Senate Bargaining Inquiry

Submission

D. No: 14/2005

Contents

INTRODUCTION

1. It is over a decade since the passage of the *Industrial Relations Reform* Act 1993 took effect in March 1994. This Act accelerated the transfer of responsibility for setting wages and conditions from Australian Industrial Relations Commission (AIRC) to the industrial parties. The legislation envisaged collective enterprise bargaining with agreements underpinned by the award system, and bargaining complemented by a secure and relevant safety net of minimum wages and conditions.

2. In is October 1993 Wages decision the AIRC referred directly to the complementary roles of awards and enterprise bargaining:

> *"The award system that currently exists is arguably based on considerations of equity and public interest. Any enterprise bargaining system must, of its very nature, lead to differing outcomes. In our view, the only way that they can be reconciled is if within the award system there are awards which provide equitable minimum standards of wage rates and ultimately conditions upon which enterprise bargaining is anchored. To that extent, the two can be complementary. "*

3. The 1994 reforms struck the appropriate balance between minimum standards and enterprise bargaining.

4. Because of opposition in the Senate, the 1996 amendments retained the core features of the 1994 scheme: the no disadvantage test and the capacity to maintain a fair safety net of minimum wages an conditions of employment.

5. The amendments to the system introduced by the WROLA in 1996, undermined the establishment of fair minimum by curtailing the capacity for regularly reviewing the relevance of the safety net, and introducing individual agreements (AWAs). Due to the low take up of AWAs the impact of these changes has, to date, been marginal on the economy, although clearly significant at workplace and individual level.

6. At the workplace level AWA workplaces have adopted a narrow cost-cutting to labour productivity. In doing so they have jettisoned the high road to productivity that promotes productive work practices, and which builds upon the skills and commitment of employees.

7. Thus, to the extent they have had any macro-economic impact, the 1996 amendments have detracted from rather than enhanced the reforms of 1994.

8. The government's proposed legislation will bastardise the system, abandon fairness and equity as central elements in the system and entrench and extend unfairness. It will not lead to sustainable productivity improvements. It will exaggerate existing gaps in bargaining power. At the same time proposals to hamper effective collective bargaining, and further fragment collective bargaining, will hand even greater bargaining power to employers.

9. In this submission the ACTU argues that:

- While there has been a growth in the number of employees covered by formal bargaining and over award bargaining, awards remain relevant in setting the wages of one in five employees. Award dependent workers are more likely to be women, young workers, employed on a casual basis and in jobs that require fewer educational qualifications. Awards remain relevant in underpinning bargaining for the majority of employees employed under collective agreements.

- The Workplace Relations Act denies workers the right to chose the form of bargaining that suits them. This is in breach of our International obligations under ILO Convention 98 and 87. The rhetoric of choice is undermined by the Act according the employer the right to choose the form of bargaining at their workplace and granting them the right to refuse to negotiate collectively with their employees.

- The parties ability to genuinely bargain can be measured by the outcomes of bargaining. Generally AWAs have delivered poorer outcomes for ordinary employees in terms of wages and conditions. Non-union bargaining whether individual or collective is associated with lower wages. Vulnerable groups of employees fair particularly poorly on AWAs. This must indicate that the bargaining process is weighted in favour of the employer in these workplaces.

- Bargaining generally has been associated with improvements in productivity. However, the extent of causation is unproven. Individual bargaining under the Workplace Relations Act is not widespread. At a workplace level AWAs have not been associated with the high road to productivity but have been focussed on cutting labour costs.

- The period during which bargaining has been extended into the economy has been associated with the growth in family hostile working arrangements and stagnation or worsening of the gender pay gap. This is most acute in AWA workplaces. Reform of the Act, which removes the role of the AIRC, will remove any capacity to intervene on equity grounds.

10. The system of bargaining in Australia does not meet the objective of the WRA, and the proposals to amend the laws will exacerbate the defects in the laws. In a system where arbitration is limited, the laws must promote fair bargaining practices.

11. The preference given in the Act to individual bargaining should be abandoned in favour of protection of collective bargaining.

12. Employers should be obliged to bargain in good faith with their employees collectively where that is the wish of the employees.

13. Unfair bargaining practices such as lockouts should have no place in our laws.

14. The parties should be free to determine the level at which they bargain.

15. The role, scope ane relevance of the safety net must be preserved for those who are unable to bargain, and to moderate the impact of the market on vulnerable workers including women and young people.

16. Not all workplace reform can be delivered through bargaining. The AIRC has proven over the years to be an effective regulatory instrument to promote equitable outcomes such as equal pay and family friendly working conditions. This should be preserved.

THE SCOPE AND COVERAGE OF AGREEMENTS

Overview

17. The ACTU believes that collective bargaining should be encouraged as the primary means by which improvements in wages and conditions are achieved. However there is a need for a secure set of minimum wages and conditions that are adjusted periodically to ensure workers who have similar levels of skills, training and job complexity are treated equitably.

18. While there has been a considerable growth in the coverage of formal agreements across the economy since 1994, there are still significant sections of the workforce who are not engaged in wage bargaining. For these employees awards continue to set wages and conditions of employment. Formal bargaining covers fewer than half (44 per cent) of Australian workers. Only a minority of these agreements operate to the exclusion of the award. Despite the growth of agreement coverage, awards remain an important instrument in setting the conditions of employment in workplaces, including those engaged on individual over-award wage setting, and those covered by registered collective agreements.

19. Within the formal bargaining sector, certified agreements with unions account for the lion's share of wage bargaining. Non-union collective agreements (s170LK agreements) covered only 8 per cent of employees in agreements made during 2002, and 11 per cent in 2003.

20. The ABS estimates fewer than 2.5 per cent of non-managerial employees are covered by AWAs.

The scope and coverage of types of wage bargaining

21. Registered agreements set the wages of 41.5 per cent of non-managerial employees. Individual agreements (including over award agreements) fix wages for 31 per cent of non- managerial employees. 22 per cent of these employees are award reliant.

Table 1.1: All non managerial employees

	Males	%	Females	%	Persons	%
Award only	613.2	18.6	922.0	25.9	1535.2	22.4
Registered collective agreement	1311.4	39.9	1531.3	43.1	2842.6	41.5
Unregistered collective agreement	96.8	2.9	77.9	2.2	174.7	2.6
Registered individual agreement	103.4	3.1	68.0	1.9	171.4	2.5
Unregistered individual agreement	1164.2	35.4	955.2	26.9	2119.4	31.0
Total	3289.0	100.0	3554.3	100.0	6843.3	100.0

Source: ABS 6306.0 2004 page 34

22. A quarter (24.3 per cent) of employees are employed under federally registered certified agreements, and about 14 per cent under State registered agreements. Since the change of government in Western Australia virtually all the registered individual agreements are federal AWAs.[1]

23. DEWR estimate 1.6 million employees are covered by current federal certified agreements.[2] Applying the ABS estimate of 24.3 per cent of employees covered by federally registered collective agreements results in a slightly higher estimate of 1.97 million employees.

24. The number covered by AWAs is harder to gauge. The OEA estimates 421,000 employees are covered by agreements approved over the three years to end May 2005[3] and reports that 200,000 AWAs were approved in the 12 months to end May 2005.[4] However applying the May 2004 ABS estimate of the proportion of employees covered by AWAs to the current labour force estimates of employed persons produces an estimate of only 195,000 employees covered by AWAs. Even if the proportion has increased over the 12 months, the OEA estimate and ABS estimate are a long way apart.

25. Formal collective bargaining dominates wage fixing in the public sector. Registered collective agreements cover 90 per cent of men and 92 per cent of women working in the public sector.

1 ABS 6306.0

2 DEWR 2004 page 17

3 OEA 2005 AWA statistics Who is making AWAs? , www.oea.gov.au accessed 17/07/2005

4 OEA 2005 The Truth about AWAs www.oea.gov.au accessed 17/07/2005

26. In contrast only a quarter of private sector employees are covered by registered collective agreements. Another quarter are covered by awards, and over award agreements account for four in ten employees. This is not to say there are low levels of bargaining in the private sector. Ninety percent of agreements certified under the WRA during 2003 (representing 68 percent of employees covered by agreements) were private sector agreements.[5]

Table 1.2: Percentage of employees by wage fixing method

Private Sector

	Award	Reg. Coll'tve	Unreg. Coll'tve	Reg. individual	Unreg. Individual	Working prop'tor	Total
Private sector males	19.0	23.3	3.6	3.0	41.7	9.5	100
Private sector females	31.0	25.2	2.8	2.2	34.9	3.9	100
All private sector	24.7	24.2	3.2	2.6	38.5	6.9	100
All sectors	20.0	38.3	2.6	2.4	31.2	5.4	100

Source ABS 6306.0 Nov 2004

Characteristics of employees covered by certified agreements

27. Collective bargaining is significantly more likely to occur in industries that are either male dominated or have a significant proportion of employees engaged in public sector employment. The industries with high collective bargaining coverage are:

- Electricity Water & Gas (79.9 per cent);
- Communication Services (62.6 per cent);
- Government Administration & Defence (89.3 per cent);
- Education (83 per cent); and
- Health & Community Services (54.8 per cent).[6]

28. Occupational category also matters, with collective bargaining prevalent amongst professionals (55 per cent of whom are on collective

5 DEWR 2004 p 19

6 ABS 6306.0 May 2004 p 29

agreements), associate professionals (40 per cent) and intermediate production workers (50 per cent).[7]

29. DEWR's biennial reports on formal bargaining under the WRA shows that women and young workers are represented amongst bargaining employees in proportion to their labour force participation, but that this is not so for part time employees or workers from NESB backgrounds. Only 16 per cent of part time employees are covered by certified agreements but they represent 29 per cent of employed persons.

Table 1.3 Coverage of designated groups by certified agreements 2002 and 2003

	2002		2003	
	All employees %	CA employees %	All employees %	CA employees %
Female	44	48	45	37
Part time	28	18	29	14
NESB	14	8	10	8
Age 15-19	7	12	7	7

Source: DEWR 2004

30. The ABS estimates that only 29 per cent of casual employees are covered by collective bargaining, compared to 44 per cent of permanent and fixed term employees. Casuals are concentrated under awards.

31. The average number of employees covered by certified agreements has been decreasing over time. DEWR claim that small business agreement making is on the rise, pointing to the fact that the average number of employees covered by a certified agreement is 72, down from 142 in 1997, and that there has been an increase in agreements covering fewer that 20 employees.[8] However this data refers to the number of employees covered by an agreement, not the number employed by the employer so will overstate the case.

7 As above p 28

8 DEWR 2004 page 18

Characteristics of employees covered by AWAs

32. It is almost impossible to compile a picture of AWA employees, due to the secrecy surrounding their approval.

33. Individual wage setting, including both formal and informal arrangements are more common than average in male dominated industries. Employees in mining (58 per cent of employees), manufacturing (44 per cent), construction (41 per cent), and wholesale trade (62 per cent) have their wages set by individual arrangements. Individual arrangements also account for a high proportion in of wage fixing in the Finance & Insurance (47 per cent) and property and business services (57 per cent) industries.

34. However the industries with high proportions of AWAs (compared to all AWAs) are retail trade (17 per cent) property and business services and manufacturing (each accounting for 13 per cent of AWAs.[9] Thus there is a mis-match between informal and formal individual wage setting.

35. This lack of congruence suggests that the individual bargaining in mining, construction, wholesale trade and the finance industry is more likely to be informal over award bargaining than AWAs which can undercut the award.

36. Individual wage setting is prevalent amongst managers and administrators (4 per cent), associate professionals (42 per cent) and advanced clerical, sales and service workers (52 per cent). The OEA's Employee Attitude Survey[10] found a similar occupational coverage pattern for AWA employees.

37. Part time employees are under-represented, accounting for only 12 per cent of AWAs in the DEWR/ACIRRT 2003 survey.[11]

38. Other characteristics of AWA employees are:

[9] DEWR 2004
10 OEA (2001) AWA Employee Attitude Survey 2001
11 DEWR 2004 p88

- AWA employees are much more likely to be young employees than average: 15 per cent of employees on AWAs are under age 21;[12]

- AWA employees have been with their employer for shorter periods than non-AWA employees;[13]

- Three quarters of AWAs are made in businesses employing more than 100 employees; and

- AWAs have increasingly been made in the private sector, asserting that 89 per cent of AWAs approved in 2002-3 were private sector. [14]

Characteristics of Award dependent workers

39. One in five Australian workers are excluded from either formal or informal bargaining. The AIRC, in its 2005 Safety Net Review said:

> *The characteristics of the minimum rates workforce reinforce the point that award-reliant employees lack the capacity or bargaining power to negotiate an enterprise agreement. Data from wave 1 of HILDA illustrate that in 2001 employees earning the minimum wage or less were disproportionately likely to be female, from a non-English speaking background, live in a regional area and/or work in a low-skilled occupation.*[15]

40. Women are not only disproportionately award reliant; 31 per cent of women employed in the private sector rely on awards to set their pay.[16]

41. Over a third of part time employees award-reliant.

42. Women and part time employees are excluded from informal, over award bargaining not from collective bargaining.

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12 DEWR 2004 p 88

13 OEA 2001

14 However the Committee should note that this is a recent trend. During the 1990s AWAS were disproportionately approved covering public sector workers. In 1998-9 a third of AWAs were in the public sector. In 2000 89 per cent of AWAs covered public sector workers. It was form this pool that most respondents to the OEA's 2001 AWA Employee Attitude Survey was drawn. Results from that survey are skewed by this bias.

