Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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1. My Background
2. Introduction
3. Equality of Bargaining Power
4. Misrepresentation
5. Can Workers Negotiate an AWA that Suits Them
    - Hours of Work
    - Family Friendly hours
6. Legal Knowledge of Workers and the Employers
    - Legal Power of the Employer
    - Public Holidays
7. Bona Fide Choices
    - Young workers
    - Young worker - a Licensed Post Office
    - Older Workers
8. Conclusion

1. MY BACKGROUND

I am a lawyer working for a trade union – the Communications Electronics and Electronics Union. I am regularly asked for advice on AWAs particularly in the Telecommunications Sector. I speak to workers and try to explain the situation to them, and have experienced the frustrations of workers who have to sign unwanted contracts, or unwisely enter into AWAs on an assurance from the boss.

I have recently worked in an international trade union capacity for over 3 ½ years. I grew familiar with industrial systems in many countries in Asia Pacific. I have studied the international trade union system through the Harvard University Trade Union program.

My contribution arises from practical involvement with employment contracts.

1. INTRODUCTION

Unfortunately, I have not had sufficient time to properly address the massive changes set out in the proposed "Work Choices" Bill (hereinafter abbreviated to WC Bill). My submissions address problems and abuses with the existing legislation. The WC Bill provides no remedy to these problems and abuses. On my reading, it will facilitate even further abuse.

Basically, employers are getting away with abuses now. But the WC Bill will take away all pretence of fairness. With registration on lodgement, and a very low no-disadvantage test, this appears to be the situation now:

> If a worker is persuaded, with a shot-gun, to sign a 5 year AWA,
> the boss may be fined under the WC Bill.
> But the unfair AWA will bind the worker, and benefit the boss
> without viable redress, for at least 5 years and 3 months!

I will concentrate on issues associated with the fairness of contract, and the facilitation of less fair contracts under the WR Bill. I am concerned about remedies.

3. EQUALITY OF BARGAINING POWER

Common Law over many years has recognised the principle that in many contract situations, equality of bargaining power does not exist. As a result Equity has intervened and found many ways that relief can be provided to persons who have entered into an unsuitable contract. These include:

- Duress
- Undue Influence
- Unconscionable Conduct
- Illegal Conduct
- Misrepresentation
- Capacity

In some jurisdictions, eg NSW, there are legislative remedies available to redress the situation. There is an ability to fix an unfair contract.

One of the most disturbing aspects of the WC Act is the assumption that no employer would engage in duress, undue influence, unconscionable conduct, illegal conduct and misrepresentation. Yes, the act makes it an civil offence. But the victim cannot redress the resultant unfair contract.

Thus I believe that fairness must be put back into the work place in the form of a remedy to void or amend contracts that have been extracted from vulnerable workers. This must be proceedings where the hearing is cheap, simple and independent. The AIRC would already have the skills, structure and independence to provide a suitable initial remedy. Of course, ultimately this may need Court involvement to satisfy our constitutional requirements, but the initial conciliation and arbitration (to create a remedial contract) could be done in that AIRC.

My experience here is, I believe, valuable.

Typically, workers sign a contract to get a job. They are not lawyers. They do not read contracts, and if they did, they fail to understand what it means.

To illustrate many of my points, I will use some clauses from a typical Telstra AWA. This is a pattern agreement. It is given to workers, many of whom do not have any tertiary education, or even secondary education.

4. CAN WORKERS NEGOTIATE A CONTRACT THAT SUITS THEM?

Hours of Work

I am at a loss to understand why there is a need to set maximum hours. AWAs typically convert all hours to single time. While an AWA may say that your normal hours are 40 hours or 50 hours, all is at single time. You get paid single time for whatever the boss decides are reasonable hours for the week.

Take a Telstra AWA. What are the normal hours of work?

> *6.1 Your ordinary hours of work will be Telstra normal business hours… From time to time you may be required to work additional time other then during normal business hours.*

How does a worker understand this contradiction? If your hours are “normal business hours, how can you work additional time during “normal business hours”. Then what are “normal business hours”? Telstra is a 24/7 operation.

Ah, but you say that the worker can ask? Yes we did. I was appointed as a bargaining agent for a member and had a formal meeting with the two high level managers, we were assured that it meant 36 ¾ hours. We all agreed. So I simply asked that the AWA be amended to reflect the agreement.

Unfortunately, the Managers intimated that they had no authority to amend any words in the AWA. They had to go back to the corporate lawyers for advice. (I have confirmed this with numerous managers since and every one agrees that when they negotiate an AWA, they are not allowed to change even one word!)

Later I received written response to a series of amendments sought. There was no mention of the 36 ¾ hour “agreement”

We also sought that the work should be “Monday to Friday within a span of hours from 7am to 7pm, with a rostered day off.” Is not this generous flexibility for a day worker?

