Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

Submission no: 57

Received: 9/11/2005

Submitter: Mr James Macken

Organisation:

Address: 34 Booroondara Street
REID ACT 2612

Phone: 02 6247 2980

Fax: 02 6247 1085

Email: Jamesmacken@smartchat.net.au

---

1. The Government is fond of explaining its workplace bargaining laws as affording choice for employers and employees. It is a formulation that implicitly posits a single sovereign agent weighing the pros and cons of different options according to what 'it' finds most suitable. It goes without saying that this is a rhetorical fiction.[1] Employers and employees have different, often opposed, interests. They are subject to different constraints and pressures and are concerned with different considerations.

2. The reasoning of the Full Federal Court in *Burnie Port Corporation*[2] acknowledged that the Government's sempiternal references to choice really just pose the question: Whose choice? The answer given by WorkChoices appears to be that the choice lies with the stronger party. Moreover changes to be introduced through the Bill mean that the widening scope for choice and flexibility becomes a right for the weak to choose less.

Collective Agreements

3. Some of the constraints and pressures that bear on the choices people make are economic. Employees are often faced with a spurious 'choice' between accepting the terms offered or having no employment. Australia has historically spurned treating people as commodities by establishing awards that have protected most employees from such choices. There has still been scope for parties, whether individuals or organisations, to agree to different pay and conditions to those prescribed. But that must be in addition to award rights.[3]

> *When any person is employed to do work to which an award applies, the parties are bound by a contract. Their legal relations are in part determined by the contract between them and in part by the award. The award governs their relations as to all matters with which it deals.*

4. The introduction of systematic enterprise bargaining allowed far-reaching departure from award conditions by agreement. The current Act is the heir to the substance of those changes. There is now no award provision that cannot be put aside; flexibility is substantially unfettered.

5. But that degree of flexibility has been subject to two fundamental protections. An agreement cannot generally[4] be certified if it, on balance, reduces the

---

[1] Nevertheless this vacuous formula is dignified with a place in the objects of the Act: *Workplace Relations Act 1996*, s.3(c)).

[2] *Burnie Port Corporation v MUA* [2000] FCA 1768 at [27]-[28].

[3] *Byrne v Australian Airlines* 131 ALR 422 at 427; *True v Amalgamated Collieries of WA Limited* (1940) 62 CLR 451 (Privy Council) No paragraph numbers; *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 per Latham CJ:

[4] Subject to an exception where a business is facing a short term crisis such that an agreement should be certified although it does not pass the no disadvantage test: ss.170LT(3) and (4). There are too other exceptions in relation to trainees, apprentices and workers with disabilities.

overall terms and conditions of employment.[5] Agreements are scrutinised by the Commission usually in a public hearing, and the Commission must be satisfied that the agreement passes the test.[6]

6. The other key protection is the requirement that the agreement be genuinely made or approved by a valid majority. The Commission has enforced the requirement where it was concerned that the consent of employees was not informed or not without coercion, such as where a union was prevented from explaining it or because the employer did not explain the effect of the agreement.[7]

7. Allowing employees to take protected industrial action gives employees the opportunity to apply pressure in pursuit of issues that are important to them. It is the possibility and reality of protected industrial action that gives employees an opportunity to choose what is important to them collectively and to press their views on the employer. In that way an approximation of the notion of choice can be given effect through certified agreements. 'The parties' may, through negotiation and industrial action, press the matters they value most highly as far as their willingness and capacity to bare the economic loss permits.

8. No doubt there is an ever wider range of industrial matters that the parties may not choose. These include rights that are inconsistent with the Act's unfair dismissal provisions,[8] preference in employment for unionists, bargaining fees, limits on the use of contractors. No agreement can be certified that contains any 'objectionable provisions'.[9] Provisions allowing discrimination against unionists are also prohibited, but generally the constraints on the parties' freedom of choice are of one ideological colour.[10] In fact it is no exaggeration to say that there was wider scope for agreement available to the parties to a consent award under the *Conciliation and Arbitration Act 1904* than there is under the thoroughly modern, highly facilitative *Workplace Relations Act.*

9. Collective bargaining is the best way of permitting a departure from arbitrated entitlements through a process that at least has a chance of incorporating the main priorities of each of the parties. It is no doubt a rough engine, responsive to different industrial cultures and industrial bargaining power. But

