Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into Workplace Agreements

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1.0 Introduction

1.1. I am currently employed at the Australian Centre for Industrial Relations Research and Training (ACIRRT) under an Australian Research Council grant to examine the changing character of labour disputes and conflict resolution. As part of the ARC fellowship, I have examined comparative policy models of industrial action and bargaining systems.

1.2. This submission is not comprehensive but instead aims to contribute by focusing on aspects of the Workplace Relations Act (WRA), and proposed amendments in these areas of expertise, which relate to terms of reference (b) (capacity for employers and employees to choose the form of agreement-making which best suits their needs) and (c) (the parties ability to genuinely bargain, focusing on groups such as women, youth and casual employees). The submission is made personally and not on behalf of ACIRRT.

1.3. There are three key points I wish to make:

1.3.1. *The WRA does not provide a genuine choice for the parties to select and design the type of agreement which best suits their needs.* The bargaining model of

the WRA is actually a rigid, one-size-fits-all model. It superimposes one type of bargaining structure (enterprise-level, single-employer bargaining) across the entire labour market instead of genuinely allowing the parties to choose the bargaining structure and agreement coverage which best suits their needs – be it the enterprise, the supply-chain, the occupation, the region or the sector. If the Commonwealth Government removed the monopoly of enterprise-level agreements, the bargaining system would be much more diverse and flexible as the parties could choose the type of agreement which genuinely suited their needs.

1.3.2. *The WRA does not provide a genuine capacity for employees to choose between collective and individual agreements.* The rights of employers and employees who prefer individual agreements are prioritized over those who prefer collective agreements. Unlike other decentralised bargaining systems, there is no effective legal mechanism for protecting the right of employees to choose collective representation and agreements, there are no good faith bargaining provisions to encourage constructive dealings and employers are legally empowered to exploit these gaps in bargaining infrastructure through a variety of inducements and coercion to pressure employees into signing individual agreements (AWAs) not permitted

elsewhere, including lockouts – even where the overwhelming majority of employees would prefer a collective agreement. No other OECD nation allows employers to lockout their employees to coerce them into signing an individual agreement.

1.3.3. *Instead of reforming the WRA to ensure AWAs are genuinely voluntary arrangements and enhance the choices of the parties, the proposed amendments will deepen the inequities and rigidities.* If the upcoming reforms come to pass, AWA lockouts will become the most accessible, flexible and lightly regulated form of industrial action – less regulated than certified agreement lockouts which in turn will be less regulated than strikes. Australia will be unique in legally discriminating in favour of lockouts vis-à-vis strikes and the differences in regulation of certified agreement lockouts and AWA lockouts will create incentives for employers to use AWA lockouts. AWA lockouts should have no role in a modern bargaining system but these reforms will reshape legal regulations in such a way as to encourage greater usage of AWA lockouts.

2.0 Terms of Reference (b): Capacity for employers and employees to choose the form of agreement-making which best suits their needs

2.1 There are three key formal principles which frame the bargaining system under the WRA. Firstly, the WRA is formally based on a principle of neutrality towards different types of agreements. Secondly, a conception of freedom of association which aims to simultaneously protect the rights of individuals to associate or not associate. Thirdly, an enterprise-oriented system of agreement-making guided by the principle this enables the parties to develop work arrangements which best suits their needs.

2.2 In theory, these appear sound principles but in practice the WRA as currently structured does not genuinely allow the parties to structure their bargaining arrangements so as to best suit their needs or allow employees to genuinely choose between collective and individual agreements.

2.3 *The Monopoly of Enterprise-Based Bargaining*

2.3.1 In moving away from the arbitral model, Federal Legislators constructed the bargaining system around the enterprise. Only single-employer

agreements are legally recognised, industrial action must relate to a single-employer and so on. The object of designing a system around enterprise-based bargaining was to maximise the choice and flexibility of the workplace parties.

2.3.2 Over a decade onwards, it is clear that the focus on enterprise-level bargaining has itself become a rigidity which doesn't reflect the diversity of modern business and workplace arrangements. Economic relationships are now often organised into complex supply-chains. Distinctive regional labour markets exist outside metropolitan areas. Some types of work are structured as occupations, others are structured as sectors. Many economic activities have multiple layers of organisation which ideally would be regulated by different types of agreements depending on the issue. By only recognising single-employer agreements, the WRA inhibits the capacity of the parties to design agreements which reflect their circumstances and needs.

