Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

Submission no: 104

Received: 9/11/2005

Submitter: Mr Bill Shorten
National Secretary

Organisation: The Australian Workers' Union

Address: 685 Spencer Street
WEST MELBOURNE VIC 3003

Phone: 03 8329 0888

Fax: 03 8327 0899

Email: members@awu.net.au

RECEIVED
9 NOV 2005
Senate EWRE
Committee

Submissions of The Australian Workers' Union to the

Senate Employment, Workplace Relations and Education Committee

Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005

9 November 2005

Authorised by Bill Shorten
National Secretary
The Australian Workers' Union

685 Spencer Street
WEST MELBOURNE VIC 3003

Phone: 03 8327 0888
Fax: 03 8327 0899
Email: members@awu.net.au
Web: www.awu.net.au

Contents

1. The Australian Workers' Union
2. Form of submission
3. General Comments
4. Australian Fair Pay Commission
5. Australian Industrial Relations Commission
6. Powers and Functions of the Employment Advocate
7. Transmission of Business Provisions
8. Exclusion of State and Territory Laws
9. Unfair Dismissal
10. Right of Entry
11. Workplace Agreements
12. Industrial Action
13. Other Provisions
14. Conclusions

Attachments

(a) Submission of The Australian Workers' Union, Queensland Branch
(b) Submissions of The Australian Workers' Union, Victorian Branch
(c) Submissions of The Australian Workers' Union, Greater South Australian Branch
(d) Submissions of The Australian Workers' Union, Tasmanian Branch
(e) Submissions of The Australian Workers' Union, West Australian Branch

1. The Australian Workers' Union

1.1 The Australian Workers' Union is Australia's oldest general union and was formed in 1886.

1.2 Today, the AWU represents more than 130,000 members across Australia in a diverse range of industries. The AWU has the widest coverage of employees of all unions in Australia.

1.3 Our members build railways, work in underground mines, they mill paper and they asphalt roads. They also farm fish and grow tobacco. Some of the major industries in which our members work include: pastoral and agricultural, aluminium, aviation, oil and gas, mining, health, local government, manufacturing, chemicals, construction and steel. The AWU is the largest union outside metropolitan Australia.

1.4 The AWU is a federally registered union with 11 Branches, the AWU is also comprises state unions registered in Queensland, New South Wales, Tasmania, South Australia and West Australia.

1.5 The AWU employs 147 organisers, industrial officers and specialist staff and 78 administrative staff across 46 offices in every capital city and most regional centers.

1.6 The AWU is party to and responsible for 253 Awards registered under the *Workplace Relations Act 1996*.

1.7 Branches of the AWU are party to and responsible for:

- 170 Awards registered under the *Industrial Relations Act 1999 (Queensland)*

- 89 Awards registered under the *Industrial Relations Act 1996 (New South Wales)*
- 27 Awards registered under the *Industrial Relations Act 1984 (Tasmania)*
- 57 Awards registered under the *Industrial Relations Act 1994 (South Australia)*
- 94 Awards registered under the *Industrial Relations Act 1979 (West Australia)*

1.8 The leadership of The Australian Workers' Union are directly elected by all members of the union every four years. Members of the union elect the full-time and honorary office holders of the union and the governing bodies. The supreme governing body of the AWU is the National Conference which meets every two years and in-between Conferences the National Executive holds the powers of the National Conference. The current National Secretary of the union is Bill Shorten and the National President is Bill Ludwig.

2. Form of Submission

2.1 This submission is made on behalf of the National Executive of the AWU and is authorised by National Secretary Bill Shorten.

2.2 The submission contains two parts the first being the over-all view of the union on the components of the *Workplace Relations Amendment (WorkChoices) Bill*, the second being the views of the Branches of the AWU specifically looking into the effect of the abolition of the state industrial relations systems of employees who are members or are eligible to be members of the AWU and other general issues of concern to the Branches. Submissions from the Queensland, Victorian, Tasmanian, Greater South Australian and West Australian Branches of the union are included in the attachments to this submission.

3. General Comments

3.1 The AWU welcomes the opportunity to provide comment on the *Workplace Relations Amendment (WorkChoices) Bill.*

3.2 The AWU is disappointed and concerned that the closing date for submissions to this inquiry was only four working days after the legislation was released to the public and introduced into the House of Representatives. The fact that the Bill and Explanatory Memorandum was over 1200 pages long and the short period of time between the release of the legislation and the closing date for submissions made it very difficult for the union to provide and full and frank view on all aspects of the proposed Bill to the Committee. The AWU submits that the Committee should provide a further opportunity to the public to submit further submissions on the proposed legislation so all persons and organizations concerned have adequate time to fully investigate all aspects and potential implications of the Bill and are able to submit their views to the Committee.

3.3 The AWU notes that when the Government announced the WorkChoices package a detailed briefing was given both by the Prime Minister and the Minister for Employment and Workplace Relations to a large group of representatives from employer organisations. The AWU is disappointed to note that the Government did not invite any organisations representing employees to the briefing nor have they anytime since spoken to, communicated with the AWU regarding the legislation. This in the view of the AWU demonstrates a complete disregard by the Government to views of the community regarding the legislation except for the views of the Business community.

3.4 The AWU is concerned that the Inquiry will not be able to fully investigate the effect of the legislation on the Australian working population given that the Committee has only allocated four days for public hearings and also that the Committee is required to report back to the Senate within one working day after the conclusion of the public hearings.

3.5 Given that the Committee has been only allocated such a short period of time to report back to the Senate the AWU is concerned that the Government may view the outcome of the Committee's report as a "fait accompli".

3.6 It is the view of the AWU that the Inquiry into the legislation should be extended to ensure all Senators are able to fully investigate the effect of the legislation. The AWU notes previous Senate inquires into amendments to the *Workplace Relations Act 1996* have previously allocated a substantially longer period of time for investigation and public hearings[1].