---

[5] Section 170XA.
[6] Section 170LT(2).
[7] *Toys 'R' Us Australia Pty Limited Enterprise Flexibility Agreement*, Print L9066 (No paragraph numbers).
[8] Subsection 170LU(2)(a)
[9] Subsection 170LU(2A) refers for its operation to the definition of 'objectionable provision' at s.298Z. That refers in turn to provisions allowing a contravention of Part XA concerning freedom of association. The substantive provisions are at ss.298K, 298L, 298S, 298SA.

it does allow agreements to be reached "through a process of real and not illusory negotiation and general agreement."[11]

Australian Workplace Agreements

10. The above quote from Justice Moore in *Schanka v ENA* was applied to Part VID of the Act, regarding AWA bargaining. While there is a measure of truth to that as regards certified agreements, in the context of AWAs that is only rarely true.

11. The whole rationale for the existence of protective labour laws is the absence of any real equality of bargaining power between an employer and an individual employee.[12] Of course it may happen that ordinary labour market imperatives may put an employee in a stronger bargaining position. But that is only likely where the employee has at least one alternative job that offers better conditions and the employer is likely to have difficulty finding another suitable employee. Even then the employee may live to regret his success, once labour market conditions turn.

12. Such studies as are available strongly suggest there is very rarely any true negotiation regarding AWAs. In the case studies of major employers using individual agreements, AWAs were invariably offered on a 'take it or leave it' basis. In the public service, one of the few industries where major inroads have been made, pro forma AWAs are published on departmental homepages. In most studies of the content of AWAs the conclusion is consistent; once freed from the fetters of 'third party interference', employers do not seek agreements that benefit the interests of both parties. Rather they follow a "wage-minimising, labour-intensification logic."[13]

13. If there is scant opportunity to truly negotiate the content of AWAs, employees' choice is simply whether or not to sign. There appears to be little true 'tailoring' of employment conditions to suit individual needs. The imperative as to the content of AWAs is most commonly to maximise workforce flexibility as to hours and duties and to vest some discretion in the employer as to pay.[14]

14. The Act does protect employees against duress in relation to AWAs[15] and there are circumstances where a bare choice to 'take it or leave it' may amount to duress.[16] More usually however, offering employment on the

---

[11] 166 ALR 663 at [38].
[12] Creighton and Stewart, *Labour Law* at 4-5, 177-178.
[13] A Roan, et al, 'Australian Workplace Agreements in Practice: The Hard and Soft Dimensions', in (2001) 43 JIR 387 at 399.
[14] R Mitchell and J Fetter, 'HRM and the Individualisation of Australian Industrial Relations', Working Paper No 25, Centre for Employment and Labour Relations Law at 7, 20-21.
[15] Subsection 170WG(1).
[16] Subsection 170WG(1). The remedy for breach is a fine: s.170VV(1).

condition that an employee sign an AWA does not amount to duress under the Act. In that sense the concept of duress under the Act itself operates in way that is thoroughly unfair. Duress appears to have different content as between existing and prospective employees. It seems the one must be able to decline without losing her job. The other may not decline. Those who have, get some protection; and those who have nothing, apparently get to hold onto it.

AWAs and Collective Agreements

15. For employees an offer of an AWA presents an immediate choice about where their economic interests lie. For employers the use of AWAs, and earlier forms of individual agreement, has often involved a different order of choice concerning the terms on which its industrial relations are to be conducted.

16. The immediate historical progenitor of the AWA regime was the Weipa dispute. That dispute and associated litigation arose from a strategic choice by CRA that it would no longer engage in collective bargaining.[17] Despite set-backs in the AIRC, which upheld the primacy of collective bargaining, CRA managed to substantially achieve an individualised employee relations regime with a de-unionised workforce.

17. That success led directly to adoption of a similar strategy by BHPIO. It has been emulated in different ways by other large employers who have made 'take it or leave it' offers.[18] In each case the decision to offer individual agreements has been accompanied by a refusal to negotiate collectively.[19]

18. In many instances then, the employer's choice of AWAs represented a move away from collective industrial relations.[20] The employers' choice about the form of bargaining was also a choice not to bargain anymore. In choosing to accept an AWA employees are practically caught up in that strategy.[21]

WorkChoices

19. The obvious potential for AWAs to undermine collective forms of negotiated agreements and union organisation has remained untapped across most of

---

[17] J Fetter, 'The Strategic Use of Individual Employment Agreements' Working Paper No 26, Centre for Employment and Labour Relations Law at 12

[18] Ibid at 18.

[19] Ibid at 34.

