Chapter 2

Enterprise Bargaining and Australian Workplace Agreements

2.1 This chapter examines the issue of bargaining in the making of workplace agreements. It asks whether concepts of 'good faith' and 'genuine' bargaining have any practical relevance for workers, especially when the Workplace Relations Act does not guarantee that collective bargaining will occur just because workers want it. It examines the disparity of bargaining power between employees and employers and how the Government's real agenda in promoting individual statutory agreements, or Australian Workplace Agreements (AWAs), is to further tilt the balance of power the employers' way. It considers whether employees can choose the form of agreement-making which best suits their individual preferences and circumstances and genuinely bargain over terms and conditions of employment.

2.2 The committee takes a closer look at the practical effects of AWAs on workers' wages and conditions. It examines independent academic research and evidence from unions which challenge the Government's claim that AWAs provide employees with 'freedom' and 'choice' to negotiate higher wages and more flexible employment conditions than under a collective agreement. This research leaves the committee in no doubt that data published by the Department of Employment and Workplace Relations (DEWR) and the Office of the Employment Advocate (OEA) is misleading, unreliable and in some instances false. The committee does not take issue with figures released by the Australian Bureau of Statistics (ABS) on wage levels under different types of workplace agreements. The ABS data is an indispensable source of reliable information for researchers of industrial relations and labour market issues. The committee instead calls into question the methods used by the department and the OEA to assess and interpret ABS figures and the political 'spin' which accompanies their published findings.[1]

2.3 The committee notes that peak employer groups such as the Australian Industry Group (AiG) and the Australian Chamber of Commerce and Industry (ACCI) accept uncritically the DEWR and OEA figures and quote their findings while failing to address the issues raised by critics. The ACCI submission in particular used unsourced figures to make an unsubstantiated claim that AWAs provide superior wages and conditions for workers compared to federal awards and collective agreements.[2] The committee knows of no research by employer groups which supports this claim and, as will become clear later in the chapter, it is a claim rejected by most academic specialists in the field.

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1 Professor Andrew Stewart, *Committee Hansard*, Melbourne, 29 September 2005, p.2

2 ACCI, *Submission 10*, pp.6-7

2.4 Australian Workplace Agreements can be used as a convenient mechanism for employers to unilaterally dictate the pay and conditions that workers receive. Used in this way, their main effect can be to lower wages and conditions below award rates by reducing or abolishing penalty rates. They are also a mechanism for employers to weaken the role of unions and third parties, particularly the industrial relations commissions. That this is the inevitable outcome of a system of statutory individual agreements is demonstrated by New Zealand's and Western Australia's failed experiment with individual contracts during the 1990s. This had disastrous consequences for workers who had relied on the protection of awards. The committee believes there are salutary lessons about the dangers of further individualising agreement-making and enhancing managerial regulation of the workplace.

2.5 The chapter concludes with a brief description of the Government's plan for a streamlined, simpler and less costly agreement-making process under its new industrial relations policy, WorkChoices. The committee casts an eye over the Government's proposals for agreement-making outlined in the information booklet which was released in October 2005, ahead of the WorkChoices Bill being introduced in the Parliament.[3]

Agreement-making, bargaining power and choice

2.6 The submission from Dr Chris Briggs identifies three formal principles which frame workplace bargaining as characterised in the Workplace Relations Act: neutrality towards different types of agreements, freedom of association which aims to protect the rights of individuals to associate or not associate, and agreement-making at the enterprise level to enable parties to develop work arrangements which best suit their needs.[4] The committee accepts that the balance of power between employers and employees is an important determinant of bargaining outcomes. One of the WR Act's objectives is to provide a framework for cooperative workplace relations which supports 'fair and effective agreement making'. However, the act neither directly requires fair bargaining nor directly prohibits unfair bargaining.[5] The analysis by Briggs demonstrates that while the principles underpinning the act are sound in theory, in practice they do not genuinely allow employers and employees to structure their bargaining arrangements to suit their needs, nor do they allow employees to genuinely choose between collective and individual agreements.[6]

2.7 The Melbourne Centre for Employment and Labour Relations Law submission to the Government's 2004 review of the WR Act argued that the act does

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3 *WorkChoices: A New Industrial Relations System*, Australian Government, 2005

4 Dr Chris Briggs, *Submission 47*, p.4

5 Margaret Lee, 'Crafting Remedies for Bad Faith Bargaining, Coercion and Duress: "Relative Ethical Flexibility" in the Twenty-first Century', *Australian Journal of Labour Law*, vol. 18, 2005, pp.26-52

6 Dr Chris Briggs, *Submission 47*, p.4

not regulate how employees might choose the type and content of the workplace agreement they consider appropriate:

> …existing employees in practice have only a *negative* capacity to select the appropriate form of agreement. They can refuse an AWA, or vote down an enterprise agreement…but the WR Act provides no mechanism for employees to deliberate and to express a *positive* choice about which form of agreement they would prefer.[7]

2.8 The assumption of a level playing field where workers negotiate wages and conditions with their employers is widely viewed as a fiction by labour market analysts and academic specialists.[8] The act is undeniably employer-friendly. Average workers struggle to bargain on an equal basis with their employers, unless they are supported by a union, have skills which are in demand or are confident and assertive individuals. The submission from Professor Andrew Stewart stated with conviction:

> It is a basic fact of life, which only the most blinkered ideologue would deny, that there is an inequality of bargaining power between most individual workers and their employers. This inequality arises through the typical workers' lack of information, lack of resources, lack of negotiating skills and, in many instances, lack of alternatives…
>
> Without the support of a union, most workers face a simple choice: accept the terms offered, or find another job. Negotiation rarely comes into it.[9]

2.9 Professor Bradon Ellem expressed the view that while the principle of treating individual and collective agreements equally is fair and reasonable, unscrupulous employers can easily frustrate and evade the preference of employees for collective representation: 'In the absence of legal processes to direct employers to respect the wishes of the majority of their employees to bargain collectively, there is little that employees without bargaining power can do to redress that'.[10]

2.10 Independent research shows that employees face an imbalance of bargaining power at all stages of their working lives, from when they seek employment, start work and establish conditions to when they face changes at work, have a grievance with their supervisor and are retrenched. The tendency is for AWAs to be offered to employees on a 'take it or leave it' basis and as pattern agreements the terms of which are more or less set in stone by employers. The only option for non-managerial employees, particularly women, casual and part-time workers is to accept an AWA

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7 Centre for Employment and Labour Relations Law, Submission to the Minister for Employment and Workplace Relations, the Honourable Kevin Andrews, MP concerning A Ministerial review of the *Workplace Relations Act 1996*, December 2004, p.27 (emphasis in original)

8 Professor Bradon Ellem, *Submission 32*; Ross Gittins, 'The changing shape of workplace muscle', *Sydney Morning Herald*, 12 October 2005, p.17

9 Professor Andrew Stewart, *Submission 12*, pp.1-2

10 Professor Bradon Ellem, *Committee Hansard*, Sydney, 26 September, p.20

prepared by their employers or find another job. The rhetoric of 'effective choice'[11] promoted by the Prime Minister presupposes a position of equal bargaining power between employees and employers which is irrelevant to most workers.