4. Australian Fair Pay Commission (AFPC)

4.1 The Australian Workers' Union expresses its extreme concern regarding the provisions of Part 1A of the *Workplace Relations Amendment (Work Choices) Bill 2005.*

[1] The AWU refers to the following inquiries: Inquiry into the Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003 and the provisions of the Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003; Inquiry into the Workplace Relations Amendment (Protecting the Low Paid) Bill 2003; Inquiry into provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002; Inquiry into the Workplace Relations Amendment (Paid Maternity Leave) Bill 2002; Inquiry into the Workplace Relations Bills 2002; Inquiry into the Workplace Relations Amendment (Transmission of Business) Bill 2001; Inquiry into the Workplace Relations (Registered Organisations) Bill 2001; Inquiry into the Provisions of the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001; Inquiry into the Consideration of the Provisions of the Workplace Relations Amendment Bill 2000; Inquiry into the Workplace Relations Amendment (Unfair Dismissals) Bill 1998.

4.2 The AWU has many members particularly in the pastoral and agricultural industries which rely on the annual Safety Net Increases awarded by the Australian Industrial Relations Commission for improvements to their income.

4.3 The current system provides for a mechanism where Government, Business and Employee Representatives can make submissions on their views regarding what appropriate changes should be made to Award conditions and wage rates.

4.4 The AWU is concerned regarding Part 7K (1) of the Bill which empowers the AFPC to determine on its own accord the "*timing and frequency of wage reviews*". This provision abolishes any guarantee of any annual improvements to the incomes of the 2 million working Australians who are paid base Award wages. The Bill does not provide for any input by employee or employer organisations and representatives into the timing, scope or frequency of improvements to the Minimum wage. The end result of this section of the Bill if it is passed by the Senate will be the economic future of over 2 million Australians will reside solely in the hands of the four members of the AFPC.

4.5 The AWU is extremely disappointed regarding Part 7P if the Bill which states "*To be appointed AFPC Chair, a person must have a high level of skills and experience in business or economics*" This provision ensures that the a person with experience as an advocate for employees is unlikely to be appointed as Chair of the AFPC.

4.6 The AWU is concerned regarding the lack of provision in the legislation for any pay increase to keep up with the general cost of living or inflation which will result in those workers on the minimum wage experiencing a drop in their real wage over time with the potential to create a new class of workers living in

extreme poverty. (We wish to bring the attention of the Committee to points 3.1 to 3.25 of the Submission of the AWU Greater South Australian Branch located in "Attachment C" for further arguments on this issue).

4.7 The AWU notes that since 1996 if the submissions of the Federal Government were accepted by the Australian Industrial Relations Commission then the minimum wage would be $50 less per week than it is today.

4.8 The AWU is concerned that the AFPC has been established not to form a genuinely independent body to set the minium wage but rather to find a way for the Federal Government to be able to implement it's vision for a low minimum wage which has been rejected over the last nine years by the current independent umpire.

5. Australian Industrial Relations Commission

5.1 The Government's proposed amendments fall into three categories changing fundamentally the powers, functions and procedures, independence of the AIRC and the special conditions applying to Victoria. The main changes are summarised along with the impacts of the changes:

5.2 Powers, functions and procedures. New section 33. This item repeals section 33, which provides that the AIRC may exercise powers on its own motion or after an application by a specified party, subject to any limitation or restriction in the WR Act or Schedule 1B. Proposed section 33 serves to limit the jurisdiction of the AIRC.

5.3 Impacts of proposed change: There will be greater regulatory duplication and confusion between the various regulatory

stakeholders, including the AIRC, the Fair Pay Commission, the Employment Advocate and the courts. This will result in higher compliance costs, delay and confusion for stakeholders under the operative sections of the Act.

5.4 New section 44A – Commission to take into account the public interest. Proposed section 44A would require the AIRC to take into account the public interest when performing its functions under the WR Act or Schedule 1B to the Act. When considering the public interest, the AIRC would be required among other matters to have particular regard to:

- the state of the national economy and the likely effect that an order the AIRC is considering or proposing to make will have on the national economy, particularly the likely effects on the level of employment and inflation (proposed paragraphs 44A(1)(b) and 44A(2)(b)).

5.5 Impact of proposed change: The Government is aiming to ensure that the AIRC exerts downward pressure on wages and conditions in its review and appeal roles.

5.6 Subdivision B - Particular powers and procedures of the Commission. Proposed subdivision B would provide for particular powers and procedures of the AIRC. The powers and procedures contained in this subdivision are based upon the existing powers and procedures of the WR Act but have been modified, in part to make changes consequential to the changed constitutional underpinnings of the WR Act. That is, Commission will no longer have the power to certify agreements, but to only vary an award or workplace agreement.

5.7 Impact of proposed change: An historic shift in the balance of power in favour of employers at the expense of employees, equity and fairness. Unprecedented responsibilities for determining wages and conditions now vested with employers. Outcomes for employees will not be as a consequence of a bargain but prescription. That may lower employer costs in driving down wages and conditions, but by removing employee incentives do nothing to address declining productivity and the competitiveness of Australian industry.

5.8 Independence of the AIRC and section 44L Review on application by Minister. This section provides wide scope for the intervention of the Minister. The Minister may make such an application if it appears to the Minister that the award, order or decision is contrary to the public interest.

5.9 Impact of proposed change: Overrides the statutory independence of the Commission in undertaking its duties.

5.10 Items 28 to 31 would amend references to certified agreements to be replaced with workplace agreements and to persons bounded by certified agreements to an employer, employee or organisation bound by an award.

5.11 Impact of proposed change: Limits the efficacy of the AIRC to generating future growth, productivity and employment via CAs which have been the driver of growth, productivity and employment since the 1993 reforms of the Keating Government.

5.12 Impact on Victoria. Items 24, 30, 34, 35 and 36 make amendments to the provisions relating to Victoria. In particular, item 35 would repeal subsection 45(3A), which provides a Minister of Victoria with a right to intervene in certain AIRC proceedings. This provision would be replaced, in part, by

proposed subsection 504(2), which would require the AIRC to grant leave to intervene in an appeal against a decision of the AIRC under subsection 107G(1) in certain circumstances.

