AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION

SUBMISSION TO SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (TRANSITION TO FORWARD WITH FAIRNESS) BILL 2008

FEBRUARY 2008

EXECUTIVE SUMMARY

One of the differences between the then Howard Government and the Labor Party Opposition that received plenty of attention during the recent federal election campaign was the respective positions on Australian Workplace Agreements (AWA's). The contrast between them was stark. A return of the Howard Government meant the retention of AWA's. On the other hand, Labor in Government meant their abolition.

The Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 reflects the outcome of that contest.

The experience of the Australian Rail, Tram and Bus Industry Union (RTBU) and its members with AWA's has not been a happy one. Whilst AWA's have only impacted on a small minority of employees in workplaces covered by the RTBU their impact has been unambiguously negative. The RTBU experience is reinforced by a wealth of other evidence gathered elsewhere during the period commencing with the introduction of "Work Choices".

The RTBU therefore welcomes the path to the abolition of AWA's as set out in this Bill. This is so even though we do not see any need for the proposed individual transitional employment agreements (ITEA's). The recent election result suggests that the intent of the Bill will also be welcomed in most households across the country.

The impact of the abolition of AWA's as set out in this Bill can only be positive. Economic and social progress cannot occur where legislation exists to compel employees to work in circumstances they would otherwise reject – and in circumstances where they recognize the give-and- take in the employment relationship. To believe that productivity can increase over time in a workplace of discontent is delusional. And that was the world of AWA's.

The Bill also sets up the 'award modernisation' process. An award system that is contemporary and represents a proper safety net can only be welcomed. The RTBU believes that there is much work to do and whether the current Bill is satisfactory to that end remains to be seen. Certainly, the RTBU will work to ensure that the awards covering our members when read in conjunction with the national employment standards provide a comprehensive and up to date safety net.

INTRODUCTION

The RTBU welcome and appreciates the opportunity to make this submission to the Senate Committee concerning the Workplace Relations (Transition to Forward with Fairness) Bill 2008 (the "Bill").

The RTBU is a Union of employees registered pursuant to the Workplace Relations Act 1996 (Cwth). The constitution of the RTBU defines its membership as comprising the following:

- Employees employed in or in connection with the railway industry
- Employees employed in or in connection with the tramway industry
- Employees employed by any one of a number of publicly owned urban bus operators

Save for the membership employed by some public bus authorities, the RTBU has no restriction on the class or category of employee who, according to the constitution, may become a member. Accordingly the RTBU has members employed in operations, maintenance and administrative work that intersect blue and white collar employment. A similar situation exists with respect to coverage in both the public and private sector. The current membership is approximately 35,000.

The Bill focuses on two key areas:

- the abolition of Australian Workplace Agreements; and
- the establishment of a modern award system

The RTBU welcomes this Bill as the first legislative stage in the abolition of Australian Workplace Agreements (AWA's). Whether in the form of AWA's or their earlier manifestations, the introduction of legislatively backed individual contracts by the then Howard Government were mechanism designed to attack the capacity of workers to organize collectively and to reduce wages and conditions and workplace rights of Australian workers. There is overwhelming evidence to this effect[1].

That the Australian public understood and disapproved of the motive and impact of AWA's is evidenced by its decision in November 2007 to remove the Government that introduced them. From whatever perspective one comes from – economic, political and/or social – the abolition of AWA's can only be seen as a positive advance for Australia.

Whilst the RTBU supports the position put by the ACTU that the introduction of individual transitional employment agreements (ITEA's) are unnecessary, the fact that ITEA's are simply a passing phase means that we can live with them.

[1] A list of sources of such evidence is attached in Annexure 1

With respect to the award modernization process, the RTBU notes that when taken together with the national employment standards, awards will have more meaningful content than had they been left to the mercy to Work Choices. Not to mention what would have been left of awards had a Liberal Government been given the opportunity to have another go at them. The RTBU would however prefer that awards be able to contain a wider range of matters than is proposed in the legislation. The Bill also sets up a process more than an outcome. Whether experience with this process produces the desired outcome remains to be seen. The experience with Work Choices has revealed that workers not only need but also deserve the maximum protection that legislation can give them.

