The Senate

Employment, Workplace Relations and Education References Committee

Workplace Agreements

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Terms of Reference

Whether the objectives of various forms of industrial agreement-making, including Australian Workplace Agreements, are being met and whether the agreement-making system, including proposed federal government changes, meet the social and economic needs of all Australians, with particular reference to:

(a) the scope and coverage of agreements, including the extent to which employees are covered by non-comprehensive agreements;

(b) the capacity for employers and employees to choose the form of agreement-making which best suits their needs;

(c) the parties' ability to genuinely bargain, focusing on groups such as women, youth and casual employees;

(d) the social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities;

(e) the capacity of the agreement to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standards; and

(f) Australia's international obligations.

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Preface

On 23 June 2005 the Senate referred to the references committee an inquiry into the various forms of industrial agreement-making, including Australian Workplace Agreements, to ascertain whether their objectives are being met and whether the agreement-making system, including proposed government changes, meets the social and economic needs of all Australians. The committee was asked to have particular regard to:

- the scope and coverage of agreements, including the extent to which employees are covered by non-comprehensive agreements;
- the capacity for employers and employees to choose the form of agreement-making which best suits their needs;
- the parties' ability to genuinely bargain, focusing on groups such as women, youth and casual employees;
- the social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities;
- the capacity of the agreement to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standards; and
- Australia's international obligations.

The committee was asked to report by 31 October 2005.

This report in chapter 1 provides a brief overview of the history of workplace agreements since the introduction of the Workplace Relations Act in 1996, including the scope and coverage of different types of agreements. The report then critically examines the economic and social arguments which have underpinned the Government's legislative efforts in industrial relations. The argument about industrial agreement-making is about the relativities of bargaining power. The evidence showed that the Government's promotion of AWAs is designed to tilt the balance of power the employers' way. The issue of good faith bargaining and the practical effect of AWAs on workers' wages and conditions are the subject of chapter 2. The report then examines in chapter 3 the Government's central economic justification for its industrial relations changes; namely, that only through such changes will the economy grow and employment rates increase. The committee considers evidence which challenges these claims, noting that such assumptions are based less on any serious economic analysis than on unquestioning faith. Chapter 4 considers the social effects of Government policies on industrial relations, including the work and life balance issue and the gender pay gap.

Anticipation of the WorkChoices Bill

Interest in this inquiry intensified as the committee was finalising its report because of the imminent introduction of the Government's long anticipated legislation, the

Workplace Relations Amendment (WorkChoices) Bill 2005. Although the committee did not have the opportunity to examine the legislation before tabling its report, it did have at its disposal the Government's 68 page information booklet which was released when the committee was winding up its inquiry. The booklet outlined the Government's new policy, including measures which for some weeks held the attention of the media and expert commentators. The centrepiece of the WorkChoices policy is the creation of a national industrial relations system, a new wage setting body, a new safety net comprising five minimum conditions of employment and a simpler agreement-making system. The booklet described measures which were included at the last minute as a marketing tool to sway public opinion in support of the Government's agenda. It appears they were not included as serious proposals arising from an identified public policy need. The report briefly addresses these measures at the end of chapter 2.

The committee's terms of reference covered issues which the Government announced would be part of the WorkChoices Bill. The timing of this inquiry meant the committee could cast only a superficial eye over proposals to be included in the WorkChoices legislation. This, however, may be regarded in some way as a forerunner to the much more restricted inquiry which the legislation committee will conduct on the bill in November 2005. The committee was fortunate in receiving evidence that may not be forthcoming in the pending WorkChoices bill inquiry, and its experience with the workplace agreements inquiry leaves it far better informed about issues that will undoubtedly arise with the bill inquiry.

Conduct of the inquiry

The committee received and published 59 submissions, a full list of which is at Appendix 1. The committee thanks all those who made submissions. A notable omission from the expected submissions was that from the Department of Employment and Workplace Relations (DEWR), which advised the committee that its energies and resources were devoted to drafting the WorkChoices Bill, and that in view of the considerable overlap in the policy details covered by both the inquiry and the bill, could not make a submission.

The committee held public hearings in Sydney and Melbourne in September and in Perth in October. The committee thanks all those who appeared as witnesses. Later hearings anticipated by the committee for Brisbane and Canberra did not eventuate because Coalition Government senators used their Senate majority to oppose a motion by the chair to extend the reporting deadline to 28 November 2005. This was in spite of the fact that the committee had agreed that a short and reasonable extension of time to report was necessary to enable it to complete its inquiry. The committee majority's understanding was that Government senators accepted that the committee needed a few extra weeks to gather a full range of evidence, especially from employers and small business. At no time during the inquiry did Government members of the committee indicate to the chair that there were reasons why an extension should not be sought.

The committee majority notes that there have been only four occasions over the past 20 years where committees that have sought an extension of time to report have been denied it by the Senate.

The committee majority believes that the Government's decision was a subversion of due process which showed its willingness to use a slim Senate majority to prevent the references committee functioning properly. The committee majority rejects the Government's argument that it was unacceptable to expect the Senate to agree to a references inquiry into workplace agreements running concurrently with a legislation inquiry covering roughly the same policy ground. This is a lame excuse which the Government used to prevent proper scrutiny of its industrial relations policies, both old and new.

The committee majority takes seriously its obligation to properly examine issues which are included in its terms of reference and to report to the Senate. It takes the view that the curtailment of this inquiry by the Government deprived the committee of the opportunity to hear from witnesses who represent a wide spectrum of viewpoints, including those from the small business sector. They had been scheduled to appear in Brisbane, at the request of Government members of the committee. While the views of peak organisations were well represented in Sydney and Melbourne, those closer to the practical effects and implementation of the Workplace Relations Act at the workplace level were denied an opportunity to put their view. The committee majority considers that in order to discharge its responsibilities fully, evidence should have been taken from a wider variety of interested parties.

The committee majority is concerned that the Government's attitude with regard to the conduct of this inquiry has set the tone for the legislation committee's forthcoming inquiry into the WorkChoices Bill. The Government has already made up its mind about the scope and conduct of that inquiry; for example, it has decided that the inquiry will run for three weeks in November with hearings to be held in Canberra, and that it will not include issues which the Government believes have been inquired into previously. The committee majority believes that this is an unacceptably short time-frame in which to complete an inquiry of this magnitude. It believes that the Government's posturing in the lead up to unveiling its WorkChoices Bill was intended to prevent proper parliamentary scrutiny of what is a large, complex and controversial piece of amending legislation.

The committee majority, comprising Opposition and Democrat senators, commends this report to the Senate.

Senator Gavin Marshall
Chair

Senator Andrew Murray

Chapter 1

The evolution of workplace agreements

1.1 This is an introductory chapter which describes and outlines themes and arguments that will be presented more fully in the following three chapters. It puts the current interest in workplace agreements in an historical context, recognising that the pace of change has quickened suddenly in the light of the imminent introduction of the WorkChoices Bill. As was explained in the Preface, it has not been possible in this report to avoid anticipating what is likely to come with the WorkChoices Bill.

1.2 There is considerable commentary on the evolving process of wage determination over the past dozen years. Most areas of employment have been affected. Movement away from centralised wage fixing began with amendments to the Industrial Relations Act in 1993, toward enterprise bargaining arrangements, a move by the Keating Government which was initially opposed by sections of the union movement.

1.3 Since then, a diminishing proportion of the workforce has directly relied on industry-wide awards, which provide a comprehensive set of wages and conditions per industry, and which provide the current safety net for lower-paid members of the workforce. These are generally unskilled workers but also cover part-time and casual workers and immigrant skilled workers with poor English. Very large numbers of employees indirectly rely on awards, using them as the base starting point for collective and individual agreements, or, with respect to specific provisions, as default provisions. Skilled workers, and certainly those represented by unions, generally enjoy above-award wages and other benefits of enterprise agreements. However, it remains the case that the award system continues to underpin the wages and conditions of workers who have collectively and individually negotiated above-award wages; and acts as an important safety net for the remaining workforce. Such wage differentials in the workforce are not exceptional, as they were fifteen years ago, and are a notable characteristic of the current wages structure.

1.4 The central issue in the debate over industrial agreements, which is the subject of this report, is the extent to which the current trend toward wider disparities in wages and conditions can continue. Traditionally, the award structure has put a substantial floor under wages. This report deals in part with the consequences of the removal over time of the award structure, and its replacement by new mechanisms and agreement processes which many claim will widen the wages gap and create a permanent underclass of unskilled employees existing barely above poverty levels. There has been much speculation on the social consequences of such a development. It is feared it will move Australia towards the harsher and less egalitarian USA practice. The spectre of poverty and social alienation that is evident on the extensive fringes of American society concentrates the minds of many commentators, who also acknowledge that in many other respects the conditions and traditions of governance which prevail in the United States find no mirror in this country.

1.5 Of relevance to this inquiry are the social consequences of New Zealand's experience with individual contracts during the 1990s. It has been widely reported that the Employment Contracts Act of 1991 had disastrous consequences for workers who had previously relied on industrial awards to provide a safety net of minimum wages and conditions. The new system of individual contracts introduced in 1991 was a disaster for jobs, wages and productivity, resulting in a significant rise in the number of 'working poor'.[1]

1.6 The other side of this argument draws heavily from the necessity of continuing with the work begun with the 1993 legislation ushering in enterprise agreements, based largely on the assumption that economic imperatives make further movement along this path essential. That is, reform must follow reform in a continuing cycle in the direction of sustaining maximum productivity. To stand still is to go backwards. Proponents of this line of argument emphasise its importance at a time when the economy of the country is subject to unrelenting global competition.

Historical context

1.7 In the last 20 years, Australian wage fixation has moved incrementally from a centralised model of awarding national wage increases to match increases in the cost of living, to a much more devolved system, where wages are primarily set at the workplace level, often based on improvements in productivity.

1.8 This shift first started to occur in 1987, with the Commission's introduction of the Restructuring and Efficiency Principle.[2] This was reinforced (albeit at an industry level) by the Structural Efficiency Principle[3] which accelerated following the development of the Enterprise Bargaining Principle in 1991.[4]

1.9 From this time, the Commission's decisions and the Government's legislative action (most significantly through the *Industrial Relations Reform Act 1993* and the *Workplace Relations and Other Legislation Amendment Act 1996*) have facilitated this shift in focus from national and industry level wage fixation to workplace level wage fixation. In broad terms, by the mid 1990s, there was general acceptance of the principle that industrial agreements could not be fairly made without regard for the profitability – and the capacity to pay higher wages – of businesses, especially in such a diverse economy when not all businesses were profitable at the same time.

The Workplace Relations Act and subsequent amendments

1.10 Following the Coalition's election in March 1996, the Government introduced the *Workplace Relations and Other Legislation Amendment Act 1996*, which renamed

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1 See the discussion in chapter 2 at paras 2.33 and 2.34.

2 National Wage Case Decision, Full Bench, Australian Industrial Relations Commission, 10 March 1987, Print G6800

3 National Wage Case Decision, Full Bench, 12 August 1988, Print H4000

4 National Wage Case Decision, Full Bench, 30 October 1991, Print K0300

and significantly reformed the *Industrial Relations Act 1988*. The amendments focused on achieving wage increases linked to productivity at the workplace level. The new name of the act reflected this, as did new provisions relating to negotiating and certifying agreements. The act also introduced a new form of agreement, Australian Workplace Agreements (AWAs), which could be made between an employer and an individual employee.

1.11 Two other significant changes were to restrict the Commission's ability to make awards in relation to matters outside a core of 20 'allowable award matters' set out in section 89A, and the introduction of provisions requiring the Commission to review and simplify awards to remove all provisions falling outside these 'allowable award matters' after a transitional period of 18 months. These provisions achieved what the Commission had decided it could not do itself under the former legislation; this is, limit the content of the award safety net to a set of core minimum conditions.[5]

1.12 The simplification of Federal Awards to 20 allowable matters had the most significant effect of removing restrictions on casual labour. Although the rise of casual labour from 18.2 per cent of the workforce in 1988 to 26.6 per cent of the workforce in 2004 is a significant trend, its effect on workers has been more recently felt.[6] The committee believes it is a trend which will continue under proposals contained in the WorkChoices Bill.

1.13 The role of the Commission, and that of its awards, has developed to reflect the increasing emphasis on setting wages and conditions by agreement at the workplace. It was inevitable that the scope for arbitration by the Commission would be reduced in line with these changes, and the Commission itself had recognised this earlier.[7]

1.14 It is worth noting that the Government did not get their full proposal through the Senate. In the end, there were 176 Democrat amendments made to the original legislation.

1.15 Having been successful in having the Workplace Relations Act passed, with substantial amendments insisted on by the Senate, the Government thereafter had less success with subsequent amendments to the act. Many of the amendments the government has sought to make to the act in the years since 1996 have been thwarted by the Opposition and other parties in the Senate. While that is true, the extent of Government failure should not be exaggerated. It is common for the Government to claim that their legislative IR agenda has been routinely obstructed in the Senate, but

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5 Safety Net Adjustment and Review Decision, Full Bench, Australian Industrial Relations Commission, 21 September 1994, Print L5300, p.39

6 *Alternative estimates of casual density, with and without owner-managers of incorporated enterprises, 1988-2003*, Iain Campbell & Robyn May, Centre for Applied Social Research, RMIT University, 2005

7 National Wage Case Decision, Full Bench, 30 October 1991, Print K0300

up until June 30 2005 the Coalition secured passage of 18 workplace relations bills through the Senate. Of these, five were supported by all parties and passed without amendment, including the very substantial Workplace relations (Registration and Accountability of Organisations) Bill 2002.

1.16 The first significant amendments proposed after 1996 were contained in a major bill, the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. The bill, often referred to as the MOJO Bill, sought among other things, to reduce the role of industrial awards, reform the certification of agreements and the making and approval of AWAs and to clarify rights and responsibilities relating to industrial action. It also sought to reduce allowable award matters, restrict union right of entry provisions and review provisions for freedom of association. This bill lapsed at the end of the 39th Parliament. Following the failure of MOJO to pass the Senate, this comprehensive amendment bill was 'unpackaged' into separate constituent bills which were reintroduced in following years. A number of less contentious bills were passed.

