CHAPTER 7

THE NEEDS OF WORKERS VULNERABLE TO DISCRIMINATION

'We remain a reformist government but we are a reformist government with a heart.'

- John Howard, 3 November 1999

'..we must let slip the leash on those 'wild animal spirits' ...'

- Peter Reith, 15 September 1999

Introduction

7.1 The principal object of the WR Act is to '…provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia…, including by:

> j) Respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

7.2 In a decentralised and deregulated bargaining environment, it is more difficult to monitor discriminatory employment practices. Therefore, it is particularly important that the Government ensure that this object is being translated into practice by providing a legislative framework that adequately protects vulnerable employees from discrimination.

7.3 The Government asserts that 'Australia has a comprehensive legislative framework dealing with anti-discrimination issues, supported by government agencies who are dedicated to the administration of, and compliance, promotional and education activities associated with, this legislative framework'.[1] Essentially, the Government believes that the current provisions of the WR Act, in combination with the *Sex Discrimination Act 1984*, the *Racial Discrimination Act 1975* and the *Disability Discrimination Act 1992*, sufficiently protect employees against workplace discrimination in the new deregulated environment.

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2171

7.4 However, the Committee received evidence suggesting that, in practice, many employees are still disadvantaged in their employment for discriminatory reasons, and the provisions of the WR Act introduced in 1996, and the industrial relations climate that the WR Act has produced, have exacerbated the problem.

Women

7.5 As highlighted by submissions from a large number of women's organisations:

> It has been a decade of decentralisation. However, we believe this was intensified greatly by the Workplace Relations Act. Protections that were put in place previously in the Industrial Relations Act to counteract some of these tendencies towards dispersion were removed in the 1996 Act and there was also an additional and even more decentralised level added of AWAs.[2]

7.6 Witnesses from women's organisations expressed the following concerns about the WR Act and current Bill;

> The groups representing working women in Australia argued that the proposed Workplace Relations Act if enacted would disadvantage women workers. Three years later we find that our fears have been realised. The act has been detrimental to women workers and we now submit to this inquiry that the proposed amendments will further disadvantage women workers. We are concerned that the safeguards inserted into the act in 1996 after negotiations with the Australian Democrats are now being eroded under these new proposals.[3]

Equal remuneration for work of equal value

Impact of the Workplace Relations Act

7.7 A major problem highlighted in the Inquiry is the continuing disparity between male and female earnings. Despite significant work over the last few decades, the gender pay gap continues, and there is evidence to suggest that decentralised bargaining has had a negative impact on equal remuneration for women:

> Data analysis of both the Department of Employment, Workplace Relations and Small Business Workplace Agreements Database and the Australian Centre for Industrial Relations Research and Training (ACIRRT) Agreements Database and Monitor (ADAM) confirm the trend that there is an enterprise bargaining gender pay gap. It should also be noted that the enterprise bargaining gender pay gap (the difference in male and female average annual wage increases achieved under enterprise bargaining) will tend to have a cumulative effect. Given that what is measured here are annual wage increases…we would expect even quite small differences each

2 Evidence, Ms Fran Hayes, Sydney, 26 October 1999, p. 412

3 Evidence, Ms Suzanne Hammond, Sydney, 26 October 1999, p. 406

> year to tend to increasingly magnify existing differences between male and female earnings.[4]
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> [The Department's] report shows that, of the last 19 quarters in which there has been a difference in the annual average wage increases for men and women, in 14 of those quarters it has been higher for men than for women. Secondly, analysis of the AWIRS data—the Australian Workplace Industrial Relations Survey data—by many independent researchers, including Cornelius Reiman, Michael Alexander and Barbara Pocock, has found a gender pay gap that can be attributed to enterprise bargaining. Thirdly, our own analyses show that lower wage rises under enterprise bargaining have tended to occur in the more highly feminised industries—the more highly feminised parts of the economy.[5]

7.8 Most experts who appeared before the Committee expressed frustration at the limited data available to assess the impact of agreements, including both certified agreements and AWAs, on the gender pay gap.[6] The Human Rights and Equal Opportunity Commission (HREOC) were concerned that the data limitations were 'likely to obscure discriminatory impact'.[7]

7.9 Despite the lack of data collected and provided by the Government, most witnesses were very concerned that the current legislative framework was not adequate to ensure equal remuneration and protect women from discrimination. The Sex Discrimination Commissioner found in some key areas the objects of the WR Act are not supported by appropriate provisions to implement them in practice. For instance, the HREOC submission states that:

> The ability to successfully give effect to the equal remuneration sections of the WR Act in cases where pay discrimination is occurring is essential if the WR Act object…is to be met. The provisions, as currently drafted, are inadequate as a mechanism to address gender based pay inequity or, consequently, to fulfil Australia's international obligations with regard to pay equity'.[8]

7.10 The HREOC submission provides a detailed critique of the current equal remuneration provisions of the Act (Division 2, Part VIA) and how they have operated since 1996.[9] In particular, the HREOC submission discusses the proceedings against HPM Industries, which highlighted specific deficiencies in the current provisions. HREOC make several recommendations to improve these provisions, including:

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4 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5799

5 Evidence, Dr Richard Hall, Sydney, 22 October 1999, pp. 250-1

6 See, for instance, Evidence, Dr Barbara Pocock, Canberra, 28 October 1999, p. 511

7 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 11, p. 5800

8 *ibid*.

9 *ibid*., pp. 22-7

- allowing equal remuneration applications to be heard by a Full Bench of the Commission;
- ensuring that the Commission, in determining equal remuneration applications, can consider remuneration matters not limited to 'allowable award matters' in section 89A(2); and
- allowing the Commission to develop principles for equal remuneration applications, that provide a default mechanism to establish work value in the absence of agreement between the employer and affected employees, and specify that differential rates of pay for male and female employees for work of equal value establishes 'discrimination based on sex' for the purposes of the WR Act.

7.11 The Bill does not currently propose any such amendments, even though the issues highlighted by the HPM case could have been addressed by the Government.

