



Guide to the federal wage safety net

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Executive summary

- The possibility of recurring national political contest over the composition and content of the legislated wage and employment safety net may come to be seen as the legacy of the Coalition Government's 'Work Choices' amendments to the *Workplace Relations Act 1996*. For over 80 years, federal workplace relations laws were based primarily on the Constitution's conciliation and arbitration power, enabling an independent industrial tribunal to make and vary awards through the resolution of industrial disputes.
- This approach changed under the Keating Government when certain employee entitlements were provided nationally relying on other constitutional powers. The shift to Parliament determining safety net standards was completed under the Howard Government's 'Work Choices' amendments relying on constitutional powers other than the conciliation and arbitration power, but relying mainly on the Constitution's corporations power. Parliament could thus vary the standard working week from 38 hours and it could directly set the national minimum wage.
- The scope of the safety net is proposed to be enhanced, evident in the Labor Government's National Employment Standards (NES) which propose ten minimum conditions (in effect eleven standards including a minimum wage for award-free workers). This is in contrast to the Coalition Government's five conditions under the Australian Fair Pay and Conditions Standard (AFPCS), and certain other minimum entitlements.
- Employees who may have previously been employed as award-free workers are likely to have been advantaged by the advent of the AFPCS in 2006. For award workers, an improvement to personal and compassionate leave is the result of superior AFPCS terms displacing similar award provisions. Some award workers also benefit from shorter working hours under the AFPCS.
- However, limitations of the safety net may arise when a business fails and where employees work under employment contracts and under award-free arrangements that are silent on redundancy. The Australian Industrial Relation Commission (AIRC) does not appear to have the necessary award-making function to resolve these types of matters. Although, there may be other options available to resolve a redundancy situation. Labor's proposed ten-point safety net redresses the question, but the timing of the reforms is likely to leave a hiatus until 2010.

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Introduction

The enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices) significantly altered the framework of federal and state awards which previously constituted the award safety net, in part, supplementing these through the introduction of the Australian Fair Pay and Conditions Standard (AFPCS).¹

Work Choices amended the *Workplace Relations Act 1996* (hereon the WR Act, which includes the Work Choices amendments) and took effect, in the main, from 27 March 2006.

This Research Paper sets out some of the key features associated with the safety net/s for wages and employment conditions. It outlines:

- the widened coverage of the federal system brought about by bringing in employers and employees formerly falling under state jurisdictions
- the role of specific parts of the federal safety net including: the AFPCS, Australian Pay and Classification Scales (APCS), the No Disadvantage Test (NDT), and allowable, preserved and non-allowable matters in federal awards,² and
- a case study about a hypothetical application of the safety net to employees of an award-free employer to indicate how the legislated safety net works in practice.

The case study assumes the group of companies formerly known as ‘One.Tel’ (which was placed in liquidation in 2001) continued to trade into 2008 before being placed in liquidation. The case study uses a question and answer format to analyse what would happen if One.Tel was operating in 2008. For example, how would the federal safety net apply to such a business group which employed staff under ‘common law’ employment contracts? This is a pertinent question in light of the estimate that about 1.5 million employees work under employment contracts.³ In the case of employer insolvency, what role could the Australian Industrial Relations Commission (AIRC) play in 2008 in respect of making a safety net

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1. An industrial award has been defined as ‘a legally enforceable determination containing terms and conditions of employment in a firm or an industry. These conditions have been certified by an industrial tribunal following agreements between the respondents (employers, or employer associations and trade unions) or following conciliation and arbitration at either the State or federal level’ in P. Sutcliffe & R. Callus, *Glossary of Australian Industrial Relations Terms*, ACIRRT/ACM, July 1994, p. 17.
 2. State awards are duplicated as federal instruments (NAPSAs, see below) where a state award employer can be defined as a Work Choices employer. The Work Choices legislation is the first federal law to take over or incorporate the bulk of state awards into the federal jurisdiction. The legislation was found to be valid by the High Court: *New South Wales v Commonwealth*, 2006 HCA 52.
 3. B. van Wanrooy, S. Oxenbridge, J. Buchanan & M. Jakubauskas, *Australia@Work: the Benchmark Report*, Workplace Research Centre, September 2007, p. 35.

award for redundancy pay, as it did in 2001 for One.Tel employees? Could these staff access the General Employee Entitlements and Redundancy Scheme (GEERS), operated by the federal government in the event of employer insolvency?

The Research Paper also considers the federal Labor Government's policy position on these issues in light of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (the Transitional Act), which amended the WR Act. This Act terminated the making of new Australian Workplace Agreements (AWAs), replacing these with an alternative in the form of Individual Transitional Employment Arrangements (ITEAs). It also re-introduced an NDT for the assessment of individual and collective workplace agreements against award provisions. It replaced the Work Choices award simplification/rationalisation with an award modernisation process which will, inter alia, formally incorporate the 'transferred' state awards into the federal award system (due to commence from 2010).

The Research Paper includes three appendices: Appendix 1 provides a glossary; Appendix 2 provides a comparison (in table form) of pre and post Work Choices safety nets and award matters; and Appendix 3 provides a table on federal safety net wage movements since 1991, including summarised submissions of state and federal governments and key employer and union groups.

For the assistance of the reader, the following table attempts to summarise the changes from arbitrated awards (constituting a 'safety net' of wages and employment conditions) to the current federal legislated safety net. However, it is important to note, this paper is primarily concerned with the system from 2006 onwards.

Timeline of key changes to the federal wage system 1990-2008

To 1991	Federal (and state) awards constitute a wage and employment conditions safety net. Federal awards are determined by a tribunal (AIRC) exercising the authority conferred on it by the <i>Industrial Relations Act 1988</i> which in turn derived its constitutional authority, mainly, from the conciliation and arbitration power of the Constitution (s.51 (xxxv)). As registered organisations under the Act, unions and employer associations can notify industrial disputes (created by serving logs of claims). Disputes can be resolved through making or varying an award. Major improvements occur through 'Test Case' decisions (e.g. introducing unpaid parental leave, superannuation and termination of employment provisions to awards) or, in respect of wage increases, through National Wage Cases. Federal (and state) tribunals are independent from the government of the day. Federal and state award streams are reasonably distinct.
1993	The Industrial Relations Act is amended to introduce certain national workforce standards such as termination of employment remedies and unpaid parental leave (both legislated to give effect to international treaties). Bargaining between the unions and an employer is given priority over awards, but non-union agreements are authorised (using the Constitution's corporations power, s.51 (xx)). The AIRC approves all agreements according to whether they meet the terms of a relevant

	award (via an No Disadvantage Test, NDT). National Wage Cases are replaced by 'Safety Net Reviews' of awards primarily for those employees who do not have the power to bargain above the relevant award. The concept of protected industrial action is introduced for the purposes of bargaining.
1996	Labor loses the March 1996 federal election. The Coalition Government replaces the Industrial Relations Act with the <i>Workplace Relations Act 1996</i> . It reduces the content of awards to 20 allowable matters. The independence of the AIRC is retained in resolving 'industrial' disputes, but an individual agreement-making stream in the form of AWAs made via the corporations power and approved by the Employment Advocate reduces the AIRC's influence over workplaces. The Act retains protected industrial action. It increases reliance on the Constitution's corporations power, e.g. agreement-making, unfair dismissal and freedom of association and non-association are based, in the main, on this power. Victoria transfers the bulk of its industrial system to the Commonwealth.
2005	The Workplace Relations Act is amended by 'Work Choices'. All of its key provisions such as awards, dismissal, right of entry, freedom of association, industrial action etc., are based on the Constitution's corporations power (and certain other powers noted below). State awards and agreements which include corporations as employers are transferred to the federal jurisdiction. The AIRC is given no authority to resolve industrial disputes through the making of new awards. Primacy is given to agreements made between employers and employees. These changes are designed to diminish the previous roles given to 'uninvited third parties' (unions, tribunals/courts and employer associations). A legislated safety net (the Fair Pay Standard) covers parental leave, wages including a minimum wage (set by a Fair Pay Commission), annual leave, standard hours and personal leave for those who cannot make agreements superior to the safety net. Award content is to be reduced. Agreements with non-award workers made under Work Choices need only meet the legislated standard to be filed/take effect and the previous NDT is jettisoned.
2007/08	A stronger agreement approval test with third party approval process by the Workplace Authority (replacing the Employment Advocate) is introduced by the Coalition Government which, six months later, loses the November 2007 federal election. An incoming Labor Government reintroduces an award-based NDT to approve workplace agreements. The ability to make new AWAs is terminated, but ITEAs are introduced in their place. A new legislated safety net for non-award workers is proposed to take effect from 2010. It will tie in with a 'modern' award system.

