Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into Workplace Agreements

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The Terms of Reference established by the Senate Inquiry into Workplace Agreement-Making are outlined below:

1. Detail how the new industrial relations regime is likely to disadvantage particular sectors of the workforce? (giving details on each sector) (page 2)

2. Explain the inequalities in bargaining power between employers and employees? (page 6)

3. How are the new procedures for agreement making fair, equitable and how are these procedures open to choice as to the form an agreement may take? (page 10)

4. Explain whether the agreement making changes will promote higher productivity? (page 12)

The Australian Workers' Union (AWU) welcomes the opportunity to make submissions to the Inquiry. The AWU has extensive coverage across all States of Australia.

In addressing the terms of reference, antidotal evidence can only be provided, due to the lack of detail of the proposed new industrial relations regime. This lack of information has created significant insecurity and concern amongst the union movement and the community at large. There has been criticism about the interpretation being place by the Unions on the Prime Minister's Announcement in May 2005. This criticism is unwarranted as the onus is on the Government to explain its proposed legislation. That explanation should be clear and supported by strong reasoning for its implementation. None if this has been forthcoming. The verbal explanations provided by the Prime Minister and the Federal Industrial Relations Minister has not assisted in removing the confusion. In fact many of their statements have been inconsistent with the original May announcement.

The AWU has coverage in quite a diverse number of sectors therefore only some of the core industries are outlined below:

- Rural
- Horticulture
- Agriculture
- Petro-chemical
- Building and Construction
- Airline
- Aluminum
- Steel
- Cement and Concrete
- Entertainment
- Hospitality

It is in this context, that the AWU responds to the terms of reference.

1. Detail how the new industrial relations regime is likely to disadvantage particular sectors of the workforce? (giving details on each sector)

Based on the AWU's broad coverage it is not realistic to give details on each sector. It is however possible to identify those sectors that are likely to be disadvantaged compared to others and why that disadvantage is likely to arise.

Those industries that are likely to be most affected will be those dominated by precarious employment in the private sector. An example of those sectors would be hospitality, agriculture and rural industries.

These industries predominately employ casuals. Many have low unionisation because of fear that belonging to a union could lose them their job. Many of these workers work by themselves or in groups/teams of two or three. Workers in these types of industries have little bargaining strength. They rely heavily on their award and legislative entitlements. This means that they rely on the minimum safety net adjustments granted by the Australian Industrial Relations Commission.

The majority of these industries are made up of small to medium employers. Due to the size of the businesses, most of the companies are not roped into Federal Awards. They maintain their employment arrangements through State Common Rule Awards. Many if not all of these companies would be moved into the Federal jurisdiction by the proposed regime, subject to any High Court challenges.

By moving these employers and employees into the Federal jurisdiction, not only do these employees lose the benefit of the extensive scope of employment conditions available under the State jurisdiction, but also the independent annual safety net adjustments awarded by the IRC in each State.

The AWU submits that any movement away from this broad power of the Commission to conciliation and arbitrate, is to the disadvantage of employees and employers. Those employers would also be exempt under the proposed Unfair Dismissal provisions. This would create further disadvantage to the employees.

The following is the view the AWU has on several of the proposed reforms:

Further Award simplification – significant sections of AWU membership rely solely on award conditions for example pastoral industry (shearers, station hands etc). Enterprise bargaining has had no effect in this sector. Rates of pay and conditions in the award, although minimum, are in fact the actual rates which apply in the industry. Removal of some of these conditions therefore will have a direct impact on these employees. In the pastoral, horticultural and agricultural industries, employees move regularly between employers. Many may work casually for several employers in order to make up a living wage. In this context the role of awards should be expanded rather than reduced.

In petro-chemical and oil industries award conditions are superior to the both state and federal legislative entitlements to long service leave. Removal of the

award provisions means that employees will fall back onto lower legislative conditions. We estimate that only 40% of agreements in these industries deal with long service leave. That means 60% have no protection for long service leave and refer back to the award. These employees will be disadvantaged by the proposed legislation.

Notice periods in these awards will also often define the amount of notice as the actual amount the employee would earn for that period. The statutory provisions are below this. For employees who rely heavily on off-shore allowances, shift loading or annualized salaries the differential is great.

Unfair dismissal changes – about 90% of unfair dismissals run by the AWU involve employees working in workplaces of less than 100 employees. Generally, workplace agreements do not deal with termination policies. This means employees have no other remedies when unfairly dismissed. An example is that agreements do not generally contain disciplinary procedures. Under the new regime an employee sacked after a single incidence of lateness would be able to neither lodge an unfair dismissal nor attract the jurisdiction of the Commission under s170LW.

