Submission
No 25

INQUIRY INTO IMPACT OF COMMONWEALTH WORKCHOICES LEGISLATION

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Summary

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Inquiry - Impact of Commonwealth WorkChoices Legislation

Thank you for the opportunity to make a submission for the Legislative Council Social Issues Committee's Inquiry on the Impact of Commonwealth WorkChoices Legislation.

Combined Community Legal Centres Group (NSW) Inc. (CCLCG) has 38 member Community Legal Centres (CLCs) that work for the public interest, particularly assisting people who, for a range of reasons, have difficulty in accessing the legal system, including people with disabilities, women, young people, Indigenous people and people from a non-English speaking background, among others. CLCs provide legal services including information, referral and advice, strategic case work, community legal education and law reform campaigns. CCLCG is a not-for-profit organization.

Employment law advice is one of the major areas of work for CLCs. The demand for employment law advice is commonly in connection with dismissals or denial of access to proper wages and entitlements.

We would like to take this opportunity to further highlight some of the concerns that the proposed amendments raise for our clients in NSW. The basis of these concerns has come from the range of legal issues community legal centres in NSW address through their casework and advice on an on-going basis, so where possible we have provided actual case studies (without personal references) to illustrate how these issues occur in practice.

Preliminary

The primary difficulty that we face in making meaningful submissions to this enquiry (over and above the many submissions made by CLCs to last years Senate enquiry into the Federal Government's draft WorkChoices legislation) is that the amended *Workplace Relations Act 1996* ('WorkChoices') has so far only been in operation for a very short period. As a sector we have not yet had the opportunity to deal with a large number of cases under this legislation, and given the breadth of the changes wrought by the new system there may be as yet unforseen consequences for our clients. Nevertheless, set out below are some of the issues that have to date caused us significant concern, particularly in relation to the increased complexity, costs and uncertainty the WorkChoices legislation has created in the field of Industrial Relations.

The loss of a low cost forum for disputes

Apart from the loss of access to remedies for unfair dismissal, perhaps the greatest single injustice meted out to working people by WorkChoices is the loss of the low cost, low complexity tribunal system for the resolution of industrial disputes. For those workers now covered by WorkChoices, limited alternative dispute resolution processes are still provided by the AIRC, but if these efforts fail the only alternative in many cases is to seek

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judicial redress before the Federal Court. Not only does this present a formidable procedural obstacle for the unrepresented or poorly funded litigant (and an employee seeking redress for, say, unlawful termination will generally by definition be unemployed), but the risk of a costs award being made under Section 666 as a result of an 'unreasonable act or omission' will pose a deterrent to all but the most confident litigants in a higher court unaccustomed to the self-represented and their inevitable unfamiliarity with court procedural requirements. Certainly there is the potential grant of $4,000.00 in legal assistance to eligible employees, but this is a negligible amount compared to the actual funds required to run a case in a higher court of record. In any event, CLCs' current experience with Federal anti-discrimination laws, where the Human Rights and Equal Opportunity Commission ('HREOC') assists with no more than an initial conciliation before referring clients on to the Federal Court, leaves us feeling less than optimistic about the prospects of many employee complainants under WorkChoices opting to try their chances before a judge.

> ***Case study:*** A non-Anglo-Celtic man was refused service in a hotel with the words '*get out of here you black c****'. A CLC assisted him to file a complaint with HREOC. The hotel management was invited to attend conciliation organised by HREOC but failed even to respond to the Commission's correspondence. HREOC wrote to the applicant advising him that the respondent would not attend conciliation and that his only remaining recourse was to commence proceedings in the Federal Court. Upon hearing that there was a risk that he might suffer a costs award should he lose, the applicant declined to take his case further.

Multiplicity of actions across jurisdictions

There was an element of discrimination in many of the unfair dismissal cases that came to Tribunals before the commencement of WorkChoices. The majority of those cases were settled at Conciliation stage, and a key element in those settlements (and one not appreciated in the WorkChoices philosophy) was that a Deed of Settlement was agreed to by both parties and almost always included a key clause that settled all instances of litigation, dispute and proceedings in any Tribunal or Court regarding any aspect of the employment relationship in dispute between the parties. It is anecdotally known that, before WorkChoices, many of the perceived 'unjust' settlements of unfair dismissal cases which employers complained of, were in fact finalised under such Deeds and under the supervision of Tribunals. When specific employer complaints about the operation of the industrial relations landscape prior to WorkChoices have been examined, they have usually shown the employer has not 'valued' (or not disclosed) that aspect of the settlement. In fact, such settlements under Deed have spared many employers the publicity that an anti-discrimination case would have generated.

