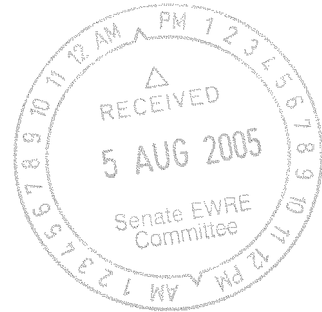

ACCI SUBMISSION
TO THE SENATE EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO AGREEMENT MAKING

AUGUST 2005

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ACCI

- The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations.

- ACCI is Australia's largest and most representative business organisation.

  - Through our membership, ACCI represents over 350,000 businesses nationwide, including:

    - Australia's top 100 companies.

    - Over 55,000 medium sized enterprises employing 20 to 100 people.

    - Over 280,000 smaller enterprises employing less than 20 people.

- Businesses within the ACCI member network employ over 4 million working Australians.

- ACCI members are employer organisations in all States and Territories and all major sectors of Australian industry.

- Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

- Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.

- ACCI members actively participate in developing national policy on a collective and individual basis.

- As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.

Summary of ACCI Submission

1. ACCI supports a workplace relations system focused around genuine workplace level bargaining (either collective or individual).

2. By and large, larger Australian businesses (employing a majority of employees) have made the shift to workplace bargaining.

3. Only a small minority of employees directly rely on awards for the determination of employment conditions.

4. Medium and small businesses, which make up the majority of employers, have engaged in formal enterprise bargaining to a more limited extent.

5. The shift to agreement-making has been associated with a range of impressive economic outcomes, including high levels of productivity improvement, falls in the level of unemployment and sustained real wages growth.

6. ACCI supports measures aimed at entrenching and extending agreement-making within the workplace relations system. This submission contains proposals which in ACCI's view would improve the operation of the agreement-making system.

7. ACCI supports measures which would simplify agreement-making and make it more accessible to a wider range of employers and employees.

8. ACCI also supports measures aimed at preventing pattern bargaining and at improving the regulation of protected action within the bargaining framework.

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ACCI Policy

9. ACCI policy, in relation to agreement-making, has, for many years, been that the Australian system of workplace relations should be a system based around formal and informal agreement-making underpinned by a safety net of statutory protections.

10. Chapter 3.1 (Agreements) and Chapter 3.4 (Internal Regulation) of the ACCI *Workplace Relations Policy Blueprint*, which addresses agreement-making, are attached, and form the basis for ACCI policy development.

11. Contracts of employment are the cornerstone of employment relationships and should be seen as the central basis on which terms and conditions of employment are agreed.

12. A system of statutory minimum conditions underpinning workplace-level agreement making is the most widely prevalent system of determining employment conditions in, at the very least, the developed world.

13. This is the system our competitors use and against which our own system should be assessed.

14. To a significant extent, the shift to bargaining has now been made. The overwhelming majority of employees in Australia now have their employment regulated through agreement-making, be it collective, individual, formal or informal.

15. The level of direct reliance on awards, either federal or state, has steadily reduced during the 1990s' and 2000's.

16. The results of our shift to workplace bargaining are evident in Australia's improved economic performance. In particular, since the introduction of workplace bargaining Australia has experienced:

    a. Sustained, highly significant increases in both labour productivity and multi-factor productivity;

    b. Very significant falls in the level of unemployment, including long-term unemployment;

    c. High levels of GDP growth;

    d. Significant increases in real wages for employees;

e. The development of conditions and benefits tailored to the needs and preferences of employees and employers at particular workplaces.

17. Agreement-making has also assisted in keeping Australia internationally competitive, in particular, by allowing work practices and workplace conditions to be tailored to suit the needs of businesses, seeking to compete and export in the global marketplace.

18. There can however be no complacency in our workplace arrangements. Policymakers need to examine what can be done to make agreement-making easier and more accessible to all employers and employees. We still have a system which is excessively complex and which some groups of employers and employees find difficult to enter. Smaller businesses are on of these groups.

19. For the first few years of formal agreement-making after 1993, most agreements were made with unions and unionised workplaces, often at the instigation of unions. Agreement making has only gradually penetrated the non-unionised sector.