[20] Mitchell and Fetter estimate 50% of cases in a sample of AWAs

[21] In the mining industry case studies the spread of individual agreements substantially crippled unionism: Fetter, op cit at 12.

the economy.[22] It is both ironic and unsurprising that the only really successful form of agreement, collective agreements, is to be further fettered. It is for their untapped potential that AWAs are to be made the pre-eminent form of agreement. AWAs prevail over, not only awards, but certified agreements even where they are within their nominal period of operation.[23] The parties may choose to preclude using collective agreements. They may not preclude use of AWAs.[24]

Collective Agreements

20. That is one of a long list of limitations on the content of collective agreements which prevent employees and unions from strategically influencing the terms of the employment relationship. Prohibited content includes, unfair dismissal rights, bargaining fees, trade union training and paid union meetings, limits on contractors or obligations with respect to contractors, mandatory union involvement in disputes procedures and provisions relating to any replacement agreement. Industrial action in respect of any prohibited content will be unprotected.[25]

21. Taking protected industrial action will become significantly harder. There must be a secret ballot which may be held only if an order is made by the AIRC. An order is subject to a number of conditions, including that the applicants do not hold or are not pressing their view that there should be parity of pay conditions in the industry.[26] That the rules against pattern bargaining are part of a Bill trumpeted as promoting choice is doublespeak.

22. If an application is made for an order to stop or prevent industrial action it must be heard within 48 hours. Otherwise the order issues automatically.[27] That is despite the fact that an order to stop industrial action is a very serious step to take. It usually involves a finding that the action is illegitimate and has potentially serious legal consequences for both unions and employees.[28] That the AIRC is to be used in this way, to provide a quasi-judicial cloak to what is a plain act of political spite is an outrage.

23. Those that want to negotiate a collective agreement will face a formidable array of additional proscriptions, practical impediments and legal challenges.

---

[22] Mitchell and Fetter give a breakdown of the incidence of AWAs by industry, current at May 2001. The total number of AWAs approved since 1997 is 761,291. Despite increasing use of AWAs their penetration of the entire workforce still stands at only 5.7%. Source: www.oea.gov.au/docs/awa_fact_sheet.pdf.
[23] WorkChoices at 24.
[24] Ibid at 23.
[25] Ibid at 24.
[26] Ibid at 27.
[27] Ibid at 27.
[28] *Coal and Allied Operations v AFMEPKIU* (1997) 73 IR 311 at 324, 327.

AWAs

24. The indifference of most employers to AWAs to date is addressed through a major incentive. The no disadvantage test is abolished, though there does not seem to be any direct acknowledgment of that in the Government's information. All that remains from a century of striving towards a fair balance in employment rights are certain minima regarding pay, personal leave, annual leave and ordinary hours.[29]

25. All other award provisions may be abolished or varied by agreement without any compensating benefits. This provides an enormous financial incentive to employers, especially as regards key protections such as span of ordinary time hours, shift penalties and overtime.

26. Employers are unlikely to secure valid majority support for such changes. It is more likely individuals may be prevailed upon to agree. It is more likely still that prospective employees would agree to such reductions if that is the price of a job. The category of prospective employees is the likely vector of such changes in the workforce.[30]

27. Employees who are covered by an AWA are not able to take protected industrial action.[31] The basis for future collective negotiation will be gradually reoded. It does not appear to matter that the only successful form of agreement making is to be undermined. The objective appears to be more about undermining the unions that are the most important and only enduring expression of collective forms of organisation.

Conclusion

28. Nevertheless it is clear that in the ostensible interests of providing choice, the least widely used form of agreement is to be privileged. Major incentives to secure below award conditions are being pushed under employers' noses to induce them to adopt of a form of agreement making in which employees are most vulnerable. That vulnerability will tend to become entrenched as employees are drawn out of collective industrial relations processes. Meanwhile the scope of collective agreement making is to be limited, and practical impediments piled in the way of those industrial processes that do tend to produce negotiated outcomes.

---

[29] Ibid at 24.

[30] In some circumstances it is possible that businesses could become substantially restaffed through a process of restructuring and dismissal of existing employees for 'operational reasons'. Any unfair dismissal claim would then face a serious jurisdictional objection. Operational requirements need only be one of the reasons for the dismissal to invoke the jurisdictional objection: Ibid at 51. It is unclear with a provision to the same effect as s.298L(1)(h) is to be continued.

[31] WorkChoices at 28.