 A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE	
SUBMISSION NUMBER	10
DATE AUTH'D FOR REGISTRATION	16/3/06

# ACT Government Submission

to the Inquiry of the

## Select Committee on Working Families in the ACT

into the Federal Government's

**Workplace Relations Amendment (Better Bargaining) Bill 2005**  
*Building and Construction Industry Improvement Act 2005*  
*Workplace Relations Amendment (Work Choices) Act 2005*

### February 2006



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 building our community  
 ACT Government

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## **Introduction**

The ACT Government welcomes the opportunity to make a submission to this important Inquiry. Working families are fundamental to the wellbeing of a healthy and prosperous community. The Federal Government has consistently sought to introduce legislation that exposes workers to uncertain and diminishing conditions of employment.

The introduction of the Workplace Relations Amendment (Better Bargaining) Bill 2005, *Building and Construction Industry Improvement Act 2005* and, most recently, the *Workplace Relations Amendment (Work Choices) Act 2005* has the potential to have a devastating effect on the family life of ACT workers.

The ACT Government opposes these changes because they will:

- reduce pay, conditions and protection for workers and their families;
- increase cost and complexity for employers; and
- cause immediate harm to employment and family relationships.

## **Workplace Relations Amendment (Better Bargaining) Bill 2005 and *Building and Construction Industry Improvement Act 2005***

### ***Collective Bargaining and the Right to Strike***

The ability of workers and their representatives to pursue free collective bargaining is essential to the employment relationship as it is generally the only tool available to employees to protect and influence the terms and conditions of their employment. The right to take industrial action is seen as an intrinsic corollary to collective bargaining, because it is the only avenue through which employees can influence the bargaining process.<sup>1</sup>

Due to the power imbalance inherent in the employment relationship, without full collective bargaining employees face the prospect of employment conditions being diminished or even removed all together.

Both the Workplace Relations Amendment (Better Bargaining) Bill 2005 (Better Bargaining Bill) and the *Building and Construction Industry Improvement Act 2005* (BCII Act) significantly restrict the right to take protected industrial action in support of collective agreement making.

### ***The Workplace Relations Amendment (Better Bargaining) Bill 2005***

Currently the Australian Industrial Relations Committee (AIRC) may suspend a bargaining period under section 170MW of the *Workplace Relations Act 1996* (WR Act). Industrial action can only be protected from injunctions and damages claims where a party first seeks a bargaining period from the Commission in accordance with provisions under Division 8 of Part V1B of the WR Act. If a bargaining period is suspended, protected action loses its protected

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<sup>1</sup> ILO Committee of Experts on the Application of Conventions and Recommendations, *General Survey* (2000).

status. Where a bargaining period is suspended and industrial action continues, action may be taken to stop it (injunction) and seek the recovery of any loss (damages).

The Better Bargaining Bill will allow a third party (neither employer nor employee), affected by industrial action, such as a business client, to apply to the AIRC to have a bargaining period suspended and thus terminate protected industrial action.

The Bill will limit protected industrial action to single employers.

The Bill will deny access to protected industrial action during the life of a certified agreement (CA), including over claims for matters not addressed in the CA, and thus nullifies the effects of the Federal Court's *Emwest* decision 1. (The *Emwest* decision held that the WR Act's provisions on certified agreements and protected industrial action did not prevent a new claim, hence CA, on a subject matter not addressed in a current CA between the same parties).

### ***The Building and Construction Industry Improvement Act 2005***

The BCII Act establishes a regulatory body for the building and construction industry. The Office of the Australian Building and Construction Commissioner (Office of the ABC Commissioner) has wide-ranging powers to monitor, investigate and enforce Federal workplace relations laws and the Building Code, and refer other matters to the appropriate Federal, State or Territory agency.

The BCII Act allows the Minister to issue a Building Code. The Act also sets out obligations to report on Building Code compliance.

The BCII Act sets out the powers and functions of the Federal Safety Commissioner, and provides for the establishment of an Occupational Health and Safety (OHS) accreditation scheme to be administered by the Federal Safety Commissioner.