15 PR002005 at Para 290

16 ABS 2005 page

43. Almost half (48 per cent) of all casual employees are award reliant. Casuals are under-represented compared to permanent staff covered by individual pay setting (23 per cent compared to 31 per cent). Casuals are also under-represented in collective bargaining (29 per cent compared to 44 per cent permanent employees).

44. Certain groups of workers with limited labour market power are more concentrated in casual jobs:

- Two-fifths (40%) of casual employees are aged 15-24 years;
- 36 per cent of mothers with children under 12 are engaged on a casual basis[17]; and
- Sole parents are disproportionately engaged in casual jobs.

45. Employees in certain occupations and industries are also less likely to bargain, although this has been reducing over time. In the female dominated industries of Retail Trade (31.3 per cent), Hospitality (60.1 per cent) And Health & Community Services (26.6 per cent) employees are award reliant.

Table 1.5 Methods of Setting Pay in Award-Reliant Industries

	Accommodation, Cafes & Restaurants %	Retail Trade %	Health & Community Services %	Total %
2000	64.7	34.9	37.4	23.2
2002	61.2	34.2	30.3	20.5
2004	60.1	31.0	26.6	20.0

[Source: 2000 & 2002, ABS Cat. No. 6306; 2004, ABS Cat. No. 6305.0.55.001.]

46. Elementary clerical, sales and service workers, (39.9 per cent) and labourers and related workers (37.0 per cent) are disproportionately award dependent.

The role of awards in setting wages and conditions

47. Awards continue to be relevant in workplaces for three reasons. Firstly only about 29 per cent of employees covered by collective agreements[18] are covered by comprehensive agreements, up from 20 percent in the 2000-2001

17 ABS 6342.0 Nov 2003 p 15

report. AWAs are also not comprehensive, with many amending only hours of work.[19] Awards continue to set some or all of the conditions of employment in those workplaces.

48. Secondly, it must be assumed that in a significant proportion of workplaces where unregistered individual pay setting occurs, the employer is bound by either a federal or State award, and the wages are set by way of voluntary over-award payments. In these workplaces the award is not displaced and is enforceable, and will presumably set some conditions of employment.

49. Finally the current legislation awards continue to form the no disadvantage test underpinning agreement making, which ensures that, even with a shift to more comprehensive agreements, awards remain relevant during the negotiation and approval of new agreements.

50. Changes to the award system need to be considered in light of the continued relevance of awards and the characteristics of award dependent workers.

51. For example in some awards superannuation is superior under the award that the Superannuation Guarantee Act. The *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1*998 provides that employees earning $350 per month will receive superannuation contributions, compared to the SG Act which excludes employees earning $450 per month. In others Long Service Leave is superior, for example Victorian nurses who qualify for double the leave under their award than under the default State laws.

52. Employees with less bargaining power rely upon the system of minimum wages and conditions for fairness in the workplace. Changes to the way minimum wages and conditions are determined will have a disproportionate impact union the most vulnerable groups in the workforce. This is one reason why the ACTU is vehemently opposed to proposals that will significantly weaken the safety net of minimum wages and conditions.

18 DEWR 2004 page 25 Data relates only to federally registered certified agreements

19 Mitchell, R and Fetter, J 2004

53. The announced transfer of responsibility for fixing minimum wages to the Australian Fair Pay Commission is to give effect to the government's long held view that minimum award wages should be lower than they currently are.[20] This must mean a reduction, over time, in the real value of the federal adult minimum wage (and presumably other minimum wages including award wage rates for other classifications). The government's announced changes to the content of awards will directly reduce the entitlements of these low-income vulnerable groups of employees.

20 Kevin Andrews reported by John Garnaut in Sydney Morning Herald, Tue 1 Mar 2005: "[T]he commission had consistently failed the unemployed by pricing them out of the job market through excessive award wage rises. It had raised minimum wages by as much as $70 more than it should have over the Government's term."

THE CAPACITY FOR EMPLOYERS AND EMPLOYEES TO CHOOSE THE FORM OF AGREEMENT-MAKING WHICH SUITS THEIR NEEDS

54. The Objects of the WRA include:

> *(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and*
> *..*
> *(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and*
>
> *(f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and*

In practice, these objectives are not met.

55. The WRA does not guarantee that employees choose the form of bargaining. Instead, employers choose. This has been the subject of adverse comments by the ILO Committee of Experts on the Application of Conventions and Recommendations, members of the judiciary, members of the AIRC and academic commentators.

56. The principle of freedom of association entails the right of employers and workers to not only establish organisations for the defence of their occupational and industrial interests. It also comprises the promotion of collective bargaining between workers and employers and the right to strike. The WRA clearly does not meet this obligation.

57. The Act allows employer to choose the form of bargaining by:

- Permitting employers to offer AWAs on a “take it or leave” it basis;
- Permitting employers to engage in offensive lockouts in pursuit of an AWA;

- Permitting employers to engage in unfair bargaining practices, especially permitting employers to refuse to bargain in good faith with the representatives of employees, and allowing employers to offer a non union agreement or AWA after negotiations have commenced with an union;

- Restricting third party involvement in bargaining. At the same time it is lawful for the government to coerce bargaining parties to offer certain types of agreements or agreements with certain provisions under threat of funding cuts;

- Allowing employers to choose which union they bargain with; and

- Restricting multi-employer or industry level bargaining.

58. The Act also restricts the content of agreements, with a particular focus on restricting agreements that promote collective bargaining. If the WR Amendment (Right of Entry) Bill 2004 becomes law the WRA will further restrict the capacity of employers and employees to agree arrangements that suit their needs by outlawing right of entry clauses in certified agreements. This constitutes an unnecessary restriction on the freedom of the parties to agree conditions that suit their circumstances, subject only to fair minima.

Permitting employers to offer AWAs on a take it or leave it basis

59. Employers can offer AWAs on a take it or leave it bases to new employees. This has been held to be neither duress, nor discrimination.

60. This was the view of the government when it introduced the legislation, as the Explanatory Memorandum to the WROLA stated, “to stipulate that entry into an AWA is essential to obtain employment with the offeror will not, of itself, necessarily constitute duress”.

61. In *ASU v Electrix* Marshall J indicated that this was unconscionable:

> *It's also my view that the conduct of Mr McLeod, in effectively saying to meter readers "*it's the AWA or your job*", is unconscionable conduct*

which no employee in a humane, tolerant and egalitarian society should have to suffer.

However this view was not accepted and in *MUA v Burnie Port Corporation*[21] where the Court held making employment conditional upon signing an AWA was not duress, even though there was no other prospect of employment in the regional area available to the employees.

62. In the same case the Court has also held that a "take it or leave it" AWA is discrimination in breach of s 298L(1). The Full Court said:

> *28 In the circumstances we are unable to discern any legislative policy or intent that an employer be prevented from offering to a prospective employee one form of industrial regulation under the Act rather than another. Put another way, we do not discern a legislative policy or intent in respect of the anti-discrimination provisions in ss 298K(1)(d) and 298L(1)(h) that it is the prospective employee, rather than the employer, who is to be entitled to choose the mode of industrial regulation under the Act that is to apply to his or her employment, where more than one form of such regulation is available in the prospective employer's workplace. Yet that consequence flows from the Union's interpretation of those provisions. In our view the Union's interpretation is not supported by the ordinary and natural meaning of the provisions or by any discernible legislative policy or intention in respect of prospective employees.*

63. This interpretation gives employers the whip hand in determining the form of agreement making at their workplace.

Lockouts

64. Section 170WB and 170WC provide for AWA industrial action, whereby an employer may lock out an employee for the purpose of compelling or inducing an employee to make an AWA on particular terms and conditions. Under section 170ML(3) an employer may lock out employees in pursuit of a certified agreement, or in response to union action in pursuit of an agreement.

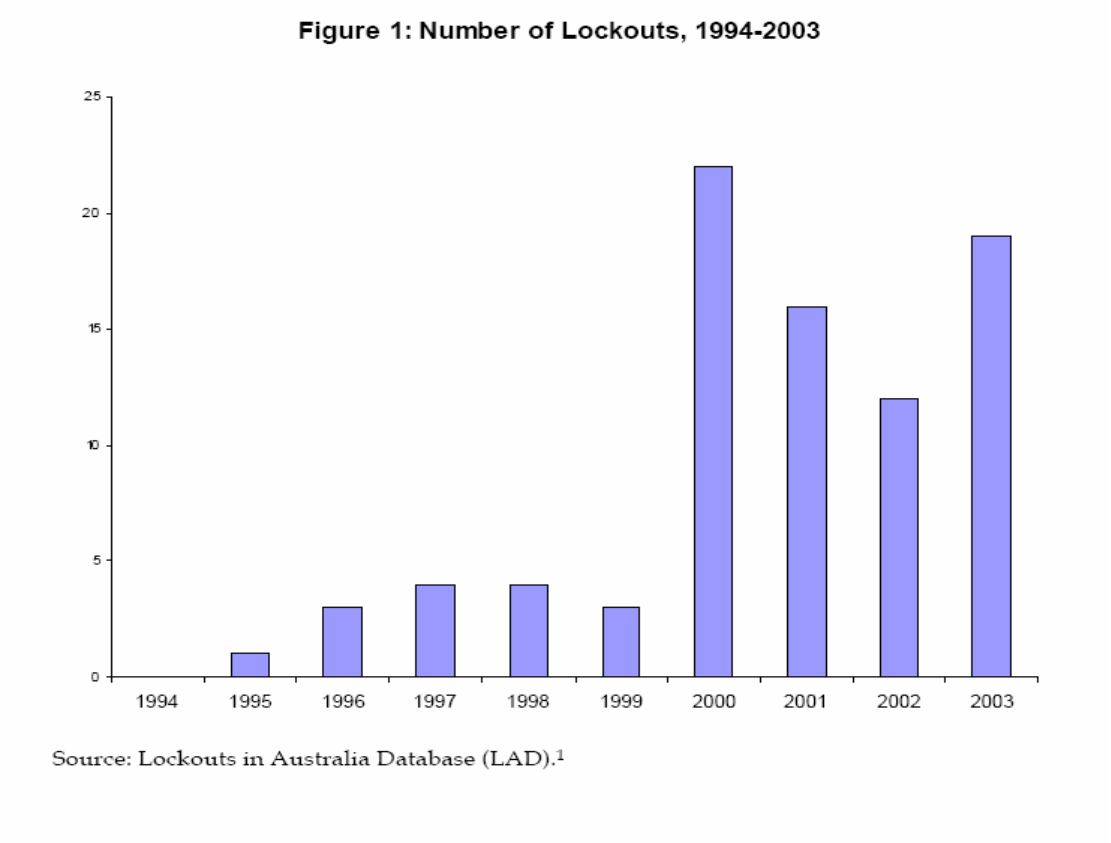
65. Lockouts have been used to deny employees the right to collectively bargain, and to compel employees to accept AWAs. Lockouts have also been used to drive down the settlement terms in collective bargaining. In some cases they

21 Maritime Union of Australia v Burnie Port Corporation Pty Ltd [2000] FCA 1189 (24 August 2000)

have been used by employers in advance of any industrial action, or have constituted a disproportionate response to industrial action.

66. The notion of protected lockout is nonsensical, especially in the context of AWAs where the prospect of an individual suing their employer for economic loss is slim, and damages are likely to be limited to the wages that the employer would otherwise have paid. Lockouts are essentially a coercive tool against employees. Briggs[22] found that the WRA's sanctioning of offensive lockouts is unique amongst OECD nations. In some nations lockouts are not permitted at all, while in others lockouts are only permitted in response to evidence of a serious imbalance of bargaining power in favour of the employees.

Figure 2.1 Numbers of Lockouts 1994-2003



Source: Briggs 2004 page 18

22 Briggs, (2004) C Lockout law in Australia: Into the Mainstream ACIRRT working paper 95.

67. Briggs also shows that the use of lockouts, while still rare, has been increasing, while employee industrial action has been declining. In 1994-1998 lockouts accounted for only 1.6 per cent of working days lost, by 1999-223 they accounted for 9.3 per cent of days lost. In the manufacturing sector lockout action accounted for 26.6 per cent of working days lost in the period 1999-2003. Briggs notes that, if not for employer industrial action, working days lost in manufacturing would have declined during the period 1999-2003.

68. Briggs assessment is that between one fifth and a quarter of lockouts were instigated by employers and were not in response to union or employee industrial action. In addition, Briggs reports that disproportionate retaliatory lockouts are being used, where a stop work meeting is countered by lockouts of up to 4 weeks.

69. In the ACTU's view lockouts have no place in Australian labour laws. Instead there should be good faith bargaining provisions and a role for the AIRC is assisting the parties settle disputes.

Lockouts in pursuit of AWAs

70. The most offensive lockouts are those used to coerce employees into signing an AWA. As Briggs says:

> *"There is clearly no equality or "parity of arms" in relation to AWA industrial action. Individual employees have no capacity to effectively withdraw their labour. Only employers have the capacity to access AWA industrial action. Lockouts should have no role in the making of individual agreements) or more broadly agreement making with groups of non-union employees)."*[23]

71. Lockouts have been used in conjunction with an ultimatum that employees will not return to work until an AWA is signed. There is no need for negotiations to have proceeded in order for a lockout to be considered AWA industrial action.[24]

23 Briggs (2004) p 37

24 Australasian Meat Industry Employees' Union v Peerless Holdings Pty Ltd [2000] FCA 1047 (18 August 2000)

72. AWA industrial action is politically sanctioned coercive behaviour. In *AMIEU v Peerless Holdings* the employer both locked out the employees and made use of casual replacement labour. Finn J said:

> *'AWA industrial action is a statutorily mandated instrument of compulsion that a negotiating party can bring to bear on the other for the purpose of securing the agreement proposed. It may be that in given circumstances resort to it is or appears to be unfair. Compulsion readily can be seen to have that attribute or appearance.'* [25]

73. In response to the union submission that the lockout amounted to coercion, he noted that coercion must be illegitimate, and the WRA legitimises lockouts as a tactic.

