Submission
No 37

INQUIRY INTO IMPACT OF COMMONWEALTH WORKCHOICES LEGISLATION

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Theme:

Summary

Submission to

Legislative Council Standing Committee on Social Issues

In the

Inquiry into the impact of Work Choices

On behalf of the

NSW Government

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Executive Summary

1. The federal government introduced the Workplace Relations Amendment (Work Choices) Bill into Parliament in November 2005. The Bill was passed on 7 December and the Bill received royal assent on 14 December becoming the *Workplace Relations Amendment (Work Choices) Act 2005* (the Work Choices Act). The bulk of the operative provisions of the Work Choices Act commenced on 27 March 2006.

2. The Act has introduced the most fundamental changes to the industrial relations environment in Australia for almost a century. The Act was promoted by the federal government as a way of achieving a 'simple, unitary' industrial relations system. Had the federal government entered into consultation with the state governments an opportunity may have existed to improve national consistency in some important industrial relations areas. However, the federal government failed to make use of this opportunity. Instead it pursued a hostile takeover of state industrial relations resulting in a complex, confusing, fragmented and highly regulated industrial relations system.

3. In this submission the NSW Government first outlines the key aspects of the Work Choices Act including the changes to collective bargaining, industrial action, wage setting, the awards system, unfair dismissal and occupational health and safety (Chapter 1). Chapter 2 then examines the impact of these changes on specific groups in the community as identified by the terms of reference for this Inquiry. These include: the ability of workers to genuinely bargain, focusing on younger workers and women; the impact on rural communities; the impact on gender equity; the impact on balancing work and family responsibilities; the impact on injured workers; and the impact on employers especially small businesses.

4. The NSW Government maintains that:

- The Work Choices Act has weakened the bargaining position of workers, particularly those in vulnerable groups such as women, young workers and trainees. This weakened bargaining position will lead to reduced wage outcomes and poorer working conditions.

- The Work Choices Act will exacerbate social and economic disadvantages for workers and employers in rural and regional communities.

- The Work Choices Act will exacerbate the gender pay gap and will reduce access to equal remuneration and work value cases for workers.

- The Work Choices Act will not promote a balance between work and family, and will further disadvantage workers with caring responsibilities.

- The Work Choices Act will be detrimental to workers who have been injured in the course of their employment, providing them with little or no feasible avenue for protection from dismissal.

- The Work Choices Act has created a confusing, complex and costly industrial relations environment for business with excessive regulation.

5. While this submission focuses on the micro impacts of the Work Choices Act, this legislation is also likely to have negative impacts on macro factors such as the economy.

6. The NSW Government, through services such as the Fair Go Advisory Service of the Office of Industrial Relations, is well aware of the impact of the Work Choices Act on employers and employees in New South Wales. It is estimated that the Work Choices Act will affect almost 200,000 businesses and 2.1 million workers in New South Wales. In order to more clearly demonstrate the impact that of the Work Choices Act will have on these businesses and workers, case studies have been included in the chapters.

7. The NSW Government has attempted to minimise the impacts of the Work Choices Act through both legislative and legal avenues including launching a High Court challenge, amending the *Industrial Relations Act 1996* and the *Public Sector Employment and Management Act 2002*, by participating in the state wage case and through its ongoing compliance and information services run by the Office of Industrial Relations. The NSW Government has also participated in joint activities with the other state and territory governments in order to raise public awareness about the impacts of the Work Choices Act. This included the 'Fair Go or Anything Goes?' conference held in July 2005 which facilitated valuable discussion on the industrial relations changes.

8. The NSW Government welcomes the inquiry by the Standing Committee on Social Issues into the impacts of the Work Choices Act and supports the ongoing monitoring of these impacts into the future.

1. Key Aspects of the Work Choices Act

Coverage of the Laws

9. Historically industrial relations regulation has been shared between the state governments and the federal government. This shared system of industrial relations has worked effectively in Australia for over 100 years by providing balance, fairness and choice for employees and employers.

10. The Australian Constitution contains an explicit power concerning the regulation of industrial relations. The limited scope of the power makes it clear that industrial relations is an area where the federal government and the states have shared legislative responsibility.

11. Section 51(xxxv) of the Constitution provides the federal government with the power to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. The broad interpretation of this section of the Constitution has seen the expansion of the federal industrial relations system into many areas which may not, on the face of it, appear to be the domain of interstate disputes. By and large, however, the federal government was content to leave the state systems with room to operate.

12. In the drafting of the Work Choices Act, the federal government has chosen to rely instead on the corporations power in section 51(xx) of the Constitution. The NSW Government considers that the use of the corporations power to regulate industrial relations is unconstitutional as it oversteps the intended use and purpose of the corporations power. This matter is currently before the High Court of Australia.

13. By relying on the corporations power in the drafting of the Work Choices Act, the federal government has indicated its intentions regarding the regulation of industrial relations. That is, firstly, that all constitutional corporations must compulsorily move into the federal industrial relations system (even if these corporations operated in the state system and preferred to stay there) and secondly, that most state industrial laws will no longer apply to constitutional corporations and the determinations of state industrial tribunals will, in large part, no longer bind them.

14. Prior to the commencement of the Work Choices Act most employers and some employees had the choice of operating in either the state or the federal industrial relations system. This provided employers and workers with the option of using the system which best suited their needs. This choice provided balance for industrial relations stakeholders and promoted healthy competition between the industrial relations systems; a key benefit of federalism.

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

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

16. This is because laws made on the basis of this power would be laws about the object of the power, the corporation, rather than about the industrial relationship between parties (employers and employees and their representatives). This is likely to result in a focus on the needs and attributes of the corporation and not upon the nature of the interaction between the parties and a proper consideration of the needs and attributes of each.

17. This is a significant and unprecedented attempt by the federal government to 'cover the field' in industrial relations by forcing all constitutional corporations to operate in the federal industrial relations system. The Work Choices Act operates to the exclusion of certain state legislation under Section 16. It says:

> **WORKPLACE RELATIONS ACT 1996 - SECT 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;

The term 'a State or Territory industrial law is specifically defined at s4(1) of the amended WR Act as follows:

"State or Territory industrial law" means:

> (c) any of the following State Acts:

the *Industrial Relations Act 1996* of New South Wales;

> a. .....

> (d) 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:

[1] Prof R McCallum (2005) at 'Fair Go or Anything Goes?' Conference transcript at www.fairgo.nsw.gov.au.

(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

(e) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or
(f) a law that:

(i) is a law of a State or Territory; and
(ii) is prescribed by regulations for the purposes of this paragraph.

However, s16 also makes specific exceptions, as (relevantly) follows:

State and Territory laws that are not excluded

However, subsection (16(1)) does not apply to a law of a State or Territory so far as:

(g) 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
(h) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or
(i) the law deals with any of the matters (the ***non-excluded matters***) described in subsection (3).

(2) The non-excluded matters are as follows:
1. .....
(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);

18. The NSW Government rejects this attempted hostile takeover of the state industrial relations jurisdiction which has provided a fair and cooperative industrial relations system for over a century. The New South Wales 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.

Collective Bargaining

The New South Wales Experience

19. In the late 1980s and early 1990s the concept of 'enterprise bargaining' was born.

20. In 1991, New South Wales inserted provisions into the *Industrial Arbitration Act* 1940 permitting the negotiation of union and non union collective agreements as an alternative to the common rule award system. These provisions are currently embodied within Chapter 2 Part 2 of the *Industrial Relations Act* 1996.

21. The existing New South Wales legislative framework recognises the importance of collectivism, good faith bargaining and its role in empowering workers to negotiate mutually beneficial results. State enterprise bargaining provisions allow individual workplaces broad scope to determine work practices and wages outcomes best suited to their workplace while maintaining a decent safety net for workers.

22. Since the inception of the New South Wales Act in 1996, this state has enjoyed a period of industrial harmony. In fact from June 2004 to June 2005, New South Wales accounted for just fewer than 6 per cent of Australia's working days lost to disputes in the construction industry, compared to nearly 47 per cent in Victoria which is in the federal system.

23. The collective bargaining provisions contained within the *Industrial Relations Act 1996* are underpinned by principles of fairness and justice and importantly, encourage equitable, innovative and productive workplace relations while providing a level playing field for workers. Further, the availability of collective agreements enables employees to discuss terms and conditions of employment with a union, fellow employees or both and participate in a genuine negotiation process.

24. Awards have traditionally been the major device whereby the New South Wales Industrial Commission determines the wages and conditions of employment for New South Wales employees and are the alternative to the enterprise bargaining framework. Most awards in New South Wales, have common rule application, that is industry awards are binding for all employers and employees performing relevant work whether or not they were a party to the making of the award (s12(1) of the *Industrial Relations Act 1996).*

25. The New South Wales Government firmly believes that collective bargaining is a vital and effective negotiating strategy which delivers

positive outcomes for all parties involved. The success of the New South Wales industrial system pays testimony to this.

The Federal Experience

26. The last decade has seen steady erosion in the ability of Australian workers to bargain collectively and achieve decent working conditions.

27. The enactment of the federal *Industrial Relations Reform Act 1993* signalled the beginning of a shift away from the traditional conciliation and arbitration system towards decentralisation of federal industrial relations, providing for the first time, a federal system for registering enterprise agreements between employers and employees.

28. In 1996, the federal Coalition Government's principal objective of encouraging parties to depart from the collective bargaining process was clear. They enacted the federal *Workplace Relations Act* (WRA) and launched a new breed of negotiating instrument the Australian Workplace Agreement (AWA), an opaque document exempt from public scrutiny.

29. AWAs established a process of individual bargaining, a largely unbalanced exercise synonymous with the transfer of power from employee to employer. This has since become the federal government's preferred tool for achieving reform in the federal industrial system.

30. While Minister Andrews claims that AWAs are a crucial component of the modern flexible workforce,[2] studies indicate that when compared with collective agreements, AWAs reflect inferior wage outcomes and a reduction in working conditions and non wage benefits. This has been the case even prior to the commencement of the Work Choices Act. Individual 'bargaining' in the form of an AWA ultimately results in 'negotiated' outcomes being largely determined unilaterally by the employer.

31. AWAs are less likely to feature penalty and overtime rates and commonly link pay increases to individual performance measurement. Professor Richard Mitchell, director of the Centre for Employment and Labour Relations Law at the University of Melbourne says his research shows that workers who have AWAs have tended to trade plenty for slim gain.[3]

32. The lack of primacy given to collective bargaining within the federal legislative framework prior to the Work Choices Act denotes the federal government's determination to undermine the collective nature of employment relations, to the detriment of Australian workers and has

[2] Andrews Media Release KA127/05 28 April 2005

[3] 'Cold War' Frontline IR Article Spring 2004

attracted strong criticism from the International Labour Organisation for its failure to fulfil Australia's international obligations.

33. Since 1996, the federal Workplace Relations Act has fettered a worker's right to engage in collective bargaining in a number of other ways, including a myriad of restrictions placed on the right to strike and the exclusive right of the employer to determine whether negotiations should be collective or individual. This is powerfully demonstrated by the following high profile examples.

34. In late 1995, workers at the Weipa Bauxite mine spent three months fighting mining giant Rio Tinto for the right to negotiate a collective agreement. This was in the face of a campaign undertaken by Rio Tinto to lure employees onto individual contracts with pay rates 15% higher than their union counterparts.

35. More recently, maintenance workers at Boeing requested to negotiate a collective workplace agreement with their employer. Despite the majority of workers expressing support for the collective agreement, Boeing Australia Ltd refused to negotiate and retained the employees on common law individual contracts. The workers' picket attracted significant media coverage and highlighted the damaging effects of bestowing employees with the right to refuse the terms of an AWA but no affirmative choice to insist on a collective agreement. It also exposed the federal government's lack of power to intervene and resolve this unnecessary and costly dispute and the capacity of an industrial relations system to impose unnecessary cost and loss of production on state economies.

Bargaining under the Work Choices Act

36. Collective agreements, which replace certified agreements in the new system, may be either 'union collective agreements', 'employee collective agreements', 'multiple-business agreements', or 'greenfields agreements'. All types of workplace agreements are now lodged with the Office of the Employment Advocate (OEA), rather than the AIRC. A 'streamlined' process means that agreements can start operating from the point of lodgement, and with no need for a formal hearing.

37. With the exception of multiple-business agreements, which as before are only available if a public interest test is satisfied, there is no bone fide approval process. Agreements are able to come into operation even if there has not been strict compliance with the pre-lodgement procedure.

38. Prior to the Work Choices Act, federal and state awards were the baseline against which collective and individual agreements were measured. Under the new system, 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 which previously formed a safety net that could not be bargained away. From this point forward, employees will be compelled to forgo conditions over and above the standard in return for no or minimal increases in their take home pay, if any. The only protection for workers is that workplace agreements cannot legally offer less than the five basic entitlements enshrined in the Australian Fair Pay and Conditions Standard (AFPCS), or in a separate standard relating to public holidays and meal breaks.

39. The negative impacts of this change are clearly evident. Since the commencement of the Work Choices Act, 6263 AWAs have been filed with the Office of the Employment Advocate (OEA). Of the sample, all had removed at least one protected award condition, 64% had removed leave loading provisions, 63% had removed penalty rates, and 52% had removed shiftwork loading.[4] Penalty and other loadings comprise an important element of many employees' salaries. Any reduction to such loadings may adversely impact the gender pay gap as women rely more heavily on these entitlements than men, and affect equal remuneration.

40. In addition the Work Choices Act provides an incentive for employers to offer individual workplace agreements at the expense of collective bargaining.

41. No other OECD country takes this approach to collective bargaining. The right for employees to choose to bargain collectively, and requiring employers to recognise this choice, is legally protected in all other OECD nations. A legal guarantee of an employee's right to collective bargaining where that is their preference is standard practice internationally.[5] Against this background, it is hardly surprising that the International Labour Organisation has criticised this aspect of Australian industrial relations regulation[6].

42. The full impact of these changes are discussed in Chapter 2(a).

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[4] McIlwain, Peter (2006), before Senate estimates hearing 29 May 2006 as reported in *Workplace Express* 'Employers using AWAs to delete protected award conditions, OEA reveals', 30 May 2006.

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

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

Industrial Action

Introduction

43. The Work Choices Act has ushered in a new era of fear and uncertainty in workplaces across Australia. There are strict and prohibitive laws in place that act to create uncertainty and disruption in NSW workplaces that have been enjoying a period of relative industrial harmony. The changes create a more adversarial approach to the settlement of industrial disputes and has shifted the balance of power even further towards employers. Such a move will be particularly precarious for workers due to the well accepted imbalance of power between workers and their employers.

44. Under the Work Choices Act employers can lock out workers within 3 days who are employed under the terms of a NAPSA, potentially driving them onto different employment agreements, which may be collective or individual agreements. This would not be permissible under the NSW industrial relations system. Any stand down of employees by employers would only be allowable if there is no useful work for the employee because of industrial action by the employee, breakdown of machinery or any other act or omission that the employer could not be held responsible for.

45. The changes in the Work Choices Act swing the balance of power significantly in the employer's favour so that they may significantly influence any industrial action taken by employees, and effectively take their own action against their employees. Employers could effectively stall and refuse to negotiate with employees.

46. There is no positive right vested in employees and their representatives to access forms of collective bargaining under The Work Choices Act. Employers are under no obligation to recognise the wishes of a majority of employees to have a union collective agreement, or even an employee collective agreement. The power rests with the employer to decide the nature of the agreement they may chose to offer their employees. This acts to significantly reduce the bargaining power of employees and limits the effective impact of any industrial action that they may endeavour to take. Coupled with the threat of dismissal and no remedy from unfair dismissal available for a large number of workers, there is a high degree of uncertainty and concern involved when employees and their representatives contemplate taking industrial action and exercising their bargaining power.

Industrial Action – Pre Work Choices Act

47. Prior to the introduction of the Work Choices Act, NSW enjoyed a period of relative industrial harmony, enjoying significant improvements over the last two decades. In 1985 lost working days numbered 96 800 days, and in 2005 lost working days only numbered 24 700, representing a decrease in lost working days due to industrial disputation of 74.5%[7] over this period. In fact, NSW has always been under the national average for working days lost due to industrial disputation[8]. These improvements have been realised largely due to the positive framework that the NSW industrial relations system adopts. The *Industrial Relations Act 1996* NSW in its stated objects encourages an equitable and cooperative approach to work. This includes a role for a central, independent umpire.

48. Under Chapter 3, Industrial Disputes of the *Industrial Relations Act 1996*, parties to a dispute in New South Wales, including employer and employee representatives, those affected by secondary boycotts or a state peak council, may notify the Commission of the dispute for the purpose of resolving it. The Commission may also act on its own initiative to resolve a dispute. The New South Wales Industrial Relations Commission has a proven record of effective dispute resolution through the exercise of its conciliation and arbitration powers. The vital and even handed role the NSW industrial Relations Commission plays has been recognised by employers in New South Wales. For example BlueScope Steel's Executive Vice-President of Human Resources, Ian Cummin has said:

> *...under the NSW system the parties have swift access to effective remedies against the misuse of industrial power, without the need for crippling economic damages.*[9]

49. The Work Choices Act has removed access from the arbitration and conciliation powers of the New South Wales Industrial Relations Commission for workplaces where the employer is a constitutional corporation. However, access is still available to some employers and employees under common law agreements. This issues is discussed in more detail later in this Chapter.

Industrial Action under the Work Choices Act

50. 91 per cent of employer lockouts occur in the federal system, and the number of working days lost as a proportion of all disputes has risen from 3 per cent to 26 per cent over the last five years. [10]This is a crucial indicator that the federal system is going to experience further industrial disputation.

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[7] 6321.0.55.001 - Industrial Disputes, Australia, Dec 2005

[8] 6321.0.55.001 - Industrial Disputes, Australia, Dec 2005

[9] Priest, Marcus in *The Australian Financial Review* (2005), 'Backing for state IR system', 17 June.

[10] Briggs, Chris (2003) *Lockout law in Australia: Into the mainstream?,* Working paper 95, ACIRRT, University of Sydney.

51. Under the Work Choices Act, the taking of protected (ie lawful) industrial action by employees has been made very difficult. This means that during collective bargaining negotiations, for example, it is very difficult for employees to take action to further their bargaining position. Of particular concern for employees and unions is the complex procedural requirements for a secret ballot before protected industrial action can be taken by employees or a union (except in response to an employer lock out). The secret ballot provisions comprise some 44 sections and a further 20 regulations.

Secret Ballots

52. Under the Work Choices Act employees are only eligible to take protected industrial action when that action has been authorised by a secret ballot upon application to the AIRC. The application cannot be granted unless it is supported by a set number of employees and this prescribed minimum number of employees will vary according to the number of employees affected. An application for a ballot order can only be granted if the employees or union have genuinely tried to reach agreement and have not engaged in pattern bargaining.

53. The AIRC must consider the application and, if ordered, it must collate a roll of voters or order the ballot agent to do so. The Australian Electoral Commission is the default ballot agent although other entities may also be the ballot agent. In the event that a union has applied for a ballot order, only the members of the union who are employed in the relevant workplace are eligible to vote. It is also necessary for there to be separate ballots for every union that seeks to be involved in action at a particular workplace.

54. The regulations require a party who provides a list of employees (for the purpose of a roll of voters for a secret ballot) to make a declaration as to the accuracy of the list. The regulations require employees to be made aware of the ballot agent's contact details, once a ballot order is made and allow them to contact the ballot agent to confirm whether they are on the roll of voters and, if not, to be added to the roll. The union or employees undertaking the secret ballot must pay for at least 20% of the costs of running the ballot and the Commonwealth will be liable for the balance of the cost after a relevant review in individual cases by the Industrial Registrar. As yet, the federal government has not made any preliminary costings on the expense of running a secret ballot.

55. This is a highly formalised process which may intimidate some workers. Consequently, only a few successful secret ballots have been held since the commencement of the Work Choices Act. There is also a conflict between the time allowed in the Act and the speed with which a secret ballot may be organised by the AEC or the ballot agent. Furthermore, once a secret ballot has been successfully conducted, protected industrial action may still be stopped.

56. Under the Work Choices Act, the federal government, through the discretion of the Minister for Workplace Relations, is able to terminate industrial action where it considers that it threatens the life, personal safety, health or welfare of the population, or where it is likely to cause significant damage to the economy. This Ministerial power to terminate a bargaining period significantly undermines the bargaining power of employees to take protected industrial action. This provision is likely to have serious ramifications for industries such as mining, oil production and manufacturing when they may next attempt to collectively bargain with their employer.

57. In addition, the Work Choices Act provides for third parties directly affected by protected action to seek a suspension of the bargaining period. These provisions provide unprecedented power for the Minister, and third parties, to intervene and possibly stop industrial disputes in New South Wales.

Unprotected Industrial Action

58. The Work Choices Act also provides heavy legal penalties and litigation for unprotected industrial action. The AIRC is required to provide a remedy for unprotected industrial action within 48 hours. In addition, the AIRC must act to remove restrictions to common law tort remedies for unprotected industrial action. This may expose workers and unions to personal actions for damages initiated by the employer for taking part in unprotected industrial action. For union officials who organise industrial action there are draconian penalty provisions of up to 12 months imprisonment for the contravention of injunctions ordered by the AIRC to restrain unprotected industrial action.

59. One commentator has characterised the Work Choices Act's lawful industrial action regime in the following terms:

> *Given the hurdles that must be overcome by those who wish to take protected action, and the ease with which employers(or affected parties) may be able to get even lawful industrial action stopped, it remains to be seen how many unions will bother to comply with the Act at all.*[11]

[11] Prof Andrew Stewart, *The Work Choices Legislation – An Overview*, page 26.

Wage Setting

60. The Work Choices Act has significantly altered the responsibility for minimum wage determination. Prior to the commencement of the Work Choices Act, the responsibility for minimum wage determinations was vested in the AIRC and the New South Wales Industrial Relations Commission. The AIRC conducted a Safety Net Review (also known as the national wage case) annually in which it would make a decision regarding changes in federal award wages. In making its decision the AIRC would be required to take into account the state of the economy and the needs of the low paid. The AIRC would receive submissions and testimony from a variety of industrial relations stakeholder representatives before making its decision. In recent years the AIRC has awarded moderate and affordable award pay increases that were capable of being absorbed by the economy.

61. After the decision in the national wage case, the New South Wales state wage case would be convened by the Industrial Relations Commission to consider the national decision as part of its statutory responsibility. The Industrial Relations Commission would hear submissions from stakeholder representatives and would consider applications for wage increases to state awards with a view to flowing on the decision made by the AIRC in the national wage case. This 'flow on' principle provided consistency across awards while giving proper consideration to the economic situation in New South Wales.

62. This process provided an independent and transparent means of setting minimum award wages in an arbitrated environment. This process ensured that award reliant employees received fair wages while ensuring that these wage rises could be absorbed by employers and the economy. This transparent and fair process has served employees and employers in New South Wales well.

63. The Work Choices Act, however, has fundamentally changed the wage determination process. Upon assent, the Work Choices Act removed power from the AIRC to set award wages or to hear the national wage cases. The Work Choices Act conferred on a new body, the Australian Fair Pay Commission (AFPC), the responsibility for determining minimum wages and classifications.

64. Unlike the AIRC the AFPC is not an arbitral, independent body. The AFPC consists of five part-time members. The Work Choices Act gives the AFPC the power to make and adjust the Federal Minimum Wage, all minimum wages (now removed from awards and incorporated into Australian Pay and Classification Scales [APCS]) and casual loadings. The AFPC also determines piece rates and special minimum wages for junior workers, apprentices and trainees and for workers with a disability. The matters that the AFPC must consider in making its wage determinations and the timing of such decisions has changed markedly under the Work Choices Act.

65. Sections 88B and 90 of the *Workplace Relations Act 1996* required the AIRC to consider numerous factors in making its wage determinations. In particular this included economic considerations, the needs of the low paid, and the likely effects of its decision on employment and inflation. Of primary importance, however, the AIRC was required to consider fairness in its decision. This is not a requirement for the AFPC. The federal government has emphasised the narrow economic parameters within which the AFPC must operate. These narrow parameters for decision making do not require the AFPC to consider the needs of the low paid. In fact, the parameters for the AFPC are strongly economically focused, with consideration of the impacts of wage increases on unemployment by the AFPC given considerable weight. The Work Choices Act specifically removes the requirement for the AFPC to consider fairness in making its wage determinations.

66. It could be argued that these restricted parameters were set in order for the federal government to achieve its policy aims regarding minimum award wages. The federal government has, since 1997 in effect consistently opposed the decisions of the AIRC in the national wage cases. In fact, if the federal government's submissions to the national wage cases had prevailed, then the federal minimum wage would be $50 per week less than its current rate. This amount would not have met inflation rises, resulting in a reduction in real wages. Indeed, the federal Minister for Employment and Workplace Relations has been quoted as saying that the Federal Minimum Wage is $70 per week too high.[12] It may be argued that the creation of the AFPC has been intended to 'correct' this position.