5.13 Impact of proposed change: To deny Victoria its current rights under existing legislation without any compensatory benefits from the legislation to Victoria. This is open to challenge on constitutional grounds.

5.14 Item 38 would repeal subsection 45(9), which relates to the hearing or determination of an industrial dispute to the hearing or determination of an appeal. The existence or otherwise of an industrial dispute will no longer be relevant to the AIRC's jurisdiction or powers.

5.15 Impact of proposed change: Increased uncertainty and compliance costs to participants.

6. Powers and Functions of the Employment Advocate

6.1 A list of those functions would appear in subsection 83BB(1). The major functions in that list include:

- promoting the making of workplace agreements;
- the provision of assistance and advice to employees and employers (especially small business) in relation to workplace agreements and the Standard;
- providing education and information to employees and employers in relation to workplace agreements;
- promoting better work and management practices though workplace agreements; and
- accepting lodgment of workplace agreements and notices about the transmission of instruments.

6.2 Impact of the proposed changes: Vests significant responsibilities on the Office of the Employment Advocate to improve workplace agreements which really means to promote AWAs. In this case, the Office will not result in positive growth, productivity or employment outcomes but serve as an agent of Government to wipe out collective agreements and collective bargaining.

6.3 Minister's Directions to Employment Advocate Under section 83BC, the Minister may direct the Employment Advocate in the exercise and performance of powers or functions.

6.4 Impact of the proposed changes: To remove any independence of the Employment Advocate in the performance of its functions. This will lead to Government activism and intrusion into the day-to-day operations of the industrial relations system to an unprecedented extent. It will lead to a major regulatory burden to business as the ultimate decision maker is not the Employment Advocate, but the Minister. In turn, the Government is taking on responsibility for delivering on the workplace agreements to business and employees alike. Budget impacts are likely to be very large in view of the Government's monitoring role.

7. Transmission of Business Provisions

7.1 One of the most significant proposed changes to agreements is new transition of business arrangements. These changes will vest significant (and unprecedented) obligations on employers in transferring of employees between the seller and purchaser of an existing business. The changes serve to diminish the oversight role of the Australian Industrial Relations Commission (AIRC). The changes will raise significant legal issues likely to be revisited by the High Court because they follow recent

amendments by the Government to transmission of business arrangements and decisions by the High Court prior to the introduction of the Work Choices Bill.

7.2 Existing arrangements: What does transmission of business mean and what does it cover? Currently, when a company is sold, employee entitlements are either paid out or rolled over into the new business. In other words, agreements currently 'transmit' with the workforce when a company is sold.

7.3 A sale of business means the work performed by the employee is no longer required by the former employer.[2] Effectively this means the employee is made redundant and only becomes an employee of the successor, if s/he accepts an offer of employment made by the successor. In addition to notice and payment in lieu of notice, many awards and agreements contain provisions requiring employers to pay severance when an employee's employment is terminated in a redundancy situation.

7.4 Depending on the redundancy provisions within the certified agreement or AWA, the former employer may have an obligation to pay severance pay, even where the employee has accepted employment with the new employer. For this not to be the case, the agreement must provide that there is no entitlement to severance pay where an offer of suitable alternative employment is made to the employee. Then upon an offer of the same/similar position under the same/similar terms and conditions by the successor, the former employer would have no

---

[2] The Government defines redundancy pay as occurring when an employer decides that they no longer wish the job the worker has been doing to be done by anyone, and this is not due to the ordinary and customary turnover of labour. This may happen due to operational requirements, the introduction of new technology, economic downturns, company mergers, take-overs or restructuring.

obligation to pay severance pay. An example of such a provision is:

> "The Company shall not be obliged to make a severance payment if the Company obtains suitable alternative employment for the employee, and the employee unreasonably rejects the offer of employment".[3]

7.5 Effectively this means that from the time of succession, the new employer "steps into the shoes" of the old employer and becomes the employer party to the CA, AWA or award.[4] The new employer however, if not located in Victoria, the Northern Territory or the Australian Capital Territory, must be a constitutional corporation at the time of succession. Whether or not the new employer is a "successor" to the business is a question of fact and law. *Amendments dealing with Transmission of Business have already been made....*

7.6 The changes are being made after tightening of the provisions pertaining to transmission of business have already occurred. The provisions of the Workplace Relations Amendment (Transmission of Business) Act 2004 commenced on 30 April 2004. The Act makes changes to the operation of section 170MB of the *Workplace Relations Act 1996* .[5]

7.7 The key change made by the Transmission of Business Act is to give the Australian Industrial Relations Commission (AIRC) a new power to make orders moderating the way a **certified**

---

[3] http://www.oea.gov.au/text.asp?showdoc=/employers/awa_transmissionBusiness.asp

[4] ibid

[5] Section 170MB addresses who is bound by a certified agreement after a business, or part of a business, has changed hands. Broadly, section 170MB makes the new business operator a party to a certified agreement made by an earlier operator of the same business.

agreement applies to a business (or part of one) in the hands of a new operator.[6]

7.8 The Commission already has power under section 149(1) of the Workplace Relations Act 1996 to make orders that **federal awards** will not apply in instances of business transfers such as acquisitions, mergers, restructures or outsourcing, often referred to as a 'transmission of business'.

7.9 The change recognises that employment at a business that has changed hands may become regulated by multiple and possibly conflicting **certified agreements**. The stated benefit of the new power will allow the AIRC to assist employers and employees to solve many of the workplace issues that arise after a transmission of business. For example, where the business is in short-term crisis the capacity to streamline the operation of certified agreements may help the survival of the business (and jobs).[7]

7.10 The government has already introduced legislation[8] to overturn the 2004 decision of the AIRC to grant up to eight weeks **redundancy pay** to employees of small businesses who are made redundant where their employer employs less than 15 employees.[9] Yet, the reasoning of the Commission showed a

---

[6] http://www.wagenet.gov.au/WageNet/templates/PageMaker.asp?category=FactSheets&fileName=../FactSheets/DataFiles/General/TransmissionOfBusiness.html

[7] When making an order about transmitted certified agreements, the AIRC must consider (among other things).