In this submission it is the intention of the RTBU to make a number of general comments with respect to issues determined by the Senate, as being matters the Committee should give "particular reference to". These matters go to the broader impact of the Bill to Australian society. To put that in to a proper context we commence by presenting a brief summary of the experience of RTBU members with AWA's[2]. Following the general comments about the impact of the Bill the submission will make some specific comments about certain provisions in the Bill.

The RTBU also agrees with the submission of the Australian Council of Trade Unions in this inquiry.

The RTBU believes that it is important that we move on past the transitional stage and get to the main game with the substantive legislation. To that end, we submit that, with one amendment, this Committee should recommend the passing of the Bill forthwith.

[2] In this submission the acronym "AWA" is used to describe statutory individual employment contracts that have been in operation since the Workplace Relations Act 1996.

THE EXPERIENCE OF THE RTBU WITH AWA'S

The first experience of the RTBU with AWA's occurred in the early days of the Workplace Relations Act 1996. This was in 1997 and occurred as a result of a decision by the then Howard Federal Government to privatise the Australian National Railways Commission (ANRC).

The privatisation process saw the sale of the ANRC in three parts – the Tasmanian rail operations (Tasrail), the intrastate freight operations in South Australia and the interstate passenger rail services (being the Ghan, the Indian Pacific and the Overland). Two of the three purchasers opted for AWA's – the Australian Transport Network (ATN) which purchased Tasrail and Great Southern Railways which through a facilities management company, Serco Australia Ltd used AWA's to employ employees in the "on train hospitality services" and as on train air conditioning technicians.

The privatisation process also entailed the retrenchment of all employees of ANRC. Those employees received a redundancy payment and could then, if they so wished, apply for jobs with the new private operators. The new operators chose to employ less employees than had been employed by ANRC. Each person who was offered a job came under an obligation to sign an AWA. No AWA, no job. The AWA's had been prepared by the companies with no input from either the employees or the relevant unions. There was no capacity to negotiate on the terms and conditions of the AWA. Comparisons between the AWA's and the enterprise agreement that applied to their employment in ANRC revealed an overall reduction in wages and conditions. And with respect to the on train employees of Serco Australia Ltd. the award used for the purposes of the no disadvantage test by the then Employment Advocate was not the award that applied in ANRC but rather an award of the South Australian Industrial Commission.

In these circumstances, the concept of choice was nonexistent. The capacity to negotiate was nonexistent. The capacity to be represented by a union was nonexistent. Attempts by the RTBU to negotiate a collective agreement were rebuffed. Attempts by the RTBU to resolve the problems in the Australian Industrial Relations Commission were frustrated because the Howard Government had removed any capacity for the Commission to act in any meaningful way.

The fact of the matter was that the employers got exactly what they wanted. That meant a smaller workforce and lower labour costs through reduced overall wages and conditions. The employees had no say in it at all and the companies took advantage of the Howard industrial legislation to sideline the Union.

It needs to be kept in mind here that whatever the outcome, the employers were acting within the legislation of the Howard Government. The experience outlined above simply shows how far the Howard Government went in favour of the employers.

Nevertheless the RTBU continued to maintain a presence and to play a role as best we could. Our task was helped by the fact that many people employed in those companies saw the need for a union and became and remain members of the Union. In 2002, the RTBU struck a collective agreement for most of the employees in the Tasmanian rail operations of ATN. The RTBU has negotiated subsequent enterprise agreements with ATN and its successor, Pacific National (Tasmania) Ltd.

Serco Australian Ltd has, however, stuck steadfast to AWA's and has done so regardless of the views of its employees. This is the case even though a ballot on employee preference conducted under the auspices of, and as a result of an order of, the Australian Industrial Relations Commission produced a result that saw an overwhelmingly positive vote in favour of a collective agreement. Despite the vote, the company decided that its view should prevail. And, given the legislation of the Howard Government at the time there was little that could be done in the short term.

