WORKCHOICES: A LICENCE TO EXPLOIT

SUBMISSION TO
SENATE EMPLOYMENT, WORKPLACE RELATIONS
AND EDUCATION LEGISLATION COMMITTEE
ON THE WORKPLACE RELATIONS AMENDMENT (WORKCHOICES) BILL 2005

ORGANISATION: **FEDERATION OF ETHNIC COMMUNITIES COUNCILS OF AUSTRALIA - WOMEN'S STEERING COMMITTEE**

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FECCA

WOMENS STEERING COMMITTEE

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Executive summary

- The Women's Steering Committee of FECCA considers that the new workplace relations laws will irreparably damage the working lives of women from CLDB and their families.
- The proposed laws will:
  - undo the hard work that has been done to assist women from CLDB, at Federal and State levels;
  - cement existing barriers faced by women from CLDB in the workplace;
  - fortify those barriers; and
  - erect new barriers.

- We consider that the government has failed women from CLDB.

Who We Are : The Women's Steering Committee of FECCA

1. The Federation of Ethnic Communities' Councils of Australia (FECCA) is the Australian national peak body representing Australians from culturally and linguistically diverse backgrounds. FECCA supports and promotes multiculturalism, full access and equity, community harmony and social justice.

2. The Women's Steering Committee of FECCA concentrates on issues affecting women from culturally and linguistically diverse backgrounds (CLDB). We argue that all discrimination against women needs to be eliminated, whether it is on the grounds of gender, religion, sexual orientation, race, ethnicity or age; that women have the right to freedom from violence and oppressive acts, including domestic and family violence, detention that compounds pre-existing trauma, detention without fair trial or justifiable reasons and traditional practices detrimental to the health and well being of women and girls; and that women have the right to access services, information and opportunities that will optimise quality of life. It is actively involved in lobbying for the interests of women from CLDB, especially those from disadvantaged backgrounds.

3. The Women's Steering Committee of FECCA counts amongst its 10 affiliates, Ethnic Communities' Councils, the Migrant Women's Lobby Group, the Victorian Immigrant and Refugee Women's Coalition, the National Ethnic Disability Alliance, and the Islamic Women's Welfare Council of Victoria.

Suppression of community debate

4. The Committee condemns the token consultative process adopted to dismantle an industrial relations system which has served Australia since 1904. The *Workplace Relations (Workplace Choices) Bill 2005* (the Bill) is 687 pages long. It was released on 2 November 2005, with the deadline for submissions set for only seven days later, on 9 November 2005. We object to the fact that public submissions and consultation on such a major legislative initiative are to be compressed into such a short period. By any standard, this is an insult to the community.

5. For vulnerable workers, such as women from CLDB, the disadvantage is especially acute because such women will be among the first casualties of the reforms and have much more to lose by their introduction.

Women in the workplace

6. The Women's Committee of FECCA considers that the foreshadowed changes will operate to the detriment of women generally and of women from CLDB, specifically.

7. In order to understand the unique position of women from CLDB in the workplace, it is useful first to summarise the obstacles faced by women in the workplace. We do not propose to deal with this in detail, but there is well documented evidence[1] indicating that:

[1] See for example Submission by Women in Social and Economic Research, Curtin Business School, to the 2005 Senate Employment, Workplace Relations and Education Reference Committee Enquiry into

- there are systemic barriers to women's survival, let alone advancement, in the workplace;
- women are concentrated in insecure, low-paid, part-time or casual sectors of the workforce, in non-strategic industries;
- their working life is interrupted by pregnancy;
- they are likely to work in small unregulated workplaces including in their homes or the homes of others[2];
- balancing work and life is especially difficult for women, who tend to shoulder a greater share of carer responsibilities and who tend to be primary care givers;
- their bargaining power is low or non-existent and
- women fare worse under individualised bargaining models.

8. For these reasons, the bargaining power of women in the workplace is substantially inferior to that of men.

Women from CLDB in the workplace

9. The disadvantages faced by women in the workplace is multiplied when one considers the disadvantage faced by women from CLDB. Superimposed upon

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Workplace Agreements ; submission by M.Baird and P. Todd , to the 2005 Senate Employment, Workplace Relations and Education Reference Committee Enquiry into Workplace Agreements.

