Classification Scales (APCS) and wages set by the Australian Fair Pay Commission make up the five minimum conditions of employment under WorkChoices. Annual leave, personal/carer's leave and parental leave provisions in awards will no longer be allowable. This is because the Standard now sets these minimum conditions of employment.

**4.6** However, current award provisions about annual leave, personal/carer's leave and parental leave will be preserved where an employee's entitlement under a preserved term is more generous than the Standard. On 27 March 2006, all state awards and agreements binding on constitutional corporations became respectively Notional Agreements Preserving a State Award or Preserved State Agreements.

**4.7** That said, preserved award terms will not bind employers who become covered by the award after the commencement of WorkChoices. In addition, preserved award conditions will not form part of the Standard for agreement making.

**4.8** When negotiating individual or collective agreements, parties are obviously free to make provisions in respect of pay, annual leave, personal/carer's leave and parental leave over and above the minimum standards.

**4.9** The AFPCS applies to:

- employees of trading, financial and foreign corporations (constitutional corporations)
- employers in the Australian Capital Territory, the Northern Territory and Christmas and Cocos (Keeling) Islands
- employees of the Commonwealth, including its authorities
- employers who employ waterside, maritime and flight crew employees in connection with interstate, overseas, inter-territory or state-territory trade and commerce
- employers in Victoria.

**4.10** The Standard does not apply to employees covered by:

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<sup>35</sup> This followed reports that employees were being fined for being absent from work due to illness, discussed more in Chapter 5.

<sup>36</sup> Explanatory Statement, Select Legislative Instrument 2006 No. 247, cited at [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/7609CA644C277308CA2571EF00819F6E/\\$file/F2006L03154.doc](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/7609CA644C277308CA2571EF00819F6E/$file/F2006L03154.doc) (accessed 9 October 2006), p1

- the five-year transitional federal award system
- Australian Workplace Agreements (AWAs) or certified agreements approved prior to the commencement of WorkChoices
- preserved state agreements.<sup>37</sup>

## The minimum wage and wage scales under WorkChoices

### The Australian Pay and Classification Scales

- 4.11** As indicated in Chapter 2, one of the most fundamental changes to be brought about by WorkChoices is the change in the way in which wages are set and adjusted.
- 4.12** Historically, minimum wages and pay classifications have been prescribed through state and federal award determinations by the Australian Industrial Relations Commission (AIRC) or state tribunals.
- 4.13** However, under WorkChoices, all classification structures, along with casual loading rates and some piece rates have been removed from awards. New instruments have been created called APCS which contain wages and some classification structures to apply under the federal industrial relations system.
- 4.14** Responsibility for adjusting APCS now rests with the Australian Fair Pay Commission. Its role is to ‘set and adjust minimum and award classification wages, minimum wages for juniors, trainees, apprentices and employees with disabilities, minimum wages for piece workers, as well as casual loadings’. The Commission’s determinations are binding on all parties.<sup>38</sup>
- 4.15** The AFPC consists of a Chair who can be appointed for a period of up to five years on a full or part-time basis and four Commissioners who can be appointed for a period of up to four years on a part-time basis. The inaugural Chairman is Professor Ian Harper, Executive Director of the Centre for Business and Public Policy at the Melbourne Business School.<sup>39</sup>

<sup>37</sup> Australian Government, WorkChoices Fact Sheet 10, ‘WorkChoices and the Australian Fair Pay and Conditions Standard’, cited at <https://www.workchoices.gov.au/ourplan/publications/WorkChoicesandtheAustralianFairPayandConditionsStandard.htm> (accessed 5 October 2006)

<sup>38</sup> Australian Government, WorkChoices Fact Sheet 5, ‘WorkChoices and minimum rates of pay’, cited at [https://www.workchoices.gov.au/NR/rdonlyres/EF4A892C-66E6-4079-8294-8B4624CF2E1D/0/afpc\\_min\\_rates\\_of\\_pay.pdf](https://www.workchoices.gov.au/NR/rdonlyres/EF4A892C-66E6-4079-8294-8B4624CF2E1D/0/afpc_min_rates_of_pay.pdf) (accessed 5 October 2006)

<sup>39</sup> The Hon Kevin Andrews MP, ‘Professor Ian Harper Fair Pay Commission Chairman’, Media Release, 13 October 2005, cited at <http://mediacentre.dewr.gov.au/mediacentre/AllReleases/2005/October/ProfessorIanHarperFairPayCommissionChairman.htm> (accessed 10 October 2006)

### **The minimum wage**

- 4.16** As indicated, responsibility for adjusting the minimum wage now rests with the AFPC. In setting the minimum wage, the AFPC must consider:
- the capacity for the unemployed and low paid to obtain and remain in employment
  - employment and competitiveness across the country
  - providing a safety net for the low paid
  - providing minimum wages for junior employees, those in training and employees with a disability, to ensure such employees are competitive in the labour market.<sup>40</sup>
- 4.17** The Commission's consultation process for the 2006 wage review consisted of eighteen public consultation sessions held around the country during July and August. Thirteen of these were general consultations and five were targeted consultations. During this process, the Commission met with over 100 stakeholders across the country and received more than 180 submissions from government, interested organisations and individuals.<sup>41</sup>
- 4.18** In evidence before the Committee, Ms Pat Manser, Deputy Director General of the NSW Office of Industrial Relations, expressed concern about the transparency of the AFPC's determination of the minimum wage and, in particular, the consultation sessions conducted to assist this process. Ms Manser stated that the consultation sessions held by the AFPC for the purpose of 'seeking information, insight and impacts about the minimum wage' were not open to the public. Instead, 'people were asked to say that they would like to go, their backgrounds were checked and they were then invited to turn up'. Ms Manser also questioned the effectiveness of these consultation sessions given that, on some occasions, no commissioners were present and 'in at least one instance the process was conducted by a public relations company'.<sup>42</sup>
- 4.19** In its submission to the inquiry, the NSW Government also noted that the AFPC's process for setting the minimum wage is significantly different from the previous system administered by the AIRC. The NSW Government expressed the following concerns:
- there is no longer a requirement for the AFPC to consider fairness in its decisions
  - the timing of wage increases are now discretionary rather than annual
  - there is no requirement for the AFPC to give consideration to any increases in the rate of inflation that may adversely impact on minimum wages in real terms even if the decisions are three or four years apart
  - employee representatives no longer have legal standing in the decision making process, nor is there capacity for these parties to appeal against AFPC decisions

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<sup>40</sup> Australian Fair Pay Commission, 'About the Commission', cited at <http://www.fairpay.gov.au/fairpay/About> (accessed 17 October 2006)

<sup>41</sup> Australian Fair Pay Commission, 'Consultation', cited at <http://www.fairpay.gov.au/fairpay/Consultation> (accessed 17 October 2006)

<sup>42</sup> Ms Manser, Evidence, 15 September 2006, p15

- WorkChoices only permits, rather than requires, the setting of minimum wages for juniors, employees with a disability and employees for whom training arrangements apply. Consequently, in the event that the AFPC fails to set these wages, no minimum wage will apply to these workers.<sup>43</sup>

**4.20** Similarly, the NSW Nurses' Association observed in its submission that there is no guarantee that the national minimum wage will be adjusted to keep pace with inflation. As a result, the Association noted that the minimum wages may rise more slowly than under the previous system.<sup>44</sup>

**4.21** The Committee also notes the following evidence of Dr Marian Baird, Senior Lecturer in the Discipline of Work and Organisational Studies at the University of Sydney:

If we look at comparative studies, we know that the minimum wage as a proportion of average earnings in deregulated environments tends to drop. For example, in New Zealand the minimum wage is 47% of average earnings, in the United States it is 36%, whereas in Australia at the moment it is 60%. So I would anticipate that through the changes occurring we will see a lowering of the minimum wage relative to average wages.<sup>45</sup>

**4.22** Similarly, Dr Chris Briggs, Senior Lecturer at the Workplace Research Centre at the University of Sydney, commented:

Everywhere where you see the deregulation of labour standards, whether you look at Australian state jurisdictions, New Zealand or other English-speaking nations, you see growth of wage dispersion and inequality as standards and the bottom end of the labour market fall and I think that is what we will see under WorkChoices.<sup>46</sup>

**4.23** As noted in chapter 2, the Commission handed down its first decision on wages under the new legislation on 26 October 2006. The Commission announced an increase of \$27.36 per week in the standard Federal Minimum Wage and in all Pay Scales up to \$700 per week. According to the Commission, 'this covers just over one million Australian workers who rely on the Commission's decisions for adjustments in their wages.'<sup>47</sup>

**4.24** The Commission also awarded an increase of \$22.04 per week to all Pay Scales paying \$700 per week and above, or more than \$36,000 per year, representing another 220,000 workers, about 2% of the workforce.<sup>48</sup>

<sup>43</sup> Submission 37, NSW Government, pp17-18

<sup>44</sup> Submission 34, NSW Nurses' Association, p5

<sup>45</sup> Dr Baird, Evidence, 15 September 2006, pp25-26

<sup>46</sup> Dr Briggs, Evidence, 28 July 2006, p35

<sup>47</sup> Australian Fair Pay Commission, Media Release, 'Federal Minimum Wage Decision', 26 October 2006, accessed at [www.fairpay.gov.au/fairpay](http://www.fairpay.gov.au/fairpay) on 27 October 2006

<sup>48</sup> Australian Fair Pay Commission, Media Release, 'Federal Minimum Wage Decision', 26 October 2006, accessed at [www.fairpay.gov.au/fairpay](http://www.fairpay.gov.au/fairpay) on 27 October 2006

### **Wage scales**

- 4.25** Traditionally, awards have set different wage levels for a number of different job classifications in order to take into account the range of skill levels. Consequently, across all awards there were tens of thousands of wage classifications and pay rates.
- 4.26** However, under WorkChoices, the Federal Government has established an Award Review Taskforce to analyse and report on the rationalisation of award wage and classification structures in all federal awards, along with state awards that will be moved into the federal system.
- 4.27** The NSW Government raised the following concerns with regard to the rationalisation of award wage and classification structures:
- rationalisation has the potential to result in the creation of different types of awards and as a result, in the longer term the system may become so complicated that it becomes inaccessible and unusable
  - rationalisation may result in the 'levelling up' of wages and working conditions, leading to a decrease in the competitiveness of Australian industry, with negative impacts on employment
  - rationalisation of consent awards into general industry awards may disrupt existing workplace arrangements.<sup>49</sup>

### **Minimum conditions of employment under WorkChoices**

- 4.28** As indicated, the AFPCS now sets out the minimum conditions of employment that apply to employees in the federal industrial relations system. However, various concerns were raised during the inquiry about the maintenance of these standards under WorkChoices.

### **Working hours**

- 4.29** As noted, the AFPCS prescribes that a person cannot be required or requested to work more than 38 ordinary hours per week, plus 'reasonable' additional hours. However, an employer and employee may agree in writing that the employee's hours of work are to be averaged over a period of no more than 12 months (e.g. 152 hours over 4 weeks). That agreement must be through an award, workplace agreement, AWA or by other means (e.g. contract of employment).
- 4.30** A majority of federal awards already include a 38 hour week. If a pre-WorkChoices award provided for 38 ordinary hours of work or less per week, that maximum number of hours will continue to apply. Current awards which provide for more than 38 ordinary hours of work

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<sup>49</sup> Submission 37, NSW Government, pp101-103

per week will be reviewed by the Award Review Taskforce and varied by the AIRC to comply with the AFPCS. This must occur within three years of the commencement of WorkChoices.<sup>50</sup>

- 4.31** In evidence, Ms Manser pointed out that the term ‘reasonable additional hours’ is not defined in the WorkChoices legislation, with the result that a definition will have to be determined at some point in the courts. In the meantime, however, Ms Manser argued that employees may feel pressured into working additional hours that may be beyond what is ‘reasonable’. She observed:

Waiting for court cases to determine what reasonable hours actually is will be a very tricky thing for people to manage because ‘reasonable’ is one of those words that courts have defined over the years in many different ways. They normally mean what you or I, ordinary laypeople would think of as reasonable, but what that means in a particular workplace is going to be up to the courts to decide.<sup>51</sup>

- 4.32** Ms Manser further noted that while there are practices within industries which have been agreed upon between employers and employees as to what constitutes reasonable working hours, under WorkChoices there is now nothing to prevent employers from changing those hours or taking steps such as reducing rest breaks.<sup>52</sup>
- 4.33** In her evidence to the Committee, Ms Alison Peters, Deputy Assistant Secretary of Unions NSW, noted that while the state occupational health and safety laws should act as a brake on employees working unreasonably long hours, workers may be reluctant to raise such issues if they feel they are under pressure to keep their job.<sup>53</sup>
- 4.34** Ms Peters also raised concern about the possible unpredictability of working hours affecting the balance between work and family life. Under WorkChoices and the 38-hour averaged week, workers face uncertainty as to their weekly working hours, which creates difficulties for those with family responsibilities, particularly families with young children or children in childcare.<sup>54</sup>
- 4.35** A further concern raised with respect to the unpredictability of working hours is the effect on people’s ability to volunteer; if people trade hours or conditions for more pay, charitable organisations will lose volunteer hours, at a time when volunteers will be more required than ever.<sup>55</sup> The Committee heard that if people are not able to participate in their community it will lead to disconnection with others and a loss of the sense of trust and co-operation and sense of belonging to a community.<sup>56</sup> This is discussed further in Chapter 6.

<sup>50</sup> Australian Government, WorkChoices Fact Sheet 11, ‘WorkChoices and ordinary hours’, cited at <https://www.workchoices.gov.au/ourplan/publications/WorkChoicesandordinaryhours.htm> (accessed 5 October 2006)

<sup>51</sup> Ms Manser, Evidence, 19 June 2006, p6

<sup>52</sup> Ms Manser, Evidence, 19 June 2006, p6

<sup>53</sup> Ms Peters, Evidence, 19 June 2006, p26

<sup>54</sup> Ms Peters, Evidence, 19 June 2006, p28

<sup>55</sup> Ms Burrell, Acting Director of NCOSS, Evidence, 19 June 2006, p53

<sup>56</sup> Ms Maree McDermott, Manager, South Penrith Youth and Neighbourhood Services, Evidence, 17 July 2006, p17

**4.36** Finally, in evidence, Ms Annie Owens, NSW Branch Secretary of the Liquor, Hospitality and Miscellaneous Union, raised the concern that WorkChoices leaves it open to employers to exploit workers by employing them for 37.5 hours per week, making them technically part-timers. Under this scenario, the employees are not owed 52 weeks employment at 38-hours a week on average, giving the employer a great deal of flexibility to reduce staff during downtimes.<sup>57</sup>

### Penalty rates

**4.37** As indicated above, penalty rates are not part of the minimum conditions of employment stipulated in the AFPCS.

**4.38** The Construction, Forestry, Mining and Energy Union (CFMEU) provided a case study illustrating the potential impact that reduced penalty rates will have on the annual salary of a carpenter. The following award provisions currently contribute to a carpenter's annual salary: redundancy pay; inclement weather allowance; rostered days off; annual leave loading; public holiday pay; and fares and travel allowance. If these provisions are removed by an AWA, and the current hourly rate of \$17.13 were reduced to the statutory minimum of \$12.75 per hour, it would have the following effect on a carpenter's annual salary:

- award based carpenter's annual salary: \$42,764.16
- AWA based carpenter's annual salary: \$22,919.76
- annual difference: \$19,844.40
- percentage annual wage cut: 46.4%.<sup>58</sup>

**4.39** The Committee notes that a case concerning penalty rates recently highlighted in the Australian media was that of workers at Spotlight, Australia's largest chain of fabric, craft and home interiors superstores. In May this year, it emerged that workers at Spotlight's Coffs Harbour Store were offered an AWA that removed penalty rates, overtime, paid rest breaks, breaks between shifts and maximum and minimum shift lengths. In return, the AWA included an increased hourly rate of pay of 2 cents. The net effect was estimated at a \$91 drop in wages for each worker doing Thursday evening and weekend work each week.<sup>59</sup>

**4.40** In its submission, the Shop, Distributive and Allied Employees Association (SDA) broke down this \$91 drop in wages as follows.

<sup>57</sup> Ms Owens, Evidence, 19 June 2006, pp40-41

<sup>58</sup> Submission 12, CFMEU, p12

<sup>59</sup> Sydney Morning Herald, 'Finally, the monster is unleashed', 2 June 2006, cited at <http://www.smh.com.au/news/opinion/finally-the-monster-is-unleashed/2006/06/01/1148956477155.html?page=fullpage> (accessed 5 October 2006)



**Table 4.1: Impact of the Spotlight AWA on a full-time adult Spotlight employee**

Hours	NSW Award	Spotlight AWA	Loss
Thursday penalty rate (6pm – 9pm @ 125%)	(\$14.28 x 125%) x 3 hrs (6pm – 9pm) = \$53.55	\$14.30 x 38hrs = \$543.40	
Saturday penalty rate (125%)	(\$14.28 x 125%) x 7.6 hrs = \$135.66		
Sunday penalty rate (150%)	(14.28 x 150%) x 7.6 hrs = \$162.73		
Other hours	\$14.28 x 19.8 hrs = \$282.74		
<b>Total</b>	<b>\$634.75</b>	<b>\$543.40</b>	<b>-\$91.35</b>

Source: Submission 31, SDA, p41

- 4.41** Mr Gerard Dwyer, Branch Secretary-Treasurer of the SDA, also highlighted the impact of Spotlight AWA on part-time employees. He reported that the Spotlight AWAs simply state that employees will normally work less than an average of 38 hours per week over a six week cycle, but that at times they may be required to work as little as three hours work over a six week cycle. Mr Dwyer continued:

An award employee who would be entitled to 12 hours per week, which is the New South Wales Shop Employees State Award part-time minimum, would earn an average weekly wage of \$171.36. If you look at the Spotlight AWA, on the construction I have just taken you to, they would actually be getting \$164.21 pay cut per week if they finished up with their three hour minimum engagement over the six week cycle, which is completely legal and permissible under the Spotlight AWA.<sup>60</sup>

- 4.42** The Committee spoke with a Spotlight employee, Ms Anna Szwec, during its public hearing in Wollongong. Her case study is set out below.

#### Case study: Anna Szwec

Anna is a wife and mother from Fairy Meadow, near Wollongong on the South Coast of NSW. She is the primary carer for her husband, who is on a disability support pension, and two sons who also have disabilities. Anna has been working part-time at Wollongong Spotlight for the past three years.

Anna is covered by the Shop Employees (State) Award, which will be terminated on 27 March 2009, after which she will be covered by WorkChoices. Prior to the legislation Anna would have been entitled to a \$20 a week wage increase as a result of a recent state wage case. However now, as a result of WorkChoices, she is not entitled to receive this.

Since the introduction of WorkChoices, Spotlight has hired new employees on AWAs. These new agreements, as opposed to the state award, do not include rights to penalties, allowances, loadings or minimum rostering conditions, and these have been compensated for by an additional two cents an hour. By taking away these conditions, Anna has calculated that someone on the Spotlight AWA, working the same hours as her would receive on average \$3,639 per year less (including superannuation, sick leave, annual leave and leave loading). This is equal to a 16.7% pay cut for new employees on the Spotlight AWA.

This means that in Anna's workplace, there are some workers being paid more than others for doing exactly the same work. Anna fears that workers on the AWA will be given all the weekend shifts, and shifts that would otherwise incur penalty rates, at the expense of workers on the award. As the workers on AWAs are not entitled to penalties and allowances, they will be significantly cheaper for Spotlight to roster on.

<sup>60</sup> Mr Dwyer, Evidence, 20 June 2006, p35

Anna works shifts that give her various allowances, penalties and entitlements because she needs the extra money to support her family. She told the Committee that if she loses this money, her family's already basic standard of living will take a further dive. She stated to us, 'I'm not a skilled ... engineer whose skills are in high demand ... I am an ordinary part-time shop assistant who earns less than \$23,000 per year with a family to support.'<sup>61</sup>

**4.43** The Committee notes the following evidence from Ms Szwec:

The Spotlight AWA strips so called "protected award conditions" of employment. Since the commencement of the legislation, Spotlight has engaged new employees at my workplace and others across New South Wales on Australian Workplace Agreements, which strip away all these award rights to penalties, loadings, allowances and decent minimum rostering conditions in return for little or no compensation. Where compensation has been provided it has been a miserable extra 2¢ per hour. The Federal Government has described many of these conditions as "protected award conditions". How are these conditions protected if new employees may be required to sign an AWA excluding most of these conditions?<sup>62</sup>

**4.44** Although not citing it in detail here, the Committee also notes that in its supplementary submission, the SDA provided a detailed study of the impact of the Spotlight AWA on the wages of different employees at Spotlight, taking into account their different employment patterns.<sup>63</sup>

### **Permanent employment provisions**

**4.45** During the inquiry, the Committee heard that in many industries, such as nursing and building and construction, awards include a provision allowing casual employees the right to a permanent position after a certain period of time. However, under the WorkChoices legislation, such provisions cannot be included in collective agreements or individual contracts.<sup>64</sup>

**4.46** The loss of this provision was of particular concern to several witnesses. Ms Rita Mallia, Senior Legal Officer with the Construction and General Division, NSW Branch of the CFMEU, observed that many employees under WorkChoices now face being continually in casual employment:

... under this legislation someone could be a casual forever. That impacts on their capacity to get mortgages, on their ability to plan their day-to-day life and on their security and certainty of employment. It does leave a lot of people, particularly those in lower paid jobs, in a precarious position. This legislation is quite insidious in the way that it impacts on the most vulnerable.<sup>65</sup>

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<sup>61</sup> Ms Szwec, Evidence, 27 July 2006, pp25-27

<sup>62</sup> Ms Szwec, Evidence, 27 July 2006, p26

<sup>63</sup> Submission 31a, Shop, Distributive and Allied Employees' Association, Annexure A

<sup>64</sup> Ms Mallia, Evidence, 28 July 2006, p3

<sup>65</sup> Ms Mallia, Evidence, 28 July 2006, p3

- 4.47 Mr Michael Rawling, Research Assistant and PhD student in the Law School at the University of Sydney, also noted the findings of a recent case in the NSW Industrial Relations Commission that much casual employment is not genuine, but rather involves workers performing regular, ongoing work on a casual basis.<sup>66</sup>
- 4.48 The Committee also heard that the issue of casual employment is particularly relevant to women, who make up the majority of casual and low-paid workers in Australia. Ms Mimi Zou, National Adviser on Women and Employment with the National Council of Women Australia, noted that research shows that casual work has a negative effect on gender equality, as it adversely impacts on the development of skills, provides workers with no long-term security to plan, and contributes to a wider degrading of wages and conditions.<sup>67</sup>
- 4.49 Mr Adrian Catt of the community group A Future for Our Kids also expressed concern that WorkChoices may make it possible for permanent workforces in some industries to be replaced by overseas guest workers, who are themselves vulnerable to exploitation. He suggested that this is likely to lead to an increase in racism, with unemployed workers blaming the overseas worker for taking their job, in ignorance of the real economic reasons for this occurring.<sup>68</sup>

### Industrial cases of national importance

- 4.50 The Committee notes that during her evidence, Ms Manser indicated that the NSW Government was looking at giving the NSW Industrial Relations Commission the capacity to sit with their colleagues in other states and territories in order to hear industrial cases of 'national importance', such as wage cases or test cases such as the pay equity and casual work test cases. As it stood, the NSW Industrial Relations Commission had the capacity to sit jointly with Federal Commissioners, but not with other state and territory commissioners.<sup>69</sup>
- 4.51 In accordance with this evidence, on 24 October, the Government introduced the Industrial Relations Further Amendment Bill 2006 into the Legislative Assembly. Amongst other things, the Bill amends the *Industrial Relations Act 1996* to enable the Industrial Relations Commission of New South Wales to exercise its functions in co-operation with the industrial relations tribunals of other States.<sup>70</sup>
- 4.52 The Bill passed Parliament on 15 November 2006. Clause 2 of the Bill provided for its commencement on a day or days to be appointed by proclamation. Other aspects of the Bill are discussed in Chapter 11.

<sup>66</sup> Mr Rawling, Evidence, 20 June 2006, p40

<sup>67</sup> Ms Zou, Evidence, 18 July 2006, p52

<sup>68</sup> Mr Catt, Evidence, 17 July 2006, p30

<sup>69</sup> Ms Manser, Evidence, 15 September 2006, p13

<sup>70</sup> Explanatory memorandum, Industrial Relations Further Amendment Bill 2006, cited at <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/E7C41F2B26B88E31CA257211001B7D7F?Open&shownotes> (accessed 15 November 2006)

## Unfair dismissal under WorkChoices

### The changes to the unfair dismissal laws

- 4.53** Under WorkChoices, employers with 100 employees or less will be exempt from unfair dismissal laws.
- 4.54** Employees may only lodge an unfair dismissal claim with the AIRC if their employer has more than 100 employees, they have been employed by that employer for six months or more and are:
- employed by a constitutional corporation
  - employed in Victoria or a territory
  - a Commonwealth employee, or
  - employed in interstate or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer.
- 4.55** Employees who are excluded from federal unfair dismissal laws include:
- seasonal workers
  - employees engaged under a contract of employment for a specified period or a specified task
  - employees on probation
  - casual employees engaged for a short period
  - trainees
  - employees earning \$98,200 or above.
- 4.56** Employees who are dismissed for a 'genuine operational reason' are also not allowed to pursue an unfair dismissal claim. Genuine operational reasons include economic, technological, structural or similar matters relating to the employer's business.<sup>71</sup>
- 4.57** During the inquiry, a number of concerns were expressed about the changes to the unfair dismissal laws. These are examined below.

### The loss of protection for employees

- 4.58** The Committee notes that a significant proportion of the workforce in NSW and nationally has lost access to protection from unfair dismissal under the WorkChoices changes.

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<sup>71</sup> Australian Government, WorkChoices Fact Sheet 9, 'WorkChoices and Termination of Employment', cited at <https://www.workchoices.gov.au/ourplan/publications/WorkChoicesandterminationofemployment.htm> (accessed 5 October 2006)

4.59 In his evidence to the Committee, Mr Rawling highlighted the arbitrary nature of employers' power to dismiss employees under the new unfair dismissal laws:

It is our submission that these reductions in unfair dismissal rights means that the threat of dismissal is now an ever-present reality for many workers in New South Wales workplaces. Many workers in New South Wales will now work in the shadow of job insecurity.<sup>72</sup>

4.60 The Committee notes that the Federal Government's principal reason for changing the unfair dismissal laws was a concern that they discouraged employers from taking on more staff, for fear of employees bringing frivolous or unfounded proceedings.

4.61 However, in evidence, Ms Patricia McDonough, a solicitor with the Inner City Legal Centre, reported that eight out of 10 people who previously brought unfair dismissal proceedings had a genuine case.<sup>73</sup>

4.62 Mr Mark MacDiarmid, Principal Solicitor with the Elizabeth Evatt Community Legal Centre, noted that some abuse of the system is a feature of any jurisdiction where ordinary people can access justice, ranging from Commissions to the Supreme Court, but commented:

[T]he mere fact that the abuse of process is available is not a sound reason to withdraw a remedy from someone. There are procedural issues that can be put in place to penalise people who abuse process.<sup>74</sup>

### **Alternative mechanisms for resolving employment-related matters**

4.63 Concerns were also expressed during the inquiry that the removal of the unfair dismissal remedy makes it more complicated and expensive for both employers and employees to resolve employment-related issues.

4.64 For example, Ms Mallia argued that the changes to remedies available to parties in dispute will result in complicated, legalistic dispute resolution which 'will not help the economy of workers certainly, and probably not employers either'.<sup>75</sup>

4.65 Ms Linda Tucker, a solicitor with the Kingsford Legal Centre, noted that dismissed employees are now more likely to pursue actions through various alternative arenas such as the Anti-Discrimination Board, the Human Rights and Equal Opportunity Commission, the Chief Industrial Magistrate Court, local courts and the Australian Tax Office. She commented:

There will be not only a diversification of our practice in relation to going to these different jurisdictions, but [you will have] people who do not deal with these matters from day to day as the Commission did, so there is a burden also on these other services, that is, the Anti-Discrimination Board, the Chief Industrial Magistrate and the Local Court. So you have that loss of expertise and the loss of the convenience of

<sup>72</sup> Mr Rawling, Evidence, 20 June 2006, p40

<sup>73</sup> Ms McDonough, Evidence, 20 June 2006, p6

<sup>74</sup> Mr MacDiarmid, Evidence, 20 June 2006, p6

<sup>75</sup> Ms Mallia, Evidence, 28 July 2006, p4

having them all in the one jurisdiction, where you could roll it all up into one settlement. So we might not have so many unfair dismissals, but we are having to run all over the place with a whole lot of other matters.<sup>76</sup>

- 4.66** Similarly, Mr MacDiarmid argued that where previously numerous matters could be settled in one final, legally binding deed, now it will require expensive legal action in different forums.<sup>77</sup>
- 4.67** In this regard, Ms McDonough advocated that additional resources be invested in the Anti-Discrimination Board and the courts – notably the Chief Industrial Magistrate's Court – to deal with increasing unfair dismissal claims.<sup>78</sup> This issue is addressed in Recommendation 1.

### **Access to alternative remedies for the disadvantaged**

- 4.68** The Committee also heard from Mr MacDiarmid that many workers will be disadvantaged in their access to advice about alternative remedies following the changes to the unfair dismissal laws. Mr MacDiarmid stated:

We have many clients who struggle with literacy and other issues. I cannot say to a client, "Go off and complain to the Australian Taxation Office" or "Complain to WorkCover" or "Complain to the local council about the guy recycling cooking oil."<sup>79</sup>

- 4.69** Mr MacDiarmid also commented that many clients of his legal centre do not know whether they are covered by the WorkChoices regime, and that in many cases it is problematic for the legal experts to determine that question, let alone for a worker who does not have the necessary resources or skills.<sup>80</sup>
- 4.70** Employees in rural and regional centres face further difficulties in accessing advice about possible remedies to perceived unfair dismissal. In this regard, Mr MacDiarmid noted that the Elizabeth Evatt Community Legal Centre, based in Katoomba, provides the only free legal service to people with employment difficulties between Richmond and Dubbo, and is staffed by only two part-time solicitors.<sup>81</sup>

## **Conclusion**

- 4.71** The Committee is deeply concerned about the erosion of minimum standards for wages and conditions under the new federal industrial relations system following the passage of the WorkChoices legislation. The protections provided by the award system have been largely removed and replaced by the AFPCS and APCS. These protections are simply not commensurate with those that previously existed for employees.

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<sup>76</sup> Ms Tucker, Evidence, 20 June 2006, p2

<sup>77</sup> Mr MacDiarmid, Evidence, 20 June 2006, p7

<sup>78</sup> Ms McDonough, Evidence, 20 June 2006, p9

<sup>79</sup> Mr MacDiarmid, Evidence, 20 June 2006, p3

<sup>80</sup> Mr MacDiarmid, Evidence, 20 June 2006, p12

<sup>81</sup> Mr MacDiarmid, Evidence, 20 June 2006, p1

**4.72** The Committee shares the apprehension expressed by many of the witnesses and parties making submissions to this inquiry that the WorkChoices legislation simply does not put an adequate floor under wages and conditions of employment for employees in the federal industrial relations system in NSW. The Committee notes the following comment of Dr John Buchanan, Acting Director of the Workplace Research Centre at the University of Sydney:

At the end of the day, the key thing with WorkChoices is the five statutory minima which drops to three for casuals: that is the single most important part of that Act that completely changes the reference point around which all labour market standards will evolve in this country.<sup>82</sup>

**4.73** The Committee shares the opinion of some parties to the inquiry that the current minimum conditions of employment set out in the AFPCS will become de-facto standard for the vast majority of employees. As part of this process, most employees will lose previously protected entitlements in the bargaining process. This issue is examined further in the following chapter.

**4.74** Moreover, the Committee finds it unacceptable that an employee with a valid cause of action will no longer have affordable access to unfair dismissal laws. The removal of the unfair dismissal remedy tilts power towards the employer, giving them an arbitrary right of dismissal, and is likely to result in job insecurity and an inequitable working environment for employees.

**4.75** The Committee believes that the NSW Government should investigate whether it should provide additional resources to the Anti-Discrimination Board and the courts – notably the Chief Industrial Magistrate’s Court – to deal with unfair dismissal claims following the changes to the federal unfair dismissal arrangements.

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## Recommendation 2

That the NSW Government, in consultation with other states and territories, investigate whether it should provide additional resources to the Anti-Discrimination Board and the courts – notably the Chief Industrial Magistrate’s Court – to deal with unfair dismissal claims.

**4.76** For those workers who continue to be able to access unfair dismissal laws, the Federal Government has introduced measures to decrease the transparency of proceedings, thereby individualising cases and disempowering employees further. Whereas previously, unfair dismissal proceedings provided a simple means of bringing employers and employees to the table for conciliation by the Industrial Relations Commission, that is no longer the case.

**4.77** In making the above recommendation, the Committee believes it is fundamentally unjust that the NSW Government should have to provide further investment of time and money to support the Federal Government’s industrial relations changes. The Committee acknowledges that other States and Territories are also affected by these changes. As noted in Recommendation 1, the Committee calls on the Commonwealth Government to repeal the WorkChoices legislation. Nevertheless, the Committee further recommends in Recommendation 2 that certain immediate protections are provided for New South Wales employees and employers.

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<sup>82</sup> Dr Buchanan, Evidence, 28 July 2006, p41

## Chapter 5 Individual and collective bargaining under WorkChoices

This chapter examines the impact of the *Workplace Relations (WorkChoices) Amendment Act 2005* on individual and collective bargaining under the federal industrial relations system. It initially considers the restrictions on the content of workplace agreements and the abolition of the 'no disadvantage test' under WorkChoices. Subsequently, it examines the impact of WorkChoices on the respective bargaining position of employers and employees, including the lack of compulsion on employers to bargain collectively and the incidence of so called 'take it or leave it' Australian Workplace Agreements (AWAs). Finally it examines the compliance and enforcement provisions in WorkChoices and the colloquially named 'race to the bottom' effect.

### Restrictions on the content of workplace agreements

- 5.1 As indicated in Chapters 2 and 4, the Australian Fair Pay and Conditions Standard (AFPCS) now sets out the minimum wages and conditions of employment that apply to employees in the federal WorkChoices system. This standard applies to new federal workplace agreements (including AWAs) made after the commencement of WorkChoices. By law, no workplace agreement can stipulate conditions that are less than those prescribed in the Standard.
- 5.2 However, WorkChoices also prohibits certain matters from being included in workplace agreements. They are as follows:
- deductions from an employee's pay or wages for trade union membership subscriptions
  - restrictions on the offering, negotiation or entering of an AWA
  - restrictions on the use of independent contractors or labour-hire arrangements
  - provisions allowing for industrial action during the term of an agreement
  - provisions for the forgoing of annual leave entitlements other than in accordance with the *Workplace Relations Act 1996*
  - paid leave to attend trade union training or union meetings
  - provisions for paying bargaining fees to trade unions
  - terms providing unions with information about employees bound by the agreement
  - terms for the renegotiation of a workplace agreement
  - provisions that any future agreement must be a union collective agreement
  - terms mandating union involvement in dispute resolution
  - provisions guaranteeing union right of entry
  - provisions encouraging or discouraging union membership
  - terms prohibiting or restricting disclosure of details about a workplace agreement



- arrangements providing a remedy for unfair dismissal
- objectionable provisions as defined in the *Workplace Relations Act 1996*
- terms that are discriminatory against employees for reasons including race, colour, sex, sexual preference, age, disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- matters that do not pertain to the employment relationship.

- 5.3** All workplace agreements are now lodged with the Office of the Employment Advocate (OEA), rather than the Australian Industrial Relations Commission (AIRC). A ‘streamlined’ process means that agreements can start operating from the point of lodgement.
- 5.4** An agreement term that contains prohibited content is void and cannot be enforced if it is included in a workplace agreement. The OEA can remove prohibited content from agreements.
- 5.5** Employers face penalties of up to \$33,000 for lodging an agreement that contains prohibited content, unless they get advice from the OEA that the content is not prohibited before lodging the agreement.<sup>83</sup>

### **The abolition of the ‘no disadvantage test’**

- 5.6** As indicated in Chapter 2, prior to the introduction of WorkChoices workplace agreements and AWAs had to pass the ‘no disadvantage test’. This meant that, on balance, an AWA or agreement could not result in a reduction in the overall terms and conditions of employment of the employee concerned, compared with an applicable federal or state award.
- 5.7** However, under WorkChoices, the ‘no disadvantage test’ has been abolished. It is now possible for incorporated employers to make agreements, either individual or collective, that significantly reduce or eliminate existing award or statutory entitlements that previously applied. As indicated in the previous chapter, the only protection afforded to employees is that workplace agreements cannot legally offer less than the five basic entitlements enshrined in the AFPCS, or in separate standards relating to preserved award conditions.
- 5.8** The Committee notes that the removal of the ‘no disadvantage test’ provoked significant comment during the inquiry.
- 5.9** Ms Michelle Burrell, Acting Director of NCOSS, argued that many low income workers relied on the award protections, and that they will become significantly more vulnerable without them.<sup>84</sup> Commenting on the change to the ‘no disadvantage test’, Ms Burrell observed:

<sup>83</sup> Australian Government, WorkChoices Fact Sheet33, WorkChoices and the content of agreements’, cited at <https://www.workchoices.gov.au/ourplan/publications/WorkChoicesandthecontentofagreements.htm> (accessed 5 October 2006)

<sup>84</sup> Ms Burrell, Evidence, 19 June 2006, p45

We consider that to be a step backwards. In terms of fairness and equity, it seems odd that you should be bargaining for a position where you are worse off than you were before. We cannot understand why that should be enshrined in law; that it is okay to be worse off.<sup>85</sup>

- 5.10** Similarly, Professor Ron McCallum, Dean of the Law School at the University of Sydney, stated that in his view, the protections now offered under the WorkChoices legislation are minimal and insufficient to protect workers. He commented:

Labour law must protect the employees, particularly employees who are vulnerable ... no-one wants a system where you cannot shed labour, where you cannot go into new innovation. On the other hand, no-one wants a system where people are vulnerable, where people cannot raise families in security. My concern about WorkChoices is that in the zeal in which it has been enacted it has gone too far. My concern is that its effects will be felt, not on persons like myself so much but on persons at the lower end of the market.<sup>86</sup>

- 5.11** Both the NSW Government and Unions NSW cited in their submissions information from a Senate Employment, Workplace Relations and Education Committee budget estimates hearing of 29 May 2006. At the hearing, Mr Peter McIlwain, head of the OEA, indicated that in the first month of operation of WorkChoices<sup>87</sup>, 6,263 AWAs were lodged with the OEA. A sample of 4 per cent, or 250, of those 6,263 AWAs revealed that 100% of them had removed at least one protected award condition, 64% of them had removed annual leave loadings, 63% had not included penalty rates, 52% had cut penalty rates, 40% had dropped gazetted public holidays and 16% had removed all award conditions except the Government's five minimum conditions.<sup>88</sup>
- 5.12** The Committee notes that when asked to update these figures at the Senate Employment, Workplace Relations and Education Committee supplementary budget estimates hearing on 2 November 2006, Mr McIlwain indicated that OEA was no longer conducting research into the provisions of AWAs, despite saying in May that OEA would continue to gather the figures.<sup>89</sup>

## **The bargaining position of employers under WorkChoices**

- 5.13** Parties to the inquiry argued that WorkChoices has fundamentally altered the bargaining position of employers relative to their employees.

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<sup>85</sup> Ms Burrell, Evidence, 19 June 2006, pp44-45

<sup>86</sup> Professor McCallum, Evidence, 20 June 2006, p43

<sup>87</sup> The four days of March 2006 from 26 March 2006 and all April 2006

<sup>88</sup> Senate Employment, Workplace Relations and Education Legislation Committee, Estimates Hansard, 29<sup>th</sup> May 2006, pp118, 138-139, cited in submission 35, Unions NSW, p7 and in submission 37, NSW Government, p11. See <http://www.aph.gov.au/hansard/senate/committee/S9350.pdf> (accessed 8 November 2006)

<sup>89</sup> Senate Employment, Workplace Relations and Education Legislation Committee, Estimates Hansard, 2 November 2006, pp5-10, cited at <http://www.aph.gov.au/hansard/senate/committee/S9779.pdf> (accessed 10 November 2006)

**5.14** In his evidence, Professor Ron McCallum, Dean of the Law School at the University of Sydney, argued that WorkChoices gives employers too many options to lower the employment conditions of employees, while at the same time discouraging employers from developing trusting and productive relationships in the workplace. As stated by Professor McCallum:

... I am concerned that WorkChoices gives employers so many options to operate in the short term that they will be less disposed to develop high trust, individualised workplaces, which are probably the workplaces, in large part, of this current century.<sup>90</sup>

**5.15** Similarly, in her evidence to the Committee, Ms Pat Manser, Deputy Director General of the NSW Office of Industrial Relations, noted that:

... not all employers will be exploitative of these arrangements, but I have got enough experience to have seen many who will.<sup>91</sup>

**5.16** Unions NSW also addressed the bargaining position of employers and employees in its submission. Prior to the enactment of the WorkChoices legislation, Unions NSW commissioned Dr Don Edgar, former Director of the Australian Institute of Family Studies, to prepare a paper on WorkChoices entitled 'Family Impact Statement on WorkChoices'. Based on Dr Edgar's research, Unions NSW offered the following comment on the relationship between employers and their employees under WorkChoices:

Dr Edgar considers that the WorkChoices legislation promotes an environment of cost cutting by employers by removing awards as minimum standards and replacing them with the AFPCS. He also argues that bargaining power is tilted in favour of employers by removing unfair dismissal protection for workers in workplaces with less than one hundred employees and also those employees in larger workplaces where their dismissal is due to "operational reasons". The emphasis is on efficiency and greater flexibility for those in control of job opportunities and working conditions. His analysis notes that there is nothing in the legislation that encourages a workplace culture that respects the ongoing and changing family responsibilities that all workers have.<sup>92</sup>

**5.17** Unions NSW subsequently argued that WorkChoices has tipped the balance of power between individual workers and their employers in favour of employers by:

- restricting the ability of unions to represent their members
- restricting the ability of employees to take industrial action
- removing the unfair dismissal protection for employees in workplaces with less than 100 employees
- allowing AWAs to override collective agreements, and to be offered on a 'take it or leave it' basis

<sup>90</sup> Professor McCallum, Evidence, 20 June 2006, p45

<sup>91</sup> Ms Manser, Evidence, 19 June 2006, p9

<sup>92</sup> Submission 35, Unions NSW, p10

- not compelling employers to enter into negotiations in good faith where employees wish to bargain collectively.<sup>93</sup>

**5.18** The Committee examines the lack of compulsion on employers to bargain collectively and the offering of 'take it or leave it' AWAs below.