1.17 One of these was the Workplace Relations Amendment (Genuine Bargaining) Act 2002, which specified factors to be taken into account by the Commission when considering whether a negotiating party was genuinely trying to reach agreement, and which empowered the Commission to make orders in relation to new bargaining periods.

1.18 The Workplace Relations Amendment (Better Bargaining) Bill 2003 proposed to restrict access to industrial action before the expiration of an agreement, provide more ready access by employers to cooling-off periods, allow third party suspensions of industrial action and limit union access to protected and unprotected industrial action. The bill lapsed at the end of the 40th Parliament.

1.19 Most recently, the Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004 sought to simplify certified agreement-making at the workplace level, reduce the delays, formality and cost involved in having an agreement certified, and prevent interference by third parties in agreement-making. It also sought to provide for the extended operation of certified agreements of up to five years. The bill lapsed at the end of the 40th Parliament.

1.20 The brief chronology above pertains primarily to amendments in relation to widening the scope of agreement-making. With its newly realised Senate majority, the Government has announced its intention to introduce legislation into the Parliament in late 2005 in its latest attempt to 'simplify' agreements. Announcements from the Government suggest that the bill will seek to encourage the use of Australian Workplace Agreements (AWAs) at the expense of collective agreements, and dismantle the award structure over time. The Australian Industrial Relations Commission (AIRC) will have responsibility for simplifying awards, regulating industrial action and registered organisations, and will play a role in relation to termination of employment. Employers and employees will also be able to use the AIRC to help them resolve a dispute. The new Australian Fair Pay Commission will

set and adjust a single minimum wage and determine other working conditions within a framework of a reduced number of allowable matters. These are expected to include annual leave, carer's leave, parental leave, and maximum ordinary hours of work.

Agreements: their scope and coverage

1.21 This section provides a descriptive summary of the nature and coverage of enterprise and individual agreements in the context of the broader employment framework, since the passage in 1996 of the Workplace Relations Act.

1.22 The act introduced significant changes to the legislative framework of formalised agreement-making in the federal jurisdiction. Under the act, there are a number of options for making an agreement, both formal and informal. Formal options include a certified agreement (CA), which are most commonly certified by the AIRC under either section 170LJ (employer and employee organisation), or section 170LK (employer and a majority of employees). Other options exist for the formation of a CA pertaining to new businesses and for the settlement of industrial disputes.

1.23 The other type of formal agreement is AWAs, which were the first non-collective agreement to be recognised by legislation in the federal jurisdiction. AWAs are made directly between an employer and an employee, and are approved by the Employment Advocate.[8]

1.24 The Australian Bureau of Statistics collects and publishes data relating to the scope and coverage of different agreements, as well as incomes. Registered agreements are statutory instruments and unregistered agreements are common-law agreements. The ABS records the most common methods of setting pay for all employees in May 2004 as being registered collective agreements (38.3 per cent), unregistered individual arrangements (31.2 per cent) and award only (20.0 per cent). Unregistered collective agreements (2.6 per cent) and registered individual agreements (2.4 per cent) were the least common methods of setting pay. The remaining 5.4 per cent of employees were working proprietors of incorporated businesses.

1.25 The most common methods of setting pay for full-time employees were collective agreements (41.5 per cent) and registered and unregistered individual arrangements (38.9 per cent). For part-time employees, collective agreement (39.7 per cent) and award only (34.3 per cent) were the most common methods of setting pay.

1.26 The median weekly total earnings for full-time adult non-managerial employees who had their pay set by awards only were $625.00. This compares with median weekly total earnings of $904.00 for full-time adult non-managerial employees who had their pay set by collective agreements and median weekly total earnings of $814.00 for full-time adult non-managerial employees who had their pay

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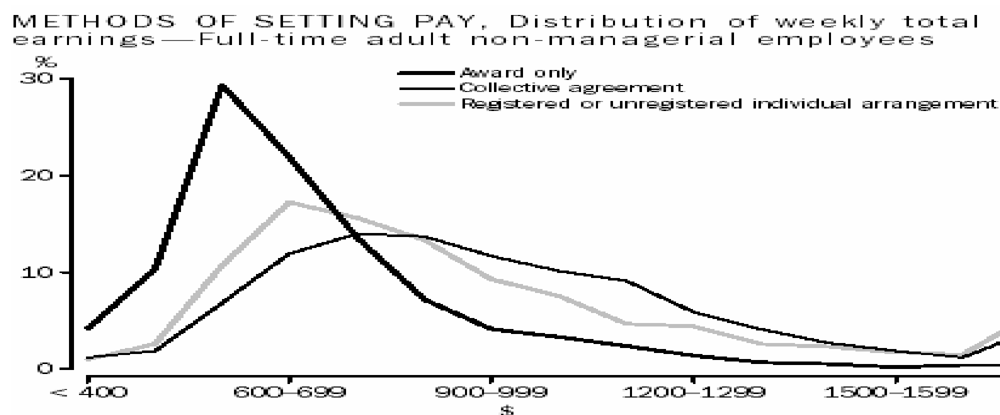
8 *Agreement making in Australia under the Workplace Relations Act: 2002 and 2003*, A report prepared by the Department of Employment and Workplace Relations and the Office of the Employment Advocate, 2004, pp.1-2

set by registered and unregistered individual arrangements.[9] The committee notes that ABS figures do not differentiate between those agreements, collective or otherwise, which are in part underpinned by award provisions.

1.27 The following graphic illustrates the use of different employment arrangements across the income levels.[10]



1.28 The committee does not know how many AWAs are currently operative. Data relating to AWAs, and to an even larger extent non-AWA individual agreements, can best be described as estimates. They are individual agreements and confidential documents, running for differing lengths of time. At the committee's hearing in Perth, Western Australian Minister, Hon John Kobelke MLA, also referred to the difficulty in obtaining accurate data on the coverage of workplace agreements.[11]

1.29 The Office of the Employment Advocate (OEA) has submitted that AWA approvals have enjoyed an annual growth rate of 29 per cent over the past three years, and an even higher rate for small to medium businesses. The OEA also estimated that 'industry penetration' by AWAs stands at 5.4 per cent nationally.[12]

1.30 Professor David Peetz has taken issue with the OEA's submission, arguing that:

> …[I]t is important not to misinterpret cumulative OEA lodgement data as providing any measurement of actual coverage, as there is substantial potential for double and triple counting of AWA employees who leave and are replaced by AWA employees or who sign replacement AWAs … The OEA estimate that 5.4 per cent of the Australian population was 'covered' by AWAs in June 2005 is implausible, given that only 2.4 per cent were covered in May 2004, only 217 000 AWAs (equivalent to about 2.7 per

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9 The statistics referred to in these paragraphs are drawn from the Australian Bureau of Statistics, *Employee earnings and hours*, publication 6306, May 2004, p.6,7.

10 Australian Bureau of Statistics, *Employee earnings and hours*, publication 6306, May 2004

11 Hon John Kobelke, MP, *Committee Hansard*, Perth, 25 October 2005, p.81

12 Office of the Employment Advocate, *Submission 19*, pp.3, 13

> cent of employees) were approved in 2004-05, and many of the workers covered by AWAs in May 2004 … would have either left their jobs or been covered by replacement AWAs.[13]

1.31 The ACTU had similar concerns, pointing to a disparity in the number of AWAs estimated to be in force by the OEA and the ABS of more than 226 000. This equates to a disparity of 115 per cent.

1.32 Professor Peetz also pointed to ABS data which makes clear that growth in the number of employees covered by collective agreements from 2002 to 2004 far exceeded the likely rise in registered individual contracts.[14]

1.33 One of the main criticisms of the use of the ABS data to support the view that the coverage of individual agreements is growing rapidly relates to the way the ABS categorises employees. Professor Ellem argued:

> [T]he way that the Australian Bureau of Statistics count these figures is not the most helpful way of doing it. When they do their samples, any one employee is classified into only one category whereas … a large number of or most employees in effect have their wages and condition determined by a combination of instruments. For example, if your wages and conditions are determined by a federal award and some kind of individual agreement then modifies some part of that agreement … [the ABS] would count such a person as being in the individual agreement-making category only. [Thus] we do not really know for sure what the make-up of the regulation of the Australian labour market is at the moment in any sophisticated way.[15]

1.34 Professor Ellem continued:

> I am saying that it is a genuinely difficult problem and there are legitimate ways of going about it. All that we want to do is to make sure that we are comparing like with like.[16]

1.35 Professor Ellem's observations appear to the committee to be well founded. The glossary of the relevant ABS report discloses that those in the individual arrangement category include employees who had the main part of their pay set by an individual contract, registered individual agreement, common-law contract, or an agreement to receive over-award payments.[17]

1.36 Finally, it was pointed out that figures from Western Australia are skewed as a result of a change of government. There is a higher proportion of AWAs in effect in

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13 Professor David Peetz, *Submission 33*, p.5

14 ibid.

15 Professor Bradon Ellem, *Committee Hansard*, Sydney, 26 September 2005, p.25

16 ibid., p.31. See also Dr Kristen van Barneveld, *Submission 6*, p.46

17 Australian Bureau of Statistics, *Employee earnings and hours*, publication 6306, May 2004, p.50

Western Australia than in any other state. This is partly due to the prevalence of AWAs in the mining industry, but also because most of the workers formerly covered by Individual Workplace Agreements went over to AWAs.[18] Nonetheless, it is clear to the committee that the scope and coverage of AWAs across the country is open to considerable dispute.

What do AWAs cover?

1.37 The most comprehensive analysis of AWA content was carried out by the Australian Centre for Industrial Relations Research and Training (ACIRRT) based on sample AWAs provided by the OEA between 2002-03. Issues commonly dealt with in AWAs include wages and other remuneration, span and flexibility of hours, leave provisions, and so-called 'family friendly' provisions. Of these, the most commonly covered issue is span and flexibility of hours, which 82 per cent of surveyed AWAs made reference to. Only 15 per cent of AWAs placed a limit on the number of hours to be worked in any one day, with 4 per cent of agreements allowing for more than 12 hours per day to be worked.[19]

1.38 Professor Peetz's submission contended that the span of hours is the predominant issue covered by AWAs, and he draws on ACIRRT research to argue that AWAs tend to provide for annualised working hours which are longer than other agreements. These 'annualised hours' can leave workers at a significant disadvantage because they tend to be paid at ordinary-time, rather than overtime rates of pay.[20] This results in wages being devalued over time. This was the general experience in Western Australia under its previous system of individual workplace agreements (IWAs). The Western Australian Government submission noted that while many IWAs included very open-ended hours of work under the guise of flexibility: '…an analysis of the loaded rates of pay for these workers did not appear to make up for the increasingly open and flexible hours of work arrangements'.[21]

1.39 The committee heard evidence from Ms Janine Freeman, Assistant Secretary, UnionsWA, that inclusion of annualised working hours in AWAs raises serious health and safety issues. Ms Freeman described the effect of annualised salaries on the ambulance officers who worked at Port Hedland:

> They had workplace agreements to annualise their salaries. At first the salaries looked extremely attractive because they were annualised and took things into account…When they looked at the hours they were working, the amount of call-out they had to do and the additional duties that were considered in the workplace agreement, they found that, if they had been on

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18 Professor David Peetz, *Submission 33*, p.50. It draws on Todd and Eveline, *Report on the Review of the Gender Pay Gap in Western Australia*, University of Western Australia, 2004.

19 Office of the Employment Advocate, *Submission 19*, pp.14-22, drawing on research conducted by ACIRRT.

20 Professor David Peetz, *Submission 33*, p.8

21 Government of Western Australia, *Submission 48*, p.8

> a certified agreement, they would have been underpaid. The impact on families in Port Hedland – in remote and regional areas – was quite harsh and caused a lot of difficulty.[22]

1.40 The next most common employment condition covered by AWAs is leave, which was specified in 74 per cent of agreements, followed by 'family friendly' provisions such as parental leave or additional flexibility when required for family-related contingencies.

1.41 Alarmingly, only 38 per cent of AWAs covered by the survey made reference to wage rises, and in 41 per cent of AWAs one or more loadings such as overtime had been 'absorbed' into an overall rate of pay.

1.42 The ACTU drew on data from the Department of Employment and Workplace Relations (DEWR) to show that even collective agreements are frequently left wanting in content detail. Only about 29 per cent of employees covered by certified (collective) agreements are covered by comprehensive agreements. Comprehensive certified agreements appear most frequently in the construction, manufacturing, retail trade, and transport and storage industries. However, with the exception of retail trade, these agreements account for only a small proportion of employees covered by this type of agreement.[23]

1.43 Hence, for the purpose of this report the committee assumes that the number of AWAs currently in effect is uncertain, but that awards and collective agreements still set wages and conditions for the majority of the workforce.

Characteristics of employment under AWAs and other individual agreements

1.44 There is a significant proportion of the workforce which relies solely on awards and informal agreements. Workers operating under awards, and forms of unregistered agreements, total one quarter of the workforce, and are primarily those on lower incomes. They include a high proportion of women, and young and casual workers. As the ACTU argued:

> While there has been rapid growth in the number of employees covered by formal bargaining, awards remain relevant in setting the wages of one in five employees … [A]wards [also] remain relevant in underpinning bargaining for the majority of employees employed under collective agreements.[24]

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22 Ms Janine Freeman, UnionsWA, *Committee Hansard*, Perth, 25 October 2005, p.72

23 Department of Employment and Workplace Relations, *Agreement making in Australia under the Workplace Relations Act 2002-2003*, 2004, p.25. This data pertains to federally registered certified agreements.