The BCII Act establishes that certain types of industrial action are unlawful unless it is protected industrial action within the meaning of the WR Act. Unions and those taking unlawful action will be liable to financial penalties and may be ordered to pay substantial uncapped compensation to any person affected by the unlawful industrial action.

A person will generally not be exposed to penalties under both the BCII Act and s170MN of the WR Act. However a court can order compensation even if a civil penalty has been imposed for a breach of s170MN.

The BCII Act provides for increased penalties for contravention of the strike pay provisions in the WR Act. The penalty for this offence is 1000 penalty units.

The BCII Act allows that inspectors under the WR Act will be able to bring actions under the *Building and Construction Improvement Act 2005*.

The BCII Act prohibits the coercion of persons in relation to the engagement of subcontractors and employees, and coercion or undue pressure in relation to certified agreements or choice of superannuation fund. Discrimination on the basis of the type of, or parties to, an industrial instrument covering a person's employees is also prohibited.

The BCII Act sets out penalties for contravention of civil penalty provisions and orders that a court may make. The BCII Act also sets out who may apply for these orders. The orders that a court may make include an order to pay damages to any person who suffers loss as a result of a contravention of the unlawful industrial action prohibition.

### ***What will this mean for working families in the ACT?***

The main impact for the Better Bargaining Bill and the BCII Act on working families in the ACT is in the reduction of the capacity of workers to bargain effectively. Both the Better Bargaining Bill and the BCII Act limit the rights of workers to engage in protected industrial action. This is a key tool that workers use to bargain and reducing access to it could lead to poorer industrial outcomes for workers.

These impacts will be disproportionately felt by low skilled workers who do not have as much market power as higher skilled workers. The result could be less ability for families to balance work and family commitments as well as the possibility that these families will become part of the 'working poor'.

### ***Workplace Relations Amendment (Work Choices) Act 2005***

#### ***Introduction***

The Workplace Relations Amendment (Work Choices) Bill 2005 (Work Choices Bill) was introduced in Federal Parliament on 2 November 2005. The Work Choices Bill proposed a range of changes that will weaken the power of the AIRC, remove the protection of unfair dismissal laws for workplaces with less than 100 employees, reduce the level of scrutiny that individual agreements are subject to, radically reduce the ability of employees to take protected industrial action, and replace the award safety net with five minimum conditions in the Australian Fair Pay and Conditions Standard.

The ACT Government contributed to a joint State and Territory submission to the Senate Employment, Workplace Relations and Education Committee's inquiry into the Work Choices Bill. The full submission is provided at Attachment A and forms part of this submission.

The Senate Committee received over 200 formal submissions on the Work Choices Bill. Submissions were provided by employers, unions, individuals, churches and community groups. Overwhelmingly, submissions expressed concern about the potential impact of the Bill on working families. In addition to the formal submissions, the Senate Committee received over 4,000 e-mails about the proposed legislation. The response was so significant the Senate Committee was not able to acknowledge every e-mail it received.

Despite the high level of community concern demonstrated through the Committee process, the Work Choices Bill passed through the Federal Parliament on 7 December 2005. While a number of amendments were made to the Bill, these have not gone to the fundamental structure of the legislation.

The following comments, based on those provided in the joint State and Territory submission to the Senate Inquiry, are still relevant and highlight the likely impact of the legislation on working families in the ACT.

## ***Impact on families***

The ACT Government believes the reduced capacity to collectively bargain will negatively impact on families in the ACT and across Australia. The potential to lose fundamental family friendly conditions in awards and agreements such as maternity leave, carer's leave, transfer to part-time employment and security of employment against casualisation or arbitrary dismissal, added to the increase in unpredictable and irregular hours of work, short notice call-in, fluctuating weekly income and increased working hours will have a significant impact on workers with families.

### Role of the Commission

Over the years, the AIRC has played a crucial role in establishing important protections for working parents. Conditions such as the right to 52 weeks' unpaid maternity leave granted in 1979, and the right to five days' paid carer's leave to care for a family or household member granted in 1995, are now established community standards.

