AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION

SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (A STRONGER SAFETY NET) BILL 2007

JUNE 2007

Executive Summary

This submission addresses the amendments proposed by the Federal Government in the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007.

The Australian Rail, Tram and Bus Union (RTBU) is a federally registered union with some 35,000 members employed in the public and private sectors and in all State and Territories. The RTBU has members who will be directly affected by these amendments if they become law.

The amendments purport to restore fairness to the industrial relations system. While the removal of checks and balances in relation to fairness is seen as a regressive step on the part of the Federal Government, these amendments do not restore workers to their pre- WorkChoices position.

The need for these amendments demonstrates that WorkChoices is a failure and is detrimental to the Government's chances of being returned at the next election.

The RTBU has strong concerns about certain specific sections of the Bill. There are also a number issues which have not been addressed by this Bill and which the RTBU considers crucial to maintaining dignity and fairness in any 21st century workplace.

The RTBU supports the position of the Australian Council of Trade Unions (ACTU) in relation to this Bill and looks forward to the abolition of the Federal Government's Workplace Relations legislation in its entirety. The RTBU hopes to see the establishment of a fair and just industrial relations system in the near future, which includes an independent umpire with comprehensive powers to resolve disputes and set minimum wages.

Introduction

The RTBU welcomes this opportunity to contribute to the Senate Committee addressing the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 ("the Bill").

The RTBU is a Union of employees registered pursuant to the *Workplace Relations Act 1996* (Cwlth). The constitution of the RTBU defines its membership as comprising the following:

- employees employed in or in connection with the railway industry;
- employees employed in or in connection with the tramway industry;
- employees employed by one of a number of publicly owned urban bus operators.

Save for the membership employed by some public bus/authorities, the RTBU has no restriction on the class or category of employee who, according to the constitution, may become a member. Accordingly, the RTBU has members employed in operations, maintenance and administrative work that cut across the categories of blue collar and white collar employment. A similar situation exists with respect to coverage in the public and/or private sector. The current membership is approximately 35,000.

The Bill is designed to amend the Workplace Relations Act 1996 (the "Act") in a number of respects.

With respect to the application of the Bill, the RTBU has a significant number of members who stand to be directly affected by its provisions in the event it becomes legislation.

The Bill represents a "back flip" by the federal Government only months before an election as its WorkChoices legislation is deeply unpopular with the electorate and is posing a significant barrier to the re-election of the Federal Government. The RTBU considers that the Bill represents a cynical exercise by the Federal Government to dupe Australian workers into believing that its workplace laws are fair.

While the Bill attempts to deal with certain key issues, it fails to deal with the unfairness of the WorkChoices Amendment Act 2006 (Cwlth) ("WorkChoices") in a comprehensive way. It does not represent an attempt at positive, long term, and meaningful change in terms of restoring genuine negotiating power to workers.

The Bill does not attempt to replace many of the employment terms and conditions withdrawn or prohibited by WorkChoices. The RTBU supports the ACTU's position to "tear up" the Workplace Relations Act altogether and to rebuild an industrial relations system which provides workers with a fair balance

of power and preserves their dignity in the workplace. The RTBU considers WorkChoices to be fundamentally problematic and regressive legislation which cannot be repaired by making minor amendments.

The Government's attempt to retract the brand "WorkChoices" highlights, among other things, that the current legislation provides fewer choices and significantly restricted bargaining power for workers than previously existed. Industrial instruments, particularly AWA's, can continue to be imposed by employers without any say on the part of the employees affected. The Bill does not succeed in addressing the problems that many are experiencing in the workplace and in society due to lack of genuine choice. For example, the choice to be represented by a union and the choice not to sign an AWA and be covered by an award or collective agreement.

Outline of the Bill

The Bill seeks to amend the Act in a number of respects. A summary of the amendments follows:

- the Bill seeks to create a new "fairness test" to be applied to workplace agreements by a new Government Authority, "the Workplace Authority;
- the Bill sees to establish the new "Workplace Authority" and the "Workplace Ombudsman";
- the "fairness test" will only apply to AWA's lodged on or after 7 May 2007. AWA's lodged between 27 March 2006 and 6 May 2007 will not be subject to the fairness test, meaning that unfairness in these agreements will be legitimised;
- the test will only apply to workers who earn less than $75000 per year;
- the Bill does not restore unfair dismissal provisions;
- the Bill does not restore the former "no disadvantage test" (NDT) as it only provides protection for certain matters. Under the NDT, agreements were tested against the whole award, not just certain protected matters;
- conditions such as redundancy pay, ceremonial leave, leave to seek alternative employment, and type of employment are not protected matters and will not be covered by the proposed "fairness test";
- the Bill does not restore unfair dismissal provisions and makes no reference to pay equity.

