CHAPTER 5

STANDING OF THE OFFICE OF THE EMPLOYMENT ADVOCATE

It has been our experience with the Employment Advocate that the office should be renamed the 'Office of the Employer Advocate'.

- Ms Linda Carruthers, Australian Rail Tram and Bus Industry Union, *Hansard*, Sydney, 22 October 1999, p. 286

Role of the OEA

5.1 The Office of the Employment Advocate (OEA) has a dual role of administering Australian Workplace Agreements (AWAs) and to assist in enforcement of the compliance aspects of the Act. The terms of reference of this inquiry with regard to the OEA require an examination of the powers, standing and procedures of this body. A great deal of evidence was presented indicating the manner in which the OEA has undertaken its role since its inception in 1997.

5.2 The OEA defines its role as;

- providing assistance and advice to employers (especially in small business) and employees on the *Workplace Relations Act 1996*, particularly AWAs and the freedom of association provisions;
- filing and approving AWAs, ensuring that they meet all statutory requirements;
- handling alleged breaches of AWAs and the AWA and freedom of association provisions; and
- assisting parties in taking action in relation to alleged breaches of AWAs and the AWA and freedom of association provisions..[1]

5.3 This inquiry has put the spotlight on the performance of the Office of Employment Advocate as an impartial facilitator of fair employment agreements. The title of the office suggests a commitment to fitting both employers and employees into mutually acceptable employment arrangements. The OEA has instituted a performance measure that appears to be statistically based: the number of AWAs approved; number of employers covered; number of AWAs refused or referred and the time taken to approve them.

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[1] Office of the Employment Advocate, *Annual Report 1998-1999*, p. 6

5.4 While such measure are obviously important, they ignore or at least relegate other important tasks and responsibilities, which by their nature are less measurable in statistical terms, but which go to the manner in which AWAs operate. As a consequence of the OEAs activities the measure of success for promotion will be numbers achieved. The submission and evidence presented by the OEA support this conclusion. Labor Senators conclude that this dependence on quantifiable measures at the expense of qualitative measures is indicative of a conflict of interest.

5.5 Dr David Peetz has suggested to the Committee that there is a clear bias in the way the Employment Advocate operates to promote and facilitate the use of AWAs as the preferred form of workplace agreement.[2] Dr Peetz stated that some organisations use AWAs as a means to deunionising the workplace, and suggested that it was for this reason that the OEA was created.

> While there is a lot of rhetoric about freedom of association, the reality is that the Employment Advocate was established to implement the incoming government's agenda in relation to shifting the balance of power. Two of the elements in this were promoting individual contracts and prohibiting compulsory unionism.
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> In order to prohibit compulsory unionism you have to prohibit discrimination against employees on the grounds of their being union members as well as not being union members. …The great majority, as far as I can tell, of the Employment Advocate's activities in relation to freedom of association issues have been in dealing with people or situations where people do not want to belong to a union …There has been disproportionably less of the other side where people who have been wanting to belong to a union have not been able to, yet the evidence does suggest that the latter is the biggest problem.[3]

5.6 When questioned about its attitude to complaints it received, the OEA released figures to show that since its beginnings in March 1997 it had investigated 397 complaints where the primary issue is freedom of association. Of those complaints, 60 were complaints made by employees against employers. Of those complaints, 45 were regarding the right to be, or not to be, a member of a union. 44.5 per cent of those 45 complaints were from employees who wanted to join or who were in a union. 55.5 per cent of those complaints were from employees who were not in or who did not want to belong to a union.

5.7 No doubt from the Employment Advocate's perspective these figures bear out a pleasing trend toward a more compliant workforce, and one which is more likely to resist unionism than embrace it. There is another, and more plausible interpretation. In the current climate, when the pressure to be a non-unionist is particularly strong, the 44.5 per cent of complaints against employers is a significant proportion. There would

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[2] Evidence, Dr David Peetz, Brisbane, 27 October 1999, p. 433

3 *ibid*, p. 433

be very few NESB women working in the TCF industry who would have heard of the Employment Advocate. There would be very few employees in any industry who would put in a formal complaint against their employer. As was noted above, the dependence of the Office of the Employment Advocate on quantifiable measures of performance at the expense of qualitative measures, assisted by some policy assumptions identified by Dr Peetz, distorts the picture of workplace reform which the OEA envisages.