[2] See Submission of the Textile Clothing and Footwear Union of Australia to the 2005 Senate Employment, Workplace Relations and Education Reference Committee at pars 19, 22

the disadvantages listed above are the additional disadvantages associated with being from such a background. These include:

- geographic dislocation,
- a history of multiple displacement which has denied them normal benefits (such as educational opportunities) associated with continuity of life patterns,
- lack of English language proficiency,
- different levels of education and literacy,
- unfamiliarity with a new culture and customs,
- heavy responsibility to provide financial support for family in the country of origin,
- likely life-experience of trauma (such as torture, dispossession, abuse by those in authority) which makes it difficult for them to assert themselves in a situation of power imbalance,
- a greater likelihood of exploitation by unscrupulous employers,
- being the target of negative stereotypes and racist behaviour at work,
- a diminished idea of self-worth,
- difficulties with having their qualifications recognised,
- humanitarian entrants from small and emerging communities being unable to demonstrate their qualifications due to their inability to bring relevant documents from their country of origin,
- limited knowledge of services available,
- limited education opportunities,
- higher unemployment of young adults,
- lack of childcare (including lack of access to an extended family who would normally have provided this), and

- difficulty accessing services which are predicated on a "white Anglo-Celtic" paradigm.

10. Restrictions on access to social security entitlements on arrival in Australia mean that women from CLDB must find employment or be completely dependent upon their sponsors or extended family, many of whom are themselves under financial pressure. This translates into a willingness to accept whatever employment they can get and to refrain from complaining about working conditions even where they are being patently exploited or abused.

11. Women from CLDB women who hold temporary protection visas (TPVs) are not eligible for Government assistance for English language tuition. Without access to English language training, their capacity for improving their employment prospects are severely diminished.

12. The factors we list above have generated a pool of extremely vulnerable women who are ripe for exploitation and are already being exploited. Without adequate safeguards, that exploitation will increase dramatically. These women depend upon the protection of a decent system of workplace regulation, underpinned by comprehensive awards, a strong arbitral system, together with protection from unfair dismissal.

13. We fear that, under the proposed laws, irreparable harm will be done to women from CLDB and their families.

The Vocabulary of 'Choice'.

14. It is misleading to couch the new initiatives in the vocabulary of choice because the single greatest flaw in the proposed laws is that they erroneously presume equality of bargaining power between employers and workers. Initiatives such as the increased emphasis on individual negotiation at grassroots level ignore the difficulties faced by those who are competing for work in a market which is geared against them. Where one has no bargaining power, there can be no choice.

15. For similar reasons, we take issue with the use of misleading language in the promotional material associated with the legislation. Terms such as *"flexible, simpler, fairer"*[3], *"enjoy"*[4], *"protect"*[5], *"relevant to modern workplaces"*[6], *"accessible"*[7], *"easily understood"*[8], *"simplify"*[9], *"will not be cut"*[10], *"standardised"*[11], *"parties can choose"*[12], *"will support genuine choice"/"will facilitate choice"*[13] do not convince us, for reasons which we set out below. We are especially offended by the invention of the employer greenfields '*agreement*' which is in effect a unilateral declaration of the employer's own desires[14].

[3] Explanatory Memorandum - Outline
[4] "WorkChoices: A New Workplace Relations System" p 31
[5] "WorkChoices: A New Workplace Relations System"p 37
[6] "WorkChoices: A New Workplace Relations System"p 61
[7] "WorkChoices: A New Workplace Relations System"p 61
[8] "WorkChoices: A New Workplace Relations System" p 61
[9] "WorkChoices: A New Workplace Relations System" p 61
[10] "WorkChoices: A New Workplace Relations System"- p35
[11] "WorkChoices: A New Workplace Relations System" p 35
[12] "WorkChoices: A New Workplace Relations System" p 35
[13] "WorkChoices: A New Workplace Relations System" p 39.
[14] cl 96D

Generating Confusion

16. Far from simplifying the industrial relations system, the new initiatives will result in more, rather than less, regulation and considerable confusion.

17. The federal system and five state systems will in effect be replaced by seven systems: the federal "constitutional corporations" system; the federal "conciliation and arbitration" transitional model (which extends for five years) and the five state systems which will continue to operate for employers who are non-constitutional corporations or who, for other reasons, do not fall within the federal system[15].

18. Far from decreasing, the level of regulation will increase. The Australian Industrial Relations Commission (AIRC) and Employment Advocate will be supplemented by, among other things, the Fair Pay Commission, the Award Review Task Force and the Office of Workplace Services, each with the capacity to affect the working of the other.