An analysis of the proposed amendments readily identifies that their effect will be negligible in terms the balance of power between employers and employees. The current balance is strongly skewed in favour of employers and will continue to remain so despite these proposed amendments.

For the "fairness test" to be applied to an AWA, the AWA must have come into force on or after 7 May 2007. This means that those AWA's which came into force from or after 27 March 2006 but before 7 May 2007 will not be subject to the "fairness test". The creation of two types of AWA, one that is subject to the fairness test and one that is not, is fundamentally unfair and unjust for those workers who signed AWA's between 27 March and 6 May 2007. These AWA's have been allowed to escape scrutiny. The Government is attempting to establish a system where two classes of AWA's will operate side by side. A system which allows some workers access to a general "fairness" standard, regardless of its significant flaws, and bars access to others offends the principles of social equality and justice.

Those workers who will not be allowed to access the "fairness test" will only be in that position because the Government's Work Choices Amendment Act was flawed from the very beginning. The Government is now admitting that many workers have been unfairly disadvantaged by its WorkChoices legislation. This Bill is evidence of that admission. However, the Government does not intend to assist those workers who have been caught up in the industrial relations system

actually intended by the Government - workers who may be bound by unfair agreements for five years.

The RTBU is disappointed, but not surprised, that the Bill does not restore the former safety net, the full powers of an independent umpire, nor does it increase the number of allowable or protected matters.

The Bill does not explain what happens if an employee is award free.

The Bill does not restore basic employment conditions lost by employees through the Workplace Relations Act 1996 and, in particular, the WorkChoices amendment Bill 2006.

Specific Objections
Content of the fairness test
The “fairness test” does not restore bargaining/negotiating power needed by workers to ensure that their interests are effectively represented. The Bill allows for compensation in return for certain conditions which may be traded off during negotiations but does not protect workers who do not want to trade off conditions and who would prefer to keep their entitlements rather than accept compensation.

WorkChoices removed a significant number of protected employment conditions. The Bill does not restore these.

Section 346M(1)(a) and 346M(1)(b)
These sections deal with whether or not an agreement passes the “fairness test”. Section 346(1)(a) deals with how an AWA may pass the “fairness test”. Section 346(1)(b) deals with whether or not a collective agreement passes the fairness test. Sections 346(1)(a) and 346(1)(b) are identical except that s. 346(1)(b) contains the words “on balance”. Clearly, the so called “fairness test” is weaker for AWA’s than for collective agreements.

Section 346M(2)
This section deals with issues that the Workplace Authority Director must first have regard to when considering whether a workplace agreement provides fair compensation. Section 346M(2)(b) states that the Workplace Authority Director must have regard to:

> *the work obligations of the employee or employees under the workplace agreement.*

The work obligations of the employee or employees are irrelevant in considering fair compensation in circumstances where protected award conditions have been lost through the implementation of an AWA. The term “work obligations” is also vague and ambiguous thereby permitting inconsistent and even further disadvantageous outcomes.

Section 346M(3)
Under this section, the Workplace Authority Director “may” also have regard to personal circumstances of the employee or employees, including in particular the family responsibilities of the employee or employees.

The RTBU is concerned that the inclusion of the words “in particular” will mean that only family responsibilities “may” be considered with respect to fair compensation and other personal obligations and needs will be ignored.

Section 346M(4)
This section represents a major "loophole" for employers as a means of avoiding the so called "fairness test". It allows the Workplace Authority Director, in "exceptional circumstances" to take into account the *industry, location, or economic circumstances of the employer and employment circumstances of the employee or employees when considering whether a workplace agreement provides fair compensation…*

This section may result in geographical discrimination, where workers in a particular location will be treated less favourably than those in another. This may pose issues for those working in rural and remote Australia.

Again, the employment circumstances of the employee should not be a relevant consideration in deciding on fair compensation.

Employees are not responsible for subsidising employers and are not responsible for the economic circumstances of a business.