2.11 Under the provisions of the WR Act, collective bargaining is not freely available to all employees. Employers are able to pursue individual agreement-making even when employees prefer collective bargaining. The ACTU submission argued that the act undermines the rhetoric of 'choice' because employers have the right to choose the form of bargaining at their workplace as well as the right to refuse to negotiate collectively with their employees.[12] ACTU President, Ms Sharan Burrow, described a number of instances where employers have refused to negotiate collective agreements even when workers have democratically shown their support for one.[13]

2.12 Other witnesses pointed out that Australia's industrial relations laws are out of step with countries with decentralised bargaining regimes where employees are guaranteed the right to bargain collectively by democratically voting in the workplace. Employees in Canada, Britain and the United States can vote by majority to decide on the form of bargaining to occur with their employer. It is a democratic choice binding all employees and the employer. The idea has been floated in Australia by ACTU Secretary, Mr Greg Combet, who believes that real choice involves letting workers decide how best to protect and advance their own pay and employment conditions, and backing it up with an enforceable right.[14]

2.13 The idea that employees have 'effective choice' and that the Government's reform agenda is designed to 'enhance choices' is even dismissed as 'political speak' by the Deputy Director of Melbourne University's Melbourne Institute, Professor Mark Wooden. He is described by one commentator as the person who should be the Government's strongest academic defender on industrial relations policy, and leader of the 'tiny employer-leaning faction [of industrial relations specialists] in the continuous battle against the union-leaning majority'.[15] In a paper presented at the 34th conference of economists in September 2005, Professor Wooden is highly critical of the Government's failure to require employers to bargain in good faith and protect the ability of workers to bargain collectively:

> …it is not at all clear that the reform agenda is one which is particularly interested in promoting collective agreements. The Government has been concerned with the low level of coverage by AWAs and thus intends…to

11 Four Corners, Monday 26 September 2005, Brave new workplace: investigation into proposed industrial relations reforms, transcript, p.8

12 ACTU, *Submission 22*, p.2

13 Ms Sharan Burrow, ACTU, *Committee Hansard*, Sydney, 26 September, p.48

14 Greg Combet and Andrew Robb, 'Haggle scrabble spells toil and trouble', *Australian Financial Review*, 24 September 2005, p.63

15 Ross Gittins, 'Amended wage plan fails to meet rationalist's criticisms', *Sydney Morning Herald*, 10 October 2005, p.19

> encourage further interest in them by employers. But what if AWAs are not desired by workers? Currently, there do not appear to be measures that ensure that workers have the ability to choose between individual agreements and collective agreements. If the aim is to provide employees with real choices, then I am on Greg Combet's side – the right to bargain collectively needs to be protected.[16]

2.14 The committee notes that the Western Australian Government is currently preparing a model of bargaining which will ensure that any negotiations between employers and employees must be conducted in a climate of good faith. The Minister for Consumer and Employment Protection, Hon John Kobelke MLA, told the committee at its Perth hearing that the model will include a number of features. It will include a requirement for parties to enter into negotiations through the Industrial Relations Commission, and give the Commission the power to arbitrate in a dispute, leading to an enterprise order. An enterprise order will exist for two years during which time the Commission will be able to arbitrate an outcome if either party does not enter into negotiations in any reasonable and proper way.[17] The Democrats with the support of the ALP and other Opposition parties have moved a similar 'good faith bargaining' amendment to Workplace Relations Act, but the Government has rejected it.

2.15 The committee finds that the WR Act provides little scope for workers, especially the low-skilled, to either choose the form of agreement-making which suits their interests or negotiate the terms of an agreement to take into account their individual needs. Submissions to this inquiry were critical of the Government's rhetoric of 'choice' and flexibility' to promote individual contracts, and argued that in most workplaces the choice of agreement type lies squarely with the employer.[18] National Secretary of the Communication, Electrical and Plumbing Union, Mr Peter Tighe, told the committee that only highly skilled workers will be able to use their stronger bargaining position in periods of skills shortages to negotiate a reasonable outcome. The committee notes that while employers have more bargaining power than workers, the overall balance of bargaining power is also influenced by cyclical and structural factors in the economy which are outside the individual workplace.[19] These matters will be taken up further by the committee in the next chapter.

Australian Workplace Agreements

2.16 A consistent theme in evidence to this inquiry is that AWAs are not what the Government and business claim they are. National Industrial Officer of the Shop,

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16 Mark Wooden, *Australia's Industrial Relations Reform Agenda*, 34th Conference of Economists, 26-28 September 2005, University of Melbourne, p.16

17 Hon John Kobelke, MP, *Committee Hansard*, Perth, 25 October 2005, p.79

18 Dr Kristin van Barneveld, *Committee Hansard*, Sydney, 26 September, p.33

19 Ross Gittins, 'The changing shape of workplace muscle', *Sydney Morning Herald*, 12 October 2005, p.17

Distributive and Allied Employees' Association (SDA), Mr John Ryan, told the committee at its Melbourne hearing:

> I quibble with the fact that the current system does everything opposite to what it says it will do – it is not fair, it is not free, it is not effective bargaining, there is no employee choice and everything is done in secret. People only do evil things in secret. If people do good things, they want to boast about it from the rooftops; if you want to do something evil, you go and hide.[20]

2.17 A number of leading academic researchers in the field of industrial relations are highly critical of AWAs and of the Government's spurious rhetoric of 'freedom' and 'choice' to promote individual agreements and obfuscate the main agenda driving its industrial relations policy – to make it easier for employers to boost short-term profits by cutting labour costs. The significance of AWAs is not that they permit individual contracting but that they supersede awards and, in some circumstances, enterprise agreements, and can reduce specificic conditions provided in those forms of collective regulation.

2.18 The only qualification is that in order for an AWA to be certified it has to pass a global no disadvantage test, which means the Employment Advocate has to certify that the agreement does not, on balance, disadvantage the employee compared to the relevant award that applies under federal, state and territory laws.[21] The 'global' nature of the no disadvantage test is important because, as suggested above, it means that an AWA may fall below any individual terms or condition set by an award, provided that the *overall* agreement does not disadvantage employees whose terms and conditions are covered by the AWA.[22] Where this falls down and where the committee has serious reservations, is the OEA's ability to fulfil and enforce this important statutory protection and obligation which, along with other concerns, is discussed later in the chapter.

2.19 While most witnesses appearing before the committee were in favour of abolishing AWAs, there was acceptance that an enterprise bargaining system should accommodate different types of agreement-making, both collective and individual. The committee does not take issue with individual agreements *per se*, both statutory and common-law, provided they are underpinned by a comprehensive award safety net and adequate processes and resources are set aside to ensure compliance. As discussed in Chapter 1, this reflects the reality that some 40 per cent of workers are on individual contracts of one kind, many of which provide workers with over-award benefits. Problems arise with the processes involved in making and approving AWAs.

