The Australian Workers' Union submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

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Introduction

The Australian Workers' Union ("AWU") is Australia's oldest and largest continuously operating union of employees, formed in 1886.

The AWU represents over 130,000 members throughout Australia, from industries as diverse as mining, oil and gas, manufacturing, tourism and hospitality, aged care, civil construction, shearing, aluminium refining and smelting, steel production, local government, health, horse racing and training, sugar refining and retail.

In some significant areas of traditional AWU coverage – particularly the resources and mining industries in Western Australia and Queensland – the rapid (and relatively unprecedented) scale of expansion in capital investment, infrastructure development and jobs growth during the course of the last five (5) years has permitted employers to unilaterally and fundamentally alter the pattern and scope of industrial regulation, almost exclusively through the operation of the *Workplace Relations Act 1996* ("WRA") and, more particularly since March 2006, through the operation of the *Workchoices* legislation.

Much debate has ensued in the public domain on the desirability, appropriateness and fairness of the *Workchoices* legislation. However, the most scathing criticisms have been reserved for the operation of Australian Workplace Agreements ("AWA's").

The AWU has been in the unique position of having witnessed first-hand the transformation of industrial relations throughout Australia since the first form of federal industrial regulation was enacted in 1904. The AWU was the first union to apply for – and succeed in securing – a federal industrial award[1]. The AWU, and its constituent amalgamated entities, have also been at the forefront of many of the significant advances to wages and working conditions during the course of the last 104 years.

These advances have emerged through a combination of merit-based outcomes through independent arbitration and through successful negotiations with employers.

Unfortunately for AWU members (indeed, for many union members Australia-wide), the opportunity to fairly and effectively deliver appreciable and collectively-based social justice outcomes for ordinary working men and women had been largely stifled with the advent of AWA's and the provision of a legislated manuscript for employers to unilaterally break down, side-step or demolish fair and decent working standards that have been incrementally improved upon since the early years of the last century.

The *Workchoices* scheme, and the AWA's that largely informed it, were never designed to improve wages, conditions of employment, job security, productive capacity or employment participation in a meaningful, verifiable and transparent fashion. To the contrary, both have been exposed for the crude tools that they were.

The AWU unequivocally supports the Labor Government's initiative to eradicate the menace of statutory individual contracts, and to restore a reasonable measure of balance, transparency and fairness to the Australian industrial relations system.

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1 *Pastoral Industry Award 1907*

Workplace Relations Amendment (Transition to Forward With Fairness) Bill 2008

The *Workplace Relations Amendment Bill (Transition to Forward With Fairness) Bill 2008* ("the Bill") represents a critical first step in the restoration of core industrial standards in Australia.

In sharp contradistinction to the former federal government, the newly elected Labour Government has a clear and overwhelmingly supported mandate to effect fundamental change to the WRA legislative scheme, particularly with regard to AWA's.

In accordance with that mandate, the Bill is clearly framed with the intention to completely remove statutory individual contracts and to manage the transition that a relative minority of employees and employers will be required to undertake as a result of this legislative change[2].

The move is not without its significance. It is now beyond doubt that the operation of AWA's have, in many cases, removed key employee entitlements. Data recently provided to the Department of Employment and Workplace Relations by the Workplace Authority confirms, amongst other things, the following with respect to AWA's –

- 89% excluded one or more "protected award conditions"
- 83% excluded two or more "protected award conditions"
- 78% excluded three or more "protected award conditions"
- 71% excluded four or more "protected award conditions"
- 61% excluded five or more "protected award conditions"

The scale and reach of the removal of key employee entitlements by virtue of the operation of AWA's is compounded, and aggravated, by the fact that wage and wage related outcomes pursuant to the terms and conditions of AWA's are manifestly inferior to those achieved by non-managerial employees under collectively negotiated agreements. On the basis of the material that was made publicly available by the former government, this situation appears to have been evident (almost without exception) since the introduction of AWA's in 1996[3].

There are other contextual elements with respect to the proposed removal of AWA's. In spite of the empty rhetoric and hyperbole exercised by a succession of former Workplace Relations Ministers, the March 2006 "reforms" to the WRA as they related to AWA's gave many employees absolutely no choice in determining the manner by which they would employed. Australian Workplace Agreement could be unilaterally imposed on new employees on a "take it or leave it basis"[4]. This, coupled with the former government's welfare to work policies, grossly disadvantaged the economically needy at the expense of the economically greedy and simply acted to entrench the inequality in effective bargaining power that exists between many employees and their prospective employers.

