NEW SOUTH WALES GOVERNMENT SUBMISSION TO THE STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

INQUIRY INTO

WORKPLACE AGREEMENTS

12 AUGUST 2005

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Part 1

Executive Summary

1. Agreement making is the centrepiece of the *Workplace Relations Act 1996.* Since 1996, both collective agreements and individual agreements by way of AWAs have coexisted in the federal jurisdiction. The changes foreshadowed by the Prime Minister suggest a fundamental shift towards a system in which individual bargaining is the preferred means of agreement making.

2. In May 2004, 20.5 per cent of all employees were on state and federal awards only and 38.3 per cent of all employees were covered by state and federal collective agreements. Recent statistics released by the Office of the Employment Advocate indicate that 709,417 AWAs have been approved since 1997 and various estimates put AWA coverage at 2-3 per cent of the Australian workforce.

3. Women, migrants, the young and the low skilled often fall outside the bargaining stream. Due to their circumstances they are unable to demand above award pay and conditions. Further, many employees lack sufficient bargaining power to insist upon agreements which enshrine family friendly policies. A comprehensive industrial regime must consider the needs of these categories of employees and this is the role played by awards.

4. It is also important for the industrial relations systems to recognise that some workers may not be able to bargain because they are not employees at law, despite being in an 'employee like' relationship, and being in a weak bargaining position. The current New South Wales system actively recognises the difficult position of these workers, and allows them to bargain by means of such measures as the deeming provisions in the *Industrial Relations Act 1996* and Chapter 6 of the same Act, which deals with workers who operate public vehicles and carriers.

5. The federal *Workplace Relations Act 1996* contains no analogous provisions in fact, a recent discussion paper released by the Department of Employment and Workplace Relations (DEWR)[1] indicates that it is the federal government's intention to override these provisions.

6. The WR Act fails to provide employees with a genuine opportunity to choose the type of agreement they want. Primacy can be given to individual bargaining irrespective of what the employees concerned might want.

7. By contrast, the existing New South Wales legislative framework recognises the importance of collective arrangements, good faith bargaining and its role in empowering workers and employers to negotiate mutually beneficial results.

[1] Discussion paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements, DEWR, March 2005

8. The introduction of individual agreement making in the form of AWAs is one of the most significant changes wrought by the WR Act. However, the Act fails to provide employees with the ability to do other than refuse or accept an offered AWA. In other words, the WR Act does not provide the opportunity to make a positive choice, without penalty, of the type of workplace agreement preferred.

9. The ability of workers and their unions to organise has been the subject of considerable legislative activity since the Howard Government came into power all of which is designed to regulate, to a greater or lesser degree, the activities of unions in the workplace.

10. The changes to industrial relations proposed by the federal government offer no prospect for women workers to benefit from the progressive New South Wales award system. The proposed Australian Fair Pay Commission (AFPC) does not have a mechanism to provide equitable outcomes for women workers nor redress the historical undervaluation of women's work.

11. It is not clearly demonstrable that the changes proposed by the federal government will deliver the new burst of productivity of which the Prime Minister is confident.

12. In fact, the New Zealand experience suggests that the further deregulation and/or individualisation of bargaining now being proposed by the federal government is unlikely to deliver the productivity outcomes claimed.

13. The right to organise is well recognised and supported in international conventions to which Australia is a signatory. In fact, the right for employees to choose to bargain collectively and requiring employers to recognise this choice is legally protected in all other OECD nations including the United States. The WR Act has already attracted strong criticism from the International Labour Organisation for its failure to fulfil Australia's international obligations in particular, *Convention 98 Right to Organise and Collective Bargaining*. As such, it can be said that the bargaining regime operating under the WR Act fails to conform with relevant international conventions. The changes now proposed by the federal government promise to take Australia even further out of step with these international standards.

14. In short, the federal bargaining regime operating under the WR Act provides a difficult and often hostile environment for employees and employers. Limited choices, institutionalised conflict and a lack of regard for fair and reasonable outcomes place the current federal system at odds with its New South Wales counterpart. Foreshadowed changes to the federal system promise to make these deficiencies even more pronounced. The prospect of having the present New South Wales system replaced with a federal system even more confrontational, unfair, and inefficient than the present one can only be seen as disadvantageous for New South Wales employees.

