Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into Workplace Agreements

Submission no: 41

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Transport Workers' Union of Australia

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24 August 2005

The Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Secretary,

RE INQUIRY INTO WORKPLACE AGREEMENTS

Please find attached submissions by the TWU to the above inquiry.

We apologise for the delay in forwarding the same to you.

Yours faithfully,

LINTON DUFFIN
FEDERAL LEGAL OFFICER

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Senate Employment, Workplace Relations and Education Committee

Senate Inquiry into Agreement-Making

1. The Transport Workers' Union of Australia ("the TWU") has approximately 82,000 members. The TWU's members are predominantly employed in road transport although we represent a significant number of employees in air transport. In addition the TWU has a significant number of owner-driver members, such persons being independent contractors who work in the road transport industry.

2. The TWU welcomes the opportunity to make a submission to the Senate Inquiry ("the Inquiry"). We believe that our submission will be of assistance to the Committee in its deliberations on these important issues. Our submissions will address the matters specifically raised by the terms of reference, but will also go to a range of issues which the Committee needs to consider when examining the issues raised by the terms of reference.

Proposed Federal Government Changes

3. The TWU notes that the Committee has been asked to examine whether the Government's proposed changes to agreement-making are likely to operate in the interests of all Australians.

4. The key aspects of the Government's proposal in relation to agreement-making appear to be the following:

(a) the introduction of the new Fair Pay Commission although as yet we are without knowledge as to obligations or the composition thereof;

(b) the introduction of the Fair Pay Standard – annual leave, parental leave, personal leave, minimum wage;

(c) further award simplification, through the reduction of matters such as superannuation, jury service and long service as allowable matters;

(d) the reduction of the relevance of the award safety net; and

(e) the transfer of vetting of agreements from an independent body, the Australian Industrial Relations Commission (AIRC), to a body, the Office of the Employment Advocate (OEA), which has an apparent core purpose of promoting AWAs at the expense of any other form of agreement or award.

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5. The intention of the changes was correctly described by Ross Gittins in the following terms

> *Whereas until quite recently it was almost universally accepted that workers had a right to bargain collectively, this Government is doing all it can to discourage collective bargaining and foster individual bargaining.*
>
> *Often, combatants resort to hurling abuse because their case is weak or hard to defend. The Government's basic problem is it can't bring itself to admit that the crystal-clear objective of its changes is to shift the balance of bargaining power in favour of employers.*
>
> *Far from admitting that truth, it is seeking to conceal it from an unsophisticated electorate.*[1]

6. Furthermore the Government's proposed legislative changes are designed to enhance the position of the OEA and the Fair Pay Commission at the expense of an independent statutory body, the AIRC. The OEA has shown over the past decade that it sees itself not as an independent statutory body but as a body designed to pursue the Government's agenda of preference being granted to individual agreements and non-union workplaces.

7. The changes will increase the power granted to partisan bodies at the expense of independence. It is mystifying to the TWU that the Government chooses to represent itself as being best friend of the worker when every policy position they have pursued (most obviously the decision to remove existing entitlements and restrict redundancy entitlements) has been to the detriment of worker rights and entitlements.

8. The OEA appears to ignore the conflict of interest involved in the promotion of AWAs at the expense of its statutory function of ensuring that such agreements meet the statutory minimum. Again and again whenever independent scrutiny is made of AWAs

[1] Gittins R., You are telling lies but I am selling reform, *Sydney Morning Herald* July 11.

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approved by the OEA they are shown to fail the no disadvantage test. Research conducted by ACIRRT in Sydney and by Professor Richard Mitchell at the University of Melbourne is consistent with the decision of the South Australian Supreme Court in the Bakers Delight case.

9. It is of course a rather strange scenario whereby the OEA indicates that it seeks to have over 1.1 million employees covered by AWAs by 2008. By what logic does a Government department seek such an outcome when the alleged purpose of the Act is to ensure that employers and employees choose the agreement which best suits their purpose. The only reason would appear to be an almost evangelical belief in AWAs and their role in undermining the award system and unions.