5.8 There is ample evidence to justify the claim that the end of compulsory unionism has had a much less significant impact on those who are reluctant unionists than those who would prefer to belong to a union but are denied access. Surveys conducted by the Australian Workplace Industrial Relations Survey show that while 5 to 8 per cent of all employees were 'unwilling conscripts', up to 24 per cent were 'unwillingly excluded'.[4] Despite this the OEA does not identify issues of concern to employees in the situation where they are denied access to unions, nor investigate employee satisfaction with the AWA system.

Australian Workplace Agreements

5.9 Despite certain claims made by the Employment Advocate about the benefits of AWAs it is difficult to be persuaded in the absence of empirical evidence. From the first appearance by the then Employment Advocate, Alan Rowe, in Budget Estimates the Senate has consistently requested that the OEA undertake a content analysis of AWAs. After further requests for some content analysis during the course of this inquiry, the OEA has provided the Committee with four case studies.

5.10 Unfortunately, these case studies are of little assistance to the Committee, attempting to ascertain the manner in which AWAs have been drafted since their inception. With a figure of 73,057 AWAs approved to September 1999, covering some 1,695 employers, and even allowing for the 'pattern bargaining' nature of these documents, a more comprehensive study was expected.

5.11 There should be no reason why the Employment Advocate cannot provide more detailed analysis of AWA content. The argument that the Act requires confidentiality seems a convenient reason for denying data to the Committee. General information about the employer and employee who are party to each AWA could be provided by the Employment Advocate, while ensuring confidentiality for individual identities. In addition suitably 'sanitised' AWAs could be made available for researchers and the public in order to collect data to assess the impact of these agreements on women and other vulnerable employees.

5.12 Despite the lack of analysis of AWAs a great deal of evidence about the affect of AWAs on individuals was made available to the Committee. The global nature of the no disadvantage test has resulted in terms and conditions of employment being 'traded off' for marginal pay increases and in some case for no increases at all. Of

4 Submission No. 386, Dr David Peetz, vol.13, p 2894

concern to Labor Senators is the issue of employees being able to make an informed decisions that see the permanent removal of conditions of employment for a one off pay increase. Mr Tim Lee of the Australian Services Union described the situation as:

> … how do you reconcile the loss – permanently, I would argue – of an entitlement to be recompensed for working extraordinary hours out of the normal Monday to Friday spread versus a one-off pay increase which is going to diminish in terms of its relevance over time?[5]

5.13 The comments by Mr Lee raise the important point about the diminishing relevance of one-off pay increases in an agreement that may be in place for up to three years and potentially beyond that period if no action is taken to draft a new agreement. Potentially, an employee may agree to an AWA that trades off conditions and over time will also see a reduction in real wages. Without access to more data the long term affects of AWAs on individuals cannot be quantified. However, the weight of anecdotal evidence showed that such arrangements were common.

5.14 The issue of vulnerable and disadvantaged workers is discussed at length in Chapter 7 of this report. With regard to AWAs the evidence presented by Ms Susan Halliday, the Sex Discrimination Commissioner, should be noted. Ms Halliday highlighted the fact that while she is able to intervene with respect to awards and agreements this was not the case for AWAs[6]. This means that another check on the exploitation of women workers is effectively removed.

5.15 Further comments from Ms Halliday indicate that employers are able to disregard the information produced by the Employment Advocate, with serious consequences:

> Sadly, we see the practical, day to day evidence where an employer goes in and collects the information from the Employment Advocate, bins it on the way out, never talks to the employees about their rights and responsibilities. When you have women in that situation who do not speak the language, who are not unionised, who cannot access a working women's centre, what happens? Where do they go? What do they do? In some of the sadder cases, to keep their job, they terminate their pregnancy[7].

