Submission
No 12

INQUIRY INTO IMPACT OF COMMONWEALTH WORKCHOICES LEGISLATION

Organisation: CFMEU Construction & General Division

Name: Mr Andrew Ferguson

Position: State Secretary

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Date Received: 25/05/2006

Theme:

Summary

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24 May 2006

The Hon J Burnswoods MLC
Chair of the Standing Committee on Social Issues
NSW Legislative Council
NSW Parliament
Macquarie St Sydney NSW

Dear Ms Burnswoods,

Re: Inquiry - Impact of Commonwealth WorkChoices legislation

Please find enclosed a submission regarding this Inquiry from the Construction Forestry Mining and Energy Union (NSW Branch) Construction and General Division.

Please advise us of hearing dates so that we may organise some of our members referred to in the submission to give evidence.

Yours faithfully,

ANDREW FERGUSON
State Secretary.

SUBMISSION BY THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION (NEW SOUTH WALES BRANCH) CONSTRUCTION AND GENERAL DIVISION TO THE INQUIRY - IMPACT OF COMMONWEALTH WORKCHOICES LEGISLATION

INTRODUCTION

The Construction Forestry Mining and Energy Union (New South Wales Branch) Construction and General Division ("CFMEU") welcomes this inquiry into the effect os the WorkChoices legislation. In our submission, the CFMEU, attempts to canvas some of the issues relating to the impact of the changes to the *Workplace Relations Act* by the *Workplace Relations Amendment (Work Choices) Act* 2005 on workers and their representatives. This submission is by no means exhaustive of the issues of concern for working people and the CFMEU remains opposed to the changes in their entirety. The changes represent a fundamental attack on the rights of workers to organise, take collective action and to be represented by effective unions. These are human rights enshrined in international law. The Howard Government sees fit to crush such rights in favour of employers in this country.

It was appalling, and hardly democratic, that the Howard Government sought to introduce the most sweeping changes to Industrial Relations laws in Australia in more than 100 years giving interested stakeholders one week to put together their response to more than 1250 pages of explanatory material and proposed legislation. The approach clearly shows the complete disdain that the Howard Government has for the democratic processes in this country and the contempt it has for Australian workers. If the Howard Government's package was genuinely good for workers, the Government would have allowed us a proper opportunity to test its claims about the benefits of its packages. Instead the legislation is being pushed through without proper and informed debate, which can only raise, in the minds of workers and Unions, great suspicion. The package is not good for Australian workers.

The *Workplace Relations Amendment (Work Choices) Act* 2005 represents a comprehensive attack on the right of workers to effectively bargain collectively, through their union, with their employer for better wages and conditions. The legislation places in the hands of employers a powerful tool by which employers can, subject to limited prescribed minima, determine unilaterally the terms and conditions of employment for its employees.

In workplace agreement making, there is a complete abolition of any scrutiny by an independent third party, such as the Australian Industrial Relations Commission, to

ensure that in making agreements the law is complied with. Agreements can be made and lodged by employers that will continue to have effect, despite failures by an employer to follow the provisions of the Act. Recourse to a Court to address any deficiencies in agreement making for breaches that attract a civil penalty is in reality illusory relief.

The curtailment of the role of the AIRC and the pushing of parties to litigate in the ordinary courts places employers, who are far better resourced, in an advantageous position over their employees.

Further the introduction of the Australian Fair Pay and Conditions Standard will undermine the award system, particularly in the building and construction industry where the relevant awards have provided superior conditions in combination with enterprise bargaining agreements. Ultimately this will operate to disadvantage vulnerable Australian workers.

WORKPLACE AGREEMENTS- THE FLEXIBILITY IS ALL ONE WAY!

Part 8 of the Workplace Relations Act 1996, sets out the provision relating to the making of workplace agreements and their operation.

There will be six types of workplace agreements that can be made:

- Australian Workplace Agreements;
- Employees Collective Agreements;
- Union Collective Agreements;
- Union Greenfield Agreements;
- Employer Greenfield Agreements; and
- Multiple Business agreements.

Australian Workplace Agreements (AWAs) and Non-Union Collective Agreements

The Process

The Government places great importance on and is unashamedly encouraging the use of Australian Workplace Agreements. These are agreements struck between an employer and an individual employee. They can be made before the commencement of employment, so the right to participate in and obtain a collective agreement can be denied new employees from the start of their employment (s326(2)).

Moreover, such agreements can be made even where a collective agreement or award is in place and in operation. AWAs will override a collective agreement (s348(2) and an award (s349)

This means that despite a collective agreement being reached an employer can undermine such agreements by requiring an AWA. This was not the case under the Workplace

Relations Act 1996 prior to the changes. Section 400(6) specifically frees employers from claims of duress for requiring an employee to make an AWA a condition of employment.