Section 346M(5)
This section provides an example of where section 346M(4) may come into play. The section states that section 346(M)(4) may be relevant:

> *…where the workplace agreement is part of a reasonable strategy to deal with a short term crisis in, and to assist in the revival of, the employer's business.*

Employees are not responsible for subsidising employers and are not responsible for the management practices, good or bad, of a business. Such a clause, which would seek to justify the undercutting of conditions of employment, leaving workers worse off, cannot in any reasonable way, be part of a "fairness test".

Section 346M(6)
This section allows the Workplace Authority Director to inform himself or herself in *any way he or she considers appropriate.* The only qualification to this is that the Workplace Authority Director may contact the employer and the employee or some of the employees whose employment is subject to the agreement.

The section is vague and ambiguous and does not explain the criteria to be used to conduct the fairness test or whether different criteria might apply at different times. It means that some people subject to a workplace agreement may be contacted by the Workplace Authority Director in the process of informing him/herself while others may not. This is unfair.

Section 346M(7)(b)
It is of concern that the section does not explain how the words, *of significant value to the employee…* will be interpreted in deciding how non-monetary

compensation will be allocated. This section may result in employees unwittingly, or for other reasons, agree to compensation which is not equal or equivalent to the lost conditions. An employee's capacity to understand issues and to negotiate on their own behalf may be limited and they may not be able to ensure their own protection in the negotiation of AWA's. In particular, intellectually disabled workers and other disadvantaged persons, such as young workers, may not be able to understand or negotiate on their own behalves. Other examples may include workers from non-English speaking backgrounds and those who experience literacy problems.

Section 346ZF
This section says that employers must not dismiss employees if a workplace agreement fails to meet the "fairness test". This is an inadequate response to the real threat of unfair dismissal under this system. Comprehensive unfair dismissal laws should be re-established to ensure fairness.

Section 150B(1)(h)
This section allows the Workplace Authority Director …*to analyse workplace agreements.* However, there is no information provided about whether or not this analysis will be publicly available. There is no guarantee that proper reporting about AWA's, in particular, will be made available and that public scrutiny of the fairness test will be allowed.

Other General Concerns

Children

The hours, rates of pay, penalty rates and loadings that parents earn from employment directly determines the socio-economic wellbeing of children. If parents are losing conditions of employment, children will suffer economically.

Unilateral changes in the hours and days of the week an employee works will affect children socially where parents have less quality time to spend with children and may be unable to be involved in childrens' activities in a voluntary capacity eg. coaching sporting teams. [1] The "fairness test" does not attempt to resolve these issues.

The impact on young workers has also been documented. While the Bill acknowledges that younger employees tend to be disadvantaged in the workplace, it offers no special measures to address the exploitation of young people whose inexperience may result in more limited employment opportunities and a reduced ability to effectively negotiate with an employer on their own behalves and may be coerced by employers[2].

Pay equity

Women are particularly disadvantaged by the extension of individualised bargaining through AWA's, the loss of access to state based Equal Remuneration Principles, and the ability to run test cases.[3] The Bill makes no changes to the Australian Fair Pay Commission's (AFPC) criteria for determining minimum wages. The AFPC has failed to maintain real wage value for workers in general and has failed women workers as the gender pay gap has widened under the current system. The "fairness test" does not acknowledge or attempt to address the fact that Australian women workers do not earn as much as their male counterparts for doing the same work. This cannot be considered to be fair in the 21st century.

A key component in achieving pay equity is paid parental leave, particularly paid maternity leave. The Bill does not attempt to address long standing community concerns about the low incidence of paid parental leave provisions in Australia. Australia continues to be the only OECD country, apart from the United States of America, which does not have a comprehensive system of maternity leave payment.[4]

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[1] Labor Parliamentary Taskforce on Industrial Relations, WorkChoices: a race to the bottom, Interim Report, 20 June 2006.

[2] Labor Parliamentary Taskforce on Industrial Relations, WorkChoices: a race to the bottom, Interim Report, 20 June 2006

[3] Whitehouse G, "WorkChoices, the Australian Fair Pay Commission and gender equity", Women and WorkChoices Roundtable, Brisbane, 5 December 2006.

