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Australian Council of Trade Unions Submission to the Senate Education, Employment and Workplace Relations Committee

Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

29 February 2008

INTRODUCTION

1. The ACTU welcomes the opportunity to contribute to the Committee's consideration of the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008.

2. The ACTU supports the government's objective in formulating this Bill. If passed the Bill will prevent the making of AWAs individual contracts. It will set in train the processes to establish a new safety net of awards and legislated minimum standards

3. These measures will immediately redress one of the worst aspects of the former Howard government's unfair Work Choices laws, and will commence the process for the introduction of a fairer, more productive and flexible workplace industrial relations system.

4. However, the ACTU has identified areas where improvements to the Bill could be made.

5. This submission discusses the economic and social impact of the abolition of Australian Workplace Agreements (AWAs), and then makes some suggestions for improvements to the provision of the Bill.

6. The ACTU makes a number of suggestions to improve the Bill. In doing so we have recognised the transitional nature of the proposed new arrangements, and have not proposed wholesale reforms. Rather, our suggestions "tweak" concepts already contained within the Act and are advanced as interim solutions pending the government's foreshadowed substantive reform of industrial relations laws.

7. The recommendations address deficiencies in the areas of agreement-making, modern awards and the maintenance of pay and conditions scales during the transition period.

THE IMPACT OF THE ABOLITION OF AUSTRALIAN WORKPLACE AGREEMENTS

8. The ACTU strongly welcomes the abolition of AWAs. Independent research suggests that AWAs have been highly disadvantageous to many, if not most, employees employed under an AWA. At the same time, there is no evidence that they have had any positive impact on employment, inflation, productivity or levels of industrial disputation across the economy.[1]

9. Set out below is a discussion of the impact of AWAs on employees, society and the economy, and the likely consequences of their abolition.

Impact on employees

10. AWAs cover about 4-5% of the employed workforce.[2] The majority of AWAs are found in low-paid sectors of the economy. The retail, hospitality and personal services sectors account for 55% of all AWAs lodged to date.[3] On the other hand, the greatest density of AWAs occurs in the mining and communications industries, even though the absolute number of employees covered by AWAs in those industries is relatively small.[4]

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[1] The Committee considered much of this evidence in its Inquiry into Workplace Agreements in 2005.

[2] ABS cat 6306.0 (May 2006) 25. See also David Peetz, 'Assessing the Impact of "Workchoices": One Year On' (2007).

[3] Workplace Authority, 'Lodgement Data: 27 March 2006–30 September 2007' (2007) 5.

[4] Estimate based on comparison of the number of AWAs lodged in each sector (see footnote 3) with the numbers of employees in each industry.

11. Workplace Authority data indicates that in 2006, the vast majority of AWAs (88%) remove 'protected' award conditions, including penalty rates (reduced or removed in 65% of AWAs), annual leave loading (68%), shift work loadings (70%), overtime loadings (49%), State/Territory public holidays (25%), days off work as a substitute for working on a public holiday (61%), public holiday penalties (50%), rest breaks (31%), allowances (56%) and bonuses (63%).[5] A survey of the Victorian retail and hospitality industries further found that AWAs in those industries also tend to abolish casual loadings (63% of agreements), redundancy pay (63%) and even meal breaks (7%).[6]

12. Up to 28% of AWAs undercut legally protected minimum conditions of employment, including about 6% of AWAs, that pay less than the legal minimum wage.[7] In the Victorian retail and hospitality industries, many AWAs fail to provide employees with their full sick leave entitlements (45% of agreements) or parental leave rights (20%).[8]

13. Most AWAs increase hours of work. The average AWA employee works a 13% longer week than their peers employed under collective arrangements.[9] Often, they work longer hours for *less* pay. For example, in New South Wales, female AWA employees work 4.4% longer hours than their counterparts engaged under collective agreements, but earn 11.2% less.[10]

14. In those low-paid industries, where AWAs have been the vehicle through which employers have reduced the costs of labour, and AWAs have resulted

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[5] Julia Gillard, 'AWA Data the Liberals Claimed never Existed' (20 February 2008) Media Release.

[6] Victorian Workplace Rights Advocate (VWRA), 'Report on the Inquiry into the Impact of the Federal Government's Work Choices Legislation on Workers and Employers in the Victorian Retail and Hospitality Industry' (2007) 62.

[7] Davis article.

[8] VWRA, 62–3.

[9] ABS cat 6306.0 (May 2006) 33.