It is fanciful that individuals in most workplaces, even where individuals are highly skilled or experienced, will be in a position to negotiate with their employer on an equal footing. The employer has the power in the relationship, they have the job. Combine this with the effective abolition of unfair dismissal rights and employees are put in a very difficult and precarious position; they will be forced to accept what is on offer, or risk losing the job! Employees will be put in impossible positions and will have to compromise on their rights and entitlements, even those entitlement supposedly protected by legislation.

Moreover, many employees just do not know what their lawful entitlements are. It is not proposed to educate workers about their rights. This will be the challenge for trade unions. Also most people are not taught negotiating skills. Employers negotiate all the time in the course of running their businesses. By and large employees do not have such skills. The employment relationship is not an equal one. Any negotiation about flexibility will by and large be one way- in favour of employers!

Moreover, despite the picture that the Howard Government wants to paint of employers and individual employees negotiating on equal footing the terms and conditions of employment, it is the CFMEU's experience of AWAs in the construction industry, that AWAs are often pattern documents, with each employees offered the same terms and conditions of employment and if they are not accepted the employees do not get the work. Yet Unions, on the other hand, are prevented from negotiating pattern agreements with employers.

It will also be difficult for employees to get advice and get access to representation in such negotiations.

The capacity for workers to get advice about AWAs or non-union collective agreements is further limited by the fact that employers need only give 7 days prior to approval a copy of the agreement, or **ready access,** to the agreement in writing (s337). Seven days is insufficient time in which employees are able to get advice, such as from their union, or to have their union or other advisor properly scrutinising and advising them of the agreement and its effect.

It is not even a requirement to provide each employee with a written copy of the agreement. It is conceivable that "ready access" might mean one copy of the document located in an office at the employer's premises, otherwise why use the terminology? It is absurd that an employer is not required to provide each and every employee with their own copy of the agreement that they can take away to consider.

In the new approach to agreement making, workplace agreements are lodged with the Office of Employment Advocate. This process will be purely a rubber stamping exercise, with agreements applying at time of lodgement. The Employment Advocate is, by

legislation, not required to consider or determine whether any of the requirements of the legislation in agreement making as to process or content have been met (s344(5)). The scrutiny that the AIRC provided ensured that enterprise agreements meet the no-disadvantage test and that provisions of the Act had been complied with. The role of the Office of the Employment Advocate to scrutinise AWAs (not that this was actually done in any real or meaningful way), under the Workplace Relations Act 1996 is removed.

In the event that the provisions of the Act have not been complied with, such as failing to provide employees with ready access and information statements, or failure to recognise a bargaining agent, or failure by an employer to seek approval of a union collective agreement within a reasonable period and for which there are penalties attached, the only relief that can be sought is through a Court.

Any legal action in the Federal Court, or the Federal Magistrate Court, is expensive. In the event that employers are in breach of the provisions, workers, or their unions, are not likely to be in a position to bring actions in the courts for relief due to prohibitive costs. Unions will be unable to purse such relief without express authorisation by an employee member. Employees are unlikely to make such formal complaint and risk reprisal by their employer.

Given that the provisions of the proposed legislation favour employers the CFMEU has absolutely no confidence that the Howard Government will pursue non-compliance by employers.

Given the Employment Advocate plays no role in ensuring the law is complied with, employers are given free reign.

The provisions clearly operate to the disadvantage of workers and their union representatives. The capacity to negotiate collectively either directly with employees or through a union still exists. However, the problems outlined above in relation the disadvantageous position employees find themselves with respect to AWAs equally applies to the negotiation of non-union and union collective agreements. Employers will be able to flout the law with abandon.

Since the introduction of enterprise agreement making in the mid- 1990s the evidence has been that Union negotiated agreements deliver superior wages and conditions.

At any time collective agreements can be usurped by an AWA of inferior conditions. Thus, even after a collective agreement has been secured by workers and their unions, their employment conditions can be undermined by their employer with an AWA.

Prohibited Content

The Act makes provision for regulations to specify matters that are prohibited content in workplace agreements. No surprise that the matters that have been prohibited mainly relate to trade union activity, such as paid leave to attend trade union training. Trade

Unions have traditionally played a positive and important role in providing training for workers and employers, particularly in the area of safety. Trade Union have also played an important role in educating workers as to their rights. The Office of Employment Advocate is insisting that references to trade union training be removed from workplace agreements.

Australian Fair Pay and Conditions Standard

WorkChoices also abolishes the no-disadvantage test by which agreements are measured in the current system against the relevant award. The Act now provides that the Australian Fair Pay and Conditions Standard prevails over a workplace agreement or a contract of employment. However, various conditions can be the subject of variation. For example, s233 allows the cashing out of annual leave, which was not allowed under NSW law.

It is absolutely contrary to the public interest that workers are not guaranteed a minimum 4 weeks annual leave. Given the disadvantageous bargaining position workers are placed vis a vis their employers, workers will be left worse off. A developed society like Australia should not support the erosion of what should be a basic condition.