Part 2

Introduction and Overview

15. On 23 June 2005, the Senate resolved to conduct an Inquiry according to the following Terms of Reference:

> *Whether the objectives of various forms of industrial agreement-making, including Australian Workplace Agreements, are being met and whether the agreement-making system, including proposed federal government changes, meet the social and economic needs of all Australians, with particular reference to:*
>
> a. *the scope and coverage of agreements, including the extent to which employees are covered by non-comprehensive agreements;*
> b. *the capacity for employers and employees to choose the form of agreement-making which best suits their needs;*
> c. *the parties' ability to genuinely bargain, focusing on groups such as women, youth and casual employees;*
> d. *the social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities;*
> e. *the capacity of the agreement to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standards; and*
> f. *Australia's international obligations.*

16. The New South Wales Government's submission to this Inquiry is set out in the following pages.

17. Until recently, it has been the New South Wales Government's policy to refrain from commenting on the operation of the federal industrial relations system however, recent developments have led to a reconsideration of this position. Specifically, recent federal government Bills, such as, for example the *Workplace Relations Amendment (Termination of Employment) Bill 2002*, *Workplace Relations Amendment (Termination of Employment) Bill 2002 No 2*, and the *Workplace Relations Amendment (Right of Entry) Bill* 2004, seek to take over aspects of the New South Wales industrial relations jurisdiction, and are therefore of direct interest to the New South Wales Government.

18. Similarly, amongst the changes announced by the Prime Minister on 26 May 2005 was a proposal to set in place a unitary industrial relations system. This system would attempt to replace current state systems with a single system (though this does not appear possible), incorporating many of the features of the current federal system, as well as the other policy proposals announced concurrently by the Prime Minister.

19. All current Industrial Relations Ministers and the New South Wales Premier are on the record as strong opponents of this proposed course of action. Bargaining in such a unitary federal system would differ significantly from current New South Wales arrangements, and would particularly attack the paramount role of collective arrangements in the current New South Wales system.

20. The New South Wales Government is strongly of the view that the Senate should be made aware of our concerns about the operation of the current system, and further, of our concerns about what the federal system is likely to become, particularly if it overrides the current New South Wales system.

21. As a starting point, we draw particular attention to the following features of the New South Wales industrial relations system as it relates to bargaining:

Emphasis on Collective Arrangements and Fairness

22. The keystone of the New South Wales industrial relations system, the *Industrial Relations Act 1996*, is specifically and deliberately designed to firstly deliver both fair and just outcomes (Object 3(a)), and secondly to emphasise collective forms of organisation and regulation (Objects 3(d) and (e) respectively). Awards remain the centrepiece of the New South Wales industrial relations system, setting general standards for the industries/occupations to which they relate. Collective agreement making is available to parties wishing to tailor enterprise specific arrangements to suit their own requirements, as long as employees suffer no net detriment.

23. By contrast, the *Workplace Relations Act 1996* (WR Act) does not contain a similar overarching requirement for fairness.

24. In relation to collective instruments, the WR Act, and the federal government policy that accompanies it, is intended to be 'neutral' between collective and individual instruments such as Australian Workplace Agreements (AWAs). While a narrow reading of the WR Act may support such a view, the practical operation of the Act leads to a different conclusion, as will be seen later in this submission.

25. In any event, the active promotion of AWAs through, inter alia, tied grants to the states and the activities of the Office of the Employment Advocate (OEA), make claims of legislative neutrality of little practical significance.

Broad Powers of the New South Wales Industrial Relations Commission

26. The New South Wales Industrial Relations Commission (NSW IRC) is an integral part of the state industrial relations fabric.

27. The State Commission possesses all the appropriate powers to arbitrate in a prompt and fair manner and with a minimum of legal technicality. It also encourages and facilitates co-operative workplace reform and equitable, innovative and productive workplace relations in New South Wales.

Absence of Protracted Disputes or Lockouts

28. Protracted and bitter bargaining disputes are one of the most disturbing features of the federal industrial relations system. While it is certainly true that the WR Act contemplates industrial action by the bargaining parties, it is difficult to accept that rational policy makers could have expected, or intended to encourage, disputes such as Boeing, Kemalex, and Tenix Solutions. Many of these disputes have occurred in small regional communities, with obvious disruptive effects.