67. The Work Choices Act states that award wages are not permitted to be reduced in nominal terms. However the federal government has consistently failed to guarantee that award wages will not reduce in real terms. Indeed, the Chairman of the AFPC Prof Ian Harper recently said that:

> *the law prevents the minimum wage from being put down in nominal terms – that just means dollar terms... in real terms minimum wages could go up or down over time.*[13]

68. It could be suggested, therefore, that real wages may reduce under the AFPC.

69. The second key concern regarding the transfer of wage setting powers to the AFPC is the timing of wage increases. The Work Choices Act contains no requirement that wages be regularly reviewed nor does it establish a time frame in which decisions must be made. In short, the timing of the wage reviews are at the complete discretion of the AFPC. This is in stark contrast to the practice adopted in the previous system

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[12] Garnaut, J (2005) *Tribunal bypassed in fixing base wages,* Sydney Morning Herald, 1 March, page 2.

[13] Smith, Stephen (2006), *Harper Admits the Minimum Wage can go down in real terms*, Media Release, 27 April.

under the jurisdiction of the AIRC which provided for annual reviews of award wages.

70. In addition, once a decision is made by the AFPC, there is no requirement in the Work Choices Act for the AFPC to consider the impact on minimum wages of the delay between its decisions. In other words, 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 it makes decisions three or four years apart.

71. Furthermore the participation of industrial relations stakeholders in the decision-making process of the AFPC is uncertain. Prior to the commencement of the Work Choices Act employees, through their representatives, had legal standing before the AIRC to present submissions on what the Federal Minimum Wage should be. This ensured that the AIRC was made aware of the needs of award-reliant workers. However, under the Work Choices Act, employee representatives have no legal standing before the AFPC. In fact the Work Choices Act does not stipulate that any industrial relations stakeholders have the right to make submissions or representations to the AFPC regarding its decisions. Similarly, there is no capacity for these parties to appeal any decision of the AFPC.

72. Finally, the Work Choices Act permits the AFPC to set special minimum wages for juniors, employees with a disability and employees to whom training arrangements apply. However, the Work Choices Act only *permits* the setting of these wages but does not *require* the AFPC to set these wages. Consequently, in the event that the AFPC fails to set these special wages, no minimum wage will apply to these workers. The Work Choices Act is likely to increase the vulnerability and disadvantage of these workers in New South Wales.

The Western Australian Experience

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

74. The Coalition Government routinely ignored the recommendations of the WAIRC when setting the minimum wage, and delayed the granting of adjustments. In only a few years Western Australia's minimum wage was $50 a week below the rest of Australia. Perhaps not coincidently, this is the same disparity that would currently exist had the federal government achieved its desired outcomes in the National Wage Cases since 1997.

Australian Pay and Classification Scales (APCS)

75. In addition to setting minimum wages, the Work Choices Act has given power to the AFPC to set casual loadings, piece rates and classification structures. Historically minimum wages and pay classifications have been prescribed in state and federal awards negotiated by the parties and determined by the AIRC or state tribunals. The classification structures contained in these awards addressed the specific needs of the industry or occupation to which the awards apply. In particular the classification structures adopted were designed to establish a career path.

76. However, under the Work Choices Act, all classification structures, along with casual loading rate and some piece rates have been removed from awards. New instruments have been created called Australian Pay and Classification Scales (APCS) which will contain wages and some classification structures and which will apply to employees of constitutional corporations. Casual loadings and piece rates will be set at the discretion of the AFPC.

77. In addition, APCSs will undergo a 'rationalisation' and 'simplification' process. The Award Review Taskforce (ART) has been established to make recommendations to the federal Minister on the most expedient methods of 'rationalising' and 'simplifying' federal awards and wage and classification structures. Of great concern regarding this process are the issues of coverage of APCSs and awards and the removal of variations based on state or territory boundaries. Further analysis on the ART is available in Chapter 2(f).

78. The changes introduced by the Work Choices Act will move the majority of employers and employees from a transparent and fair wage setting system to one characterised by complexity, uncertainty and lack of impartiality.

Unfair Dismissal Laws

79. The Work Choices Act has introduced fundamental changes to the unfair dismissal laws applying to employers and employees in New South Wales. Prior to the commencement of the Work Choices Act employees had access to the unfair dismissal provisions in either Chapter 2 Part 6 of the *Industrial Relations Act 1996* (NSW) or Part VIA Division 3 of the *Workplace Relations Act 1996* (Cth).

80. The New South Wales unfair dismissal provisions provide an avenue for a worker to challenge a dismissal, or a threatened dismissal, which they believe is harsh, unjust or unreasonable. Unfair dismissal claims are lodged with the New South Wales Industrial Relations Commission which will resolve the claim by conciliation and, if necessary, by arbitration with a 'fair go all round' principle. The Industrial Relations Commission has extensive expertise in resolving unfair dismissal claims and offers an informal and cost effective solution. Most unfair dismissal matters in the Industrial Relations Commission are listed for conciliation within three weeks of lodgement and 90 per cent of matters are resolved either before conciliation or before arbitration.

81. The *Industrial Relations Act 1996* excludes from access to the unfair dismissal provisions certain classes of workers including employees under a contract for a specific time or task, employees on a probation period, casual employees engaged for a short period and apprentices and trainees. The NSW unfair dismissal jurisdiction gives the NSW Industrial Relations Commission a broad discretion to consider a wide range of factors. Not only can the Commission consider the nature and length of employment but also the reason for the dismissal and whether that reason had a basis in fact. If a dismissal is determined to be harsh, unjust or unreasonable, the Industrial Relations Commission may order the reinstatement of the worker, the re-employment of the worker in a different position or for compensation to be paid if it considers an order for reinstatement or re-employment would be impracticable.

82. Prior to the commencement of the Work Choices Act the federal industrial relations system also provided a remedy for dismissals which were considered to be harsh, unjust or unreasonable. Under Part VIA Division 3, Subdivision A of the *Workplace Relations Act 1996* an application could be made to the AIRC for conciliation and arbitration of an unfair dismissal claim. In a similar approach to the NSW unfair dismissal jurisdiction the AIRC was required to make decisions with a view to according a 'fair go all round' for both employees and employers.

83. Unfair dismissal laws have an extremely important function. Being able to seek compensation or reinstatement for an alleged unfair dismissal

is an important element of a workers' rights. It ensures that employees who make legitimate requests in relation to remuneration, access to leave, or raise issues of concern (for example, health and safety issues or harassment issues) are not dismissed for doing so. The unfair dismissal provisions act as a deterrent to unacceptable employer conduct and act as a mechanism for ensuring that employees are not dismissed without reason and/or without notice.

84. Since the commencement of the Work Choices Act, access to unfair dismissal laws has been severely curtailed. Employees of constitutional corporations operating in New South Wales no longer have access to the NSW unfair dismissal provisions. In addition, employees of constitutional corporations will only have access to federal unfair dismissal laws if their employer has more than 100 employees. In other words, the Work Choices Act exempts employers with 100 or less employees from the unfair dismissal provisions. It is estimated that, as a result of this legislation, up to 4 million Australian workers will no longer have access to unfair dismissal. [14]

85. Since the start of the Work Choices Act numerous cases of sudden and potentially unfair dismissals have been reported. These instances have been discussed in more detail in Chapter 2 (b).

Unlawful Termination

86. The federal government has stated that, although workers who are employed by constitutional corporations with 100 or less employees will be excluded from unfair dismissal laws, they will still be protected by unlawful termination laws. Unlawful termination was introduced in s170CK of the *Workplace Relations Act 1996.* Unlike the unfair dismissal provisions, unlawful termination can only be claimed on specific grounds. These are:

- temporary absence from work because of illness or injury
- trade union membership or participation in trade union activities
- non-membership of a trade union
- acting or seeking to act as a representative of employees
- filing of a complaint against an employer involving an allegation of violation of laws or regulations
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin

[14] Beazley, K & Smith, S (2006) *Labor's Plan for Unfair Dismissal Protects and Small Business Operators,* Joint Statement, 24 March.

- refusal to negotiate or make, sign, extend, vary or terminate an Australian Workplace Agreement (AWA)

- absence from work during maternity leave or other parental leave or

- temporary absence from work because of the carrying out of voluntary emergency management activity.

87. Unlike unfair dismissal cases, unlawful termination claims cannot be heard by the AIRC. The AIRC conducts a preliminary hearing for unlawful termination cases in order to determine the merits of the case and determine whether conciliation options have been exhausted. The actual claim, however, is heard in the Federal Court of Australia or Federal Magistrates Court. This involves a formal court hearing requiring legal representation. Some recent unlawful termination cases have taken up to three years to be finalised. The federal government has announced that it will provide $4,000 in legal assistance to some employees pursuing unlawful termination claims. Access to this funding will be heavily restricted.

88. The exemption from unfair dismissal laws for some workers may result in workers seeking redress through the anti-discrimination legislation. However, the anti-discrimination legislation was not designed to address such dismissal issues. Discrimination issues in a termination are often very difficult to prove and can be time consuming and costly.

89. These changes in the Work Choices Act will mean that workers doing similar jobs will be treated differently based on the size of their employer's workforce. The NSW Government believes that all workers deserve to be treated fairly and all employers should adhere to fair employment practices, regardless of the size of their business.

90. The impact of the exemption from unfair dismissal laws on employees and employers in organisations with 100 or less employees is discussed in more detail in Chapter 2.

Awards

91. The Work Choices Act has made substantial changes to the operation and application of both federal and state awards. An award is an order made by an industrial tribunal, often in response to an industrial dispute. In New South Wales the Industrial Relations Commission considers the merits of an application to create or vary an award with an overall view to fairness and the implementation of reasonable working conditions. The New South Wales award system has developed over a long period in response to the changing economic and business environment and in response to the occurrence of industrial disputes. As such, the state award system has developed flexibly in response to problems, needs and changes within organisations, industries, the economy and society.

92. In New South Wales, awards may be applied by common rule. This means that awards which are created to cover a certain industry or occupation will apply to all employees in that occupation or working in that industry throughout the state. This common rule approach simplifies the award system by not requiring each individual employer in an industry or occupation to apply to the Industrial Relations Commission to become party to an award. Instead these awards will generally apply to an occupation or industry unless another valid industrial instrument, such as an enterprise bargaining agreement, is in force.

93. In comparison, federal awards, prior to the commencement of the Work Choices Act power, did not apply by common rule because of constitutional limitations on the Commonwealth's powers. Federal awards were made on a respondency basis, that is, they bound employers who had been named as parties by the union. Other employers could become a party to a federal award either through application to the AIRC or through membership of an employer association that was already a party to an award.

94. Historically awards have served three key purposes. Firstly, awards have set out the minimum employment conditions that a worker is entitled to receive. Awards specify the wage rates, penalty rates, overtime, working hours and other conditions that an employee is entitled to. This means employees are secure in the knowledge that, where an award applies to their employment, they can not lawfully receive wages and conditions which are less than the award. In addition, many awards contain classification scales which have envisaged a career progression for workers in certain occupations or industries.

95. Secondly, the presence of a strong award system provides a level playing field for competing businesses. Employers are aware that award conditions provide the minimum wages and entitlements that all

employees working in a certain occupation or industry are entitled to receive. Supported by a rigorous compliance framework, this ensures that businesses are not undercut on wage costs by their competitors. Awards also provide employers with the assurance that they are paying their staff correctly and valuing their work appropriately.

96. Finally, awards have acted as the benchmark for enterprise bargaining agreements and, in the federal jurisdiction, for individual agreements. In approving an enterprise bargaining agreement, the New South Wales Industrial Relations Commission will compare the terms of the enterprise agreement with the relevant award. This collective agreement must not, on balance, provide a net detriment to employees when compared to a relevant award.

97. Prior to the commencement of the Work Choices Act, the AIRC conducted a similar 'no-disadvantage' test on federal collective agreements. Similarly a 'no-disadvantage' test was also applied to individual agreements, called Australian Workplace Agreements (AWAs) under the pre-Work Choices Act federal system. Although concerns were raised about the rigours of this test, in theory it was designed to ensure that an AWA did not disadvantage a worker in comparison with the relevant award. This has provided employers and employees with the ability to make flexible and productive workplace arrangements while still ensuring that workers are protected by the award system.

98. However, since the commencement of the Work Choices Act, the application and objectives of the award system have fundamentally changed.

Former State Awards

99. Since the commencement of the Work Choices Act, employers who are constitutional corporations are no longer able to use state awards or access the NSW Industrial Relations Commission for a variation of a state award. At the start of the Work Choices Act a NSW state award in so far as it applies to employees of a constitutional corporation was effectively 'frozen' and transferred into the federal jurisdiction as a NAPSA. This NAPSA can operate up to three years in the federal system unless the parties choose to negotiate a new (federal) agreement prior to expiry. Significantly, under the Work Choices Act, it is not possible to vary a NAPSA during the three year transitional period except in limited circumstances where the AIRC can vary NAPSAs for the purpose of removing ambiguity, uncertainty or discrimination. Practically, this means that the only way an employee covered by a NAPSA will be able to formally obtain better conditions during their three year term will be by negotiating a new federal workplace agreement. However local arrangements between an employer and an employee can occur which may provide for pay and conditions above those contained in the NAPSA.

100. In addition, a NAPSA will not retain the exact terms and conditions of the former state award. NAPSAs, under the Work Choices Act, will be compared against the Australian Fair Pay and Conditions Standard (AFPCS) and will have any prohibited content removed. The AFPCS contains five minimum employment standards that all employees in the federal jurisdiction must receive. The conditions are:

- 10 days personal/carer's leave (including sick leave)
- maximum 38 hour ordinary working week plus reasonable additional hours
- 52 weeks unpaid parental leave
- four weeks paid annual leave and
- basic rates of pay.

101. These five conditions will be compared against the provisions contained in a NAPSA. If the AFPCS minimum conditions are more generous than the corresponding preserved notional entitlements provided in the NAPSA then the AFPCS conditions will have effect to the exclusion of the relevant ones in the NAPSA. However, if the preserved notional entitlements of the NAPSA are more generous than those provided in the AFPCS, these entitlements will have effect and are not overridden by the AFPCS. The method for determining when entitlements are more generous is set out in the Workplace Relations Regulations 2006. These complex provisions relating to the interaction of the terms of the NAPSA and the AFPCS illustrate the potential confusion facing employers trying to determine their obligations under the Work Choices Act.

102. In addition, the federal government has declared some provisions of NAPSAs to be 'prohibited content' and thereby unenforceable. A term of a NAPSA or preserved state agreement that restricts the range and duration of training arrangements or prevents an employer from making an AWA is prohibited content.

103. In addition, the wage and classification structures contained in NAPSAs will be removed and transferred to new instruments called preserved Australian Pay and Classification Scales (APCS) contained in the AFPCS and under the jurisdiction of the Australian Fair Pay Commission.

104. It is unclear what will happen once a NAPSA expires if no other federal agreement has been made and a federal rationalised award does not apply. There will be uncertainty as to what employment conditions will form the basis of employment. This is likely to create confusion and uncertainty for many employees.

Former State Agreements

105. Upon the commencement of the Work Choices Act former state agreements, such as enterprise agreements, applying to constitutional corporations were transferred to the federal jurisdiction as Preserved State Agreements (PSAs). Similarly to NAPSAs, these PSAs have a three year expiry date in the federal system. However, unlike former state awards, PSAs will not be compared against the AFPC and will retain wage and classification structures, including any agreed pay increases programmed to come into effect over the life of the agreement. However, PSAs will still be subject to the removal of specified prohibited content. This means that certain clauses in agreements which were negotiated by an employer and employee representatives and agreed to by the New South Wales Industrial Relations Commission have now been overridden by the Work Choices Act. According to Regulation 8.8 of Division 7.2 any clause to the extent that it prevents the employer from making an AWA is prohibited and can be removed from PSAs by the Employment Advocate.

Removal of the 'No-disadvantage test'

106. The Work Choices Act has removed the role of awards as the benchmark for collective and individual agreements. As mentioned above, collective agreements and AWAs were compared against the relevant award to ensure that they were not of disadvantage to a worker. This 'no-disadvantage' test has now been removed from the federal jurisdiction.

107. Under the Work Choices Act all agreements must comply with the bare minima contained in the AFPCS to be valid. However, there is no requirement or obligation for collective or individual agreements to be compared against the award. Protected award conditions will not apply to agreements where the terms of the agreement expressly exclude them. This means that employers which are constitutional corporations are legally allowed to provide working conditions which are below the award. Practically this means that the protections previously afforded by the award system have been eroded for employees of constitutional corporations. This is likely to lead to the erosion of the level playing field between competing businesses resulting in a race to the bottom on wages and increased uncertainty for employers. These issues are discussed in more detail in Chapters 2(a) and (f).

Award Review Taskforce

108. The Award Review Taskforce (the Taskforce) was established in October 2005 to recommend a strategy to the federal Minister for the 'rationalisation' and 'simplification' of federal awards and wage and classification structures. The Taskforce released two discussion papers in late 2005 entitled *Award Rationalisation* and *Rationalisation of Award Wage and Classification Structures*. These papers discussed

the requirements of the Work Choices Act in regards to the rationalisation and simplification of awards and possible methods for achieving these requirements.

109. The rationalisation of awards and wage and classification structures has been promoted by the federal government as a means of simplifying the awards system. A close analysis of the discussion papers shows, however, that the rationalisation process will actually result in an award system of great complexity and confusion with the creation of up to six different types of awards. The NSW Government argues that this rationalisation process will result in lengthy, complex and prescriptive awards which will be costly and inaccessible to employers and employees.

110. The Award Review Taskforce has provided its preliminary report to the federal Minister. This report has not been made available to the public.

Occupational Health and Safety

111. For all workers raising workplace health and safety concerns is now affected by the Work Choices Act. The removal of unfair dismissal remedies for those employed by an incorporated business with 100 employees or less may act as a disincentive for workers to raise issues of safety in the workplace. The threat of termination, without a feasible avenue of appeal, is likely to result in the reluctance by workers to report health and safety concerns.

112. Under the New South Wales *Occupational Health and Safety Act 2000* (OH&S Act) it is an offence to dismiss or victimise an employee for making a health and safety complaint or for belonging to an OH&S committee or for acting as an OH&S representative. Similar provisions apply under the *Industrial Relations Act 1996.*

113. It is unclear, under the Work Choices Act, whether the rights and remedies available to employees who are dismissed or victimised because they make a health and safety complaint and other matters under the *Industrial Relations Act* will be overridden. Although State laws dealing with occupational health and safety matters will not be overridden under the Work Choices Act, it is possible that these provisions could be characterised as State industrial laws as opposed to occupational health and safety matters and could therefore be overridden.

114. Further, the Work Choices Act's definition of 'industrial action' will create a significant disincentive for employees to voice health and safety complaints. The Work Choices Act defines that a health and safety complaint will not be considered 'industrial action' where the action was based on a 'reasonable concern' by the employee about an 'imminent risk' to his or her health or safety. However the burden of proof lies with the employee to prove that such 'a reasonable concern' and 'imminent risk' existed. If an employee does not prove this, those actions may constitute 'industrial action', the consequences for which could be a loss of wages or an order from the AIRC to stop the action.

115. Moreover, there is no protection under the definition of 'industrial action' for employees expressing health and safety concerns about other work colleagues or potential risks as opposed to 'imminent risks'. This seriously compromises safety in the workplace. New South Wales WorkCover considers it vital that employees should not be inhibited by sanctions from expressing health and safety concerns in the workplace.

116. Further compounding the issues concerning workplace safety are the changes to union right of entry. Changes to rights of entry as defined by the Work Choices Act will seriously impede the effectiveness of

authorised representatives to act quickly and effectively with respect to OH&S and workers compensation matters. This is of critical importance not only to young and vulnerable workers, but to all workers.

117. The Work Choices Act limits the right of entry provisions for union officials, under the OH&S Act. Under the Work Choices Regulations, the OH&S Act is prescribed as an 'OH&S law' for the purpose of the right of entry provisions. This means that right of entry exercised by union officials under the OH&S Act are subject to the provisions of the Work Choices Act.

118. Under the Work Choices Act an official of an organisation who has a right under an OH&S law to enter work premises must not exercise that right unless the official holds a permit under the Work Choices Act and exercises the right during working hours. Similarly other provisions in the Act apply to the operation of OH&S laws dealing with union rights of entry and prescribe a range of restrictions and limitations.

119. Such restrictions on the monitoring of health and safety together with the federal government's changes to its own OH&S laws which proposes curtailing union representation in relation to consultation as well as the rights of employee health and safety representatives, signals a very worrying departure from the current open and transparent OH&S system in New South Wales.

120. Subjecting the State right of entry provisions under OH&S law to the right of entry provisions under the Work Choices Act seriously impedes the effectiveness of authorised representatives to act quickly and effectively to ensure workplace safety. The safety of and certainty in workplaces in New South Wales will be diminished by the application of the new right of entry provisions under the Work Choices Act.

121. With restricted access from employee representatives regarding occupational health and safety issues, the ability of New South Wales workers to work in safer environments is reduced, as the scrutiny employers face reduces.

New South Wales Government Response to the Work Choices Act

122. The New South Wales Government has repeatedly demonstrated its opposition to the federal government's hostile takeover of industrial relations. In both a legislative and legal capacity, the New South Wales Government has attempted to minimise the impact of these unfair laws on employers and employees in New South Wales. The New South Wales Government supports a fair and cooperative industrial relations system with a strong independent umpire. It considers that the Work Choices Act will reduce real wages and working conditions, increase the gender pay gap, lead to increased industrial disputation, be costly and complex to business and ultimately lead Australia down the low-skilled low-road through wage competition.

High Court Challenge

123. On 21 December 2006 the New South Wales Government filed a challenge on the validity of the federal government's Work Choices Act. As previously noted the Australian Constitution contains an explicit power concerning the regulation of industrial relations. That power makes it clear that industrial relations is an area in which the powers of the Commonwealth and the states are to be shared. The New South Wales Government believes that use of the corporations powers in section 51(xx) of the Constitution for the Work Choices Act is an overstep and was not what was intended by the drafters of the Constitution.

124. The New South Wales Government argued its case to the High Court of Australia in hearings from 4 to 11 May 2006. This case was also argued by the other states and several trade unions. The High Court has reserved its decision.

State Wage Case

125. As previously noted, prior to the commencement of the Work Choices Act, a national wage case and state wage case were held annually to review the minimum wage and other award wages. Since the inception of the Work Choices Act the AIRC is no longer able to conduct the national wage case. Consequently the New South Wales Industrial Relations Commission is not able to flow-on its decision in the state wage case.

126. However, even in the absence of the national wage case ruling, the state wage case for 2006 has been bought before the New South Wales Industrial Relations Commission. The decision of this state wage case will affect state common rule awards applying to employees of non-constitutional corporations. Consequently the continual updating of state awards to ensure that they reflect current living requirements

and economic conditions is still an important role for the state governments.

127. The NSW Government is supporting a moderate and reasonable increase of $20 per week to minimum award wages in the 2006 case. The New South Wales Industrial Relations Commission has commenced hearings on this matter.

Industrial Relations Amendment Act 2006

128. The NSW Parliament passed the *Industrial Relations Amendment Act 2006* (the Amendment Act) in order to offer greater protection to some employers and employees in New South Wales from the Work Choices Act. The Amendment Act has made several key amendments:

- Part 8A – This amendment seeks to maintain the integrity of enterprise consent awards applying to constitutional corporations after the commencement of the Work Choices Act. This Part gives enterprise consent awards effect as enterprise agreements that contain the same terms as the previous award. This ensures that these agreements are treated as Preserved State Agreements (PSAs) under the federal jurisdiction. Further information on this amendment is available in Part 2(f).

- Section 146A – This amendment provides employers and employees with the capacity to make common law dispute resolution agreements which provide for an industrial dispute to be referred to the New South Wales Industrial Relations Commission. This amendment provides employees and employers who may be covered by the federal jurisdiction with continuing access to the expertise of the NSW Industrial Relations Commission. Importantly, this amendment does not restrict the matters that parties can include in the common law agreement. This means that provisions considered to be 'prohibited content' under the Work Choices Act may be included in a s146A common law agreement.

- Outworker provisions – The outworker provisions in the *Industrial Relations Amendment Act* 2006 had the effect of ensuring that outworker protections are not award based, and therefore could not be moved into the federal system when the Work Choices Act took effect on 27 March. The outworker provisions were removed from the state award and placed in the *Industrial Relations Act* 1996, preventing them from being converted into federal arrangements. This was intended to preserve all the reporting, registration and other obligations set out in the award, these being obligations that do not deal directly with the conditions of employment of outworkers, but which support compliance with those conditions of employment.