The effect of the termination of workplace agreements- the Abolition of Award Entitlements

Upon the termination of workplace agreements, all industrial instruments cease to apply to the employees until a new workplace agreement is made (s399). Thus, employees are subject to the fair pay standard and effectively lose any additional rights and conditions contained in a relevant award. Thus by slight of pen, employees become award free and subject only to the minimum Australian Fair Pay and Conditions Standard and other minimum conditions. For building workers this will mean a loss of valuable Award rights and conditions which generations of building workers have gained over decades of struggle. The abolition of award minimums is completely unacceptable.

Termination of Bargaining Periods (s430-433)

The Australian Industrial Relations Commission is given very broad powers to intervene and suspend bargaining periods for many reasons, including so called pattern bargaining, and to limit the initiation of new bargaining periods. Further the Act empowers the AIRC to suspend bargaining powers where industrial action affects a third party. In industries such as the building and construction industry, industrial action will clearly affect third parties, for example on a particular site. Such powers further stymie, almost completely, the capacity for building workers to negotiate collectively and take protected industrial action. This is a further example of how stacked against workers and unions this legislation is.

Employers have already started taking an aggressive approach to workers. As this example below shows:

Stephen and Brett –Apprentices Ripped Off

Stephen and Brett are two 17 year olds who were employed with a company on the promise of apprenticeships. However, the employer required them to sign individual contracts which saw them being paid approximately $3.30/hour. They did not receive sick leave or rostered days off.

The Union and the young men campaigned to gain back pay.

Samuel - Young Worker Abused

Samuel was brought over by his employer from the Cook Islands in 2004. He was forced to sign an individual contract. He was contracted to his employer for 2 years. He lived with the employer and his family and was subject to physical abuse. So too were other co-workers. He worked for the boss but did not receive any wages. His employer systematically physically abused him, slapping, punching and assaulting with a hammer. He has ongoing physical injuries as a result of the abuse. The boss also goaded other co-workers to hurt Samuel. The police have charged the employer

The Federal Government has made it easier for employers to import guest workers. The CFMEU have identified over the years many stories of abuse of guest workers, The CFMEU is concerned that the deregulation of the industrial relations system will encourage more of this exploitation by employers.

THE RIGHT TO TAKE INDUSTRIAL ACTION- ABOLISHED!

The Act makes it difficult for workers to take industrial action to further claims for better wages and conditions and represents a further attack on the right of workers to bargain collectively. Workers' efforts to take effective industrial action will be perilous in terms of the increasing complexity of the process and increasing number of offences that employees and unions face if they get it wrong. In the building and construction industry unlawful industrial action can also attract uncapped damages and other fines through the operation of the *Building and Construction Industry Improvement Act 2005*.

The necessity for a secret ballot (Part 9 Division 4))

The requirement of conducting a secret ballot in the manner proposed in the legislation will discourage many workers from taking industrial action and also places on their trade unions an unreasonable burden. A complex and highly technical process is involved, particularly if the ballot is initiated by a trade union as only members of the organisation can participate.

The failure to comply with the legislative requirements, even for very minor technical issues, could result in any action taken being rendered "unprotected" exposing individual workers and their unions to massive fines, and claims for damages. The process will also mean that employers, who are far better resourced, can delay ballots, as is the case in the United States, with technical arguments and legal action and defeat the efforts of workers to take industrial action.

Commission powers to issue orders against industrial action

The Australian Industrial Relations Commission is empowered to make orders stopping industrial action if it ***"appears"*** that unprotected action is happening, threatened, impending, or probable, or being organised. This does away with any burden of proof required by employers to show that indeed unprotected industrial action is taking place or probable.

Financial Penalties on Workers

If a workers takes protected or unprotected industrial action they will have their wages deducted by a minimum of four hours, even where the industrial action was less than four hours. This is highly unfair and excessive and is a further barrier to workers taking industrial action, even if it is protected industrial action. In recent times we have seen ludicrous situations where workers taking 15 minutes to raise money for the family of a deceased fellow worker were docked 4 hours pay. Further, in Western Australia where we understand a delegate was also docked 4 hours pay for coming back a few minutes late after dropping of money raised for the Beaconsfield miners.

Unions will be penalised if they make a claim for payment

Unions, including an organisation, officer, member or employee, face pecuniary penalties if they make a claim for payment of wages for employees which take industrial action. Unions from time to time bring claims for underpayment of wages for example where the Union and employees believe that the action take was not industrial action, for example, when workers face imminent health and safety concerns. This is often done in the course of legal proceedings, before the relevant industrial tribunal or court. If Unions fail in such cases, not only do workers not receive payment, but their representatives can be subject to fines as high as $33 000. Combine this with the positive burden of proof placed on employees to show that their action was based on a reasonable concern about an imminent risk to health or safety and the difficulties associated with this, the imposition of a civil penalty is ridiculous. Lawyers are not subject to civil penalties if they lose their client's cases. This is highly oppressive and prohibitive and will inhibit unions bringing claims even where the preponderance of evidence is in their favour for fear that if the case is lost the union, or its officers and members could face very serious significant penalties.