19. The number of industrial instruments has increased and we consider that, even for those from an English-speaking background, it will be difficult to understand how and when they operate. For CLDB women, this simply means that an employer will find it even easier to nominate an instrument which best suits its enterprise, at the expense of employees. The explanatory memorandum notes that *'many employees currently do not know which award applies to them.."*[16], but our fear is that the proposed changes will exacerbate this problem. Women from CLDB will be required to understand the

[15] For example, certain state employees
[16] Explanatory Memorandum – Regulation Impact Statement point 3 - Costs and Benefits to Employees

difference between an Australian Workplace Agreement[17], a pre-reform AWA[18], an award, a pre-reform award[19], a transitional award[20], a notional agreement preserving State awards[21], a Victorian reference award[22], a pre-reform federal wage instrument[23], a pre-reform non-federal wage instrument[24], a pre-reform State wage instrument[25], a pre-reform Territory wage instrument[26] an employee collective agreement[27], a union collective agreement [28], a union greenfields agreement [29], an employer greenfields agreement[30] and a multiple business agreement[31] .

20. The patchwork of regulation will generate even more confusion because the classification of an employer as a constitutional corporation is a complex question and, as implicitly recognised by the WorkChoices booklet[32] classification of a corporation as a 'constitutional corporation' is still open to debate. There is thus a degree of uncertainty for employers and employees at this threshold point. We foresee significant potential for employers to exploit this uncertainty and evade their responsibilities by claiming either to be covered or not covered by the federal system, as the situation suits them.

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[17] cl 96
[18] cl 4
[19] cl 4
[20] sch 13 cl 1
[21] [referred to in item 10 of sch 4,p678]
[22] sch 13 cl 2
[23] cl 90B
[24] cl 90B
[25] cl 90B
[26] cl 90B
[27] cl 96A
[28] cl 96B
[29] cl96C
[30] cl 96D
[31] cl 96E
[32] at p 11 of the booklet entitled "WorkChoices A New Workplace Relations System

Reducing the Role of the AIRC

22. The Committee opposes the reduction in the role of the Australian Industrial Relations Commission and reassignment of its most important functions to authorities which conduct business behind closed doors and whose decisions cannot be reviewed. The Fair Pay Commission[33] and the Award Review Taskforce[34] can set wages and reorganise classifications, respectively, without being obliged to hear from affected persons, justify their decisions or face an appeal or review.

Dispute Resolution

23. We consider that the focus on the prevention and settlement of industrial disputes, which until now has served the vulnerable well, will now be ignored, in favour of a focus on the wellbeing of corporations.

24. Women from CLDB will suffer under the new model dispute resolution system, where the focus is on employers and employees settling disputes face to face at the workplace level[35] especially as the employer is given a broad discretion, while the dispute is being resolved, to require an employee to perform '*other available work*' and order the employee to work at another workplace [36].

[33] cl 7K
[34] at p 62 of the booklet entitled "WorkChoices A New Workplace Relations System"
[35] cl 174
[36] cl 176

25. Under the new laws the AIRC will have extraordinarily limited powers in dispute resolution and in some cases will not be able to take certain action even if the parties want the AIRC to do so and agree that the AIRC should do so[37].

26. It would also seem that dispute settling procedures would not be able to be invoked other than in a narrowly prescribed set of circumstances[38]. There is therefore no cost-effective recourse for women from CLDB who are faced with a dispute which falls outside these categories. Even if there is a legitimate grievance, such matters will need to be take to a court of law as the AIRC no longer has any general dispute settling powers, even if the parties would like it to make a binding order (see above). Women from CLDB will not have the resources to litigate.

> *Phuong lives in the inner city and works as a cleaner in the city, cleaning offices. She has a dispute with her employer. After unsuccessfully trying to resolve the dispute at the workplace and being unable to agree on who is to conduct an alternative dispute resolution process, Phuong notifies the Industrial Registrar. As there continues to be no agreement on who is to conduct the alternative dispute resolution process, Phuong applies to have the matter dealt with by the AIRC. Her employer tells her that the company is short-staffed in an outer suburban factory and, while the dispute is being resolved, she should work there, cleaning the latrines. Phuong suffers expense and inconvenience as she has to catch a train and two buses to get to the outer suburb. She asks the AIRC to order the employer to let her work in her previous location, but the AIRC tells her it does not have the power to do so. She asks the AIRC to settle the dispute quickly, but the AIRC tells her that under the new laws it cannot make any orders.*

[37] cl 176D (5) prevents the AIRC from compelling a person to do anything, making an award, making an order in relation to the matter or appointing a board of reference

[38] note to cl 173

27. There does not appear to be any prohibition on an employer dismissing an employee while the dispute resolution process is in train. Where the employer employs fewer than 100 employees, the employee will not be able to challenge that dismissal[39].

