Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into Workplace Agreements

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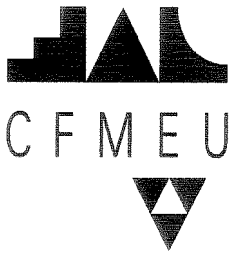
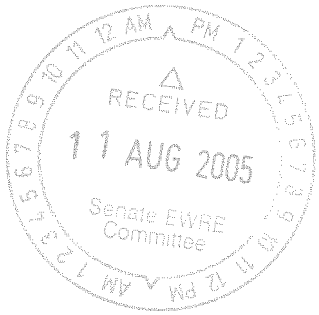




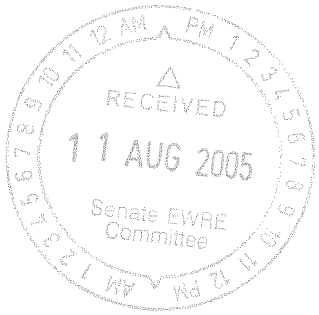
SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION

REFERENCES COMMITTEE

Submission by the
Construction, Forestry, Mining and Energy Union
(Construction and General Division)
to the

Inquiry into Workplace Agreements

August, 2005.



INTRODUCTION

1. The current provisions of the *Workplace Relations Act* 1996 [the Act] relating to agreement-making contain a number of significant limitations on the fundamental labour rights of Australian workers. The Act gives primacy to individual rather than collective agreement-making and bargaining at the enterprise or workplace level is elevated above industry, sector or multi-employer arrangements. The Act also allows employers to choose the union it wants to reach agreement with irrespective of the representative nature of that union and entirely at the expense of the right of workers to be represented by the union of their choice.

2. Those matters place Australia in breach of recognised international labour standards and Conventions to which it is signatory. In spite of repeated criticisms by the ILO and calls by that body for those issues to be rectified, the Howard Government has announced its intention to proceed to enact further measures that will make the problem worse, further disadvantage Australian workers and cause more damage to Australia's credentials and standing in the international community.

AUSTRALIAN WORKPLACE AGREEMENTS [AWAs]

3. The current Act permits secret, individual work contracts, AWAs, between employers and employees and gives such agreements statutory pre-eminence over collective bargaining agreements. AWAs override federal awards and any later collective agreement. This provides an incentive for employers to conclude AWAs to avoid the prospect of regulation by a certified agreement. It has been suggested that under the proposed legislation, AWAs would take precedence over collective bargaining agreements in all circumstances. The CFMEU [Construction and General Division] opposes AWAs.

4. The process for the making and 'certification' of AWAs is much simpler than for collective agreements. In particular, the 'no-disadvantage' test is less stringently

applied and whereas the processes of the Australian Industrial Relations Commission for certification of collective agreements are undertaken in an open, public forum, AWAs are dealt with in secret. This makes them an effective mechanism not only for undermining collective agreement-making but for undermining the award safety net itself.

5. The Office of the Employment Advocate [OEA] is a separate statutory body charged with various functions including the filing and approval of AWAs.[1] In performing his or her functions the Employment Advocate must have particular regard to promoting better work practices *through* AWAs.[2] The OEA has the responsibility for assessing AWAs against the 'no-disadvantage' test. The confidential nature of AWAs makes it very difficult to ensure that they are not used to undermine established work standards.

6. Attachment 1 is an example of a 2003 AWA to apply in the construction industry. Amongst the various clauses are those that lead to the following:-

- No entitlement to payment during inclement weather
- No sick leave or alternatively, non-cumulative sick leave
- No defined ordinary hours of work [though the agreement mentions 40 hours when the award has provided for a 38 hour week since the 1980s]
- No overtime or alternatively, all overtime [whenever that arises], at X 1.5 only
- No annual leave
- No leave loading
- No public holidays
- No RDOs
- No fares entitlement or alternatively a fares entitlement less than the award
- 'All-up' hourly rates only marginally more than the bare award rates

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[1] S 83BB(d)
[2] s 83BB(2)(c)

7. The processes adopted by the OEA relating to AWAs are open to abuse. In the matter of *BGC Contracting Pty Ltd & Ors v CFMEU* [2004] FCA 981 it was argued that AWAs could be used to exclude a union right of entry that could otherwise be validly exercised under state law in Western Australia. The Federal Court of Australia heard evidence about certain practices of the OEA relating to the processing of AWAs. The Court summarised the position as follows:-

> *"There was some evidence adduced by Killarnee that it was the practice of the Employment Advocate in Perth to accept for filing AWAs lodged electronically more than 21 days after they were actually signed. This is evidently done on the basis that the electronic lodgement somehow constitutes a signing of the agreement by the employer. Beyond the statement that this was based on 'internal legal advice' no exposition of a legal justification for this surprising practice was advanced."*

8 In the same matter, a worker gave evidence that, despite never seeing or signing an AWA, the OEA had informed him that an AWA had been registered in his name. The worker later obtained a copy of the AWA from the OEA which he said had a false signature over his name. This evidence was not challenged in the proceedings.