The response here was far more enlightening. It said:

> *In Telstra, aligning the work behaviour of our staff members to meet customer and business requirements is a critical, strategic development. We need an employment relationship with our workforce that is flexible and responsive to our rapidly changing environment. Individual contracts are a way of developing a more direct relationship with our staff members in order to be able to respond quickly to change and move to a culture that is more responsive to customer needs.*
>
> *The prescription of hours of work, RDOs etc is an attribute of the Award environment and will not be replicated in the (AWA). The contract environment offers an alternative model. It is based on a positive relationship between staff member and manager where there is give and take to get the job done whilst meeting the needs of both parties.*

In summary, despite a number of requests from the worker, not one word was changed in the pattern agreement. The manager was not allowed to change words that even he agreed with. We did not trouble the corporate lawyers with many more useless bargaining sessions. I have asked many workers to request amendments where they had concerns. All reported that they were unable to amend the pattern agreement.

Family Friendly Hours

Most workers want weekends off and a Rostered Day Off (RDO). This allows them to participate in family activities, particularly sporting activities involving their children. Typically, these are Saturday events. Workers want to be there, to coach, and to be team managers. This involves having some control over work.

Does the Telstra AWA “allows” this flexibility and certainty? What does a reader make of this set of words in the pattern agreement?

6.2 Your manager will discuss with you the days on which you must work your actual hours of work and your starting time.
6.3 Your manager will inform you of your hours of work prior to your start date.
6.4 The actual hours of work may change from time to time. Your manager will notify you of any change to your hours.

When I ask workers to read this carefully, then they seem to come to a surprising conclusion. The boss unilaterally will decide the days worked and hours of worked. Workers have no right to even have input. The boss can change it at any time and the worker will be informed!

MISREPRESENTATION

This is an area where much abuse occurs in Telstra. Lower level Managers make statements which are either untrue, reckless, unintentionally misleading or legally incorrect. They are made to induce workers to sign an AWA. This is probably officially promoted as some Managers have their performance assessed according to the number of workers that they can get onto an AWA.

For example, a worker will complain to me that he was promised an RDO, overtime payments, certain hours, benefits, promotion, security from redundancy, better tasks, etc as an inducement to sign an AWA. Then the promise is not fulfilled as either the Manager reneges, is replaced or forgets about the promise. I can only remind the worker that of a clause in his contract that says:

21.10 This Agreement forms the entire agreement between us regarding your employment and covers the field of terms and conditions applicable to your employment. No previous correspondence, agreements, representations or commitments will affect the terms and conditions of your employment with Telstra.

So even a written promise from the CEO would be excluded by this punishing clause.

LEGAL KNOWLEDGE OF WORKERS AND THE EMPLOYERS

Power of the Employer

An employer such as Telstra has an internal legal team and retains some of Australia's largest law firms to draft and review its AWAs. Some of the clauses from these firms are legal "works of art".

Let me demonstrate this. Telstra (and OTC) once had about 96,000 full time workers. Due to the "successful" competition policy, it now has about 36,000 full time workers in Australia. Many skilled workers are now driving taxis, mowing lawns and other non technical jobs. When technical staff are made redundant, they naturally seek work in the industry they know. An obvious source is the contract firms that accept the work previously done by the full time worker.

What does Telstra do to assist redundant staff find a new job? You will be surprised to find that they make every effort to block redundant staff from getting another job. Some time ago, one contractor leaked this clause to us:

51 Employment of Telstra employees and former employees

51.1 xxx agrees to work together with Telstra to develop a plan outlining the processes and timeframes for the transfer of suitably qualified and experienced employees of Telstra seeking transfer to xxx……

51.2 (e) xxx undertakes not to employ or engage on any terms any (former) employee of Telstra who has received or is eligible to receive a redundancy payment from Telstra to perform the Services or any other services to Telstra from the date of that person's termination of employment with Telstra and until the period of:

i. two years;
ii. one year;
iii. three months;
iv. one month.

(f) xxx must not do this within the area of:

i. Australia;
ii. the State of residence of the former employee of Telstra ;
iii. a radius of 50 km of the work-site of the former employee of Telstra.

(g) Sub-clauses 51.4(e) and (f) must be interpreted to have the effect as if they were a number of separate clauses and sub-clauses. Each paragraph is severable from each other paragraph. If any of the sub-clauses or paragraphs are invalid or unenforceable for any reason, the remaining sub-clauses or paragraphs remain valid and enforceable.

(h) Despite the other provisions of this sub-clause, the parties agree that the maximum restraint of a 2 year period within the area of Australia is acceptable and is to be applied.

51.4 If xxx employs any former employee of Telstra in breach of clause 51.3, xxx shall pay to Telstra within 15 Working Days of employing such former employee, 64% of any redundancy amount paid to such former employee, which represents the after tax cost of that liability, by Telstra upon that former employee being made redundant by Telstra."