WorkChoices has effectively removed such benefits that were possible through a Deed of Settlement. With WorkChoices removing the unfair dismissal component of an employer's actions, the balance of matters – which often include issues of discrimination– will inevitably go to a State ADB or HREOC process. Or, which is highly likely, the whole process of seeking redress will present so many obstacles to workers that they will simply accept unlawful or unfair conditions.

> ***Case study:*** For over five years a CLC client worked regular shifts of 20 hour per week as a shop assistant. Although formally classified as a 'casual' and paid at the casual rate, under the old law she would have had an arguable case that she was permanent part-time. After the introduction of WorkChoices she was asked by her employer to sign an AWA under which she would receive $12.75 per hour instead of $17.85 per hour (her previous rate). The AWA classified her as a part-time permanent employee. The AWA also stipulated that she would not receive any penalty rates; that she was 'entitled to THREE weeks annual leave for each completed year of appointment'; and that her 'duties may be varied from time to time to allow the company to respond to changing business and operational needs'. This last point was a concern to her as on two previous occasions she had been offered managerial positions which she had declined despite the fact that under the award she would have received a higher hourly rate. She believed that she would now be forced into these roles without additional pay. Unfortunately this client has found the whole process extremely stressful and it is likely that she will not return to work nor does

she want to take any action against her employer. She indicated that most staff at her workplace signed the AWA as they needed the job.

It is also worth noting that lawyers – whether assisting a worker in these situations as a representative or adviser, or a Federal Government employed lawyer working in one of the assistance areas set up by WorkChoices or otherwise – are ethically and legally bound to advise the worker where clear matters of discrimination are raised. Many workers now cannot elect to go through an industrial tribunal process that could deal with and settle finally every aspect of the matter that could be agreed (e.g. dismissal, reinstatement, discrimination, wages, superannuation, entitlements etc). Every head of the problem might now need to be separately actioned because there is no alternative, through the State ADB's and HREOC, the Chief Industrial Magistrate (for wages and Long Service Leave), the ATO (for PAYG and Superannuation Guarantee Levy matters), the Workers Compensation Commission (for injured worker disputes), WorkCover (for bullying and other OHS issues), and so on.

This may well lead to workplace relationships entering into more frequent and more costly litigation than the previous system has ever had.

> ***Case study:*** "Z", a part-time retail assistant in a small business was summarily dismissed without sufficient reason prior to the commencement of Workchoices. After the commencement of NSW Industrial Relations Commission proceedings, the employer initiated a separate Local Court action against Z claiming a minor debt arising out of Z's alleged failure to return a key. The matter as a whole comprised many issues, including casual versus part time status, a strange employment contract devised by the employer, sexual harassment, breaches of the *Workplace Surveillance Act*, and non-payment of superannuation. Nevertheless, the dispute was resolved to Z's satisfaction by way of a Deed of Settlement covering all actions, an agreed sum paid in cash, discontinuance of the Local Court proceedings, the provision of a genuine employment reference and including a non-disparagement clause. However, under WorkChoices, in addition to taking action on the employment agreement, Z would also have had to both commence and meet several separate actions, creating an unfair legal and costs imbalance and potentially putting pressure on Z to forgo legitimate remedies.

Uncertainty of interpretation

The effective re-drafting of the Commonwealth *Workplace Relations Act* means that the substantial body of Federal industrial relations case law that had been built up over many years is now either irrelevant or of uncertain application. Ferreting through the Canopic jars of case law left over from the evisceration of the AIRC is a pointless exercise in many cases, and legal advisers for both employees and employers have little to go on but the legislation itself. Presumably this situation will eventually change, but the formidable obstacles that WorkChoices throws up in the face of an employee who wishes to mount, say, an unlawful dismissal claim, means that we cannot expect a comforting tide of case law to clarify the operations of this legislation any time soon. Given this, it seems reasonable to speculate that we have now embarked upon an extended period of interpretative uncertainty vis-à-vis Federal industrial relations law. The perennial difficulty with introducing uncertainty into any aspect of the legal system is that it tends to exacerbate disputes.

Some of the practical effects of this are obvious, some more surprising. For example, it can now be difficult to predict the effect of Federal and State awards in so far as they are deemed '*pre-reform awards*' or '*notional agreements preserving state awards*'. This is because in many circumstances both award types now need to comply with the *Australian Fair Pay and Conditions Standard* ('AFPCS'). Not all awards comply with the AFPCS in all respects, often as a result of trade-offs entered into by union and employer representatives during the award making process, and so some employees might find that conditions that they had traded away in return for other conditions are now restored or available to them for the first time. This can surprise employers and has the potential to escalate disputes.