### **The lack of compulsion on employers to bargain collectively**

**5.19** WorkChoices allows six types of formal agreements, of which only four involve collective agreement making:

- employee collective agreements negotiated between a group of employees in a workplace and their employer
- union collective agreements negotiated between employers and unions that represent employees in the workplace, provided the employer has agreed to bargain with the union
- union greenfields agreements negotiated for new businesses, new projects and new undertaking which do not have employees
- multiple-purpose agreements where a number of businesses carrying on the same type of business wish to offer their employees the same conditions (typically used in franchise operations).<sup>94</sup>

**5.20** During the inquiry, significant concerns were expressed that the WorkChoices legislation does not compel employers to bargain collectively with their employees if the employees wish this to occur. The only way employees can collectively bargain under WorkChoices is if the employer agrees to do so.

**5.21** The Committee notes the article entitled 'WorkChoices: Myth-making at Work', published in the December 2005 edition of the *Journal of Australian Political Economy* deals in detail with this issue. Professor Russell Lansbury, Professor of Industrial Relations at the University of Sydney, forwarded this article to the Committee in his submission. In the article, the authors suggested that employers who wish to, can readily frustrate the preference of their employees for collective representation and the development of a collective agreement (as opposed to individual contracts). In the absence of legal processes to direct employers to respect the wishes of their employees to bargain collectively, there is little or nothing that employees without bargaining power can do.<sup>95</sup>

**5.22** Professor McCallum also observed that the absence of provisions compelling employers to collectively bargain differs from the practice in the United States, Canada, the United Kingdom and New Zealand, where employers have an obligation to negotiate collectively if their employees wish to do so. He stated that, in this respect, he considers that the

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<sup>93</sup> Submission 35, Unions NSW, pp18-19

<sup>94</sup> NSW Office of Industrial Relations, Response to questions on notice from 15 September 2006, p2

<sup>95</sup> B.Ellem, M.Baird, R.Cooper and R.Lansbury 'WorkChoices: Myth-making at Work', *Journal of Australian Political Economy*, No 56, December 2005, p18, cited in Submission 45, Professor Lansbury

WorkChoices legislation breaches the following standards of the United Nations International Labour Organisation:

- Convention 87, Freedom of Association and Protection of the Right to Organise
- Convention 98, Right to Collective Bargaining
- Article 2(a) of the Declaration on Fundamental Principles and Rights at Work.<sup>96</sup>

**5.23** The NSW Office of Industrial Relations also argued that in addition to Conventions 87 and 98, WorkChoices breaches the 1990 International Labour Organisation declaration on *Fundamental Principles and Rights at Work*.<sup>97</sup>

#### **‘Take it or leave it’ AWAs**

**5.24** As indicated in Chapter 2, AWAs are not a new initiative under WorkChoices. They were introduced in 1996 with the stated objective of enhancing flexibility in the labour market in order to increase productivity and improve the competitiveness of Australian business.<sup>98</sup>

**5.25** However, WorkChoices does change the procedures for employers and employees entering into an AWA. For instance, employers must give their employees at least seven days to consider a proposed AWA before it is approved. Further, they must take reasonable steps to ensure that employees have a copy of the agreement or ready access to it during that period. Employers must also provide employees with a copy of the relevant Information Statement for Employees from the OEA at least seven days before the agreement is approved. In addition, those employees who are under 18 years of age must have a parent or guardian sign and date their AWA.<sup>99</sup>

**5.26** WorkChoices also allows a bargaining agent to be appointed by either the employer or employee when making, varying or terminating an AWA. The appointment must be in writing and neither party can refuse to recognise the other’s bargaining agent.<sup>100</sup>

**5.27** It is not mandatory to sign an AWA, however, for new employees, employers can make the offer of a job conditional on signing one. At the same time, the new legislation prohibits use of duress in connection with an AWA. According to the OEA website, examples of duress include:

- a threat that an employee may lose their job if they do not sign an AWA
- a threat that an employee may be demoted or lose work if they do not sign an AWA

<sup>96</sup> Professor McCallum, Evidence, 20 June 2006, p39

<sup>97</sup> NSW Office of Industrial Relations, Response to questions on notice from 15 September 2006, p3

<sup>98</sup> Parliamentary Library Research Service, ‘The New Federal Workplace Relations System’, Briefing Paper No 2/06, p8

<sup>99</sup> Office of the Employment Advocate, ‘My Workplace Agreement’, cited at [http://www.oea.gov.au/docs/employees/my\\_workplace\\_agreement.pdf](http://www.oea.gov.au/docs/employees/my_workplace_agreement.pdf) (accessed 17 October 2006), p4

<sup>100</sup> Ibid, pp3-4

- a threat to make unreasonable changes to an employee's roster or location of work unless they sign an AWA.<sup>101</sup>

**5.28** Despite these safeguards to protect employees negotiating AWAs, the Committee notes that a number of parties expressed concern that certain employees have very little bargaining power when it comes to AWAs and are being offered them on a 'take it or leave it' basis.

**5.29** In its submission, the Construction, Forestry, Mining and Energy Union (CFMEU) indicated that the construction industry has seen the emergence of pattern AWA documents, with each employee offered the same conditions of employment on a 'take it or leave it' basis.<sup>102</sup> This was reiterated by Mr Ferguson, State Secretary of the CFMEU in evidence:

Employers are imposing those AWAs as a condition of employment. There is no choice. When a worker fronts up to the gate of a new project they are told that the wages and conditions are an individual choice and if you do not like it you do not have a job. That has a very significant impact in building and construction because the workers go from job to job, site to site, frequently seeking new employment and the opportunity to impose AWAs means that employers can lower the wages and employment conditions of building workers.<sup>103</sup>

**5.30** Similarly, Mr Mark Crosdale, Secretary of the Newcastle and Northern Sub-branch of the Transport Workers Union NSW, argued that in competitive industries such as the road transport industry, drivers have no choice but to enter into AWAs to preserve their livelihood. Mr Crosdale cited the provisions in one agreement whereby a driver was required to reimburse his employer the full cost of all damage to the vehicle in the event of an accident.<sup>104</sup>

**5.31** The Committee also notes that in the *Journal of Australian Political Economy* article entitled 'WorkChoices: Myth-making at Work', referred to earlier, the authors raised the concern that most employers have not been genuinely bargaining with their employees about the content of AWAs and common law individual contracts. Rather, the authors suggested that AWAs and common law contracts are typically 'take it or leave it' pattern contracts, unilaterally developed by employers and offered on a universal basis without any alteration. The authors argued that the increasing use of AWAs has amounted to an increase in managerial prerogative by employers within the workplace.<sup>105</sup>

**5.32** Similarly, Dr Chris Briggs, Senior Lecturer at the Workplace Research Centre at the University of Sydney, pointed to the experience of New Zealand, where new employees arriving at a job

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<sup>101</sup> Office of the Employment Advocate, 'Coercion and duress', cited at [http://www.oea.gov.au/graphics.asp?showdoc=/employers/duress.asp#index\\_CanAn](http://www.oea.gov.au/graphics.asp?showdoc=/employers/duress.asp#index_CanAn) (accessed 17 October 2006)

<sup>102</sup> Submission 12, CFMEU, p3

<sup>103</sup> Mr Ferguson, Evidence, 28 July 2006, pp1-2

<sup>104</sup> Mr Crosdale, Evidence, 28 July 2006, p61

<sup>105</sup> B.Ellem, M.Baird, R.Cooper and R.Lansbury 'WorkChoices: Myth-making at Work', *Journal of Australian Political Economy*, No 56, December 2005, p18, cited in Submission 45, Professor Lansbury

simply have a standardised AWA put in front of them, often with a single hourly rate and no room for negotiation.<sup>106</sup>

**5.33** Ms Alison Peters, Deputy Assistant Secretary of Unions NSW, also cited anecdotal evidence of situations where employees were presented with an AWA and requested to sign it immediately on the basis that if they did not comply it would be offered to the next person.<sup>107</sup>

**5.34** The Committee notes the following case study from the submission of Ms Lorissa Stevens.

**Case study: Ms Lorissa Stevens**

The next week, on the Tuesday the MES manager, [ ] came to the mine site and into the training room. [ ] walked straight into the room and slapped a document in a plastic sleeve onto the desk in front of me. It was an AWA. [ ] gave me a piece of paper to sign which was to acknowledge that I had received the AWA. It said something about me having 7 days to look over the AWA, and said [ ] would be back the next Monday to pick it up from me. [ ] told me to make sure it was signed. I had no idea then of what my rights were, and how long I was entitled to take to read over the AWA.

During the break I looked at the AWA and saw that the trainee rate was \$20.65 an hour. I also saw a number of conditions that I didn't agree with. There was a provision to the effect that the company could deduct money from my wages to pay for induction costs, which was not something that had been discussed with me before starting. There was also a clause that you had to give 12 hours notice of being sick, and if you didn't do so you would lose your days wages and also lose \$200. I couldn't believe it. Not only did you miss out on your own wages, you had to pay the boss for being sick. It also provided for as little as one hour's notice of termination of employment by the company, but the employee had to give 7 days notice of resignation, otherwise they could withhold from pay an amount equal to the pay for the notice period. So they could take 7 days of the pay I had already earned because I was unable to work another 7 days.

When we discussed the AWA in our training group, we were all gobsmacked. The fellows who worked with other companies didn't have the same clauses in their contracts, and we couldn't believe that the terms could be legal. We thought that the AWAs had to be checked by someone before they were approved. We thought that the sick leave provision was a real safety problem, because the penalty for late notice of sick leave might encourage people to come to work and drive heavy equipment even if they are sick.

Three days later, on the Friday, my manager [ ] came to the mine site to see me. [ ] asked me about the AWA, and I told [ ] about the things that concerned me. What followed was an unbelievable tirade of abuse. [ ] stood over me, and within earshot of the trainers and other trainees told me that my views were "rubbish", and that there was no reason for me not to sign the AWA. Everyone watching was appalled. [ ] continued at me for about 20 minutes. For about the last fifteen minutes of that I was crying, but that only made [ ] become louder and more abusive.

I have played soccer at representative level, and worked in earthmoving, which is a fairly tough industry. I was also once shot at in the course of a job and didn't cry. It is not easy for someone to make me cry but [ ] managed to do it. [ ] told me again: "I will personally go out of my way to destroy you, and make sure you never enter a Hunter Valley mine site again."

[ ] finally asked whether I would sign it or not. I told [ ] there was no way I would ever sign it. [ ] told me that I had wasted everybody's time and that I would not have a job with MES.<sup>108</sup>

<sup>106</sup> Dr Briggs, Evidence, 28 July 2006, p35

<sup>107</sup> Ms Peters, Evidence, 19 June 2006, p22

<sup>108</sup> Submission 43, Ms Stevens, pp3-4

**5.35** Parties to the inquiry also suggested that the argument that employees can seek new employment if they are unhappy with conditions in their AWA is not realistic. For example, Unions NSW argued that many employees will have little choice but to sign AWAs containing unfavourable conditions, for fear of losing their livelihood. In other words, many workers are faced with a choice between a job with reduced conditions and no job at all.<sup>109</sup>

**5.36** Ms Maree McDermott, Manager of the South Penrith Youth and Neighbourhood Services, commented:

We know that many of the families that we work with and see on a day-to-day basis will sign any sort of agreement put before them because they cannot afford to bargain or be seen to be unhappy with their conditions. There is the rent or the mortgage to pay, medical, pharmaceutical and dental fees, school excursion and sports fees, childcare costs and the costs of food on the table. Who can afford to tackle that when your budget runs week to week? That is not flexibility. That is coercion.<sup>110</sup>

**5.37** Similarly, Mr Adrian Catt of the community group A Future for Our Kids argued that it is lower skilled and other disadvantaged employees who will be affected by lower wages and conditions under AWAs. In discussing the situation of the Spotlight workers, Mr Catt said:

What sort of people are we talking about who are being affected by this? We are talking about the most unfortunate people, the people with the least skills, the people with the lowest wages, the people with the least ability. We are not talking about affluent people with an education. I have a number of degrees. I am relatively confident that I will be okay under this legislation. I might be hurt a little, but I have skills that I can take with me to another employer. But these people have no choice: these are unskilled or low-skilled workers at Spotlight. If they turn down this offer, they cannot just go somewhere else and get another job. The comments of the Prime Minister on this have been quite deceptive. He said they can just go and get another job. Sometimes they do not have the choice. He has also said that it is better for these people to have a job than to be on the dole. I agree with that, but I do not think it is better for them to be in a job where they are being exploited because they have no choice.<sup>111</sup>

**5.38** Professor McCallum told the Committee:

In our considered opinion unskilled employees, especially women and young persons among them, will suffer disadvantage under this individual bargaining mechanism.<sup>112</sup>

**5.39** A further concern raised in evidence is that as the WorkChoices system matures and the initial round of AWAs expire, workers will have to negotiate new AWAs but will have little with which to bargain, and will be in a more vulnerable position.<sup>113</sup>

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<sup>109</sup> Submission 35, Unions NSW, p16

<sup>110</sup> Ms McDermott, Evidence, 17 July 2006, p17

<sup>111</sup> Mr Catt, Evidence, 17 July 2006, pp29-30

<sup>112</sup> Professor McCallum, Evidence, 20 June 2006, p40

<sup>113</sup> Ms Manser, Evidence, 15 September 2006, p10



**5.40** Finally, the Committee also heard evidence that some employers are taking advantage of the confusion created by the introduction of the WorkChoices legislation to unlawfully change working conditions without observing the correct procedures. Ms Debra Carstens, Co-ordinator of Asian Women at Work, described the situation many of the members of her organisation were facing:

... a factory in Campsie stopped paying penalty rates to its employees in January. This is obviously before WorkChoices commenced and the workers were not asked to sign an AWA which would actually concede that this was now their arrangement. A factory in Fairfield stopped paying overtime after the commencement of WorkChoices, again without an AWA.<sup>114</sup>

### **The bargaining position of employees under WorkChoices**

**5.41** The Committee notes that not all employees are in a poor bargaining position when negotiating AWAs or collective agreements. Clearly, the bargaining position of employees depends in part upon their skills and qualifications.

**5.42** For example, Ms Peters from Unions NSW argued that those workers who have skills and qualifications that are sought after in the workplace will be largely unaffected by WorkChoices. Rather, it is those workers who lack skills or qualifications who will be worse off, resulting in growing economic and social inequality.<sup>115</sup>

**5.43** The Committee notes that concerns about the impact of WorkChoices on disadvantaged groups – including women, young people, migrants, people with a disability and people from rural and remote areas – were expressed by a broad range of parties during the inquiry.

**5.44** South Penrith Youth and Neighbourhood Services stated in its submission:

... the fundamental flaw in this legislation [is] it impacts upon a number of groups who do not have bargaining power because of gender, age, ethnicity, educational status or indeed a very specific, saleable skill. All these people are relying on the goodwill of the employer, a very shortsighted and limiting principle.<sup>116</sup>

**5.45** Ms Peters from Unions NSW argued:

Women, young people and casuals are already disadvantaged within the workplace with poor bargaining power now. These changes, we would say, actually reduce further their bargaining power. So the impact on those workers will, in fact, be greater. The fact that women and young people are far more likely to change jobs more frequently than men and older workers means that they are more likely to be put in a position where they are offered an AWA on a take it or leave it basis. As a result, these workers will further find that their bargaining capacity, either as individuals or collectively, will in fact be worse.<sup>117</sup>

<sup>114</sup> Ms Carstens, Evidence, 28 July 2006, p22

<sup>115</sup> Ms Peters, Evidence, 19 June 2006, p19

<sup>116</sup> Submission 7, South Penrith Youth and Neighbourhood Services, p6

<sup>117</sup> Ms Peters, Evidence, 19 June 2006, p20

- 5.46** Ms Annie Owens, NSW Branch Secretary of the Liquor, Hospitality and Miscellaneous Union, advised the Committee that many lower skilled employees have a poor understanding of their entitlements and often have a naïve belief that somehow they will be automatically protected.<sup>118</sup>
- 5.47** The Reverend Gordon Bradbery, Administrator at the Uniting Church – Wollongong Mission, noted that workers in disadvantaged groups are more likely to lack the interpersonal skills to negotiate with someone whom they perceive to be more powerful than them, who ‘have all the cards’.<sup>119</sup> He stated:
- This is the sort of thing that we are asked to invite these people - and there are lots who are struggling, hurting and are at the bottom of the pile - to enter into such negotiations. It is almost laughable to expect a person who is applying for a job to work in a café to say to the employer, “Before I sign this, I would like to take it away to my solicitor to have it checked over”, and more specifically to understand the language which is so often convoluted and is not easy to understand.<sup>120</sup>
- 5.48** The Committee notes that under section 151(2) of the *Workplace Relations Act 1996*, as amended by WorkChoices
- (2) In performing his or her functions relating to workplace agreements, the Employment Advocate must encourage parties to agreement making to take account of the needs of workers in disadvantaged bargaining positions (for example: women, people from a non English speaking background, young people, apprentices, trainees and outworkers).
- 5.49** However, the Australian Workers Union pointed out that this provision simply involves encouraging parties to consider these issues, rather than requiring them to accommodate such needs.<sup>121</sup>
- 5.50** The Union also highlighted that a large number of employees feel uncomfortable dealing with their employer, wish to avoid any form of confrontation and would rather accept an agreement with unfavourable conditions than engage in any sort of conflict. Combined with the fact that employers have most likely had assistance in preparing agreements and are experienced in workplace negotiations, this places many workers at a disadvantage.<sup>122</sup>
- 5.51** In this regard, Ms Linda Tucker, a Solicitor at Kingsford Legal Centre, expressed concern that workers seeking assistance at her legal centre were reporting being threatened by their employers with losing their job for poor performance, in the knowledge that unfair dismissal remedies no longer exist and that they can be easily dismissed.<sup>123</sup>

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<sup>118</sup> Ms Owens, Evidence, 19 June 2006, pp31-2

<sup>119</sup> Rev Bradbery, Evidence, 27 July 2006, p12

<sup>120</sup> Rev Bradbery, Evidence, 27 July 2006, p12

<sup>121</sup> Submission 11, Australian Workers Union, p17

<sup>122</sup> Submission 11, Australian Workers Union, p9

<sup>123</sup> Ms Tucker, Evidence, 20 June 2006, p13

- 5.52** The Committee notes that a broad range of other parties, too numerous to cite individually, also raised in their evidence to the inquiry the poor bargaining position under WorkChoices of employees who lack skills or qualifications.<sup>124</sup>
- 5.53** In his evidence, Dr Briggs argued that the simplest indicator of the ability of employees to bargain is their reliance on the award safety net prior to the introduction of WorkChoices, some 15 years after the introduction of enterprise bargaining. Prior to the introduction of WorkChoices, approximately 40% of low-skilled white-collar and blue-collar employees, one in four women, approximately 60% of hospitality workers and 30% of retail workers relied on the award safety net. Dr Briggs observed that such a large number of employees were not choosing to be paid the minimum rate. Rather, the fact that they remained on the award indicates their general inability to negotiate better wages and conditions.<sup>125</sup>

### The 'race to the bottom' effect

- 5.54** During the inquiry, a number of participants argued that under the new WorkChoices environment, wages and conditions will fall as unscrupulous employers use their stronger bargaining position to reduce the wages and conditions of their employees, while other decent employers are forced to do the same in order to remain competitive. This was referred to as the 'race to the bottom' effect.
- 5.55** As Mr Mark Diamond, Workplace Relations Adviser with Waste Contractors and Recyclers Association of NSW, explained:

When you have such a complete deregulation, so suddenly and so fundamentally, what happens is that opportunities for people to exploit it are opened up. That can never be assumed to be an advantage for business in a wholesale way. If you have people who are providing certain levels of wages and conditions to their employees, and they suddenly find themselves confronted with a low-cost entrant exploiting that sort of deregulated environment, it starts a race to the bottom.<sup>126</sup>

- 5.56** This view was echoed by Professor McCallum, who observed:

The problem with the WorkChoices legislation is that it gives employers the opportunity to lower wages and benefits without controls. Employers do not lower wages for the love of it: they lower wages when they, themselves, are pressed and pressured, and when there is less competition. It can start a race to the bottom. To put it another way, no matter how saintly I may be as an employer, if I am running a restaurant and the restaurants in my suburb have taken away benefits from employers and reduced labour costs, if I want to stay in business I have to do the same. This is

<sup>124</sup> Ms Pat Manser, Assistant Director General, Office of Industrial Relations, Department of Commerce, Evidence, 19 June 2006, p3; Ms Michelle Burrell, Acting Director, NCOSS, Evidence, 19 June 2006, p43; Professor Ron McCallum, Dean of Law, University of Sydney, Evidence, 20 June 2006, p40; Reverend Gordon Bradbery, Wollongong Mission, Evidence, 27 July 2006, p12; Mr Michael McDonald, Executive Director, Catholic Commission for Employment Relations, Evidence, 20 June 2006, p52; Ms Formosa, Community worker, Graceades Cottage, Evidence, 17 July 2006, p3; Ms McDermott, Evidence, 17 July 2006, p17

<sup>125</sup> Dr Briggs, Evidence, 28 July 2006, p35

<sup>126</sup> Mr Diamond, Evidence, 18 July 2006, p38

not an issue of good and bad, it really depends upon the labour market. When the laws do not set limits to the labour market ... labour market forces will take operation unchecked.<sup>127</sup>

## The compliance and enforcement provisions in WorkChoices

- 5.57** Under WorkChoices, the Office of Workplace Services (OWS) is responsible for providing protection to employees by monitoring compliance with the new legislation and enforcing the new penalty provisions.
- 5.58** The OWS can enforce penalties for breaches of the following categories of employee entitlements:
- a term of the AFPCS
  - a term of a workplace agreement
  - a term of an award or order of the AIRC
  - meal break entitlements
  - public holiday entitlements
  - extended parental leave entitlements.
- 5.59** Penalties can also be sought for breaches of:
- workplace determinations
  - undertakings about post-termination terms and conditions
  - various other provisions of the *Workplace Relations Act 1996* and associated regulations.
- 5.60** OWS inspectors are able to take legal action on an employee's behalf for breaches of the above industrial instruments or provisions of the *Workplace Relations Act 1996* and associated regulations.
- 5.61** OWS can also seek the imposition of penalties if a workplace agreement is lodged without the pre-lodgement requirements being met. For example, as noted, employers are required to provide a consideration period of at least seven days for a new agreement presented to an employee for their approval. If this consideration period is not provided, penalties can be applied by OWS.<sup>128</sup>
- 5.62** However, in her evidence, Ms Manser expressed concern about the capacity of the OWS to properly fulfil its role, given the small number of inspectors currently carrying out enforcement checks. She informed the Committee that while the NSW Office of Industrial

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<sup>127</sup> Professor McCallum, Evidence, 20 June 2006, p41

<sup>128</sup> Australian Government, WorkChoices Fact Sheet 8, 'WorkChoices and employee protections', cited at <https://www.workchoices.gov.au/ourplan/publications/WorkChoicesandemployee protections.htm> (accessed 5 October 2006)

Relations has 110 inspectors working across NSW, the federal OWS has just 200 inspectors working across Australia.<sup>129</sup>

- 5.63** The Australian Workers Union noted in its submission that the employment of 200 workplace inspectors by the OWS is the equivalent of one inspector for every 50,000 workers. The Union commented that it would be impossible for each inspector to be able to give the appropriate support to that number of workers.<sup>130</sup>
- 5.64** Given this, Dr Marian Baird, Senior Lecturer in the Discipline of Work and Organisational Studies at the University of Sydney, observed that under WorkChoices, the onus to understand contractual arrangements and to police agreements has shifted onto individuals, especially as unions, which have traditionally worked to ensure conditions are being properly enforced, have had their powers diminished. Dr Baird observed that employees have not been assisted in this regard by the creation of many new agencies with whom both they and employers will be unfamiliar.<sup>131</sup>
- 5.65** In response to this issue, Ms Patricia McDonough, a solicitor with the Inner City Legal Centre, advocated that the NSW Government invest additional resources in the Office of Industrial Services to boost its inspectorate.<sup>132</sup>
- 5.66** The Committee also notes the evidence of Ms Mimi Zou, National Adviser on Women and Employment with the National Council of Women Australia, that Victoria has established an Office of the Workplace Rights Advocate as an independent statutory body to assist employees, employers and independent contractors to negotiate pay and conditions under the new federal industrial relations system and to monitor unfair and illegal industrial practices. Ms Zou advocated the development of a similar body in NSW.<sup>133</sup> Professor McCallum adopted a similar position.<sup>134</sup>
- 5.67** This issue is addressed in Recommendation 2.

### **The need for additional data on the content of workplace agreements**

- 5.68** In her evidence to the Committee, Ms Manser highlighted the problem that there is very little data available on the impact that WorkChoices is having on employees' wages and conditions of work.
- 5.69** She noted that previously the Commonwealth Government conducted every five years an ongoing national longitudinal survey of workplace agreements called the Australian Workplace Industrial Relations Survey. However, she indicated that this survey has now been discontinued.

<sup>129</sup> Ms Manser, Evidence, 19 June 2006, p9

<sup>130</sup> Submission 11, Australian Workers Union, p4

<sup>131</sup> Dr Baird, Evidence, 15 September 2006, p28

<sup>132</sup> Ms McDonough, Evidence, 20 June 2006, p9

<sup>133</sup> Ms Zou, Evidence, 18 July 2006, pp62-63

<sup>134</sup> Professor McCallum, Evidence, 20 June 2006, p46

- 5.70** Ms Manser subsequently noted that three states – NSW, Queensland and Victoria – have tried to take up the role of surveying employees and employers for the content of workplace agreements. However the problem remains that there is very little information available at the national level.<sup>135</sup>

## Conclusion

- 5.71** The Committee believes that the dramatic reductions in the minimum standards of employment under WorkChoices, together with the abolition of the ‘no disadvantage test’, have placed some workers, and particularly those with limited skills, qualifications and negotiating skills, in a very vulnerable position. The evidence shows that previously protected conditions are being removed from AWAs, a trend that is likely to continue in a ‘race to the bottom’ under WorkChoices.
- 5.72** While WorkChoices promotes the notion that employees will be able to shop around and negotiate the best terms and conditions for themselves, in reality many workers do not have the ability to do so. Workers with limited alternative employment in the lower-paid, unskilled labour market are often prepared to accept reduced conditions in order to protect their livelihood. Many employees are unaware of their right to peruse the workplace agreement or to seek assistance and, when placed in a position of pressure, sign the AWA for fear of losing their livelihood.
- 5.73** The Committee acknowledges that some employees are capable of negotiating with their employers. Those workers who have skills and qualifications that are sought after in the workplace will be largely unaffected by WorkChoices. However, for lower skilled and lower qualified employees, the lowering of wages and conditions of employment, combined with increasingly jeopardised job security, means that many workers face an unpleasant work environment and their families an uncertain future.
- 5.74** In an attempt to prevent vulnerable workers from being exploited, the Committee supports calls for the NSW Government to establish an Office of the Workplace Rights Advocate, similar to that in Victoria, as an independent statutory body to assist employees, employers and independent contractors to negotiate pay and conditions under the new federal industrial relations system and to monitor unfair and illegal industrial practices.

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### Recommendation 3

That the NSW Government establish an Office of the Workplace Rights Advocate, similar to that in Victoria, as an independent statutory body to assist employees, employers and independent contractors to negotiate pay and conditions under the new federal industrial relations system and to monitor unfair and illegal industrial practices.

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- 5.75** In addition, the Committee believes that there would be merit in the NSW Government examining the provision of additional resources in the NSW Office of Industrial Relations in order to boost its inspectorate and to enable the Office to provide advice and training

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<sup>135</sup> Ms Manser, Evidence, 19 June 2006, p13

seminars, and information and resource kits for community legal centres. The Committee encourages the Office of Industrial Relations to target training, information and support to rural and regional New South Wales in order to increase the participation and skills of people living in these areas.

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**Recommendation 4**

That the NSW Government consider the provision of additional resources to the Office of Industrial Relations in order to boost its inspectorate and to enable the Office to provide advice and training seminars, and information and resource kits for community legal centres. The Committee encourages the Office to target training, information and support to rural and regional New South Wales in order to increase the participation and skills of people living in these areas.

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- 5.76** Finally, the Committee notes the problem that there is very little data available on the impact that WorkChoices is having on employees' wages and conditions of work. As noted in this chapter, the OEA has ceased its study of AWAs. As identified in evidence to the inquiry, the Commonwealth Government conducted every five years an ongoing national longitudinal survey of workplace agreements called the Australian Workplace Industrial Relations Survey. The Committee is disappointed that this survey has now been discontinued and believes that the Commonwealth Government should recommence the survey.
- 5.77** The Committee once again acknowledges that it is unfair that the NSW Government, as well as other states and territories, should have to provide further investment to support the Federal Government's industrial relations changes. Nevertheless, if the Commonwealth Government does not recommence the Australian Workplace Industrial Relations Survey, the Committee believes that the NSW Government, in consultation with other states, should consider developing a longitudinal study to track wages and conditions of work, so as to monitor the impact of WorkChoices on employees and employers in this state as the WorkChoices regime continues.

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**Recommendation 5**

That the NSW Government should consider developing a longitudinal study tracking wages and conditions of work in NSW, and consult with other states about achieving a common approach to this study.

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## Chapter 6      **The economic and social impact of WorkChoices**

This chapter examines the economic and social impact of WorkChoices. It initially examines the stated aims of WorkChoices and the neo-liberal ideology underpinning the legislation. Subsequently, it explores the economic and social impact of WorkChoices. The discussion of the social impact paves the way for a detailed discussion of the impact of WorkChoices on specific groups in the following three chapters.

### **The stated aim of WorkChoices**

- 6.1**      The explanatory memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005 states:

This Bill will amend the *Workplace Relations Act 1996* (the WR Act) to create a more flexible, simpler and fairer system of workplace relations for Australia. The Bill will carry forward the evolution of Australia's workplace relations system to improve productivity, increase wages, balance work and family life, and reduce unemployment.<sup>136</sup>

- 6.2**      Subsequently, in his second reading speech on the Workplace Relations Amendment (Work Choices) Bill 2005, the Commonwealth Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP, stated that the legislation will, 'encourage the further spread of workplace agreements in order to lift productivity and hence the living standards of working Australians'. He argued that increased productivity is the key to advancing Australia's prosperity and to ensuring that 'individuals and families benefit from more jobs, better jobs and higher living standards'.<sup>137</sup>

### **A paradigm shift in Australia's industrial relations?**

- 6.3**      As indicated above, the explanatory memorandum to the WorkChoices Bill characterises the bill as carrying forward the *evolution* of Australia's industrial relations system. Similarly, the Hon Kevin Andrews MP stated in his second reading speech 'This is economic reform the Australian way – evolutionary and in a manner that advances prosperity and fairness together.'<sup>138</sup>

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<sup>136</sup> Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005, cited at <http://www.workplace.gov.au/NR/rdonlyres/D5BBE0D6-A1C9-4342-B97A-9FE1DFB8B7BA/0/wrawcbill2005em.pdf> (accessed 9 October 2006), p1

<sup>137</sup> Hon. Kevin Andrews MP, Minister for Workplace Relations, Second Reading Speech, Workplace Relations Amendment (Work Choices) Bill 2005, cited at <http://www.workplace.gov.au/NR/rdonlyres/89F786BA-FCDC-4AF2-B642-210D40CB52C5/0/wrawcbill20052rs.pdf> (accessed 9 October 2006), p1

<sup>138</sup> *Ibid*



- 6.4 However, the Committee notes that this position was contradicted in evidence by Dr Marian Baird, Senior Lecturer in the Discipline of Work and Organisational Studies at the University of Sydney:

We believe WorkChoices represents a significant paradigm shift in the regulation of employment relations in Australia. It draws on the corporations power rather than the industrial relations power; it emphasises individual, non-union contracts rather than collective, union-based agreements; it establishes federal legislated minima—some of them for the first time, which is quite a change; and it establishes a range of different institutions, including a different institution for the setting of minimum wages in Australia. Coupled with the changes to welfare and family law, the changes to the regulation of work are potentially very far-reaching. We believe that their impact goes beyond the individual worker and the employer, to the very heart of Australian communities and society.<sup>139</sup>

### The neo-liberal ideology behind WorkChoices

- 6.5 In his evidence during the inquiry, Dr John Buchanan, Acting Director of the Workplace Research Centre at the University of Sydney, labelled the ideology behind WorkChoices as a ‘neo-liberalist agenda’.
- 6.6 The philosophy behind traditional economic liberalism is that prosperity is best served by self-regulating markets. Traditionally, this has been associated with the concept of ‘laissez-faire’ economics – that government does not intervene in the affairs of the market.
- 6.7 However, Dr Buchanan explained that neo-liberalism goes beyond the liberal tradition by advocating government intervention to prescribe the boundaries in which a market should function. According to neo-liberals, factors such as minimum wages and collective bargaining are an impediment to economic efficiency, and government should try to remove these barriers.<sup>140</sup>
- 6.8 In this regard, the Committee notes the comment of Dr Buchanan that WorkChoices entails government intervention to deliberately limit the application of labour law standards to the workplace, thereby freeing up the market:

... WorkChoices is essentially about reducing the reach of labour law, centralising labour law and tilting the balance of bargaining power ... the net result of that will be to limit the ability of labour law to evolve in ways that can grapple with the changing nature of work, and that is the only way you can breathe life into a system of labour standards, that it has got to change and evolve as society changes and evolves. WorkChoices kills it dead; it freezes it. It does not give the tribunals any capacity to really update awards; it does not give unions any real power to negotiate new standards.<sup>141</sup>

- 6.9 The Committee also notes the comment of Ms Laura Williams, Youth Resource Development Officer at South Penrith Youth and Neighbourhood Services:

<sup>139</sup> Dr Baird, Evidence, 15 September 2006, p25

<sup>140</sup> Dr Buchanan, Evidence, 28 July 2006, pp48-49

<sup>141</sup> Dr Buchanan, Evidence, 28 July 2006, pp42-43

... I view the WorkChoices legislation as a dehumanising policy move by the Government. It appears to me to be a strategy of rationalist economic ideology, designed to provide increased profits to business at the expense of the most vulnerable members of our society. Is it right that some people with power, or provided with power by market manipulation, should be permitted to enslave other people born less powerful, or made less powerful by market manipulations, to demean their lives with unfair conditions and remuneration, to corrode their destinies with suddenly abandoned traditions of work? If it is permissible for human beings to harass and humiliate another human being in the name of profit, and to do so without fine or hindrance, it is not a democratic system; it is a tyranny.<sup>142</sup>

- 6.10** While seeking to prescribe the boundaries in which a market should function, together with conformity with those markets, neo-liberalism also looks to develop new markets. In the labour market, new markets are generated by increasing the frequency and number of individual contracts, by increasing the frequency of contracts for service (for example, cleaning contracts), and by intensifying the assessment of employees even within a contract period.
- 6.11** Ultimately, the Committee notes that neo-liberalism, by focussing on conformity with the markets and the development of new markets, envisages a world in which not just goods and services, but all human and social life, are the product of conformity to market forces.<sup>143</sup>

## The economic impact of WorkChoices

### Productivity growth and deregulation of the labour market

- 6.12** As indicated, improving productivity through deregulation of the labour market was emphasised as a fundamental objective of the WorkChoices bill, both in the explanatory memorandum and by the Hon Kevin Andrews MP in his second reading speech.
- 6.13** The basic premise of this approach is that increased productivity leads to greater output for the same labour input, thereby increasing business income. Any increase in income is distributed by payments to the factors of production, labour (wages) and capital (operating surplus).
- 6.14** Australia's productivity growth surged in the 1990s. The Commonwealth Treasury's Budget Paper No 1 for 2005-2006 indicates as follows:

Beginning at the start of the 1990s, Australia's rate of labour productivity growth revived following decades of lagging [behind] other major developed countries. Productivity grew more rapidly during the latter half of the 1990s than during any comparable period in the past forty years. Australian labour productivity even grew faster than the 'new economy' of the United States. The revival since the 1990s is especially remarkable in that it did not accompany a worldwide productivity boom. Indeed the average rate of labour productivity growth was slower across the OECD

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<sup>142</sup> Ms Williams, Evidence, 17 July 2006, p19

<sup>143</sup> 'Neoliberalism: origins, theory, definition', cited at <http://web.inter.nl.net/users/Paul.Treanor/neoliberalism.html> (accessed 30 October 2006)

during the 1990s than in the previous decade. This suggests that additional circumstances unique to the Australian economy were responsible.<sup>144</sup>

**6.15** The Commonwealth Treasury attributed the surge in productivity in the 1990s to the broad and deep program of reforms implemented during recent decades including: liberalising trade, foreign investment, financial markets and workplace relations regimes; tax reform (including reforms of the indirect tax system and targeted incentives to work and save); corporate law reform; and implementing a broad-ranging national competition policy agenda.<sup>145</sup>

**6.16** However, productivity growth in Australia has slowed markedly this decade. This is shown in Table 6.1 below.

**Table 6.1: Australia's annual rate of productivity growth**

	1993-1994 to 1997-1998	1998-1999 to 2003-2004	2004-2005	1964-1965 to 2003-2004 (historical average)
<i>Labour productivity growth</i>	3.2	2.2	-1.3	2.3

Source: Dean Parham and Marn-Heong Wong, 'How Strong is Australia's Productivity Performance?', Paper presented to the Commonwealth Productivity Commission Conference 'Productivity Perspectives 2006', cited at <http://www.pc.gov.au/commission/work/productivity/conferences/pp2006/presentations/parham/index.html> (accessed 9 October 2006)

**6.17** As indicated, the Federal Government regards WorkChoices as a further step in the ongoing reform of the Australian economy which will promote productivity.

**6.18** However, in her evidence, Dr Baird questioned the argument that Work Choices will lead to an improvement in productivity, commenting:

In terms of the productivity debate, ... we have seen that the causal relationship between productivity and individualised bargaining is very doubtful, and comparisons with other countries show that. I think we could say, though, that over time we will see a widening of income distribution and pay gaps, especially for certain groups, and an incentive for employers to produce lower-quality and lower-paid jobs, and thereby going down a low path to development rather than a high-quality route. To end where I began, I would say that my colleagues and I do not think that this is the road that Australia should be travelling at the moment in a globalised economy.<sup>146</sup>

**6.19** In his evidence, Dr Chris Briggs, Senior Lecturer at the Workplace Research Centre at the University of Sydney, cited the impact that the New Zealand *Employment Contracts Act 1991* had on productivity in that country:

<sup>144</sup> Commonwealth Treasury, Budget Paper No. 1 2005-2006, Statement 4: Prosperity and Sustainability - Building on a strong foundation, cited at <http://www.budget.gov.au/2005-06/bp1/html/bst4-03.htm> (accessed 12 October 2006)

<sup>145</sup> Commonwealth Treasury, Budget Paper No. 1, Statement 4: Prosperity and Sustainability, Building on a strong foundation, cited at <http://www.budget.gov.au/2005-06/bp1/html/bst4-03.htm> (accessed 9 October 2006)

<sup>146</sup> Dr Baird, Evidence, 15 September 2006, p26

They have locked themselves into a low wage, low productivity economy. New Zealand's productivity rates used to more or less track Australia's for a couple of decades until around about 1990 when it introduced the *Employment Contracts Act*. It flat-lined after that and now it has the second lowest productivity levels in the OECD, just ahead of Portugal and it is locked in this sort of low wage, low productivity cycle. Low productivity means there is no capacity to increase wages and you get this sort of cheap labour, low value added economy.<sup>147</sup>

### Wages and employment

- 6.20** As noted, the explanatory memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005 states that an objective of the legislation is increasing wages and reducing unemployment.
- 6.21** In his evidence to the Committee, Dr Briggs argued that a fundamental assumption of the WorkChoices legislation is that minimum wages are set too high, and if they are allowed to fall then more jobs will be created.
- 6.22** The Committee also notes that this position has been central to the Commonwealth Government's submissions to the annual Australian Industrial Relations Commission Wage Cases to adjust the minimum wage for over a decade. In its submission to the 2005 Safety Net Review – Wages, the Commonwealth Government stated:
- The increase in the minimum wage, above a level that employers can afford will have a detrimental impact on those who are unemployed or at the margins of the labour market.<sup>148</sup>
- 6.23** On the other hand, Dr Briggs argued in evidence that making labour less expensive by reducing the minimum wage can reduce the incentive to improve productivity:
- If you make labour sufficiently cheap and disposable then it removes a lot of incentive to make it more productive and what is more you set up competition to occur on the basis of the cheapening of labour, rather than making it more productive. Then the firms that would actually like to make a longer term investment in things like skills, which requires to get a return back, they lose that capacity because the competitor down the road has simply cut their costs by removing overtime, penalty rates and so on and you either follow suit or you get out of the market because they have jumped a march on you. Whereas if you have an effective minimum safety net which sort of effectively takes this basic labour costs out of play then it is on productivity, skills training quality and things like that that business is competing against each other.<sup>149</sup>
- 6.24** Under this scenario, productivity growth ultimately declines as innovation and skills development stalls, as occurred in New Zealand following the introduction of the *Employment Contracts Act 1991*.

