Submission by the Rail Tram & Bus Union to the:

Senate Employment, Workplace Relations and Education Committee: Inquiry into Workplace Agreements

5 August 2005

Introduction

The Australian Rail Tram & Bus Industry Union (RTBU) represents 35,000 employees across Australia, in the transport industry. This includes rail passenger and freight transport, bus, tram and light rail operations.

The RTBU traditionally covered public sector transport workers. However with increased privatisation of both public transport and rail freight operations during the 1990s, the RTBU's membership has become a mix of public and private sector workers.

The RTBU's submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into Workplace Agreements addresses each of the relevant terms of reference in turn below.

1. The scope and coverage of agreements, including the extent to which employees are covered by non-comprehensive agreements;

The vast majority of RTBU members in both the private and public sectors of the transport industry are employed under union negotiated certified agreements (under s170LJ). These agreements are generally comprehensive documents and have been developed and adapted to take into account changes in the transport sector.

There have been occasions however where some employers have endeavoured to use a combination of structural change and individual contracts (the product of favourable industrial relations legislation) to significantly alter the wages and conditions of employees and to endeavour to exclude or at least minimise the role of the RTBU in representing its members.

The predominant vehicle in the employers' armoury has been the Australian Workplace Agreement (AWA). In this submission we present two examples of how employers have used AWAs to diminish wages and conditions, to enhance managerial prerogative and to undermine the capacity of employees to be represented by a union.

It is undeniable that the provisions of the *Workplace Relations Act* 1996, with its preference for individual contracts (AWAs) over collective agreements, have fostered and encouraged the attack on employee wages and conditions. The Act provides the legal means by which the attack is undertaken. The separation of the individual from the collective, with respect to labour, swings the balance of bargaining power strongly in favour of the employer. The employer gains the capacity to deliver ultimatums to its employees. The employees on the other hand, have little room to manoeuvre.

Any subsequent 'agreement' is on the employer's terms. Its contents are at the discretion of the employer. Unlike a collective agreement which, unless otherwise stated, is read in conjunction with the relevant award and where the certified agreement applies to the extent of any inconsistency, an AWA operates to the exclusion of the award (s170VQ). Further, unlike a collective certified agreement, an AWA is not open to public scrutiny. In these circumstances, whether an AWA is comprehensive in terms of the range of employment conditions covered is problematic. The real issue is the substance and breadth of the employment conditions. For example, it is one thing to say that an AWA provides comprehensively for hours of work or includes family friendly provisions. It is quite another thing when the term 'comprehensive' means, in practical terms, that hours shall be

worked at the discretion of the employer and the extent of the family friendly provisions is this 'flexibility' in hours of work.

2. The capacity for employers and employees to choose the form of agreement-making which best suits their needs;

Under a system of certified agreement making, employees negotiate collectively with their employer. Where the employer is reluctant to negotiate collectively, employees have a range of practical options available to bring the employer to the negotiating table – not least, that of protected industrial action.

Despite the *Workplace Relations Act* 1996 being shrouded in the rhetoric of choice for all workers, and industrial action also being available for this type of agreement-making, choice is not a feature of Australian Workplace Agreements and no employee has ever taken industrial action to compel their employer to negotiate the content of their AWA. While the RTBU has limited experience with AWAs to date, the experience thus far confirms that AWAs do not provide choice but are foisted upon workers by employers who dictate the wages and conditions of employment therein.

One such experience in the rail industry involved the sale in 1997, in three parts, of the then federal government owned Australian National Railways Commission (AN). With all employees of AN made redundant, two of the three sales involved accepting employment with the new employer being contingent on the signing of AWAs. This was at Serco and Tasrail.

Serco[1]

Great Southern Railroad (GSR) purchased the interstate passenger component of AN (the Indian Pacific, Ghan and the Overland) in November 1997. While GSR owned the business, Serco was effectively the operator of these services, providing the labour. Serco later purchased GSR, becoming the owner and operator, with the operations remaining under the title of GSR.