In addition, the legislation provided that the statutory obligations relating to outworkers will continue to be linked to the conditions that are set out in the Clothing (State) Award, as that award is varied from time to time. This recognised that the Industrial Relations Commission will continue to play a role in adjusting the state award as it applies to those outworkers whose employers are not caught by the Work Choices Act.

129. This Amendment Act has provided some protection and alternative avenues for employees and employers who are covered in the federal system by the Work Choices Act.

Public Sector Employment Legislation Amendment Act 2006

130. The *Public Sector Employment Legislation Amendment Act 2006* (the PSEL Act) commenced on 17 March 2006. The PSEL Act transferred up to 186,000 employees from employment directly by a corporate entity to employment by the New South Wales Government in the service of the Crown. This transfer ensured that these employees could continue to be covered by the New South Wales industrial relations system. Further information on this amendment is available at Chapter 2(f).

New South Wales Social and Community Services Taskforce

131. The New South Wales Social and Community Services Taskforce (SACS) has been established to develop recommendations to ameliorate the negative impact of the Work Choices Act on the lowly paid and highly feminised workforce and on the vulnerable people that they serve. The SACS Taskforce has representatives from state government agencies and peak non-government organisations.

132. The SACS Taskforce has identified the social and community services sector as been particularly vulnerable to the erosion of conditions of employment and service delivery as a consequence of the Work Choices Act. The organisations in this sector frequently operate on a not for profit basis and are often managed by voluntary management committees. Yet these organisations are responsible for delivering essential human services to the most vulnerable people in our community. Employment conditions in this sector are largely protected by the minimum conditions of a comprehensive state award as there is little enterprise bargaining activity in this sector. In New South Wales, 78% of employees in the community services sector are female.

133. These characteristics place employees in the community services sector in a particularly vulnerable position under the Work Choices Act. The SACS Taskforce seeks to redress this position.

Service Delivery

134. The New South Wales Government will continue to support employees and employers in this state through the services provided by the Office of Industrial Relations. This Office will continue to provide a comprehensive compliance framework supported by experienced workplace inspectors. This compliance service conducts targeted campaigns in certain industries or occupations. In recent years, the Office of Industrial Relations has conducted a specialist compliance and education program, *Behind the Label,* which targeted clothing outworkers.

135. In addition, the seminars and information services run by the Office of Industrial Relations have been expanded to include information on the Work Choices Act and its practical implications for employers and employees. The Office has also established the Fair Go hotline which has received over 40,000 calls from employers and employees about the industrial relations changes. This hotline has provided assistance and information to these callers.

136. The New South Wales Government will continue to provide a fair and cooperative industrial relations system in this state which provides a rigorous safety net for employees and which promotes a level playing field between competing businesses.

2. Impact of the Work Choices Act on the Terms of Reference

2a. 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

Introduction

137. Labour law is potentially designed to have a protective function, to act to relieve workers of the consequences of their relative lack of power in the labour market[15]. As such, labour law has developed over the past century to ensure fair and cooperative workplaces in New South Wales. The effect has been to ensure that all workers, in particular women, young people, people with disabilities and other vulnerable groups in the community receive a fair minimum set of conditions through the award system for decent work.

138. Genuine bargaining is best exercised when the employee has the ability to choose the way they want to bargain. Employees should be able to choose to collectively bargain or not, with the relevant state award providing the minimum set of terms and conditions a person may be employed under for a particular industry[16]. For genuine bargaining to occur in New South Wales workplaces, a fair safety net needs to be in place so that workers can genuinely bargain a fair outcome and be adequately remunerated for their skills and abilities in line with community standards.

139. The impact of Work Choices Act on vulnerable groups including women, young workers, migrant workers, people with disabilities and indigenous workers is discussed below. Consideration is also given to the interaction between the Work Choices Act and the welfare-to-work changes which are due to commence on 1 July 2006. These changes are likely to further disadvantage the most vulnerable groups in society.

Women

140. Women disproportionately carry the responsibility for caring, family and household responsibilities. As a group women have been a historically vulnerable group of workers often experiencing undervaluing of their work. The Work Choices Act which actively encourages the individualised 'bargaining' of working arrangements is

[15] Creighton and Stewart, 'Labour Law, Fourth Edition' (2005) p6
[16] See s406 of NSW *Industrial Relations Act 1996.*

likely to further disadvantage the position of women employees in New South Wales. Significantly issues relating to the growth in atypical or non-standard employment particularly affect women as this is largely the experience of many women, who are employed in precarious employment, with lack of security of employment and also particularly the loss of penalty rates and other benefits if forced to enter into new working arrangements under The Work Choices Act[17]. This can be explained partly by the employers desire for numerical flexibility in the workplaces to meet periods of demand and secondly exacerbated by the number of women re-entering the labour market may work to exacerbate the disadvantage women suffer by reason of their concentration in low status, and low reward employment[18]. The impacts of the Work Choices Act and welfare-to-work on women are discussed extensively in parts 2 (c) and (d).

Young Workers

141. The Work Choices Act increases the vulnerability of young workers by removing many of the protections that were previously in place to ensure fair and equitable workplace outcomes. The steady erosion of award conditions and the replacement of the no-disadvantage test with the Australian Fair Pay and Conditions Standard (AFPCS) as the benchmark for agreement making will have a particularly detrimental impact on young employees in the workforce.

142. Young people represent a significant section of the labour market[19] with a participation rate of 57.1% in New South Wales, at July 2005[20]. Despite this, the workplaces and working conditions of some children may be hazardous and precarious due to the nature of the work that they undertake. The Work Choices Act is likely to exacerbate this problem.[21]

143. Children are concentrated in jobs in the retail trade, accommodation, cafe and restaurant industries[22]. These industries are highly casualised and are often associated with low pay[23]. It is also important to note that young people are less likely to be union members. In a recent study conducted by the New South Wales Government, 77.9% of young respondents identified themselves as 'casual workers'. Industries that employ a high proportion of young workers are often associated with

[17] Creighton and Stewart, 'Labour Law, Fourth Edition' (2005) p16
[18] Ibid, p18
[19] Australian Bureau of Statistics, *Australian Social Trends, 2005,* cat. no. 4102.0, ABS, Canberra.
[20] Australian Bureau of Statistics, *Australian Social Trends, 2005,* cat. no. 4102.0, ABS, Canberra.
[21] McNamara, M, 2006, *The hidden health and safety costs of casual employment Key findings and recommendations* , Industrial Relations Research Centre, University of New South Wales.
[22] Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, Preliminary,* cat. no. 6305.0.55.001; *Labour Force, Australia, Detailed - Electronic Delivery January 2006,* cat. no. 6291.0.55.001; *Australian Social Trends, 2005,* cat. no. 4102.0, ABS, Canberra.
[23] Human Rights and Equal Opportunity Commission, Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Legislation Committee into the Workplace Relations Amendment (Work Choices) Bill 2005, p. 43.

high staff turnover rates and adverse occupational health and safety (OH&S) outcomes.[24]

144. Young workers generally fall outside of the bargaining stream and are less likely to hold the bargaining power to achieve conditions which assist them to balance their other responsibilities such as study.[25] Given this, the working conditions of children entering work under the federal system are likely to decline as the Act encourages the individualisation of bargaining. Additionally, the erosion of real wages for workers whose pay is regulated by the Australian Fair Pay Commission, or who hold weak bargaining power, may increase the pressure on children to work longer hours to maintain their current contributions to household incomes. These circumstances may also mean that a child's income may shift from been discretionary in nature, to an essential contribution to their household.

145. An International Labor Organization report titled *The End of Child labour: Within Reach* identifies a key factor in raising children's standards of living as the opportunity for their parents to participate in decent work[26]. In Australia, low paid jobs which do not necessarily equate to decent jobs, are likely to increase in the federal system under the Work Choices Act as award-dependant employees with low bargaining power are transferred to, or new employees are offered, AWAs, non-union collective agreements or contractor status.[27]

146. The New South Wales Commission for Children and Young People (CCYP) recently conducted research into the working lives of 11,000 students enrolled in years 7 – 10 in New South Wales schools. In June 2005 the CCYP released a report titled 'Children at Work'. The report (and related research) revealed that a quarter of children in New South Wales aged 12 to 16 years are in formal, paid employment.

147. A 'Children at Work' taskforce has been established to enquire into issues including the vulnerability of young workers to exploitative and harmful work practices and the need to provide increased employment protection to this group of workers[28]. The Queensland Government has reviewed the issue of children at work in Queensland and is currently drafting legislation to deal specifically with the employment of children in Queensland.

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[24] McNamara, M, 2006, *The hidden health and safety costs of casual employment Key findings and recommendations* , Industrial Relations Research Centre, University of New South Wales, pp.4-5.

[25] Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee into the Workplace Relations Amendment (Work Choices) Bill 2005 on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, The Australian Capital Territory, The Northern Territory, 9 November 2005, p. 57.

[26] Report prepared by the ILO as a Global Report as a follow-up to the ILO Declaration of Fundamental Principles and Rights at Work 2006.

[27] Briggs, C 2005, *Federal IR Reform – the Shape of Things to Come, commissioned by Unions New South Wales* cited in Watts, M and Mitchell, W 2006, *Wages and Wages determination in Australia 2005,* Working Paper No. 06-01, Centre for Full Employment and Equity, University of Newcastle, Callaghan New South Wales, p.16.

[28] NSW Commission for Children and Young People (2005), *Children at Work,* researched and written by Toby Fattore, Sydney.

148. A study commissioned by the New South Wales Government conducted by the Australian Centre for Industrial Relations Research and Training (ACIRRT) in July 2005 of more than 5000 children aged predominantly between 12 and 16 years found that 18.8% of respondents aged 12-16 reported bullying at work, that the incidence of reported bullying increased with age and that girls reported higher rates of bullying than boys – 25.3% and 18.6% respectively. The survey found 8.7% of respondents reported working in dangerous jobs, or that they had felt in danger of being hurt or injured while at work. Young people working in the hospitality sector, where 33.1% of young people aged 12-16 were employed and were most at risk of workplace injury, with 42.8% of those respondents reporting having been injured at work.[29]

149. The survey demonstrated that even with the protection of a state based safety net young vulnerable employees were in no position to negotiate their overtime, penalty rates and other working arrangements. As young people have a limited understanding of their rights at work they will be one of the groups of workers that will suffer the most in the wake of the Work Choices Act. The abolition of the no-disadvantage test will have a particularly negative impact.

150. Prior to the Work Choices Act, there were various state laws regarding young people that the Work Choices Act has now overridden with respect to constitutional corporations. The impact of The Work Choices Act is wider than just the working conditions of young people. These additional impacts relate to safety, international obligations and work with children protections.

Safety for Young Workers

151. Safety for young and vulnerable workers in New South Wales who are employed by constitutional corporations, is now of particular concern when raising workplace health and safety concerns as The Work Choices Act has removed for a large number of workers access to unfair dismissal provisions, in the event they are terminated for raising issues of unsafe working environments. The removal of access to remedy for unfair dismissal is of particular importance to young people working in New South Wales, who may be inexperienced or not have had sufficient training to perform work safely. The dismissal of injured workers is further discussed in Section 2e of this Submission and a further discussion of Unfair Dismissal is found in Chapter 1.

International obligations

152. Traditionally, Australia has been regarded as a world leader in the application of labour standards. However, this status is now in jeopardy. The federal government's Work Choices legislation will

[29] ACIRRT 2005, *Young people and work survey,* Commissioned by the New South Wales Government, July.

ensure that the Australian industrial landscape is no longer regarded as a benchmark to aspire to. Rather, Australia will be reduced to a willing participant in a 'race to the bottom'. The combined practical effects of the Work Choices Act will either erode or completely destroy many of the important protections that have been established over many years, effectively guarantying that Australia will lose the respect and admiration that it currently enjoys in the international community. The Work Choices Act will have a fundamental impact on the lives of vulnerable workers including children. There are two relevant International Labour Organisation (ILO) Conventions[30] regarding the elimination of child labour and the protection of children and young persons in the workplace. Neither of these conventions have been ratified by Australia even though they are considered to be fundamental by the international community.

Working With Children

153. The Work Choices Act aims to override the existing New South Wales industrial framework for constitutional corporations. In doing so, it will potentially dismantle the screening process of employees who will be working with children, as detailed within Part 7 of the *Commission for Children and Young People Act 1998.*

154. Part 7 of the *Commission for Children and Young People Act 1998* contains provisions for the screening of employees who are in child-related employment (meaning any employment that involves direct contact with children where the contact is not directly supervised) including:

- a check for any relevant criminal record of the person, for any relevant apprehended violence orders made against the person, for any child protection prohibition orders made against the person or for any relevant employment proceedings completed against the person,
- any other relevant probity check relating to the previous employment or other activities of the person,
- an assessment of the risk to children involved in that child-related employment arising from anything disclosed by such a check, having regard to all the circumstances of the case,
- the disclosure of the results of any such check or risk assessment to any person who determines whether the person is to be employed or continue to be employed in that child-related employment (or to a person who advises or makes recommendations on the matter).

[30] Minimum Age Convention (No. 138) and Recommendation (No. 146), 1973 and Worst Forms of Child Labour Convention (No. 182) and Recommendation (No. 190), 1999

155. Under the *Commission for Children and Young People Act 1998* an employer is obliged to notify the Commission of the name and other identifying particulars of any employee against whom relevant employment proceedings have been completed by the employer (other than proceedings in which a finding is made that the alleged reportable conduct, or the alleged commission of an act of violence, did not occur).

156. The Working with Children Check prohibits people convicted of sex offences, kidnapping or murder of a child from working in child-related employment. Responsibility for administering the Working with Children Check rests with the New South Wales Commission for Children and Young People.

157. Section 222 of the New South Wales *Children and Young Persons (Care and Protection) Act 1998* is an occupational health and safety provision. It makes it an offence for employers to cause or allow a child under the age of 15 years to take part in any employment that puts their physical or emotional well-being at risk.

158. A fair and productive industrial relations system must consider the needs of young workers and provide an adequate safety net at least equal to the well established provisions afforded by the New South Wales state system prior to the commencement of the Work Choices Act.

Casuals

159. The Work Choices Act has created a considerable amount of uncertainty in some areas, in particular the employment provisions in the Act relating to casual employees. This has been primarily due to the compulsory federal coverage of all employers which are constitutional corporations.

160. Prior to the commencement of the Work Choices Act, many casuals in New South Wales enjoyed conditions which have now become invalidated due to the industrial relations changes. These include provisions such as:

- conversion from casual employment to permanent employment after a qualifying period;
- proportions or limits on the ratio of casual employees to permanent employees; and
- any form of direct or indirect prohibition on forms or basis of employment an employer may choose to engage an employee.

161. Where such provisions, as outlined above, were contained in State awards or agreements, they still survive in the NAPSA or PSA that replaced the original state award or agreement.

162. A default 'casual loading' is referred to under the Work Choices Act, which is currently prescribed under this legislation to be 20%. However under transitional instruments, where the casual loading may be more or less than 20% there is confusion as to which loading will apply and when. Below are some of the cases showing when and how loading is payable[31]:

NAPSA: Where a former state award granted a casual loading of less than 20%, the lower loading will continue to apply until such time as a new agreement is entered into. This is an issue for many New South Wales NAPSAs as the most common casual loading in state awards is 15 %, which is lower than other jurisdictions. This is partly due to a provision in the New South Wales *Annual Holidays Act* that provides casuals with a 1/12th loading per hour to compensate for lack of annual leave entitlement.

The question of whether casual employees continue to have an entitlement to the 1/12th casual holiday pay under the Work Choices Act is a question that is to be resolved by the relevant federal agencies. However, if it is found that casual employees are not entitled to the casual 1/12th holiday pay, they will suffer a significant wage loss per hour of 8.33% until such time as the employer may enter into a new agreement.

PSA: Whatever the casual loading was that was preserved in the state agreement will continue to apply and will not be overridden by the 20% default casual loading until such time as a new agreement is entered into, where 20% casual loading will be the default amount.

Award free employees in New South Wales: Regardless of the terms of a common law contract of employment, the default casual loading of 20% will apply unless the common law contract of employment is more generous than the default loading.

New agreement: If an agreement is to be ratified under the Work Choices Act, it must provide a casual loading equal to the default 20%. The 20% default loading will continue to apply to casuals even if the agreement is terminated or the loading amount under the Australian Pay and Classification Scale (APCS) is higher.

163. In summary the significant amount of uncertainty surrounding the employment of casuals and under which terms, is driven by the complexity of the Work Choices Act.

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[31] Paul Munro, IR Consultant Date: published 26/4/06; revised 29/5/06 " Work Choices and Casuals', Workplace Info.

Related Issues of importance to casual workers

164.A casual employee has no entitlement to annual leave under the AFPCS. However a pre-Work Choices agreement that provides an entitlement to annual leave, such as casual holiday pay ($1/12^{th}$) will continue to apply until such time as the employer enters into a new agreement or the agreement expires. Prior to the Work Choices Act, the majority of casual employees in New South Wales would have been entitled to receive the $1/12^{th}$ casual holiday payment (unless their award encompassed that entitlement in the casual loading component).

165.Casuals have no entitlement to paid personal (sick) leave, carers leave or compassionate leave, however a casual can access up to two days unpaid for carers leave under the AFPCS. While before the Work Choices Act, a casual employee did not have access to paid sick leave or personal carers leave, such an employee was eligible to access unpaid leave. In the event that the employer was unsatisfied with the amount of leave taken by an employee and dismissed them, the employee under the New South Wales jurisdiction had the ability to seek relief in the form of an unfair dismissal claim.

166.Casual employees in New South Wales also gained access to additional leave requests following the decision of the New South Wales Industrial Relations Commission in the Family Provision Test Case. Please see chapter 2(d) for more information on this decision.

167.Casual employees are still eligible to accrue long service leave under the Work Choices Act as this is a matter for the state industrial relations system. In New South Wales, the *Long Service Leave Act 1955*, has applied to casuals since 9 May 1985.

168.Casual workers will experience a heightened level of job insecurity under the Work Choices Act. As discussed in Part 1, casual employees who were engaged on a regular and ongoing basis had access to the unfair dismissal provisions in Part 6 of the *Industrial Relations Act* or Division 3 of the *Workplace Relations Act 1996.* However, under the Work Choices Act, casual employees who work for a constitutional corporation with 100 or less employees, no longer have access to either the state or federal unfair dismissal provisions. This exemption is likely to make casual employment even more precarious.

169.A research paper recently produced by the Productivity Commission has looked at the role of non-traditional work in the labour market and has discovered that casuals tend to work part-time, be young, female, less skilled and are more prevalent in regional and remote areas than

cities[32]. The research paper also revealed the following characteristics about the casual labour force:

- almost half of all casuals are under 25
- three in ten casuals are students
- 42% of casuals are prime working age (25-54). 40% of this population have education of Year 12 or less and a quarter have dependents
- casuals aged between 55-64 years and women casuals aged between 25-54 years are most happy with their casual work status
- casual prime age men with low education or dependents report low levels of satisfaction with most aspects of work
- casuals have lower education on average than employees in other forms of employment – 62% have completed Year 12 or less. Only 38% of casual employees have achieved at least a certificate or diploma, compared to 63% of ongoing employees, 70% of fixed-term and 52% of labour hire employees
- 11% of casual employees aged between 25-54 years have dependent children
- casual employees who work full-time or would like to work more hours are more likely to realise the transition to ongoing employment
- casuals have the highest non-traditional employment persistence rates at 38% and
- post-high school qualified employees are much less likely than those without to remain as casuals.[33]

170. Structurally, the number of casual jobs produced by the economy has swelled, increasing to 1.9 million nationally in 2003 from 1.3 million in 1993,[34] and in 2005, 29% of all employees worked on a part-time basis. The proportion of women employees who are casual has increased to 31% in 2005 from 28% in 1990.[35] Welfare to Work generates increased supply-side demand for increased casual and contingent work[36] perpetuating conditions which contribute to pay inequity. This issue is discussed in more detail in Chapter 2(c).

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[32] Productivity Commission (2006), *The role of non-traditional work in the Australian labour market,* Research Paper, May.
[33] Ibid.
[34] ABS 4102.0 - Australian Social Trends, 2005
[35] ABS 1370.0 Measures of Australia's Progress, 2006
[36] Productivity Commission 2006, *The role of non-traditional work in the Australian labour market,* Research Paper, May.

171. Casual employees are more likely than ongoing employees to have more than one job. In 2003, 8% of employees who were casual in their main job were multiple job holders, compared with 4% of employees who were ongoing in their main job. The incidence of casual and part-time work can in part explain the widening distribution of income, which along with current trends will perpetuate the pay gap. Between 1990 and 2000 only one quarter of new jobs created were full-time, and of those, virtually all were casual.[37] The interaction of the Work Choices Act and Welfare to Work will exacerbate the proliferation of non-traditional forms of employment such as casual work.[38]

Other groups of vulnerable workers

Migrants

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

173. The New South Wales Government does not support the removal of the fair and decent safety net that will further disadvantage the lowest paid in New South Wales. The removal of this safety net is likely to result in the creation of an American style working poor in Australia. Evidence from the United States shows that up to 70 % of users of homeless shelters are engaged in full time employment and would only be able to afford low cost, below average apartment housing only after working 80 hours per week on the minimum wage.

174. For more information regarding the impact of the Work Choices Act on migrants please refer to the submission of the Community Relations Commission.

Outworkers

175. A large number of vulnerable workers are employed in the clothing industry as outworkers. The introduction of the Work Choices Act has given rise to concern as to whether New South Wales clothing outworkers will be covered by the coming Independent Contractors Act (ICA), please refer to Section 4.5 below. If this is the case, then any achievements by the State Government, unions and employers to reduce exploitation in this industry will be lost. It has also been

[37] Gregory, R,G 2002, 'It's full-time jobs that matter', *Australian Journal of Labour Economics,* vol.5, no.2, pp. 271-278 cited in Saunders, P 2006 *A perennial problem: employment, joblessness and poverty,* Discussion Paper No.146, Social Policy Research Centre, University of New South Wales.

[38] Productivity Commission 2006, *The role of non-traditional work in the Australian labour market,* Research Paper, May.

announced that the Australian Fair Pay and Conditions Standard (AFPCS) will apply to contracted textile, clothing and footwear outworkers in States and Territories where they are not covered by a law providing for some form of remuneration guarantee.

176. It is not clear whether the whole of the AFPCS or just the minimum wages component will apply to these workers. It is likely, although not clearly indicated, that the AFPCS will apply to workers under independent contracting arrangements and may give them an entitlement to the standard minimum wage of $12.75 per hour. However, under the New South Wales system, these clothing outworkers would have been guaranteed the wages and working conditions contained in the Clothing Trades (State) Award as a result, in part, of the deeming provisions of the *Industrial Relations Act.*

177. The federal government claims it will retain existing outworker protections but it is not clear how long they will survive in a legislative setting where employment protections through deeming arrangements have been removed for other categories of workers with inferior bargaining power.

Workers with a Disability

178. Employees with a genuine disability may be forced to attempt to re-enter the workforce under the federal government's Welfare to Work reforms. This raises a multitude of practical problems for this group in returning to work and locating suitable employment. In particular, the potential loss of control over working hours and rosters under federal workplace agreements may result in difficulties for disabled workers in finding suitable public transport to and from work and in managing personal care including the availability of carers outside of standard working hours. These concerns held are further exacerbated by provisions for the AFPC to create a special minimum wage for disabled workers as noted in Chapter 1.

179. Some employees may have injuries or disabilities that would not affect their ability to work provided that reasonable adjustments are made. These employees could be more vulnerable under the Work Choices Act, because employers could choose to terminate them rather than make reasonable adjustments. It would then be the responsibility of the employee to allege that this would constitute unlawful termination.

180. Under the Work Choices Act the qualification to pay an employee a special federal minimum wage is that the person qualifies for the Disability Support Pension. While many people who are disabled are productive members of the community, in professional and skilled employment, an employer may be legally able to pay them less than other employees.

181. Prior to the Work Choices Act, if a person with a disability sought employment they were required to be paid the minimum legal award wage based on the industry they were employed in under the New South Wales industrial relations system. However, exception did apply under s125 Permits – Special Wage Payments of the *Industrial Relations Act.* This provision provides an avenue for an employee to be paid less than the minimum award wage as approved by the Industrial Registrar. The benefit of the permit system is that it is individualised and based on the employee's assessed capacity. For example, if an employee has an assessed capacity of 90% of the work to be done then the worker would receive 90% of the appropriate wage. Further, the permit could be revoked at any time by the Industrial Registrar.

182. In comparison, the Special Federal Minimum Wage, if set, will not provide the level of individual attention on a case by case basis as the New South Wales System did and continues to do for employees of unincorporated businesses. Instead the Special Federal Minimum Wage will apply across the board regardless of the differing levels of disability and capacity of the individual to contribute to the working environment.