5.16 Wage outcomes for women is more fully discussed in the section on workers vulnerable to discrimination, however it should be noted here that major concerns were raised that women, who were perceived to be in a weaker bargaining position than men, have not done well under AWAs. This is particularly the case in part-time and casual employment. Evidence to the effect was anecdotal. However, the anecdotal evidence was supported by a study into wage outcomes in Western Australia which demonstrated a distinct, and growing, wage gender gap under the

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[5] Evidence, Mr Tim Lee, Perth, 25 October 1999, p 327

[6] Evidence, Ms Susan Halliday, Sydney, 26 October 1999, p 378

[7] Evidence, Ms Susan Halliday, Sydney, 26 October 1999, p 378

state individual agreements. The Labor Senators conclude, on balance, that women are disadvantaged under AWAs.

5.17 The lack of transparency and ability to review decisions of the Employment Advocate was discussed in the 1996 report.[8] This lack of transparency was seen as a particular problem in a considerable number of submissions and by many witnesses. The RTBU described the situation as:

> …the Employment Advocate is a law unto himself and that there is no review of his decisions. We have asked that he give us reasons for his determinations and he has simply said, 'I don't have to'.[9]

5.18 The CEPU expressed their concern as:

> It was a bit like the 13th century papacy: we had to accept what the decision was….[10]

5.19 The situation is particularly well illustrated in the case studies supplied by the Employment Advocate to the Committee. Case study 2, D & S Concreting was undertaken by ACIRRT. Mention was made in the submission that an officer of the OEA alerted the employer that an undertaking may be required for an employee paid a 'low concreters allowance'. The case study reports on the next page that no undertakings were sought. Due to the lack of transparency it is not possible to ascertain why the Employment Advocate subsequently approved the AWAs without an undertaking. This would be a pertinent question given the statement by ACIRRT that only one employee was better off under the AWA as opposed to the former employment arrangements.[11]

Case Studies

5.20 Throughout the inquiry process, several disturbing allegations were made concerning an apparently inherent bias in the manner in which staff of the OEA have undertaken their duties. These allegations have ranged from a refusal by OEA compliance staff to investigate alleged Award breaches to the deliberate designation of incorrect Awards for the purposes of frustrating a fair and equitable administration of the 'no disadvantage test' (NDT).

- The ALHMWU described a case where a 17-year-old employee from Essentials Pide Bread in Canberra was dismissed within two weeks of joining the Union. The dismissal was made following threats by the employer to do so. This case

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[8] Report on Consideration of the Workplace Relations and other Legislation Amendment Bill 1996, Senate Economics References Committee, August 1996, pp. 106-9

[9] Evidence, Linda Carruthers, Sydney, 22 October 1999, p 284

10 Evidence, Peter O'Brien, 27 October 1999, p. 481

[11] Case study undertaken by ACIRRT on behalf of the OEA, November 1999, pp 12 – 13, 25

apparently breaches the Freedom of Association provisions of the WR Act, which the OEA administers.[12]

- The CFMEU advised of the use of illegally recorded material by the OEA in evidence.[13]

- In the sale of Australian National Rail and the subsequent contracting by Great Southern Railway Limited of certain services to Serco Australia Pty Limited, staff from the former ANL were required to sign AWAs as a condition of employment. Serco requested designation of an award for the purposes of the NDT and the Employment Advocate determined a South Australian state motel award. The employees were previously covered by a Federal rail award that provided for superior terms and conditions. The initial AWAs were approved against this award. Subsequently the RTBU applied to the AIRC for registration of a new Federal award in the same terms as the previous Federal award. Further AWAs would be compared to the new award for the purposes of the NDT however there was no review of the initial AWAs and no right of appeal or review concerning the Employment Advocate's award designation.[14] The union made the following comment:

  > …it reveals that the Office of the Employment Advocate does not operate in the public interest, and in addition operates and is seen to operate in a manner which exhibits gross conflicts of interest and a lack of regard for procedural fairness or any possibility of independent review of the decisions made.[15]

- The SDA advised of a case in Sportsmart where young employees where told to sign AWAs without explanation as required by the WR Act, and that if they did not sign they would have their hours reduced.[16] This case was reported to the OEA by the union for investigation. The employees requested the OEA to involve the SDA during the process. The OEA however ignored this request with no satisfactory resolution after 12 months.