> *'The pressure authorised by the Act in the case of both protected action and AWA industrial action may well be coercive. But it is, nonetheless, permitted to be applied. And the financial hardship it might occasion because of refusal to remunerate is a consequence which can inhere in the right the Act gives an employer to refuse to pay.'* [26]

74. There is no effective circuit breaker involving AWA industrial action. Unlike protected union industrial action, where s170MW provides for the suspension of a bargaining period, applications under s127 for orders to cease AWA industrial action are treated cautiously, and the Commission has been reluctant to exercise its discretion to order the action stop.

75. In one case the last remaining employee to hold out against an AWA was locked out for 10 weeks until the AIRC concluded, "enough was enough".[27] In the case involving G & K O'Connor's and the AMIEU 334 employees were locked out for 8 months. This approach fails to recognise the disparity in bargaining power of the parties.

Lockouts in the context of collective bargaining

76. In the context of collective bargaining lockouts constitute an unfair bargaining practice.

25 Australasian Meat Industry Employees' Union v Peerless Holdings Pty Ltd [2000] FCA 1047 (18 August 2000) at [39]

26 as above at [53]

27 Australasian Meat Industry Employees Union v The Employer, SDP O'Callaghan , Adelaide, 15 May 2003 PR931516

77. According to Briggs they are not permitted in comparable nations except where there is an obvious imbalance in favour of the union. This is not the case in Australia, where lockouts can be used pre-emptively by employers. Employers have been able to engage in lockouts without giving any notice, and where there is no industrial action in place by the employees. . Three days notice may not be required. An employer may institute a lockout simply on receipt of notice by a union of intention to take protected action. In *AMIEU and Castricum Brothers* SDP O'Callaghan allowed an indefinite lockout to continue, finding it was general protected industrial action. He said:

> *Section 170MO(3)(a)(i) does not preclude an employer from having mixed motives or impure ulterior purposes or from seizing the initiative in the face of a Notice issued by a union when that employer takes lock out action pursuant to s.170MO(3) of the Act.*

Unfair labour practices including refusal to bargain in good faith with the representatives of employees

78. Section 3(e) and (f) of the WRA require the system to promote fair agreement making and to promote freedom of association. Freedom of association is not the right to join a union, it is the right to enjoy the benefits of collectivism. But the WRA does neither ensure a right to collective bargaining. Nor does it ensure fair bargaining.

79. In *BHP Iron Ore v AWU*[28] the Federal Court held that offering AWAs that were superior to the collective instrument was permissible. It also held that refusal to negotiate a collective agreement did not constitute prejudicial treatment on the grounds of trade union membership.

80. As a result of this decision, it is permissible for an employer to offer different wages and conditions to employees doing the same work based only upon whether they choose to be represented and bargain collectively or sign up to an individual contract.

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28 BPH Iron Ore v Australia Workers' Union [2000] FCA 430 (7 April 2000)

81. In *Morris Mc Mahon and AMWU*[29] the substantive dispute involved the company's desire to reverse a compressed working week roster. However the dispute centred around refusal by the company to enter in to a certified agreement of any form, and in particulate an agreement under s170LJ, and upon the refusal by the company to enter into any agreement, formal or informal with the AMWU. The evidence of the company was that the union represented a substantial number of the employees. In proceedings involving an application by the company for a certificate under s166A Justice Munro noted that he had no powers to prevent or address this, despite his view that the employer had not come with clean hands:

> ***[30]*** *Where a refusal to bargain collectively with representatives of employees is associated with a tactic involving a high degree of avoidance of genuine negotiation by the selection of other possible negotiators more acceptable to the employer negotiator, in my view the employer's conduct is not consistent with bargaining in good faith with the organisation of employees which is the negotiating party under the statute for purposes of the bargaining period validly constituted.*
>
> ***[31]*** *So far as I am aware no such power is available. It is for a court to determine whether any such conduct may be a basis for a defence, or justification against actions mounted by an employer. I can only record that, in the terms familiar to the equity jurisdiction, this employer does not come from the industrial arena with clean hands.*

82. While the AIRC can conciliate matters, and even issue directions to asset the in negotiations, it has no power to require an employer to bargain with a union even if that it the desire of the majority of employees at the workplace. In *Sensis v CPSU* [30] a Full Bench of the AIRC held that:

> ***[25]*** *It follows from these provisions that the power to issue directions should be exercised so as to give primacy to the object of ensuring the primary responsibility for determination of terms and conditions rests with employers and employees at the workplace or enterprise level and that the choice of the form of agreement is a matter for them. The Commission's role is facilitative. In carrying out that role it should remain neutral about the form of agreement while attempting to protect the rights of each party. It is a part of the scheme that employees who so choose may be represented in negotiations by their union: s s.170LJ , 170LK(4) and (5), 170LL and 170LN. Any directions the Commission makes should protect that right. The Act also provides that an employer may seek to make an agreement directly with its employees. In making directions the Commission should also protect that right. The power to make directions should not be exercised so as to pre-empt the right of either party to seek the type of agreement that it prefers.*

29 Morris McMahon & Co Pty Ltd and AMWU Industries Union, Munro, J Sydney, 8 May 2003 PR931192

30 Sensis Pty Ltd V CPSU, Full Bench, Melbourne, 28 October 2003 PP939704

83. In *Tenix Solutions*[31] the company was refusing to negotiate with the union, and instead offering AWAs despite a petition signed by the 89 out of 120 employees indicating a desire for to be represented in collective bargaining. In issuing directions that a secret ballot be held Wheelan C noted that:

> ***[41]*** *The Commission clearly cannot require parties to reach agreement. Ultimately, as [the company] has submitted, each party has its rights to pursue whatever option it wishes to pursue, in whatever form it chooses provided it acts within the requirements of the Act. The directions which I intend to issue will not prejudice those rights.*

Permitting third parties to use funding or other inducements to coerce bargaining parties to offer certain types of agreements

84. The government has, in a number of industries, used its powers as a purchaser or funding body to require employers to offer AWAs. This was held not to constitute coercion by the federal Court in NTEU v Commonwealth. [32]

85. In the implementation guidelines to the Building and Construction Industry National Code state:

> *The Act provides for more effective choice and flexibility for parties in reaching workplace agreements. AWAs and CAs are available and are designed to enable employers and employees to take responsibility for their own workplace arrangements and relations. Parties should ensure that implementation of the code supports a direct relationship between employees and employers and contractors/subcontractors, with a reduced role for third party intervention in workplace arrangements. (emphasis added)*

31 ASU and Tenix Solutions Pty Ltd, Wheelan C, Melbourne, 17 December 2004, PR954451

32 National Tertiary Education Industry Union v Commonwealth of Australia (includes corrigendum dated 15 April) [2002] FCA 441 (12 April 2002)

Employer choice of union bargaining party

86. In *CPSU v Telstra Corporation*[33] the court confirmed that an employer can refuse to bargain with a union, in effect allowing to elect which union it wished to bargain with, despite the wishes of the employees. If the government was even half serious about choice in bargaining, the legislation would not permit employers to shop around for the union with which they prefer to bargain, it would respect the view of the majority at the workplace.

Multi employer bargaining

87. The WRA also unduly restricts the capacity of employees and employer to choose the level at which they bargain. While s170LC provides for multi-employer agreements, there are procedural hurdles to making multi-employer agreements. They can only be approved by a Full Bench of the AIRC, and must pass a public interest test, having regard to whether workplace level bargaining would be more appropriate. There is no protected industrial action in pursuit of a multi-employer agreement, and agreements covering a single business will over-ride a multi employer agreement to the extent of any inconsistency.

88. It appears that the size of the employer, rather than the wishes of the employer and union parties are determinative. In the *Master Grocers' Association* case the AIRC rejected the submissions of the employer and the union that the grocers would be disadvantaged by being forced to bargain at enterprise level:

> *The MGAV has submitted that because of the way in which its members choose to operate, agreements applying to a single business are impractical, costly, likely to lead to unemployment and will put the members of the MGAV at a competitive disadvantage. We think those submissions overstate the difficulties. The growth in agreements certified pursuant to Part VIB since 1994 has been very significant. It has not been confined to large employers. Experience suggests that many small to medium-sized businesses are able to enter into single-business agreements, assisted in many cases by advisers such as employer associations and registered organisations.*

33

89. In the four years 2000-2003 only 100 multi-employer agreements were certified. During 2002-03 they covered only 9 per cent of employees employed under a certified agreements.[34]

90. The government's proposed Workplace Relations Amendment (Better Bargaining) Bill 2005 will, if enacted remove the protection afforded to industrial action taken in pursuit of agreements made in respect of related corporations.

91. These restrictions, which are designed to fragment the collective strength of unions, undermine principle of allowing the parties to an agreement to determine the level at which bargaining should occur.

The content of agreements

92. The WRA also restricts the matters that can be included in agreements expressly and due to the requirement that agreements only relate to matters pertaining to the employment relationship. Matters expressly excluded are clauses that are said to offend the freedom of association provisions, and compulsory bargaining fees. Under the proposed Workplace Relations Amendment (Extension on the Prohibition of Bargaining Fees) Bill 2005 bargaining fees will be prohibited in agreements made under Sate industrial laws.

93. The government's Workplace Relations Amendment (Right of Entry) Bill 2004 will, if enacted, prohibit agreements governing when and how unions access the employers premises.

94. The ACTU submits that these restrictions constitute an unwarranted limitation on the freedom of the negotiating parties to bargain, and are directed at curtailing the role of unions in the workplace, even where such role is agreed to by employers.

95. In addition the Commonwealth uses its procurement powers (in the private sector) and funding powers (in the public sector) to coerce parties to restrict the content of their agreements. The National Code of Practice in the Building

34 DEWR 2004 page 24

and Construction Industry restricts the scope of agreements and the matters that can be incorporated into an agreement. Unless employers comply, they will be ineligible to tender for projects that attract Commonwealth funding. Under amendments announced by the Minister in July 2005, all agreements entered in to by an employer must comply with the code, including agreements covering projects that involve no Commonwealth money.

96. The Code's implementation guidelines restrict the content of agreements that parties may enter into, despite such matters being deemed matters pertaining to the employment relationship. For example the code prohibits parties agreeing to clauses governing the engagement of contractors:

> *The code prohibits head contractors or clients requiring (either through the tendering process or otherwise) that subcontractors or material suppliers have particular workplace arrangements in place, whether that be in the form of a CA, AWAs, or a state enterprise agreement.*

The impact of proposed changes

97. The Government's 26 May 2005 reform announcements include a commitment to implement government policy. The ACTU infers that this includes the promotion of individual contracts as the preferred means of regulating employment relationships, by affording even greater primacy to individual contracts over collective bargaining. This is abhorrent to the government's stated position of choice; it offends freedom of association that includes the notion of freedom to act collectively in pursuit of employees' interests, and conflicts with the Australia's obligation to promote collective bargaining.

98. Any legislative reform should instead respect freedom of association and promote collective bargaining. This should include, as a minimum, an obligation upon employers to negotiate with unions in good faith where the majority of employees at the workplace wish to be represented collectively.

99. The ultimate purpose of this kind of duty is to ensure that the parties have every possible opportunity to reach agreement. Such a duty is common in other jurisdictions.

THE PARTIES' ABILITY TO GENUINELY BARGAIN

100. Genuine bargaining is facilitated by collective bargaining. With the exception of corporate high flyers, individual bargaining is unlikely to involve genuine bargaining. This is most apparent for workers with fewer educational qualifications, lower skills, and who are vulnerable in the labour market.

101. The imbalance in the bargaining position of the parties, and the capacity for collective bargaining to redress this imbalance is reflected in the comparatively poor outcomes for ordinary employees covered by AWAs when compared to collective agreements. This appears in both objective assessments of the content of agreements, and in employee satisfaction with agreement-making and agreement outcomes.

102. The WRA restricts genuine bargaining by restricting the capacity of workers to redress this imbalance through strike action. Instead it reinforces the imbalance by preferring individual bargaining to collective, and by fragmenting collective bargaining by the prohibitions on multi-employer agreements and sympathy action.

The bargaining process

103. There is scarce evidence about how agreement making takes place, due in part to the secrecy surrounding AWA making. Nonetheless it is clear that AWAs are employer-initiated, not employee initiated. In the 2000 OEA survey of 688 employers, employer preference for AWA's was the most commonly occurring reason for introducing AWAs, while employee preference was the second lowest. 16 per cent of employers admitted a reason was to limit collective bargaining at their workplace.

104. This data includes AWAs applying to managerial level employees, and therefore overstates the bargaining power of the employees involved.

105. The introduction of AWAs was unwelcome in one in five workplaces, where employers encountered employee resistance. In one in four workplaces employers encountered union resistance.[35]

106. The OEA employer survey found a third of employers (35 per cent) didn't discuss the matter with their employees before drafting the AWA. One fifth of employers neither discussed the AWA before drafting it, nor changed the AWA in light of employee input. In four in ten workplaces the AWA did not change following discussions. Where change did occur following discussions with employees this much more likely amongst professionals and associate professionals than elementary clerical employees and tradespeople.[36] For an organisation not shy of self-promotion, the OEA survey is extremely cautious in concluding that there is any negotiation, saying instead that its figures do not show the success of discussions, but rather *"suggest that employees may have a degree of influence in drafting the AWA".* Hardly a ringing endorsement of equal bargaining!