28. In such circumstances there is little incentive for women from CLDB to raise a dispute with their employer. We anticipate that women from CLDB with legitimate grievances will self-censor and remain silent rather than submit to a system so loaded in favour of the employer.

Scrutiny of Collective Agreements

29. The AIRC will no longer scrutinise collective agreements (see below). The new laws merely require the employer to lodge the agreement with the Employment Advocate after employees have approved it. The removal of the AIRC's role, combined with the removal of the no disadvantage test and the obligations on the employer to explain the agreement and the other severe reductions of protections for employees entering a collective agreement (see below, Agreement Making), means that the interests of women from CLDB will be overlooked.

Empowering 'Closed Door' Authorities

30. As indicated above, the Committee opposes the reduction in the role of the AIRC and reassignment of its most important functions to authorities which

can choose to conduct business behind closed doors and whose decisions cannot be reviewed. The establishment of these bodies is inconsistent with transparent decision-making and is not in the public interest.

The Fair Pay Commission

31. The Australian Fair Pay Commission (AFPC) will have important duties which were previously the province of the AIRC. It will set wages, determine the timing, scope and frequency of wage reviews, the manner in which wage reviews are conducted and the date on which wage setting decisions are to come into effect[40].

32. We note that the AFPC's parameters are to promote 'the economic prosperity of the people of Australia'[41], as opposed to promoting 'the economic prosperity and welfare of the people of Australia' (emphasis added). The reference to the welfare of the people appears in the objects of the Act and would seem to us to be an integral element of wage setting [42]. The omission of the reference to 'welfare of the people' confirms our fear that the focus of the AFPC is deliberately confined to economic considerations, rather than the broader welfare of the community. Such a shift in focus militates to the disadvantage of vulnerable groups such as women from CLDB.

33. We also note with concern the small size of the AFPC and its members' exposure to risk of non-renewal of appointment. The AFPC will service the whole of Australia, yet it comprises only a Chair, (who may be part –time) appointed for up to 5 years[43] and four part-time Commissioners[44] who will be

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[39] item 113 proposed amendment to s 170 CE
[40] cl 7K
[41] cl 7J
[42] s 3 *Workplace Relations Act 1996*; (WRA) the reference to 'welfare' in the objects will remain : cl 3
[43] cl 7P

appointed for up to 4 years[45] (emphasis added). Under this formula, there would be nothing to stop the entire AFPC comprising part-time, short term appointments of, say, 6 months at a time. Nor is it necessary for all members to sit. If a member is unavailable, as few as three members (including the Chair) may exercise wage-setting functions[46]. Either it is anticipated that the workload will be minimal, because little will be done, or a substantial workload has been relegated to an under-resourced body. By contrast, the AIRC, has 45 full-time members[47], appointed until the age of 65[48], plus a substantial Registry[49]. The limits on the AFPC's size and tenure will, in our view, militate against development of a body with corporate memory and depth of knowledge. They will also ensure that this body can in effect be censored by the simple expedient of non-renewal of a member's term and replacement with a docile substitute. Such fragile and inferior mechanisms do not serve the interests of those who need and deserve protection, such as women from CLDB.

34. As mentioned earlier, we are also concerned at the lack of transparency and absence of accountability for a body which exercises such important functions. There is no obligation for the AFPC to hold public hearings or, indeed, to hear from those who might be affected by its decisions. This means that even if its decisions are based on a fundamental misapprehension of the

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[44] cl 7G
[45] cl 7Y
[46] cl 7L
[47] Although the President may consent to a member performing duties on a part-time basis – s 12 *WRA 1996*.
[48] Although a President appointed after Act no 46 of 1994 may be appointed for a fixed term - s 16 former *WRA 1996*.
[49] Part IV WRA 1996

law or fact, the community may never know this. In any event, there is no appeal from a decision of the AFPC, so it is in effect a law unto itself[50].

The Award Review Task Force

35. We have similar concerns about the Award Review Task Force. We are at an immediate disadvantage in addressing this matter because there is little reference to this body in the Bill, although it is mentioned extensively in the promotional booklet which preceded introduction of the Bill. We presume the machinery for its composition will therefore be relegated to subordinate legislation or mere administrative prescription . Again, the lack of transparency is a problem.

36. In so far as we are able to glean information about the Award Review Taskforce, it seems that it, too, will be a small body comprising a Chairman (sic) and a 'reference group'[51]. In addition to a recommendatory function, it will have the sole power actually to rationalize award wages and classifications[52] . These are important functions which would formerly have been the province of the AIRC and subject to public hearing from affected parties and interest groups. Like the Fair Pay Commission, the Award Review Task Force is entrusted with important powers in relation to wages, with no obligation to hold public hearings, no requirement for its decisions to be published and no appeal from its decisions.