To summarise these changes, whereas in 1990 a federal tribunal independent from the government of the day set wages and major employment conditions via an award system, by 2008 direction over many of these functions has been assumed by the parliament. The legislative scheme continues to give preference to agreements made in the workplace with an award safety net acting as a fall back for low paid workers who might be faced with

agreements set at a low standard (but for the relevant award). A narrower legislated safety net assists often higher paid, award-free employees to negotiate contracts.

Defining the wage 'safety net'

A broad definition of an employment safety net of wages and conditions might include a number of Work Choices provisions and instruments, such as pre-reform federal awards, transitional federal awards, state awards now incorporated within the federal jurisdiction, the AFPCS, and certain entitlements such as dismissal remedies (as well as current state awards, for example, applying to state public services or to non-incorporated entities in the private sector). The WR Act allows state laws to operate which deal with the following:

- anti-discrimination and equal employment opportunity
- superannuation (including the Superannuation Guarantee legislation)
- workers compensation
- occupational health and safety
- matters relating to outworkers
- child labour
- long service leave, and
- other applicable laws.⁴

It might be reasonable to include in a definition of the broad safety net, the General Employee Entitlements and Redundancy Scheme (GEERS).⁵ This non-legislated scheme is into its eighth year of operation and meets certain accrued employee entitlements in the event of employer insolvency. The broad safety net might also include 'transmission of business' provisions which attempt to ensure employee agreements and entitlement accrue to a purchasing employer in the sale of a business.⁶

4. WR Act, subsections 16 (2) and (3).

5. GEERS is an administrative scheme funded by the Commonwealth designed to meet certain employee accrued entitlements left unpaid at the time of the relevant employer's insolvency. It replaced the Employee Entitlements Support Scheme (EESS) in September 2001. EESS came into operation on 8 February 2000. Since 2000, these two schemes have advanced over \$300 million to employees left without accrued entitlements following the insolvency of their employer. Information on the GEERS can be found at:

<http://www.workplace.gov.au/workplace/Programmes/EmployeeEntitlements/GEERSV2> .

6. WR Act at Part 11.

However, in the context of the narrower federal award safety net, the *Industrial Relations Reform Act 1993* introduced the concept of awards acting ‘as a safety net of minimum wages and conditions of employment underpinning direct bargaining’ with this safety net being ‘designed to protect the wages of the low paid’.⁷ In an environment where enterprise agreements were to set pay and conditions of employment tailored to the circumstances of businesses and their employees, awards were retained specifically to assist the low paid, a point noted by the AIRC in its 1994 Safety Net Review:

The award system provides a safety net of wages and conditions which underpins enterprise bargaining and protects employees who may be unable to reach an enterprise agreement while maintaining an incentive to bargain for such an agreement.⁸

The current federal award system comprises all pre-Work Choices federal awards extant prior to 27 March 2006. Federal awards are referred to as pre-reform or transitional (discussed below).⁹ The federal award system includes those state awards (in New South Wales, Queensland, Tasmania, South Australia and Western Australia) where the relevant employers fall under subsection 6(1) of the WR Act and can be defined as ‘federal’ employers.¹⁰ State awards which federal system employers are party to, now form part of the federal system and are referred to as ‘Notional Agreements Preserving State Awards’ (NAPSAs).¹¹ NAPSAs have been incorporated into the federal system under transitional arrangements up to 31 December 2009. Thereafter it is likely that NAPSAs will integrate within the federal award system. State-based agreements to which the employer can be considered as a federal employer are also part of the federal jurisdiction. However, the federal award safety net interrelates with the WR Act’s legislated safety net and it is helpful to set out why a legislated safety net was introduced.

A legislated safety net: why have one?

The rationale for a legislated safety net of wages and employment conditions (now referred to as the AFPCS) was put to parliament by former Prime Minister John Howard in May 2005, some six months before the Work Choices Bill was introduced:

For the first time, the government will introduce legislative minimum conditions to protect the rights of Australian workers. These conditions will be for annual leave, personal leave, parental leave and a maximum number of ordinary working hours.

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7. The award safety net was prescribed at subsection 88A(b) of the amended *Industrial Relations Act 1988*.
 8. AIRC, ‘Review of Wage Fixing Principles Decision’, *Print L4700*, 26 August 1994, p. 34.
 9. WR Act at Schedule 6.
 10. It is not an option for employers (let alone employees) to choose the industrial jurisdiction they work under. The employer falls under the constitutional definitions of employer (or not as the case may be) as prescribed in section 6 of the WR Act.
 11. WR Act at Schedule 8.

Currently workplace agreements are assessed against a test which is unduly complex and which acts as a hindrance to agreement making. For this reason, the government will introduce a new Australian fair pay and conditions standard.

This standard will be based on minimum wages, as set by the Australian Fair Pay Commission, and the guaranteed minimum conditions of employment as set out in the legislation. No worker can have his or her relevant award classification rate lowered.

This new standard will be the test for all agreements. It will make it easier for employers and their employees to compare any agreement against this new safety net of fair pay and conditions.¹²

The Work Choices scheme was novel (in the federal context) in so far as it introduced legislatively determined minimum employment standards via the AFPCS to large parts of the private sector, as Mr Howard noted, to protect the rights of Australian workers. In doing so, the move also introduced the legislative setting of employment standards into the national political debate and contest.¹³ Traditionally, Australian employment standards have been set, by and large, by federal and state industrial tribunals exercising either judicial or quasi-judicial functions in making industrial awards, usually in resolution of a dispute or claim brought by trade unions. The AFPCS interacts with the award safety net, in the main, by displacing award provisions which deal with the same matters covered by the AFPCS (unless the award provisions provide superior entitlements to employees).

Components of the legislated and award safety nets

The Australian Fair Pay and Conditions Standard

The AFPCS is found under Part 7 of the WR Act. The AFPCS's role is to provide a safety net of employment standards in respect of:

- minimum wages initially based on award rates, and casual loadings.¹⁴ These are discussed below under the heading 'Australian Pay and Classification Scales'
- a 38 hour 'standard' week. For some workers this represents a reduction from higher hours prescribed in some awards for certain industries¹⁵

12. J. Howard (Prime Minister), 'Ministerial Statement: Workplace Relations Reform', House of Representatives, *Debates*, 26 May 2005.

13. For example, Senator Fielding (Family First) has sought to have the provisions of the award safety net transposed to the legislated safety net, particularly in respect of penalty rates and meal breaks, see: S. Scott & T. Lee, 'Scrappy fight over AWAs', *Australian Financial Review*, 22 February 2008, p. 20.

14. WR Act, sections 182 and 185.

15. WR Act, section 226.

- personal leave of 10 days per year (comprising sick, carers' leave and compassionate leave).¹⁶ An employee is entitled to accrue 1/26 of the number of nominal hours worked during a previous four-week period. As well, for many workers an improvement to personal and compassionate leave has been the result of slightly improved AFPCS terms displacing award provisions (for example, compassionate leave at 2 days per occasion).
- annual leave of four weeks per year or 1/13 of the nominal hours worked by the employee during a previous four week period.¹⁷ Annual leave is cumulative and will accrue on a pro rata basis. Continuous shift workers are entitled to an extra week of leave under the standard, and
- parental leave at 12 months unpaid leave which may be shared between partners, and adoption leave.¹⁸

The AFPCS underpins all contracts of employment whether formalised in workplace agreements or not, via a 'more favourable' test. In other words, the AFPCS provisions stand unless replaced by 'more favourable' provisions in a workplace agreement.¹⁹ The AFPCS's role and purpose has been described in the following terms:

First, it would provide guaranteed minimum entitlements to wages and conditions for award- and agreement-free employees.