7.12 Labor Senators recommend that HREOC's proposed amendments be adopted.

Amendments proposed in the Bill

7.13 Witnesses expressed grave concerns about the Bill's proposed amendments to the WR Act, and their possible impact on achieving equal remuneration for women:

> I started work 60 years ago and I worked for 54 per cent of the male rate of pay…Then I joined the Air Force and found myself working for 66 per cent of the net pay of the boys working next to me, net of the allotment they sent home to their wives…I used to say that I wished pay equity would come in before Jean Arnot, one of our long-time, hardworking members died, and also before Edna Ryan from WEL died. However, that did not happen. So now I say I hope it will be achieved before I die. However, if this sort of legislation goes through, my two colleagues here will be saying in 30 years or 40 years time, 'I hope it happens before I die.'[10]

7.14 In general, the amendments which were of most concern were amendments to limit the Commission's involvement in assessing agreements to ensure that they meet the no disadvantage test:

> We are concerned that the protections included in the Workplace Relations Act in 1996 providing that the Industrial Relations Commission play a role in ensuring that Australian workplace agreements satisfy the no disadvantage test, and that they meet a public interest test, are now being removed and that the jurisdiction is being taken away from the commission and placed in the hands of the Employment Advocate. We argue that this will be a less stringent and less transparent process.[11]

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10 Evidence, Ms Val Buswell, Sydney, 26 October 1999 p. 409

11 Evidence, Ms Suzanne Hammond, Sydney, 26 October 1999, p. 406

> Proposed amendments to the Workplace Relations Act that agreements may be certified without scrutiny leaves the door wide open for greater instances of discrimination, in my view. The Human Rights and Equal Opportunity Commission proposes that a process of scrutiny should be conducted prior to certification and that this scrutiny should include, in accordance with the principal object of the Workplace Relations Act, whether or not the agreement contains provisions that may be discriminatory, whether employees generally consented to the agreement and whether the agreement satisfies the no disadvantage test requirements.[12]

7.15 On the issue of monitoring agreements, the Sex Discrimination Commissioner also pointed out that it was possible for her to intervene in proceedings before the Commission relating to discriminatory provisions in awards and agreements, but the Sex Discrimination Act does not allow her to intervene in the Employment' Advocate's consideration of AWAs.[13]

7.16 Another provision of the Bill that would seriously impede the ability of the industrial relations system to ensure equal remuneration for work of equal value is the proposal to remove the Commission's power to make safety net wage increases above basic minimum award wage rates.

7.17 Women are disproportionately reliant on awards to set their pay and conditions.[14] The proposed provisions to prevent the Commission from adjusting internal relativities in awards could result in all award-reliant employees above the basic minimum classification pay point in their awards not having access to pay increases until the base pay rate catches up with their current pay rate.

7.18 As a result of the proposed compression of internal award relativities over time, women employed at higher award classification levels would not necessarily be paid according to their skills, duties and responsibilities, which is inherently unfair and discriminatory, and would tend to exacerbate the gender pay gap, given the proportion of award reliant employees who are women.[15]

Conclusions

7.19 Thirty years after the first federal case, equal remuneration for work of equal value has not yet been achieved for women. Decentralisation of industrial relations in Australia appears to be having a negative impact on pay equity, although many academics cautioned that they are simply unable to produce concrete findings due to a paucity of data on agreements.

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12 Evidence, Ms Susan Halliday, 26 October 1999, p. 374

13 *ibid*., p. 378

14 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5827

15 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, pp. 5864-5

7.20 Labor Senators believe that the data problems need to be addressed as a matter of urgency, by amending section 358A of the WR Act, which requires the Government to report about developments in agreement-making. The section should be strengthened considerably and should include more detail about the data that should be collected and made available to researchers, as suggested by ACCIRT.[16] In particular, the Department of Employment, Workplace Relations and Small Business should be required to modify the Workplace Agreements Database to ensure all agreements are coded for gender breakdown and quantifiable wage increases.

7.21 The provisions of the Act requiring secrecy for AWAs should also be repealed, and the provisions of the Bill that would further entrench 'secret' AWAs should not be enacted. This will ensure that researchers and the public can have access to the contents of AWAs, in order to collect data to assess the impact of these agreements on women and other vulnerable employees. General information about the employer and employee who are party to each AWA could be provided by the Employment Advocate, while ensuring confidentiality of individuals' identities.

7.22 HREOC, the government agency charged with eliminating discrimination based on gender, has submitted that the current equal remuneration provisions in the Act are deficient in several areas. Labor Senators recommend that HREOC's proposed amendments to the equal remuneration provisions of the Act be adopted in full.

7.23 The proposed amendments to the Act to allow agreements to be certified without scrutiny by the Commission, and without a public hearing will further limit the capacity of the Sex Discrimination Commissioner to intervene in cases of discriminatory agreement provisions - if there is no public hearing before certification of an agreement, how could the Commissioner possibly intervene?

7.24 Similarly, Labor Senators believe that the proposals to remove the Commission's ability to apply safety net wage increases to all wage rates set by awards will have a negative and discriminatory impact on most award-reliant employees, of which a significant proportion are women.

Pregnancy

Impact of the Workplace Relations Act

7.25 In reviewing the operation of the WR Act, HREOC also noted that there were a significant number of concerns raised during the National Pregnancy and Work Inquiry about continuing discrimination against female workers who become pregnant:

> While some attest that we no longer suffer blatant discrimination, my work sadly, on a daily basis, reflects otherwise. A submission to the recent national pregnancy and work inquiry…told of a judge's associate who, when eight months pregnant, was told by the judge that he was not going to

16 Evidence, Dr Richard Hall, Sydney, 22 October 1999, pp. 253-4

> support her application for maternity leave because she had chosen a new career. He believed that women should stay at home with their children.[17]
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> Recently, the FSU consulted its female members who had experienced pregnancy in the workplace as part of the Human Rights and Equal Opportunity Commission inquiry into pregnancy and work. Our members highlighted their concerns around job insecurity, whether they should take maternity leave, and feelings of discrimination in the workplace...Even members with long periods of service had experienced degrees of discrimination and feelings of job insecurity, and particularly doubt as to whether or not they would have a job upon their return to work, or whether or not that job would have changed. This is despite object 3(j) of the legislation.[18]
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> People are sacked when they become pregnant. These things are clearly unlawful and people are shocked to hear that they are happening. But we have a substantial database which evidences the points that we make. Because we are a legal service, we have to state every call that we take and we have an extensive database to justify the position that I am putting here today.[19]

Amendments proposed in the Bill

7.26 Incredibly, against the backdrop of the HREOC report and findings, the Bill proposes to amend the WR Act to specify that award clauses dealing with transfers of employees between locations and between types of employment are not allowable award matters (proposed paragraphs 89A(3A)(a) and (g) – item 13 of Schedule 6). These amendments will put in jeopardy standard award provisions established by the Commission in the Parental Leave Test Case.[20]

7.27 These provisions entitle pregnant workers to be transferred to a safe job where a doctor certifies that the worker or baby is in endangered by the worker's normal job, and also entitle new parents to work part time following the birth of their child, and to revert to full time employment when their caring responsibilities permit. The forced removal of these clauses from awards will affect the ability of women to balance work and family, particularly because so many women continue to rely on awards for their pay and conditions:

> The removal of award provisions for transfer and test case standards from awards can be expected to have a detrimental effect on the ability of women to combine pregnancy and family responsibilities with their employment.[21]

