Submission
to
Senate Employment, Workplace Relations and Education Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill

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Introduction

Job Watch Inc is an employment rights legal centre, which, since 1980, has operated as the only service of its type in Victoria. The centre is funded by the Victorian State Government (the Department of Innovation, Industry and Regional Development – Industrial Relations Victoria) and by the Commonwealth Office of the Employment Advocate (OEA).

Job Watch's core activities are:

- The provision of advice, information and referral to Victorian workers via a free and confidential telephone advisory service.[1]
- A community education program that includes publications, information via the Internet, and talks aimed at workers, students and other organisations.
- A legal casework service for disadvantaged workers and workers experiencing human rights abuses.
- Research and policy advice on employment and industrial law issues.
- Advocacy on behalf of those workers in greatest need and disadvantage.

Job Watch has a statewide focus and services a broad range of Victorian workers, who number around 20,000 annually. We have played a vital role in providing advice and assistance about mainstream employment issues to the Victorian workforce since the deregulation of the industrial relations system in Victoria in the early 1990s and subsequent dismantling of the state industrial relations system.

Job Watch maintains a database record of our callers, which assists us to identify key characteristics of our clients and trends in workplace relations.

Our records indicate that our callers have the following characteristics:

- until recently, the majority were not covered by federal awards or agreements and were only entitled to the minimal employment conditions contained within Schedule 1A of the Workplace Relations Act 1996;
- the majority are not union members;
- a large proportion are employed in businesses with up to 100 employees and of those businesses more than half have less than 20 employees;
- a significant number are engaged in precarious employment arrangements such as casual and part-time employment or independent contracting;
- many are in disadvantaged bargaining positions because of their youth, sex, racial or ethnic origin, pregnancy status, socio-economic status, or because of the potential for exploitation due to the nature of the employment arrangement, for example apprenticeships and traineeships; and
- many are job seekers attempting to return to the labour market after long or intermittent periods of unemployment.

As the above indicates, we have a particular interest and insight into the conditions of disadvantaged workers and, due to our client profile; we are uniquely placed to comment on the Workplace Relations Amendment (WorkChoices) Bill from the perspective of disadvantaged workers.

Job Watch's submission

Job Watch welcomes the Senate Inquiry. However, we are of the firm view that given the magnitude of the Bill and its extensive impact on the Australian community, both the terms of reference and the

[1]The Job Watch advice service has 11 incoming phone lines, including a designated 1800 telephone number, which prioritises calls from rural and remote areas of Victoria.

length of time set aside for the inquiry are grossly inadequate. These constraints have also meant that Job Watch is only able to provide a limited response on some specific areas of the Bill.

Job Watch objects to the Bill in its entirety. This legislation represents the greatest assault on workers' rights since Federation.

The measure of a civilized society is the way in which it treats its most disadvantaged members. The proposed changes effectively strip any measure of fairness from those who require the greatest protection and confine the Australian ideal of "a fair go" to the history books.

The Bill will create few winners and many losers and it will foster a climate of insecurity, anxiety, coercion and fear. Rather than creating "choices" it will deprive many workers of any real option but to accept stripped-back conditions knowing that opposition is futile.

Australian workers and their families deserve better than this: they are entitled to no less than fair and decent working conditions and an industrial relations system that values all participants.

Issue: The Australian Fair Pay and Conditions Standard (Part VA)

Areas of Concern

Division 1 - Preliminary

The set of five minimum entitlements are outlined in s89 of the Bill. In short, these entitlements relate to rates of pay, hours of work, annual leave, personal leave and parental leave. Job Watch submits that these five matters that make up the Standard are insufficient. On their own, they do not provide an acceptable set of minimum entitlements of employment.

We note that one of the intended functions of this Standard is for it to underpin workplace bargaining so that any new agreement must be equal to or more favourable than the Standard. However, we consider that the safety net embodied by the current Standard is inadequate. It reflects an approach of settling for the lowest common denominator when it comes to employee entitlements. The Standard, as it is currently formulated, is a definite step in the direction of deregulating the labour market. Deregulation in this way will in our view have the effect of creating a marked two tiered system, with an ever-widening gap and greater inequality between those employees whose only employment entitlements are the skeletal ones provided for by the Standard and, on the other hand, those employees with greater bargaining power who manage to secure more favourable terms and conditions for themselves.

Job Watch is conscious of the imbalance of power that prevails in many, if not most, employment relationships. There is a particularly stark contrast in the relative power positions of the employees who form Job Watch's client group and their employers. Not only are our clients generally vulnerable by virtue of them being low-skilled employees who are often economically, linguistically or physically disadvantaged. They are also likely to be employed by small business operators whose focus is on making a profit but who function without the benefit of dedicated human resources personnel who are specifically trained to ensure that proper processes are adhered to in the workplace. Accordingly, we call for an improved Standard, one which incorporates and satisfactorily addresses the currently recognised 20 allowable matters under federal awards, so that employees may be afforded more adequate protections.