2.3.3 The monopoly of enterprise-based bargaining is based on false premises about the nature of a 'genuine' bargaining system. The Australian debate continues to proceed as though the choice is between 'centralised

regulation' or 'decentralised flexibility'. Consequently, the focus of policy-makers when they come across evidence of the parties trying to bargain across enterprises has been to respond with 'anti-pattern bargaining' measures. The assumptions and rhetoric accompanying these measures invariably suggest a 'genuine' bargaining system only permits enterprise-level bargaining.

2.3.4 In reality, there is not a single bargaining system in the OECD which corresponds to these notions of a 'genuine' bargaining system. All bargaining systems combine elements of multi-employer patterns and workplace bargaining. Even in the United States and the United Kingdom, universally considered to be the most decentralised and de-regulated bargaining systems, there is considerable pattern bargaining intermingling with workplace bargaining.[1] The latest OECD review of wage-fixing devoted extensive consideration to the different forms and impacts of multi-employer coordination in bargaining systems and how they interact with workplace bargaining.[2] Whilst Australian debate

[1] See, for instance, K. Sisson and P. Marginson. (2002) 'Coordinated Bargaining: a Solution for our Times?', *British Journal of Industrial Relations,* 40(2).

[2] OECD (2004) *Employment Outlook*, OECD: Paris, ch. 3. It is worth noting the OECD also concluded in relation to the macro-economic performance of 'intermediate' systems which combine multi-employer coordination with workplace bargaining that 'little evidence emerges for intermediate cc countries

continues to rehearse old polemic about centralisation versus decentralisation, enterprise versus pattern bargaining, international debates and policy practice have moved on to consider how best to organise the interaction between multi-employer coordination and workplace flexibility inherent to all bargaining systems.

2.3.5 A system which only recognises enterprise-level agreements inhibits the capacity of the parties to choose and develop bargaining arrangements and agreements which suit their circumstances. Many parties find enterprise-level bargaining suitable but other parties would prefer the flexibility to structure their bargaining arrangements around occupations, regions, supply-chains or industries. The monopoly of enterprise-based bargaining is in practice a 'one-size-fits-all' approach which forces the parties to structure their bargaining arrangements and agreements to comply with Federal regulation. The monopoly should be relaxed to allow the parties to genuinely choose what type of agreement best suits their needs.

(centralisation/coordination) having the worst economic performance' (OECD 2004: 159). It further noted in relation to the 'hump-shaped thesis' which argues 'extremes work best' (i.e. centralised or decentralised systems) that 'some subsequent studies have reported evidence in support of the "hump-shaped hypothesis", but most other studies have not found such a relationship' (OECD 2004: 134).

2.4 Collective or Individual Agreements: Enabling Genuine Choice for Employees

2.4.1 In most other English-speaking nations with decentralised bargaining systems – the United States, United Kingdom, Ireland and Canada – there is a legally-defined process, usually a ballot, to allow employees a genuine choice as to whether they wish to be represented by a union. If the ballot verdict is affirmative, the employer is required by law to respect their wishes and bargain with their chosen union representative. A legal guarantee of an employee's right to collective bargaining - where that is their preference - is standard practice internationally. Unfortunately, there is no legal mechanism for employees to have their preference for collective bargaining recognised. Whereas the Commonwealth Government will legislate to require a mandatory secret ballot before the use of industrial action, it has dismissed out of hand a ballot process to determine whether employees genuinely prefer a collective or individual agreement. Only 2-3 per cent of employees take industrial action per annum[3] but the type of agreement is a threshold issue which affects all employees. It says much about the priorities and purpose of these reforms

[3] See Australian Bureau of Statistics (1994-2003), Industrial Disputes, Cat. No. 6321.0. The portion of employees who have taken industrial action has fallen to 2-3 per cent each of the past five years.

that the focus is on the 2-3 per cent of employees who take industrial action instead of the much bigger issue of freedom of association for the workforce at large.

2.4.2 Nor does the *Workplace Relations Act* have good faith bargaining provisions. The United States and Canada have good faith bargaining statutes in addition to recognition ballots. New Zealand has elected to use good faith bargaining provisions as an alternative to a recognition ballot process. Good faith bargaining is one of the 'building blocks' of the Employment Relations Act, aiming 'to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment',[4] including both individual and collective employment relationships. One element of good faith bargaining across all of these jurisdictions is the prohibition of tactics designed to undermine and frustrate the expressed preference of employees for collective bargaining. If the preference of employees is for collective bargaining, the employer can 'bargain hard' but not refuse to bargain and engage in tactics designed to undermine and disintegrate the collective bargaining unit.

[4] Employment Relations Act, Section 3.