29. Such disputes are starkly absent from the New South Wales system. This is not least because of the primacy of collective arrangements and the wide powers of the Commission to ensure that such arrangements are put in place and stay in place.

30. These features of the New South Wales industrial relations system distinguish it fundamentally from its federal counterpart. As will be seen below, the absence of such features in the current federal system has far-reaching practical effects. The imposition of a unitary system on workers currently covered by the New South Wales system will therefore be to their significant detriment. The changes recently foreshadowed by the Prime Minister promise to make that detriment even more significant.

Part 3

Terms of Reference

(a) Scope and coverage of agreements

31. Agreement making is the centrepiece of the *Workplace Relations Act 1996.* Since 1996, both collective agreements and individual agreements by way of AWAs have coexisted in the federal jurisdiction. The changes to the federal system (and possibly state systems) foreshadowed by the Prime Minister suggests a fundamental shift towards a system in which individual bargaining is the preferred means of agreement making.

32. By contrast, the New South Wales jurisdiction has never provided for individual bargaining. However, the New South Wales jurisdiction was the first to introduce enterprise-level bargaining through its 1991 State Wage Case. Enterprise bargaining arrangements have been carried forward into legislation, most recently in the *Industrial Relations Act* 1996 (NSW). However, the construction of the New South Wales Act differs fundamentally from that the WR Act. As will be seen below, the New South Wales Act emphasises collective instruments and has an overriding requirement for fairness. The practical result is that the New South Wales jurisdiction differs from its federal counterpart by having awards – largely common rule awards – as the primary instrument of industrial regulation. Under the federal system, awards are relegated to playing a safety net role.

33. The Australian Bureau of Statistics biennial Survey of Employee Earnings and Hours provides the most comprehensive data on the distribution of employees across different types of federal and state agreements and associated rates of pay, in its latest issue, May 2004. At that time, 20 per cent of all employees were on state and federal awards only, and 38.3 per cent of all employees were covered by state and federal collective agreements. Registered individual agreements were the least common method of setting pay with 2.4 per cent.[2]

34. Recent statistics released by the Office of the Employment Advocate (OEA) indicate that 725,114 AWAs have been approved since 1997.[3] At this point in time AWAs account for approximately 2-3 per cent of the workforce, however, this proportion is likely to grow given that the 2004/05 financial year saw a marked surge in the number of AWAs approved with the OEA endorsing a total of 205,865, a 36 per cent increase on the 2003/04 financial year.[4]

35. However, significant numbers of employees fall outside the bargaining stream. Of all Australian employees, 19.9 per cent, about 1.6 million people, depend on award wages. More than 965,000 of these workers are women, 82 per cent of these employees earn less than the median weekly wage and 46 per cent

[2] Ausstats
[3] OEA Media Release AWA approvals close to three quarters of a million 8 August 2005
[4] OEA Media Release AWA approvals rising month-on-month 7 July 2005.

are casual. The most award-reliant industries are retail and accommodation, cafe and restaurant employees.[5]

36. Those with low (or no) bargaining power are often at lower skill and pay levels. They are more likely to be women, young, speak English as a second language, hold only high school or vocational qualifications, live in regional areas and work in lower-skilled occupations and are engaged as a casual and/or part-time employee. Due to their circumstances they are unable to demand above award pay and conditions and lack the capacity to negotiate agreements. A comprehensive industrial regime must make appropriate provisions to address these workers.

37. Thus, while bargaining is the centrepiece of the federal industrial relations system, it is clear that a substantial number of workers fall outside the bargaining system. Given that these are among the most vulnerable workers in the system, no discussion of the adequacy or otherwise of the federal bargaining system would be complete without at least acknowledging the existence of this group of workers.

38. As to the relationship these workers have with the federal bargaining system, in their submissions to the 2005 federal safety net review, employers and the federal government submitted that if safety net adjustments are too high they remove or detract from the incentive to bargain. While there is some force in this submission, as the Commission has found in previous cases, it cannot be accepted without reservation.