We further note that s89 (2) as currently drafted leaves no scope for the Regulations to prescribe any further matters to which minimum entitlements may relate in future. Short of amending the whole of

Part VA, so as to increase the number of matters which should all together constitute the Standard, we propose that at the very least there ought to be an express provision for the Regulations to identify additional matters to which Part VA may apply.

Division 2 - wages

Public holidays: we are concerned that s90G (3) effectively allows the Regulations to exclude any day, or kind of day, from counting as a public holiday. In the absence of any further guidance on when or in what circumstances the Regulations might exclude a day; this provision appears to be dangerously vague and open-ended.

Training: s90G(4) provides that an Australian Pay and Classification Scale **may** determine that hours spent by an employee attending off-the-job training are to count as hours worked, but there is no guarantee that an APCS will in fact contain provisions determining that these hours are to count as payable hours.

Division 3 – maximum ordinary hours of work

The guarantee: s91C provides that an employee's ordinary hours of work will be an average of 38 hours per week (to be calculated over a 12 month period) plus any reasonable additional hours. This is not a satisfactory guarantee. We submit that a 12 month averaging period is too long and we therefore recommend that this issue be re-examined with a view to shortening the period so that it is not misleading, as it currently appears to be, to refer to an average number of ordinary hours "per week". Further, whilst we note that s91C (5) attempts to provide some guidance on how to determine what might constitute "reasonable additional hours", we recommend that a more precise definition of the term "reasonable additional hours" be inserted in s91A. Such a definition could, for example, include a maximum cap on the number of additional hours to be worked in any one day or week, so that employees' health and safety is not merely protected by rhetoric but by more concrete statutory measures.

Division 4 – annual leave

Entitlement to cash out annual leave: Job Watch has concerns about s92E, in that it permits the cashing out of a portion of annual leave. We acknowledge that theoretically this provision is all about choice, as it is drafted in terms of an employee's "entitlement" to forgo the leave and it requires the employee concerned to elect to forgo the leave in writing. Whilst we recognise that s92E(3) may provide some protection to employees by stating that employers must neither "require" employees to forgo annual leave nor "exert undue influence or undue pressure" on employees, we consider that many of Job Watch's disadvantaged clients may nevertheless be vulnerable in this regard. Further, we are of the view that the notion of cashing out annual leave is wholly inconsistent with the primary purpose of annual leave, which is to provide employees with a necessary break from work for rest and recreation.

Shut downs: under s92H (5), employees will be forced to take annual leave if they are directed to do so by an employer because of a shut down. We submit that shut down provisions should be dealt with exclusively and expressly by agreement at the commencement of the employment relationship. In the alternative, if the Act is to allow for employees to be directed to take leave during a shut down period, we recommend that provision be made for a minimum (but adequate) notice period to be given to employees before they may be forced to take leave during a shut down period.

Extensive accumulated annual leave: We are concerned that s92H (6) effectively authorises employers to force employees to take a period of annual leave for any reason and at any time but

without a requisite notice period. Again, we recommend that provision be made for a minimum (but adequate) notice period to be given to employees before they may be forced to take annual leave.

Division 5 – personal leave

Definitions: We recommend that the definition of "de facto spouse" in s93A be amended so as to include a person of the same sex, as well as a person of the opposite sex, living with the employee as a husband or wife.

Paid carer's leave – annual limit: We recommend that, in accordance with the principle embodied in s93F (5), paid personal/carer's leave is cumulative and should therefore accrue from year to year. There ought not to be an annual limit of available carer's leave as provided by s93I (2). Employees should be entitled to take as much paid carer's leave as they require subject to them having accrued sufficient hours.

Sick leave – medical certificate: We consider that s93N should be amended so that employers may require *either* a medical certificate *or a statutory declaration* from an employee in relation to the employee's period of sick leave. Such an amendment would be in line with the rights of employers under the current Schedule 1A of the Act.

Carer's leave – documentary evidence: Similarly here, we recommend that s93P be amended so that employers may require *either* a medical certificate *or a statutory declaration* from an employee in relation to both situations envisaged by s93P (1). That is, that either of these forms of evidence may be required in the event of personal illness or injury of a member of the employee's immediate family or household as well as in the event that care or support is required because of an unexpected emergency.

Compassionate leave: For the avoidance of uncertainty, and for the sake of consistency with s93S, we recommend that s93Q(2) be amended to include the word *paid*, such that the provision would specify that an employee is entitled to a period of 2 days' *paid* compassionate leave.

Division 6 – parental leave

Definitions: Again, we recommend that the definition of "de facto spouse" (this time in s94A) be amended so as to include a person of the same sex, as well as a person of the opposite sex, living with the employee as a husband or wife.