20. The policy challenge now is to:

    a. Examine ways to make agreement-making easier and simpler;

    b. Examine ways to allow more employers and employees to enter agreement-making, especially non-unionised businesses that have had no cultural or historical engagement with the formal workplace relations system;

    c. Consider ways of targeting agreement-making more at genuine workplace-level determination of terms and conditions of employment;

    d. Ensure that there are effective protections for employers against unprotected industrial action, and that protected action does not become so protracted that it results in significant economic damage, either to particular businesses and the economy in general.

    e. Ensure that there are effective mechanisms for both collective and individual bargaining.

Australian Workplace Agreements

21. After 8 years, ACCI believes that AWAs, as a form of workplace agreement, on an individual basis, are an essential component of a modern workplace relations system.

22. Each month, approximately 12,000 Australians are making AWAs with their employer. Since March 1997, **709,417** AWAs have been approved[1].

23. It is estimated by the OEA that AWAs now cover approximately 459,200 employees. The rate of AWA agreement making continues to increase.

24. In some industries - e.g. mining - AWAs now exceed the coverage of collective agreements.

25. As an example, the OEA estimates that 16,600 employees in the accommodation, cafes and restaurants industry sector are covered by collective agreements, compared to 53,600 covered by AWAs. This would mean that approximately 76% of hospitality employees covered by registered federal agreements are covered by AWAs.

Benefits of AWA agreement making

26. It is clear that employers and employees are becoming more familiar and confident in using AWAs over time, and consequently, AWA use will continue to increase.

27. AWAs provide the system with:

    a. A viable agreement-making choice for many employers and employees;

    b. Opportunities to pursue higher productivity, better pay and flexible working conditions;

    c. Opportunities to tailor wages and conditions to both employee conditions and circumstances.

28. AWAs have provided superior wages and conditions for staff compared to federal awards and many collective agreements:

[1] AWA statistics are available at www.oea.gov.au. They are regularly updated.

a. Average weekly AWA earnings are higher than collective agreement earnings ($1001.10 compared to $741.30)[2];

b. In the private sector, AWA employees earn on average 23% more than employees under collective agreements;

c. Women on AWAs earn 32% more than women on collective agreements;

d. Non-managerial AWA employees are 12% better off than those on collective agreements.

AWAs - aside from contracts of employment, there is no alternative

29. Over 90%of Australian businesses are not unionised. Recent ABS data demonstrates that four out five working Australians are no longer members of trade unions.

30. In such circumstances, a form of formal agreement between individual employers and employees is essential. Collective agreement making between trade unions and employers is, simply put, no longer a viable option in vast areas of our economy. Given the benefits of agreement-making, options should be available to all employers and employees, and should be crafted to suit their circumstances.

31. AWAs are a key component of such a system.

32. Employees who have entered AWAs also report high levels of satisfaction with their employment conditions. It could be that AWAs are a key component in creating the kind of 'high trust/high performance' workplaces that will drive Australia's future economic success.

33. The report *Agreement making in Australia under the Workplace Relations Act 1996, 2002-2003*, reported the following results in examining the attitudes of employees engaged under AWAs. AWA employees reported higher levels of satisfaction than employees under collective agreements in the following areas:

a. Hours of work (68%, compared to 65%);

b. Level of control over work (52 % compared to 49%);

[2] Average weekly total earnings (mid 2004 figures).

c. Level of communication (41% compared to 36%);

d. Amount of work performed (55% compared to 48%);

e. Amount of training they received (41% compared to 36%) and

f. Recognition of work and effort (45% compared to 29%).

34. AWA employees were also more likely to report a positive view/good relationship with management[3].

35. This is not about AWAs v collective agreements. The point is that genuine agreement-either, whether collective or individual, has produced substantial economic, productivity and human resource benefits.

36. However, the outcomes of AWA agreement-making reinforce the view that it is a system of agreement-making that delivers mutually beneficial outcomes to both employers and employees.

37. That said, a range of measures could be introduced which would significantly improve access to, and the capacity of, employers and employees to enter into AWA agreement-making.

38. Policy improvements fall into two broad categories:

    a. Improvements in filing and approval processes;

    b. Improvements to the No Disadvantage Test, and the operation of AWAs.

AWAs - Filing and Approval Processes

39. Eight years of experience using the system have provided employers with important feedback on the various ways in which filing and approval processes can be improved.

