



29 February 2008

Mr John Carter
Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Carter

As the peak business organisation in this State, Commerce Queensland welcomes the opportunity to make a submission to the Standing Committee on Education, Employment and Workplace Relations in respect to the Workplace Relations Amendment Transition to Forward with Fairness) Bill 2008.

Workplace relations is a key issue for the Queensland business community. It is essential that the nation's workplace relations system promotes and is conducive to flexible, creative and mutually beneficial working arrangements.

Commerce Queensland has been actively involved with employers in facilitating discussion and understanding of the Federal Government's changes. We are well placed to provide representative and informed comment.

COMMERCE QUEENSLAND

Commerce Queensland is the State's largest business organisation. It has a state-wide membership across all industry sectors. In total we represent in excess of 25,000 businesses - 3,700 members spread across the State with links to 135 local chambers of commerce and 60 industry associations. A full membership profile is attached.

ECONOMIC BACKGROUND

This Inquiry is taking place in an economic environment that has changed dramatically during the past several months. Commerce Queensland's latest Pulse Survey of Business Confidence (for the December Quarter 2007) revealed a significant deterioration in business confidence as measured by the 12 month outlook for both the Queensland and National economies.

This downturn is attributed by businesses to the ongoing prospect of higher interest rates, inflationary pressures, increasing global economic instability and uncertainty associated with a new Federal Government.

The Pulse survey also reveals that the biggest constraint on business continues to be recruiting and retaining suitable qualified staff.

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OVERVIEW

The Australian business community has experienced three workplace relations systems in the past two years: the pre-WorkChoices system prior to March 2006; WorkChoices system from March 2006 to June 2007; and the WorkChoices plus fairness test system since June 2007.

Although further change creates disruption for the business community, the Government has the right to propose changes to workplace laws according to the policies and timetables it has released.

However Commerce Queensland emphasises employers must have sufficient lead time to be able to plan for the changes proposed for Australia's workplace relations system. We have urged the Federal Government to look closely at aspects of the current workplace relations legislation before dismantling it.

Commerce Queensland recommends that a key objective of the workplace relations system, including legislative changes during 2008-09, encourages and stimulates increased productivity, competitiveness and innovation in Australian workplaces and the wider economy.

Economic analysis conducted by the Australian Chamber of Commerce and Industry (ACCI) attached to this submission confirms that the first 18 months of *WorkChoices* indicates a significant beneficial contribution to strengthening the Australian economy. It stands to reason that some of these results will be put at risk if there is a complete rollback of workplace reform as Econtech analysis prepared for the ACCI confirms.

Changes to the workplace relations system have both social and economic impacts. Those economic impacts can affect, either positively or negatively, the competitiveness and productivity of industry, and in turn economic performance. Proposed changes to workplace laws must be tested against the Government's economic and social policy.

Accordingly Commerce Queensland is encouraged to see the Committee's emphasis on inflation, industrial disputation, productivity, employment and broader economic and social impacts. The material prepared by and for the ACCI will greatly aid the Committee's assessment of proposed changes and their likely impact on the Australian business community.

AUSTRALIAN WORKPLACE AGREEMENTS

Commerce Queensland is disappointed that the government has decided, in accordance with its policy, to prevent further Australian Workplace Agreements from being made. The impact of individual statutory agreements has significantly benefited employers and employees. We acknowledge that unfortunately in some cases employees have been made worse off compared to the award. However, this problem could have been addressed by ensuring that all individual agreements pass the No Disadvantage Test.

The Government has created a new Individual Transitional Employment Agreements (ITEA) which are identical to an AWA. In this case the ITEA must pass the new No Disadvantage Test which will provide a greater protection for employees. An ITEA has a limited period of operation with the latest expiry date being 31 December 2009.

The concept of an individual entering into an individual agreement with an employer will be available under the Award Modernisation process.



Under matters to be dealt with under the Award Modernisation matter dealing with “Annualised wage or salary arrangements” will allow employers and employees to enter into an agreement that would involve the employer paying an employee an overall amount average over the course of the year that is inclusive of the employees wage (or salary) and other award based monetary entitlements eg penalty rates. This arrangement would include appropriate safeguards to ensure that individual employees are not disadvantaged.¹

The concept of agreeing to an annualised salary including penalty and other monetary benefits is in effect no different to an AWA or an ITEA.