[50] cl 7K requires reasons but these cannot be challenged.
[51] See booklet entitled "WorkChoices A New Workplace Relations System" at p 35
[52] See booklet entitled "WorkChoices A New Workplace Relations System" at p 62. The AIRC will conduct the award rationalisation exercise, but this is distinct from rationalisation of award wages and classifications, which the taskforce will conduct.

Awards

37. Women are more likely than men to depend on awards, as are part-time workers (a preponderance of whom are women) [53]. Despite rhetoric assuring workers that their award rights will remain intact[54], the reality is that:

    - new awards will not be made except as part of the award rationalization process[55] ;
    - certain terms of existing awards will be rendered unenforceable[56];
    - existing awards will be rationalized and may even be deleted[57].

38. Existing awards will continue to cover current employees and new employees of enterprises in which the employer is bound by the award. However, there will be a further reduction of allowable matters in existing awards and certain other terms[58], though preserved in the interim, will not be able to be included in new awards (which in any case are unlikely to be made).

39. The Committee opposes the dismantling of the award-making powers of the AIRC and the associated erosion of the place of awards in the industrial system. Awards have traditionally been an important safeguard for women from CLDB and other vulnerable workers. Dispensing with them represents a backward step for such workers. This move is especially objectionable when

[53] See the Submission by Women in Social and Economic Research, Curtin Business School, to the 2005 Senate Employment, Workplace Relations and Education Reference Committee Enquiry into Workplace Agreements at p 7.
[54] See booklet entitled "WorkChoices A New Workplace Relations System" at p 8
[55] cls 118E, F
[56] cl 116B
[57] cls 118ff
[58] Long service leave, superannuation, jury service, notice of termination – cl 116G, 117

seen against the background of government promises to maintain workers' rights.

The Fair Pay and Conditions Standard

40. The Australian Fair Pay and Conditions Standard[59] (AFPCS) will in effect become a rudimentary substitute for the no disadvantage test. Our concern is that the AFPCS is confined to only a handful of matters (4 weeks annual leave of some may be 'traded' [60]away, personal carers leave (including sick leave), unpaid parental leave, maximum hours of work [61] and wages (minimum wage and award classification wages). While the government has been keen to emphasise that these matters are "protected", the subtext is that everything else may be traded away. This, combined with the dilution of the award system, means that vulnerable workers such as women from CLDB may be asked to take several steps backward in order to keep their jobs.

41. Regrettably, the standards set by the AIRC in the recent Family Provisions Case[62] are conspicuously absent from the AFPCS. This is a backward step for women in Australia. In these circumstances, we fail to see how the Bill may be said to *"carry forward the evolution of Australia's workplace system to…balance work and family life"*[63].

[59] cl 89
[60] cl 92E; despite the provisions preventing an employer from requiring this or exerting undue influence, women from CLDB with poor bargaining power are expected to agree to trading away the term even if they do not wish to do so.
[61] Because maximum hours of work may in some cases be averaged over 12 months, it will also be difficult to ascertain what a normal working week will be, which in turn will complicate the setting of penalty rates in agreements cl 91C
[62] PR082005 - 8 August 2005
[63] Explanatory Memorandum - Outline

42. We anticipate that the AFPCS will become the lowest common denominator for a variety of purposes under the new laws. When an agreement ends, if it is not replaced, workers will now be covered by the AFPCS [64]. The AFPCS will thus eventually generate downward pressures which will suppress working conditions generally.

Agreements

Abandonment of the No Disadvantage Test

43. The Committee notes with concern the abolition of the 'no disadvantage test' which safeguards the interests of the vulnerable, including women from CLDB. Under the 'no disadvantage test,' an AWA or certified agreement could be made only if, considering all the circumstances, the Employment Advocate [65](in the case of AWAs) and the AIRC[66] (in the case of certified agreements) concluded that despite any apparent trade-offs, the instrument did not disadvantage employees in relation to their terms and conditions of employment[67]. Whilst the application of the test was not free from problems, especially when administered by the Employment Advocate [68], it provided some measure of insurance that, where employees did 'trade off' existing terms, the total result would not operate to their disadvantage.

44. The 'no disadvantage test' is of particular importance to women from CLDB, who are unlikely to have the resources to conduct the technical comparison

[64] See Explanatory Memorandum to cl 103R
[65] s170 VPB (1) WRA 1996
[66] s170 LT (2) WRA 1996
[67] s170 XA
[68] For example, see "Plastics workers seek back pay for wrong award" The Age, 16 September 2005, which outlines the mistaken selection by the OEA of a comparable award as the foundation for an AWA.

between the agreement being offered them and their existing award terms. The assistance of an independent authority is vital.

