Government Senators' Report

This report of the workplace agreements inquiry was bound to be overtaken by events. Government party senators realise that the ostensible purpose of the inquiry was to attempt some overarching inquiry into principles and practices of workplace bargaining and to examine economic rationales or principles under-pinning government policy. In the course of time, however, the inquiry provided a cover for maintaining a campaign against the Government's declared policy of legislating for more thoroughgoing workplace reform.

The inquiry commenced in June 2005, and this report was tabled on 31 October, the date set down in that 23 June referral motion. There has been ample time to report. It was disingenuous of the Opposition to propose an extension of time for the committee to report. Deferral of tabling, had it been agreed to, would have had the effect of sidelining this inquiry indefinitely as a consequence of the introduction into the House of Representatives on 3 November, with consequent referral to the legislation committee, of the Workplace Relations Amendment (WorkChoice) Bill 2005. So much of the evidence before the committee related to provisions of the forthcoming bill, and so much interest has been generated in it, that there would have been little point in extending the original inquiry beyond its due reporting date. Nonetheless, Government party senators recognise the opportunity which has been afforded by this inquiry to debate the broad issues of workplace reform, which it is hoped will sharpen the focus of examination of the bill when the committee deals with it in mid-November.

This report begins with a discussion of some general principles and then continues to consider some issues in detail.

Evolving industrial agreements

The evolution of policy over 15 years in regard to industrial agreements is often referred to in academic papers. Government senators emphasise some points in relation to this. It is a matter of history that the Keating government, in the face of considerable opposition from some unions, adopted the principle of enterprise bargaining, and that these were implemented in amendments to the Industrial Relations Act. This was belated recognition of some economic realities, but it is inconceivable that any Labor government would have been able to progress workplace reform beyond that point. To begin with, the principles of enterprise agreements were at odds with the insistence on practices which allow the continuation of pattern bargaining. The two are incompatible. The effect of this anomaly is still being felt. If enterprise bargaining is to work it can only do so in circumstances where collective agreements take account only of the workplace and profitability performance of the individual enterprise: where the correlation between employee and employer performance and productivity can be recognised and rewarded accordingly.

It is difficult to ascertain the approach to workplace relations of the Opposition at a time when it must, on the one hand, acknowledge the imperatives of economic change in a global economy, and the changes in work practices and employee preferences in recent years, and on the other hand the reluctance of unions to accept of the need to change their attitudes to negotiation in the workplace. The Opposition is tied to the demands and expectations of its trade union supporters.

Collective versus individual agreements

Government policy has never encompassed the aim of eliminating collective agreements. These are decisions for workplace-level negotiation. The Australian Industry Group (AiG) has described enterprise bargaining as delivering improvements to efficiency and productivity as well as to workplace relationships.[1] Nonetheless, and despite these successes, there is a need to reinvigorate bargaining processes in order to drive workplace change.[2] The claim for equal acceptance of individual agreements in workplaces, where enterprise agreements are in force, should be accepted. The AiG claims that the right of employers to manage their businesses extends to the right of employers to choose the form of agreement most appropriate to their operations, whether that be an individual or a collective agreement. Disputes over this issue should be negotiated.[3]

Government party members of the committee agree with sentiments expressed by the Australian Minerals and Metals Association executive director who gave evidence to the committee in Perth:

> Our view is that the individual ought to override the collective. You may well come to a work force with collective arrangements but, if you are able to bargain with your employer for something different that suits you and suits the employer, then the existence of a collective agreement should not prevent you from doing so.