- whether any employees would be disadvantaged by the proposed order; and
- the employment conditions available to the workforce already engaged by the new employer, where an order is applied for before the business has changed hands.

[8] *Workplace Relations Amendment (Small Business Protection) Bill* 2004.

[9] *Redundancy Case* (2004) 129 IR 155, and see also *Redundancy Case Supplementary Decision* (2004) 134 IR 57

careful approach whereby the extension of redundancy payments to employees of small businesses was recognised as a necessary measure in a time of business restructuring and downsizing.

7.11 The High Court's Consideration of - Transition of Business. It is important to note that the changes are also being made on the back of the High Court's considerations and decisions made in March 2005 pertaining to transmission of business. The decisions confirm that there is already a very high hurdle to establish that: 1) transmission of business has occurred; and 2) that having occurred, liabilities pertain on the new business. Two recent cases illustrate the points[10]:

7.12 *The Minister for Employment and Workplace Relations and Gribbles Technology Pty Ltd, versus the Health Services Union of Australia* . The High Court found that the relevant federal award was not binding on Gribbles (which replaced MDIG as a service provider to Regent Dell (owner of medical clinics) regarding claims for severance pay because the transmission of business (for the particular services for which Gribbles was now the supplier) could not be established. Liabilities therefore under the award regarding severance entitlements did not transfer to Gribbles and did not apply.

7.13 The High Court also applies a wide interpretation of the nature of employment as a whole. In the *Amcor Ltd versus the Construction, Forestry, Mining and Energy Union* and following a corporate restructure and employment by another business in the group, the Court looked at the business as a whole in order to determine eligibility for redundancy (severance) and decided that it did not apply.

---

[10] http://www.emalegal.com.au/newsitem.php?pageid=993e334cea14fdfc0e1e0507bae474c0

7.14 On the back, therefore, of existing law and judicial precedent summarised above, which is already serving to constrain eligibility to (and liability for) workers' entitlements in the event of transition of business, the Government proposes a fundamental break with the existing arrangements under the Workplace Relations Amendment (Work Choices) Bill 2005. On first principles, this is unnecessary.

7.15 Division 1, proposed section 122 (**Object**) would outline the object of Part VIAA which is to provide for the transfer of employer obligations under those instruments contained in Divisions 3 – 6 (see below) when the whole, or a part, of a person's business is transmitted to another person.[11]

7.16 The proposed changes and outcomes are summarised here. Under the Bill transmission of business will now only last for 12 months. After the 12 months, the employer may choose the appropriate standards to apply including the 5 minimum standards.

[11] This would also encompass assignment of a business, or part of a business from one person to another and the succession of a business, or part of a business, to one person from another.

7.17 Proposed Division 2 – Transferring Employees: Proposed section 123A would create a definition of '*transferring employees*'. Subsection 123A(1) would provide that a person is a transferring employee if the person is employed by the old employer immediately before the time of transmission and the person ceases to be employed by the old employer and then becomes employed by the new employer within two months of the time of transmission.[12]

7.18 Subsection 123A(2) would provide that a person is also a **transferring employee** if the person:

(a) is employed by the old employer at any time within the period of **one month** before the time of transmission; and

(b) the person's employment is terminated because of, or for reasons that include, genuine '**operational reasons**';[13] and

(c) the person becomes employed by the new employer within **two months** of the time of transmission.

7.19 Impact of the changes: There are two main issues of concern:

1) the vendor employer has an incentive to make workers redundant before the one month period prior to the transmission of business in order to avoid

---

[12] *Schedule 1 ~ Main Amendments, House of Representatives page 279 Workplace Relations Amendment (Work Choices) Bill 2005*

[13] Operational reasons is attributed with the same meaning as in proposed subsection 170CE(5D) of the WR Act (see item 112). Subsection 170CE(5D) would provide that the definition of operational reasons are reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to part of the employer's undertaking, establishment, service or business.

liabilities associated with the transmission of business; and

2) workers are made redundant on mass for operational reasons.

7.20 With the break in employment longer than one month, this would have the effect of precluding the employee from being a transferring employee for the purposes of Part VIAA even if genuinely made redundant and even if employed again within two months by the new employer. Again, the new employer my decide (**for operational reasons for example)** to not offer employment until after the two month transition period thereby avoiding obligations pertaining to transferring employees.

7.21 Proposed Division 3 – Transmission of AWAs. Contains the transmission of business provisions specific to the transfer of AWAs from an old employer to a new employer. Proposed subsection 124(1) would provide that where, immediately before the time of transmission, the old employer and an employee were bound by an AWA, and the employee is a transferring employee in relation to the AWA, the new employer becomes bound by the AWA.[14]

7.22 Subsection 124(2) would establish for how long the new employer is bound to the transmitted AWA and specifies events which would cause the new employer to no longer be bound by the transmitted AWA[15] and in particular:

[14] This means that a new employer who is a successor, transmittee or assignee to a business or part of a business, would be bound by the AWA that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within two months and the AWA is capable of covering the employee's employment with the new employer. Workplace Relations Amendment (Work Choices) Bill 2005, p281

[15] Workplace Relations Amendment (Work Choices) Bill 2005, p321

1) the transmitted AWA would no longer bind the new employer if the employee ceased to be a transferring employee in relation to the AWA. For example, this could occur where the transferring employee ceased to be employed by the new employer, or moved to another job while still working for the new employer that is not capable of being covered by the transmitted AWA; and

2) The transmitted AWA would no longer bind the new employer once the transmission period ends. This means that the maximum period for which a new employer would be bound by the transmitted AWA by force of subsection 124(1) would be12 months.