The guarantee: Job Watch is in favour of a statutory entitlement to a period of paid parental leave. Any such period should count as service. However, in the absence of such provision being made, we would at least call for the inclusion, in Division 6, of the recently recognised "rights of request", as stipulated by the Full Bench of the Industrial Relations Commission in the *Family Provisions Test Case 2005*. That is, we recommend that a provision be introduced whereby employees are given a right to request the following:

- an increase in simultaneous parental leave from one to eight weeks at the time of the birth or adoption of a child;
- an extension of unpaid leave so that the total period of parental leave is extended from 52 to 104 weeks; and
- permission to return to work on a part time basis after a period of parental leave until the child reaches school age.

Employers should only be permitted to refuse such requests where they have reasonable grounds for the refusal.

In addition, we recommend that Division 6 be amended so as to include a duty on both employers and employees to communicate during a period of parental leave (for example, to notify each other of any significant changes either in the workplace or to the employee's proposed return to work).

Level of conditions making up standard

The Standard consisting of five minimum conditions is a much lower minima of conditions for employees compared to the existing no disadvantage test, which AWAs and certified agreements currently have to meet. The no disadvantage test is compared to conditions contained in the designated award. These conditions include annual leave loading, redundancy pay, overtime pay rates, weekend and public holiday loadings, and shift loadings. These conditions are ones that workers, particularly those in low paid jobs, rely on to make ends meet (see case studies[2] below).

Case Studies

Natasha works as a supervisor in the accommodation, café and restaurant industry on a permanent part time basis. She and the other employees were presented with AWAs to sign. Under the AWA she would be classified at a lower level from her current level and penalty rates would be removed with a standardized pay rate replacing them. Natasha will be worse off under the proposal because she does some weekend work.[3]

Vanessa has been working for 6 months as a part time sales assistant. Her employer wants to put staff onto AWAs. Under the AWA pay structure cash bonuses and weekend work pay rates would be removed, this would have a huge impact on Vanessa who principally works on weekends.[4]

Bargaining above the Standard

The Bill provides that conditions above the Standard such as overtime pay rates can be negotiated directly by the employee with the employer. However, workers who are in disadvantaged positions because of their age, socio-economic status, occupation, location of residence, sex, ethnic background and employment status have little to bargain with and are likely to just receive the Standard. This certainly was the experience of Schedule 1A[5] employees in Victoria, where those who were in disadvantaged bargaining positions only received the 5 conditions under Schedule 1A.

As Job Watch outlined in its recent submission to the Senate Inquiry into workplace agreements:

…..356,000 Schedule 1A employees relied almost solely upon the 5 conditions provided under Schedule 1A with two thirds of this group only in receipt of minimum rates of pay.[6] These were people

[2] These case studies are extracted from Job Watch's database records. The names of the callers and some details have been changed to protect the caller's privacy and confidentiality.

[3] Smiljanic, Vera, *Submission to Senate Employment, Workplace Relations and Education Committee – inquiry into workplace agreements,* Job Watch Inc, Melbourne, 2005, page 11

[4] Ibid

[5] In Victoria, since January 1997 (the Kennett State Government referred its industrial relations power to the Commonwealth in November 1996) workers who are not covered by Federal Awards or Certified Agreements are entitled to 5 minimum conditions provided under Schedule 1A of the Workplace Relations Act 1996.[5] These five conditions included: 4 weeks' annual leave, 5 days' sick leave, parental leave, notice of termination and payment for the first 38 hours of work at minimum rates. These conditions were based on Schedule 1 of the Victorian Employee Relations Act 1992, the legislation introduced by the Kennett Government to abolish state awards and deregulate the Victorian Industrial Relations system.

[6] Ibid

in Job Watch's experience likely to be in disadvantaged bargaining positions… who had little or no capacity to negotiate terms over the minimum conditions provided under Schedule 1A.[7]

As Job Watch submitted to the Senate Employment, Workplace Relations, Small Business and Education Committee inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999:[8]

> *…It is simply not realistic for these employees (Schedule 1A employees) to easily negotiate with an employer about entering into either a Certified Agreement or an Australian Workplace Agreement. This is a consequence of Schedule 1A employees having minimal protected statutory rights; they in fact have nothing with which to bargain or trade. In practical terms, there is little to encourage or motivate an employer to negotiate with an employee or group of employees to enter into a Certified Agreement, or even an Australian Workplace Agreement. An employer in this situation would have to agree to provide conditions to those employees greater than those that contained in Schedule 1A, and such agreements would have to satisfy a No Disadvantage Test (as the law currently stands). In this context, the 'choice or freedom to bargain' in a contract of employment is non-existent.*

Job Watch believes that under the Federal Government's proposed changes the outcome will be the same. Workers in disadvantaged bargaining positions are likely to receive only the conditions and entitlements provided under the Standard. This is certainly what occurred with Schedule 1A employees in disadvantaged bargaining positions in Victoria…..