Indigenous Workers

183. In 2005, an estimated 176,400 Indigenous people were in the labour force representing 48% of the indigenous population aged 15 and over[39]. This represented a labour force participation rate for all Indigenous people aged 15 years and over of 57%. Of the Indigenous people in the labour force, more lived in regional areas (75,100 people) than in major cities (59,300) or remote areas (42,000)[40]. In 2005, there were 51,000 (54%) Indigenous people employed in major cities, 59,500 (46%) employed in regional areas and 36,900(43%) employed in remote areas.

184. Indigenous females in remote areas experienced a considerable decrease in the employment to population ratio, falling from 52% in 2002 to 36% in 2005. Indigenous males in remote areas also experienced a decline, from 63% in 2002 to 51% in 2005. Indigenous people participating in the Community Development Employment Projects (CDEP) scheme, who are classified by the Australian Bureau of Statistics as employed, are likely to form a significant proportion of Indigenous employment in remote areas[41].

185. However, under the federal government's changes to the CDEP scheme, participants will be classed as being employed for only 12 months. This will further compromise the employment prospects of indigenous employees as previously participants could remain in the CDEP program and learn valuable skills for more than 12 months. This

[39] ABS Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians. 6287.0 2005 p8

[40] ABS Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians. 6287.0 2005 p8

[41] ABS Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians. 6287.0 2005 p8

issue of CDEP participation is also exacerbated by the introduction of the Welfare to Work changes, where Centrelink will class CDEP participants as employed whereas the federal government will class these workers as unemployed. This is a confusing situation for Indigenous workers, compounding the problems already introduced by the Work Choices Act.

Independent Contractors

186. The Work Choices Act regulates the interaction between employees and employers in their working relationship. However, many workers perform work outside of a formal employee/employer relationship, including through various forms of contracting. The full impacts of the Work Choices Act cannot be appreciated unless consideration is given to these alternative forms of working. The federal government has recently announced its intention to legislate on independent contractors and is expected to introduce its Independent Contractors Bill (the Bill) into Parliament shortly. This Bill is expected to have further impacts on workers in New South Wales.

187. Independent contractors have enjoyed protection and fair dealing under the New South Wales jurisdiction which is supported by extensive case law and expertise in the Industrial Relations Commission. The New South Wales unfair contracts jurisdiction allows independent contractors access to a quick and enforceable remedy regarding issues such as:

- the non payment of monies for work performed
- contracts which are considered unfair, harsh or unconscionable
- contracts which are against the public interest or
- contracts which provide less remuneration than a person performing the work as an employee would be entitled to receive.

188. The federal government's anticipated Bill appears to be on the same continuum as the Work Choices Act by 'de-regulating' areas of labour, pushing more risk onto individual workers and re-enforcing the position of independent contracts as de-facto employees in the labour market. The Bill has been promoted as protecting, for the first time, the freedom of contractors to bargain with their principals without the 'interference' of industrial relations laws. In particular, this is likely to involve the overriding of the New South Wales deeming provisions which declare certain types of workers as employees with access to the state industrial relations system.

189. Although many of the provisions to be contained in this Bill remain unknown, it is anticipated that the New South Wales provisions for

independent contractors will be overridden by a new set of federal provisions. These provisions are likely to stop available avenues through the Industrial Relations Commission forcing independent contractors to seek remedy through the Federal Magistrates Court. The Federal Magistrates Court has limited industrial experience and could not be reasonably expected to possess the same depth of experience as the New South Wales Industrial Relations Commission.

190. The federal government has said that these provisions will provide 'a more balanced approach', retaining access to 'a fair and reasonable federal remedy for genuine cases'. While no detailed information about the new jurisdiction is available, these words suggest that it will be more difficult to access, and the remedies will be more restricted than those currently available in the New South Wales jurisdiction.

191. For independent contractors, training and skill development will become the responsibility of the individual. This means that the historical training and skills development responsibility of the employer will be transferred to individual workers who are classed as 'independent contractors'. Evidently, this will also result in a shifting of the cost burden for training and skills development from the employer to the contractor.

192. Overall this Bill is likely to facilitate situations where independent contractor relationships may be entered into while minimising the avenues available to 'contractors' to challenge their work contracts and legitimate employment status. The Bill appears to facilitate the shifting of risk and costs of an employment relationship from the employer onto individual workers.

Wages

Impact on low paid workers

193. International evidence shows that wage deregulation leads to increased wage dispersion and inequality. In the US where the minimum wage is $5.15 an hour, the highest ten percent of earners earn more than four and a half times that of the lowest 10 percent. In comparison, in Australia, the highest ten percent of earners earn three times that of the lowest 10 percent. This evidence is confirmed in work conducted by Sloan and Wooden[42] across New Zealand, Australia, and the United Kingdom. Over the past decade or so, the degree of earnings dispersion increased, broadly in line with the extent to which the different countries have decentralised bargaining structures. The data shows a modest increase in wage disparity in Australia after 1991, as enterprise bargaining was introduced, but a much larger increase was experienced in New Zealand with its more radical deregulation.

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

The larger increase in wage disparity in Australia came after the introduction of the *Workplace Relations Act* in 1996.

194. As discussed in Chapter 1, for more than 100 years minimum wages in Australia have been set, reviewed and adjusted by an independent body, the AIRC, its predecessors and the state counterparts. This system ensured that lowly paid workers and their families maintained fair and reasonable wages.

195. The federal government repeatedly refuses to guarantee that the real value of minimum wages will be maintained under the Work Choices Act. The federal government has 'guaranteed' that minimum wage will not fall below the current rate of $12.75 per hour; however the combination of a reduced bargaining position of low paid workers, rising inflation and the need for employers to cut wage costs to remain competitive will undoubtedly reduce the real value of wages over time. Minister Andrews in a speech has been quoted as saying:

> *Australia's businesses and Australia's workers must have a modern workplace relations system if they are to compete with the likes of China and other emerging economies.*[43]

196. It could be argued that by implication, the position of the federal government is that wages must be reduced in order to compete with emerging economies, like China.

197. The New South Wales jurisdiction has led the way in providing for a fair 'living wage'. In the *Sawmiller's Case* of 1905, Heydon J of the New South Wales tribunal set a wage that was to allow workers to have a 'human life' with some degree of comfort, to marry and raise a family[44]. The concept of the 'Living Wage' was further articulated by Higgins J in the Harvester case.[45] That case involved a determination under the then Excise Tariff Act. The issue in this case was whether an employer should be granted certain excise exemptions on the ground that wages paid to his employees were 'fair and reasonable'. In extrapolating guidelines for the term 'fair and reasonable' in this context, Higgins J focused on the 'normal needs of the average employee, regarded as a human being living in a civilised community'.

198. As noted in Chapter 1, under the Work Choices Act, 'fairness' is no longer a requirement in the setting of wages by the AFPC.

199. The federal government has attempted to argue the fact the word 'Fair' appears in the title of the Australian Fair Pay Commission ensures the body will give due diligence to the issue of fairness when

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[43] Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, Minister Assisting the Prime Minister for the Public Service on 27 July, 2005, speech delivered on '*The Howard Governments New Workplace Relations System*'

[44] Patmore, G 2005, 'Setting the Pace: The New South Wales jurisdiction before 1981', *Australian Review of Public Affairs*, University of Sydney. http://www.australianreview.net/digest/2005/09/patmore.html

[45] Ex parte HV McKay (1907) 2 CAR 1

setting minimum wages. The New South Wales Government contends the name of any particular wage fixing body is irrelevant. The objectives and wage setting parameters set down by particular legislation are the factors that will ultimately determine whether any minimum wage outcomes are deemed fair.

Special Federal Minimum Wages

200. Under the Work Choices Act, the AFPC may set a Special Federal Minimum Wage for people with disabilities, young workers or for people to whom training arrangements apply. However, as noted in Chapter 1, there is no explicit requirement that the AFPC set special minimums wages. In the event that these employees are not covered by an APCS and no special FMW is set by the AFPC it appears that no minimum rate of pay would apply to their work.

201. A fair and productive industrial relations system must consider the needs of young workers and apprentices and provide an adequate safety net at least equal to the well established provisions afforded by the New South Wales state system prior to the commencement of the Work Choices Act.

Security of employment

202. The implications of the Act extend well beyond the workplace with reduced job security for all employees of constitutional corporations in New South Wales. The elimination of the protection of award based conditions will be further compounded by the removal of former unfair dismissal protection for employees engaged by businesses with 100 employees or less. This will also negatively impact on employee bargaining power. The trend of increasing casualisation in the Australian workforce has been outlined above. The increasing trend towards casualisation, coupled with the precarious forms of employment, will further exacerbate issues regarding security of employment, as not only will employment be less secure, there will be arguably less opportunity for seeking relief from harsh, unfair or unjust dismissals.

203. Maria McNamara, from the Industrial Relations Research Centre, University of New South Wales, has released a paper regarding the hidden costs of casual employment regarding health and safety. She surmises that the Work Choices Act does have a significant effect on security, tenure and types of employment and in respect to casual employment. She outlines three effects:

204. The Work Choices Act appears to allow the employer to convert the status of employees from permanent to casual easily or to change the status backwards and forwards. She argues that the stripping back of awards and minimum pay setting processes is also likely to mean that

the loadings paid to casual workers will be diminished making them an even cheaper option. The Work Choices Act makes it easier for employers to challenge or bypass federal or state awards and agreements.

205. The Workplace Relations Act/Prohibited agreement content (s356 Regulation 8.5) puts terms and conditions on the engagement of contractors and labour hire workers which could also encourage greater use of labour hire workers. [46]

206. McNamara asserts that the Work Choices Act makes it easier for employers to restructure work agreements and encourages the use of temporary workers. On the other hand, she argues that the exemption from unfair dismissal provisions for employers with 100 workers or less may reduce employer reluctance to take on permanent workers though the question is under what conditions. She suggests that it is unclear what the dominant effect of the Work Choices Act will be on labour. However, is unlikely that there will be any significant shift away from the widespread use of casualised labour.[47] For a further discussion on the impact of precarious work please refer to Section 2(d).

207. As example of the impacts of the exemption from unfair dismissal laws for employees working at organisations with 100 or less staff, and its effects on security of employment is illustrated below.

[46] McNamara, Maria (2006) *The Hidden Health and Safety Costs of Casual Employment* , Industrial Relations Research Centre, University of New South Wales.

[47] McNamara, Maria (2006) *The Hidden Health and Safety Costs of Casual Employment* , Industrial Relations Research Centre, University of New South Wales.

Case Study: Project Air Con

A skilled, full-time worker was employed by Project AirCon in Sydney. After the commencement of the Work Choices Act, Project AirCon issued the following memo to staff, outlining the new terms and conditions of their employment. The memo read:

'To: All Staff

1. Working hours start from 7:00 am to 4:00 pm. A lunch break included at 12:00 midday.
2. All staff shall attend work before 7:00 am. Otherwise, an hour payment will be deducted from those attend 5-10 minutes late.
3. A two-day payment will be deducted for unexcused absence.
4. Every worker is entitled to one-day sick leave every two months. Repeated absence shall cause their employment terminated.
5. Staff must be responsible towards the maintenance of the company tools and equipment. Otherwise, the price of any damaged tool will be deductible from the weekly payment of the staff that is liable to.
6. Lives and safety of our Staff are valued; therefore, you are required to comply with safety rules, avoid injuries, and wear your official uniform.
7. The above Rules and Regulations are to be executed from 01/05/2006.

The Management'

Project AirCon did not consult with its staff regarding the memo or their new working conditions.

The worker was alarmed at the employer's new conditions of employment and challenged his employer about the new rules. The next day the worker was terminated. As Project AirCon employs less than 100 staff, but is covered by the Work Choices Act, the worker has no access to the unfair dismissal provisions. The worker sought assistance from the federal Office of Workplace Services, but was told that they were unable to assist.

Prior to the commencement of the Work Choices Act, this worker would have been able to purse a claim for unfair dismissal in the New South Wales Industrial Relations Commission. In addition this worker would have had his award minimum terms and conditions of employment protected and enforced by the New South Wales Office of Industrial Relations. These protections are no longer available to this worker.

2b. the impact on rural communities

208. Social and economic disadvantage by location is a well-documented phenomenon in Australia. Labour market participation and unemployment rates vary dramatically from location to location. In recent years rural communities have been severely affected by drought, decreasing commercial and support services and dwindling employment opportunities. Rural communities operate in different labour markets to metropolitan areas.

209. The Work Choices Act does not differentiate in any way between big businesses with global markets and small businesses with genuinely local markets. However, the Work Choices Act gives big business (employing more than 100 workers) the option of resolving termination issues through the AIRC, a low cost exercise, as compared to the expensive unlawful termination jurisdiction which is now the only option available to small business. Recent unlawful termination cases have taken nearly three years to be finalised and can often cost as much as $30,000. Unlawful termination cases are complex and legalistic and must be heard in the Federal Court, where both employers and employees must be represented by legal practitioners. This is a discriminatory unfair dismissal regime that is a particularly onerous burden for rural communities.

210. To understand the detrimental affect of the Work Choices Act we need to consider locational disadvantages such as: the range of industries operating in a region, mobility in and out of a region (especially for the young and the aged), the level of education in regional areas which influences job choice and the above average levels of unemployment.

211. The Work Choices Act is silent about regional inequalities, assuming that workplace bargaining will take place on a level playing field across Australia and any employee has a choice to accept new conditions or else 'take another job'. However as Dr Don Edgar has noted:

> *Choice is never decided by an individual – it arises from opportunities and structures available within and outside the family's geographical and cultural context.*[48]

The Impact on local economies in regional areas of the Work Choices Act

212. To assume that a single aggregate labour market can exist in regional areas is simplistic and damaging to the interests of employers and employees.

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[48] Edgar, Don 2005, *Family Impact Statement on 'WorkChoices' – the Proposed New Industrial Relations Regime* prepared for Unions NSW.

213. The Work Choices Act requires the AIRC to remove state based differences from awards. Currently state awards acknowledge the local economies and markets which employers and employees operate in. The abolition of state based differences in provisions to a 'one size fits all' model will result in increased costs, inflexible and rigid federal awards and substantial unfairness especially for regionally based businesses which operate only in local markets. This issue is discussed in more detail in Chapter 2(f).

Case Study: Broken Hill Disability Workers[49]

Proprietor threatened 30 employees of Silver Lea Care and Respite with the sack if they did not sign AWAs that would have reduced conditions and removed penalty and weekend rates. The new conditions cost Broken Hill workers around $200 a week.

The AWAs are offering different rates of pay for people doing the same work with the same experience. Some of the rates vary by as much as three dollars an hour.

Workers are concerned about the quality of care clients would receive with the workers on lower conditions and the conflict caused between staff.

Local disability care worker Mary Ellen-Crimp commented:

"My husband and I would have to leave town, a majority, many families, would have lost homes and cars."

214. Further impacting on local businesses is the complexity of the Work Choices Act. For example, under the Work Choices Act, preserved award terms and preserved notional terms for state awards will be exempt from the AIRC requirement to remove state based differences. This will result in the creation of two types of awards: those that contain differences and those that have had state based differences removed. This adds complexity and is confusing for employers and employees. Many small to medium business will have to seek external advice to read and interpret the Work Choices Act. As Peetz et al noted:

> *One of the goals of the Bill expressed by the Government is to reduce complexity in the system. The current Bill fails on this count. Instead the*

[49] The Guardian (2005) *Broken Hill confronts "choice"*, 8 June.

Bill adds a new layer of complexity to industrial relations. The Bill is 687 pages long. It amends an Act that is over 600 pages long. Its explanatory memorandum is another 565 pages. Many employers will struggle, we predict, with the complexity of the new regulatory proposals. Research tells us that many employees-especially those most disadvantaged in the labour market-already have limited knowledge about the industrial relations system and their rights within it. These changes will complicate workplace life, foster industrial litigation and further confuse many employees and employers. The arrangements are more complex, not less. This is not deregulation, it is increased regulation; but the increase in regulation does not benefit employees.[50]

215. The *Industrial Relations Act 1996 (NSW)* is concise and significantly shorter than the Work Choices Act. In contrast, the complexity of federal workplace relations regulation is demonstrated by the fact that the Work Choices Act and Workplace Relations Regulations, with accompanying explanatory memoranda, exceed 2,000 pages in length.

216. Regional and rural labour market issues demonstrate why the Work Choices Act will be detrimental to local economies. Data from the Australian Bureau of Statistics show that all but one regional area of New South Wales reports higher rates of unemployment than the state average. The overall unemployment rate for Sydney is 5% whereas for the balance of New South Wales there is a 7.3% unemployment rate. [51]

217. This demonstrates the dramatically fewer job options available in regional areas and the considerably smaller size of those labour markets particularly in the Richmond-Tweed and Mid-North Coast areas where the unemployment rate is among the highest in the state at 9.1%.[52] The Work Choices Act imposes a one size fits all solution on all of Australia's local markets, based on averages: average weekly earnings, average growth rate, average hours and average families. Clearly many rural areas do not fit into the federal government's average.

218. Regional employment figures also reflect the higher costs of participating in the labour market in regional areas with issues such as the costs of public transport and petrol, lower telecommunications service levels and the costs of technology coming into play.

219. Small businesses in rural and regional areas not only face the difficulties of geographical distance, they also experience difficulties in operating in small labour markets.

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[50] Peetz D & A Group of One Hundred and Fifty Academics (2005) *Research Evidence About the Effects of the 'Work Chocies' Bill, A Submission to the Inquiry into the Workplace Relations Amendment (Work Choices) bill 2005*, page 5.

[51] Australian Bureau of Statistics (2006), Annual Regional Labour Force Data March 2006 Quarter, Canberra.

[52] Ibid.

220. The impact and attraction of a known brand name moving into a regional area should not be underestimated as local employees view these businesses as providing opportunities for training and career advancement not usually available in small local businesses. This can leave local operators in a vulnerable position as big businesses and franchise operators undercut locally owned smaller businesses and force them out of the market, leaving them free to raise prices for goods and services due to reduced competition in the local market. These larger businesses may also import their own labour and therefore not provide any or further employment opportunities for local staff.

The Interaction between Welfare to Work and the Work Choices Act

221. The Work Choices Act impact on regional labour markets cannot be examined in isolation. It is the interaction between this legislation and the federal government's 'welfare to work' policy that enables a more accurate scrutiny of the anticipated outcomes.

222. A recent Australian Council of Social Service (ACOSS) report examines the regional distribution of people affected by the federal government's 'welfare to work' policy agenda. The research shows that those people living in regional Australia will be disproportionately affected by the Welfare to Work changes. After July 2006 new applicants for income support will be put onto a lower Newstart Allowance rather than existing pensions of the Single Parents Payment (PPS) and the Disability Support Pension (DSP). This is likely to have a disproportionate impact on rural communities given that:

- unemployment is higher in regional Australia, so many recipients affected by the policy would find it hard to avoid income loss by acquiring a full time job

- research suggests that by moving to a non metropolitan area, single parents on income support reduce their short term job prospects by half. However the main reason for moving is the unaffordability of housing in urban areas, especially once a family has split up.[53]

223. On 26 October 2005 the Council of Social Services of New South Wales noted that:

> *Many people have not finished high school, have been out of the workforce for a while and have children to care for or health problems to deal with. They need more education, services and support - not payment cuts and stricter penalties - if they are going to get jobs.*[54]

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[53] Australian Council of Social Service 2005, *Who is worse off? The regional distribution of people affected by the Welfare to Work policy* ACOSS Info 381 ACOSS, Strawberry Hills NSW.

[54] Council of Social Service of New South Wales (2005), *Welfare reforms to hit rural New South Wales hard*, Media Release, 26 October.

224. With little or no bargaining power, the risk of losing pension benefits will force the groups targeted by welfare to work into work with potentially substandard conditions, reducing their capacity to manage their illnesses and caring responsibilities.[55] The welfare to work and industrial reforms forcibly generate a labour supply for low paid jobs.[56] Creating a situation where the vulnerable in our society and those with caring responsibilities will be competing against each other for low paying jobs. These effects can only be exaggerated in rural areas where the unemployment rate is higher than in metropolitan areas.

Negotiating and Bargaining in Regional Areas

225. The promotion of individual contracts at the expense of collective bargaining is significant for employees in regional Australia where mobility between jobs is restricted. Many workers in small rural towns are likely to be employed by large overseas corporations that run huge agriculture, dairy, cattle and poultry industries; a formidable 'partner' in a supposedly equal negotiating position.[4] In addition the Work Choices Act has made jobs less secure as evidenced by the following case study.

[55] Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee into the Workplace Relations Amendment (Work Choices) Bill 2005 on behalf of the New South Wales, Queensland, Western Australia, Tasmania, the Australian Capital Territory, the Northern Territory, 9 November 2005 p.52.

[56] Briggs, C. 2005, *Federal IR reform: the shape of things to come* acirrt, University of Sydney p.76.

Case Study - Cowra Abattoir

The abattoir sacked 29 meatworkers and some were offered their jobs back at up to $200 less per week. As this was a rural area there were few job options in the area for these workers. Many workers would need to take the lower pay or look at relocating. These workers and many like them in rural communities are not in a strong or remotely equal negotiating position.

John Bornstein, a principal solicitor with Maurice Blackburn Cashman said:

> *"The purpose of this new clause in Work Choices is specifically to make it very easy for employers to sack workers on enterprise agreements and to replace them with cheaper labour, or to offer their jobs back on lower wages and conditions"*

The following is an extract from Workplace Express - Wednesday 31st May 2006

Cowra Abattoir sackings legal: leaked OWS report

The Cowra abattoir that tried to sack 29 workers then rehire some of them for less pay last month had acted lawfully, according to leaked preliminary advice from the OWS.

The Age newspaper today said the OWS report found the abattoir did not breach the Work Choices Act because the "dominant reason" for the proposed sackings was the company's viability, in accordance with s792. The section provides exemptions to the prohibition on companies sacking workers for reasons including their entitlement to an industrial instrument such as an award or agreement or trade union membership under s793.

The OWS found there was "no material difference" between the ordinary hours pay offered by the old award and the proposed new contract, according to The Age report, but unions have claimed workers would be worse off by $180-$200 a week.

OWS director Nick Wilson last night told a Senate estimates committee last night that his office had formed a "preliminary view" on the Cowra case, but he would not comment on it. He expected the report to be finalised in about a month and he thought "it would be impossible to avoid" making it public.

Australian Council of Trade Unions secretary Greg Combet agreed that the abattoir bosses had backed down as a result of government pressure, but said that the new laws *do* allow bosses to sack workers and rehire some at lower pay.

226. For rural employers moving from state to federal agreements, negotiating and bargaining in the Work Choices environment has heightened paper work, red tape and compliance costs for businesses. This issue is discussed in more detail in Chapter 2(f).

227. The farming sector provides an example of how the proposals will impact on regional industries. There are over 130,500 businesses in Australia undertaking agricultural operations that will be forced to navigate through the Work Choices Act's complex, confusing and costly transitional provisions until a decision is made on whether or not to incorporate[57]. These transitional arrangements may disrupt the cooperative and productive workplace relations of these small businesses and create heightened uncertainty.

228. The social impact of the Work Choices Act on employees in regional areas also cannot be underestimated. It is likely that employees will be bargaining not only with their employers but also competing against family members and friends for limited job opportunities.

229. For example the highest rates of female unemployment occur in medium townships (8.2%) and small rural towns (7.8%). Access to alternate jobs is particularly hard for women in rural areas where child care is scarce, transport costly and where partners are likely to be locked in to retaining jobs in one available industry.[58]

Case Study – Mobility

John is an unemployed worker who lives in a rural area in Queensland. John has been offered a job in tourism in a small town in New South Wales and, although he would prefer not to move, John needs the job. John relocates to the small town in New South Wales with his family.

On commencing his job, John is offered an AWA which requires that he give four weeks notice if resigning, but which allows John's employer to dismiss him without notice. After several weeks in the position, John is told that he is no longer needed by the business and is dismissed without notice, as permitted by his AWA. John is now left unemployed with his family in an unfamiliar town with limited employment opportunities. John may not be able to find a new job unless he relocates again.

[57] Australian Bureau of Statistics 2006, *Year Book Australia 2006* Cat.no.1301.0, ABS, Canberra.

[58] Edgar, Don (2005) *Family Impact Statement on 'Work Choices' – the proposed new Industrial Relations Regime prepared for Unions NSW,* November, page 35.

230. In recent years there has been a substantial increase in casual or temporary employment and more than one in four (27.9%)[59] of all Australian workers are casual workers. According to Australian Bureau of Statistics data, agriculture, forestry and fishing are among industries with a very high percentage (49%) of casual workers. In fact roughly half of workers in these industries are casual.[60] These industries are also among the top five most dangerous industries with 27 new compensation cases per 1000 employees each year.[61]

231. A report published by the Industrial Relations Research Centre at the University of New South Wales outlines the possible effects of the Work Choices Act on casual employment. The report highlights the significant consequences for rural areas which have a large number of casual workers.