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<sup>147</sup> Dr Briggs, Evidence, 28 July 2006, p40

<sup>148</sup> Australian Government Submission, Safety Net Review – Wages 2005, cited at <http://www.workplace.gov.au/NR/rdonlyres/B7352D9A-A33D-4CC1-8353-330B2084F85B/0/SNRWages2005CwlthSub.pdf> (accessed 9 October 2006), pp42-43

<sup>149</sup> Dr Briggs, Evidence, 28 July 2006, p40

**6.25** Dr Briggs raised the distinction between low productivity, low growth economies with a low minimum wage based on market-based industrial relations systems and the more coordinated industrial systems in Europe:

A major topic of debate of course is the United States versus Europe where there are more market-based IR systems or what they call more co-ordinated systems in Europe which produce different outcomes in terms of employment, productivity and so on. The comparisons are very sensitive to when you start them and which countries you include and exclude. I think the general finding is that over a reasonable period of time the economic performance is actually very similar except on the question of inequality and that you get much more inequality in low paid jobs in the more deregulated systems but in terms of productivity, employment and things like that, the longer term performance across these two different types of systems is actually pretty similar.<sup>150</sup>

**6.26** In its supplementary submission, the Shop, Distributive and Allied Employees' Association (SDA) cited the recent OECD report entitled *Employment Outlook 2006 – Boosting Jobs and Incomes*, released on 13 June 2006, as evidence that that employment protection legislation, fair and reasonable minimum wages and highly centralised wage bargaining do not have a significant negative impact on employment.<sup>151</sup>

**6.27** Based on the OECD report, the SDA argued that:

- there is no significant correlation between unemployment and the stringency of employment protection legislation
- there is in the words of the OECD 'no significant direct impact of the level of the minimum wage on unemployment'
- where wage bargaining is highly centralised, this significantly reduces unemployment.<sup>152</sup>

**6.28** Similarly, Dr Briggs also reported that the OECD found that the highest rates of employment to population rested with those countries that had the highest level of employment protection, such as the Nordic countries and Switzerland. Accordingly, Dr Briggs concluded that the Federal Government's argument that employment participation rates increase with less regulation and lower minimum wages is not borne out in the OECD study.<sup>153</sup>

### **Skills shortages**

**6.29** A number of inquiry participants also contended that WorkChoices may result in significant skills shortages in the future.

**6.30** In his evidence cited above, Dr Briggs told the Committee that by making labour sufficiently cheap, WorkChoices will remove the incentive to make labour more productive. Businesses

<sup>150</sup> Dr Briggs, Evidence, 28 July 2006, p38

<sup>151</sup> Submission 31a, Shop, Distributive and Allied Employees' Association, p9

<sup>152</sup> Submission 31a, Shop, Distributive and Allied Employees' Association, p10

<sup>153</sup> Dr Briggs, Evidence, 28 July 2006, pp36-37

will be forced to compete on the basis of cheap labour and will not have the resources to invest in employee training.<sup>154</sup>

- 6.31** Similarly, the Australian Workers Union suggested that, under WorkChoices, training will be relegated in importance and that WorkChoices will exacerbate the skills shortage that already exists in many industries as businesses reduce their training commitments in response to the competitive advantage of cheap labour. The union's submission noted that in excess of 74% of businesses with less than 100 employees do not provide training.<sup>155</sup>
- 6.32** Dr Buchanan also noted the problems of skills shortages and lack of training. He stated that while the rhetoric of WorkChoices is individualisation, fragmentation of the workplace will make it more difficult for employers to attract and retain the workers they need. He observed that as the capacity to provide for training and skills diminishes it will become necessary to obtain those skills from elsewhere and predicted that this would lead to further debates about immigration laws.<sup>156</sup>
- 6.33** An example of this growing problem was provided by the Reverend Gordon Bradbery, Administrator at the Uniting Church – Wollongong Mission, who spoke of the aged care industry's difficulty in obtaining skilled staff, such that nurses had been brought in from Africa to fill the gap. Reverend Bradbery noted that such countries can ill afford to lose their skilled labour, but suggested that with workers in Australia not being trained to fill the deficits in the labour market, it will be a continuing trend.<sup>157</sup>

### **The social impact of WorkChoices**

- 6.34** Balancing work and family life and helping individuals and their families benefit from more and better jobs were also emphasised as fundamental objective of the WorkChoices bill, both in the explanatory memorandum and by the Hon Kevin Andrews MP in his second reading speech.
- 6.35** As the Committee noted in the previous chapter, not all employees are in a poor bargaining position when negotiating Australian Workplace Agreements (AWAs) or collective agreements. As previously noted, the bargaining position of employees depends in part upon their skills and qualifications. Those workers who have skills and qualifications that are sought after in the workplace will be largely unaffected by WorkChoices. However, those workers who lack skills or qualifications are very likely to be worse off, resulting in growing economic and social inequality.
- 6.36** In late 2005, Unions NSW commissioned two studies in an attempt to predict the likely social impact of WorkChoices:
- First, Unions NSW commissioned the Australian Centre for Industrial Relations Research and Training (now the Workplace Research Centre) at the University of

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<sup>154</sup> Dr Briggs, Evidence, 28 July 2006, p40

<sup>155</sup> Submission 11, Australian Workers Union, pp18

<sup>156</sup> Dr Buchanan, Evidence, 28 July 2006, p49

<sup>157</sup> Reverend Bradbery, Evidence, 27 July 2006, p12

Sydney to provide a report analysing the likely impact of WorkChoices, based on the experience of other jurisdictions of labour market deregulation. The report, *Federal IR Reform: The Shape of Things to Come*, was prepared by Dr Chris Briggs.

- Second, Unions NSW commissioned Dr Don Edgar, former Director of the Australian Institute of Family Studies, to prepare a paper entitled, *Family Impact Statement on WorkChoices – The Proposed New Industrial Relations Regime*. This second report examined the impact that the trends predicted in the first report would have on families and communities.<sup>158</sup>

**6.37** Dr Briggs based his research partly on evidence from New Zealand, Victoria and Western Australia. He concluded that WorkChoices would be expected to result in widespread loss of penalty and overtime rates, a proliferation of low paid jobs, and the growth of wage inequality. Dr Briggs also concluded that these impacts would especially be felt in rural areas and by women, young people and low skilled employees.<sup>159</sup>

**6.38** Dr Briggs argued that WorkChoices would affect the interplay between the spheres of work, private households and the community, and that by eroding time for families, friends and community life, the legislation would ‘fracture’ social relationships. He contended that by undermining the quality of jobs and earnings, WorkChoices would further undermine the quality of family life, parenting and health, which are already under considerable strain.<sup>160</sup>

**6.39** In his *Family Impact Statement*, Dr Edgar argued that sound family and community relationships are essential both for individual wellbeing and for sustaining the national economy. He concluded that the WorkChoices legislation would have a negative impact on family and community relationships and that this impact will be worse for people in low paying jobs, with limited skills and poor bargaining power. He further predicted that the legislation would undermine volunteerism and social capital.<sup>161</sup> Dr Edgar stated:

It is my considered view that the IR proposals will damage relationships, inside families, within workplaces, and across the wider community. Without families and the caring work that they do – providing mutual support, nurturing and educating children, looking after the aged and disabled, helping others through voluntary community work – there would be no viable economy at all ... indeed a prosperous economy based on inequality and job conditions not designed to help workers meet their family responsibilities is likely to be a divided and unhappy one for many families.<sup>162</sup>

**6.40** The Committee received a great deal of evidence during the inquiry that WorkChoices is already having a deleterious impact on many individual employees, their families and the

<sup>158</sup> Submission 35, Unions NSW, p3

<sup>159</sup> Briggs C, *Federal IR Reform: The Shape of Things to Come*, report commissioned by Unions NSW, November 2005, p3

<sup>160</sup> Briggs C, *Federal IR Reform: The Shape of Things to Come*, report commissioned by Unions NSW, November 2005, p8

<sup>161</sup> Submission 35, Unions NSW, p10

<sup>162</sup> Edgar D, *Family Impact Statement on WorkChoices – The Proposed New Industrial Relations Regime*, report commissioned by Unions NSW, November 2005, p4

broader society. Much of the evidence accorded with the studies commissioned by Unions NSW in late 2005 as cited above.

### **Individual employees**

- 6.41** During the inquiry, parties expressed concern that market-based industrial relations systems such as that introduced by WorkChoices can reduce disadvantaged groups to what essentially amounts to an underclass of 'working poor', living on the margins in terms of their housing, weekly income and social participation. As Ms Michelle Burrell, Acting Director of NCOSS, stated in evidence:

I sincerely believe that for some of the younger people, women, who are on the margins of our work force on low pay at the moment, we should be very concerned if their rates of pay or conditions go down any more because we have significant numbers of people living on the margins in terms of their housing affordability and other sorts of issues.<sup>163</sup>

- 6.42** In its submission, Anglicare expressed concern that the potential for WorkChoices to erode wages, particularly among low-income groups, will lead to an increase in numbers of Australians suffering financial stress.<sup>164</sup>

- 6.43** The Committee also notes the evidence of Dr Buchanan about the cycle of poverty in other market-based industrial relations systems around the world:

Let us be quite frank, in the US today 28 per cent of the work force is employed at an hourly rate that could not keep a family of four out of poverty if the breadwinner worked 40 hours a week. That is 28 per cent – more than one worker in four. That percentage went up over the 1990s when the US had the strongest growth it has had in a generation. These are not academic arguments, these are actual facts on what the structure of the US economy is. The New Zealanders have had a similar sort of experience and there is a public debate in New Zealand now on how to get themselves out of the low-wage trap.<sup>165</sup>

- 6.44** Unions NSW's submission reiterated the finding of Dr Briggs that labour market deregulation has exacerbated the growth of inequality and low-paying jobs in other OECD countries.<sup>166</sup> When she appeared before the Committee, Ms Alison Peters, Deputy Assistant Secretary of Unions NSW, reported:

We see very much that this research confirms that those who are relatively well off already within workplaces will be largely unaffected by WorkChoices but that those who are the most marginal in our work forces will be worse off, resulting in growing inequality. This, we say, is bad for the entire community.<sup>167</sup>

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<sup>163</sup> Ms Burrell, Evidence, 19 June 2006, p47

<sup>164</sup> Submission 38, Anglicare, p8

<sup>165</sup> Dr Buchanan, Evidence, 28 July 2006, p40

<sup>166</sup> Submission 35, Unions NSW, p7

<sup>167</sup> Ms Peters, Evidence, 19 June 2006, p19



- 6.45 Finally, the Reverend Gordon Bradbery predicted that there will be a rise in the number of people seeking sustenance and support from the charitable sector as they will not have the skills to negotiate decent conditions in their agreements.<sup>168</sup>

### Families

- 6.46 Participants in the inquiry were not only very concerned for vulnerable workers who may be affected by WorkChoices, but for also their families and communities. They argued that by moving away from the long-held model of a 'living wage' and reducing household incomes, WorkChoices will place further stress on already burdened families. In evidence, Ms Linda Everingham, member of Penrith Working Families, stated:

People are just so worried about the impact that WorkChoices is going to have on their families. I mean, there has been so much said here today. I despair about what is going to happen to my children. Sometimes I cannot breathe when I try and struggle with my budget by robbing Peter to pay Paul, and I wonder how my kids are going to cope in 10 years time when they are trying to find a job.<sup>169</sup>

- 6.47 Ms Burrell stated:

Our major concern is that WorkChoices will result in increased hardship and disadvantage for unskilled and low paid and marginalised workers and their families ... this population group is already significantly disadvantaged and WorkChoices could make that situation even worse.<sup>170</sup>

- 6.48 During the Committee's visit to Penrith, witnesses told the Committee that they already feel vulnerable because they rely on limited wages, whilst meeting hefty mortgage repayments, high petrol prices, and the ordinary costs of raising a family. For them, the prospect of reduced wages and poorer job security was deeply frightening. As Mr James Nero, a community member from the Penrith area, told the Committee:

For us to drop wages, we have a big mortgage. We are a normal family. We have a large mortgage. We need to both work. Our girls are going to suffer if we cannot do this. We will lose the house. We aspire like [another forum participant] does to send our daughter to university. ... I have worked with my hands my whole life and I do not want that for them, but I will not be able to afford to even keep a roof over their head let alone give them the education that I would love to give them under this new WorkChoices system ... What do you tell your kids? You try to teach your kids that if you work hard, you will get rewarded, but that is not the case any more. We will suffer. My daughters will suffer. When I brought them into the world, I did not expect that this would be the future that they would have.<sup>171</sup>

- 6.49 Parties to the inquiry also expressed concern about the impact of WorkChoices on hours of work and the availability of time for workers to spend with their families.

<sup>168</sup> Reverend Bradbery, Evidence, 27 July 2006, p15

<sup>169</sup> Ms Everingham, Evidence, 17 July 2006, p45

<sup>170</sup> Ms Burrell, Evidence, 19 June 2006, p43

<sup>171</sup> Mr Nero, Evidence, 17 July 2006, pp8-9

**6.50** Representatives of the Catholic Commission for Employment Relations and Unions NSW both argued that the shift away from standard 'sociable' hours, including the ability under AWAs to average the standard 38 hours per week over a 12 month period, created significant problems in terms of predictability of hours and pay.<sup>172</sup> Ms Alison Peters, Deputy Assistant Secretary of Unions NSW, explained families' need for predictable hours of work:

We would also note that WorkChoices provides no protection for hours predictability, something that is incredibly important for workers with family responsibilities, particularly for younger children. It is not so much when the hours are worked it is knowing that those will in fact be the hours worked and that you can be asked to chop and change your shift roster. Particularly for those people who have children at school or in childcare, predictability is far more important than so called flexibility in terms of hours.<sup>173</sup>

**6.51** Many other participants including Anglicare, the National Council for Women and Unions NSW argued that together, the pressure to work longer hours and the unpredictability of hours would significantly affect family time, parenting and relationships.<sup>174</sup>

**6.52** The Australian Workers Union also voiced its concern about the absence of leave provisions in many AWAs. Citing figures from the Office of the Employment Advocate (OEA) that approximately 16% of AWAs allow sick leave to be used for carers' leave, and approx 24% of AWAs have provision for family leave, the union contended that only 40% of AWA employees have access to family leave provisions, compared to 100% of award employees. Further figures from the OEA indicate that 34% of those under an AWA have their annual leave absorbed into their hourly rate of pay, thus having no provision for paid holiday breaks.<sup>175</sup>

**6.53** Given such evidence, the Conference of Leaders of Religious Institutes NSW identified a certain irony in the Federal Government's advocacy of WorkChoices:

Irregular working hours, the inability to plan and the lack of support in determining pay and conditions have a huge impact on the security and stability of families and on the capacity of people to contribute to wider society. If, as the Federal Government frequently reiterates, we are about families and family values then any changes to industrial relations ought to be focused on supporting families and communities.<sup>176</sup>

**6.54** The impact of the legislation on children, both in the immediate and longer term, is further illustrated in the following case study, provided by Ms Patricia Formosa of Graceades Cottage in Bidwill.

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<sup>172</sup> Mr McDonald, Evidence, 20 June 2006, p54; Ms Peters, Evidence, 19 June 2006, p28

<sup>173</sup> Ms Peters, Evidence, 19 June 2006, p28

<sup>174</sup> Ms Zou, Evidence, 18 July 2006, p60; Ms Peters, Evidence, 19 June 2006, p28; Submission 38, Anglicare, p8

<sup>175</sup> Office of the Employment Advocate, submission to the Senate Inquiry into the WorkChoices Legislation, cited in Submission 11, Australian Workers Union, p19

<sup>176</sup> Submission 17, Conference of Leaders of Religious Institutes NSW, p3

### Case study: A family in Bidwill

Ms Patricia Formosa, a community worker with Graceades Cottage in Bidwill, a suburb in western Sydney, told the Committee about one family she has come into contact with. They are one of the few families in the area who have a mortgage. In this family, there is a husband, a wife and three children. Both parents work full time in unskilled jobs. One of the children has learning difficulties, and requires extra assistance with his schooling.

Before WorkChoices, the mother negotiated with her employer to work night shifts, so that she would be able to collect her children from school, take her son to tutoring and have dinner with her family. Also with working late shifts came various penalties and entitlements, which were essential for the family to maintain at least an adequate standard of living.

When WorkChoices came in, the mother's shifts were all changed. Her night shifts were given to workers who were willing to work without penalty rates and other entitlements, often foreign students. The only shifts that were offered to the mother were long day shifts, and as she was not working any nights, she did not receive any penalty rates or entitlements.

Ms Formosa told the Committee that she simply had no option but to take these shifts in order to keep up her mortgage payments. She felt that even if she did find work in another place, the conditions might be even worse than her current job.

In addition, her child with learning disabilities has had to stop going to tutoring after school, as there is no one able to take him there or pick him up. He has now fallen behind at school and his motivation has gone.

Ms Formosa suggested to the Committee, 'What are his chances of gaining skilled or semi-skilled employment in the future? This is simply perpetuating the cycle of the working poor.'<sup>177</sup>

### Broader society

- 6.55** Parties to the inquiry also expressed concern about the broader impact of the perceived marginalisation of low-wage workers and their families under WorkChoices on the community and Australian society.
- 6.56** In its submission, Anglicare predicted an increase in 'negative social outcomes more commonly found among low income groups, including lower life satisfaction across various domains, rising fear of crime, less trust of other people and feelings of job insecurity.'<sup>178</sup>
- 6.57** Unions NSW cited in its submission international research on the link between inequality and health undertaken by Dr Briggs. The research found that societies with higher levels of inequality tend to have lower life expectancies, higher rates of 'excess' morbidity and mortality, and worse physical and mental health among people on low and middle incomes. Dr Brigg's study concluded:

It is reasonable to infer that the proposed industrial relations reforms are likely to worsen overall population health, especially for those on the lower side of the labour market.<sup>179</sup>

- 6.58** A number of witnesses also expressed concern that the WorkChoices legislation will affect community life by reducing opportunities for volunteering. Mr Catt suggested that the

<sup>177</sup> Ms Formosa, Evidence, 17 July 2006, p3

<sup>178</sup> Submission 38, Anglicare, p8

<sup>179</sup> Briggs C, *Federal IR Reform: The Shape of Things to Come*, report commissioned by Unions NSW, November 2005, pp102 and 108

capacity of local volunteer organisations such as the Rural Fire Service, the Volunteer Rescue Association and the State Emergency Service will be affected by the pressures and constraints that the legislation places on workers.<sup>180</sup> Similarly, Ms Carmen Boserio, a volunteer management committee member of the South Penrith Youth and Neighbourhood Services, told the Committee:

Volunteers like myself juggle their full-time paperwork, family life, carer commitments and volunteer hours, which necessitates predictability of working hours for our availability. WorkChoices, by undermining the award safety net, will see ordinary working hours extended into evenings and weekends, adversely impacting on the balance between work and family and volunteer commitments.<sup>181</sup>

- 6.59** Finally, the Committee notes the evidence of Dr Briggs that it will take some time for the broad economic and social effects of the WorkChoices legislation to flow through; it will be an incremental process occurring over the next five to ten years and particularly during the next economic downturn.<sup>182</sup>

## Conclusion

- 6.60** The Federal Government introduced the WorkChoices legislation with stated aims to improve productivity, increase wages, reduce unemployment, and to improve living standards and the balance between work and family life.
- 6.61** The Committee recognises that the evidence on the final impact of WorkChoices will take several years to reveal itself. However, the Committee is concerned that based on the evidence provided during this inquiry, even in this early stage, WorkChoices is having the opposite effect to that claimed by the Federal Government.
- 6.62** The Committee does not believe that the way to generate strong sustainable productivity growth, high output and jobs growth is through reducing minimum wages and creating a large pool of low-paid, low productivity jobs. In the Committee's opinion, the link between productivity and deregulation of the labour market is doubtful. The international evidence suggests the opposite – deregulation may in fact remove incentives to businesses to promote productivity by making cheap labour the basis of competition, rather than skills and innovation.
- 6.63** In the Committee's opinion, WorkChoices is likely to exacerbate the skills shortage in Australia by removing the incentives for certain employers to invest in employee training and development. Businesses will be forced to compete on the basis of cheap labour and will not have the resources to invest in employee training.
- 6.64** Moreover, the Committee is dubious whether minimising labour costs in industries such as the cleaning and hospitality industries, where wages tend to be low already, is an effective means of maximising productivity. Similarly, international comparisons of productivity in such low paid industries tend to be somewhat meaningless. Productivity is not a major factor when

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<sup>180</sup> Mr Catt, Evidence, 17 July 2006, p30

<sup>181</sup> Ms Boserio, Evidence, 17 July 2006, p20

<sup>182</sup> Dr Briggs, Evidence, 28 July 2006, p44

dealing with many unskilled workers. Productivity is generated when workers are really adding value to what they are doing. Accordingly, most productivity gains tend to be generated in the middle and upper parts of the labour market.

- 6.65** The Committee shares the apprehension expressed by many of the witnesses to this inquiry that the WorkChoices legislation, while failing to boost productivity and innovation, will result, as it has in other deregulated systems, in disparity and inequity in wages, in more low-paid jobs and a larger section of underprivileged society. In the Committee's opinion, the unskilled are particularly vulnerable under the WorkChoices regime.
- 6.66** The Committee strongly believes that modern workplaces can and must accommodate people's dual work and family commitments, and is concerned about the impact of WorkChoices on community life as families experience the strain of making ends meet and as children grow up in more stressed and vulnerable families. The Committee predicts that social capital and community life will inevitably suffer as people have less capacity to contribute to their community.
- 6.67** The Committee examines the impact of WorkChoices on specific disadvantaged groups in the labour market in greater detail in the following three chapters.

## Chapter 7      The impact of WorkChoices on women

The terms of reference of the inquiry required the Committee to examine the impact of the Commonwealth WorkChoices legislation on pay equity, including pay gaps. This chapter examines the impact of the legislation specifically on women, principally in terms of pay equity, job security and the ability to accommodate caring responsibilities.

### Women's labour market disadvantage

- 7.1** A broad range of inquiry participants told the Committee that as a group, women are already disadvantaged in the labour market compared to men, and will be even more so under the WorkChoices regime.
- 7.2** The NSW Government submission documents the evidence in relation to women's already unequal position in the workforce:
- the average weekly earnings of women employed full time in NSW are approximately 85% of those of men (\$967 compared to \$1,144)
  - when all workers, including casuals and part-timers, are taken into account women's average weekly earnings are approximately 69% of those of men (\$697 compared to \$1,005)
  - women make up the majority of casual and part-time employees, and as such, tend to be less well paid and to have more precarious work, less access to training and career advancement, and less access to permanency (in the case of casual employees) and to standard employment benefits such as paid holiday and sick leave
  - women are more likely than men to be concentrated in jobs whose wages have been set by minimum wage regulation, regardless of occupation, industry and employment status
  - women tend to be concentrated in jobs with less access to a range of over-award payments and bonuses, and in industries where over-award conditions are not traditionally offered.<sup>183</sup>
- 7.3** In addition, the tendency for women to carry greater responsibility for caring for children and other family members has a number of consequences, which affect their income and working conditions. Such consequences include:
- broken employment patterns which may increase their precarious attachment to the workforce and affect their career progression
  - reduced ability to take on extra responsibilities or to access training or other career development opportunities
  - possible subjection to negative perceptions on the part of employers about the impact of family responsibilities on work performance.<sup>184</sup>

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<sup>183</sup> Submission 37, NSW Government, pp67-70

- 7.4** The Committee took evidence from representatives of a number of unions that represent less skilled and lower paid workers amongst whom women predominate, including the Liquor, Hospitality and Miscellaneous Union (LHMU), which represents childcare workers and cleaners, the Australian Workers Union, which represents hairdressers, the Shop, Distributive and Allied Employees Association, which represents retail workers, along with the NSW Nurses' Association. In addition, a number of women's groups, along with academics specialising in gender and work, took part in the inquiry. Each of these participants emphasised that female employees will be less well off under WorkChoices.<sup>185</sup>
- 7.5** Ms Mimi Zou, National Adviser on Women and Employment with the National Council of Women Australia, reported that women's lower pay, fewer entitlements and poorer job security relative to that of men, in addition to the lack of support for those juggling paid work and family, all serve as barriers to women's equal status in the workplace. She stated:
- Unfortunately, we do not believe that WorkChoices actually addresses these barriers to women's participation in paid work. On the contrary, the new reforms are likely to produce less favourable outcomes in wages, conditions and employment rights for women. The implications of lower wages and higher job insecurity emerging from these reforms will discourage the constructive participation of women in the labour market and worsen the position of women in the workplace. It will exacerbate the existing problem of a gender wage gap, which will have long-term, adverse repercussions for women, their families and communities, as well as the future prosperity of this country.<sup>186</sup>
- 7.6** A number of participants including the Inner City Legal Centre and the United Services Union pointed out that women's caring responsibilities have a significant impact on their bargaining power under WorkChoices. The former contended that, for example, women returning to work after a year or more break to care for their children will have poor leverage when negotiating their pay and conditions.<sup>187</sup>

## Pay equity

- 7.7** Inquiry participants explained that Australia has traditionally fared very well in respect of pay equity compared to other OECD countries, principally because of its system of centralised wage fixing through awards. However, since the 1990s, the gap in pay equity has widened as a result of the introduction of enterprise bargaining, followed by further industrial relations deregulation in Victoria and Western Australia.<sup>188</sup>

<sup>184</sup> Submission 37, NSW Government, p68

<sup>185</sup> Ms Annie Owens, NSW Branch Secretary of the Liquor, Hospitality and Miscellaneous Union, Evidence, 19 June 2006, pp31-32; Mr Russell Collison, State Secretary, Australian Workers Union, Evidence, 20 June 2006, p18; Mr Gerald Dwyer, Branch Secretary-Treasurer, Shop, Distributive and Allied Employees Association, Evidence, 20 June 2006, p40; Ms Michelle Pederson, NSW State Advisor on Women and Employment, NSW Nurses Association, Evidence, 18 July 2006, pp54, 56-57

<sup>186</sup> Ms Zou, Evidence, 18 July 2006, p52

<sup>187</sup> Submission 41, Inner City Legal Centre, p2

<sup>188</sup> Ms Alison Peters, Deputy Assistant Secretary of Unions NSW, Evidence, 19 June 2006, p25

**7.8** In its submission, Unions NSW cited research by Plowman and Preston<sup>189</sup> who examined wage outcomes in Western Australia, highlighting the impact of individual agreements on women workers in female dominated industries, whose bargaining power has been low. Like numerous participants, Unions NSW argued that based on this past experience, the WorkChoices legislation will have a 'dramatic effect' on pay equity.<sup>190</sup>

**7.9** The Committee also notes the *Journal of Australian Political Economy* article entitled 'WorkChoices: Myth-making at Work' forwarded by Professor Russell Lansbury, Professor of Industrial Relations at the University of Sydney, in his submission:

If we simply concentrate on the experience of women and men under the same regulatory instrument, registered individual agreements, we find that in 2004 women were earning an average of \$20.00 per hour compared with their male counterparts who were earning \$25.10. This gap in men's and women's average hourly earnings under individual agreements increased from 12.7 per cent in 2002 to 20.3 per cent in 2004. While men's average hourly rates had increased from \$23.70 to \$25.10, women's had actually decreased from \$20.70 to \$20.00 (Baird & Todd, 2005). Against this history, the prospects for decreasing the gender pay gap under the [WorkChoices] changes appear very bleak.<sup>191</sup>

**7.10** Dr Marian Baird, one of the authors of that article and Senior Lecturer in the Discipline of Work and Organisational Studies at the University of Sydney, told the Committee:

In terms of gender equity, I see that the weakening of awards and the move to AWAs does not augur well for women. There is already a 20 per cent pay gap in hourly rates between women and men on AWAs; this is not so for women and men on awards, where the pay gap is minimal. The minimum wage is likely to decline in real terms over time and as a proportion of average earnings, and this will disproportionately affect women ...

Pay equity may be harder to maintain, with more emphasis on individual bargaining and the removal of test case abilities. It is important to understand that overall this would put downward pressure on minimum wage rates, and as a result some sectors and some groups of individuals will be impacted more. In particular, I am referring to the hospitality, retail, and health and community services sectors, where large numbers of women are employed on award rates only. Relative to other sectors of the labour market, women on minimum wages are likely to experience a decline in real wages over time.<sup>192</sup>

**7.11** Ms Pat Manser, Deputy Director General of the NSW Office of Industrial Relations, noted that while it is intended that the Australian Fair Pay Commission will take pay equity issues into account when it makes its decisions about minimum rates of pay, it remains to be seen

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<sup>189</sup> D.Plowman & A.Preston, 'The New Industrial Relations: Portents for the Lowly Paid', *Journal of Australian Political Economy*, No 56, December 2005

<sup>190</sup> Submission 35, Unions NSW, p21

<sup>191</sup> B.Ellem, M.Baird, R.Cooper and R.Lansbury 'WorkChoices: Myth-making at Work', *Journal of Australian Political Economy*, No 56, December 2005, attachment to Submission 45, Professor Lansbury

<sup>192</sup> Dr Baird, Evidence, 15 September 2006, pp25-26



whether and to what extent it will do so.<sup>193</sup> As noted in chapters 2 and 4, the Commission handed down its first decision on wages under the new legislation on 26 October 2006. The Commission announced an increase of \$27.36 per week in the standard Federal Minimum Wage.<sup>194</sup>

**7.12** Ms Michelle Pederson of the National Council on Women NSW also pointed out that as the Fair Pay Commission will only have the power to recommend changes to the minimum wage, ultimately the Federal Government will control whether its recommendations are implemented.<sup>195</sup>

**7.13** Both Ms Manser and Ms Annie Owens, NSW Branch Secretary of the LHMU, emphasised that with WorkChoices' negation of the powers of the NSW Industrial Relations Commission, an important avenue for addressing pay equity issues has now been closed off. Whereas previously, groups of workers could make a case to the Commission that they were disadvantaged in their wages and conditions because they were female, such collective action is no longer allowed.<sup>196</sup> Ms Owens noted the Commission's recent decision in relation to childcare workers which awarded them substantial pay increases to address the historical undervaluing of their labour. She concluded:

... under WorkChoices that can never happen again. No other group of undervalued women have a capacity under WorkChoices to bring a similar claim, and childcare workers are not the only group of women with that kind of claim.<sup>197</sup>

**7.14** Dr Michael Lyons, Senior Lecturer in the School of Management at the University of Western Sydney, observed that by closing off the avenue of the NSW Industrial Relations Commission, WorkChoices has made pay equity an 'individualised' process, where the issue will now simply be left to individual workplaces, individual employers and individual workers. He also noted that the only remedy now available is for individual workers to make a complaint to the Human Rights and Equal Opportunity Commission, which has no powers beyond individual matters.<sup>198</sup>

**7.15** Ms Jo Jacobson, a childcare worker and spokesperson for Penrith Working Families, gave her perspective on the emasculating of the NSW Industrial Relations Commission:

I am disgusted to think that we are not rewarded for working hard. I used to be paid \$280 a week to look after and take on responsibility for other people's children. Though the pay equity case is through, some small businesses will not have to pass on the benefits of that decision, and I am concerned that from now on it will operate on a case-by-case basis ... Regardless of the political rhetoric, in the real world it is not a level or genuine playing field for women to thrash out their rights and conditions with their bosses. Couple this with the removal of the independent umpire and the no

<sup>193</sup> Ms Manser, Evidence, 19 June 2006, p14

<sup>194</sup> [www.fairpay.gov.au/fairpay](http://www.fairpay.gov.au/fairpay) (accessed on 27 October 2006)

<sup>195</sup> Ms Pederson, Evidence, 18 July 2006, p57

<sup>196</sup> Ms Manser, Evidence, 19 June 2006, p14; Ms Owens, Evidence, 19 June 2006, p31

<sup>197</sup> Ms Owens, Evidence, 19 June 2006, p31

<sup>198</sup> Dr Lyons, Evidence, 19 June 2006, p39

disadvantage test, and tell me honestly how we can fight the person who has the purse strings.<sup>199</sup>

- 7.16** The South Penrith Youth and Neighbourhood Services submission pointed out that individual agreements will undermine equity even at the most basic level, the workplace, observing, 'This means that women doing exactly the same or similar work may be paid differently depending on their individual negotiation and assertiveness skills.'<sup>200</sup>

## Job security

- 7.17** A number of inquiry participants emphasised that the WorkChoices legislation will affect the job security of many women. Ms Michelle Pederson of the National Council on Women NSW argued that the unfair dismissal laws will unduly disadvantage women working in small and medium business enterprises, many of whom already have low job security as casual and part-time employees.<sup>201</sup>

- 7.18** Ms Zou also noted that given the predominance of women among casual employees, women will also be disproportionately affected by the removal of the right to convert from casual to permanent status after a certain period:

In many current Federal and State awards there are clauses that allow casual conversion to permanent after a minimum length of time – for example, 12 months. Under WorkChoices a lot of these clauses will become redundant and opportunities for women to rely on these clauses in the previous award system in order to gain more permanency and security in their occupations, that has also been removed. That is a real grave concern in the trend towards casualisation of our work force, particularly the impact on women.<sup>202</sup>

- 7.19** The case study below of Denise Guthrie, who spoke to the Committee in Penrith, illustrates the situation of many women workers on lower wages, with comparatively poor bargaining power, who are vulnerable to unfair dismissal. Ms Guthrie refused to sign an AWA reducing her pay and was dismissed. Given the timing of her employer's action, she was able to lodge an unfair dismissal claim with the NSW Industrial Relations Commission, which she subsequently won.

### **7.20 Case study: Denise Guthrie**

Denise is a childcare worker at a preschool in the western suburbs of Sydney. She has worked at the same centre for over three years as a casual employee, doing regular work with set hours. In February 2006, she applied for her position to be made permanent part-time.

At the beginning of April 2006, her employer offered Denise her position on a temporary, part-time employment agreement. Under this agreement, her pay would be cut by around \$4 an hour, and the other conditions that come with part-time employment would not continue. She did not accept this agreement, and requested further negotiations with her employer.

<sup>199</sup> Ms Jacobson, Evidence, 17 July 2006, pp42-43

<sup>200</sup> Submission 7, South Penrith Youth and Neighbourhood Services, p6

<sup>201</sup> Ms Pederson, Evidence, 18 July 2006, pp57-58

<sup>202</sup> Ms Zou, Evidence, 18 July 2006, p54

On April 27, Denise attended a staff meeting at which she was told in front of her co-workers that as she had rejected the employer's offer, she no longer held her job. Instead, she was made a casual relief worker, to work when other people are off sick.

Following this meeting, Denise got in touch with her local federal Member and her union. Through her local Member's office, she was put in touch with the Office of Workplace Services, but was told that there was no one there who was up to date with the new legislation, and that while they believed she had a case they could not help her. She again contacted her local Member, whose staff personally rang the Office of Workplace Services, who then called Denise. The staff member from the Office of Workplace Services also rang Denise's employer to get their side, and Denise was told that she had no case.

Not happy with this, Denise again called her local Member's office, who put her in touch with the office of the Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP.

The Minister's office researched Denise's case and advised her to lodge an unfair dismissal claim in the NSW Industrial Relations Commission. Denise's union then lodged the claim on her behalf. Before the dispute was resolved by the Commission, Denise met with her employer and she was reinstated into a permanent part-time position.

Denise said to the Committee, '... this process placed a lot of strain on me and my family, both personally and financially ... If I had had to fight for my job under the new Federal laws, I would be still fighting for my job at a huge cost to myself and my family, with minimal chance of success. I have gone from pillar to post with what has happened. I got on the phone and tried to do all my own legwork. But I just kept getting fobbed off ... Having only nine employees, under the new industrial relations laws because it is under 100 employees I would have been put on the scrap heap, you may as well say. It has been a hard fight, but it has been worth it.'<sup>203</sup>

## Fear and stress in the workplace

- 7.21** Numerous participants reported an increased level of fear and stress in the workplace since the advent of WorkChoices. A number of witnesses raised this issue specifically in relation to women employees.
- 7.22** For example, Ms Owens of the LHMU reported that the negation of unfair dismissal rights was creating an atmosphere of fear in the workplace for members of her union.<sup>204</sup> Similarly, Ms Debra Carstens, Co-ordinator of Asian Women at Work, raised this as an issue of strong concern:

The single biggest issue that migrant women workers are reporting to us is the increasing stress and fear of workers in their workplace. Workers are fearful that they are going to be sacked and are not speaking out about issues concerning them in their workplace: they are not raising health and safety issues; they are not speaking up about unfair treatment and they are being bullied and abused by employers and supervisors to a greater degree than before.<sup>205</sup>

<sup>203</sup> Ms Guthrie, Evidence, 17 July 2006, p4

<sup>204</sup> Ms Owens, Evidence, 19 June 2006, pp32-33

<sup>205</sup> Ms Carstens, Evidence, 28 July 2006, p23

## Provisions to accommodate caring responsibilities

**7.23** Earlier in this chapter, the Committee noted the evidence that women's caring responsibilities impact upon their bargaining power in the workplace. Many participants emphasised that under WorkChoices, women will have less ability to secure the working conditions that enable them to fulfil their dual roles. For example, Dr Baird stated in evidence:

In terms of work and family, we believe it will be - and I particularly think this is the case having looked at the evidence - much harder to bargain for improvements in work and family conditions, and thus more difficult for Australian employees to balance work and family and added caring roles. WorkChoices did not improve on the unpaid parental leave provision that Australia already had, so we continue to rank very poorly compared with other OECD nations. There is also less likelihood that work and family entitlements such as paid maternity leave, paid parental leave, or childcare or elderly care, can be bargained for individually under the new regime.<sup>206</sup>

**7.24** In the article by Ellem *et al* attached to Professor Lansbury's submission, the authors noted that the Federal Government has claimed that individual contracts can deliver the flexibility to enable women to balance work and family, and that employers will recognise the worth of female employees by providing innovative and flexible packages for them. The authors argued, however, that this promise is not supported by the research evidence, with numerous studies having shown that neither AWAs nor enterprise agreements have delivered significant improvements in paid maternity leave, a key element of family-friendly provisions. Indeed, one study by Baird in 2005 found that only 10 per cent of enterprise agreements and 7 per cent of AWAs referred to paid maternity leave. In addition, the authors reported that it is those who are in the lowest paid and female-dominated industries that are least likely to have access to paid maternity leave and associated work and family entitlements.<sup>207</sup>

**7.25** Ms Michelle Burrell, Acting Director of NCOSS, pointed out that the problem of affordable and accessible childcare might further impact on women:

... I think that in terms of the interrelationships between childcare and how Work Choices might play out in trading conditions for pay and family life balance, if you get unaffordable childcare into that mix as well, that also complicates the issue quite significantly. It may be that in order to keep your job, you have to trade some of your hours or other conditions affecting your work-family balance, which means that you have to put your child into childcare which (a) is really expensive and (b) is often simply not available in some circumstance.

**7.26** Ms Burrell flagged the broader implications of women having to trade off the very conditions that enable them to balance their work and family roles:

I think we should all be very concerned if carers are faced with difficult choices about trading their conditions because those conditions may well be what they rely upon in order to care for their [children or] family member with a disability. I think we would all agree about the huge amount of unpaid work that carers do. That just may be one

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<sup>206</sup> Dr Baird, Evidence, 15 September 2006, p25

<sup>207</sup> B.Ellem, M.Baird, R.Cooper and R.Lansbury 'WorkChoices: Myth-making at Work', *Journal of Australian Political Economy*, No 56, December 2005, p18, cited in Submission 45, Professor Lansbury

of the hidden effects that really was not necessarily thought through clearly at the time that the legislation was developed.<sup>208</sup>

- 7.27** In the climate created by WorkChoices, participants predicted a broad reduction in women's access to maternity leave, parental leave, carer's leave and related provisions. A number referred to the 2005 test case which established a mechanism whereby workers could expect to return to work after 24 months' unpaid parental leave, thus setting a new standard for such entitlements. These witnesses pointed out that under WorkChoices, the Federal Government has established only 12 months as the standard entitlement.<sup>209</sup>
- 7.28** The case study below, related during the Committee's visit to Penrith, illustrates both the difficulties many women face returning to work after a child, as well as the discretion that employers are now exercising in relation to wages.

#### **Case study: James and his wife**

James is a full-time worker from Werrington in South Western Sydney. He is a father of three young daughters who range in age from eleven to six months old. He and his wife work hard and have a large mortgage to make a comfortable life for their family. However, since James' wife's recent experiences with employers after the introduction of WorkChoices, they are very fearful for their financial future and family life.

When James' wife had her first two children, she applied for and was granted maternity leave. She was also fortunate that her workplace allowed her to work part-time, and to structure her working day around her family commitments. When she had their third child, she again applied for twelve months of maternity leave and it was granted.

This time, however, she received a letter from her employer, asking her to guarantee that she would return to work before the end of her twelve months of leave. In the same letter, she was told that the flexible working conditions she had benefited from were a thing of the past. James' wife called her employer to find out why her working conditions had been changed, and the employer told her that in their view, they did not have to provide flexibility under the new industrial relations system and she would have to come back as a full-time employee.

With James and his wife both having to work long hours, childcare costs would be added to their already substantial mortgage payments.