45. The 'no disadvantage test' will be replaced by the Australian Fair Pay and Conditions Standard[69], which is qualitatively inferior. As noted above the Australian Fair Pay and Conditions Standard comprises only five matters[70] and cannot be reasonably compared to the comprehensive balancing of circumstances involved in application of the 'no disadvantage' test. Under the proposed law, there will be rudimentary minima and a self-policing system, weighted in favour of the employer, involving a mere obligation on the employer to lodge a declaration attesting to compliance with requirements for agreement making and agreement content.

Operation of Agreements Despite Non-Compliance

46. The Explanatory Memorandum to the Bill promises a "*simpler streamlined lodgement only process*"[71], but this comes at enormous cost to employees. Under the proposed legislation, agreements (whether AWAs or collective agreements) will commence operation upon their lodgement with the Employment Advocate[72], whether or not they have complied with the safeguards set out in Divs 3 and 4[73]. As conceded in the Explanatory Memorandum:

> "*For example, an employer might lodge a collective agreement without giving employees ready access to the agreement ..or seeking*

[69] Explanatory Memorandum – Outline- point 8 - Summary
[70] Cl 89
[71] Explanatory Memorandum - Outline
[72] Cl 100 (1)

approval for that agreement….In those circumstances the agreement would come into operation."[74]

47. As also conceded by the Explanatory Memorandum, the only way to remedy this is for the matter to be decided by a Court[75]. For women from CLDB, pursuing their rights through litigation against a well-resourced employer, who has the power to hire and fire, is not a realistic option.

> *Asha has a job as an overlocker with a clothing manufacturer. She is the sole breadwinner in her family. Her employment is governed by an award, under which she is entitled to penalty rates. One day, her employer tells her that she will no longer be paid penalty rates, because her employment is now governed by a collective agreement, which was lodged by the employer the previous week. Asha has never seen the collective agreement. Because of the new laws, the collective agreement will operate until it is challenged in Court. Asha cannot afford to go to Court but more importantly, she does not want to antagonize her employer because she needs her job. Asha therefore works under the inferior collective agreement, which she never saw and to which she never agreed.*

Abandonment of Requirement to Explain Agreements

48. The removal of the scrutiny of agreements is coupled with a very brief, waivable consideration period or "access period" for workers, of only seven

[73] Cl 100(2)
[74] Explanatory Memorandum – 'New section 100 – when a workplace agreement is in operation'
[75] Explanatory Memorandum – 'New section 100 – when a workplace agreement is in operation'

days[76]. This represents a considerable diminution of the safeguards under the current system, which requires employers to explain the agreement to employees [77]. Despite reference to the capacity for an employee to obtain advice, obtaining such advice in such a short time will be difficult for the vulnerable, such as women from CLDB, especially as even that brief time period may be waived.

> *Rahat has been unemployed for a year. She joins a queue of people applying for a job as a packer at a warehouse. Her prospective employer tells her he would like to hire her, then gives her an AWA and asks her to sign it, together with another form for her to sign, indicating that she waives the seven day period for considering the AWA . She tells him she cannot read English well and would like to take both documents home so that her daughter can explain them to her. The employer says there is nothing to worry about in the AWA, that normally she would have seven days to look it over, but the warehouse needs someone straight away so it would be good if she could sign it and start tomorrow, otherwise there are lots of other people who would like the job. Rahat agrees to sign the AWA and the waiver because she wants the job, even though she does not understand the AWA or the waiver.*

Abandonment of Requirement to Explain Terms to Women from CLDB

49. The Committee is especially alarmed at the abandonment of the protection provided to women and persons from non-English speaking backgrounds, in making a collective agreement. No longer is there any requirement that the employer have explained the agreement to employees at all, nor that the needs of the vulnerable have been specifically addressed.

[76] cl 98

50. Under the current WRA 1996, a collective agreement cannot be certified unless an explanation of its terms has taken place:

> *"in ways that were appropriate, having regard to the person's particular circumstances and needs. An example of such a case would be where persons included :*
>
> *(a)women*
> *(b) persons from a non-English speaking background or*
> *(c) young persons"*[78]

51. This provision has been used to assist women from CLDB. The AIRC has refused to certify agreements which do have not been adequately explained to people in their first language [79]. The provision is a very important protection for women for CLDB. Its removal sends a message about the low priority given to them by the government.