232. The Work Choices Act makes it easier for employers to restructure work arrangements to encourage the use of more temporary workers. This denies employees the advantages and security of permanent positions. Also, the legislation makes it easier for an employer to change the status of an employee from permanent to casual. The stripping back of awards and minimum pay setting processes also means that loadings paid to casual workers may be diminished making them an even more affordable option.[62]

233. Casual workers are more likely to be under greater pressure in terms of competition for work and retention of that work.[63] Even with a casual loading, casual workers are paid 21% less than permanent workers and statistics show that 37% of all casual workers want more hours of work because they need the income.[64] Employees in rural locations with limited job opportunities may have no choice but to accept whatever casual work is on offer or face unemployment.

234. Regional and rural workers often experience reduced mobility due to their social and family circumstances. This potentially results in reduced turnover in the workforce and in turn may force younger workers to leave the local job market in search of work elsewhere.

235. Young people often move from small communities to larger regional centres or metropolitan areas for training and employment and do not return to bring the benefit of their skills and experience to smaller communities. Another significant trend, particularly in small coastal

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[59] Australian Bureau of Statistics 2006, *Year Book Australia 2006,* Cat no. 1301.0, ABS, Canberra, page 170.

[60] Ibid.

[61] McNamara, Maria 2006, *The Hidden Health and Safety Costs of Casual Employment: Key Findings and Recommendations,* Industrial Relations Research Centre, University of New South Wales.

[62] Ibid

[63] Quinlan, M., Mayhew, C. and Bohle, P. 2001, 'The Global Expansion of Precarious Employment, Work Disorganisation and Consequences for Occupational Health: A Review of Recent Research' *International Journal of Health Services* Vol.31 no.2 pp.335-414.

[64] Australian Bureau of Statistics 2005, *Employee Earnings, Benefits and Trade Union Membership August 2005* Cat.no.6310.0, ABS, Canberra.

townships, is the movement of low income families and people of pre-retirement age into these regional areas putting additional pressure on an already limited labour market.

236.Some key locational disadvantages in regional areas include:

- the range of industries operating in a region
- mobility in and out of a region (especially for the young and the aged)
- the availability of infrastructural services such as transport, childcare, education and training
- the level of education in regional areas which influences job choice
- drought and the environment
- above average levels of unemployment
- and an ability to access to support services.

237.In recognition of these disadvantages the New South Government has invested heavily in regional and rural communities resulting in:

- improved access for country patients to health care services by extending the Isolated Patients Travel and Accommodation Assistance
- $32 million to secure CountryLink's future with retention of all services and refurbished railway carriages
- $2.6 million allocated to rural and farm safety to prevent injuries caused by accidents such as entanglement in farm machinery
- 'Remote Area Fire-fighting Teams' (or fire jumpers) introduced with 150 highly trained RFS volunteers and a further 50 volunteers to be trained.
- tenders awarded for $54 million pipeline and water management system for Darling River on the Anabranch, saving up to 47 gigalitres of water each year
- support for rice growers resulting in the retaining of the single export desk against the federal government's imposed deregulation of NSW's highly efficient rice industry
- support for local meat producers 'Fair Dinkum Food' campaign resulting in mandatory country of origin labelling requirements for pork products. The NSW Government also lobbied on behalf of fruit and vegetable growers to ensure no watering down of draft proposals for mandatory labelling

- drought conditions have improved across much of NSW, but measures to support farmers and rural communities through the recovery continue. These include drought support workers, rural financial counsellors and interest rate subsidies. Transport subsidies continue to be available for those areas still in drought, and

- support for communities affected by storms and bushfires through natural disaster relief assistance.

238. The Current and Future Skills Needs Rural Skills Australia Submission number 10 – 14 February 2003 commented:

> *The operation of the New Apprenticeship programme, with varying levels of State/Territory Government support and supplementary funding assistance, has provided an excellent mechanism to assist industry and individual employers improve their capacity to train new entrants and upskill existing workforce.*[65]

239. The Work Choices Act does not recognise the uniqueness of regional and rural areas. Locational disadvantage has been well documented and must be considered in any changes to industrial relations laws. In particular, consideration must be given to the relative size in any region of the indigenous population, the number of households reliant on social security, the range of industries operating in any region, mobility in and out of a region. These issues will significantly alter the meaning of 'flexibility' and 'choice' for some employees and employers.

The Availability of Skilled Staff in Regional Areas

240. Rural and regional NSW is experiencing a skills shortage. Employees in these areas are working large amounts of overtime due a lack of availability of qualified tradespeople. This often has a negative affect on family and social life[6]. This problem is exacerbated by geographical isolation resulting in limited transport and the movement of young, skilled workers to metropolitan areas. Due to the lack of skilled labour businesses may be forced to relocate their operations to different regions. This in turn will have a ripple effect on the economy of the whole community[7] as noted by Tony Catanzaraiti:

> *The economic and social aspects of skills shortages in rural and regional NSW are profound – many local towns face the challenges of loss of income, loss of essential services and loss of young people to metropolitan areas.* [66]

241. Recognising the skills shortages of regional and rural, the NSW Minister for Regional Development, the Hon David Campbell MP, initiated the *Inquiry into Skills Shortages in Rural and Regional NSW.*

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[65] Rural Skills Australia (2003), *Submission to the House of Representatives Inquiry into Current and Future Skills Needs*, February, page 4.

[66] New South Wales Parliament Legislative Council Standing Committee on State Development (2006), *Inquiry into Skills Shortages in Rural and Regional NSW*, Sydney.

This inquiry examined the impacts on local communities, businesses and industries of the skills shortage. Tony Catanzariti, the Chair of the Legislative Council Standing Committee in State Development, acknowledged the importance of training in addressing the skill shortage:

> *The vocational education and training system is the key to addressing the long term skills shortages in the labour markets. The Committee in particular recognises the importance of the TAFE NSW in responding to the training needs of the industry, and makes recommendations to increase the flexibility.*[67]

242. The Committee undertook an extensive round of public consultations and investigated the evidence about the skills shortages in different areas of the state. State investment in the rural and regional community is not new. In 1999 the former Premier Bob Carr set up the Regional Co–ordination Program (RCP) harnessing the capacities of agencies and communities to respond to these broad and complex issues. This resulted in initiatives across 37 different agencies. A particular strength of the RCP has been its capacity to lead and support local initiatives including:

- job creation and economic development in places facing particular challenges such as the Hunter Region, Wollongong, Bega, Lithgow and Greystanes
- local community development in Kempsey, Moree, Bourke, Windale, Mt Druitt
- a more integrated approach to delivering services in Kyogle, Gunning, Armidale, Murwillumbah, and
- a whole of Government approach to managing the environment and natural resources involving local government and community participation in the Lake Macquarie Estuary, Menindee and Willandra Lakes.

243. In marked contrast the Work Choices Act does not recognise the challenges facing regional and rural committees and proposes no investment to aid these skills shortages. Instead the Federal government has demonstrated their lack of regional and rural understanding by using their Welfare to Work policies to remove existing assistance, the federal government recently said:

> *The federal budget is providing $17.9 million over four years to help fund a progressive lifting of remote area exemptions from activity testing for income support recipients in remote communities as a result, income*

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[67] New South Wales Parliament Legislative Council Standing Committee on State Development (2006), *Inquiry into Skills Shortages in Rural and Regional NSW*, Sydney.

support recipients in the communities will be required to look for work or other approved activities.[68]

244. Previously exemptions were available for activity tests in regional and rural areas in recognition of higher unemployment, lack of job mobility and skills shortages. However, under the welfare to work changes, this exemption will be removed and regional and rural workers will be treated same as metropolitan workers. It is unclear how this will be implemented:

- Will DEWR phase in the removal of remote area activity test exemptions for income support recipients?
- How will DEWR implement the removal of remote area activity test exemptions for income support recipients?
- On what basis will DEWR determine the order in which remote areas will be targeted for the removal of the remote area activity test exemptions for income support recipients?
- What actions will DEWR take to ensure that income recipients whose activity test requirements have in the past been reduced or nil, will be able to meet their new activity test obligations?
- According to the 06/07 Budget Paper 2 - Part 2: Expense Measures Families, Community Services and Indigenous Affairs, the Government will provide $17.9 million over four years to fund the progressive lifting of remote area activity test exemptions for income support recipients. How will this funding be spent?
- What measures will be used to assess the success of this budget expenditure for 'enhanced opportunities for employment and participation in remote communities' and over what period of time?
- Which organisations will likely receive this funding?
- What types of programs will be a priority for this funding? Which agency will administer this funding - Centrelink or DEWR or another?

245. Once again there is no acknowledgment of the well documented issues facing rural and regional communities. The simplified approach proposed in the federal budget will encourage rather than discourage the skills migration from areas that are clearly in need.

Accessibility of Information on the Work Choices Act and Service Delivery in Regional Areas

[68] 2006/07 Budget Paper No 2 Part 2 – *Expense Measures – Families, Community Services and Indigenous Affairs.*

246. One of the strengths of the state industrial relations system is its responsiveness to regional needs. The NSW Industrial Relations Commission regularly sits in regional areas and is supported by a comprehensive education and compliance campaign.

247. To promote fair and equitable workplaces and to assist employers with their responsibilities the Office of Industrial Relations employs a team of 110 inspectors throughout the state ensuring compliance with state awards and maintaining a level playing field between competing businesses.

248. Due to the Work Choices Act the NSW compliance will no longer be able to assist rural and regional businesses which are 'constitutional corporations'. These businesses will be reliant on the compliance service offered by the federal government. The federal government currently employs only 130 inspectors to cover all workplaces across Australia. This is significantly fewer compared to the 110 state inspectors who work exclusively in New South Wales. The federal government has announced that it will appoint a total of 200 inspectors based in 28 as yet unspecified locations to administer the Work Choices Act across Australia. These inspectors are to cover about 1.2 million businesses throughout the country, including 465,000 in New South Wales.

249. To date, in this financial year the Office of Industrial Relations has conducted 12,500 targeted workplace inspections and 2,500 complaint-based investigations covering a total of 47,560 workers across the state. During this period 3,400 employers were found breaching New South Wales industrial relations provisions, and 1,200 were found to be underpaying staff. Please refer to Table 2 for further information.

250. This is in stark contrast to the federal system. Each year the Commonwealth receives about 5,000 complaints from workers who have been short-changed, yet last year it prosecuted just seven employers for illegal behaviour.

251. In 2005/06, it is anticipated that the Office of Industrial Relations will conduct approximately 12,500 targeted workplace investigations, and 2,500 complaint-based investigations. A similar workplace compliance program is being planned for 2006/07. [69]

252. The Office of Industrial Relations also runs a series of public seminars available in locations throughout the state to both employers and employees. Almost 2000 people in regional New South Wales attended these seminars in the period January 2005 – May 2006.

[69] Office of Industrial Relations – internal statistics

253. The NSW government has also invested money and resources in education and compliance for vulnerable workers in rural areas. The Aboriginal and Torres Strait Islander Unit within the Office of Industrial Relations has reached either by email, telephone or personal contact, over 1500 employees, coordinators and committee members. The Workplace Advice Unit has reached over 1,300 attendees in 14 different regional locations in just over a year.

254. Table 1 shows the regional distribution of investigations commenced by the Office of Industrial Relations in the period 1 July 2001 to 31 March 2006.

Region	All OIR Invest. Total	All OIR Invest. %	Complaint-based Invest. Total	Complaint-based Invest. %	Targeted Invest. Total	Targeted Invest. %
Sydney Metropolitan	**28,924**	**51.2%**	**7,989**	**50.7%**	**20,935**	**51.4%**
Central Sydney	14,185	25.1%	3,876	24.6%	10309	25.3%
Northern Sydney	2,052	3.6%	485	3.1%	1567	3.9%
South West Sydney	3,472	6.1%	829	5.3%	2643	6.5%
Southern Sydney	2,534	4.5%	510	3.2%	2024	5.0%
Western Sydney	6,681	11.8%	2,289	14.5%	4392	10.8%
Regional NSW	**26,451**	**46.8%**	**7,159**	**45.4%**	**19,292**	**47.4%**
Blue Mountains	560	1.0%	97	0.6%	463	1.1%
Central Coast	2,103	3.7%	832	5.3%	1271	3.1%
Hunter	5,244	9.3%	1,996	12.7%	3248	8.0%
Mid North Coast	714	1.3%	264	1.7%	450	1.1%
North Coast	2,606	4.6%	579	3.7%	2027	5.0%
Northern Rivers	2,636	4.7%	587	3.7%	2049	5.0%
New England	1,481	2.6%	293	1.9%	1188	2.9%
North West NSW	611	1.1%	208	1.3%	403	1.0%
Central West NSW	3,019	5.3%	634	4.0%	2385	5.9%
Western NSW	239	0.4%	45	0.3%	194	0.5%
Illawarra	2,231	4.0%	490	3.1%	1741	4.3%
Shoalhaven	498	0.9%	147	0.9%	351	0.9%
South Coast	954	1.7%	155	1.0%	799	2.0%
Southern Highlands	614	1.1%	190	1.2%	424	1.0%
Murrumbidgee Irrigation Area	838	1.5%	140	0.9%	698	1.7%
Southern NSW	2,103	3.7%	502	3.2%	1601	3.9%
Interstate/not elsewhere recorded	**1,086**	**1.9%**	**623**	**4.0%**	**463**	**1.1%**
TOTAL	**56,461**	**100.0%**	**15,771**	**100.0%**	**40,690**	**100.0%**

255. Table 2 summarises the outcome of investigations completed by the Office of Industrial Relations in the period 1 July 2005 to 31 March 2006.

Region	All OIR Invest. Total	All OIR Invest. %	Complaint-based Invest. Total	Complaint-based Invest. %	Targeted Invest. Total	Targeted Invest. %
No Breach Identified	1,644	17.3%	93	6.1%	1551	19.4%
Compliance Achieved/Matter Settled	1,604	16.8%	679	44.8%	925	11.6%
Employer Cautioned	3,061	32.1%	20	1.3%	3041	38.0%
Employer Fined/Prosecuted	134	1.4%	73	4.8%	61	0.8%
Referred to another agency	89	0.9%	89	5.9%	0	0.0%
Outside NSW jurisdiction	532	5.6%	85	5.6%	447	5.6%
Employee withdrew complaint	192	2.0%	192	12.7%	0	0.0%
Employer Bankrupt	70	0.7%	66	4.4%	4	0.0%
Other	2,195	23.1%	217	14.3%	1978	24.7%
TOTAL	**9,521**	**100.0%**	**1,514**	**100.0%**	**8,007**	**100.0%**

256. In comparison, in the 2006-07 Budget the federal government provided an additional $7.3 million in 2005-06 for educational activities Australia-wide directed at assisting employers **only** with the application of the industrial relations reforms. There was no on-going funding allocated for educational activities specifically designed for employees, and no direct funding for targeted educational activities in regional areas.[70]

257. In the recent federal budget the Department of Employment and Workplace Relations announced an action plan to progressively increase employment opportunities in regional areas. However specific details of this plan are as yet undefined.[71] Clearly services and support for regional businesses in the federal system will be extremely limited, and virtually non-existent for employees.

[70] 2006-07 Budget Paper No.2 – Part 2: Expense Measures - Employment and Workplace Relations

[71] 2006-07 Budget Paper No.2 – Part 2: Expense Measures - Family, Community Services and Indigenous Affairs pp.19-20.

2c. The impact on gender equity including pay gaps

258.Pay equity ensures equal payment and remuneration for adult males and adult females doing the same class of work or work of equal value. The significance of the concept lays in the fact that, historically in Australia and internationally, the rates of pay of males and females have not been equal even where the same class of work had been performed by both.

259.The gap between women's and men's earnings reflects a number of distinct, yet complex and interrelated, factors. These factors may be usefully divided into two categories: equal pay factors and equal opportunity factors.

Equal pay factors which contribute to the earnings gap

260.The undervaluation of women's skills reflects a range of social, historical and industrial factors. Prejudices regarding women as employees and the nature of their skills have interfered with objective assessment of women's work. Women's skills are often viewed as `natural attributes' or social skills, rather than industrial or workplace skills. In addition, the work value criteria used by industrial tribunals in some cases have tended to value features which are characteristic of work performed predominantly by men.

261.Women workers receive a significantly lower level of discretionary payments, particularly over award and bonus payments, than do men. Such payments may also include profit sharing, service increments and commissions.

262.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 payments are not traditionally offered.

Equal opportunity factors which contribute to the earnings gap

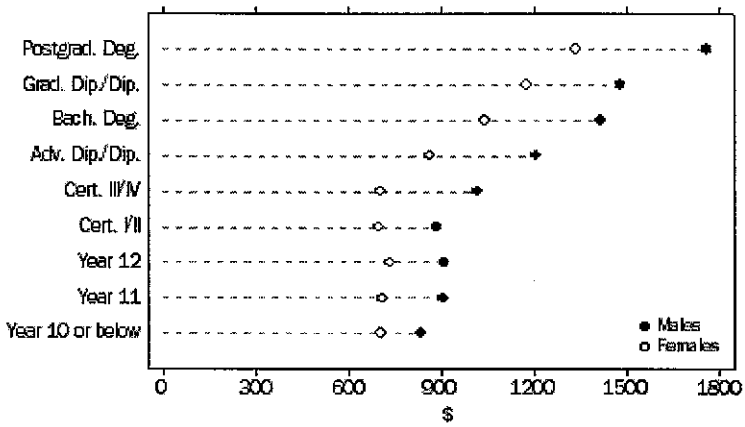
263.The reasons for women's concentration in particular occupations and industries include societal expectations regarding the role of women as carers as well as workers, and in some cases, legislative restrictions on the employment of women in certain areas.

264.The lack of formal recognition of women's skills (which are often developed outside the formal education and training system), and the concentration of women in traditional areas of training, contribute to the undervaluation of women's skills. Further, women realise less financial gain from education regardless of the level of qualification achieved, as the figure below illustrates.[72]

[72] ABS 6278.0 - Education and Training Experience, Australia, 2005.

265. At the lower levels of the labour market, returns on education and training are low. Whereas years of formal training can explain white males reaching professional positions with associated high pay, women realise comparatively smaller gains in wages from education.[73] Women's concentration in low-paid, low-skilled jobs and limited mobility options is unlikely to see these sources of pay inequality rectified under the Work Choices Act.

Figure 1
Full-time employees of incorporated enterprises aged 15+
Average weekly earnings by level of highest educational attainment



Source: ABS 6278.0 - Education and Training Experience, Australia, 2005

266. Working women also generally carry a greater share of the responsibility for caring for family members than working men.[74] These women may have their earnings affected because they:

- may work in jobs where flexible working arrangements are not available or may not be able to work full-time, take on extra responsibilities, access training and career development opportunities
- may have broken employment patterns due to career breaks taken to deliver and care for children, or care for other family members, which are likely to result in increasing their precarious attachment to the workforce, with a negative impact on career progression
- may be subject to employers' notion of 'the ideal worker' and so have negative perceptions about the effect of family responsibilities on work performance, attitude and loyalty to the organisation, which in turn may affect remuneration and promotional prospects.

[73] Brosnan, P 2005, *Can Australia Afford Low Pay?* Griffith University, p. 3.
[74] ABS 1370.0 – Measures of Australia's Progress, 2006.

Women's concentration in part time and casual employment

267. The availability of part time work is advantageous to many women with family responsibilities. Despite this, women's concentration in part time and casual employment has a number of pay equity implications, including:

- more precarious and lower-remunerated work due to the absence of quality part-time work following parental leave
- less access to training and more limited opportunities for advancement and career development than full-time employees
- lower levels of unionisation and participation in union structures than full time employees
- in the case of casual employment, no permanency and limited access to standard employment benefits such as paid holiday and sick leave, and long service leave.[75]

268. The concentration of women in part-time and casual work in Australia is clearly demonstrated by the evidence. Only 35% of full-time employees are female. On the other hand, females represent 71% of all part-time employees[76] and 67% of part-time casual employees.[77]

269. Part time work and casual work is often not structured to meet family needs but rather to suit the employer. Many women have reported increases in unsociable hours, split shifts and rotating rosters over the last decade.[78]

270. Part-time employees have been found to experience decreased likelihood of promotion, poorer access to training and career advancement compared to full-time employees.[79] Part-time jobs have been found to 'provide less experience and teach less responsibility' than full time jobs, which leaves part-time workers further behind[80] and perpetuates gender pay inequity.

271. The Work Choices Act invalidates many pre-existing provisions relating to casuals, in particular, provision in awards for conversion from casual employment to another form of employment after a certain period of time. This removes the positive step taken by the New South

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[75] Baird M 2006 'The Gender Agenda: Women, work and maternity leave' in *Rethinking work: Time, Space, Discourse*, ed. M Hearn and G Michelson, Cambridge University Press: Melbourne pp. 39-59.

[76] ABS 6202.0 - Labour Force, Australia, Apr 2006

[77] ABS 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, Aug 2005 Labour force 6202.0 April 2006.

[78] Pocock, B, *The Impact of The Workplace Relations Amendment (Work Choices) Bill 2005 on Australian Families* , paper prepared for Industrial Relations Australia, November 2005, pp.10-11

[79] Harley, B and Whitehouse, G 2001, 'Women In Part-Time Work: A Comparative Study Of Australia And The United Kingdom', *Labour & Industry* vol.12 no.2 p. 47.

[80] Tilly, C 1996, *Half a job: bad and good part-time jobs in a changing labour market*, Temple University Press: Philadelphia, p. 55.

Wales Industrial Relations Commission in its Secure Employment Test Case which supports casual workers to improve their working conditions and employment security by having the right to convert their casual status to permanent full-time or part-time employment after a certain period of time. [81]

272. The Work Choices Act also neutralises the Family Provisions Test Case provisions which provided for a 'right to request' a range of work and family conditions.[82] This will have the effect of increasing broken workforce attachment and diminished remuneration.

Quantifying the pay gap

273. Women in New South Wales working full-time earn about 85% of men's average weekly wages, or $967 compared to $1144 for men.

274. Accounting for all workers, including those employed part-time or casual, the gender pay gap widens considerably. In New South Wales women's average weekly total earnings are $697, or 69% of the $1005 received by men. Nationally, the gender pay gap is 85% for full-time adult ordinary time earnings and 65% for all employees' total earnings.[83]

275. Awards are the primary source of determining pay for 24% of all female employees[84] and by occupation, industry, and employment status, women are most likely to be concentrated in jobs affected by minimum wage regulation.[85]

Mechanisms to address pay inequity

276. Prior to the introduction of the Work Choices Act, mechanisms existed in both the state and federal jurisdictions to address the systematic causes of the gender-based pay gap.

277. In June 2000, the NSW Industrial Relations Commission made a new Equal Remuneration and Other Conditions principle to enable parties to seek variations to awards by establishing that the rates in the award are undervalued on a gender basis. The principle followed a recommendation of the 1998 NSW Pay Equity Inquiry that a new principle to address undervaluation be made.

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[81] Secure Employment Test Case [2006] NSWIRComm 38.
[82] Family Provisions Case 2005 [2005] NSWIRComm 478
[83] ABS 6203.0 Average Weekly Earnings, February 2006
[84] Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee into the Workplace Relations Amendment (Work Choices) Bill 2005 on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, The Australian Capital Territory, The Northern Territory, 9 November 2005, p. 56.
[85] Rubery, J, Grimshaw, D and Figueiredo, H 2002, 'The Gender Pay Gap and Gender Mainstreaming Pay Policy', presented at the European Work and Employment Research Centre, UMIST, Manchester, cited in *Research Evidence About the Effects of the 'Work Choices' Bill A* Submission to the Inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005,* authored by A Group of One Hundred and Fifty Australian Industrial Relations, Labour Market, and Legal Academics, November 2005, p. 33.

278. Accepting evidence of undervaluation based on sex and noting the significant human rights framework of the Industrial Relations Act 1996, the Commission agreed to rescind the existing 1973 Equal Pay Principle and establish the Equal Remuneration and Other Conditions Principle, creating a framework for parties to bring pay equity cases before the Commission.

279. The Equal Remuneration and Other Conditions Principle seeks to remedy the effect of the historical gender-based undervaluation of work, particularly in feminised industries, and the consequential gap in women's earnings. The Principle provides the mechanism to achieve pay equity without the traditional need to compare women's work with men's, by ensuring alteration of wage relativities is based upon the gender-neutral assessment of work, skill and responsibility required, including the conditions under which the work is performed.