39. The New South Wales Government maintains that there is no evidence to sustain assertions that safety net adjustments act as a disincentive to enterprise bargaining. Firstly, enterprise agreements continue to grow in spite of the safety net adjustments, secondly, the gap between pay rates under awards and certified agreements and the demographic characteristics of the minimum rates workforce illustrates award employees rely on safety net adjustments for wage increases because they lack the bargaining power or capacity to negotiate agreements. Proponents of the argument that minimum wage increases are a disincentive to bargaining are asking the AIRC to accept the proposition that employees choose to be paid the lowest rate possible.

40. Thirdly, the persistence of award-only employees (and employees who are not covered by a certified agreement) must at least in part reflect the preferences of employers, especially amongst small business owners who prefer their employees to be covered either by common law employment contracts or awards. Small businesses, which have a very low propensity to negotiate enterprise agreements, are proliferating faster than large or middle-sized businesses. To the extent that safety net adjustments increase the cost of employing labour for businesses engaging labour on award rates, it might be argued that far from creating disincentives for agreement-making, safety net increases stimulate the incentive to bargain for employers.

[5] Safety Net Review—Wages 7 June 2005, AIRC Decision [PR002005]

41. Some consideration should also be given to workers who perhaps **should** be allowed to bargain. For example, the New South Wales system allows a broader range of workers who do bargain, by means firstly of the deeming provisions at s5(3) and Schedule 1 of the New South Wales Act, and secondly the provisions regulating public vehicles and carriers at Chapter 6 of the New South Wales Act.

42. The deeming provisions at s5(3) and Schedule 1 of the Industrial Relations Act broaden the range of workers to be considered to be employees for the purposes of the Act. These provisions recognise that a number of categories of workers exist who are often in weak negotiation positions and that in many instances, the relationship which exists is not substantively different to that of employee and employer.

43. Examples of deemed employees include cleaners, carpenters, joiners or bricklayers, plumbers, drainers or plasterers, painters and clothing outworkers. Deeming these workers to be employees permits them to join unions which can either bargain collectively on their behalf or seek award protection where bargaining is not a viable option.

44. It is noted that the federal government's intention appears to be to override these provisions on the basis that:

> Deeming provisions have the effect of invalidating individual choice and flexibility in choosing workplace relationships, including their right to negotiate conditions of work that suit their own individual needs. Further, deeming provisions undermine the legitimate desire of many employers to increase efficiency by allowing for a flexible workforce they can augment or restrict to meet their requirements. [6]

45. Chapter 6 of the New South Wales Act provides a discrete regulatory regime which applies to contracts of bailment (taxi drivers) and contracts of carriage (drivers involved in the transportation of goods who own their own vehicle). It is worth noting that provisions of this nature were first introduced into the then *Industrial Arbitration Act* 1940 in 1979.

46. This Chapter provides the NSW IRC with the power to make contract determinations (analogous to awards) and to approve contract agreements (analogous to enterprise agreements) between parties in relation to such contracts. The IRC is also empowered to resolve disputes in the industry.

47. Importantly, these arrangements provide a framework in which these workers can organise and bargain collectively.

48. The Chapter 6 scheme is based on the premise that the drivers involved are, in terms of bargaining power, in an analogous position to employees. In other words, although the contractual agreements entered into by these drivers are

[6] DEWR Discussion Paper: Proposals for Legislative Reforms in Independent Contractors and Labour Hire Arrangements 2005.

not employment contracts at law, nevertheless they are in a vastly inferior bargaining position as against the large transport companies for whom they perform services. Chapter 6 provides these workers with a minimum set of industry conditions via contract determinations, a means to organise collectively and from that basis to collectively bargain for appropriate pay and conditions.

49. The *Workplace Relations Act 1996* contains no analogous provisions, and none appear to be planned. Given the view expressed in the recent DEWR Discussion Paper (see paragraph 21 above), it would appear that the federal government's position is that provisions of this nature should be dispensed with.

50. It therefore seems reasonable to conclude that, under the type of unitary system envisaged by the federal government, such provisions would simply disappear, and the number and range of workers able to bargain would contract significantly.