The AIRC recently continued along this socially responsible path through its decision to provide women with a right to request an additional 12 months maternity leave and part-time work when they return to their job.

Unfortunately, this may be the last decision of its kind, with AIRC test cases becoming a thing of the past under the federal government's changes. It will be up to disempowered workers to negotiate new family friendly provisions.

Further, the Federal Government has decided not to include the new award standard for parental leave in their minimum conditions. Indeed, the Work Choices legislation under s116B actually proscribes one of the new work and family award provisions. Provisions giving employees the right to request part time employment, by making 'transfers from one type of employment to another type of employment' will not be allowed in awards.

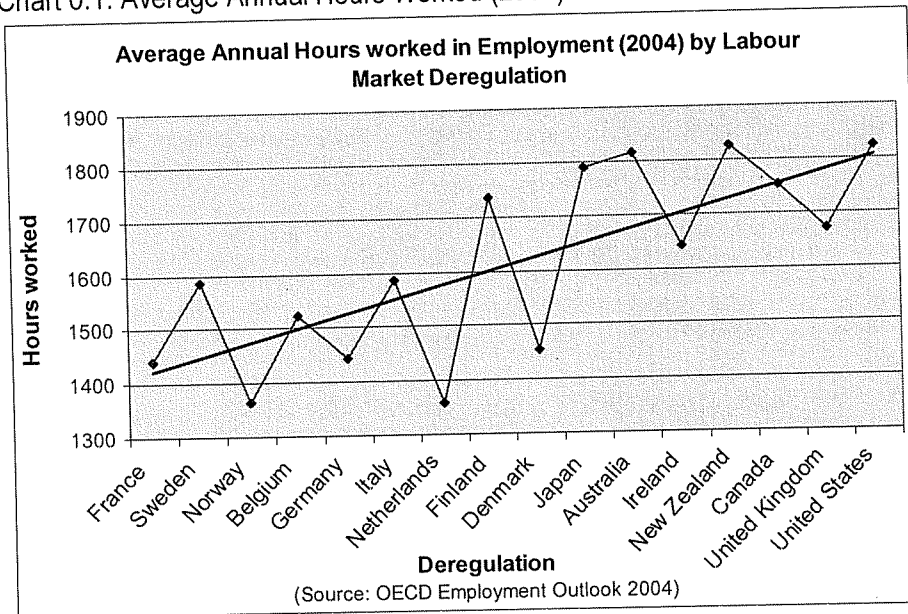
### Individual bargaining

The provisions of the Work Choices legislation, especially those that promote individual contracts based on minimum conditions at the expense of collective bargaining, will have a devastating impact on families. A loss of control over rosters and hours of work, through averaging provisions and provisions which allow the employer to direct reasonable additional hours without notice, will make it even harder for families to spend time together and make reliable caring arrangements. This will result in unpredictability for employees, not flexibility.

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

The impact of the Work Choices legislation will be that employees will have to work cheaper and longer. The evidence shows that countries with deregulated systems have the highest levels of annual hours worked, with the United States up the top but with Australia not too far behind.

Chart 0.1: Average Annual Hours Worked (2004)



A Parliamentary Library research paper on 'Work and family policies as industrial and employment entitlements,' published in 2004, confirms that Australian Workplace Agreements (AWAs) are likely to result in increased working hours, claiming the idea that 'AWAs enhance work and family policies seems based on patchy evidence, instead AWAs are more likely to be used to extend work hours'.<sup>2</sup>

Add to this evidence the additional pressure that will be experienced under the 'fire at will' unfair dismissal exemptions, and the capacity for balancing work and family responsibilities rapidly recedes into the distance.

Research conducted by the Department of Employment and Workplace Relations (DEWR) shows that AWAs do little to assist workers balance their work and family responsibilities.<sup>3</sup>

This research shows that in 2004, 93 percent of private sector employees on AWAs had no additional family friendly rights in their individual agreement. Only 11 percent of AWAs included maternity leave, paid or unpaid. Ironically women were least likely to get any family friendly entitlements, with 14 percent fewer women than men having access to any family leave arrangement in their individual contract.