RIGHT OF ENTRY

The provisions dealing with Right of Entry to workplaces by authorised officers of industrial organisation will make it very difficult for trade union representative to access their members or potential members.

WorkChoices introduces an overly bureaucratic process in the issuing of permits (s740-742), with applicants and their organisation having to satisfy onerous and uncertain list of prerequisites. It obliges the Registrar to judge an applicant's character and requires the disclosure of personal information that can have no bearing to the purposes for which such a permit is granted.

In revoking, suspending or imposing conditions on a permit and its holder, the industrial Registrar is required to take into account matters that have happened since the issue of the permit even if they are not the subject of the complaint that gives rise to proceedings under this section against permit holders (s744).

The provisions curtail the Registrars' discretion to impose disqualification periods by introducing mandatory minimum disqualification periods. Such a regime means the factors of individual cases cannot be fairly considered and weighed up. The imposition of even the minimum three month ban can severely impact on the livelihood of effected individuals.

The provisions in relation to notice giving (s749) are onerous and will significantly curtail the capacity of industrial organisations to investigate breaches of industrial law on behalf of their members, as well as their capacity to recruit and assist their members. Further the requirement to provide particulars as to the suspected breaches, and the positive burden of proving reasonable grounds of suspected breach (s749(2)(c)) result, particularly in small workplaces, in the identification of employees who might have complained to their union and make them a target for reprisal by their employer.

The limitations provided in the Right of Entry provisions of the Act further curtail the rights of authorised officers and empowers employers with a capacity to circumvent the exercise of right of entry by permit holders by dictating the conditions under which a permit holder exercises their right by putting in place procedures which reduce the time available for permit holders to exercise their statutory rights.

Further the requirement imposed by s756 of the Act, that a state permit holder have a federal permit is onerous and prohibitive. The permits allow for certain rights in very different circumstances and give very different rights to permit holders; the two should be treated as separate and distinct rights. The provisions of s758 may also be used to hinder unreasonably the exercise of an OHS permit holder's rights.

In relation to the provisions of s760, it is a further curtailment of the capacity of trade unions to access their members and potential members, thus depriving workers of access

to their trade unions, by limiting discussions with employees to those enterprises where an award or collective agreement binds the organisation. This deprives workers under non-union agreements or AWAs, which are generally less advantageous than union negotiated agreements, access to their union at the workplace. It also severely restricts trade unions to recruit new members and is just another example of the thrust of this legislation to de-unionise workplaces and to crush the trade union movement.

The complex nature of these provisions, the entwining of the Federal system with state OHS systems and the various limitations and restrictions put in place by the changes will severely impact on the capacity for trade unions to represent and protect their members, recruit new members and ensure that their members are not placed in unsafe situations which could threaten their lives.

SUBMISSIONS RE AWARDS IN WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005

Underpinning Concepts

Awards and the award making power have been the raison d'etre of the federal industrial relations system exemplified in Justice Higgins' Sunshine Harvester decision of 1907. Lacking a definition of a fair and reasonable wage he arrived at a figure necessary to satisfy the *"normal needs of the average employee regarded as a human being living in a civilised community"*. He saw this as an irreducible minimum going onto to say:

> *Unless great multitudes of people are to irretrievably injured in themselves and their families, unless society is to be perpetually in industrial unrest, it is necessary to keep this living wage as a thing sacrosanct beyond the reach of bargaining.*

This underpinning concept was fundamentally collective. Higgins' viewed an employer unable to pay award wages as one that ought not to be an employer. He saw that the employing function had itself a collective responsibility to society and the humans employed by it, to pay the award minima or to leave the marketplace.

This was buttressed when Australia adopted the two core International Labour Organisation (ILO) Conventions in 1972. *Convention 87 the "Freedom of Association and protection of the Right to Organise, 1948" and Convention 98 the "Right to Organise and Collective Bargaining Convention 1949.* Article 4 of which states:

> *Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

The collective nature of the federal industrial relations system was fulfilling this Article and as the system has evolved to formalise informal enterprise and workplace "over award" bargaining into a formalised enterprise bargaining system, the awards underpinning these bargains have continued to develop at arms' length from the government.