Employers will have no incentive and disadvantaged workers any bargaining power to negotiate an agreement with terms and conditions above that standard.[9]

Impact on workers' living standards

The exclusion of entitlements like overtime pay, meal breaks, from the Australian Fair Pay and Conditions Standard is likely to have a negative impact on the living standards of workers, particularly those in disadvantaged bargaining positions. This was the experience of Schedule 1A employees in Victoria (see case studies below).

Case Studies

Kathy worked as a full-time Assistant Manager in a Fast Food outlet. Kathy worked 50 hours a week but was only paid for 40 hours. She got burnt out working those hours and went part time. Kathy was rostered to do a 9-hour shift with no meal break. She ended up only being paid for 8 hours of work.[10]

Jan had been working as a casual full-time store assistant over 12 months. She and the other employees who were covered by Schedule 1A were told by their employer that he was going to stop paying them time and half for hours worked above 38 hours. He expected them to 12 days straight and 12 hour long days.[11]

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[7] Wiles, Vivienne, op cit, p8

[8] Wiles, Vivienne and Barron, Oonagh, *Submission to the Senate Employment, Workplace Relations, Small Business and Education Committee Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, Job Watch Inc, Melbourne, September 1999, page 5

[9] Smiljanic, Vera, *op cit*,

[10] Dickinson, Louisa, *Submission to The Senate Employment, Workplace Relations and Education Committee – inquiry into Workplace Relations Amendment (Improved Protection for Victoria Workers) Bill 2002*, Job Watch Inc, Melbourne, 2002, pages 10 and 11

[11] Ibid

Larry worked as a Manager at a tourist park. On average he worked between 45 and 50 hours a week. However Larry did not receive any overtime penalties for the extra hours he worked. He was promised time off in lieu but did not always receive it.[12]

Removal of statutory rights and protections

Disadvantaged employees' ability to bargain will be further eroded through the removal of statutory rights and protections such as access to unfair dismissal for employees of a business of up to 100 employees. The existence of unfair dismissal laws has enabled employees when negotiating with their employer to have recourse to those laws if they are dismissed for refusing to agree to changes in their terms and conditions. This has given employees some leverage in the bargaining process.

Recommendations

1. The preferred position of Job Watch is that the number of conditions comprising the Australian Fair Pay and Conditions Standard be increased to include what are currently the allowable matters provided for under federal awards.
2. In the alternative to recommendation 1, we recommend that the proposed Part VA be amended so as to provide for the following:
    a. the Regulations to prescribe additional matters to which Part VA may apply;
    b. further guidance on the (limited) circumstances in which the Regulations may exclude a day from counting as a public holiday;
    c. a guarantee that Australian Pay and Classification Scales will contain provisions determining that hours spent attending off-the-job training will count as hours worked;
    d. for the purpose of calculating an employee's ordinary hours of work, a shorter averaging period than 12 months;
    e. a more precise definition of the term "reasonable additional hours" in s91A, including a maximum cap on the number of additional hours to be worked in any one day or week;
    f. the exclusion of s92E, which permits the cashing out of a portion of annual leave;
    g. the exclusion of s92H(5), which permits employers to direct their employees to take annual leave in the case of a shut down; (in the alternative, we recommend that employees be entitled to a minimum, adequate notice period before they may be forced to take annual leave in these circumstances).
    h. an employee entitlement to a minimum, adequate notice period under s92H(6), which deals with employees being directed to take annual leave for any reason and at any time;
    i. the definition of "de facto spouse" in s93A to include a person of the same sex living with the employee as a husband or wife;
    j. no annual limit of available paid carer's leave as provided by the currently proposed s93I(2);
    k. either a medical certificate or a statutory declaration to be provided in relation to sick leave requirements under s93N;
    l. either a medical certificate or a statutory declaration to be provided in relation to carer's leave requirements under s93P;
    m. inclusion of the word "paid" in relation to the entitlement to compassionate leave in s93S;
    n. the definition of "de facto spouse" in s94A to include a person of the same sex living with the employee as a husband or wife;
    o. a minimum period of paid parental leave which should count as service;

[12] Ibid

p. an employee entitlement to request an increase in simultaneous parental leave, an extension of unpaid parental leave and/or permission to return to work on a part-time basis after parental leave in line with the rights granted by the Australian Industrial Relations Commission in the *Family Provisions Test Case 2005*;
q. an obligation on employees and employers to communicate during a period of parental leave, consistent with the mutual obligation recognised in the *Family Provisions Test Case 2005*.

Issue: Workplace Agreements (Part VB)

Job Watch makes the following observations about the proposed Part VB of the Bill in relation to workplace agreements.

Access to agreements and information statements

The proposed subsection 98(1) requires an employer to ensure that employees either have, or 'have ready access to' a proposed agreement before it is approved.