107. The OEA employee survey asked whether AWA covered employees were willing to negotiate wages and conditions with their employer. A quarter of AWA employees were not willing to do so, and approximately a third of elementary clerical, sales and services employees on AWAs were unwilling to negotiate with their employer.[37] Given these "agreements" are purported to be voluntary this is an extraordinary finding.

108. The OEA has conducted surveys of employers and employees to determine their satisfaction with AWAs agreement making. Peetz found that, amongst ordinary (ie non-managerial and professional level employees) AWA employees are less satisfied with their work than other employees. He found ordinary AWA employees, compared to the control group:

- were less satisfied with their pay (43 per cent to 53 per cent);
- were less satisfied with their pay and conditions (46 per cent to 52 per cent);

35 OEA (2000) Trends in the processes and outcomes of employers making Australian Workplace Agreements (AWAs) 2000 p 21

36 Above , page 36

37 Gollan 2001 page 31, 32

- were less satisfied with their control over hours (50 per cent to 57 per cent);
- were more likely, amongst full time workers to have experienced an increase in hours of work (33 per cent to 25 per cent);
- had experienced work intensification (53 per cent to 47 per cent); and
- found it harder to balance their work and family life (39 per cent to 34 per cent).

109. These findings confirm that AWAs are often non-voluntary arrangements, and that AWA employees are generally less satisfied with their wages and conditions that other employees.

The process for making AWAs is seriously flawed

110. The Objects of the WRA include:

> *(d) providing the means:*
>
> > *(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards;*

111. The no disadvantage test is the tool for ensuring this objective is met. A number of studies have criticised the test itself as inadequate. (eg the test only applies at certification or approval not throughout the life of the agreement).[38] Others have been critical of both the AIRC and the OEA in their scrutiny of agreements against the test, especially the OEA's practice of accepting employer undertakings.

112. In the ACTU's experience, the OEA's scrutiny is flawed. The ACTU is aware of instances where the wrong award has been used as the benchmark. When unions complain the OEA refuses to consider the matter unless the worker has formally appointed the union as the bargaining agent.

113. Mitchell and Fetter found evidence of agreements approved with no wages clauses, including 5 of which also purported to over-ride the award. They also

[38] Mitchell et el , 2004. Protecting The Workers Interests in Enterprise Bargaining: The No Disadvantage Test in the Australian Federal Industrial Jurisdiction

found AWAs approved which gave the employer unilateral power to reduce the non-performance related component of wages during the life of the agreement.[39] While the numbers are low, this is a purely simple test. If two per cent of their sample of 500 agreements clearly failed in respect of wages, how many fail when compared to the award?

114. The OEA's website contains an agreement (Retail Industry (RET05) where the employer undertaking to meet the NDT was met by the provisions of one weekly hire video, to the value of $6.00). Any pay increase over the life of the agreement is at the discretion of the employer.

115. In *Yurong Holdings Pty Ltd v Renalla* the SA IR Court held considered an (unfiled) AWA which underpaid the applicant by 25 per cent, plus cashed out all holidays. The OEA is reported as defending the AA on grounds it was not formally approved by his office. This defence ignores the fact, found by the Court, that 50 other employees of the business were employed on similar AWAs.[40]

116. In the case of Meirbin Mushrooms the OEA refused the approve AWAs following Federal Court action by the AWU that resulted in the reinstatement on March 15 of four mothers who were sacked from the farm when they refused to sign the AWAs, fearing pay cuts of up to 25%. The OEA's refusal notice said it rejected the AWAs because workers did not genuinely consent to the individual contracts when they replaced collective Award conditions on the farm in mid-February. The AWAs in that case reduced take home pay by 25 per cent.

117. An OEA partner, the Small Business Union, which was founded by Graeme Haycroft, prepared the AWAs. As an Industry partner, the Small Business Union is supposed to have:

> *"been approved and endorsed by the Employment Advocate as having met a high standard of competence and experience in assisting employers in drafting and implementing AWAs."* [41]

39 Mitchell and Fetter Page XXX

40 Yurong Holdings Pty Ltd v Renella [2005] SAIRC 60

41 OEA website accessed 12 August 2005

118. The Small Business Union is a specified partner, which means provides it with access to streamlined filing processes. It advertises that:

> *"With our extensive experience we make certain that we do it right the first time with no disruption to the workplace, and we will explain the procedure to all parties ensuring that everyone understands the changes being made"*[42]

119. The AWAs in that case conformed to the Small Business Union's template which they say:

> *"For over three years we have been designing AWAs and have developed a template that is both effective and simple to understand. We specialise in AWAs that offer workers a flat hourly rate of pay, which is applicable twenty-four hours a day, seven days a week. The all-up rate is calculated by taking into account work patterns that would normally include overtime and penalty rates. This means that workers can work for as many hours as are available and get paid for what they do at one flat rate, encouraging better work practices and allowing workers to be rewarded for their performance. The all-up rate also cashes up contingencies and includes components for holiday pay and loading, long service leave, sick pay, meal and travel allowances, redundancy and severance."*

120. However, based on the work patterns, the AWAs in fact would have reduced the take home pay by 25 per cent.

121. Simply AWAs are not an appropriate vehicle for genuine bargaining. Mc Cusker J referred in *Yurong Holdings* to the "manifest disadvantage of the respective bargaining positions of a 15 year old Year 10 student negotiating her terms with an experienced businessman."[43]

122. While young workers, workers for whom English is not their preferred language, workers with disabilities and workers with dependents are particularly at risk the outcomes in AWAs reflects the poor bargaining position of ordinary employees. This fact is compounded by the manifest failure of the government regulator to protect workers' interests.

42 http://www.oea.gov.au/graphics.asp?showdoc=/home/partner/partners_display.asp&id=2141

43 [2005]SAIRC 60 at 15

Employee earnings under different forms of bargaining

123. The only recent data comparative data about the outcomes for various forms of bargaining is ABS data from May 2004. The government has previously relied on this data to misleadingly assert that AWAs deliver superior wage outcomes those collective agreements.[44] Peetz describes numerous flaws in the use of this data for comparison purposes, not the least that the data on AWAs is skewed by the inclusion of managerial level employees.

124. When non-managerial employees are excluded it is clear that earnings under collective agreements are higher than AWAs, or any other form of agreement. In 2004 the average hours of employees on registered collective agreements was .50 cents per hour higher than those on registered individual agreements ($23.90 compared to $23.40).

125. For part time employees the gap was $5.20 per hour, ($15.20 compared to $20.80) and for casuals the gap was $3.10 per hour ($15.60 compared to $20.80). The fifty-cent per hour wage gap between those employed on registered collective agreements and those employed on AWAs is due to a $2.50 per hour gap between women covered by registered collective agreements and those on AWAs.

Table 3.1 Average hourly rate of pay- Non managerial employees

	males	females	Persons
Average hourly rate of pay	$	$	$
Award	16.40	16.40	16.40
Registered collective	25.10	22.50	23.90
Unregistered collective	22.00	20.30	21.40
Registered individual	25.10	20.00	23.40
Unregistered individual	23.90	21.20	22.80
All	23.20	20.70	22.00

Source _ABS 2005 6306.0 Nov 2004

44 This data is not entirely useful, as it is affected by compositional shifts. Peetz demonstrates the impact of this by comparing movements in average earnings of workers on federal agreements in Victoria between 2002 and 2004.44 The increase in average earnings of workers on federal certified agreements increased by 6.9 per cent over the period, while the average earnings of workers on AWAs deceased by 1.3 per cent. This must be in part due to a change in the composition of AWA workers. The data inflates average employee earnings on AWAs due to the concentration AWAs in industries with high average earnings, such as mining.

126. There has been some debate about the correct basis for comparison of average wages under different wage setting methods, with the OEA rejecting the use of hourly figures in favour of weekly figures. However the government's own statistician, the ABS, uses the hourly rate:

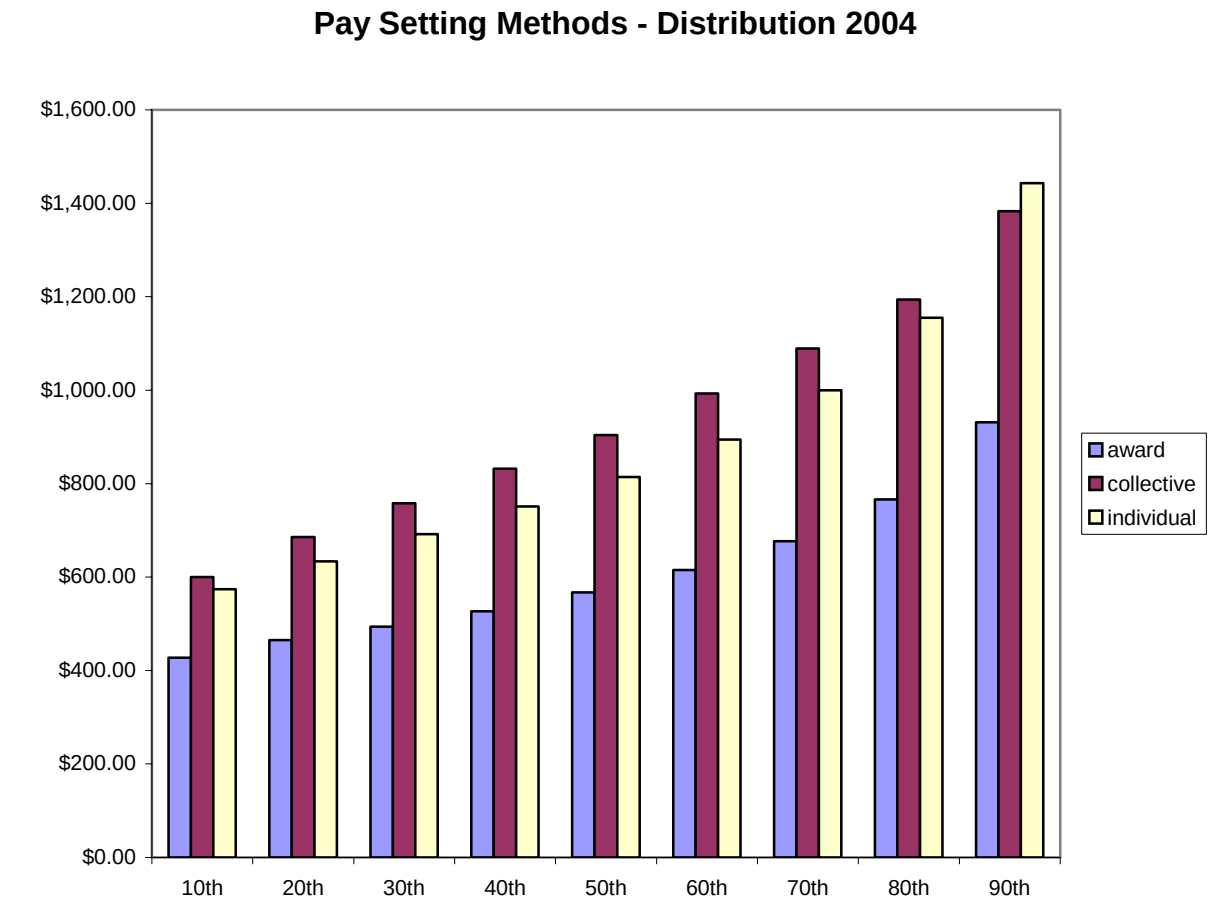
> *In 2004, full-time adult non-managerial employees who had their pay set by award only (i.e. who were not paid more than the award rate of pay) received considerably lower average hourly ordinary-time earnings ($16.70) than those who had their pay set by collective agreement ($24.10) and individual arrangement ($23.30).*[45]

127. Examination of the distribution of wages under the different pay setting methods illustrates the distorting affect of highly paid employees on the average wage outcomes. It shows is that individual contracts are shown to be worse for low and medium income employees.[46] At the median level collective agreements for full time non-managerial adult employees provide for $90 per week more than individual pay setting methods. It is only for the top 10 per cent of employees that individual wage setting outperforms collective bargaining.

45 ABS Australian Social Trends 2005

46 ABS Cat No. 6306.0 – May 2004

Figure 3.1



Source ABS 6306.0 May 2004. Note data includes both registered and unregistered agreements

128. For low and medium income earners individual agreements have paid lower wages than collective agreements.

129. This data includes informal individual agreements which inflate the earnings for those on individual pay setting methods. In the private sector earnings in unregistered agreements are $68.20 per week higher than AWAs and $56.80 per week higher when overtime is included. It should be remembered that these unregistered over-award payments sit on top of the award conditions, and are not the result of trade offs, as the parties cannot contract out of the award.[47]

47 ABS 2005 EEH May 2004 Table 12

Wage increases in bargaining under the WRA

130. The extent to which bargaining is genuine will be reflected in the outcomes. Collective bargaining has delivered better wages and conditions of employment for workers, especially non-managerial employees. Collective bargaining involving unions involves better wages than non-union bargaining, and more equitable wages for vulnerable employees.

Wages – Certified agreements

131. Wage outcomes in certified agreements over the period from 1993 have been within the band 3.1 – 5.2 per cent, and since 1997 have been stable within a band of 3.5-4.4 per cent.[48] In current agreements the average annual wage increase has been within a band of 3.5-4.0 per cent. The process of union bargaining for wages has not resulted in high wage volatility.

