Submission
No 13

INQUIRY INTO IMPACT OF COMMONWEALTH WORKCHOICES LEGISLATION

Organisation: NSW Council for Civil Liberties

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Date Received: 26/05/2006

Theme:

Summary

From: "NSWCCL" <office@nswccl.org.au>
To: <jan.burnswoods@parliament.nsw.gov.au>
Date: Friday, 26 May 2006 1:19
Subject: NSWCCL submission to Inquiry into Impact of Commonwealth WorkChoices Legislation

26 May 2006

The Hon. Jan Burnswoods MLC

Chair

Standing Committee on Social Issues

NSW Legislative Council

Parliament House

Macquarie St

Sydney NSW 2000

Dear Ms Burnswoods

Re: Inquiry into Impact of Commonwealth WorkChoices Legislation

by the NSW Legislative Council Standing Committee On Social Issues

Please find attached the submission of the NSW Council for Civil Liberties to the Committee's inquiry.

We thank the Committee for this opportunity to make a written submission and hope our submission will prove useful to the Committee.

Please advise us when we may disclose this submission publicly on our website. NSWCCL grants the Committee permission to publish the submission in full.

Yours sincerely

Stephen Blanks

Secretary

New South Wales
Council for
Civil Liberties

Submission to the
Standing Committee on Social Issues,
NSW Legislative Council

concerning the inquiry into the
Impact of Commonwealth WorkChoices Legislation

The Council for Civil Liberties thanks the Parliamentary Joint Committee for the invitation to make this submission. We would be happy to comment further on any of the matters raised, or on any other matters that arise from the inquiry, should the Parliamentary Committee so desire.

The New South Wales Council for Civil Liberties opposes the changes introduced by WorkChoices. The Council believes that the thrust of the changes will deprive Australian workers of the right to freedom of association, the right to collective bargaining and the right to take industrial action where appropriate to do so. Further the stripping back of minimum award terms and conditions of employment will place low paid workers in a precarious position eroding what are now protected entitlements. The proposed changes wind back 100 years of regulation of industrial relations which will favour employers over employees. The Council is concerned that this will disadvantage vulnerable workers, such as the low paid and the unemployed.

International law, such as the *Right to Organise and Collective Bargaining Convention* 1949, enshrine the rights of workers to organise and undertake collective bargaining to improve their wages and work conditions. Such rights are significantly compromised by the WorkChoices changes.

Some of the issues which the Council identifies are set out below.

The Right to Collective Bargaining

The WorkChoices legislation promotes individual agreements, known as Australian Workplace Agreements, as the favoured method of regulating wages and conditions of employment. The approach ignores that many employees, if not most, are not in an equal bargaining position with their employers. Moreover, with more and more people being employed on a casual basis, the capacity of workers to negotiate is further eroded.

WorkChoices sets up a system that makes it relatively easy for employers to utilise this type of workplace agreement. 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 (s362(2)).

Moreover, such agreements can be made even where a collective agreement or award is in place an in operation. AWAs will override a collective agreement and an award (s(348)(2) and s349).

This means that despite a collective agreement being reached an employer can undermine such agreements by requiring an AWA. Section 400(6) specifically frees employers from claims of duress for requiring an employee to make an AWA a condition of employment.

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 a copy of the agreement, or ready access, to the agreement in writing 7 days prior to approval (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 scrutinise the agreement and advise them of the agreement and its effect.

Such an approach also ignores the needs of people from non-English speaking backgrounds or people who are illiterate. There are no protections in the legislation for people who may be vulnerable to exploitation and victimisation.

In the new approach to agreement making, workplace agreements are lodged with the Employment Advocate. This new "streamlined process" allows agreement to take effect at time of lodgement. There is no independent scrutiny of agreements to ensure that they at least meet the legislative minimum terms and conditions or that the processes used to make the agreement were consistent with the provisions of the Act. 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.

The scrutiny that the AIRC has currently to ensure the enterprise agreements meet the no-disadvantage test and that provisions of the Act have been complied with, and the role of the Office of the Employment Advocate to scrutinise AWAs is removed.

In the event that the provisions of the Act have not been complied with, such as the failure 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, whilst there are civil penalties attached, the only relief that can be sought is through a Court.