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17 Evidence, Ms Susan Halliday, 26 October 1999, p. 374

18 Evidence, Ms Susan Kenna, Melbourne, 7 October 1999, p. 86

19 Evidence, Ms Wendy Tobin,Melbourne, 8 October 1999, p. 176

20 Print J6777

21 Evidence, Ms Susan Halliday, Sydney, 26 October 1999, p. 374

> We only have to look at the recent inquiry that was conducted to know that discrimination against pregnant women is still rife and prevalent. To now remove a further protection whereby women are able to transfer between types of employment or locations based upon any needs that may arise and have that extra hurdle for women to go over if they want to partake of those rights is an intrusion into what society is all about—a society where we grow and mature—and denies, yet again, fundamental rights for women who have children. It is unbelievable that it is even being contemplated. Yes, it will be very difficult for women to take these matters up once they are removed from awards and if they do not appear in their enterprise bargaining agreements.[22]

Conclusions

7.28 It cannot be expected that award provisions allowing women to transfer between jobs and types of employment to manage pregnancies will be picked up in certified agreements. This would require employees, many of whom may never be affected by pregnancy or parenthood, to negotiate and trade off wages and conditions in return for these 'benefits' currently provided for in awards.

7.29 Labor Senators do not agree that these fundamental types of protections should be viewed as optional 'benefits' for employees to negotiate themselves. To prevent discrimination against women, the Government must provide protection for pregnant workers and new parents in overarching legislative or award provisions. The proposed amendment to prohibit award clauses that deal with transfers between locations and types of employment should be rejected.

Award simplification

Impact of the Workplace Relations Act

7.30 The HREOC submission to the Inquiry raised concerns about the impact of award simplification on women. Although the current award simplification provisions require the Commission to remove directly discriminatory provisions, indirectly discriminatory provisions remain in awards. Examples of indirectly discriminatory provisions include those allowing changes in rosters and hours with little or no notice, which can have a very detrimental affect on women with caring responsibilities. This is discussed further in Chapter 8 of this report, which deals with the balance between work and family responsibilities and the impact of flexible working arrangements.

7.31 HREOC recommended that in any future workplace relations reform, the Government ensure that employees are not exposed to either direct or indirect discrimination.[23] HREOC suggested that this should be done by introducing a new 'anti-discrimination' allowable award matter to allow the Commission and the parties

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22 Evidence, Ms Grace Grace, Brisbane, 27 October 1999, p. 443

23 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5830

to awards to deal comprehensively with the issue of eliminating discrimination in awards.[24]

7.32 This may go some way to addressing potentially discriminatory anomalies which have arisen during award simplification, for example, the removal of award clauses which prevent employers from requiring bar attendants to work topless.[25]

7.33 HREOC also suggested that providing the Sex Discrimination Commissioner with the power to refer discriminatory awards or agreements to the Australian Industrial Relations Commission on her own initiative, without the requirement for a formal complaint, would assist in addressing discrimination. At the moment, The Sex Discrimination Commissioner may only refer an agreement or award to the Commission after receiving a complaint in writing from an 'aggrieved person' or a trade union representing an aggrieved person.[26] The Sex Discrimination Commission also thought that she should have some scope to examine discriminatory provisions in AWAs:

> The other option, if you had a wish list, is that I am in a position to intervene with respect to awards and certified agreements but not with AWAs.[27]

Amendments proposed in the Bill

7.34 It is proposed that 'skill based career paths' would be removed from the list of allowable award matters in section 89A(2). Many groups who made submissions to the Inquiry, including employer groups, did not support this amendment, and supported the retention of industry-wide training arrangements in awards. This is discussed further in Chapter 4 'Standing of the Australian Industrial Relations Commission'.

7.35 There were particular concerns, however, about how this amendment would affect women:

> …we are concerned about the removal of skill based career paths from allowable award matters. The development of skill related career paths in low paid female dominated awards—for example, in the hospitality and clothing industries—over the last 10 years has been an important strategy in the quest for pay equity for women. Once lost from these awards, these hard won provisions will be lost forever…women in the industries concerned are unlikely to be in a position to bargain to have career paths included in individual agreements. This is a blow to pay equity.[28]

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24 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5801

25 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4364

26 Section 50A *Sex Discrimination Act 1984* (Cth)

27 Evidence, Ms Susan Halliday, Sydney, 26 October 1999, p. 378

28 Evidence, Ms Fran Hayes, Sydney, 26 October 1999, p. 408

> The inclusion of skill based career paths in awards provide for a level of scrutiny of the objectivity of valuing the work of employees and the level of objectivity inherent in the requirements for moving from one classification to another. The removal of these processes and standards from awards will result in women being dependent on informal processes. Historically, industrial (formal and informal) processes for valuing levels of skill and the criteria for progression from one level to another…have been fraught with discriminatory practices. Only the transparency of formalised processes and standards can provide a forum to address the historically discriminatory assumptions, such as undervaluing skills such as dexterity in women's work and valuing highly skills such as strength in men's work…the removal of this allowable matter will have a direct and immediate impact on the ability of the award system to address discrimination in this area.[29]
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> The deletion of skill based qualification structures will be highly detrimental for women workers. The New South Wales Pay Equity Inquiry Report found that remedies to address undervaluation of women's employment should include 'reclassification of work, the establishment of career paths and changes to incremental scales'. As women rely on minimum entitlements, the removal of incremental scales will significantly reduce the recognition of women's skills and thereby increase the pay gap.[30]

7.36 The proposals to prevent award clauses from dealing with transfers between locations and types of employment will also have further discriminatory impact on women with children. This amendment is discussed above.

Conclusions

7.37 Labor Senators agree that the Commission should have the power to comprehensively deal with the issue of discrimination in awards. Given the current restraints in the WR Act on the exercise of the Commission's arbitral functions, this can only realistically be achieved by expanding the list of allowable award matters to include 'anti-discrimination'.

7.38 Labor Senators do not accept that the current model anti-discrimination clauses for awards and agreements are effective in preventing discrimination. In this regard, HREOC submitted:

> …in practice, a clause restating principles already embodied in legislation does no more to provide a mechanism to actively address discriminatory pay or conditions provisions in awards than other legislative mechanisms such as the Division 2 Part VIA equal remuneration for work of equal value provisions.[31]

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29 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p.5868

30 Submission No. 520, New South Wales Government, vol. p. 6926

31 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5829

7.39 The Government should take more direct responsibility for eliminating discriminatory work practices by arming the Commission and the Sex Discrimination Commissioner with real powers to prevent discrimination. As a starting point, 'anti-discrimination' should be included as an allowable award matter, as suggested by HREOC. Labor Senators agree that the Sex Discrimination Commissioner should be given power to directly refer discriminatory awards and agreements to the Commission, and considers that an equivalent mechanism for referring discriminatory AWAs to the Commission should also be established.