24 Australian Council of Trade Unions, *Submission 22*, p.2

1.45 The following table illustrates the coverage of individual agreements among different industry groups.[25]

	Award only	Collective agreement(a)	INDIVIDUAL ARRANGEMENT Registered or unregistered(b)	Working proprietor of incorporated business(b)	Total	All methods of setting pay
PROPORTION OF EMPLOYEES (%)						
Mining	*1.9	38.8	57.6	*1.7	59.3	100.0
Manufacturing	14.9	35.8	44.5	4.8	49.3	100.0
Electricity, gas and water supply	*1.7	79.9	17.7	*0.7	18.4	100.0
Construction	15.2	24.1	40.8	20.0	60.8	100.0
Wholesale trade	14.9	16.0	61.8	7.3	69.1	100.0
Retail trade	31.3	33.4	30.3	5.0	35.3	100.0
Accommodation, cafes and restaurants	60.1	11.7	25.9	2.4	28.3	100.0
Transport and storage	14.4	41.9	36.2	7.5	43.7	100.0
Communication services	*2.1	62.6	32.8	*2.5	35.3	100.0
Finance and insurance	4.5	43.7	46.9	4.9	51.8	100.0
Property and business services	19.7	12.8	56.8	10.8	67.5	100.0
Government administration and defence	*0.8	89.3	9.9	. .	9.9	100.0
Education	8.9	83.5	7.2	*0.4	7.6	100.0
Health and community services	26.6	54.8	15.9	2.7	18.6	100.0
Cultural and recreational services	17.7	38.7	40.4	*3.2	43.5	100.0
Personal and other services	23.5	45.7	27.8	*2.9	30.8	100.0
All industries	20.0	40.9	33.7	5.4	39.1	100.0

1.46 The table shows the preponderance of workers employed under individual agreements who are occupied in the mining, wholesale trade, finance, manufacturing, property and business sectors. There is evidence to suggest that a significant proportion of these workers are not party to an AWA, but rather are engaged in informal over-award common-law agreements.

1.47 What is also clear from the table is the situation of workers in the burgeoning hospitality (hotel, cafes and restaurants) sector, who are more often than not working solely on awards, while those in retail, health and community and personal services also have a high rate of award adherence. These industries are among the highest employers of casual and female workers, as well as being among the lowest paid, particularly for women.[26] Any move toward AWAs which is facilitated under forthcoming legislation will probably affect these employees as the award structure gradually winds up.

1.48 It is pertinent to note here that in promoting individual agreements, employers are resisting collectivism and promoting workplace flexibility, but on their terms only. As the committee heard from one authority:

> The two biggest changes that have taken place, including in the services sector but more broadly in manufacturing, are an increase in the number of employees on 12-hour shifts. There is also an increase in the basic length of the working day to 12 hours. That does not mean necessarily that people work 12 hours a day but it means that any time within the 12 hours is considered ordinary working time. It reduces payments for working

25 Australian Bureau of Statistics, *Employee earnings and hours*, May 2004, p.29

26 Australian Bureau of Statistics, *Employee Earnings and Hours*, publication 6306, May 2004, p.20

> unsociable hours. …I think that in those sectors in particular the really critical thing about AWAs compared to any kind of old collective agreement is that what it is really about is individualising the process of making the agreement itself. It is about individualising employee representation at work and, I think, in effect reducing real flexibility for employees and reducing their voice in relation to their employer when they have a grievance or a concern.[27]

1.49 Evidence such as this puts a basis of academic research beneath instinctive distrust of workplace arrangements which avoid the scrutiny imposed by traditional processes of collective bargaining and tribunal decisions. This is the basis for fears that AWAs will not promote socially or family-friendly working conditions. Wage justice may be achieved through AWAs, as experience with mining and high-skill jobs has demonstrated, but even in these cases the costs to individuals has been high, and is barely sustainable over a working career.

Pattern bargaining and pattern agreements

1.50 Few industrial relations practices infuriate the Government more than 'pattern bargaining', whereby union managements across a state attempt to negotiate an identical enterprise agreement across comparable industries within a state. The Government claims that this defeats the rationale for enterprise based agreements based on shared interests of a firm and its employees. It argues that a firm's level of remuneration should be based on its capacity to pay, and its capacity to trade productivity increases with higher wages.

1.51 Peak employer bodies dutifully condemn pattern bargaining, but evidence to this committee's inquiries over a number of years from peak body constituents appears to be ambivalent. As wages make up the bulk of expenditure outlays, any practice which sets predictable wages at the same level across an industry greatly simplifies cost estimates for firms tendering for work. Pattern bargaining, especially in the building and construction industry, saves a great deal of management time and allows contractors to remain competitive on the basis of work practices, contract management and in managing the cost of materials. Productivity gains are no less assured under these conditions than in having to bargain large numbers of individual agreements.[28]

1.52 The Government's stand against pattern bargaining for collective agreements in the private sector is in contrast to its own habit of pattern bargaining for collective agreements in the public sector. Its stand against pattern bargaining for collective agreements in the private sector is also juxtaposed to its support of pattern individual agreements in both the private and public sectors. Anyway, AWAs are mostly not 'bargained' agreements but are imposed agreements, the only likely exceptions being

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27 Professor Bradon Ellem, *Committee Hansard*, Sydney, 26 September 2005, p.32

28 Senate EWRE Committee, *Beyond Cole: the future of the construction industry*, June 2004, pp.105-07

those for very high income employees. Nor do AWAs extend across an industry, although the variations may be slight in areas with skill shortages.

1.53 Some evidence suggests that many employers prefer awards and statutory collective agreements. They provide a base upon which to build common-law agreements. They provide a standard of wages and conditions which is useful. Professor Bradon Ellem agrees, arguing that, for many employers, transparent, efficient and equitable occupational health and safety and workers' compensation schemes are more important.

Conclusion

1.54 The argument about industrial agreement-making is about the relativities of bargaining power. The Government has taken the view that the upper hand in bargaining for wages and conditions has generally been held by employees, backed by their unions and the apparatus of wage-fixing institutions. Hence the frequent claim of its legislative intentions as securing 'balance', 'choice' and 'flexibility'. There is an unspoken assumption in Government circles, and some employer circles, that in many areas of employment wages are too high. Yet the Government also claims as a justification for AWAs that wages will increase. Evidence suggests that they will, but only in highly professional and highly skilled jobs, and in the particular circumstances of some industries, and as a result of volatility in the labour market and the long-term trend toward labour shortages in certain sectors.

1.55 The Government's legislative intent since 1996, which continue with the imminent WorkChoices Bill, has been to tilt bargaining power toward employers. It is a policy based on dubious assumptions about the relationship between employers and employees. The policy rationale is as follows: the economic is more important than the social; a philosophical objection to collective agreements (including awards); and an assumption that employment relations should regulate employees as economic units, who exist primarily for work. As a corollary to this, employers stand in a naturally ascendant relationship with employees, and their needs are therefore paramount. The system of individual contracts proposed by the Government will significantly enhance managerial prerogatives and diminish the independence and choice available to employees.

1.56 The reason given for the paramount importance of employer demands is the need to increase productivity. The flaw in this argument is that labour costs and hours worked are only two elements in the productivity equation. It will be argued in chapter 3 that squeezing labour is far less effective in raising productivity than improved management, technology and the injection of capital. What evidence we have shows that productivity in general is highest in firms in which collective, rather than individual, agreements are the norm, and where the security, and therefore contentment, of employees is manifested through good work performance.

1.57 As will also be noted, it is not productivity that concerns businesses as much as profitability. It is true that cutting labour costs may increase profits in some

circumstances, but this can be a blunt instrument in dealing with market cycles. If labour costs are significantly reduced, the flow-on effect through the economy will affect consumer demand. As employer's profit share is already at a record high of 27 per cent of GDP, and workers' wages share is almost at the lowest on record at 53 per cent of GDP, this committee agrees with commentators who wonder what the real purpose of these changes is.[29]

1.58 Perhaps the answer to this question was given by one of the key witnesses to this inquiry, who reminded the committee, that the focus of workplace changes proposed now and in the past by the Government is less concerned with outcomes than with process.[30] As the committee has observed before in dealing with numerous amendments to the Workplace Relations Act, the micro-regulation of industrial legislation ensures that process has become an end in itself; that hoops must be jumped through in particular order, lest employers be tempted to take a pragmatic view of the responsibility they have to hold the line with the Government in whatever it is attempting to achieve.

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29 Tim Colebatch, 'Howard's high stakes IR gamble', *Age*, 18 October 2005, p.13

30 Professor Bradon Ellem, *Committee Hansard*, Sydney, 26 September 2005, p.29

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

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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

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

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

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

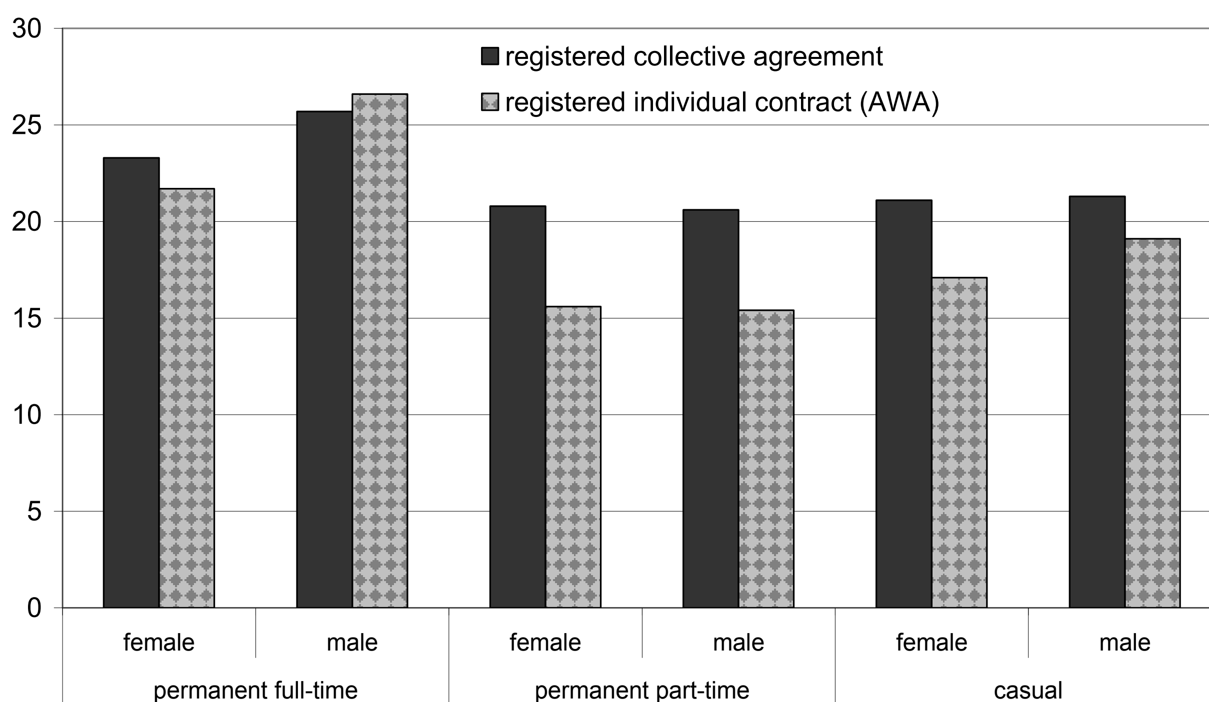
37 ibid., p.15

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

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

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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.

Chapter 3

Enterprise bargaining, productivity and economic performance: where is the evidence?

3.1 The Government's central justification for its industrial relations changes is based on the assumption that it is only through such changes that the economy can grow and employment rates increase. As this chapter will show, such an assumption is based less on any serious economic analysis than on unquestioning faith. In the face of evidence and assertion to the contrary, the Government has convinced itself of the exclusive nexus between productivity and industrial relations. All other factors, perhaps more difficult to rationalise or explain in public debate, are conveniently ignored. It has been said that, for the Prime Minister, whose personal crusade this is, the world is painted in:

> …vivid black and white, with enemies and supporters, bad and good, wrong and right, all lined up neatly on the two sides of the party divide. Critics putting arguments and reasoned differences are treated as opponents and shoved into the Labor camp. There is no room here for hearing a range of points of view, grappling with complexity, acknowledging uncomfortable facts. Rational nuanced debate about complex and difficult matters of public policy becomes well-nigh impossible.[1]

3.2 The Government has a policy to sell and the money to sell it, and repetition of an idea and constant reinforcement of a message is recognised as a successful sales pitch. Reiteration can establish credibility even when reality suggests unpredictable consequences. An instance of the Government's avoidance of any argument beyond rhetoric is indicated by the following Four Corners exchange:

> **Sally Neighbour**: Numerous labour market economists are saying that there is no evidence that these [proposed industrial relations] changes will boost productivity but that what they will do is cut the income of the poorest workers and increase inequality. What do you say to that?
>
> **John Howard**: Well, I don't agree with them and I point around the world to those countries that have a less regulated labour market – workers are better off…All the evidence suggests that as you free the labour market, you boost productivity, you lift wages and you reduce unemployment.[2]

3.3 This chapter examines the debate over the effects of enterprise bargaining and individual contracts on national economic performance. It challenges the Government's claim that individual contracts deliver higher productivity and that

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1 Judith Brett, *Relaxed and Comfortable: the Liberal Party's Australia*, Quarterly Essay 19, 2005, pp.41-42

2 Four Corners, Monday 26 September 2005, Brave new workplace: investigation into proposed industrial relations reforms, transcript, p.12

greater coverage of AWAs is necessary to deliver a much needed 'productivity spike' to the economy. Like the debate comparing employees' wages on AWAs and collective agreements discussed in chapter 2, the committee finds that the overwhelming view of labour market economists is that a connection between individual contracts and productivity has not been demonstrated by any economic evidence, either in Australia or abroad. As one newspaper columnist has put it, there is as much evidence that the Government's proposed industrial relations changes will promote productivity growth as there was for the claim that Saddam Hussein possessed weapons of mass destruction.[3] Assertions by Business Council of Australia (BCA), Australian Chamber of Commerce and Industry (ACCI) and Australian Industry Group (AiG) submissions about the link between AWAs and productivity are also without foundation or economic evidence.