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2 Between 4-6% of the total workforce are subject to the operation of AWA's – see generally *Employers Defend Howard's AWAs Despite Slow Take-Up* by Brad Norington & Andrew Trounson, The Australian, 31 March 2007, p. 33. See also Watts, M. and Mitchell, W. *Wages and Wage Determination in 2005*, Journal of Industrial Relations, 48(3), page 321

3 See generally - Peetz, D. and Preston, A.*, AWAs, Collective Agreements and Earnings: Beneath The Aggregate Data*, Report Commissioned by Industrial Relations Victoria, March 2007; *AWA Data the Liberals Claimed Never Existed*, Media Release, The Hon. Julia Gillard MP, 27 February 2008; Mitchell, R. and Fetter, J (2003) *Human Resource Management and Individualisation In Australian Labour Law*, Journal of Industrial Relations, 45(3): 292-325.

4 Section 326(2) of the WRA

The power of an employer to unilaterally terminate an AWA after the expiration of the agreement's nominal term of operation, and the attendant effects of such an election, could only ever have been designed to exacerbate the differential in real power relations between employees and employers[5].

In addition to this, the scheme giving effect to the operation of AWA's has been repeatedly investigated and queried by the International Labour Organization for offending fundamental human rights, particularly those that relate to the right of employees to collective representation and the right to collective bargaining[6].

In response to the matters referred to this Committee for consideration with regard to the Bill, and for the reasons advanced in this submission, the AWU believes that the removal of statutory individual agreements will improve the basis upon which industrial relations in this country are conducted, such that the fundamental rights of employees of employees are protected; that employees are not overtly or unwittingly subjected to the removal of core terms and conditions of employment; and that employees have the meaningful right to participate in collective bargaining processes without the threat of individual contracts lurking in the background.

Economic and Social Impacts from the Abolition of Individual Statutory Agreements

Due to the highly secretive nature of AWA's (a micromanagement and politically-driven tool which was deliberately exploited by the former federal government to stifle transparency and accountability), it has been somewhat difficult for researchers to critically evaluate the economic and social impact that has occurred with the advent of those agreements, or that may occur with the abolition of them[7]. The causal connections between industrial relations system changes and macroeconomic outcomes is acknowledged as being "exceedingly difficult" to demonstrate and quantify[8].

5 Section 393 of the WRA

6 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); and Right to Organise and Collective Bargaining Convention, 1949 (No. 98); ILO Committee of Experts on Application of Conventions and Recommendations (2005) *Individual Observation Concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia* (ratification: 1973) International Labour Office, Geneva; ICTUR (2005) *Submission to the Australian Senate Employment, Workplace Relations, and Education References Committee Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005*, Submission 185, International Centre for Trade Union Rights, November.

7 Wooden, M. (1999) *The Role and Significance of Individual Agreements in Australian Industrial Relations*, The Transformation of Australian Industrial Relations Project, Discussion Paper Series, No. 6, Flinders University, Adelaide: National Institute of Labour Studies

8 Hodgkinson, A. and Markey, R., *Industrial Relations Change in the Illawarra Region of NSW: an Insight Into Responses to the Workplace Relations Act*, Australian Bulletin of Labour, p.37

From a macroscopic viewpoint, what is known is that many AWA's stripped away from employees what were to have been core "protected award" conditions[9]. It is also known that for non-managerial employees, AWA's largely delivered less favorable wage outcomes than those delivered through collective agreement making[10]. It necessarily follows that the abolition of AWA's and the reinstitution of legitimate no-disadvantage bargaining tests will act to restore an appropriate benchmark of terms and conditions of employment for employees that have, to date, been subjected to the operation of individual statutory agreements. Whilst the precise economic and social effects of this transition may not be readily calculable, an appreciable and immediate effect could be expected for the employees concerned. In reality, this only places employees back in the position they would have been in, but for the imposition of an individual statutory agreement making regime in 1996.

Some critical analysis has been attempted with regard to the significance of the use of AWA's on mining industry practices and productivity within the Australian mining industry[11]. Whilst noting the relatively widespread use of AWA's in the mining industry, visiting scholar and PH.D. economist Jim Stanford concluded that –

"….there is no empirical evidence that AWA's and the other elements of the Howard Government's industrial relations regime have altered fundamental labour practices or costs at all (compensation, hours of work, productivity, and unit labour costs). Mining profits have increased to record levels, generating extremely high profit rates, solely because of an unprecedented increase in global mineral prices, which have risen by two-thirds since 2003. A diminishing share of those profits is being reinvested in new projects – partly because of resource constraints and other factors. ***There is no credible case that future mining investments would be undermined by the elimination of AWA's****."*

Peetz and Preston (2007) have also noted that the widespread use of AWA's in the mining industry is attributable to well-documented "union avoidance" strategies, resulting in a 3.6% wage reduction premium for employers that use such agreements[12]. As with many other industries, AWA's in the mining industry can be criticised "for being minimal documents, focused on limited provisions, primarily designed to increase the number of hours an employee can work whilst minimising the cost of labour"[13].