Other than the above there are not a lot of AWA's in operation in the field of coverage of the RTBU. We are aware of AWA's in some companies, including some labour hire companies where casual employment predominates.

Nevertheless the RTBU was under no illusion that we could not come under attack from employers determined to introduce AWA's. There was a view that some companies were awaiting the outcome of the last federal election before making a decision. The politics of the matter was important. Fortunately the good sense of the Australian people intervened.

The experience of the RTBU with AWA's as outlined above is consistent with experience elsewhere and with the evidence available in the literature. It simply reinforces the decision of the Australian people that they have no place in any industrial relations system where the notions of fairness and equity are to prevail.

THE IMPACT OF THE BILL

The resolution passed by the Senate for the formation of this inquiry set out a number of points to which the Committee should pay particular reference.

This section of our submission makes some comments about those points.

a. Economic and social impacts from the abolition of individual statutory agreements

The economic and social impacts from the abolition of AWA's are only positive. Any change that reduces the capacity of the powerful to achieve their ends at the expense of the vulnerable must produce a society that is more fair and equitable than the alternative. As noted in our comments on the operation of AWA's and in the material in the documents mentioned in Annexure 1, the system allowing for the use of AWA's put in place a set of arrangements that allowed employees to be treated in an unfair and inequitable manner.

b. Impact on employment

The impact on employment can only be positive. The abolition of AWA's will result in people feeling more confident about entering the workforce in the knowledge that there is one less vehicle that can be used by employers to compel them to work under less than desirable circumstances. Further people will be more aware that they can join a union with less risk of being penalized for it. As such the abolition of AWA's can only help increase the labour participation rate. Whilst the abolition of AWA's is not sufficient on its own to increase the participation rate there is no doubt that it is necessary for it to occur.

c. Potential for a wages breakout and increased inflationary pressures

There is no evidence to suggest that the abolition of AWA's could lead to a "wages breakout" – whatever that term actually means. With respect to inflation it is suggested that the current pressures on it overwhelmingly come from and are a product of forces other than wages.

The abolition of AWA's is about establishing a fairer and more sensible means of determining wages, conditions and the rights of workers in the workplace.

d. Potential for increased industrial disputation

The abolition of AWA's enables a system whereby employers should display a higher level of respect for the workforce. The use of AWA's permitted employers to unilaterally

determine the wages and conditions of employees regardless of the view or choices of those employees.

Leveling the playing field and applying the notion of bargaining in good faith are hardly harbingers of increased industrial disputation. Indeed, when it is recognized by employers that they need to deal reasonably and fairly with their employees the potential for industrial disputation will diminish.

e. Impact on sectors heavily reliant on individual statutory agreements

Given the abovementioned comments the RTBU believes that the impact on sectors that have been heavily reliant on AWA's can only be positive.

f. Impact on productivity

It also follows from the above that the RTBU believes that the impact on productivity can only be positive.

The happier and more respected a workforce is the more productive it is likely to be. The operation of AWA's, by denying an employee choice, by effectively allowing an employer to determine an employee's wages and conditions, and by undermining the right of employees to effective union representation, could only result in discontented employees. Nobody seriously contends that a workplace of discontented employees would make a positive contribution to productivity.

In summary, the RTBU submits that the abolition of AWA's can only have a positive effect on the Australian community. They were instruments of much controversy and conflict in the community and their abolition can only be a unifying factor. Further there is no evidence to support any argument that their abolition means a negative economic or social outcome.

SOME SPECIFIC COMMENTS

With respect to certain items in the Bill, the RTBU submits the following points

1. As mentioned in the introduction, the RTBU supports the position of the ACTU that there is really no need for the enactment of Individual Transitional Employment Arrangements. We see no need for the making of such instruments during the transitional period. However, as they are of an ephemeral nature it is our view that there are more important things to focus on.

2. Schedule 5 of the Bill provides for 'transitional arrangements for existing pre-reform Federal agreements." In substance this schedule allows for the extension or variation of pre-reform certified agreements under a number of conditions. Those conditions are that the parties genuinely agree to the extension or variation; that no party has taken industrial action or applied for a protected action ballot; that it meets the no disadvantage test and that it be approved by a majority of employees covered by the pre-reform agreement.