The Slow Death of These Underpinning Concepts

WorkChoices vitiates the founding basis of the *Harvester* judgement and the core ILO conventions. Not that this is apparent if one reads page 13 of the WorkChoices summary that the government sends to callers of its' hotline. All the pictures of happy smiling white people plus the copious *"protected by law"* stamps would give the impression that one's award is safe and protected under this proposal. Nothing could be further from the truth, it may be technically true as page 13 opines "*Awards will not be abolished*", as it would be true that someone who beats a person near to death but leaves them still breathing could say *"I did not beat that person to death"*. What the government deliberately conceals with its' polished sophistry is that once an agreement collective or individual is made there is no going back to the formerly underpinning award. Combining this with the removal of duress as a legal ground to object to the making of an Australian Workplace Agreement (AWA) leaves awards to bleed to death whilst the government walks away declaring its' innocence of any such crime.

Removal of Award Making and Varying Powers

Further heralding the death of the award system is the removal of the AIRC's general award making and varying power, this power is no longer *"protected by law"*. The ability of unions to bring test cases, work value cases and national wage cases to set the basis of the *"sustained progress"* envisioned in *ILO Convention 87* is no longer *"protected by law"*. In so doing the workforce has lost its' democratic right to reasonably and legally seek general improvements for itself through union membership. This fundamental loss of collective voice denies the *"freedom of expression"* in the Australian context that this convention sees as the purpose of unions.

Particular Impacts on CFMEU Members in the Construction and Joinery Industries

In an industry such as construction where the workforce is itinerant and moves from project to project and employer to employer the National Building & Construction Industry Award (NBCIA), the National Joinery & Building Trades Products Award (NJBTPA) and their state counterparts have taken wages and conditions out of competition. Workers will now not have their award follow them from job to job, they will find that over time the rights and conditions that have protected them replaced by part time casual AWAs, that employers will perfectly legally be able to make a condition of employment on their projects.

In terms of the NBCIA allowing part time work is something that the AIRC as the independent umpire has recently ruled as inappropriate, in an award that operates for tradespeople and labourers as a daily hire award. The Award already allowed for enormous flexibility for employers. Another core condition of employment is the conversion of casual employment to full time employment, currently this happens after six weeks in the NBCIA and twelve weeks in the NJBTPA. This will no longer be an allowable matter under this legislation, workers now can be causal forever never receiving the benefits of the certainty of full time employment in their working lives.

Conditions Potentially Disallowed Currently in the NSW Building & Construction Industry (State) Award

The proposed legislation further cuts the matters allowable in awards the following is a list of those that would fall outside the definition of allowable matters currently in the CFMEU's main two state awards. Further the Act gives the Minister power to disallow further matters by regulation. This is totally unacceptable.

1. Clause 11 Settlement of disputes. CFMEU involvement in dispute settling;
2. Clause 11.9 Copy of award exhibition of the award in the workplace;
3. Clause 11.10 Posting of union notices in the workplace;
4. Clause 12.4 Provision of personal protective equipment, free x-rays for refractory brick layers and labourers;
5. Clause 12.4.6 Washing time before lunch and finishing;
6. Clause 12.5 Recognition of rights and protection of CFMEU delegates;
7. Clause 12.6.1 Award provision of amenities, such as toilets, meal rooms and changing rooms;
8. Clause 12.7 Free transport to hospital if injured and the provision of first aid kits/rooms on site;
9. Clause 12.8 Employer provision of special trade tools and clothing and boots;
10. Clause 13.2 Conversion of casuals to full time employees after six weeks regular and systematic employment;
11. Clause 15 Minimum payment of one days pay plus fares if employees not required after reporting for work;
12. Clause 16 Redundancy pay for termination other than for misconduct;
13. Clause 18.3 Follow the job loading the allowance for eight days unemployment between jobs being an immediate 3.17% wage cut;
14. Clause 22 Mixed functions clause that regulates temporary transfers to higher duties;
15. Clause 23.8 Deduction and remittance of union fees;
16. Clause 27 Collective agreement over changes to working hours and rostered days off;
17. Clause 33.5 Trade Union Training Leave;
18. Clause 36 Union picnic day first Monday in December.

CONDITIONS POTENTIALLY DISALLOWED CURRENTLY IN THE NSW JOINERS (STATE) AWARD

1. Clause 10 Mixed functions clause that regulates temporary transfers to higher duties;
2. Clause 12 Permitting daily hire only of casual employees, no part time employment permitted. 12 weeks maximum engagement for casuals before conversion to full time;
3. Clause 13 Provision for a constant number of hours for part time employees, Union notification of part time employment under the award;
4. Clause 21 Collective agreement over changes to working hours;
5. Clause 36 Termination, change and redundancy consultation with union;
6. Clause 37 Washing time five minutes before lunch and finishing;
7. Clause 38 Amenities access to boiling and cool drinking water
8. Clause 39 Free transport to hospital when injured;
9. Clause 45 Posting of award in workplaces;
10. Clause 46 Posting of union notice in workplaces;
11. Clause 47 Union delegates rights and protections;
12. Clause 49 Union delegate and secretary involvement in dispute procedures;
13. Clause 50 Trade union training leave.