#### Interaction with welfare to work proposals

In the 2005 Budget, the federal government announced the 'welfare to work' changes directed at increasing workforce participation at the expense of vulnerable Australians. It features strategies to coerce welfare recipients into the workforce, with a focus on parents, the disabled and the long-term unemployed. The package will require people with a disability and parents in receipt of income support to undertake work of at least 15 hours a week.

<sup>2</sup> Parliament of Australia Parliamentary Library (August 2004) Work and family policies as industrial and employment entitlements, Research paper No 2, p 11, Canberra.

<sup>3</sup> Department of Employment and Workplace Relations and Office for the Employment Advocate, 2004.

Under the proposed 'welfare to work' compliance regime from 1 July 2006 an eight-week non-payment penalty period will apply to those who, without good reason refuse a job offer or leave a job voluntarily.<sup>4</sup>

The combined effects of these legislative changes will mean that welfare recipients, who have little or no bargaining power, will lose their benefits if they refuse to enter into a sub-standard AWA, even if the AWA removes conditions necessary to balance work and family.

The changes will mean that a recipient of a parenting payment will be forced to accept a job which only provides for the minimum conditions of the Australian Fair Pay and Conditions Standard.

The ACT Government strongly reject the proposals contained in the Work Choices legislation which will make it impossible for workers to effectively balance their work and family needs.

### International Obligations

The Australian Government is a signatory to the *International Covenant of Civil and Political Rights* (ICCPR). Article 23 of the ICCPR guarantees the right to the protection of the family as the natural and fundamental group unit of society.<sup>5</sup>

The impact on families in the ACT could be profound. The Work Choices Act will remove access to unfair dismissal protection for a very large proportion of the workforce. This will lead to job insecurity, as workers will have no access to external scrutiny of employers' decision to dismiss. Further award "simplification" is likely to remove essential family friendly provisions such as limits on when you can be required to work, loss of overtime pay, weekend or night work rates, work related allowances and annual leave loading.

The ability to bargain for time off, flexible working hours that suit **both** parties, job sharing and the right to refuse unreasonable or short notice shifts are all compromised by the removal of these conditions.

### **Impact on women**

The Work Choices legislation will adversely affect women who are as a group more likely to be award dependent and less likely to have bargaining power to achieve fair and decent outcomes.

Women still carry a disproportionate responsibility for caring, family and household responsibilities. When women are forced to bargain from the reduced position of the Australian Fair Pay and Conditions Standard they will face the prospect of being forced to trade away pay and other conditions to obtain conditions such as leave for family purposes or flexible hours.

As a package, the Work Choices legislation will render women more isolated and precariously placed than ever before. Awards are the primary mechanism for establishing pay for 24 percent of all female employees. Through the deliberations of the AIRC, the majority of employees not only have access to minimum wage increases annually, but also to the improved conditions delivered through test cases. It is through test case decisions that many current social and

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<sup>4</sup> [http://www.budget.gov.au/2005-06/overview2/download/overview\\_welfare.pdf](http://www.budget.gov.au/2005-06/overview2/download/overview_welfare.pdf)

<sup>5</sup> [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

industrial entitlements have been introduced. The recent Family Provisions Test Case decision provides an example of the way in which test cases have been used to improve conditions of employment. Both employees and employers can benefit with improved employee satisfaction rates boosting employee commitment and retention rates.

As women already occupy a higher proportion of the precarious employment market, the increased focus on AWAs in the Work Choices legislation will further marginalise female employment. Offering an AWA on a 'take it or leave it' basis does not constitute a real choice for women with limited job security. If rejecting a job will result in cuts to welfare payments, the economic pressure to accept an AWA with no family friendly conditions may be impossible to resist.

Research clearly shows that women are worse off under AWAs.<sup>6</sup> Women on AWAs are paid 20 percent less than men on AWAs, and women on AWAs are paid 11 percent less than women on collective agreements. Casual employees, many of whom are women, on AWAs are paid 15 percent less than those on collective agreements, and part-time employees on AWAs, again many of whom are women, are paid 25 percent less than those on collective agreements.<sup>7</sup>

The ACT Government is particularly concerned about the impact the Work Choices legislation will have on the ACT workforce, which is made up of 48 percent women and has the highest female participation rate in the country. The increased use of AWAs will clearly have a negative impact on female workers in the ACT. As the percentage of women with children under four years of age in the ACT is also 10 percent above the national average, the protections of test case decisions such as the recent Family Provisions Test Case are vital.

