Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into Workplace Agreements

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CPSU (PSU Group) Submission

Introduction

1. The PSU Group of the Community and Public Sector Union ("CPSU") and its members have extensive experience with agreements, be they certified under the Workplace Relations Act or approved by the Employment Advocate. The public sector has a high proportion of employees covered by certified agreements, and the push by the current Government for AWAs has lead to a small but increasing number of AWAs in the public sector.

2. The CPSU estimates it has successfully negotiated and assisted members to negotiate well over 1000 workplace agreements since the inception of the *Workplace Relations Act 1996* ("the Act"). These include agreements under both s.170LK (agreements made with staff) and 170LJ (agreements made with unions) as well as agreements under s.170LL (greenfields agreements) and Australian Workplace Agreements ("AWAs").

3. The CPSU has had the opportunity the read the ACTU submission, and supports and endorses that submission.

4. In preparing this submission the CPSU asked its members for their impressions and their stories of bargaining. These are persons who do not bargain for a living, but who endeavour as part of their working lives to improve the wages and conditions of their fellow workers. They often bargain at considerable cost to themselves, if only in terms of the extra time required to attend to their normal workload, but often also professionally. They get blamed for all the bad outcomes by persons who will not do it themselves, and rarely thanked for the good ones.

5. They deserve to be listened to.

Choice

6. Choice is held up as one of the virtues of the current system, and is enshrined as one aspect of the Principal Object of the WRA. Section 3(c) states that the Act enables

"*employers and employees to choose the most appropriate form of agreement for their particular circumstances*".

7. Yet despite this objective, choice can be difficult to achieve, is off limits to some and hard won by others.

> *As a DEWR employee I would have to say that employees do not have a free choice in what form of agreement they sign up to. As you will be aware employees new to DEWR and the public service have no choice but to sign an AWA. For those of us who appear to have an option the choice is illusionary.*

8. DEWR are not the only employer to compel new starters to sign an AWA, and as the Courts have held that it is not unlawful to make employment contingent on signing an AWA, the only real choice for such persons is whether they wish to refuse employment or not.

9. The illusionary concept of choice can well characterise numerous public sector agencies where employees have tried to have a say in what agreements should apply to them. A recurring struggle in public sector agreement making is about the form of agreement that will be negotiated or offered.

> *Do workers get enough say in choosing the type of agreement? No. It will come to the stage where the employer dictates what he/she wants and take it or leave it.*

10. The Principal Object referred to above talks about "employers ***and*** employees" choosing the form of agreement to apply to them. Despite those words, many employers act under a ethos that this is a choice reserved to them alone.

11. The Department of Industry Tourism and Resources (DITR) is but one example. Union representatives and elected workplace representatives were together negotiating a certified agreement and were keen as part of those negotiations to discuss with the employer the type of agreement to be offered.

12. The employer position was that it was not a matter for discussion, the decision having been made by the employer. As was said by Commissioner Deegan of the AIRC who was asked to try and conciliate the matter:

"DITR is clearly of the view that the matter of the form of the agreement to be negotiated … is not a question about which … DITR staff to be covered by the Agreement should have any input. ….. Section 3(c) of the Act would point to a different interpretation"

13. Yet despite this clear view of the AIRC, DITR and numerous other public sector employers continue to operate on the basis that an industrial agreement is a matter for the employer alone to decide.

14. This effective denial of choice occurs despite comments by the Minister for Employment & Workplace Relations publicly advocating choice to the community:

"Employees deserve the freedom, the flexibility to choose whether to belong to a union or negotiate directly – as an individual or a group – with their employer about agreements best suited to their workplace not a 'one size fits all' award or pattern agreement." [Kevin Andrews speech, National Press Club 31/5/05]

15. The CPSU has held and proposed ballots to democratically determine the matter, yet employers continue to refuse to acknowledge the process or accept the outcome. Choice it seems is reserved to the employer.

16. Even where choice is negotiated or agreed, employers remain ready and able to walk away from that choice where circumstances don't suit them. In Centrelink for example, the employer had agreed to negotiate a union agreement. Halfway through the negotiations however, Centrelink simply decided to abandon them and see whether its current bargaining position would be acceptable to staff. That position was then put as a proposed agreement to a ballot of staff under s.170LK of the WRA. The ballot was lost by Centrelink with over 70% of Centrelink workers rejecting the s170LK proposal and Centrelink was forced to return to the negotiations. An agreement was ultimately reached with the union which was endorsed by staff.