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20 Mr John Ryan, SDA, *Committee Hansard*, Melbourne, 29 September 2005, p.49

21 Mark Bray and Peter Waring, 'The Rise of Managerial Prerogative under the Howard Government', Employment Studies Centre, University of Newcastle, *Submission 32*

22 *Agreement making in Australia under the Workplace Relations Act: 2002 and 2003*, A report prepared by the Department of Employment and Workplace Relations and the Office of the Employment Advocate, 2004, p.5

Critics of AWAs raised a number of concerns, including the capacity for AWAs to provide a standard for setting wages and employment conditions which is lower than the award system, and the ability of employers to offer AWAs on a 'take it or leave it' basis.

Managerial prerogative and pattern AWAs

2.20 The Government's proposed changes to industrial relations laws are the subject matter of eleven papers by seventeen academic researchers, which were submitted to the inquiry as a 'report card' on the effect on workers and workplaces of polices introduced by the Coalition Government since 1996. It is their collective view that Government policies have undermined employee rights; specifically, that the narrowing of awards and collective agreements and the promotion of individual contracts has significantly enhanced managerial prerogatives, diminished the independence and choice available to employees and denied them access to collective agreements.[23]

2.21 A coordinator of the 'report card', Professor Bradon Ellem, told the committee at its Sydney hearing that the narrowing of awards and the promotion of individual contracts have enhanced managerial prerogatives – the right of management to unilaterally determine the pay, working hours, duties and employment conditions of workers. This is a view supported by a number of studies.[24] Employees on individual contracts have an inherently weaker bargaining position, and inherently weaker power, than employees under collective agreements. This is one of the largest differences between individual and collective agreements.[25]

2.22 Professor Ellem pointed out that Labor and Coalition governments have a history of intense interventionism in employment relations. Far from pursuing a policy of deregulation, the general thrust of the industrial relations policies of the Howard Government, especially its promotion of AWAs, has been to 'reregulate' the labour market to enhance managerial regulation of the workplace. This has involved a significant power shift away from external regulation by third parties, particularly the industrial relations commissions, towards the internal regulation of organisations by management.[26] It is essentially a process which encourages employee commitment to one kind of collective, namely the corporation, while reducing the role of other collectives, namely unions. This trend is set to continue under the Government's

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23 Professor Bradon Ellem, *Submission 32*, p.1

24 Mr Richard Mitchell and Mr Joel Fetter, *Submission 43*, attachment 1

25 David Peetz, *Individual Contracts, Collective Bargaining, Wages and Power*, Centre for Economic Policy Research, Discussion Paper No.437, September 2001

26 Professor Bradon Ellem, *Committee Hansard*, Sydney, 26 September, pp.26-27

WorkChoices policy which, according to one academic assessment, will involve '…profound state intervention mandating a very particular vision of working life'.[27]

2.23 The committee heard evidence from unions that AWAs are a 'marvellous mechanism' for employers to isolate and decollectivise individuals and remove their benefits and entitlements.[28] An employee of Queensland Newspapers, Mr Ross Franks, described to the committee at its Sydney hearing his experience negotiating an AWA and the effect it had on him and his colleagues within the company, News Limited:

> Our experience since…working within an AWA, as compared to a site agreement with the other employees, is that we have been marginalised, separated from the main body of workers and have not had opportunities open to us to negotiate our positions as the negotiation stages came up – for example, when the AWAs were due to expire. We have found that, as these documents have come to their conclusion and been up for renegotiation, the company has point blank refused to negotiate with us on key parts, mainly our annual increase in salary or wages. That was certainly the one thing that we were most uncomfortable with.[29]

2.24 The committee finds that the main purpose of AWAs is to individualise the process of agreement making between employers and employees rather than the outcome of negotiations. This is why AWAs operate increasingly as pattern agreements which are offered to workers in the same classification across like industries. A number of case studies confirm the use of standardised or pattern AWAs. Research by Dr Kristen van Barneveld into the practical operation of AWAs in the hospitality industry found that employers are not interested in individual agreements but utilise pattern AWAs:

> In my research, the only difference was whether you were full-time, part-time or casual and salaried or non-salaried. Even where employees did want to negotiate their own wages and conditions, there was only one instance of an employee…who revealed he had success. There was evidence of probably three or four other people negotiating minor things like what doctor they went to if they were sick or whether or not they wore a uniform, but I would argue that they re not major issues…[30]

2.25 Bray and Waring's survey also concluded that AWAs on the whole are used by management to extend managerial prerogative and reap the administrative benefits

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27 John Buchanan, 'Workchoices: a hostile takeover', *Sydney Morning Herald*, 11 October 2005, p.13

28 Mr Linton Duffin, Transport Workers Union of Australia, *Committee Hansard*, Melbourne, 29 September 2005, p.15

29 Mr Ross Franks, *Committee Hansard*, Sydney, 26 September 2005, p.83

30 Dr Kristin van Barneveld, *Committee Hansard*, Sydney, 26 September 2005, p.42

that arise from contractual standardisation. An increase in the incidence of AWAs amounts to an increase in managerial decision making within the workplace.[31]

Contesting OEA data on wages

2.26 One of the main areas of contention between the Government and critics of AWAs is over the interpretation of official statistics on earnings under various types of workplace agreements. It became clear to the committee during the inquiry that this important debate is hampered by the absence of reliable disaggregated data on wage increases under individual and collective agreements. Some time after the passage of the 1996 Act, the OEA provided samples of AWAs to the Australian Centre for Industrial Relations Research and Training (ACIRRT) from which it published data on wage increases under AWAs. Yet apparently after a few years, the OEA stopped providing AWAs to ACIRRT for reasons which are unclear, thus preventing further analysis of this issue. The figures on earnings included in the OEA submission are based on the Australian Bureau of Statistics (ABS) survey, *Employee and Hours*, which is published every two years. Figures from the May 2004 survey were published in March 2005. According to the OEA submission:

> The published data show that the average weekly total earnings (AWTE) of employees working under Australian workplace agreements (AWAs) remain clearly higher than those for employees covered by either an award or certified agreement (CA).
>
> The AWTE of employees on AWAs are on average 13 per cent higher than for employees on CAs ($890.93 cf. $787.40), and 100 per cent higher than those on the award ($890.93 cf. $444.55).[32]

2.27 The OEA figures have been critically examined by Professor David Peetz who has found serious flaws with its methodology and findings. Peetz's assessment is worth quoting in full:

> When the advocates of individual contracting cite higher wages from AWAs than from collective agreements, they are careful to choose the figure that is most favourable to individual contracting – but which is also the least valid comparison of like with like. For example, they will typically use weekly rather than hourly earnings (because AWA employees work 6 per cent more hours, though they have an hourly rate of pay 2 per cent lower, the total earnings of AWA employees are 4 per cent more than workers on collective agreements) and include managerial employees

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31 Mark Bray and Peter Waring, 'The Rise of Managerial Prerogative under the Howard Government', Employment Studies Centre, University of Newcastle, *Submission 32*, p.10

32 Office of the Employment Advocate, *Submission 19*, p.33. See also *Agreement Making in Australia under the Workplace Relations Act: 2002 and 2003*, prepared by the Department of Employment and Workplace Relations and the Office of the Employment Advocate, 2004, p.xviii where it is claimed that during 2002-03: 'AWA employees in both the public and private sectors earned more than employees covered by CAs in those sectors', and 'AWA employees in the private sector earned an average 23 per cent more than CA employees'.