7.40 Labor Senators reject the removal of 'skill-based career paths' from the list of allowable award matters. As pointed out by many witnesses, structured career paths have been essential in improving women's pay and working conditions. Training and career development entitlements should continue to be available to award-reliant employees.

Paid rates awards

Operation of WR Act

7.41 A high proportion of women formerly worked under paid rates awards, which have been converted to minimum rates awards under the Commission's award simplification exercise. Paid rates awards traditionally cover publicly funded sectors, including Government employees, nurses and teachers.

7.42 Some witnesses submitted that these workers had been disadvantaged by the operation of the WR Act:

> The 1996 legislation abolished [paid rates awards] and required to Commission to convert them to minimum rates awards. The effect of this is a significant reduction in the work value which has been recognised in CPSU awards through paid rates and incremental ranges. Each classification is assigned a single point minimum rate which in most cases is thousands of dollars below the previous award rate. The role of the award as a safety-net is being substantially eroded in relation to pay entitlements of employees.[32]

Proposed amendments set out in the Bill

7.43 The Bill would further disadvantage workers who have traditionally worked under paid rates awards by removing the ability of the Commission to arbitrate under section 170MX where negotiations for an agreement have stalled between an employer and employees formerly covered by paid rates awards.

7.44 The option of section 170MX arbitration was included in the WR Act as many employees who used to work under paid rates awards are employed by Governments

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32 Submission No. 379, Community and Public Sector Union, vol. 13, Attachment B. See also Submission No. 458, Australian Nursing Federation (South Australian Branch), vol. 22, p. 5446

or Government-funded organisations, and it is difficult for these employees to effectively negotiate for wage increases:

> The amendment will mean the removal of special access to arbitration for workers under paid rates awards, particularly affecting nurses, teachers and other public sector workers who are unable to reach agreement with their government employers.[33]

7.45 The Government has not indicated that there has been any change in the bargaining position of these employees which alleviates the need for access to section 170MX arbitration. The Department's submission merely states that the amendment is 'consistent with the continuing move away from paid rates awards in the system.'[34]

7.46 This rationale is either obfuscatory or disingenuous. It clearly ignores that the current provisions of subsection 170MW(7) relate to employees who were covered by paid rates awards at the time subsection 170MW(7) commenced operation. The conversion of paid rates awards to minimum rates awards through award simplification is irrelevant to the reasons why this provision was inserted into the WR Act in 1996. The Government has not provided any evidence suggesting that public sector employees now have any greater bargaining power.

7.47 Other witnesses raised concerns that removing access to section 170MX arbitration would disadvantage women and undermine remuneration equity:

> My final point on pay equity is that the proposed changes to section 170MW(7) to remove access to arbitration for workers on paid rates awards concern us. Our commitment is to pay equity for all women workers, not just low paid workers. This provision will hit women in female dominated professions in the public sector particularly hard. Many of these professions are arguably still underpaid relative to comparable male professions. Any pay increases will be confined to those that these groups can reach agreement on with their employer. There will be no access to arbitration to resolve unsuccessful negotiations. Women in these groups traditionally have poor bargaining power to achieve pay increases without arbitration, often because their commitment to their clients inhibits them from taking industrial action. We would call on the government to retain the access of these workers to arbitration.[35]

Conclusions

7.48 The Government has provided no arguments to support this amendment, or demonstrated any benefits that will flow from this amendment. This is possibly because the amendment will simply increase the power that Governments have to

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33 Submission No. 196, Lutheran Community Care, vol. 5, p. 985

34 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2393

35 Evidence, Ms Fran Hayes, Sydney, 26 October 1999, p. 408

unilaterally set conditions of employment in the public sector, leaving their employees with little choice but to accept proposed agreements or forego any wage increases.

7.49 The Committee has been provided with evidence indicating that the amendment would tend to disadvantage female workers, who are concentrated in industries formerly covered by paid rates awards. Labor Senators believe that access to arbitration by the Commission under section 170MX should remain available to former paid rates workers.

Workers from a Non-English Speaking Background

Operation of the WR Act

> …women of non-English speaking background in the workforce are amongst the most vulnerable…This vulnerability is due to a number of factors, different for every individual. However, they include poor English language skills, lack of familiarity with Australian laws and sources of assistance and advice, lack of experience in their countries of origin with organisations such as unions, discrimination in the workplace and in the process of gaining employment, lack of recognition of overseas-acquired skills and qualifications, and a lack of alternative sources of income (particularly for those subject to the Government's new 2 year waiting period for access to social security in Australia).[36]

7.50 Women are already disadvantaged in terms of pay and conditions in the Australian labour market, and the problems are compounded for women from non-English speaking backgrounds (NESB). The problems facing NESB workers were also highlighted by the Federation of Ethnic Communities' Councils of Australia's submission to the Inquiry:

> The fundamental premise of Workplace Agreements is that there is a level playing field on which employers and employees negotiate as equal partners. This may be the case where the employee is highly skilled and competent in the English language…[b]ut there cannot be equality of position in the case of newly arrived migrant workers who live in total employment insecurity, do not speak fluent English, do not know the Australian Industrial Relations legislation, come from a country where such legislation does not exist and have no idea of their rights. Added to that are the cultural factors that often prevent individuals, especially women, from questioning those in authority, which places some doubt on the fundamental premise of the legislation.[37]

7.51 The increasingly limited focus on only setting pay and conditions through workplace level agreements therefore contains inherently discriminatory outcomes for

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36 Submission No. 411, The Association of Non-English Speaking Background Women of Australia, vol. 16, p. 3496

37 Submission No. 417, Federation of Ethnic Communities' Councils of Australia Inc, vol. 18, p. 4314

workers from some cultural backgrounds. Liberty Victoria, a civil liberties group, agreed with this assessment:

> It is not so much that we disagree with industrial reform. What we are concerned about is that the reform does not occur at the expense of those at the lowest end. Probably one analogy to use about when people come before an employer is that if you are employing me, you have a full plate of food, I have none, and without basic protections that puts me in a dreadful bargaining position…At least under the award system I am guaranteed at least a quarter of your bowl of food. The general direction in which these reforms are going is to take away even my right to that quarter of that bowl of food. It also impacts very much on ethnic groups, women, people who are not conversant with how you negotiate agreements.[38]

Proposed amendments set out in the Bill

7.52 The proposed amendments would even further restrict capacity to set wages and conditions outside workplace level bargaining. For instance, allowable award matters would be pruned; removing matters such as training and skills formation from awards, and requiring employees to negotiate agreements to obtain access to training.