52. We cannot accept as a fair substitute the obligation upon the Employment Advocate merely to 'encourage parties' to agreement making to take into account the needs of workers in disadvantaged bargaining positions[80]. This is so weak as to be ineffectual. We also note that the Employment Advocate is in fact <u>discouraged</u> from taking any active role in quality control over agreements because the Employment Advocate *"is not required to consider or*

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[77] S 170VPA WRA 1996 for AWAs; ss 170 LJ (3), 170 LK (7) for certified agreements.
[78] S 170LT WRA 1996
[79] In *Re Epona* (PR931064. 6. 5.03) the AIRC refused to certify an agreement involving a clothing manufacturer because information provided to the largely NESB workforce was inadequate.
[80] cl 83BB (2);

determine"[81] whether the employer has met the conditions to which it attests in the declaration it is required to lodge before an agreement may commence.

53. Further because, under the new system, an agreement commences upon lodgment[82], unfair agreements (which override awards) will come into operation swiftly and with no checks and balances.

54. Especially abhorrent is the introduction of the employer greenfields "agreement"[83]. The use of the word "agreement" in this context distorts the natural meaning of that term because these agreements permit an employer to make an agreement without negotiating with anyone – neither a union nor employees.

AWAs

55. The new system concentrates upon encouragement of individualized bargaining to the detriment of the vulnerable. Australian Workplace Agreements (AWAs) to date have included a preponderance of managerial employees[84] . They are not an instrument suited to protecting the needs of the vulnerable, in particular women, who fare worse under AWAs than under collective agreements[85]. Women from CLDB are an even more endangered subset of this sector.

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[81] cl99B (5)
[82] cl 100
[83] cl 96D
[84] Report of 2005 Senate Employment, Workplace Relations and Education Reference Committee Enquiry into Workplace Agreements Report at par 2.30
[85] See Submission of D Peetz to the 2005 Senate Employment, Workplace Relations and Education Reference Committee at p 15

56. Whereas previously, AWAs overrode certified agreements only to the extent of any inconsistency[86], they now operate to override both awards and collective agreements in a blanket way[87]. Thus, even where workers might have expended considerable time and resources in negotiating a collective agreement, an employer may use its superior bargaining power to pick employees off one by one and enter into AWAs which cover a smaller range of conditions, inferior in quality to the collective agreement or award. Where the AWA is silent, it will no longer be presumed that the award or collective agreement will fill the gap.

57. We have already voiced our concern about the removal of any vetting process for AWAs (see above). As noted above, although the Employment Advocate's track record in protecting workers' rights has been less than satisfactory (see above), removal of its power to provide at least some scrutiny of agreements is regrettable and suggests a lack of concern for the interests of the vulnerable.

58. In our experience, women from CLDB will not be in a position to stand up to an employer who has the power to hire and fire, set shift rosters, determine who gets overtime work and so on.

59. It is also perfectly clear that the proposed legislation expressly supports the proposition that an employer may refuse to hire a person who does not sign an AWA[88]. As has already been noted in a recent Senate Committee Report, "

[86] s 170VQ WRA 1996
[87] cl 100A, 100B
[88] cl 104(6)

the only option for non-managerial employees, particularly women, casual and part-time workers is to accept an AWA"[89].

Threats to Freedom of Association posed by Industrial Action and Right of Entry Provisions

60. The Committee is concerned that new provisions governing industrial action and right of entry will exert further pressure on women from CLDB. As explained above, women from CLDB fear for their job security and often come from backgrounds where they fear reprisals resulting from the taking of action which might, even as a remote possibility, reveal one's identity, to those in positions of power. We expect that the new laws proscribing the taking of industrial action will have the practical effect that women from CLDB will self-censor rather than speak out, refrain from participating in legitimate industrial action and thus work in silence, under inferior conditions.
61. It has already been observed, in some industries, that the number of members who do not want to disclose their union membership to their employers has been increasing and that these workers are often women and usually from a non English speaking background[90].

62. The Committee opposes the new provisions concerning the taking of industrial action. Under the new laws, the preconditions to the taking of such action are so cumbersome and prescriptive that in our view they impede the right to strike.

[89] Report of 2005 Senate Employment, Workplace Relations and Education Reference Committee Enquiry into Workplace Agreements Report at par 2.10

63. For women from CLDB, there is a real concern that the new laws will lead inevitably to revealing the identity of those who take industrial action. For example, despite the technical safeguards, the practical effect of requiring that only those union members who are employees and would be covered by the agreement may vote[91], could, in our view lead to a process of identification of women with some particularity, especially in smaller workplaces.