Second, it would underpin workplace bargaining. New agreements made under the Act must always provide entitlements which are equal to or more favourable than the Standard. The Standard would apply throughout the life of these agreements, and will prevail over inconsistent agreement terms to the extent that it is more favourable, in a particular respect.

Third, it would provide the basis for the "more generous" comparison with preserved award terms.²⁰

The five AFPCS provisions replace pre-reform award provisions except where the award provision is 'more generous' and excepting hours of work award provisions. It should also be noted that entitlements to meal breaks and time off work for public holidays are provided as 'minimum entitlements.'

16. WR Act, section 245.

17. WR Act, section 232.

18. WR Act, section 265.

19. WR Act, section 172(2).

20. CCH Australian Labour Law Reporter at ¶26-902.

Australian Pay and Classification Scales

Australian Pay and Classification Scales (APCS) are one element of the AFPCS. APCS replace wage and classification rates formerly expressed in industrial awards. The Australian Fair Pay Commission (AFPC) was given a pre-eminent role in determining minimum wage rates under Work Choices.²¹ Labor's Transitional Act circumscribed the role of the AFPC. It is empowered to set the federal minimum wage and vary pay scales.²² The minimum wage applies to an adult in the absence of any applicable APCS.

APCS are 'a set of provisions relating to pay and loadings' for employees and are administered by the AFPC.²³ APCS were determined to have come into effect on the day Work Choices became operative (27 March 2006).²⁴ These scales replace classification and wage provisions in pre-reform awards. The WR Act's minimum wage and APCS provisions do not apply to employees working under either state or federal individual or collective agreements.²⁵ In the case of pre-reform awards, APCS are derived from that award's classification and pay rates, referred to as Preserved Australian Pay and Classification Scales.²⁶ Pay and classification scales include:

- the federal minimum wage initially set at \$12.50 per hour²⁷
- minimum rates of pay derived from award classifications and pay rates
- minimum wages for employees with disabilities
- a minimum wage for piece workers
- casual loadings.

For casual employees, the AFPCS includes a minimum casual loading of 20 per cent.²⁸ In the event that a casual employee is not covered by an award classification, the adult casual wage is the federal minimum wage, plus the 'default' loading of 20 per cent for casual

21. WR Act, *sections 21, 22 and 23.*

22. WR Act, *section 196.*

23. WR Act, *section 201.*

24. WR Act, *section 208.*

25. WR Act, *Schedule 7 and Schedule 8.*

26. WR Act, *section 208.*

27. WR Act, *section 195.* The Australian Fair Pay Commission has increased this rate twice, with a third increase effective from 1 October 2008 to bring the adult hourly Federal Minimum Wage rate to \$14.31 per hour.

28. WR Act, *section 186.*

employees.²⁹ The setting of award wages was removed from the AIRC's jurisdiction under Work Choices and, in effect, conferred on the AFPC. Under Labor's policy, wages will be reintegrated into awards under award modernisation, with the new awards coming into effect in 2010.

Current federal awards

The most useful source of information on the current spread of federal awards (and NAPSAs) is from a taskforce set up in 2005 to prepare the grounds for the then award simplification and rationalisation process (as prescribed by Work Choices). It advised that as at 2 November 2005, there were 2251 federal awards and 1802 NAPSAs coming within the federal system.³⁰ It is in fact these instruments which make up the federal award system in 2008.

Although the Work Choices amendments provided for a ministerial request to the AIRC to trigger award simplification and rationalisation by the AIRC, the required request was never made. Had it been, award provisions deemed to be inferior to AFPCS standards (such as personal leave) would have been removed from awards, as well as non-allowable award matters. However, the rationalisation of awards has been triggered under award modernisation (discussed below) and the number of awards identified in 2005 is likely to be dramatically reduced, but not until 2010. In the meantime, the current federal award safety net is basically that identified by the Award Review Taskforce in 2005.

While 'pre-reform' federal awards and NAPSAs were approved or determined by industrial tribunals according to their respective award making principles, these documents appear to have become instruments and expressions of federal legislation, and less the 'property' of the parties to the disputes which initially created the instruments.³¹ The parameters of award content are determined strictly by the legislation. NAPSAs are treated slightly differently. They can be varied only to remove ambiguities and discriminatory terms and also cannot contain 'prohibited' content.³² Also, as award simplification and rationalisation was not carried out prior to the election of the Labor Government, and as it is yet to have its award modernisation process completed, the content of current awards is out of kilter compared to what is prescribed for awards under the WR Act.

Pre-reform awards

Pre-reform federal awards are those operating at the enactment of the Work Choices amendments but under the constitutional powers referred to earlier, meaning that the

29. WR Act, sections 182 and 185.

30. M. O'Callahan, Award Review Taskforce Report on Award Rationalisation, July 2006, p. 29.

31. These aspects of the changing nature of awards were raised by Senator Siewert during debate on the Workplace Relations (A Stronger Safety Net) Bill 2007: Senate, *Debates*, 20 June 2007, from p. 4.

32. WR Act under Division 3 of Schedule 8.

employers to the award are ‘federal system employers’, such as trading corporations which employ staff. Parallel award and AFPCS provisions in pre-reform awards are to be resolved in favour of the AFPCS provision on the criterion that any less generous pre-reform award terms are to be replaced by four of the five AFPCS provisions.³³ These go to annual, carers’ and parental forms of leave, although awards may continue to contain terms addressing hours of work.³⁴

Transitional awards

A federal award in force immediately before Work Choices commencement, in so far as it bound ‘excluded employers’, continues in force as a transitional award for five years to March 2011 (the transitional period) with the aim of allowing employers to incorporate their businesses over this time and so be covered by the federal system.³⁵ Transitional awards may deal with matters covered by the AFPCS, and therefore include provisions on wage rates, classifications, casual loadings, annual leave, personal/carers’ leave and parental leave. There are approximately 1500 transitional awards, which in effect mirror their pre-reform counterparts in most but not all respects.³⁶

Transitional employers are now effectively outside the scope of the WR Act, for example, the unfair dismissal provisions of the WR Act do not apply to them (or to their employees). They continue their responsiveness to their federal award/s by virtue of being defined as ‘transitional employers’. At the end of the transitional period, transitional awards will cease to have effect. However, it is presumed that these awards will be folded into modern awards.

Allowable, non-allowable and preserved matters in pre-reform awards

Allowable matters

Allowable award matters applicable to pre-reform awards are stipulated under the legislation.³⁷ These are:

- ordinary time hours of work and the time within which they are performed, rest breaks, notice periods and variations to working hours

33. *WR Act, sections 182 and 185.*

34. *WR Act, section 516.*

35. In other words the relevant employer is not caught under the constitutional definition of Work Choices employers as prescribed in section 6 of the WR Act and typically this means that the business is not an incorporated entity. Schedule 6 of the WR Act deals with transitional employers, transitional awards and transitional employees.

36. Personal communication from the Australian Industrial Registry, December 2007.

37. *WR Act, section 513.*

- incentive-based payments and bonuses
- annual leave loadings
- ceremonial leave
- leave for the purpose of seeking other employment after the giving of a notice of termination by an employer to an employee
- observance of days declared by or under a law of a state or territory to be observed generally within that state or territory, or a region of that state or territory, as public holidays by employees who work in that state, territory or region, and entitlements of employees to payment in respect of those days
- days to be substituted for, or a procedure for substituting, days referred to in the above paragraph
- monetary allowances for:
 - (i) expenses incurred in the course of employment
 - (ii) responsibilities or skills that are not taken into account in rates of pay for employees
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations
- loadings for working overtime or for shift work
- penalty rates
- redundancy pay, within the meaning of subsection (4)
- stand-down provisions
- dispute settling procedures but only as provided by section 514
- type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and
- conditions for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

Non-allowable matters

Certain matters formerly provided in awards are rendered unlawful. These matters are specified and include inter alia:

- dispute resolution procedures to the extent that they stipulate union involvement
- provisions which stipulate the numbers or proportions of employees an employer may employ
- prohibitions on employers employing employees in certain forms of employment
- maximum or minimum hours for part-time workers
- restrictions or conditions on the engagement of contractors or labour hire workers and
- conversion from casual status to other employment forms.³⁸

Preserved award terms

There are also certain provisions which are not included in allowable award matters but which continue to operate for the class of persons who were employed under them prior to Work Choices. For these employees, preserved terms include provisions duplicated in the AFPCS where the award provision is 'more generous' than the AFPCS provision, and thus prevail. Preserved award terms are specified in section 527 of the WR Act. Preserved award terms do not bind employers who may become covered by the award after the commencement of Work Choices.