The witness went on to illustrate his point:

> I can give you an example of where it can operate to the disadvantage of the employees: we have had one client where they have got a collective agreement and the collective agreement does not specifically allow for the making of Australian workplace agreements. We have some employees who have large amounts of annual leave and want to take four weeks leave and get paid for eight and therefore cash out eight weeks of their annual leave. We would be unable to do so because we could not enter into an Australian workplace agreement that allows you to do that unless the certified agreement specifically provides for it. That is an example where an

1 Australian Industry Group*, Submission 1*, p.4

2 ibid., p.13

3 ibid., p.12

> employee request cannot be met because of the inability to override a certified agreement with an AWA.[4]

The dilemma for the Opposition is shown in its ambivalence toward AWAs. These agreements are proving acceptable, and indeed are welcome, to a large number of employers in the mining and resources industry. This is an industry with an historically high rate of union membership. But the profile of that workforce has changed, as have the conditions of the work, with a high degree of mechanisation and in many cases with the use of a fly-in, fly-out workforce. It is, furthermore, an industry dependent on an export trade with price structures determined accordingly. While the mining industry may be regarded as exceptional in these respects, it is also illustrative of how workplaces across all of industry adjust to changing trading circumstances.

Government senators make the point here that the evolution of industrial agreements is continuing. It does not reach a certain point and then become fixed, as Opposition policy appears to presume. Workplace relations must adapt to changing circumstances of economic and social conditions. Policy must be reactive because there is no possible alternative.

Current failings in enterprise bargaining

Evidence from the Australian Industry Group is noteworthy for its revelation of increasing disillusionment with the enterprise bargaining system. The AiG submission pointed to the need to restore the role of enterprise bargaining as a significant driver of productivity improvements. Despite its success in the past, many employers, according to AiG, have stopped using enterprise bargaining because of strong union opposition to any new productivity measures being included within enterprise agreements. This has led to negotiations focussing exclusively on union demands rather than on the need for continuing productivity improvements. This was detrimental to the competitiveness of the industry.[5] The AiG representative at the Sydney hearing explained that while the circumstances and requirements of enterprises varied widely, many required more flexible shift arrangements. It was then explained that:

> What has happened over recent times is that unions like the CFMEU, the ETU and the AMWU have forced companies to accept significant restrictions on casual employment, outsourcing and so on, which they may well have been able to cope with two to five years ago but now, faced with this very fierce competition from China, they can no longer cope with. …We saw many examples during the manufacturing bargaining round in 2003. I was involved in a number of negotiations where the companies wanted some reasonable flexibility, some relatively minor changes to their agreements, and the AMWU's position was what they called 'no trade-

4 Mr Christopher Platt, *Committee Hansard*, 25 October 2005, p.55

5 AiG, *Submission 1*, p.13

> offs'. They were not prepared to change a word in the existing agreement to provide enhanced flexibility or productivity. It was all about negotiating around their claims. We believe that the system needs to be changed so that genuine bargaining—this concept of genuinely trying to reach agreement—takes into account the fact that there needs to be a demonstration by all parties that there is a willingness to consider productivity and efficiency improvements at the enterprise level.

The inflexibility of enterprise agreements appears to Government party senators to result from inflexible union negotiators failing to bargain in good faith, rather than an inherent weakness in the concept of bargaining. The resultant agreement allows management little flexibility in bargaining at the margins of the agreement to suit the needs of individuals. It is a case of the unions applying the traditional 'all for one, and one for all' approach to workplace relations, which takes no account of social change over the past fifty years. A glimpse of this anachronistic behaviour was revealed by the AiG spokesman in regard to individual employee needs:

> … we are aware of plenty of examples where unions take an overly prescriptive approach to the issue. Again, take the example of the AMWU. To me and to Ai Group it seems that this whole issue of family friendly workplaces largely centres around individual employees, the needs that they might have and trying to match those needs with the needs of the company. The AMWU has often argued that flexibility at the level of the individual employee should be implemented through the facility provisions. In the metals award, for example, those provisions in some cases require that you get a whole vote of the overall work force together to decide whether or not flexibility should be available at the individual level. We think that is just nonsense. Why should a company have to stop the work of 1,000 employees, for example, in order to decide whether one employee is able to access a certain level of flexibility? It is the same when it comes to award changes or even the use of AWAs. If an employee wants more flexibility than that already in place in the overall work force then there should be an ability to reach agreement with the employer on that flexibility.[6]