> (which makes AWA employees appear to receive 12 per cent more per week than workers on registered collective agreements).[33]

2.28 When comparing wages under AWAs with other forms of agreement it is important that the hourly rate of pay be used as a basis for comparing wages.

2.29 Another flaw with the argument that workers on AWAs receive significantly higher wages than workers covered by collective agreements and awards is that '…it does not tell you anything'. It only shows that high-paid workers receive more wages than low-paid workers. The committee finds that evidence used by the OEA and the department is presented at too aggregate a level, which makes it difficult to make meaningful claims across the spectrum of industries and occupations about employees being better or worse off under AWAs. According to Professor Peetz, the ABS data does not directly compare the same people in the same workplaces at two points in time: '…the official statistics do not necessarily compare like with like, they just compare averages, and are affected by the compositions of the different groups'.

2.30 Peetz argued that at least six factors should be borne in mind when using official statistics to compare the hourly wage levels of workers on AWAs and collective agreements. First, AWA employees include a disproportionate number of managerial employees, which is the biggest single factor boosting the average pay of AWA workers. Second, the average hours worked by employees on AWAs are longer than those on collective agreements. Third, the average earnings of employees on AWAs are exaggerated by their being disproportionately concentrated in industries with higher average earnings, such as mining, communications and finance. Fourth, at the time of the ABS survey in May 2004, a small number of workers on registered individual contracts were covered by state systems rather than the federal system. Fifth, the average pay of workers on registered collective agreements is depressed because some of them are covered by non-union enterprise agreements which have inferior wage increases compared with union collective agreements. Finally, roughly 20 per cent of workers on collective agreements are not union members but free ride on the gains achieved by unionists. This reduces the benefits achieved in collective agreements.[34] The assessment is supported by Professor Bradon Ellem who told the committee that only a comparison of the hourly wages of award, enterprise agreement and AWA workers within the same industry, and preferably within the same workplace, will identify any real wage differences.[35]

2.31 With these cautions in mind, the committee notes that ABS surveys of employers conducted in May 2002 and 2004 do not support the Government's position on wages under AWAs and collective agreements. There is no evidence to support the contention that earnings of employees on AWAs have increased at a faster rate than those on collective agreements. Quite the contrary. Average weekly earnings of

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33 Professor David Peetz, 'Lies, AWAs and Statistics', *Workers Online*, June 2005, p.2

34 Professor David Peetz, *Submission 33*, pp.13-14

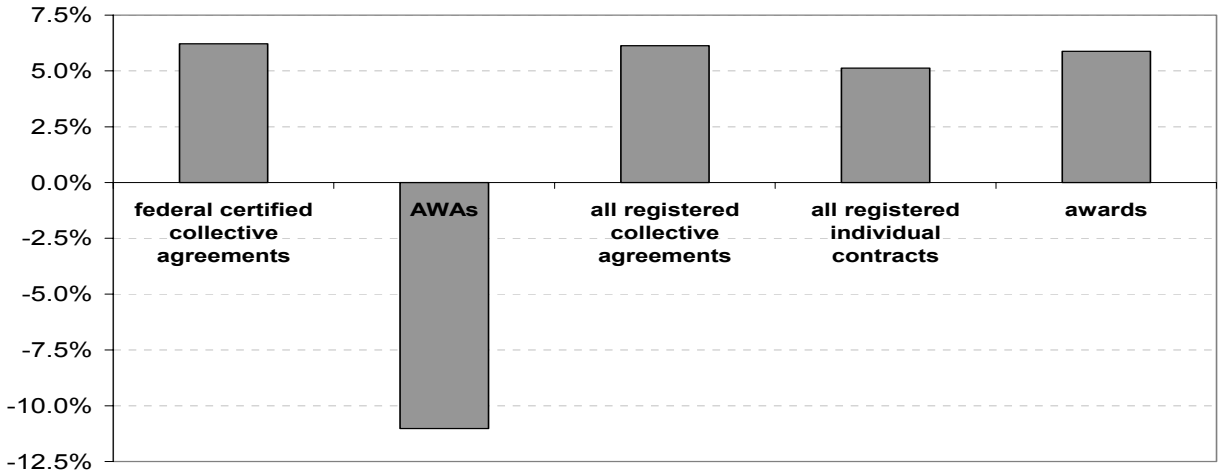
35 Professor Bradon Ellem, *Committee Hansard*, Sydney, 26 September, p.29

employees on federal collective agreements were 6.2 per cent higher in May 2004 than in May 2002, whereas weekly earnings of employees on AWAs were 11 per cent lower for the corresponding period (see Figure 1).[36]

2.32 More telling is the data on hourly earnings for non-managerial workers on registered individual contracts, 99 per cent of whom are on AWAs (see Figure 2). The figures show that workers on registered collective agreements were paid about 2 per cent more than workers on AWAs. Casual workers on AWAs were paid 15 per cent less than registered collective agreements, permanent part-time workers were paid 25 per cent less and female permanent full-time workers on AWAs were paid 7 per cent less than collective agreements. Only male permanent full-time workers had higher average hourly earnings than registered collective agreements. The committee examines the gender pay gap for workers on AWAs and collective agreements in chapter 4.[37] The committee finds Peetz's conclusion compelling:

> Overall, the ABS data confirm the conclusions from numerous other sources and studies: unions, and union-based collective bargaining, create higher wages and better conditions for workers: individual contracting creates poorer pay and conditions and does this most effectively for those with weaker positions in the labour market.[38]

Figure 1
Change in average weekly earnings, by agreement type, 2002-2004[39]