7.53 The Commission would also be prevented from flowing safety net increases on to those award-reliant employees who are not paid at the minimum award pay point. Those who have higher skills and qualifications would no longer have access to safety net adjustments, and these employees will have to negotiate any further pay increases with their employers.

7.54 Many of the proposed amendments to the Bill were criticised because they assume all Australian workers can read and write in English, rather than accepting and promoting a multicultural workforce.

7.55 For instance, it is proposed that an employee who wants their union to investigate a possible award breach would have to write an invitation to their union, specifying details of the suspected award breach and details of the evidence of the breach the employee believes can be found in the workplace. This would be a large ask for any employee not fully conversant with Australian industrial relations legislation. However, it will have a much more significant impact on an employee who cannot write in English. Under the proposed provisions, these employees would find it very difficult to even have contact with their unions, let alone recover their entitlements in cases of award breaches.

7.56 Similar fears were expressed regarding the secret ballots proposal. The proposed provisions require detailed applications, supporting material and ballot papers, which would be very intimidating for NESB employees:

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38 Evidence, Ms Anne O' Rourke, Melbourne, 8 October 1999, p. 154

> The proposed requirement to hold the secret ballot before the taking of industrial action is unnecessary and restrictive to the point of obstructing the right of workers to take industrial action. However, in TCF industries it will impede our members' capacity to make democratic decisions about industrial action due to the low levels of literacy in English and cultural suspicion of government agencies which typify our membership.[39]

Conclusions

7.57 Australia has a diverse workforce. The Government must keep this in mind when developing legislative proposals. It is disturbing that the Government has seen fit to propose amendments to the WR Act that are Anglo-centric in nature and clearly ignore the needs of more vulnerable workers from non-English speaking backgrounds.

7.58 Labor Senators believe that there is a continuing need for a fair and adequate award safety net to protect those workers that are unable to bargain, whether this is due to their cultural background or the reluctance of their employer to enter into agreements.

7.59 A fair and adequate safety net cannot only focus on the low paid. Award-reliant employees, who may be lowly paid compared with those on agreements, but are entitled to more than the lowest rate of pay in an award, must also be considered. If the Commission is to be preventing from maintaining a range of award-based classification pay structures, then it is disadvantaged, award-reliant workers who will suffer.

Low paid and other vulnerable workers

Operation of WR Act

7.60 The Government has submitted that:

> Under the WR Act, awards continue to operate as a fair and effective safety net for workers in a disadvantaged bargaining position. Safety net adjustments have delivered wage increases for award reliant employees and these increases have been more equitably targeted at low paid award employees than under previous legislation.[40]

7.61 Other witnesses and submission did not agree that low paid and vulnerable workers were adequately protected by a fair and effective safety net. The fairness and effectiveness of awards is not limited to an assessment of safety net wage increases passed on by the Commission. The award simplification exercise, reducing awards to a core of 20 allowable award matters, has resulted in losses of substantive conditions

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39 Evidence, Ms Robbie Campo, Sydney, 26 October 1999 p. 364

40 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2104

and entitlements, which workers in a disadvantaged bargaining position have little hope of renegotiating in agreements.

7.62 The ACTU provided 31 examples of matters that have been removed from awards as the result of award simplification.[41] These matters include:

- award provisions relating to sexual harassment and award prohibitions on requirements to wear inappropriate clothing (this clause was inserted to prevent bar attendants being required to work topless);
- award provisions requiring consultation with employees and unions about redundancy;
- award provisions requiring employers to provide first aid kits in the workplace;
- award provisions requiring employers to provide boiling water and tea and coffee making facilities; and
- award provisions restricting the ability of employers to require employees under 18 years of age to work overtime and night shifts.

7.63 As the ACTU points out, '[w]hile there is no statistical evidence of how removal of these provisions has affected employees in practice, it is likely to be extensive given that even where agreements are in place, these might not cover the particular entitlements removed from the award'.[42]

7.64 In general, it is unfair to arbitrarily remove provisions from awards, particularly where award entitlements may have been the result of earlier productivity measures and negotiated outcomes under the former Structural Efficiency or Restructuring and Efficiency Principles. However, the outcome is even more unfair for low paid workers and those with little bargaining power, as these employees have limited ability to renegotiate even basic conditions, such as the provision of first aid kits or boiling water, in agreements.

7.65 The Uniting Church Board for Social Responsibility submitted:

> A review of Government submissions [to award simplification hearings] will indicate that, in spite of the rhetoric, the Government sought to remove not only process and detail from awards but to reduce a number of fundamental entitlements and protections. The process is not yet complete but the Government is seeking to reduce awards even further and force the process to be done all over again. The legislation seeks to override the outcomes and independent processes to date, with far reaching detrimental effects on all parties but particularly the low paid.[43]

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41 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4364

42 *ibid*., pp. 4634-5

43 Submission No. 440, Uniting Church Board for Social Responsibility, vol. 21, p. 5157

7.66 The Australian Council of Social Services suggests that it is imperative to strengthen the award system to protect low paid workers:

> The establishment of effective wage fixation mechanisms and adequate industrial protection, through a strong award system supported by an independent regulatory structure, is an essential part of the process for maintaining and improving the living standards and job security of low paid workers.[44]

7.67 Vulnerable workers have also been disadvantaged under the new agreement-making framework introduced by the WR Act. This is discussed below under 'Discrimination in agreement making'.

Proposed amendments as set out in the Bill

7.68 The Government has proposed a number of amendments that would tend to particularly disadvantage low paid and vulnerable workers.

Termination of employment

7.69 The Bill would amend the unfair dismissal provisions of the WR Act to:

- make it more difficult for employees who have been 'constructively dismissed' to have access to unfair dismissal remedies;
- widen employers' access to costs orders against applicants and allow the Commission to order an applicant to provide security for costs that may be awarded against the applicant;
- limit the circumstances in which the Commission may accept late applications for unfair dismissal remedies;
- require disclosure of whether an applicant's representative or legal adviser has been engaged under contingency fee arrangements;
- prevent the Commission from finding that a dismissal was harsh unjust or unreasonable where one of the reasons for the employee's dismissal was 'operational grounds'; and
- allow greater scope for small business employers to dismiss employees unfairly.