Preserved terms should not be confused with the now repealed protected award terms.³⁹ Preserved provisions are:

- annual leave
- personal/carers' leave
- parental leave, including maternity and adoption leave
- long service leave
- notice of termination

38. WR Act, section 515.

39. Protected award conditions referred to those terms of a workplace agreement which should be reflected in its content, unless they were bargained away. The Transitional Act repealed protected award terms on the basis that the No Disadvantage Test was being re-introduced and it was a test of a workplace agreement based on all terms of the award.

- jury service and
- superannuation

For employees employed under awards, the effect of preserved award terms is to ‘grandfather’ the specified terms and thwart the intent of the reduced allowable matters.

All workplace agreements are subject to the AFPCS. A fifth AFPCS provision, working hours, is both an allowable award provision and a provision of the AFPCS.

Workplace agreements and the safety net

The Coalition Government determined under Work Choices that employees entering into workplace agreements would be protected by the AFPCS via three devices.

Firstly, through a ‘more favourable’ test based on the AFPCS. This means that only agreement terms which were more favourable than the AFPCS would be allowed to displace AFPCS terms, thus ensuring that agreements, whether formal or informal, would reflect the AFPCS.⁴⁰

Secondly, for award employees and those who usually work under an award but for the new agreement, those award terms specified as allowable/protected were to be taken to be included in the content of workplace agreements.

Thirdly, where the employees’ AFPCS provisions are less generous compared to the award’s provisions for those matters, then the award’s ‘preserved’ provisions were to take precedence.

Workplace agreements had been proffered as business friendly alternatives to ‘rigid’ centralised awards since the late 1980s.⁴¹ The importance of registered or filed workplace agreements is reflected in accompanying provisions allowing agreements to override parts of the legislated and award safety net. Under both Labor and Coalition federal governments, some legislative form of comparative test of agreement provisions to award provisions had existed since 1992.⁴² However, the Howard Government considered these tests had been too complex and proposed the simplified approach outlined above. It reversed this view just on two years later and introduced a Fairness Test to compare workplace agreement provisions with award provisions from 7 May 2007.

40. WR Act, Section 172.

41. Business Council of Australia, *Enterprise-Based Bargaining Units: A Better Way of Working*, Report by the Industrial Relations Study Commission, BCA, 1989.

42. For an account of phases of the ‘No Disadvantage Test’ see S. O’Neill and M. Nielsen, ‘Workplace Relations Amendment (A Stronger Safety Net) Bill 2007’, *Bills Digest*, no. 181, Parliamentary Library, Canberra, 2006–07.

The extent of federal system coverage

It is often reported that the Work Choices amendments have extended the coverage of employers and employees under the federal jurisdiction, but still fall short of uniform coverage. The former Department of Employment and Workplace Relations observed that:

It is estimated that a national workplace relations system will ... cover 85 per cent of all Australian workers.⁴³

This may be an overestimate. The Queensland Government undertook survey research on jurisdictional coverage, based in part on the legal status of businesses and concluded that 38 per cent of Queensland employees would remain in the Queensland jurisdiction after Work Choices. Nationally, the study estimated that 76 per cent of employees would be federally covered.⁴⁴ It should be noted that the study assumed local governments to be trading corporations and therefore within federal coverage.⁴⁵ However, doubts about the legal status of local government persist in light of conflicting cases emerging as to whether councils can be regarded as ‘trading’ corporations.⁴⁶

Overall, employees excluded from the federal system are state government, some local government employees and employees of unincorporated employers in the private sector. This leaves possibly upwards of 70 per cent of employees under the federal system, for the time being.⁴⁷ The Australian Chamber of Commerce and Industry (ACCI) estimates a minimum of 800,000 additional employees have come under federal workplace regulation

43. Formerly available under the Department of Employment and Workplace Relations, ‘Our plan for a modern workplace relations system’, at www.workchoices.gov.au/ourplan.

44. Qld Department of Industrial Relations, *The Coverage and Characteristics of the State jurisdiction under a new Industrial Relations system*, 2005, p. 16, http://www.deir.qld.gov.au/pdf/ir/statewagecase_paper2006.pdf, accessed on 26 September 2008.

45. *ibid*, p. 8.

46. Local government **may** be currently included in the federal jurisdiction by virtue of federal award responsiveness. There is an unresolved matter as to whether local government bodies can be considered ‘trading’ corporations and simply come under the federal Work Choices system by virtue of section 6 of the WR Act: *Jacqueline Ann Bysterveld v Shire of Cue*, [2007] WAIRC 00941 (shire excluded from Work Choices). The Federal Court reached a similar conclusion in excluding Etheridge Shire Council from the reach of the federal workplace jurisdiction: *Australian Workers’ Union of Employees, Queensland v Etheridge Shire Council* [2008] FCA 1268. However the WAIRC has since found that the Shire of Dalwallinu comes under Work Choices in *Bell v Dalwallinu*, [2008] WAIRC 01269.

47. Employers bound to ‘transitional’ federal awards forfeit their responsiveness after 27 March 2011 and may revert to state jurisdictions. See heading below: ‘Transitional Awards’.

who are employed under employment contracts which are now subject to the Australian Fair Pay Standard (and other regulations).⁴⁸

It is useful to understand the mechanisms by which the new federal workplace system captures the current share of employers and their employees. The WR Act establishes its wide coverage of employees through its definition of employer which reveals the constitutional underpinning introduced by the Work Choices amendments.⁴⁹ An employer is taken to mean:

Section 6 (1)

- (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
- (b) Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person or entity (which may be an unincorporated club) so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.
- (g) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.

48. ACCI, 'An inconvenient truth: *Work Choices* delivers workers more than the AIRC on working hours', *Policy Analysis*, May 2007, p. 3.

49. The following constitutional powers are relied on in section 6 of the WR Act: the corporations power at section 51(xx) of the Constitution; the power to regulate Commonwealth employers and employees at section 52(ii) and section 61; the trade and commerce power at section 51(i), the territory power at section 122, and in respect of Victoria since 1997, the referral of powers by a state parliament at section 51(xxxvii).

Employers who do not fall within the above constitutional criteria are excluded from the federal system (except for ‘transitional employers’ discussed below). The relationship between the federal system and state jurisdictions is discussed later also, but it is important to note that the shift of the constitutional underpinning from the labour power to the constitutional underpinnings outlined above has broadened the scope of the federal jurisdiction and the application of the federal safety net of employment conditions to more employees than was the case.⁵⁰

Case study: application of the safety net to a non-award employer

There are many reports that the safety net following the Work Choices amendments has widened obligations on employers.⁵¹ It would be reasonable to assume that corporate employers who were formerly award-free would have experienced a significant increase in their employment obligations with the advent of the AFPCS, as well as having to meet associated regulatory obligations such as maintaining time and wages records.⁵²

A useful way of understanding the new safety net to employers and employees is to look at the application of the safety net to award-free employers. The example proposed to be used for illustrative purposes is the telecommunications business One.Tel, which traded as a telephony business over 1995–2001. Its use of employment contracts (not registered as AWAs) and the absence of a relevant industry award came to light in One.Tel’s insolvency in 2001 and the subsequent termination of its staff.⁵³

50. Australian Constitution at section 51(xxxv).

51. ACCI, ‘An inconvenient truth: *Work Choices* delivers workers more than the AIRC on working hours’, *Policy Analysis*, May 2007. Steve Knott CEO of the Australian Mining and Minerals Association also claims that costs associated with 2005 legislative reform were incurred by AMMA members in reviewing and ensuring that existing employment arrangements and record keeping systems complied with the legislation: S. Knott, ‘Examining IR changes from an AMMA perspective’, *Address to Fair Work Australia Summit*, 28 April 2008.