7.23 Impact of the changes: This amendment will expedite the transition of employees under AWAs which, in turn, will encourage employers to promote AWAs in preference CAs and Awards in their workplaces.

7.24 Proposed Division 4 – Transmission of Collective Agreements. Would contain provisions particular to the transfer of collective agreements from one employer to another upon a transmission of business. Proposed subsection 125B(3) would provide that a transmitted collective agreement could be replaced by another collective agreement even if the transmitted collective agreement has not passed its nominal expiry date.

7.25 Impact of the changes: This amendment would allow collective agreements to be torn upon transition of business. Employers would have an incentive to avoid the conditions and entitlements of a pre-existing CAs and replace them with a revised offer of a CA or AWA on transition. The amendment cuts across the existing role of the AIRC in streamlining the application of CAs

upon transition of business, dilutes entitlements and adds no value.[16]

7.26 Proposed Division 5 – Transmission of awards contain provisions particular to the transfer of awards from one employer to another upon transmission of business. Proposed subsection 126(1) binds the new employer to a pre-existing award if the award pertained to a transferring employee if employed within two months and the award is capable of covering the employee's employment with the new employer.

7.27 Period for which new employer remains bound. Proposed subsection 126(2) would establish for how long the new employer will be bound by the transmitted award. It would specify four events which would cause the new employer to no longer be bound by the transmitted award in its entirety. These are:

1) the transmitted award could be revoked (see proposed Part VI). The AIRC can revoke an award in limited circumstances (i.e. as part of award rationalisation, award simplification, or where the award is no longer applicable or is obsolete), so that it is no longer binding on the new employer;

2) the transmitted award would cease to bind the new employer when there are no longer any transferring employees in relation to the transmitted award. This is where all transferring employees for example, either cease to be employed by the new employer or move to

---

[16] http://www.wagenet.gov.au/WageNet/templates/PageMaker.asp?category=FactSheets&fileName=../FactSheets/DataFiles/General/TransmissionOfBusiness.html

another job while working for the new employer that is not capable of being covered by the transmitted award;

3) the new employer would cease to be bound by the transmitted award in respect of the transferring employees if a collective agreement comes into operation in relation to all of the transferring employees, or all the employees enter into AWAs with the new employer;

4) the transmitted award would not be binding on the new employer once the transmission period ends. This means that a new employer would only be bound by the transmitted award by force of subsection 126(1) for a maximum period of 12 months.

7.28 Impact of the changes: Assuming the transferring employee has a pre-existing award and is employed within 2 months, the employer would have an incentive to make job offers through AWAs to all transferring employees below award minima for wages and conditions. Awards would be replaced with AWAs less generous than the awards for transferring employees.

7.29 Proposed Division 6 – Transmission of APCSs would contain provisions particular to the transfer of *Australian Preserved Classification Scales* (APCSs) upon a transmission of business. APCSs would be established under Division 2 of Part VA (the Australian Fair Pay and Conditions Standard). Proposed subsection 127(1) would provide that where, immediately before the time of transmission, an employee's employment with the old employer is covered by an APCS, the employee is a transferring employee in relation to the APCS and the new employer would not otherwise be covered by the APCS, this section binds the new employer to the APCS in respect of the

transferring employee. APCS's are not subject to a transmission period.

7.30 Impact of the changes: Includes non-allowable award matters covering piece rate employees, casuals and juniors. Workers on APCS will for all practical purposes have few if any entitlements to either buy out or preserve under the Bill upon transmission of business.

7.31 Proposed Division 7 - Parental leave and other entitlements under the Australian Fair Pay and Conditions Standard Would contain provisions detailing what happens to an employee's parental leave and other entitlements arising under the Standard when there is a transmission of business. Proposed section 128A would provide for the transfer of accrued employee entitlements in relation to matters, other than parental leave, under the Standard, in certain circumstances. The provisions allow for new and old employers to agree to transfer particular employee entitlements to the new employer upon transmission of business. Where this does not occur, the old employer will remain liable for those accrued entitlements. The provisions intend to allow for a 'clean break' in relation to particular accrued entitlements (with the exception of parental leave).

7.32 Impact of the changes: Other than for parental leave, employers can agree on what, if any, employee entitlements transfer on transmission of business. This provision appears to operate independently of award or agreement terms and conditions apart from the minimum standard. In this case, accrued annual leave and sick leave could disappear upon transmission of business for transferring employees and for the old employer to pay them out. However, as this would be built into the sales terms, employees, rather than the employers' are subsiding this part of the transition of business valued at the discounted future

value of the entitlements. Even if the entitlements are established (see discussion below) it will mean that no employees' entitlements will ever be secure for longer than 12 months because they may change (be reduced) after 12 months in the event of takeover or change in corporate structure. That will lead to a further diminution of entitlements longer term. It will impact on employees in a range of ways, including the prospect of a risk premium demanded by lending institutions before lending for such financial products as mortgages and personal loans. In addition, income protection and mortgage insurance in the event of redundancy and illness is likely to become more expensive. This is indicative a symptom of the casualisation of the workforce. Unfair dismissal and unlawful dismissal protections do not cover casual employees. Employees cannot access unfair dismissal provisions unless employed for a minimum of 6 months in businesses with more than 100 employees.

7.33 Proposed Division 8 – Notification obligations Would deal with notification obligations for an employer who becomes a successor, transmittee or assignee to a transferring business, as well as lodgment of notices and civil remedy provisions relevant to the notification requirements. Proposed section 129 would create notification obligations for a new employer with respect to a transferring employee. The effect of the provisions would be to inform the transferring employee about the operation of transferred instruments and the nature of the instruments that could apply to the transferred employee and new employer in a transmission of business situation. The provisions are civil remedy provisions.

7.34 Impact of the changes: There is no obligation to consult, merely to inform.

7.35 Proposed Division 9 – Regulation making would enable regulations to be made to deal with additional transmission of business issues that may arise.

7.36 Impact of the proposed changes: Creates uncertainty as to the possible nature of future changes to the transmission of business (Part VIAA) of the Act.