Conclusion

51. At present agreement making is the centrepiece of the federal workplace relations system. Although the legislation gives primacy to individual bargaining rather than collective, AWAs currently only cover 2-3 per cent of the workforce. However, it is now stated federal government policy that AWAs are an integral part of a modern economy and part and parcel of a flexible, productive workforce.

52. A significant number of employees fall outside the bargaining stream and rely on safety net reviews because they are unwilling or unable to bargain. These are most likely to be low paid employees with low skill levels – women, young workers, casual workers, workers in regional areas and so on.

53. It is also important for the industrial relations systems to recognise that some workers may not be able to bargain because they are not employees at law, despite being in an 'employee like' relationship, and being in a weak bargaining position. The current New South Wales system actively recognises the difficult position of these workers, and allows them to bargain by means of such measures as the deeming provisions in the *Industrial Relations Act 1996* and Chapter 6 of the same Act, which deals with workers who operate public vehicles and carriers.

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

54. Object 3(c) of the WR Act states:

> **Principal object of this Act**
>
> The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:
>
> …..
>
> (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;

55. Despite this, the practical reality is different. As Fenwick et al put it:

> the WR Act does little to regulate how employees might choose the type and content of the workplace agreement they consider appropriate (5.1.2.1)

and

> existing employees in practice have only a *negative* capacity to select the appropriate form of agreement. They can refuse an AWA, or vote down an enterprise agreement (whether under s 170LJ or s 170LK), but the WR Act provides no mechanism for employees to deliberate and to express a *positive* choice about which form of agreement they would prefer (5.1.2.5, emphasis in original).

56. The introduction of individual agreement-making in the form of Australian Workplace Agreements (AWAs) is one of the most significant changes wrought by the *Workplace Relations Act 1996*. On one view, the introduction of AWAs was a true innovation:

> Their singular contribution to the regulation of labour relations in Australia is that, for the first time since the introduction of a compulsory conciliation and arbitration a hundred years ago, they provide a mechanism by which an individual agreement might lawfully undercut the safety net of conditions as built up over the years in awards of the AIRC and its predecessors.[7]

[7] University of Melbourne Centre for Employment and Labour Relations Law Submission to the Ministerial Review of the Workplace Relations Act 1996 December 2004. Colin Fenwick et al p 27.

57. While Minister Andrews claims that 'AWAs are a crucial component of the modern flexible workforce',[8] studies indicate that when compared with collective agreements, AWAs reflect inferior wage outcomes and a reduction in working conditions and non wage benefits.

58. Professor Richard Mitchell, director of the Centre for Employment and Labour Relations Law at the University of Melbourne says his research shows that 'workers who have AWAs have tended to trade plenty for slim gain'.[9]

59. As it stands, AWAs cover a limited number of workers. Most recent figures provided by the Office of the Employment Advocate as at 30 June 2005 reveal that there have been 725,114 AWAs approved since March 1997. Operative AWA figures would stand much lower with various estimates of their level of coverage falling between 2 and 3 per cent of the workforce.

60. AWAs are concentrated in a number of industries specifically retail, manufacturing, mining and accommodation, cafes and restaurants. However, their effects on collective bargaining arrangements in these industries are significant. The legislative changes foreshadowed by the Prime Minister appear intended to boost the availability and incidence of AWAs even further:

61. The features of AWA bargaining include the following:

- An AWA may be offered to any employee of a constitutional corporation at any time by the employer (WR Act s170VF);
- The employer is not required to have regard to the collective or individual wishes of employees about their preferred form of industrial instrument. In other words, the employer may continue to offer AWAs even if the individual or collective group says they want a collective instrument. The legality of such employer action has been the subject of substantial judicial scrutiny since 1996, and no legal impediments of any significance to such employer action have been identified (see, for example, *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 1623 (15 November 2001), *Re G & K O'Connor Pty Ltd* AIRC Print No S2371 12 January 2000).
- Employees and employers may take industrial action in relation to individual bargaining. Whilst industrial action by employees in pursuit of an AWA is rare, lockout action by employers is increasingly common. A paper recently prepared by Dr Chris Briggs, a senior researcher at the University of Sydney, entitled 'Lockout Law in Australia: Into the Mainstream' revealed that employers, not unions, are now responsible for most of the long-running disputes in Australia. It is significant that 91 per cent of lockouts occur in the federal industrial relations system.