52. B. D. Waldron, *Work Choices: Its Impact within Australian Workplaces: Survey Findings*, Australian Human Resources Institute, 23 August 2007. It found inter alia that a significant proportion of respondents (40.2 per cent) thought the new laws had added to the complexity of employment arrangements, with a larger proportion (55.5 per cent) claiming the laws had increased their need for legal advice, p. 6. It also found that the main form of employment arrangements operating pre and post Work Choices were common law contracts, p. 20.

53. The telecommunications business One.Tel was placed under financial administration on 30 May 2001 resulting in the termination of about 1400 employees. As the common law employment contracts used to employ its employees had not contained redundancy provisions, the AIRC was able to use its award-making powers to make a safety net award with the appointed administrator, providing for redundancy and pay; notice of termination and pay and annual leave for these employees was via an application from the Community and

The WR Act as introduced at the end of 1996 countenanced the making of such informal or non-registered employment arrangements and stipulated these under its objects. The then WR Act's concession to informal employment arrangements distinguished it from its predecessors. Previously, it would have been difficult to countenance that a new business employing more than 1400 staff could operate award-free.⁵⁴

This case study assumes that a hypothetical 'One.Tel' had continued to trade from 2001 up to the less buoyant economic conditions of 2008, and was then placed under financial administration resulting in the termination of its staff. The question that is addressed is how would the federal safety net affect that business? There is little question that such a business would be subject to the federal safety net in 2008. The hypothetical application of the wage safety net to 'One.Tel' is assessed below with questions and answers in reference to the terms of the safety net discussed earlier. Such a process helps to outline both its role and limits.

One.Tel Hypothetical: Key Questions

Would the WR Act apply to 'One.Tel'?

Yes. As the company and its related entities were businesses registered with the Australian Securities and Investment Commission, 'One.Tel' would fall under the definition of a Work Choices employer at section 6 of the WR Act.

Would the AFPCS apply to 'One.Tel'?

Yes. Its contracts with its employees would be subject to the AFPCS, i.e. in respect of a minimum wage set by the AFPC at \$522.12 for adults from 1 October 2007, a 38 hour week averaged, annual leave, personal carers' leave and parental leave. In addition, minimum entitlements would apply to 'One.Tel' employees: a meal break after five hours work and seven public holidays. The WR Act's Termination of Employment provisions would apply to 'One.Tel' employees and the employer would have to comply with time and pay record obligations under Work Choices.

Would 'One.Tel' contracts be subject to the No Disadvantage Test?

No. Workplace agreements are defined to be ITEAs or collective agreements (section 4) and do not include employment contracts. Were 'One.Tel' predisposed to register the contracts as AWAs in 2001, the Employment Advocate would have designated an award for assessment of the agreement under the then NDT.

Do allowable award matters, and protected award terms apply to 'One.Tel' employees?

No. These provisions would be irrelevant to 'One.Tel' employees.

Public Sector Union (CPSU): see decision of Cr Smith in PR904916, 5 June 2001 reported in CCH *Australian Industrial Law Reports* at ¶4-478.

54. Subsection 3(c) of the WR Act (as enacted) enabled employers and employees to choose a suitable form of agreement, 'whether or not that form is provided for by this Act'.

If ‘One.Tel’ were to become insolvent, could a redundancy award be made for ‘One.Tel’ employees, as in 2001?

No. Redundancy pay is not a provision of the AFPCS. The AIRC no longer has the authority to make a safety net redundancy award (prevented previously by section 540, although the Transitional Act repealed s.540 of the WR Act). While the Labor Government has proposed the National Employment Standards (NES) which include redundancy pay, they are not intended to operate until January 2010. New awards can only be made via the award modernisation process. In the meantime should a ‘One.Tel’ situation occur, the AIRC may utilise its powers to vary an award with respect to resposdency under sections 552, 553 and 557, i.e. to bind the award-free employer to a relevant industry award. Whether such a strategy would resolve the issue is difficult to anticipate.

How would Labor’s Transitional Act affect ‘One.Tel’ employment relationships

Key components of the Work Choices safety net remain in place. The Transitional Act introduced an NDT similar to the one which operated in 1997-2006 for new agreements. The NDT only applies to workplace agreements submitted for approval with the Workplace Authority, and does not apply to unregistered employment contracts, although the Work Choices safety net does. Therefore the impact of the Transitional Act in respect of award-free employers would be the award modernisation amendments and the possibility of becoming bound to an award.⁵⁵

Would ‘One.Tel’ employees be entitled to GEERS payments in the event of their employer’s insolvency?

No. ‘One.Tel’ employment contracts did not make provisions for redundancy.⁵⁶ GEERS Operational Arrangements (revised in 2006 and applicable in 2008) require that at the date of the appointment of an insolvency practitioner, a GEERS entitlement, such as redundancy pay, must be provided for in: legislation, an award, a Statutory Agreement or a written contract of employment.

It might be noted that the Coalition Government refused the opportunity to extend the AFPCS to include redundancy, following proposed amendments by the Australian Greens to incorporate redundancy pay into the AFPCS in 2007. The Greens amendments were in response to the Bill introducing the Fairness Test.⁵⁷ Then, Senator Abetz responded:

55. The AIRC has raised concerns about making awards binding on employers and organisations during the initial round of award modernisation: AIRC, *Award modernisation*, 2008 AIRCFB 717, 12 September 2008, paras 9–11,

<http://www.airc.gov.au/decisionssigned/html/2008aircfb717.htm>, accessed on 29 September 2008.

56. For the importance of employment contracts (and AWAs) containing redundancy and other relevant clauses to trigger the GEERS entitlements system in the event of employer insolvency, see: ‘No GEERS payments for redundant meatworkers on AWAs’, *Workforce*, Issue 1600, 24 August 2007, p. 2.

57. These amendments were discussed by Senator Siewert in amendments to the Workplace Relations (A Stronger Safety Net) Bill 2007: Senate, *Debates*, 20 June 2007, p. 4.

The Government opposes the amendment ... The Government considers that parties should be free to bargain the terms and conditions that best suit their circumstances, and adding redundancy provisions to the standard reduces their ability to do so.⁵⁸

Labor's directions

Labor's Transitional Act modifies the operation of certain elements of the Work Choices safety net, while other elements are left in place with a view to a more thorough revamp effective from 2010. The making of new AWAs has been terminated. Their replacement, ITEAs, must not disadvantage employees when compared with an applicable collective agreement and the AFPCS or, in the absence of such an agreement, the AFPCS and the relevant award.⁵⁹

Labor intends to replace the AFPCS with National Employment Standards (NES); however the AFPCS is in force currently and should remain so until January 2010.⁶⁰ The AFPCS and the proposed NES are compared in summary form, in Appendix 2. Wage rates will be reinstated within modern awards, due to come into operation from 2010. A minimum wage is to apply to award-free workers.⁶¹ Prima facie, this appears to constitute an eleventh national employment standard.

Labor made the NES available for public consultation and discussion early in 2008 and a final version of the NES was announced on 16 June 2008, but is yet to be tabled in

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58. Senator Abetz, 'Workplace Relations (A Stronger Safety Net) Bill 2007', Senate, *Debates*, 20 June 2007, p. 8. The Howard Government did agree to an amendment of Senator Fielding's to extend the application of redundancy provisions in certified agreements to two years after the agreement's termination to deal with the Tristar redundancy dispute (which did not have similar characteristics to the earlier One.Tel matter).
59. J. Gillard, (Minister for Education, Employment and Workplace Relations and Social Inclusion), *Forward with fairness transitional arrangements*, media release, 17 December 2007.
60. The ALP's workplace policy, *Forward with Fairness* (April 2007), stipulates ten minimum conditions of employment compared to the five conditions enunciated by Prime Minister Howard on 26 May 2005. A supplementary document, *Forward with Fairness: Policy Implementation Plan* (August 2007), sets out a time frame for substantive legislation to be introduced and operating by January 2010. The NES, which are likely to be incorporated in Labor's substantive Bill, were 'released' by Prime Minister Rudd and Deputy Prime Minister Gillard on 16 June 2008.
61. A minimum wage for award-free workers has been included in measures for the new workplace relations system announced by Deputy Prime Minister Gillard on 17 September 2008. See:
<http://www.workplace.gov.au/workplace/Publications/PolicyReviews/ForwardwithFairness/ForwardwithFairness.htm>.

parliament.⁶² Labor expects the modernisation of awards will contain its proposed allowable matters content and reflect the NES where needed. The process should be completed over 2008–09, in time for incorporation in Labor’s principal workplace relations Bill. This Bill will give effect to modern awards and the NES (as well as other provisions).