The inability to access part-time work to enable a balance between work and caring for children or the need to return to work instead of having access to extended maternity leave is likely to result in more families needing to access child care. As the ACT has the highest out of pocket costs for childcare across all income levels and the highest average fees, the economic pressures on families who may otherwise not have required childcare will be significantly increased.<sup>8</sup>

As a result of the Federal Government's ideologically driven propulsion of workplaces to take up AWAs, it is possible that the Work Choices Act may breach several UN conventions including Article 26 of the *International Covenant of Civil and Political Rights* (ICCPR). ICCPR states that the government signatories to this convention (including Australia) are obliged to uphold the right of all persons to the equal protection of the law, taking into account both direct and indirect discrimination. Indirect discrimination occurs when a practice, rule, requirement or condition is neutral on face value, but impacts disproportionately upon particular groups.<sup>9</sup>

Clearly the statistics demonstrate that women are disproportionately affected in the workplace by the introduction of AWAs and the increase of these types of working arrangements will only exacerbate this potential.

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<sup>6</sup> David Peetz 2005, *The Impact of Australian Workplace Agreements and the Abolition of the 'No Disadvantage Test*, pp. 11-12

<sup>7</sup> Ibid.

<sup>8</sup> Report of Government Services 2005, Chapter 14

<sup>9</sup> [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm)

Therefore, the ACT Government notes that the Work Choices legislation may be inconsistent in principle with our own ACT Human Rights Act 2004 (HRA) and Discrimination Act 1991 (DA) which contain provisions for direct and indirect discrimination.

#### Interaction with income support changes

Employees with caring responsibilities, predominantly women, who leave a job or are dismissed because of a mismatch between employment conditions and their obligations as carer, will not be able to access income support for two months. This will place significant financial pressures on households and also on government funded community services that families will turn to.

It should also be noted that the federal 'welfare to work' policy, commencing on 1 July 2006, actually creates disincentives to participating in paid work for some groups of women, such as sole parents and women with disabilities. The effective marginal tax rates for these groups will increase sharply, reducing their disposable income once they have commenced work.<sup>10</sup> These groups will have less income to meet the additional costs of work, such as child care and transport costs. The simultaneous introduction of industrial relations changes and income support changes is going to impact most heavily on these marginal workers.

The ACT Government rejects proposals that remove rigorous and enforceable pay equity principles from the wage setting process and urges the Committee to recognise the disproportionate impact the Work Choices legislation will have on women.

#### ***Impact of the Work Choices legislation on current or future ACT legislation***

While the ACT is a self-governing Territory, s122 of the Australian Constitution gives the Commonwealth the power to override any Territory law. The Work Choices legislation has serious implications for the capacity of the Territory to make industrial relations legislation. Section 9 of the Work Choices legislation inserts new provisions to expressly override State and Territory industrial laws including:

- a State and Territory law that applies to employment generally and deals with leave other than long service leave and,
- a State and Territory law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair.

The Work Choices legislation also provides the capacity to exclude the application of other State and Territory industrial laws by regulation.

The ACT Government is currently seeking legal advice on the full impact of the Work Choices legislation on ACT legislation.

#### **Conclusion**

The ACT Government is opposed to the regime implemented by the Work Choices legislation. The ACT Government supports an harmonious industrial framework built on cooperation. The

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<sup>10</sup> NATSEM, The distributional impact of the Welfare-to-Work reforms upon sole parents, 2005

ACT Government also supports a framework that recognises the rights of all industrial parties and one that provides decent working conditions and job security, improves real wages over time, and balances work and family responsibilities.

The ACT Government believes that if the Work Choices legislative package is implemented it will cause much detriment to working people, their families and communities across the ACT. The ACT Government will continue to do everything in its power to support ACT working families.