3.4 The committee notes that the evidence from New Zealand shows conclusively that its system of individual contracts introduced during the 1990s was a disaster for productivity. Professor David Peetz has drawn attention to the fact that New Zealand's productivity growth under its radical Employment Contracts Act fell 14 per cent below what it would have been had it kept pace with Australia, which then favoured collective enterprise bargaining.[4] A similar story holds for Western Australia today. The Western Australian Government submission argued that it is doubtful that AWAs make any significant contribution to enhanced productivity or efficiency. In fact, the opposite appears to hold true. The submission pointed out that:

> Western Australia has recorded the highest labour productivity of all the States over the last three years, despite the repeal of its former system of workplace agreements…This clearly demonstrates the fact that radical labour market deregulation is unnecessary for achieving productivity improvements.[5]

3.5 Nor is the committee convinced by additional information from ACCI which is alleged to show a strong connection between AWAs and productivity. The material ACCI refers to, including from AWA ambassadors and one working paper by the Melbourne Institute published in 2002, cannot be relied upon as either authoritative or conclusive. Most of it relies on business and industry sources and reflects that bias. The committee does not believe this material contributes anything new to the debate. During the inquiry there was no attempt by ACCI or any other employer organisation to respond to the research by Professor David Peetz, which has succeeded in debunking economic arguments underpinning the Government's WorkChoices policy.[6] This is reminiscent of the Government's approach to evidence received by the committee's unfair dismissal inquiry. In that inquiry, authoritative academic voices critical of Government policy to exempt small business from unfair dismissal laws

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3 Kenneth Davidson, 'IR changes put profit before productivity', *Age*, 13 October 2005, p.15

4 David Peetz, 'Reform isn't working', *Courier Mail*, 4 July 2005, p.9

5 Western Australian Government, *Submission 48*, pp.20-21

6 Professor David Peetz, *Submission 33*

were either ignored or brushed aside by employer groups and the workplace relations department, DEWR. While the committee has had the benefit of examining Peetz's research for this inquiry, Senators on the committee were denied the opportunity to question him and other witnesses at a public hearing which was scheduled for 17 November, after the Government refused to grant an extension to the inquiry's reporting date beyond 31 October.

Productivity and economic performance

3.6 As discussed in chapter 1, the introduction of enterprise bargaining as the centrepiece of industrial relations policy during the 1990s placed greater emphasis on employers and employees handling their own workplace arrangements and making agreements that best suited their own interests. The presumption was that reduced interference by the state would improve productivity and through it national welfare. The Howard government had a belief that agreements on wages and conditions reached at the level of the workplace would assist a properly functioning market, a strong economy and employment growth. The Howard Government has an abiding belief that a reduction in union power would also assist a properly functioning market, a strong economy and employment growth. According to one assessment, the industrial relations changes announced in Parliament in May 2005 are the fullest expression of this philosophy.[7]

3.7 The Prime Minister's statement to Parliament made it clear that only with a simplified agreement-making process 'will the full potential for productivity gains in the Australian economy be realised'. It concluded that the Government's new framework for industrial relations will 'drive future productivity growth, create jobs and increase further living standards'. The clearest expression of the Government's claim that agreement-making at the workplace, especially individual contracts, will lift productivity is the Prime Minister's response to questions during a Four Corners program on the Government's proposed changes. During that interview, the Prime Minister stated that encouraging increased use of individual workplace agreements will generate the 'biggest single productivity boost' of all the changes being proposed by the Government:

> **Sally Neighbour**: How will these [industrial relations changes] boost productivity?
>
> **John Howard**: Because they will give a much greater focus on agreement-making at the workplace level. And experience all around the world tells us that if we allow individual employers and employees to work out the arrangements that best suit them, the businesses go better, they make more money and they pay their workers higher wages.
>
> **Sally Neighbour**: And how does that actually boost productivity as in output per working hour?

7 Mike Stekette, 'The wages gap is about to get a whole lot wider', *Australian*, 13 October 2005, p.12

> **John Howard**: Well, it must automatically. If you run your firm more efficiently, then productivity is lifted. And higher wages result because if you make higher profits and you want to maintain that higher efficiency, you'll pay your workers more so they'll contribute more. It really is getting it at a workplace level, rather than having arrangements imposed from on-high or in some kind of pattern across an industry.[8]

3.8 Submissions from employers groups pushed the same line, arguing that individual contracts, encouraged by the WR Act, have lifted productivity and that a higher take-up of AWAs is therefore required to boost productivity further. The BCA submission stated that AWAs have been a positive development in workplace relations policy in Australia. While they represent only a small proportion of total agreements, it is alleged they have played an important role in driving greater flexibility and improved enterprise productivity and performance in key sectors of the economy.[9] The same argument is found in the ACCI and AiG submissions. The committee notes that employer group submissions do not include any evidence to back these assertions.

3.9 The committee notes the effort by ACCI to provide it with additional information which is alleged to show a strong connection between AWAs and productivity growth. Some of the information relates to questions which ACCI agreed to take on notice at the committee's Melbourne hearing. In correspondence that followed, Mr Scott Barklamb, Manager, Workplace Relations, stated: 'Any suggestion that there is no link between AWAs and productivity is at odds with the experience of employers. An ample demonstration of this is found in the experiences reported by the OEA AWA Ambassadors…and from key industries such as the mining and hospitality industry'.[10] The OEA website describes the OEA ambassadors as employers who have implemented AWAs or possibly employees who have been on AWAs and who are willing to speak publicly about how their AWAs have been of benefit to them.[11] Is it any wonder that ACCI referred the committee to a small sample of ambassador reports from employers and employees willing to write glowing reports of their experiences of AWAs.

3.10 The committee does not believe that the sample of ambassador reports listed on the OEA's website can be taken seriously as evidence of any link between AWAs and productivity. Apart from the ambassador reports and one Melbourne Institute Working Paper, Mr Barklamb referred the committee to so-called 'evidence' which is already contained in OEA publications and other employer group submissions. The committee does not believe that any of the additional evidence contained in Mr Barklamb's correspondence adds anything new to the debate.

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8 Four Corners, Monday 26 September 2005, Brave new workplace: investigation into proposed industrial relations reforms, transcript, pp.3-4

9 Business Council of Australia, *Submission 25*, p. 6

10 Mr Scott Barklamb, correspondence and additional information, 19 October 2005

11 http://www.oea.gov.au/graphics.asp?showdoc=/employers/ambassadors.asp&SubMenu=4

Is there a link between individual contracts and productivity?

3.11 The Government's argument linking individual contracts to productivity is rejected by one of Australia's leading academic researchers of industrial relations and labour market issues, Professor David Peetz. He has pointed out that the economic evidence to support the Government's assertion does not exist. The lack of economic evidence that individual contracts boost productivity has even been acknowledged by head of the Australian Industry Group, Heather Ridout.[12] The research by Professor Peetz on individual contracts and productivity is very important in this regard. It hinges on two separate lines on inquiry. The first is a comparison of labour productivity over the various productivity cycles since 1964-65 and the various institutional arrangements that applied at the time (see Figure 1). The analysis shows that under the award system that operated before the prices and incomes accord of the 1980s, productivity growth was between 2.4 and 2.9 per cent per annum. It fell to 0.8 per cent following the introduction of a centralised accord. With the shift to enterprise bargaining in the mid-1990s, productivity growth peaked at 3.2 per cent. The current productivity cycle, which commenced in 1999-2000, has seen a fall in annual productivity growth to just 2.3 per cent per annum. According to Peetz: 'this is even below the rate of labour productivity growth that applied during the traditional award period. It is despite the fact that average union density, at 53 per cent, was over twice the rate of union density that has applied in the current cycle'.[13]

3.12 The figures on multi-factor productivity tell a similar story (see Figure 2).[14] They show that during the most recent cycle, which has taken place under the Workplace Relations Act, the rates of multi-factor productivity growth have been below the average that applied during the traditional award period.

3.13 Peetz also challenged claims by the Business Council of Australia (BCA) linking individual contracts and productivity. He pointed out that as the most important corporate lobby group supporting the Government's industrial relations reforms, the BCA co-funded three large-scale academic studies to examine, in part, this relationship. The studies were based at the National Institute of Labour Studies, Flinders University; Melbourne Institute for Applied Economics and Social Research, Melbourne University; and the University of New South Wales. Peetz found that none of the studies' conclusions were what the BCA would have wanted:

> The Flinders project showed that "unions apparently are good for productivity, but only at workplaces where unions are active". The Melbourne project showed that collective bargaining coverage was associated with higher claimed levels of productivity. The New South

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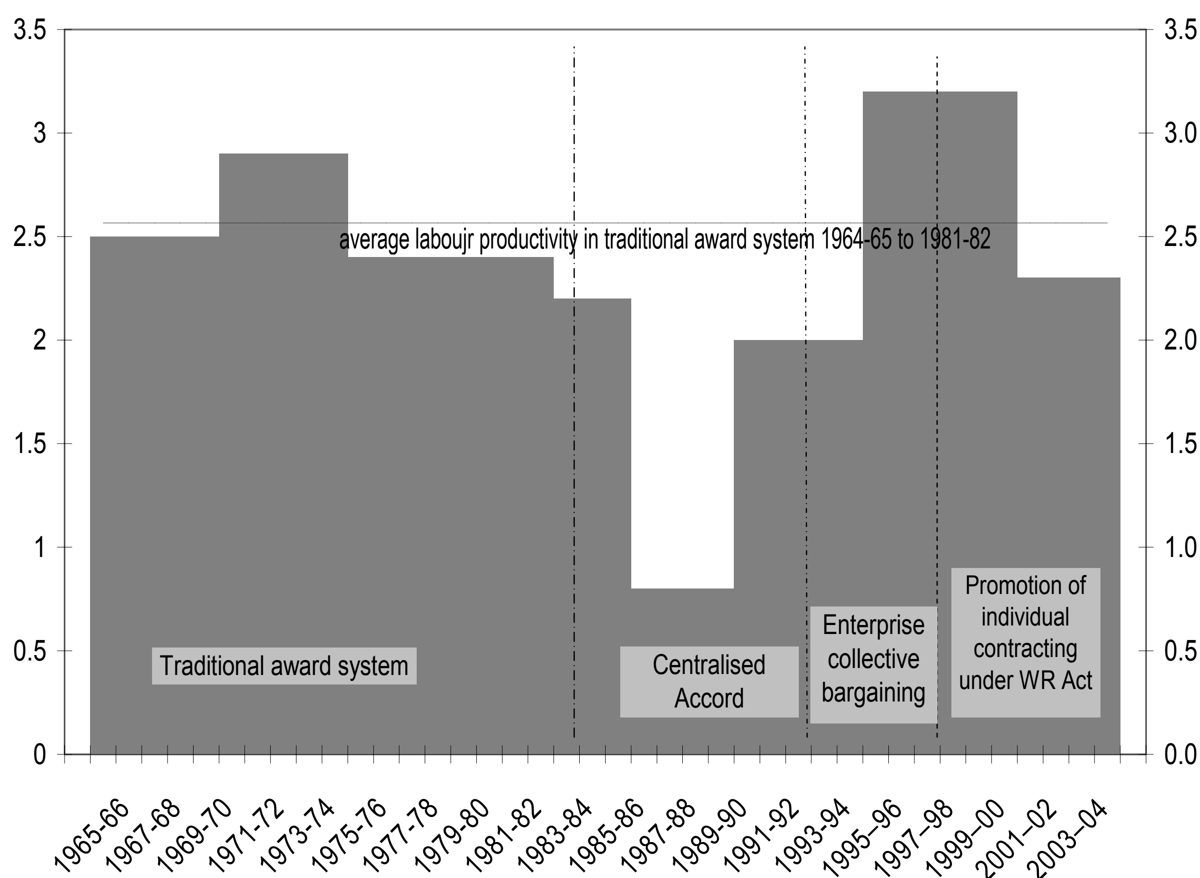
12 Four Corners, Monday 26 September 2005, Brave new workplace: investigation into proposed industrial relations reforms, transcript, p.10

13 Professor David Peetz, *Submission 33*, p.20

14 Multi-factor productivity refers to all inputs into the production process, such as machinery and computer equipment as well as person-hours of labour. A thorough measure of multifactor productivity includes the amount of input divided by *all* the inputs.