As a result of this treatment by her employer, James' wife decided to call other employers in her local area, to try and find some work close to home that she could take up when her maternity leave finished. She was shocked at the responses she received from the various employers she called. They all asked her 'What are you prepared to work for?', meaning 'How much an hour will you work for?'. James' wife told these employers her current hourly rate, sometimes a dollar or so less. Each told her that they would call her back with an interview time, but they never did. James' wife was asking employers for a flat rate wage that was actually below award rates, but what she was asking was deemed to be too high a price. He told the Committee, 'She is finding it really hard to find work, and we will find it really hard if she cannot find anything within the next six months.'<sup>210</sup>

## **Conclusion**

- 7.29** The Committee believes that WorkChoices is likely to have a significant adverse impact on women as a group. Evidence to this inquiry suggests that this is already occurring. In the Committee's opinion, the disparity between male and female earnings will grow as a result of

<sup>208</sup> Ms Burrell, Evidence, 19 June 2006, pp51-53

<sup>209</sup> Mr Dwyer, Evidence, 20 June 2006, p31; Ms Zou, Evidence, 18 July 2006, p58; Ms Burrell, Evidence, 19 June 2006, p52

<sup>210</sup> Mr Nero, Evidence, 17 July 2006, pp8-9 and pp12-13

both the loss of the awards system and the withdrawal of the powers of the NSW Industrial Relations Commission, both of which were important institutional tools for achieving pay equity. The Committee believes that the Federal Government is naïve in believing that the market will deliver gender equity in the workplace.

- 7.30** The Committee is also concerned that the job security of many women is likely to suffer as a result of the loss of both the unfair dismissal laws and award protections. The Committee is very troubled by the anecdotal reports of women employees experiencing increased fear and intimidation in the workplace since the advent of WorkChoices.

## Chapter 8      **The impact of WorkChoices on young people, people from rural and regional areas and people from other cultures**

This chapter continues the Committee's consideration of the human impact of WorkChoices by examining its impact on young people, people from rural and regional areas and people from other cultures, including those from culturally diverse and Aboriginal communities.

### **Young people**

**8.1**      During the inquiry, a significant number of parties expressed concern about the impact of the WorkChoices regime on young people. A number of organisations representing children and young people, such as the Youth Action Policy Association (YAPA), the NSW Commission for Children and Young People, NSW Young Labor, the National Union of Students and the Young Christian Workers made submissions to the inquiry emphasising that WorkChoices did not afford children and young people sufficient protection.<sup>211</sup> The Committee also took evidence during hearings on the issue of young people from representatives of groups as diverse as the Ethnic Communities Council, the Gymea Sub-Branch of the Australian Manufacturing Workers Union Retired Members Association, Retirees Care About Your Rights at Work and the Catholic Commission for Employment Relations.<sup>212</sup>

#### **The participation of young people in the workforce**

**8.2**      The Committee notes that over 150,000 young people aged less than 18 are in formal employment in this State.<sup>213</sup> According to the NSW Government submission, the workforce participation rate of young people in New South Wales is 57.1%. Children and young people are concentrated in the retail, accommodation and hospitality industries, which are highly casualised and associated with lower rates of pay, high turnover and poor occupational health and safety outcomes.<sup>214</sup>

**8.3**      The Committee notes the evidence of Ms Kristy Delaney, Executive Officer of YAPA, that the transition from school to work for young people has changed markedly over the past few

<sup>211</sup> Submission 19, YAPA; Submission 46, The NSW Commission for Children and Young People; Submission 30, NSW Young Labor; Submission 27, National Union of Students; Submission 24, Young Christian Workers

<sup>212</sup> Mr Rathana Chea, Youth Chair, Ethnic Communities Council of NSW, Evidence, 18 July 2006, p31; Submission 5, Gymea Sub-Branch of the Australian Manufacturing Workers Union Retired Members Association, p2; Mr Roger Hennessy, Member, Retirees Care About Your Rights at Work, Evidence, 17 July 2006, p36; Mr Michael McDonald, Executive Director, Catholic Commission for Employment Relations, Evidence, 20 June 2006, p52

<sup>213</sup> Hon Morris Iemma MP, Premier, 'New Laws to Protect Young NSW Workers from WorkChoices', *Media Release*, 30 August 2006

<sup>214</sup> Submission 37, NSW Government, pp35-36

decades. In the past, few young people worked while at school but, once finished, they tended to work full time. Now, by contrast, more and more young people are combining school and then further study with casual or part-time work – the number of young people combining school with work has doubled over the last decade, while for young adults it has tripled.<sup>215</sup>

### **The perceived vulnerability of young people in the workplace**

**8.4** Various parties argued during the inquiry that children and young people are particularly vulnerable to exploitation in the workplace as a result of their youth and inexperience. For example, the NSW Government argued in its submission that young people generally have a poor understanding of their rights at work, which inevitably will affect their capacity to negotiate pay and conditions, especially with the abolition of the ‘no disadvantage’ test.<sup>216</sup> The NSW Commission for Children and Young People stated in its submission:

It is the nature of the relationship between adults and children that children are raised to do what adults tell them. Children are already in a non bargaining position relative to adults by virtue of their status as children. Further to this, children approach adults from a position of trust and assume that adults are there to help them and look after their interests. However, this is not necessarily the case in work settings. A deregulated work environment may result in children feeling unable to protest and stand up to adults, which in turn undermines their capacity to bargain.<sup>217</sup>

**8.5** In its submission, YAPA documented the findings of its recent survey of over 400 young people which found that:

- the majority of young people thought they would be better off under an award
- less than 1 in 5 young people thought they would be better off negotiating their own pay and conditions
- the majority of young people are not confident to negotiate their own pay and conditions
- young people are more likely to put up with poor pay and conditions than to quit and look for another job.<sup>218</sup>

**8.6** The Committee also notes the advice of Ms Rebekah Stevens, Acting Assistant Director General of Industrial Relations Analysis and Partnerships at the Office of Industrial Relations, that there is currently no federal minimum wage that applies to employees aged under 21 years, and that as a consequence, young people can legally sign an Australian Workplace Agreement (AWA) with a wage rate much lower than the current adult minimum wage of \$12.75 an hour.<sup>219</sup> Ms Stevens further observed that ‘while WorkChoices does allow the Fair

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<sup>215</sup> Ms Delaney, Evidence, 18 July 2006, p4

<sup>216</sup> Submission 37, NSW Government, p37

<sup>217</sup> Submission 46, The NSW Commission for Children and Young People, p5

<sup>218</sup> Submission 19, YAPA, p1

<sup>219</sup> Ms Stevens, Evidence, 15 September 2006, p23



Pay Commission to set a federal minimum wage that applies to those employees, there is no requirement for it to do so'.<sup>220</sup>

### **The bargaining position of young people in the workplace**

- 8.7** Parties to the inquiry argued that young people tend to be in a poor bargaining position in the workplace. In its submission, the Australian Workers Union argued that young people entering the workforce for the first time may often be in a particularly poor bargaining position, as they are likely to find it difficult to negotiate with experienced employers or their management team.<sup>221</sup>
- 8.8** NSW Young Labour suggested in its submission that young people are less likely to be able to bargain effectively in the workplace due to a number of systemic factors including:
- the hierarchical nature of the education system
  - a lack of experience in bargaining situations
  - a lack of accessible information on workplace rights and industrial law
  - low rates of union membership amongst young people
  - the nature of the labour market in the youth demographic
  - the financial barriers to legal assistance and representation.<sup>222</sup>
- 8.9** Similarly, the National Union of Students noted in its submission that:
- Young workers are unlikely to have more experience in workplace negotiation than their employer, or their employer's legal representatives, so it is unlikely that they will have superior bargaining ability.
  - Young workers are often looking for entry level positions, so it is much more difficult for them to differentiate themselves in terms of skills and experience from other applicants.
  - Young people are more likely to be employed on a casual basis than older workers. Casual work has the potential to provide some individuals with an enhanced capacity to organise work and other elements of their life, However casual employees have less job security, benefit from less investment in training and have lower expectations about how they should be treated in the labour market.
  - Young people who have worked as casuals for many years before accepting a full-time job are, therefore, less likely to demand the forms of conditions and job security that full-time employees have historically come to expect.<sup>223</sup>

<sup>220</sup> Ms Stevens, Evidence, 15 September 2006, p23

<sup>221</sup> Submission 11, Australian Workers Union, p16

<sup>222</sup> Submission 30, NSW Young Labour, pp6-7

<sup>223</sup> Submission 27, National Union of Students, p3

- 8.10** Ms Laura Williams, Youth Resource Development Officer at South Penrith Youth and Neighbourhood Services, also raised the situation of young people from disadvantaged backgrounds, and the impact this has on their bargaining position:

My second point relates to young people from disadvantaged backgrounds: young people who may have come from families who are struggling to keep food on the table and a roof over their head; young people from refugee backgrounds who need to work but have little connection with those outside their families and whose parents either speak English as a second language or not at all; young people with disabilities or parents with disabilities. Young people from disadvantaged families are already living in poverty. This group of young people may be under pressure from family to accept a job, regardless of poor pay and conditions.<sup>224</sup>

### **The impact of AWAs on young people**

- 8.11** Particular concerns were expressed during the inquiry about the impact of AWAs on young people in the workplace. In its submission, the Commission for Children and Young People noted evidence that prior to WorkChoices, there were already instances of young people worse off under AWAs. The Commission cited a case before the South Australian Industrial Relations Court, in which an employer was ordered to pay an employee (a year 10 student) \$1,438 in back pay. The judge commented:

But the plain fact is that under this AWA the respondent worker was paid grossly less than she was entitled to as a minimum under the State Award ... The AWA sought to cut her minimum entitlement by approximately 25 percent.<sup>225</sup>

- 8.12** However, concerns were expressed that young people would be even more vulnerable to exploitation under the provisions relating to AWAs implemented by WorkChoices. For example, the National Union of Students submitted:

As students tend to be employed in casual and short-term work the protection of existing awards/collective agreements will not count for much. When they go for their next job they are more than likely to face an AWA that gets rid of existing work rights like weekend, shift and public holiday rates; overtime; redundancy pay and allowances. While the student has the right to not take that job there is little choice for the students if such conditions become the new race to the bottom benchmark in the area.<sup>226</sup>

- 8.13** As noted in Chapter 5, one protection that is provided under WorkChoices for young people being offered an AWA is the requirement that if they are aged under 18, the AWA must be approved by a parent or guardian. However, participants such as Ms Pat Manser, Deputy Director General of the NSW Office of Industrial Relations, pointed out that this provides no guarantee that the agreement will be fair.<sup>227</sup>

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<sup>224</sup> Ms Williams, Evidence, 17 July 2006, p19

<sup>225</sup> *Yurong Holdings Pty Ltd v Renella* [2005], South Australian Industrial Relations Court, McCusker J, paragraph 15, quoted in Submission 46, The NSW Commission for Children and Young People, p5

<sup>226</sup> Submission 27, National Union of Students, pp3-4

<sup>227</sup> Ms Manser, Evidence, 15 September 2006, p12

8.14 The Committee notes the case of Ms Amber Oswald set out below.

**Case study: Ms Amber Oswald**

Amber is a sixteen year old high school student from the Northern Beaches of Sydney. Before the introduction of WorkChoices, she was working as a casual employee at the Pulp Juice Bar in Warriewood Square Shopping Centre. Amber was initially employed under a certified enterprise agreement.

At the end of March 2006, the company that ran the outlet went into liquidation, and another company stepped in and took over its management. Amber was told verbally that although her employment with Pulp Juice Bars had been terminated when the company stopped trading, she still had a job with the new owner. Nothing was given to her in writing; she did not receive an offer of employment or any information about new employment conditions.

Amber heard from other employees that the conditions of employment under the new owners were going to be different from what existed before. She found out that there was an AWA that all employees were to sign, however she did not see a copy of it. Amber's father repeatedly asked the juice bar managers for a copy of the AWA, but was told the new agreements were not available. Instead, he was given a generic 'welcome letter' that, as Amber's legal guardian, he was supposed to sign. He was told by the manager that Amber would now be receiving a flat hourly rate, regardless of which days she worked. The manager said that Amber would be paid in accordance with the 'WorkChoices Rates - Level 1 (Shop Assistant)' wage.

Under her enterprise agreement, Amber had been paid time-and-a-half for working Sundays. The new hourly rate in the AWA was set at \$1 below the old one, and amounted to a pay cut of \$40 per week for her Sunday shift alone if Amber signed the agreement.

Amber kept working for the juice bar without signing any documents. As a result of the new owner making a mistake in the paperwork, Amber's union was able to take the case to the Australian Industrial Relations Commission to have her previous conditions of employment restored. The only reason that the union was able to do this was because the new juice bar owners had followed the WorkChoices procedures incorrectly.

Amber has since had her pay restored to her enterprise agreement rates. However, her employer won't give her any more Sunday shifts because it is cheaper to roster on employees who are working under the AWA. Her take home pay has declined substantially.<sup>228</sup>

8.15 The Committee also notes the case of Ms Carmen Cindric.

**Case study: Ms Carmen Cindric**

Carmen is an eighteen year old law and journalism student from the western suburbs of Sydney. She used to work weekends as a casual employee in a Penrith homewares store.

On 2 July 2006, Carmen arrived at work for her usual Sunday shift and was given an AWA to sign by one of her co-workers. Her employer did not contact her at all, and was not there to answer any of Carmen's questions or to negotiate with her.

The AWA took away weekend penalty rates and Carmen was told that if she did not sign the Agreement, she would be out of a job. She did not sign it, but her co-workers that did found themselves over \$100 a week worse off. Under the Agreement, Carmen would only earn \$46 a week, which would barely cover her travel and university costs.

Carmen told the Committee, 'To come into work and be told suddenly I must go home if I did not sign and agree to the terms was a great shock, especially with no-one there to speak to about it. I am worried that this is how it will be in the future - that employers can treat their workers with such disregard.'<sup>229</sup>

<sup>228</sup> Submission 9, MR Phillip and Ms Amber Oswald, p1-4

<sup>229</sup> Ms Cindric, Evidence, 17 July 2006, pp6-7

- 8.16** The Committee also heard numerous other examples of young people being 'offered' AWAs on a 'take it or leave it' basis, unwittingly signing away important conditions, or foregoing penalties in return for minor increases in hourly rates.<sup>230</sup>

### **The impact of WorkChoices on young people**

- 8.17** Based on cases such as those cited above, parties to the inquiry predicted a range of serious and potentially long-term consequences for young people would flow from WorkChoices. Dr Chris Briggs, Senior Lecturer at the Workplace Research Centre at the University of Sydney, argued that, on the basis of the evidence from New Zealand, wages for young people and other casual workers can be expected to decline.<sup>231</sup>

- 8.18** The National Union of Students predicted that the loss of penalty rates would have a major impact on the time students have to devote to their studies while still meeting their basic living expenses.<sup>232</sup> Mr John Ferguson, Policy and Training Officer with YAPA, reiterated this in evidence:

... there are some young people who are supported by mum and dad at home and their casual pay may not be that critical but a large number of young people are dependent on every dollar they earn and they have to do this work. For some of them it is not a choice ... If we are going to force them to work longer hours because they need this money and they need to make financial commitments, they will be going to school less or they will be less attentive at school. They need this money.<sup>233</sup>

- 8.19** Similarly, the South Penrith Youth and Neighbourhood Services suggested in its submission that reduced wages will lead to a drop in the standard of living for young people coming into the workforce and will place further pressure on families to continue to support young people for a longer period of time.<sup>234</sup>

- 8.20** Other participants such as Mr Rathana Chea, Youth Chair of the NSW Ethnic Communities Council, argued that WorkChoices will exacerbate the 'culture of casualisation' already affecting many young people, whereby they work in casual or more marginalised employment over many years. Mr Chea argued that this has broader societal implications:

It relates to a sense of participation in society. It also impacts on whether or not young people become disenfranchised [from] society and whether or not they feel disengaged or further marginalised, which creates a raft of other problems.<sup>235</sup>

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<sup>230</sup> Mr Hennessy, Evidence, 17 July 2006, pp36-37; Submission 51, Milton Ulladulla Rights at Work Committee, p1; Ms Williams, Evidence, 17 July 2006, pp18-19

<sup>231</sup> Dr Briggs, Evidence, 28 July 2006, p35

<sup>232</sup> Submission 27, The National Union of Students, p4

<sup>233</sup> Mr Ferguson, Evidence, 18 July 2006, p5

<sup>234</sup> Submission 7, South Penrith Youth and Neighbourhood Services, p3

<sup>235</sup> Mr Chea, Evidence, 18 July 2006, p29

- 8.21** As noted earlier in this report, increased casualisation of the workforce is also likely to mean that employers invest less in training, which will in turn affect young people's careers as well as the skill base of the community.<sup>236</sup>
- 8.22** Finally, a number of participants argued that WorkChoices will further undermine the safe working conditions of young people. These research findings are documented in Chapter 11, which explores the broader issue of workplace safety in detail.

### **New protections for young people**

- 8.23** Given the perceived adverse impact that WorkChoices will have on young people, a number of parties called for additional protections for young people from exploitation in the WorkChoices environment. For example, YAPA recommended government action to ensure that young people aged less than 20 are exempted from individual work contracts. It also recommended that a Young Workers Advisory Service be established to provide information, advocacy and legal advice to young people in the workplace, based on a model established in Victoria.<sup>237</sup> Ms Williams from the South Penrith Youth and Neighbourhood Services supported the YAPA recommendations.<sup>238</sup>
- 8.24** In August 2006, the NSW Government announced that it would introduce legislation to protect young people from WorkChoices through the child labour laws. As noted in Chapter 2, this is an area of industrial relations for which state governments retain responsibility. The new legislation will mean that:
- wages and conditions for young people under the age of 18 will have to be at least at the level provided by NSW awards and legislation
  - young workers will not have to bargain individually to maintain their existing penalties, allowances, training pay and training leave.<sup>239</sup>
- 8.25** Ms Manser of the Office of Industrial Relations explained the State Government's intentions to the Committee:

We will define a person who is under the age of 18 years to be a child. We will require an employer of an employee under the age of 18 years to provide terms and conditions at least equivalent to those applying under the relevant New South Wales award and legislation. In other words, we will be maintaining the status quo for young people with regard to wages and conditions. We will allow people to apply those stipulations flexibly - in other words, it might be an Australian Workplace Agreement [AWA], a collective agreement or something else - provided that the arrangements do not constitute a disadvantage to the young person concerned. We will use our industrial inspectors to enforce the requirements and enable the Industrial Relations

<sup>236</sup> Submission 11, Australian Workers Union, p18

<sup>237</sup> Submission 19, YAPA, p3; see also Mr Ferguson, Evidence, 18 July 2006, p8

<sup>238</sup> Ms Williams, Evidence, 17 July 2006, p19

<sup>239</sup> Hon Morris Iemma MP, Premier, 'New Laws to Protect Young NSW Workers from WorkChoices', *Media Release*, 30 August 2006

Commission to make a determination as to whether or not a child is disadvantaged if there is any dispute.<sup>240</sup>

**8.26** On 24 October, the Government introduced the Industrial Relations (Child Employment) Bill 2006 into the Legislative Assembly. During the second reading speech on the Bill, Mr David Campbell described the Bill's effect was to 'reintroduce a safety net'.<sup>241</sup> The Bill amends the *Industrial Relations Act 1996* to:

- require employers that are constitutional corporations not bound by state industrial instruments to provide certain minimum conditions of employment to children under 18 years of age that they employ under federal workplace agreements or other arrangements entered into on or after 27 March 2006 (being the date when the principal provisions of the federal Work Choices Act commenced)
- continue the application of the unfair dismissal provisions that are currently available under Part 6 of Chapter 2 of the *Industrial Relations Act 1996* to the dismissal by constitutional corporations of children under 18 years of age that they employ.<sup>242</sup>

**8.27** The Bill passed Parliament on 15 November 2006. Clause 2 of the Bill provided for its commencement (other than Part 2) on the date of the Bill's assent. The provisions of Part 2 are to commence on a day or days to be appointed by proclamation.

**8.28** In its supplementary submission, the NSW Commission for Children and Young People welcomed the NSW Government's proposal to retain current award provisions for workers under 18 years of age. However, the Commission still expressed concern that WorkChoices will lead to changes in the nature of work – notably in relation to workplace safety – that will adversely affect children and young people. The Commission also noted that once young people turn 18, they may find themselves on a very unequal footing in the workplace.<sup>243</sup>

## Rural and regional communities

**8.29** As directed by the terms of reference, the Committee took evidence on the impact of WorkChoices on rural and regional communities. Many stakeholders such as NCOSS, the South Coast Labour Council, various unions and a number of employer bodies such as the Local Government and Shires Associations and the Catholic Commission for Employment Relations identified this as an important area of concern.<sup>244</sup>

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<sup>240</sup> Ms Manser, Evidence, 15 September 2006, p12

<sup>241</sup> Mr David Campbell, Minister for Water Utilities, Minister for Small Business, Minister for Regional Development, Minister for the Illawarra, Legislative Assembly, New South Wales, *Hansard*, 24 October 2006, p87

<sup>242</sup> Explanatory Memorandum, Industrial Relations (Child Employment) Bill 2006, cited at <http://bulletin/prod/parlment/nswbills.nsf/0/F9D3FC98C54FE3D8CA257211001AE5CE?Open&shownotes> (accessed 15 November 2006)

<sup>243</sup> Submission 46a, The NSW Commission for Children and Young People, p1

<sup>244</sup> Ms Michelle Burrell, Acting Director, NCOSS, Evidence, 19 June 2006, pp51-52; Mr Arthur Rorris, Secretary, South Coast Labour Council, Evidence, 27 July 2006, pp1-2; Mr Gerald Dwyer, Branch Secretary-Treasurer, Shop, Distributive and Allied Employees Association, NSW Branch, Evidence, 20 June 2006, p31; Mr Greg Golledge, Industrial Officer, United Services Union, Evidence, 18 July

### **The nature of rural and regional labour markets**

- 8.30** The Committee notes that whilst many parts of Sydney have very low rates of unemployment, rural and regional communities generally have higher unemployment and more limited jobs markets. Ms Anna Watson, an organiser with the United Services Union, told the Committee:

In a regional area such as the Shoalhaven there is less of a job market. There are simply fewer jobs than there are in metropolitan areas, and there is not as much turnover in those jobs. Regional Australians know that it is not easy to pack up and move on.<sup>245</sup>

- 8.31** The Committee also notes the evidence of Ms Michelle Burrell, Acting Director of NCOSS, that significant numbers of low-paid workers and other disadvantaged groups live in rural and regional communities, either because they have lived there all their lives, or because they have moved there to find a more affordable place to live.<sup>246</sup>

### **The bargaining position of people from rural and regional areas**

- 8.32** As with young people, concerns were expressed during the inquiry about the bargaining power of people from rural and regional communities. Inquiry participants noted that in rural areas, people's choices are constrained not only by the smaller jobs pool but also by factors such as their social and family ties to the community and their partner's job, so that they have less ability to walk away from an offer they are not happy with. Ms Manser observed:

The WorkChoices Act is actually silent about social inequalities and regional inequalities, assuming that workplace bargaining will take place on a level playing field across Australia and any employee has the choice to accept new conditions or take another. Those of us who have lived in rural communities will know just how hard that is ... I think that social impact in rural communities of the WorkChoices is also going to be large.<sup>247</sup>

- 8.33** The Committee also notes, however, the evidence of Mr David Gibson representing the Local Government and Shires Associations that there are potentially positive impacts from the flexibility offered by WorkChoices in rural and regional communities:

There are a number of things that affect the rural economy, things like the drought, the loss of commercial undertakings and services to that area, high unemployment levels. They all go together to set up a situation, which means that potentially under WorkChoices, I suppose, that employers can bring people on workplace agreements or AWAs at varying levels. That is the one side of it. On the other hand, being able to do that potentially keeps industry alive whilst we are going through those particular periods of drought or economic recession in rural communities, so there are two sides of looking at that ...<sup>248</sup>

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2006, p24; Mr David Gibson, Workplace Solutions, Local Government and Shires Associations, Evidence, 18 July 2006, p24; Mr McDonald, Evidence, 20 June 2006, p52

<sup>245</sup> Ms Watson, Evidence, 27 July 2006, p18

<sup>246</sup> Ms Burrell, Evidence, 19 June 2006, p52

<sup>247</sup> Ms Manser, Evidence, 19 June 2006, p8

<sup>248</sup> Mr Gibson, Evidence, 18 July 2006, pp23-24

### The impact of WorkChoices on people and communities in rural and regional areas

**8.34** Parties to the inquiry predicted that a range of serious and potentially long-term consequences for people in rural and regional areas would flow from WorkChoices. In his evidence to the Committee, Professor Ron McCallum, Dean of the Law School at the University of Sydney, cited the experience of Victoria following the introduction of the *Employee Relations Act 1992* as indicative of the likely impact of WorkChoices on rural communities. Professor McCallum told the Committee:

On my visits to rural Victoria to examine the matter I came clearly to the view that workers were disadvantaged in small towns. The low wage economy really operated, and employers simply offered the minimum. There was no competition for labour in these small towns. As one employee put it, "Where should I go to get another job? The next town is four hours away and my husband has a job here." ... I have no doubt in my mind that in rural New South Wales and particularly in small towns where there is no great competition for labour, that employers, if pressed, will, in time, using Australian Workplace Agreements, take away various protected award rights and lower wages ... What I am suggesting to you is that those market forces may operate at their most rampant in rural areas of Australia where jobs are scarce and where people may work for less.<sup>249</sup>

**8.35** Unions NSW also referred in its submission to the two reports it commissioned in late 2005 in an attempt to predict the likely social impact of WorkChoices:

- The report prepared by Dr Edgar entitled *WorkChoices: Family Impact Statement* observed that young people and skilled workers tend to leave rural and regional communities in search of better jobs, while at the same time rural and regional areas tend to attract less skilled workers seeking cheaper living costs. The result is generally a reduction in an area's economic viability.<sup>250</sup>
- The report prepared by Dr Briggs entitled *The Shape of Things to Come* found that the abolition of awards and their replacement with statutory minimum conditions in Victoria resulted in significant growth in low paying jobs, concentrated in non-metropolitan areas.<sup>251</sup>

**8.36** Based on the studies of Dr Edgar and Dr Briggs, Ms Alison Peters, Deputy Assistant Secretary of Unions NSW, expressed her concern that WorkChoices will promote even greater inequality between rural and regional communities and metropolitan areas:

So essentially you draw out your skilled work force leaving behind those who are perhaps more vulnerable and less able to negotiate decent pay and conditions. So we have some grave concern that the impact of WorkChoices will again highlight the difference that is already there between rural communities and those perhaps who are working within the Sydney labour market.<sup>252</sup>

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<sup>249</sup> Professor McCallum, Evidence, 20 June 2006, p41

<sup>250</sup> Submission 35, Unions NSW, p20

<sup>251</sup> Submission 35, Unions NSW, p20

<sup>252</sup> Ms Peters, Evidence, 19 June 2006, p28



**8.37** Mr Arthur Rorris, Secretary of the South Coast Labour Council, noted in evidence the consistently higher unemployment rates in the Illawarra region compared with Sydney over many years, even during the recent economic boom, and predicted that WorkChoices would have a very negative impact on the Illawarra's economy:

If you have a work force - or, more broadly, a labour force - characterised by high unemployment on the one hand and by a structural employment deficit on the other, you have a major problem in this region. Minimum wages account for 50 to 60 per cent of the population ... you have a recipe for disaster.<sup>253</sup>

**8.38** The Milton Ulladulla Rights at Work Committee noted that the tourism, food and beverage and accommodation industries of small towns such as Milton and Ulladulla rely on short-stay patrons from Sydney, Wollongong and Canberra for the vast majority of their business. Based on this, they suggested that the likelihood of reduced wages, leave entitlements and job security among city-dwellers, combined with increased unpredictability of working hours, would lead to a substantial downturn in demand for tourism and hospitality services in regional and rural areas.<sup>254</sup>

## People from culturally and linguistically diverse groups

**8.39** In its submission, the Community Relations Commission for a Multicultural NSW provided the following snapshot of the participation of immigrants in the workplace:

- 87% of working immigrants are employees, with many reliant on award wages and conditions
- Generally immigrants are employed in unskilled or semi-skilled areas – manufacturing (16%), property and business services (14%), health and community services (12%) and retail trade (11%).<sup>255</sup>

**8.40** The Committee notes concerns raised during the inquiry about the impact of WorkChoices on people from culturally and linguistically diverse communities. In its submission, Asian Women at Work voiced strong concern that people from culturally and linguistically diverse backgrounds will be further disadvantaged by WorkChoices as a result of the legislation's reliance on individual bargaining, its removal of unfair dismissal protections, its restrictions on union access to the workplace and the probability that it will lead to a decline in wages, conditions, safety and security.<sup>256</sup>

**8.41** Mr Chea suggested that, while different migrant groups will have different levels of vulnerability under WorkChoices, some groups will be particularly vulnerable:

On the whole I would say that our communities are vulnerable, given the experiences of many of them in relation to displacement and re-establishment in Australia. It places a lot of stress on them in their reintegration into society, their stability and

<sup>253</sup> Mr Rorris, Evidence, 27 July 2006, p2

<sup>254</sup> Submission 51, Milton Ulladulla Rights and Work Committee, p2

<sup>255</sup> Submission 33, Community Relations Commission for a Multicultural Commission, p1

<sup>256</sup> Submission 52, Asian Women at Work, pp3-4

security, and all those things. If it looks as though a piece of legislation will take away their security in employment, obviously that is a matter of major concern for them. Within the category we look at culturally and linguistically diverse communities and at smaller and emerging communities. Communities that number fewer than 12,000 obviously are far more vulnerable because they do not have the established networks that the more established communities have.<sup>257</sup>

- 8.42** Mr Chea also noted that those with poor English are especially vulnerable. He noted that understanding the WorkChoices legislation is beyond the reach of many ordinary Australians, let alone those whose English is poor.<sup>258</sup>
- 8.43** In its submission, the Community Relations Commission for a Multicultural NSW also argued that WorkChoices may erode incentives for immigrants to move to regional and rural areas by providing less stability and security in the workforce. There is also a concern that WorkChoices will create feelings of resentment within local communities if immigrants displace local workers, when employers offer lesser wages and conditions under AWAs.<sup>259</sup>
- 8.44** Mr Chea further explained that, in areas where jobs are hard to find, migrants who have experienced significant hardship before coming to Australia may be willing to accept poor pay and conditions 'because of that mentality of survival. If you have nothing, very little seems like a lot.' As a result, they will have poor standards of living and may be stigmatised by other members of the community for undermining pay standards.<sup>260</sup>
- 8.45** Mr Andrew Ferguson, State Secretary of the Construction, Forestry, Mining and Energy Union, spoke of the vulnerability of migrant workers specifically in the construction industry. He noted that the construction industry is dominated by workers with limited English and a poor understanding of their industrial rights. He also noted that people from other countries engaged to work in Australia under '457 visas' can be particularly vulnerable to exploitation as cheap labour in unsafe conditions.<sup>261</sup>
- 8.46** Ms Elizabeth Rivera, whose husband works in construction and has very limited English, told the Committee that her husband is working under an agreement that he has never seen and cannot get a copy of, despite her best efforts in contacting not only the employer concerned, but also the Office of the Employment Advocate:

He is limited in his English skills so that makes it even more difficult to find out, to ask properly, to probably go to the employer and make sure that he does not come across too strong to ask for the agreement and get put off. The main concern at the moment is that he does not want to be put off and he does not want to lose his job. That is why I am here, just to tell the story and say that unfortunately no matter where I went or who I asked or what phone numbers I called, nobody was able to let me

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<sup>257</sup> Mr Chea, Evidence, 18 July 2006, pp28-29

<sup>258</sup> Mr Chea, Evidence, 18 July 2006, p33

<sup>259</sup> Submission 33, Community Relations Commission for a Multicultural NSW, p6

<sup>260</sup> Mr Chea, Evidence, 18 July 2006, p30

<sup>261</sup> Mr Ferguson, Evidence, 28 July 2006, p2

know anything about this agreement until yesterday when I tried once again, there was no answer for me.<sup>262</sup>

- 8.47** More broadly, Mr Ferguson also observed that even when migrant workers are given a copy of their AWA, they often cannot understand it and their rights.<sup>263</sup>
- 8.48** The Committee also heard that the information provided to culturally and linguistically diverse communities about WorkChoices has been extremely poor. Mr Chea noted that media reports of the impact of WorkChoices had caused significant confusion and anxiety in different communities, but that he is not aware of any translated information explaining the WorkChoices package made available by the Federal Government. He advised that after obtaining a copy of the original education package on the legislation last year, the Ethnic Communities Council had requested such information to be provided. However, by the time he appeared before the Committee in July, the Council was still not aware of any such translations having being made available.<sup>264</sup>
- 8.49** On this basis Mr Chea called for an effective education campaign targeting culturally and linguistically diverse communities, to equip them better for the new industrial relations system.<sup>265</sup>
- 8.50** The Committee notes that the Federal Government has made its ‘Fact Sheets’ on the WorkChoices legislation available in thirteen different languages.<sup>266</sup> The Federal Government has also implemented an Employer Advisor Programme to provide information and assistance to employers and employees to implement the industrial relations changes.<sup>267</sup> The Committee understands, however, that this program does not specifically target culturally and linguistically diverse communities.

### **Migrant outworkers**

- 8.51** The Committee received evidence that migrant outworkers are especially vulnerable to exploitation under the WorkChoices regime. For example, in its submission, the Gynea Sub-Branch of the Australian Manufacturing Workers Union Retired Members Association stated:

This country of ours already has a hidden outsourced network where mainly women are exploited by ruthless small businesses which the trade unions [have] been powerless to combat because these workers are loners. How much worse is the situation going to be in the future.<sup>268</sup>

<sup>262</sup> Ms Elizabeth Rivera, Evidence, 28 July 2006, p6

<sup>263</sup> Mr Ferguson, Evidence, 28 July 2006, p7

<sup>264</sup> Mr Chea, Evidence, 18 July 2006, pp33-34

<sup>265</sup> Mr Chea, Evidence, 18 July 2006, p36

<sup>266</sup> See <https://www.workchoices.gov.au/ourplan>

<sup>267</sup> See <https://www.workchoices.gov.au/ourplan/EmployerAdvisorProgram/>

<sup>268</sup> Submission 5, Gynea Sub-Branch, Australian Manufacturing Workers Union Retired Members Association p2

**8.52** Similarly, Ms Debra Carstens, Co-ordinator of Asian Women at Work, stated in evidence:

There are some people who have been working for 20 years in Australia and have never had what I would call a real job where they actually receive all their entitlements. Equally, there are new arrivals to Australia that ... say to us, "Well, that might be our rights but we are not ever going to be able to achieve that". The women in these workplaces that have never received award wages and conditions are reporting a worsening situation since the implementation of WorkChoices in the sense that the industrial relations environment has changed and employers seem to believe that they can get away with even more than what they were getting away with before.<sup>269</sup>

**8.53** Ms Qi Fen Huang, a member of Asian Women at Work, provided the Committee with two examples of women who work in these marginalised environments, cited in the case study below.

#### **Case study: Women in marginalised workplaces**

Ms Huang told the Committee, 'My friend's sister works in one of the clothing factories in Surry Hills. She is a very quiet woman. Because her language is not good at all she is fearing the people. She is working very, very hard. At the moment she told me she is very scared because all the factory workers are very scared they will be sacked by the employer at any time. During their work they are yelling at the people. They have two storeys in the factory. When she wants to go to the toilet she is scared to go from the top down to the ground floor to go to the toilet. She is very, very scared. Because of the stress over a long period of time her hair at the moment drops a lot, and her kidneys have got a problem. She cannot have a good sleep at night every night.'

'When she went to the doctor the doctor asked her to maybe rest for a while, for a few days, she said, "No, I could not do that because everyone is scared". She is worried she will be sacked by the employer over her health issues.'

Ms Huang also told us about several people she knows who work in a meat wholesale and retail shop. She stated, 'They work from seven o'clock in the morning and some from 7.30 to one o'clock. They are paying by cash the casual rate. But work with meat is a heavy load for them and it is more physical work. They are without any breaks—teatime. The supervisor will just criticise them in front of the whole people, the clients. They say, "You need to cut fast. Don't be lazy". When the supervisor heard about the new workplace law that was just introduced they said, "You know at the moment anytime you can be sacked if you are not working hard?"'

One of the workers told Ms Huang that his back is sore from carrying heavy loads of meat, but he is too scared to tell the supervisor or even to go to the doctor. She told the Committee, 'They are very scared to talk to the doctor because they are getting a work injury. One person take off one week of work but she said it is not related to the injury, she said her son is sick.'<sup>270</sup>

**8.54** Mr Igor Nossar, Chief Advocate with the Textile, Clothing and Footwear Union, told the Committee that there is very strong research evidence of the link between exploitative environments and poor occupational health and safety. Referring to a study co-authored by himself and Professors Michael Quinlan and Richard Johnstone, Mr Nossar reported:

It was unequivocal to the effect that exploitative work arrangements drive work injuries and you do not only get \$3 an hour, you get \$3 an hour plus pain, plus injury, plus effect on the family.<sup>271</sup>

<sup>269</sup> Ms Carstens, Evidence, 28 July 2006, pp22-23

<sup>270</sup> Ms Fen Huang, Evidence, 28 July 2006, pp23-24

<sup>271</sup> Mr Nossar, Evidence, 28 July 2006, p30

- 8.55** The issue of workplace safety among outworkers and other groups is discussed further in Chapter 11. In addition, the Committee examines the impact of the Federal Government's independent contractors legislation on outworkers in Chapter 12.

## Aboriginal people

- 8.56** Concerns were raised during the inquiry about the impact of WorkChoices on Aboriginal people. For example, the South Penrith Youth and Neighbourhood Services submission observed the systemic patterns of disadvantage and racism experienced by Aboriginal people and stated:

With this as a dominating background it would be fantasy to suggest that Aboriginal people's bargaining power in the workplace would be equal. With lower levels of education, Aboriginal people would be more likely to be employed in low paid or low skilled jobs which make people particularly vulnerable to unfair work practices. Coupled with systemic racism, the WorkChoices legislation leaves them no accessible protection.<sup>272</sup>

- 8.57** Similarly, Ms Julie Abdalla, Aboriginal Team Leader with the South Penrith Youth and Neighbourhood Services, stated in evidence:

I do not think any Aboriginal people, or at least very few, would have the power to bargain. Historically, many Aboriginal people have not been educated as well as others, and in many cases do not have the confidence to advocate for themselves. I worked in an organisation in which every week people were paid different amounts of money for doing the same job, without penalty rates or anything else, but would never question why that was. That went on for a long time. People were happy to have a job, felt empowered that they had a job, but were being ripped off—and that was when they were governed by awards and established conditions! But, even then, people did not advocate for themselves, so they would not do so now.<sup>273</sup>

## Conclusion

- 8.58** The Committee is concerned about the impact that WorkChoices will have on vulnerable young people. In general terms, young people are more vulnerable to exploitation in the workplace. They also tend to be in a poor bargaining position at work, leaving many young people open to exploitation. The AWA case studies cited in this chapter are stark examples of this. Reducing the wages and conditions of young people places them under greater financial stress to support themselves, to balance work and study and to participate in society. WorkChoices also has the potential to further entrench the marginalisation of those children and young people who are from disadvantaged social groups.
- 8.59** Accordingly, the Committee welcomes the announcement of the NSW Government that it will move to protect young people under the age of 18 from the full impact of WorkChoices by exempting them from the bargaining process and requiring that they be no worse off under workplace agreements. However, the Committee remains concerned about the impact of

<sup>272</sup> Submission 7, South Penrith Youth and Neighbourhood Services, p7

<sup>273</sup> Ms Abdalla, Evidence, 17 July 2006, p23

WorkChoices on young people aged 18 or over who generally experience the same disadvantages as their younger counterparts, but to whom the State Government is unable by law to extend such protection.

- 8.60** The Committee is also concerned about the impact of WorkChoices on people from rural and regional areas and the flow-on effects on their communities. WorkChoices makes no allowance for geographical differences in the Australian labour market and the reality of hardship and reduced bargaining power that people in rural and regional communities face. In the Committee's opinion, WorkChoices will compound the disadvantage of people in those rural and regional communities, not only by providing the framework in which their wages and conditions will be reduced, but also by generating serious flow-on effects for their local economies.
- 8.61** The Committee notes that in Recommendation 4, it advocated the provision of additional resources to the Office of Industrial Relations partly to enable it to provide additional training, information and support to rural and regional New South Wales in order to increase the participation and skills of people living in these areas.
- 8.62** Finally, the Committee is also concerned for the welfare of people from culturally and linguistically diverse and Aboriginal backgrounds under WorkChoices. The legislation neither recognises nor addresses the systemic barriers to workforce participation that both groups experience. The evidence is strong that those with poor English and a limited understanding of their rights are in an extremely poor bargaining position, which may well affect their wages and conditions, leaving them more vulnerable still to exploitation and unsafe work environments.

## Chapter 9      The impact of WorkChoices on income support recipients

This chapter continues the Committee's consideration of the human impact of WorkChoices by examining its impact on income support recipients, including sole parents and people with a disability. In particular, it examines the interaction between WorkChoices and the Federal Government's Welfare to Work changes implemented in the *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005*.

### The Welfare to Work legislation

**9.1** As noted in Chapter 2, the *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005*, which amended the *Social Security Act 1991 (Cth)*, implemented several changes to welfare payments, welfare eligibility and compliance mechanisms in Australia. The legislation came into effect on 1 July 2006.

**9.2** Welfare to Work is intended by the Federal Government to boost workforce participation and reduce welfare dependency, thereby promoting Australia's economic prosperity and social wellbeing. It is informed by the principle that people who are able to work should be required to seek work to their level of capacity.<sup>274</sup>

**9.3** The Federal Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP, has previously stated that Welfare to Work and WorkChoices are intended to work together to achieve mutually supportive outcomes in the medium and longer term:

These two pieces of legislation are designed to meet challenges that Australia faces in the future, challenges in terms of continuing to grow our productivity which is at the base of our economic growth in the future, which means jobs and higher wages for Australians but also the Welfare to Work changes in terms of ensuring that as many people of working age in Australia who are able and capable of working have that opportunity to be able to work ... They are reforms which are designed to have their effect not over three or four or five months, but over a number of years.<sup>275</sup>

**9.4** One of the key changes in the Welfare to Work legislation is to place more people who would previously have been entitled to pension-level payments onto allowance-level payments, where they are subject to activity requirements.

