Support Transition to Forward with Fairness Bill 2008

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

Senate Submission by Chris White for amendments 29/2/ 2008

I support the Transitional Bill abolishing AWAs.

The Australian people in our democratic process voted against AWAs, individual bargaining agreements.

The Rudd government has a mandate for the repeal of AWAs that is respected.

Some fine-tuning by the Senate is possible.

I support amendments to improve details for the fairness and effectiveness of the transition.

I re-iterate a basic purpose of labour law. This is the principle of balance; a fair workplace relations system has to have labour law that balances the (normal) unequal bargaining power between employers, corporations and HR versus an individual employee.

Everyone knows this obvious workplace reality that the employer has more power than the employee. Consequently, the Transition Bill has important re-balancing strategies that are appropriate and fair.

However, some improvement of process could be made for these three concerns.

I summarise the policy behind the amendments (and can provide more details).

1. Improved Fair play process in the transition;
2. Restore the individual right to strike in individual bargaining.
3. A Transitional right to strike for existing pre-reform Federal agreements.

1. Fair Play process

In order to make the Transition fairer for the employee, I recommend a 'fair play' process amendment be passed. This allows the employee to make an application to the AIRC to consider, on the merits, whether the AWA or ITEA is coercive, made under duress or is unfair.

The umpire considers whether there is an abuse of the principles of bargaining.

The individual, who feels so aggrieved that she had no choice during the AWA period and/or the transition ITEA, now has a choice to argue a 'fair play' case before the umpire.

The application process would be at no cost, speedy, simple and non-threatening.

The individual employee or both the employee and management or the AIRC can determine the matter in dispute is handled by mediation or conciliation - where the AIRC has discretion for a recommendation, or finally arbitration: but only as a last resort.

The 'fair play' test is based on merit and equity principles and not 'black letter law reasoning' nor legal technicalities.

The drafting would be the reverse of *WorkChoices* in that it is non-prescriptive: i.e. 'fair play' is not defined by the Act, but the umpire has a broad discretion.

Often the grievance is solved after notification to the employer or after an initial conference.

The umpire has a discretion to respond by doing nothing i.e. dismiss the application.

The umpire can after hearing the merits order that the 'agreement' be re-negotiated by the parties.

If arbitrated the umpire can order fairer terms, to the end of the transition.

I predict that only a few of the worst cases will be entertained by the AIRC.

The employee may of course not have the confidence or resources to argue his/her case, so is to be allowed to have representation, from a union, lawyer, or bargaining agent or other person of his/her choice.

It is stated in response to this amendment that the current *WorkChoices* system of the Workplace Authority (that has new powers under the Bill in evaluating the AWAs or ITEAs) is satisfactory to handle this fair play amendment.

If MPs believe this, then you are sorely mistaken. It is the inadequacy of the *WorkChoices* process that demands the fair play choice be heard by the AIRC.

2. ITEAs and the 'power' of individual negotiating

The right to strike is an essential ultimate means assisting an employee's negotiating power with the more powerful employer.

WorkChoices even abolished this basic human right to strike for the individual employee. AWA protected action was re-moved.

Prior to *WorkChoices,* an individual worker could lawfully threaten to withdraw labour when faced with an AWA. If the individual was able to go through the technical process, lawful bargaining pressure was possible.

This AWA right to strike did not have much use. The employers' 'take it or leave it' repression prevailed over the feeble strength of one. But at least when an individual was faced with AWA bargaining, the 'protected AWA action' provision matched the means to lawfully strike, as a last resort, in collective bargaining for collective agreements.

An individual in AWA 'bargaining' was forced to negotiate in a 'slave-like position'. But not quite the slave, who has no right to strike. The individual's freedom to withdraw labour without penalty is paramount.

The right to strike is accepted politically from the left, the middle and the right.

I do not know any Member of Parliament who denies the individual the right to strike.

Liberal and National Party MPs know that the right to strike in principle has been supported by Liberals for many years and former Ministers. Employers support enterprise bargaining protected action. Neo-liberal theorist for the market economy Hayek supports the right to strike. Even the right-wing libertarian individualists campaign against the state taking away such a basic individual right. As a human right it has pre-dominance.

I add an important qualification to this amendment. Due to the unequal power relationship between employers and an employees, it is unreasonable to have a right of the employer to lockout existing employees.

The lock-out in the last decade returned with a vengeance until the individual or all of the workforce signs an AWA. Too many employers have abused this right. This negated any protection offered by the prohibition on duress to the individual on the AWA.

Working families have suffered the terrible impact of the 'starve them onto an individual contracts'. Such coercion is obviously not anywhere near balance.

Australia has a 'worlds-worst' lock-out practice that ought not to be part of any new fair work system: nor in a transition.

3 Delete in Schedule 5 2A (2) the subsection (b) as it denies the right to strike for existing pre-reform Federal agreements during the transition.

Section 2A says the Commission may extend or vary pre-reform certified agreements and that is a most appropriate process for the industrial relations parties in the transition.

However, I submit that subsection (b) unfairly totally prohibits industrial action in these circumstances.

There is no merit argument that overrules the fundamental freedom of association to negotiate, here the terms of the pre-reform agreement rolled over, with the lawful strike as a last resort measure without which effective and fair bargaining does not exist.

It is fair and reasonable for the Senate to reinsert the provisions of the pre-reform Act as to 'protected action.'

The right to strike as a principle ought to be upheld by this Senate.

Employees who choose to vary the terms of the pre-reform agreement during the transition ought to have the 'protected action' provisions applied where the individual and the collective action are protected.

Under *WorkChoices* the right to collectively strike is severely curtailed, almost to the point of suppression. More penalties apply. Legitimate strikes are now legally very risky, with complex legal technicalities of the 'command and control' penal regime. See my Senate submission 129 to the *WorkChoices* Bill and www.JAPE.org No 56 '*WorkChoices*: Removing the choice to strike'.

Legitimate collective withdrawing of labour has been made unlawful by a repressive state in too many circumstances in the past.

The Rudd government ought not to add to these circumstances, however transitional.

It is the principle that is important.

Addendum: Senators can pass retrospectivity when in the public interest. Here it is responsible against employers who moved to exploit workers on AWAs after the election. The operative date ought to be from that night on the grounds of respecting the democratic voice. The Howard government passed retrospectively without legitimacy in the disastrous and repressive Building and Construction Improvement Act (2005).

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