Every employee enters into an individual employment contract. The terms and conditions of their employment is governed by legislation and or an industrial instrument. Every employee should have a right to enter into their own individual agreement (whatever name is given to it) and not be restricted by the terms and conditions contained in workplace agreements or awards that may not be suitable to their own particular circumstances. An individual can have different circumstances that need to be met such as family matters (start and finish times, leave requirements etc) that may not be able to be accommodated in a workplace agreement where the majority of employees need to agree to such a change, for example changing custody arrangements for one or more parents.

We support the legislation in respect to ITEAs and the provision to allow for annualised wage or salary arrangements. We would still strongly urge the Parliament to reconsider the use of individual statutory agreements with the proper protections to ensure employees are safeguarded.

MATTERS OF CONCERN

1. *Section 326 Individual Transitional Employment Agreement*

- An ITEA can be only be made with a new employee or an existing employee who is currently on an AWA.

It would be our submission that an ITEA should not be restricted to the above two categories of employees. An existing employee’s circumstances can change which may result in the employee seeking to enter into an ITEA. Why should this employee be restricted from entering into such arrangements. The employee cannot be disadvantaged because of the No Disadvantage Test which is applicable to the above two categories of employees. Secondly, if the majority of employees are on AWAs or ITEAs then it is less likely that the employer will enter into a collective agreement under the time is closer to the expiry date. The employee cannot access the flexibility under the award modernisation because that will not be available until 1 January 2010.

Action:

We would propose that the Bill be amended to allow existing employees (not employed under an AWA) or new employees after the 14 day period has lapsed to enter into an ITEA.

¹ Explanatory Memorandum pg 68



2. NO DISADVANTAGE TEST (NDT)

Section 346C

- S 346C requires that an agreement that ceases to operate must still be tested (NDT).² If this provision is limited to wages only then that would be acceptable. However, if the provision relates to all award and monetary provisions then this clause is not acceptable because during the life of a workplace agreement an award could be modified which may provide additional benefits. This would be manifestly unfair to an employer who has negotiated in good faith for a period of time but will still be exposed to wage claims or civil penalties if the amendments are not implemented.

Other than wages, an agreement after it has passed the initial NDT, should not be required to satisfy meet the NDT. The absurd situation is that unless an employer continuously lodges their agreement with the Workplace Authority Director, an employer could be in breach of this provision.

Action:

Section 346C be amended to ensure that during the life of a workplace agreement or an ITEA an employee's wage rate will not fall below the wage rate prescribed by the Reference Instrument, Relevant General Instrument or a Designated Award

Section 346E – When does an agreement pass the no –disadvantage test

In respect to an ITEA the instrument that it will be tested against is a “Reference Instrument”. We would submit that the test should be the same as for a “Collective Agreement” which is limited to a “general instrument” or if no general instrument any “designated award”. It would be manifestly unfair to treat an ITEA differently to a Collective Agreement.

Action:

Section 346E (1) (a) be amended to delete the reference to a relevant collective agreement.

Section 346 U – Workplace Authority Director must notify of decision

- The section requires the Workplace Director to notify the parties whether their agreement has passed or failed the NDT. Our principal concern with this section is that there are no time limits imposed on the Workplace Director to notify the parties. Unless there are some in built time requirements contained in the legislation then the problems that employers are currently facing regarding the uncertainty of whether their agreement has passed the Fairness Test will continue to be compounded under the NDT. This is unfair to the parties that have entered into a workplace agreement as they are unaware of whether the agreement has passed the NDT until advised.

² Explanatory Memorandum pg 11



- An agreement that operates from lodgement can be a major concern to the parties if they are unsure of whether an agreement passes the NDT. This is particularly relevant if the agreement is being assessed against a designated federal award where previously the previous employment may not have been covered by an award. This could result in an unintentional outcome where the agreement may fail the NDT. If this period is excessive, then the employer is required to make up the difference between what is paid and the shortfall.
- Commerce Queensland is seeking fast track this notice period by imposing a 30 day period for the Workplace Authority to notify the parties. The 30 days is the same period given to Employers to lodge any variations or an undertaking to rectify any shortfall in the agreement to pass the NDT.