**9.5** For example, sole parents will no longer be able to get Parenting Payment once their youngest child turns eight but will, instead, receive Newstart Allowance. Similarly, people with disabilities who apply for payments and are assessed as being able to work for more than 15

<sup>274</sup> Australian Government, *Budget 2005-06*, 'A Sustainable Welfare System For The Future', [www.budget.gov.au/2005-06/overview2/html/welfare\\_01.htm](http://www.budget.gov.au/2005-06/overview2/html/welfare_01.htm) (accessed 22 September 2006)

<sup>275</sup> Hon. Kevin Andrews MP, Minister for Workplace Relations, Transcript, Doorstop Interview, Parliament House, Canberra, 'Workchoices and Welfare to Work Bills', 7 December 2005, cited at <http://mediacentre.dewr.gov.au/mediacentre/MinisterAndrews/Releases/WorkchoicesandWelfaretoWorkBills.htm> (accessed 9 October 2006)

hours per week (previously 30 hours per week) will no longer qualify for the Disability Support Pension, but will be placed on Newstart.

- 9.6** Moreover, recipients of Newstart Allowance receive a substantially lower payment than they would have received on either the Parenting Payment or the Disability Support Pension (\$420.90 per fortnight at the maximum single adult rate compared with \$512.10).<sup>276</sup>
- 9.7** The Welfare to Work legislation also implements a new compliance and penalty system for people on allowance level payments. Individuals on Newstart Allowance are subject to 'activity testing' to ensure that they are searching for a job. If they fail to undertake an activity they can incur a 'strike' on their record. Once three strikes are incurred – or only one strike in the case of refusing a job offer, leaving a job, or failing to meet the requirements of the Work for the Dole Scheme – an eight week no payment penalty period can be incurred.<sup>277</sup>

### **The impact on income support recipients**

- 9.8** A number of parties to the inquiry argued that the Welfare to Work changes and WorkChoices will in combination have a very significant adverse impact on income support recipients. Dr John Buchanan, Acting Director of the Workplace Research Centre at the University of Sydney, argued that the Welfare to Work legislation and WorkChoices will work in concert with one another to drive down wages and conditions amongst lower skilled workers:

Welfare to Work is essentially about massively increasing the number of low-paid, unskilled workers on the labour market to drive wages down. So if the Government stops paying the most vulnerable that will make them desperate to take any job possible. WorkChoices will limit their capacity to organise any industrial tribunals to look after their standards. So the two working together will create a significant number of low-paid jobs for a large number of unemployed people which will keep the wages for low-skilled jobs down.<sup>278</sup>

- 9.9** Ms Pat Manser, Deputy Director General of the NSW Office of Industrial Relations, further explained how this might occur:

... one of the things the Welfare to Work legislation does is create a pool of workers, or potential workers, who have previously been on some kind of income support from the Commonwealth who will be looking for 15 hours a week work because their income is being reduced by the new rules. So a pool of people is being created at the bottom of the heap and they will be in competition with the usual people who are at the bottom of the wage-earning scale, such as students who want some part-time work and women who can only work part-time. Those groups will be in competition with each other fairly savagely.<sup>279</sup>

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<sup>276</sup> Centrelink, <http://www.centrelink.gov.au/internet/internet.nsf/payments.htm> (accessed 10 October 2006)

<sup>277</sup> NCOSS, Answers to questions taken on notice, 19 June 2006, p1

<sup>278</sup> Dr Buchanan, Evidence, 28 July 2006, p43

<sup>279</sup> Ms Manser, Evidence, 19 June 2006, p3



- 9.10 When he appeared before the Committee, Mr Arthur Rorris, Secretary of the South Coast Labour Council, cited the case of “Craig”, detailed below.

**Case study: “Craig”**

Craig is married and has two children below school age. He was working for a major hotel chain in Sydney when he was dismissed in April 2006. Prior to WorkChoices he would have been able to seek remedy for what he believed was unfair dismissal, but now was not able to do so. He was given no separation certificate and, owing to his family situation, felt he had no choice but to move his family back to Nowra on the South Coast to live with his wife’s parents while he looked for another job.

After he moved he went to the local Centrelink office and was informed he could not receive income support until he submitted a separation certificate. His employer didn’t produce one for two weeks, leaving his family without income support for that time.

When the separation certificate finally arrived, Centrelink informed Craig that he was not able to register for unemployment benefits for six months because he had moved from an area with a lower unemployment rate to one with a higher unemployment rate, and as such, was considered to have reduced his chances of finding further employment.

Mr Arthur Rorris, Secretary of the South Coast Labour Council told the Committee, “The fact that Craig and his family had no choice, given Sydney’s rents ... but to move in with their parents whence they originally came ... had nothing to do with it ... He copped a six-month exclusion from unemployment benefits. He had a double whammy.”<sup>280</sup>

**Sole parents**

- 9.11 Particular concerns were expressed about the impact of the Welfare to Work and WorkChoices changes on sole parents, who are mostly women. Ms Jo Jacobsen, spokesperson for Penrith Working Families, contended that WorkChoices will have a particular impact on women, who make up the vast majority of those currently in receipt of Parenting Payment.<sup>281</sup> Ms Jacobsen reported a recent comment from a sole parent she knows:

She asked, “What chance do I have of finding employment, now that my youngest has started school, with the back-to-work policy being coupled with the WorkChoices legislation?” This is what I mean about things going hand in hand. With women under threat of losing government support if they do not accept positions, combined with the possible unscrupulous use of WorkChoices legislation by employers to ensure bare minimum wages and conditions, what chance does she have of finding a job that pays fairly and provides a proper income and entitlements?<sup>282</sup>

- 9.12 Mr Mark MacDiarmid, Principal Solicitor with the Elizabeth Evatt Community Legal Centre, further noted that the Federal Government’s recent changes to child support arrangements, whereby child support is more proportional to nights spent with different parents, will mean that many women and children who would previously have relied on Parenting Payment are worse off.<sup>283</sup>

<sup>280</sup> Mr Rorris, Evidence, 27 July 2006, p3

<sup>281</sup> Submission 41, Inner City Legal Centre, p4; Ms Jacobson, Evidence, 17 July 2006, pp42-43

<sup>282</sup> Ms Jacobson, Evidence, 17 July 2006, p43

<sup>283</sup> Mr MacDiarmid, Evidence, 20 June 2006, p11

**9.13** In its submission, the Combined Community Legal Centres Group argued that the combined effect of WorkChoices and the new child support arrangements will be to push already disadvantaged primary carers of children (mostly women) into greater poverty, putting their children at risk. The submission continued:

Not only does this bode ill from a child protection perspective, but given that the majority of sole parents are women, the disturbing conclusion that the Federal Government's legislative program contains an intentional gender bias seems irresistible.<sup>284</sup>

**9.14** NCOSS argued that low wage rates would further entrench the disadvantage of income support recipients, also noting that the effective marginal tax rates would serve as disincentives to workforce participation. It cited economic modelling by the Brotherhood of St Laurence which indicated that a sole parent with two children would face effective tax rates of 61%, which would rise to 77% when the costs of childcare were taken into account.<sup>285</sup> NCOSS further commented on the impact of the changes on families:

Whilst immediate and inter-related impacts of Welfare to Work and WorkChoices are likely to hit sole parent families hardest, the general erosion of entitlements and incomes of working poor families relative to the median wage will over time contribute to the relative disadvantage faced by children in these family environments.<sup>286</sup>

**9.15** Ms Julie Abdalla, Aboriginal Team Leader with the South Penrith Youth and Neighbourhood Services, voiced her concern that Welfare to Work will not take sufficient account of the caring role played by many Aboriginal income support recipients.<sup>287</sup>

**9.16** Her colleague, Ms Maree McDermott, Manager of the South Penrith Youth and Neighbourhood Services, noted her 'deep fear' for those affected by the two Acts, whose lives are already disrupted and marginalised, as reflected in the fact that they are receiving income support.<sup>288</sup> She raised the question of where people will turn when the safety net of the social security system has been withdrawn:

... are we next going to have to run soup kitchens for people who have their Centrelink benefits taken off them? People need to be fed and that is a terrible situation to be returning to – the days when people had to come and line up to get bread and soup.<sup>289</sup>

**9.17** In his research report commissioned by Unions NSW, *Federal IR Reform: The Shape of Things to Come*, Dr Chris Briggs predicted that, rather than addressing welfare dependency, Welfare to Work in tandem with WorkChoices will actually increase dependency by creating greater need for income support measures to supplement lower wages:

<sup>284</sup> Submission 25, Combined Community Legal Centres Group, p5

<sup>285</sup> Submission 22, NCOSS, p6

<sup>286</sup> Submission 22, NCOSS, p11

<sup>287</sup> Ms Abdalla, Evidence, 17 July 2007, p25

<sup>288</sup> Ms McDermott, Evidence, 17 July 2006, p24

<sup>289</sup> Ms McDermott, Evidence, 17 July 2006, p25

So although the effect of welfare reforms will be to prod disability and single parent allowance holders in[to] short-hour low-pay jobs, the countervailing effect will be a larger group who rely on transfer payments to supplement their incomes. The use of tax credits or transfer payments are widespread in the US as a consequence of low-wages. In New Zealand, also, the number of persons on income support and tax credits to supplement income from paid work increased by over 100,000 from 1991-99

... A secure livelihood, based on a living wage, earned in the workplace, remains a far preferable basis for citizenship and social inclusiveness. The balance has already shifted in Australia but further shifting the balance would have negative equity and social consequences.<sup>290</sup>

- 9.18** Dr Briggs went on to argue that, if the Federal Government's goal is to boost labour supply by propelling welfare recipients into the labour market, instead of stigmatising and targeting those on disability and sole parent benefits, it would be more effective to use policies that focus on tax disincentives, childcare resources and family friendly provisions such as paid maternity leave.<sup>291</sup>

### People with a disability

- 9.19** According to statistics provided by the NSW Disability Discrimination Legal Centre, Australian workforce participation rates for people with a disability are significantly lower than those for people without a disability. For instance, in 2003, 53.2% of people with a disability participated in the labour force compared to 80.6% of those without a disability. In addition, since 1993, the labour force participation rate of people with a disability has fallen, while the rate for people without a disability has risen.<sup>292</sup>
- 9.20** A number of parties to the inquiry expressed concern that WorkChoices will only further disadvantage people with a disability in the workplace. In its submission, the NSW Council for Intellectual Disability (CID) argued that negotiating AWAs under WorkChoices is particularly difficult for people with intellectual disability. The submission argued that people with intellectual disability can meaningfully participate in any activity, including workplace bargaining, if communication is appropriate and support is available. However, whilst WorkChoices does allow for a representative to be present during bargaining, many people with intellectual disability may not even realise they have the right to bring someone along with them. Additionally, finding someone with the necessary skills to understand the legislation and interpret it appropriately for them would be very difficult.<sup>293</sup> This position was reiterated in evidence by Ms Helena O'Connell, Executive Officer of the NSW CID:

I also think for people with intellectual disability that some may not even understand the concept of an agreement or that it is binding or long term. They might agree to

<sup>290</sup> Briggs C, *Federal IR Reform: The Shape of Things to Come*, report commissioned by Unions NSW, November 2005, pp99-100

<sup>291</sup> Briggs C, *Federal IR Reform: The Shape of Things to Come*, report commissioned by Unions NSW, November 2005, p100

<sup>292</sup> Submission 1, NSW Disability Discrimination Legal Centre, p3

<sup>293</sup> Submission 23, NSW Council for Intellectual Disability, pp2-3

sign it on the day but not necessarily understand what it means in terms of their long-term employment.<sup>294</sup>

**9.21** According to the NSW CID, the broad reductions in wages that are expected to flow from AWAs may leave those people with disabilities with high costs associated with their disability even more financially disadvantaged.<sup>295</sup>

**9.22** The NSW CID also cited in its submission the operation of Business Services, formerly known as Sheltered Workshops. Business Services employs people with a disability to do process work. It is funded by the Federal Government. However, NSW CID expressed concern that Business Services could impose collective agreement upon their employees, locking them in to low wages and poor working conditions.<sup>296</sup> Again this was reiterated by Ms O'Connell in evidence:

... people have been, if you like, coerced or perhaps not even coerced but encouraged to sign agreements when they had no understanding of what they were signing and getting locked into really low wages and poor conditions and, more importantly, particularly in Business Services, the contractual arrangements have not allowed them to move on to open employment, to move out of that congregate setting.<sup>297</sup>

**9.23** Finally, the NSW CID submission expressed concern about the impact of the new unfair dismissal laws on workers with disabilities. Despite the fact that people with intellectual disability are protected under unlawful termination provisions, NSW CID stated:

People with intellectual disability often work at different productivity levels to other employees ... if an employer wants to increase productivity it is likely an employee with intellectual disability would be seen to be negatively impacting the business. If an employer does not want to employ a person with intellectual disability they will use the bargaining process to place unfair expectations and demands on the individual, probably resulting in dismissal if these expectations cannot be agreed upon. In both cases difficulty understanding the legislation may mean that there is no consequence if employers do take advantage in such circumstances.<sup>298</sup>

**9.24** The Committee also notes that in its submission, the Australian Workers Union pointed out that while section 83BB(2) of WorkChoices requires the Office of the Employment Advocate to encourage parties to an agreement to take into account the needs of workers in disadvantaged bargaining positions, people with disabilities are not listed among those groups whose needs are to be considered. Section 151(2) of the *Workplace Relations Act 1996*, as amended by section 83BB(2) of the *Workplace Relations (WorkChoices) Amendment Act 2005*, provides:

(2) In performing his or her functions relating to workplace agreements, the Employment Advocate must encourage parties to agreement making to take account of the needs of workers in disadvantaged bargaining positions (for example: women,

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<sup>294</sup> Ms O'Connell, Evidence, 28 July 2006, pp17-18

<sup>295</sup> Submission 23, NSW Council for Intellectual Disability, p4

<sup>296</sup> Submission 23, NSW Council for Intellectual Disability, p3

<sup>297</sup> Ms O'Connell, Evidence, 28 July 2006, p14

<sup>298</sup> Submission 23, NSW Council for Intellectual Disability, p3

people from a non English speaking background, young people, apprentices, trainees and outworkers).

- 9.25 The Australian Workers Union submitted that people with a disability should be included under this section of the legislation.<sup>299</sup>

## Conclusion

- 9.26 The Committee is very concerned about the combined impacts of the WorkChoices and Welfare to Work changes on income support recipients, especially sole parents and people with a disability. Not only are the Welfare to Work changes highly punitive, in combination with the WorkChoices legislation they place income support recipients in a very poor bargaining position in the workplace. This is likely to further drive down the wages and conditions of employment of income support recipients.
- 9.27 The Committee also accepts the argument, based on the experience of other countries, that such policies are likely to be counterproductive in reducing welfare dependency and less effective in boosting labour supply than alternative policies which seek to reduce disincentives to work and to address the needs of working families.
- 9.28 The Committee recognises that the evidence on the final impact of WorkChoices on disadvantaged groups will take several years to reveal itself. However, based on the Committee's findings in this chapter, and the previous two chapters, the Committee anticipates that WorkChoices will in general terms be detrimental to the interests of disadvantaged groups including women, young people, people from culturally diverse backgrounds, Aboriginal people, those from rural and remote communities, people with disabilities and people receiving income support. The Committee believes that there will be an adverse impact upon the children, families and communities of all those groups, leading to greater rates of poverty, and exclusion and the breakdown of community ties.
- 9.29 To help ameliorate these anticipated impacts, the Committee makes the following recommendations.

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### Recommendation 6

That in establishing an Office of the Workplace Rights Advocate, as set out in Recommendation 3, the NSW Government ensure that the Office pays explicit attention to the needs of disadvantaged groups.

### Recommendation 7

That in examining the provision of additional resources to the Office of Industrial Relations, as set out in Recommendation 4, the NSW Government specifically consider the needs of disadvantaged groups.

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<sup>299</sup> Submission 11, Australian Workers Union, p17

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**Recommendation 8**

That in considering the development of a longitudinal study tracking wages and conditions in NSW, as set out in Recommendation 5, the NSW Government also consider the capacity to monitor effects specifically in relation to disadvantaged groups.

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- 9.30** The Committee is very concerned about evidence provided that while section 83BB(2) of WorkChoices requires the Office of the Employment Advocate to encourage parties to an agreement to take into account the needs of workers in disadvantaged bargaining positions, people with disabilities are not listed among those groups whose needs are to be considered. As pointed out to the Committee, despite their clear disadvantage, people with disabilities are not subject to this small protection under the legislation. As noted in recommendation 1, the Committee believes the best course of action is for the Commonwealth Government to repeal the WorkChoices legislation. Failing this, the Committee believes that the Commonwealth Government should amend the legislation to include people with disabilities in section 151(2) of the *Workplace Relations Act 1996*.
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**Recommendation 9**

That the NSW Government call on the Federal Liberal/National Coalition Government to amend section 151(2) of the *Workplace Relations Act 1996* to include people with a disability amongst the list of workers in a disadvantaged bargaining position.

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## Chapter 10 The impact of WorkChoices on employers

Terms of reference (f) required the Committee to examine the impact of the *Workplace Relations (WorkChoices) Amendment Act 2005* on employers and especially small businesses. This chapter examines the impact of WorkChoices on a number of specific industries and sectors: the motor trades industry, the waste and recycling industry, the local government sector and the social and community services sector. These were the industries and sectors on which the Committee received evidence during its inquiry. The Committee notes that it invited an extensive list of employer bodies to participate in this inquiry, both by making a submission or by giving evidence at a hearing, but that the majority did not participate in the inquiry. The chapter concludes with a summary of two surveys that have been conducted examining the experience of employers during WorkChoice's short period of operation.

### The impact of WorkChoices on employers in certain industries and sectors

**10.1** As previously indicated, the major employer associations were not involved in this inquiry, despite the Committee's invitation to them to participate. However, the Committee did receive submissions from a number of industry organisations and representatives examining the impact of WorkChoices on their industry. These are examined below.

#### The motor trades industry

**10.2** The Motor Traders' Association of NSW (MTA) is an employer organisation registered under both the NSW *Industrial Relations Act 1996* and the Commonwealth *Workplace Relations Act 1996*. It represents in excess of 5,000 members and affiliate members in the motor industry in NSW who are involved in vehicle repair, sales and product manufacturing.<sup>300</sup> Approximately 40% of member businesses are not constitutional corporations and are therefore not captured under the WorkChoices legislation, however the remaining 60% are. Members of the Motor Traders' Association employ approximately 80,000 people in NSW.<sup>301</sup>

**10.3** In its submission, the MTA identified a number of concerns in relation to the WorkChoices legislation. These concerns were also expressed in evidence by Mr James McCall, Chief Executive of the MTA, and Mr Gregory Hatton, Director of Employment Relations Services with the MTA.

**10.4** First, WorkChoices entails varying transitional costs to small business in the motor trades industry. The standards for annual leave and personal leave are prescribed under the new Australian Fair Pay and Condition Standard (AFPCS), which varies from existing provisions in awards and legislation. As a result, employers must go to the expense of updating leave accrual systems and training staff in these processes.<sup>302</sup> As stated by Mr Hatton in evidence:

<sup>300</sup> Submission 8, MTA, p1

<sup>301</sup> Mr McCall, Evidence, 19 June 2006, pp55,56

<sup>302</sup> Submission 8, MTA, p1

For a lot of small businesses the standard introduces new work conditions for the employees of those businesses. I suppose the challenge for the small business is to understand those changes and to try to apply them.<sup>303</sup>

- 10.5** Second, the MTA submitted that at the conclusion of the five-year WorkChoices transition period, those member businesses that are operating under the federal system but are not constitutional corporations will fall out of the federal system and into the NSW system.<sup>304</sup> Mr Hatton commented further:

Those businesses, because they are not corporations, will at the conclusion of that transitional period – despite their membership of MTA, which is a federally registered organisation – then slide into the State system. Then those 40 per cent of businesses will need to readjust their operations to apply various State awards that apply to their businesses. In some cases some of our members will have one award or maybe two awards that apply to their business when they move into the State system. They could have five, six or seven awards because those State awards are a little bit more narrow and occupational based. So potentially there will be increases in the varying costs and different conditions of employment and obviously a lot more complex arrangements from an industrial relations perspective.<sup>305</sup>

- 10.6** Third, the MTA argued that WorkChoices and the new AFPCS remove the ability of small business employers in the motor trades industry to effectively manage the taking of annual leave by their employees. Under the new arrangements, small business employers in the motor industry have no right to direct employees to go on annual leave until such time as an employee accrues an equivalent of two years' worth of annual leave. Under the previous arrangements, employers could direct employees to take annual leave during down times, making it easier for employers to manage their business effectively.<sup>306</sup>

- 10.7** The Committee notes that in his opening comments, Mr McCall indicated that despite the perceived imbalance created by the WorkChoices legislation in favour of employers, the MTA has urged and continues to urge its members not to exploit or take advantage of their employees in the new WorkChoices environment:

We would encourage, and do encourage, our members to the view that their staff are their most valuable asset, and they should treat their staff and their employees as the most valuable asset that their organisations have. We would impress upon our members the need to maintain the same quality management systems that they have maintained over the past decades; in other words, to treat their employees equitably and justly and, in cases where there are difficulties with their employees, to go through the same warning processes and remedial actions that they have taken and been required to take over the past decades. We would ask them not to do anything that would act in a manner that was unfair or inequitable in terms of their own employees.<sup>307</sup>

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<sup>303</sup> Mr Hatton, Evidence, 19 June 2006, p58

<sup>304</sup> Submission 8, MTA, p2

<sup>305</sup> Mr Hatton, Evidence, 19 June 2006, p59

<sup>306</sup> Submission 8, MTA, p2 See also Mr McCall and Mr Hatton, Evidence, 19 June 2006, p58

<sup>307</sup> Mr McCall, Evidence, 19 June 2006, p55



**10.8** In this regard, Mr McCall noted that employers in the motor industry have a very good and constructive working relationship with the major union covering motor industry employees – the Australian Miscellaneous Workers Union.<sup>308</sup>

### **The waste and recycling industry**

**10.9** The Waste Contractors and Recyclers Association of NSW represents 93 members employing an estimated 4,500 employees and subcontractors in the waste and recycling industry, including areas such as domestic and commercial solid waste removal and recycling, liquid waste removal, skip waste removal, transfer station operations, landfill operations, recycling centres and hazardous waste collection.<sup>309</sup>

**10.10** In its submission to the inquiry, the Waste Contractors and Recyclers Association of NSW indicated that there are a number of positive aspects to the WorkChoices legislation:

- The award system was overly complex and cumbersome. Even with the award simplification process, the association submitted that the Waste and Recycling Award and the Trade Waste Award had approximately 40 clauses each. As such, the award system contributed to significant business inefficiencies.
- The achievement of a unified national industrial relations system where employers operate according to one set of laws, regardless of which state they do business in, will increase the efficiency of the waste management industry, and indeed other industries.
- The limitation on the right of employees to commence unfair dismissal proceedings will lead to a welcome reduction in legal argument and legal fees. While the Association acknowledged that there may be some aggrieved individuals, it argued that the changes to unfair dismissal laws were in the national interest.<sup>310</sup>

**10.11** At the same time, however, the Waste Contractors and Recyclers Association of NSW indicated that its members have some very deeply held concerns about the medium to long-term effects of WorkChoices. The Association suggested that by developing the AFPCS as the benchmark for employment, the Federal Government has greatly reduced the scope of the industrial safety net system. The Association argued that in the waste and recycling industry, a situation may develop where employers are forced to reduce the pay and conditions of their workers in order to remain competitive with unscrupulous competitors – the so called ‘race to the bottom’ scenario:

Currently our Members are committed to sustaining a decent level of wages so that employees can work in the industry and know they will be properly treated. In order to do so, our members must have viable and sustainable businesses themselves. If they are confronted by unscrupulous competitors who seek to drive down wages to the lowest possible level, then in order to save their business, our members will be forced to respond; and it will be within such a scenario that there will be a crash in

<sup>308</sup> Mr McCall, Evidence, 19 June 2006, p55

<sup>309</sup> Submission 47, Waste Contractors and Recyclers Association of NSW, p1 See also Mr Khoury, Evidence, 18 July 2006, p37

<sup>310</sup> Submission 47, Waste Contractors and Recyclers Association of NSW, pp1-2

wages and conditions and resultant social effects on employees in the industry. None of this bodes well for the future.<sup>311</sup>

- 10.12** Representatives of the Waste Contractors and Recyclers Association of NSW expanded on this point in their evidence to the Committee. Mr Mark Diamond, Workplace Relations Advisor to the Association, argued that the so called 'race to the bottom' under the WorkChoices environment is more likely to occur in relatively unskilled and unschooled labour environments:

It is ... a significant concern in the waste industry. Although there is an enormous amount of effort and resources being spent by the very people we represent here today on training and upskilling, you are still driven to the conclusion that it is, in the classic sense of the Australian labour market, a technically unskilled work force, and it is ripe for that sort of incursion of which we spoke.<sup>312</sup>

- 10.13** The Committee also notes that the waste industry is a rapidly changing and developing industry, with an increasing demand for employees. However, if the effect of WorkChoices is to create a downward spiral in wages and conditions, then the capacity of employers to find good people to work in the industry may be severely curtailed.<sup>313</sup>

- 10.14** As a solution to this issue, the Waste Contractors and Recyclers Association of NSW submitted that the Australian Fair Pay Commission should set minimum rates of pay and conditions across specific industries, such as the waste and recycling industry, rather than across the entire workforce. At the moment, the WorkChoices legislation prevents this.<sup>314</sup>

### **The local government sector**

- 10.15** The Local Government Association of NSW and the Shires Association of NSW together represent 152 general purpose councils across NSW. In addition, their membership includes a number of special-purpose county councils (with functions like water supply and noxious plants control), together with the Aboriginal Land Councils, which are members of the Local Government Association.<sup>315</sup> Data for 2004 indicates that across NSW, councils employed approximately 51,600 employees, or the equivalent of 42,000 full-time positions.<sup>316</sup>

- 10.16** In their submission, the Local Government and Shires Associations indicated that in August 2005, their Executives resolved to express their opposition to WorkChoices, based on the following considerations:

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<sup>311</sup> Submission 47, Waste Contractors and Recyclers Association of NSW, pp2-3

<sup>312</sup> Mr Diamond, Evidence, 18 July 2006, p38

<sup>313</sup> The Contractors and Recyclers Association of NSW, 'Inquiry into the impact of the Commonwealth WorkChoices Legislation', Tabled document, 18 July 2006, p2

<sup>314</sup> The Contractors and Recyclers Association of NSW, 'Inquiry into the impact of the Commonwealth WorkChoices Legislation', Tabled document, 18 July 2006, p2

<sup>315</sup> See <http://www.lgsa.org.au/www/html/88-about-the-associations.asp> (accessed 13 September 2006)

<sup>316</sup> Mr Gibson, Evidence, 18 July 2006, p13

- the complexity and legalistic nature of the proposed changes
- the limitation of the dispute resolution powers of the Australian Industrial Relations Commission (AIRC)
- the potential that councils may be exposed to an array of claims in other jurisdictions.<sup>317</sup>

**10.17** Further, at its Annual Conference in October 2005, the Local Government Association of NSW resolved to express opposition to the following aspects of the proposed changes:

- The use of the corporations power as the foundation of the WorkChoices legislation, which means that the reforms are complex and legalistic, leading to uncertainty and additional costs.
- The diminished role of the AIRC. With the restriction on the AIRC's dispute resolution powers, councils will not have the benefit of the assistance of a third party experienced in employment related matters. As a result, it is expected that councils will be exposed to an array of claims in non-industrial jurisdictions such as common law claims, anti-discrimination and occupational health and safety claims.
- The use of Australian Workplace Agreements (AWAs). The Associations indicated their support for the right of Australian workers to choose a collective agreement and be represented by a trade union if workers decide that it is in their best interests.
- The potential for council staff to be transferred from a state to a federal award, limited in its scope to a small number of allowable matters.
- The potential end to skills based career structures, annual salary progression and the ability to improve wages to recognise changes in work value and pay equity.
- The possible loss of job security and an increase in casualisation of the workforce.
- The loss of workers' protection from unfair dismissal in workplaces where less than 100 employees are engaged.<sup>318</sup>

**10.18** However, in its submission, the Local Government and Shires Associations indicated that to date WorkChoices has not had an impact on the working conditions of council employees in NSW. They noted that the industry is covered by a single state award and a small number of enterprise agreements which for the time being have been notionally preserved under the WorkChoices legislation. In addition, the relevant unions and the Associations have agreed to maintain industry arrangements for resolving disputes at the local level, based on the current section 146A of the NSW *Industrial Relations Act 1996*. At the time the Association made its submission, it was also awaiting the outcome of the High Court challenge to the legislation.<sup>319</sup>

<sup>317</sup> Cited in Submission 32, Local Government Association of NSW and Shires Association of NSW, p1

<sup>318</sup> Cited in Submission 32, Local Government Association of NSW and Shires Association of NSW, p2. See also Mr Gibson, Evidence, 18 July 2006, p14

<sup>319</sup> in Submission 32, Local Government Association of NSW and Shires Association of NSW, pp2-3 See also Mr Gibson, Evidence, 18 July 2006, p14

- 10.19** The Committee also notes the evidence of Mr David Gibson representing the Local Government and Shires Associations. Mr Gibson noted that one of the major issues facing councils in NSW, and indeed across Australia, is whether they fall under the definition of a constitutional corporation for the purposes of the WorkChoices legislation. He advised that the legal advice at present is that probably most councils will be caught by the legislation, but that this advice needs to be tested.<sup>320</sup>

### **The social and community services sector**

- 10.20** The Catholic Commission for Employment Relations provides advice to Catholic employers in NSW and the ACT in relation to all employment-related matters. Through its various agencies, the Catholic Church employs a significant number of staff throughout NSW in the areas of diocesan and parish administration, pastoral care, education (primary, secondary and tertiary), community services and health and aged care.<sup>321</sup>
- 10.21** During the hearing on 20 June 2006, the Committee took evidence from Mr Michael McDonald, Executive Director of the Catholic Commission for Employment Relations, and Ms Kirrily McDermott, Employee Relations Adviser to the Commission. Mr McDonald expressed the concern that the WorkChoices package is not in keeping with the aim of the Catholic Church to be fair in its dealings with its employees.<sup>322</sup>

Employers in the context of this legislation can easily find themselves being led down a path that is not conducive to good employment relations and can encourage the development of mistrust and fear in workplaces.<sup>323</sup>

- 10.22** Mr McDonald subsequently expressed the opinion that WorkChoices leads down the path of 'command and control' in the workplace, away from the co-operative workplace which delivers productive employment relations.<sup>324</sup>
- 10.23** Mr McDonald also emphasised that because of the complexity of WorkChoices, most employers, other than those that are highly skilled or very well resourced, will be turning to employer associations, such as the Catholic Commission for Employment Relations, for support when working through the WorkChoices legislation.<sup>325</sup>
- 10.24** The Committee also received a submission from the Country Children's Services Association of NSW, which represents and assists in the management of more than 575 early childhood service providers across NSW. The key concern expressed by the Association was that many not-for-profit children's services do not know whether they are captured by WorkChoices, due to the difficulty of determining whether they are a constitutional corporation for the

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<sup>320</sup> Mr Gibson, Evidence, 18 July 2006, pp14-15

<sup>321</sup> Submission 36, Catholic Commission for Employment Relations, p1

<sup>322</sup> Mr McDonald, Evidence, 20 June 2006, p51

<sup>323</sup> Mr McDonald, Evidence, 20 June 2006, p48

<sup>324</sup> Mr McDonald, Evidence, 20 June 2006, p49

<sup>325</sup> Mr McDonald, Evidence, 20 June 2006, p50

purposes of the legislation. To this extent, WorkChoices has created significant uncertainty for many not-for-profit children's services providers.<sup>326</sup>

## Surveys of the experience of employers of WorkChoices to date

**10.25** During her evidence on 15 September 2006, Ms Pat Manser, Deputy Director General of the NSW Office of Industrial Relations, tabled with the Committee information on the experience of employers and businesses under WorkChoices. In it, the Office of Industrial Relations cited two surveys by Sensis<sup>327</sup> and MYOB<sup>328</sup> of the reaction of small and medium-sized businesses in Australia to the WorkChoices legislation. In its summary of the findings of the two surveys, the Office of Industrial Relations indicated that:

- only 3% of businesses 'strongly agreed' that the new WorkChoices legislation will lead to increased business productivity
- more than four in five small and medium sized enterprises are not planning to make any changes at all under the new workplace relations system
- 40% of small businesses believe the legislation is unfair and 42% 'agree' or 'strongly agree' that the WorkChoices legislation is unfair to low-skilled employees
- 38% of small businesses remain neutral when asked if they are more likely to recruit new employees because of the WorkChoices legislation, and almost one-third (31%) disagreed that the legislation makes them more likely to take on more staff
- 40% of small businesses report having a low level of understanding of the WorkChoices legislation
- 26% of small and medium enterprises felt that the Federal Government policies worked against them, due to the level of bureaucracy and paperwork, while also feeling that the Federal Government is only concerned with big business.<sup>329</sup>

## Conclusion

**10.26** As previously indicated in this report, the Committee believes that WorkChoices tilts the balance of bargaining power in the workplace significantly in favour of employers. Put simply, WorkChoices acts to remove from industrial law a raft of conditions of employment that were previously prescribed in awards and legislation and which served as a safety net for employees. At the same time, the legislation stipulates various forms of labour market bargaining such as AWAs and individual common law contracts which place individual employees at a disadvantage when bargaining with employers.

<sup>326</sup> Submission 50, Country Children's Services Association of New South Wales, p2

<sup>327</sup> Sensis, *Business Index – Small and Medium Enterprises*, August 2006

<sup>328</sup> MYOB Australian Small Business Survey, *Special Focus Report: The Accountant-Client Relationship and Industrial Relations*, July 2006

<sup>329</sup> Cited in tabled document, Office of Industrial Relations, *Experience of Business under WorkChoices*, September 2006, pp1-2

- 10.27** Given this situation, it might be anticipated that many employers would welcome the WorkChoices legislation as an opportunity to reduce wage costs by removing industrial protections from their employees. Indeed, since the commencement of WorkChoices, a number of employers have apparently sought to do this – the recent examples of Spotlight and Pulp Juice raised earlier in this report are cases in point.
- 10.28** However, the evidence in this chapter demonstrates that while many employers recognise the unfairness built into the WorkChoices legislation, they nevertheless do not intend to exploit the opportunities it provides in order to reduce the wages and conditions of their employees. They consider that a cooperative employment relationship which delivers genuine productivity growth and work satisfaction is preferable to the alternative offered by WorkChoices.
- 10.29** That said, good employers are concerned that unscrupulous employers in their industry may use WorkChoices to force down industry-wide wages and conditions in a so called ‘race to the bottom’, obliging principled employers to lower their wages and conditions in order to remain competitive.
- 10.30** The Committee is deeply concerned that within a competitive market environment, the introduction of WorkChoices will mean that even the most ethical of employers will eventually be forced to compromise their wage and employment condition standards in order to remain competitive and viable.

## Chapter 11 The impact of WorkChoices on workplace safety

This chapter examines the impact of the *Workplace Relations (WorkChoices) Amendment Act 2005* on workplace safety and the rehabilitation of injured workers. It initially examines the interaction between the WorkChoices legislation and NSW occupational health and safety (OHS) legislation, notably the provisions of Chapter 2, Part 7 of the NSW *Industrial Relations Act 1996*. It also examines the impact of WorkChoices on unlawful termination provisions for injured workers, state award OHS provisions, right of entry provisions and OHS training provisions. Finally, it considers the broader impact that industrial laws and workplace arrangements in the WorkChoices environment have on workplace safety.

### NSW occupational health and safety legislation

**11.1** In NSW, the principal piece of legislation regulating OHS in the workplace is the *Occupational Health and Safety Act 2000*. On its website, WorkCover NSW lists the objectives of the *Occupational Health and Safety Act 2000* as follows:

- to secure and promote the health, safety and welfare of people at work
- to protect people against workplace health and safety risks
- to provide for consultation and cooperation between employers and workers in achieving the objects of the Act
- to ensure that risks are identified, assessed and eliminated or controlled
- to develop and promote community awareness of OHS issues
- to provide a legislative framework that allows for progressively higher standards of OHS to take account of new technologies and work practices
- to protect people against risks arising from the use of machinery, equipment or appliances.<sup>330</sup>

**11.2** In addition to the provisions of the *Occupational Health and Safety Act 2000*, workers who have suffered a workplace injury in NSW and are receiving workers' compensation are protected from dismissal by their employer by the provisions of Chapter 2, Part 7 of the NSW *Industrial Relations Act 1996*:

- Section 92 provides that if an injured employee is dismissed because he or she is not fit for employment as a result of the injury received, the employee may apply to the employer for reinstatement to employment of a kind specified in the application.
- Sections 93-97 provide that in the event of a dispute about reinstatement, the matter may be determined by the NSW Industrial Relations Commission, although the

<sup>330</sup> WorkCover NSW, 'Occupational Health and Safety Act 2000', <http://www.workcover.nsw.gov.au/LawAndPolicy/Acts/ohsact.htm> (accessed 25 September 2006)

Commission may not make a reinstatement order, except in special circumstances, if the application to the employer for reinstatement was made more than 2 years after the injured employee was dismissed.

- Section 99 makes it an offence to dismiss an employee because they are not fit for work as a result of an injury if less than six months have elapsed since they became unfit for employment or the dismissal occurred during a period in which the employee was entitled to accident pay by virtue of Commonwealth or state industrial instruments (in excess of 6 months).

**11.3** These protections are intended to apply to all workers in NSW, irrespective of whether they are subject to state or federal industrial relations systems.

**11.4** The entitlements in Chapter 2, Part 7 of the *Industrial Relations Act 1996* are in addition to other relevant entitlements conferred by the Act, such as those that provide for relief from unfair dismissal.<sup>331</sup>

### **WorkChoices and NSW OHS laws**

**11.5** In its Fact Sheet 34 on the WorkChoices legislation, the Commonwealth Government indicates its position that WorkChoices does not affect the operation of state and territory OHS laws, which remain in force in the new WorkChoices environment.<sup>332</sup>

**11.6** Specifically, as noted in Chapter 3, section 16(1) of the amended Commonwealth *Workplace Relations Act 1996* provides that the Act 'applies to the exclusion' of certain state and territory industrial laws. However, section 16(2) indicates that subsection (1) does not apply to certain non-excluded matters, listed in section 16(3) as including:

- workers' compensation
- occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety).

**11.7** Nevertheless, the NSW Government expressed concern in its submission about whether the WorkChoices amendments to the Commonwealth *Workplace Relations Act 1996* did actually preserve Chapter 2, Part 7 of the NSW *Industrial Relations Act 1996*. The NSW Government submitted that this depends on the narrowness with which the words 'applies to the exclusion of' in section 16(1) are interpreted.<sup>333</sup>

**11.8** The NSW Government pointed out that if the injured worker provisions in Chapter 2, Part 7 of the NSW *Industrial Relations Act 1996* are excluded under the WorkChoices environment, a significant part of the work injury management arrangements under the NSW Workers'

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<sup>331</sup> Submission 37, NSW Government, pp88-89

<sup>332</sup> Australian Government, WorkChoices Fact Sheet 34, 'WorkChoices and occupational health and safety laws', [https://www.workchoices.gov.au/NR/rdonlyres/B58D603C-9898-42FF-84D7-4ACC679C7B2A/0/workchoices\\_ohs.pdf](https://www.workchoices.gov.au/NR/rdonlyres/B58D603C-9898-42FF-84D7-4ACC679C7B2A/0/workchoices_ohs.pdf) (accessed 21 September 2006), p1

<sup>333</sup> Submission 37, NSW Government, p90



Compensation Scheme would become ineffective, and employers could avoid their obligation to injured employees by simply dismissing them.<sup>334</sup>

**11.9** The NSW Nurses' Association<sup>335</sup> and the Catholic Commission for Employment Relations expressed similar concerns in their contributions to the inquiry.<sup>336</sup>

**11.10** However, in his evidence to the Committee, Mr David Gibson from the Local Government and Shires Associations, referred the Committee to the recent 2006 decision of Deputy President Harrison in the NSW Industrial Relations Commission in *AMIEU (on behalf of B Fisher) v Inghams Enterprises Pty Ltd*.<sup>337</sup> This case involved the termination of an employee of Ingham Enterprises who was injured at work, the application of Part 7 protection of injured worker provisions under the NSW *Industrial Relations Act 1996*, and whether the NSW Act is replaced or excluded by the revised Commonwealth *Workplace Relations Act 1996*. In his determination of the case, Deputy President Harrison stated:

(1) Part 7, Protection of Injured Workers, of Ch 2 of the NSW Act applies to employees of constitutional and trading corporations and is not excluded by the Federal Act.

(2) Part 7 of Ch 2 of the NSW Act is properly characterised as a law dealing with the subject matter of workers' compensation and is specifically preserved by s 16(3)(b) of the Federal Act.