[8] Andrews Media Release KA127/05 28 April 2005
[9] 'Cold War' Frontline IR Article Spring 2004

- The AIRC's power to intervene to, say, force the parties to bargain, or to bargain in good faith, is limited (See *Sensis Pty Ltd* AIRC Full Bench PR939704 28 Oct 2003 at [20] – [29])
- Acceptance of AWA can be a condition of engagement for new employees under s170VF(2). Fenwick et al noted:

  > at least some new employees may lawfully be *required* to enter into an AWA as a condition of accepting an offer of employment. In this case, an employees capacity to choose an alternative arrangement, such as a (collective) certified agreement is foreclosed'. [10]

- The key test of a particular AWA's validity is the No Disadvantage Test (NDT) (WR Act Part VIE), as applied by the OEA. The practical effect is that 'for the first time since the introduction of compulsory conciliation and arbitration a hundred years ago, [AWAs] provide a mechanism by which an individual agreement might lawfully undercut the safety net of conditions as built up over the years in awards of the AIRC and its predecessors' (Fenwick et al at 5.3.1.1).

62. As far as the direct relevance of AWAs to the bargaining process is concerned, a particularly clear illustration of their effect is provided by the BHP Iron Ore case (*Australian Workers' Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3 (10 January 2001)). In this case, the employer, BHP Iron Ore Pty Ltd offered employees in its Pilbara operations individual agreements (WPAs) under then existing WA legislation, which was substantially similar to the WR Act in so far as it provided for individual agreements. The unions sought to restrain BHPIO from doing so, primarily on the basis that 'the offer of WPAs reduced the collective bargaining power of those employees who did not sign a WPA by diminishing their ability to take effective collective action' (Case Summary p2). The unions unsuccessfully sought to use the Part XA freedom of association provisions of the WR Act for this purpose.

63. In evidence, Mr Robert Kirkby, Chief Operating Officer of BHP Minerals, deposed as follows:

> 187 ….The rollout of offers of individual contracts and movement onto individual contracts was a step that I saw would improve the relationship between BHPIO and its employees and allow the employees to work more flexibly and to be more attuned to the aims and objectives of BHPIO. I considered that the removal of the need to negotiate change with union representatives was desirable and in the best interests of BHPIO. I did not intend by approving the rollout of the agreements and not entering into negotiations for a new EBA to encourage or require anyone to leave union membership. At the time that I approved the arrangements, I held the view, which I continue to hold, that an enterprise based agreement is not a preferred employment arrangement for BHPIO as it still involves and requires

[10] University of Melbourne Centre for Employment and Labour Relations Law Submission to the Ministerial Review of the Workplace Relations Act 1996 December 2004. Colin Fenwick et al p 27.

> negotiation with union representatives who can still hold up and demand a price for any change. I held the view in late 1999, which I still hold, that the introduction of workplace agreements and the movement away from collective bargaining is in the best commercial interests of BHPIO and will deliver benefits over time…

64. Subsequent research findings confirm that this a common employer approach:

> In Australia, two-thirds of 'individualised' workplaces (ie individualised by the introduction of AWAs) had no union presence according to a recent study…., and in many industries and enterprises where there *is* union presence, their resistance power has been weakened by legal and labour market factors. One outcome of this, of course, has been a consequent restoration of unilateral power to management, as union restraints and controls at the workplace have been rolled back…
>
> ….
>
> In some respects, this evidence once again matches the British findings. Greater managerial discretion to set terms and conditions of employment, according to a major British study, did not necessarily imply an enhanced role for individual contracts as incentive devices for eliciting employee cooperation. Rather, the British evidence indicated that the key effect of 'individualisation' had been the enhanced capacity of management to bring about desired flexibilities, including functional flexibilities, through the opportunity to set employment conditions at will… [11]

65. In the BHPIO case (and in many others, in our submission), individual agreements provided the employer with a unilateral choice about the type of agreement to be used, and allowed BHPIO to leave the existing collective bargaining arrangements. Notwithstanding the ability of individuals to refuse, the employees concerned may face considerable hardship, protracted lockouts, and possibly ultimate defeat in a war of attrition. (See Briggs pp39-44).