Government party senators observe that while business has been content to stay with enterprise agreements, this attitude may change. It appears puzzling as to why, in opposing AWAs so vehemently, unions appear to be weakening the case for continuing with enterprise agreements. The AiG made its position clear that in the event that an individual employee wants to enter into an AWA for the purposes of securing particular work arrangements, then that right should be enjoyed. It should also, for that employee, override the collective agreement. There is an indication that provision for this is likely to appear in the forthcoming WorkChoices Bill. It appears that a number of unions refuse to accept this principle, and so long as they do, their long-term effectiveness in employer representation is further diminished.

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6 Mr Stephen Smith, *Committee Hansard,* 26 September 2005, p.5

The continuing influence of industrial awards

The majority report acknowledges the importance of industrial awards in influencing the process of workplace agreements. It correctly points out that the award system continues to underpin the wages and conditions of workers who have negotiated above-award wages. A report on the IMFs Article IV Consultation with Australia states that:

> The relatively low share of employees reliant on awards for pay determination nevertheless underestimates their true importance, because this figure only refers to their role in setting wages and salary increases and not the extent to which reform has changed work conditions. If enterprise agreements which are 'add-ons' to award are included, then award coverage is much higher, possibly over 80 per cent of the labour force.[7]

AWAs currently allow for 20 matters to be considered in the making of agreements, and the Employment Advocate, in approving AWAs, must look at them against appropriate awards in a process known as the 'no disadvantage test'. It is likely that the legislation committee, looking at the proposed WorkChoices Bill, will be taking a closer look at awards and the no disadvantage test. Government party senators take the view here that safety-net awards are probably too high – a matter to be addressed in the forthcoming legislation – and that this causes serious distortion in the wage structure, leading to discouragement of employment.

Abuse of 'protected action'

An aspect of industrial agreement-making which has been discussed in only a few submissions has concerned the fundamental issue of industrial peace. Agreement making has often been accompanied by industrial action because 'protected action' is allowed for under the WRA. As the Australian Mines and Metals Association told the committee:

> a culture appears to have developed whereby parties know that there is a level of industrial action that they can take which is unlawful—for example, there is not a bargaining period in the course of a certified agreement—but they know that they can get away with at least some action because of the time it takes to go to the commission, seek a section 127 order and have the commission convince itself that there is an industrial dispute. On that point I am aware that there was a dispute in the Latrobe Valley, where I am told they spent up to two months, and I think a couple of hundred thousand in legal fees, just arguing whether or not they had an industrial dispute or a community picket.

As the AMMA pointed out, such actions, and the reluctance of the Commission to make a firm ruling, have resulted in a culture whereby people are taking industrial action and interrupting projects with relative impunity. It noted that the WorkChoices Bill is likely to include provisions for companies and unions to bypass section 166A,

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7 International Monetary Fund, *Report on Article IV Consultation with Australia*, November 2004, p.157

which provides a three-day period before you can take action in tort, and go straight to a civil court and obtain injunctive relief and damages as required in the circumstances.

