Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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Helping Australian Business Grow

NRA Submission to Senate Inquiry – Workplace Relations (Work Choices) Bill 2005

The National Retail Association

The National Retail Association ('NRA') is a not-for-profit industry organisation that has been serving the retail industry for over 75 years. It is the pre-eminent, Australia-wide voice of the retail sector, which employs more Australians than any other industry and accounts for almost 20% of the Australian workforce.

There are now over 3700 businesses serviced by NRA. Members range from sole operator enterprises to speciality, chain, and franchise stores of all types and sizes throughout Australia. NRA's members collectively employ over 300,000 Australians.

The Association provides a range of professional services to employers including:

- Employment law advice
- Tenancy/leasing advice
- Professional development training programs for business owners, employees and potential retail employees.
- Event management
- Industry representation and advocacy

NRA Supports the Submissions of the Australian Chamber of Commerce and Industry.

NRA asks the Inquiry to note that NRA is a member of ACCI. It supports the ACCI resolutions about workplace reform of June 2005 and supports the submissions of ACCI presented to this Inquiry.

Unitary System of Industrial Relations

The concept of a unitary system of industrial relations enjoys almost universal support. The main consideration is not that the federal government has seen it necessary to use the corporations power to trigger a move toward a unitary system, but why all governments have failed to act in a collective and collaborative manner before this point in time.

No Disadvantage Test

The current test has failed to deliver the necessary flexibility to allow employers to negotiate productive enterprise based solutions.

In the first instance, and conceptually, the no-disadvantage test was not intended to paralyse choice but was intended to set fair parameters in terms of conditions of employment.

Unfortunately, and over time, tribunals have tended to adopt increasingly inflexible approaches in interpreting and applying the no disadvantage test. As a generalization, tribunal members have tended over time to adopt, in the certification process, a highly forensic administrative and clerical process which involves elaborate comparisons between the proposed certified agreement and the designated safety net award. Over time, this approach has meant that a proposed certified agreement needs to mirror the safety net award or provide wages and conditions significantly superior to the safety net award, before certification is possible.

This approach has largely paralysed enterprise bargaining in that it has discouraged employers from commencing the process of negotiating a certified agreement. Why negotiate a enterprise based agreement if the result will be largely indistinguishable from the award that currently applies?

Consequently employers remain captive to a system of awards that insists that everyone must be remunerated equally notwithstanding the individual contribution. The high performing and high achieving employee must be remunerated on the same basis as a malingering low performing employee. Some may suggest, in response, that awards only set minimum standards. However this is not the case and the effective use by the trade union movement of the centralized wage setting system has meant that market driven wage levels, not minimum wage levels, are included in awards. Additionally, in an historical context, these market driven wage levels were a product of outcomes in industries with a capacity to pay and where unions could exercise maximum leverage. Hence the centralized wage system was used as a vehicle to flow wage movements across the workforce. This is clearly not a sustainable practice.

In the circumstances there is an urgent need to reform the operation of the no-disadvantage test and substitute a far simpler process of review. The Workplace Relations Amendment Bill achieves this outcome.

Some tribunal members have also tended to discouraged agreement making in other ways. They have unnecessarily complicated the procedure of certification. The legislation imposes a relatively simple test. But tribunal members are increasing demanding more information and constantly challenging the veracity of the information provided particularly in the case of agreements made directly with employees. For example, some tribunal members frequently demand the attendance at hearings of employee representatives and make other demands on applicants that further discouragement is provided to even commence the process. Much of the information demanded and the procedures stipulated go well beyond what is prescribed and contemplated by the Act, and what was customarily supplied in statutory declarations.

This type of approach by tribunal members is seen to conflict with the objects of the act in terms of the facilitation of enterprise based agreements. Their procedures and the manner in which they conduct their proceedings discourage employers from commencing the process.

International Comparisons

International comparisons do not suggest that any controversy should attach to the Australian workplace reforms. In particular relevant comparisons should be made with the deregulated labour markets of the US and Britain.

After the reforms are introduced Australia's minimum wage will be set at the highest in the Organisation for Economic Co-operation and Development, and the labour market in Australia remains substantially regulated.