17. Whilst an agreement *was* reached, the ballot delayed the negotiations and the pay increases, and caused unnecessary confrontation, all because the employer decided to try and walk away from the agreed choice.

The other point of this arrangement is that we don't get to exercise any of our rights about the parameters of the negotiations until the end game - too late! We are made to look bad by our employers because we are forced to fight rear end battles. The Government restricts its contribution and preserves its image (to those who don't know them well) at the front end because it has the power to do so.

18. Choice is also undermined by the capacity of the employer to offer AWAs outside of the collectively negotiated agreement. Whilst the Act convolutedly sets up a regime in which a certified agreement can prevent subsequent AWAs being entered into (170VQ(6)), all Commonwealth public sector agreements allow AWAs to be entered into at any time, whether or not there is an existing certified agreement. The choice to bargain collectively, a choice that is a central tenet in ILO Conventions and one which is protected legislatively in all OECD countries, is undermined and eroded by subsequent AWAs. It has already been noted that new starters are required to sign AWAs in DEWR and elsewhere (eg Telstra).

19. It is incumbent upon the Government to ensure that employees have the right to exercise real choice, as opposed to rhetorical and illusory choice. That choice should be protected by mechanisms that are binding. A ballot of staff as to the form of agreement would determine the issue for all parties, and the outcome should then be locked in. This would establish the future course of negotiations, which should also be susceptible to oversight and sanctions by the AIRC. Finally, the right to collectively bargain must be legally enshrined and protected from erosion through individual agreements where the collective choice has been exercised. The capacity to enter into subsequent AWAs or another form of individual agreement must be removed.

Genuine and fair bargaining

20. Parties must genuinely try to reach agreement if they wish to retain their rights under the Act with respect to bargaining (see eg s.170MW). And in *AMIEU v GK O'Connor 99 FCA 310* Justice Marshall saw little or no difference between the notion of genuinely trying to reach agreement and bargaining in good faith. Yet genuine and fair bargaining is often difficult to achieve.

21. The high water mark of unfair employer behaviour with respect to bargaining would arguably be Sensis. Sensis wanted to make an agreement with staff and was negotiating through a Management Consultative team (MCT) with an elected Staff Consultative Team (SCT). The staff representatives wanted the assistance of the CPSU, and the employer refused to allow it. The CPSU on behalf of staff sought orders from the IRC to enable the employees to be assisted, and the matter went to the Full Court of the Federal Court.

22. The CPSU was not seeking orders that would direct the employer to negotiate with the union. It was not seeking orders to force the employer to make an agreement with the union. It was seeking orders to enable the employees to be assisted by the union in their negotiations with the employer. The Court agreed, and made the following statement:

"The only effect of such a direction would be to enable the SCT members to have the immediate assistance of a union representative during their negotiations with the MCT. Their desire to have that assistance does not seem unreasonable. The SCT members bear the responsibility of negotiating on behalf of many other Sensis employees, as well as themselves. They are confronted with management representatives that include a lawyer and the company's human resources manager. <u>It is difficult to understand why any fair-minded employer would wish to deny expert assistance to an employees' negotiating team placed in that situation</u>". (emphasis added)

23. As a result of the decision, Sensis determined it would not bargain at all.

> *I do not consider myself able to bargain & negotiate my working conditions. I believe it is too personal to try and do by myself and I don't want to fight by myself. I don't have time to make sure I cover everything correctly and to me it feels like divide and conquer. I want my Union to negotiate on my behalf and I don't want the conditions we currently have to be eroded away through individual bargaining.*

24. Of course, had Sensis refused to recognise the assistance sought by staff from the CPSU with respect to an AWA (that is, as a bargaining agent), it would have been unlawful conduct and left Sensis open to injunctions and penalties under the WRA (see ss.170VK(2), 170VV and 170VZ). No such sanction or compulsion exists with respect to representation with respect to a certified agreement.

25. In the GK O'Connor case referred to, an aspect of fair or genuine bargaining was said to be "*a preparedness to consider seriously offers and proposals made by the other side and to take account of arguments*".

26. Unfortunately many s.170LK agreements made with staff involve little or no negotiation, or even the involvement of staff. A proposed agreement put together by the employer HR area, perhaps having canvassed staff suggestions, is simply put out to the 14 day consideration period and then a ballot. The "meet and confer" required by s.170LK(4) is complied with by having a meeting and then changing nothing.