- Julia Ross Personnel was a case dealt with by the CEPU. It involved Julia Ross Personnel taking over functions previously undertaken by Telstra. The union detailed apparent cases of duress as well as a deterioration in working conditions. The union dealt directly with the OEA to resolve these issues. Despite the union lodging complaints on behalf of members the OEA did not seek to interview or discuss allegations however it appears that the OEA considerably assisted the employer. The union comment is pertinent in regard to

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[12] Submission No. 373, ALHMWU (ACT), vol. 12, p 2541

[13] Evidence, Mr John Sutton, Sydney, 22 October 1999, p 271

[14] Submission No. 291, Australian Rail, Tram and Bus Industry Union, vol. 7, pp. 1348-9

[15] *ibid*., p. 1353

[16] Submission No. 414, Shop Distributive and Allied Employees Association, vol. 17, Attachment 4, pp. 3869-3915

public confidence; 'The re-writing of the AWA's on OEA letterhead doesn't help the perception of objectivity'[17]

- The AMIEU provided a detailed history of events for the Australian Food Corporation Pty Ltd plant in Coominya, Queensland. It is evident that there was a great deal of disputation on this site. With regard to the involvement of the OEA it seems unreasonable that the OEA required the union to submit their comments on an AWA in less than 24 hours. Particularly as the AWAs in question were approved on the afternoon of the day the Union's submission was due..[18]

- The CPSU raised concerns about the transparency of the OEA. In the case of the formation of APRA, the agency wrote to the OEA asserting it was award free which was apparently accepted at face value. In addition the issue of coercion for transferring staff to sign AWAs as a condition of continued employment is a continuing problem, notwithstanding the Employment National decision. This was also flagged as a requirement for promotion.[19]

- The situation at Civic Video stores in Sydney where the OEAs guidelines have been apparently ignored with no subsequent action.[20]

- New Breed Security of Western Australia made an apparent blatant attempt to breach the Freedom of Association provisions of the WR Act, when they wrote to employees to make an offer which included the cessation of 'victimisation' conditional upon:

> … the withdrawal of the Unions from this negotiation and the withdrawal of consent for them to inspect records and act as your bargaining agent.[21]

- The Federal Office of the TWU in its submission expressed its lack of confidence in the OEA dealing with agreements in the long distance road transport industry. The union made clear how an understanding of the industry was crucial in approving agreements. Remuneration for a long distance driver is calculated in the Award on a cents per kilometre basis. The submission demonstrated how the increase in the average speed a vehicle is to travel could have dire consequence.[22]

- The Queensland TWU advised of an incident where the State Secretary, when on site at the On Line depot in Brisbane, informed an officer of the OEA who was

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[17] Submission No. 500 and 500A, Communications Electrical Plumbing Union, vol. 24, pp. 6388-6412

[18] Submission No. 521, Australasian Meat Industry Employees Union, vol. 26, pp. 7080-4

[19] Submission No. 379, Community and Public Sector Union, vol. 13, pp. 2708-35

[20] Evidence, Mr Andrew Killion, Sydney, 26 October 1999, p 388

[21] Submission No. 444, Australian Liquor, Hospitality and Miscellaneous Workers Union (WA), vol. 21, p. 5258

[22] Submission No. 447, Transport Workers Union, vol. 21, p. 5296

in attendance of an apparent award breach. The breach involved a 16 hour driving shift without break. The officer declined to assist in any manner.[23]

- There has been a failure of the OEA to act on requests by the CPSU for assistance with regard to duress to its members in the Northern Territory Tourist Commission.[24]

5.21 This list is not exhaustive of the number of cases that were mentioned in connection with the OEA during the course of this inquiry. While the Employment Advocate has provided a response to these allegations in the main this is merely a rejection of the claims. The responses themselves indicate fundamental deficiencies in the manner in which the Employment Advocate sees his role. In particular, the Employment Advocate's assertion that the subsequent making of an interim award by the Commission in the above mentioned Serco case, that was not retrospective, absolves him from any concern, ignores the fundamental fact that the interim award was in the same terms as the rail award that the employees were employed under previously. It would appear that the award that should properly been designated by the Employment Advocate was the rail award.