Lawyers will appreciate the carefully and deliberately constructed clause, with deliberate contradictions, designed to provide for a restraint of trade, without any possible penalty. The contractor is punished if it hires ex-Telstra staff. But the most effective deterrent to workers is the fall back provisions, meaning that a legal challenge may be useless when the costs and time delays in the Courts are realistically considered.

Is this fair? Clearly this is grossly unfair to a worker. Current contractors intimate to us that they would like to employ ex-Telstra staff as they are the best skilled and immediately qualified. Yet Telstra is still trying to control the market.

I have already covered some of the problems of workers understanding the terms of an agreement. On one side, we have (allegedly) the best legal practitioners in the country, and unlimited funds. On the other hand we have workers like my 19 year old daughter, who without any legal training, would have difficulty appreciating what the words in a contract mean.

Public Holidays

When I discuss this with workers, I ask *"Do you have the right to spend Xmas day with your family?"* The AWA says:

> *6.5 Unless you are required to work, you will be eligible for paid public holidays that are observed by Telstra in your work location.*

Clearly the workers do not have a right to leave on any public holidays. They only get the day off if Telstra doesn't want them. This is a surprise to the workers.

If they do work on Xmas day, what do the get? There are complex rules, but there is no loading at all if you are not released for Xmas Day or any other public holiday. Of course AWAs do not provide for overtime. All work is at single time!

BONA FIDE CHOICES

Young People

If my daughter wishes to work in Telstra, she has no choice now (or under the work "choices' legislation) but to sign a pattern agreement. Telstra of course has been a test bed for "modern" industrial policies, and no worker (excluding CEO etc) has joined Telstra without "choosing" to sign a pattern AWA. I do exaggerate as they have the choice to accept the pattern agreement or remain unemployed.

Young worker - a Licensed Post Office

Let me call her Alex. Alex is now 18 years old. I understand that she has a slight disability. She has worked for a small family company (a Licensed Post Office) but did not know and could not find out if she was casual or part-time. She asked why her pay was so low. She was told that it was because she was a trainee and still learning. So he gave her a choice. The best was a contract with a salary of $9.68 per hour.

The business was a party to an award and the minimum hourly rate for an 18 year old was $12.30 at the time. This incidentally is the national safety net minimum wage, so the honourable employer would not even pay the safety net wage.

My contact was through her father and I had a written statements and a copy of the proposed contract. Of course I offered (through our union) to sue the honourable gentleman for the back wages and demand the minimum wages, but warned that she would face dismissal, without any unfair dismissal protections. He father agreed that she would be dismissed.

But the choice here was simple. He did not wish to put his daughter through a legal process or adversarial proceedings at her age. So the company got away with it, and the honourable gentleman profited from his actions.

Older Workers

I am currently a bargaining agent for a number of workers in a NSW construction company. The workers are dozer drivers. They signed an AWA to get the job. I will relate an actual case who I shall call Bill.

Bill signed an AWA, as did all his mates. He is paid $18.50 per hour as an all up rate. His ordinary hours of work are 50 hours per week. His actual hours average around 60 hours per week. This is all paid at $18.50 per hour. He is casual. He has no holiday pay, sick leave or other leave. He is away from his family for a minimum of 10 days per fortnight. He has not had a pay rise in over 2 years under the AWA. He is not paid for some work incurred travel time – often 6-8 hours per fortnight.

My calculations show that compared to the appropriate Award (mentioned in the AWA), he is paid considerably below the guaranteed "no disadvantage test" rate. There are about 20 other workers in his position and the company faces a large claim.

The honourable company directors do not even acknowledge our correspondence, even though I have been appointed bargaining agent for more than half of the workers. At the last meeting of workers, we were obliged to discuss the possibility that the honourable directors will wind-up the company if faced with a claim from the workers. They may be owed over half a million dollars. Of course the honourable directors solemnly pledged to the Employment advocate that the AWA passed the no-disadvantage test.

Here is their choice: Do the workers ask for the wages as solemnly promised, face collapse of the company and loss of their jobs and accrued benefits, without any redundancy, or do they continue with an unlawful contract?

Why do dozer drivers have to address such difficult questions? Where is the protection for workers? Who can protect our vulnerable workers from exploitation from honourable company directors and their well heeled lawyers?

Give me a statement about how the WC Bill will help and protect these hard workers and their families from a massive loss!

CONCLUSION

In order to compensate for the uneven playing field, I believe that a process is needed to review unfair contracts.

Recommendation: that the AIRC be given power to review, amend or terminate contracts that have been unwisely entered into by workers who have been the victim of duress, undue influence, unconscionable conduct, illegal conduct and misrepresentation by an otherwise honourable employer.

The constitutional problems could possibly be overcome using a procedure similar to the existing s166A, where the AIRC may make a finding of fact, but is enforceable in a Court of competent jurisdiction.

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