2.4.3 Under the Workplace Relations, the 'neutrality' of the Act towards different types of agreement allows an employer to pursue individual agreements at any stage of the process – before and during the process of collective bargaining – irrespective of the wishes of their employees. As Justice Munro noted in a case involving an AWA lockout:

> … the employer may also be attempting to have his or her view of the appropriate bargaining unit prevail over the relevant employees' preferred bargaining unit or form of representation. No provision of the Act prohibits the forms and procedures for agreement making from being applied for that purpose.

2.4.4 Consequently, the only legal defence for employees who prefer collective representation and bargaining is to be found in the freedom of association provisions in Part XA of the WRA. Under Part XA of the WRA, 'union security' arrangements are outlawed (e.g. closed shops, preference deals for union members), employees cannot be 'victimised, injured, dismissed or discriminated' on the basis of membership or non-membership of an association and an employer cannot induce an employee to leave a union 'by threats or promises or otherwise'.

2.4.5 On the surface, these provisions appear to protect employee rights to combine and bargain. Indeed, early rulings following the introduction of the Workplace Relations Act did protect the right of employees to not only join a union but also to collective representation:

> The concept of union membership contemplated by the respondent would be a mere shell. It would be devoid of any meaningful benefit to the employee who retained it, because they would be unable to exercise their rights as members to engage in collective bargaining as to their terms and conditions of employment.[5]

However, at trial following an appeal against the injunctive relief granted in this instance, Justice Kenny ruled offering AWAs on superior terms and conditions whilst effectively refusing to bargain collectively does not constitute a breach of freedom of association.[6] As legal scholars have noted, judicial authorities have interpreted the WRA such that Part XA protects the right to be a union member but not to collective bargaining.[7] The WRA protects the right to dis-associate – but not the right to associate.

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[5] *Australian Workers Union v BHP Industrial Organisation Pty Ltd* (2000) 96 IR 422.
[6] *Australian Workers Union v BHP Industrial Organisation Pty Ltd* (2001) 106 FLR 482.
[7] D Noakes and A Cardell-Ree, 'Recent Cases: Individual Contracts and the Freedom to Associate', (2001) 14 (3) *AJLL*; D Quinn, 'To Be Or Not To Be a Member – Is That the Only Question? Freedom of Association under the Workplace Relations Act', (2004) 17 (1) *AJLL*.

2.4.6 Consequently, in the absence of a recognition ballot process, good faith bargaining provisions or effective freedom of association protections for collective bargaining, the WRA gives employers considerable legal space to use a variety of tactics to sway, induce or coerce employees into signing AWAs which are not permitted in other bargaining systems. Specifically, the following tactics can be used:

. offering AWAs on a take-it-or-leave-it basis to new employees to erode the integrity of the collective bargaining unit;

. refusing to bargain collectively even after the process of collective bargaining has commenced – irrespective of the support for collective bargaining amongst their employees – whilst offering individual agreements on superior terms and conditions i.e. effectively making improvements on pay and conditions contingent on signing an individual agreement

. making transfers and promotions contingent on signing an individual agreement Consequently, employees are really only protected from coercive tactics so long as nothing changes i.e. they remain in the same job covered by a operative agreement which prevents AWAs from being offered.

. Lockout employees without pay indefinitely until they sign an AWA.

The mere act of offering individual agreements to employees represented by a union is considered an act designed to undermine the integrity of the collective bargaining unit in other national legal systems but under the WRA employers are free to pursue the full range of tactics to switch their employees onto individual agreements.

2.4.7 The most striking deviation from international norms of freedom of association is the legal recognition of AWA lockouts. The WRA contains provision for 'AWA industrial action' including 'an employer locking out an employee for the purpose of compelling or inducing the employee to make an AWA, under particular terms and conditions' (name section). Typically, when AWA lockouts occur, unionised production workers (usually in regional areas) are locked out indefinitely with an ultimatum they won't return to work until they sign an AWA. Sometimes, after a few months part of the workforce succumbs and returns to work upon

signing an AWA at which point the lockout is renewed for the remainder of the workforce which hasn't signed the AWA.[8]

2.4.8 It is remarkable that AWA lockouts exist at all. The Commonwealth Government has, after all, repeatedly asserted that no-one can be forced to sign an AWA whilst the Act expressly allows for lockouts to 'compel or induce' employees into signing an AWA. Even more remarkably, the reforms now being canvassed would actually discriminate in favour of lockouts against strikes, make AWA lockouts the most lightly regulated form of industrial action and consequently create incentives for employers to choose AWA lockouts against other forms of industrial action.