7.70 Most employer groups supported the proposals, but did not provide evidence about the potential impact of these amendments on disadvantaged employees. Most other witnesses who made submissions to the Inquiry were horrified by the proposed amendments:

> Overall it appears that the effect of the amendments is to restrict access for individuals, by narrowing the scope and application of the laws and making

44 Submission No. 476, Australian Council of Social Services, vol. 23, p. 6072

> it more difficult for individuals to have access to representation…It is an inevitable consequence of the amendments in this Bill that: firstly, it will be much easier to shed staff; and secondly, rights and remedies for unfair dismissals will be reduced with the attendant reduction in job security for employees. The changes to the unfair dismissal laws most starkly demonstrate how this Bill undermines job security...These provisions will reduce access to individuals and are more likely to affect applicants who are poor, with language difficulties or non-union members.[45]
>
> In essence, the laws should ensure that employees are treated decently and fairly, and that they are afforded natural justice. However, these basic tenets of unfair dismissal law are undermined by a number of factors that are contained in the federal Government's approach to termination of employment. These include the small business exemption…, amendments that discourage employees from lodging applications and which make it more difficult to seek a remedy, and the perception that unfair dismissal laws impede job prospects.[46]
>
> In introducing the payment of security for costs by applicants to the Commission, many employees who have been unfairly treated by employers will be reluctant to make an application to the Commission. This payment…will be a significant disincentive and prevent many people from pursuing a remedy they are entitled to. At the present time, many employees who have been unfairly dismissed are in a precarious financial position and do not have the resources to recover entitlements.[47]
>
> The proposed amendments in relation to costs will strongly impact on those in the community with the most limited means of exercising their legal rights, by enabling the threat of a costs sanction...The practical effect of these proposed amendments will be to increase the need for employees to incur legal costs in obtaining legal advice within the 21 day time limit in which an unfair dismissal application must be brought. This will most disadvantage those in the community with limited financial resources, poor education, or with communication/language difficulties.[48]

7.71 The amendments to limit access to unfair dismissal remedies in cases of constructive dismissal caused particular concern because of the potential impact on women and young employees who may be harassed or bullied to the point of resignation:

> [The constructive dismissal amendment] indicates a poor appreciation of the circumstances of the phenomenon. Termination of employment in the form of constructive dismissal is well recognised in the field of unlawful

45 ibid., p. 6074

46 Submission No. 473, Queensland Government, vol. 23, p. 5954

47 Submission No. 480, Working Women's Centre, Tasmania, vol. 24, p. 6132

48 Submission No. 462, Turner Freeman Solicitors, vol. 22, p. 5655

> discrimination...An employer who sexually harasses a woman until she resigns does not normally indicate that the woman will be dismissed unless she resigns; nor would the employer necessarily intend, by the employer's conduct, that she resign…Similarly, in cases involving workplace bullying culminating in resignation, the preconditions set by the proposal would normally be absent.[49]

Conclusions

7.72 The Government seems to have completed ignored the needs of low paid and disadvantaged workers when developing the proposed amendments in Schedule 7 to the Bill. Employees who have been unfairly dismissed will already be in straightened financial circumstances as a result of their dismissal, and threatening these employees with costs orders will simply ensure that employers can unfairly sack any employees without the independent means to cover large legal fees.

7.73 It should be noted that the proposed amendments specifically target employees with cost orders. There are no complementary amendments to allow the Commission to order employers who unmeritoriously defend unfair dismissal applications to provide security for costs. Additionally, there would be appear to be no mechanism for employees to recover their costs associated with an unsuccessful bid by the employer to seek an order for costs against the employee:

> …an applicant who has a punitive or vexatious application for costs made against them can not make an application for the costs they incurred in defending the application.[50]

7.74 This may be simply a technical oversight by the Government, or another deliberate attempt to disadvantage employees. Regardless, the impact would be most severe on the low paid.

7.75 Labor Senators are concerned about the potential impact of the proposed amendments on low paid and vulnerable workers, and endorses the comments of Turner Freeman Solicitors in this regard:

> Clearly, the [amended legislation] creates a large number of practical and legal difficulties for employees seeking relief from unfair dismissal, that will result in many genuine and meritorious claims being foregone, particularly due to the increased costs involved. Our society ought not to permit the most vulnerable in our community, in most need of access to laws protecting their rights, to be most adversely affected by legislative amendment.[51]

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49 Submission No. 441, Women for Workplace Justice Coalition, vol. 21, pp. 5194-5

50 Submission No. 398, Jobwatch Inc., vol. 14, p. 3255

51 Submission No. 462, Turner Freeman Solicitors, vol. 22, pp. 5658-9

Conciliation fees

7.76 The proposed amendments to introduce a voluntary conciliation jurisdiction for the Commission include a requirement for the Commission to charge a fee of $500 for these services. The Government submitted that it would be necessary to introduce fees to allow private sector mediation firms to compete with the Commission to provide these services to the community.[52]

7.77 Even though the Bill would allow the Commission to waive this fee in the case of financial hardship, some witnesses were concerned that introducing fees would tend to limit access to the Commission for low paid and other disadvantaged workers:

> This submission demonstrates that women workers are skewed towards the poorer and most vulnerable end of the employment spectrum. The need to pay may deter their access and therefore the proposed amendment disproportionately affects women... HREOC proposes that the imposition of fees to access AIRC voluntary conciliation is inequitable, in that the ability of a party to pursue a conciliated outcome may be curtailed by limited resources, irrespective of the merits of the case with potentially discriminatory outcomes.[53]

7.78 It is not clear why the proposed 'financial hardship waiver' provision has been constructed to only allow waiver in the case of 'persons' rather than 'parties' to conciliation proceedings. It may be that this section is only intended to apply to natural persons, not incorporated bodies or employee/employer organisations registered under the WR Act. No definition of the term 'person' is provided in the WR Act or Bill.

Conclusions

7.79 It is possible that the simple prospect of fees will deter low paid employees from using the Commission's conciliation services. It will not be clear to many employees what circumstances would suffice to demonstrate 'financial hardship' under proposed section 357B. Labor Senators also note that this provision would require an employee to make a written application to the Commission for waiver, again potentially disadvantaging employees who have poor literacy skills or who are from a non-English speaking background.

7.80 It is not clear why access to waiver would be limited to 'persons', and whether this would restrict applications to natural persons. This may have been intended to prevent unions from making applications for waiver of fees. However, if this was the intention, Labor Senators note that this may inadvertently impact on small incorporated businesses.

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52 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2333

53 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. pp. 5887-8

Limits on expansion of federal award coverage

7.81 Amendments to the principal object and section 111AAA of the WR Act would strengthen the presumption in favour of State employment regulation, including by legislative minimum conditions such as those established for Victorian employees under Schedule 1A of the WR Act, and prevent further transfer of employees from State to the federal industrial relations jurisdiction.

7.82 The proposed amendment to the principle object purports to enable both employers and employees to choose the most appropriate jurisdiction to regulate their employment relationship. However, the Bill does not propose a mechanism to allow choice of jurisdiction issues to be resolved where an employer and their employees do not agree on the most appropriate jurisdiction to regulate their employment.