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9 *AWA Data the Liberals Claimed Never Existed*, Media Release, The Hon. Julia Gillard MP, 27 February 2008

10 Peetz, D. and Preston, A.*, AWAs, Collective Agreements and Earnings: Beneath The Aggregate Data*, Report Commissioned by Industrial Relations Victoria, March 2007; van Barneveld, K., *Australian Workplace Agreements Under WorkChoices*, (2006) 16(2) The Economics and Labour Relations Review 165

11 Stanford, J., *Prices, Labour Costs and Profits in the Australian Mining Industry: 2001 through 2006*, D!ssent, Spring Edition 2007

12 Peetz, D. and Preston, A.*, AWAs, Collective Agreements and Earnings: Beneath The Aggregate Data*, Report Commissioned by Industrial Relations Victoria, March 2007

13 van Barneveld, K., *Australian Workplace Agreements Under WorkChoices*, (2006) 16(2) The Economics and Labour Relations Review 165

From a broad social perspective, the abolition of AWA's (particularly in the mining industry) are necessitated when the occupational health and safety of employees is considered. On balance, AWA's are less likely than collectively negotiated agreements to adequately address issues associated with occupational health and safety, consultative mechanisms and employee training, with up to 25% of sampled AWA's only providing the most cursory references to these important industrial issues[14].

The escalation of the use of AWA's in the mining industry, and the concomitant decline in the focus on occupational health and safety, consultative mechanisms and employee training within individual statutory agreements can (and in the AWU's submission, has) had an appreciable social impact. The mining industry is typified by "community" – whether intermittent (but regular) in nature (ie. where employees live and work with one another for extended periods of time in fly-in/fly-out operations), or where permanent mining communities have been established around particular mining operations (eg. Xstrata's mining operations in Mount Isa, Queensland).

Mining operations, particularly underground operations, necessitate the close coordination of effective communication and established confidence amongst employees, and between employees and their supervisors. The "crew" nature of the organisation of work in these environments should ordinarily operate in favor of achieving these objectives. However, the divisive and individualistic nature of AWA's (particularly in an underground mining environment) may act to break down the fundamental collective mentality which has historically, and should ideally, exist.

The AWU has witnessed the catastrophic aftermath of a number of largely avoidable incidents where AWA's were being exploited by mining operators and where serious employee injury and death has resulted. Recently, an underground miner was unfortunately killed at a Queensland mine that had introduced AWA's, and where for the balance of its operations collectively negotiated outcomes (including those that relate to occupational health and safety, consultative mechanisms and training) had predominated[15]. In this case, the AWU is of the view that AWA's (including the attendant restrictions on union access to the Mine site) conspired to contribute to an unfortunate set of events that led to the death of a worker. The AWU has made similar criticism of the recent deaths associated with Fortescue Metals Corporation operations in Western Australia. These tragedies bear an enormous social impact on the communities concerned, and the AWU firmly believes that the abolition of individualistic AWA's and the reinstitution of collective rights will provide a greater ability to promote, monitor and improve the safety of workers in the industry.

Impact on Employment

The economic arguments used by the former federal government to justify the WRA legislative scheme and the use of AWA's revolved squarely around the neo-liberal "Washington Consensus" model where labour deregulation and "flexibility" were credited with lower unemployment, higher wages and a more productive economy[16].

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14 Roan, A., Bramble, T. and Lafferty, G., *Australian Workplace Agreements in Practice: The 'Hard' and 'Soft" Dimensions*, The Journal of Industrial Relations, Vol. 43, No.4, December 2001, 387-401