36 Professor David Peetz, *Submission 33*, pp.11

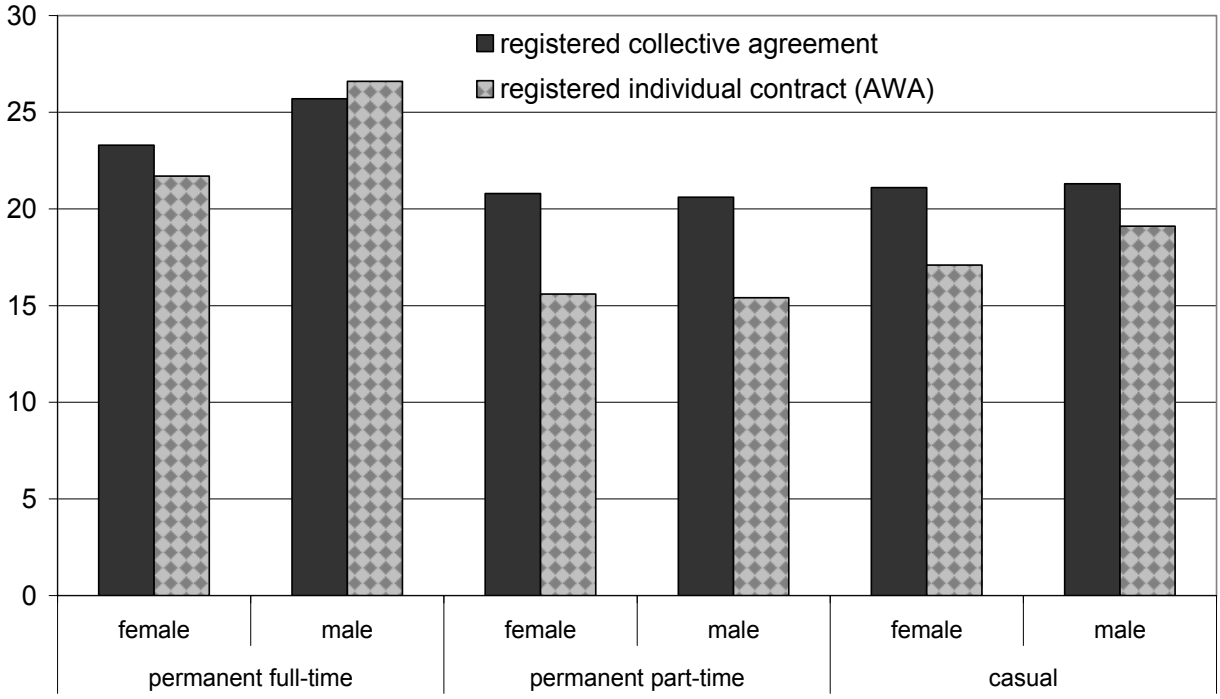
37 ibid., p.15

38 ibid., p.17

39 ibid., p.12

2.33 A main area of concern, especially for workers in low paid jobs, is how wages are calculated and factored into AWAs, which produces significant cost savings for employers compared to award conditions. A typical AWA replaces entitlements such as casual and weekend loadings with an 'all-in' or annualised rate of pay, rather than payment of an hourly rate plus penalties. This will not always compensate workers for the loss of income from those other entitlements, which many low paid workers rely upon to make ends meet.[40] These findings are consistent with the research by Dr Kristen van Barneveld which found that employees on AWAs in the hospitality industry were less likely to gain a wage increase during the term of their agreement than employees covered by certified agreements. Employers in the hospitality sector have used AWAs to introduce annualised salaries with a loading 25 per cent below the award rate.[41]

Figure 2
Average hourly earnings, non-managerial employees by method of setting pay, May 2004[42]



Lessons from New Zealand and Western Australia

2.34 Between 1991 and 1996, the New Zealand Government pushed individual agreements under its radical *Employment Contracts Act 1991* (ECA). The ECA abolished industrial awards, ended official recognition of unions, prohibited compulsory unionism and created a system of individual contracts and collective contracts. The safety net under individual contracts in New Zealand was very similar

40 Job Watch Inc, *Submission 53*, p.11

41 Dr Kristen van Barneveld, *Submission 42*, p.6

42 ibid., p.16

to the five minimum standards under the Government's proposed fair pay and conditions standard. Analyses of New Zealand's industrial relations experiment have concluded that it was a disaster for jobs, wages, and productivity growth and dramatically increased the numbers of 'working poor' as many jobs were casualised, reduced to part-time hours or contracted out.[43]

2.35 The committee notes with some concern industry minister, Ian MacFarlane's, admission on commercial radio on 16 August 2005 that one of the main goals of industrial relations reform is to reduce wages to a level which is experienced in New Zealand. The minister stated: 'We've got to ensure that industrial relations reform continues so that we have the labour prices of New Zealand. They reformed their industrial relations system a decade ago. We're already a decade behind the New Zealanders. There is no resting'.[44]

2.36 The effects of the industrial relations changes introduced in New Zealand were soon to be felt in Australia. Within six weeks of being elected in 1992, the Kennett Government in Victoria passed an Employment Relations Act which effectively abolished awards for many workers and replaced them with individual contracts. In a similar vein, the Court Government in Western Australia introduced registered individual workplace agreements (IWAs) under the *Workplace Agreements Act 1993*. The Western Australian Government submission notes that under a system of 'minimalist employment contracts', many workers in that state were led to believe that implementing individual agreements would remove the influence of awards and unions and automatically enhance their success.[45]

2.37 The outcome was very different. Individual contracts were not used to facilitate mutually rewarding workplaces. They were used instead to strip awards and drive down wages and employment conditions. Reports prepared by ACIRRT in 1996, 1999 and 2002 on the effects of IWAs provided concrete evidence that the system which promoted individual contracts over collective agreements did not provide a fair and equitable safety net of wages and conditions. The first two reports were commissioned by the then Trades and Labour Council of Western Australia (UnionsWA).[46] The reports found that most individual workplace agreements did not provide penalty rates for weekend, holiday or overtime work, discouraged the formal pursuit of grievances and were used by employers to pursue pattern bargaining.[47] The

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43 Lyndy McIntyre, *The Failed New Zealand IR Experiment – Lessons for Australia*, May 2005; Peter Conway, *Deregulation in New Zealand*, New Zealand Council of Trade Unions, undated

44 Ian MacFarlane, Minister for Industry, Tourism and Resources, 2GB Alan Jones, 16 August 2005

45 Government of Western Australian, *Submission 48*, p.21

46 UnionsWA, *Submission 58*, pp.1-4

47 *Understanding Individual Contracts of Employment: An exploratory study of how 25 workplace agreements compare with relevant award entitlements*, ACIRRT, University of Sydney, February 1996; *An Exploratory Study of Western Australia s30 Workplace Agreements: Emerging Trends*, ACIRRT, University of Sydney, October 1999

1996 report concluded that 'deregulation may simply result in reduced accountability in the settlement of wages and working conditions and not the development of dynamic, innovative agreements that meet the particular needs of the individual parties involved'.[48]

2.38 The 2002 ACIRRT report prepared for the Commissioner of Workplace Agreements compared employment conditions in 200 IWAs across four industries against the relevant state award. The report overall found that workers were generally worse off under IWAs than under the comparable award.[49] It concluded that IWAs were basic documents adopting a 'bare bones' approach to hours of work and hourly rates of pay. The agreements invariably provided open-ended hours of work under the guise of flexibility, with management and business needs being the key drivers determining hours of work. A common approach was to expand the ordinary working time arrangements and thereby reduce penalty costs that would have previously been paid for working outside ordinary hours.[50] The report found that while it appeared that workers on IWAs received a significantly higher rate of pay relative to the award, a closer analysis found that the 'loaded hourly rate' which absorbed entitlements such as leave and penalty payments did no make up for the increasingly open and flexible hours of work.[51]