7.83 Evidence received by the Committee indicates that those employees working under Schedule 1A are very unlikely to agree with their employers that they should remain under these minimum conditions. An overwhelming desire was expressed by representative Victorian employees to move to federal award regulation:

> As a result of the working conditions currently in place for many Victorian workers who do not have a federal award, I am forced to endure many hardships, which I cannot bargain over as a qualified hairdresser. I work on average between 45 to 50 hours in a given week. There is no choice on this. It would seem to me that the people who wrote the provisions for Victorian minimum standards do not understand that it is not normal for a full-time hairdresser on minimum conditions to simply work 38 hours. Shops are open for trade these days for 65 hours a week. The days and times that I am expected to work include one, and sometimes two, 12-hour shifts Saturday and Sunday, all with only half an hour for lunch. These working days at times include public holidays but I am told by my employer that, if I do not work, I will not get paid for the holiday. Penalty rates and overtime simply do not exist. I cannot afford not to work. As an employee, I do not have a choice but to work these hours on a flat rate of pay. My colleagues on federal awards receive penalty rates for late nights, Saturdays and Sundays, compensation for public holidays and overtime rates for working in excess of 38 hours. My colleagues on federal awards are entitled to longer lunchtimes and paid morning and afternoon tea-breaks. Did you have your morning tea today? When was the last time you did a 12-hour day, standing on your feet, with only 30 minutes for lunch? …How long is the government willing to force me to work under these minimum conditions until I find an employer who is not under Victorian minimum conditions? I want a federal award. Why should I not be allowed to have one?[54]

7.84 HREOC also thought that the proposed amendment to prevent transfer between State and federal jurisdictions would unfairly affect disadvantaged workers:

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54 Evidence, Mr Mark Brown, Melbourne, 8 October 1999, pp. 183-4

> Currently, employees who are not covered by a basic minimum of protections within their State jurisdiction may apply for federal award coverage. The current minima are that an agreement must be approved by a State industrial authority and before approving the agreement, that authority is satisfied that: the employees covered by that agreement are not disadvantaged in comparison to their entitlements under the relevant award…The WR Bill proposes to replace these protections with the lower threshold of 'relevant contract of employment'…includ[ing] any arrangement covered by…Part XV and Schedule 1A; the *Minimum Conditions of Employment Act 1993* of Western Australia; the *Industrial and Employee Relations Act 1994* of South Australia…The effect of these proposed amendments is to make it more difficult for the most vulnerable employees (those without award protection – inly legislated minima) to transfer to the federal jurisdiction and gain award coverage.[55]

Conclusions

7.85 Evidence presented to this Inquiry demonstrated that the terms of employment established under Schedule 1A of the WR Act fall far short of award safety net standards.[56] Although the Committee did not receive a great deal of evidence about minimum conditions established under Western Australian and South Australian legislation, it is possible that these conditions also fall short of award standards. It is not fair to prevent these workers from accessing the Government's safety net by stealth, by effectively stopping any further transfers from State jurisdictions to the Federal jurisdiction. The award safety net should be available to all Australian employees.

Discrimination in agreement-making

Operation of the WR Act

7.86 This report has already considered evidence suggesting that women and workers from non-English speaking backgrounds have been disadvantaged by the increasing focus on workplace level bargaining generally, as these types of workers are not well equipped to bargain for their pay and conditions. This section of the report examines the impact of a specific type of agreement, AWAs, on disadvantaged workers:

> As AWAs have been available for just over two years, it is too early to say how women have fared under individual agreements, although the anecdotal material is ominous…Experience of women with over-award payments would indicate that women will be severely disadvantaged if forced onto individual contracts. Australia-wide, women earn only 43.7 per cent of the payments in excess of award and agreement rates that are made to men.[57]

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55 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5802

56 See for instance Evidence, Ms Wendy Tobin, Jobwatch Inc, Melbourne, 8 October 1999, p. 176

57 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4370

7.87 Many employees made private submissions to the Inquiry detailing their experiences with AWAs. These submissions suggest that vulnerable workers, including women, new and young workers, are not properly consulted about their terms of employment under AWAs and are, in many cases, bullied into signing substandard instruments by their employers:

> I was a sale assistant at ShooBiz…within the first four weeks I was employed a contract was given to all employees called an Australian Workplace Agreement. I was asked to sign the contract and return it to head office within two weeks. As I had never seen a contract like this before I asked my store manager to explain it to me. She…was having problems understanding it herself. Although it was worded formally and legally she understood it would affect her and all staff negatively. She informed me that she was not going to sign it, but advised me to do so as she thought that during my probationary period I should go along with the company's wishes…Over the next two week period we felt scared, confused and in danger of losing our jobs if we didn't sign…The store manager and 2nd in charge were constantly on the phone to other store mangers trying to decide what they should do so they wouldn't put their jobs in jeopardy or be moved to stores far from their homes. They were under pressure from head office to sign and get their staff to sign. The store environment at the time was very stressful, confusing and emotional…I thought my only choice was to sign the contract as I was scared that I could have been fired in my probation period.[58]

> I have been an employee of …Civic Video since 1993 as a shop assistant…In February 1999 I attended work and my manager presented me with an AWA. I was asked to sign it that very day. As I was busy that evening working I took it home to read. I was later reprimanded for doing so. The AWA was to be left on the store premises…It was at no time ever explained to me what an AWA was, how it would change my working conditions, nor that it was an agreement that was non compulsory…My employer attempted to contact me on a number of occasions, both on my mobile and at the beginning of every shift I worked. I felt harassed and dreaded going to work, I felt pressured, I did not feel that I was being given any choice in regards to the signing of the document…My brother Peter is also an employee of Civic Video…Peter experienced similar phone calls and constant harassment by our employer as I did. My brother is only 20 and this was his first job since leaving school…I believe he felt intimidated by our employer and felt that he was unable to raise his concerns in a professional manner with our employer. I contacted the employment advocate after my brother was forced to sign the AWA without being allowed to read it and with our employer standing next to him. When my brother voiced his concerns about not having read the document, our employer answered 'Just sign it'. I found my dealings with the employment advocate frustrating…I finally gave in and signed the AWA on approximately 11 April 1999…I strongly believed that if I did not sign the

58 Submission No. 260, Shae Leviston, vol. 6, pp. 1204-6

> AWA then my employment at Civic Video would be terminated. With the assistance of the SDA I was successful in having my AWA overturned.[59]

7.88 The Committee also received evidence that a new form of employment discrimination has been born from the WR Act – discrimination against employees who choose to remain under awards or collective agreements. Unfortunately, most of the evidence suggests that it is Governments as employers who are generally responsible:

> In the Department of Education we have had discrimination practices where the employer has offered people performance pay based on five per cent of outcome if they have signed an AWA, but has offered on two per cent to those who stuck with the collective bargaining process. That matter is currently before the Federal Court. We have people who are denied the right to bargain on the hours of work, currently before the federal commission, because they refuse to work a 10-day fortnight or a 40-hour week—an increase in hours. They are not allowed to bargain on that question; it is a centrally mandated matter from government.[60]