15 BHP Cannington Mine, Queensland

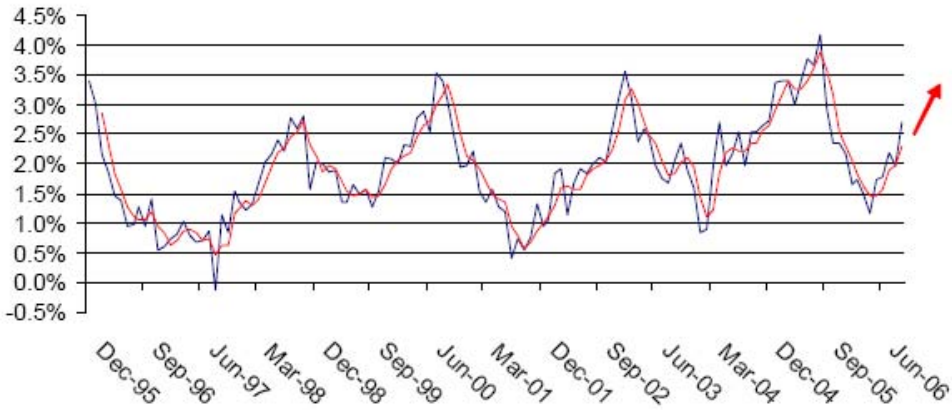
16 Freeman, R., Address to the *Fair Go* Conference, Brisbane, 10 September 2007, reported in *Workplace Express*, 11 September 2007: www.workplaceexpress.com.au/news

Operating on the assumption that AWA's are designed to limit wage outcomes and consequently promote employment growth (or conversely put, that high aggregate wages impedes employment growth), the ideological underpinnings of this exercise are now subject to serious question. In its 2004 *Employment Outlook* paper, the OECD stated that there was "fragile" evidence that excessively high aggregate wages impeded employment growth and unemployment reduction. That conclusion was re-emphasised by the OECD in its 2006 *Employment Outlook* paper where it was noted that "no significant direct impact of the level of the minimum wage on unemployment is identified."

This notwithstanding, the oft-repeated catch-cry of the former federal government was that the WRA scheme, particularly the use of AWA's, delivered higher real wages for employees subject to the operation of those agreements. For the reasons already articulated and cited, the overwhelming majority of credible academic analysis of AWA's demonstrates the minimalistic and cost-reduction nature of those arrangements, as opposed to a focus on improving productivity. In the absence of genuine, demonstrable and verifiable improvements to workplace practices through the use of AWA's, the argument that AWA's bear a direct relationship with employment growth cannot be credibly sustained.

Perhaps more importantly, the claims of the former federal government in this regard need to be assessed against the cyclical nature of employment growth in Australia. As Swan and Smith amplified in their 2006 report[17], the former federal government's claims regarding the positive impact of the WRA scheme on employment growth is not borne out by the historical and cyclical trends in employment (refer to the table below).

Employment growth has been cyclical



Source: ABS Labour Force, annual employment growth and trend

[17] Swan, W. and Smith, S., *Industrial Relations and Australia's Economic Future*, 23 October 2006, p.8

Potential for a Wages Breakout and Inflationary Pressures

For a considerable period of time, the former federal government took much credit in asserting that the operation of the WRA and AWA's actuated higher real wages for employees. This is an internally inconsistent argument with regard to the stated need to reduce a potential wages breakout and to constrain inflationary pressures through the continued operation of AWA's.

For the reasons already advanced, the operation of the WRA and AWA's have deliberately and artificially dampened wage outcomes within the domestic economy. The illusion (or delusion) of productivity gains through the use of AWA's is not borne out by any credible evidence.

The proposals that constitute the Labor Government's *Forward With Fairness* plan will operate to ensure that appropriate regulatory mechanisms are established so that real wage outcomes are obtained in exchange for mutually agreed (and demonstrable) productivity improvements at the enterprise level.

Potential for Increased Industrial Disputation

The assertion that the removal of AWA's will necessarily increase the potential for industrial disputation is neither credible, nor supported, by available data. As Hamburger noted in 2007[18], industrial disputation trends in other OECD countries (notably the US, UK, France, Germany, Canada and Italy) have also declined markedly over the course of the past decade.

Buttressing this phenomenon is the fact that the legislative scheme promoted by the federal Labor Government in its *Forward With Fairness* plan does not fundamentally alter the core regulatory mechanisms that presently exist with respect to agreement making. Industrial parties will continue to be prevented from undertaking unprotected industrial action; an enforcement regime will still exist with regard to unprotected industrial action; and formal applications and processes will still be required to be complied with prior to the institution of protected industrial action.

As a point of immediate reference, the bargaining dispute concerning Boeing workers at the Williamtown (NSW) Military Aerospace Support facility, near Newcastle, in 2005 and 2006 amply demonstrate the regulatory failings of the WRA, particularly with respect to the conflict between AWA's and limited collective bargaining rights (refer Attachment 1 for a summary of findings by the NSW Industrial Relations Commission).

Despite having a logical, rational and genuinely founded reason to seek to move away from AWA's and individual common law contracts of employment, AWU members at Boeing were confronted by an employer that would not, and could not be compelled, to enter into meaningful negotiations at all. This regulatory failing only served to exacerbate the genuine feelings of dissatisfaction the employees felt with regard to the mode of industrial regulation that existed in the operations, which in turn directly fed into a cycle where industrial positions became entrenched and unresolved for a period of 265 days of protected industrial action.