Wales projects identified 15 "key drivers" for excellence but "working arrangements and representation" (individual versus collective bargaining) were not among them: indeed they were "points of difference".[15]

Figure 1
Labour productivity growth and wage fixing institutions, 1964-65 to 2003-04[16]



3.14 In his submission, Peetz continued his critique of the BCA by pointing out that its Workplace Relations Action Plan released in February 2005 does not refer to any evidence from the three academic studies that it had jointly funded. It relied instead on a series of observations on the mining industry, notably the contentious claim that labour productivity growth from 1994 to 2002 was higher than in other industries.[17] The Action Plan ignored ABS data for the eight years to 2003-04 which was released by the ABS in November 2004. It showed that mining had the *lowest* rate of productivity growth, which was only a quarter of the national average growth rate for this period. Peetz is also critical of a February 2005 report by Access Economics, which the BCA commissioned to give an 'authoritative basis' for its latest claims. The

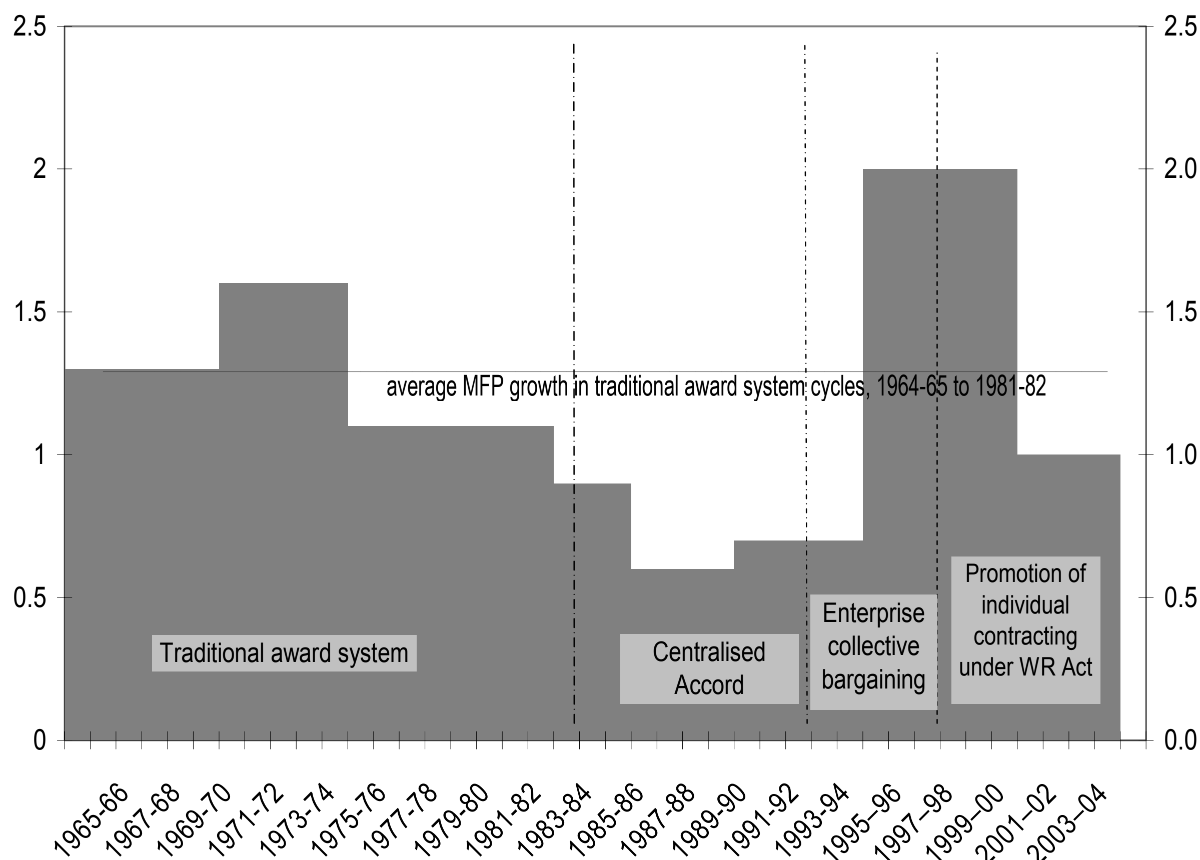
15 David Peetz, 'Reform isn't working', *Courier Mail*, 4 July 2005, p.9

16 Professor David Peetz, *Submission 33*, p.20

17 Professor David Peetz, *Submission 33*, p.23

report, according to Peetz, is dominated by sweeping generalisations about productivity.[18]

Figure 2
Multi-factor productivity growth and wage fixing institutions, 1964-65 to 2003-04[19]



3.15 Peetz concluded that there is no compelling evidence presented by or on behalf of the BCA to support the claim that individual contracts leads to higher productivity. What evidence is presented '…is shallow and dependent on either misrepresentation or failure to use current data that has been available for some time'. Peetz maintained that the lack of a 'smoking gun' is not surprising. It is consistent with academically rigorous quantitative studies which show there is no consistent relationship between either individual contracts and productivity or unionism and productivity.[20]

3.16 The argument linking AWAs to productivity relies essentially on enhanced employee commitment. However, studies show that company commitment is higher amongst people also committed to a union and collective bargaining. There is a strong argument that individual contacts may actually reduce productivity because of

18 ibid., pp.23-25

19 ibid., p.21

20 ibid., p.25

employee mistrust. That collective bargaining delivers higher productivity growth than do individual contracts is a view widely shared, including from some unlikely sources. It is supported by the research of Professor Peetz as well as that of Professor Mark Wooden, who told a recent Four Corners program:

> I think that the biggest gains for productivity still revolve around a system which is collectively based...with or without unions. I don't think unions are critical to this though there's plenty of evidence around…that unions can enhance productivity where they're very active representing the worker's interest and collaborate cooperatively with firms.[21]

3.17 Research by Professor Bradon Ellem and his colleagues compared productivity growth in Australia and New Zealand to challenge the Government's claim that individual contracts deliver higher productivity. It showed that productivity growth was substantially higher in Australia during the period when Australia had a 'collectivist national Government' and New Zealand an 'individualistic one':

> Australian productivity growth increased in the productivity cycle that commenced after the introduction of collective enterprise bargaining, but fell back in the cycle that commenced after the introduction of the Workplace Relations Act. Current rates of productivity growth in Australia are, if anything, inferior to the rates that were achieved under the traditional award system in the 1960s and 1970s.[22]

3.18 The committee finds it difficult to align the goal of productivity growth to the Government's WorkChoices policy because productivity is a function of many factors such as enhanced skills and technical progress. It is not a product of workplace flexibility and labour regulation.[23] According to Peetz, the rate of technical production won't come to a halt because a system of individual contracting has not been introduced or unfair dismissal laws for workers in firms with less than 100 employees have not been abolished. The Australian Manufacturing Workers Union National Secretary, Mr Doug Cameron, told the committee that Ireland was able to move from a rural economy to one of the highest productivity manufacturing economies in the world through 'skills, intervention and investment', not through labour deregulation.[24]

3.19 Peetz's criticism is consistent with the broader critique of the neo-liberal orthodoxy which holds that deregulated labour markets improve economic performance. The committee notes that the doyen of US labour market economics, Professor Richard Freeman of Harvard University, has published a paper which draws attention to substantive and growing objections to the evidentiary base on which the

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

22 Professor Bradon Ellem, *Submission 32*, p.3

23 'PM's bid for voters' trust: Explaining workplace reform', editorial, *Sydney Morning Herald*, 10 October 2005, p.10

24 Mr Doug Cameron, Australian Manufacturing Workers Union, *Committee Hansard*, Monday, 26 September 2005, p.77

new orthodoxy rests. Freeman's paper reportedly describes as 'non-robust and ill-specified' and as 'more sawdust than hardwood' the belief that deregulating labour markets and weakening trade unions will cure employment and spur economic growth.[25]

3.20 The committee notes that a number of analysts believe that Government policies risk slowing the rate of productivity. The acting director of the Australian Centre for Industrial Relations Research and Training (ACIRRT), Dr John Buchanan, has expressed his concern that the policies contained in the WorkChoices document, especially a further weakening of unions and publicly defined standards, will dampen the incentive for employers to find creative ways to boost productivity: 'The dismal – zero – rate of productivity in the United States' services sector attests to this'. He also drew attention to the effect of similar policies on part-time supermarket workers in New Zealand whose rates of pay fell by 30 to 45 per cent in real terms in the decade after its reforms were brought in.[26]

Profits before productivity

3.21 Peetz's work has demonstrated that individual contracts are attractive for employers because they increase managerial prerogative, and can be used to raise profits and weaken union power. Productivity is not the driving motive. It is easier for companies to drive down labour costs in the short term than it is for them to increase productivity over the long term. His findings are widely supported in the literature.

3.22 The committee finds that the Government's proposals are designed to increase short-term profitability rather than productivity, principally by driving down the cost of labour. It is true that profits can be increased by gains in productivity, as ACCI pointed out, but it is easier for firms to increase their profits by cutting employees' wages by reducing or abolishing penalty and overtime rates, which is already a common feature of AWAs. The committee notes that a reduction in employee entitlements is often dressed up as productivity. Employers in the hospitality industry, for example, may claim that abolishing penalty rates for night or weekend work increases labour productivity. But it does not. All that happens is that the wage cost per meal is reduced while profits increase. Productivity, however, is unchanged.[27] The same would apply to waiters in cafes and restaurants. Cutting their penalty rates would not result in more plates being carried out per hour, but in a reduction in pay. Peetz concluded his study by stressing that productivity is not what corporations seek: 'it is profitability they seek'.[28]

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25 Ross Gittins, 'More slant than substance in jobs reform ideology', *Sydney Morning Herald*, 8 October 2005, p.42

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

27 Kenneth Davidson, 'IR changes put profit before productivity', *Age*, 13 October 2005, p.15

28 Professor David Peetz, *Submission 33*, p.29

3.23 The other avenue open to firms to increase profits is to increase the hours of work, which is a central feature of many AWAs. According to Professor Bradon Ellem, two of the biggest changes that have taken place in the services sector and in manufacturing are an increase in the number of employees on 12 hour shifts and an increase in the length of their working day to 12 hours.[29] Changing the hours of work is not a measure of productivity but a way for companies to increase profits by getting more value for labour than was previously the case, and without any long-term strategic planning to improve the nature of the organisation.[30] Professor Richard Mitchells' research shows that much of the productivity growth of the past decade is because people are working harder, their working lives are more fraught, there is greater employer control over people's working lives and people are doing more tasks.[31]

WorkChoices: economic and social risks

3.24 The committee believes that the Government is moving into uncharted waters with its new WorkChoices Bill. It has not satisfactorily explained how it will address the social consequences of radical change and the slowdown in productivity. Nor has it explained how it will create more jobs, alleviate the labour and skills shortage, ease work-family tensions and address the growth of low-paid and precarious employment. The committee is not even sure that employers and business are convinced of the Government's rhetoric that the industrial relations system is so outdated that a complete re-write of the WR Act is needed. Far from it. Professor Andrew Stewart told the committee that most of the large employers which his law firm represents: 'are not desperately unhappy with the system that we have. There are certain things that irritate them and that they would like to see fixed up, but they are not clamouring to go out and do individual agreements. Many of them are already dealing with the unions and they are content to continue to deal with unions'.[32] The committee is critical of the Government's approach to national economic debate, where views and perspectives contrary to its own are dismissed as wrong and irrelevant, or ignored altogether.

3.25 Nowhere is uncertainty over the consequences of the Government's proposals clearer than on the issue of skills shortages. The Government is now arguing that individual contracts will help repair the current shortage of skilled labour. The argument appears to be that individual contracts offer workers more flexible working hours which will encourage people, especially women, back in to the workforce. It is a view which the committee does not support. The committee, if anything, believes that AWAs will make labour shortages worse, at least in the short term. Lower wages under AWAs will mean fewer people will want to enter the workforce. Women in

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29 Professor Bradon Ellem, *Committee Hansard*, Sydney, 26 September 2005, p.32

30 ibid., p.28

31 Professor Richard Mitchell, *Committee Hansard*, Melbourne, 29 September 2005, p.32

32 Professor Andrew Stewart, *Committee Hansard*, Melbourne, 29 September 2005, p.11

particular will not think it worthwhile to get a job when minimum wages under the proposed WorkChoices legislation fall steadily behind the current award rate. As the committee found in chapter 2, AWAs increase flexibility only in how working hours are paid for. This means that individual contracts increase flexibility for employers only, who can use them to achieve cost reductions.[33]

3.26 No one, it seems, outside Government and some business circles is convinced there is an economic imperative mandating the Government's industrial relations reform agenda. Yet the Government is pushing ahead regardless of growing concerns that it has turned a blind eye to community standards in the pursuit of economic objectives. The evidence before the committee points in the other direction – that the Government should be crafting innovative workplace changes that will deliver on economic *and* social outcomes. The committee agrees with the research by Professor Bradon Ellem and his colleagues which found that the 'old-fashioned low-wage solution' proposed by WorkChoices is a missed opportunity.[34]

3.27 The committee believes that the Government has failed to come up with solutions to the significant labour market and workplace challenges which lie ahead. Dr Ron Callus and Dr John Buchanan from ACIRRT have argued that a new approach is needed to remedy major problems affecting an increasing number of workers: 'More than a third of part-timers want more hours of work. More than half of those working more than 50 hours a week want to work less'.[35] In Dr Buchanan's view, WorkChoices has failed the challenge. It is a policy that will deepen rather than solve the major problems facing workers:

> Problems in work-life balance, skills shortages and productivity growth are real. They require the creative blending of standards for flexibility, not an erosion of standards in the name of flexibility. The changes proposed by WorkChoices will become part of the problem, not part of the solution.[36]

3.28 The debate over whether AWAs are necessary for productivity growth leads the committee to speculate on the relationship between enterprise bargaining and factors external to the workplace, such as the effect of a strong economy, low unemployment and demographic change on the demand for skilled and unskilled labour. The committee is particularly concerned by forecasts that Government policy is taking Australia down the American path of low skills and low wages, which will see the terrible social and economic consequences of New Zealand's failed deregulation policies revisited across the Tasman.[37] The committee fears that this will

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33 Professor David Peetz, *Submission 33*, p.28

34 Professor Bradon Ellem, *Submission 32*, p.4

35 Ron Callus and John Buchanan, 'What the Government should do to solve the problems of the labour market', *Sydney Morning Herald*, 20 October 2005, p.17

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

37 Professor Andrew Stewart, Submission 12, p.3; Professor Richard Mitchell, *Committee Hansard*, Melbourne, 29 September 2005, p.36

result in higher levels of poverty and economic deprivation with corresponding threats to social cohesion. Isolated pockets of skilled labour surrounded by unskilled and low-paid workers comprising women, young and casual workers and persons from non-English speaking backgrounds will be created. One commentator has argued that many of the harsher provisions of WorkChoices will come into play in a recession, especially for new employees. In this scenario, employers will be laying-off workers or threatening to do so unless employees agree to cut back on their conditions.[38] There is also a risk that consumer confidence will slide as a result of penalty rates being stripped away without the protection of awards.[39]

3.29 The Government's claim for increased flexibility and a simpler agreement-making process may also produce an insecure, unstable and de-motivated workforce. Professor Andrew Stewart has predicted that as a result of the Government's proposals:

> …we could certainly expect to see an even bigger gap developing between those fortunate enough to be in high skill, high demand occupations or in powerful unions, and those who…must effectively agree to whatever their employer demands. Needless to say, women…are likely to be disproportionately represented in the latter category. If the Government believes that this is the price that must be paid for improved economic performance, then so be it – but they should have the courage to come clean and say so, not hide behind spurious rhetoric as to individual "freedom" and "choice".[40]

3.30 The Government's claim that its workplace reforms will lift the employment rate has been brought into question by independent researchers. It has been pointed out that under the WorkChoices policy, the Government is only guaranteeing that the nominal value of the last safety net wage increases given by the Commission will be preserved. Yet there is no proposed indexation of the present minimum wage to ensure that its real value is maintained. It is the Government's belief that this new 'Fair Pay' Commission is necessary to create more jobs. Yet, the committee believes that the scope for increasing employment by reducing the minimum wage will be limited. This is because, as one commentator put it: 'the more wages are cut, the closer they come to bumping up against welfare benefits and the less incentive people have to take jobs'.[41]

3.31 The committee believes that the Government is taking an unnecessary risk with the economy with its WorkChoices legislation. It has failed to make an empirical economic case for its industrial relations reforms. It has failed to explain why a large unprotected underclass of workers and a widening gap between skilled and unskilled

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

39 Ms Sharan Burrow, ACTU, *Committee Hansard*, Sydney, 26 September 2005, p.57

40 Professor Andrew Stewart, *Submission 12*, p.3

41 Mike Stekette, 'The wages gap is about to get a whole lot wider', *Australian*, 13 October 2005, p.12

labour must be the price for its narrowly conceived vision of improved economic performance. The committee is concerned by the prospect that WorkChoices will be a blueprint for undoing the economic gains made over the last 15 years and will seriously threaten the quality of life and Australian society. It may even be a trigger for an economic downturn.