(3) The character and terms of Pt 7 of Ch 2 of the NSW Act are not found in the Federal Act and accordingly no constitutional conflict arises.<sup>338</sup>

**11.11** Despite this clear judicial precedent preserving the provisions of Part 7 Ch 2 of the NSW *Industrial Relations Act 1996* within the WorkChoices environment, Ms Vicki Telfer, General Manager of the Strategy and Policy Division at WorkCover NSW, indicated that WorkChoices has nevertheless created confusion and uncertainty in the minds of some employers and employees about the ongoing applicability of Part 7 Chapter 2 provisions. Ms Telfer observed:

I wanted to briefly highlight some of the concerns about injured workers and their rights. I will not go through the Government submission to this inquiry in detail, but it is worth highlighting the fact that one of the impacts of the WorkChoices legislation is that it excludes occupational health and safety and workers' compensation as State industrial matters. However, we have received a number of inquiries from injured workers, as I know has the Office of Industrial Relations, expressing concerns that employers have sought to say to someone who has had a work-related injury that they can now be dismissed. This is in contrast to the provisions of the New South Wales Industrial Relations Act, which says that an employee who has a compensatable,

<sup>334</sup> Submission 37, NSW Government, p94

<sup>335</sup> Submission 34, NSW Nurses' Association, pp13-14 See also Ms Sullivan, Evidence, 18 July 2006, p61

<sup>336</sup> Submission 36, Catholic Commission for Employment Relations, p23

<sup>337</sup> [2006] NSWIRComm 202

<sup>338</sup> *Australasian Meat Industry Employees Union, Newcastle and Northern Branch (on behalf of B Fisher) and Inghams Enterprises Pty Ltd* [2006] NSWIRComm 202, cited at <http://caselaw.lawlink.nsw.gov.au/isysquery/irlcd5c/5/doc> (accessed 22 September 2006)

work-related injury cannot be dismissed within the first six months of sustaining that injury, and in fact has a right of reinstatement. This highlights the impact of WorkChoices in creating confusion, where people are now being told that if they have a work-related injury they can be dismissed within the first six months of incurring the injury, despite the fact that those State provisions are supposed not to have been overridden by WorkChoices.<sup>339</sup>

**11.12** At her subsequent appearance before the Committee on 15 September 2006, Ms Telfer further informed the Committee that to avoid any doubt or confusion for businesses and employers about the status of the provisions of Chapter 2, Part 7 of the *Industrial Relations Act 1996*, the NSW Government is planning to move those provisions into the NSW *Occupational Health and Safety Act 2000* in exactly the same format.<sup>340</sup>

**11.13** On 24 October, the Government introduced the Industrial Relations Further Amendment Bill 2006 into the Legislative Assembly.<sup>341</sup> Mr David Campbell in his second reading speech explained that the Bill amends the *Industrial Relations Act 1996* and *Occupational Health and Safety Act 2000* to 'ensure that certain occupational health and safety matters and workers compensation matters continue to be appropriately regulated by New South Wales'.<sup>342</sup> Mr Campbell outlined the five key measures introduced by the Bill, including:

- 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
- electronic publishing of the industrial gazette.<sup>343</sup>

**11.14** The provisions of the Bill in relation to protecting workers who raise occupational health and safety issues from discrimination, and protection from unlawful termination are discussed below.

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<sup>339</sup> Ms Telfer, Evidence, 19 June 2006, p17

<sup>340</sup> Ms Telfer, Evidence, 15 September 2006, pp12-13

<sup>341</sup> Mr David Campbell, Minister for Water Utilities, Minister for Small Business, Minister for Regional Development, Minister for the Illawarra, Legislative Assembly, New South Wales, *Hansard*, 24 October 2006, p87

<sup>342</sup> Mr David Campbell, Minister for Water Utilities, Minister for Small Business, Minister for Regional Development, Minister for the Illawarra, Legislative Assembly, New South Wales, *Hansard*, 24 October 2006, p91

<sup>343</sup> Mr David Campbell, Minister for Water Utilities, Minister for Small Business, Minister for Regional Development, Minister for the Illawarra, Legislative Assembly, New South Wales, *Hansard*, 24 October 2006, p89

## Unlawful termination provisions

**11.15** Under WorkChoices, it continues to be unlawful to terminate an employee on the grounds of temporary absence from work due to illness or injury. The unlawful termination provisions of the amended Commonwealth *Workplace Relations Act 1996* are set out in Part 12, Division 4, Subdivision C. Section 659(2) provides in part:

- (2) Except as provided by subsection (3) or (4), an employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:
  - (a) temporary absence from work because of illness or injury within the meaning of the regulations;

**11.16** However, in its submission, the NSW Government argued that accessing the above unlawful termination provision under WorkChoices requires recourse to the courts – either the Federal Court of Australia or the Federal Magistrates Court. Legal representation is mandatory and the cost is therefore likely to be substantial – estimated to be in the region of \$30,000 to \$40,000.

**11.17** Accordingly, the NSW Government submitted that the federal unlawful termination provisions are unlikely to be a realistic option for employees seeking to make a claim of unlawful termination on the grounds of temporary absence from work due to illness or injury.

**11.18** The NSW Government also argued that the federal unfair dismissal provisions (as opposed to *unlawful* dismissal) are unlikely to be of assistance to employees seeking relief from dismissal due to illness or injury. For a start, employees of enterprises with less than 100 people are automatically excluded from such remedies. Further, it is not clear whether dismissal on the grounds of injury would be classed as 'harsh, unjust or unreasonable' dismissal in terms of s.637 of the WorkChoices legislation. As well as this, termination on the grounds of 'genuine operational reasons' is exempt from being the subject of applications for unfair dismissal, thereby providing substantial opportunities for employers to mask the real reasons for dismissal without being subject to unfair dismissal proceedings.<sup>344</sup>

**11.19** In its submission, the Police Association of NSW also contended that the WorkChoices legislation decreases the level of support for unlawful termination claims, leaving injured workers open to being dismissed by unscrupulous employers.<sup>345</sup>

**11.20** The Committee also notes the comments of Mr Andrew Ferguson, State Secretary of the Construction, Forestry, Mining and Energy Union (CFMEU):

The removal of the unfair dismissal laws makes it very difficult for workers to raise issues of safety on sites. The workers do not have any rights in relation to safety. It inevitably means that employers are going to cut corners and that means further fatalities and serious injuries in future years.<sup>346</sup>

<sup>344</sup> Submission 37, NSW Government, p92

<sup>345</sup> Submission 42, Police Association of NSW, p10

<sup>346</sup> Mr Ferguson, Evidence, 28 July 2006, p2

- 11.21** Similarly, Ms Telfer expressed the concern that workers may be reluctant to raise OHS issues for fear of victimisation by or reprisals from employers, and the possibility of losing their employment, in the absence of the unfair dismissal remedies.<sup>347</sup>
- 11.22** As noted above, on 24 October, the NSW Government introduced the Industrial Relations Further Amendment Bill 2006 into the Legislative Assembly. Amongst other objectives, the Bill amends the *Occupational Health and Safety Act 2000* to enable certain employees who have been dismissed because of making a complaint about, or exercising certain functions in connection with, occupational health and safety matters to apply to the Industrial Court of New South Wales for reinstatement.<sup>348</sup> As explained by Mr David Campbell in his second reading speech on the Bill:
- These protections are an essential part of the occupational health and safety framework of this State. ... There should be no threats to job security ... to any person doing the right thing by his or her workmates and employers by raising health and safety concerns.<sup>349</sup>
- 11.23** 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*.<sup>350</sup> Those provisions provide for an injured worker to be reinstated if the worker is dismissed from employment because he or she is not fit for employment because of that injury. As explained during the second reading on the Bill, the provisions also create an offence where 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.<sup>351</sup>
- 11.24** The Bill passed Parliament on 15 November 2006. Clause 2 of the Bill provided for its commencement on a day or days to be appointed by proclamation.

## State award OHS provisions

- 11.25** In its submission, the NSW Government also raised concerns in relation to state awards that contain OHS provisions, such as 'accident make-up pay', which tops up an employee's

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<sup>347</sup> Ms Vicki Telfer, General Manager, Strategy and Policy Division, WorkCover Authority of NSW, Evidence, 19 June 2006, p6

<sup>348</sup> Explanatory Memorandum, Industrial Relations Further Amendment Bill 2006, cited at <http://bulletin/prod/parlment/nswbills.nsf/0/E7C41F2B26B88E31CA257211001B7D7F?Open&shownotes> (accessed 15 November 2006)

<sup>349</sup> Mr David Campbell, Minister for Water Utilities, Minister for Small Business, Minister for Regional Development, Minister for the Illawarra, Legislative Assembly, New South Wales, *Hansard*, 24 October 2006, p91

<sup>350</sup> Explanatory Memorandum, Industrial Relations Further Amendment Bill 2006, cited at <http://bulletin/prod/parlment/nswbills.nsf/0/E7C41F2B26B88E31CA257211001B7D7F?Open&shownotes> (accessed 15 November 2006)

<sup>351</sup> Mr David Campbell, Minister for Water Utilities, Minister for Small Business, Minister for Regional Development, Minister for the Illawarra, Legislative Assembly, New South Wales, *Hansard*, 24 October 2006, p91

statutory workers' compensation payment to their normal award payment during a period when they are on workers' compensation.

- 11.26** As indicated previously, on 27 March 2006, all state awards and agreements binding on constitutional corporations became respectively Notional Agreements Preserving a State Award or Preserved State Agreements. As a result of this process, the terms of such state industrial instruments such as 'accident make-up pay' all became the terms of a federal agreement, and will continue to have effect for the time being.
- 11.27** However, in its submission, the NSW Government argued that there is no guarantee that such industrial instruments as 'accident make-up pay' will survive in the long term. Accident pay does not appear on the list of allowable award matters which may be included in awards, as set out in section 513 of the amended *Workplace Relations Act 1996*. As a result, accident pay may be bargained away as part of future bargaining processes.<sup>352</sup>
- 11.28** The Catholic Commission for Employment Relations expressed similar concerns in its submission, noting that award OHS provisions do not form part of the list of allowable award matters. The Catholic Commission argued that this is especially worrying in industries that are high risk, such as the mining and construction industries.<sup>353</sup>

## Right of entry provisions

- 11.29** The WorkChoices legislation imposed new requirements in relation to union officials seeking to exercise a right of entry to a workplace.
- 11.30** Under the amended *Workplace Relations Act 1996*, a union official (which includes an employee) of a registered union has the right to enter an employer's premises if he or she holds a valid and current right of entry permit, and has provided written notice to the employer required by the *Workplace Relations Act 1996*, for the purposes of:
- investigating suspected breaches of the Act, a workplace agreement or award
  - holding discussions with certain employees
  - exercising a right under a prescribed state or territory OHS law.
- 11.31** However, unions may only enter a workplace to investigate if a member of the union is carrying out work at the premises and the suspected breach affects a union member. If all employees are on Australian Workplace Agreements (AWAs) or there is a collective agreement to which the union is not a party, a union does not have a right of entry for discussion purposes under the *Workplace Relations Act 1996*.<sup>354</sup>
- 11.32** Applications for the issue of right of entry permits to union officials are made by the union to a Registrar of the Australian Industrial Registry. Most significantly, officials who wish to

<sup>352</sup> Submission 37, NSW Government, pp90-91

<sup>353</sup> Submission 36, Catholic Commission for Employment Relations, p23

<sup>354</sup> Commonwealth of Australia, Work Choices and unions, fact sheet 20, p2

investigate a breach of an award or an agreement, or of the Act itself, may only do so if the suspected breach affects at least one employee who is a member of the relevant union.

**11.33** In determining whether the official is a fit and proper person to hold a permit, the Registrar must take into account a number of matters set out in s.742 of the *Workplace Relations Act 1996*. These include:

- whether the official has received appropriate training about the rights and responsibilities of a permit holder
- whether the official has been convicted of certain offences or ordered to pay certain penalties
- whether any right of entry held by the official has been revoked or suspended or made subject to conditions.

**11.34** The Registrar may impose conditions on a permit having regard to the above considerations.

**11.35** An official who holds a right of entry permit is entitled to enter work premises if that person suspects, on reasonable grounds, a breach of:

- the *Workplace Relations Act 1996*
- an AWA
- an award or collective agreement.

**11.36** In addition, the Act stipulates that the visit must be for the purpose of investigating the suspected breach and must occur during working hours. An official must also give between 14 days' and 24 hours' written notice to an employer before entering their premises to investigate suspected breaches. The notice must be in a form approved by the Industrial Registrar under s.738 and must specify:

- the day or days of entry
- the particulars of the suspected breach
- that the entry is authorised by s.747 of the Act.

**11.37** The notice period can be waived upon application to a Registrar if an official believes that advance notice of entry onto the premises might result in the employer destroying, concealing or altering relevant evidence. If the Registrar is satisfied that there are reasonable grounds for believing this might occur, an exemption certificate must be issued.<sup>355</sup>

**11.38** No notice is required however to enter workplaces to investigate suspected OHS breaches if the union does not wish to inspect employment records.<sup>356</sup>

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<sup>355</sup> Australian Industrial Relations Commission, 'Right of Entry Fact Sheet', [http://www.airc.gov.au/wc2k6/fact\\_sheets/right\\_of\\_entry.html](http://www.airc.gov.au/wc2k6/fact_sheets/right_of_entry.html) (accessed 25 September 2006)

<sup>356</sup> Commonwealth of Australia, Work Choices and occupational health and safety, fact sheet 34, p3

**11.39** The Committee notes that some parties to the inquiry did express concern about the impact of WorkChoices on the right of unions to enter the workplace for OHS purposes. In his evidence, Mr Stephen Bali, organiser with the Australian Workers' Union, stated:

... plus for unions, I think 24 hours or 48 hours we have to give notice to do an inspection in relation to occupational health and safety issues. In that time we have got to actually identify – and this is how ridiculous the law is – the person who has raised the issue and what the issue is, before we even get onto the site, so how would we know in detail what the problem is, and possibly even solve it. Then we would turn up in 48 hours' time and all they can say to us at the door is, "Problem solved". The employer has now gone or has the problem actually been solved? It has restricted the ability of us to really be involved in occupational health and safety and people's lives will be in danger.<sup>357</sup>

**11.40** Similarly, in its submission, the Police Association of NSW argued that the new WorkChoices legislation will make it much harder for union representatives to attend workplaces in order to ensure that OHS requirements are being observed.<sup>358</sup>

## OHS training provisions

**11.41** Under the amended *Workplace Relations Act 1996*, agreements and AWAs cannot contain specific provisions for union officials or others to attend OHS training. Division 7.1 of the *Workplace Relations Regulations 2006* sets out prohibited content of workplace agreements under section 356 of the *Workplace Relations Act 2006*. Subdivision 8.5 states in part:

(1) A term of a workplace agreement is prohibited content to the extent that it deals with the following: ...

(c) employees bound by the agreement receiving leave to attend training (however described) provided by a trade union

**11.42** The Committee notes, however, that while a specific provision to attend trade union training cannot be included in an AWA or a collective agreement, that does not prevent employers granting leave to attend such an activity.<sup>359</sup>

**11.43** In his evidence to the Committee, Mr Ferguson of the CFMEU, raised the issue of safety training for union delegates in the construction industry. He stated:

WorkChoices and related Federal legislation has a disastrous impact on workplace safety. This is an industry where one worker is killed every week and under the new radical workplace relations laws we have restrictions on union right of entry to sites. We have a prohibition on including in enterprise bargaining agreements, provision for delegates, including safety delegates, to go to any forums and any training sessions that are conducted by the union but even more outrageous there is actually a prohibition

<sup>357</sup> Mr Bali, Evidence, 20 June 2006, p25

<sup>358</sup> Submission 42, Police Association of NSW, pp10-11

<sup>359</sup> Australian Government, WorkChoices Fact Sheet 34, 'WorkChoices and occupational health and safety laws', [https://www.workchoices.gov.au/NR/rdonlyres/B58D603C-9898-42FF-84D7-4ACC679C7B2A/0/workchoices\\_ohs.pdf](https://www.workchoices.gov.au/NR/rdonlyres/B58D603C-9898-42FF-84D7-4ACC679C7B2A/0/workchoices_ohs.pdf) (accessed 21 September 2006), pp1-2

on paid leave for safety representatives or union delegates to go to any forums or training courses where there will be union members present. Even if it is not conducted by the union, if union members are present that is prohibited content and cannot be included in enterprise bargaining agreements.<sup>360</sup>

- 11.44** Mr Ferguson subsequently noted that the CFMEU has in the past been in the forefront of training in issues of workplace safety. Such training is regularly attended by NSW WorkCover representatives who often present seminars on particular hazards or safety alerts. However, he indicated that attendance at such training sessions has fallen dramatically under the WorkChoices legislation, and argued that as a result, the transfer of knowledge on OHS in the industry is being lost.<sup>361</sup>
- 11.45** Similarly, in its submission, the Public Service Association of NSW argued that the restriction on the right to negotiate union training clauses for inclusion in workplace agreements seriously compromises health and safety in the workplace through the curtailing of training and education.<sup>362</sup>
- 11.46** NSW Young Labor also argued in its submission that without a role for unions in training and enforcing OHS standards, young people, who are already particularly vulnerable to accidents in the workplace, will increasingly be the victims of unsafe workplaces.<sup>363</sup>

### **The impact of working arrangements on workplace safety**

- 11.47** The Committee notes that various inquiry participants commented not only on the specific OHS provisions in WorkChoices, but also the broader impact that industrial laws such as WorkChoices have on working arrangements and hence, workplace safety.
- 11.48** In his evidence, Dr John Buchanan, Acting Director of the Workplace Research Centre at the University of Sydney, argued that a critical condition for safety at work is enforcement of labour standards:

What is critical, though, is the reality of enforcement on the job. If you have a building site that is full of contractors and no union representation then you usually find that accident rates go up. But the underlying structure of right to enforcement is there and that is why the question of industrial relations is so important for safety. It is not just the occupational health and safety laws that are the key to outcomes, it is how they work in concert with your IR. I know that the Cole Royal Commission had a whole special day summit talking about safety because they knew they were about to weaken the power of unions. They know the correlation is you weaken unions and accident rates go up. That is fantasyland stuff. You cannot weaken the institutional forces that enforce standards and then expect, miraculously, through wishing that safety standards were more strictly enforced, that you will overcome that problem. You just cannot have your cake and eat it too.<sup>364</sup>

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<sup>360</sup> Mr Ferguson, Evidence, 28 July 2006, p2

<sup>361</sup> Mr Ferguson, Evidence, 28 July 2006, p2

<sup>362</sup> Submission 18, Public Service Association of NSW, p5

<sup>363</sup> Submission 30, NSW Young Labor Council, p14

<sup>364</sup> Dr Buchanan, Evidence, 28 July 2005, p47



- 11.49** Dr Buchanan subsequently argued that WorkChoices will inevitably reduce safety standards at work. This is not because employers are not concerned about safety, but because they are under pressure to preserve their margins. It is only through a collective instrument, like a union or an active inspectorate, that proper OHS standards are maintained in the workplace.<sup>365</sup>
- 11.50** Dr Chris Briggs, also of the Workplace Research Centre at the University of Sydney, emphasised that under the trend towards more contractors and casual employees working on a site, together with much more fragmented working hours and working patterns, it is more likely that gaps in communication and understanding will occur, with a resultant increase in the likelihood of accidents.<sup>366</sup>
- 11.51** Similarly, NSW Young Labor argued in its submission that the increasing casualisation of the workplace, entailing high turnover of relatively inexperienced employees, will increase the incidence of injury and death in the workplace. Moreover, it argued that WorkChoices encourages young people to enter into the workplace in casual arrangements, which generally entail a greater rate of accidents and injury.<sup>367</sup>
- 11.52** In its submission the NSW Commission for Children and Young People cited the findings of its June 2005 study entitled *Children at Work*, based on a questionnaire of 11,000 children aged 12 – 16 years. The study found an unacceptably high level of injury and harassment of children at work, due in part to their lack of experience in workplace tasks and culture. The Commission further suggested that the vulnerability of young people at work to injury and illness may be exacerbated by a more deregulated work environment under WorkChoices.<sup>368</sup>
- 11.53** Similarly, a study commissioned by the NSW Government and conducted by the former Australian Centre for Industrial Relations Research and Training at the University of Sydney, found that young people reported high rates of bullying at work, of dangerous jobs and of feeling in danger of injury at work.<sup>369</sup>
- 11.54** In her evidence to the Committee, Ms Pat Manser, Deputy Director General of the NSW Office of Industrial Relations, also argued that a possible push for longer hours under WorkChoices may compromise workplace safety:

... awards contain hours, which have been agreed upon between workers and employers as reasonable but there is nothing to stop an employer, except his own commonsense and wisdom, from changing that now in the current environment. One of the attributes of the Spotlight agreement that we have seen discussed so much is just the stripping away of any breaks, any rest periods for people. Those sorts of issues may not be terribly critical in retail, although you would have to say that tiredness and fatigue get in the way of everybody's safety at work, but in particularly critical industries where tiredness and fatigue are a big issue, presumably good employers will

<sup>365</sup> Dr Buchanan, Evidence, 28 July 2006, p47

<sup>366</sup> Dr Briggs, Evidence, 28 July 2006, p48

<sup>367</sup> Submission 30, NSW Young Labor Council, pp13-14

<sup>368</sup> Submission 46, The NSW Commission for Children and Young People, p7

<sup>369</sup> Submission 37, NSW Government, p37

still use those sorts of things you are talking about but there is no obligation on them to do so.<sup>370</sup>

- 11.55** Ms Alison Peters, Deputy Assistant Secretary of Unions NSW, expressed similar concerns in her evidence. Ms Peters noted that state OHS arrangements act as a brake on working excessively long hours, including through the inclusion of penalty rates in industrial instruments. However, the possible removal of conditions such as penalty rates raises concerns about hours of work and safety in the workplace.<sup>371</sup>
- 11.56** In this regard, the Committee notes the submission of Ms Lorissa Stevens cited in Chapter 5. On her employment with a large mining company in the Hunter Valley, Ms Stevens was offered an AWA which included in it a provision that employees had to give the company 12-hours' notice if they were sick. Failure to do so would lead to a loss of a day's wages and an additional \$200. Ms Stevens cited this provision as a significant safety concern, because the penalty for late notice of sick leave might encourage employees to come to work and drive heavy equipment even if they were sick.<sup>372</sup>
- 11.57** The Committee notes that the Federal Government moved to address this issue in its amendments to the WorkChoices legislation of September 2006.

## **Industries with a high incidence of workplace injury**

- 11.58** The Committee received specific evidence in relation to safety in the road transport, construction and clothing outworker industries – traditionally high-risk industries – in the new WorkChoices environment.

### **The road transport industry**

- 11.59** In his evidence to the Committee, Mr Mark Crosdale, Secretary of the Newcastle and Northern Sub-branch of the Transport Workers Union, emphasised that the road transport industry is a notoriously dangerous industry. Many people in the industry regularly work 18 hours a day, and are subject to significant pressure to deliver on time. Mr Crosdale continued:

One of the protections that people have is their ability to organise. I see that has a very positive safety benefit. I deal with some large transport yards that are fully unionised. I can name one on the Central Coast of New South Wales that is engaged in carrying groceries for Coles Myer. That transport yard is fully unionised. It does trips as far away from the Central Coast as Armidale and Coffs Harbour. ... That operation has operated for 20 years without a major accident. The reason is that that yard does not work excessive hours because it is a fully unionised yard. If any employer or manager came in and said to one of those drivers, "You must work an 18-hour day", they would simply say, "No" – end of story. It would not go any further than that.<sup>373</sup>

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<sup>370</sup> Ms Manser, Evidence, 19 June 2006, p6

<sup>371</sup> Ms Peters, Evidence, 19 June 2006, p19

<sup>372</sup> Submission 43, Ms Stevens, p3

<sup>373</sup> Mr Crosdale, Evidence, 28 July 2006, p52

- 11.60** Mr Crosdale subsequently argued that any diminution of these protections under WorkChoices will have a very deleterious effect on safety – both of workers in the industry and of the general public using the roads.<sup>374</sup>
- 11.61** In this regard, Mr Crosdale noted that the Fair Pay and Conditions Standard for the transport industry has been set with the minimum wage as \$12.75 an hour. By contrast, Mr Crosdale indicated that the award rate of pay is currently \$15.06 for someone involved in sorting the product and \$17.28 for someone involved in transporting the product. So under these arrangements, a truck driver could potentially lose up to \$5 an hour.<sup>375</sup> Mr Crosdale continued:
- ... if the owner-drivers do not have those protections the rates are driven down and as an industry they have trouble making money as it is and many people go broke as owner-drivers in road transport. An even starker contrast is interstate owner-drivers because no contract determination covers across State borders. We see interstate drivers – I have been in this industry for 20 years and many of my mates are owner-drivers. Some have gone broke, some have been killed trying not to go broke ...<sup>376</sup>
- 11.62** The Committee notes that this issue also raises the protections afforded to transport industry workers under chapter 6 of the *Industrial Relations Act 1996*, and the impact of the WorkChoices legislation on those protections. This is discussed further in Chapter 12.

### **The construction industry**

- 11.63** In his evidence to the Committee, Mr Andrew Ferguson, State Secretary, Construction, Forestry, Mining and Energy Union, suggested that workers in the construction industry raising issues about workplace safety that cost their employer money – such as providing a scaffold or a harness – could be the victims of discrimination or even be sacked under the WorkChoices regime. However if workers do not raise such concerns, more corners will be cut and the end result will be more injuries and fatalities.<sup>377</sup>
- 11.64** On a separate matter, Mr Ferguson also noted the case of Mr Majstrovic, who accompanied representatives from the CFMEU and gave evidence during the hearing on 28 July 2006. The CFMEU alleged that Mr Majstrovic was sacked by his employer after putting in a compensation claim for loss of hearing, although Mr Majstrovic's former employer disputes this. Ms Rita Mallia, Senior Legal Officer with the Construction and General Division, NSW Branch of the CFMEU, indicated that there does not seem to be any legal remedy for Mr Majstrovic following the termination of his employment.<sup>378</sup>

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<sup>374</sup> Mr Crosdale, Evidence, 28 July 2006, p52

<sup>375</sup> Mr Crosdale, Evidence, 28 July 2006, p54

<sup>376</sup> Mr Crosdale, 28 July 2006, p58

<sup>377</sup> Mr Ferguson, Evidence, 28 July 2006, p12

<sup>378</sup> Ms Mallia, Evidence, 28 July 2006, pp9-10

### Clothing outworkers

- 11.65** In evidence, Mr Igor Nossar, Chief Advocate with the Textile, Clothing and Footwear Union, cited to the Committee the high incidence of overuse injuries in the clothing outworker industry, even when compared with the clothing factory sector.
- 11.66** Mr Barry Tubner, Secretary of the Textile, Clothing and Footwear Union, noted the lack of workers' compensation coverage for many backyard clothing outworker operations. According to Mr Tubner, it is only when NSW WorkCover inspectors, federal Comcare inspectors or the union intervene that the factories are brought into line with award standards, including adopting appropriate workers' compensation arrangements.<sup>379</sup>

### Comcare

- 11.67** Comcare is the Commonwealth statutory authority responsible for workplace safety, rehabilitation and compensation in the Commonwealth jurisdiction. It reports to the Minister for Employment and Workplace Relations and administers two Commonwealth pieces of legislation:
- the *Occupational Health and Safety (Commonwealth Employment) Act 1991*
  - the *Safety, Rehabilitation and Compensation Act 1988*.
- 11.68** Comcare also supports the Safety, Rehabilitation and Compensation Commission in exercising its functions and powers. These relate broadly to the regulation of workplace safety, rehabilitation and compensation performance under the *Occupational Health and Safety (Commonwealth Employment) Act 1991* and the *Safety, Rehabilitation and Compensation Act 1988*.<sup>380</sup>
- 11.69** Comcare operates alongside state OHS agencies including NSW WorkCover.
- 11.70** In their evidence to the Committee, Mr Russ Collison, State Secretary of the Australian Workers Union, and Mr Stephen Bali, also from the union, expressed concern that the Commonwealth Government is looking to develop a national unified workers' compensation system across Australia under Comcare, on the same premise of national consistency used for WorkChoices. They argued that Comcare does not have the same resources as state agencies such as WorkCover in NSW, and that the Comcare system does not offer the same level of assistance to injured workers as state arrangements.<sup>381</sup>
- 11.71** The Committee notes that WorkCover NSW has approximately 300 inspectors across the state, responsible for approximately 400,000 workplaces and 2.75 million employees.<sup>382</sup> The

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<sup>379</sup> Mr Nossar and Mr Tubner, Evidence, 28 July 2006, p31

<sup>380</sup> Comcare, 'About Comcare', <http://www.comcare.gov.au/overview.html> (accessed 22 September 2006)

<sup>381</sup> Mr Collison and Mr Bali, Evidence, 20 June 2006, p25

<sup>382</sup> WorkCover, 'Facts and Figures', cited at <http://www.workcover.nsw.gov.au/AboutUs/FactsandFigures/default.htm> (accessed 8 November 2006). See also WorkCover, Annual report 2005/06, p6, cited at

Committee also understands that in May 2006, across Australia, Comcare had approximately 16 inspectors covering approximately 330,000 employees, although Comcare is also able to engage state and territory inspectors and people in the private sector to enforce the *Occupational Health and Safety (Commonwealth Employment) Act 1991*.<sup>383</sup>

**11.72** Ms Peters also indicated in evidence:

One thing I would say at this point is that the Commonwealth Government has also opened up its own workers' compensation system called Comcare to employers who operate across State boundaries. As a result, what that might do is actually undermine any sort of regulations that WorkCover might seek to introduce for New South Wales-based employers, if those employers, indeed, operated across State boundaries – and many of the larger companies do. Leaving aside the legal issues, the practical issues of the opening up of Comcare to become the workers' compensation provider for larger national companies may well undermine any attempt by WorkCover to institute such standards.<sup>384</sup>

## Conclusion

- 11.73** The Committee is satisfied that the provisions of the WorkChoices legislation do not act to exclude the operation of the provisions of either the NSW *Occupational Health and Safety Act 2000* or the provisions of Chapter 2, Part 7 the NSW *Industrial Relations Act 1996*. However, the Committee welcomes the NSW Government's proposal to consolidate the provisions of Chapter 2, Part 7 of the *Industrial Relations Act 1996* into the *Occupational Health and Safety Act 2000*. Such a move is likely to avoid confusion or doubt about the applicability of Chapter 2, Part 7 provisions in NSW.
- 11.74** Nevertheless, the Committee is concerned at the watering down of some OHS provisions in the WorkChoices legislation – particularly as relates to unlawful termination provisions for injured workers, state award OHS provisions, right of entry provisions and OHS training provisions. In the Committee's opinion, the amendments made to the *Workplace Relations Act 1996* by the *Workplace Relations (WorkChoices) Amendment Act 2005* and related regulations do nothing to promote safety in the workplace.
- 11.75** Of equal concern is the broader impact that industrial laws and workplace arrangements in the WorkChoices environment have on workplace safety. In the Committee's opinion, it is naïve to believe that removing enforceable labour standards, such as penalty rates for overtime and hours of work restrictions, and removing enforcement mechanisms from the workplace such as the union and workplace inspectors, will lead to anything but an increase in serious injury and death in the workplace. This is not to suggest that employers are not concerned for the safety of their employees. However, in a competitive market where margins are tight and

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[http://www.workcover.nsw.gov.au/NR/rdonlyres/ECE4A47F-C380-4367-8209-A817D1B51B6F/0/workcover\\_annual\\_report\\_2004\\_05\\_4779.pdf](http://www.workcover.nsw.gov.au/NR/rdonlyres/ECE4A47F-C380-4367-8209-A817D1B51B6F/0/workcover_annual_report_2004_05_4779.pdf) (accessed 8 November 2006)

<sup>383</sup> Senate Employment, Workplace Relations and Education Committee, *Provisions of the OHS and SRC Legislation Amendment Bill 2005*, p11, cited at [http://wopared.parl.net/Senate/committee/eet\\_ctte/ohs\\_and\\_src/report/index.htm](http://wopared.parl.net/Senate/committee/eet_ctte/ohs_and_src/report/index.htm) (accessed 8 November 2006)

<sup>384</sup> Ms Stevens, Evidence, 19 June 2006, p27

where workers are often casuals or contractors, lacking the education or bargaining power to raise issues of safety, a reduction in safety with consequential results in death and injury is inevitable.

- 11.76** The Committee is also aware of proposals for expansion of the Comcare scheme, including self-insurance by large Australian companies under the scheme. In the Committee's opinion, this proposal has the potential to lead to a reduction in OHS standards at the large companies involved, while also undermining the NSW OHS scheme, which is backed by the largest inspectorate in Australia and which has been delivering steadily improving safety results in recent years. Clearly, the continued involvement of WorkCover NSW in industries such as construction, road transport and clothing outworker industries is vital to maintaining workplace safety standards in those highly competitive and dangerous industries.

## Chapter 12 Independent contractors

This chapter examines the provisions of the Federal Government's Independent Contractors Bill 2006 and the related Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006. The aim of this proposed legislation is to remove independent contractor relationships from industrial or labour law, thus preventing labour law from influencing the independent contractors' work arrangements.

The significance of the Independent Contractors Bill 2006 should not be understated. It is in many ways as significant as the WorkChoices legislation. Contractor forms of employment are growing very rapidly in the Australian labour market. However, under the proposed legislation, the wages and conditions of independent contractors will be less protected than those of traditionally defined 'employees', who themselves have significantly reduced protections under the WorkChoices legislation. The Committee examines in particular the impact of the bill on the clothing outworker industry and the owner-driver transport industry, two of the sectors of the economy (along with construction) where independent contractor arrangements are most prevalent.

### Who is an independent contractor?

- 12.1** An 'independent contractor' is a person who contracts to perform services for others without having the legal status of an employee. The term is generally used to refer to a person who is engaged by a principal, rather than an employer, on a labour-only contract. Under such a contract, the principal pays the independent contractor a one-off flat rate. There are generally no legislatively prescribed minimum entitlements or other employee-style benefits and the independent contractor is responsible for a number of aspects of the relationship that would usually be the responsibility of an employer (for instance, remitting income tax to the Australian Tax Office and contributing to a superannuation fund).
- 12.2** Independent contractors' work arrangements take a variety of forms; for example, they may have a direct relationship with another enterprise or work through an intermediary (such as a labour hire firm), and they may or may not employ staff. The common law has traditionally maintained a distinction between 'employees' and 'independent contractors'. Employees are engaged under a contract of service (an employment contract), whereas independent contractors are engaged under a contract for services. Historically, independent contractors have been perceived as running their own business and working under commercial, not employment, contracts. In contrast, employees have been seen as subject to control and direction.
- 12.3** The courts have adopted a multi-factor test to determine whether a person is an employee or an independent contractor. No single issue concerning control, economic independence or the description of the relationship in a contract will be determinative; however, courts will place greater weight on some matters, in particular, on the right to control the manner in which the work is performed.<sup>385</sup>

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<sup>385</sup> Explanatory Memorandum, Independent Contractors Bill 2006, cited at <http://www.workplace.gov.au/NR/rdonlyres/616B785D-D915-4872-9A8A-03624CCF3FF3/0/icbill2006em.pdf> (accessed 3 October 2006), p3

## Deeming provisions in state legislation

- 12.4 'Deeming', in the context of employment law, involves the power to declare persons who work under a contract for service, such as independent contractors, to be employees. Due to concerns about worker welfare, state governments have introduced deeming legislation to ensure that such workers have protection under their industrial relations legislation. They consider that many of these workers are dependent contractors or 'disguised employees'.
- 12.5 In New South Wales, schedule 1 of the *Industrial Relations Act 1996 (NSW)* deems certain types of workers to be employees. The NSW Government states that the deeming provisions recognise that a number of categories of workers exist who are often in weak negotiation positions. In many instances, the relationship which exists is not substantively different from that of employee and employer, and hence should be covered by the protection of generally accepted standards of industrial regulation. The NSW legislation includes:
- a range of specific occupations, such as cleaners, carpenters, bread and milk vendors, joiners, bricklayers, plumbers, drainers, plasterers, painters and clothing outworkers deemed to be employees
  - power to deem others to be employees by regulation
  - a system of contract determination
  - a process to test if employment contracts are unfair.
- 12.6 The NSW Government considers that, if there were not deeming provisions, there might be a significant degree of inequality in bargaining power between the worker and the provider of work.<sup>386</sup>

## The Independent Contractors Bill 2006

- 12.7 As part of its industrial relations changes, the Federal Government has introduced independent contractors legislation in two Bills: the Independent Contractors Bill 2006 (the 'principal bill') and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the 'consequential bill').
- 12.8 The purpose of the Independent Contractors Bill 2006 is to move contractual relationships as far as possible from the realm of employment and to place these relationships as far as possible under commercial regulation.
- 12.9 During the 2004 federal election campaign, the Federal Government made a commitment to introduce separate independent contractors legislation. The Coalition Government's policy paper, *Protecting and Supporting Independent Contractors* stated:

A re-elected Coalition Government will introduce the Independent Contractors Act to prevent the workplace relations system from being used to undermine the status of

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<sup>386</sup> NSW Government submission to the *Making It Work* Inquiry, paragraph 5.13, 5.15, cited in Parliament of Australia, Department of Parliamentary Services, Bills Digest: Independent Contractors Bill 2006, cited at <http://www.aph.gov.au/library/pubs/bd/2006-07/07bd019.pdf> (accessed 15 September 2006), p6



independent contractors. ... While the courts have developed tests to uncover 'sham' independent contractor arrangements, there is a view in the community that these tests have gone too far and that too frequently, the honest intentions of parties are disregarded and overturned. A party's freedom to contract must be upheld and there must be certainty in commercial relationships. The Independent Contractors Act will seek to ensure that these principles are enshrined and protected.<sup>387</sup>

**12.10** The Minister for Employment and Workplace Relations, the Hon Kevin Andrews MP, when introducing the bills to Federal Parliament, reflected a similar sentiment:

... the attraction of independent contracting is to operate independently, not to work as an employee. The flexibility that independent contractors provide the workplace is an important component of a modern and dynamic economy.

The Independent Contractors Bill (the Principal Bill) reflects the Government's commitment to ensuring that independent contracting is encouraged without excessive regulation. The Principal Bill is built on the principle — a principle this Government believes in — that genuine independent contracting relationships should be governed by commercial not industrial law.<sup>388</sup>

**12.11** There are a number of key features of the principal bill. The bill:

- Does not define the term 'independent contractor' beyond its meaning under the common law.
- Applies to 'services contracts' (contracts for the performance of work by an independent contractor) with the 'requisite constitutional connection'.
- Overrides the 'deeming provisions' contained within state and territory industrial legislation which deem certain categories of independent contractors to be employees, and the provisions which bestow employee related entitlements on independent contractors. This is subject to a three year transitional period.
- Provides a default minimum rate of pay for contract outworkers in the textile, clothing and footwear industry where an outworker is not guaranteed a minimum rate of pay under state and territory laws.
- Establishes a national services contract review scheme for the review of unfair contracts.
- Excludes state and territory unfair contracts provisions as far as constitutionally possible.<sup>389</sup>

**12.12** Significantly, the Committee notes that the Independent Contractors Bill 2006 purports to preserve existing protections for outworkers contained within state and federal legislation. It also purports to preserve existing protections for owner-drivers in the road transport industry

<sup>387</sup> Federal Government Election 2004 Policy, *Protecting and Supporting Independent Contractors*

<sup>388</sup> Minister for Employment and Workplace Relations, Independent Contractors Bill 2006, House of Representatives, *Hansard*, 22 June 2006, p5

<sup>389</sup> Cited in Parliament of Australia, Department of Parliamentary Services, Bills Digest: Independent Contractors Bill 2006, cited at <http://www.aph.gov.au/library/pubs/bd/2006-07/07bd019.pdf> (accessed 15 September 2006)

in Victoria and New South Wales, although this is to be reviewed in 2007 with a view to rationalising and nationalising the laws.<sup>390</sup> These issues are examined later in this chapter.

- 12.13** The bills were introduced into the House of Representatives on 22 June 2006 and passed on 13 September.<sup>391</sup> The bills were introduced into the Senate on 13 September 2006 and were adjourned after their second reading.<sup>392</sup>

### **The growth in independent contractor arrangements in recent years**

- 12.14** In his evidence to the Committee of 20 June 2006, Professor Ron McCallum, Dean of the Law School at the University of Sydney, noted the rapid increase in the use of independent contractors and other forms of consultancy work over the past 15 years in Australia, to the point where independent contractors constitute approximately 15% of the workforce. He argued that this number is only likely to increase further under the proposed independent contractors legislation.<sup>393</sup>
- 12.15** Mr Michael Rawling, Research Assistant and PhD student in the Law School at the University of Sydney, provided additional information on this growth of independent contractor arrangements in his response to questions on notice from 20 June 2006. Mr Rawling cited data from the Australian Bureau of Statistics' November 2004 *Forms of Employment* survey that indicates that employees without paid leave entitlements made up approximately 20% of employed persons in November 2001 and approximately 21% of employed persons in November 2004.
- 12.16** The November 2004 *Forms of Employment* also provided figures regarding 'independent' contractors. Owner-managers of incorporated enterprises that did not engage employees made up 2.2% of employed persons in August 1998, 2.4% in November 2001 and 2.6% in November 2004. Owner-managers of unincorporated enterprises that did not engage employees made up 8.7% of employed persons in November 2001 and 9.4% in November 2004.
- 12.17** Mr Rawling suggested that there may be some doubts as to how independent many of these workers are, given that they do not supply the labour of any employees other than their own. In the absence of research to the contrary, many of these workers might in fact be described as dependent contractors.<sup>394</sup>
- 12.18** Independent Contractors of Australia has also used Productivity Commission data and the November 2004 *Forms of Employment* survey to claim that the share of independent contractors

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<sup>390</sup> Cited in Parliament of Australia, Department of Parliamentary Services, Bills Digest: Independent Contractors Bill 2006, cited at <http://www.aph.gov.au/library/pubs/bd/2006-07/07bd019.pdf> (accessed 15 September 2006)

<sup>391</sup> House Daily Bills List, cited at <http://www.aph.gov.au/parlinfo/billsnet/blist.pdf> (accessed 20 September 2006), p5

<sup>392</sup> Senate Daily Bills Update, cited at <http://www.aph.gov.au/parlinfo/billsnet/billsupd.pdf> (accessed 20 September 2006), p3

<sup>393</sup> Prof McCallum, Evidence, 20 June 2006, p42

<sup>394</sup> Answers to questions on notice taken during evidence 20 June 2006, Mr Rawling, pp3-4

in total employment in Australia has grown from 16.4% of total employment in 1978 to 19.9% in 2004 (or 1.9 million). This estimate is based on the total number of owner managers in incorporated and unincorporated enterprises and, therefore, includes owner managers with employees, which the Productivity Commission argues should not be included in the estimate.<sup>395</sup>

- 12.19** Accordingly, estimates range from approximately 800,000 to 2 million independent contractors in 2004 (or from approximately 8% to 20% of all Australian employed persons).