132. DEWR report separately the wage outcomes for women, young workers, part time employees and workers born in non-English speaking countries.[49] Generally collective agreements have not seen disparate average wage outcomes for vulnerable groups of employees.

133. No discriminatory effect is seen for NESB workers.

134. DEWR reports little difference in annual average wage increases for women and men covered by certified agreements, and also report that AAWI's in female dominated workplaces are akin to those in male dominated workplaces.

135. AAWI's for part time employees are equivalent to full time employees, although the increases in workplaces with higher levels of part time work are lower than workplaces with little or no part time work.

48 DEWR 2004 page 27

49 DEWR 2004 page 43-47 Note that the data reflects average annual wage increases, and does not employee earnings.

136. However young workers, and workplaces with high concentrations of young workers, experienced lower wages increases than workers over 21. This has been consistent since 1996. DEWR attribute these to lower wages in the industries where young people and part time work is found.

137. This data suggests there might be a different bargaining dynamic at workplaces where there are more part time and young workers than in other workplaces. Even in collective agreements, there is a concern that bargaining without the protection of the no disadvantage test may lead to comparatively worse outcomes for employees with lower bargaining power.

Wages – S 170LK agreements

138. The bargaining process for non –union (s170LK) agreements is weighted in favour of employers. Non-union s170LK agreements accounted for 11 percent of agreements and covered only 8 per cent of employees. In 2003 they accounted for 14 per cent of agreements covering 11 per cent off employees. Workers employed under non-union certified agreements receive lower average wage increases than those employed on union agreements. Since 1996 the average annual wage contained in s170LK agreements has been half a percentage point (0.5) lower that agreements made directly with unions, and the cumulative gap was 4.3 per cent, meaning workers covered by non union agreements over that time would be 4.3 per cent behind their colleagues on anion agreements.[50]

50 Peetz 2005 page 4

Wages increases in AWAs

139. The most disadvantageous bargaining position for employees is individual contracts. One study identifies three reasons why employers introduce AWAs: to foster employee/er relations, to reduce labour costs and to avoid unions in the workplace.[51] In instances AWAs have been used as a vehicle to exclude unions from the workplace the content of AWAs may be beneficial and exceed those offered collectively, as employers outbid the union. Clearly the purpose dictates the content of the AWA.

140. However where AWAs have been introduced outside this context the evidence indicates they are used to reduce labour costs, not improve efficiency.

141. Oddly, the DEWR biennial reports on bargaining outcomes do not report the average annual wage increase for AWAs. Over the period 1999-2001 ACIRRT examined the wage increases in AWAs compared to union and non-union collective agreements. In 2001 ACIRRT examined the wage increases in 1189 AWAs (out of the then 3738 employers) who had made AWAs with their employees. They found lower average annual wage increases in AWAs compared to both union and non-union collective agreements.

Table 3.2: Annual Wage Increase (%) in currently operating agreements 1997-2000

	Union (n =968)	Non-union (n=275)	AWA (n=87)
All agreements	4.0	3.1	2.2
Public Sector	3.5	2.6	2.9
Private Sector	4.1	3.1	2.0

(Source ACIRRT ADAM Report No 31 Dec 2001 page 7)

142. High wage AWAs were associated with longer working weeks, and with contingent wage increases (eg performance pay or bonuses).

143. Unfortunately ACCIRT has been unable to publish this data since 2001 when the OEA stopped providing the data to ACIRRT.

51 van Barneveld, K and Nassif, R (2003) Motivations for the Introduction of Australia Workplace Agreements p24

144. In 2003 ACIRRT conducted an analysis of the content of a broadly representative sample of 500 AWAs supplied to them by the OEA. Only 38 per cent of agreements provided for a wage increase, and in 9 per cent the wage increase was entirely performance based. While ACIRRT point out that this does not mean that only four in ten AWA employees receive a wage increase, it does suggest that wage increases for at least some AWA employees were at the employers total discretion, and paid in spite of and not because of the AWAs.

Insecure wage outcomes

145. Wages paid under AWAs are also less secure than those under collective agreements. Income security is important to family budgets. While performance related pay *may* be associated with productivity, contingent wage inherently increase income insecurity. Whatever its merits, performance pay should not be at the expense of a secure minimum wage. Contingent wage increases are much more common in AWAs that in certified agreements.

146. It appears that even low paid AWA employees have a portion of their wage paid on a contingent basis. A quarter of AWA employees earning wages as low as $25,000 per annum were paid contingent wages, and the majority of AWA employees earning $50,000 per annum have a portion of their wage paid on a contingent basis. [52]

Wage outcomes for Women on AWAs

147. Women on AWAs earn $5.10 per hour less than men on individual contracts. Based on women's average hours of work, this adds up to $152.00 a week less than men. Women on individual contracts are disadvantaged compared to men and also when compared to women on collective agreements. Non-managerial women on individual contracts earn around $2.50 per hour (or on average $70 per week) less than women on registered collective agreements.

148. Most shocking is the picture for women that are permanent part-time employees engaged on individual contracts. These women earn on average

52 DEWR 2002 Agreement making in Australia under the Workplace Relations Act 2000 and 2001 p190

$5.00 an hour or $141 a week less than their female counterparts on collective agreements and they also they earn on average $1.00 an hour or $28 a week less than women who are paid under awards. [53]

Wage outcomes for Permanent Part time employees on AWAs

149. On average permanent part time employees on AWAs earn less per hour than their counterparts paid on award rates of pay. This highlights the extent to the AWA population is comprised of some very low wage jobs.

Table 3.3 Non managerial employees average hourly rate of pay Permanent part time workers

	Males	Females	Persons
	$	$	$
Award	16.20	16.90	16.80
Registered collective	20.60	20.90	20.80
Unregistered collective	22.40	21.10	21.30
Registered individual	15.40	15.90	15.60
Unregistered individual	23.70	21.70	22.20
All	20.10	20.00	20.10

Source ABS 6306.0 May 2004 table 20

Wage outcomes for Casual employees on AWAs

150. Casual employees, both male and female, earn less average per hour than workers under AWAs than employees on collective agreements.

Table 3.4 Non managerial employees average hourly rate of pay Casuals

	Males	Females	Persons
	$	$	$
Award	17.50	16.70	17.00
Registered collective	21.30	21.10	21.20
Registered individual	19.10	17.10	18.80
All	20.40	18.40	20.10

Source ABS 6306.0 May 2004 table 20

53 ABS EEH 2004

The content of AWAs

151. AWAs are, by and large, not used to deliver a high trust, high skill labour force. The primary use of AWAs is to affect pay by changing the hours of work. Peetz points to this occurring in other jurisdictions where comparable industrial instruments existed-Queensland, Western Australia, New Zealand and Victoria.[54]

152. AWA employees work longer hours and are more likely to report they are working harder than 2 years ago. 32 per cent of AWA employees more hours than they did 2 years ago compared to 24 per cent of employees in trade union workplaces of over 100 employees (categories as collective workplaces).[55]

153. Non-managerial employees on AWAs work longer average hours than employees on all other form of industrial regulation. These longer hours are usually paid for at ordinary time rates, not overtime.[56]

154. ACIRRT found that four in ten AWA cash in loadings such as penalty rates, shift loadings and overtime.

Table 3.5 Cashing out of penalty rates in AWAs

	Absorbed into rate %	Not absorbed %	No provision %
Penalty rates	54	44	2
Shift rates	18	82	
Overtime	25	72	3
Allowances	41	56	3
Annual leave	34	63	4
Annual leave loading	41	57	1
Sick leave	28	68	4
Rostered days off	2	93	4
Other payments	32	65	4

(Source: DEWR 2004 page 91)

54 Peetz 2005 The impact on Workers of Australian Workplace Agreements and the abolition of the No Disadvantage Test, p 1

55 OEA, 2012, AWA Employee Attitudes Survey _ Comparative data

56 ABS 6306.0

155. Mitchell and Fetter analysed 500 AWAs approved between 1999 and 2002 in order to test whether there was a link between AWAs and high performance HRM practices, employee empowerment, performance related rewards, commitment to quality and so forth. They found that many AWAs were very simple single-issue agreements, aimed at deregulating hours of work. Even the more complex agreements were aimed at pay and time flexibility.

156. In a detailed analysis of 200 of the 500 agreements they found that:

- Up to a quarter of the AWAs provided for a fixed hourly, weekly or annual wage regardless of how much overtime is worked;
- 36 per cent permitted the employer to unilaterally require additional hours be worked;
- 26 per cent of agreements provided no set ordinary hours of work;
- 13 per cent provided hours could be worked a any time;
- 14 per cent permitted the employer to unilaterally vary hours of work; and
- 14 per cent provided hours could be unilaterally varied within an unlimited span of hours.

157. The ACIRRT 2003 study of a representative sample of 500 agreements found:

- A quarter of AWAs contain a span of ordinary hours greater than 16 hours per day;
- Only 15 per cent of AWAS contain a limit on daily hours; and
- In 15 per cent of AWAs hours of worked could be averaged over a year.

158. Clearly employers see AWAs as a means to move to payment arrangements that do not provide additional compensation for long hours, for irregular hours or for unsocial hours. The Small Business Union website says:

> *Easily the most flexible of all industrial instruments an AWA can cash up all elements of the employment package except superannuation. This means that you can develop an all up hourly, daily weekly or monthly rate and give a guaranteed cash value for contingent entitlements such as sick leave, redundancy and long service leave.*

159. Currently, while this is permissible, the agreement must compensate for lost of penalties and overtime. However according to the government's 26 May 2005 policy announcements the legislation to be introduced will no longer guarantee that the value of penalty rate and overtime rates is compensated for within AWAs. Given the prominence of hours flexibility and pat flexibility clauses in AWAs there the ACTU's concerns about loss of take home pay under the new regime is well founded.

Content of AWAs – vulnerable groups

160. Vulnerable groups have lower access to the beneficial provisions in AWAs and are more likely to be employed under AWAs with deleterious clauses. Women are less likely than men to be covered by AWAs dealing with training, family friendly leave arrangements, annual leave, sick leave, long service leave, and performance bonuses.

161. The same is true of part time employees. Part timers also more likely to be covered by agreements that absorb extra payments.

162. Young workers have equal access to training as older workers, but otherwise they too are less likely to be covered by family friendly leave arrangements, annual leave, sick leave, and long service leave performance bonuses.

163. Women, part timers and young people are more likely to be covered by AWAs that contain span of hours provisions, averaging of hours and absorption of extra payments.

Table 3.6 Percentage of designated groups by content of AWA

	Female %	Male %	Part time	Full time	Under 21	Over 21
Apprentice			4	6		
Training	31	37	29	38		
Family-friendly leave provision	52	66	63	69	60	60
Annual leave entitlement	51	62	54	72	39	64
Sick leave entitlement	46	59	63	65	41	57
Long service leave entitlement	33	48	29	37	27	45
Family Friendly flexibility provision *	41	31	46	43	49	33
Span of hours provision	35	31	46	40	42	31
Averaging of hours of work	30	23	29	16	30	25
Performance bonus	22	26	21	34	17	26
Absorption of extra payments	42	41	58	42	53	39

Source DEWR 2004 page 101

Note: The characterisation of provisions in agreements as family friendly is contentious and the ACTU is unable to discern from the report what type of arrangements are included in this category.

164. The only conclusion open on the evidence is that, for ordinary employees, AWAs are associated with lower wage outcomes that collective agreements. Further the wages are less secure wage outcomes even at quite low wages. Women, part time workers and casuals all do worse on AWAs than under collective agreements.

The impact of the abolition of the "No Disadvantage" test

165. The government's proposals to abandon the no disadvantage test in favour of the Australian Fair Pay and Conditions Standard (AFPCS), will lead to AWAs which result in lower hourly rates of pay for employees. Legislation similar to that proposed by the government existed in Western Australia for almost a decade. Peetz reports that in 1994-96 5 per cent of employees were paid on an IWA that provided for below award wages. By 1998 one quarter of IWAs [paid below award rates of pay.[57]

57 Cited in Peetz above

166. Without having seen any legislation, the ACTU understands that the main difference between the proposed government AFPCS and the WA minimum standard is that the minimum wage in WA was the legislated minimum, while the government proposed that the current award rate of pay for the employees classification will form the wage rate against which agreements will be tested under the AFPCS.

167. Nonetheless the WA experience is instructive because IWAs were not benchmarked globally against the award. The Western Australian experience demonstrates the gradual erosion of entitlements through individual barraging.

168. A survey of 200 IWAs in four industries was conducted whereby the IWAs were examined against the relevant award. The IWAS examined covered cleaners, shop assistants, catering workers ands security officers. In respect to hours of work they found:

- Eighty per cent of provisions specified hours were to be allocated on the basis of management discretion or business need, compared to only 20 per cent that provided for discussion or consultation.

- 78 per cent of these agreements specified ordinary hours could be worked Monday – Sunday. Of IWAs containing hour's clauses, 100 per cent of part time employees had their ordinary hours Monday – Sunday, compared to 82 per cent of full time employees, and 97 per cent of casuals.

- 87 per cent of agreements provided for a daily span of hours greater than 12 hours

- 80 per cent of agreements specified overtime at the single rate, with 20 per cent specifying overtime between 104 per cent and 150 per cent of ordinary time rates.