Chapter 4

Social objectives

4.1 In chapter 1 it was noted that while the Government placed emphasis on the employment enhancing claims of its policy and legislation, most of the adverse comment on the policy debate leading up the introduction of the WorkChoices Bill concerned 'quality of life' aspects of employment. The claim of 'improved flexibility' was seen for what it is: an extended period of hours of employment at a standard wage. There was much discussion on the effects of extended hours of work on family life, and on likely cuts to special leave benefits.

4.2 This chapter considers the proposed changes discussed in earlier chapters in relation to social effects, beginning with the likely effects on female wages and conditions and its implications for sex discrimination in the workplace. Women constitute the most significant group of workers experiencing continuing disadvantage in the workforce, particularly in regard to their ability to balance work and non-work obligations.

4.3 The committee has long noted the indifference of the Government to Australia's adherence to international labour obligations. It has presumed that the Government probably regards International Labour Organisation (ILO) conventions as having more relevance to advanced first world European countries than to countries like Australia. For this reason it is particularly important for this report to relate industrial agreement changes to ILO benchmarks.

The work and life balance

4.4 Advanced living standards represent the aspiration of progressive countries. These standards require wages and working conditions that provide a firm foundation for personal and family development. A floor under wages and a ceiling over working hours has been a basic principle – perhaps the central principle – around which industrial relations has been built for over one hundred years. The principle has become enshrined in the standard eight hour working day which is the basis of family-friendly work practices. The contests over pay and conditions have occurred on matters of detail rather than principle. This is still the case, but long fought-for rights over hours of work are now threatened by likely employer demands for 'flexibility' in working hours which have the potential to severely discriminate against people, especially lower-paid workers, in the services and other industries. Current agreements which might be considered to promote flexibility and balance in work and non-work obligations are varied and sometimes onerous, but they commonly include the availability of leave to care for dependents and flexibility around otherwise regular hours of work. Even now, the casualisation of the labour force, especially at the low-paid end of manufacturing and service industries, has no regard for the work and life balance of individuals and families.

4.5 Press commentary over past months on the issue of work and life balance has been as illuminating as academic submissions received by the committee. Economic correspondent Ross Gittins put the issue of flexibility and productivity in the perspective of workplace changes when he wrote:

> Now, there's no doubt that keeping our factories, offices and shops open for longer – ideally 24 hours a day – will raise their productivity. That might not be profitable, of course, if the longer hours were a lot more expensive in terms of penalty rates.
>
> But get rid of the penalties and the increased productivity will assuredly lead most of us to higher incomes. …Trouble is, doing so puts means ahead of ends. It focuses on the income, forgetting why we want it. It makes us servants of factories and offices rather than their masters. …It robs us of our humanity, taking away our leisure and making us more like robots. The thing about robots…is that they don't have families and don't need relationships to keep them satisfied with life.[1]

4.6 The increasing demand for family friendly working conditions is illustrated by submissions such as from the Independent Education Union of Australia (IEU), which cited an unmet need for flexibility for teachers, particularly in senior schools, and the unwillingness by administrators to embrace flexibility measures. The IEU pointed out that the option of working part-time is only a partial solution, as for many workers it is not financially viable, particularly when the part time worker has to pay for child care. The Union also noted that the teaching profession is ageing, a fact which brings with it the need for its members to care for aged or ill parents. Education is hardly alone in this regard. This is a timely reminder that, while child rearing is perhaps the most common reason for needing workplace flexibility, it is not the only one.[2]

4.7 Some analysis of 'family friendly' provisions contained in agreements has been done. At present, according to the Government's figures, 84 per cent of federal certified agreements contain at least one family friendly measure, and these provisions cover 94 per cent of employees working under such agreements.[3] On the other hand, only 70 per cent of AWAs contain any such provisions. The OEA submission reported that provisions such as these in AWAs are more common among those working in the private sector, as many public sector employers have made provision for family-related leave and flexibility through other means. Employees enjoying these benefits were more likely to come from a large organisation.[4]

4.8 The OEA submission also said that bereavement leave (paid or otherwise) was the most common 'family friendly' provision contained in AWAs surveyed. Given

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1 Ross Gittins, 'An efficient ride up the garden path', *Sydney Morning Herald*, 19 October 2005, p.11

2 Independent Education Union of Australia, *Submission 1*, p.11

3 *WorkChoices: A New Workplace Relations System*, Australian Government, 2005, p.64

4 OEA, *Submission 19*, pp.32, 33

that nearly half of those contained only one such provision – bereavement leave – for many AWA employees could constitute the beginning and the end of active provision for a healthy work and life balance.[5]

4.9 The Government's figures are contested by the ACTU, which claimed that:

> Analysis of the evidence upon which the government relies reveals that it double counts the incidence of provisions that are guaranteed through awards or legislation, i.e. where a clause [in an agreement] simply mirrors the provision of an entitlement under an award or in legislation, it is counted as having enhanced workers ability to reconcile their commitments. This is ludicrous. When the government's data is examined, only three provisions appear in agreements in double-digit percentages – carer's leave, part time work, and single day absences on annual leave. Each of these is standard in awards, having arisen from the Personal/Carers leave test cases in 1994 and 1995.[6]

4.10 A study by Dr Gillian Whitehouse, published in 2001, also contained findings which were significantly different from the Government's figures, as is illustrated by the following Table.

Percentage of agreements with reference to work/family measures[7]

	Collective agreements							AWAs			
	1995	1996	1997	1998	1999	2000	*Total*	1997	1998	1999	*Total*
Any work/family provision	0.6	8.5	19.3	22.0	15.2	12.0	*13.5*	12.7	15.5	7.4	*11.6*
Family/carer's leave[b]	0.3	3.4	4.2	3.8	2.2	1.6	*2.4*	2.4	3.4	1.5	*2.4*
Paid maternity leave	-	1.7	8.0	7.0	4.5	4.7	*4.4*	6.8	6.4	2.7	*5.1*
Paid paternity leave	-	0.4	4.2	2.2	1.2	0.7	*1.3*	6.0	5.4	0.9	*3.8*
Job sharing	0.3	3.8	5.9	4.6	3.1	3.6	*3.4*	0.8	2.0	0.3	*1.0*
Childcare[c]	-	0.4	0.8	0.6	1.7	0.2	*0.7*	0.4	-	-	*0.1*
Work from home	-	1.3	-	2.8	2.4	0.7	*1.4*	2.0	2.7	0.6	*1.7*
Career breaks	-	-	0.4	0.4	0.3	0.2	*0.3*	0.4	0.3	-	*0.2*
Elder referral	-	-	0.4	0.4	0.2	-	*0.2*	-	-	-	-
N (agreements)	319	236	238	500	580	443	*2379*	251	296	339	*889*

Notes

a. Low numbers of AWAs from 2000 in the sample and low incidence of work/family measures in collective agreements prior to 1995 mean that not all years are represented in the table, hence yearly Ns do not sum to the full datasets.

b. Family or carer's leave additional to sick leave

c. Childcare facilities at workplace or provision for subsidised places

Data source: ADAM databases of collective agreements providing coverage details and AWAs (March 2001), ACIRRT, University of Sydney, unpublished data.

5 OEA, *Submission 19*, p.33

6 ACTU, *Submission 22*, p.46

7 Dr Gillian Whitehouse, *Australian Workplace Agreements and Work/Family provisions*, Paper for presentation at ACIRRT/OEA Conference, University of Sydney, 7 September 2001. Accessed at http://www.oea.gov.au/graphics.asp?showdoc=/home/papers-whitehouse.asp on 18 October 2005, p.6

4.11 The stark differences in the findings can largely be attributed to Dr Whitehouse's omission of provisions which reiterate statutory rights or test case standards. A number of other disparities are also evident. The research differs from the OEA findings in concluding that 13.5 per cent of collective agreements and 11.6 per cent of AWAs contained a family friendly measure, and only 7 per cent of private sector AWAs contained such a measure, compared with 34 per cent in the public sector.[8] This is in direct contrast to the OEA's findings, and once again throws doubt on the accuracy of its statistics.

4.12 Dr Whitehouse concluded that her data:

> … provide little support for optimism about continuing growth in the use of industrial agreements for work/family provisions … although the prevalence of these types of provisions in collective agreements increased significantly from the mid-1990s, a downturn is evident since 1997/98. A similar trend is evident for AWAs, with the 1999 figure the lowest of the three years available for all items.[9]

4.13 Nor does analysis from other sources support the argument that AWAs are family-friendly. Professor Bradon Ellem made the point that women tend to bare the brunt of inflexible workplace practices and Australian Workplace Agreements are less likely to contain family friendly provisions:

> …[W]e do not find things like flexible working hours … we do not find measures to encourage affirmative action within particular workplaces or to have sexual harassment clauses or child-care facilities. We do not find those very particular and readily measurable changes taking place in AWAs – nor, indeed, as I say, in as many enterprise agreements as we might expect or look for.[10]

4.14 The Queensland Working Women's Service (QWWS) reminded the committee that the adoption of flexible conditions is often ad-hoc and that the availability of part-time work was not mandatory for employers of workers following the birth of a child or after significant changes in caring responsibilities. The QWWS also submitted that organisational culture was variable and frequently hostile to the concept of flexibility for workers, and that the career consequences for women choosing to be away from the workplace were often significant. Notably, in this context, it also informed the committee that 'pregnancy discrimination' was reported by 657 of their clients over a three year period, and that more than half of this cohort was employed in the clerical or personal services sectors.[11]

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8 Whitehouse, *op cit*, p.8

9 Whitehouse, *op cit*, p.5

10 Professor Bradon Ellem, *Committee Hansard,* Sydney, 26 September 2005, p.20

11 Queensland Working Women's Service, *Submission 31*, pp.4, 5

4.15 The relative disadvantage of women in terms of their income and prospects for promotion was set out in a paper by Marian Baird and Patricia Todd. The paper argues that the lack of support for the increasing number of women who choose to combine work with motherhood is a fundamental example of where workforce measures let women down. This lack of support includes the lack of universal access to paid maternity leave. Baird and Todd argue that the broader use of individual agreements and the reduction in the role of awards will serve to decrease protections for women who wish to have children.[12]

4.16 Professor Bradon Ellem also commented on the likely effect of increased coverage of individual agreements on women, submitting that:

> Australia has very high levels of casual work compared to other OECD countries, which in turn have negative effects on gender equity and skill development … the proposals do nothing substantial to address the work-life balance. In fact, we argue that the changes are likely to exacerbate the problems of low pay, fewer entitlements and job insecurity which already affect female employees.[13]

4.17 Notwithstanding the legislative entitlement to parental leave, the OEA's own data confirmed that less than one quarter of AWAs surveyed specifically allowed for it.[14]

4.18 Employer groups argued that flexibility benefits both their membership and workers. The Australian Industry Group (AiG) argued in support of flexibility in agreement-making, and observed that AWAs fit easily into a society which values the needs and circumstances of individuals in the determination of employment conditions. Conversely, awards and collective agreements were limited in their ability to cope with the differing needs of individuals.[15] This argument has also been made by the government in support of increasing the role of AWAs and 'simplifying' the award process.[16]

4.19 However, in her 2001 study of the effect of AWAs on the work and life balance, Dr Whitehouse noted that:

> … [S]tudies to date of the role of both collective and individual industrial agreements in delivering work/family measures offer little encouragement. Agreement databases have shown little incidence of provisions explicitly oriented to work/family goals and a high incidence of hours flexibility

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12 Marian Baird and Patricia Todd, *Government Policy, Women, and the New Workplace Regime: A Contradiction in Terms and Policies*, *Submission 32*

13 Professor Bradon Ellem, *Committee Hansard,* Sydney, 26 September 2005, p.19

14 OEA, *Submission 19*, p.33

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

16 See, for example, *WorkChoices: A New Workplace Relations System*, Australian Government, 2005, p.63

> measures, some of which may impede the successful combination of work and family responsibilities by reducing control and predictability of hours.[17]

4.20 The relative failure of collective and individual agreements to assist in balancing work and private lives was picked up on by a number of submissions. In addition to the unmet need for flexibility highlighted by the Independent Education Union[18] the Australian Nursing Federation questioned the extent to which employers took this issue seriously, observing that while promises by employers to facilitate the striking of a balance were frequently made, action was often restricted to a recitation of the human resources policy manual and little else. This, the Federation submitted, was the underlying reason for the relative lack of progress.[19]

4.21 The ANF also submitted that their members struggled to cope with tensions created by work and private demands, exacerbated by labour shortages in their industry. Indeed, it argued that: 'Nurses often conflicting roles as family members and community participants appears to be an increasingly key issue in the way nurses view their employment'.[20]

4.22 The union movement was not alone in levelling criticism at the wider use of individual agreements. Ms Kate Wandmaker, of the Western New South Wales Community Legal Centre, stated categorically that, of the thousands of AWAs she had given advice in relation to, she had never come across one which provided favourable conditions in relation to being able to better balance work and family commitments. Ms Wandmaker observed that AWAs were almost always drafted by employers, who have been slow in Australia to realise the benefits of promoting a balanced lifestyle for their employees.[21] In Scandanavia, better family policies are led by the Government and are then reinforced by companies, not the other way around.