The current system is not onerous or costly for small business. We represent the non-skilled blue collar labour market. These workers often find it extremely difficult to get alternative employment. Many have re-entered the labour market from welfare support. Many are new migrants. Despite this, most unfair dismissals are conciliated and settled for an average payout of 6-8 weeks. For a low-earning employee, for example this translates to about $3,000.

In most cases, both parties are able to represent themselves – at least up to the conciliation stage. In our experience about 90% of matters are settled at conciliation. The Commission members are very competent at resolving disputes.

Example 1 - A recent migrant to Australia was employed by a medium sized manufacturing company (about 60 employees). The individual was involved in an industrial accident resulting in major surgery to his left arm. He returned to work after a short period on light duties. Because of the injury he was unable to drive. As a result he was forced to leave home at 5.00am to catch public transport. This resulted in him being late for work on a small number of occasions. The employer refused to renegotiate his commencement time. He was terminated. He returned to WorkCover for a short time but is now unemployed and receiving sickness benefits. In this instance re-instatement would have been appropriate. The employee could have become a productive member of the workforce again.

Example 2 – a senior nursery worker with 7 years service was asked to spray a glasshouse with chemicals she was inexperienced with. She requested training prior to performing the task. She was told that given the advanced state of infestation there was no time for training. She refused to perform the task. Over a period of 2 days she was repeatedly instructed (and refused) to perform the task. She was terminated. She is 59 years old and may never work again.

AWAs – any expansion of the AWA provisions will disadvantage the disempowered. People performing the same type of work may receive different pay rates according to employer discretion. In our experience this discretion is not always exercised fairly. The Act also prevents any 'outside' parties scrutinizing. It also makes impossible for a negotiating agent (eg a union) to negotiate over two or more AWAs at the same time. That means adopting the position of equal pay for equal work is difficult to advance.

AIRC only to deal with 'legitimate' disputes – any shortcomings of the Commission system do not reside in the illegitimacy of cases before it. In practice this proposed change will increase the role of lawyers and the likelihood of distracting arguments about jurisdiction. This serves to delay and unnecessarily complicate matters rather then fixing the actual industrial dispute.

2. Explain the inequalities in bargaining power between employers and employees?

Other than professional highly skilled employees engaged in high demand industries, employees generally have limited bargaining power. As a collective group they are able to sustain additional power, however without an independent representative skilled in negotiations, they still struggle to obtain above average wages and conditions.

The most recent Adam Report – ACIRRT June 2005, shows that non-union agreements in the March quarter of 2005 average annual percentage wage increases of 3.4%, where union agreements in the same quarter recorded 4.3% increases. Even in some highly unionized areas such as Retail, the wage increases currently in operation, according to the ACIRRT Report shows that they have only obtained 2.9% annual wage increases. This arises from the precarious nature and low skill level of the industry. If these employees were not represented, the increases were likely to have been non-existent.

An individual required to represent themselves in a one-on-one situation with their employer in industries such as these, has no bargaining strength. Both parties are aware that they can be easily replaced if the terms are not conceded to. Even though the employer incurs initial costs in recruiting and training new employees, they generally have a long list of casuals on stand-by that can step in to replace the unwilling employee. That employee is not in a position to make demands that are in excess of what their fellow workers are receiving.

Further, a female employee in child bearing years employed in a low skilled highly precarious employment industry, is in no position to demand flexibility to accommodate work and family needs.

Those employees under the State jurisdiction or even under the existing federal jurisdiction can at least access disputes procedures or unfair dismissal provisions, if dismissed either unfairly or unlawfully. The Federal Government

has stated publicly that it is misleading to say that a worker can be dismissed for being pregnant, that this is an unlawful dismissal, and unlawful dismissals are available to all employees.

The new regime would mean that the same pregnant worker would have to file an unlawful dismissal with the Australian Industrial Relations Commission and if unsuccessful at conciliation stage, would then need to proceed to the District, Country or Local Court, or a Magistrates Court or a State Court prescribed by the regulations. This is a much more daunting prospect for a pregnant worker who has lost their job, to run a matter in one of these Courts. It is more likely that the individual would feel the need to instruct legal representatives. As the unfair dismissal laws in both jurisdictions provide for minimum compensation (maximum of 6 months wages), any compensation is quickly swallowed up by the legal fees.

Even though the terms of reference are limited to agreement-making, it is the lack of bargaining power and the risk of termination, that results in the necessity to also consider the proposed unfair dismissal exclusions. This is a further example of how the new industrial relations regime will disadvantage workers.