169. These hours cannot be seen as being traded for additional pay. Of the surveyed agreements:

- The ordinary hourly rates of pay for IWA workers varied from $4.72 below the award to $5.60 above award. 56 per cent of IWAs provided for a rate of pay below the award hourly rate.

- A further 28.7 per cent of agreements paid less than $1.00 per hour above award. Only a quarter of IWAs provided for a wage increase. Those that provided for a measurable increase provided for 1 per cent per annum wage rise.

- Three quarters of security guards, and 60 per cent of shop assistants paid on IWAs received less than the award rates of pay.

- A higher proportion of juniors were earning below award, although when adults were earning below award rates they appeared to earn well below the award. This may have been due to junior rates being closer to the State minimum wage.

- 77 per cent of casuals were paid below award rates, compared to 25 per cent of permanent employees.

170. Nor can they be seen as trade-offs for better leave and family friendly arrangements. Of the agreements surveyed only 36 per cent provide for annual leave, and half of these absorbed it into ordinary pay.[58]

171. What this data demonstrates is the capacity of individual bargaining to revert to the minimum. The government's proposals to abolish the no disadvantage test will mean a race to the bottom in industries where there is an incentive to achieve cost savings through reduced labour costs.

58 ACIRRT 2002 A Comparison of employment conditions in Individual Workplace Agreements and Awards In Western Australia

ACHIEVING SOCIAL OBJECTIVES, INCLUDING ADDRESSING THE GENDER PAY GAP AND ENABLING EMPLOYEES TO BETTER BALANCEWORK AND FAMILY

172. The principal object of the WRA include providing a framework for workplace relations which promotes:

> *(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and*
>
> *(aa) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment;*
>
> *(i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and*
>
> *(j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*

173. In 1994 it was not envisaged that bargaining alone would achieve these outcomes. Equity objectives were to be met through the maintenance of a robust role for the AIRC, including periodic revision of minimum wages and conditions to ensure they were equitable.

174. It was not envisaged that a market-based system would deliver equity, and that has indeed proven to be the case. Further deregulation and reduction or erosion of minimum wages and conditions will inevitably lead to even greater inequity.

175. Over the past decade changes in workforce composition and the way work is organised have meant the capacity of workers to balance their work and family orles has deteriorated. Workplace bargaining at both the collective and individual level has been ineffective in promoting widespread and equitable access to family friendly working arrangements. Both forms of bargaining have been associated with the development of family hostile working arrangements. Developments under AWAs have been more deleterious in the impact work/family balance than collective bargaining.

176. The experience in Australia is that the only regulatory instrument that has effectively promoted measures that assist employees has been the award system, through the test case process. Unpaid maternity, adoption, paternity and parental leave, carers leave and the capacity to refuse overtime based on family responsibilities are all the product of the test case process.

177. In 2004, during conciliation over the Act's work and family claims, agreement was reached to improve the carers leave provisions in awards, including extending a right to absence form work to casual employees. It is fanciful to expect that, in the absence of the prospect of arbitration, agreements of this sort will be possible in the future.

178. Bargaining has not delivered widespread assistance to employees, due to three factors. Firstly the focus on mutuality can mean that employees with caring roles have to bargain or trade-off other rights to gain family friendly measures, which may have an indirectly discriminatory effect.[59] Secondly the focus of flexibility and productivity promotes family-hostile working arrangements.[60] Thirdly, where employees have gained access to additional leave or control over their hours, the evidence is that it within firms this is given to higher paid, better-educated[61] employees with longer job tenure, and is not available to all employees.

179. Collective agreement making has been ineffective in spreading family friendly work arrangements. Individual agreements have proven even less able to

59 Zetlin and Whitehouse

60 ACIRRT XXXX

61 AIFS, Gray and Tudball XXXX

achieve the goal of work and family reconciliation, and are more likely to include family hostile provision than certified agreements.

Work and family clauses in agreements

180. There are two categories of entitlement that can assist employees with their family roles: leave to care for dependents, and employee initiated flexibility around otherwise regular and predictable hours of work.

181. The government is fond of claiming that agreement –making has led to more flexible and family friendly workplaces. 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 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 – carers 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.

182. When family reconciliation measures that are contained in legislation (such as unpaid parental leave) or awards arising from test cases in the AIRC (carer's leave, bereavement leave, time of in lieu of over-time, make up time, flexible RDOs, and part time employment) are excluded from the analysis it is clear that bargaining has done little to assist employees reconcile their work and family roles.

183. Table 4.1 shows that the rate of inclusion of family friendly provisions has fallen over the period 1998-2000.

Table 4.1: Percentage of Collective Agreements with reference to work/family measure by year of registration

	1995	1996	1997	1998	1999	2000	Total
Any provision	0.6	8.5	19.3	22.0	15.2	12.0	13.5
Family/carers leave	0.3	3.4	4.2	3.8	2.2	1.6	2.4
Paid maternity leave		1.7	8.0	7.0	4.5	4.7	4.4
Paid paternity leave		0.4	4.2	2.2	1.2	0.7	1.3
Job share	0.3	3.8	5.9	4.6	3.1	3.6	3.4
Childcare		0.4	0.8	0.6	1.7	0.2	0.7
Work form home		1.3		2.8	2.4	0.7	1.4
Career breaks			0.4	0.4	0.3	0.2	0.3
Elder referral			0.4	0.4	0.2		0.2
No of agreements	319	236	238	500	580	443	2379

Source: Whitehouse 2001 page 6, using ADAM database, University of Sydney

Family friendly provisions in AWAs

184. A number of studies have examined the incidence of family friendly provisions in AWAs. In 2001 Whitehouse noted that:

> *"studies 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 measures, some of which may impede the successful combination of work and family responsibilities by reducing control and predictability of working hours."*[62]

185. Her 2001 assessment of family friendly agreement making found only 14 per cent of collective agreements and 12 per cent of AWAs contained any family friendly measure. Only 7 per cent of private sector AWAs contained any family friendly measure.

62 Whitehouse 2001 page 2

Table 4.2: Percentage o f AWAs with reference to work/family measure by year of registration

	AWAs			
	1997	1998	1999	Total
Any provision	12.7	15.5	7.4	11.6
Family/carers leave	2.4	3.4	1.5	2.4
Paid maternity leave	6.8	6.4	2.7	5.1
Paid paternity leave	6.0	5.4	0.9	3.8
Job share	0.8	2.0	0.3	1.0
Childcare	0.4			0.1
Work form home	2.0	2.7	0.6	1.7
Career breaks	0.4	0.3		0.2
Elder referral				
No of agreements	251	296	339	889

186. Whitehouse's' assessment is supported by the 2003 ACIRRT study of 500 agreements provided to it by the OEA. The ACIRRT study found only 8 per cent of agreements provided paid maternity leave; 5 per cent paid paternity leave; 1 per cent for additional maternity leave; and 4 per cent unpaid purchased leave.[63] It must be of little comfort to employees on AWAs to know that most common family reconciliation clause in AWAs is bereavement leave.

Family hostile provisions

187. The flip side of family friendly provisions is family hostile provisions. The most odious of these are agreements that promote long hours of work, that extend ordinary hours beyond 38 hours per week, that provide for Monday-Sunday as ordinary hours and that have a span of hours greater than 12 hours per day.

188. Very few agreements contain hour's provisions that can be unambiguously considered family friendly. In 2003 only 6 per cent of agreements provided for hours to be negotiated.[64]

63 DEWR 2004 page XX

64 DEWR 2004 page 96

189. When flexible working hours are properly assessed to determine whether they provide for employer or employee initiated flexibility it becomes clear that many agreements make it harder for employees to reconcile their work and family roles.

190. An assessment certified agreements in the federal and Queensland jurisdictions found that most hours-flexibility clauses were generally employer-initiated flexibility. [65]

191. The same is true, or even worse for employees on AWAs. In the 2001 OEA employee survey workers on AWAs (both full time and all workers) reported lower satisfaction with their control over their working hours than other employees.

192. AWAs contain fewer family friendly benefits than collective agreements, and are more likely to contain family hostile working hours. While the survey found some improvement for managerial employees in managing work and family, ordinary workers on AWAS reported greater dissatisfaction with their work and family balance than ordinary non-AWA employees.

193. AWAs tend to be associated with all up rates, where every hour is paid at the same rate. Graeme Haycroft, Director of the Small Business Union, argued in *The Australian* in May 2005:

> *As an employer of about 1000 people and working through the years with several hundred small businesses to change their workplace arrangements using Australian Workplace Agreements, my experience is that workers just want to get paid for what they do, irrespective of when they do it.*[66]

194. This propensity to abandon the normal working week is detrimental to families. Working on a Sunday involves the loss of 2 hours of time with families that is not compensated for during the week.

65 get citation

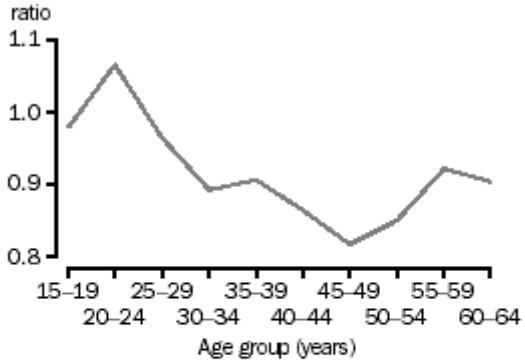
66 The Australian 25 May 2005

Women's wages

195. As women are more likely to perform their caring role in families, the failure to provide proper work and family measures reflects in the average male and female earnings.

196. The connection between women's wages and work and family balance is highlighted by the graph below which shows that the gender wage gap increases in the years during which women are responsible for the care of infants and young children, and that while it narrows again as women reach their mid 50's it never recovers.

Female/male average hourly earnings ratio(a) by age group - August 2004



(a) Total weekly earnings in main job divided by total hours paid for in main job among full-time non-managerial employees in their main job (excluding owner managers of incorporated enterprises).

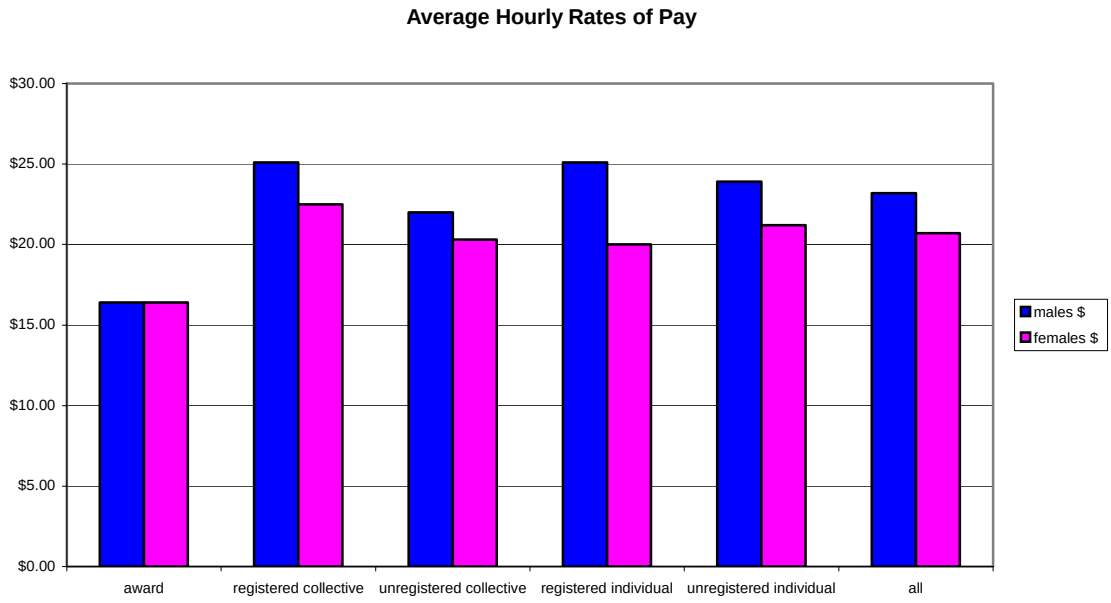
Source: ABS 2004 Survey of Employee Earnings, Benefits and Trade Union Membership.

197. Devolution of wage setting to the workplace has not assisted close the gender pay gap. Recent data indicates that the average adult non-managerial female's hourly ordinary time earnings are 92 per cent of the equivalent male earnings.

198. Between 1983 and 1994 the gap between men's average earnings and women's average earnings closed from 0.88 to 0.94. Since that time the gender pay gap has hovered between .90 and .94. The move from award regulation and to workplace-based regulation has been associated with a stalling of the narrowing of the pay gap.

199. The more deregulated the wages system of an economy, the larger the gender wages gap. In 2004 the gap for non-managerial employees was widest amongst those on individual arrangements, with a $5.00 per hour gap between men and women on AWAs. There was no gap for those on award wages. Legislative change, which promotes individual contracts, will only worsen the gender pay gap.