As mentioned, at the time of the sale, those employed by AN were made redundant. If they wished to continue working on the Ghan, Indian Pacific or Overland, they were required to apply for a new job with Serco. Serco made these jobs contingent on signing AWAs. In addition, even when the employees appointed the union as their bargaining agent for the AWAs, and the union sought discussions with Serco, the person responsible for the employment arrangements threatened that employees who delayed their employment by requesting negotiations with the employer would fail to gain employment in the enterprise.

The AWAs effectively reduced the overall pay by 40 per cent and did not contain a wage increase for the three year term of the agreement.

Despite numerous attempts by the RTBU to negotiate a certified agreement with the employer, including presentation of a petition signed by 80 employees which expressed their desire to be covered by a collective agreement, Serco refused.

[1] See for example PR901283, 16th February 2001.

In mid-2000, the RTBU lodged an application in the Commission and sought the Commission's powers of conciliation to assist the parties in negotiating a certified agreement.

On 25th October 2000, the RTBU notified the Commission of an industrial dispute between the RTBU and Serco pursuant to s99 of the *Workplace Relations Act* 1996.

The RTBU sought that a secret ballot be conducted under s135 of the Act to ascertain the preference of Serco employees for a union negotiated certified agreement.

In August 2001, the Commission directed that a ballot be conducted because of unfair conduct by Serco, and evidence before the Commission that Serco did not accept the outcome of the informal petition.

The ballot of Serco's 141 employees was conducted in late October 2001 by the Australian Electoral Commission. The outcome was unanimous among the 81 employees who voted. They clearly restated their preference for a collective agreement.

Serco chose to ignore this outcome with the company's representative suggesting that the '*ballot result was "not too convincing", as 60 employees hadn't bothered to vote. If those 60 had favoured a collective agreement, one would have expected them to vote*'[2].

Unfortunately nothing further under the *Workplace Relations Act* 1996 could be done by the Australian Industrial Relations Commission to require Serco to negotiate collectively.

Employees at Serco remain covered by AWAs. In 2004, a new CEO joined GSR. The RTBU met with the CEO and had several discussions about negotiating a certified agreement. The new CEO appeared receptive to those discussions but then engaged a private consultant to compare the differences between the AWA and the Award. The CEO informed the RTBU that after consulting with the GSR Board there was 'no compelling reason for GSR to move to a certified agreement'. The RTBU has been unable to obtain recent copies of the AWAs and so does not know how these compare with the Award. However it is probably a safe assumption that the AWA overall contains wages and conditions either less than, or not much above the award.

Although Serco employees' AWAs did not provide for a wage increase and indeed during the first three years of operation, no increase was provided, recently, due to changes in operational requirements Serco has provided AWA employees with a 3% increase. However, it is crucial to note that this increase does not form part of the AWA and is entirely at the discretion of management. The RTBU understands that the provision of this 3% increase was contingent on signing the third round AWA.

[2] Workplace Express 5th November 2001.

Tasrail

An American company, Wisconsin Central (trading in Australia as Australian Transport Network -'ATN'), purchased the Tasmanian infrastructure and operations of AN (which was federal government owned). ATN traded under the name of Tasrail.

Before taking up the business, Tasrail held some meetings with the RTBU in relation to wages and conditions. However Tasrail did not give the RTBU any forewarning that the company intended to employ under AWAs. The RTBU was unaware of the company's intention to use AWAs until the agreements were circulated among the new employees.

Upon taking over the business, Tasrail required all employees of its rail operations to be employed pursuant to AWAs, despite petitions from those employees requesting the employer to negotiate with their unions on their behalf for a collective certified agreement. Again, similar to Serco, employees were simply told that either they signed AWA's or they would not be considered for employment.

Constant pressure from employees to be given the choice in 2001 to negotiate a collective agreement resulted in Tasrail negotiating a collective agreement with the RTBU. Despite this, some employees at Tasrail remain covered by AWAs.