The minister’s award modernisation request to the AIRC stipulated that it develop award flexibility clauses allowing employees to agree to changes in the application of award provisions (Award Flexibility Agreements or AFAs). The AIRC issued a decision on the contours of award flexibility clauses following submissions from key stakeholders in response to the request.⁶³ It confirmed that employers would be able to enter award flexibility agreements limited to:

- arrangements for when work is performed
- overtime rates
- penalty rates
- allowances and
- leave loading.

Employers would not be able to make AFAs a condition of employment for new employees. The AIRC added a no-disadvantage test based on the existing test for ITEAs in the transitional legislation for employers to assess the AFA against, although any AFA will not need to be registered.

Award Modernisation

Award modernisation is intended to rationalise the number of awards and NAPSAs and align their content to the proposed allowable award matters, and to a lesser extent, the NES. Award modernisation is facilitated under the amendments made to the WR Act by the Transitional Act. Section 576C of the WR Act provides that the award modernisation process must be carried out by the AIRC in accordance with a written request made by the minister to the AIRC President. The process was activated when the Minister for Education, Employment and Workplace Relations, Julia Gillard, signed a formal request to the President of the AIRC on 28 March 2008 pursuant to section 576C of the WR Act. AIRC President Guidice has reported that, excluding single enterprise awards or awards made when bargaining had failed

62. J. Gillard (Minister for Education, Employment and Workplace Relations and Social Inclusion), *New National Employment Standards Released*, media release, 16 June 2008, which states ‘Legislation will be introduced into Parliament later this year to give effect to the Government’s commitment’.

63. AIRC, Request from the Minister for Employment and Workplace Relations – Award Modernisation, PR062008, 28 March 2008.

(formerly referred to as section 170MX awards) there are about 740 awards subject to modernisation. This tally excludes single enterprise awards and a number of other awards, for example providing only for long service leave or superannuation.⁶⁴

The minister's request provides additional guidance to the AIRC on the nature and function of modern awards and on the process generally. Inter alia, the AIRC is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer; where an overlap does arise, the AIRC will indicate which award applies. Award modernisation is not to result in increased costs for employers nor should employees lose conditions. The request envisages that the AIRC complete award modernisation by 31 December 2009. The process of award modernisation was detailed in the Parliamentary Library's *Bills Digest* on the Transitional Act.⁶⁵

The amendments to the WR Act by the Transitional Act set out the characteristics of modern awards (section 576A). They must:

- be simple to understand, easy to apply and must reduce the regulatory burden on business
- provide a fair minimum safety net of enforceable terms and conditions, in step with the proposed legislated employment standards (NES)
- be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work and
- be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but a system which does not provide for statutory individual employment agreements.

Modern awards must result in a certain, stable and sustainable modern award system for Australia. The following awards have been selected by the AIRC as priority awards for modernisation:

- clerical workers in the private sector
- coal mining
- glue and gelatine
- higher education

64. Justice G. Guidice (President of the AIRC), 'Current and emerging issues for the Australian Industrial Relations Commission', *Address to the AMMA Conference*, Melbourne, 2 April 2008.

65. S. O'Neill and M. Neilsen, 'Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, *Bills Digest*, no. 72, Parliamentary Library, Canberra, 2007–08.

- hospitality
- metal and associated industries
- mining industry
- racing
- rail
- retail
- rubber, plastic and cable making
- security
- textile, clothing and footwear and
- vehicle manufacturing.⁶⁶

An initial attempt to modernise the awards listed above was made by the AIRC on 12 September 2008 in drafting the content of new awards.⁶⁷ However the proposed new awards are said by the Australian Chamber of Commerce and Industry (ACCI) to significantly increase costs in the retail industry and the Australian Services Union (ASU) claims Victorian casual clerical workers will lose \$45 a week. The AIRC's plan to reinstate small business redundancy pay from 2010 has also concerned employers, and the Government response has been to make submissions to the AIRC.⁶⁸ As noted, new awards are supposed to coincide with the operation of Labor's substantive legislation and be operative from January 2010.⁶⁹

Overall and in the longer term, Labor prefers to increase the percentage of the workforce covered under the federal system and to develop a single workplace relations system for the

66. The AIRC has an award modernisation website at: <http://www.airc.gov.au/awardmod/>.

67. AIRC, *Award modernisation*, 2008 AIRCFB 717, 12 September 2008, <http://www.airc.gov.au/decisionssigned/html/2008aircfb717.htm>, accessed on 29 September 2008.

68. 'Modern awards will cost clerks \$45 a week: union', *Workplaceinfo.com.au*, 16 September 2008; 'Modernised awards a 'disaster and catastrophe': business', *Workplaceinfo.com.au*, 15 September 2008.

69. More detail on Labor's substantive workplace legislation including an outline of the proposed fair dismissal code, was provided at an address to the National Press Club, see: J. Gillard, Minister for Education, Employment and Workplace Relations and Social Inclusion, 'Introducing Australia's New Workplace Relations System', *Speech*, 17 September 2008.

private sector.⁷⁰ New South Wales on the other hand appears reluctant to cede the relevant powers and supports a co-operative federal-state system for administering industrial relations.⁷¹

Conclusions

The scope and content of wage (and employment) safety nets is likely to be of ongoing public debate.⁷² Recurring political contest over a core non-award employment safety net may come to be seen as the enduring legacy of the Coalition Government and Work Choices. The scope of the employment safety net is subject to political contest, most evident in the Labor Government's increased safety net (offset in part by the reduction in award matters, see Appendix 2).

It also needs to be acknowledged that certain advances have been made with the introduction of the AFPCS. Employees who may have previously been award-free workers are likely to have been significantly advantaged by the application of the AFPCS. As well, many workers have experienced an improvement to personal and compassionate leave as the result of slightly improved AFPCS terms displacing award provisions. However, awards are not as definitive as they once were. This is the consequence of the former award simplification and rationalisation process not having been triggered, while award modernisation is yet to be completed. Therefore, possibly 30 per cent of current award provisions are either not enforceable (such as small business redundancy provisions) or are possibly inaccurate (such as award personal leave standards when compared to the AFPCS).

The example of a hypothetical 'One.Tel' insolvency under Work Choices highlights the limitations of the AFPCS, and Work Choices restraints over the industrial machinery. Not too long ago, the industrial machinery fashioned a suitable response to the One.Tel insolvency, in light of community standards on redundancy and other entitlements. It is less clear as to how the industrial system would respond to a similar situation in 2008.

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70. K. Rudd and J. Gillard, *Forward with Fairness*, March 2006: 'A Rudd Labor Government will achieve nationally consistent industrial relations laws for the private sector', p. 3.
 71. T. Ong, 'National IR plan in the works', *The Australian Financial Review*, 4 December 2007, p. 10.
 72. J. Gillard, Minister for Education Employment and Workplace Relations and Minister for Social Inclusion 'Forward with Fairness Transitional Arrangements', *Media Release*, 17 December 2007.