[10] ABS cat 6306.0 (May 2006) Table 10.

in lower wages. For example, in the Victorian hospitality industry, average earnings for AWA workers are 5% lower than the average earnings of workers covered by the award (and 17% lower in the case of female workers).[11] The reductions appear to be even more severe for casuals, young workers, and the lower-skilled.[12] In other industries, where award wages are not a good reflection of market wages, the relative wage losses suffered by AWA workers can be inferred by comparing AWA wages to the wages payable to workers employed under collective agreements. Nationally, the median AWA worker earns 16.3% less per hour than the comparable worker on a collective agreement.[13] This deficit is much greater in small firms, in unionised sectors of the economy, and for women in male-dominated industries.[14]

15. In some industries, employees on AWAs do receive a wage premium. However, researchers have suggested that this premium is paid by employers in order to entice employees away from collective bargaining and union membership. This conclusion is reinforced by the fact the largest AWA premiums are paid in industries such as communication and finance where the prevalence of such anti-union strategies is well-known.[15]

Impact on society

16. there is strong evidence that the existence of AWAs has been associated with a worsening gender pay gap. Across the economy, women's wages have

[11] ABS data, extracted in David Peetz and Alison Preston, 'AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data' (2007) 39.

[12] See Peetz and Preston, i-iv.

[13] Peetz and Preston, 13.

[14] Peetz and Preston, 24.

[15] Peetz and Preston, 10–11.

fallen from 94% of men's wages in 1994 to around 90% in 2006.[16] This is explained by two factors. First, industries employing large numbers of women (such as retail and hospitality) have, partially due to AWAs, suffered stagnant real wages growth or even real wage declines,[17] while those sectors employing large numbers of men (such as mining) have enjoyed better wages growth. Secondly, *within* industries, women have fallen behind their male counterparts, again partially due to AWAs. For example, consider the communication industry, which has a relatively high AWA density. In 1994, women earned 92% as much as men in the sector.[18] But by 2004, female earnings had dropped to 84% of male earnings.[19]

17. AWAs have also tended to undermine work and family balance. they are associated with longer working hours, which takes away from family time. Secondly, they also tend to remove award-based restrictions over the employer's power to dictate the pattern of working time, and the probable result is that there is less 'flexibility' over working time for AWA workers.[20] Finally, they generally do not contain express 'family friendly provisions' (such as the right to request additional parental leave) which have become a feature of awards and collective agreements in recent years.[21]

18. Finally, we know that AWAs have also been associated with a loss of employee autonomy and voice in the workplace. Widespread anecdotal evidence suggests that AWAs are generally forced upon employees on a

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[16] ABS cat 6306.0 (May 1994) 41–2; ABS cat 6306.0 (May 2006) 33. The comparison is between the average hourly ordinary-time earnings of full-time adult non-managerial employees.

[17] See, eg, VWRA, 35–7, 41–2.

[18] ABS cat 6306.0 (May 1994) 11.

[19] ABS cat 6306.0 (May 2004) 20.

[20] See, eg,Richard Mitchell and Joel Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.

[21] Ibid.

'take it or leave it' basis.[22] Other studies suggest that a significant motive for introducing AWAs is the desire to exclude unions from the workplace.[23] Moreover, once in place, AWAs generally deny employees a voice at work: for example, very few require the employer to consult with employees or their representatives in relation to roster changes or in the event of major workplace change (clauses which are found in the vast majority of collective agreements).[24]

19. This unilateralist style of industrial relations clearly undermines fairness in the workplace, and will often be at the expense of productive, harmonious and co-operative workplace relations.

Impact on the economy

20. Some supporters of Work Choices warn that the abolition of AWAs will lead to a 'wages break out' and will increase inflation and/or decrease employment. However, as the Committee found in its Inquiry into Workplace Agreements, there is no evidence of any link between AWAs and broader economic measures, such as employment levels or inflation.[25] This is not surprising, given that AWAs cover less than 5% of the workforce.

21. The ACTU acknowledges that abolishing AWAs may have a proportionately greater impact in those sectors which have a higher than average AWA density (such as mining). However, the ACTU notes that the prosperity of these industries is far less dependent on domestic industrial relations arrangements than on other factors such as commodity prices, exchange

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[22] See, eg, Kelly Burke, 'Same work, $40 less: take it or leave it' (10 April 2006) *Sydney Morning Herald*.

[23] VWRA 57.

[24] See VWRA 63–4, 69–70.

[25] Senate Employment, Workplace Relations and Education References Committee, *Workplace Agreements* (Oct 2005) ch 3.

rates, and infrastructure bottlenecks. In any case, employers who presently use AWAs will effectively have until 2010 to make alternative arrangements for the future; this is ample time for them to develop plans to minimise the impact on their business of the abolition of statutory individual contracts.