Case study: A CLC client was on extended sick leave. She had been providing her employer with regular medical certificates, but under the relevant award the employer was entitled to much more detailed information on her condition, which the employee was reluctant to provide. Because the relevant award is now a '*pre-reform award*'' with respect to these parties, it needs to be read in the light of the guarantees set out in WorkChoices. The relevant guarantee states that it is enough for the employee to provide the employer with a complying medical certificate, and so to the degree that the award contains more onerous conditions it is unenforceable against this employee. The employer had been accustomed to the pre-WorkChoices operations of the award and refused to accept that WorkChoices modified the award at all. He refused to obtain legal advice, leaving the employee with little choice but to approach the Office of Workplace Services, escalating what might otherwise have been a readily resolvable dispute.

Uncertainty of coverage

Given the Federal Government's unusual recourse to the Federal Constitution's corporations power, one of the main triggers for bringing an employer into the WorkChoices system is that that employer is a trading or financial corporation. Whether or not an organisation falls into that category is a question of interpretation based on an assessment of the degree to which the organisation's trading or financial activities are 'significant' or 'substantial'. This is a matter of judgment based on case law, since it is not possible to determine solely from an organisation's style of incorporation (that is, say, whether it is incorporated under the Commonwealth *Corporations Act* or the NSW *Incorporated Associations Act*) whether it will be bound by the main provisions of WorkChoices. In fact, it is entirely possible that in one year an organisation might be a constitutional corporation, but in a subsequent year fail the trading or financial activity test and therefore drop out of the WorkChoices system. For the non-government sector in particular this poses significant uncertainty. It is common for community sector agencies to draw their income from a mixture of grant money and money raised through, say, cost recovery or donations. If this funding mix significantly varies from year to year the consequent uncertainties as employer and employee lurch from State system to WorkChoices and back again may seriously prejudice both parties. Anecdotal reports also show that almost all workers from larger organizations (i.e. more than 20 employees) have no idea as to whether the organisation employs more than 100 workers and therefore don't know what their entitlements would be under the new WorkChoices legislation.

Thus contrary to the Government's claims of introducing a simpler, fairer system, the uncertainty resulting from this complex legislation has made the situation more uncertain for both employers and employees.

Complexity of Formal Agreements

Although the mandatory content specified for inclusion in workplace agreements under WorkChoices is minimal (compliance with the Australian Fair Pay & Conditions Standard, a nominal expiry date, and a dispute settling process), agreements will inevitably be far more complex, and most will no doubt seek to modify protected award conditions and insert other conditions. Although employers are obliged to provide employees with information from the Office of the Employment Advocate prior to finalisation of agreements, they are not obliged to explain content. Further agreements only needs to be lodged with the OEA, they no longer need to be certified. It is now incumbent on individual employees to sift through agreements and make their own minds up as to their meaning and legality. As a practical matter, this will no doubt increase the likelihood of unlawful or unfair agreements being relied upon by employers in the workplace.

Case study: A CLC client, "Y", was a Child Care Worker in an early childhood centre Y also had dyslexia , a disability of which her employer was aware. Some time after commencing work Y was summarily dismissed after alleged "complaints" about grammar and spelling. Y had only been told of one complaint (about a month earlier) and immediately took steps to effectively overcome her errors, although her employer made attempt to adapt her workplace to her disability. Y filed an Anti-Discrimination Board ('ADB') complaint. Fortunately, she was represented at the ADB, since her

employer was represented by 3 senior staff and a professional advocate from an employer body. After considerable negotiation, an agreement was reached including a financial settlement, a genuine employment reference, a statement of regret, and a non-disparagement clause.

Y's experience is indicative of many employees' future under Workchoices. Many workers affected by dyslexia (estimated around 8% of population) will be faced with demands to sign complex employment contracts (although difficulty with interpreting legal documents is of course not limited to the dyslexic). In non-employment situations dyslexic people can overcome such problems by having a document read directly to them, or provided on media in aural format. In a workplace situation, they may be directly affected by necessarily declaring their disability in order to access the agreement and achieve hiring or ongoing employment. Perhaps employers would not risk an ADB action by discriminating on the basis of any such newly declared disability, but the announcement on 28 March 2006 by the Federal Minister for Industrial Relations that workers can in fact be sacked for a personality clash with an employer means that other grounds could be used by unscrupulous employers to achieve the same end.

The interaction of the Family Law, Child Support, Welfare to Work and Industrial Relations changes

Many of these legislative changes have yet to come into force. Nevertheless, we have good reason to be concerned that their combined effect will be to push already disadvantaged primary carers of children (mostly women) into greater poverty, putting their children at risk.