In relation to collective bargaining, even with strong union representation, all workers are starting from a lower benchmark. Currently the State and Federal jurisdictions require a no-disadvantage test to be applied. That test is measuring the proposed agreement against the existing conditions in the relevant award. This means measuring it against comprehensive beneficial award conditions. This test is applied by the IRC or AIRC in a public forum for parties to be heard. The State has general rights for relevant unions to be heard on applications for certifying agreements. Federal intervention provisions are much more restricted, however they do allow an individual or group of employees directly affected by the proposed agreement to be heard and voice their concerns.

The new IR reforms not only significantly diminish the test to be applied, limiting it to annual leave, personal/carer's leave, parental leave (including maternity leave) and maximum ordinary hours of work, it also removes the transparency of the

approval process. By limiting the test to these core conditions, the test fails to ensure that meal breaks and rest pauses are maintained. These issues are crucial to the health and safety of workers. If workers are required to work continuous shifts without reasonable breaks, workers lives can be at risk, not only minor but also serious accidents can occur because of the absence of reasonable breaks. Even though workplace health and safety legislation require safe workplaces and the employer has a duty of care to provide a safe workplace, the legislation does not specifically prescribe breaks in the working shift. Industrial instruments have always maintained these conditions.

Other conditions, equally important because of the need to maintain a reasonable standard of living that directly impacts on the health and well-being of workers and their dependants, is the potential reduction or removal of penalties and allowances. Employees deserve to be compensated for working longer hours, afternoon and night shifts, weekends and public holidays. Many low skilled industries have low base rates, however these rates are supplemented by penalties and allowances. Often these additional payments are relied on to meet everyday living expenses. Reducing workers take home pay, directly impacts on their standard of living and the community at large.

There is also the potential to remove casual loading. This would allow workers to have no job security, be unable to secure loans, not receive entitlements such as annual leave or sick leave, but not receive any additional payment beyond a normal adult full-time employee. The reforms would also allow for the removal of minimum and maximum hours. This could lead to casuals working the same number of hours as full-time employees, but not receiving any of the entitlements and no additional compensation, such as a loaded rate.

Although these propositions may seem unlikely, it is important to remember that employers pay these conditions because they are legally liable for these wages and conditions. Take away the liability, there is no incentive for employers to maintain such conditions. Considering the employer associations and the Federal Government's opposition to any test cases or increases to wages and

conditions in the State and Federal jurisdictions, the Union submits that the Senate Inquiry should presume that employers are more likely then not to reduce entitlements.

How can an approval process that is not transparent and that does not allow for either the workers or their representatives to participate be fair and equitable. It is clear that with the introduction of the proposed test, there is little for the body approving the agreements to assess. This does not alter the fact that this process should be open.

Employees rely for their livelihood on maintaining a good working relationship with their employer. Generally, they pride themselves on being a 'good worker'. Employers often misunderstand that employees – despite their loyalty - also wish to advance their own interests. That is, employees will want to increase remuneration, be paid at industry or market rates, access costly training, rely on penalty rates for overtime work… Crucially, sometimes employee and employer interests will not align. This may be because of budget constraints. It may be because of conflicts over whether an employee works after ordinary hours. It may because safety procedures are occasionally onerous and slow.

In general, employees are in a weaker bargaining position because they are more disposable. This is particularly evident in the industries covered by the AWU. If an employee loses their job it is easier for to find a replacement employee than it is to find alternative employment. Alternative employment may require moving, it may depend on a different skill set. This means that employees are more dependent on preserving a good working relationship with their boss than vice versa.

These reforms actively disadvantage the most disadvantaged. Well organised, well remunerated employees are in a stronger bargaining position. They will be less affected. It is those employees who are disposable and only semi-skilled who will be most affected. They rely on trade unions to advance their interests. This occurs by award improvements, anonymous wages inspections, setting

industry standards.

3. How are the new procedures for agreement making fair, equitable and how are these procedures open to choice as to the form an agreement may take?

The new procedures for agreement making are not fair and equitable. Neither are they open to choice.

The proposals need to include a mechanism which requires the employer to take account of the choice or preference of the employees. It is common that employees will choose a collective agreement rather than AWAs. The proposals should include a process of Commission ordered secret ballot to ascertain employee preferences in situations where employees/employers disagree about the form of agreement.

To lengthen the term of an agreement to allow for 5 years, is of no benefit to either the employer or employees. 5 years is a long time in business and many changes can occur. The company could significantly grow and become highly profitable. The company can restructure and change the roles of employees and the business. These changes cannot be reflected in the agreement, at the time of entering into the agreement, as they are unknown. Employees can be locked into wages and conditions that are inferior to the changes in community standards and even the proposed new wages to be granted by the Fair Pay Commission. Employees wages and conditions can be frozen in time. The employer equally may require flexibility during this time that they may be unable to achieve because of the legally binding agreement applying.