Job Watch is concerned that the presence of the word "or" in this subsection means that an employer is under no obligation to allow an employee to take a copy of a proposed agreement from the workplace to consider and seek advice. 'Ready access' could be interpreted to mean that an employer might, for example, only have to leave a copy of a proposed agreement in a room or on a noticeboard but could lawfully refuse to allow an employee to take a copy from the workplace.

We believe that this situation could occur based on the experience of Job Watch clients who have complained to us that their employer has not allowed them to take a proposed AWA, or a common law contract of employment, from the work premises.

> *Mohammed – 19 – had worked as a security guard on a casual full-time basis for 2 years. He was called into a meeting by his employer where he was provided with an AWA and advised that he had to sign it. Mohammed asked whether he could read the AWA and seek some advice on it. His employer refused his request, threatened him and then terminated him.*

We query why the wording under the current Act was thought to be inadequate or unclear. Current subsection 170VPA (1) says that approval requirements for an AWA include that the employee actually "received a *copy* of the AWA".

We also note with concern the absence of the current requirements that the employer explain the effect of the AWA to the employee and that the employee genuinely consent to making the AWA.

The effect of the proposed legislation would be that employees may not be allowed to take a copy of a proposed agreement away from the workplace to get advice on what they are being asked to sign, and further that their employer does not have to tell them what it is they are signing. This is of particular concern in relation to employees of non-English speaking backgrounds.

Waiver of ready access period

Job Watch also has serious concerns about the effect of the proposed section 98A, which provides that an employee may make a waiver in relation to a workplace agreement. The Explanatory Memorandum states that this provision would allow employees to waive the remainder of the ready access period (a minimum of 7 days).

There appears to be nothing to prevent employers from pressuring employees to sign a waiver to the effect that 'they have had sufficient time to consider the agreement and are happy to bring forward the approval' (Explanatory Memorandum, paragraph 888). While some employees may genuinely wish to do this, we can envisage situations (based on the experience of our clients) where an employer not only prevents an employee from taking an agreement away to consider and seek advice, but also presents them with a waiver form to sign and complete. Again, this will be more of a risk for employees of non-English speaking backgrounds. Unlike other provisions in this Part, it is not stated to be a contravention of the Act or a civil penalty provision.

More generally, we have concerns about the lack of vetting of agreements under the proposed changes. Under the current system, the Office of the Employment Advocate (OEA) sends a letter to employees asking them if they have genuinely consented to signing an AWA. We note that subsection 99B(5) states that the OEA does not have any obligation to scrutinise the agreement-making process and that subsection 100(2) provides that a workplace agreement comes into operation even if the Act's agreement-making requirements are not complied with.

Bargaining agents

We note that subsection 97A (2) provides that an employer must not refuse to *recognise* a bargaining agent re AWAs. This appears to be more restricted than the obligation under subsection 97B (3) to give bargaining agents a reasonable opportunity to 'meet and confer' before a collective agreement is approved. Job Watch queries whether the Bill imposes any obligation on an employer to 'meet and confer' with a bargaining agent in relation to an AWA, ie to actually speak to, and genuinely negotiate with, an employee's bargaining agent.

Practicality of remedying breaches of the Bill

Although the Bill contains 'civil penalty provisions', there are serious issues with the practicality of these for many employees. Many employees cannot afford to take a matter to Court. In addition, many are going to be reluctant to approach the Office of Workplace Services for advice or assistance due to fear of having their employment terminated for doing so. There may technically be an unlawful termination remedy, but in many cases employees would prefer to keep their job rather than take expensive, uncertain and complicated action for unlawful dismissal.

Protected award conditions

Certain allowable award matters (from proposed section 116) are taken to be included in a workplace agreement, unless expressly modified or excluded (s101B). We note that redundancy pay is not one of these matters.

Job Watch opposes the abolition of the current no-disadvantage test and its replacement with the Fair Pay and Conditions Standard. We believe that the Bill's concept of 'protected award conditions' is a very poor substitute for the existing arrangements. However, even on their own terms, the proposed arrangements are deficient. It is unfair that an employee does not have to be told that they will lose their entitlement to redundancy pay if they sign a workplace agreement.

This is especially unfair when there appears to be nothing to stop the employer from preventing an employee from taking a copy of the proposed agreement from the workplace to check what the effect of signing the agreement will be (see above).

Termination of agreements

The Bill proposes that workplace agreements be able to be terminated by approval (section 103A and following). Job Watch believes that some employers will place pressure on employees to agree to a termination of a workplace agreement *before* its nominal expiry date. This is of concern because, upon termination, their terms and conditions will be reduced to the basic minimums contained in the Fair Pay and Conditions Standard (s103R).

Despite the obligation to provide an information statement and the fact that it will be unlawful to terminate an employee's employment due to their refusal to terminate an AWA, we believe that some employees will agree to the termination of a workplace agreement, and hence be disadvantaged, due to fear of losing their job.