2.39 A research paper in 2005 by the Liquor, Hospitality and Miscellaneous Union which analysed the effect of WA workplace agreements also found that the Workplace Agreements Act of 1993 contained provisions which were significantly inferior to those contained in the awards. It found that under the act standard full-time working hours increased from 38 to 40, the accepted minimum casual loading of 20 per cent was reduced to 15, junior rates applied up to the age of 21 years and the accrual of unused sick leave was removed as were penalty loadings for weekend and shiftwork.[52] These were the conditions prevailing under an act which in 1995 the then Leader of the Opposition, John Howard, fully endorsed as an industrial relations system 'I would like to see throughout Australia'.[53]

2.40 The Western Australian Government submission argued that AWAs in that state have been used by employers to undercut award conditions. The data on earnings

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48 *Understanding Individual Contracts of Employment: An exploratory study of how 25 workplace agreements compare with relevant award entitlements*, ACIRRT, University of Sydney, February 1996, p.13

49 *A comparison of employment conditions in individual Workplace Agreements and Awards in Western Australia*, produced for Commissioner of Workplace Agreements, ACIRRT, University of Sydney, February 2002

50 ibid., p.64

51 ibid.

52 Helen Creed, *A Decade of Experience: Life Under WA Workplace Agreements*, LHMU, July 2005

53 ibid., p.26

shows that AWAs in that state provide the lowest rates of pay of any form of agreement – $65.10 less per week than workers on certified agreements and $21.80 less per week than those on state industrial agreements: 'Most disturbingly, average weekly total earnings for AWA employees in the last two years have declined by $212.20 per week'.[54]

2.41 A recent report on the gender pay gap in Western Australia found that Western Australia has the largest gap between men's and women's wages of any state.[55]

'Take it or leave it' AWAs, employer lockouts and coercion

2.42 As previously noted, the WR Act is based on the principle that individual and collective agreements should be 'treated equally' with no preference for either. Yet when the act eased the way for employers to introduce AWAs, it created the conditions for unscrupulous employers to bully, frustrate and evade the preference of their employees for collective representation. The committee is concerned by two loopholes created in the employee protection provisions under section 170WG of the WR Act. The first loophole is 'take it or leave it' AWAs where employers can legally make signing an AWA a condition of employment when starting a job: sign the AWA, agree to this wage and set of conditions and sign away any right to collective bargaining, or you don't get the job.[56]

2.43 According to the ACTU, the freedom of association and anti-coercion provisions of the act do not provide a sufficient safeguard for workers who experience pressure or coercion from their employer to sign an individual agreement.[57] The Job Watch submission referred to a significant number of workers who had been subjected to duress or coercion by their employer to sign an AWA, including the threat to terminate employment and reduce hours and entitlements:

> …callers indicated that they would or had signed the AWA because they feared the repercussions if they refused to sign. For many employees the threat of losing their job, or a cut in hours, or a reduction in their entitlements made them feel that they had little room to bargain. This was despite the fact that rights and protections were available under the Workplace Relations Act.[58]

2.44 The committee received submissions from two former employees of the company Krispy Kreme, who claimed they were 'pressured and bullied' into signing

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54 Government of Western Australian, *Submission 48*, p.10

55 Dr Trish Todd and Dr Joan Eveline, School of Economics and Commerce, The University of Western Australia, November 2004

56 Chris Briggs, Rae Cooper and Bradon Ellem, 'Undermining the Right to Collective Bargain', *Submission 32*, p.3

57 Ms Sharan Burrow, *Committee Hansard*, Sydney, 26 September, p.49

58 Job Watch Inc, *Submission 53*, p.8

an AWA.[59] One of the submitters, Ms Jasmin Smith, explained that once on an AWA, many standard award benefits including overtime, fixed Saturday loadings, 50 per cent penalty rates for Sunday work and a uniform allowance were abolished. She claimed to have suffered a 9.3 per cent wage cut without receiving any benefits in return, and a significant increase in the number of hours of work. She criticised the AWA for not providing any satisfactory mechanism for workplace disputes to be referred to a third party such as the Commission, and described how a formal written complaint of sexual harassment made by her against a company manager was ignored with no redress available under the AWA, except for a non-binding mediation provision. This instilled little confidence that the complaint would be dealt with fairly. Ms Smith strongly urged the committee to recommend against the retention of AWAs 'in any form whatsoever'.

2.45 The AiG responded to the issue of coercion and 'take it or leave it' AWAs by referring the committee to the unlawful termination provisions of the WR Act which state that employers are not able to force existing employees onto an AWA. The AiG also referred the committee to decisions of the Federal Court and the Commission which have held that offering an AWA to prospective employees as a condition of employment is not coercion: 'It is simply offering terms and conditions to a prospective employee. The employee then has a free decision about whether or not they want to go and work for that employer on those terms and conditions'.[60]

2.46 The committee is unconvinced by these assurances as, no doubt, are workers who have been pressured into signing an AWA. Professor Andrew Stewart told the committee at its Melbourne hearing that employers have developed ways and means of applying pressure on existing employees who are reluctant to sign an AWA, without being in technical breach of the legislation:

> We saw some efforts being made in that way in the Merbein Mushrooms case, where all the workers were transferred to a separate company without being told and then told, 'You're now new employees.' Even in the simpler situation of casuals or people who want a promotion or a wage rise, it is pretty easy to say, 'If you want those things, here is the instrument you have to sign'.[61]

2.47 At a more fundamental level, the committee is concerned by the lack of an effective remedy for employees who have experienced coercion to sign an AWA. Evidence to the committee was that enforcement of the anti-duress provisions is virtually non-existent. The anti-coercion provisions of the WR Act appear to be beyond the reach of most workers. Under the law, workers have a right to raise the issue of duress and prosecute an employer through the courts. Yet, under the legislation even a successful prosecution does not invalidate an agreement that has

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59 Ms Jamin Smith, *Submission 11*; Ms Thea Birch Fitch, *Submission 13*

60 Mr Stephen Smith, AiG, *Committee Hansard*, Sydney, 26 September, p.11

61 Professor Andrew Stewart, *Committee Hansard*, Melbourne, Thursday 29 September 2005, p.8

been signed, which is the most likely reason why very few prosecutions for duress have been taken to court. Employees can raise the issue of duress with the OEA, who has the power to investigate whether or not consent has been given to an AWA. The committee is not aware of any evidence that the OEA pursues cases of alleged coercion with any conviction, if at all.[62]

2.48 The committee rejects the suggestion that the principle of 'take it or leave it' individual agreements applies equally to AWAs, collective agreements and awards. While workers covered by the award system are required to accept the terms and conditions of the award which covers their employment, it was rightly pointed out by Dr Kristen van Barneveld that workers would have some confidence that the content of the award had been negotiated by a collective and voted on or approved by the Commission: 'In that sense, as an employee, I would have more confidence being under the collective stream than being told: "Here's an AWA. If you don't like it, you can't have the job"'.[63]

2.49 The second loophole under section 170WG is the capacity of employers to lock out employees for the purpose of compelling or inducing them to sign an AWA on particular terms and conditions. Employers may also lock out employees in pursuit of a certified agreement or in response to union action in pursuit of an agreement. The ACTU submission argued that lockouts are essentially a coercive tool used against employees. There are many examples where lockouts have been used to deny employees the right to collectively bargain, compel employees to accept AWAs and drive down the settlement terms in collective bargaining. In some instances they are used as a disproportionate response to industrial action.[64] The committee is particularly concerned by the effect of lockouts on productivity, especially when they arise from disputes over the form of an agreement and last for long periods.