10. Perhaps this is unsurprising. If the Government had wished to ensure that the statutory function of ensuring that such agreements met the no disadvantage test it would have allowed for an appeal mechanism and/or independent external scrutiny of the agreements. As it is employees of the OEA receive performance pay based on the number of agreements approved by the OEA creating a clear conflict of interest in levels of scrutiny.

11. The Government and the OEA's pursuit of AWAs and the rejection of the award system is contrary to a professed preference in many places, including amongst employer organisations, for the retention of the award system, and indeed the maintenance of State systems of industrial regulation.

12. Nonetheless while we have a bare bones approach to the forthcoming legislation, it is difficult to assess what the Government's proposed changes actually will be. More recent pronouncements by different members of the Government have been contradictory to those announced in May. Indeed given the speed at which the Prime Minister or the Minister for Workplace Relations appear to change the policy that had been announced it is difficult to be certain as to the exact position of the Government at any particular moment.

13. Indeed having seen the comments made it is difficult to conclude other than that the Government Ministers in charge of the policy appear not to have a proper grasp of the

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way the system currently operates, what the no disadvantage test provides and how agreements are made.

14. For example, the Prime Minister's comments about meal breaks being maintained absolutely is just nonsense unless it is enshrined as a minimum entitlement. In the absence of such a statutory protection (which was the case in the Prime Minister's statement) there is no way that meal breaks can be maintained absolutely.

15. Likewise the fact that the Minister appeared to suggest that the existing long service leave benefits for nurses would of course be maintained is simply inconsistent with what was stated in the May announcements.

16. The fact that the Government now appears to trot out the line that everything will be made clear when the legislation is presented is demonstration that the announcement was either inaccurate or was some sort of ambit claim.

17. Accordingly the TWU is simply unable to provide submissions on the Government's proposals. They are a moveable feast and accordingly unable to be accurately analysed. Perhaps the situation will be clearer when the legislation is provided. However recent press reports indicating that the Government is now backing away from parliamentary scrutiny of the legislation will afford organisations such as the TWU few opportunities to provide input into the parliamentary processes.

18. The TWU believes that the Committee should be given the opportunity to examine the legislation in detail to determine whether the Government's policies are likely to worsen or reduce the rights or entitlements of workers.

(a) The scope and coverage of agreements, including the extent to which employees are covered by non-comprehensive agreements

19. The TWU is a party to over 50 awards. These awards range from general road transport awards (such as the Transport Workers Award 1998), awards which regulate the long distance driving sector (Transport Workers' (Long Distance Drivers) Award 2000) specialised components of the transport industry

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20. In addition the TWU is a party to over 200 certified agreements in the Federal system. These agreements apply to workplaces which are large and small, part of a business only or the entire business, cover only the transport workers or cover all workers on the site, are with other unions or by the TWU itself.

21. However in our experience relatively few such agreements are comprehensive in the sense of including all of the terms and conditions of employment which might apply to the workers covered by the agreement.

22. We are also well aware of the nature and contents of non-union certified agreements and AWAs which are pursued in the industry. Again it is fair to say that many such agreements cannibalise the terms in the award. Indeed it is a rare agreement which does not adopt any of the terms of the award.

23. The parties to agreements at the workplace in the transport industry are, generally speaking, content with the flexibility provided in the awards which apply. Further the transport industry is highly competitive and has extremely low levels of concentration. Unlike many Australian industries the 4 largest road transport companies have a market concentration of less than 20 per cent.

24. The substantial competition in the industry creates the circumstances in which the award operates as a means of ensuring that employees receive a living wage. The transport industry is, in almost all circumstances, a price-taker. Employers in the industry usually use the award to tender for work. This mechanism ensures that a floor exists in the tendering process at the level of the award wage.

25. The removal of many elements of the award system will ensure that the race to the bottom will occur.

26. A classic example in this area is the waste inudstry. Ten years ago waste industry workers were relatively well paid in the transport industry owing to allowances payable for working with domestic refuse. However in the last ten years the repeated

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experience of better paying employers losing contracts after being undercut has meant that the pay rate in the industry remains close to the award rate of pay.