280. The Principle has delivered real outcomes in addressing the failures of the labour market to deliver pay equity to women. In March 2002 the NSW Commission found public sector librarians' and archivists' work had been undervalued on the basis of gender, awarding significant pay rises: Senior Library Technicians for example were awarded a 26% pay increase. In February 2004 the Commission delivered local government community service workers reduced weekly hours of work (from 38 to 35) without any loss of pay. Most recently, in March 2006 the Child Care Unions Pay Equity Case [86] raised child care workers wages between $70 and $166 per week depending on qualifications and experience. Decisions such as these, and the equal remuneration principle itself, have set standards for other states and territories to follow.

281. Prior to the commencement of the Work Choices Act, the AIRC also set minimum wages and wage relativities through the award system on the basis of fairness and equity. The award system provided a systematic mechanism for addressing pay equity.

282. The AIRC has been the 'source and forum for all recent advances on work and family standards' and in recent years, it has been an active function of the AIRC and the state commissions to hear employees contest their employer's application of work and family provisions. The AIRC is required to prevent discrimination against workers who have family responsibilities, and to help workers reconcile their work and family responsibilities, under the Family Responsibilities Convention. Under the Work Choices Act the scope for action by the AIRC family-friendly provisions is greatly reduced, affecting most significantly those outside of collective agreements and vulnerable groups in the labour

[86] Liquor, Hospitality and Miscellaneous Workers Union, www.lhmu.org.au.

market, such as women, who are least able to win such advances alone.[87]

Impact of the Work Choices Act

283. The 1998 NSW Pay Equity Inquiry concluded that the collective industrial system provides the most effective means to rectify pay equity. A primary consequence of enterprise bargaining has been increased wage dispersion. Continued and increased decentralisation of wage determination under the Work Choices Act will diminish Australia's record for addressing the gender-based pay gap.

284. The Work Choices Act, however, has significantly diminished the capacity of the NSW Commission and the AIRC to hear pay equity claims. In particular the AIRC is still able to hear pay equity claims under the Work Choices Act although it no longer has the capacity to makes orders regarding these claims. State tribunals can no longer make equal remuneration for work of equal value orders in respect of employees covered by the federal jurisdiction (section 16).

285. At the same time, the Work Choices Act offers no systematic means by which to investigate or redress pay inequity, or to make determinations based on the principle of pay equity and work value in the federal jurisdiction. The Work Choices Act removes the power of the AIRC to make orders for employees, or to vary federal awards wages and classifications operating, in incorporated enterprises.

286. The central role the AIRC and the NSW Commission have played in addressing and redressing pay equity is not matched by the Australian Fair Pay Commission (AFPC). The Work Choices Act provides no mechanism by which the Australian Fair Pay Commission may hear pay equity or work value applications or make wage determinations based solely on pay equity principles.

287. Under s222(1)(a) of the Work Choices Act the AFPC is required to 'apply the principle that men and women should receive equal remuneration for work of equal value' when adjusting wage rates and classifications. The AFPC has no mechanism to achieve that objective and no mandate to ensure its decisions do in practice deliver equal remuneration for work of equal value.

288. The Work Choices Act provides no process by which the AFPC may hear claims or cases for equal remuneration or work value, nor does it provide for any challenge or appeal of the AFPC's application of pay equity principles in its decisions.

289. Transparency of process is a crucial means by which the veil on gendered wage decisions made by institutions and organisations may

[87] *The impact of the Workplace Relations Amendment (Work Choices) Bill 2005 (or "Work Choices") on Australian Working Families*, a paper prepared for Industrial Relations Victoria, November 2005.

be lifted. The lack of transparency and access to the AFPC exacerbates the resolution of pay inequity.[88]

290. Without a centralised scheme through which to address pay inequity, gender discrimination in the industrial relations system is permitted to fragment and disperse.

291. Given the AFPC has no capacity to hear equal remuneration or work valuation applications, and there will be no method to consider the systemic sources of gender pay gaps, the only possible redress of pay inequity will be in an individual complaint based process. Over time, the gap could be expected to grow for low-income workers compared with those in stronger bargaining positions and workers covered by state awards.

292. Award classification structures and the non-gendered assessment and valuation of skill and reward is intrinsic in addressing and resolving pay inequity.[89] Reducing occupational classifications and salary points by rationalising awards reduces the skill-based career paths built into the current system and the way in which these career-paths help to improve the gender pay gap.[90]

293. It is women who will lose most from changes in the method and location of wage setting under the Work Choices Act.

Individual bargaining and pay equity

294. The gender pay gap differs according to the wage setting method. The gap is less for employees whose pay is determined by awards and greater for employees whose wages are negotiated through individual and collective agreements.[91]

295. Conditions and entitlements which help employees balance their work and other responsibilities are particularly volatile to individual bargaining. Women carry a disproportionate responsibility for caring, and family and household responsibilities[92] which is likely to increase as the population ages and older family members require care over longer life spans. Women's unpaid work responsibilities affect their bargaining power, and inform the conditions for which they bargain.

296. When women are forced to negotiate from the reduced position of the new Australian Fair Pay and Conditions Standard under the Work Choices Act, they face the prospect of being forced to trade away pay and other conditions to obtain provisions such as leave for family purposes or flexible hours to meet these responsibilities.

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[88] Submission of the New South Wales Government to the Federal Award Review Taskforce, 3 February 2006, p.15.
[89] Submission by CPSU, The Community and Public Sector Union (PSU and SPSF Groups) to the Award Review Taskforce, January 2006, p.26.
[90] Human Rights and Equal Opportunity Commission submission to the Award Review Taskforce, p.4.
[91] Todd, T., & Eveline, J., (2004). *Report on the review of the gender pay gap in Western Australia*, November, p. 19.
[92] ABS 1370.0 – Measures of Australia's Progress, 2006

Table 2: Family friendly provisions in AWAs

Provisions	% of sample AWAs (2002-2003)*	% of sample AWAs (2004)
Paid maternity leave	8	2
The right for an employee to request part-time work	1	2
Job sharing	1	<1
Home-based work	2	0
Family responsibilities	49	Unavailable#
Paid family leave (inc. paid maternity leave)	62	40
Unpaid family leave	10	24

297. Table 2 provides an indication of the difficulties women on individual agreements have when negotiating family friendly provisions in their employment contracts.[93]

298. It is of particular concern to note that while 46% of all federal certified agreements contained paid maternity leave provisions[94], such provisions were only included in only 8% of AWAs in 2002/2003 and in just 2% of AWAs in 2004.

299. The removal of the no disadvantage test from agreement making under the Work Choices Act can be expected to produce bargaining outcomes that are detrimental to women's pay and conditions.

300. Other aspects of the Work Choices Act will also directly impact on the capacity for women, particularly those in low skilled, low paid, and highly casualised industries. These aspects include the removal of protection from unfair dismissal, the capacity for employers to pressure workers to sell off up to two weeks of their 'minimum' annual leave allowance and reduced transparency in the agreement making process.

301. Weaker safety net standards, the removal of agreement standards that lock in overtime, penalty rates, public holidays and other long established minimal conditions, and more individualised bargaining, are all likely to lead to lower incomes for marginalised workers such as low paid women in casual jobs[95] which will negatively affect the gender pay gap, and widen gender pay inequity.

302. The Work Choices Act makes it easier for employers to force employees onto AWAs. Jobs offers can be conditional on accepting an

[93] Senate Employment, Workplace Relations and Education Legislation Committee, 2004-2005 Additional Senate Estimates Hearing 17 February 2005, Questions on Notice, W160-05.

[94] Statistics provided by the Department of Employment and Workplace Relations (DEWR) for December 2005 quarter.

[95] B. Pocock, *The Impact of The Workplace Relations Amendment (Work Choices) Bill 2005 on Australian Families*, paper prepared for Industrial Relations Australia, November 2005.

AWA, and existing collective agreements can be terminated unilaterally by the employer, reducing the bargaining position of employees to just that of the five minimum standards of the Fair Pay and Conditions Standard. Employees who were previously covered by state awards can be locked out of their workplace with just three days notice, with the employer offering a collective, non-union agreement that contains only the five minimum standards.

303. Award rationalisation carries the risk of directly or indirectly discriminating against women, and other marginalised labour groups.[96] The Award Review Taskforce (ART) has the job of recommending to the federal government ways of rationalising and simplifying the wage and classification scales in awards. While the Taskforce has not ruled out the application of Australian Pay and Classification Scales on a common rule basis, it is likely a common rule application would be limited to certain sectors or types of work.

304. The New Zealand experience shows that our increasingly individualised bargaining system will continue to deliver gendered outcomes. In the first two years of bargaining under the Employment Contracts Act 1991, men's wage rates increased at a faster rate than women's while in the third year women's and men's wage rates moved together.

305. Men were significantly more likely to break free of traditional wage relativities and experience large wage increases (over 4%) than women. Women meanwhile were significantly more likely to be working under contracts where penalty and overtime rates had been removed or reduced than men.[97]

306. On the most recent national figures, women employed under AWAs earned 11% less than women on collective agreements. Casual employees working under AWAs earned 15% less than casual workers engaged under collective agreements. Part-time workers employed under AWAs were much worse off than casuals employed under the same instrument – receiving 25% less pay than part-timers under collective agreements.[98]

307. A premise of the Work Choices Act and the individualised bargaining system is that labour is mobile and that this mobility will temper employers' interests in driving down the wages and conditions they offer, as those looking for work take their labour elsewhere if not satisfied by the conditions offered.

308. Job mobility however assumes a discrete unit of labour, but the increasing number of workers with caring responsibilities (71% of

[96] Human Rights and Equal Opportunity Commission submission to the Award Review Taskforce, p.4.
[97] Hammond and Harbridge 1993 cited in Hince, K., & Harbridge, R. (1994). "The Employment Contracts Act: An Interim Assessment", *New Zealand Journal of Industrial Relations* 19(3):235-255.
[98] ABS 6306.0 – Employee Earnings and Hours, Australia, May, 2004

primary carers are women[99]) is a factor of connectedness. Expectations of mobility and the reality of connectedness with caring are fundamental policy contradictions. The Work Choices Act does not address this contradiction in any systematic way. By definition those with caring obligations have less flexibility to negotiate their working lives, reducing their bargaining power and limiting their opportunity to participate in full-time, ongoing work, permanent, or more highly skilled work.

309. There is no established link between low paid work and upward mobility, or between casual employment and permanent employment.[100] No 'stepping stone' effect from low paid or casual employment to ongoing or permanent employment can be demonstrated for women generally; married women are at even greater risk of churning between casual jobs and unemployment.[101] Since 1992, the proportion of people who have been in their current job for less than one year has increased.[102]

[99] ABS 1370.0 – Measures of Australia's Progress, 2006

[100] Watts, M and Mitchell, W 2006, *Wages and Wages determination in Australia 2005,* Working Paper No. 06-01, Centre for Full Employment and Equity, University of Newcastle, Callaghan NSW.

[101] Productivity Commission 2006, *The role of non-traditional work in the Australian labour market,* Research Paper, May.

[102] Australian Bureau of Statistics 2004, *Year Book Australia,* cat. no. 1301.0, ABS, Canberra.

Case Study

Lydia is a 57 year old woman working part-time in a regional outlet of a national soft goods retailer. She is employed under the Shop Employees State Award but has been offered an AWA.

Under the state award Lydia is paid $14.285 per hour; annual leave loading of 17.5%; penalty rates of $17.856 per hour for working Saturdays and after 6pm for Thursday night shopping; $21.427 per hour on Sundays; $35.712 for public holidays, and overtime pay for any day she is required to work when she has not already been rostered at $17.856 per hour.

Under the AWA she would be paid $14.405 per hour, or 2 cents per hour more, but would lose the penalty and overtime loadings, including those for public holidays, which she would continue to be required to work.

If Lydia works 20 hours per week, including a shift from 9pm on Thursdays and a four hour shift on Saturdays under the award, she earns $310.69 per week or $16,155.88 per annum (without taking into account any other allowances, annual leave loading, or possible overtime). If Lydia were to work the same 20 hours per week at the hourly rate offered in the AWA she would earn $286.10 per week or $14,877.20 per annum, a difference of at least $1278.68 per year.

The AWA Lydia has been offered has a five year lifespan but does not provide for any pay rise over the term of its life. Under the award, each year Lydia would have received an annual pay rise consistent with the positive adjustment made by the New South Wales Industrial Relations Commission in its State Wage Case. Last year through the state award system Lydia received a pay rise of $9 per week or $468 per year, based on the 2005 $17 positive state minimum wage adjustment.

As an existing employee, Lydia has the choice to accept the AWA offered to her or remain working under the Shop Employees State Award. If she were seeking work with her employer as a new employee, should would have no choice but to accept the AWA on offer.

Australia's international obligations

310. A principal object of the Work Choices Act is to 'assist in giving effect to Australia's international obligations in relation to labour standards'.[103]

311. Australia is a signatory to numerous international instruments supporting the labour standard of gender-equal remuneration: the International Labour Organisation's C100 Equal Remuneration Convention, 1951, concerning equal remuneration for men and women workers for work of equal value and C111 Discrimination (Employment and Occupation) Convention, 1958, concerning discrimination in respect of employment and occupation; the United Nations Convention on the Elimination of all forms of Discrimination Against Women, of which Article 3 stipulates parties undertake measures to guarantee women their human rights and fundamental freedoms on a basis of equality with men, with particular mention of economic equality; and

[103] Workplace Relations Act (WorkChoices) Amendment Act 2005, section 3(n).

the International Covenant on Economic, Social and Cultural Rights of which Article 7 requires member parties to recognize the right to fair wages and equal remuneration and guarantee women's working conditions are not inferior to men.

312. The Work Choices Act decentralises wage setting, stipulating centralised adult minimum wages should be determined at a price to encourage individual bargaining. Women and other vulnerable labour market groups such as Indigenous people, people with disabilities and those with caring obligations are not adequately protected, making equal remuneration for work of equal value difficult to achieve and even more difficult to enforce. In this respect the Work Choices Act does not support the achievement of pay equity, or the prevention of other forms of discrimination against vulnerable labour market groups, despite it being a stated object of the Act.

2d. the impact on balancing work and family responsibilities

313. Parents are an invaluable part of the Australian labour force. If Australia is to continue to be internationally competitive, women and men must have the opportunity to stay in the workforce when they decide to start a family.

314. The fundamental bases for the Work Choices amendment, as described in the accompanying Explanatory Memorandum, was that it would

> *carry forward the evolution of Australia's workplace relations system to ...balance work and family life....*[104]

and yet none of the description of the Act's reforms that follows allows for the evolution of workplace conditions that will bring balance to work and family life.

315. Recent Australian Bureau of Statistics data reveals significant growth in workforce participation by women in the last decade coincides with significant demand for family friendly working arrangements. In 2005, 74% of employed mothers reported normally using these work arrangements compared to 72% of employed mothers in one parent families. In couple families, 33% of employed fathers used these work arrangements compared to 68% of employed fathers in one parent families[105].

316. The overwhelming majority of young women want to have children by the age of 35, with almost half planning to work full-time, one quarter aspiring to work part-time, and almost one fifth preferring self employment. Only five per cent of young women are planning to choose a traditional role of full-time unpaid work in the home.

317. In July 2005, 55.5 per cent of NSW women were in paid work – 45 per cent of the total NSW labour force.[106]

318. Workers with family responsibilities need a secure living wage; adequate, predictable common family time (including social work time and holidays); flexibilities that meet their needs, including the opportunity for leave and part-time work; protection from excessive hours; and quality, accessible, affordable childcare.

319. Australia's working women make widespread use of part-time work to find some kind of balance (much more so than in most comparable

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[104] Commonwealth Government of Australia (2005), *Explanatory Memorandum of the Workplace Relations Amendment (Work Choices) Bill 2005.*

[105] Australian Bureau of Statistics, (*(June 2005) Child Care, Australia,* Cat. No. 4402.0, ABS Canberra.

[106] Australian Bureau of Statistics, *(July 2005) Labour Force Australia* Cat. No. 6202.0, ABS Canberra.

countries). Having ready access to the opportunity to work part-time and fair rights around requests to change hours are of great significance in the Australian environment. Unfortunately, the growth in part-time work to date in Australia has occurred within a regulatory regime that has fostered its precarious character, with two-thirds of part-time work being casual in nature. [107]

320. Over a quarter of all Australian employees are now employed on casual terms. In 2003, 26 per cent – or almost two million – were casual compared to 22 per cent ten years earlier (ABS Cat No 4102.0, 2005, p 125). By international standards Australia has one of the highest rates of casual and temporary employment. The number of casual jobs produced by the economy has swelled, increasing to 1.9 million nationally by 2003 from 1.3 million in 1993[108]. This increase was largely over the period of the *Workplace Relations Act 1996*.

321. The NSW industrial relations system has taken practical steps to address this issue. Specifically the Industrial Relations Commission decided the Secure Employment Test Case which allowed for casual employees to seek permanent status after a certain period of service. This advancement has now been negated by the Work Choices Act which specifically prohibits the application of provisions relating to the outcome of the Secure Employment Test Case. This test case is discussed in more detail in Chapter 2(c).

322. Some 31 per cent of Australian women are employed casually, compared to 21 per cent of men (ABS cat no 4102.0 2005). However, much of the recent growth in casual jobs has been amongst men. Australian research suggests that insecurity in employment is associated with deferral of family formation (Birrell, Rapson and Hourigan 2004 in Pocock). For many, this insecurity reduces their flexibility in having and raising children and may reduce their access to training and promotion. [109]

323. In 2002 – 2003, AWAs delivered low levels of family friendly provisions to employees. Only 8% of AWAs (c.f. 10% of collective agreements) included paid maternity leave. Some 5% of AWAs (7% of collective agreements) had paid paternity leave and only 4% of AWAs provided unpaid parental leave. [110]

324. In recent decades, working hours have increased. In 2003/04, women working full-time averaged 37.5 hours per week and men working full-

[107] Barbara Pocock in 'The impact of the Workplace Relations Amendment (Work Choices) Act 2005 (or Work Choices) on Australian Working Families', prepared for Industrial Relations Victoria, November 2005.
[108] ABS 4102.0 - Australian Social Trends, 2005.
[109] Barbara Pocock in 'The impact of the Workplace Relations Amendment (Work Choices) Act 2005 (or Work Choices) on Australian Working Families', prepared for Industrial Relations Victoria, November 2005.
[110] DEWR (2004) *Wage trends in enterprise bargaining* (December quarter and previous editions), Canberra, p 96. This analysis is based on content analysis of 500 AWAs randomly selected from those for 2002 and 2003 (250 in each year).

time averaged 41.9 hours (up from 30 hours for women and 38 hours for men in 1978).[111]

325. Since employers have had the option to offer individual agreements, such agreements have been used to extend trading/business hours. Removing any obligation to pay penalty or overtime rates removes costs associated with increasing an employee's hours. Therefore, longer working hours for the same pay are likely to emerge for employees on individual agreements.

326. Women's role as the primary carer of children and other family members is a major reason for women's continuing inequality in the workplace. Women's employment and promotion prospects continue to be limited by a lack of family-friendly conditions. In its submission to the House of Representatives Standing Inquiry into Work and Family Balance the NSW Government recommended that the federal government:

- fund a national paid maternity leave scheme
- improve the distribution and wider availability of children's and family services
- improve family-friendly provisions by both large and small employers
- not exempt small businesses from unfair dismissal laws
- acknowledge the importance of an awards system as the principal means of delivering pay equity to women workers.

327. Unfortunately, the Work Choices Act delivers none of these.

328. Women's capacity to balance working and family have become a lot more difficult under this federal government already and are likely to get much worse under the Work Choices Act. Right now many women report an increase in unsociable working hours, split shifts and the like, adding to their problems rather than diminishing them. An increased use of individual AWAs is likely to reduce women's access to flexible work arrangements.

329. Below is a case study demonstrating the impacts of AWAs on work and family balance.

[111] Australian Bureau of Statistics (2004) *Labour Force Australia,* Cat. No. 6203.0, ABS Canberra.

Case Study

Julie is the mother of two small children and lives in a small country town. She is employed as a sales assistant and her pay and conditions have been based on those set out by the NSW Shop Employees (State) Award.

Her working hours included regular weekend shift work and so she has received penalty rates as prescribed by the state award. She works the same shifts each week and has organised her child care arrangements around these shifts.

Julie has been a loyal employee for a number of years and she values her job. Her income is crucial to her family as her husband has had his working hours reduced recently because of a downturn in the industry in which he works.

Her employer is a constitutional corporation and has now chosen to offer her an individual workplace agreement (AWA) under the new federal legislation. This has serious implications for Julie and her family as it varies her employment conditions significantly.

Julie's AWA removes penalty rates reducing her income. The AWA also changes her working hours so she will no longer have regular shifts and will be expected to work to 'operational requirements'. This irregularity makes it very difficult for Julie to organise child care.

Julie is not happy with the terms of her AWA however, as she lives in a small rural town, the alternative employment options are very limited. Julie has little choice but to accept the AWA.

Welfare to Work

330. The federal government's 'welfare to work' regime will drive sole parents into low paying and insecure jobs. Under the Welfare to Work changes sole parents will be transferred over from the existing Parenting Payment Single (PPS) to the lower paid Newstart Allowance once their youngest child turns eight. This age will decrease to six for new applicants after 1 July 2006. Sole parents will also be required to work part time for at least 15 per hours per week or demonstrate an effort to seek part-time work.

331. There are approximately 821,000 sole parent families in Australia, representing 15% of all families (ABS: 2004: Cat.no1370). Figures from the Australian Council of Social Service (ACOSS) estimate that approximately 90,000 of these sole parent families who would be entitled to the PPS under current arrangements will be placed onto the lower paid and higher taxed Newstart Allowance after 1 July 2006.

332. There is already a mismatch between the demand for child care places and available supply. In 2005 Australia-wide, one third of the 188,400 children needing extra child care places where unable to obtain them because centres were booked out or lacked places. More than half of the extra places sought were from parents who work[112].

333. Many mothers or carers returning to work, who may be single parents or recently divorced, face strong welfare demands to take any job on any terms. Their working standards will be *as strong as prevailing minimum legal standards and no stronger,* given their weaker capacity to bargain and their pressing need to provide for their families. In this system, family responsibilities suppress bargaining power and the 'care-less' are advantaged[113].

334. The five components of the 'Fair Pay and Conditions Standard' represent a retreat on national work and family standards by incorporating only basic family leave provisions and failing to incorporate the right for parents to request extended parental leave, part-time work or more shared parental leave.

335. The right to 'sell' two weeks annual leave (at an unspecified rate) will reduce common family time, with detrimental effects on children and parents. This effect may well compound disadvantage in lower income households.

336. Under the federal government's former approach to workplace bargaining, the relevant award provided a comprehensive safety net of conditions of employment. The 'No Disadvantage Test' (NDT) was developed to ensure that no worker would be worse off through

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[112] Australian Bureau of Statistics, *Child Care, Australia, Jun 2005*, cat.no. 4402.0, ABS Canberra.

[113] *Workchoices* And Women Workers, Barbara Pocock and Helen Masterman-Smith, Journal Of Australian Political Economy, No 56, pg 132.

enterprise bargaining, particularly under an Australian Workplace Agreement. If an award condition of employment was to be removed by an agreement, it retained its value to the worker in some other form. The employer was compelled by that process to demonstrate that the alternative conditions were not to the disadvantage of the employee.

337. The evidence shows that since their introduction in 1996, individual contracts have thus far resulted in much lower access to industrial supports for work and family[114]. By removing the intrinsic support otherwise provided by the NDT for the award-based entitlements such as unlimited access to paid sick leave for caring responsibilities and the right to reasonable consideration of a request for additional parental leave and allowing conditions such as public holidays, rest breaks and meal breaks, incentive based payments, annual leave loadings, penalty rates and shift/overtime loadings to be simply written off, the Work Choices Act authorises the employer to unreasonably exclude family friendly conditions of employment from their employment arrangements. The Work Choices Act allows employers to simply opt out of providing important work and family balance conditions without compensation.

338. The recent Spotlight AWA case (below) is demonstrative of the impact on work and family balance of the removal of the intrinsic support for award conditions. The workforce characteristics of the retail industry are 56% of all employees are paid less than $500 per week[115], 31% are totally award reliant[116] and 82% of clothing and soft good employees are female[117]. A large employer in that industry offered a contract that removed former award conditions with little monetary compensation in return. The Prime Minister subsequently said that *...the test of workplace relations laws is the contribution they make to the general health of the economy*[118]. This indicates that it will be the most vulnerable of workers, women, the already low paid and time poor, carrying the substantial burden of caring responsibilities, who will lose out under the Work Choices laws.

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[114] Barbara Pocock, The Impact of *The Workplace Relations Amendment (Work Choices)Bill 2005* (or *"Work Choices"*) on Australian Working Families, November 2005.
[115] Low paid employment – a brief statistical profile, Project on low paid service sector employment, Dr John Buchanan, Workplace Research Centre, University of Sydney, April 2006.
[116] ibid.
[117] ABS, 6291.0.55.003 - *Labour Force, Australia, Detailed*, Quarterly, Feb 2006.
[118] Hansard, pg 45, House of Representatives, Thursday 25 May 2006

Case Study: Spotlight

Spotlight has moved to introduce Australian Workplace Agreements (AWA) to all new staff that they employ. The AWAs offer an increase of just 2 cents an hour over the award rate in return for eliminating overtime, penalty rates, public holidays and other conditions such as meal and first-aid allowances. New employees will receive an hourly rate of just $14.30 per hour.