POTENTIAL FOR SUBSTANTIAL WAGE CUTS

Beyond the cuts in award conditions above, the legal right of the employer to require a new employee to be employed under an AWA in the itinerant project based construction industry gives enormous opportunities for employers to impose substantial wage cuts on workers. Presuming that following current NBCIA conditions: Clause 16 Redundancy Pay, Clause 21 Inclement Weather, Clause 27 Rostered Days Off, Clause 32 Annual Leave Loading, Clause 36 Public Holiday Pay, Clause 38 Fares and Travel Allowance, are removed in an AWA, has the following consequences:

Award based carpenter annual wage	$42,764.16
AWA based carpenter annual wage	$30,894.95
Annual difference	$11,869.20
Hourly difference	$4.51
Percentage annual wage cut	27.755%

The cut becomes even more savage taking out the current award hourly rate of $17.13 and replacing it with the legislated minimum of $12.75 per hour:

Award based carpenter Annual wage	$42,764.16
AWA based carpenter Annual wage	$22,919.76
Annual difference	$19,844.40
Hourly difference	$8.89
Percentage annual wage cut	46.404%

Applying the same loss of conditions (except inclement weather as apprentices are weekly employees) with current pay rates to apprentices yields the following wage cuts:

	Award Apprentice Annual Pay	AWA Apprentice Annual Pay	Annual difference	Hourly difference	Percentage annual wage cut
1st yr	16,797.05	12,036.26	4,760.78	2.42	28.343
2nd yr	22,449.09	17032.56	5416.52	2.74	24.128
3rd yr	28,120.61	22,116.37	6004.24	3.02	21.135
4th yr	32,189.05	25,733.16	6455.89	3.23	20.056

Detailed tables substantiating these figures are attached.

Workers in depressed rural and regional job markets are likely to be most vulnerable to AWA enforced wage cuts. However as the construction industry is an exemplar case of the boom and bust cycles of capitalism, wage cuts will be felt in the country's metropolitan areas sooner rather than later.

CONCILIATION AND ARBITRATION IN WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005

Model dispute resolution process

The new Part 13, which introduces for the first time into the *Workplace Relations Act* an "alternative dispute resolution process using an agreed provider". Division 2 of Part VIIA contains a "model dispute resolution process" clause. The model clause will be contained in all Awards as well as agreements which are lodged without a dispute resolution process.

Under the clause, parties are first required to attempt to resolve the dispute between themselves. If this fails, the model clause provides that one of the parties can notify the Industrial Registrar of the dispute, but only where the parties cannot agree on who should conduct the alternative dispute resolution process. The parties must then wait 14 days (the "consideration period") before applying to the Commission to conduct the alternative dispute resolution process.

At present, the Commission is frequently able to conciliate in relation to industrial disputes within a few days, and sometimes even hours, of being notified of the existence of a dispute. The enforced delay contained in the model dispute resolution process will make it much more difficult for the parties to seek the benefit of the Commission's assistance in addressing and resolving disputes in a timely and efficient manner.

In conducting the alternative dispute resolution, the Commission may not: compel a person to do anything; make an award or order; or appoint a board of reference, even if the parties agree that the Commission should be able to do these things. The Commission can only arbitrate or otherwise determine the rights of a party if the parties agree. The Commission is not even able to make a recommendation unless the parties request the Commission to do so. Further, the process must be conducted in private.

The power of the Commission in this process will essentially be limited to arranging conferences for the parties to attend and assisting the parties to reach an agreement between themselves, unless both the parties wish the Commission to make a recommendation or decision. It appears that the Commission does not have power to compel attendance. The powers of the Commission will be much the same as those of a private mediator. At present, the Commission is able to act quickly to convene conciliation conferences in relation to disputes. The Commission can compel attendance. This often helps resolve disputes.

The clause provides that the alternative dispute resolution process is complete when the parties to the dispute agree that the matters are resolved, or the party who elected to use the process informs the Commission that it no longer wishes to continue with the process.

Under the model clause, the process is entirely "voluntary". Where no satisfactory resolution is reached, the parties will generally have no recourse to arbitration. This will significantly disadvantage a party to a dispute where the other party does not wish to resolve the matter. Generally, the stronger party to the dispute will have little incentive to compromise.

If the parties use an alternative dispute resolution provider other than the Commission, this provider will have no powers other than to assist the parties reach an agreement amongst themselves. This again will clearly advantage the stronger party to the dispute.

Dispute resolution by the Commission under a workplace agreement

Under the new s710, the Commission must not conduct a dispute resolution process under a workplace agreement unless all the steps under the agreement have first been taken. It is often a matter of dispute between the parties as to whether the steps have been correctly followed. Presumably the Commission will have to deal with any argument in relation to this as a jurisdictional matter, before attending to the substantive matter in dispute. This will cause delay in the Commission being able to provide quick and practical assistance to the parties in resolving disputes.