9 The allegation that an AWA had been registered for an employee whose signature did not in fact appear on the document was brought to the attention of the OEA. The OEA undertook in writing to conduct an 'investigation' into the matter on 7 September, 2004. That process is still not complete. On 27 June, 2005 after requests from the CFMEU, the OEA advised that evidence had been gathered and the matter would "be considered by the Employment Advocate". Attachment 2 contains the relevant documentation relating to this incident and subsequent 'investigation'.

10 On 31 May, 2005 the OEA told a Senate Estimates Committee that it was not their practice to sight an AWA signed by both employer and employee as part of the process of satisfying themselves that employees had in fact consented to the agreement as filed. Rather, they rely on electronic lodgement by the employer and send a letter to the employee advising them of the AWA. In spite of the patent

inadequacies of this procedure, the OEA seems to regard it as something 'above and beyond' what they need to do to properly discharge their function since the Act does not require a letter to be sent.[3]

11 Given the binding nature of AWAs and the fact that the present Government seems intent on giving them still further prominence in workplace regulation, it is in the public interest that the processes for giving them legal effect be completely open and subject to the usual legal processes of scrutiny and review, not "rubber stamped" behind a closed door.

12 It was recently reported that the OEA is unable to prosecute employers applying duress to employers to force them into AWAs. The OEA was quoted as saying "That's just the way the world is"[4] and went on to say that it was up to the individuals concerned or their unions to bring such prosecutions.[5] Section 170WG prohibits a person from applying duress "in connection with an AWA." Under section 170VV, an application for a penalty for breach of section 170WG can be made by "a party to the AWA." It would appear then that not only does the body with principal responsibility for AWAs have no standing to bring an action alleging duress, but unless a person is actually a party to the AWA in question, they would likewise have no standing. In other words, a person to whom duress is being applied but who has not yet become a party to the AWA, would be unable to rely on those provisions to deter the employer from using duress.

13 Likewise, the OEA has no standing to bring an action against an employer who breaches an AWA resulting in loss/damage to an employee.[6] This can be contrasted with the statutory provisions and Government policy on prosecutions for alleged breaches of awards, orders or agreements by unions and workers, particularly in the building and construction industry.

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[3] Hansard EWRE 31 May, 2005 p. 81.
[4] *'Workers Must Front Court in Contract Coercion Cases'* M. Bachelard and P. Taylor - The Australian 22 June 2005.
[5] Ibid.
[6] Section 170VW.

THE PRIORITY OF WORKPLACE/ENTERPRISE LEVEL BARGAINING

12. The Act presupposes that agreements at the workplace/enterprise level are inherently more 'legitimate' than agreements reached at any other level. Priority is given to 'single business agreements' over multiple business agreements, the latter of which can only be certified by a Full Bench of the Commission after consideration of the public interest and whether the matters in the agreement could be more appropriately dealt with at the enterprise level.

13. The view embodied in the Act that the individual enterprise is the most legitimate level at which bargaining should occur, demonstrates a failure to understand or accept the representative nature of registered organisations under the *Workplace Relations Act*. Unions consist of members who combine to pursue their common interests. They democratically elect their leadership to pursue those interests as they determine appropriate. They should not be constrained by law to negotiations at the workplace level particularly in a context where global developments shape the economy in which they live and work.

14. The construction industry workplace is by its nature a social and transient one. Apart from coming in and out of the industry and in and out of employment within the industry, building workers regularly change employers. They also work alongside others because their workplace is a multi-employer/multi-enterprise one. This makes the need for representative bodies, unions, even more important to them.

15. Likewise employer groups have their own mechanisms for ensuring that their policy positions reflect the views and interests of their membership. In circumstances where union and employer groups reflect democratic and representative processes, there is nothing inherently wrong with those bodies negotiating and accepting responsibility for matters, including industrial agreements, on behalf of their respective memberships.

16. Parties to enterprise bargaining, not the government, should be allowed to determine for themselves the level at which bargaining is to occur. That proposition is consistent with Australia's international obligations.

Although one of the principal objects of the WRA is:-

> *"assisting in giving effect to Australia's international obligations in relation to labour standards."*[7]

the present Act manifestly fails to allow that by favouring bargaining at an individual workplace level. For this reason the ILO's Committee of Experts has repeatedly criticised the Act.

17. In 1998 the ILO's Committee of Experts on the Application of Conventions and Recommendations stated in respect of Australia's compliance with Convention 98: -

> *The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organisations to promote and protect their economic and social interests.*[8]

18. Industrial negotiations other than at a workplace/enterprise level, occurs in many developed economies around the world. Although much bargaining in the USA can be observed at the corporate or plant level, industry level bargaining does occur particularly in industries such as steel, mining and the automotive sector. In European nations, more centralised industry level bargaining has a long and well-established history. Countries such as Germany, Finland, Austria and in particular the Scandinavian nations, all exhibit degrees of industry level negotiations by unions and employers and respective peak bodies. One study of collective bargaining trends in 20 OECD nations from 1970 to the late 1990's observed that: -

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[7] Section 3(k).
[8] Observations Concerning Ratified Conventions – Convention no. 87 pg 2.