### The impact of the proposed independent contractors legislation

- 12.20** In his evidence to the Committee, Dr John Buchanan, Acting Director of the Workplace Research Centre at the University of Sydney, commented that as contractor forms of employment have grown in recent decades, the states have developed labour standards such as the *Industrial Relations Amendment (Unfair Contracts) Act 1998 (NSW)* and the *Industrial Relations Amendment (Unfair Contracts) Act 2002 (NSW)* to regulate such forms of employment and to prevent abuse of labour standards. The NSW *Industrial Relations Act 1996* in particular contains in s.106 provisions for the Industrial Relations Commission of NSW to declare any contract wholly or partly void if the Commission finds that the contract is an unfair contract.

- 12.21** However, Dr Buchanan argued that the Federal Government's proposed independent contractors legislation is designed explicitly to stop labour law having the capacity to respond to the growth in contractor forms of employment:

So my view is in the longer term the Independent Contractors [Bill] is probably just as, if not more, significant than WorkChoices because it is actually creating the space for a particular type of employment form to flourish [while] WorkChoices is doing its best to limit the kind of forms of employment as we currently know them, particularly in the standard wage earner model ...<sup>396</sup>

- 12.22** Similarly, Professor McCallum suggested that the proposed independent contractors legislation does not offer the same level of protection to workers as is currently available under state awards, workers' compensation statutes and occupational health and safety statutes.<sup>397</sup>

- 12.23** This was also stated by Mr Rawling in his answers to questions on notice from 20 June 2006:

Unfortunately, in Australia, there is a growing tendency for employers to exploit the way that work relationships are categorized by law so as to obscure workers' 'employee' status. This employer strategy is pursued primarily to minimise employer obligations and liabilities for worker entitlements and protections that may arise under common law, industrial statutes and industrial instruments. One method of avoiding obligations and liabilities towards workers is to carefully design contractual

<sup>395</sup> Explanatory Memorandum, Independent Contractors Bill 2006, cited at <http://www.workplace.gov.au/NR/rdonlyres/616B785D-D915-4872-9A8A-03624CCF3FF3/0/icbill2006em.pdf> (accessed 3 October 2006), p4

<sup>396</sup> Dr Buchanan, Evidence, 28 July 2006, p43

<sup>397</sup> Professor McCallum, Evidence, 20 June 2006, p42

arrangements so as to characterise workers as 'independent' contractors. In many situations the label 'independent contractors' is applied despite for all practical purposes the workers involved performing the same role as employees.<sup>398</sup>

- 12.24** However, Mr Rawling went on to emphasise that the use of independent contractors is only one method available to employers of minimising their employment obligations and liabilities. He suggested that other methods now prevalent in NSW include hiring casual employees rather than permanent employees, hiring workers through labour hire companies and, in some cases, hiring fixed-term employees. In all cases, these work arrangements deviate from continuing or 'permanent' employment and involve a loss of some or all of the protections and entitlements that the status of permanent employment usually entails.<sup>399</sup>
- 12.25** Mr Rawling also emphasised that the proposed independent contractors legislation, if passed into law, would likely increase the trend towards greater use of independent contractors by taking away the current checks on conversion of permanent 'employees' to independent contractors and other forms of labour that are lower cost.<sup>400</sup>

### **Clothing and footwear workers**

- 12.26** The Committee took evidence during its hearing on 28 July 2006 from representatives of the Textile, Clothing and Footwear Union and Asian Women at Work in relation to the pay and conditions of outworkers in the clothing industry and the likely impact of the Independent Contractors Bill 2006.
- 12.27** In Chapters 8 and 11, the Committee documented the very vulnerable position of some workers from migrant backgrounds and the high likelihood that they will occupy outworker positions. Given the exploitative practices that have often characterised outworker positions, it was argued that outworkers from migrant backgrounds need strong protection of their employment conditions.
- 12.28** In response, state governments around Australia have in recent years introduced a series of measures including, in NSW, the *Industrial Relations (Ethical Clothing Trades) Act 2001*, designed to protect outworkers in the clothing and footwear and transport industries and to address the exploitation of outworkers.<sup>401</sup>
- 12.29** The Independent Contractors Bill 2006 purports to preserve these existing protections for outworkers contained within state and federal legislation. However, this was questioned during the inquiry.
- 12.30** In his evidence to the Committee, Mr Igor Nossar, Chief Advocate with the Textile, Clothing and Footwear Union, indicated that the Commonwealth *Workplace Relations Act 1996*

<sup>398</sup> Answers to questions on notice taken during evidence 20 June 2006, Mr Rawling, p1

<sup>399</sup> Answers to questions on notice taken during evidence 20 June 2006, Mr Rawling, p2

<sup>400</sup> Mr Rawling, Evidence, 20 June 2006, p42

<sup>401</sup> Explanatory Note, *Industrial Relations (Ethical Clothing Trades) Act 2001*, <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/803381802CA070B4CA256B1300140588?Open&shownotes> (accessed 3 October 2006)

maintained the protection of outworkers in the clothing and textile industries within the 20 award allowable matters. He also noted that as recently as December 2005, the Federal Government gave a commitment to the union that, amongst other things, state jurisdiction protection for outworkers would be maintained.

**12.31** Apparently in keeping with this commitment, Mr Nossar noted that Section 7 of the Independent Contractors Bill 2006 purports to preserve existing state law as it relates to outworkers. Specifically, section 7(2) of the Bill provides in part:

- (2) Subsection (1) does not apply in relation to:
  - (a) a law of a State or Territory, to the extent that the law:
    - (i) applies to a services contract to which an outworker is a party;

**12.32** However, Mr Nossar argued that the apparent protection of section 7(2) is undermined by the capacity of the Federal Minister to remove that protection through regulation. As stated by Mr Nossar:

What is apparently a concession to entrench the protection of outworkers is a very provisional [and] contingent one, dependent on the good humour of the Minister from day to day.<sup>402</sup>

**12.33** Mr Nossar further argued that the subsequent subsection of section 7(2)(a)(i) raises a further problem. Section 7(2)(a)(i) provides:

- (2) Subsection (1) does not apply in relation to:
  - (b) a law of a State or Territory, to the extent that the law:
    - (i) ...
    - (ii) makes provision, otherwise than as mentioned in paragraph (1)(c), in relation to such a contract;

**12.34** Mr Nossar argued that the caveat in the words ‘otherwise than as mentioned in paragraph 1(c)’, together with a reading of section 9 of the bill, would allow an employer to impose on outworkers an agreement for the terms of a contract which may explicitly avoid all the state outworker protection laws.<sup>403</sup> Mr Nossar continued:

I think you might agree with me that it immediately raises the question as to why that exception is built into there in the first place. And it leads to the conclusion that the draft Independent Contractors Bill, as it has been released by the Federal Government, flagrantly does not meet the commitments given by the Federal Government in a public announcement by the Minister to maintain State jurisdiction protections. There is a built-in escape hatch whereby an exploiter, dealing with an outworker, can lean on the outworker through the balance of bargaining power to build into the contract, clauses that actually avoid the protection of the State laws.<sup>404</sup>

<sup>402</sup> Mr Nossar, Evidence, 28 July 2006, p26

<sup>403</sup> Mr Nossar, Evidence, 28 July 2006, p26

<sup>404</sup> Mr Nossar, Evidence, 28 July 2006, p26

- 12.35** Mr Barry Tubner, Secretary of the Textile, Clothing and Footwear Union, subsequently expressed the concern that unscrupulous employers in the industry will try to legitimise their illegal employment practices by taking advantage of the new provisions proposed in the Independent Contractors Bill 2006. Mr Tubner argued that reputable and honest employers will then be forced to follow in order to compete.<sup>405</sup>

### **Owner drivers in the transport industry**

- 12.36** As indicated in Chapter 11, the road transport industry is a notoriously dangerous industry, with drivers subject to significant pressure to work very long hours and to deliver to very tight schedules.
- 12.37** During the hearing on 28 July 2006, the Committee took evidence from Mr Mark Crosdale, Secretary of the Newcastle and Northern Sub-branch of the Transport Workers Union (TWU), and Mr Tony McNaulty, a delegate of the TWU. The TWU represents approximately 35,000 transport workers in NSW and just under 100,000 nationally.<sup>406</sup>
- 12.38** In his evidence, Mr McNaulty noted that in the past, NSW governments, both Labor and Coalition, have introduced significant reforms through chapter 6 of the *Industrial Relations Act 1996* to protect the employment conditions of contractors engaged in the transport of goods in NSW:

There has been a fair amount of history between courier drivers and New South Wales chapter 6. Without that chapter 6 in place we would see the rates of pay not have a bottom rung in the ladder – basically it would always be pushed downwards. Through having those protections here in New South Wales we have gradually been able to keep our reimbursement of costs in place by yearly or over a couple of years increases in the minimum rate structure.<sup>407</sup>

- 12.39** As with clothing and footwear workers, the Independent Contractors Bill contains an exemption for owner-driver contractors in NSW to provide that chapter 6 of the NSW *Industrial Relations Act 1996* will continue to apply to them. Section 7(2) of the Bill provides in part:

(2) Subsection (1) does not apply in relation to:

...

(c) any of the following laws:

(i) Chapter 6 of the *Industrial Relations Act 1996* of New South Wales (and any other provision of that Act to the extent that it relates to, or has effect for the purposes of a provision of Chapter 6);

- 12.40** However, Mr Crosdale indicated his concern, similar to that of the Textile, Clothing and Footwear Union in relation to the clothing and textile industry, that these protections may be

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<sup>405</sup> Mr Nossar, Evidence, 28 July 2006, p28

<sup>406</sup> Mr Crosdale, Evidence, 28 July 2006, p51

<sup>407</sup> Mr McNaulty, Evidence, 28 July 2006, p53

removed through regulation at the discretion of the Commonwealth Minister for Workplace Relations.<sup>408</sup>

## The position of the NSW Government

**12.41** In her evidence to the Committee on 15 September 2006, Ms Pat Manser, Deputy Director General of the NSW Office of Industrial Relations, reiterated her view that the provisions of the Federal Government's Independent Contractors Bill 2006 and related Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 allow for individual state provisions in relation to clothing outworkers and the trucking industry to be preserved. However, she continued:

The bill itself is a very commercially oriented bill, if you like. It is very much about the capacity of people to decide to be independent contractors. The New South Wales Government has no problem with that if it is a genuine arrangement and people choose it. But, as I think we all know, there have been occasions when people, including outworkers, have been told they are contractors, and nothing could be further from the truth of their relationship with the person supplying the work. We see it as a missed opportunity to address some of the issues that have appeared in that area of law.<sup>409</sup>

**12.42** Ms Manser subsequently commented that the proposed independent contractors legislation also does not offer adequate protection to individuals against sham arrangements where a person may be engaged as an independent contractor, but would generally be regarded under different circumstances as an employee, with the protections that an employee relationship brings.<sup>410</sup>

**12.43** Ms Manser also indicated that the NSW Government may look at certain strategies to ameliorate the impact of the proposed independent contractors legislation on certain employment relationships. However, until such time as the proposed legislation passes the Commonwealth Parliament and is proclaimed or comes into effect, it is difficult to envisage what those strategies may be.<sup>411</sup>

## Conclusion

**12.44** The Committee acknowledges that the proposed Independent Contractors Bill 2006 and related Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 are still before the Senate, and may be subject to considerable amendment before coming into law. Accordingly, the Committee does not propose to comment on the specific provisions of the proposed legislation.

<sup>408</sup> Mr Crosdale, Evidence, 28 July 2006, p58

<sup>409</sup> Ms Manser, Evidence, 15 September 2006, p18

<sup>410</sup> Ms Manser, Evidence, 15 September 2006, p18

<sup>411</sup> Ms Manser, Evidence, 15 September 2006, p18

- 12.45** In general terms, however, the Committee does not support legislative provisions that make it easier for employers to shift genuine employees onto independent contracts, thereby minimising the protections and entitlements that the status of permanent employment usually entails. The Committee believes that labour law should continue to protect employees in circumstances where a genuine 'employment' relationship exists.
- 12.46** The Committee is aware that this is a contentious area of the law and that the current tests developed by the courts to determine who is an independent contractor are complex. However, the Committee is concerned that an opportunity has been lost to address sensibly the balance between 'employee' and independent contractor arrangements so as to prevent exploitation of workers. This is particularly worrying in relation to the clothing outworker and transport industries, where employees and contractors are particularly vulnerable to exploitative and dangerous work practices.
- 12.47** The Committee understands that following the passage of the independent contractors legislation through the Federal Parliament, the NSW Government intends to introduce legislation to attempt to ameliorate its impact on NSW workers.



## Chapter 13 Conclusion

- 13.1** The *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)* – colloquially known as WorkChoices – commenced on 27 March 2006. The Act amended the *Workplace Relations Act 1996 (Cth)* to give effect to the Federal Liberal/National Coalition Government’s changes to the agenda in relation to the industrial relations system.
- 13.2** WorkChoices contains two fundamental changes.
- 13.3** First, WorkChoices has dramatically extended the coverage of the federal industrial relations system in Australia. Under the industrial relations power in section 51 (xxxv) of the Australian Constitution, Australia has traditionally had a federal industrial relations system, operating concurrently alongside six separate state industrial relations systems. WorkChoices significantly expands the coverage of the federal industrial relations system through the use of a separate constitutional power – the corporations power under section 51(xx) of the Australian Constitution.
- 13.4** The Committee notes that the NSW Government, in company with various other parties including other states and territories, challenged the constitutional validity of WorkChoices and its reliance on section 51(xx) of the Constitution in the High Court. In its decision dated 14 November 2006, the High Court rejected this challenge by a majority of five to two, Justices Kirby and Callinan dissenting.<sup>412</sup>
- 13.5** Despite this decision, the Committee is of the opinion that the ‘takeover’ of industrial relations in this country is an unreasonable and unwarranted move by the Federal Liberal/National Coalition Government to encroach upon the jurisdiction of the states and to impose its own industrial ideology on workers hitherto outside the federal industrial relations system.
- 13.6** At the same time, the Committee notes that the expansion of the federal industrial relations system under WorkChoices has been accompanied by an extraordinary level of regulation and prescription of the labour market. While WorkChoices has been characterised by the Federal Liberal/National Coalition Government as ‘deregulation’ of the Australian industrial relations system, the degree of complexity, paperwork and bureaucracy it entails is surely unique in the developed world.
- 13.7** The second key change implemented in WorkChoices is the wholesale reworking of the operation of the federal industrial relations system, breaking with over a century of evolutionary change in a radical paradigm shift. The key changes to the federal system include:
- the abolition of compulsory conciliation and arbitration
  - the erosion of the award safety net, to be replaced by minimum conditions of employment in the Australian Fair Pay and Conditions Standard (AFPCS)
  - the implementation of new minimum wage setting arrangements

<sup>412</sup> New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia [2006] HCA 52 (14 November 2006)

- the abolition of the 'no disadvantage test' when negotiating agreements
- the exemption of businesses with up to 100 employees from unfair dismissal laws

- 13.8** The erosion of the award safety net, replaced by the AFPCS and the Australian Pay and Classification Scales, is particularly significant. Quite simply, the minimum standards applied to wages and conditions of employment under WorkChoices are plainly not commensurate with those that previously existed for employees under the award system. Accordingly, they do not provide an adequate floor under wages and conditions of employment in the federal industrial relations system for employees in NSW.
- 13.9** In the Committee's view, the erosion of minimum standards of employment completely changes the way the industrial relations system will work in the future in this country. In all likelihood, the current minimum conditions of employment set out in the AFPCS will become the de-facto standard of employment for the vast majority of employees.
- 13.10** Furthermore, the impact of the erosion of the minimum standards of employment under WorkChoices is compounded by the abolition of the 'no disadvantage test' under WorkChoices.
- 13.11** Prior to WorkChoices, an agreement would not pass the 'no disadvantage test' and could not come into force if it would result, on balance, in a reduction in the overall conditions of employment of the employees concerned, compared with applicable federal and state awards and legislation. However, under WorkChoices, it is now possible for employers to make agreements, either individual or collective, that significantly reduce or eliminate existing award or statutory entitlements that previously applied. The only protection afforded to employees is that workplace agreements cannot legally offer less than the very basic entitlements enshrined in the AFPCS, or in separate standards relating to preserved award conditions.
- 13.12** The Committee believes that the dramatic reductions in the minimum standards of employment under WorkChoices, together with the abolition of the 'no disadvantage test', has placed workers who have limited skills, qualifications and negotiation skills in a very vulnerable position. There is no compulsion on employers under WorkChoices to bargain collectively with employees if they do not wish to do so; there is nothing to prevent employers from offering employees AWAs which remove previous protections and conditions on a 'take-it-or leave-it' basis; and the notion that employees will be able to shop around and negotiate the best terms and conditions for themselves is in many cases fanciful. This is particularly true for workers living in rural and regional communities.
- 13.13** The Committee accepts two caveats to this. First, the Committee does not believe that employers on the whole will actively exploit the new WorkChoices laws in order to reduce the wages and conditions of their employees. In the Committee's opinion, the vast majority of employers seek a cooperative and fair employment relationship in the workplace. However, the Committee is concerned that a minority of unscrupulous employers will seek to use WorkChoices to force down the wages and conditions of their employees, obliging ethical employers to do the same in order to remain competitive. This is the so called 'race to the bottom' effect.
- 13.14** The second caveat the Committee recognises is that some employees with skills and qualifications are in a strong bargaining position in the workplace, and are not likely to be

significantly affected by the changes implemented in WorkChoices. It is for those employees with fewer skills and qualifications – the disadvantaged groups in the workplace – that the Committee is concerned.

- 13.15** The Federal Government introduced the WorkChoices legislation with stated aims of improving productivity, increasing wages, reducing unemployment, improving living standards and enhancing the balance between work and family life.
- 13.16** The Committee rejects the WorkChoices legislation as a means of achieving these objectives.
- 13.17** The Committee does not believe that the way to generate strong sustainable productivity growth, high output and jobs growth is by reducing minimum wages and creating a large pool of low-paid, low productivity jobs. The international evidence suggests that by attempting to make labour cheaper, such ‘deregulation’ may in fact remove incentives to businesses to increase productivity through innovation and skill development. The imperative to minimise labour costs under WorkChoices will simply lead to a ‘race to the bottom’ and a profusion of low-pay, poor quality work in an economy characterised by low productivity.
- 13.18** Moreover, the Committee shares the apprehension expressed in many of the submissions and by many of the witnesses to this inquiry that WorkChoices, while failing to boost productivity and innovation, will result in disparity and inequity in wages, more low-paid jobs and a larger number of the underprivileged in society.
- 13.19** The Committee studied in this report the significant adverse effects of WorkChoices on disadvantaged groups in the workplace – women, children and young people, people from culturally diverse and Aboriginal communities, and people from rural and regional areas – together with their families and the broader community. The findings are sobering.
- 13.20** On the basis of the evidence available, the Committee considers that WorkChoices will further marginalise a range of already disadvantaged groups including women, young people, people from culturally diverse backgrounds, Aboriginal people, those from rural and remote communities, people with disabilities, and people receiving income support. In so doing, it is likely to have a profound impact upon the children, families and communities of all those groups, leading to greater rates of poverty, and exclusion and the breakdown of social ties.
- 13.21** The Committee recognises that the evidence on the final impact of WorkChoices will take several years to reveal itself. But based on the evidence available to date, the Committee believes that WorkChoices is inherently unjust and will also cost our society and economy a great deal in the future.
- 13.22** WorkChoices represents a paradigm shift in the regulation of industrial relations in Australia. It pursues a radical neo-liberal agenda, designed to reduce the reach of labour law and to create an individualised industrial relations system in which workers have few protections and bargaining power is tilted firmly in favour of employers. In the Committee’s opinion, it has no place in a modern Australian liberal democracy.
- 13.23** Accordingly, as outlined in recommendation 1, the Committee calls on the Federal Liberal/National Coalition Government to withdraw its unfair WorkChoices legislation.

## Appendix 1 Submissions

No	Author
1	Mr Ben Fogarty, NSW Disability Discrimination Legal Centre
2	Mr Glenn Elliott-Rudder
3	Ms Libby Rogerson, Diocese of Parramatta
4	Mrs Cherry Stewart
5	Mr Spencer Kain, Gymea Sub Branch of the Australian Manufacturing Union Retired Workers
6	Mrs Bridget Chojnacki
7	Ms Maree McDermott, South Penrith Young & Neighbourhood Services Inc
8	Mr James McCall, Motor Traders' Association of New South Wales
9	Mr Phillip & Ms Amber Oswald
10	Mr Roger & Mr Denise Hennessy
11	Mr Russ Collison, Australian Workers Union
12	Mr Andrew Ferguson, Construction, Forestry, Mining & Energy Union (CFMEU) – Construction & General Division
13	Mr Stephen Blanks, NSW Council for Civil Liberties
14	Mrs Maree Filipczuk
15	Mr Daniel Kicuroski, Transport Workers' Union (NSW Branch)
16	Ms Annie Owens, Liquor, Hospitality & Miscellaneous Union (LHMU) NSW
17	Ms Sharon Price, Conference of Leaders of Religious Institutes (CLRI) NSW
18	Mr John Cahill, Public Service Association of NSW
19	Ms Kristy Delaney, Youth Action & Policy Association (YAPA)
20	Mr Brian Harris, NSW United Services Union
21	Ms Jo Jacobsen, Penrith Working Families
22	Mr Gary Moore, Council of Social Service of NSW (NCOSS)
23	Ms Lee-Anne Whitten, NSW Council for Intellectual Disability
24	Ms Sarah Taylor, Australian Young Christian Workers
25	Ms Agnes Chong, Combined Community Legal Centres' Group (NSW) Inc
26	Mr Stewart Scott-Irving
27	Ms Rose Jackson, National Union of Students Inc
28	The Most Reverend Dr Peter Jensen, Social Issues Executive, Anglican Diocese of Sydney
29	Mr Adrian Catt, A Future for Our Kids
30	Mr Michael Meurer, NSW Young Labor Council

<b>No</b>	<b>Author</b>
31	Mr Gerard Dwyer, Shop, Distributive & Allied Employees' Association (SDA) 31a Supplementary Submission
32	Mr Bill Gillooly AM, Local Government Association of NSW & Shires Association of NSW
33	Mr Stepan Kerkyasharian, Community Relations Commission
34	Mr Brett Holmes, NSW Nurses' Association
35	Ms Alison Peters, Unions NSW
36	Ms Kirrily McDermott, Catholic Commission for Employment Relations
37	The Hon John Della Bosca MLC, NSW Government
38	Mr Peter Kell, Anglicare, Diocese of Sydney
39	Ms Megan Lee, Combined Pensioners & Superannuants Association of NSW
40	Ms Michelle Pedersen, National Council of Women NSW Inc
41	Ms Pat McDonough, Inner City Legal Centre 41a Supplementary Submission
42	Mr Greg Chilvers, Police Association of New South Wales
43	Ms Lorissa Stevens
44	Mr John Gooley, Marrickville Community Legal Centre
45	Professor Russell Lansbury, School of Business, University of Sydney
46	Ms Gillian Calvert, NSW Commission for Children & Young People 46a Supplementary Submission
47	Mr Tony Khoury, Waste Contractors & Recyclers Association NSW
48	Ms Clover Moore MP, State Member for Bligh
49	Professor Ron McCallum & Mr Michael Rawling, University of Sydney
50	Miss Romola Hollywood, Country Children's Services Association of NSW
51	Ms Ruth Lamont, Milton Ulladulla Rights at Work Committee
52	Ms Debbie Carstens, Asian Women at Work

## Appendix 2 Witnesses

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
Monday 19 June 2006	Ms Pat Manser	Deputy Director General, Office of Industrial Relations, Department of Commerce
	Ms Vicki Telfer	General Manager, Strategy & Policy Division, WorkCover Authority of NSW
	Mr Chris Raper	Assistant Director General, Public Employment Office, NSW Premier's Department
	Ms Alison Peters	Deputy Assistant Secretary, Unions NSW
	Ms Annie Owens	Secretary, Liquor, Hospitality & Miscellaneous Workers Union (LHMU)
	Ms Jane Lee	Worker and LHMU member
	Dr Michael Lyons	Lecturer, University of Western Sydney
	Ms Michelle Burrell	Acting Director, NCOSS
	Mr Dev Mukherjee	Senior Police Officer, NCOSS
	Mr James McCall	CEO, Motor Traders' Association of NSW
	Mr Greg Hatton	Director, Industrial Relations, Motor Traders' Association of NSW
	Tuesday 20 June 2006	Mr Mark MacDiarmid
Ms Linda Tucker		Solicitor, Combined Community Legal Centres Group NSW
Mr John Gooley		Member, Combined Community Legal Centres Group NSW
Ms Pat McDonough		Member, Combined Community Legal Centres Group NSW
Mr Stephen Bali		Organiser/Media Officer, Australian Workers' Union
Mr Russell Collison		State Secretary, Australian Workers' Union
Mr Gerard Dwyer		Branch Secretary/Treasurer, Shop, Distributive & Allied Employees' Association
Mr David Bliss		Senior Industrial Officer, Shop, Distributive & Allied Employees' Association
Professor Ron McCallum		Dean, Law School, University of Sydney
Mr Michael Rawling		Research Assistant, Law School, University of Sydney
Mr Michael McDonald		Executive Director, Catholic Commission for Employment Relations
Ms Kirrily McDermott		Employment Relations Advisor, Catholic Commission for Employment Relations

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
Monday 17 July 2006	Ms Maree McDermott	Manager, South Penrith Youth & Neighbourhood Services Inc (SPYNS)
	Ms Laura Williams	Youth Resource & Development Worker, SPYNS
	Ms Julie Abdalla	Aboriginal Family Worker, SPYNS
	Ms Carmen Boserio	Management Committee Member, SPYNS
	Mr Adrian Catt	A Future for Our Kids
	Mrs Denise Hennessy	Convenor, Retirees Care About Your Rights at Work
	Mr Roger Hennessy	Member, Retirees Care About Your Rights at Work
	Mrs Shirley Bains	Member, Retirees Care About Your Rights at Work
	Mr Morrie Mifsud	Member, Retirees Care About Your Rights at Work
	Ms Jo Jacobsen	Member, Penrith Working Families
Ms Linda Everingham	Member, Penrith Working Families	
Tuesday 18 July 2006	Ms Kristy Delaney	Executive Officer, Youth Action Policy Association (YAPA)
	Mr John Ferguson	Policy & Training Officer, YAPA
	Mr David Gibson	Director, Workplace Solutions, Local Government & Shires Association
	Ms Lyn Fraser	Research Officer, United Services Union
	Mr Greg Golledge	Industrial Officer, United Services Union
	Mr Rethana Chea	Youth Chair, Ethnic Communities Council
	Mr Tony Khoury	Executive Director, Waste Contractors & Recyclers Association NSW
	Mr Harry Wilson	Senior Vice-President, Waste Contractors & Recyclers Association NSW
	Mr Mark Diamond	Workplace Relations Adviser, Waste Contractors & Recyclers Association NSW
	Ms Kathryn Sullivan	Government & Community Relations, NSW Nurses' Association
	Ms Rita Martin	Government & Community Relations, NSW Nurses' Association
	Ms Mimi Zou	Adviser, National Council of Women Australia
	Ms Michelle Pedersen	Adviser on Women & Employment, National Council of Women NSW

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
Thursday 27 July 2006	Mr Arthur Rorris	Secretary, South Coast Labor Council
	Ms Anna Watson	Organiser, United Services Union Southern Region
	Mr Robert Long	Representative, NSW Teachers Federation
	Mr Rudi Oppitz	Organiser, United Services Union Southern Region
	Ms Anna Swec	Worker, Spotlight, Wollongong
	Ms Mavis Starcic	Worker, Spotlight, Wollongong
	Rev Gordon Bradbery	Minister, Wollongong Uniting Church
	Mr Bryan Smith	Organiser, LHMU
Friday 28 July 2006	Mr Andrew Ferguson	State Secretary, CFMEU, Construction & General Division, NSW Branch
	Ms Rita Mallia	Legal Officer, CFMEU, Construction & General Division, NSW Branch
	Mr David Halls	Member, CFMEU
	Mr Omir Majstrovic	Member, CFMEU
	Ms Elizabeth Rivera	Member, CFMEU
	Ms Helena O'Connell	Executive Officer, NSW Council for Intellectual Disability
	Ms Debbie Carstens	Coordinator, Asian Women at Work & Fairwear
	Ms Qi Fen Huang	Member, Asian Women at Work
	Ms Barry Tubner	State Secretary, Textile, Clothing & Footwear Union
	Mr Igor Nossar	Chief Advocate, Textile, Clothing & Footwear Union
	Mr John Buchanan	Deputy Director, Workplace Research Centre
	Dr Christopher Briggs	Senior Research Fellow, Workplace Research Centre
	Mr Mark Crosdale	Sub-branch Secretary, Transport Workers Union
Mr Tony McNulty	Member, Transport Workers Union	
Friday 15 September 2006	Ms Vicki Telfer	General Manager, Strategy & Policy Division, WorkCover Authority of NSW
	Ms Pat Manser	Deputy Director General, Office of Industrial Relations, Department of Commerce
	Ms Rebekah Stevens	Acting Assistant Director General, Office of Industrial Relations, Department of Commerce
	Dr Marian Baird	Senior Lecturer, Discipline of Work and Organisational Studies, University of Sydney



## Appendix 3 Minutes

Minutes No 76  
Thursday 30 March 2006  
Legislative Council Members' Lounge, Parliament House at 10.45am

### 1. Members present

Ms Burnswoods (Chair)  
Ms Parker (Deputy Chair)  
Dr Chesterfield-Evans  
Mr Lynn  
Ms Griffin  
Mr West

### 2. New inquiry - Impact of Commonwealth WorkChoices Legislation

Mr West moved - that the Committee accept the terms of reference for the inquiry into the impact of Commonwealth WorkChoices legislation referred by the Hon John Della Bosca, Minister for Industrial Relations

Ms Parker moved an amendment - that the words after 'the Committee' be deleted and replaced by the words 'not accept the terms of reference for the inquiry into the impact of Commonwealth WorkChoices legislation referred by the Hon John Della Bosca, Minister for Industrial Relations, as it is inappropriate for the Committee to conduct an inquiry into Commonwealth legislation'

Question put.

Committee divided.

Ayes: Dr Chesterfield-Evans, Ms Parker, Mr Lynn  
Noes: Ms Burnswoods, Ms Griffin, Mr West

There being an equality of votes, the Chair exercised her casting vote with the noes.

Question resolved in the negative.

Original motion put.

Committee divided.

Ayes: Ms Burnswoods, Ms Griffin, Mr West  
Noes: Dr Chesterfield-Evans, Ms Parker, Mr Lynn

There being an equality of votes, the Chair exercised her casting vote with the ayes.

Question resolved in the affirmative.

### 3. Adjournment

The Committee adjourned at 11.00am sine die.

### Meeting 77

Thursday 30 March 2006  
Legislative Council Members Lounge, Parliament House at 7.35pm

### 1. Members Present

Ms Burnswoods (Chair)  
Dr Chesterfield-Evans  
Ms Griffin

Mr Lynn  
Mr West

2. **Apologies**

Ms Parker (Deputy Chair)

3. **Inquiry into the Impact of Commonwealth WorkChoices legislation inquiry**

Resolved, on the motion of Ms Griffin: that the closing date for submission be Friday 26 May 2006.

Resolved, on the motion of Mr West: That advertisements calling for submissions be placed in The Sydney Morning Herald and The Daily Telegraph on Saturday 8 April 2006, and that a media release announcing the inquiry be sent to local print and radio media across the State.

Resolved, on the motion Ms Griffin: That the Chair write to relevant individuals and organisations inviting submissions to the inquiry, and that Committee members forward the names of suggested individuals and organisations to the secretariat by 5pm, Friday 7 April 2006.

4. **Adjournment**

The Committee adjourned at 7.45pm until Monday 3 April 2006 at 9.00am.

**Minutes No 78**

**Friday 7 April 2006**

**Room 814/815, Parliament House at 9.30am**

1. **Members present**

Ms Burnswoods (Chair)  
Ms Parker (Deputy Chair)  
Dr Chesterfield-Evans  
Ms Griffin  
Mr West

2. **Correspondence**

\*\*\*

3. **Deliberative meeting**

***Confirmation of minutes***

Resolved, on the motion of Mr West: That Minutes No 75, 76 and 77 be confirmed.

*Correspondence*

...

*Received*

Letter dated 28 March 2006 from Mr John Della Bosca, Minister for Industrial Relations to Chair, referring Inquiry into the Impact of Commonwealth WorkChoices legislation.

...

4. **Inquiry into the Impact of Commonwealth WorkChoices legislation – meeting dates**

Resolved, on the motion of Ms Griffin: That six initial hearing days be set on 19 and 20 June 2006, and 17, 18, 27 and 28 July 2006, at venues to be determined.

5. **Adjournment**

The Chair thanked the outgoing Director of the Social Issues Committee, Ms Rachel Simpson for her assistance in the work of the Committee, and welcomed the new Director, Mr John Young.

The Committee adjourned at 4.45pm sine die.

**Minutes No 79****Friday 2 June 2006****Room 1108, Parliament House at 1pm****1. Members present**

Ms Burnswoods (Chair)  
 Ms Parker (Deputy Chair)  
 Dr Chesterfield-Evans  
 Ms Griffin  
 Mr Lynn  
 Mr West

**2. Confirmation of minutes**

Resolved, on the motion of Ms Griffin: That Minutes No 78 be confirmed.

**3. Correspondence**

...

*Inquiry into the impact of Commonwealth Work Choices legislation*

Received

1. Letter from Fiona Davies, Australian Medical Association (NSW) Ltd, to Chair, 1 May 2006, advising that the Association will not make a submission to the Inquiry.
2. Letter from Mr Peter Thyer to the Committee, 15 May 2006, concerning information to be provided to the Inquiry.

Sent

1. Letter to the Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, from Chair, 5 May 2006, inviting a submission and appearance at a hearing.
2. Letter to Mr Nicholas Want, Executive Director, Office of Workplace Services, from Chair, 9 May 2006, inviting a submission.

...

**4. Chair's draft report on inquiry into public disturbances at Macquarie Fields**

...

**Minutes No 80****Thursday 8 June 2006****Legislative Council Members' Lounge, Parliament House at 1.10pm****1. Members present**

Ms Burnswoods (Chair)  
 Ms Parker (Deputy Chair)  
 Dr Chesterfield-Evans  
 Ms Griffin  
 Mr Lynn  
 Mr West

**2. Confirmation of minutes**

Resolved, on the motion of Mr West: That Minutes No 79 be confirmed.

**3. Chair's draft report on inquiry into public disturbances at Macquarie Fields**

...

**4. Correspondence**

The Committee noted the following correspondence:

Received

1. Email from Bronwyn Cooper, Analyst, Office of Industrial Relations, to Director, 18 May 2006, enclosing list of organisations of interest to the WorkChoices Inquiry.
2. Letter from June McPhie, President, NSW Law Society, to Chair, 31 May 2006, advising that the Society will not be making a submission to the Inquiry.

**5. Inquiry into the impact of the Commonwealth WorkChoices legislation**

The Chair tabled a list of proposed witnesses, which had previously been circulated.

Ms Parker and Mr Lynn left the meeting.

Resolved, on the motion of Dr Chesterfield-Evans: That the secretariat invite the Chair's proposed witnesses to participate in the hearings to be held on 19 and 20 June 2006, and that the secretariat continue to investigate possible witnesses for future hearings.

Resolved, on the motion of Dr Chesterfield-Evans: That submissions 1 to 30 be published, with the suppression of certain information in submission 12.

Resolved, on the motion of Dr Chesterfield-Evans: That the Committee continue to consider issues in respect of potentially sensitive information on a case by case basis as they arise, using a similar approach to that taken during the General Purpose Standing Committee No.1 inquiry into serious injury and death in the workplace.

## 6. Adjournment

The Committee adjourned at 2.15pm sine die.

## Minutes No 81

Monday, 19 June 2006

Jubilee Room, Parliament House at 9.30am

### 1. Members present

Ms Burnswoods (Chair)  
Dr Chesterfield-Evans  
Ms Griffin  
Mr Lynn  
Mr West

### 2. Apologies

Ms Parker (Deputy Chair)

### 3. Public Hearing - Inquiry into the impact of the Commonwealth WorkChoices legislation

Ms Pat Manser, Deputy Director General, Office of Industrial Relations, Department of Commerce, Ms Vicki Telfer, General Manager, Strategy and Policy Division, WorkCover Authority of NSW and Mr Chris Raper, Assistant Director General, Public Employment Office, NSW Premier's Department, were sworn and examined.

Questioning concluded and the witnesses withdrew.

Ms Alison Peters, Deputy Assistant Secretary, Unions NSW, sworn and examined.

Questioning concluded and the witness withdrew.

Ms Annie Owens, Secretary and Ms Jane Lee, Worker and Member, Liquor, Hospitality and Miscellaneous Workers Union, and Dr Michael Lyons, Lecturer, University of Western Sydney, sworn and examined.

Dr Lyons tabled a document, Gender pay equity, wage fixation and industrial relations reform in Australia: one step forward and two steps backwards? (Group Researching Organisations, Work, Employment and Skills, University of Western Sydney).

Ms Owens tabled a document, A clean start for the property services industry (LHMU/SFWU).

Resolved, on the motion of Mr West: That the Committee accept the documents tabled by Dr Lyons and Ms Owens.

Questioning concluded and the witnesses withdrew.

Ms Michelle Burrell, Acting Director and Mr Dev Mukherjee, Senior Policy Officer, NCOSS, sworn and examined.

Questioning concluded and the witnesses withdrew.

Mr James McCall, Chief Executive Officer and Mr Greg Hatton, Director, Industrial Relations, Motor 'Traders' Association of NSW, sworn and examined.

Questioning concluded and the witnesses withdrew.

#### 4. **Deliberative meeting**

##### ***Confirmation of minutes***

Resolved, on the motion of Ms Griffin: That Minutes No 80 be confirmed.

##### ***Correspondence***

The Committee noted the following correspondence:

Received

1. Mr Arthur Rorris, Secretary, South Coast Labour Council, to the Committee, 13 June 2006
2. Mr Tony Khoury, Executive Director, Waste Contractors and Recyclers Association of NSW, to the Minister for Industrial Relations, forwarded to the Chair, 14 June 2006
3. Mr Nick Davy, Assistant Manager – Policy, Research and Government Affairs, Sydney Chamber of Commerce, to the Committee, 14 June 2006

Sent

1. Mr R Stedman, from the Chair, 9 June 2006

##### ***Submissions***

Resolved, on the motion of Dr Chesterfield-Evans: That the Committee publish submissions 31 to 42, with the suppression of identifying information in submission 31.

##### ***Matters arising out of the public hearing***

Resolved, on the motion of Dr Chesterfield-Evans: That the documents accepted by the Committee during the hearing be published.

Resolved, on the motion of Ms Griffin: That the secretariat write to Cubby House Australia to invite the company to reply to allegations made during evidence.

Resolved, on the motion of Ms Griffin: That the following additional question be forwarded to WorkCover Authority of NSW: 'Does the WorkChoices legislation impact on the right of entry of the Work Cover Authority of NSW to either check any breaches of occupational health and safety legislation or investigate enquiries or fatalities that occur in workplaces across NSW? If so, can the Work Cover Authority of NSW advise the Committee of any changes to right of entry that may impact on any investigation?'

Resolved, on the motion of Dr Chesterfield-Evans: That the following additional question be put to the Office of Industrial Relations: 'Could you provide information concerning any longitudinal studies the Government has put in place to monitor the affects of the WorkChoices legislation?'

##### ***Future work of the Committee***

Resolved, on the motion of Ms Griffin: That the Committee conduct hearings in Penrith and Sydney on 17 and 18 July 2006, and in Wollongong and Sydney on 27 and 28 July 2006.

#### 5. **Adjournment**

The Committee adjourned at 5:00 pm until 10:30 am, Tuesday 20 June 2006.

#### **Minutes No 82**

**Tuesday 20 June 2006**

**Jubilee Room, Parliament House at 10.35am**

##### 1. **Members present**

Ms Burnswoods (Chair)  
Ms Parker (Deputy Chair)  
Dr Chesterfield-Evans

Ms Griffin  
Mr Lynn  
Mr West

**2. Public Hearing - Inquiry into the impact of the Commonwealth WorkChoices legislation**

Mr Mark MacDiarmid, Solicitor, Ms Linda Tucker, Solicitor, and Ms Pat McDonough, Solicitor, Combined Community Legal Centres Group NSW, affirmed and examined; Mr John Gooley, Solicitor, Combined Community Legal Centres Group NSW, sworn and examined.

Questioning concluded and the witnesses withdrew.

Mr Stephen Bali, Organiser and Media Officer, and Mr Russ Collison, State Secretary, Australian Workers Union, sworn and examined.

Questioning concluded and the witnesses withdrew.

Mr Gerard Dwyer, Branch Secretary – Treasurer, and Mr David Bliss, Senior Industrial Officer, Shop, Distributive and Allied Employees' Association, sworn and examined.

Questioning concluded and the witnesses withdrew.