The AWU has already commented on the disadvantage of moving the approval process from an open, accountable process before an independent arbiter, to a closed door arrangement. The AWU also relies on the comments already made in regard to the no disadvantage test and the affect the removal of it will have on employees.

In relation to the issue of choice, the AWU has touched upon the issue of bargaining strength in responding to terms of reference 1 and 2. The fact is that, other than highly skilled and high demand workers, all other workers have little bargaining strength. Collectively the employees could agree with their union to do an agreement. The employer may even concede to this. Currently where this occurs the employer is unable to override that collective agreement with individual agreements, unless the collective agreement expressly allows for this to occur. The new system will ignore the choice of the employees to enter into a collective agreement, by allowing the employer to approach the worker to sign an individual AWA the following day. This would then override the individual agreement. This process fundamentally undermines the objectives of collective bargaining and the fact that the majority of employees have voted to accept that agreement.

As already stated, individuals when approached to agree to AWA's feel intimidated and coerced. This coercion is mostly subtle, with employers explaining that if the employee is not willing to agree to the flexibilities in the AWA the company would not be able to sustain their employment. This Union has experienced many of its members being coerced into signing AWA's. Some of those have been the subject of challenges and the employers have been penalized. However in the main many employees do not speak up for fear of loosing their jobs. The AWU is also aware of members who have written to the Office of Employment Advocate and advised them that they were coerced into signing and that the agreements disadvantage them. The response that they have received is that it is to late and there is nothing that can be done.

As for new employees choice does not exist at all for the employee. The only choice is for the employer to decide whether it is requiring the new employee at the time of interviewing, to commit to an AWA or not. If the employee does not want that AWA, they will not get the job. This has been confirmed by the Federal Minister for Industrial Relations, Kevin Andrews, who has acknowledged that such requirement already exist within his own department. This shows the flaw

in the role and powers of the Office of the Employment Advocate. Despite the problems that already exist with this Office, the Federal Government is planning to hand all powers in relation to the making and approval of collective and individual agreements to the Office of the Employment Advocate.

For all of the reasons stated within these submissions, the AWU submits that fairness, equity and choice will not exist under the proposed new agreement making procedures.

4. Explain whether the agreement making changes will promote higher productivity?

The Federal Government has promoted the reforms as a way of addressing the skills shortage in Australia and promote higher productivity. The Government has stated that employers will be able to offer those workers in industries that are in desperate need of skilled workers, higher wages as incentives. There is no evidence that this is in fact what the Federal Government supports or encourages. In fact, there is evidence to the contrary.

The Association of Professional Surveyors, recently applied through their industrial representatives for a new classification structure that provides significant increases to qualified surveyors. The industry argues that there were only 6 students who graduated as surveyors in 2004. That they need to encourage people into the industry and that the rates were too low to be an incentive. The industry was trying to do what the Federal Government was promoting. Attracting people to the industry by providing improved wages through their State award. Not only did the employer group, Commerce Queensland intervene and oppose the application, they sought to have it struck out in the public interest. The QIRC rejected the public interest argument and are proceeding to hear the matter.

The question has to be asked, if an industry, which is currently suffering a skills shortage, wants to take the initiative of offering higher wages as an incentive,

why isn't the Federal Government intervening to support the matter? The Federal Government has intervened in IRC matters in recent times to submit to the IRC that they should not deal with matters such as TCR for small business because the Federal Government was preparing a Bill to exclude TCR for these businesses. If the Federal Government is willing to intervene to ensure that State Commission's do not provide greater benefits then the Federal jurisdiction, why then are they not willing to support employers creating incentives in areas of skill shortages.

As for productivity, there is no evidence in western societies where the reduction of wages and conditions have lead to an increase in productivity. Businesses may be able to employ more people with the reduction of wages and penalties, they may be willing to employ more people because of the removal of unfair dismissal remedies (although significant employment growth is unlikely), but the actual increase in the productivity of a business cannot be achieved by demoralizing the workers, making them nothing but a commodity to be traded and bargained away. Moral is an important aspect of high productivity; low moral leads to low productivity. Reduced take home pay leads to low morale. The AWU submits that there is no evidence to support the Government contention, and the onus is on the Federal Government to prove that such evidence exists.

In summary the AWU submits that there exists minimal if any benefits from the proposed agreement making provisions of the Federal Government. The AWU does not dispute that improvements can always be made to the current system. What is proposed does not seek to address deficiencies in process, it seeks to undermine the fundamental rights of workers and reduce the minimum standards for the working class in society. Fairness and equity does not describe what is proposed, harsh, unjust and unreasonable is a more appropriate description. These are the core principles that in Industrial Relations Commissions around Australia, were established to protect workers.

These submission have been prepared and provided by:

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BILL SHORTEN

National Secretary

Dated this 11th day of August 2005.