Chart 5.1: Average Hourly Ordinary Time earnings Full Time Adult Non managerial employees by Sex



Source: ABS 2005, EEH May 2004 Table 20

200. As noted earlier female dominated industries are less likely than those in male dominated industries to be engaged in bargaining, and to remain award reliant. As the ABS notes:

> *For both men and women, there were some large differences in pay rates between industries. In May 2004, among both male and female full-time adult non-managerial employees, average hourly ordinary-time earnings for those employed in the Mining industry ($34.30 for men and $27.10 for women) were almost double the hourly earnings of those in the Accommodation, cafes and restaurants industry ($17.60 for men and $17.10 for women) and the Retail trade industry ($18.10 for men and $17.00 for women). Overall, differences in hourly earnings between industries tended to be greater than earnings differences between men and women in the same industry.*[67]

201. Similarly women are concentrated in occupations less likely to be engaged in bargaining:

> *In 2004, at most skill levels, there were examples of relatively high-paying, predominantly male occupations with comparatively low reliance on the award only method of pay setting. There were also examples of lower-paying, largely female occupations, often substantially reliant on award increases for their pay rises.*

202. The ABS analysis shows that in occupations at the same skill level, the concentration of men and women in an occupation corresponds to the wage gap. This reflects the generally accepted notion that "women's work" is undervalued compared to 'men's work". The AIRC, and the State industrial tribunals have played a role in correcting this market failure, at least in part. Just this year the AIRC recognised that qualified childcare worker's wages were undervalued compared to the award rates for similarly qualified workers in otter occupations and the award rate was increased by $64.50 per week. Similarly the NSW IRC lifted wages for aged care nurses by 23 per cent in recognition of the undervaluation of the work. While these cases only align award rates and not market rates, they recognise the lack of bargaining position of these workers.

203. The NSW, Queensland and Tasmanian AIRC's have developed pay equity principles to recognise the concentration of women in sectors of the economy unlikely to bargain. In NSW and Queensland these arose form extensive. Similar provisions are under consideration in Western Australia.

204. This role is important, and is one that bargaining cannot address. Periodic review of the award safety net to ensure that workers performing similar work under similar conditions, having undertaken similar training would be treated equitable in respect of wages.

205. The inability of the bargaining system to deliver wage equity was highlighted in recent case in the Queensland jurisdiction where the IRC confirmed that a retention allowance (payable in this case to the male dominated occupations) was not a matter related to work value and therefore did not justify rejection of

67 ABS, 2005 Australian Social Trends,

the agreement on ground that it failed to provide for equal pay for work of equal value.

Proposals for change

206. Further restrictions on the role of awards and an emphasis on the entry level minimum wage over properly set skill based career structures will remove the only instrument that has effectively addressed the gender pay gap.

Economic objectives including productivity

207. An Object of the WRA is:

> *(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market;*

208. Although this object was included in 1996, the economic prosperity and welfare of the Australian public was the principal object of the Act long before its current form.

209. The government attributes the recent period of economic growth and strong employment to its WROLA. But conciliation and arbitration has always been an adjunct to collective bargaining, not a substitute for collective bargaining. Until 1992 collective bargaining was largely unregulated, with over-award shop agreements providing for wages and conditions of employment that were superior to awards. But this does not mean regulated collective bargaining was unknown. Consent awards gave legal force to collective bargaining, and company specific awards gave effect to enterprise level collective bargaining.

210. However it was in 1994, with the passage of the *Industrial Relations Reform Act 1993* that the real shift away form conciliation and arbitration occurred. In 1994 the legislation was amended to provide for certified agreements that could, for the first time displace the provisions of awards provided they met the no disadvantage test. At the same time protection against liability for damages arising out of industrial action taken in pursuit of an agreement was enacted. The Industrial Relations Reform Act 1993 replaced Part VIB, and provided for both certified agreements and enterprise flexibility agreements.

211. In respect of workplace bargaining, the *WROLA Act* 1996 continued the changes initiated by the Keating government, albeit with two significant departures. First, and most significantly the government legislated for AWAs. While a major and unwelcome departure from collective agreement making, this change to the industrial landscape can barely be credited with having any significant impact on macro economic outcomes. In May 2005 AWAs set wages fewer than 2.5 per cent of non-managerial employees.

212. The second main change was to diminish the extent to which awards could underpin agreement making, by limiting the arbitral role of the AIRC. To the extent that the relative wages of award dependent workers have deteriorated over the period, and that the gender pay gap has worsened, these are a directly attributable to the deregulation, and the shift in the balance from social equity to the market.

213. In many other respects the deal between the government and the Australian Democrats tempered the amendments proposed by the government. The regular claim by the Howard government that the WRA has contributed to a growth in real wages; job creation and flexibility in the workplace, plus a fall in industrial disputation needs to be assessed in light of this history. Claims by the government that the 1996 *Workplace Relations Act* heralded a significant change in industrial relations give the lie to the fact that the shift to workplace level bargaining had its genesis in the 1993 reforms to the *Industrial Relations Act* introduced by the then Keating government.

214. It is therefore disingenuous for the government to claim that jobs growth and labour market flexibility over the past decade are attributable to the *WROLA Act* 1996.

215. At the very least other factors will have had both positive and negative impacts on levels of employment, inflation, growth and productivity.

216. Peetz disputes the link between individual contracting and productivity.

217. His examination of productivity growth averaged over annual cycles from 1964-5 showed productivity at 2.4 –2.9 per cent per annum prior to the accord period. It also showed that the growth in productivity associated with the cycle 1994-2002 ie commencing before the WRA, and ceasing as AWAs start to flow through the system. He finds a fall in productivity 1999-2000, to rates below that under the award period.

218. After looking at the New Zealand experience 1978-1996 under the Employment Contracts legislation he concludes that:

for the period when Australia had a collectivist national government and New Zealand an individualistic one, productivity growth was substantially high in Australia.

219. The impact of bargaining on economic performance has been the subject of argument before the AIRC. In 2004 the Bench said "*There is no necessary association between award coverage, safety net adjustments and productivity growth".* In this year's Safety Net Review the Commission noted:

6.2 Conclusion on Safety Net Adjustments and Bargaining

[322] *Clearly the move to enterprise bargaining has contributed to productivity growth but it is not the sole factor given the extent of structural change and microeconomic reform since the early 1990s. The contribution of enterprise bargaining outcomes to productivity growth will vary between industries and workplaces. In this context we note the comments of Professor Wooden that the available evidence from workplace and enterprise-level studies does not enable any strong conclusions to be reached about possible links between enterprise bargaining and productivity.*

220. Having reviewed the literature they said:

[324] The findings confirm the view that in Australia labour productivity has increased throughout the 1990s for a variety of reasons, one of which is the move to enterprise bargaining. They also demonstrate that it is simplistic to conclude that a correlation between an increase in labour productivity and enterprise bargaining is evidence of causality:

- *at any one time a number of factors could be impacting on productivity at a particular workplace or within an industry;*
- *as noted earlier, Professor Brain has cautioned against applying an assumption that all industries will have the same productivity given different technological bases;*
- *the proportion of employees covered by enterprise agreements varies between sectors which yield different levels of productivity;*
- *as pointed out by the States and Territories, in its submission last year the Commonwealth referred to high and low productivity sectors;*
- *in the May 2004 decision the Commission noted flaws in the Commonwealth's submission which attempted to prove a positive linkage between agreements and productivity and negative linkage between awards and productivity. None of the regression analyses presented in this case overcomes the criticisms which lead us to depart from our conclusion that "in the absence of more reliable and*

appropriate data it is not possible to confidently reach conclusions about causality from these regression analyses" ;

- *as the Commonwealth noted:*

  "[T]he bulk of disaggregated data in award-reliance over time makes a detailed time series analysis of the aggregate relationship between award reliance and productivity impossible" ;

  the results of ACCI's testing of the relationship between total factor productivity growth and award reliance, in which it found no trend for either the longer term or the 2002-03 financial year, does not appear to be consistent with the Commonwealth's regression analysis which took into account capital deepening and the intrinsic capacity for productivity growth presented in last year's case. This analysis found a positive relationship between enterprise bargaining and productivity growth.

221. The Commission concluded:

> ***[327]*** *There is no cogent evidence before us that award coverage per se inhibits productivity growth. The increase in productivity in the award-reliant sectors relied on by the ACTU and welcomed by the Commonwealth tells us nothing about causation. Nor is there any measure of the extent to which productivity has increased as a result of the shift to enterprise bargaining.*
>
> *…*
>
> ***[328]*** *This view is reinforced in the Commonwealth's publication, Agreement Making in Australia Under the Workplace Relations Act-2002 and 2003, in which the observation is made:*
>
> > *"Australia's productivity performance improved significantly in the 1990s, coinciding with the growth of agreement making . . . These productivity improvements are the result of a range of factors and it is difficult to isolate individual drivers . . . A number of studies by the Productivity Commission and others confirm the positive association between workplace bargaining and productivity growth."*

222. A number of studies find that AWAs are not associated with high trust high performance work practices.[68] Peetz critiques the BCA funded Access Economics study that sought to correlate productivity with the of wage bargaining, showing that industries with higher proportions of AWAs performed on average 0.2 per cent worse than those with high proportions of employees covered by collective union agreements.

68 Eg Mitchell and Fetter, 2002

223. Mitchell and Fetter found that few AWAs displayed high trust or high commitment HRM strategies. They said:

> "*International literature has drawn a distinction between two fundamental ways in which businesses can pursue economic growth and profitability. One of these is an approach which attempts to restore high profitability in the short term through cost reduction methods – wage cuts, greater intensification of work effort, workforce reductions, increases in casual and temporary employment, and hierarchical organisation characterised by strong management controls and related high rewards for managers. The second approach is productivity centred, favouring a long-term view of business strategy centred on a highly wages, highly skilled workforce, collaborative or participative work systems, high levels of investment in training and skill development and employment security (Streek 1987; Thurow 1993; Boreham et al 1996). It is apparent from our assessment of AWA content that those agreements falling into the first two of our categories are essentially consistent with the cost reduction strategy rather than the productivity-centred approach. These constitute the overwhelming proportion of AWAs approved under the terms of the WRA*.

224. Clearly the period since 1994 has been associated with improved productivity. But this is not evidence that enterprise bargaining is the cause of that change. The low take up of AWAs mitigates against claims that they have been associated with any macro economic trends. And the evidence that they adopt a low road to productivity debunks claims they have unambiguous specific workplace effects.

MEETING INTERNATIONAL OBLIGATIONS

225. The Objects of the WRA include:

(k) assisting in giving effect to Australia's international obligations in relation to labour standards.

226. There is no question that the bargaining framework in operation breaches Australia' obligations under ILO Conventions 87 and 98. For the past decade the supervisory structures of the ILO have consistently called for legislative amendment to bring Australian in to line.

227. These Conventions were ratified by Australia in 1945, and are of such fundamental nature that they are expected of all nations that are members of the ILO, regardless of whether they have been ratified by that nation.[69] It is a matter of significant national shame that Australia has been persistently criticised as breaching these Conventions.

228. This Committee should not under-estimate the extent to which Australia is flaunting its obligations at international law. The mere fact that the CEACR has published Observations on our failure to comply with these Conventions is an indication of the seriousness of the breach. For less serious breaches the Committee's practice is to make a (private) direct request of a government as a first step toward dialogue with a country. By contrast, more serious issues are the subjects of published individual observations and the very fact of a published observation is an indication that the CEACR considers the non-compliance with international standards to be a serious matter. Since 1997 Australia has been the subject of an adverse observations in 1998, 2000 and 2005 (Convention 98) and 1997, 1999, 2001, 2003 and 2004 (Convention 87).

69 In 1998 the ILO adopted the Declaration on Fundamental Principles and Rights at Work which was created to strengthen the application of the four principles that are considered fundamental for social justice. Its creation imposes an obligation member states to adhere to four fundamental principles regardless of the relevant Conventions have been ratifies by that nation. The four principles are freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

229. Additionally the ILO Conference hears a number of significant cases arising from the CEACR report. The cases chosen by the conference committee represent serious matters where the Conference has determined it is appropriate for governments to be publicly called to account. Australia has been the subject of hearings before the Conference Committee on the Application of Standards on 5 occasions since 1996, twice in relation for forced labour and three times in relation to Convention 98.

230. Article 4 of Convention No. 98 requires countries which ratify it to take:

Measures appropriate to national conditions (…), where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

231. The WRA (and sections of the Trade Practice Act and Crimes Act) have been the subject of adverse comments in relation to the following matters relevant to Convention 98:

- Failing to promote collective bargaining and favoring individual bargaining over collective bargaining;
- Permitting an employer to select with whom it bargains
- Favoring workplace level bargaining over other forms of bargaining; and
- Restricting the subject matter of agreements.

232. Convention 87 protects the rights of workers to establish organisations to represent their industrial interests. The Convention includes the right to establish organisations and the right to organise. It is not limited to passive membership.

233. The General Survey states that Convention No. 87, Article 3, paragraph (1)) *includes, in particular, the right to hold trade union meetings, the right of trade union officers to have access to places of work and to communicate with management, certain political activities of organizations, the right to strike and,*

in general, any activity involved in the defence of members' rights (General Survey, para. 128).

234. The WRA has also been criticised as offending Convention 87 in respect to effective exercise of freedom of association by restricting the right to strike where the subject matter of the dispute is:

- Incapable of being contained in a certified agreement (i.e. matters not pertaining to the employment relationship or expressly prohibited);
- An aim is to convince an employer to make payments in relation to periods of industrial action (sections 166A and 187AB); and
- Involves a demarcation dispute (sections 166A and 170MW); and
- Involves sympathy strikes.

235. The WR Amendment (Right of Entry) Bill 2005 would, if enacted, constitute a further restriction on employees' right to organise by restricting access to the workplace.

Failure to promote collective bargaining and favouring of individual agreements

236. Article 4 of Convention 98 requires nations to promote collective bargaining. Patently the government does not support this position, promoting instead its purported policy of neutrality. The legislative framework is portrayed as supporting individual agreements directly with employees and agreements between employers and trade unions equally.