4.23 It is clear to the committee that neither collective nor individual agreement-making in Australia has resulted in sufficient progress in striking a proper balance between work and non-work activities for many workers. This is a matter of serious concern, and warrants continued scrutiny in the future. However, the committee finds that, in all likelihood, AWAs and other individual agreements tend to offer a far less satisfactory result than do collective agreements for those workers who have family-related responsibilities outside work. The increased coverage of AWAs therefore augers badly for the increasing number of employees who require flexibility in their leave and hours of work. Any government initiative to reduce the availability of pattern or industry bargaining is likely to have a negative impact on the ability of employees to strike a balance between their work and private lives.

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17 Whitehouse, *op cit*, p.2

18 Independent Education Union of Australia, *Submission 1*, p.11

19 Australian Nursing Federation, *Submission 2*, p.6

20 ibid.

21 Western New South Wales Community Legal Centre, *Submission 28*, p.3

4.24 It is worth noting the United Kingdom, one of the countries the Prime Minister argues Australia needs to be more attuned with respect to labour regulation, has recognised the importance of the work and family balance. The UK Government legislated for six months government funded paid maternity leave and the right of employees of children under six (or 18 if the child has a disability) the right to request flexible hours, including part-time work.

4.25 The committee is also concerned about the negligent application of the no disadvantage test by the OEA, and the need for inclusion of leave provisions and negotiations for hours of work ceilings in the list of allowable matters. It is beyond doubt that a number of unscrupulous employers will attempt the exploit the 'flexibility' provisions to suit their own exclusive purposes. With the proposed changes to unfair dismissal laws, lower paid, and mainly young and female workers will be vulnerable to pressure from these unscrupulous employers. The committee will be paying particular attention to this issue when it considers the Government's proposed WorkChoices Bill.

The gender pay gap

4.26 The fact that women on average in Australia receive less pay per unit of time is well documented. The Australian Bureau of Statistics report on Employee Earnings and Hours reported that, as late as May 2004, average income for full-time non-managerial males was $974.90, compared with $828.00 for women. This represents a disparity of more than 17 per cent.[22] While significant strides have been made in recent decades, a disparity of this magnitude is of great concern. It is in this context that the committee has examined the effects of individual agreements on the gender pay gap.

4.27 The statistics are worrying. It is clear that women fare better, on average, under registered collective agreements, earning $678.50 per week in May 2004, than under registered individual ones ($636.60 per week). It is also clear that the difference between average earnings by males and females in each of the employment categories is greatest in the case of individual registered agreements. Men working under registered collective agreements earned on average $943.40 in May 2004, while those on registered individual agreements earned $1055.20. The latter figure represents an inequity of $418.60 per week, or nearly 40 per cent, between women and men working under similar employment arrangements.[23]

4.28 The Western Australian Minister for Consumer and Employment Protection pointed to figures in his own state, where the gender pay gap is greater than the national average and greater than it was prior to the introduction of individual agreements in 1993, as evidence of what effect individual agreements can have on gender pay equality. The Government submitted that the gender pay gap was up to 9

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22 Australian Bureau of Statistics, *Employee earnings and hours*, publication 6306, May 2004, p.4

23 ibid., p.25

per cent higher after the introduction of individual agreements without an award safety net in 1993.[24]

4.29 The committee is not aware of any evidence which suggests that an increase in the use of individual agreements would help to close the gender pay gap. Indeed, even under the OEA's own analysis of the ABS data, women are considerably less well off under AWAs than under awards or collective agreements. The OEA submission said that women employed under AWAs are worse off in both the private and public sectors:

> Overall, the data shows that AWA females earned approximately 60 per cent of their male counterparts' earnings. The overall [certified agreement] and Award female earnings ratio was higher, at 69 and 79 per cent respectively.[25]

4.30 The Textile, Clothing and Footwear Union of Australia provided the committee with an example of where women working under a certified collective agreement had been 'organised' into a lower level classification than their male counterparts. The certified agreement provided for an independent review of the classification structure by the AIRC, enabling the situation to be challenged. The Union points out that, under individual agreements, there would be no guarantee of pay equity in the first instance, let alone scope to mount a challenge to any unfair gender imbalance.[26]

4.31 The statistics and other evidence leave little room for doubt. It is clear that, on average, women fare worse under individual arrangements than under centralised or collective ones. The simple application of logic supports the conclusion that broader use of AWAs in the workplace will bring about a widening in the gender pay gap, and that women stand to lose from such a development.

4.32 The Committee is also concerned that in some states, such as Queensland and New South Wales, the state industrial relations commission have developed equal remuneration principles which have been used as a key mechanism to run pay equity cases to remedy the undervaluation of work undertaken primarily by women. Such a mechanism does not exist at the federal level, and with the Commonwealth Government planning to take over the state system, there will be little opportunity to achieve pay equity.

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24 Western Australian Government, *Submission 48*, p.14

25 OEA, *Submission 19*, pp.36, 37. This data is underpinned by research conducted by the Australian Centre for Industrial Relations Research and Training (ACIRRT) from sample AWAs provided by the OEA in 2002-2003.

26 Textile, Clothing and Footwear Union of Australia, *Submission 24*, p.20

International obligations

4.33 The ACTU submitted that the current bargaining arrangements breach Australia's international obligations under International Labour Organisation Conventions 87 and 98. The Council submitted that the Workplace Relations Act, as well as sections of the Trade Practices and Crimes Acts, had been singled out for adverse comment by the ILO in relation to Convention 98, particularly insofar as they neglect to promote collective bargaining, restrict the subject matter of agreements, and favour workplace bargaining over bargaining in other forms. The Council also argues that Convention 87 has been contravened through provisions in the Act which restrict strike action.[27]

4.34 The Committee majority acknowledges the analysis put forward by the ACTU in relation to Australia's likely breach of ILO conventions. However, due to the scarcity of evidence from other sources in relation to this matter, the committee majority is unable to comment further.

27 ACTU, *Submission 22*, pp.59-69. Other submissions on this issue included the Queensland Working Women's Service, *Submission 31*, Northern Rivers Community Legal Centre, *Submission 30*, and Transport Workers' Union, *Submission 36*.

Conclusion and findings

In this all too brief inquiry, the committee has examined issues which required further examination and reflection. The opportunity for the committee to take a full range of evidence, especially from employers and small business, was denied by the Government's decision not to agree to a motion from the chair seeking a short and reasonable extension of time to report.

The committee's examination of workplace agreements under the Workplace Relations Act (WR Act) finds that unregistered individual agreements and awards are by far the most common methods for setting the pay and conditions of workers, even though enterprise agreements have become more common under the operation of the WR Act. Data published by the Australian Bureau of Statistics shows that the Office of the Employment Advocate and the Minister for Workplace Relations have overstated the coverage of Australian Workplace Agreements (AWAs) across all industries. The committee finds that most AWAs are represented among managerial workers and in high-paying industries such as mining, which helps explain the distortion in official figures. The committee emphasises that the award system provides a very important floor to the wages and conditions of workers who rely solely on award provisions. However, the award system also partially underpins the conditions of workers who sign up to collective or individual agreements, which typically provide for above award wages.

The committee majority finds that most employees are in a weak bargaining position. The Government's rhetoric of 'choice' and 'flexibility' is designed to enable employers to unilaterally determine the pay, working hours, duties and employment conditions of workers. Employees on individual contracts have an inherently weaker bargaining position, and inherently weaker power, than workers under collective agreements. As the evidence to this inquiry indicated, workers can only exercise freedom of choice when they possess the power to choose. Unfortunately, few workers find themselves in this position. The committee majority finds that the WR Act neither requires fair bargaining nor prohibits unfair bargaining, even though the act lists 'fair and effective agreement making' as one of its main objectives.

During this inquiry the committee has seen a practical side of AWAs which is absent from material posted on the Employment Advocate's website, which generally paints a rosy picture of employee wages and conditions under AWAs. The committee heard from witnesses who had experienced a much darker side to individual contracts than is otherwise portrayed by the Government and employer groups. There are numerous examples of workers presented with 'take it or leave it' and 'pattern' AWAs which have been set in stone by employers, and pressured and coerced into moving from collective agreements to signing individual contracts. Others experienced a significant reduction in pay and entitlements under AWAs because they included annualised rates of pay and annualised hours of work, without appropriate compensation. The committee emphasises that these are not isolated cases but appear to be characteristics of most AWAs.

Nowhere is this clearer than on the issue of wages. The committee majority is concerned that the Office of the Employment Advocate, the Department of Employment and Workplace Relations and peak industry bodies refer to misleading and unreliable data which is alleged to show that workers on AWAs earn significantly more than workers on collective agreements. This is false. The committee majority examined independent research which shows that workers under collective agreements have higher wages and better conditions than do workers on individual contracts. Australian Workplace Agreements create poorer pay and conditions, especially for workers with weaker positions in the labour market. The committee majority is concerned that the long fought for rights over hours of work are now threatened by likely employer demands for 'flexible' work hours which have the potential to severely discriminate against people, especially lower paid workers in the services and other industries.

The Government's active promotion of AWAs is designed to further undermine the rights of workers and shift power away from the industrial relations commissions. The narrowing of awards and collective agreements has significantly enhanced managerial prerogatives, diminished the independence and choice available to employees and denied them access to collective agreements. The committee is concerned by evidence from expert commentators that AWAs are being certified by the Employment Advocate which appear to fail the no disadvantage test. It is concerned that the current requirement for AWAs to include a dispute resolution mechanism is so vague as to make it irrelevant for most workers. The committee strongly believes that any agreement-making system which includes individual contracts should be underpinned by a comprehensive set of awards and provide an arbitral role for the Australian Industrial Relations Commission to ensure that parties to a dispute enter negotiations in a reasonable and proper way. It should be a requirement of the Government's WorkChoices Bill that employers and employees bargain in good faith.

The committee's report examined the debate surrounding the effects of individual contracts on national economic performance. The committee majority finds that there is no evidence linking individual contracts with productivity growth, nor is there any economic evidence to show that AWAs will create jobs or address the current skills shortage. What evidence is available, especially from New Zealand, shows an opposite trend of falling productivity and rising numbers of 'working poor'. The committee majority notes that not even the Australian Industry Group and those academics sympathetic to the Government's cause are convinced by the argument that AWAs improve economic performance. It appears that the Government is pushing ahead with its radical industrial relations agenda despite growing concerns that it is ignoring community standards in the pursuit of ill-defined economic objectives.

The committee majority is concerned by the direction of the Government's industrial relations policies as foreshadowed in the soon to be released WorkChoices Bill. The policy framework behind this new legislation makes it clear that statutory individual contracts will be the preferred type of workplace agreement. Workers will have no choice but to accept an AWA or find another job. This will be the reality of what the Government calls a simplified agreement-making system. The Government has

indicated that all agreements, collective and individual, will take effect from when they are lodged with the Employment Advocate, and that workers will be able to trade away entitlements which Government advertising falsely claims are 'protected by law'. They are not.

Of greatest concern to the committee is that under the WorkChoices legislation, the most vulnerable workers in the community will be considerably worse off under the new minimum legislative standard. Protections which workers have enjoyed under a comprehensive award system will be stripped away. This will not only have disastrous consequences for low-paid, casual, part-time and young workers. It will also remove the basic structure of awards which currently underpins the conditions and entitlements of all workers, whether or not they are on collective or individual agreements or rely on awards. The committee looked to New Zealand and Western Australia to see the disastrous consequences of a system of individual contracts for individual workers and for productivity growth. The committee majority believes that the Government's WorkChoices Bill is a recipe for undoing the economic gains of the last 15 years, will seriously threaten the quality of life of many workers, and may even lead to an economic downturn.

The committee majority believes that the contents of this report demonstrate that the policy which is likely to underpin the Government's WorkChoices Bill is fundamentally flawed and at the least requires radical surgery.

The committee majority further believes this inquiry should be extended to allow proper consideration of a range of issues raised during the inquiry which if properly implemented could form the framework of a fair, equitable and decent industrial relations environment.

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

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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.

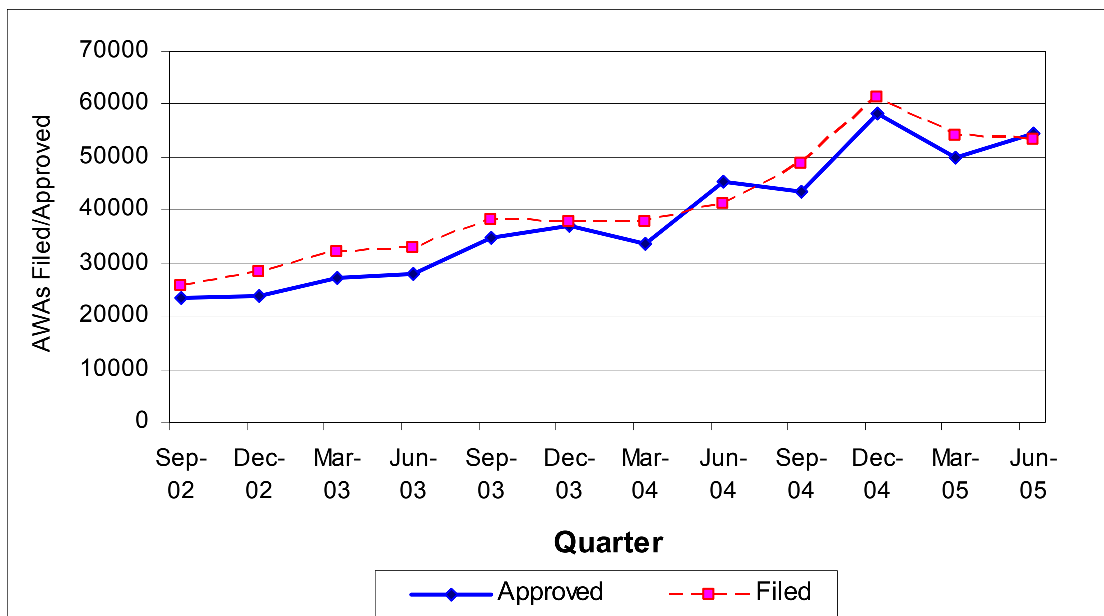
Government party senators agree with the AMMA that there is a national interest in preventing disputes which may have strategic economic consequences. Such inclusions in WorkChoices will give the Commonwealth minister no more powers than state ministers have under the various state emergency powers.[8]

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.