Under the new s712, the Commission is required to conduct the dispute in private, and must not disclose any information or documents provided during the course of the process. Further, evidence from the dispute before the Commission is not admissible in a court. The current practice is for the parties to be able to place some matters on the public record, and also to make use of the Commission's assistance in private discussions. The amendments take these options away from the parties, and introduce a lack of transparency.

The Commission will not have power to make orders in conducting a dispute resolution procedure under an agreement. This could well affect the Commission's ability to hear evidence about the matters in dispute in a procedurally fair manner, and therefore the

Commission's ability to make a recommendation or decision in a properly informed manner.

The Commission will be unable to arbitrate unless the workplace agreement specifically provides for this. This is likely to lead to complicated and time consuming jurisdictional arguments.

Dispute resolution by the Commission other than under a workplace agreement or the model clause

The Commission may only conduct alternative dispute resolution other than in accordance with a workplace agreement or the model clause if the dispute is in relation to bargaining for a proposed collective agreement and the parties agree to the Commission conducting dispute resolution. These are extremely narrow circumstances. A party in negotiation with another party who is unwilling to resolve the dispute will have no recourse to the assistance of the Commission. This would be a significant disadvantage to the party who does wish to resolve the dispute.

Under the new 706, the commission has no power to arbitrate under these circumstances, even if the parties agree that it should. Again, the "voluntary" nature of the process will seriously disadvantage a party to a dispute where the other party does not wish to resolve the dispute.

Orders of the Commission in relation to industrial action

Under the new s496, the Commission is required to make an order to stop or prevent industrial action which is not protected, if is "appears" that the industrial action is happening, threatened, impending or probable, or is being organised. This is even the case in respect of non-federal system employees or employers if the industrial action is likely to cause substantial loss to the business of a constitutional corporation. If the Commission cannot hear and determine an application under this section within 48 hours, it must make an interim order unless this would be contrary to the public interest.

These provisions contrast sharply with the voluntary nature of dispute resolution under the proposed changes. Further, the Commission loses its discretion in respect to granting orders, and must grant the orders irrespective of the circumstances. This significantly curtails the ability of the Commission to try to resolve matters without issuing orders preventing industrial action.

Workchoices takes away the power of the Commission to arbitrate or issue orders except in the case where unprotected industrial action is taking place, in which case the Commission is generally required to make orders to prevent it. The Commission will only have power to arbitrate subject to a workplace agreement where the agreement specifically gives the Commission that power, and even this is subject to significant limitations.

The Commission's power to conciliate in relation to disputes has also been significantly reduced. Essentially, the Commission will now only be able to conciliate where the parties agree to this course. Even then, the powers of the Commission in conciliating are subject to significant limitations.

At present, the conciliation and arbitration powers of the Commission are of great assistance to parties to industrial disputes in resolving these disputes. Under the proposed changes, the parties will lose the benefit of this independent third party to assist in resolution of disputes unless both sides agree. This will significantly disadvantage the less powerful party to a dispute.

The proposed changes will disadvantage and weaken the bargaining position of unions, and strengthen that of employers. Unions and employees will generally not be able to force a reluctant employer to the bargaining table, even for conciliation.

The removal of the Commission's power to arbitrate except in limited circumstances means that if a party is unwilling to resolve the dispute, the weaker party will have no recourse to an independent umpire.

The requirement that the Commission issues orders to prevent industrial action generally within 48 hours will also significantly disadvantage employees and unions. It even further curtails the ability of employees to withdraw their labour in any circumstances other than negotiating for a workplace agreement.

Far from being an "alternative" dispute resolution mechanism, the new legislative regime for industrial disputes is likely to force parties into the court system in relation to breaches of laws, awards or agreements, given that participation in Commission proceedings will now be mostly voluntary. This will deprive parties of access to a quick and cost effective method of resolving disputes.

TERMINATION OF EMPLOYMENT

WorkChoices in effect gives employers the capacity to hire and fire at will. Relief from unfair dismissal can only be made where an employer has more than 100 employees (s643(10)). Further, even where a person can meet this threshold an application cannot be made if a reason for the termination was *"genuine operational requirements"* (s643(8)).

The CFMEU, under pre-WorkChoices law, successfully brought an application for relief from unfair dismissal in the AIRC and won reinstatement for our member. The decision is *David James Halls v. Boral Formwork and Scaffolding Pty Ltd*, a decision of Commissioner Larkin [PR972414]. This decisions illustrates the unjust nature of the Federal Government's new industrial relations laws.

Halls v. Boral Formwork and Scaffolding Pty Ltd

A scaffolding yard employee of Boral Formwork and Scaffolding, Hall who was also a CFMEU delegate was made redundant on December 7th 2005 on the basis of operational requirements. There was no doubt that the company were suffering a decline in profitability and the union did not dispute that point. However regardless of the issue of profitability there was still a high workload that was generating significant amounts of overtime per week.