Appendix 1: Glossary

ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFA	Award Flexibility Agreement
AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Conditions Standard
AiG	Australian Industry Group (formerly the Metal Trades Industry Association or MTIA)
AIRC	Australian Industrial Relations Commission
ALP	Australian Labor Party (Labor)
APCS	Australian Pay and Classification Scales
AWA	Australian Workplace Agreement
DEEWR	Department of Education, Employment and Workplace Relations
EES	Employee Entitlements Support Scheme
GEERS	General Employee Entitlements and Redundancy Scheme
ITEA	Individual Transitional Employment Agreement
MTFU	Metal Trades Federation of Unions
NAPSA	Notional Agreement Preserving State Award
NDT	No Disadvantage Test
NES	National Employment Standards
QLD	Queensland
Transitional Act	<i>Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008</i>
WR Act	<i>Workplace Relations Act 1996</i>

Appendix 2: Comparison of safety nets (award and legislated)

Pre Work Choices award allowable matters (1998-2006)	Work Choices award allowable matters (and protected terms in agreements, from 2006)	Australian Fair Pay and Conditions Standard (from 2006)	Proposed legislated safety net: National Employment Standards (from 2010)	Proposed award minimum conditions (from 2010)
Classification of employees	Ordinary time hours of work and the time in which they are performed	Annual leave: 4 weeks; 5 weeks for shift workers and 2 weeks can be traded off	Hours of work: 38 hours	Minimum wages - including skill-based classifications and career structures, incentive-based payments and bonuses, wage rates, and arrangements for apprentices and trainees
Ordinary time hours of work and the times in which they are performed	Incentive-based payments and bonuses	Personal leave: 10 days; 2 days compassionate leave; 2 days unpaid carers' leave when paid leave exhausted. Can cash out providing 15 days accrual is retained	Unpaid parental leave: 24 months	Type of work performed - permanent or casual, facilitative provisions for flexible work
Rates of pay	Annual leave loadings	Unpaid parental leave: 12 months	Flexible work for parents	Arrangements for when work is performed – hours, rosters and breaks
Incentive-based payments, piece rates and bonuses	Ceremonial leave	Ordinary working hours: 38	Annual leave: 4 weeks; Shift workers 5 weeks	Overtime rates
Annual leave and leave loadings	Leave to seek other work after notice of termination	Minimum wage: \$522.12 or \$13.75 ph	Personal, carer's leave: 10 days' paid; 2 days' paid compassionate leave. Additional 2 days of unpaid personal leave	Penalty rates when work is "unsocial, irregular or unpredictable"
Long service leave	Paid public holidays, declared by a state or territory	7 Public holidays (not necessarily paid) and others declared by a state or territory except union picnic days or others excluded by regulation	Community Service Leave eg jury service and unpaid leave for emergency services	Annualised wage or salary arrangements as an alternative to penalty rates
Personal/carers' leave	Monetary allowances (for skills, expenses, disabilities)	Meal break: 30 mins after 5 hrs work	Public holidays: minimum of 8 plus extra holidays depending on state/territory	Allowances including expenses, higher duties and disability payments.
Parental leave	Loadings for working overtime or for shift work		Information in the workplace: a Fair Work Information Statement	Leave and leave loadings
Paid public holidays	Penalty rates		Termination of Employment & Redundancy: notice of up to 4 weeks, plus 1 week for	
Allowances: 'work-related' or 'expense-related'	Redundancy pay			
Loadings for working overtime or for casual work or shift work	Stand-down provisions			
Penalty rates, e.g. weekend work	Dispute settling procedures			
Redundancy pay				
Notice of termination				

Pre Work Choices award allowable matters (1998-2006)	Work Choices award allowable matters (and protected terms in agreements, from 2006)	Australian Fair Pay and Conditions Standard (from 2006)	Proposed legislated safety net: National Employment Standards (from 2010)	Proposed award minimum conditions (from 2010)
Stand-down provisions in a dispute settling procedure	Type of employment: full-time, part-time or casual and shift work		those > 45yrs. Redundancy pay up to 16 weeks reducing after 10 yrs service	Superannuation Consultation, representation and dispute settling processes
Jury service				
Type of employment: full-time, casual, regular part-time employment and shift work	Conditions for outworkers		Long service leave: current state/federal entitlements (National minimum wage for award free workers ⁷³)	To exclude employees on >\$100,000
Superannuation				
Pay and conditions for outworkers				

73. A minimum wage for award free workers has been included in measures for the new workplace relations system announced by Deputy Prime Minister Gillard on 17 September 2008.

Appendix 3: Federal safety net wage adjustments 1991-2008

	Claim	Government position	Industry response	AIRC Outcome
1990	<p>ACTU to implement Accord 6 via enterprise bargaining, essentially outside the AIRC</p> <p>November: ACTU claim for \$12.00 from 16 May 1991, + additional 3% superannuation from 1 May</p>	(see below)	(see below)	September: AIRC issues decision acknowledging enterprise bargaining (Print J4700)
1991	(follows from above claims)	The ACTU claims were supported by the Commonwealth Government and the governments of Victoria, Western Australia, South Australia, Tasmania and Queensland	<p>The Confederation of Australian Industry (CAI) opposed the \$12.00 per week across the board increase. It argued that the Commission should defer consideration of the claim until closer to the date sought by the ACTU (May 1991)</p> <p>The Metal Trades and Industry Association (MTIA) and the Metal Trades Federation of Unions (MTFU) agreed on a \$12.00 per week increase, plus two payments of 2.5% plus an increase of Employer Superannuation contributions of 1%</p>	<p>16 April 1991: \$12.00 refused – 2.5% available from 16 April (Print K7400)</p> <p>October 1991: enterprise bargaining adopted via s.112/115 agreements (Print K0300)</p>
1992	ACTU flagged a general wage increase		ACCI responded that any general wage increase would be bitterly contested, as unemployment was increasing	No decision

	Claim	Government position	Industry response	AIRC Outcome
1993	ACTU sought rescission of the October 1991 principles and a wages system according to Accord Mk 7 which included \$8.00 for those not able to strike workplace agreements	Commonwealth supported Accord Mk 7	ACCI/MTIA supported enterprise bargaining but not Accord Mk 7. They also argued that awards should be simplified to form a true basis for enterprise bargaining and supported the removal of award-based superannuation provisions	The AIRC gave two decisions in the October 1993 <i>Review of Wage Fixing Principles</i> , 25 October 1993 (Print K9700) and the 15 November 1993 Supplementary decision (Print K9940). These decisions awarded an increase of \$8 per week in award supplementary payments, but also revamped wage fixing principles
1994	ACTU claim \$8.00 per week wage increase to employees who have not received wage increases of this level (other than Minimum Rates Adjustment or Structural Efficiency Adjustment) since 1991; another safety net adjustment of \$8.00 per week to employees who have not received an increase through enterprise bargaining; and a further SNA for employees of \$8.00 per week from 1 July 1995.	The Commonwealth supported the ACTU claim. Note that the Commonwealth supported an extensive review of awards under s.150A, and proposed 'foundation' and 'non-foundation' clauses	ACCI wanted to defer the claim indefinitely, perhaps until awards were fully restructured through s.150A reviews MTIA believed no increase should be granted and any consideration of the safety net adjustment claim should be deferred	August 1994: <i>Review of Wage Fixing Principles</i> confirms two more safety net adjustments of \$8.00 (Print L4700) 21 September 1994: <i>Safety Net Adjustment and Review</i> (Print L5300)
1995	Application for the third \$8.00	The Commonwealth, New South Wales and Queensland, supported the adjustment.	ACCI and the National Farmers' Federation (NFF) were opposed to the granting of the third arbitrated safety net adjustment. MTIA, gave qualified support to the third arbitrated safety net adjustment	October 1995: <i>Third Safety Net Adjustment and Section 150A Review</i> confirmed availability of third \$8.00 (Print M5600)