Existing employees will receive a permanent hourly rate for ordinary hours worked of $14.28 and will further receive award entitlements such as overtime, penalty rates and public holiday payments.

Workers who accept jobs with Spotlight under the new AWAs will lose up to $90 a week compared with existing employees. The retail sector is female dominated with large numbers of workers engaged in part-time or casualised positions. Prior to the implementation of the Work Choices Act, these workers would have been protected by the Shop Employees (State) Award which provides a set of minimum terms and conditions. Many of these award conditions have been removed by these AWAs.

A spokesman for the federal government said that Spotlight was legally entitled under the Work Choices Act to offer jobs that traded off many conditions. Mr Gelfand said the company's AWAs met all of the federal government's Work Choices legislative requirements ('Company offers 2c for cut in benefit', *The Australian,* 25 May 2006):

> *We are just doing whatever we are required to do to meet the minimum conditions set out by the Australian Fair Pay Commission.*

Spotlight is a profitable business demonstrated by its market dominance, and is subsequently a large employer engaging over 5000 staff Australia wide. Spotlight is entering into the 'race to the bottom' cutting the conditions of new employees to the bare minimum of the AFPCS.

339. The provisions of the Work Choices Act, especially those that promote individual contracts based on minimum conditions at the expense of collective bargaining, will have a devastating impact on families. A loss of control over rosters and hours of work, through averaging provisions and provisions which allow the employer to direct reasonable additional hours without notice, will make it even harder for families to spend time together and make reliable caring arrangements. For example, if employers choose to change work hours weekly or fortnightly in quiet business periods and increase them in busy trading periods, then women will have difficulty in anticipating and securing child care arrangements. The Work Choices Act legislates for unpredictability for employees, not flexibility.

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

organise a child care place and pay the rent. The impact of the Act will be that employees will have to work cheaper and longer. [119]

341. To improve work and family balance, the NSW Government has:

- improved parental leave and part-time work provisions, provided access to the leave to long term casual workers and outlawed discrimination against workers with carers' responsibilities;
- produced materials to help employers and employees negotiate family friendly work conditions and arrangements; and
- published a guide to pregnancy in the workplace
- supported the Industrial Relations Commission of NSW decision (flowing from a national decision) in a test case on family provisions, giving parents (under state awards) the right to request additional unpaid parental leave, and part-time work until their child reaches school age. Employers can only refuse these requests on reasonable grounds.

342. Along with the Federal Minimum Wage, the Work Choices Act makes provision for four minimum conditions – the Australian Fair Pay and Conditions Standard. The conditions are a maximum average 38 hour week, four weeks' annual holidays, 10 days' personal leave per year (including carer's leave) and 12 months' unpaid parental leave. They are the most fundamental of conditions helping employees bring some balance between the obligations to their paid employment and that of their family. In the broadest sense, these standards replicate pre-Work Choices award standards in New South Wales prior to the Industrial Relations Commission of New South Wales' decision in the Family Provisions Test Case.

343. That most recent case resulted in New South Wales State awards being varied to provide for enhanced parental leave rights for employees and greater clarity to the responsibilities of employers.

344. The case, in concert with the earlier decision of the AIRC, saw the uniform introduction of an employee 'right to request' additional parental leave and part-time work afterwards, along with a commensurate employer 'duty to consider and not unreasonably refuse' such requests.

345. While the Work Choices Acts' minimum standards are a vindication of earlier decisions of the New South Wales and Australian Commissions regarding parental leave and carer's leave, it inexplicably denies key

[119] Submission to the Inquiry of the Senate Employment, Workplace Relations an Education Committee into the *Workplace Relations Amendment (Work Choices) Bill 2005* from all States and Territories, November 2005.

components of the most significant advance in parental leave rights since the first maternity leave case in 1979.

346.Further, by curtailing the effectiveness of the AIRC and reducing the ability of the Industrial Relations Commission of NSW to influence working standards in the community without providing a mechanism for future change, those work and family standards will remain anchored in the twentieth century.

347.Proponents of the Work Choices Act would say that the right to request lives on in the complex web of notional agreements, former federal awards and preserved entitlements for individuals under rationalised awards. Such notions are illusory. The failure to support the right to request model in the minimum standards, the constraints imposed on Industrial Commissions coupled with the divisive and diluting effect of notional federal agreements and preserved entitlements and the inexorable march to individual bargaining, will see this important advance in facilitating women's attachment to the workforce rendered ineffective.

348.Unsupported by the Work Choices Act framework, the right to request additional parental leave and part-time work afterward will not even feature as a tradeable commodity in individual bargaining. The Work Choices Act minimum standard falls short of protecting the most significant advance in facilitating women's participation and life course attachment to the paid labour force.

349.Yet the federal government has asserted that a paradigm shift to individual contracting is necessary for the next round of productivity improvements. There is however, no evidence that the sacrifices to be made by workers will help them work smarter or work faster much less improve productivity. The more likely impact is that workers will work cheaper and longer, to the detriment of their families. In his recent research, David Peetz found that pay under AWAs is lower in the first instance than otherwise might be obtained under collective bargaining arrangements and locked in for the term of the contract .

350.The move to AWAs underpinned by a very basic set of minimum conditions of employment will see increased working hours for some and increased uncertainty of working hours for others.

2e. the impact on injured workers

Introduction

351.The *Industrial Relations Act 1996* includes protections from dismissal for workers with a compensable injury. These protections are intended to apply to all workers in NSW, irrespective of whether they are subject to state or federal industrial regulation. The Work Choices legislation at best significantly undermines these protections, or at worst, eliminates them for employees of constitutional corporations.

352.Broadly speaking, the current NSW provisions make it an offence to dismiss an injured employee within six months of their injury (or for a longer period in some cases), and provide for reinstatement of dismissed employees through the NSW Industrial Relations Commission.

353.The intent of such legislation is to provide incentives for employees to return to work and be provided with suitable duties as part of the relevant injury management arrangements. In the absence of such legislation, employers would be able to simply dismiss injured employees, and therefore avoid any role in the injury management process. Injured employees would have limited avenue to seek redress for such a situation. Permitting employers to dismiss injured workers and avoid injury management responsibilities is strongly contrary to the intent of NSW OH&S and workers' compensation legislation, and provides for the shifting of cost burdens onto the NSW health system and ultimately, the taxpayer.

354.Properly functioning legislation of this kind therefore performs a significant deterrent/incentive role.

Existing NSW Provisions

355.Protection for injured employees currently arises out of Chapter 2 Part 7 of the *Industrial Relations Act* 1996, or out of existing NSW award or agreement entitlements.

356.The protections in the NSW Act were first introduced in the *Industrial Arbitration Act 1940* in 1987. Those provisions were carried over as sections 235-244 of the *Industrial Relations Act 1991.*

357.The provisions in Chapter 2 Part 7 of the current NSW Act provide for reinstatement of an injured employee who has been dismissed 'because he or she is not fit for employment as a result of (an) injury received' (s92). In the event of a dispute about reinstatement, the matter may be determined by the NSW Industrial Relations Commission (ss93-97).

358.Section 99 makes it an offence to dismiss an employee because they are not fit for work as a result of an injury, and if:

359.less than six months have elapsed since they became unfit for employment (s99(1A)(a)), or

360.the dismissal occurs during a period in which the employee is entitled to accident pay by virtue of a Commonwealth or state industrial instrument, in excess of six months (s99(1A)(b)) since they became unfit.

361.A number of NSW awards prescribe a period of entitlement to accident pay of 39 weeks.

362.No corresponding provisions appear in the Work Choices Act, and none appeared in its predecessor. Provisions in federal awards to this effect were removed by the federal award simplification processes set in train by the *Workplace Relations and Other Amendments Act* 1996, companion legislation to the original 1996 *Workplace Relations Act.*

363.The entitlements in Ch2 Part 7 are in addition to other relevant entitlements conferred by the *Industrial Relations Act* 1996, such as those that provide for relief from unfair dismissal.

Effect of the Work Choices Act – Excluded State Legislation

364.The Work Choices Act threatens these entitlements for workers employed by a constitutional corporation. As noted in Chapter 1 this happens as a result of the exclusion of certain state legislation provided for by s16 of the amended WR Act. Specifically it notes that the non-excluded state matters include:

- workers compensation and
- occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety).

365.The *Industrial Relations Act* 1996 is thus clearly 'a State or Territory industrial law', and is specifically named as such in s4(1), so it could certainly be argued that the Work Choices Act applies to its exclusion, and in particular to the exclusion of Ch2 Part 7. However, this would appear to turn on the narrowness with which the words 'apply to the exclusion of' in s16(1) are interpreted.

366.On the other hand, Chapter 2 Part 7 of the *Industrial Relations Act* is somewhat unique, since the substance of these provisions deals with matters supportive of the NSW OH&S and workers compensation

regimes, and it could therefore be argued that the exemptions at ss16(2) and 16(3) preserve its operation in this respect.

367. The New South Wales Government has sought exemption for the OH&S Act from the Work Choices Act through a variation to the Work Choices Regulations. However the federal government has only responded to this request in very general terms. Although a series of amendments were recently made to the Work Choices Regulations, the federal government failed to vary these Regulations to accommodate the NSW Government's request. In the absence of any definitive view from the federal government there must be a real risk that corporate employers will act on the basis that they are not bound by the provisions, and, further, that such conduct may be upheld as lawful.

368. This in turn suggests that the final answer to these questions will only provided by courts or tribunals, following litigation and further uncertainty.

Effect of the Work Choices Act – State Awards and Agreements

369. Work Choices Act also attacks these entitlements by virtue of its effects on NSW awards and agreements.

370. As noted in Part 1, on 27 March 2006, all State awards and agreements binding constitutional corporations became, respectively, Notional Agreements Preserving A State Award (NAPSAs) or Preserved State Agreements (PSAs) (Work Choices Act Schedule 8). If an employee subject to a NAPSA subsequently becomes subject to a federal agreement or award, the NAPSA ceases to apply to that employee. In any event, NAPSAs will cease to operate on 27 March 2009 (Schedule 8 cl38A). PSAs continue until either their nominal expiry date, or 27 March 2009 (Schedule 8 cl14), whichever arrives first.

371. As a result, the terms of such State industrial instruments all become the terms of a federal agreement. This will include any accident pay provisions, and these (and all other provisions except for prohibited matters) will continue to have effect.

372. However, being the term of an agreement means that accident pay provisions are, or may be, subject to future bargaining processes and may therefore be traded away as part of the latter. The cessation of all NAPSAs after three years means that terms providing for accident pay will not survive beyond this point.

373. While accident pay provisions may therefore be retained in the short term, they may not survive the next or subsequent bargaining processes. This means that the future of extended periods of accident pay which would engage the terms of s99(1A)(b) of the NSW Act, cannot be assured.

374. It should also be noted that accident pay does not appear on the list of allowable award matters which may be included in awards appearing at s513 of the Work Choices Act. The intent of the Work Choices amendments is to deal with pay matters at large by means of Australian Pay and Classification Scales (AFPCSs), and the parts of the Work Choices Act dealing with the latter (Part 7, Division 2 Subdivisions H-K) do not mention accident pay.

375. As such, it appears that the only way to provide for accident pay in the federal system is to do so in the terms of a workplace agreement, and thus make it subject to bargaining processes as discussed in earlier paragraphs.

Federal Unlawful Termination Provisions- A Viable Alternative?

376. It may be possible for an injured worker to obtain relief for termination of employment by means of the unlawful termination provisions at Part 12, Division 4 Subdivision C of the Work Choices Act. Section 659 relevantly provides that:

> ..... 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;
>
> which shares some common substance with Ch2 Part 7.

377. However, it is the access to, and method of obtaining such relief which starkly differ between the NSW and federal acts.

378. As discussed in Part 1, in the NSW provisions, all disputed matters are dealt with by the NSW Industrial Relations Commission. The NSW Industrial Relations Commission is an exclusively industrial tribunal, directed to resolve matters by means of conciliation and arbitration. Absence of legal representation is not fatal to applicant's case under Ch 2 Part 7, and applications may be prosecuted by experienced union advocates, for example.

379. By contrast, matters arising from the federal unlawful termination provisions must be heard in a court of superior record (either the Federal Court of Australia or the Federal Magistrates Court in this case), as these are matters of litigation in the strict legal sense of the term. As such, legal representation is mandatory, and the cost is therefore likely to be substantial – reliably estimated to be in the region of $30,000 - $40,000 at a minimum[120]. Given that the employees in

[120] See for example Priest, M 2005 Law Pits David against Goliath Australian Financial Review, 30 September 2005

question are injured, this may have to be added to litigation regarding compensation claims and the like.

380. In short, the federal unlawful termination provisions are a realistic option for only the most determined and well supported workers. As experience of the unamended federal termination of employment provisions shows, such employees appear to be a very small minority indeed[121].

381. It should also be noted that the federal unfair dismissal provisions are unlikely to be of assistance. For a start, employees employed by enterprises employing 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 the Work Choices Act (s637). As well as this, termination on the grounds of 'genuine operational reasons' is exempted from being the subject of applications under these provisions (ss643(8) and 643(9)), which provides substantial opportunities for employers to mask the real reasons for dismissal without being subject to unfair dismissal proceedings.

382. Below is a case study example of the impacts of the Work Choices Act on injured workers.

[121] Since 1996, there have been about 56,000 unfair dismissal applications in the federal system, but only 147 or 0.25% involved unlawful termination. See:
http://www.workplaceexpress.com.au/news_selected.php?act=2&selkey=30487&hlc=2&hlw=termination

Case Study

A meat worker employed at a country abattoir was only working for a few days when he suffered an injury at work. He was employed under a Federal Award. The employer terminated his employment on 27 March, the day the Work Choices Act commenced, whilst he was still on compensation. The abattoir is a constitutional corporation and therefore subject to the Work Choices legislation.

Prior to the commencement of Work Choices, the meat worker could have applied, firstly to the employer, or subsequently to the NSW Industrial Relations Commission for reinstatement, pursuant to ss92 and 93 of the NSW Act. If the employer did not reinstate the employee, the NSW Industrial Relations Commission could have ordered the employer to do so (s94). The employer may also have been guilty of an offence by virtue of s99 of the NSW Act, and may therefore have been liable to prosecution.

Following the enactment of Work Choices legislation, it appears that none of the causes of action available under the NSW Act are available to the dismissed employee. Litigation to attempt to enforce the provisions of the NSW Act may be an option, but only if the employee or their union are willing to bear the financial risks of initiating court action which they may lose.

Action under federal unlawful termination provisions may also be theoretically possible, but once again, the worker must be willing and able bear all relevant costs and risks.

It should also be noted that, despite the presence of a compensable injury, the incentives to rehabilitate the worker are undermined, if not removed, absent a protection from dismissal. The costs of doing so will then fall to the worker, and ultimately, the taxpayer.

383. Work Choices Act threatens the ongoing viability of the protections for injured workers contained in Ch2 Part 7 of the *Industrial Relations Act* 1996.

384. Whilst the ultimate effect of the exclusions of State legislation at s16 of the WR Act is as yet unclear, the best that can be said is that the enactment of Work Choices Act has created a great deal of uncertainty about these provisions. At worst, it may be that the s16 exclusions may render the protections for injured workers in the NSW Act inoperative as far as constitutional corporations are concerned.

385. Further, the conversion by the Work Choices Act of State awards and agreements to transitional federal workplace agreements places the future of the extended protection from termination provided by s99(1A)(b) in doubt. The operation of the bargaining process may lead to the disappearance of extended accident pay provisions in such agreements, in turn removing protection from termination for periods of more than six months.

386.The federal jurisdiction provides only nominal relief for injured workers who are terminated. While federal unlawful termination provisions do prohibit termination on the grounds of injury, access to these provisions requires financial resources and perseverance beyond the capacity of the vast majority of workers.

387.It could be argued that if the injured worker provisions of the NSW *Industrial Relations Act* did not exist a significant part of the work injury management provisions in NSW workers compensation scheme would become ineffective and an employer could avoid the obligation to provide suitable duties by simply dismissing the injured employee.

388.In this connection, the NSW WorkCover authority has noted numerous reports of injured workers being dismissed whilst receiving workers compensation payments, since the enactment of the federal government's legislative changes.

389.In short, it remains uncertain whether the injured workers protections contained in the *Industrial Relations Act 1996* will continue to apply to constitutional corporations under the Work Choices Act. Please see Chapter 2(a) for more information on the impact of the Work Choices Act on OH&S.

2f. the impact on employers and especially small business

Introduction

390. The federal government has claimed that its industrial relations changes will simplify the industrial relations system and, in theory, remove the barriers to employment. However, an examination of the Work Choices Act clearly shows that, in practice, this Act has imposed a complex, uncertain and costly system on employers in New South Wales. Such a complex system is likely to result in negative economic consequences.

391. The Work Choices Act removes the choice of businesses to operate in the industrial relations system that best suits their needs and requires all constitutional corporations to operate in the federal system. The Work Choices Act creates an enormous red tape burden and compliance requirements on employers, including small businesses. The Act also undermines the role of awards in providing a level playing field between competing businesses resulting in uncertainty and competition on wage costs in a 'race to the bottom'. The exemption from unfair dismissal laws for constitutional corporations with 100 or less employees is also likely to result in greater difficulties for these businesses in recruiting and retaining skilled and valuable staff.

Lack of Choice

392. Prior to the commencement of the Work Choices Act most businesses could choose the industrial relations system that best suited their needs; either the state system or the federal system. In New South Wales two out of every three businesses elected to operate in the state system as it is less complex and less costly than the federal system. However, with the commencement of the Work Choices Act, businesses no longer have the capacity to choose the system that best suits their circumstances.

393. As noted in Chapter 1 the federal government has relied on the corporations power in drafting the Work Choices Act. This has resulted in the mandatory coverage of all constitutional corporations by the federal industrial relations system.

394. This unprecedented mandatory coverage by the federal industrial relations system has had several important implications. Firstly some businesses have required expensive legal advice in determining whether they have the status of a 'constitutional corporation' for the purposes of the Work Choices Act. For many organisations such as those working within the not-for-profit or community sectors, determining jurisdictional coverage will be an expensive process. Secondly, for employers which have been determined to be

'constitutional corporations' these businesses have had to move and try to operate in the federal system that favours large corporations operating in global markets. The federal system does not support small businesses with local employees and markets. Such small businesses may require specialist industrial relations and human resources expertise in order to function in the complex regulatory environment characterising the federal system. The additional cost to small business of acquiring dedicated human resources expertise in order to become compliant may make it more difficult for small to medium sized businesses to compete on a level playing field with larger better resourced businesses. Many employers, including small and medium sized businesses, have now been confronted with this complex and expensive transfer into the federal industrial relations system.

395. The difficulties that will be experienced by smaller organisations under the Work Choices Act was noted by Professor Andrew Stewart prior to the commencement of the Act:

> *If you're a small of medium sized business, and you're affected by these changes, and that particularly applies to businesses who are currently covered by state awards, you are going to have a lot of difficulty making sense of what this means for you... You're probably going to need a lot of expensive legal advice just to understand the immediate impact, let alone what you might have to do or want to do in the future – simply unintelligible.*[122]

396. This view is supported by the outcome of a recent informal survey of members of the Small Business Development Corporation initiated by the Department of State and Regional Development. The general view that emerged was that there is some confusion amongst small business operators surrounding the Work Choices Act changes. There was anecdotal evidence that many small businesses believe they do not have to make any adjustments to their operations. In a paper prepared by the Small Business Development Corporation which reflected the views of its members the observation was made that:

> *Small business is not necessarily sure about what the changes mean for them and are therefore not adapting their business operations and practices to become compliant.* [123]

397. There were also concerns expressed about the failure of Commonwealth agencies such as the Department of Employment and Workplace Relations (DEWR) and the Office of the Employment Advocate(OEA) to effectively and efficiently disseminate important information concerning the new workplace laws and processes. There was evidence that employers found the preparation of workplace agreements more onerous under the Work Choices Act and relevant information in a form required by employers was not available on the

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

[123] Small Business Development Corporation (2006), Internal Briefing, 26 May.

website of the responsible advisory agency, the OEA. This relative lack of accessible information is compounding the confusion of many small business owners over the regulatory impact of the Work Choices Act.

398. Many businesses and especially small businesses have historically relied on the state common rule award system. This common rule award system provides a legal framework for minimum wages and conditions which may be automatically applied to a particular workplace. The common rule award system also provides for over award payments as an incentive to attract, retain and reward valuable staff. Employers previously covered by state common rule awards could be assured that they were paying their staff a fair and reasonable wage and valuing their work appropriately.

399. In addition, the award system provided a level playing field for wages and conditions between competing businesses. This level playing field encourages businesses to compete on grounds such as quality, innovation, technology and efficiency rather an wages.

400. In New South Wales, the award system is supported by a dynamic compliance framework provided by the state government. This compliance service investigates breaches of award and legislation, conducts targeted compliance initiatives and provides state wide education and information programs for employers and employees. These compliance activities not only protect employees; they also protect small businesses from unfair competition.

401. These effective characteristics of the New South Wales industrial relations system are now no longer accessible to constitutional corporations. Instead such employers, including many small and medium sized enterprises, now have to compete and operate in the complex federal system that is not underpinned by a robust awards system nor an effective compliance framework. Under the federal system such businesses may easily be undercut on wages and working conditions by their competitors and face extensive bureaucratic procedures and red tape to ensure compliance with the federal government's industrial relations laws.

Red Tape

402. The Work Choices Act has imposed significant additional bureaucracy, red tape and paperwork requirements on employers. Although the industrial relations changes were promoted by the federal government as a means of creating a simpler industrial relations environment, the practical effects of these laws have resulted in extensive red tape compliance. This compliance is particularly onerous for small and medium sized businesses.

403. Firstly employers need to access and understand 1388 pages of industrial relations legislation, over 400 pages of regulations and 500 pages of explanatory notes. This is a significant and costly process requiring most businesses to seek legal or accounting assistance. Of particular concern, is the onerous record keeping obligations that employers are now required to maintain in order to satisfy the most basic compliance with the Work Choices Act. For example, to ensure compliance an employer must maintain the following records under the Work Choices Act:

- Record each employee's birth date
- Calculate nominal daily hours for each full-time and part-time employee
- Record all variations to nominal hours
- Calculate hourly rates of pay for workers on annualised salaries
- Keep accrual dates for all forms of leave
- Nominate pay dates in the pay records
- Provide a pay slip within one day of the date of payment
- Keep agreements on averaging of hours
- Keep all records about payments made while on all forms of leave
- Show the basis of calculations for pay rates
- Kept time records for all employees, including managers and executives who may not work fixed hours – again, with nominal hours and variations fully detailed and
- Retain these records for seven years.

404. The above regulations exemplify the bureaucratic nature of the most essential of record-keeping requirements under the federal system. Such requirements are particularly onerous and costly to smaller employing entities. Many businesses will be required to change or completely revise their payroll and human resource functions to become compliant with the new record-keeping requirements. This will be another costly and unnecessary burden on the business community.

405. The federal government has claimed that it will reduce these onerous record-keeping requirements by amending the Regulations. According to this announcement, the amendment will exempt employers from keeping records relating to hours worked for employees who earn more than $55,000 per year and who are engaged under an instrument that does not provide for overtime. Although this announcement was made on 18 April 2006, the Regulations have only just been amended this week.

406. In addition, this exemption will create four different record-keeping criteria for employers to navigate through. Importantly, though, these

record-keeping criteria only relate to starting and finishing times and total hours worked; all other recording keeping requirements will continue to remain for employee's earning above $55,000. The four new criteria for record keeping are as follows:[124]

> **Employee Status:** Where an employee has provisions for overtime and is paid an annual salary of less than $55,000
> **Record Keeping Requirements:** Employers would be required to keep records of starting and finishing times and total hours worked.
>
> **Employee Status:** Where an employee has provisions for overtime and is paid an annual salary of $55,000 or more
> **Record Keeping Requirements:** Employers would be required to keep records of starting and finishing times
>
> **Employee Status:** Where an employee has no provisions for overtime and is paid an annual salary of less than $55,000
> **Record Keeping Requirements:** Employers would be required to keep records of total hours worked.
>
> **Employee Status:** Where an employee has no provision for overtime and is paid an annual salary of $55,000 or more
> **Record Keeping Requirements:** There would be no record keeping requirements under Regulations 19.9.