Professor Ron McCallum, Dean, and Mr Michael Rawling, Research Assistant, Law School, University of Sydney, sworn and examined.

Questioning concluded and the witnesses withdrew.

Mr Michael McDonald, Executive Director, and Ms Kurrily McDermott, Employment Relations Adviser, Catholic Commission for Employment Relations, sworn and examined.

Questioning concluded and the witnesses withdrew.

**3. Deliberative meeting**

***Submissions***

Resolved, on the motion of Ms Parker: That the secretariat contact the author of submission 43 and that consideration of the submission be deferred.

***Matters arising out of the public hearing***

Resolved, on the motion of Ms Parker: That the secretariat write to Prodigy Hair Salon to invite the company to reply to allegations made during evidence.

**4. Adjournment**

The Committee adjourned at 4:45 pm sine die.

**Minutes No 83**

**Monday 17 July 2006**

**The Theatre, Penrith City Library, Penrith at 11.05am**

**1. Members present**

Ms Burnswoods (Chair)  
Ms Parker (Deputy Chair)  
Dr Chesterfield-Evans  
Ms Griffin  
Mr Lynn  
Mr West

**2. Public forum - Inquiry into the impact of the Commonwealth WorkChoices legislation**

Participants, the public and the media were admitted.

The Chair made an opening statement welcoming attendees to the forum and outlining the procedures for the day.

The following participants, having been sworn or affirmed, made statements to the Committee:

- Mr Keith Barrington, private citizen
- Mr Colin Chapman, private citizen
- Ms Patricia Formosa, Community Worker, Graceades Cottage, Bidwell
- Ms Denise Guthrey, private citizen
- Mr Thomas Hennessy, private citizen
- Ms Mary Yaager, Occupational Health and Safety and Workers Compensation Officer, Unions NSW
- Ms Carmen Cindric, private citizen
- Ms Stephanie Cindric, private citizen
- Mr Geoffrey Pearson, private citizen
- Mr James Nero, private citizen
- Mr Bruno Mendonca, Union Official, National Union of Workers.

Ms Guthrey, Mr Nero and Ms Formosa responded to questions from the Committee.

Questioning concluded and the participants withdrew.

Resolved, on the motion of Ms Griffin: That the names of the individuals referred to in Ms Yaager's statement be suppressed.

### 3. **Public hearing - Inquiry into the impact of the Commonwealth WorkChoices legislation**

Ms Maree McDermott, Manager, Ms Laura Williams, Youth Resource and Development Worker, Ms Carmen Boserio, Management Committee Member, and Ms Julie Abdalla, Aboriginal Family Worker, South Penrith Youth and Neighbourhood Services (SPYNS) Inc, sworn and examined.

Ms McDermott tabled a document, 'SPYNS young people: case studies of employment experiences'.

Resolved, on the motion of Mr West: That the Committee accept and publish the document tabled by Ms McDermott.

Questioning concluded and the witnesses withdrew.

Mr Adrian Catt, Member, A Future for Our Kids, sworn and examined.

Questioning concluded and the witnesses withdrew.

Mrs Denise Hennessy, Convener, Mr Roger Hennessy, Member, Mrs Shirley Bains, Member, Mr Morrie Mifsud, Member, Retirees Care About Your Rights at Work, sworn and examined.

Questioning concluded and the witnesses withdrew.

Ms Jo Jacobsen, Member, and Ms Linda Everingham, Member, Penrith Working Families, sworn and examined.

Questioning concluded and the witnesses and the public withdrew.

### 4. **Adjournment**

The Committee adjourned at 3.40 pm until 9.30 am, 18 July 2006 (public hearing).

#### **Minutes No 84**

**Tuesday 18 July 2006**

**Jubilee Room, Parliament House at 9.30am**

#### 1. **Members present**

Ms Burnswoods (Chair)  
 Ms Parker (Deputy Chair)  
 Dr Chesterfield-Evans  
 Ms Griffin  
 Mr Lynn

Mr West

**2. Public hearing - Inquiry into the impact of the Commonwealth WorkChoices legislation**

The public and the media were admitted.

Ms Kristy Delaney, Executive Officer, and Mr John Ferguson, Policy and Training Officer, Youth Action Policy Association (YAPA), sworn and examined.

Questioning concluded and the witnesses withdrew.

Mr Greg Golledge, Industrial Officer, United Services Union, Ms Lyn Fraser, Research Officer, United Services Union, and Mr David Gibson, Director, Workplace Solutions, Local Government and Shires Association, sworn and examined.

Mr Gibson tabled document, Local Government and Shires Association, 'supplementary material'.

Resolved, on the motion of Ms Parker: That the Committee accept the document tabled by Mr Gibson.

Ms Fraser tabled the documents, 'United Services Union: Allowable award matters ...', 'Employment Info Series, Info Sheet No.1.2,' and 'Employment Info Series, Info Sheet No.1.3'.

Resolved, on the Motion of Dr Chesterfield-Evans: That the Committee accept the documents tabled by Ms Fraser.

Questioning concluded and the witnesses withdrew.

Mr Rathana Chea, Youth Chair, Ethnic Communities Council of New South Wales, sworn and examined.

Questioning concluded and the witness withdrew.

Mr Tony Khoury, Executive Director, Mr Mark Diamond, Workplace Relations Adviser, and Mr Harry Wilson, Senior Vice President, Waste Contractors and Recyclers Association NSW, sworn and examined.

Mr Khoury tabled a document summarising the Association's evidence during the hearing.

Resolved, on the motion of Ms Griffin: That the Committee accept the document tabled by Mr Khoury.

Questioning concluded and the witnesses withdrew.

Ms Michelle Pederson, Advisor on Women and Employment, National Council of Women NSW, Ms Mimi Zou, Adviser, National Council of Women Australia, Ms Kathryn Sullivan, Government and Community Relations Officer, and Ms Rita Martin, Government and Community Relations Officer, NSW Nurses' Association, sworn and examined.

Questioning concluded and the witnesses and the public withdrew.

Resolved, on the motion of Ms Griffin: That the documents tabled during the hearing be published.

**3. Deliberative meeting**

***Confirmation of Minutes***

Resolved, on the motion of Mr West: That Minutes No. 81 and 82 be confirmed.

***Correspondence***

The Committee noted the following correspondence:

...

*Inquiry into the impact of the Commonwealth WorkChoices Legislation*

Received



1. From the Hon Kevin Andrews MP, Commonwealth Minister for Employment and Workplace Relations, Minister Assisting the Prime Minister for the Public Service, to the Chair, 28 June 2006, declining invitation to make a submission to the inquiry
2. From Mr Henry Grech, Grech Partners Solicitors, on behalf of Cubby House Childcare Australia, to the Director, 5 July 2006, seeking an extension for a reply to a letter inviting response to adverse comments made in evidence
3. From Mr John Gooley, Volunteer Solicitor, Marrickville Legal Centre, to the Committee, 16 July 2006, updating information provided to the Committee in evidence

Sent

1. To the Director, Cubby House Child Care Australia, from the Director, 28 June 2006, inviting a response to adverse comments made in evidence
2. To the Manager, Prodigy Hair Salon, from the Director, 28 June 2006, inviting a response to adverse comments made in evidence
3. To the Hon Diane Beamer MP, Member for Mulgoa, Minister for Western Sydney, Minister for Fair Trading and Minister Assisting the Minister for Commerce, from the Chair, 7 July 2006, advising of the public forum to be held in Penrith on 17 July 2006
4. To Ms Karyn Paluzzano MP, Member for Penrith, from the Chair, 7 July 2006, advising of the public forum to be held in Penrith on 17 July 2006
5. To Mr Allan Shearan MP, Member for Londonderry, from the Chair, 7 July 2006, advising of the public forum to be held in Penrith on 17 July 2006
6. To the Hon Bob Debus MP, Member for Blue Mountains, Attorney General, Minister for the Environment and Minister for the Arts, from the Chair, 7 July 2006, advising of the public forum to be held in Penrith on 17 July 2006

#### ***Answers to questions on notice***

Resolved, on the motion of Dr Chesterfield-Evans: That the Committee publish the answers to questions taken on notice received from:

- Ms Michelle Burrell, Acting Director, NCOSS
- Ms Alison Peters, Deputy Assistant Secretary, Unions NSW
- Ms Pat Manser, Deputy Director General, Office of Industrial Relations
- Mr Michael Rawling, Associate of the Ross Parsons Centre and Research Assistant to Professor Ron McCallum, Faculty of Law, University of Sydney
- Mr Peter Dunphy, A/General Manager, Strategy and Policy, WorkCover NSW

#### ***Submissions***

Resolved, on the motion of Mr Lynn: That the Committee publish Submissions 44 to 49, along with Supplementary Submission 41a.

Resolved, on the motion of Dr Chesterfield-Evans: That the Committee publish Submission 43 with the names of individuals referred to in it suppressed.

Resolved, on the motion of Dr Chesterfield-Evans: That the Committee write to Mining and Earthmoving Services Pty Ltd to invite the company to reply to allegations made in Submission 43.

#### ***Future work of the Committee***

The Chair tabled a list of remaining and proposed witnesses.

Resolved, on the motion of Mr West: That the Committee undertake a further half-day or day of hearings during September, and that the Secretariat invite the identified witnesses to future hearings.

#### **4. Adjournment**

The Committee adjourned at 4.50 pm until 11.30 am, 27 July 2006 (public forum).

**Minutes No 85**

**Thursday 27 July 2006**

**Level 9 Function Room, Wollongong Council Chambers, Wollongong at 11.35am**

**1. Members present**

Ms Burnswoods (Chair)  
Dr Chesterfield-Evans  
Ms Griffin  
Mr West

**2. Apologies**

Ms Parker (Deputy Chair)  
Mr Lynn

**3. Public hearing - Inquiry into the impact of the Commonwealth WorkChoices legislation**

The public and the media were admitted.

The Chair made an opening statement welcoming attendees to the hearing in Wollongong and outlining the procedures for the day.

Mr Arthur Rorris, Secretary, South Coast Labour Council, affirmed and examined.

Questioning concluded and the witness withdrew.

Revd Gordon Bradbery, Administrator, Wollongong Mission Uniting Church, affirmed and examined.

Questioning concluded and the witness withdrew.

Ms Anna Watson and Mr Rudi Oppitz, Organisers, United Services Union, Southern Region, sworn and examined.

Questioning concluded and the witnesses withdrew.

Ms Anna Szvec, affirmed and examined.

Ms Mavis Starcic, sworn and examined.

Questioning concluded and the witnesses withdrew.

Mr Robert Long, Delegate, NSW Teachers Federation, affirmed and examined.

Questioning concluded and the witness withdrew.

Mr Bryan Smith, Organiser, Liquor, Hospitality and Miscellaneous Workers Union, sworn and examined.

Questioning concluded and the witness and the public withdrew.

**4. Adjournment**

The Committee adjourned at 3.30 pm until 9.30 am, 28 July 2006.

**Minutes No 86**

**Friday 28 July 2006**

**Room 814-815, Parliament House at 9.30am**

**1. Members present**

Ms Burnswoods (Chair)  
Ms Parker (Deputy Chair)  
Dr Chesterfield-Evans  
Ms Griffin  
Mr West

**2. Apologies**

Mr Lynn

### 3. Public hearing - Inquiry into the impact of the Commonwealth WorkChoices legislation

The public and the media were admitted.

Mr Andrew Ferguson, State Secretary, and Ms Rita Mallia, Senior Legal Officer, Construction, Forestry, Mining and Energy Union, Ms Elizabeth Revera, Mr Omir Majstrovic and Mr David Halls, affirmed and examined.

Ms Mallia tabled the documents, 'Inquiry into the impact of the Commonwealth WorkChoices legislation - Draft questions for hearing on 28 July 2006', 'Elizabeth Rivera', 'David Halls vs Boral Formwork and Scaffolding Pty Ltd' and 'Omir Majstrovic'.

Resolved, on the motion of Mr West: That the Committee accept and publish the documents tabled by Ms Mallia.

Questioning concluded and the witnesses withdrew.

Ms Helena O'Connell, Executive Officer, NSW Council for Intellectual Disability, affirmed and examined.

Questioning concluded and the witness withdrew.

Mr Barry Tubner, State Secretary, and Mr Igor Nossar, Chief Advocate, Textile, Clothing and Footwear Union, and Ms Debra Carstens, Coordinator, Asian Women at Work, sworn and examined.

Ms Qi Fen Huang, Member, Asian Women at Work, affirmed and examined.

Mr Tubner tabled the documents, 'Statement of Barry Tubner', 'Submission to Senate Inquiry into Workplace Agreements', 'Submission to Senate Inquiry into Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006'.

Resolved, on the motion of Dr Chesterfield-Evans: That the Committee accept and publish the documents tabled by Mr Tubner.

Questioning concluded and the witnesses and the public withdrew.

### 4. Deliberative meeting

#### ***Confirmation of Minutes***

Resolved, on the motion of Mr West: That Minutes No. 83 and 84 be confirmed.

#### ***Correspondence***

The Committee noted the following correspondence:

##### *Inquiry into the impact of the Commonwealth WorkChoices Legislation*

Received

1. From Mr Henry Grech, Grech Partners Solicitors, on behalf of Cubbyhouse Childcare Australia, to the Director, 20 July 2006, responding to adverse comments made in evidence
2. From Mr David Costello, Chief Executive Officer, Clubs NSW, declining the invitation to make a submission
3. From Ms Jane Lee, undated, requesting clarification in transcript of evidence for 19 June 2006

Sent

1. To Ms Noreen Hay MP, Member for Wollongong, from the Chair, 24 July 2006, advising of the public forum to be held in Wollongong on 27 July 2006

Resolved, on the motion of Ms Parker: That the letter from Gretch Partners Solicitors on behalf of Cubbyhouse Australia be made public, and that before this occurs, Ms Jane Lee be provided with a copy of the letter.

Resolved, on the motion of Ms Parker: That Ms Lee's clarification be published as a footnote to the transcript of evidence for 19 June 2006, and that the secretariat write to Cubbyhouse Australia with a copy of Ms Jane Lee's clarification.

***Matters arising from the hearing***

Resolved, on the motion of Ms Parker: That the Chair write to Boral Formwork and Scaffolding Pty Ltd and Formbrace Pty Ltd to invite each company to reply to allegations made during evidence.

***Submissions***

Resolved, on the motion of Dr Chesterfield-Evans: That the Committee publish Submissions 50 and 51.

***Future work of the Committee***

The Chair tabled a list of remaining and proposed witnesses.

Resolved, on the motion of Mr West: That the Committee invite identified witnesses to the hearing on 15 September 2006.

**5. Public hearing - Inquiry into the impact of the Commonwealth WorkChoices legislation**

The public and the media were readmitted.

Dr Chris Briggs, Senior Research Fellow and Dr John Buchanan, Acting Director, Workplace Research Centre, University of Sydney, affirmed and examined.

Dr Briggs tabled the document, 'Work, Contracts and the Law'.

Resolved, on the motion of Mr West: That the Committee accept and publish the document tabled by Dr Briggs.

Questioning concluded and the witnesses withdrew.

Mr Mark Crosdale, Secretary, Newcastle and Northern Sub-Branch, NSW Branch, Transport Workers Union, affirmed and examined.

Mr Tony McNulty, Member and Delegate, Transport Workers Union, sworn and examined.

Questioning concluded and the witnesses and the public withdrew.

**6. Adjournment**

The Committee adjourned at 4.25 pm until 11.00 am, 15 September 2006.

**Meeting 87**

**Friday 15 September 2006**

**Jubilee Room, Parliament House at 2.35 pm**

**1. Members present**

Ms Burnswoods (Chair)  
Dr Chesterfield-Evans  
Ms Griffin  
Mr Lynn  
Mr West

**2. Apologies**

Ms Parker (Deputy Chair)

**3. Public hearing - Inquiry into the impact of the Commonwealth WorkChoices legislation**

The public and the media were admitted.

Ms Vicki Telfer, General Manager, Strategy and Policy Division, WorkCover Authority of NSW, was readmitted and examined under a previous oath.

Questioning concluded and the witness withdrew.

Ms Pat Manser, Deputy Director-General, Office of Industrial Relations, Department of Commerce, was readmitted and examined under a previous oath.

Ms Rebekah Stevens, Acting Assistant Director-General, Industrial Relations Analysis and Partnerships, Office of Industrial Relations, Department of Commerce, sworn and examined.

Ms Manser tabled a document entitled, 'Experience of business under WorkChoices'.

Resolved, on the motion of Ms Griffin: That the Committee accept the document tabled by Ms Manser.

Questioning concluded and the witnesses withdrew.

Dr Marian Baird, Senior Lecturer, Discipline of Work and Organisational Studies, University of Sydney, sworn and examined.

Questioning concluded and the witness and the public withdrew.

#### 4. Deliberative meeting

##### *Confirmation of Minutes*

Resolved, on the motion of Mr West: That Minutes No. 85 and 86 be confirmed.

##### *Correspondence*

The Committee noted the following correspondence:

...

##### *Inquiry into Commonwealth WorkChoices Legislation*

Sent

1. Fax to Ms Jane Lee, 3 August 2006, from the Director, providing a copy of a letter from Cubby House Australia, responding to her evidence of 19 June 2006
2. To the Manager, Boral Formwork and Scaffolding Pty Ltd, 4 August 2006, from the Acting Director, inviting a response to adverse comments made in evidence
3. To the Manager, Formbrace Pty Ltd, 4 August 2006, from the Acting Director, inviting a response to adverse comments made in evidence
4. To the Director, Cubbyhouse Australia Childcare, 4 August 2006, from the Acting Director, forwarding clarifications made by Ms Jane Lee to the transcript of evidence for 19 June 2006
5. To Mr James Jordan, Jordan Djundja Lawyers, 18 August 2006, from the Acting Director, granting an extension to 1 September 2006 for a response on behalf of Formbrace to adverse comments made in evidence.

Received

1. From Ms Jane Lee to the Chair, 4 August 2006, responding to the statement supplied by Gretch Partners Solicitors on behalf of Cubby House Australia, in response to comments made by Ms Lee in evidence
2. From Mr James Jordan, Jordan Djundja Lawyers on behalf of Formbrace Pty Ltd, to the Committee, 17 August 2006, requesting an extension of time to respond to adverse comments made in evidence
3. From Mr Ben Murphy, Boral Formwork and Scaffolding Pty Ltd, to the Committee, 1 September 2006, responding to adverse comments made in evidence.

Resolved, on the motion of Mr Lynn: That the statement from Ms Lee and the response from Mr Ben Murphy, Boral Framework and Scaffolding, be published, and that Mr David Halls be provided with a copy of the letter from Mr Murphy.

##### *Submissions*

Resolved, on the motion of Dr Chesterfield-Evans: That the Committee publish Submission 52.

##### *Answers to Questions on Notice*

Resolved, on the motion of Ms Griffin: That the Committee publish answers to questions on notice received from:

- From Mr David Gibson, Local Government Association of NSW and Shires Association of NSW
- From Mr Ben Kruse, Acting General Secretary, United Services Union
- From Mr John Ferguson and Ms Kristy Delaney, Youth Action & Policy Association
- From Rev Gordon Bradbery, Wollongong Mission.

***Secretariat arrangements***

The Chair congratulated Ms Katherine Fleming on her new position outside the Legislative Council and thanked her for her significant contribution to the work of the Committee.

**4. Adjournment**

The Committee adjourned at 5:25 pm sine die.

**Meeting 88**

**Thursday 28 September 2006**

**Legislative Council Antechamber, Parliament House at 2.15 pm**

**1. Members present**

Ms Burnswoods (Chair)  
Ms Parker (Deputy Chair)  
Dr Chesterfield-Evans  
Ms Griffin  
Mr West

**2. Apologies**

Mr Lynn

**3. Confirmation of Minutes**

Resolved, on the Motion of Mr West, that Minutes No.87 be confirmed.

**4. Tabled documents**

Resolved, on the motion of Ms Griffin, that the Committee publish the documents tabled during the hearings of 28 July 2006 and 15 September 2006.

**5. Correspondence**

The Committee noted the following correspondence:

*Inquiry into Commonwealth WorkChoices Legislation*

Sent

1. To the Commissioner for Children and Young People concerning alternative arrangements in lieu of the hearing on 15 September
2. To Jordan Djundja Solicitors, 15 September 2006, providing further advice in relation to information that defamation action has commenced on behalf of Formbrace

Received

1. From Mr James Jordan, Jordan Djundja Lawyers on behalf of Formbrace Pty Ltd, to the Committee, 8 September 2006, responding to adverse comments made in evidence

Resolved, on the motion of Ms Parker, that the Committee publish the letter of response from Jordan Djundja Lawyers on behalf of Formbrace Pty Ltd.

**6. Secretariat arrangements**

The Chair and Committee thanked Merrin Thompson, Acting Director, for her contribution to the secretariat and wished her well for her maternity leave.

**7. Adjournment**

The Committee adjourned at 2.35 pm sine die.

**Meeting 89**

**Wednesday 8 November 2006**

**Room 1153, Parliament House at 10am**

**1. Members present**

Ms Burnswoods (Chair)

Ms Parker (Deputy Chair)  
 Dr Chesterfield-Evans  
 Ms Griffin  
 Mr West

2. **Apologies**  
 Mr Lynn

3. **Deliberative meeting**

***Confirmation of Minutes***

Resolved, on the motion of Ms Griffin: That Minutes No.88 be confirmed.

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***Supplementary submission***

Resolved, on the motion of Mr West: That supplementary submission 46a from NSW Commission for Children and Young People be published.

***Answers to questions on notice***

Resolved, on the motion of Ms Parker: That answers to questions on notice from the A/General Manager – Strategy and Policy, WorkCover, received 11 July 2006, be published.

Resolved, on the motion of Ms Parker: That answers to questions on notice from the Deputy Director General, Office of Industrial Relations, received on Monday 6 October, 2006, be published.

Resolved, on the motion of Ms Parker: That answers to questions on notice from the General Manager – Strategy and Policy, WorkCover, received 1 November 2006, be published.

4. **Deliberative - Discussion of Chair's draft report for Inquiry into the impact of Commonwealth WorkChoices legislation**

The Chair submitted her draft report which, having been circulated to each member of the Committee, was accepted as having been read a first time.

The Committee proceeded to consider the draft report in detail.

Chapter 1 read.

Resolved, on the motion of Ms Parker: That the following paragraph be added after paragraph 1.8: 'The Committee notes that Australian Business Limited, incorporating the State Chamber of Commerce (NSW), did not participate in the inquiry. In a media release dated 3 March 2006, Australian Business Limited stated:

"The six Member Committee includes three ALP members and a Democrat – with the majority view of the Committee already known. The referral to the Upper House excludes any reference to economic growth or job creation. Business supports WorkChoices because it will allow employers and employees to develop agreements that improve productivity and job satisfaction. WorkChoices is a fact of life and business does not intend to participate in an inquiry where the outcome is already known. Business continues to support WorkChoices and the need for NSW to refer its workplace relations powers to the Australian Government. ABL/State Chamber has nearly 30,000 members and is affiliated with over 150 Chambers of Commerce throughout NSW."

Ms Parker moved: That a new paragraph be added after paragraph 1.8 to read 'The Committee acknowledges that the lack of submissions from peak employer groups does not allow them to provide a balanced report on the issue.'

Question put.

Committee divided.

Ayes: Ms Parker

Noes: Ms Burnswoods, Ms Griffin, Mr West, Dr Chesterfield-Evans

Question resolved in the negative.

Chapter 2 read.

Resolved, on the motion of Ms Griffin: That paragraph 2.53 be amended by adding to the last sentence the words 'for an interim period'.

Chapter 3 read.

Resolved, on the motion of Dr Chesterfield-Evans: That a new paragraph be added after 3.14 to read 'Dr Buchanan continued: "This could only happen in Australia. When we talk to researchers overseas they are actually shocked at the degree of detail and prescription that is written into an Act. The Kiwi Act was 100 pages."'

Ms Parker moved: That paragraph 3.20 be amended by replacing the words 'The Committee does not support the' with 'The Committee supports', and deleting the second and third sentences of the paragraph.

Question put.

Committee divided.

Ayes: Ms Parker

Noes: Ms Burnswoods, Ms Griffin, Mr West, Dr Chesterfield-Evans

Question resolved in the negative.

Dr Chesterfield-Evans moved: That paragraph 3.20 be amended by adding to the end of the first sentence the words 'although it concedes that a uniform IR system for Australia would be desirable'.

Question put.

Committee divided.

Ayes: Dr Chesterfield-Evans, Ms Parker

Noes: Ms Burnswoods, Ms Griffin, Mr West

Question resolved in the negative.

Dr Chesterfield-Evans moved: That paragraph 3.20 be amended by adding to the end of the paragraph the words 'The Committee recognises that a uniform IR system may involve constitutional change.'

Question put.

Committee divided.

Ayes: Dr Chesterfield-Evans, Ms Parker

Noes: Ms Burnswoods, Ms Griffin, Mr West

Question resolved in the negative.

Ms Parker moved: That paragraphs 3.21, 3.22, 3.23, 3.24, 3.25 and 3.26 be deleted.

Question put.

Committee divided.

Ayes: Ms Parker

Noes: Ms Burnswoods, Ms Griffin, Mr West, Dr Chesterfield-Evans

Question resolved in the negative.



Ms Parker moved: That recommendation 1 be amended to read 'That the NSW Government acknowledge that the Federal Liberal/National Coalition Government's Workplace Relations (WorkChoices) Amendment Act 2005 is necessary to provide workers with the choice of negotiating their terms of employment directly with an employer if they so desire.'

Question put.

Committee divided.

Ayes: Ms Parker

Noes: Ms Burnswoods, Ms Griffin, Mr West, Dr Chesterfield-Evans

Question resolved in the negative.

Chapter 4 read.

Resolved, on the motion of Ms Griffin: That paragraph 4.17 be amended by deleting the sentence 'The Commission will make its first minimum wage decision in Spring 2006.'

Resolved, on the motion of Ms Parker: That paragraph 4.75 and Recommendation 2 be amended by deleting the word 'increasing'.

Resolved, on the motion of Ms Griffin: That paragraph 4.75 be amended by adding to the end of the sentence the words 'following the changes to the federal unfair dismissal arrangements'.

Chapter 5 read.

Resolved, on the motion of Dr Chesterfield-Evans: That paragraph 5.11 and 5.12 be amended to read 'Both the NSW Government and Unions NSW cited in their submissions information from a Senate Employment, Workplace Relations and Education Committee budget estimates hearing of 29 May 2006. At the hearing, Mr Peter McIlwain, head of the OEA, indicated that in the first month of operation of WorkChoices, 6,263 AWAs were lodged with the OEA. A sample of 4 per cent, or 250, of those 6,263 AWAs revealed that 100% of them had removed at least one protected award condition, 64% of them had removed annual leave loadings, 63% had not included penalty rates, 52% had cut penalty rates, 40% had dropped gazetted public holidays and 16% had removed all award conditions except the Government's five minimum conditions. The Committee notes that when asked to update these figures at the Senate Employment, Workplace Relations and Education Committee supplementary budget estimates hearing on 2 November 2006, Mr McIlwain indicated that OEA was no longer conducting research into the provisions of AWAs, despite saying in May that OEA would continue to gather the figures.'

Resolved, on the motion of Ms Griffin: That paragraph 5.19 be amended by adding to the second dot point the words 'provided the employer has agreed to bargain with the union'.

Resolved, on the motion of Ms Griffin: That paragraph 5.76 be amended by adding after the first sentence the words 'As noted in this chapter, the OEA has ceased its study of AWAs.'

Resolved, on the motion of Dr Chesterfield-Evans: That paragraph 5.77 be amended by deleting the words 'in NSW'.

Resolved, on the motion of Dr Chesterfield-Evans: That Recommendation 5 be amended by deleting the words 'in consultation with other states' and adding the words 'and consult with other states about achieving a common approach to this study'.

Chapter 6 read.

Chapter 7 read.

Chapter 8 read.

Chapter 9 read.

Resolved, on the motion of Mr West: That Recommendation 7 be amended by deleting the words 'in order to boost its inspectorate'.

Chapter 10 read.

Chapter 11 read.

Resolved, on the motion of Dr Chesterfield-Evans: That a new paragraph be added after paragraph 11.70 to read 'The Committee notes that WorkCover NSW has approximately 300 inspectors across the state, responsible for approximately 400,000 workplaces and 2.75 million employees. The Committee also understands that in May 2006, across Australia, Comcare had approximately 16 inspectors covering approximately 330,000 employees, although Comcare is also able to engage state and territory inspectors and people in the private sector to enforce the Occupational Health and Safety (Commonwealth Employment) Act 1991.'

Chapter 12 read.

Chapter 13 read.

Ms Parker moved: That paragraph 13.15 be deleted.

Question put.

Committee divided.

Ayes: Ms Parker

Noes: Ms Burnswoods, Ms Griffin, Mr West, Dr Chesterfield-Evans

Question resolved in the negative.

Ms Parker moved: That paragraph 13.22 be deleted and replaced with 'The Committee acknowledges that the Federal Liberal/National Coalition Government has introduced a significant and necessary reform with its WorkChoices legislation and calls on the Minister to note the concerns of the Committee.'

Question put.

Committee divided.

Ayes: Ms Parker

Noes: Ms Burnswoods, Ms Griffin, Mr West, Dr Chesterfield-Evans

Question resolved in the negative.

Mr West moved: That chapters 2-13, as amended, be adopted.

Question put.

Committee divided.

Ayes: Ms Burnswoods, Ms Griffin, Mr West, Dr Chesterfield-Evans

Noes: Ms Parker

Question resolved in the affirmative.

Resolved, on the motion of Ms Griffin: That Appendices 1-4 be adopted.

## 5. Adjournment

The Committee adjourned at 12.10pm, until 10am on 13 November 2006, in Room 1153

**Meeting 90**  
**Tuesday 21 November 2006**  
**Room 1153, Parliament House at 1pm**

**1. Members present**

Ms Burnswoods (Chair)  
 Ms Parker (Deputy Chair)  
 Mr Lynn  
 Ms Griffin  
 Mr West

**2. Apologies**

Dr Chesterfield-Evans

**3. Deliberative - Minutes**

Resolved, on the motion of Mr West: That Minutes No.89 be confirmed.

**4. Deliberative – Continue discussion of Chair’s draft report for Inquiry into the impact of Commonwealth WorkChoices legislation**

The Committee continued to consider the draft report.

Chapter 1 read.

Resolved, on the motion of Ms Parker: That paragraph 1.9 be amended to read ‘The Committee notes that Australian Business Limited, incorporating the State Chamber of Commerce (NSW), did not participate in the inquiry. In a media release dated 3 March 2006, Australian Business Limited stated: ‘The six Member Committee includes three ALP members and a Democrat – with the majority view of the Committee already known. The referral to the Upper House excludes any reference to economic growth or job creation. Business supports WorkChoices because it will allow employers and employees to develop agreements that improve productivity and job satisfaction. WorkChoices is a fact of life and business does not intend to participate in an inquiry where the outcome is already known. Business continues to support WorkChoices and the need for NSW to refer its workplace relations powers to the Australian Government. ABL/State Chamber has nearly 30,000 members and is affiliated with over 150 Chambers of Commerce throughout NSW.’

Resolved, on the motion of Ms Griffin: That chapters 2, 3, 5, 11 and 13 be recommitted to allow for the consideration of further amendments.

Chapter 2 re-read.

Resolved, on the motion of Mr West: That paragraphs 2.57 – 2.62 be amended to account for the High Court decision handed down on 14 November 2006.

Resolved, on the motion of Mr West: That paragraph 2.64 be amended to account for further amendments to the WorkChoices legislation on 13 November 2006.

Chapter 3 re-read.

Resolved, on the motion of Ms Griffin: That paragraphs 3.14 and 3.15 be amended to include the following quote from Dr Buchanan’s evidence: ‘This could only happen in Australia. When we talk to researchers overseas they are actually shocked at the degree of detail and proscription that is written into an Act. The Kiwi Act was 100 pages.’

Resolved, on the motion of Mr West: That paragraph 3.21 be amended by including ‘Despite the majority decision of the High Court in *New South Wales v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia* dated 14 November 2006, the Committee regards the Federal Government’s wholesale ‘takeover’ of industrial relations in Australia as an unreasonable and unwarranted move by the Federal Liberal/National Coalition Government to encroach upon the jurisdiction of the states and to impose its own industrial ideology on workers hitherto outside the federal industrial relations system.’

Chapter 5 re-read.

Resolved, on the motion of Ms Griffin: That paragraph 5.11 and 5.12 be amended to read: 'Both the NSW Government and Unions NSW cited in their submissions information from a Senate Employment, Workplace Relations and Education Committee budget estimates hearing of 29 May 2006. At the hearing, Mr Peter McIlwain, head of the OEA, indicated that in the first month of operation of WorkChoices, 6,263 AWAs were lodged with the OEA. A sample of 4 per cent, or 250, of those 6,263 AWAs revealed that 100% of them had removed at least one protected award condition, 64% of them had removed annual leave loadings, 63% had not included penalty rates, 52% had cut penalty rates, 40% had dropped gazetted public holidays and 16% had removed all award conditions except the Government's five minimum conditions. The Committee notes that when asked to update these figures at the Senate Employment, Workplace Relations and Education Committee supplementary budget estimates hearing on 2 November 2006, Mr McIlwain indicated that OEA was no longer conducting research into the provisions of AWAs, despite saying in May that OEA would continue to gather the figures.'

Chapter 11 re-read.

Resolved, on the motion of Mr West: That paragraph 11.71 be amended to read 'The Committee notes that WorkCover NSW has approximately 300 inspectors across the state, responsible for approximately 400,000 workplaces and 2.75 million employees. The Committee also understands that in May 2006, across Australia, Comcare had approximately 16 inspectors covering approximately 330,000 employees, although Comcare is also able to engage state and territory inspectors and people in the private sector to enforce the Occupational Health and Safety (Commonwealth Employment) Act 1991.'

Chapter 13 re-read.

Resolved, on the motion of Ms Griffin: That paragraph 13.4 be amended to read 'The Committee notes that the NSW Government, in company with various other parties including other states and territories, challenged the constitutional validity of WorkChoices and its reliance on section 51(xx) of the Constitution in the High Court. In its decision dated 14 November 2006, the High Court rejected this challenge by a majority of five to two, Justices Kirby and Callinan dissenting.'

Mr West moved: That chapters 1, 2, 3, 5, 11 and 13, as amended, be adopted.

Question put.

Committee divided.

Ayes: Ms Burnswoods, Ms Griffin, Mr West

Noes: Ms Parker, Mr Lynn

Question resolved in the affirmative.

Executive Summary read.

Ms Griffin moved: That the Executive Summary be adopted.

Question put.

Committee divided.

Ayes: Ms Burnswoods, Ms Griffin, Mr West

Noes: Ms Parker, Mr Lynn

Question resolved in the affirmative.

Resolved, on the motion of Ms Parker: That pursuant to Standing Order 229 the Committee consider the Chair's Foreword for approval.

Chair's Foreword read.

Resolved, on the motion of Ms Parker: That the 4th paragraph be amended to read ‘The majority of the Committee...’.

Resolved, on the motion of Mr West: That the Chair’s Foreword, as amended, be adopted.

Resolved, on the motion of Ms Griffin: That the report, as amended, be the report of the Committee and presented to the House.

Resolved, on the motion of Mr West: That pursuant to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and under the authority of Standing Order 223, the Committee authorises the publication of minutes, submissions, tabled documents, responses to questions on notice and items of correspondence.

Resolved, on the motion of Ms Parker: That statements of dissent be provided to the Secretariat by no later than 12 midday on Wednesday 22 November 2006.

**5. Adjournment**

The Committee adjourned at 1.20pm.

## Appendix 4 Dissenting statement

### Statement of Dissent by The Hon. Robyn Parker MLC (Deputy Chair) and The Hon. Charlie Lynn MLC

The inquiry serves a purely political purpose on behalf of the NSW Labor Party and its allies in the union movement, and it is the opinion of the undersigned dissenters that unanimity was neither sought nor wanted in the process of this inquiry and in the report of the Committee.

The Opposition members of the Standing Committee into Social Issues note that this inquiry reports on a matter of federal legislation, and the place for debating this matter is the nation's constitutional courts, not a NSW Legislative Council standing committee.

The Opposition members of the committee acknowledge that the Federal Liberal/National Coalition Government has introduced significant and necessary reform with its WorkChoices legislation. This report does not reflect the economic and industrial realities facing the Australian workforce. Nor does it seek adequate right of reply from employer groups. Instead, it almost exclusively addresses the concerns of a section of the community with strong ties to the Labor Party.

Of the four 'employer groups' that did send submissions, only the Local Government Association of NSW outright condemns the legislation.<sup>1</sup>

As noted in a submission by the Motor Traders' Association of NSW (MTA);

*"It is the opinion of the MTA that the conduct of this inquiry is too soon to effectively gauge the impact of the Commonwealth WorkChoices Legislation."*<sup>2</sup>

The views of the MTA are not detailed in the Committee's final report, unlike those of the union movement, social activists, and academics. The MTA's views are at odds with those held by the Committee majority. However, it is the opinion of the undersigned dissenters that this makes them no less valid. The inference of the MTA's submission is that many small businesses would prefer to operate under the federal system of industrial relations. The MTA states they would prefer a stronger system of industrial relations, with less emphasis on;

*"...the priority of an employee's family (responsibilities) over and above all elements of the employee's work obligations"*

Whilst the Opposition members of the Committee do not necessarily endorse this opinion; that it was ignored by this inquiry is indicative of the conclusion the Iemma Government was looking for.

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<sup>1</sup> It should be noted, that this outright opposition to the Industrial Relations Reform was detailed in a letter to the Hon. John Howard, Prime Minister of Australia dated 28 July 2005, before the then proposed reforms were detailed in a draft bill.

<sup>2</sup> Submission No. 8

The Opposition members of the Committee notes with concern that the peak employer group in NSW, Australian Business Limited/The NSW State Chamber of Commerce declined to make a submission to the inquiry, because the terms of reference omit any allusion to the social impacts of economic growth or job creation. To quote from an ABL press release, where Mark Bethwaite, Chief Executive of ABL/State Chamber says:

*“This is an inquiry which has a pre-determined outcome in mind. The views of the members of the Upper House on this matter are already on the public record.”*

*“Business supports Work Choices because it will allow employers and employees to develop agreements that improve productivity and job satisfaction,”*

Whilst the Committee received a total of 52 submissions from ‘major stakeholders’ with regard to WorkChoices, including the NSW Government, unions, welfare organisations and academics, the committee did not hear from employers themselves, nor were individual employers asked to give evidence until they had been subject to adverse commentary by third parties.

The inquiry provided an outlet for some witnesses (including trade unions) on four (4) separate occasions to make statements in evidence under parliamentary privilege that could have been considered defamatory if made in the public domain. The Committee was obliged to provide those named with the right of reply.

The Opposition members of the Committee also note with concern that of the 13 chapters of the final report, recommendations for legislative reform were only contained in 4. A substantial amount of time, on behalf of members and parliamentary staff was wasted therefore on placing upon the public record the views of organisations and individuals with ties to the Labor Party, in particular Unions NSW, the National Union of Students, and Young Labor.

In Chapter 8 these organisations are given a *carte blanche* opportunity to express their views on the perceived negative effects of Work choices, yet the chapter makes no recommendations with regard to a State Government legislative agenda.

In Chapter 13, the Committee rejects the WorkChoices legislation as a means to achieving the Federal Government’s stated aims, specifically, increasing wages and improving living standards.

The undersigned dissenters believe it is worthy of note that during the Inquiry, on the 26th of October 2006, the Australian Fair Pay Commission handed down it’s first minimum wage adjustment; an increase of \$27.36 per week in the standard Federal Minimum wage.

Comparatively, the New South Wales minimum wage was adjusted on June 19, with an increase of only \$20.00 per week.

That the Federal Government’s new AFPC not only matched that decision but exceeded it by \$7.36 refutes the Union’s, and the NSW Government claim that the new system is unfair to workers. Workers in NSW on a minimum wage State award are now disadvantaged by \$7.00 per week compared to those on a Federal Award.

The Committee's assertion that the WorkChoices scheme is unfair and represents a '*radical neo-liberal agenda*'<sup>3</sup> is rebuked by the very fact that on 1 December 2006, low paid employees will receive a substantial boost to their salaries.

This reality does not echo that put forward by the submissions of the 11 openly Labor affiliated organisations that are heavily quoted in the report.<sup>4</sup>

On the 11th November 2006, the High Court handed down its judgement of the *New South Wales & Ors vs Commonwealth* (Workplace Relations Challenge), and found in favour of the Commonwealth's interpretation of the corporation's power constitutionally valid. This affirmation in the highest court of Australia that the laws are valid has not changed the character of this report, which still dwells on the opinions of many groups with strong ties to the Labor Party.

In conclusion, the dissenters acknowledge a submission by one Mrs Cherry Stewart, received on 22 May 2006:

*"From the notice of request for comments on the legislation to the close we have six weeks, for consideration of such limited consultation, the committee has six months. Surely, consultation in such a diverse society takes longer than deliberation! This demonstrates a bias and lack of concern for the opinions of the public. It demonstrates a 'whitewash'!"*<sup>5</sup>

**The Hon. Robyn Parker MLC (Deputy Chair)**

**The Hon. Charlie Lynn MLC**

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<sup>3</sup> Chapter 13.22

<sup>4</sup> Labor affiliated organisations who provided submissions to inquiry (this list does not include individuals): Gynea Sub Branch of the Australian Manufacturing Workers Union Retired Members, Australian Workers Union, CFMEU Construction and General Division, Transport Workers' Union (NSW Branch), Liquor, Hospitality and Miscellaneous Union NSW, Public Service Association of NSW, NSW United Services Union, National Union of Students Inc., NSW Young Labor Council, Unions NSW, The Iemma Government.

<sup>5</sup> Submission No. 4