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

SUBMISSION

AUSTRALIAN WORKPLACE AGREEMENTS

1. The Workplace Relations Amendment (Work Choices) Bill 2005 (the Bill) makes it easier for employers to reduce employees' wages and conditions under Australian Workplace Agreements (AWA's).

   Without the present protection of a 'no-disadvantage test', that compares the proposed AWA with the terms of the relevant award, an employer need only ensure that the AWA does not remove the federal minimum wage, maximum 38 ordinary hours of work per week, 4 weeks annual leave, 8 days sick/personal leave, and 12 months unpaid parental leave.

   (a) Capacity of an employee to bargain effectively with an employer

   (i) Whilst the mantras of the Workchoices campaign are "flexibility" and "choice", the reality is that choices, for the most part, will be with the employer. The employee relies on their employer to provide them with a job. Vested in the job is not only pay, but also continuity, which impact upon other conditions, such as long service leave, accrued sick leave, and superannuation.

   The employer wants the employee's skills. However, except in the case of higher level, specialist skills or a temporary shortage of a particular trade, there are always others with the same skills. The employer and the employee are not on the same footing for bargaining and they clearly do not have the same bargaining strength.

   Even in a relatively small business, the employer has his/her accountant and lawyer to assist in the bargaining process. In Frequently the employee is alone. Even if the employer affords

them the opportunity, how many labourers or casual canteen assistants can afford to engage a lawyer to look over their AWA before they sign it?

(ii) In a situation where an employer offers an AWA to an employee and says "This is the workplace agreement that I want you to sign", the employee is technically allowed to put a counter offer, and even initiate a bargaining period and take protected industrial action in support of their stance. In reality, if the employer is not inclined to accept the counter offer, that is the end of the road, because:

- The employee is unlikely to have the legal/technical knowledge to enable them to use the processes available under the Act;
- Even if they have a union official who is able to act as bargaining agent and prepare the necessary documentation, one employee taking industrial action is unlikely to make an employer willing to further the negotiation process;
- The employee immediately is identified as a "troublemaker"; and
- The employer can feel fairly safe dismissing the employee, because unless the business is very large, the employee has no recourse to unfair dismissal proceedings, and even if it falls within the gambit of 'unlawful' dismissal, the employee (now unemployed) is hardly likely to be able to fund a federal court challenge to the dismissal.

(iii) In the event that the employee wishes to propose alternative working arrangements, for example, to facilitate their juggling work and family commitments such as early finish to accommodate pre-school pick up, or additional time off in school holidays, an employer is not going to agree unless it specifically advantages his/her business. It is a joke to suggest that AWA bargaining is, or could ever be, about enabling employees to have "more choice and flexibility", or "better ways to balance work and family life".

(iv) In a situation where the employee is applying for a new job and is offered an AWA as a condition of employment, there is no right or capacity to bargain at all. The only choice is take it, or leave it. Where the employee is unemployed at the time, very possibly through no fault of their own, the government's social support policy acts punitively in conjunction with the Bill, to remove the person's access to Centrelink payments, for no reason other than that the person did not accept the conditions and/or pay on offer – where is the flexibility and choice for that person to balance work and family responsibilities?

(iv) Furthermore, the present requirement for employees to have ready access to an agreement for at least 14 days before signing it (in the case of an AWA) or voting on whether or not to accept it (in the case of a collective agreement), is reduced to a mere 7 days under the Bill, with the capacity for an employee to "waive" their right to have the agreement for the requisite time. This is a recipe for coercive behaviour on the part of an employer, to encourage an employee to sign an agreement before they have had a chance to read the fine print.

(b) No genuine protection for conditions of employment

In the context of the uneven bargaining positions of the parties referred to in (a) above, it is not difficult to see the opportunities for employment conditions to be eroded without any compensation.

For example, it will be possible for an AWA for a new employee to offer an average 38 hour week with the expectation that overtime be performed on a regular basis, with a single hourly rate to apply for all hours worked. Similarly there is nothing to prevent an AWA for a shiftworker from providing arrangements for 24 hour shift coverage, without any shift or weekend loading.

Conditions of employment such as, regular breaks for work in extremely hot conditions (ie. Near furnaces), tool allowances for tradespersons who supply their own tools, crib breaks for employees

required to work beyond an ordinary 8 hour day, and meal breaks are not “protected by law” and are all items that can be negotiated away under the Bill.

Legislation that allows Sundays to be the same industrially as Mondays cannot be legitimately claimed to be offering workers a better chance to “balance work and family responsibilities”. Few workers would agree that being expected to work weekends, overtime and shiftwork without additional loadings and penalties represents a “better way to reward their efforts”. Nor would they say that it working longer hours to earn the same pay that they earned with shift penalties etc will “improve living standards and quality of life”.

(c) No genuine protection for take home pay

A proper, rigorous no-disadvantage test underpinned by the award safety net, and applied by an independent body such as the AIRC is the only protection for take home pay. Even with the current no-disadvantage test, workers' incomes under AWA's have been consistently lower than those of workers on collective agreements, and many AWA's have been rejected by the relevant industrial tribunal when they have been given the opportunity to examine them, on the basis that they do not comply with the no-disadvantage test. See for example the recent example of the AWA for an employee of Bakers' Delight that severely reduced the employee's wages and conditions in comparison to the award.

It follows then, that with only the barest of minimum conditions against which to compare an AWA, a fairly minimalist document, in terms of wages and conditions, will be allowed to take effect, especially where the AWA is offered to new employees and that this minimalist document will be able to reduce the wages and conditions of employment in comparison to the current award wages and conditions.