Any legal action in the Federal Court or the Federal Magistrates Court is expensive and will be prohibitive for workers to pursue. In any event workers, particularly those put in a position to having to accept an AWA, if they are even aware of their rights, are unlikely to make such formal complaint and risk reprisal by their employer.

Whilst WorkChoices maintains the capacity for collective agreements, either union or non-union to be reached, these can be overridden at any time by the introduction of AWAs. There is also some complexity and barriers associated with obtaining a collective agreement under the new regime:

- By regulation making power, there are now a number of matters that are prohibited from being included in a collective workplace agreement. These include such matters as paid union meetings, trade union training leave, commitment to future agreements being union ones, compulsory union involvement in dispute procedures, or that provide a remedy for unfair dismissals, restrictions on outsourcing and use of labour hire employees. These types of provisions are more likely found in agreements that are negotiated by unions. It was also proposed that any of these types of provisions in existing awards and enterprise agreements will be unenforceable. This represents a fundamental stripping of conditions that strike at the heart of workers democratic rights at work. They will be unable to negotiate conditions which give them access to their union representatives.

- WorkChoices also abolishes the no-disadvantage test by which agreements are measured in the current system against the relevant award. The Australian Fair Pay and Conditions Standard will prevail over a workplace agreement or a contract of employment. However, various conditions can be the subject of variation. For example the legislation now allows the cashing out of annual leave, which was not allowed under NSW law. NSW protection has been invalidated by the WorkChoices legislation. It is of concern that vulnerable workers may be placed in a position where they have to give up their rights.

- Upon the termination of workplace agreements, all industrial instruments cease to apply to the employees until a new workplace agreement is made. Thus, employees are subject to the fair pay standard and effectively lose any additional rights and conditions contained in relevant awards. For many workers this will mean a loss of valuable rights. The abolition of award minimums in this way is completely unacceptable. It is often workers with the least negotiating power that were protected by Awards. These workers will now have much of this safety net removed.

- The Australian Industrial Relations Commission (the "AIRC") 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. The AIRC will also be able to suspend bargaining powers where industrial action impacts on a third party affected by the industrial action. In industries such as the building and construction industry, cleaning and transport, industrial action will clearly affect third parties given the subcontract nature of such industries.

The Council is concerned that such barriers will work as a significant disincentive for collective bargaining and result in a loss or current conditions of employment and a lower standard of living.

Capacity To Take Industrial Action

In the current system workers are able to take legal industrial action or "protected industrial action" to further their claims. In taking this action employees and their unions are excluded from claims for damages by their employed.

WorkChoices puts in place a system which will reduce the capacity for workers to take effective industrial action:

- ***The necessity for a secret ballot***- 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 unreasonable burden. A complex and highly technical process is involved. There is also a cost involved, a percentage of which will need to be met by workers or their union. The reality is that non-unionised workers will not take industrial action in this way.

- The failure to comply with the legislative requirements, even for very minor technical issues, may result in any action taken being rendered "unprotected" exposing individual workers and their unions to fines, and claims for damages.

- The process will also mean that employers, who are far better resourced can delay ballots, with technical arguments and legal action and will be able to defeat the efforts of workers taking 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.

- If a worker takes protected or unprotected industrial action they will have their wages deducted by a minimum of 4 hours, even where the industrial action was less than 4 hours.

- 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 and workers bring claims for underpayment of wages for example where employees take action that is not industrial action, for example, when workers face imminent health and safety concerns. If employees or unions fail in such cases, not only do workers not receive payments, 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 highly oppressive and will inhibit meritorious claims being made.

Right to Organise and Freedom of Association Issues

The provisions dealing with Right of Entry to workplaces of 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 to authorised representatives, with applicants and their organisation having to satisfy an onerous and uncertain list of prerequisites. It obliges a registrar to judge an applicant's character and may require 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. It is a concern that this may involve dubious evidence of a hearsay and defamatory nature which respondents to such proceedings will find it impossible to challenge. Such claims can be forum to do great damage to the reputation and livelihood of union representatives. The registrar should only deal with legitimate, substantiated complaints.

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

The provisions in relation to notice of entry are onerous and will significantly curtail the capacity of industrial organisations to investigate breaches of industrial law on behalf of their members in a timely and immediate fashion. Unions will have a reduced capacity to recruit new members 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, will result, particularly in small workplaces, in the identification of employees who might have complained to their union and make them a target for reprisal and victimisation by an unscrupulous employer.