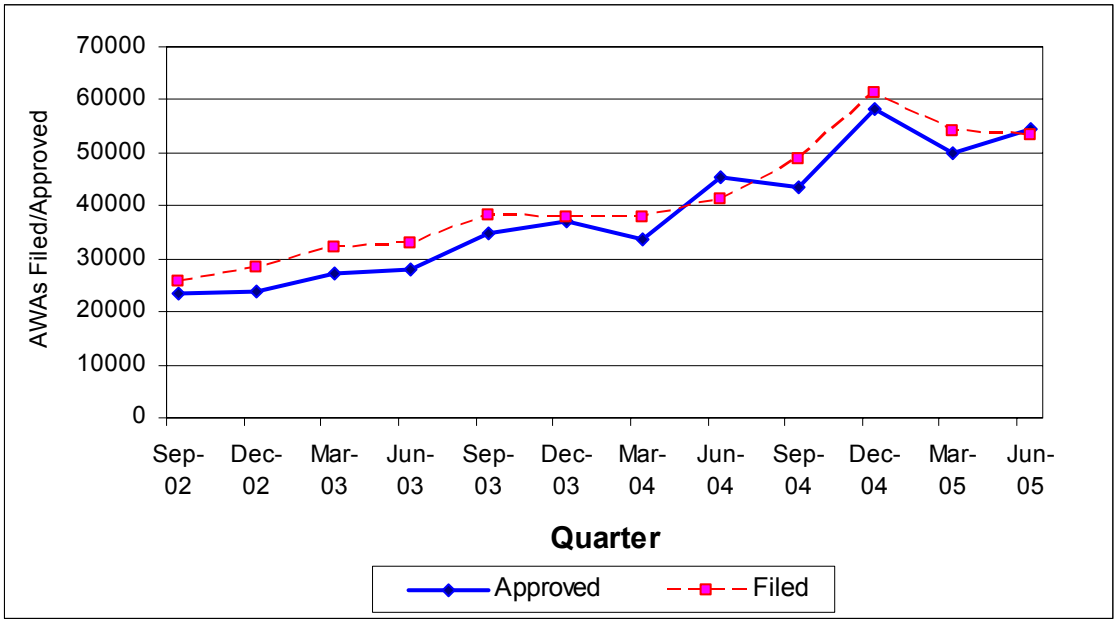
Government party senators agree with the AMMA that there is a national interest in preventing disputes which may have strategic economic consequences. Such inclusions in WorkChoices will give the Commonwealth minister no more powers than state ministers have under the various state emergency powers.[8]

Australian Workplace Agreements

A great deal of evidence to the inquiry, and discussion in hearings, has concerned AWAs. Despite their increased take-up since their introduction under the Workplace Relations Act, they continue to attract criticism which is too often left unrefuted. The Opposition has waged a sustained and sometimes bitter line of argument against AWAs, the intensity of which has barely abated despite ambivalence as to whether a Labor government would allow their continuation if it was ever to gain office. This is despite the fact that the Workplace Relations Act specifically provides for employees to seek the guidance of their union in negotiating of an AWA with an employer.

The statistics indicate the take-up rate. To the end of July 2005 over 725 000 AWAs have been approved, nearly two thirds of those in the last three years, as the chart of approvals shows:

Table 1



The Office of the Employment Advocate advised the committee that the take-up of AWAs has been highest in the retail trade, manufacturing and property and business services. Increases in take-up rates have been noted across all sectors of employment.

8 Mr Christopher Platt, *Committee Hansard*, 25 October 2005, pp.41-42

A survey conducted by the Office of the Employment Advocate in 2000 found that the main reasons why employers introduced AWAs were: to increase flexibility, to simplify current employment conditions and improve their organisations. Larger organisations were more likely than smaller organisations to have AWAs, possibly indicative of deliberate attempts to introduce culture change in the workplace. Significantly, some larger organisations opting for AWAs also cited the aim of improving management-employee relationships.[9] Government senators on this inquiry have seen no more recent evidence which contradicts this finding. An employee survey carried out for the 2000-01 study found that in comparison with a random sample group, employees on AWAs appeared to be more satisfied with their work and under less stress. They worked more hours, but preferred to do so.[10]

The distribution of AWAs across states shows some marked characteristics, as these figures show:

Table 2: Approved AWAs by state/territory

State	March 1997 to 30 June 2005	%	1 July 2002 to 30 June 2005	%
ACT	33 437	4.7	19 891	4.3
NSW	157 812	22.2	90 182	19.6
NT	11 949	1.7	6 478	1.4
QLD	87 585	12.3	57 955	12.6
SA	62 027	8.7	39 841	8.7
TAS	23 588	3.3	17 476	3.8
VIC	154 949	21.8	80 864	17.6
WA	178 069	25.1	146 706	31.9
Total	**709 417**	**100.0**	**459 393**	**100.0**

Source: OEA WorkDesk Database

The take-up rate for AWAs in Western Australia requires special mention. It has risen from 19 per cent in 1997-2003 to 33 per cent in 2003-04. A high proportion of these relate to employment in the mining industry. Another reason for the high take-up is that many employees moved from Western Australian workplace agreements (known as IWAs, or individual Workplace Agreements) to AWAs when the state agreements were abolished in 2001. Western Australia is leading a trend which is likely to be reflected in other states once the effects of workplace changes to be ushered in by the WorkChoice Bill filter through.

9 DEWR and OEA, *Agreement making in Australia under the Workplace Relations Act, 2000 and 2001,* Canberra 2002, p.6

10 ibid, p.8

The inevitability of AWAs as a future standard agreement

There is a pronounced trend toward individual agreements. This arises from the changing structure of workplaces and the increasing individualisation of positions. The growth of the casual workforce and an increasing preference for part-time work, are phenomena which reflect wider social change. There is a trend against collective consciousness.[11] Only about 10 per cent of businesses are unionised, and four out of five workers do not belong to unions.[12] High levels of unionisation are now increasingly restricted to public sector agencies and service providers. This probably does not reflect anti-union sentiment so much as an idea that unionism is irrelevant, especially to younger workers in the predominantly service sector workforce.

The appropriateness of AWAs in the current social context was also supported by the Australian Industry Group:

> We see AWAs as an important form of agreement in the same way that collective agreements are an important form of agreement. There is a change that has occurred in society—particularly this whole issue of a work-family balance becoming important. I think the issue of society being more individualistic is also a factor. There is a lot of research that has taken place about the views of generation X and Y and so on. The fact is that society is a lot more individualistic. To the extent that has occurred, AWAs fit very neatly into that. As we said in our submission, there will be plenty of circumstances where the arrangements in place within a workplace, whether through awards or, say, a collective agreement, will not provide sufficient flexibility at the individual level. AWAs are an important part of giving an individual the flexibility they need by agreement with their employer.[13]

These trends are likely to continue. It appears to Government party senators, however, that while the days of union negotiated enterprise agreements may be numbered, the competition with AWAs will still come strongly from individual common-law agreements. Even now, the used of such instruments is well ahead of the take-up rate for AWAs. ACCI has suggested that filing and approval processes for AWAs could be improved.[14]

The flexibility of AWAs

Government party senators note the accumulating evidence of the ability of employers and employees to agree to unusual working arrangements which suit particular circumstances. An instance of this is the bakery at Strahan in Tasmania which experiences a large influx of visitors during summer and a corresponding dearth of

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11 Mr Christopher Platt, *Committee Hansard,* 25 October 2005, p.42

12 ACCI, *Submission 10,* para.29

13 Mr Stephen Smith, *Committee Hansard,* 26 September 2005, p.10

14 ibid., para.39 ff

visitors over winter. Staff usually work 50 hours per week over summer - the equivalent of 10 hour days compared to the award's 7.6 hour days. Over winter the hours drop back to 15 to 20 per week.

As the proprietor of Banjo's Bakehouse reports on the OEA website:

> If we had stuck to the award, we would pay huge penalty rates over summer and would have to employ more people to cope with the demands of the business, …But come winter, we wouldn't have been able to afford to keep everyone on. It would have been feast or famine. Our AWAs allow us to establish a core group of staff who are with us all year round… Under the AWAs part-time staff work an average of up to 152 hours in a four week period and accrue pro-rata leave, which is unusual in the Strahan area where there are few opportunities for employment and most jobs are casual.[15]

Another example, this time from a large corporation, is also instructive. Cerebos Australia is an international food and coffee manufacturing company which produces such food and beverage products including Gravox gravy, Fountain sauces, Saxa salts and Riva coffee. Australian Workplace Agreements (AWAs) were introduced for sales representatives in 2004 in response to the need to reduce the administrative load of managing variations in employment conditions arising from the different state laws.