40. That said, employers report high levels of satisfaction with the approach to agreement-making taken by the OEA.

41. The following recommended changes would further improve the agreement-making process and provide additional incentive for employers and employees to consider agreement-making.

[3] *Agreement Making in Australia under the Workplace Relations Act, 2002-2003*, Report prepared by the Department of Employment and Workplace Relations and Office of the Employment Advocate, pp. 84-86

42. The purpose of the following reforms would be to reduce the number of administrative/technical hurdles that can prevent an agreement being certified:

    a. Commencement: AWAs for all employees to commence from the date of signing unless otherwise specified. Where an agreement fails to meet the NDT, the OEA should have the power to order back pay. Specific provisions could address any repeated use of non-compliant AWAs.

    b. Information statement: this should merely become an educational aid that the OEA uses to assist employers and employees with agreement-making, rather than a filing requirement.

    c. Comparable employee requirements: this requirement is antithetical to the policy objectives of individual agreement-making (i.e. tailoring and bargaining to suit particular employee/employer needs) and should be removed.

    d. Time of filing: the employer and employee should have thirty working days to file for certification of an AWA.

    e. Undertakings regarding filing/signing: the OEA should have the capacity to declare an agreement valid pending the fulfilment of undertakings to overcome any deficiencies in the filing and signing of an OEA (e.g. failure to have the agreement witnessed).

        i) For example an AWA could start without a signature being properly witnessed – on the specific condition that this is supplied within a week. This reflects e a 'can do' emphasis which favours the making of agreements.

Relationship between AWAs and certified agreements

43. At the moment, s.170VQ(6) will generally have the effect of ensuring that a certified agreement overrides an AWA to the extent of any inconsistency. It is ACCI's view that an AWA should override a certified agreement to the extent of any inconsistency.

44. This would allow individual employees and employers to make agreements suited to their circumstances, without such agreements being negated by majority views on issues.

45. The diversity of personal circumstances and lifestyle preferences in contemporary Australian society make such flexibility essential. Of course, all employee preferences must be determined within a framework of an employer is in a position to agree to, consistent with their operating conditions and capacities.

46. In particular, it would allow for individual tailoring of workplace conditions to substantially assist employees in balancing their work and family responsibilities.

47. In each case, for example, the work and family challenge for individuals is different. This is why individual tailoring is particularly important.

48. It is also important to allow employers to recognise and reward individual contributions to an organisation or business.

The No Disadvantage Test

49. At present, all agreements must pass a no disadvantage test, which requires, generally, that all agreements must, on a global test, leave an employee no worse off than they would otherwise be under the relevant award.

50. There are two key limitations to such an approach:

    a. Where market rates or prevailing labour costs in an industry are at, or near to, the current award rate, employers and employees are effectively priced out of agreement-making. This is a particular concern in light of the very substantial levels of safety net increase that has occurred in recent years. In industry sectors with significant levels of labour cost competition (e.g. retail), agreement-making rates lag below other sectors.

    b. It can often be difficult for employers and employees to understand how the no disadvantage test operates, particularly in relation to non-monetary entitlements and conditions in awards. The OEA and AIRC are often required to give such non-monetary items an artificial equivalent monetary value in performing the no disadvantage test.

51. In ACCI's view, a simpler no disadvantage test, where all agreements must meet some basic statutory minimum employment standards, would overcome many of these problems.

52. In addition, one of the primary considerations in setting minimum wages must be that they are set at a level that allows all industry sectors and employers/employees to engage in bargaining where that is their wish.

Collective Agreements

53. Many of the benefits ascribed to Australian Workplace Agreements also apply to collective bargaining, particularly where collective agreements provide for the genuine workplace level determination of employment conditions.

54. ACCI supports collective bargaining with trade unions and collective bargaining through groups of employees in non-unionised businesses.

55. There is however an ongoing problem with the persistence of industry-level pattern bargaining in particular sectors. Both legislative and cultural change will be necessary to overcome pattern bargaining. Moving particular industries from a pattern bargaining culture to a genuine workplace bargaining culture represents a major policy challenge for government.

56. Agreement-making in the collective stream continues to drive significant real wage increases, productivity gains, improvements in workplace flexibility and the capacity of employers and employees to balance work and family considerations.