Job Watch considers that the provision allowing an employer to *unilaterally* terminate a workplace agreement with 90 days written notice (s103L) to be completely unacceptable.

This would allow an employer to unilaterally cut an employee's pay and conditions because their conditions would revert to the 'Fair Pay and Conditions Standard' after termination of the agreement (s103R).

What is worse is that the 90 days notice would appear to be able to be given while the agreement is operative (subsection 103L (3)). This puts employees at a major disadvantage as it is unlawful to take industrial action in relation to negotiating a new agreement before its nominal expiry date.

Job Watch queries whether it is intended that the information statement for employees entering into an agreement will advise employees that their employer will be able to cut their conditions without their consent after the expiry of the agreement.

As with approval of agreements, there is no obligation on the OEA to determine whether the requirements for termination have been met by the employer (s103N (5)) and a termination takes effect even if the requirements are not met, unless and until the Court orders otherwise (s103Q).

As with deficiencies in entering into an agreement, an employee is left with the frequently impractical option of initiating legal proceedings, or risking their job by complaining to OWS.

Issue: Non – allowable matters: restrictions on the use of independent contractors and labour hire

Areas of Concern

More workers forced to become independent contractors and labour hire employees

Job Watch believes that the inclusion of a restriction of the use of independent contractors and labour hire under non-allowable matters in proposed section 116B(1)(g) and (h) will lead to an increase in the number of workers being forced into independent contracting arrangements and permanent staff replaced by labour hire employees.

As Job Watch outlined in its submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Inquiry into Independent Contracting and Labour Hire Arrangements:

the vast majority of Job Watch's callers who seek information in relation to independent contracting arrangements are job seekers or existing employees being forced into independent contracting

arrangements. They are not Australians choosing of their own free will to become independent contractors as part of a culture of 'entrepreneurship'. In theory employees have the right to refuse to become independent contractors; however in many instances they do not have the bargaining power to do so. (See case studies below).[13]

Case Studies[14]

Con worked as a concreter on a permanent full-time basis. He received a call from his boss at home one night saying that based on advice from his accountant, he wanted Con and the other employees to become contractors from the next year. Con's boss told him he was paying too much tax to the Government and nothing else would change. Con did not want to become an independent contractor.

Tom responded to an advertisement for an assistant plasterer on junior wages. Tom did one day's trial work and was told he had to get an Australian Business Number (ABN) and become a contractor. If Tom refused to become a contractor and his employment was terminated as a result, he would be excluded from unfair dismissal because he was on a probation/qualifying period.

Rob worked as a delivery driver for a small computer company for 2 years. The Managers of the company put the whole staff on independent contracting arrangements. Rob and the other employees were told that if they did not sign the contracts the company would not pay them, so Rob and the other employees signed. The employees were told it was their responsibility to put aside money from their pay for sick leave, annual pay, and superannuation and were given an extra $50 to cover those payments.

The experience of many of the callers to the Job Watch telephone advice service is that companies are using labour hire workers to replace their permanent staff, often to avoid award entitlements (see case studies below).[15]

Case Studies[16]

After working as a cleaner for a medical service for nearly five years, Gina was retrenched. Gina's employer told her that she could only stay in her job if she came back as an independent contractor through a local labour hire agency. She was told that the employer was outsourcing all administration and cleaning positions in this manner. Wages and conditions under the labour hire arrangement were significantly lower than those she received under the award.

After eleven years as an accounts officer with a manufacturing firm, Michelle returned from annual leave and was told that her employer had undertaken a performance review. Her employer informed her that the worker from the labour hire agency they had employed while she was on annual leave performed her role more efficiently and was more cost effective. The employer offered her a packing position instead. When Michelle told her employer that this demotion was unacceptable, she was offered five weeks pay in lieu of notice.

Recommendations

[13] McCarthy, Andrew and Smiljanic, Vera, *Submission to House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation: Inquiry into Independent Contracting and Labour Hire Arrangements*, Job Watch Inc, Melbourne, March 2005, pages 17 and 18
[14] Ibid
[15] Ibid, page 9
[16] Ibid

The exclusion from non-allowable matters of restrictions on the use of independent contractors and labour hire.

Issue: Transmission of Business Rules (Part VIAA)

The proposal makes significant changes to the way in which awards and agreements (both individual and collective) which were binding on an old employer will be binding on the new employer to whom part or all of the business of the old employer is transmitted.

Under the current Act when all or part of a business is transmitted to a new employer the new employer continues to be bound by the award, certified agreement or AWAs that applied immediately before the transmission.

In comparison, under the proposed legislation the AWA, award or collective agreement will only govern the terms and conditions of employment of the transferred employees with the new employer for a period of 12 months. After this period, if a transmitted AWA or collective agreement is terminated or ceases to apply to the new employer by virtue of the expiration of the 12 months transmission period, those transmitted employees whose employment was covered by a workplace agreement or award will revert to being covered by the Australian Fair Pay and Conditions Standard and if applicable, the relevant award binding the new employer.