[18] Hamburger, J. (Senior Deputy President, Australian Industrial Relations Commission), Address to the Workplace Research Centre, Sydney, August 2007, reported in Workplace Express 10 August 2007: www.workplaceexpress.com.au/news

This unfortunate situation could have been avoided had the former federal government not made the decision to introduce AWA's; not made the decision to strip away the Australian Industrial Relations Commission's powers to intervene; and not made the decision to place the internationally recognised rights of workers to collectively bargain behind the desire of unscrupulous employers to shield themselves from appropriate scrutiny and the negotiation of fair and reasonable workplace outcomes.

The irony of the Boeing dispute is that the workers ended up with a collectively negotiated agreement that delivered over 85% of their claims – in spite of the company's repeated assertion that it would never entertain a shift away from individually negotiated industrial arrangements.

The Boeing dispute clearly highlights the inadequacies of the WRA and the greater propensity under that form of regulation for disputes to become inflated, rather than resolved.

Impact on sectors heavily reliant on individual statutory agreements and Impact on Productivity

For the reasons previously cited, and on the balance of the available academic research, there will be minimal impact on industries heavily reliant on the use of individual statutory agreements, save for the fact that relevant wages and conditions of employment for workers in those industries will be restored to levels that generally prevail in the industry, or the community.

Attachment 1

Boeing Dispute – Key Findings of the NSW Industrial Relations Commission

- "…the issues as to particular terms and conditions of employment…seem to us to be of a routine and unremarkable nature…[that] could be promptly and efficiently resolved by this Commission." (para 139)

- "We find that these grievances have been genuinely held, in that they have not been raised for any ulterior purpose but arise from a real and widespread sense of serious dissatisfaction with conditions prevailing in the workplace. Further, we find that these grievances are not unreasonable in themselves, in that the evidence shows that they have a rational and factual foundation." (para 140)

- "The Commission accepts that, from the point of view of the AWU's interests and those of its members, the AWU's position that a collective agreement is necessary is genuinely held and has, on the facts of this dispute, a reasonable and rational foundation." (para 149)

- "Each of [Boeing's] reasons bear closer analysis, since on the evidence there are real grounds to doubt whether these reasons (for refusing to enter into a collective agreement with the AWU and its members) have any objective, rational foundation." (para 156)

- "[Boeing] was unable to give any explanation as to why a collective agreement would not fit in with [its] business objectives." (para 157)

- "The evidence makes it difficult to conclude that, at Williamtown at least, the individual contract system had, at least by normal industrial relations criteria, been a success…" (para 157(c)"

- "[Boeing's] desirability of a "seamless" or common and consistent set of employment arrangements across the various sites of Boeing's Military Aerospace Support division, was not supported by a rational explanation. The Boeing witnesses were simply unable to explain why the same outcome could not be attained under a collective agreement." (para 160)

- "…while Boeing nominally recognises a right for employees to belong to a union, it adopts an approach which, in practical terms, largely denudes that right of any value or substance." (para 166)

- "The system of individual contracts which [Boeing] has established is one, however, which entrenches an inequality in economic and workplace power between Boeing and each of its employees at Williamtown, and thereby maximises Boeing's discretionary capacity to set up and change terms and conditions of employment to suit its own interests." (para 168)

- "Boeing's approach belongs in an industrial relations paradigm which is radically different from that which is contemplated by the *Industrial Relations Act* and which normally applies to employer-employee relations in [New South Wales]." [para 169)

- "…a fundamental reason why Boeing values dealing with its employees individually is that it maximises its capacity to determine unilaterally the terms and conditions of employment for its employees, rather than having to accept a negotiated outcome with the inevitable compromises that such an outcome would carry with it." (para 164)

Source: Findings of the Full Bench of the New South Wales Industrial Relations Commission in *Inquiry Into The Boeing Dispute At Williamtown* (Matter No. IRC 5639 of 2005)

The claims being agitated by AWU members at Williamtown were –

- 38 hour week
- Overtime penalty rates
- Shift allowances
- A fair dispute resolution procedure
- Fuel tank allowances
- Regular and fair wage increases
- Community Service Leave
- Redundancy pay
- Casual rates of pay
- Annual leave loadings
- Parental leave

The matters proposed to be included in the non-union collective agreement by Boeing cover the following matters –

- 38 hour week
- Overtime penalty rates
- Shift allowances
- A dispute resolution procedure
- Fuel tank allowances
- Regular across the board wage increases
- Military Service Leave
- Redundancy pay
- Casual rates of pay
- Maternity and Paternity leave

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