These two examples clearly highlight the lack of choice that workers have in relation to agreement making. Even where the AIRC is invited to participate in the process, there is nothing the Commission can do to compel an outcome. The evidence in the rail industry clearly shows that, under the *Workplace Relations Act*, there is no choice for workers unless the employer allows it. Rather the 'choice' of agreement-type lies squarely with the employer. Again, the type of agreement is chosen to suit the needs of the employer, with little regard to the needs of employees.

3. The parties' ability to genuinely bargain, focusing on groups such as women, youth and casual employees;

Casualisation is an increasing concern in the rail industry. An example is provided again from the experience of the RTBU with the privatisation of Australian National.

Before the business transferred from Australian National to Serco, employment was 100% full time. Since Serco took over the business, approximately 30-35% of the workforce has become casual. This high proportion of casual workers has an impact on the ability of workers to genuinely bargain because, as the South Australian Secretary of the RTBU commented *'how can they genuinely bargain when the job is offered contingent on signing an AWA'*.

It is grossly unfair to offer employment contingent on sub-standard conditions and the government's arguments that if the conditions are poor, workers will look elsewhere, is not borne out in the evidence. Rather, the choice becomes whether to accept a job with substandard, non-negotiated wages and conditions, or not have a job at all.

At Serco, the real concern of the RTBU is the conditions under which employees are forced to work. The majority on the Indian Pacific, Overland and Ghan start at 6am and some work right through to 3.30am with only small breaks during the work period. For example, on the Ghan between Adelaide to Darwin, hospitality attendants start at 6am. They will sometimes work right through to 2pm without a break. They might have a few

hours break after 2pm where they return to their cabin for a rest – they cannot get off the train and cannot sit in the passenger lounge car – they are effectively restricted to their bunks. They return to work at around 5pm, just before the evening meal. The earliest they will finish for the day will be 11.30pm. Some of them, particularly the bar attendants are required to be on duty until 3-3.30am when their tills are counted. They start again the next day at 6am. This cycle runs for 3 days to Darwin and 5 days to Perth. Some of the casuals will then be asked if they will work a back-to-back trip to Sydney without having any time off besides a few hours to go home and pick up a fresh set of clothes.

It is not realistic to accept that, if employees were genuinely consulted about their working conditions, any would have agreed to the situation described above. Further, the RTBU has significant safety concerns about the levels of fatigue that these workers must experience after even just one day on the job.

4. The social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities;

The precise nature and content of the proposed changes to industrial relations legislation are at this stage unclear – for example there are conflicting views being expressed by the Prime Minister, Treasurer and Workplace Relations Minister about how 'core' entitlements such as lunch breaks, annual leave, public holidays, long service leave and so on will be treated. Further, it is unclear whether the government intends on abolishing unfair dismissal laws entirely rather than just for workers who are employed in organisations with less than 100 employees.

Given the confusion between government ministers, a speech from the Prime Minister to the Sydney Institute on 11th July 2005[3] is probably the best guide to the effect of proposed changes thus far. Key features of the speech are outlined in the box below, and then discussed in detail. Further concerns about unfair dismissal and pattern bargaining are also discussed.

In his speech to Sydney Institute on 11th July 2005, the Prime Minister noted:

I've said what these reforms look to do. Let me say what they do not do:

1. *They do not abolish awards or cut award wages;*
2. *They do not abolish the right to join a union;*
3. *They do not stop a worker having a union bargain for them;*
4. *They do not abolish a right to strike;*
5. *They do not abolish the Industrial Relations Commission; and*
6. *They do not give employers the right to treat their workers poorly.*

Despite the above assurances by the Prime Minister, the RTBU's experience with individual contracts thus far suggests that, contrary to the Prime Ministers assertions, the proposed reforms, while not 'abolishing' the items listed above, will make life a lot harder for some groups of workers, negatively impacting on their work and non-work lives.

[3] Howard J (2005) 'Workplace Relations Reform: The Next Logical Step', Speech to the Sydney Institute, 11 July 2005.