22. Supporters of Work Choices also claim that abolishing AWAs will reduce productivity. However, there is no empirical link between AWAs and higher productivity. If anything, AWAs may be associated with *lower* levels of productivity. For example, productivity has fallen (by 1.9%) in the mining sector over the past decade, despite the prevalence of AWAs there.[26] The relationship between AWAs and low productivity is explained by studies that have examined the content of AWAs and have found that they do not generally promote 'high productivity' employment systems, but instead simply increase management's power to set longer working hours at lower rates of pay.[27] The true source of long-term productivity growth (apart from greater capital investment) is 'working 'smarter'. This goal cannot be pursued by slashing wages and conditions, but requires employers and employees to work together in atmosphere of mutual trust, mutual flexibility and mutual reward. AWAs did not promote this type of working culture, which is why they could not have had any long-term positive effect on productivity.

23. Proponents of Work Choices also claim that the abolition of AWAs will increase levels of industrial conflict. While it is true that workers did not take industrial action in 'bargaining' for AWAs, this was because individual industrial action was completely futile.[28] However, there is no basis for the assertion that the abolition of AWAs will lead to more industrial conflict. Levels of industrial conflict have little to do with domestic industrial relations

[26] ABS cat 1301.0 (2008) 475.

[27] Mitchell and Fetter.

[28] The Howard government recognised this when it removed the right to take protected 'AWA industrial action' as part of the Work Choices reforms: see former Part VID Div 8 of the Workplace Relations Act 1996 (Cth).

arrangements, and dispute levels have been falling in most developed economies over the last 20 years. In any case, the Bill retains a number of options for employers and employees to make collective agreements that ensure industrial peace for up to 5 years.

DETAILS OF THE BILL

Changes to the Workplace Agreement-Making Process

Abolition of AWAs and creation of ITEAs

24. The ACTU regrets the fact that the Bill will not immediately abolish statutory individual agreements. In our view, the Bill should provide a mechanism for existing AWAs to be terminated prior to their nominal expiry date where the AWA is disadvantageous to the employee.

25. The ACTU is not convinced of the need for a new form of statutory individual contract to be retained during the transition period, in the guise of Individual Transitional Employment Agreements (ITEAs). In our view over-award common law agreements provide sufficient flexibility for employers who wish to make individual employment arrangements with their employees. Historically, these instruments have covered almost a third of the workforce, and have generally operated in a fair and flexible manner.[29]

26. Having said that we recognise that the rules governing the making of ITEAs are markedly superior to those governing AWAs.

The no-disadvantage test

[29] ABS cat 6306.0 (May 2004) 25.

27. The ACTU welcomes the abolition of the unfair ‘fairness test’, and its replacement with a proper no-disadvantage test, which better ensures that employees are not left worse off as a result of agreement-making. In particular, the ACTU welcomes the new rules that require an ITEA to be compared against relevant collective agreements, as well as awards.

28. The Committee will recall that the ACTU was strongly critical of the structure for the ‘fairness test’ when it was introduced in 2007. Our concerns about the architecture, lack of transparency and complexity of the legislative regime remain.

29. The proposed new no disadvantage test is simpler and fairer test. As well as ensuring agreements are assessed against all award conditions the Bill will remove the complex regime of exclusions and loopholes that currently permit agreements to operate despite having failed to meet the required standard.

30. The Bill does nothing to improve the transparency or the ability to review of the decisions of the Workplace Authority.

Operation of agreements

31. The ACTU also welcomes the proposed changes which provide that collective agreements and ITEAs for existing employees will not be operative until approved.

32. This simple measure will decrease the complexity of the system, by removing, (for these agreements only), the extremely complex and highly artificial mechanism of resurrecting, in respect to certain employees, instruments, (often notional instruments) that have been deemed extinguished and incapable of operating in other parts of the Act.

33. However, this regime will continue for greenfields agreements and ITEAs for new employees. In our view this could have been avoided by re-visiting the issue of the effect of a workplace agreement on other instruments. While we recognise it is too late to adopt this approach, we urge that, in the foreshadowed substantive reforms, regard be had to the need for simpler regulation.

Processing agreements

34. While welcoming the changes to the operation of collective agreements, we are aware that there are substantial delays within the Workplace authority in assessing agreements against eth current so called fairness test.

35. Given that new collective agreements will not be operative until approved, we recommend the creation of a dedicated unit within the Workplace Authority to ensure that collective agreements are processed swiftly.