Action:

Section 346U be amended to include a maximum period of 30 days from the day of lodgement to the day the notice is sent.

Section 346W – Agreement does not pass the no-disadvantage test – agreement in operation

- This section allows the employer to lodge a variation to the agreement to satisfy the NDT or give an undertaking if it is a greenfield agreement. This provision should be able to be undertaken without the variation going back to the employees to be voted on. This would be a costly exercise if this was the intention of the clause.
- Commerce Queensland would seek that if the employer is lodging a variation to satisfy the NDT, then no employee can be worse off as a result of its variation, and therefore there should be no requirement for the variation to go back to the employees to be voted on.
- As there is only 30 days for the variation to be lodged this does not allow the employer sufficient time to arrange for the variation to be distributed, information statements to be provided to employees, conduct the ballot (allowing for the 7 day period), get the parties to sign off on the variation and then lodge the variation with the Workplace Authority.

Action:

Section 346W be amended to allow for a variation to be made to an agreement to satisfy the NDT without the necessity of having the variation approved by employees and then submitted.

Section 324A – Documents taken to be workplace agreements

- This new section causes Commerce Queensland considerable concern. The new “section 347 A (item 4) would ensure that only workplace agreements that comply with the requirements of Division 2 of Part 8 (including the requirements for the types of agreements that can be made) and that are properly approved in accordance with s340 would come into operation.

This means that, for example, an agreement could not come into operation if the agreement:

- is not with employees whose employment would be subject to the agreement, or
- did not meet the relevant signature requirement.”³

³ Explanatory Memorandum pg33



- The impact of this provision is that you could not enter into a workplace agreement without having an employee whose employment would be subject at the time the agreement is made.
- Our concerns can be summarised as follows:
 - (a) It would prevent Greenfield project agreements being entered into as no employees are employed prior to the agreement being made.
 - (b) An agreement cannot be lodged even if all the processes were followed because an employee has ceased employed prior to the ballot taking place. For example the agreement seeks to cover all classifications in the workplace including the fitter. Just prior to the ballot the fitter ceases employment and there are no other fitters employed and the Employer has not replaced the employee prior to the ballot. If the employer lodges the agreement the employer would be in breach of the legislation and face civil penalties.
 - (c) It would hinder the making of agreements.
 - (d) Throughout the life of an agreement circumstances can alter within a company which may require other classifications to be employed. It is not uncommon in a workplace agreement for all classifications to be included even if only 2 out of 5 classifications are employed.
 - (e) An agreement could not contained classifications levels if there are no employees employed in those levels. This would be restrictive as there are a number of classifications structures that are based on progression from one level to the next level subject to the employee meeting the minimum requirements such as hours.
 - (f) The issue of including classifications where employees are not yet employed should not be an issue as the NDT will ensure that they will not be disadvantaged.
 - (g) There is no logical reason why this provision is included and was not contained in the government's pre-election policies.
 - (h) This section, in our view, conflicts with s346G(8) which makes it clear that a reference to an employee includes a future employee." This is necessary to ensure that an award may be designated for a new venture where there are not yet any employees at the time the application for designation of an award is made."⁴

Action:

Section 324A be amended to allow workplace agreements to include classifications of employees who were not yet employed at the time the agreement is made.

⁴ Explanatory Memorandum pg 15



SUMMARY

In summary Commerce Queensland urges this Committee to ensure that a workable alternative to AWA individual workplace agreements exists, before passing any laws phasing out the AWA system. With or without AWAs, the Australian economy must have flexibility in the workplace.

Commerce Queensland draws the Committee's attention to the submission made by the Australian Chamber of Commerce and Industry and conveys its support for this representation.

I will be attending the Committee's hearings in Brisbane along with Stephen Nance (State Manager Workplace Relations Services) and Nick Behrens (State Manager Policy).

Yours sincerely

Paul Bidwell

General Manager, Policy & Membership

Attachments:

- Commerce Queensland Membership Profile
- Workchoices an Economic Success in First 18 Months – ACCI Media Release 28 September 2007
- Workchoices – Good Signs for the Economy – ACCI Issues Paper September 2007
- Independent Report Shows Benefits of Workplace Reform – ACCI Media Release 10 August 2007
- The Economic Effects of Industrial Relations Reforms Since 1993 – Econtech July 2007