In relation to the Welfare to Work changes for example, if a person refuses to accept a job on the grounds that they disagree with the contents of a workplace agreement, they may face an eight-week suspension of Centrelink benefit payments, a measure which effectively eliminates even the illusion of equal bargaining power. Furthermore, from 1 July 2006 a broader range of people will be adversely affected by these measures as many individuals with school-aged children who would previously have been on a parenting payment will now be migrated to unemployment benefits. An inevitable effect will be that primary carers of school-aged children will be compelled to accept workplace agreements that simply meet the Australian Fair Pay and Condition Standard regardless of whether, say, they have been able to arrange affordable after-school care that is acceptable to them or their children.

Meanwhile, changes to the *Family Law Act* mean that the so-called 'paramountcy' principle (namely, that the best interests of children are to be the Court's paramount concern when making orders) has been substantially modified. Over and above the matters that have traditionally been considered in determining what is in a child's best interests, the Court is now directed (for example by new section 65AA) to prioritise equal time parenting, or if not equal time then at least substantial and significant time with both parents, when making orders regarding children. Leaving aside the extensive reservations that many Family Law practitioners harbour over this modification of the paramountcy principle, our concern here is the way this modification dovetails with forthcoming changes to the child support regime. From 2007 there will be a much closer link between the number of nights spent with a parent and the amount of child support payable. Coupled with the *Family Law Act* changes, this will mean that modest changes in the nights spent with the non-residential parent will not only be easier to achieve, but will have a significant financial effect on the custodial parent.

It is difficult to see how the combined effect of a harsher workplace environment, an increasingly punitive welfare system, and a much less primary-carer-friendly child support regime can have anything but a negative impact on already disadvantaged sole-parent families. Not only does this bode ill from a child protection perspective, but given that the majority of sole parents are women, the disturbing conclusion that the Federal government's legislative program contains an intentional gender bias seems irresistible.

Complexity of transitional provisions

There are at least ten possible permutations for the application of WorkChoices to various employees, depending on the identity of the employer, whether there is an agreement in place (and whether that agreement is State or

Federal), and whether there is an award in place (and whether that award is State or Federal). Awards and agreements vary in their application according to the characterisation of the employer, the time at which the employment began and even according to the continuing membership of employer and employees in their representative organisations. The details of these many permutations are buried in the more than two thousand pages of the Act, its Schedules and the Regulations, and are opaque to many lawyers with industrial relations experience, to say nothing of ordinary employees and employers.

Large numbers of businesses not covered

According to ABS publication 8161.0.55.001 *Counts of Businesses – Summary Tables*, as at June 2004 there were 3,015,182 businesses operating in the Australian Private Sector. Of these, 836,948 were categorised as 'employing businesses'. Of these employing businesses, 754,484 (90%) were businesses that employed fewer than 20 people ('small businesses'). Of these small businesses, 141,765 were conducted by trusts (19%), 124,693 were conducted by partnerships (16.5%), and 107,642 were conducted by sole proprietors (14%). 367,200 were conducted by Proprietary Limited corporations (49%). It seems reasonable to extrapolate these figures to NSW, which would indicate that for the purposes of WorkChoices approximately 49.5% of employers in NSW are 'excluded employers' for the purposes of WorkChoices.

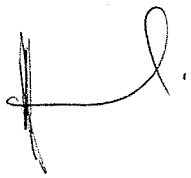
As at June 2004, out of 1,054,176 businesses in NSW, 756,092 were non-employing. Of the 298,084 employing businesses, 270,814 (91%) employed fewer than 20 people. Given the above estimate that approximately 49.5% of these businesses will have been conducted by trusts, partnerships and sole proprietors, that leaves approximately 134,052 small businesses in NSW that are 'excluded employers' under WorkChoices. This guarantees additional complexity in the workplace, since there are now two parallel, and radically different, industrial relations regimes operating throughout NSW. Furthermore, as has already been noted, these regimes apply through an assessment of the nature of the employer (which can change over time) rather through any characteristic of the work itself or through the operations of an intuitively relevant jurisdictional test.

Arbitrary treatment of similar classes

Agreements affecting employees of constitutional corporations will be treated differently under WorkChoices depending on whether the agreement is State or Federal. An employee under a Federal agreement (a 'pre-reform agreement') will find that it is only the 'anti-AWA' provisions of their agreement that will now be unenforceable. For the employee with the State agreement (a 'preserved state agreement'), the broader 'prohibited content' set out in the Regulations will be unenforceable. It is difficult to discern the purpose behind this differential treatment, but it is another example of the often arbitrary complexity of this legislation.

We hope that the information provided is useful for your deliberations. Should you require any further information please contact Mark MacDiarmid on: 02 4782 4155 (phone) or mark_macdiarmid@fcl.fl.asn.au.

Yours faithfully,



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