57. Reforms in four broad policy areas could nonetheless improve the operation of collective agreement-making under the Act:

    a. Administrative and approval processes;

    b. Industrial action;

    c. Pattern bargaining;

    d. Essential services.

Administrative/approval processes

58. It is ACCI's view that the current requirement for all certified agreements to be approved via a hearing conducted by the Australian Industrial Relations

Commission should be replaced by an administrative review and approval process.

59. In the vast majority of cases, agreements meet all statutory tests and are well in excess of the No Disadvantage Test. The AIRC in such a situation operates as an unnecessary rubber stamp.

60. The role of the AIRC could be replaced by an administrative authority dedicated to agreement approval.

61. The Federal Government has foreshadowed that the Office of the Employment Advocate will be given the role of processing and approving all agreements, be they collective or individual, in a revised workplace relations system.

62. The OEA is a statutory authority with extensive experience in agreement-making approval. It appears the natural choice for any government agency tasked with the administrative approval of agreements.

63. Other measures that could be introduced to simplify and improve the approval of collective agreements are discussed below.

Mandatory forms/filing processes - collective agreements

64. The present filing and approval processes for collective agreements could be substantially reduced and simplified.

65. In particular, the requirements of statutory Form R28 and equivalent forms could be substantially reduced, thus reducing substantially the red tape involved with agreement making.

66. The identificatory requirements in Part 1 of Form R28 should be reduced to:

    a. The identity of the employer;

    b. The name of the business;

    c. The title of the agreement;

    d. Coverage of the agreement.

67. The system should include a presumption that an agreement covers all employees in a workplace unless otherwise specified.

68. This would remove the existing administrative imperative to audit differing types of employees and report on the employee profile.

69. It would appear necessary to retain information about the employee organisation party, where applicable, as contained in Part 3 and 4 of Form R28.

70. There is also value in retaining a nominal expiry date and the statutory declaration.

71. However the general approach should be to simplify these requirements to the greatest extent possible.

Time to Consider Agreements

72. Specified periods to view or examine terms of an agreement prior to a vote / signing should be removed (e.g. 14 days, notice of intention etc), and replaced with a general requirement that the administrative body tasked with agreement approval satisfy itself that employees have genuinely approved the agreement.

73. No specific paperwork, e.g. notice of intention, should be required.

74. Once again, the aim is simplified agreement-making with a minimum of red tape.

Filing

75. The existing requirement to file within 21 days of an agreement's approval causes problems and has led to costly exercises in re-voting. This should become 30 working days, with very broad discretion to extend the period to ensure agreements enter into force without additional cost or complexity.

Commencement dates

76. It should be assumed that agreements commence from the date of signing unless otherwise specified.

Matters pertaining (Electrolux issues)

77. As a consequence of the High Court's decision in *Electrolux*[4], there is a requirement that all matters contained in an agreement are matters that pertain to the relationship of employer and employee.

78. It is an ongoing requirement that agreements only contain matters that pertain - however the understanding of what matters pertain is complex and technical (in some respects), requiring as it does mastery of a body of case law. Employers and employees cannot be expected to have an intricate knowledge of this law:

    a. For the benefit of employers and employees, a guide should be produced to assist the parties in understanding these issues.

79. In addition, there is scope to examine whether additional restrictions on the kinds of provisions could improve the agreement-making framework and workplace environment.

80. As one example, it is permissible to include in agreements provisions which substantially limit the capacity of an employer to engage contractors. Consideration should be given to identifying provisions which, although they fall within the scope of matters permitted by *Electrolux*:

    a. Are inconsistent with the vision of bargaining contemplated by the new Act.

    b. Impose unacceptable burdens on business operating conditions.

    c. Inappropriately regulate the business' relations with third parties.

81. One approach may be to explicitly identify additional types of provisions which may not be included in agreements.

82. Matters could be prohibited from agreements the way bargaining fees are, where a view is formed that the regulation of these issues is an inappropriate use of certified agreements in the contemporary workplace relations system.

[4] *Electrolux Home Products Pty Ltd v Australian Workers' Union (2004)* 209 ALR 116

Pattern bargaining

83. Some industries suffer from substantial levels of pattern bargaining. Pattern bargaining occurs where a bargaining agenda is established at an industry-wide level, usually by a trade union, and industrial action is then commenced, often simultaneously, at various workplaces to enforce the 'pattern agreement'. Pattern bargaining is usually accompanied by a refusal of the party seeking to pattern bargain to contemplate any deviation or movement from the pattern agreement, even where warranted by the circumstances of the business.