2.50 Lockouts are the employer version of strikes. However, strikes are clearly circumscribed and defined via the instrument of protected action. The question concerning lockouts is when might they be considered appropriate or legitimate in the circumstances?

2.51 The committee notes that a dramatic rise in the number of employer lockouts since 2000 has coincided with a sharp decline in the incidence of employee industrial action. A research paper on lockout law in Australia by Dr Chris Briggs shows that between 1994 and 1998 lockouts accounted for only 1.6 per cent of working days lost. By 2003, the number of days lost has increased to 9.3 percent.[65] The committee finds that Australia is alone among OECD countries in sanctioning lockouts. Lockouts are

62 ibid., p.8-9

63 Dr Kristin van Barneveld, *Committee Hansard*, Sydney, 26 September 2005, p.41

64 ACTU, *Submission 22*, p.16

65 Chris Briggs, *Lockout Law in Australia: Into the Mainstream?*, ACIRRT, University of Sydney, 2004

not a legal instrument in many countries while in others they are permitted only in response to evidence of a serious imbalance of bargaining power in favour of employees. The ACTU believes that lockouts have no place in Australia's labour laws.[66]

2.52 The committee believes that legislation should include provisions for good faith bargaining and enabling the Australian Industrial Relations Commission to intervene to assist parties settle a dispute. The committee notes that the Western Australian Government has accommodated these changes by proposing that the Industrial Relations Commission be given the power to intervene and arbitrate in a dispute to ensure that the parties negotiate and bargain in a reasonable and proper way.

The role of the Employment Advocate

2.53 The statutory position of the Employment Advocate was established under section 83BA of the Workplace Relations Act. It provides a long list of functions relating to advising employers and employees about their rights and obligations under the act and investigating alleged breaches of AWAs and other contraventions. The act states that in performing his or her functions, the Employment Advocate must have particular regard to:

(a) the needs of workers in a disadvantaged bargaining position (for example: women, people from a non-English speaking background, young people, apprentices, trainees and outworkers);

(b) assisting workers to balance work and family responsibilities; and

(c) promoting better work and management practices through Australian workplace agreements.[67]

2.54 A number of specific concerns were raised in evidence about the duties performed by the OEA, especially the crucial function of ensuring that AWAs pass the no disadvantage test. Professor Stewart's submission noted that the OEA has adopted an 'evangelical approach' to the promotion of AWAs and has treated the number of AWAs approved as some sort of key performance indicator.[68] Other commentators identified serious deficiencies with the OEA's administration of AWAs. It was argued that the impartial task of regulating AWAs on the one hand and the partial task of promoting them on the other, represents a direct conflict of interest, especially in relation to protecting employees' freedom of association under the act.

> An impartial body charged with defending freedom of association would work tirelessly to prevent AWAs being used to de-unionise workplaces. Yet because of its role in promoting AWAs, the OEA has taken virtually no action against firms using AWAs to de-unionise. Thus the OEA has been

66 ACTU, *Submission 22*, p.17

67 Office of the Employment Advocate, *Submission 19*, p.3

68 Professor Andrew Stewart, *Submission 12*, pp.4-5

> silent in many Federal Court cases when it was claimed AWAs were being used to de-unionise workplaces on the waterfront, in banking and in mining.[69]

2.55 The Western Australian Government submission expressed the view that it is 'absurd' that the same organisation entrusted with promoting and approving AWAs is also responsible for compliance.[70] The committee agrees, and adds further that the OEA can not guarantee that AWAs do not disadvantage employees when it actively encourages employers to use individual contracts to abolish penalty and overtime rates of pay, sometime without offsetting increases in base pay.

2.56 There is concern in some quarters over four other issues with regard to the role of the OEA. First, the submission by Professor Stewart referred to a number of reported instances where concerns have been raised regarding AWAs approved by the Employment Advocate which have almost certainly failed to pass the no disadvantage test. Perhaps the most celebrated of recent cases involved the Dernancourt franchise of Bakers Delight which was taken to the Industrial Relations Court of South Australia for paying a fifteen year old student who had signed an AWA $1438 less than was required under the terms of the state award that applied to her position. The committee is aware that the only reason the claim succeeded before an industrial magistrate was that the employer could not prove that the employee's AWA had been approved by the OEA. Whether or not the OEA approved the AWA is a moot point. The important issue is that the company had over 50 employees on AWAs identical to the agreement which the employee at the centre of the dispute had signed. The final paragraph of Judge McCuster's decision reads in part:

> In considering [the employer's] submission I leave aside for the moment the manifest disadvantage of the respective bargaining positions of a 15 year-old Year 10 student negotiating her terms with an experienced businessman…The AWA sought to cut her **minimum** entitlement by approximately 25 per cent. The appellant's contention that the other AWAs all of which contained the same terms passed the "no disadvantage test"…does nothing to improve its argument. Rather it shows a troubling situation.[71]

2.57 At the committee's hearing in Melbourne, Professor Stewart repeated his concern about the Employment Advocate's willingness to approve AWA's that may be of dubious merit in terms of meeting the statutory criteria: 'There is hardly a lawyer or practitioner that I speak to who has had anything to do with AWAs who does not have the view that it is a little easy to get AWAs through'.[72]

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69 David Peetz and Mark Mourell, 'Working to curtail rights', *Courier Mail*, 14 April 2005, p.17

70 Government of Western Australia, *Submission 48*, p.10

71 Professor Andrew Stewart, *Committee Hansard*, Melbourne, 29 September 2005, p.6 (emphasis in original)

72 ibid., p.3

2.58 The second issue that was brought to the committee's attention was that the Employment Advocate outsources its core function, namely the approval of AWAs, to private sector organisations known as 'industry partners', who are responsible for promoting the use of standardised AWAs. It is widely known that these consultants assist employers to fast track AWAs to reduce costs. They also typically receive a fee-for-service from clients who make AWAs. The Western Australian Government submission claimed it is 'ludicrous' for the Employment Advocate to outsource a core function to organisations that profit from the AWAs being made.[73]