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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

Australian Democrats' Supplementary Remarks

These remarks of mine are deliberately characterised 'Supplementary Remarks', because on the whole I support the majority report, but would like to make some brief additional comments restating the Australian Democrats position on Australian Workplace Agreements (AWAs).

Why have AWAs?

Individual agreements (mostly common-law) are the most common agreement of all, and are particularly prevalent in, and important to, small business. Common-law agreements are often verbal, and not written.

As the majority report showed, a large number of agreements are individual agreements, with 31.2 per cent of all forms of agreement-making being unregistered individual agreements and 2.4 per cent being registered individual agreements (AWAs).

Individual agreements are most often used by small business, generally to pay over award payments. In larger business it is common for specialists, professionals, supervisors and managers to be on individual agreements.

The major advantages of unregistered individual contracts or common-law contracts are their practicality, their ease of use and understanding, and their wide acceptability. Their major disadvantage is when there is a breach of contract or dispute, as they are hard and costly to enforce since that requires resort to common-law courts. In addition there can be confusion when a relevant award or agreement will override the terms of a contract where there is a difference in entitlement.

One of the reasons the Democrats support AWAs as a matter of principle is that we believe that the statutory protections provided in individual agreements will nearly always be additional to and therefore superior to common-law protections, which historically in jurisprudence are built on master-servant precedents.

The Democrats support individual agreements being statutory industrial instruments, and oppose the notion that they should be exclusively common-law in nature.

We supported the introduction of AWAs in the Workplace Relations Act (WRA), and among our successful amendments were the vital protections of the global no-disadvantage test, and the requirement that AWAs must be offered to all equivalent employees in a workplace.

We support the view taken by the Committee in Chapter 2: *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.*

Statutory industrial instruments, otherwise known as registered agreements, are of three categories: collective industry-general awards, collective enterprise-specific agreements, and individual agreements. Common-law agreements are in two categories: collective enterprise-specific agreements, and individual agreements.

The Australian Democrats strongly believe that a mix of agreement making – collective bargaining (union and non-union), collective awards and individual agreements – provides necessary flexibility in a modern economy, but all agreements must be fair to both employees and employers, and there must be an adequate safety net for employees' wages and conditions.

The Democrats' view is that collective agreements and awards under the existing Federal Act are often better for workers overall than individual agreements, but we recognise that individual agreements are a common and necessary part of working life, and statutory provision must be made for them.

However, anecdotal evidence that workers were being forced on to AWAs and some workers were worse off as a result led the Democrats to initiate this Senate inquiry. It has been over eight years since AWAs were introduced into federal industrial agreement making and we thought it was time they were reviewed to ensure they are meeting their stated objectives.

Our conclusion is that improvements and greater protections need to be built into the system, as opposed to the much reduced protections that the Government are proposing. That does not mean we oppose more effective process in the approval of AWAS.

Are AWAs meeting their stated objective?

The Democrats believe that the basic architecture of AWAs in the WRA is correct, that is: they are underpinned by a global no-disadvantage test referenced to the relevant applicable award; AWAs must be offered to all equivalent employees in a workplace; they are available on a pattern format for small business in similar fields; duress in offering AWAs is prohibited; and a system of checks and approval is in place.

We accept that modest reform to improve the approval process is warranted.

However, as the majority report has outlined there are significant flaws in the current system, particularly with the regulation of the system. In particular we are concerned with:

- workers presented with 'take it or leave it' contract;
- duress being regularly complained of with no effective remedies available;
- evidence of pressure and coercion into moving from collective agreements or awards to signing individual contracts;

- failure of the OEA to diligently apply the global no-disadvantage test;
- that the OEA is both the promoter and regulator of AWAs.

The failure of the system means that some employers are taking advantage of workers not in a position to negotiate and are using AWAs to unilaterally end hard-won benefits and conditions.

The Government are proposing to make radical changes to the basic architecture of AWAs, which we are extremely concerned about and do not support, specifically:

- The Government's plan to abolish the global no disadvantage test adjudged against awards covering 20 allowable matters, and to replace it with a new 5 minimum conditions standard; and to
- Allow agreements to come into force before they have been approved and checked.

We are most concerned that workers with low bargaining power such as casuals and part-timers (particularly women), youth, unskilled, single parents, disabled, ethnic workers, will be forced on to the new version of AWAs which will mean they will be required to sign up to only the minimum conditions and standards.

This will lower wages across whole industries to the detriment of living standards and the Australian 'fair-go' tradition. It will force better employers to bring down their wages to compete with less scrupulous employers, and will be detrimental to the Australian economy and society.

Conclusion

We agree with the majority report that an agreement-making system which includes individual contracts should be underpinned by a comprehensive set of awards and provide an arbitral role for the Australian Industrial Relations Commission to ensure that parties to a dispute enter and conclude negotiations in a reasonable, fair and proper manner.

We do go further however, in that we also believe that there should be a national well-resourced independent regulator for workplace relations. We are concerned with the failure of the OEA – the promoter of AWAs – to properly apply the no-disadvantage test and to police duress.

Although the Government does plan to take away the OEA's compliance function, it intends to hand it to the low-profile Office of Workplace Services, thus making the Department of Employment and Workplace Relations a much-enlarged but far-from-independent regulator at the direction of the Minister. There is the obvious danger of partisan decisions being made.

We also agree with the majority report that there should be a requirement of the Government's WorkChoices Bill that employers and employees bargain in good faith.

Again we go one step further in that we believe that genuine choice should be built into the system, where if the majority of the employees want a collective agreement then they can, and those who legitimately want individual agreements also can.

We are concerned that monopolist employers such as Governments force whole classes of employees onto AWAs where they are inappropriate. We have never understood why large numbers of public sector workers, all doing the same work, and all in the same enterprise, should be pushed out of collective agreements on to AWAs.

Finally we agree with the majority report's conclusion that more time is needed to allow proper consideration of the range of issues raised so far during the inquiry. As mentioned, the Committee were unable to examine key witnesses and therefore to fully explore ways to improve the system to make it genuinely fairer, while still providing flexibility and choice.

Senator Andrew Murray

Appendix 1

List of submissions

Sub no:	From:
1	Independent Education Union of Australia
2	Australian Nursing Federation
3	Australian Education Union
4	Australian Services Union
5	National Pay Equity Coalition, Women's Electoral Lobby (National)
6	Rail, Tram and Bus Union
7	Unions NSW
8	Community and Public Sector Union – SPSF Group
9	Australian Mines and Metals Association
10	Australian Chamber of Commerce and Industry
11	Ms Jasmin Smith, NSW
12	Professor Andrew Stewart
13	Ms Thea Birch Fitch
14	FairWear Campaign
15	The Australian Workers' Union
16	Construction, Forestry, Mining and Energy Union
17	Queensland Nurses' Union
18	CPSU – PSU Group
19	Office of the Employment Advocate
20	Liquor, Hospitality and Miscellaneous Union
21	Restaurant and Catering Australia

22	Australian Council of Trade Unions
23	New South Wales Government
24	Textile, Clothing and Footware Union of Australia
25	Business Council of Australia
26	SA Unions
27	National Tertiary Education Union
28	Western NSW Community Legal Centre Inc
29	Uniting Church in Australia, Justice and International Mission Unit
30	Northern Rivers Community Legal Centre
31	Queensland Working Women's Service Inc
32	Professor Bradon Ellem, NSW
33	Professor David Peetz, Qld
34	Communications, Electrical and Plumbing Union
35	Families Australia
36	Transport Workers' Union of New South Wales
37	Association of Professional Engineers, Scientists and Managers, Australia
38	Shop, Distributive and Allied Employees' Association
39	Women With Disabilities Australia
40	Australian Industry Group
41	Transport Workers' Union of Australia
42	Employment Studies Centre, University of Newcastle
43	Centre for Employment and Labour Relations Law
44	Australian Manufacturing Workers' Union
45	Civil Contractors Federation

46	Victorian Government
47	ACIRRT, University of Sydney
48	Government of Western Australia
49	Council of Small Business Organisations of Australia Ltd
50	Enterprise Initiatives
51	Physical Disability Council of Australia Ltd
52	Professor Alison Preston, WA
53	Job Watch Inc
54	The Australian Workers' Union, New South Wales
55	Australian Breastfeeding Association
56	Queensland Retail Traders and Shopkeepers Association
57	Young Workers Advisory Service
58	UnionsWA
59	Mr Anthony Cooke, WA

Appendix 2

Hearing and witnesses

Sydney, Monday, 26 September 2005

Australian Industry Group
Mr Stephen Smith, *Director, National Industrial Relations*

Professor Bradon Ellem
Dr Chris Briggs
Dr Rae Cooper
University of Sydney, School of Business

Dr Kristin van Barneveld
University of Newcastle, Employment Studies Centre

Australian Council of Trade Unions
Ms Sharan Burrow, *President*
Ms Cath Bowtell, *Industrial Officer*

Australian Manufacturing Workers' Union
Mr Doug Cameron, *National Secretary*

CEPU
Mr Peter Tighe, *National Secretary*

Office of the Employment Advocate
Mr Peter McIlwain, *Employment Advocate*
Mr David Rushton, *Senior Legal Manager*

Melbourne, Thursday, 29 September 2005

Professor Andrew Stewart
School of Law, Flinders University

Transport Workers' Union of Australia
Mr Linton Duffin, *Federal Legal Officer*

Professor Richard Mitchell
Centre for Employment and Labour Relations Law, University of Melbourne

Shop, Distributive and Allied Employees' Association
Mr John Ryan, *National Industrial Officer*

Textile, Clothing and Footwear Union
Ms Kathryn Fawcett, *National Industrial Officer*
Ms Jenny Kruschel, *Victorian Branch Assistant Secretary*
Ms Vivienne Wiles, *Victorian Branch Industrial Officer*

Job Watch Inc
Ms Vera Smiljanic, *Research Worker*
Mr Andrew McCarthy, *Solicitor*

Australian Chamber of Commerce and Industry
Mr Scott Barklamb, *Manager, Workplace Relations*
Mr Christopher Harris, *Senior Adviser, Workplace Relations*

Australian Services Union
Mr Keith Harvey, *National Industrial Officer*

Perth, Tuesday, 25 October 2005

Professor Alison Preston, *Co-Director, Women in Social and Economic Research, Curtin Business School, Curtin University*

Associate Professor Anthony Cooke

Mr Chris Davies

Australian Mines and Metals Association
Mr Christopher Platt, *National Industry Manager*

Western Australian Farmers Federation
Mr Philip Brunner, *Legal Adviser*

UnionsWA
Ms Janine Freeman, *Assistant Secretary*
Ms Clare Ozich, *Industrial Officer*

Government of WA
Mr John Kobelke, *Minister for Consumer and Employment Protection, Western Australia*
Mr Sean Reid, Manager, *Policy and Economic Analysis and Labour Relations Division, Department of Consumer and Employment Protection, Western Australia*

Appendix 3

Tabled documents

Hearing: **Sydney - Monday, 26 September 2005**

Australian Manufacturing Workers' Union

- The Real Agenda Exposed
- OECD Productivity Comparisons
- Deregulation and Growth – Groningen Growth and Development Centre
- United States Department of Labour – Bureau of Labour Statistics November 2004
- Australia – New Zealand Wage Comparison

Hearing: **Melbourne – Thursday, 29 September 2005**

Shop, Distributive and Allied Employees' Association

- Workplace Express article titled *'Employment Advocate in stoush with leading AWA Producer'*.
- Application for certification of 170LK Agreement by LMJ Services Pty Ltd

Hearing: **Perth – Tuesday, 25 October 2005**

Unions WA

- Dwyer Durack Barristers and Solicitors – T.L.C Legal Opinion: Executive Summary

Government of Western Australia - The Hon John Kobelke

- Summary of Key Findings – ACIRRT Report

Appendix 4

Answers to questions on notice and additional information

Hearing: **Sydney – Monday, 26 September 2005**

Employment Studies Centre
received: 12 October 2005
Answers to questions on notice from Senators Murray and Barnett

Office of the Employment Advocate
received: 18 October 2005
Answers to questions on notice from Senator Campbell

Hearing: **Melbourne – Thursday, 29 September 2005**

Professor Richard Mitchell
received: 10 October 2005
Answers to question on notice from Senator Troeth

Australian Chamber of Commerce and Industry
received: 19 October 2005
Answers to questions on notice from Senators Troeth and Campbell

Textile Clothing and Footware Union
received: 26 October 2005
Answers to questions on notice from Senator Murray

Hearing: **Perth – Tuesday, 25 October 2005**

Government of Western Australia
received: 27 October 2005
Answers to questions on notice from Senators Campbell and Siewert

Additional information

Hearing: **Sydney, Monday, 26 September 2005**

Australian Council of Trade Union

- Deregulation in New Zealand
- The Failed New Zealand IR Experiment – Lessons for Australia

Australian Chamber of Commerce and Industry

- The Australian Economic 'Miracle': A View from the North
- The Australian Labour Market in the 1990s
- Australia: 2004 Article IV Consultation—Staff Report; Staff Statement; and Public Information Notice on the Executive Board Discussion
- Innovations in Labour Market Policies – The Australian Way
- OECD Economic Surveys Australia

[these papers are to be held on archive files]

Hearing: **Perth, Tuesday, 25 October 2005**

Australian Hotels Association (WA)

- response to adverse comment made at Perth hearing