84. Pattern bargaining is damaging in various ways, including:

    a. Economically, by the commencement of simultaneous action across an industry (e.g. the AMWU's various pattern bargaining campaigns in the manufacturing industry);

    b. Furthermore, it is antithetical to the policy objectives of agreement-making, which are to allow for the workplace level determination of workplace conditions, rather than conditions being forced onto various workplaces.

85. ACCI supports legislative measures designed to address pattern bargaining, including industry-specific measures (e.g. in the building and construction industry) for those industries where pattern bargaining is an entrenched problem and which require cultural change.

86. The DEWR *Report into Agreement Making 2002-2003* provides some analysis of those industries which have high levels of pattern bargaining. That report identified three industries as most likely to have common outcomes in certified agreements: construction, health and community services and manufacturing[5]. The following unions are identified as those most likely to engage in pattern bargaining:

    a. The CFMEU;

    b. CEPU;

    c. AMWU.

87. Various legislative measures have been proposed to improve the regulation of agreement-making and protected action, including the *Workplace Relations*

[5] *Agreement Making in Australia under the Workplace Relations Act, 2002-2003*, Report prepared by the Department of Employment and Workplace Relations and Office of the Employment Advocate, p. 28

Amendment (Better Bargaining) Bill 2005 and the now lapsed *Workplace Relations Amendment (Better Bargaining) Bill 2003*. In addition, industry-specific legislation such as the *Building and Construction Industry (Improvement) Bill 2005* may provide additional relief for employers in that industry who are exposed to pattern bargaining.

88. ACCI supports passage of these bills and urges that consideration be given to additional measures designed to prevent pattern bargaining. It is ACCI's view that, in situations of pattern bargaining, protected industrial action should no longer be available to parties. Protected action should only ever accompany genuine workplace level bargaining.

Measures to protect employers from excessive or damaging industrial action

89. While a system of workplace bargaining, generally, is accompanied by some capacity for the parties to engage in industrial action in support of genuine workplace-level claims, rights to engage in protected action must always be balanced by mechanisms to ensure that such industrial action does not result in significant economic damage or loss, either to individual businesses or the economy in general.

90. The *Workplace Relations Amendment (Better Bargaining) Bill 2005* contains a variety of provisions directed at that purpose and ACCI supports passage of the Bill. In particular, the concept of a cooling-off period is one which is supported by ACCI and this would allow industrial action in support of various claims to be balanced by remedies which prevent lasting or sustained economic damage occurring to a particular business or industry.

91. ACCI also urges that additional measures be introduced to better regulate unlawful and unprotected industrial action, e.g. the capacity of a court or tribunal to issue interim orders or injunctions in a timely fashion. Such provisions have also been included in Bills previously before the Australian Parliament.

Essential services

92. Our concerns in relation to protected action are amplified in respect of essential services industries (such as, for example, power generation). In these industries, even genuine workplace bargaining and associated

protected action has the potential to easily escalate into a situation causing significant economic damage and disruption.

93. It is therefore appropriate that additional measures are introduced to prevent industrial action in essential services reaching a point where it causes economic damage or disruption.

94. Some measures that can assist in providing an appropriate level of regulation for industrial action in essential services may include:

    a. Timely access to mediators and conciliators;

    b. A lower threshold test for the suspension or termination of bargaining periods than that for other industries;

    c. Scope for third parties, including other affected employers, industry groups and State and Territory/Federal Governments to make applications to have industrial action suspended or terminated in the public interest;

    d. Access to timely remedies (e.g. injunctions) by courts and tribunals, including speedy interim remedies;

    e. Scope for cooling-off periods, accompanied by mediation/conciliation to identify areas of difference or disputation and encourage resolution of such issues;

    f. In situations where such matters proceed to arbitration, arbitration should proceed quickly and during the period of arbitration industrial action should be prohibited;

    g. Improved measures to ensure compliance with orders of courts and tribunals.

95. We further commend to the Committee's consideration the submission of the Australian Mines and Metals Association which addresses the issue of essential services and agreement-making in detail.