[4] Aedy, R, "Making hard work of participation", Sydney Morning Herald, 22 May 2007

Work intensification
The RTBU is particularly concerned that work intensification, a problem widely acknowledged prior to WorkChoices, is becoming more prevalent. It has recently been reported that Australians work some of the longest hours in the industrialised world and the numbers working more than 50 hours per week are comparatively very high.[5]

A Bureau of Statistics survey recently revealed that one third of Australian workers are working between the hours of 7am and 7pm and have no say in the hours they work.[6]

Apart from the impact in terms of time workers can spend with their families, on leisure, and community activities, and on studying or self improvement, the health impacts on increasing and intensifying working patterns will be a cost that the entire community will bear, both financially and socially.

The RTBU has a special interest in the area of workplace fatigue given that many of our members work on 24 hour rosters and shift work. The RTBU considers that WorkChoices has exacerbated this social, health and safety issue. The Bill exacerbates the problems presented by fatigue and unhealthy working hours by reducing the capacity of employees to bargain in the workplace.

Reporting
The Bill gives the Workplace Authority the power to "analyse" workplace agreements, a power which is not currently available to the Employment Advocate. The Employment Advocate has admitted that no information about AWA's has been gathered since November 2006 and that there had been no analysis conducted.[7]

The Bill does not indicate what reports, if any, will be available to the public or whether there will be any improvement in access to data about how the system is operating and general trends in AWA's. The secrecy surrounding the content of AWA's should be lifted.

Unfair dismissals
The Bill does not restore protection to workers from unfair dismissals in line with Australia's international treaty obligations.

[5] Horin A, "Millions year for 9-to-5 heydey", Sydney Morning Herald, 2 June 2007
[6] Irvine J, "No work choices – we're toiling round the clock", Sydney Morning Herald, 30 May 2007.
[7] Crowe D, "Umpire refuses to play ball", Australian Financial Review, 29 May 2007

Conclusion

The RTBU would have provided a more comprehensive submission had more time been allowed. In the circumstances, the RTBU has highlighted its main specific concerns with the Bill, as well as more general concerns about key issues affecting our members due to the current legislations and the Amendment Bill.

Our analysis can only lead to the conclusion that the Bill has been presented to in an attempt to protect the current Federal Government from further public criticism in relation to its industrial relations legislation and policy.

The Bill, if passed, will not provide a comprehensive solution to the fundmental problems facing workers and their workplaces under WorkChoices for the following reasons:

- the “fairness test” will not restore the “no disadvantage test”, a much more comprehensive safety net;
- it does not restore employment conditions which have been unfairly stripped away between 27 March 2006 and 6 May 2007;
- the bargaining power of workers has not been restored;
- long and unsociable working hours and the impact on families has not been addressed;
- an independent umpire, with powers to make orders, resolve disputes, decide unfair dismissals, set minimum wages, and decide test cases has not been restored;
- the effects on workers in disadvantaged bargaining positions has not been improved through this Bill.

We look forward to the repeal of the Government’s Workplace Relations Act, particularly the aspects associated with the WorkChoices Amendments.

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1. Aedy, R, “Making hard work of participation” in Sydney Morning Herald, 22 May 2007

2. Crowe D, “Umpire refuses to play ball”, in Australian Financial Review, 29 May 2007

3. Horin A, “Millions yearn for 9-to-5 heyday”, in Sydney Morning Herald, 2 June 2007

4. Irvine J, “No work choices – we’re toiling round the clock” in Sydney Morning Herald, 30 May 2007.

5. Labor Parliamentary Taskforce on Industrial Relations, WorkChoices: a race to the bottom, The adverse effects of the Government’s extreme industrial relations changes, Interim Report, Parliament House, Canberra, 2006

6. Peetz D, Brave New Work Choices: What Is The Story So Far?, Griffith University, Brisbane, Australia

7. Pocock B and Masterman-Smith H, WorkChoices and Women Workers in Journal of Australian Political Economy (Special Issue), WorkChoices? Analysis of the Current Industrial Relations ‘Reforms’, No. 56, December 2005

8. Whitehouse G, “WorkChoices, the Australian Fair Pay Commission and gender pay equity”, Women and WorkChoices Roundtable, Brisbane, 2006

9. Munro P, Changes to the Australian Industrial Relations System: Reforms Or Shattered Icons? An Insider’s Assessment of the Probable Impact On Employers, Employees and Unions in the University of New South Wales Law Journal, Vol 29, No. 1, 2006.