Ultimately, the changes will destroy what we know as the Australian way of life, underpinned by notions of community participation and a fair go. For example, evidence from the operation of AWAs thus far indicates that:

1. **While awards will not be abolished:**
   - The abolition of their use in vetting agreements will diminish their importance as a tool to ensure workers on agreements are not worse off.
   - Further the reduction of the content of awards from the present twenty allowable matters to even fewer items will lead to lower working conditions for award dependent workers and ultimately lower general wage and condition standards.
   - While award wages might not be deliberately 'cut', the use of the 'Australian fair pay and conditions standard' to assess the content of new agreements will lead to agreements being approved which contain lower wages – therefore effectively cutting award wages.

2. **While the right to join a union may not be abolished,**
   - It is quite clear from the Serco example above that anti-union employers can and will use AWAs to exclude unions. In the case of Serco, workers were told that they would not gain employment with the company if they used the RTBU as a bargaining agent and nor would they have their AWA renewed if they, three years later, attempted again to have the RTBU act as their bargaining agent. This is unconscionable and provides evidence contrary to the 'fairness' and 'choice' which the Prime Minister suggests underpins his reforms.

3. **While in principle the legislation may not stop a worker having a union bargain for them,**
   - In reality, the offer of employment contingent on a worker signing an AWA does stop the worker having a union bargain on their behalf. This was the experience of Serco workers.
   - The evidence in relation to this is clear. With AWAs, there is no bargaining and no choice unless the employer decides this to be so.

4. **While the Prime Minister has suggested that the right to strike remains,**
   - **It is important to note that there has been no employee initiated industrial action in an attempt to negotiate an AWA**.
   - Further, employers in the rail industry and elsewhere have used AWAs as a tool to undermine collective negotiations when legal industrial action is taken by employees – see the long running disputes between the AMIEU and Meat Industry employer, G & K O'Connor for one example.
   - Further, the changes seek to frustrate the capacity of workers to engage in legitimate industrial action through a complex, cumbersome and time consuming process that has to be met before such action can be taken.

5. **The role of the Commission, while not being abolished, is being severely curtailed.**
   - While more details on the composition and role of the 'fair pay commission' are needed, the RTBU is concerned that this commission will be not place adequate weight on the concerns of working people.

- The RTBU is concerned that award dependent workers such as those at the Perisher Blue's Skitube will effectively have their wages frozen for the first half of 2006. Traditionally the AIRC and the State Commissions have handed down their safety net decision in May of each year. Should the new fair pay commission not hand down a determination at the same time in 2006, workers will effectively be going backwards until such time a 2006 decision is made.
- Further, the RTBU questions why the role of determining safety net increases has been removed from the Commission – there is no weight in the assertion that the increases granted by the Commission in the past, after due consideration of the arguments of both labour and capital, have led to a decline in Australia's economic performance or the collapse of 'industry' or individual companies.

6. **While the reforms should not give employers the right to treat workers poorly, the effect of the reforms will be precisely that.**
   - Employees in firms of less than 100 workers can, and will, be sacked unfairly. There will be limited recourse for these workers. Our experience is that, for older workers who have been employed in one occupation virtually their whole adult life, it will be extremely difficult to find new employment.
   - While the government suggests that workers in firms of any size cannot be dismissed due to pregnancy, trade union involvement, race, gender, religion etc, in reality, reasons for dismissal will be difficult to prove denying workers even the basic protection currently provided by anti-discrimination legislation.
   - Again, the Serco experience highlights that AWAs are used by employers to treat employees poorly. The experience of the RTBU is that employers in the rail sector will seek to evade any form of regulation which they believe 'constrains' their managerial prerogative – even if this means injuring employees – financially, physically or psychologically. The example of long working hours at Serco has precisely that effect, with fatigue a real concern for the safety of passengers, and other rail workers.

Unfair dismissal and Probation Periods

Changes to unfair dismissal laws are grossly unfair. There is no evidence that removal of access to unfair dismissal remedies for companies employing less than 100 workers will lead to job creation – further in a period of low unemployment, the question needs to be asked, how much job creation can be done.