66. The current Boeing case provides a clear illustration of this process. The union members concerned have requested a collective agreement yet their employer refuses to negotiate such an agreement and instead insists on offering AWAs. It is noted that the Prime Minister now publicly supports the employer in this case.[12]

67. AWAs thus provide employers with flexibility and choice in two key areas: firstly in relation to the *type* of agreement to be used in their workplace, and secondly, in relation to the *content* of the agreement so chosen. While the content of any agreement is critical, this term of reference obviously focuses on the first of these and this submission is directed primarily at this point.

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[11] Mitchell R and Fetter J *Human Resource Management and Individualisation in Australian Labour Law* 45 JIR at 298-299

[12] PM shows his hand in Boeing dispute – Sydney Morning Herald 11 August 2005 p5

68. In fact, the lack of employee choice in the face of AWAs applies no less to the other forms of agreement-making provided by the WR Act. These are an agreement between an employer and a union (ss170LJ or s170LL), and agreement between an employer and the relevant employees (s170LK), or an agreement to prevent or settle an industrial dispute (s170LO). In any event, the foreshadowed changes to the federal jurisdiction would make AWAs 'crucial component' of the latter.

69. For employees, the effect of the WR Act is to thus conflate the two key areas, firstly, what type of agreement is to be used, and secondly, what the agreement will say. Employees may oppose a particular agreement on a number of grounds – preference for a collective arrangement, preference for an agreement with the union, insufficient improvements to pay and conditions etc. However, employees are granted but one formal opportunity to express these views in aggregate.

70. By contrast, employers can separate or conflate these two key areas at will. The employer may offer a collective agreement, and then cease negotiation and offer AWAs, or vice versa. The employer may then lock out the workforce in pursuit of the desired outcome.

71. In April this year, the secretary of the federal Department of Employment and Workplace Relations (DEWR), Dr Peter Boxall, announced that all future appointments to the department would be subject to the successful applicant signing an AWA.

72. This is the first time that the government has attempted to compel its own employees at all levels to sign AWAs.

73. These two key issues are clearly of an entirely different character. Deciding what type of agreement will be put in place raises questions such as: should the agreement be collective or individual? Should the union(s) be involved? How are grievances and disputes to be settled? These are clearly questions of a broad nature, about the industrial relationship between the employer and workforce.

74. By contrast, matters relating to the content of a particular agreement (of whatever sort) are much narrower in scope, relating to issues such as wages, leave, hours of work, allowances etc. While these matters may well be a corollary of the employment relationship, they do not shape it in the way that the matters canvassed in the previous paragraph do.

75. Moreover, Australia is unique among OECD countries in failing to legislatively distinguish these issues. As Briggs et al point out:

> The right for employees to choose to bargain collectively, and requiring employers to recognise this choice, is legally protected in all other OECD nations….

….

> In other nations with decentralised bargaining systems like ours – the United States, United Kingdom, Ireland and Canada – there is a ballot process to allow employees a genuine choice as to whether they wish to be represented by a union. If the ballot verdict is affirmative, the employer is required by law to respect their wishes and bargain with their chosen union representative. A legal guarantee of an employee's right to collective bargaining where that is their preference is standard practice internationally (Briggs et al (2005) pp1-3)

76. The basis of these protections is:

> the obvious and enduring truth – which no amount of spin can obscure for long – that most employees, most of the time confront a power imbalance at work in dealing with their employer. The exact way in which this imbalance plays out varies from time to time, place to place, occupation to occupation. But exist it necessarily does. Employees can sometimes sort out issues individually with their employers but overall they face the imbalance of bargaining power at all stages of their working lives: when they seek employment, start a job, establish conditions, when there are changes at work, when they have a grievance with the way their supervisors treat them, when they are retrenched. It is precisely for these reasons that the ILO has sought to ensure that employees can have access to union representation and engage in meaningful collective bargaining without fear of retribution from government or employers. (Briggs et al (2005) p2).

77. As we point out later in this submission, the ILO Committee of Experts is of the view that Australia does not conform to international standards in relation to collective bargaining.