An independent umpire

5.22 In evidence before the Committee Professor McCallum discussed the standing of the AIRC as part of a 'fairness compact' provided for in the Constitution. Professor McCallum talked about how this concept was being eroded

> [WROLA] … chipped away at part of this fairness compact by allowing the concluding and vetting of Australian Workplace Agreements by the Office of the Employment Advocate, which is not a certifier but in truth a compliance agency.[25]

5.23 Without public confidence in the impartiality of bodies such as the AIRC, these institutions can not function effectively. It is apparent from the evidence that the OEA is gaining responsibility for approval at the expense of the AIRC but without the historical perception of fairness and impartiality enjoyed by the Commission.

5.24 With regard to the functions outlined in the legislation, the Employment Advocate is required to pay particular attention to the need of workers in a disadvantaged bargaining position which is deemed to include women. For family friendly clauses in agreements, evidence from ACIRRT indicates that union negotiated certified agreements are better at realising these sorts of proposals. A more comprehensive discussion of Work and Family issues is canvassed at Chapter 8 of this report.

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[23] Submission No. 163, Transport Workers Union (Qld), vol. 3, pp. 639-40; Evidence, Mr Hug Williams, Brisbane, 27 October 1999, p. 461

[24] Submission No. 445, Community and Public Sector Union (NT), vol. 21, p. 5272

[25] Evidence, Professor Ronald McCallum, Sydney, 26 October 1999, p. 349

5.25 Overall Labor Senators were not persuaded that the OEA has undertaken its role in an unbiased manner. In any event, lack of public confidence in the impartiality of the OEA would be enough to dissuade employees from attempting to seek redress through this office.

The 1999 amendments

5.26 Proposed amendments in this Bill:

- allow AWAs to take effect from date of signing, rather than from the date of approval by the Employment Advocate (OEA);
- remove the requirement that the employer must offer the same AWA to all comparable employees, thus allowing a discriminatory approach to offering agreements;
- remove the requirement that the OEA refer an AWA to the Commission when unsure about whether or not it disadvantages employees;
- allow AWAs providing for total remuneration of more than $68,000 to be approved without any checking by the OEA; and
- allow AWAs to be made undercutting a collective certified agreement, even while the latter is in operation.

5.27 The following statement from the OEA should be regarded as significant, particularly when considering his role in undertaking legal action for breaches of Part 6D of the Act:

> The philosophy, as I understand it, based on the legislation as it currently is, is that AWAs devolve responsibility focus on the parties and that, while there is an OEA role, at the end of the day it should really be the primary responsibility of the parties to protect their rights. I think practical experience shows that really it is important to have a body that can assist employees, particularly to ensure that their rights are observed. So my personal view is that yes, it would be better for the Employment Advocate to actually have that power.[26]

5.28 It appears that the Employment Advocate has actually recognised the fundamental imbalance in the power relationship between an employee and an employer, as noted by Justice Higgins over 90 years ago, when he likened the relationship between an employee and an employer to that of a wolf and a lamb.

Conclusion

Labor Senators conclude that there is a conflict of interest in the role played by the Office of the Employment Advocate who has been given the task of simultaneously promoting and adjudicating on Australian Workplace Agreements. The result has been

[26] Evidence, Jonathon Hamberger, Canberra, 28 October 1999, p. 488

a diminution of wages and condition of employment, agreements settled under duress, and a denial of the rights of freedom of association for those most in need of this protection.

The submission to this inquiry from Office of the Employment Advocate addressed only peripherally the terms of reference. It provided lengthy response to answers placed on notice, drawing heavily from its data banks, but Labor Senators believe the OEA was unable to effectively refute evidence placed before it, charging the OEA with bias in its operations. For this reason Labor Senators believe the OEA has lost the confidence of unions and they believe the organisation should be abolished.

5.29 In addition to the abolition of the OEA, Labor Senators recommend the following general amendments to the Act with regard to AWAs:

- the protection from duress to new employees offered AWAs needs to be provided. This protection must be in the same terms as that currently provided for existing employees, and should provide that employees are not to be treated as new employees in cases of transmission of business;
- a prohibition should prevent the offering of AWAs as a means of undermining collective agreement making;
- the registration and approval of individual agreements should reflect the transparency and accountable processes that are applied to certified agreements; and
- on application by any interested party, any decision made with respect to AWAs or award designations must be subject to independent review by the AIRC.