7.37 Based on the above, businesses have incentives to exploit the proposed new laws in a range of ways: Under existing arrangements, when negotiating the terms of the sale of business, the previous employer may elect to pay employees their accrued paid leave entitlements upon termination of employment. Alternatively, the liability for accrued and contingent entitlements may be assumed by the buyer. Employee entitlements should be considered and form part of the contract of sale between the buyer and the seller.

7.38 However, with the proposed changes under Work Choices, cost avoidance strategies will be promoted resulting in opportunistic corporate behaviour, which in turn increases the likelihood of corporate malfeasance and lower standards of corporate behaviour. This will take away incentive to improve productivity, employment and growth, cutting across the basic stated purpose of the Bill, by among other things:

1) Businesses may be sold on to avoid the cost of paying out employee entitlements upon redundancy well prior to the transmission period commencing (i.e. before one month prior to transmission) on the expectation that the purchaser will pay a premium for an entity free of employee liabilities;

2) Businesses may be sold on by arrangement with a dummy purchaser (for a service fee) with employee entitlements in order to avoid the future cost of employee entitlements and to buy the business back by arrangement (for a fee) after the expiry of the 12 months transition period.

3) Businesses may rearrange their corporate structures to fall under the Bill's definition of a small business and avoid future possible unfair dismissal obligations.

8. Exclusion of State and Territory Laws

8.1 The submissions of the Branches of the AWU located in Attachments A, C and D outline the position of the union in relation to proposed Section 7C of the Bill. The submissions of the Victorian Branch located in Attachment B outline the negative effect of the abolition of the Victorian Industrial Relations system in 1993 had on workers in the state of Victoria.

8.2 The AWU has grave concerns regarding the future of the wages, conditions and employment status of the workers whose employment conditions are currently governed by the state industrial relations systems under the new system.

8.3 The AWU opposes the provisions of the new Section 7C in its entirety.

9. Unfair Dismissal

9.1 The AWU is opposed to the new section 170CA in the proposed legislation and believes that the right for employers to terminate the employment of their workers at will should not re-enter Australian workplace legislation.

9.2 The proposed subsection removing rights of workers employed in businesses employing less than 100 workers from making unfair dismissal claims will create a new form of discrimination never before seen in Australian workplaces. The AWU cannot see any argument of merit of why those workers should be discriminated against only because their employer employs less than 100 employees.

9.3 The AWU is concerned about the ability of large employers who do employ more than 100 employees being able to exploit the new legislation by creating series of "phoenix" companies to become the employing entity of workers and then ensuring that each of these "phoenix" companies employ less than 100 workers to avoid the ability of their workers taking unfair dismissal action against their employer if they are unfairly dismissed.

9.4 The ability of employers to be able to dismiss their workers for "operational reasons" without the workers being able to make a claim for unfair dismissal further grants all employers in Australia a further loop-hole that they can exploit so they will not be brought to account by the Australian Industrial Relations Commission if they do in fact dismiss their employees for unreasonable or harsh reasons.

9.5 The AWU has been and will continue to be active in ensuring that Australian industry expands to ensure our membership can always gain useful and well-paid employment. During these endeavours we on a regular basis meet with employers and their representatives to hear their views on what is needed to be done to ensure a strong economy. The current unfair dismissal procedures have never been raised with the union as a key factor in building a stronger economy instead issues such as tax

reform and investment in training have consistently been raised as the key factors holding our economy back.

10 Right of Entry

10.1 The AWU is extremely concerned regarding the possible comprising of confidentiality of individual workers' union membership with the new Right of Entry provisions contained in the Bill. In particular the AWU is concerned regarding the employment security of employees working in business where their employer may have a hostile attitude towards unions and union members. By empowering employers to direct where and when workers can meet with their union representatives we an employer could direct a union representative to conduct all meetings in front of a representative of the employer to monitor which employees meet with the union.

10.2 These new provisions coupled with the new Unfair Dismissal provisions could see union members targeted for dismissal after being identified through a process outlined above.

10.3 The provisions in the Bill regarding the inspection of time and wages records by union representatives could also lead to the issue outlined above. By being forced to identify to workers who have raised the issue regarding their pay union representatives will be in effect providing a map to employers who may seek to exploit loopholes in the legislation to terminate any union members in their workforce.

10.4 The provision removing right of entry for union representatives to workforces who are exclusively made up of employees on AWAs is just a blatant exercise of ensuring that workers on AWAs are kept in the dark regarding their employment conditions.

11 Workplace Agreements

11.1 The Workplace Relations Amendment (Work Choices) Bill 2005 ("the Bill") seeks to radically redefine the nature, scope and purpose of enterprise bargaining available to employers, employees and employee representatives, including trade unions.

11.2 The Bill provides the mechanism for the negotiation of six different forms of workplace agreements, namely:

a) Australian Workplace Agreements ("AWA's");
b) Employee Collective Agreements;
c) Union Collective Agreements;
d) Union Greenfield Agreements;
e) Employer Greenfield Agreements; and
f) Multiple-business Agreements

11.3 Each form of workplace agreement is underpinned by a legislative scheme that nominates, amongst other things, the procedures for the engagement of bargaining agents; the procedures to be employed prior to the lodgement of agreements; the lodgment procedure with the Employment Advocate; the operation and binding nature of agreements; the content of agreements (by inclusion or exclusion); the termination of agreements (unilateral or otherwise); and the effect of the termination of an agreement.

11.4 The Bill also specifies conduct that is prohibited with regard to the negotiation of a workplace agreement and, in this regard, provides for the imposition of civil remedies where the conduct of negotiating parties contravenes a provision of the Bill.

11.5 The proposed legislative scheme represents a savage attack on the protections afforded to employees prior to, during, and as a consequence of the operation of workplace agreements. Furthermore, the Bill fundamentally undermines the democratic right of employees to collectively negotiate in an industrially fair and supportive environment.