Involvement of ITEA and AWA employees in collective bargaining

36. While the ACTU notes the democratic principle behind allowing an employee engaged under an ITEA or AWA which has passed its nominal expiry date to participate in collective bargaining processes, there is a risk that such employees may vote on agreements which never come to apply to them. This would be undemocratic.

37. Ideally, the commencement of a new collective agreement should apply, at least to the extent that it is superior in its terms, to employees on ITEAs or AWAs who were able to vote upon its introduction.

38. Another possible solution would be to require ITEA or AWA employees to give notice of their intention to terminate their agreement before they are eligible to participate in collective bargaining processes. This would at least avoid the possibility of enfranchising employees who will not be covered by the agreement, although problems might arise if the agreement did not come into operation.

39. Another solution would be to allow ITEA or AWA employees to participate in collective processes, subject to the Commission's discretion to disallow their involvement where their participation might subvert the integrity of the collective bargaining process.

Anti-victimisation provisions

40. The Bill will prohibit employers from dismissing (or threatening to dismiss) an employee for the 'sole or dominant' reason that a workplace agreement did not pass the no-disadvantage test. The ACTU is concerned that this formulation is too narrow. First, a wider range of victimisation ought to be covered, such as detrimental variations to working conditions. Secondly, in line with most statutory anti-discrimination provisions, the onus should be upon the employer to demonstrate that their actions were not motivated, in whole or part, by the prohibited reason.

Extended operation of pre-reform certified agreements

41. The Bill will allow the Commission to extend the life of pre-Work Choices collective agreements in certain circumstances. The ACTU welcomes this provision, as it provides the parties with the capacity to make industrial relations arrangements that suit their needs, without excessive levels of micromanagement by government. However, the current provisions give rise to two areas of concern.

42. First, the Bill requires that any variation to a pre-reform certified agreement must not disadvantage employees compared to the appropriate transitional award. However, in some industries, such as finance, the transitional awards have not been updated since Work Choices commenced (because there are no employers in those sectors to whom those transitional awards apply). One solution would be for the parties to seek to have those transitional awards updated by the Commission. However, another solution would to make a minor amendment to the Bill to allow the Commission to compare the pre-reform certified agreement to the pre-reform award (and associated updated pay scale rates of pay).

43. Secondly, the Bill does not allow the Commission to extend or vary preserved collective State agreements. As a matter of logic, the ACTU considers that the Commission should have the same power to extend these State-based instruments as it does in relation to pre-reform federal certified agreements. This could be achieved by some simple amendments to schedule 8 of the Act.

Old IR agreements

44. The Bill will, during the transitional period, preserve old IR agreements. While this ensures such agreements are not arbitrarily terminated (as is the case under the Work Choices provisions), it does not address concerns that rights and obligations under these instruments will terminate automatically upon the making of a workplace agreement (see clause 28(2) of sch 7 to the Act). The ACTU considers that the making of a new agreement should not disturb existing arrangements unless the parties to the new agreement have agreed to displace them. The provisions of an old IR agreement should continue despite the making of a later agreement that deals with different matters.

Award Modernisation

45. The ACTU supports the strengthening and modernisation of the award safety net. It welcomes the emphasis on a collaborative process for making modern awards, and the ACTU intends to participate in this process in a collaborative fashion.

46. However, the drafting of the Bill leaves a number of areas of uncertainty. No doubt it is intended that the AIRC will address some of these tensions when making eth new modern awards. However we would welcome the government providing clear advice to the AIRC.

Interaction with the National Employment Standards

47. The Minister's draft award modernisation prohibits awards operating inconsistently with the NES. On its face this prohibits an award providing more beneficial provisions, where to do so requires the award to operate in a manner that offend the NES. We acknowledge that the proposed request permits a modern award to 'build on' entitlements contained in the proposed National Employment Standards (NES) in certain circumstances, and to provide industry detail where required. This allows the awards to supplement the NES.

48. However, this does not deal with situations where the NES purports to prohibit or restrict entitlements. An example would be where an award currently provides for retrenchment pay in all workplaces. On the one hand this would be permitted in a modern award as retaining the safety net having regard to the existing entitlements of the employees. On the other hand it is a provision that operates inconsistently with the NES. Similarly, the awards in an industry might provide for the taking of some or all leave whilst an employee is receiving workers' compensation. This would be inconstant with

the express prohibition in the draft NES, and therefore unable to be included despite the fact it is accepted industry practice.