> I…got a 'higher than satisfactory' level for my performance…I have had the same pay now for nearly four years. But the person sitting next to me who got exactly the same performance outcome and who happened to have signed the AWA got 7.5 per cent. That is a lot of money. I am in a position where I can afford to have principles. A lot of my colleagues cannot. They cannot afford not to take that sort of thing. If you are an individual single income earner, you cannot say, 'I won't take that extra four per cent.' And when that happens more than once, it starts to really hit.[61]

Amendments proposed in the Bill

AWAs

7.89 The Bill proposes further changes to the AWA provisions of the WR Act, which will make it easier for employers to discriminate between employees in their terms of employment. AWAs would prevail over certified agreements in almost all circumstances, and AWAs would no longer need to be offered in the same terms to comparable employees. The Department submitted that it was necessary to remove the requirement for AWAs to be offered in the same terms because:

> The obligations imposed by the current provision can be confusing for employers (for example, many employers are unaware that individual performance may be taken into account in determining what conditions should be offered) and can limit scope for flexibility in the tailoring of

59 Submission No. 264, Ms Danielle Keogh, vol. 6, pp. 1218-21

60 Evidence, Ms Karen Batt, Melbourne, 8 October 1999, p. 197

61 Evidence, Ms Judith Mead, Melbourne, 8 October 1999, p. 199

> AWAs to the particular circumstances of both employees and employers (for example, improved balance between work and family commitments).[62]

7.90 The Department made no reference to the potentially discriminatory impact of simply removing this requirement, rather than amending it so that it was simpler for employers to understand, and did not indicate whether or not employer confusion could be addressed through improved education and information programs conducted by the Government or the Employment Advocate.

7.91 Other witnesses were very concerned about the potentially discriminatory impact of the proposed AWA amendments:

> Removal of the requirement in paragraph 170VPA(1)(e) that the employer must offer an AWA in the same terms to all comparable employees will mean that employers will be able to use AWAs to discriminate between employees, possible indirectly on grounds such as sex.[63]

> We are...concerned about the proposal for AWAs to override certified agreements. This would expose women to a round of individual-focused negotiation during the term of a collectively-negotiated instrument…we have a concern about the proposal permitting different AWAs to be offered to employees by an employer…This will give rise to the unsatisfactory situation where employees might be working side by side, performing the same work – and yet some may be on more beneficial AWAs than others. Women (especially those working part time and/or on short term contracts) who are less likely to be unionised, and more likely to have been 'beaten down' in the bargaining process may agree to less beneficial AWAs without even being aware that male colleagues have been offered more beneficial terms.[64]

> The provision that an AWA be offered to comparable employees on similar terms was originally inserted so that AWAs could not be offered to employees in ways that might be discriminatory or unfair…HREOC proposes that as the current provisions do not place an onerous burden on employers for compliance and the current provision provides protections to vulnerable employees, that the current provisions be retained.[65]

Conclusions

7.92 The Government has not provided any convincing rationale for the proposed amendments. The amendments would provide employers with wide scope to discriminate between individual employees on grounds irrelevant to their employment

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62 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2386

63 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4452

64 Submission No. 441, Women for Workplace Justice Coalition, vol. 21, pp. 5191-2

65 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5885

performance, such as gender, age or favouritism. The Government and others charged with eliminating discrimination would be very limited in their ability to prevent this from occurring due to the secrecy provisions surrounding AWAs.

Certified agreements

7.93 The Bill proposes that the requirement that an agreement cover all employees who could reasonably be expected to be covered be repealed. Apparently this amendment is required to:

> …provide greater choice and flexibility in agreement-making and remove uncertainty about whether an agreement covering part of a single business will be found to comply with subsection 170LU(8).[66]

7.94 In effect this amendment could produce a new level of 'sub-workplace bargaining' where employees in the same workplace could be offered different collective terms of employment. This would seem to allow employers to target particular parts of their workforce, for instance non-unionised employees, and offer lower employment conditions than others are willing to accept. HREOC expressed comprehensive concerns about the proposal:

> The requirement that an agreement covers all employees 'who could reasonably be expected to be covered' was originally inserted so that agreements could not be made with sections of the workforce for the purpose of excluding other sections of the same workforce in ways that could be discriminatory or otherwise to the detriment of employees. For example:
>
> - excluding identifiable groups of workers such as females (given the segregated nature of employment there is potential for this); the removal of this provision would provide scope for employers to grant pay increases to small groups of employees in a strategically strong bargaining position without extending the agreement as would currently be the case, to a broader area of the workforce. In addition, the removal of this provision would provide scope for employer to negotiate reduced pay and conditions relative to those in weaker positions through separate agreements;
>
> - strategically reducing the scope for collective action (proposing agreements to isolated sections of the workforce to reduce their bargaining position) – for example, only those in a bargaining period can take industrial action – where the bargaining group is isolated within a large organisation the impact of any industrial action is reduced and the workers more vulnerable (personally identifiable as 'trouble makers',

66 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2381

> etc) – if this provision was removed the bargaining position of…already vulnerable employees would be made even more precarious.[67]

7.95 HREOC also pointed out that 'this is the only provision in the agreement making stream that provides for the consideration of groups *not* covered by the agreement, and requires the AIRC to consider the discriminatory impact of excluding employees from an agreement in the agreement approval process.'[68] HREOC therefore recommended that the current requirements in subsection 170LU(8) be retained.

Conclusions

7.96 Again, the Government has provided the Committee with a very unconvincing rationale for this amendment. If employers are uncertain about how subsection 170LU(8) operates, then surely it would make sense to attempt to address this uncertainty through education and information campaigns before proceeding to the extreme step of repealing the provision. As HREOC has pointed out to the Committee, this provision is the only mechanism currently in the WR Act to ensure that agreements do not unfairly discriminate against groups of employees, such as women, by entirely excepting them from agreement coverage.

Other discrimination matters

7.97 HREOC expressed concern about a number of other matters, in particular that there are no formal or legislative links between the Sex Discrimination Commissioner and the Office of the Employment Advocate, nor a requirement that the Employment Advocate consider any discriminatory effects in comparison to other employees in a workplace.

7.98 HREOC also noted that the Government has failed to date to act on recommendations to provide an explicit legislative basis for referral of systemic sectoral or occupational sex based discrimination issues to the Sex Discrimination Commissioner.

7.99 Labor Senators believe that these concerns raised by HREOC should be addressed by the Government.

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67 Human Rights and Equal Opportunity Commission, Submission No. 472, p. 84

68 *Ibid*, pp. 84-5