64. The net effect will be that women from CLDB will fear joining unions or revealing their union membership and therefore exercising important rights.

Termination of Employment

65. Superimposed on the unfairness already discussed above, we will now have a system which permits unfair dismissals where an employer has 100 or fewer employees[92]. The Committee objects to this arbitrary and mean -spirited curtailment of workers' rights. Again, the vulnerable, including women from CLDB, will be badly affected as they are concentrated in low paid, insecure jobs.

> *Yasmin is a single parent. She is trying to have her overseas qualifications as an accountant recognised. Until she can do so, she works as a sales person in a bookshop, which requires her to use a cash register. One day, her supervisor accuses her of having stolen $ 300 from the till and dismisses her instantly, for*

[90] Submission of the Textile Clothing and Footwear Union of Australia to the 2005 Senate Employment, Workplace Relations and Education Reference Committee at par 50
[91] cl 109R
[92] cl 170CE(5E)

gross misconduct. Two weeks later, it is discovered that the missing money had been placed in the safe by another employee, unbeknown to Yasmin. When Yasmin applies for benefits at Centrelink, she is told that, because she was dismissed for misconduct, her entitlement to benefits will be curtailed. She also knows that if she applies for other jobs, she will have to explain why she left her previous job . Yasmin wishes to clear her name, but cannot make an application in respect of harsh unjust or unreasonable termination because the bookshop employs only 45 people.

66. The Committee also has concerns about the new provisions concerning termination of employment for 'operational reasons'[93]. This term is not synonymous with 'genuine redundancy' and we foresee potential for unfair dismissal by employers (of any size) to be shielded by the mere device of claiming the termination was for operational reasons. We anticipate that the test of whether a termination was for 'operational reasons' will rely on evidence which the employer is uniquely placed to generate, if not manipulate.

Vulnerable Workers

67. For all the reasons set out above, the Committee considers it misleading for the government to make claims about protection of the vulnerable. It is clear that under the new regime, women from CLDB and other vulnerable workers have much to lose and much to fear.

68. The new regime represents a systemic erosion and dismantling of an apparatus designed to protect the weak and low-paid. The new focus will be on promoting the economy at the expense of the vulnerable.

69. In some respects the new regime institutionalises discrimination against women from CLDB. Discrimination may involve removal of protection from a vulnerable class of persons[94] as well as the imposition of new barriers. Although the proposed legislation is facially neutral, applying in the same way to everyone regardless of race or gender, discrimination may still exist where there is a disparate adverse impact on a vulnerable group. Women from CLDB are:

- facing the imposition of a condition or requirement (participation in an industrial system which is heavily weighted in favour of employers and individual contracts),
- that has, or is likely to have, the effect of disadvantaging them,
- with which they cannot comply (or can comply only with difficulty),
- but with which others not of their background (men[95], those with good English language skills[96]) can comply or comply more easily, and
- which is unreasonable in the circumstances[97].

70. The existence of anti-discrimination laws or avenues for institution of unlawful termination proceedings does not alter this conclusion. Complaint-

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[93] cl 170 CE(5C)
[94] *Waters v Public Transport Corporation* (1991) EOC 92-390
[95] Because men are less likely to be concentrated in low paid and insecure jobs
[96] Because such persons are more likely to be able to understand the terms of an individual workplace agreement and to be able to negotiate.
[97] Despite assertions to the contrary by the government, there is no foundation for the argument that these changes are based on economic need. See Report of 2005 Senate Employment, Workplace Relations and Education Reference Committee Enquiry into Workplace Agreements Report at par 3.1 ff

driven mechanisms may provide remedies for those few women who have the financial and emotional resources to invoke them. But they cannot address the systemic disadvantage which will follow from the introduction of the new laws.

Access to the Law

71. Our experience with legal aid or assistance for employment related matters gives us no cause for optimism. Much of the new regime depends on employees engaging in time consuming, expensive litigation. Unless the government guarantees legal aid funding, up to the appeal and review stages, for all cases arising under the new laws, where an individual worker's rights are at stake, women from CLDB and other vulnerable workers will be in no position to challenge unfair work practices. This underscores the disadvantage generated by the loss of the valuable services of the AIRC, which played such an important role in defusing, preventing and settling industrial disputes.

CONCLUSION

72. If a country may be measured by how it protects its vulnerable, then with these new workplace laws, Australia will diminish in stature. The Committee laments the impending loss of what few rights women from CLDB had in the workplace. The Committee considers that women from CLDB have been abandoned.

11 November 2005