   The RTBU submits that the capacity to vary pre-reform agreement pursuant to this schedule should also apply to pre-reform state agreements i.e. agreements reached under the various state jurisdictions but which now come under the Workplace Relations Act.

   In our view, this outcome would make the contents of the Bill internally consistent. There is no good reason to apply this schedule only to "federal" agreements given that the current legislation has expanded its scope and now covers agreements that were previously the province of one of the various state systems.

   The RTBU submits that this Committee should recommend an amendment to the legislation to that effect.

3. Sub-clause 346ZJ of Schedule 1 of the Bill provides that an employer must not dismiss or threaten to dismiss an employee if the "sole or dominant reason" is because a workplace agreement may or does not pass the no-disadvantage test.

   The RTBU is concerned that such criteria are too vague and can create real questions about what constitutes a "sole or dominant reason". In our view an employee should not be terminated simply because a workplace agreement does not meet the disadvantage test regardless of whether it is the sole or dominant reason or one amongst a number of reasons. There is a need, in our view, to keep an eye on this provision to ensure that it is not misused by tangling up the real reason for the

termination with other reasons so as to mount an argument that it was not a sole or dominant reason.

4. Earlier in our submission we noted that in our experience with the introduction of AWA's by Serco Australia Ltd., the then Employment Advocate used an award for the no disadvantage test that was not the award that had traditionally covered the work in question.

   The RTBU is pleased to see that the provisions in this Bill should significantly reduce the potential for a repeat performance – see sections 346G and 346H. Nevertheless it remains a possibility.

   The RTBU, for its part, will in circumstances where the Workplace Authority Director is required to identify an award for the purposes of determining the no disadvantage test, seek to ensure that the appropriate award is used.

SUMMARY AND CONCLUSION

This Bill introduces two key changes to the federal industrial relations system:

- the abolition of AWA's and the phasing out of existing AWA's; and
- establishing the award modernisation process

Both of these changes are aimed at the fulfillment of admirable objectives and should proceed forthwith. Whilst we may quibble with some of the methods of the Government, we recognize the need to get on with the process and to advance the provisions of the substantive industrial relations legislation current under discussion.

The RTBU does, however, submit that the Senate Committee should recommend an amendment to the Bill and that the Senate should take the appropriate action to make that amendment to the Bill in its current form. That amendment is spelt out in point 5 of our submission under the heading: "SOME SPECIFIC COMMENTS". The RTBU believes that it is consistent with the thrust of the legislation and that it would be internally consistent for the legislation to extend the capacity to extend the life of or vary pre reform preserved state agreements as well as federal pre reform agreements. The RTBU is aware that this amendment will also be sought in the submission by the RTBU.

Together with that amendment the Bill should assist in meeting the commitment of the current Government to abolish AWA's and establish a modern award system. The RTBU recognizes that much work remains to be done and the passing of this Bill – with the amendment sought by the RTBU – will permit that work to proceed.

ANNEXURE 1

Queensland Industrial Relations Commission, FINAL REPORT: Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers, Queensland Industrial Relations Commission, Brisbane, 2007.

Industrial Relations Commission of South Australia, INQUIRY INTO THE IMPACT OF WORK CHOICES IN SOUTH AUSTRALIA, Industrial Relations Commission of South Australia, Adelaide, 2007

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Peetz, D., & Preston, A., AWA'S, COLLECTIVE AGREEMENTS AND EARNINGS: BENEATH THE AGGREGATE DATA, Industrial Relations Victoria, Melbourne, 2007

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Office of the Workplace Rights Advocate, EMPLOYER GREENFIELDS AGREEMENTS – Interim Report, Office of the Workplace Rights Advocate, Melbourne 2007

Charlesworth, S. and Macdonald, F., GOING TOO FAR: Work Choices & the Experience of 30 Victorian Workers in Minimum Wage Sectors, Industrial Relations Victoria, Melbourne, 2007