11.6 Section 96 of the Bill establishes the right of an employer to negotiate an AWA with an employee. Whilst this does not, of itself, represent a departure from the rights afforded employers pursuant to the *Workplace Relations Act 1996* ("WRA"), it confirms the right of an employer to offer an AWA as a pre-condition to employment[17].

11.7 Contrary to the assertions of the federal government, such a facility does not support the making of any choice by an employee, particularly those whose economic, educational or other circumstances place them in a weak bargaining position. The combined effect of this express facility, coupled with the government's welfare-to-work agenda (as but one example), will operate to force the unemployed and vulnerable into individual arrangements that have the real potential to significantly alter conditions of employment that would otherwise apply pursuant to relevant state or federal awards. Legislative arrangements with this effect represent a gross departure from Australia's international commitment to advance and support "the ***effective*** recognition of the right to collective bargaining"[18]. (emphasis added)

---

17 Compare s.96(2) of the Bill and s.170VF(2) of the WRA.

18 ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998, Article 2(a). See also ILO Convention 98, Right to Organise and Bargain Collectively

11.8 Section 96D of the Bill proposes to vest an employer with the unilateral right to establish terms and conditions of employment relating to the establishment of a new business. The inherent danger of such a provision relates to the fact that the relevant benchmark against which such an agreement can be made is not the relevant award (whether state or federal), but rather the Australian Fair Pay and Conditions Standard ("the Standard"), which are limited to just five minimum conditions of universal application. Furthermore, the terms of an employer greenfields agreement may be constructed to wholly displace "protected award conditions" that would otherwise apply to the employment of persons proposed to be subject to the operation of such an agreement[19].

11.9 The situation with regard to an employer Greenfield agreement is further aggravated by the fact that the agreement is deemed to have been made upon the lodgment of the agreement with the Employment Advocate[20]. This particular facility affords employers the unprecedented power to devise terms and conditions of employment, without consultation, that have the effect of denying prospective employees adequate safeguards against the loss of core award rights such as penalty rates, overtime rates, shift loadings and rest breaks.

11.10 Of graver concern is the fact that the Bill will permit an employer to unilaterally terminate an employer greenfields agreement upon the giving of 90 days' notice of the intention to do so[21]. The consequence of such an election by the employer are staggering. If a replacement workplace agreement cannot be re-negotiated within the 90 day notice period, employees are

---

19 Refer s.101B(2)(c) of the Bill

20 Refer s.96G and s.100(1) of the Bill

21 Refer s.103L of the Bill

liable to have their terms and conditions reduced to the Standard[22]. Common sense and industrial reality informs us that the mere threat of such a situation arising gives the employer the unparalleled power to effectively dictate new working arrangements to employees against a backdrop of conditions being fundamentally eroded should agreement not be forthcoming.

11.11 In the case of the negotiation and/or variation of workplace agreements (other than AWA's), the employer must give a duly authorised bargaining agent a "reasonable opportunity to meet and confer with the employer about the agreement"[23]. As a matter of construction, the "reasonable period" to which the Bill refers is a period of seven days[24]. The legislated limitation of time within which a bargaining agent is afforded the right to meet and confer about a proposed workplace agreement represents a gross infraction against the rights of employees to engage in effective collective bargaining[25]. The provision pre-supposes that bargaining can be adequately facilitated in such a short span of time. It does not to protect workers or their representatives from the manipulation of employers with regard to availability within the timeframe of seven days. As such, it offends against Australia's international obligations to properly legislate for the protection of fundamental human rights in the conduct of workplace affairs.

11.12 Section 98 of the Bill imposes an obligation on the employer to provide eligible employees with, or provide reasonable access

22 Refer s.103R of the Bill

23 Refer s.97B(3) of the Bill

24 Refer s.97B(3)(a) of the Bill

25 ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998, Article 2(a). See also ILO Convention 98, Right to Organise and Bargain Collectively

to, the proposed agreement and an information statement at least seven days before a workplace agreement is approved. This provision manifests a significant departure from requirements currently operating in the WRA, where employees are given a period of at least 14 days within which to consider the terms of a proposed agreement[26]. There is no readily discernable policy rationale as to why the timeframe within which an employee may consider the terms of an agreement are to be reduced so significantly. The undesirability of this situation is exacerbated by the fact that a proposed workplace agreement may operate for a period of up to five years[27].

11.13 The lack of appropriate time within which an employee may consider the terms and conditions of a proposed workplace agreement is compounded by the removal of two important protections as they presently exist in the WRA, namely:

a) the obligation of an employer to explain the terms of the agreement to all eligible employees[28]; and

b) that in explaining the terms of the agreement, appropriate consideration is given to the needs and circumstances of any particular employee (eg. Women, persons from non-English speaking backgrounds and young persons)[29].

11.14 On its present construction, the Bill materially fails to take account of the needs of particular employees and removes a positive obligation on the part of the employer to satisfy an

---

26 Refer s.170LJ(3) of the WRA (for example)

27 Refer s.101(b) of the Bill

28 Refer s.170LJ(3) of the WRA (for example)

29 Refer s.170LT(7) of the WRA

independent body that the terms of the proposed workplace agreement have been explained in an appropriate manner. This will render employees, particularly those that are vulnerable to exploitation, helpless in the face of employer demands that an agreement be approved. Additionally, the proposed facility to enable employees to waive the right to ready access will only increase the prospect of employer coercion against employees, without any adequate safeguards to protect the interests of employees that are not versed in industrial or contractual law and who may not possess the relative bargaining power to negotiate effectively and fairly with their employer[30].

11.15 Section 100(1) of the Bill provides that a workplace agreement comes into operation on the day that the agreement is lodged. Of critical concern is the fact that prior to taking on the character of a legally enforceable instrument, no transparent and public analysis or assessment need be made by the Employment Advocate to ensure that the terms of the workplace agreement do not offend minimum statutory entitlements or the provisions of the Bill. This is a most undesirable circumstance, which is further complicated by the fact that important matters of pre-lodgment process (eg. recognition of bargaining agents and provision of ready access material) need not be satisfied prior to an agreement taking legal effect.