The Bill extends the maximum duration of AWA's and other agreements from 3 years to 5 years. This will have the effect of slowing down the bargaining cycle so that a substandard agreement accepted by an inexperienced or desperate employee is unable to be

replaced for a very long time. Agreements with a half - decade lifespan, with small or no wage increases will result in lower real wages, particularly in circumstances where the economy is buoyant or inflation increases.

(d) No scrutiny for agreements

No longer will there be a requirement for agreements to be subject to public scrutiny. Instead agreements will be filed and approved in private. Unions will be excluded from the process and in most cases will not even know that an agreement has been filed, and there will be little opportunity to observe market trends within and between industries in terms of industrial conditions and wages.

2. Conflicting bargaining agendas

The Bill provides for the notification of a bargaining period, and for properly notified and authorised protected industrial action in support of the bargaining claim. However where an employer flatly refuses to negotiate, the Bill leaves a union or employee negotiating party little room to move. The requirements for protected industrial action have been made so cumbersome and bureaucratic that they are unlikely to provide an effective tool for applying pressure during negotiations.

3. State award employees

The majority of ETU members in Queensland are employed under state registered collective agreement underpinned by a state award. Their industrial arrangements are regulated by the *Industrial Relations Act 1999* (Qld) (the State Act).

(a) Queensland Industrial Legislation

The State Act contains a comprehensive set of minimum conditions that reflect community standards on: -

- jury service make-up pay;
- 38 hour ordinary working week;

- paid overtime;
- unpaid meal breaks of at least 30 minutes after 5 hours' work;
- annual leave loading of 17.5%;
- casual loading of 23%;
- shift loadings of 12.5% for afternoon shift and 15% for night shift;
- penalty rates for working on public holidays;
- weekend penalty rates of 25 % for Saturday work and 50% for Sunday work;
- redundancy payments; and
- require employees to give at least one week's notice of termination to their employers.

The State Act therefore affords Queensland workers a fair, basic level of employment conditions, whilst at the same time ensuring that superior conditions are protected. For example if employees reach an agreement with an employer for certain wages and conditions, they are protected for the life of that Agreement and unable to be undermined by individual contracts.

(b) State awards

Under the current State Act there are no restrictions on "Allowable Matters" as there is in the Workplace Relations Act 1996 (Cth). Most state awards contain a variety of clauses that will become non-allowable in respect of employees of corporations. These include:

- Prohibition on harsh unjust or unfair termination;
- Severance pay;
- Notification of changes;
- Proportion of apprentices;
- Trade union training leave;
- Union encouragement;
- etc

(c) Adjustments to awards

During a State Wage Case each year, unions through the Queensland Council of Unions, and employers through their various organisations, are able to make submissions as to the appropriateness and quantum of a wage increase. Whilst award wages have not anywhere near kept pace with wages under certified agreements, the state wage case system has been able to ensure that those employees who are unable to negotiate an agreement, at least have a decent living wage guaranteed.

The Queensland Industrial Relations Commission determines Wage Fixing Principles, which it varies from time to time, and which are used in conjunction with the State Act, to determine the types of changes that may be made to awards. Hence tool allowances may be adjusted on the basis of proven increases in the cost of tools; new classifications or skill based allowances may be introduced on the basis of demonstrated increases in work value; test cases may be run to introduce or change state standards in relation to conditions such as parental leave, severance pay or method of payment for shifts.

4. Unfair dismissals

The ETU represents many members eachyear in applications to the Industrial Commission in respect of harsh, unjust and unfair termination of their employment. The vast majority of these are filed in the Queensland State jurisdiction. An overwhelming majority, in excess of 90%, are employed by businesses with fewer than 100 employees, and so will have no recourse to unfair termination remedies. Very few, perhaps one per year, would fall into the category of unlawful termination, and therefore able to access a remedy through the federal court. ETU members in the past year have been dismissed for reasons such as:

- An allegation that the employee was in an area other than where the day's work was;
- Unsubstantiated allegation of marijuana use;
- "Unsuitability" for the type of work, where glowing probationary reports show good conduct, capacity and performance;
- "Misconduct" because of minor procedural breach, where the employee has had an unblemished record of 9 years' service;

Contrary to some popular theories, the Union does not file an application on behalf of every member whose employment is terminated. If approached by a member, we interview them and investigate the situation thoroughly before proceeding to file an application. Often the matter is resolved at the conciliation phase, by the employer making good some outstanding pay and providing a good statement of service. Sometimes, a monetary settlement is agreed, either when the employer has reason to believe that they would not be able to successfully defend the claim should it go to formal hearing, or because both parties compromise where the evidence is not clearly one way or the other.

(a) Majority excluded by 100 employees threshold

Unfortunately, most ETU members will be prevented from pursuing such an option, as they work for businesses of less than 100 employees. Those employers will be able to hire and fire at will, because there are no checks on their behaviour. An employee who is not willing to sign an AWA, an employee who argues the toss in favour of a collective agreement, an employee who has suffered recurrent bouts of illness during one year, an employee who is reluctant to undertake shift work because of a need to be available to collect children from school – all of these will have reason to fear for their jobs, as they will not have access to a remedy.

(b) Unlawful dismissal

Even the union delegate who is too good at his/her job, the pregnant woman, the person with the heavy accent can be fairly readily dispensed with – let's face it, not too many employers are foolish enough to say "I'm sacking you because you are pregnant". The Bill provides an easy out anyway as the employer only has to cite "business restructure" as *part* of the reason for dismissal, and there is no remedy.

Of course there is still the Federal Court for unlawful dismissal, but that is not a realistic option for most employees. ETU members in Queensland are well paid in trade terms, with most of them earning between $40,000 and $80,000 per year. However few would have the capacity to find the

necessary $20,000 to $40,000 to fund Federal Court proceedings for unlawful dismissal.