237. The problem for the government is twofold.

238. Firstly, its policy position is in conflict with the Convention.

239. Secondly, the WRA is not neutral in its treatment of different forms of agreement. In its 1998 Report on Convention 98 the CEACR noted that the WRA places significant emphasis on direct employee-employer relations. Following an examination of Part VID of the Act regarding Australian Workplace Agreements, the Committee concluded that the WRA promotes AWAs over certified agreements through:

- Simpler filing requirements in comparison with the collective certification procedure;
- The advice and assistance of the Employment Advocate;
- Giving AWAs primacy over federal awards and state awards or agreements, and over certified agreements, unless the certified agreement is already in operation when the AWA comes into operation (section 170VQ);
- Once there is an AWA in place, a collective agreement certified under the Act cannot displace it; and
- That in providing for the extension of the provisions of the Act in Victoria when a collective employment agreement ceases to be in force, it is replaced by "an individual employment agreement with the same terms" (section 516).

240. In light of these provisions the Committee said:

> *The Committee concludes that primacy is clearly given to individual over collective relations through the AWA procedure.*[70]

241. In its 2000 Observation on Convention 98 the CEACR said:

> *"In a previous observation, the Committee raised the following issues of concern with respect to the [1996] Act: primacy is given to individual over collective relations through the AWA procedures, thus collective bargaining is not promoted; preference is given to workplace/enterprise-level bargaining; the subjects of collective bargaining are restricted; an employer of a new business appears to be able to choose which organization to negotiate with prior to employing any persons. The*

70 CEACR

Committee notes the Government's report and its submissions before the Conference Committee setting out the various ways in which collective bargaining is still provided for and taking place, including concerning multiple businesses, and the various safeguards in the AWA procedures. Furthermore, where the Act does provide for collective bargaining, clear preference is given to workplace/enterprise-level bargaining. The Committee, therefore, again requests the Government to take steps to review and amend the Act to ensure that collective bargaining will not only be allowed, but encouraged, at the level determined by the bargaining parties." (Emphasis added).

242. In its 2005 Observation the CEACR was highly critical of AWAs being offered on a "take it or leave it" basis at the time of recruitment.

243. The Committee also considered that the Act failed to protect workers from discrimination in employment on grounds of trade union memberships. The Committee rejected the government's argument that the Act protects employees through: the prohibition on termination of employment on grounds of trade union membership (s170CK); the freedom of association provisions at s298K and 298L; and s170WG (1) of the WR Act which prohibits the application of duress against an employee in connection with an AWA.

The Committee also notes, however, that the abovementioned sections do not seem to provide adequate protection against anti-union discrimination (at the time of recruitment, during employment or, for certain wide categories of workers, at the time of dismissal) to workers who refuse to negotiate an AWA and insist on having their terms and conditions of employment governed by collective agreements, contrary to Articles 1 and 4 of the Convention.

244. In its 2005 Observation the CEACR noted the decision in *MUA v Burnie Port Corp Pty Ltd* that condoned "take or leave it" AWAs. The Committee noted that neither the anti-coercion provisions nor the anti discrimination provisions of the WRA prevented this behaviour and concluded:

The Committee recalls that the protection provided for in the Convention covers both the time of recruitment and the period of employment, including the time of work termination (see General Survey of 1994 on freedom of association and collective bargaining, paragraph 210). The Committee considers that sections 170WG(1) and 298L of the WR Act and the relevant national practice do not appear to afford adequate guarantees against anti-union discrimination at the time of recruitment and cannot be considered as measures to promote collective bargaining".

245. The Committee also noted the decision in *BHP Iron Ore v AWU* which sanctioned the employer making a wage increases conditional upon signing an AWA. Those who chose to remain on the collective instrument received lower pay. It said:

> *The Committee notes that according to the Government, the Court found that in this case, there was no evidence of pressure by the employer, who had made offers of individual agreements to all employees, as it was clear that the existing collective instruments would continue to operate for those employees who did not accept the offer of individual agreements. The Committee understands from the above that the finding that there was no discrimination was based on the fact that there would be no dismissals; however, the issue of anti-union discrimination in the course of employment was not addressed.*

246. In its 2005 Observation the Committee noted that the provisions of s170VQ (6) which allow an AWA to prevail over a subsequently negotiated collective agreement constituted discrimination on grounds of union membership:

> *The Committee is of the view that the fact that a collective agreement which is subsequent to an AWA may prevail over it only after the expiration of the duration of the AWA, constitutes discrimination with regard to workers who may wish to join a union during their employment, since such workers will not be able to profit from any favourable provisions of the collective agreement despite their affiliation.*

Selection of the bargaining partner, and refusal to negotiate with most representative union

247. The ILO has been critical of S170LL in that it permits the employer to pre-select the bargaining partner before workers are employed, and locks this in for three years. Any amendment that provides for 5-year agreements would compound this.

248. The Committee has been critical of the provisions of s170LK. The Committee did not consider the ability to be represented by a union, and the requirement that an employer meet and confer with the union as inadequate protection. It said:

> *"the outcome of such request for trade union representation appears to be uncertain as section 170LK(6)(b) provides that the right of workers to be represented by trade unions will cease if any of the conditions stipulated in section 170LK(4) cease to be met. Thus, as noted by ACTU, even where workers are initially entitled to be represented by trade unions in negotiations, the employer may subsequently avoid any union involvement by unilaterally changing the scope and content of the*

negotiations (so that section 170LK(4)(b) no longer applies) or by simply declaring that it does not any longer wish to pursue an agreement under section 170LK. The Committee considers that if there is a possibility in the law that a request for trade union representation may lead to the partial or total abandonment of negotiations, then the law establishes a disincentive to request such representation. "

249. The CEACR has also been critical of s170LJ(1)(a) of the WR Act on grounds that it permits employers to "shop around" for the most advantageous bargaining partner. In its 2005 Observation the CEACR called upon the government to amend the WRA so as "to establish appropriate guarantees against employer interference in the context of the selection of a bargaining partner. In particular, the Committee would suggest the establishment of a mechanism for the rapid and impartial examination of allegations of acts of interference in the context of the selection of a bargaining partner, and the adoption of safeguards like objective and pre-established representativeness requirements."

Restricting the content of agreements

250. The ILO has commented that the WRA unduly restricts the content of agreements.

251. In its 1998 Report on Convention 98 the Committee said:

7. Regarding the subjects of negotiation, the combined effect of sections 166A, 187AA and 187AB prohibit the issue of strike pay being raised as a matter for negotiation. Considering that in general the parties should be free to determine the scope of negotiable issues (see General Survey, op. cit., paragraph 250), the Committee requests the Government to review and amend these provisions to ensure conformity with the Convention.

252. This was followed in 2000 by the following observation

On the issue of strike pay as a matter for negotiation, the mere fact that there are deductions for days on strike is not contrary to the Convention. The Committee notes, however, that it is incompatible with the Convention for legislation to impose such deductions in all cases (as under section 187AA of the Act). In a system of voluntary collective bargaining, the parties should be able to raise this matter in negotiations. The Committee requests the Government to amend the legislation accordingly.

253. In its 2001 Observation on Convention 98 the Committee re-stated this view. It considered that the WRA contains excessive restrictions on;

- the right to strike by limiting protection to the period during which a collective agreement under the Act is in operation (section 170MN);
- not protecting action in support of a claim for strike pay (section 187AB); and
- with respect to industrial action with the intent of coercing employers and eligible persons to take certain action for various reasons relating primarily to membership or non-membership of industrial associations (sections 298P and 298S).

254. And in its 2005 Report the Committee said:

> *The Committee once again recalls that in a system of voluntary collective bargaining, the parties should be able to raise the matter of strike pay in negotiations and that by preventing them from doing so, the law unduly constrains the permissible scope of collective bargaining. The Committee therefore once again requests the Government to indicate in its next report any measures taken or contemplated to amend section 187AA in accordance with the above.*

Multi-employer bargaining

255. The ILO General Survey on freedom of association and collective bargaining in 1994 (paragraph 249) noted that the parties "are in the best position to decide the most appropriate bargaining level". In its 1997 Observation the CEACR said:

> *"...In short, the determination of what level of bargaining is considered appropriate is* placed in the hands of the Commission, which is mandated to give primary *consideration to single-business agreements and to use the criterion of "the public interest". The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining"*

256. In its 1999 report the CEACR said:

> *… by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests.*

257. In its 2005 report the Committee rejected the argument proffered by the government that multi-employer agreements could be made at common law or outside the statutory framework as providing an inadequate alternative. The Committee called upon the Government to report upon measures to amend s170LC (6) of the WR Act so as to ensure that employers' and workers' organizations have a free choice as to the level at which they wish to negotiate collectively.

258. In the 2005 Observation on Convention 98 the Committee confirmed that

> *it in fact makes the entry into force of the collective agreement subject to prior approval, which is a violation of the principle of autonomy of the parties (see General Survey, op. cit., paragraph 251).*

Essential services

259. In its 1999 Observation the Committee was critical of the WRAs extension of a restriction of the right to strike beyond essential services to those strikes that affect the economy. The Committee also with noted with concern the continued existence sections 30J and 30K of the Crimes Act which permit the Governor-General to ban industrial action in essential services by proclaiming the existence of a serious industrial dispute "prejudicing or threatening trade or commerce with other countries or among the States" (section 30J), and prohibiting boycotts resulting in the obstruction or hindrance of the performance of services by the Australian Government or the transport of goods or persons in international trade.

260. In its 2003 report the Committee noted that nothing had changed and again called for legislative reform. The Committee said:

Noting with regret that the Government states that no legislative reform is proposed, the Committee recalls that: … prohibiting industrial action that is threatening to cause significant damage to the economy goes beyond the definition of essential services in the strict sense of the term. In the case of the latter restriction, however, the Committee has considered that, in order to avoid damages which are irreversible or out of proportion to the occupational interests of the parties to a dispute, as well as damages to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in services which are of public utility rather than impose an outright ban on strikes. The Committee requests once again the Government to amend the provisions of the Act, to bring it into conformity with the Convention.

Strike Pay

261. The ILO has also complained that the WRA restrictions on strike pay contravene freedom of association.

The Committee recalls that where strike action is "unprotected" and therefore potentially subject to a wide range of sanctions, as in the case of action in support of multi-employer, industry-wide and national-level agreements, it is for all practical purposes prohibited. On the issue of strike pay, the Committee acknowledges the Government's statement that it is not incompatible with the Convention for an employer to refuse to pay wages to employees on strike. However, in the Committee's view, providing in legislation that workers cannot take action in support of a claim for such wages is not compatible with the principles of freedom of association.[71]

Sympathy Action

262. In its 1999 Observation on Convention 87 the CEACR the Committee condemned the prohibitions on sympathy action saying:

"The Committee notes that sympathy action is effectively prohibited under this provision (section 170MW(4) and (6)). Industrial action also remains unprotected if it involves secondary boycotts (section 170MM). The Committee recalls in this regard that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to

71 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 2001

take such action, provided the initial strike they are supporting is lawful"[72]

263. The Committee also noted the in particular the elevated penalties introduced under s45D, 45DA and 45DB of the TPA. In its 2001 report the Committee again called on the government to repeal sections 45D, 45DA and 45DB of the Trade Practices Act.

> *the Committee must again note with regret that the Act prohibits a wide range of boycott and sympathy action. The Committee again recalls that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is lawful. Since the provisions are not in conformity with the principles of freedom of association, sanctions should not be imposed. The Committee again expresses the firm hope that the Government will amend the legislation accordingly, and will continue to provide information as to the practical application of the boycott provisions of the Act.*

264. The provisions of the Workplace Relations Amendment (Better Bargaining Bill) 2005 will, if enacted, further restrict sympathy action.

Proposals for Change

265. The government has proposed amendments to the WRA which will regulate the conduct of bargaining. These include introducing cooling off periods, compulsory secret ballots, broader grounds upon which industrial action can be unlawful, and other intervention in bargaining process. At the same time the government defends laws that permit an employer to offer jobs to new entrants on a "take the AWA or leave it" basis; that sanctions employers locking out their employees until they accept an AWA, and which permits an employer to refuse to negotiate or even recognise a union, even in the face of evidence that the majority of employees seek to be represented by the union. It defends its practice of imposing AWAs on employees and employers (against the wishes of both) as a condition of funding universities and TAFE Colleges. The double standard is breathtaking. And is evident that the government is content to disregard fundamental labour standards.

72 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 1999

CONCLUSIONS

266. The system of bargaining in Australia does not meet the objective of the WRA, and the proposals to amend the laws will exacerbate the defects in the laws. In a system where arbitration is limited, the laws must promote fair bargaining practices.

267. The majority of employees cannot genuinely bargain with their employer on an individual basis. The evidence shows that AWAs have not been used to promote high-trust, high-performance workplaces, but instead are overwhelmingly a tool to undermine minimum standards, or de-unionise the workplace. In the event to no disadvantage test is abolished or weakened, their scope to undercut the minimum will be enhanced.

268. The preference given in the Act to individual bargaining should be abandoned in favour of protection of collective bargaining.

269. Employers should be obliged to bargain in good faith with their employees collectively where that is the wish of the employees.

270. Unfair bargaining practices such as lockouts should have no place in our laws.

271. The parties should be free to determine the level at which they bargain.

272. The role, scope ane relevance of the safety net must be preserved for those who are unable to bargain, and to moderate the impact of the market on vulnerable workers including women and young people.

273. Not all workplace reform can be delivered through bargaining. The AIRC has proven over the years to be an effective regulatory instrument to promote equitable outcomes such as equal pay and family friendly working conditions. This should be preserved.