11.16 Matters of process that lead to the creation of legally enforceable industrial instruments that could conceivably last for up to five years must be given paramount importance, particularly where the rights of employees to effective representation are concerned and, more so, where particular employees may be vulnerable to the manipulation or coercion of an employer. In this regard, the provisions of the Bill do not

[30] Refer s.98A of the Bill

adequately realize the importance of proper process, nor do they address the needs and fundamental rights of employees to be protected from unscrupulous employers.

11.17 Section 101C(6) of the Bill has the effect of declaring void that part of any workplace agreement that purports to incorporate terms from a state award or agreement, or an agreement, arrangement, deed or memorandum of understanding that regulates the terms and conditions of employment and was created by a process of collective negotiation.

11.18 Firstly, the blanket prohibition against the incorporation of such content will operate to deprive employees with state registered instruments any protection against loss of entitlements, where they exist, that are superior to the minimum entitlements permitted by the Bill. Secondly, the blanket prohibition of such content will deny employees and employers the opportunity to enforce, through the terms of the agreement, any form of mutual consensus about terms and conditions of employment that may, by reason of commercial or industrial sensitivity, be more appropriately excluded from reference in a workplace agreement, but which are nevertheless fundamental to the overall industrial arrangements deemed desirable by employees and the employer.

11.19 The significance of such a series of measures cannot be overstated. This is an attempt by the government to micro-manage those matters that employees and employers should otherwise be freely able to negotiate and agree upon in a democratic society. Who are the government to determine what should, or should not be, included in an industrial instrument reached by mutual consensus after appropriate negotiation? This is a gross intrusion on the rights of employees and

employers to determine the arrangements that are best suited to the business, operation or undertaking of the employer.

11.20 Similar objection can be directed at the provisions of the Bill that relate to "prohibited content", particularly where the Bill imposes substantial civil penalties against those persons that willfully, or recklessly, seek to include prohibited content in an agreement[31]. Apart from the objections already outlined, the attraction of any sanction against the exercise of free speech (particularly in the context of matters concerning industrial relations, as opposed to national security) is a gross infraction against fundamental, democratic rights that all Australian citizens should enjoy.

11.21 Section 103L of the Bill proposes to vest an employer with the unilateral right to terminate a workplace agreement after its nominal expiry date and on the giving of 90 days' notice. This proposed facility is in stark contrast to existing provisions in the WRA that provide for the termination of workplace agreements where the Commission has approved the termination of the agreement after obtaining the views of the persons concerned and forming a view as to whether the proposed termination is in the public interest[32].

11.22 The right of the employer to undertake this course of action is not without significant consequence for the relevant employees. If an agreement is to be terminated on the giving of 90 days' notice, and a replacement agreement cannot be re-negotiated (for whatever reason), the employee's terms and conditions may automatically revert to the Standard, and not to the award that would otherwise apply[33].

---

31 Refer s.101M of the Bill

32 Refer s.170MH of the WRA

33 Refer s.103R of the Bill

11.23 In essence, the combined effect of these provisions places the employer in a significantly better bargaining position than any employee. The threat of loss of entitlements, coupled with the need to re-negotiate a replacement agreement within the limit of 90 days, has obvious potential to permit an employer to employ stalling tactics in negotiations (if there are any) and to present employees with a clear ultimatum – "take what I offer, or lose everything else". This is hardly a system that supports effective and fair bargaining and is squarely designed to place employees and their representatives in a completely unfair position with regard to the negotiation of terms and conditions of employment.

12 Industrial Action

12.1 The submissions of the Branches of the AWU located in attachments A, B, C and D spell out in detail the problematic and dangerous provisions located in Part VC of the Bill in regards to industrial action.

12.2 Specifically the AWU believes that an explosion in civil litigation will occur once the new provisions of the Act become operative.

12.3 Also the reduced powers of the Australian Industrial Relations Commission to conciliate and arbitrate industrial disputes before industrial action takes place will lead to an increase in industrial action.

12.4 The AWU is extremely concerned regarding the provisions of Section 112 of the new Bill which empowers the Minister for Workplace Relations to terminate a bargaining period and therefore remove the rights of the workers covered by that bargaining period to take industrial action.

12.5 The grounds under which the Minister for Workplace Relations can terminate a bargaining period are in practical effect the same as those to which the Australian Industrial Relations Commission can terminate or suspend a bargaining period. The AWU is extremely concerned that this provision is designed not to ensure essential services are protected but rather to give the Government unprecedented powers to intervene into industrial disputes when the Government is not satisfied with the decision of the Australian Industrial Relations Commission. These provisions coupled with the Minister's ability to order workers taking industrial action back to work arbitrarily represents the most severe attack on the right to take industrial action since Federation and it is the view of the AWU that these provisions breach the 1948 International Labour Organisation Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively[34].

13 Other provisions

13.1 Other provisions of the Bill regarding the Australian Fair Pay Standard, the new Award system, Registered Industrial Organisations and Miscellaneous are commented on in the submissions of the Branches of The Australian Workers' Union located in the attachments to this submission.

14 Conclusion

14.1 The entire process associated with the introduction of this Bill has been has been so undemocratic that the AWU is concerned that the procedures and spirit of public and parliamentary debate on issues of national significance and importance that have

[34] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098

guided the development and nature of our democracy since 1901 have been thrown out the window.

14.2 The severe limitations imposed by the Coalition Government on the terms and length of the Senate Committee Inquiry has made it near impossible for any organisation or individual to fully digest the entire legislation before the closing date of submissions.

14.3 The AWU is concerned that if the Senate does not re-open public submissions and extend the time for the Committee to investigate the legislation then the future of the Senate as the "House of Review" will be thrown into question and will weaken the Commonwealth as a Federation.

14.4 If the Senate does not extend Inquiry then the AWU submits that the Bill in its entirety should be rejected by the Committee and not passed by the Senate.