3.0 Terms of Reference (c): The parties' ability to genuinely bargain, focusing on groups such as women, youth and casual employees'

3.1 These imbalances and inequities will be worsened by proposed amendments which will affect the capacity of employees to genuinely bargain. Two set of amendments are relevant in this context – the

[8] C.Briggs (2004) 'Lockout Law in Australia: Into the Mainstream?', *ACIRRT Working Paper*, No. 95.

proposal to introduce mandatory secret ballots before industrial action and the *Workplace Relations Amendments (Better Bargaining) Bill 2005*.

3.2 No bill has yet been introduced on mandatory secret ballots so this discussion proceeds using the last Bill which was introduced to Commonwealth Parliament (the *Workplace Relations Amendments (Secret Ballots for Protected Action) Bill 2002)*. Under the 2002 Bill, mandatory secret ballots would only apply to strikes – lockouts would be excluded.

3.3 Trade unions would have to undertake the following process before they could take protected industrial action. A group of workers would first have to apply to the AIRC for permission to hold a ballot which will only be granted if certain conditions are met such as the applicant has genuinely tried to negotiate. If the AIRC approves the ballot, the Australian Electoral Commission (AEC) would then be organised to conduct the ballot. A roll of eligible voters must be drawn up, ballot papers posted to the homes of the workers and time allowed for ballot papers to be returned. Industrial action can proceed if 40 per cent of employees on the roll vote and fifty per cent of those vote yes. The

workers must then give 3-days notice to the employer and the industrial must comply precisely with the wording on the ballot.

3.4 The ballots process, which does not apply to lockouts, will sharpen the effect of lockouts vis-à-vis strikes in three ways:

3.4.1 *It will become relatively easier for employers to access lockouts.* The ballot process will take weeks at a minimum – potentially months if there are legal challenges for which there are ample opportunities (employers will be able to challenge the holding of a ballot, the wording on the ballot, the roll of voters, 'irregularities' in the ballot, whether the industrial action concords with the wording on the ballot and so on). Employers will remain free to lockout their employees with three-days notice, no questions asked. It is difficult to understand why lockouts are not also subject to a ballot of shareholders. Surely, shareholders have the same right to ensure lockouts are considered the best way of advancing their interests as investors as employees do to ensure strikes are the best way of advancing their interests as workers.

The design of the process also appears to be deliberately complex and bureaucratic. By way of contrast, employers are free to hold their own ballots of employees to determine if they consent to s.170LK agreements. The AIRC scrutinises the process to ensure it is valid. The double standard is unjustifiable. Why, if policy-makers are concerned with democracy and due-process, are industrial action ballots to be supervised by the AIRC and AEC whilst employers can self-ballot their own workforce to prove consent to a non-union agreement?

3.4.2 *There will be less flexibility in how a group of employees can deploy protected industrial action relative to employer lockouts.* Unlike employers, unions will also be limited by having to specify in detail the nature of the industrial action in advance and subsequently comply with this - or order a fresh ballot. If they fail to comply with the specific wording, the group of employees and their representative will face legal proceedings, the protected action will become unprotected and therefore liable to common law sanctions if proven. No such limitations

are placed on employers which can deploy lockouts with greater flexibility.

3.4.3 *It will significantly increase the compliance and administrative costs of industrial action for unions but not employers.* Under the 2002 Bill, 80% of reasonably incurred costs as determined by the registrar will be refunded. Leaving aside the administrative time and costs required to prove these costs were 'reasonably incurred' – and the potential incurred costs will not be refunded – the design of the Act recognises there will be substantial cost implications for unions. Employers will remain free to use lockouts without incurring these administrative and compliance costs.

3.5 Australia will be the only nation in the OECD that actually makes it harder – significantly harder at that - for a group of workers to withdraw their labour than for an employer to lock-out their employees. Other nations either prohibit lockouts or limit lockouts to exceptional circumstances in which employers are considered to suffer from an imbalance of bargaining power – typically allowing for 'defensive'

lockouts during collective bargaining in response to well-organised unions taking industrial action.[9] If employers have too ready access to lockouts, too powerful a weapon at their disposal, lockouts countermand or compromise the right to freedom of association, collective bargaining or strike.

3.6 The *Workplace Relations Amendment (Better Bargaining) Bill* applies limitations to strikes and lockouts in the certified agreement stream – though the amendments are designed to have a greater effect on strikes – but does not apply the same limitations on AWA lockouts. The key amendments of the *Better Bargaining* Bill include:

3.6.1 The AIRC will be given greater powers to suspend bargaining periods by ordering 'cooling-off' periods (s.170MWB);

3.6.2 No protected action can be undertaken against two or more employers in a related corporation (s.170ML (3));

3.6.3 Industrial action will not be protected if other persons or organisations not actually employed by the employer or a negotiated party is involved in organising or undertaking the

[9] See C.Briggs (2005) 'Lockout Law in Comparative Perspective: Corporatism, Pluralism and Neo-Liberalism', *International Journal of Comparative Labour Law and Industrial Relations*, 21 (3):

industrial action (s.170MM). The effect of this amendment appears to be that the involvement of any community members or organisations in protected action will render it unprotected.