Rather, what is required is conversion of sub-standard, precarious employment into full time permanent employment – the threat of then being sacked during that employment, hardly gives workers in those firms any more security than they had when they were precariously employed…

The Prime Minister has also highlighted that, for firms with more than 100 employees, probationary periods will be extended from the current three month period, to six months. This means that, in the first six months of their

employment, new employees can be dismissed without reason. The RTBU believes that this change to probationary employment is effectively providing large employers with an extended period of exemption from unfair dismissal protections, a move which clearly gives employers the right to treat employees fairly.

Pattern Bargaining

Another issue in the government's sights is pattern bargaining. In his speech to the Sydney Institute, the Prime Minister attacked pattern bargaining, stating that further reform was required to eliminate '*a system where industry-level, pattern bargaining by unions imposes too many 'one size fits all' agreements'.*

A brief glance at the OEA website highlights the sheer hypocrisy of the Prime Ministers statement. The 'AWA frameworks and templates' section of the website clearly provides pattern AWAs for aged care, call centres, construction, hospitality and tourism, road transport, beauty services, building services, children's services, clerical and administration, fast food, fitness, hairdressing, information technology, licenced clubs, medical centres, newsagents, real estate, restaurants and catering, retail, roadhouses, restaurants and catering, security, the rubber, plastic & cable making industry, small mixed business store & sandwich bar store, storage services, newspaper and magazine delivery, the wine industry, agriculture, government, mining, timber, vehicle and the list goes on.

In fact, if an employer is not happy with one of the OEA's pattern agreements then they can choose from one of the pro-forma clauses on specific topic areas. Just the A, B and C listing of clauses by title includes:

- Abandonment of employment.
- Absences - paid.
- Annual Leave - annual close down
- Annual leave - entitlements.
- Annual leave - restrictions.
- Annual leave at half pay.
- Annual leave -cash-out
- Annual leave loading included in annual salary.
- Annual leave, cancellation
- Anti-discrimination clause
- Attendance bonus
- Banking of hours
- Bereavement leave
- Bonus payments
- Cash and credit card handling procedures
- Casual employment
- Child care
- Company vehicle
- Confidential information
- Continuity of AWAs
- Continuity of service

- Crib Breaks

The RTBU questions how this use of pattern agreement making should be treated any differently to the pattern agreement making used at times by unions. One key difference between pattern agreement making by unions and that supported by the OEA is that employee views are reflected in the drafting of a certified agreement. This contrasts with a lack of choice and negotiation over the content of pattern AWAs.

In the rail industry, Serco again provides an example of employer driven pattern bargaining. It is our understanding that the AWAs at Serco are effectively the same for all workers in the same classification. Further, the content of the first, second and third round AWAs has changed very little. So, not only is this an example of pattern bargaining at one point in time, but long term pattern agreement making by employers – in the case of Serco, since 1997.

The RTBU is concerned that there is overwhelming evidence that, even with the current protections, some employers treat their employees poorly. Legalising some of these actions from which workers had previously been protected or at least had some legal redress is unconscionable. Further, a framework which allows workers to be treated poorly will be welcomed by some law-abiding employers who, in the search to increase profits will use any 'legal' means necessary to reduce costs.

5. The capacity of the agreement to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standards;

Individual contracts generally do not lead to improved living standards, particularly for low paid workers. The experience in New Zealand under the Employment Contracts Act 1991 provides plenty of evidence of what happens when basic wages and working conditions are undermined.

In the Australian context, the best evidence is provided by the experience in Western Australia with Western Australian Workplace Agreements (WAWAs).

In December 1993, WAWAs were introduced with the enactment of three pieces of legislation: the *Industrial Relations Amendment Act,* the *Minimum Conditions of Employment Act*, and the *Workplace Agreements Act*. This legislation enabled employers and employees, either individually or in groups, to enter into agreements that replaced all state awards and agreements.

Instead of being underpinned by the minimum conditions in awards (as AWAs currently are), WAWAs were underpinned by the *Minimum Conditions of Employment Act 1993*. These minimal conditions were that: the agreement could not be in place for more than five years, that be written, that it contain a dispute resolution procedure, and that it be signed by both parties. In registering the agreement, the Commissioner of Workplace Agreements was to be satisfied that the agreement complied with the provisions of the legislation, that the parties understood their rights and obligations under the agreement, and that no party had entered into the arrangement under duress (Reitano 1995).