The negotiation process is noteworthy in view of instances related to the committee of high-handed unilateral action by some employers. As the website description states:

> It is unlikely the same employment conditions could have been achieved via an Award or enterprise agreement, federal or state. …
>
> Employees were involved in every stage of the agreement making process through discussions with management. It was an open and transparent process. We were committed to keeping our employees up-to-date by providing them with detailed documentation so they could make an informed decision about their AWAs. They were also given the opportunity to seek advice outside the workplace.[16]

Features of Cerebos' AWAs include various types of leave entitlements including 12 months parental leave, personal (annual) leave and paid salary continuance leave for non-work related illnesses. Employees are also offered annual health and fitness assessments. The AWA also enables staff to better balance their work and family responsibilities by allowing them to choose their own days and hours of work. The AWAs also enabled Cerebos to convert its casual employees to permanents. The intention was to achieve permanency for casual employees while maintaining or increasing their take-home pay and other benefits.

Government party senators believe that changes to workplace culture will eventually see such innovations as a normal feature of employment. The result will be, in an age

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15 http://www.oea.gov.au/graphics.asp?showdoc=/employers/ambassador_banjobakehse.asp

16 http://www.oea.gov.au/graphics.asp?showdoc=/employers/ambassador_cerebos.asp

of labour scarcity, mutually beneficial workplace arrangements. The exploitation of unskilled labour which has been featured in much evidence before the committee is not an inevitable consequence of AWAs, as might be suggested. Government senators believe there is a role for government, through such agencies as the Employment Advocate, and backed by appropriate legislation, to deal with cases of exploitation. This is also likely to be a future opportunity for unions to carve out a new role for themselves once they have accepted the inevitability of the workplace changes they currently dread.

Proposals for increased flexibility

The committee heard evidence in Perth from the AMMU proposing increased flexibility in agreement making by way of the introduction of 5 year certified agreements. The reason given for this proposal was that there are a number of infrastructure projects with a construction time longer than 3 years.[17] There was a chance than protected action could harm the project two and a half to three years into the project. The committee was told that at any time within that 5 year contract duration it could be altered by consent of both parties, and that would include wages increases in order to remain competitive.

Government senators make the point that what applies to the mining industry can apply elsewhere: that wages reflect the labour market, and that while the concept of 'sweated labour' under AWAs may be a reality in some workplaces where regulations are not adhered to, employers generally will need to pay employees well enough to keep them in a tight labour market.

The 'no disadvantage' test

Much was made by union witnesses of the widely discussed assumption that the no-disadvantage test which would be abolished in the forthcoming legislation. As noted previously, this test applied to an AWA is for the purpose of benchmarking an AWA against an appropriate award. As the Australian Chamber of Commerce and Industry (ACCI) pointed out to the committee:

> The complexity which occurs as a result of the no disadvantage test keeps people employed in my organisation and makes it more expensive for employers to enter into arrangements with their employees. For example, if you are an organisation employing some metal workers and you do not happen to be a respondent to the federal metals award and you want to do either an Australian workplace agreement or a certified agreement Australia-wide, I will end up doing six no disadvantage tests for your company against every award in the country in relation to metal workers. That has got a cost to it. Under WorkChoices, hopefully, we will just be able to say, 'The wage for a metal worker in the mining industry is X and let's make sure we are above it.' We will not have to worry about squirrelling through a raft of awards to determine how they do things; we

17 Mr Christopher Platt, *Committee Hansard*, 25 October 2005, p.51

> will have clear minima that we can check off and do it. So what it will do is reduce the transaction costs for our clients of entering into either a certified agreement or an Australian workplace agreement.[18]