27. This is in spite of a developing labour shortage in the industry and a marked reluctance of applicants for such work. It was the existence of a well-paying award system which ensured that such elements of the transport industry were efficient and productive. The agreements in this sector continue to pick up many elements of the award including classifications and entitlements but this is inadequate to ensure that agreements are leading to beneficial outcomes.

28. In fact the labour shortage in this component of the transport industry is meaning that it is only through the use of excessive overtime that companies can actually attract employees. This of course sows the seed of their own downfall as it is not possible to maintain the contract paying wages in this manner. The result is a higher turnover staff, lower productivity, lower efficiency and a sector which struggles to meet basic safety standards.

(b) The capacity for employers and employees to choose the form of agreement-making which best suits their needs

29. The TWU is concerned that choice in the current system is determined by one party in the system, namely the employer, and one party external to the system, namely the Commonwealth Government.

30. Dealing firstly with the Commonwealth Government. The Government when it came to office emphasised the importance of choice for the parties. However its more recent pronouncements suggest something other than choice. Regardless of whether it is in relation to the activities of Commonwealth public sector employment, in small businesses, what is to be included in agreements or what form of agreement workers can choose to have, the Government appears determined to ensure that its choice shall be what prevails.

31. Firstly the Government appears determined to ensure that its preferred model of agreements – AWAs - prevail. The most obvious example of this is relates to the

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current policy of overriding any collective agreement which prevents the employer from offering AWAs during the life of the certified agreement. This system currently provides to employees the certainty of knowing that their collective agreement will not be undercut nor that their employment rights will be sacrificed on the altar of individual contracts.

32. However the Government's policy is to subvert this level of employee choice. The TWU submits that this approach to agreement making indicates that employee preferences are to be accorded a lower order of priority than Government priorities. This is particularly odd given that the Government came to power using the rhetoric of removing unwanted third party interference. It appears third party interference is unwelcome when it is of any hue other than the Government's.

33. Furthermore the Government now seems determined to say what matters can be included in agreements and perhaps more accurately what matters can't be included. It appears to be the case that the Government will restrict or prevent agreements dealing with superannuation, AWAs, labour hire employees, right of entry entitlements, and union recognition rights.

34. The speed at which the Government appears determined to substitute its judgment for the employer's and employees' judgment is striking. We clearly are not far away from an industrial dictatorship where the Government will impose its model of agreement upon all persons in the industrial field.

35. The approach of the Government and the rhetoric it espouses seem to place any individual above the workforce. The Government appears determined to ensure that an individual's wishes will prevail over the majority at a workplace. This does seem odd given that the Government, the High Court, the Senate, the local cricket club, the partnership of a law firm all operate on majoritarian principles.

36. A further issue concerns the level of bargaining. It is, except in extremely rare cases, unlawful to negotiate on a basis beyond a single workplace. Indeed Government efforts to prevent pattern bargaining are legend. However, ought this not be an issue

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for the parties to determine ? If the parties prefer to negotiate on a national, industry, state, enterprise or workplace level why would the Government prevent them ?

37. Pattern bargaining is of course rife. However it is rife in a Government approved program. The OEA provides template AWAs to be used in a range of industries. Employers when offering AWAs do not permit, except in rare circumstances departures from their chosen model.

38. Choice clearly resides with the employer. However the employee is left to accept what is offered or lose employment or conditions.

39. Choice must be about more than Government coercion. The Government appears to espouse choice through its rhetoric but its practices frequently involve the use of taxation or subsidies to ensure that its choice is the one adopted by the community. So much is clear with the involvement of the OEA in workplace relations.

40. However when it comes to the workplace what the majority of employees want is subsumed by what the Government says they should have. Choice is a mirage of the Government's making, a Clayton's choice.

41. The Government' position is worsened by the nature of bargaining in the Federal system and the absence of any recognition rights for collective bargaining in the system.

42. The TWU has on a number of occasions represented members who sought a collective union agreement at AWA workplaces. In most such cases management indicated it had drafted the agreement that it thought worked best at the workplace and had no intention of altering this.

43. Indeed on a number of occasions the TWU has been the representative of members who were covered by a collective agreement at a workplace who had lost a contract. The workers were informed that there would be no employment at the successful contractor unless an AWA was signed.