*Management felt that listening to workers' comments/ suggestions was enough. They did not feel the need to explain their decisions and when they did, the explanations were off point and pathetic in the extreme. This is not negotiation. Neither is it negotiation to present workers with a list of *non-negotiable* conditions. Naturally these include rates of pay and hours worked.*

27. Similarly a Full Bench of the IRC held that a Union which refused to participate in bargaining other than on its own terms was not bargaining in good faith (see Print M9940). Yet a spectre hanging over all bargaining in the Australian Public Sector is the DEWR Policy Parameters.

28. The policy parameters are a set of terms by which DEWR stipulate the basis on which bargaining will occur, and the matters which must not be included in any agreement. It is "non negotiable" and bargaining is only entered into on those terms. It is hard to see how a set of externally imposed conditions and predetermined outcomes is either fair or genuine bargaining.

"The rules of negotiation including the size of the field and what you can do on it are set by our employer. For example the requirement for an "efficiency dividend", that no supplementation will be available for wage increases etc etc. All set at the front end of the bargaining process and with little input if any (to my knowledge) from workers or their representatives. On this basis alone we severely disadvantaged in the bargaining process.

I often ponder what might be an equivalent example of behaviour from workers who wanted to set these "guides" before entering into negotiations eg we won't pay the bosses salary until he/she agrees that there will be supplementation….

26. The bargaining parameters also impose constraints on financial outcomes, irrespective of the agreement of the parties, and prevent any backdating of pay increases to the date of the expiry of the previous agreement. This provides a disincentive to the employer to actually conclude negotiations; delay simply saves the employer money.

27. DEWR also insists on vetting every certified agreement reached against the parameters. Many fair minded public sector employers reach genuine and consensual collective agreements with employees, but must then clear the agreement with DEWR. Changes may then be made by DEWR to what has been agreed. It would be akin to the ACTU checking every agreement reached by a union with an employer, and requiring the employer to make changes beyond what has already been agreed.

28. It is noted that AWAs are not checked in this way.

29. What's more, given the ferocity with which the non-intervention of third parties is championed by DEWR in the vetting process, (eg removing any reference to a union, making sure assistance in a workplace matter only occurs where requested), this after the event intrusion into concluded agreements is even more unacceptable and hypocritical. It is not just the CPSU which is unhappy with this process; many agencies do not agree with process and the delay that it can cause.

30. Fair bargaining and good faith does not end with the conclusion of the agreement. Good faith includes sticking to the agreement, another concept embedded in the Principal Object of the WRA (see s.3(e). Yet an important part of that concept, the impartial third umpire, is under threat through the actions of employers in bargaining.

31. Members in DEWR had to take industrial action twice over the Department's (and presumably the Minister's) proposal that disputes not be able to be referred to the AIRC for arbitration and it was only after a concerted industrial effort that access to the AIRC was retained. This is despite the Government's stated agenda that the AIRC should focus on its key responsibility, namely dispute resolution (see the Government "Plan for a Modern Workplace").

32. For 100 years the AIRC has discharged its dispute settlement functions through a legislative imperative to act according to merit, equity and good conscience (s.110) and it is because of this that it is valued and supported so strongly by members. An independent umpire acting in that way "helps keep the bastards honest".

33. Centrelink recently walked away from an agreed consultation process because it could. It was not part of the certified agreement because of the bargaining parameters, and so when it no longer suited Centrelink to comply they simply walked away. Without effective enforcement and an independent arbitration body, all agreements will be at risk of suffering the same fate.

34. Genuine or real bargaining is even less likely to occur with respect to an AWA. This is somewhat paradoxical given the "flexibility" mantra surrounding AWAs, but numerous studies, including for the Office of Employment Advocate (for a summary see Bray and Waring "The Rise of Managerial Prerogative", University of Newcastle) equate with the CPSU experience that there is little if any real bargaining with AWAs.

"Some staff in my section decided to accept an AWA and tried to negotiate their conditions eg. a 3% annual salary increase. They reported they were told no conditions were negotiable, they accepted the proforma AWA or not".

35. Template AWAs are the dominant species of AWA in CPSU areas. They are mostly offered on a "take it or leave it" basis. The template is usually available electronically on the employer's intranet, and only the formal parts and actual salary need to be completed. The terms and conditions are set, and whilst an employer must meet with a bargaining agent if one is appointed, meeting and negotiating are two completely different things.

"I have been on an AWA since 4-9-2001. Back then, when I requested a clause in my AWA be removed (concerning the possible re-location of my work place to another capital city), I was told that I was being offered a standard Agreement and nothing could be changed".