The ACCI submission also pointed out two key limitations to the operation of the no disadvantage test. The first was that where market rates or prevailing labour costs in an industry are at, or near to, the current award rate, employers and employees are effectively priced out of agreement making. There is particular concern about the high levels of safety net increases in recent years. Second, ACCI pointed out that it is often difficult to see how the no disadvantage test operates in regard to non-monetary entitlements and conditions, requiring the OEA and the AIRC to give such items an equivalent monetary value.[19]

The consequences of the likely abolition of the no disadvantage test will undoubtedly be investigated in the examination of the WorkChoices Bill.

Casual employment

Much has been said about the relative disadvantage in the bargaining capacity of casual employees. Government party senators see the need to dispel some myths which appear to be the basis of some strongly held views of union leaders and others. First, the status of casual employment should not be held in lower regard than any other employment. It is as important in both economic and social terms.

Second, there is an assumption that casual employers would prefer to be working full-time and be permanent. This flies in the face of all the evidence. As the committee was told:

> …there was at the end of 1999 a test case which gave casuals a right to convert their casual employment into some other form of employment, be it full time or part time. That was run through the metal industry award. That has subsequently spread to a number of other awards. We understand the usage of that to have been overwhelming in its small numbers. When casuals are provided with the chance to convert to full- or part-time work they do not take it.[20]

The committee was frequently told by union representatives and academics who appeared before it that flexibility of employment conditions was always at the expense of employees; that it was a practice to enable businesses to operate economically around the clock. This is not the case. Employer organisations clearly indicated their strong support for family-friendly work conditions, but equally it should be bourn in mind that family concerns are of little relevance to a large proportion of the working population. It does not appear to be difficult to find employees to fill rosters on public

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18 Mr Scott Barklamb, *Committee Hansard*, 29 September 2005, p.57

19 ACCI, *Submission 10*, para 50

20 Mr Scott Barklamb, *Committee Hansard*, 29 September 2005, p.78

holidays even when no penalty rates are due. This is a reflection of social change, and changing expectations of work. The instinctively conservative attitude of many traditional unionists and union leaders indicates a failure to accept the reality of these social changes.

Conclusion

Government party senators acknowledge that this inquiry has opened discussion of matters that are at stake with the new wave of workplace reforms to be placed before Parliament. It has also increased the level of the committee's familiarity with issues relevant to the legislation committee's forthcoming inquiry into the WorkChoices Bill.

It has to be acknowledged that the weight of evidence to the committee was critical, in the main, of Government policy in regard to workplace agreements, Government party senators heard or read nothing, however, that would cause them to doubt that the continuing high levels of prosperity and low unemployment figures would in any way be jeopardised by a continuation and reinforcement of these policies.

Government party senators take a broad view of issues that this inquiry has dealt with. Amidst the claims and contradictory statistics and forecasts lies the reality of a country with consistently low rates of unemployment compared to other OECD countries. While academic opinion may be divided in its assessment of the contribution that has been made by workplace reform so far implemented, the results appear highly satisfactory. There is undeniably more flexibility in the labour market, and increased opportunities for those keen to find employment. Employers are overwhelmingly satisfied with the reform process and have urged its continuation.

This detailed analysis conducted by academics and institutes that is critical of workplace policy has been worthy of study and may indicate anomalies and assumptions inherent in those policies. Equally, the conclusions arising from these studies may have dubious underpinnings. Government party senators take the view that to base arguments in a report such as this on the weight of 'informed opinion', rather than the weight of experience, is an approach which lacks credibility.

Government party senators therefore look forward to the introduction of the WorkChoices Bill. This inquiry has uncovered areas of tension and inefficiency in current workplace agreements which are in need of the remedies that will be proposed in this bill.

Senator Judith Troeth
Deputy Chair