"..multi-employer bargaining in the form of either central bargaining or industry-level bargaining has maintained its predominant status in all countries but the UK and New Zealand, aside from the countries where single employer bargaining has prevailed all the time since the end of World War II (i.e. Japan, Canada, the USA)."[9]

19. In the USA the construction industry has a long history of project agreements, known there as Project Labor Agreements or PLA's, for major public infrastructure works.

"A PLA is an agreement that defines wages and work rules for a project, and is approved by labor and the awarding public body before the project begins. It eliminates the need to negotiate a separate labor agreement with each contractor and each building trade, and sets up a process of conflict resolution to deal with the occasional job dispute.

A large project involves many separate union and non-union contractors, each with its own schedule of starting times, holidays, and other ancillary work rules. A PLA coordinates these differences.

PLA's were first devised in the 1930's to coordinate huge projects like the Grand Coulee Dam."[10]

20. Whilst there is undoubtedly a conscious political effort by employer oriented governments and bodies to decentralise the bargaining process in these countries, there is nothing to say that this form of bargaining is inherently less legitimate than enterprise level bargaining. In fact it could be said that the extent to which such forms of association are permitted is a useful measure of democratic development and that countries that permit industry/pattern bargaining do so because of the greater respect they exhibit towards rights of association and industrial organisation and representation.

21. Moreover the construction industry in Australia has a long history of "non-enterprise specific" regulation. This is in large part because of the nature of the industry itself.

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[9] *"Trends in Collective Bargaining and Economic Performance in the OECD Countries"* – Franz Traxler University of Vienna.

[10] *"Sounding Off: PLAs"* – R. L. Balgenorth – Cal-Tax Digest - California Taxpayer's Association – Sept. 2000.

Construction projects are multi-employer sites that bring together contractors of various sizes, specialities and industrial backgrounds. They are almost always a mix of state and federal regulation especially in relation to industrial instruments under which employees are paid. Both investors and principal contractors demand minimum levels of cost certainty for every project. Each site has its own idiosyncrasies that must be factored into the construction equation. Often this has meant that project specific agreements are struck with unions in the early stages that are then made known to those tendering for work on the site. Site agreements, project awards and the like have been a feature of the industry for decades because they provide certainty, consistency and stability.

22. The Committee of Experts on the Application of Conventions and Recommendations found in 1998 that the Act contravened the principle of voluntary bargaining by conferring a favoured status on single business agreements. The Committee declared that the parties to agreements themselves "are in the best position to decide the most appropriate bargaining level" and asked the Australian Government "to review this issue and amend the legislation in light of the requirements of the Convention."[11] The Committee went on to say:-

> *"In short, the determination of what level of bargaining is considered appropriate is placed in the hands of the Commission, which is mandated to give primary consideration to single-business agreements and to use the criterion of 'the public interest". The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining."*[12]

23. In 1999 the Committee concluded that Australian law restricts the right to strike by restricting the subject matter of strikes contrary to the Freedom of Association and the Right to Organise Convention No.87 ratified by Australia in 1973. It said:-

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[11] Report of the Committee of Experts on the Application of Conventions and Recommendations, 86th Session, ILC, 1998, Report III (Part 1A), at p 224.
[12] Ibid.

"... by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry wide or national level agreements, which excessively inhibits the rights of workers and their organizations to promote and protect their economic and social interests."[13]

24. The matter was put beyond doubt by the Report of the Committee in 2000 when it concluded by again requesting the Australian Government *"amend the 1996 Act to ensure that collective bargaining will not only be allowed, but encouraged, at the level determined by the bargaining parties"*[14]

AGREEMENTS MISUSED TO DENY FREEDOM OF ASSOCIATION

25. The Act permits employers to choose a union to enter into an agreement with and denies workers of the right to be represented by the union of their choosing through the mechanism of so-called 'greenfield agreements'.[15] Such agreements can have a nominal term of up to 3 years thereby denying workers of rights of association for lengthy periods of time. Once agreements are made with the union/s of the employers choosing the Act makes it very difficult for any other union to gain access to the workplace. This is a further denial of the right of workers to join and be represented by the union of their choosing.

26. The ILO has criticised these provisions in 1998 and again in 2000 by noting that the provisions permit an employer to *"choose which organisation to negotiate with"* and that the Act allows employers to *"pre-select the bargaining partner on behalf of the potential employees regardless of whether or not that union will ultimately be truly representative of the workers finally*

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[13] Report of the Committee of Experts on the Application of Conventions and Recommendations, 87th Session, ILC, 1999, Report III (Part 1A), at p 204-07.
[14] Report of the Committee of Experts on the Application of Conventions and Recommendations, 88th Session, ILC, 2000, Report III (Part 1A), at p 222-25.
[15] See section 170LL

employed." The Committee of Experts pointed out that "*the choice of bargaining agent should be made by the employees themselves.*"[16]

27. The Committee should recommend the repeal of these provisions.

[16] Report of the Committee of Experts on the Application of Conventions and Recommendations, 86th Session, ILC, 1998, Report III (Part 1A), at p 224.