	Claim	Government position	Industry response	AIRC Outcome
1997	ACTU claim 'Living Wage' increases in award rates, equivalent to 8.75%, this percentage includes the \$20.00 claim for those who have not had increases from enterprise bargaining beyond the \$24.00 since November 1991	Joint governments(Cth, ACT, WA, SA, NT, Vic, Qld, Tas) think the claim should be rejected. and a flat \$8 per week increase should be applied to minimum rates awards New South Wales thinks the claim should be granted	ACCI wanted the claim to be rejected and no increase awarded However, if the AIRC decided to award an increase, ACCI supported a special allowance e.g. \$5 per week for employees on award rates in the range of \$350-388 per week	22 April 1997: <i>Safety Net Review - Wages</i> awards \$10.00 New Minimum Wage (lowest adult rate in Metal Industry Award) set at \$359.40 (Print P 1997)
1998	ACTU claim on two stages Stage 1: effective from 22 April 1998, a minimum weekly rate of \$380.00 (\$20.60 increase); \$20.00 wage increase for all workers since 1 July 1996, or 3 rd \$8.00 which ever is later. Stage 2: effective from 22 April 1999, a minimum wage of \$418.00, through either \$38.00 increase, or 7.7% with commensurate increases for other classifications	Joint governments (Cth, ACT, WA, SA, NT, Vic, Qld, Tas) opposed the claim and proposed \$8.00 from 22 April 1998 & 2 nd \$8.00 from 22 April 1999 Also believe increases should apply to the minimum wage and there should be no increases for those above metal tradesman classification NSW supports Stage 1	ACCI believed claim should be rejected. Otherwise, a modest SN increase could apply with a 12 month space from the date of last increase in any award. MTIA rejected claim and supported a flat \$8.00 applied to award rates and the minimum wage from 22 April 1998	29 April 1998: <i>Safety Net Review – Wages</i> For award rates up to \$550 pw, \$14.00 granted. For award rates from \$551 to \$700, \$12.00 granted For award rates over \$700, \$10.00 granted Minimum Wage increased to \$373.40 (Print Q 1998)

	Claim	Government position	Industry response	AIRC Outcome
1999	ACTU claim \$26.60 per week for all award rates of pay up to \$527.80 per week for C7 in the metal industry 5% for all award rates of pay above that level, commensurate adjustment of allowances and service increments	<p>Joint governments (Cth, ACT, NT, SA, WA, Vic) believed the ACTU's wage claim should be rejected and replaced with an \$8 per week safety net adjustment to C10 level</p> <p>NSW, QLD and Tas supported the ACTU's wage claim</p>	<p>ACCI and NFF believed the hearing of the ACTU's wage claim should be deferred.</p> <p>The Victorian Employers' Chamber of Commerce and Industry (VECCI) and the Australian Hotels Association (AHA) believed the minimum wage should operate as the benchmark wages comparator for the purposes of the NDT in the certification of agreements</p> <p>AiG wanted the ACTU's wage claim rejected and replaced with a flat adjustment of \$8 per week applied to all award rates of pay and to the minimum wage, which was not payable before 22 April 1999 and fully absorbable into over award payments, irrespective of whether they reflect formal or informal agreements or individual arrangements</p>	<p>29 April 1999: <i>Safety Net Wages – Review</i></p> <p>\$12.00 for rates up to \$510; \$10.00 for rates above this. New minimum award rate of \$385.40 (Print R 1999)</p>
2000	ACTU claim for \$24 in award pay rates up to and including classification C7 (currently \$537.80) in the Metals Engineering Award, and 4.5% for classifications above this. (lodged October 1999)	<p>Federal and state coalition governments opposed \$24 but agreed that \$8 should be awarded to below trade classifications up to the C10 trade rate of \$477.20</p> <p>State Labor governments supported the ACTU application</p>	<p>ACCI requested the AIRC defer hearing the claim and submitted that new employees in start-up businesses be paid the minimum wage (\$385.40) for up to 6 months and be paid the minimum wage indefinitely if they are employed under a certified agreement or AWA.</p>	<p>AIRC decision increases all rates by a uniform \$15.00. Rejects ACCI proposal for an induction wage.</p> <p>New minimum wage of \$400.40</p> <p>2 May 2000 (Print S5000)</p>

	Claim	Government position	Industry response	AIRC Outcome
2001	ACTU claim for \$28 for classifications up to C10 (\$492), and 5.7% for those above that	Coalition governments opposed the claim and proposed a \$10 increase in rates to C10 level. Labor states supported the ACTU claim, but in the alternative supported an increase consistent with the evidence	ACCI, AHA and NFF and others submitted that a \$10 increase be confined to the minimum wage. ACCI proposed an additional 12 months delay between the times when awards are varied for a safety net increase. AiG supported a flat dollar amount.	AIRC increased rates by: \$13 for rates to \$490 \$15 for rates between \$490 to \$590 \$17 for rates over \$590 New minimum wage of \$413.40 2 May 2001 (PR002001)
2002	ACTU claim for \$25.00 for all award pay rates	Labor states supported the claim. Federal government proposed \$10.00 increase for all pay rates to the C10 level (\$507)	ACCI opposed ACTU claim and instead proposed \$10.00 increase at the minimum wage level (\$413.40)	AIRC granted \$18.00 increase to all award pay rates. New minimum wage of \$431.40 9 May 2002 (PR002002)
2003	ACTU claim for \$24.60 for all award rates	Labor states supported an increase in award rates of \$18.00. Commonwealth did not oppose an increase in award rates of up to \$12.00 but for award rates at the Metal Award's C10 rate (\$525.20), or below	ACCI opposed the claim. AiG proposed \$11.00 subject to absorption NFF opposed any increase and argued a farmer's status of 'exceptional circumstances' should satisfy the economic incapacity principle	AIRC granted \$17.00 for award rates up to \$731.80 [Metal Award's C2(a) rate] and \$15.00 for rates higher than this New minimum wage of \$448.40. 6 May 2003 (PR002003)
2004	ACTU claim for \$26.60	The Commonwealth relied on the Harding report on the effect of minimum wage rises costing jobs. Labor state governments supported \$20. Commonwealth agreed to a \$10 increase up to the C10 level	ACCI and AiG supported a \$10 increase: ACCI capped at the C10 level, AiG applying to all award rates ACCI sought a 28 day notice period for employers before passing on any increase in award rates AiG sought a new commitment to continuous improvement in productivity and efficiency	The AIRC awarded increase of \$19 for all awards on 5 May 2004 (PR002004) The minimum wage increases to \$467.40, and the C10 rate is now \$561.20

	Claim	Government position	Industry response	AIRC Outcome
2005	ACTU claim for \$26.60	State & territory governments proposed \$20 increase to all award rates Commonwealth Government proposed \$11 for C14 to C10 rates	ACCI & NFF proposed \$10 increase to the equivalent of C14 to C10 rates in the Metals award AiG proposed \$11 for all award rates	The AIRC awarded a \$17 increase on 7 June 2005 to all award rates bringing the federal minimum wage to \$484.40 (PR002005)
2006	ACTU claim for \$30	NSW, Qld and Tas supported a \$20. increase Federal government did not nominate a dollar increase	AiG proposed a \$14 increase. ACCI did not nominate a dollar increase	The AFPC determined an increase of \$27.36 for pay scales to \$700 and \$22.04 for those above \$700 on 26 October. (www.fairpay.gov.au/fairpay/WageSettingDecisions) New minimum wage of \$511.76, from 1 December 2006. State minimum wages: NSW \$504.40 QLD \$503.90 WA \$504.40 SA \$501.40 TAS \$501.40
2007	ACTU claim for \$28 over 12 months	Federal government did not propose a dollar increase but argued that tax cuts from 1 July 2007 should be allowed for. State and territory Govts proposed \$20 increase	ACCI claimed any rise should apply to low paid AiG proposed \$10	AFPC determined \$10.26 for rates to \$700; \$5.30 above \$700 on 5 July 2007, effective from 1 October 2007 (www.fairpay.gov.au/fairpay/WageSettingDecisions) New federal minimum wage of \$522.12 (\$13.75 ph) compared to: \$531.40 in NSW \$528.40 in WA \$527.10 in Tas \$528.40 in Qld \$511.90 in SA,

	Claim	Government position	Industry response	AIRC Outcome
2008	ACTU claim for \$26	Federal government did not propose a dollar wage increase	ACCI proposed \$10 - \$11 (\$10.25); AiG proposed \$13.30	AFPC determined \$21.66 on 8 July, to apply to all pay scales and the minimum wage. (www.fairpay.gov.au/fairpay/WageSettingDecisions) New minimum wage of \$543.78 (\$14.31 ph) to apply from 1 October 2008. \$552.70 in NSW \$557.40 in WA

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