2.59 The third area of concern is that the WR Act provides no mechanism to review decisions of the Employment Advocate or industry partners concerning AWAs. While the committee accepts that the confidentiality provisions under the act are necessary to protect AWAs from disclosure, it is concerned that the Employment Advocate operates with minimal accountability and the OEA is effectively a 'law unto itself'.[74] Mr John Ryan, SDA, drew the committee's attention to the fact that only by application of a technical and little known prerogative writ is the Employment Advocate subject to application for review to the High Court. Other than that, there is no opportunity to review decisions of the Employment Advocate:

> He is a strange statutory creature. He is not subject to any review under the Administrative Decisions (Judicial Review) Act. He is not subject to any review under the Workplace Relations Act. He seems to be totally devoid of being subject to any form of review other than when he is subject to review to the High Court through the application of one of the prerogative writs.[75]

2.60 Having said that, the committee is surprised that the powers available to the Employment Advocate under the act do not include the capacity to settle disputes between employees and employers over the terms of an AWA. The committee received no evidence that the dispute procedures included in AWAs have ever specified a conciliatory role for the Employment Advocate. While all agreements, individual and collective, must include a dispute-settling mechanism, the act does not stipulate what must be included in the provision or what form it must take. If an AWA lacks a dispute resolution procedure, the provision that is provided as a template in the act will be deemed to apply.

2.61 The committee believes that the WR Act's dispute resolution provision gives employers a considerable advantage over employees, especially where terms and conditions which employees have signed up to are left to the employer's discretion. It is increasingly common, for example, for AWAs to include an entitlement to four weeks annual leave but not mention when the employee can take leave, whether the employer or employee is required to give notice and under what circumstances leave

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73 Government of Western Australia, *Submission 48*, p.10

74 ibid., p.11

75 Mr John Ryan, SDA, *Committee Hansard*, Melbourne, 29 September 2005, pp.44-45

can be refused. It would be up to the employer to decide these issues, whereas under the relevant award system they are set out in clear and simple terms. In these circumstances employers hold the advantage because it would be acceptable for an AWA to set out a dispute resolution procedure which states that the decision of the human resources manager or general manger is to be taken as final. To the committee's surprise the Employment Advocate, Mr Peter McIlwain, confirmed at the committee's Sydney hearing that an AWA would be approved if, meeting all other conditions under the act, it contained a dispute resolution procedure which said the employees' avenue of appeal in the event of a dispute was, for argument's sake, the employer's grandmother.[76]

2.62 A final area of concern is what the Enterprise Initiatives submission described as 'chronic delays' in the approval of AWAs. Figures assembled by Enterprise Initiatives show that of nearly 4000 of its clients' AWAs prepared between December 2004 and August 2005, 821 were awaiting approval beyond the OEA charter of 20 days, including 187 which took more than 3 months to be approved and 309 AWAs which took more than 6 months.[77] In 2004-05, a total 6500 AWAs took longer than 6 months to be approved.[78] The submission argued that these delays and administrative inefficiencies contributed to the 'abysmal' take-up rate of AWAs as a proportion of Australia's total working population. It concluded: 'By any measure, AWAs have been an appalling and inexcusable failure, with less than 4 per cent of the Australian working population currently employed on one'.[79]

Agreement-making under WorkChoices

2.63 When the Prime Minister announced the Government's agenda for workplace relations reform in the Parliament on 26 May 2005, high on the list of proposals was a simplified process for agreement-making. Among the key principles underpinning the reforms were greater freedom and flexibility to employers and employees to negotiate at the workplace level, and providing people with the 'choice' of remaining under the existing award system or entering into workplace agreements. It was claimed that the current process of agreement-making is long and frustrating for employers and employees, preventing them from making their own arrangements at the workplace. The Prime Minister indicated that a 'streamlined, simpler and less costly agreement-making process' would be introduced where all collective and individual agreements will be approved on lodgement with the OEA.[80]

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76 Mr Peter McIlwain, Employment Advocate, *Committee Hansard*, Sydney, 26 September 2005, p.106

77 Enterprise Initiatives, *Submission 50*, attachment 1

78 ibid., attachment 2

79 ibid., p.1

80 Hon John Howard MP, Workplace Relations Reform, House of Representatives, *Hansard*, 26 May 2005, pp.38-43

2.64 Although the committee did not have the benefit of examining the detail of proposals contained in the Workplace Relations Amendment (WorkChoices) Bill 2005 before tabling its report, a number of submissions and expert commentary raised concerns about the proposals as announced by the Prime Minister. The committee notes that three proposals in the Government's WorkChoices policy will radically change agreement-making between employers and employees: abolishing the no disadvantage test and replacing it with a fair pay and conditions standard; having individual and collective agreements take effect from the date they are lodged with the OEA; and enabling employees to bargain away a range of award conditions when new workplace agreements are 'negotiated', including penalty rates, shift/overtime loadings, allowances, public holidays, meal breaks, annual leave loadings, incentive-based payments and bonuses.

2.65 The government's plan to abolish the no disadvantage test and replace it with a new minimum standard is one of the most controversial of the proposed changes. The new standard will comprise the relevant award wages and four other legislated entitlements including annual leave, personal/carer's leave (including sick leave), parental leave (including maternity leave) and maximum ordinary hours of work. According to preliminary assessments, two major consequences stand out. First, there will be widespread potential for reductions in employees' weekly pay as it will be easier for employers to reduce or cut altogether penalty rates, overtime rates, leave loading, shift allowances and all other items of remuneration not covered by the 'fair' standard. The Government appears to have responded to this criticism by including in its WorkChoices policy brochure a requirement that while these conditions can be the subject of bargaining, they can only be modified or removed by specific provision in an agreement approved by the employee. The WorkChoices policy states: 'If these conditions are not mentioned in the new agreement under WorkChoices these award conditions [penalty rates, overtime rates and so on] will continue to apply'.[81]

2.66 The committee believes this is a smoke screen. To argue that award conditions are 'protected by law', as Government advertising makes out is a deception. The idea that employees will either be able or willing to negotiate away entitlements defies the reality of AWAs. This report has shown that it will be straightforward for employers to present new or existing employees with 'take it or leave it' AWAs which exclude many award conditions. It is a ridiculous proposition to suggest that employees will have any say in this, let alone be aware of what they are signing up to.

2.67 Second, there is likely to be a surge in registered individual agreements, with employers being encouraged to download from the OEA website template AWAs of only one or two pages, with all other employment matters presumably set by managerial prerogative.[82]

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81 *WorkChoices: A New Industrial Relations System*, Australian Government, 2005, p.22

82 David Peetz, 'Coming Soon to a Workplace Near You – the New Industrial Relations Revolution', *Australian Bulletin of Labour*, vol.31, no.2, 2005, pp.94-97

2.68 The committee believes that the concerns which were raised in evidence about the consequences of the Government's intention to further simplify agreement-making will be realised after its WorkChoices legislation is passed into law. It is particularly concerned that the Government's policy will radically alter and weaken the federal award system which currently provides the foundation and structure for individual and collective enterprise bargaining agreements.