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29 August 2005

Mr John Carter
Committee Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Mr Carter,

Inquiry into Workplace Agreements

The terms of reference for the present inquiry ask the Committee, firstly, to examine the nature of workplace agreement-making in Australia and, secondly, to consider whether the proposed industrial relations reforms are desirable.

The purpose of this submission is to summarise for the Committee the findings of our research into the nature of workplace agreements made under the *Workplace Relations Act 1996* (Cth). It is not our intention in this submission to advocate for or against the proposed legislative reforms. However, the Committee will be able to draw its own conclusions as to the desirability of certain reforms in light of some of our findings about the way in which workplace agreements are presently being utilised in Australian workplaces.

Our research findings are drawn from two large empirical studies. The first study consisted of a manual examination of the content of 500 Australian Workplace Agreements ('AWAs'). The second study involved a detailed comparison of the provisions of 84 certified agreements and AWAs with the terms of their underlying awards. Further information about the methodologies employed in these two studies can be found in the published research findings, referred to below.

These two studies gave rise to four lines of inquiry. The first was an investigation into whether AWAs were being used to introduce 'high performance' employment models into Australian workplaces. The second was a series of case studies into how AWAs were being used, strategically, by large employers. The third was an examination of how the complexity of workplace regulation might impede the introduction of workplace flexibility. The final study was a major investigation into whether the 'no-disadvantage test' ('NDT') can be said to be protecting employees' interests in the enterprise bargaining process.

The findings of these four studies were reported in a number of pieces of published research, which are attached to this submission. For the benefit of the Committee, we summarise our findings below.

AWAs and 'High Performance' Workplaces

In this study we explored the hypothesis that one motivation for the introduction of AWAs by the Howard government was the desire to facilitate what human resource management theory refers to 'high performance', 'high trust', or 'flexible' workplace systems. These labels refer to a 'new' employment model, characterised by a high degree of trust in, and empowerment of, employees, the introduction of flexible working arrangements, and a focus on individual and business performance. This model is said to lead to enhanced employee commitment to the business and hence to higher levels of productivity.

Finding some evidence that this was, indeed, part of the government's motivation in introducing AWAs, we then examined the terms of the agreements in our AWA database to see whether those agreements were in fact being used for this purpose. We found that the overwhelming majority of AWAs were not concerned with implementing new, progressive workplace systems. On the contrary, many AWAs appeared to be designed to entrench and enhance the employer's power to determine working hours, duties and also (through the discretion to determine bonuses and salary increases) pay.

These findings were reported in:

R. Mitchell and J. Fetter, *The Individualisation of Employment Relationships and Adoption of High Performance Work Practices: Final Report*, Workplace Innovation Unit, Industrial Relations Victoria, 2003 (**Attachment 1**).

R. Mitchell and J. Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 Journal of Industrial Relations, p. 292.

R. Mitchell and J. Fetter, 'Human Resource Management and the Individualisation of Australian Industrial Relations', Centre for Employment and Labour Relations Law, Working Paper 25, The University of Melbourne, August 2002.

AWAs and Large Employers

This case study examines the motives of three large employers who introduced individual agreements into their collectively regulated workforce during the1990s. In each case, the decision to use individual arrangements gave rise to significant industrial and concomitant legal disputes. However, upon close consideration it appears that different motives for the adoption of individual agreements were at play.

In the case of the CRA Bell Bay and Weipa disputes, it appears that the employer's motive was to break the power of the union. In the case of the BHP Iron Ore dispute, it appears that the company was genuinely intent on pursing flexibilities and cost savings through the introduction of AWAs, albeit in the knowledge that this strategy would have an incidental deunionising effect. In contrast, in the Commonwealth Bank dispute, it appears that AWAs were introduced only as a tactic to undermine the union's collective bargaining position.

These studies show that employers may have a variety of motivations for their interest in individual arrangements, although reducing union power is often a primary or secondary goal.

The case studies can be found as **Attachment 2**:

J. Fetter, 'The Strategic Use of Individual Employment Agreements: Three Case Studies', Centre for Employment and Labour Relations Law, Working Paper 26, The University of Melbourne,

December 2002.

Complexity of Workplace Regulation

During the course of our research we noticed that there was an enormous amount of deliberate or inadvertent interplay between the various instruments of workplace regulation. We decided to examine the nature and extent of this interplay, with reference to our AWA database, and to consider the effect that it might have (in theory, if not in fact) on the pursuit of work flexibilities through the use of statutory agreements.

We found that many AWAs incorporated or otherwise refer to position descriptions, documents containing company policies, awards and certified agreements. Not only did this drafting practice create significant complexity and uncertainty in determining workplace conditions but, in our view, it also drew in restrictions on the exercise of flexibilities and discretions expressly conferred by the AWA.

Similarly, the interaction between the contract of employment and the AWA is a complex issue, and we contend that the terms of an underlying employment contract may also, as a matter of law, constrain the operation of a 'flexible' AWA.

We conclude that the complexity of workplace regulation in Australia, and the overlapping nature of many instruments of workplace regulation, may lead to significant problems in pursuing, legally, various forms of workplace flexibility.

This research was reported in:

J. Fetter and R. Mitchell, 'The Legal Complexity of Workplace Regulation and Its Impact Upon Functional Flexibility in Australian Workplaces' (2004) 17 *Australian Journal of Labour Law* 276 (**Attachment 3**).

J. Fetter and R. Mitchell, 'The Legal Complexity of Workplace Regulation and Its Impact upon Functional Flexibility in Australian Workplaces', Centre for Employment and Labour Relations Law, Working Paper 31, The University of Melbourne, September 2004.

The No-Disadvantage Test

In this study we (and five co-authors) investigated the operation of the NDT with a view to determining whether the test was sufficiently protecting workers from disadvantage. The first step was to examine the practical application of the NDT by the regulatory authorities. This led us to develop some concerns that the test was not being applied thoroughly, and that only monetary forms of disadvantage to employees were being taken into account.

We then conducted an independent evaluation of a significant number of statutory agreements to see which award entitlements were the subject of bargaining and to determine whether the agreements ought, in our view, to have been approved by the regulators. We found that it was highly questionable whether most of the AWAs and section 170LK agreements we examined ought to have been approved. Although most of the section 170LJ agreements we inspected appeared to us, on the face of the agreement, to pass the NDT, we are concerned that the NDT does not, and perhaps cannot, adequately compensate employees for the loss of certain benefits, such as leave, job security,

and control over working hours, duties and pay.

This study was reported in:

R.Mitchell R. Campbell, A. Barnes, E. Bicknell, K. Creighton, J. Fetter and S. Korman, 'Protecting the Worker's Interest in Enterprise Bargaining: The 'No Disadvantage' Test in the Australian Federal Industrial Jurisdiction: Final Report', Workplace Innovation Unit, Industrial Relations Victoria, 2004 (**Attachment 4**).

R. Mitchell et al, 'What's Going On with the "No-Disadvantage Test"? An Analysis of Outcomes and Processes Under the *Workplace Relations Act 1996* (Cth)', Centre for Employment and Labour Relations Law, Working Paper No 33, University of Melbourne (March 2005).

R. Mitchell et al, 'What's Going On with the "No-Disadvantage Test"? An Analysis of Outcomes and Processes Under the *Workplace Relations Act 1996* (Cth)', *Journal of Industrial Relations* (forthcoming).

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Taken together, our research highlights some of the problems with the current legislative scheme for agreement-making, and directs attention to those areas where reform is needed.

If you have any queries please do not hesitate to contact us.

Yours sincerely,

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