3.6.4 Any 'third party' (specifically defined to include 'the Minister'), - an individual, business or organisation – that purports to be 'significantly affected' by protected industrial action will be able to apply for a suspension of the bargaining period (s170MWC). Whilst this applies to lockouts in the certified agreement stream, the list of circumstances under which bargaining periods might be suspended or terminated are drafted with particular unions and sectors in mind. The examples cited by the Minister of Workplace Relations, the Hon. Kevin Andrews, when third parties might apply under these amendments were 'clients of health or community services, educational institutions and other businesses'.[10] From a reading of s170MWC, it is also clear the Bill is designed to apply to strikes in the automotive sector.

[10] Andrews, K. (2005) 'Workplace Relations Amendment (Better Bargaining) Bill 2005', *Second Reading Speech*, http://parlinfowe.aph.gov.au/piweb/ view_document.aspx?ID=2432977

However, the provision is so open-ended it is difficult to think of a strike which will not be open to legal challenge. Its precise impact will, of course, depend on how it is interpreted by the AIRC but to the best of my knowledge there is no other jurisdiction in the OECD which allows any affected individual or business to apply to have a strike suspended. It is particularly incongruous in view of the emphasis placed by the Federal Government in removing 'third parties' from employment relationships to allow the parties to determine their own arrangements.

3.7 AWA lockouts are completely excluded from both set of amendments. AWAs, and AWA industrial action, are a separate stream of agreement from certified agreements and are not encompassed by these amendments. A hierarchy of regulation will consequently be developed whereby strikes are more regulated than certified agreement lockouts which are more regulated than AWA lockouts.

3.8 There are two consequences of this hierarch of regulation worth noting:

3.8.1 The inequities in the current bargaining regime will deepen. Employers have more flexibility, options and access to protected action than employees. Australia will be unique in positively discriminating in favour of lockouts vis-à-vis strikes. None of the balance and checks to ensure fair, equitable agreement making found in other bargaining systems will operate as employers enjoy almost untrammeled access to lockouts whilst it will become extraordinarily difficult to legally access and use strikes for employees.

3.8.2 By regulating AWA lockouts more lightly than certified agreement lockouts, these amendments effectively create incentives for employers to use AWA lockouts. Certified agreement lockouts will potentially be subject to applications to suspend or terminate the bargaining period. AWA lockouts are subject to no such restrictions and the AIRC has shown itself extremely reluctant to exercise its discretionary power under s.127 to end a lockout.[11] Consequently, the amendments create strong incentives for employers – and the solicitors who are typically advisors to

[11] See C.Briggs (2004) 'Lockout Law in Australia: Into the Mainstream?', *ACIRRT Working Paper*, No. 95.

employers during AWA lockouts – to use AWA lockouts to side-step any potential complications arising from the Better Bargaining Bill.

3.9 The case for reforming lockout law and, in particular, abolishing AWA lockouts has been made in detail elsewhere (see attachment 1). There should be no place for AWA lockouts in a modern bargaining system. There is clearly no equality or 'parity of arms' in relation to AWA industrial action. Individual employees have no capacity to effectively withdraw their labour. Only employers have the capacity to access AWA industrial action. Nor should employers have the capacity to use lockouts to coerce employees who prefer union representation and collective bargaining into signing AWAs. Lockouts should be limited to exceptional circumstances to bring Australia into line with international standards. Encouraging AWA lockouts, as these reforms do, is indefensible and opens employees up to further abuses of managerial power.

4.0 Conclusion/Recommendations

4.1 In conclusion, my recommendations are:

4.1.1 The monopoly of enterprise-level agreements should be removed to allow the parties to genuinely choose the type of agreement which suits their needs.

4.1.2 Some form of legal mechanism should be introduced to protect the rights of employees to choose union representation and collective agreements.

4.1.3 AWA lockouts should be prohibited and lockouts regulation should be redesigned to ensure the right to lockout does not undermine rights to freedom of association and collective bargaining.

4.1.4 If secret ballots before the use of protected industrial action are to be introduced, they should apply equally to lockouts and the process should be re-engineered in the mould of the s170LK ballot process to ensure the process is not overly complex, burdensome and expensive.