49. We recommend that the government clarify the proposed prohibition on awards operating inconsistently with the NES is to be read beneficially.

State differentials

50. The ACTU recognises and supports the government's objective is to achieve nationally consistent and fair industrial relations system, at least for the private sector. However we are concerned that the prohibition on awards containing any State based differentials after 2013 constitutes an unnecessary restriction on the discretion of the AIRC to develop modern awards.

51. The ACTU supports the Commission being obliged to eliminate, as far as practicable, State based differentials. But we urge the government to allow awards to contain State based differences on an ongoing basis where there remains a sound basis for the differential.

Enterprise awards

52. At present, the Bill does not allow the Commission to modernise enterprise awards. The ACTU considers this to be unduly restrictive, and unfair to people employed in businesses with enterprise awards. The government's '*Forward with Fairness: Policy Implementation Plan'* indicated that the Commission would be able to review enterprise awards if requested by the parties.[30] The ACTU calls on the government to implement this promise according to its terms.

[30] Page 16.

Exceptional award matters

53. The Bill contains a list of matters that may be dealt with in awards. While the ACTU welcomes the fact that this list is broader than was previously the case, we are concerned that there is no capacity for the Commission to include matters that may, on an exceptional basis, be relevant to a particular industry. Examples include the regulation of nudity and simulated sex scenes which traditionally appeared in the Actors Feature Film Award 1979, and the regulation of driving safety contained in the Transport Industry — Mutual Responsibility For Road Safety (State) Award (NSW). The ACTU considers that the Commission should have the discretion to include such matters in awards where the circumstances of the industry or sector warrant.

Pay Scales

Extending pay scales to new employers

54. The Bill would remove the power of the Fair Pay Commission has the power to make new pay scales. This process is so technically complex that this power has never been exercised, and the ACTU welcomes the abolition of these highly complex provisions.

55. However, the abolition of the power to make new pay scales leaves a significant gap whereby there is no agency charged with responsibility for extending the scope of a pay and classification Scale to new employers.

56. Current pay scales only bind employers who were bound by State or federal wage instruments (such as awards) in 2005. Businesses that have opened since then (outside of the common-rule-award jurisdictions) are not bound by

these pay scales, and are only required to pay their employees the federal minimum wage ($13.74 per hour).

57. Under the Bill as it presently stands, this situation will remain until at least 2010, when modern awards will begin to regulate wages. The ACTU considers this to be highly undesirable, as it leaves an unequal playing field in place for two years.

58. The ACTU recommends that the Workplace Authority should have the power, upon application of an employer, employee or organisation, to direct that a new business in a sector which is 'usually' regulated by awards is bound to observe the pay scale derived from the relevant award. This borrows from the current regime, where the Workplace Authority is already responsible for determining which sectors are 'usually' regulated by an award, as part of its administration of the fairness test (see, eg, section 346E). Alternatively, the power could be given to the Australian Industrial Relations Commission to direct, when roping a new employer into an existing award (under section 557) to order that the employer also be bound by the pay scale that was derived from the award.

NAPSA allowances

59. At present, the AIRC can update the value of allowances under transitional federal awards, but not under 'Notional Agreements Preserving State Awards' (NAPSAs). In order to ensure consistency, and to maintain an acceptable safety net for workers covered by NAPSAs, the ACTU considers that the Bill should give the AIRC power to update NAPSA allowances.

Other provisions

60. The ACTU welcomes, without reservation, the provisions of the Bill that:

- extend the term of NAPSAs and Transitionally Registered Associations until December 2009;
- ensure superannuation clauses in awards and NAPSAs remain enforceable;
- Repeal the right to unilaterally terminate a collective agreement, and provide instead that the AIRC may terminate a collective agreement if it is not contrary to the public interest, and must have regard to the effect on the parties at the workplace;
- Provide that, where an AWA or ITEA is terminated an employee can be covered by the relevant collective agreement at the workplace or, alternatively the relevant award. Where a collective agreement is terminated the employees are entitled to the full protection of the award; and
- Enable parties to collective agreements to call up other documents as terms of their agreements.

CONCLUSION

61. The ACTU is pleased to give its support to the Bill, subject to the reservations expressed in this submission.

62. If passed, the Bill will immediately put an end to the one of the worst aspects of the discredited Work Choices laws, and will provide for a smooth transition into a fairer workplace system.

63. The ACTU looks forward to the Parliament implementing the remainder of the reforms which the Australian people voted for at the last election, including strengthening freedom of association rights, the establishment of a fair system of collective bargaining, improving unfair dismissal protection, and creating Fair Work Australia.