The limitations contained in the Act, such as the right of an employer to decide which route representatives take and where meetings will be held may also operate to empower employers to circumvent the exercise of right of entry by permit holders by establishing procedures which reduce the time available for permit holders to exercise their statutory rights and the opportunity to address areas of concerns that workers may have about their work conditions.

Further, the requirement imposed in requiring a state permit holder to have a federal permit is onerous and prohibitive (s756). The permits allow for certain rights in very different circumstances, the two should be treated as separate and distinct rights. The provisions of s219 may also be used to hinder unreasonably the exercise of an OHS permit holder's rights. This is unacceptable and may

ultimately jeopardise the lives of workers, particularly in industries like the building and construction industry where the safety risks are high. Restricting the capacity of OHS permit holders to address safety concerns may result in the death of workers.

Union representatives will only be able to enter workplaces where there is an industrial instrument that binds the Union. This 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, 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.

The complex nature of these provisions, the entwining of the Federal system with state OHS systems and the various limitations and restrictions 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.

Workers should be given reasonable access to trade unions, they should be able to organise. Unions should be able to access members and workers eligible to be members to protect their wages and conditions from erosion by unscrupulous employers.

Conciliation and Arbitration under WorkChoices

Model dispute resolution process

The Council is concerned that the manner in which the "alternative dispute resolution" process will operate unnecessarily erodes the powers of the Australian Industrial Relations Commission in dealing with industrial disputes. The AIRC over the past 100 years has played a pivotal and effective role in resolving industrial disputation which is in the benefit of both employers and employees.

WorkChoices 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 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 to 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 WorkChoices, the AIRC 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.

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.

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 of the *Workplace Relations Act* 1996, the Commission is required to make an order to stop or prevent industrial action which is not protected, if it "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 essentially 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.

The Stripping of Award Entitlements

The Council is concerned that the move to strip back awards and to confine minimum standards of employment to the Australian Fair Pay and Conditions Standard will mean a loss of pay and conditions for workers currently protected by comprehensive awards. The Council is not opposed to the principle of ensuring that all workers receive the benefit of annual leave, personal/carers leave, parental leave and not to work excessive hours, which the Australian Fair Pay and Conditions Standard purports to do. Although we are aware that the ACTU, Unions NSW and others have raised issues about whether the Standard

does actually deliver what it is claimed by the Howard Government to deliver for Australian workers. Such conditions of employment can be given to all workers without having to be accompanied by a change to the award system that sees these issues stripped out of awards, particularly if industries have standards that are more beneficial than the legislated minima.

Moreover, the Council is concerned that the move to strip back awards to a minimum set of entitlements will result in a loss of conditions. Workers who solely rely on awards for their minimum pay and conditions are those who lack sufficient bargaining power to negotiate better wages and conditions. The award is their safety net and it is most concerning that these workers, who represent the most vulnerable, might have their conditions reduced.

We are also concerned that there is some analysis of the legislation that suggests that Award provisions such as allowing women returning from maternity leave to transfer from full-time to part-time work could be abolished.

The Council does not support an award stripping process which erodes the terms and conditions of Australian workers.

TERMINATION OF EMPLOYMENT

The Council is also concerned about the abolition of unfair dismissal rights for workers employed by companies of less than 100 employees. A large number, if not the majority of workers, are employed by small business. The Council understands that the effect of the WorkChoices changes, introduces a system of "hire and fire at will". Workers will only have a limited avenue to challenge termination of employment if they can show in a court they have been terminated unlawfully. The Workplace Relations Act sets out a number of limited grounds that can be relied upon. Such cases are heard in the Federal Court and the Federal Magistrate's Court and are costly to run, thus overall of limited value to workers.

CONCLUSIONS

These are some of the issues of concern that the Council has in relation to the change in the Australian Industrial Relations System.

We are concerned that the amendments to the Workplace Relations Act 1996 brought about by WorkChoices, has been introduced in such a manner to deprive interested parties to closely consider its contents, to properly debate its impact and to fully understand the consequences of this very significant change to regulation of industrial relations in Australia.

The Council is also concerned about the impact of the changes on lower paid workers who relied on the safety net provided by the pre-Workchoices system. This safety net appears to have been removed.