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44. The power granted to the employer to determine the nature of the agreement to apply at the workplace is contrary to the rhetoric espoused by the Government and any sort of recognition of employees as equal parties in the industrial relationship.

45. Indeed, contrary to much of the philosophical basis of groups such as the Institute of Public Affairs, the very nature of who chooses the form of agreement to apply at a workplace demonstrates the inequality of bargaining power at the workplace. The party which has the bargaining power determines what form of agreement the other party is to accept.

46. The TWU believes that the Government must immediately put in place mechanisms to ensure that choice is available to the parties in the system, and not limit choice artificially to those choices which fit its pre-conceived notions of what is acceptable.

(c) The parties ability to genuinely bargain, focusing on groups such as women, youth and casual employees

47. The TWU notes that there is currently no capacity to genuinely bargain at the workplace, other than where a worker is organised in a union. This is the case regardless of whether the preference of the employer is to pursue AWAs or non-union certified agreements.

48. The TWU notes that imbalances in bargaining power exist regardless of whether the employee is a male truck driver or a female part time shop attendant.

49. The TWU has been involved in numerous companies where the employer has determined the nature of the agreement and the terms. The special features of disadvantage raised by the terms of reference are merely the some of the aspects of disadvantage which are more extensive.

50. In that context the TWU notes that genuine bargaining occurs where unionism is prevalent, where the parties are secure in their employment and where the employer is not provided with the power to determine whether employee will be granted the capacity to collectively bargain or not.

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51. The existing weakness in the federal system which is a result of the lack of a mechanism to ensure that the parties bargain in good faith and are required to recognise bargaining representatives and unions.

52. In our experience section 170LK agreements are provided to the workforce after drafting by management in consultation with lawyers or consultants. The agreement is presented as a fait accompli. The provisions of section 170LK which enable employees to seek external assistance are only available after the agreement has been presented and are usually only accessible during the 14 days where the agreement is to be voted upon. Bargaining, consultation and the involvement of the workforce are secondary considerations.

53. Even this however is better than that for AWAs where such agreements are provided to workers and new employees without any real meaningful discussion of the loss of conditions and benefits associated with the AWA. Alternatively they are provided as they are in the Minister's own Department with the entire purpose of de-collectivising the workplace. All promotions, transfers and recruitment is done pursuant to an AWA. AWAs are deliberately provided with better terms and conditions as a means for management to isolate any individual and supress any attempt at collective negotiations.

54. In other circumstances AWAs are presented on a take it or leave it basis. This is equally true in areas such as dependent contracting where the NSW Industrial Commission has on numerous occasions dealt with the evils that exist in untramelled contracts for service as well as contracts of service.

55. It is, we submit, only a perversion of the term to say that genuine bargaining occurs in the non-unionised sector.

56. Turning to the specific examples raised by the terms of reference, the TWU does not represent large numbers of female employees currently. The road transport industry currently does not employ large numbers of women. Women are typically employed as

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clerks in the road transport industry and there are increasing numbers of female drivers, albeit off a low base.

57. Likewise the TWU does not represent large numbers of young persons. Obviously it is unusual for large numbers of young employees to be employed in the transport sector requiring as it does drivers licences and in particular truck driving licences.

58. The TWU does represent significant numbers of casual workers. However there clearly are two distinct categories of casual employees (leaving aside the issue of dependent contractors). The first are those who are directly employed by the transport company. The second are those engaged by labour hire companies contracting to the transport companies.

59. In the TWU's experience, the former group are usually represented at the workplace by the union and their interests are properly protected in this context.

60. However the latter group usually only receive wages and conditions comparable to those enjoyed by direct hire employees as a result of clauses included in certified agreements by the union. In the absence of such clauses the rates of pay and conditions fall back to the "safety net" of award terms and conditions.

61. The award safety net rates of pay are up to 25% less than the rate of pay received by direct employees covered by certified agreements.

62. However they have no job security as they can be moved from the site at the whim of local management. Equally such workers are used as a means of restricting workers ability to confidently bargain at the workplace as there is a ready alternative supply of labour.