407. In addition the $55,000 benchmark is to be indexed and reviewed. Consequently an employer who may have been exempt from keeping records of working hours for some of their employees may later find that they are obliged to keep these records as the benchmark is increased.

408. These obligations are likely to result in the need for business to tailor payroll functions in order to comply with the record keeping requirements. Information technology and staff training costs will likely result from such payroll changes.

409. In addition, the exemption of certain groups of employees from the record keeping requirements is likely to further erode the level playing field between competing businesses. It will become increasingly difficult to determine if an employee has been correctly paid. This provision provides unscrupulous employers with the opportunity to avoid record keeping responsibilities and related pay obligations.

410. The amendments to the Regulations announced by the federal government are unlikely to result in a significant reduction in the record-keeping burden imposed on employers by the Work Choices Act.

411. Below is a case study example of the complications of the Work Choices Act for a small business.

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[124] Andrews, Kevin (2006), *Record Keeping Protections for Employees Under Workchoices*, Press Release, 18 April.

Case Study

Greg owns a small mechanical repairs company which employs eight people. Greg's business is a constitutional corporation and must operate in the federal industrial relations system.

Greg wants to negotiate a new agreement with his staff under the federal system. In order to do this Greg must have knowledge of the Australian Fair Pay and Conditions Standard (AFPCS), any applicable Australian Pay and Classification Scales (APCS) and the protected award conditions such as public holidays, rest breaks, incentive based pay, annual leave loading, allowances, penalty rates and overtime loading.

In addition Greg must ensure that he does not include any prohibited content in his agreement otherwise he could be fined up to $33,000. In order to determine the 'prohibited content' Greg will need to consult the Work Choices Act, Explanatory Memorandum and Regulations which are nearly 2,000 pages long.

Greg does not have specialised human resource or industrial relations expertise or an in-depth knowledge of the new legislation. Greg may be forced to seek costly advice from his accountant or solicitor to ensure that he makes his workplace agreement legally.

Award System

412. The Work Choices Act has introduced significant changes to the operation and scope of the award system. The award system has historically provided a safety net of wages and working conditions for employees and a level playing field between competing businesses. Awards have guided and structured bargaining outcomes for above award payments and acted as the benchmark for individual and collective agreements. However, since the commencement of the Work Choices Act the long term operation of the award system has fundamentally changed.

413. The important historic role of awards is especially important for small business as recently noted by the Small Business Union:

> *Awards give small business owners a benchmark. You can pull them off the shelf and find out, for example, that a fitter and turner is paid 'x' amount. Now they won't even have a clear idea of what the price of labour should be.*[125]

414. Dr Michael Schaper, President of the Small Business Enterprise Association of Australia and New Zealand also noted that:

[125] Small Business Union (2005), Submission to the *Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005*, 8 November.

This [changes to the award system] means business owners will be in the dark when it comes to setting wages and conditions, and workers will also lack the knowledge about what it is reasonable to ask for. [126]

415. From 1 July 1998, s98A of the *Workplace Relations Act* 1996 required that all federal awards be simplified to a defined set of 20 allowable matters. The Work Choices Act now imposes a further round of simplification and rationalisation on awards. In the first instance the Work Choices Act provides for the elimination of matters in federal awards which deal with:

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

416. The federal government has claimed that the removal of these provisions from federal awards will not reduce the entitlements of workers as these matters are regulated by state legislation. However, some federal awards contained more generous provisions for long service leave, superannuation, jury service and notice of termination as a result of negotiation and bargaining between the parties. The Work Choices Act has varied these bargained outcomes.

417. In contrast, the New South Wales awards system does not restrict the nature and number of matters that may be included in awards, provided that the award contains fair and reasonable conditions of employment. This allows awards to be tailored to the specific needs of an industry, occupation, industrial dispute or individual employer without rigorous restriction. This has provided New South Wales employers and employees with a fair, useable and accessible awards system.

Award Rationalisation

418. The federal government has established the Award Review Taskforce to investigate and make recommendations on the most expedient methods of 'rationalising' and 'simplifying' awards and wage and classification structures. As suggested by the terms of reference, the Award Review Taskforce is required to consider ways of rationalising awards with the outcome of creating single industry awards.

419. While this award rationalisation process has been promoted as a means of simplifying the awards system, a close analysis of the requirements of the Work Choices Act shows that the rationalisation and simplification process is likely to result in the creation of up to six

[126] Dr Michael Schaper (2006), quoted in the *Australian Financial Review*, 'SMEs plead for grace period on IR changes', 23 March.

different types of federal awards. In the longer term this is likely to result in an awards system of such complexity that it will be both inaccessible and unusable.

420. In addition the rationalisation of wage and classification scales may result in the 'levelling up' of wages and working conditions. This may occur in the process of removing state and territory based differences as the Work Choices Act provides that an employees wage rate cannot drop below is current nominal amount. The Australian Industry Group has suggested that such 'levelling up' would be a 'backward step which would decrease the competitiveness of Australian industry and have negative effects on employment.'[127] The Australian Industry Group also suggested that:

> *There is potential for massive cost increases to be imposed on employers in all industries if penalty rates, shift loadings and weekend loadings are levelled up. These rates and loadings are typically applied to over award payments.* [128]

421. Of particular concern to business and employers is the likely rationalisation of enterprise consent awards. Consent awards are made by agreement between an employer and its employees or their representatives. These awards often reflect the unique nature of the organisation and may include pay rises linked to productivity. The likely rationalisation of these awards into general industry awards has caused concern for numerous large employers in Australia.

422. Rio Tinto, in its submission to the Award Review Taskforce, noted that:

> *There is no reason to destabilise [current] arrangements by making unnecessary changes or applying a 'one size fits all' approach... This is particularly the case where enterprise awards has been used to underpin common law contracts without any additional statutory form of agreement.* [129]

423. Similar concerns were also noted by Australia Post:

> *The diversity of the Australia Post business means that it would not be feasible to fully align Australia Post's awards with transport and warehousing industry awards... As an example, Australia Post has over 9000 employees engaged in retail outlets across Australia. A single industry alignment is not considered appropriate for the diverse employment categories employed in Australia Post's enterprise operations.*
>
> *Consolidation of [Australia] Post's employment conditions with industry award conditions has the potential to alter and increase employment*

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[127] Australian Industry Group (2006), Submission to the Award Review Taskforce, January, pages 3-4.
[128] Ibid.
[129] Rio Tinto (2006), *Submission to the Award Review Taskforce*, January, pages 3-4.

conditions – for example, overtime and shift penalty conditions for part-time employees – which could add significantly to Australia Post's costs and hence impact adversely on business competitiveness.[130]

424. The award rationalisation process has the potential to disrupt these cooperative and productive workplace arrangements.

Industrial Relations Amendment Act 2006

425. In recognition of the impact of the Work Choices Act on enterprise consent awards, the NSW Government has passed an important amendment to the *Industrial Relations Act 1996.* This amendment was passed prior to the commencement of the Work Choices Act and seeks to maintain the integrity of state enterprise consent awards applying to constitutional corporations. Part 8A of the Amendment Act gives enterprise consent awards effect as state enterprise agreements that contain the same terms as the previous award.

426. The amendment provides for enterprise consent awards to be recognised and regarded as state enterprise agreements for the purposes of the *Industrial Relations Act* and the Work Choices Act. Consequently, these agreements have been transferred into the federal system as 'preserved state agreements' (PSAs). In the absence of the Amendment Act these awards would have been transferred to the federal system as 'notional agreements preserving state awards' (NAPSAs).

427. The transfer of these agreements into the federal system as PSAs provides important protections for the agreement. Firstly it protects these former enterprise consent awards from the award rationalisation and simplification process. Secondly, such agreements are exempt from comparison to the AFPCS and the application of the 'more generous' test. This protects employers against the potential liability for greater leave obligations from the AFPCS than those contained in their former consent award.

428. More importantly, however, this transfer allows these agreements to retain wage rates and classification structures including any agreed wage increases programmed to occur over the life of the agreement. As noted above, wage increases were often included in consent awards as a means of complementing productivity improvements. Such wages and classification structures would have been removed from the relevant award and reviewed at the discretion of the Australian Fair Pay Commission if this amendment had not been enacted.

429. While the actions of the NSW Government have provided some protection for the negotiated and cooperative workplace relations of some businesses, the federal government interference regarding PSAs will still be heavily felt by these organisations.

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[130] Australian Post (2006), *Submission to the Award Review Taskforce,* 27 January.

'No-Disadvantage Test'

430. In addition to the award rationalisation and simplification difficulties, the Work Choices Act has also undermined the role of awards in providing the safety net or minimum working conditions that an employee is required to receive and an employer is required to provide. Before the commencement of the Work Choices Act all agreements, including collective and individual agreements (Australian Workplace Agreements), were required to meet a 'no-disadvantage' test prior to approval. This test compared the terms of the agreement with the relevant award. The collective or individual agreement could not, overall, be less generous than the award. Or, in other words, the agreement could not be disadvantageous to the worker in comparison to the award.

431. This 'no-disadvantage' test was fundamental in ensuring that reasonable and fair award working conditions were maintained, while providing employers and employees with flexibility by creating tailored agreements. Importantly for employers, the 'no-disadvantage' test ensured that competing businesses could not undercut on particular award wages and conditions when offering collective or individual agreements. This was particularly important as it prevented larger businesses from competing with small, local businesses on wage costs and instead encouraged competition on innovation, productivity and quality.

432. However, since the commencement of the Work Choices Act, these protections, for both employers and employees, have been removed. The Work Choices Act no longer requires the AIRC to approve collective agreements. Instead all agreements, both collective and individual, are lodged with the Office of the Employment Advocate (OEA). Importantly, the Work Choices Act imposes no requirement on the OEA to check, approve or endorse any agreements. Instead, collective and individual agreements become operative upon lodgement, even if such an agreement is in breach of the federal minimum standard, known as the AFPCS.

433. This change has two important implications for employers. Firstly this change transfers the responsibility for valid and legal agreements from the AIRC and the OEA to the employer. Under the Work Choices Act employers lodging an agreement must attest that the agreement has been legally made and that all requirements in the Work Choices Act and Regulations have been met. In particular employers need to ensure that their agreements do not contain any prohibited content.

434. Prohibited content is prescribed in the Regulations and may be changed at the discretion of the federal Minister for Employment and Workplace Relations. Division 7, Regulations 8.4 to 8.7 specify the

various matters that are deemed prohibited content in workplace agreements under s 356 of the Work Choices Act. These include:

- clauses which restrict the offering of Australian Workplace Agreements (AWAs)
- restrictions on the use of labour hire and independent contractors
- remedies for unfair dismissal
- terms that permit industrial action during an agreement's nominal term
- terms that purport to require an employee to forgo an entitlement to annual leave
- trade union deductions
- bargaining fees for unions
- leave to attend union training (paid or otherwise) and paid leave to attend union meetings
- right of entry (beyond the entry rights provided in the Work Choices Act)
- renegotiation of subsequent agreements
- employer disclosure of information about employees bound by an agreement to a trade union
- mandated union involvement in dispute resolution and
- terms that encourage or discourage union membership.

435. The federal Minister has the ability to alter these Regulations and may, in the future, declare other matters to be prohibited. It is unclear whether these new prohibited matters would apply retrospectively to existing agreements. In addition, the Regulations also prohibit terms that do not pertain to the employment relationship. However, some provisions may be exempt from this if they are:

- incidental or ancillary to a matter contained in the agreement or
- a machinery matter or
- so trivial that it should be disregarded as insignificant.

436. Furthermore provisions which are considered to be objectionable under s 810 of the Work Choices Act or discriminatory are also classed as prohibited content. However, the Regulations provide for three exceptions to discriminatory terms:

- terms which comply (equal or greater than) with the Australian Pay and Classification Scales (APCSs) or a special Federal Minimum Wage

- a term if it establishes an essential need for it based on the inherent requirements of the particular employment or
- a term if it avoids offending adherents of a particular religion or creed.

437. This extreme scope of prohibited content clearly demonstrates the federal government's interventionist approach to agreement making. These Regulations expressly restrict employers and employees from including certain provisions in agreements even when these provisions are consensual and beneficial to both parties. In short, this provision restricts the flexibility of workplace agreements and may potentially limit the productive and cooperative workplace relations that can result from enterprise bargaining.

438. The Work Choices Act provides for civil penalties for any employer who lodges a workplace agreement containing prohibited content under s 367(2) of the Work Choices Act. These civil penalties are in the order of $33,000. This is a heavy penalty which transfers significant responsibility onto employers to navigate the complex and protracted Work Choices Act and Regulations to ensure compliance with the prohibited content requirements. As noted in the Regulations above, some of these requirements are potentially open to very costly and incorrect interpretation.

Competing on Wages

439. The second significant implication for employers resulting from the removal of the 'no-disadvantage' test is the potential wage undercutting by competing businesses. Prior to the commencement of the Work Choices Act, businesses were assured of a level playing field on wages and conditions due to the award system and the 'no-disadvantage' test. In New South Wales, this level playing field was supported by a robust compliance framework. As noted earlier, this level playing field encouraged businesses to compete on factors other than wages such as innovation, technology, quality, research and development, and strategy. These factors have proven beneficial to productivity enhancements and added long term value to businesses.

440. However, since the commencement of the Work Choices Act, this level playing field has been eroded. Currently both individual and collective agreements will not be compared against the relevant award. Instead these agreements will only be required to meet the Australian Fair Pay and Conditions Standard (AFPCS). The AFPCS contains only the following provisions:

- 38 hour ordinary working week
- a minimum hourly rate as specified by the Australian Fair Pay Commission

- four weeks annual leave
- ten days personal/carer's leave
- 52 weeks unpaid parental leave and
- 20% loading for casual workers.

441. This change is likely to lead to businesses legally undercutting award wages and conditions by offering individual agreements. This is likely to result in a race-to-the-bottom on wages between competing businesses.

Unfair Dismissal Laws

442. The Work Choices Act introduced fundamental changes to the unfair dismissal laws applying to businesses with 100 or less employees. These changes are likely, in the long term, to create difficulties for smaller businesses in attracting skilled staff.

443. Prior to the commencement of the Work Choices Act all businesses were covered by either state or federal unfair dismissal laws. These laws encouraged responsible and constructive human resource practices in business. However, since the commencement of the Work Choices Act constitutional corporations with 100 or less employees have been exempt from the unfair dismissal laws. While this provision was promoted as a means of encouraging employment in smaller businesses, the practical implications of this exemption will result in increased difficulty for smaller businesses in attracting and retaining valuable staff.

444. Unfair dismissal laws provide employees with an opportunity to challenge a dismissal or a threatened dismissal which they consider to be harsh, unfair or unjust. In short, this provision provides workers with a degree of security as they cannot be dismissed arbitrarily in circumstances displaying unfairness. However, as suggested by the *Australian Financial Review*, because of the exemption of businesses with 100 or less staff from the unfair dismissal laws, 'a perception is likely to develop among workers that working for a small business offers less job security because the business owner has the power to fire their employees'. [131] This was also noted by Rowena Barrett, Associate Professor at Monash University, who suggested that:

> *What makes a quality job is job security, top talent is not going to work somewhere where they know they can be dismissed.* [132]

445. Instances of unfair dismissal by small employers will impact negatively on the perception of security in employment in businesses with 100 or

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[131] Australian Financial Review (2006), *IR reform controversy set to run and run*, 23 March, page 14.

[132] Rowena Barrett (2006), quoted in *The Australian Financial Review*, 'IR reform controversy set to run and run', 23 March, page 14.

less staff and may encourage skilled and valuable workers to seek employment with larger organisations. This is likely to exacerbate the skills shortage facing smaller businesses.

Unlawful Termination

446. Although businesses with 100 or less employees are exempt from the unfair dismissal laws, these businesses may need to defend costly unlawful termination cases instead.

447. Under the Work Choices Act it is unlawful to terminate an employee, regardless of the size of their employer, on any of the following grounds:

- temporary absence from work due to illness or injury
- trade union membership or non-membership
- seeking office or acting as a representative of employees
- the filing of a complaint against an employer or participation in proceedings against an employer
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- refusal to negotiate, make, sign, extend, vary or terminate an AWA
- absence from work during maternity leave or other parental leave
- temporary absence from work because of carrying out a voluntary emergency management activity.

448. However, unlike unfair dismissal cases, unlawful termination cases cannot be heard and determined by the Industrial Relations Commission or the AIRC. Instead unlawful termination cases must be heard by the Federal Court of Australia or the Federal Magistrates Court. These proceedings are formal and costly and will require legal representation. In addition, the federal government is providing $4,000 in legal assistance to employees who are pursuing an unlawful termination case. This assistance is not readily accessible as applicants must have a certificate from the AIRC that conciliation options have been exhausted and the case has merit. The applicant also has to convince the Office of Workplace Services of financial need. Providing financial support of this kind may encourage speculative claims that employers will need to defend. Some recent unlawful termination cases have taken up to three years to be finalised.

449.The federal government has denied businesses with 100 or less employees access to the informal and less complex processes of the independent AIRC and Industrial Relations Commission. In contrast, larger businesses employing more than 100 staff still have access to the expertise of these Commissions in resolving disputes over dismissals. Small and medium sized businesses will wear the brunt of this costly change.

Costs NSW Government Incurs as an Employer

Public Sector Employment Legislation Amendment Act 2006

450.The New South Wales Government is a major employer within the state, employing approximately 10.5 per cent of the total New South Wales labour force as at June 2005. Consequently, the introduction of the Work Choices Act had the potential to greatly affect the industrial relations arrangements of the state government.

451.In order to minimise some of these impacts the New South Wales Government passed the *Public Sector Employment Legislation Amendment Act 2006* (the PSEL Act) which commenced operation on 17 March 2006. The PSEL Act transferred up to 186,000 employees from employment directly by a corporate entity to employment by the New South Wales Government in the service of the Crown. This transfer ensured that former employees of a number of government corporate entities that may have been subject to the Work Choices Act continue to be covered by the state jurisdiction. Among others, this transfer affected employees in the NSW Health service (including former NSW Ambulance Services) and the Roads and Traffic Authority. Employees of other statutory corporations subject to Ministerial direction were also brought within the state industrial relations system including former employees of the State Transit Authority and certain former employees of the Home Care Service.

452.The PSEL Act was not applied to employees of State Owned Corporations due to the unique structural arrangements of these organisations particularly given that they do not represent the Crown. State Owned Corporations are intended to operate as commercial entities, and they largely operate at arms length from the NSW Government.

453.The PSEL Act has ensured that the substantial majority of public sector employees continue to operate within the New South Wales industrial relations system ensuring the maintenance of existing employment conditions and accrued leave entitlements.

The Danger of Referring the State's Industrial Powers

454.The state opposition has publicly committed to referring the State's industrial relations powers to the federal government. If such a referral

were to occur, this would put under threat the working conditions of the state's frontline public sector workers, including teachers, nurses and police. If these workers were exposed to the Work Choices Act employment conditions such as overtime, penalty rates and work related allowances would not be legally guaranteed and would be subject to individual bargaining'. Bargaining disputes over such entitlements would not be able to be bought before the NSW Industrial Relations Commission for conciliation or arbitration. This potential for heightened industrial disputation without access to a strong, independent umpire may result in lengthy and damaging strikes by frontline public servants with potential disruptions to services.

Local Government

455. The situation of local governments in New South Wales is a good illustration of the confusion and issues surrounding the Work Choices Act. Of principal concern for local government is whether local councils are classed as 'constitutional corporations' for the purposes of the Work Choices Act and therefore will be forced to operate within the federal industrial relations system. In order to address this issue local government sought legal advice from the Crown Solicitor. The legal advice provided illustrates the confusion and uncertainty which is inherent in the Work Choices Act.

456. The Crown Solicitor's advice indicated that the 'constitutional corporation' status of a council would depend on the individual circumstances of each local government entity and the significance of each council's particular activities. This may include, for example, the extent of service delivery of the council and the significance of its trading activities. The legal advice also suggested that even after such as examination it was doubtful that a definite answer on the constitutional corporation status of a council could be given.

457. This is largely due to the relevant case law which has not clearly determined the level of trading activity required for an organisation to be characterised as a trading corporation. The trend of authority appears to indicate, however, that even a small percentage of revenue obtained from trading activities is sufficient for a body such as a local government authority to be classed as a constitutional corporation.

458. Consequently, the legal advice argued that some councils may have insufficient trading activities to be classed as a 'constitutional corporations' while others may have sufficient trading activities to be classed as a 'constitutional corporation'. In short, this may result in some local councils operating under the federal industrial relations system while others will remain in the state jurisdiction. This likely split of local government over two industrial relations jurisdictions will significantly contribute to the confusion and uncertainty about the application of industrial laws to local government. This is of particular

concern given that local government employs approximately 50,000 workers in New South Wales.

459. In addition, the complexity and costs involved in operating under the Work Choices Act have been noted by local government. The Minister for Local Government and the Minister for Industrial Relations recently issued a joint statement suggesting that:

> *Ratepayers and local communities need to have confidence they are getting the best possible services and that local governments are using public funds responsibly. To this end, councils are encouraged to work within the industrial relations policy of the New South Wales Government and continued reliance on existing industrial arrangements at each council would provide certainty and stability to all concerned.*[133]

460. In an attempt to address these problems local governments have sought alternative means of conducting their industrial affairs. Local governments have facilitated the development of two template referral agreements under the new s146A of the *Industrial Relations Act 1996.* These template agreements will empower the Industrial Relations Commission to resolve common law disputes. The agreements cover dispute resolution and dismissals alleged to have been unfair.

461. The experience of local government clearly shows the confusion and uncertainty experienced by organisations regarding the application and of the Work Choices Act and the limits of the jurisdiction it has established.

462. As detailed above the impacts of the Work Choices Act have been extensive on employers, especially small and medium sized enterprises. A significant number of employers in New South Wales have been forcibly removed from a fair, simple and balanced industrial relations system into and subjected to an industrial relations environment that is costly and complex.

463. While some of the impacts of the Work Choices Act have already been highlighted many of the medium and longer terms impacts for employers are yet to be experienced. However these may include:

- Accidents in the workplace and
- Reduced Productivity

[133] Hickey, K & Della Bosca, Joint Letter to Local Government.

Accidents in the workplace

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

465.Rest breaks, meal breaks, public holidays and annual leave are vitally important to the health and productivity of workers. The removal of these entitlements from agreements is likely to result in increased worker fatigue leading to increased levels of illness.

466.Fatigued workers pose a health and safety risk in the workplace and consequently, instances of workplace accidents are likely to be on the increase. Businesses may incur increased costs in sick leave and workers' compensation claims as a result. Businesses will also need to undergo the costs of developing and implementing a rehabilitation program for the injured workers returning to work.

467.The Work Choices Act and the anticipated Independent Contractors Bill 2006 may have further implications for occupational health and safety. Firstly, the Work Choices Act forbids the inclusion of clauses in workplace agreements relating to leave for union occupational health and safety training. Unions have historically provided an important role in workplace safety education and monitoring compliance with workplace safety laws. The removal of these provisions may result in occupational health and safety training on an ad hoc basis. In addition, the anticipated Independent Contractors Bill is likely to result in an increase in the engagement of independent contractors. These independent contractors are required to absorb the responsibility, obligations and costs of occupational health and safety. This absorption of responsibility may have impacts on the overall health and safety of a workplace.

Reduced Productivity

468.As mentioned in this Chapter, the Work Choices Act, through the removal of the 'no-disadvantage' test, encourages businesses to compete on wage costs. This, often short-term focus, will not encourage businesses to invest in long-term, value adding activities such as innovation, research and development, effective use of technology, staff training and development and strategy. These factors have been shown to improve the productivity of businesses. In the long term the failure of businesses to invest in these factors is likely to result in reduced productivity and reduced competitiveness.

469.The NSW Government encourages the ongoing monitoring of the impacts of the Work Choices Act on employers in New South Wales.

Conclusion

470. This submission has outlined the concerns of the New South Wales Government about the Work Choices Act and the impacts of this Act on specific groups within New South Wales.

471. The New South Wales Government maintains that the Work Choices Act:

- will weaken the bargaining position of workers particularly those in vulnerable groups such as women, young workers and trainees
- will exacerbate the social and economic disadvantages for workers and employers in rural and regional communities
- will exacerbate the gender pay gap and will reduce access to equal remuneration and work value cases for workers
- will fail to promote a balance between work and family and will further disadvantage workers with caring responsibilities
- will be detrimental to workers who have been injured during the course of their employment and
- will create a confusing, complex and costly industrial relations environment for employers.

472. The *Workplace Relations Amendment (Work Choices) Act 2005* does not improve choice. It maintains and extends the failures of the previous federal system and is complex and incomprehensible for the people who must use it.

473. The New South Wales Government believes that the Work Choices Act is not only unconstitutional, but that it breaches fundamental human rights and the dignity of workers.

474. The New South Wales Government entirely rejects the imposition of this industrial relations system on the employees and employers of this state.