There is little information about the use and impact of WAWAs. This is, in part, due to the secrecy provisions included in the Western Australian legislation which prohibited the

release of information about these agreements. Hence only a limited number of studies have been conducted of the WA jurisdiction, including a 1996 review of twenty five WAWAs (ACIRRT 1996), a 1999 study of eighty eight Western Australian individual contracts, and two case studies of the use of WAWAs in the public sector (Berger 2000).

These studies revealed that some WAWAs were extremely minimal in content, with the parties *'able to remove themselves completely from the award system by doing no more than registering a handful of mutually "agreed" terms and conditions of employment. Strictly speaking those terms* [did] *not have to deal with such matters as rates of pay and hours of work or indeed any central issues at all'* (Ford 1998). Both the 1996 and 1999 research showed that WAWAs were silent on many provisions normally considered standard conditions of employment. Like other forms of statutory individualism discussed in this chapter, the tendency of WAWAs to replace the relevant award meant that award conditions not expressly included in the agreement were lost (ACIRRT 1996).[4]

Accordingly, WAWAs included more extreme provisions than other forms of statutory individualism (including Queensland Workplace Agreements and AWAs). For example, a significant proportion of WAWAs either increased the span of ordinary hours or did not include any provisions relating to hours of work (ACIRRT 1999). More specifically, of concern with WAWAs was their tendency to be of long duration without incorporating a wage increase during the life of the agreement. When compared to collective arrangements, WAWAs were more likely to include a span of ordinary hours of work which was more than 40 hours per week, and a significant proportion provided for annualised salaries or 'all in' rates of pay. It is suggested that the consequence of this combination of provisions for workers was reduced compensation for more flexible hours of work, leaving them worse off than they would have been had they been paid according to the relevant award (ACIRRT 1996, 1999).

These findings correspond with 1998 data released by the West Australian Commissioner for Workplace Agreements, who found that 31 per cent of female and 20 per cent of male employees employed under WAWAs had wages which *fell below* those specified in the relevant award (Bailey and Horstman 2000). The implications of falling below the award safety net were also noted in a 1996 study, with a concern raised that the WAWA provisions would be used by employers in industries *'where wages are already low and in which workers traditionally have had little or no bargaining power.* [In these cases] *… flexibility is likely to result in a better matching of labour requirements to the needs of employers and not a better matching of work and family responsibilities'* (ACIRRT 1996:12). This lack of focus on mutually beneficial employment arrangements was also reflected in case studies of bargaining at two agencies in the Western Australian public sector. Fells and Mulvey (1994) found little evidence that the process of using WAWAs provided opportunities for employees to tailor their conditions to non-work needs'.

Confirming the picture of increased managerial prerogative at the expense of worker entitlements, Berger, in her study of agreement-making in the Western Australian jurisdiction, found that *'workplace agreements were, without fail, developed by management and not subject to negotiation with individuals or groups. There was no evidence of workplace agreements being tailored to the needs of individuals or any collective or individual bargaining taking place'* (2000:141). Likewise, Bailey and Horstman

[4] Except for those conditions which were specified as minimum conditions in the *Minimum Conditions of Employment Act 1993* (WA).

(2000) commented on the deleterious impact of the system of statutory individualism on employee choice:

> *In a state that has enthusiastically embarked on a program of market individualism, 'choice' for workers appears to be the corollary of 'free markets' for employers* (Bailey and Horstman 2000:50, citing Crouch 1977).

When Labor won government in Western Australia in February 2001, in recognition of the significant equity concerns about WAWAs, the *Labour Relations Act 2002* abolished WAWAs, and any workplace agreement which had not been cancelled or was operating past its expiry date expired automatically on the 15th September 2003.

If the West Australian experience provides any lessons, it is that, rather than competition between employers leading to best practice employment outcomes, the race to the bottom begins.

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