63. We note in this context that the Federal Government appears to be pursuing policies in its Independent Contractors policy which would seemingly prevent employees of labour hire companies from receiving the rates of pay and the conditions of employees at the workplace. This approach in our view would be counter-productive. It would

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lessen such workers capacity to receive relevant terms and conditions of employment and would make permanent employees far more concerned about the use of such workers. In the event it may cause greater levels of disputation and lead to greater levels of suspicion at the workforce. In the end it is trust and confidence which propels productivity, not fear and secrecy.

(d) The social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities

64. The TWU notes that these objective go to gender specific matters. Such matters are important but are not the only social objectives which are relevant at the workplace.

65. A further objective which ought be considered is the need for all workers to have a say at the workplace. We should not be encouraging workplaces to give all formal power be given to management. This prevents properly informed workers from being empowered with an attachment to the company and its future.

66. The need for a "fair go" at work is important. Leaving to one side the Government's issues about unfair dismissal, a more secure workforce will be prepared to offer constructive forward thinking ideas. Equally the opposite is true. A less secure workforce will have lower levels of morale, lower willingness to offer constructive criticism and a reluctance to participate in decision-making for fear of losing employment.

67. The social objective of employee participation ought be encouraged by legislation not reduced. It is unfortunate to that extent then that the Government has sought to restrict award clauses which provide minimum levels of consultation about change and seeking to minimise possible redundancies and adverse impacts upon employees. Such legislative changes do not auger well for employee participation.

68. The TWU does believe that there are few benefits to work and family balance which have emerged through the past decade. Attempts to promote change have been resisted by the Commonwealth Government. The Prime Minister's barbecue stopper has been doused by Government reluctance to pursue policies which might in any way provide employees with better choices.

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(e) The capacity of the agreement to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standards

69. The TWU believes that collective agreements are the best means of ensuring that the productivity improvements which occurred in the early 1990s are sustained.

70. However, unlike the Government which seems to believe that fairness at work is an undesirable objective, the TWU believes that fair dealing at the workplace leads to more harmonious and more successful workplaces. Fair dealing at work leads to better productivity, efficiency and living standards.

71. For numerous years there has been economic research which has demonstrated that unionised workplaces can be more productive, more harmonious and fairer through the existence of workers having a voice as to how the work is managed and organised. This research exists in a number of countries.

72. Unfortunately the Government's policies seek to minimise any role for workers to have a voice at the workplace. Workers are to be seen and not heard and managers to have obligation free management powers. Such changes, in our view, will lead to worsening productivity and efficiency.

73. Until the election of the Labour Government in New Zealand, that country was seen as the international pin-up for neo-classical economists. However any fair-minded observer of that country's economic progress would realise that the introduction of the Employment Contracts Act did not lead to the great productivity increase suggested by the Government. Instead it led to worsening conditions, wages and rights at work and lower levels of productivity improvement than occurred in Australia.

(e) Australia's international obligations

74. Although the TWU does not intend to make extensive submissions in relation to this term of reference, the TWU believes, consistent with submissions which have previously been tendered to inquiries of this sort, that the laws even as they presently stand fail to meet the international obligations imposed upon Australia.

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75. Indeed it is difficult to reconcile the Government's existing laws, let alone the proposed laws, with the express recognition of collective bargaining which is central to ILO principles. Even a cursory examination of the reports of the ILO in relation to the existing provisions make it clear that the Workplace Relations Act fails to provide for adequate protection from discrimination for union members and fails to provide a proper basis for collective bargaining.

76. The Government ought properly recognise collective bargaining and ensure that the laws it proposes are consistent with its international obligations.

Recommendations

77. The TWU believes that:

(i) the parties should be free to include in their agreements whatever they wish and not be unduly constrained in so doing by Governments;

(ii) that the award system be maintained as comprehensive and relevant and that it be used as the basis for the no disadvantage test in its entirety;

(iii) that the AIRC have power to scrutinise all agreements in the federal industrial system with proper appeal mechanisms and review procedures;

(iv)that collective agreements override individual agreements; and

(v)that a bargaining in good faith power be granted to the AIRC to ensure that unfair bargaining practices not be allowed to flourish;

(vi)that where employees express a preference for collective bargaining and union representation that the employer be bound to recognise that preference and not act in any way contrary to this.