Commissioner Larkin accepted that the company had a valid reason for a termination on the basis of its' operational requirements, but found that it did not have a valid reason for the termination of Mr. Hall's employment, and will now make an order to have him reinstated with all lost remuneration to be paid.

When one reads the provisions of the Workplace Relations Act section 643 (8) as follows;

> (8) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, if the employee's employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons.

So it would seem that Mr. Halls' under the new laws would have had no opportunity to challenge his harsh, unjust and unreasonable sacking. He and any other worker are now at the mercy of bad employers who can effectively override any previously legally binding procedural agreements regarding redundancies to pick the heads they want with no reasons given.

Some employees are not so fortunate:

James Harrop and Shoalhaven New Image Kitchens Pty Ltd

James Harrop was employed by Shoalhaven New Image Kitchens Pty Ltd as a cabinet maker from 25 June 1997 until 24 April 2006. He became a leading hand in July 2005. James joined the CFMEU in approximately October 2005. James became a CFMEU delegate in approximately December 2005. On 1 November 2005, James was threatened, sworn at and assaulted by

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James complained about the conduct of . James was issued with a written warning by Shoalhaven.

This incident became the subject of an industrial dispute between the CFMEU and Shoalhaven. The NSW Industrial Relations Commission was notified of this dispute by the CFMEU on 16 November 2005.

The dispute was the subject of proceedings in the Commission in IRC matter number 5886 of 2005. James participated in these proceedings before the Commission.

The dispute was before Commissioner Connor on a number of occasions, most recently on 11 April 2006, when the parties' representatives appeared before the Commission to read an agreement onto the record. Shoalhaven agreed to withdraw the written warning issued to James.

On 24 April 2006, Shoalhaven terminated the employment of James Harrop, for the stated reason of "redundancy".

No reason was given to James for his selection for redundancy. James was one of the longest serving and most skilled employees of the respondent.

Prior to the implementation of the WorkChoices legislation, James would have had a clear remedy in the NSW Industrial Relations Commission on the basis that he was victimised by Shoalhaven by the termination of his employment, in contravention of ss 210(1)(a), 210(1)(g) and 210(1)(j) of the *Industrial Relations Act 1996.*

James would also have been entitled to make an application in respect of unfair termination in the NSW Industrial Relations Commission prior to the implementation of WorkChoices.

It now appears that these provisions may have been displaced by s 16 of the amended Workplace Relations Act which states that this Act is intended to apply to the exclusion of State industrial laws as they would otherwise apply in relation to an employee or employer (with some limited exceptions).

James Barbour

James Barbour worked for his company since 1988. He is 66 years old. His employer sacked James on 21 April 2006. James advises that he was sacked because his employer told him his job was not done properly and that he was too old to work The company he works for has less than 100 employees. The Union has taken up James case.

Thus the Howard government has handed dictatorial powers to employers to use at their whim under the rubric of "choice".

CONCLUSION- HUMAN BEINGS LIVING IN A CIVILISED COMMUNITY

This submission seeks to detail some of the examples and legal issues arising from the WorkChoices changes. It is still early days and as time passes the effects of the changes will be felt by many more workers.

The CFMEU is opposed to the WorkChoices legislation in its entirety. WorkChoices strips workers of decent industrial regulations, abolishes awards as an effective safety net, and leaves all workers to the whim of their employers and the marketplace. Workers civil liberties and internationally recognised human rights are eroded if not removed. The Howard Government's system erodes the very foundations of what has contributed to Australia being a decent and humane society.

The most insidious aspect of these changes is the illusory nature of the guarantees and the *"protected by law"* stamps that proliferate over the glossy material produced for public consumption. The reality of the impact of these changes on the award system will be in the words of Justice Higgins *"great multitudes of people are to be irretrievably injured in themselves and their families"*. The ability of Australians to live in a civilised community will be severely attacked by the cumulative process overtime of workers and their families moving from awards to AWAs.

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CASE STUDIES EXTRACTED FOR EASE OF REFERENCE

Stephen and Brett –Apprentices Ripped Off

Stephen and Brett are two 17 year olds who were employed with a company on the promise of apprenticeships. However, the employer required them to sign individual contracts which saw them being paid approximately $3.30/hour. They did not receive sick leave or rostered days off.

The Union and the young men campaigned to gain back pay.

Samuel - Young Worker Abused

Samuel was brought over by his employer from the Cook Islands in 2004. He was forced to sign an individual contract. He was contracted to his employer for 2 years. He lived with the employer and his family and was subject to physical abuse. So too were other co-workers. He worked for the boss but did not receive any wages. His employer systematically physically abused him, slapping, punching and assaulting with a hammer. He has ongoing physical injuries as a result of the abuse. The boss also goaded other co-workers to hurt Samuel. The police have charged the employer

Halls v. Boral Formwork and Scaffolding Pty Ltd

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