36. One AWA information pack provided to new recruits in Telstra even contains the following:

Q. Can I or my manager vary the wording in the (AWA)?
A. No. The wording must not be changed in any way.

37. Members often report that signing an AWA comes with certain expectations, including that there is no place for the union. More than simply the terms and conditions in the AWA, there is an expectation that you are signing on with the management ethos, and that you will do as you are told. There is an AWA culture that you are expected to adhere to, and the wrong "type" of person might not be offered an AWA.

"A couple of years ago at the Australian Industrial Registry we were offered AWAs. I thought I would discuss it with the Industrial Registrar. We had a couple of rounds of discussion. I was concerned about the way in which it didn't provide for ongoing employment, as this had to be reviewed after 3 years. Suddenly he emailed that I was not really the sort of person that was suited to an AWA and he was abandoning the discussions".

38. The CPSU has provided advice to many members faced with signing an AWA but generally not as bargaining agent. Many members, because of this culture, do not feel

comfortable with the employer knowing they are seeking advice or obtaining assistance from a union.

39. That AWAs are the Government's employment instrument of choice is not surprising. "Divide and conquer" as expressed by a CPSU member earlier in this submission is the name of the game. The only occasions in which the CPSU was able to negotiate significant change to a template AWA was when a significant number of affected employees signed up the CPSU as a bargaining agent. Faced with a collective response, the employer had to make changes to get the AWAs accepted. Consistent though with the standardised nature of the documents, change agreed with the CPSU was applied to all relevant AWAs, not just to those for whom the CPSU was bargaining. And once the employer obtained signatures from what it considered a critical mass of employees, negotiations were broken off and no further changes were agreed.

40. If the Government is truly concerned with genuine and good faith bargaining it will write that obligation into the new Act. It will commit the parties to submitting their disputes to the body specifically established to resolve them, the AIRC. It will ensure that choice is honoured, and that when a collective choice is exercised it is respected. It will require employers to listen to the wishes of their employees, through mandated ballots if necessary, and it will require employers to offer employment on the collective agreement if one exists.

Other matters

41. The CPSU notes that the last State of the Service Report for the APS reported that over two thirds of certified agreements were made with unions and 30% directly with staff. The CPSU experience is that support for the union in bargaining is consistently higher than its membership levels, and indicates a high level of support for assistance in bargaining by the union.

42. 98% of these agreements displace completely the relevant award meaning that whilst the award plays an important part in establishing the no disadvantage test, actual terms and conditions of employment are being established through bargaining.

43. If true bargaining does not occur, one aspect at risk is the real innovation that negotiation brings. A template agreement unable to be changed, or a unilaterally determined agreement put to a ballot, standardises conditions but does not lead to

change. For instance, the CPSU through bargaining has achieved a range of enhanced conditions for parents in various agreements including:

- Access to part time work for 5 years;
- 14 weeks paid maternity leave;
- 3 days extra carers leave per year;
- A pooled carers leave credit accessed by those in need.

Employers have recognised the value of these conditions in agreeing to them, but none provided them outside bargaining. A more restricted bargaining regime threatens to restrict innovative outcomes.

41. The CPSU also notes that the Report identified a disparity between the remuneration levels of staff on a certified agreement and those on an AWA, and that this was further accentuated by the availability and size of bonus payments to staff on AWAs as compared to certified agreements. Whilst the Report noted that this did not constitute "firm evidence of unfairness or discrimination", the CPSU experience is that this is certainly an element of the remuneration arrangements.

42. Many public sector AWAs are expressed in such a way that all of the terms and conditions of the certified agreement that would otherwise apply are granted through the AWA. There is therefore little if any productivity that would account for the differences in pay, and what is really occurring is that money is being used to buy people out of their collective agreement. Indeed, the CPSU has negotiated several certified agreements where the pay increase that had been agreed was sought to be reduced by DEWR, but at the same time it was suggested by DEWR that the amount lost could be paid through an AWA.
43. This disparity causes resentment and also leads to an unfair compression of the wages of employees who choose to remain on the certified agreement. Money that should be available to all is siphoned off to be paid to those who sign an AWA. It also leads to the value of the work being erroneously undermined.

Like many of my colleagues I pay dearly for not taking up an AWA - it is simply unfair to pay someone who is performing strongly (according to DEWR own system) much less than someone performing at a lower level under an AWA.

44. Finally, a worrying trend in the payment of bonuses is that women at the higher classification levels, where most of the bonuses are paid, receive a lower average bonus than do men at the same level. This again leads to resentment and a feeling that bonuses have less to do with the work you do and more to do with who you are.