Under the new system, and by way of contrast to the current system, if no employees of the old employer are re-employed by the new employer, collective agreements and awards by which the old employer was bound will *not* transmit on transmission of the business. In addition, if the new employer enters into an AWA or new collective agreement with those transferred employees whose employment is governed by a transmitted AWA, award or collective agreement, the transmitted workplace agreements will cease to apply.

A new employer, a transferring employee or organisation of employees that is capable of representing the interests of a transferring employee in relation to the work to be performed by that employee with the new employer, may apply to the AIRC to make an order that the new employer not be bound by any transmitted collective agreement or, only be bound by a transmitted collective agreement to a limited extent.

Areas of concern

We have a number of concerns about the operation of these provisions generally and also about their possible abuse by unscrupulous employers.

A new employer who is not otherwise subject to an award is provided with no incentive to employ the staff of the business upon transmission. Rather, given that the proposed legislation will enable the new employer to make an Employer Greenfields Agreement with itself to regulate working conditions to the exclusion of any award, to negotiate AWAs with a new workforce offering conditions inferior to those in the award or otherwise, offer no more than the Australian Fair Pay and Conditions Standard, there is a strong financial disincentive to offering employment to the staff of the old employer. As a consequence, it is likely that the new provisions will result in unnecessary job losses. Furthermore, this sort of arrangement is likely to cause a decline in productivity due to the loss of skills of the existing workforce.

If some existing staff are retained and other new staff are employed, it is likely to result in unjust outcomes. For example, it is possible that a new employee working alongside a retained employee will have less favourable working conditions, including lower pay, despite doing the same job as the

retained employee. If the new employee comes from a position of low bargaining power, for example a person from a non-English speaking background, he or she may be unable to negotiate anything more than the minimum conditions.

In this scenario, after a few months it is possible that the employer will decide it is more cost effective not to retain the old employee, especially after the old employee has trained the new employee in the performance of the job. As such, the employer could terminate the employee citing performance reasons, which if there were less than 100 employees, would mean that the employee could not contest the termination through the unfair dismissal process. Alternatively, an employee could be terminated "fairly" for "operational reasons" ie, the employer has excess staff to its needs and have no recourse to unfair dismissal regardless of the size of the business.

These rules also provide considerable scope and, arguably, encouragement for an employer to avoid existing award or certified agreement obligations by developing sham arrangements which would allow an employer to terminate its workforce at the time of transferring the business to a new corporate entity. The new entity could then offer employment to a new workforce on reduced conditions, such as an Employer Greenfields Agreement or AWAs offering minimal conditions or otherwise only offer employment on the basis of the AFPS. The original workforce may be left without any entitlement to redundancy pay if the business employed less than 15 staff or if the employees were otherwise covered by a collective agreement or AWA which does not provide for the payment of severance pay.

It is also possible that employers engaging in these sorts of practices may even deliberately strip the assets of the first entity so as to avoid paying out any award-based redundancy[17].

Issue: Compliance and Enforcement (Parts VB and VIII)

The proposed legislation grants workplace inspectors increased powers and suggests they will play a more significant compliance role. We also note that the Office of Workplace Services ("OWS") is to receive additional funding to fulfill this role.

We support these developments, provided that the OWS takes a much more active role in prosecuting breaches of the Act, most particularly award and agreement breaches under section 178 than they have since the commencement of the Act.

Further, given that the Office of the Employment Advocate will not have a statutory role in ensuring that the appropriate procedures are followed in respect of the signing of AWAs, it is all the more important that the OWS actively exercise its powers to seek penalties against parties who do not fulfill their obligations under the Act.

We note with concern the possible effect of section 105A, which allows a workplace inspector to take over a proceeding that was instituted or is being carried on by another person for an order for a civil penalty under Division 11 of Part VB. Under this provision, a workplace inspector is empowered to either carry on with the matter or to discontinue it. There is no explanation of the circumstances in which this can occur and no apparent limitation on the inspector's discretion to discontinue a proceeding.

[17] In its *Corporate Insolvency Laws: a Stocktake" Report* (June 2004) the Parliamentary Joint Committee on Corporations and Financial expressed "serious concern" about " 'careerist' offenders who purposely structure their operations in order to engage in phoenix activity, avoid detection and exploit loopholes in insolvency laws." It noted that "certain creditors are targeted: the ATO, State payroll and workers compensation premium authorities and employees owed entitlements such as superannuation and long service leave."

On the basis of this provision, an employee who has instituted proceedings against his or her employer under one of the civil penalty provisions for example, a breach of section 104(5) ("a person must not apply duress to an employer or employee in connection with an AWA") could be denied the opportunity of proceeding with their claim if an inspector decides to take it over. If the inspector then decided for unspecified reasons not to continue with the proceedings, the employee would be left without any recourse. It is submitted that this could lead to unjust outcomes which deprive an employee from pursuing a legitimate statutory claim against an employer which has breached the Act.