Australia's minimum standards in the area of annual leave, sick leave, etc will continue to be seen as relatively generous in an international context.

Australia's unfair dismissal regime cannot be justified in the context of international comparisons. In Britain, for example, employees in their first year of employment have no job protection.

Increased Employment

The central objective of the reforms should be seen as increased employment. This objective regrettably will attract less attention in the current labour market where apparently full employment prevails. However the real beneficial impact of the reforms will be seen when the labour market changes and unemployment rises to levels regarded by the community as unacceptable.

Notwithstanding this, the reforms have the potential to make an immediate beneficial impact on unemployment. Some commentators suggest that the practical number of unemployed in Australia may be as high as 800,000 while the number of persons deemed to be "under employed" could be as high as 500,000.

It is these persons that stand to benefit immediately from the passage of the Workplace Relations (Work Choices) Bill 2005.

This is the experience in the deregulated labour markets of the US, NZ, and Britain, where low unemployment prevails (US -4.9 per cent, Britain -4.7 per cent, and New Zealand- 3.7 per cent.

Unfair Dismissal

The proposed federal reforms do not go far enough in that it is argued that the appropriate course would be the dismantling of unfair dismissal remedies.

These remedies are not sustainable outside of the area of "unlawful" terminations.

There is no other area of the law where remedies are available notwithstanding that all obligations are complied with. That is, notwithstanding that the terms of the contract, the award, or the relevant act has been strictly complied with – an employee may allege procedural defects and at little cost, sue an employer for damages. What other area of the law compensates employees or penalizes employers in such a manner?

It is entirely inappropriate to superimpose a dimension of "procedural fairness" on statutory provisions dealing with termination of employment. If the test applied were the simple test – do the circumstances warrant the contract being terminated - we believe that the great majority of unfair dismissals claims would fail.

There is no constraint on an employee in terms of how he/she goes about the termination of the employment contract – it is considered entirely acceptable that if an employee wants to leave the service, the employee simply complies with the contractual, award, or statutory obligation. Outside of "unlawful terminations" why should a different set of rules apply to employers?
There is no penalty imposed on an employee who, after being fully inducted into an organisation, and having received substantial training, elects to leave the employer, often without notice.

Conciliation proceedings resulting from unfair dismissal claims are pre-occupied solely with delivering a settlement (invariably with a strong money component) and do not embark on any objective review of whether the termination was appropriate. Ninety-five percent of claims are resolved at this level with tribunal members actively encouraging commercial settlements. There is little interest in whether a claim can be sustained – the greater pre-occupation is with the practical desirability of settling the matter and avoiding litigation.

Also the overwhelming number of all claims, whether resolved in conciliation or not, do not result in reinstatement in employment. In other words the jurisdiction no longer works to address the fundamental injustice which led to its creation.

The proliferation of the unfair dismissal jurisdiction co-incided with the change in remedy. Historically the only remedy was reinstatement. In these circumstances applications were taken in circumstances which would have been regarded as legitimate when the legislation was first introduced in the first half of the 20th century viz

- Economic hardship
- Social consequences
- The period of time an employee may have been out of work as a result of the termination

- The more spartan social service regime
- The difficulty for the employee in finding another position which matched the individual skills
- The limited number of alternative employers
- Very limited labour market mobility

In short, the "gold watch" era of employment is long gone. The modern day employer values a diverse resume. Employees are vastly more mobile and substantially less affected by job loss. The social security blanket is wider, thicker, and more easily accessible.

Outside of unlawful terminations we do not need an unfair dismissal remedy. The notion that in contemporary terms, with full employment and skill shortages, employers are capriciously chopping off heads is a total nonsense. Given the contemporary cost of recruiting and training new employees, why would an employer sack an employee who contributes in an average manner? Practical experience is that far too many employers err on the other side. Because of unfair dismissal laws, termination of employment occurs less frequently or less timely than it should. Productivity and a positive workplace culture suffer. Management paralysis leads to lower morale and a lowering of the performance bar across the team.

Signature

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