Issue: Costs (Part XII)

Areas of concern

The Bill expands the grounds on which a Court may order costs to include circumstances where a party has unreasonably caused another party to incur costs in a Court proceeding. However, it retains the general position that costs for proceedings under the Act will only be ordered where a proceeding has been instituted vexatiously.

In debt recovery proceedings, the usual civil practice is that costs "follow the event." This means the Court orders the unsuccessful party to a proceeding to pay the legal costs of the other party who has successfully made a claim for moneys owed.

In contrast, an employee who successfully brings a claim under section 179 of the Act for unpaid wages owed under an award or agreement is liable for his/her own costs. In some circumstances, this may mean that an employee is faced with the unenviable choice of deciding whether to spend money recovering their minimum entitlements even where the costs of pursuing their legal rights might surpass the outstanding amount.

Employees who can establish to a Court that they have not been paid their employment entitlements should not suffer adverse financial consequences because they have had no choice but to pursue legal action as a result of their employers' non-compliance with the Act.

Recommendation: That the Court be empowered to order costs to the successful party in wage recovery proceedings brought under section 179.

Case study

Rosalie is a Filipino national who was employed as a domestic service worker at the employer's private residence, performing duties such as child care and cleaning. In the course of her employment Rosalie was forced to work up to 16 hours per day and she suffered other forms of mistreatment from the employer and his family. Among other things, the employer would not allow her to leave the premises, searched her possessions, and made threats against her.

In the course of her employment Rosalie was paid $9,756 less than she was entitled to be paid under the *Personal and Other Services Industry Sector - Minimum Wage Order Victoria 1997.*

With Job Watch's assistance Rosalie commenced proceedings in the Magistrates' Court of Victoria in April 2005 to recover the moneys owed to her. Rosalie succeeded in her claim and the Magistrate ordered her former employer to pay her the outstanding wages owed.

While Rosalie has not been required to pay for our legal fees or those of the barrister who represented her in a Magistrates' Court hearing on a pro bono basis, we estimate that if Rosalie had been required to pay legal fees, the cost of pursuing her claim would have exceeded $2000.

Had Rosalie been represented by a lawyer to whom fees were payable (as opposed to obtaining representation on a pro bono basis) she would not have been entitled to seek a costs order against her employer on the basis of the cost restrictions contained within section 347 of the Act.

Summary of Recommendations

- The preferred position of Job Watch is that the number of conditions comprising the Australian Fair Pay and Conditions Standard be increased to include what are currently the allowable matters provided for under federal awards.
- In the alternative to recommendation 1, we recommend that the proposed Part VA be amended so as to provide for the following:
  - the Regulations to prescribe additional matters to which Part VA may apply;
  - further guidance on the (limited) circumstances in which the Regulations may exclude a day from counting as a public holiday;
  - a guarantee that Australian Pay and Classification Scales will contain provisions determining that hours spent attending off-the-job training will count as hours worked;
  - for the purpose of calculating an employee's ordinary hours of work, a shorter averaging period than 12 months;
  - a more precise definition of the term "reasonable additional hours" in s91A, including a maximum cap on the number of additional hours to be worked in any one day or week;
  - the exclusion of s92E, which permits the cashing out of a portion of annual leave;
  - the exclusion of s92H(5), which permits employers to direct their employees to take annual leave in the case of a shut down; (in the alternative, we recommend that employees be entitled to a minimum, adequate notice period before they may be forced to take annual leave in these circumstances).
  - an employee entitlement to a minimum, adequate notice period under s92H(6), which deals with employees being directed to take annual leave for any reason and at any time;
  - the definition of "de facto spouse" in s93A to include a person of the same sex living with the employee as a husband or wife;
  - no annual limit of available paid carer's leave as provided by the currently proposed s93I(2);
  - either a medical certificate or a statutory declaration to be provided in relation to sick leave requirements under s93N;
  - either a medical certificate or a statutory declaration to be provided in relation to carer's leave requirements under s93P;
  - inclusion of the word "paid" in relation to the entitlement to compassionate leave in s93S;
  - the definition of "de facto spouse" in s94A to include a person of the same sex living with the employee as a husband or wife;
  - a minimum period of paid parental leave which should count as service;
  - an employee entitlement to request an increase in simultaneous parental leave, an extension of unpaid parental leave and/or permission to return to work on a part-time basis after parental leave in line with the rights granted by the Australian Industrial Relations Commission in the *Family Provisions Test Case 2005*;

- an obligation on employees and employers to communicate during a period of parental leave, consistent with the mutual obligation recognised in the *Family Provisions Test Case 2005.*

- The exclusion from non-allowable matters of restrictions on the use of independent contractors and labour hire.

- That the Court be empowered to order costs to the successful party in wage recovery proceedings brought under section 179.