78. Unfortunately, judging by the nature of the legislative changes mooted by the Prime Minister, these matters are of no concern to the federal government. Instead, the federal government proposes to advance the present arrangements even further, by removing AIRC and OEA approval processes for certified agreements and AWAs respectively, providing for a much reduced no disadvantage test.

79. In fact, the federal government is already active in seeking to make AWAs the centrepiece of the federal system. The OEA's budget has been substantially increased since its inception. It will receive $12 million over the next four years (including $3 million in 2004-05) to help promote the advantages of AWAs, and the delivery of an education program that will encourage small businesses to take up AWAs. This measure was announced in 2004 as part of the federal government's election commitment *Flexibility and Productivity in the Workplace.* Further, in recent years, the OEA has been active in producing 'template' AWAs which particular employers can then provide to their employees on an 'off the shelf' basis.

80. Template AWAs are a clear example of employer pattern bargaining. The general practice of employers offering identical AWAs on a 'take it or leave it' basis has been well-established.

81. The following is an extract from the OEA website:

> The Small Business AWA Template has been produced by the OEA to provide practical assistance to small businesses looking for simple, flexible and secure arrangements for employing and paying their staff. The template includes clauses which cover the entitlements commonly found in awards, but also provide flexibility. Additionally, a separate 'bank' of alternative clauses is available, through 'AWAonline', for employers and employees wishing to tailor their AWAs to meet specific business or work and family needs. [13]

82. As well as this, the federal government has begun to tie funding for various activities such as education and construction to undertakings from state governments to offer AWAs to the employees responsible for undertaking these activities. In the context of a discussion about the ability of employees to genuinely choose their preferred form of agreement-making, it is apposite to note that, in these cases, the federal government appears to be determined to impose its choice on the industrial parties involved, irrespective of what their preferences might be.

83. The New South Wales system which these measures would replace is constructed on very different premises, and already stands in contrast to the current federal system.

84. In fact, provisions supporting enterprise level bargaining in the New South Wales system pre-date those in the WR Act. In 1991, the New South Wales Government inserted provisions into the *Industrial Arbitration Act* 1940 permitting the negotiation of union and non union collective agreements as an alternative to the common rule award system. Later, the then *Industrial Relations Act 1991* (NSW) provided a statutory scheme for enterprise bargaining in New South Wales, which was carried forward, with amendment into Part 2 of the succeeding *Industrial Relations Act 1996.*

85. The NSW IRC regularly updates both its Wage Fixing Principles - see http://www.lawlink.nsw.gov.au/ircjudgments/2005nswirc.nsf/c45212a2bef99be4ca256736001f37bd/079dfab7abba917fca257027001ddd22?OpenDocument

and the Principles Governing the making of Enterprise Agreements - see http://www.lawlink.nsw.gov.au/ircjudgments/2002nswirc.nsf/c45212a2bef99be4ca256736001f37bd/66e9aa2e2d17414fca256c890082a549?OpenDocument

86. The existing New South Wales legislative framework recognises the importance of collectivism through good faith bargaining and its role in empowering workers and employers to negotiate mutually beneficial results.

[13] Office of the Employment Advocate website www.oea.gov.au

87. In its Objects, the *Industrial Relations Act 1996* (NSW), provides that:

> **'3 Objects**
>
> The objects of this Act are as follows:
>
> (a) to provide a framework for the conduct of industrial relations that is fair and just,
>
> ……
>
> (d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,
>
> (e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,
>
> ……'

88. Section 10 of the Act provides that 'the commission may make an award in this Act setting fair and reasonable conditions of employment for employees.' The Commission considers that s10 embodies the 'paramount duty' of NSW IRC. (See *Re Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* [2002] NSWIRComm 144 (28 June 2002) at paragraph 423).

89. In short, the New South Wales Act is designed to deliver both fairness (Object 3(a) and s10) and it emphasises collective forms of organisation and regulation (Objects 3(d) and (e) respectively).

90. The NSW IRC has a broad range of powers to ensure that these objects are put into effect. Significantly, the NSW IRC is not subject to the constitutional and legislative constraints and consequent jurisdictional debates which have accompanied federal industrial legislation over the 101 years of is existence.

91. The New South Wales system is also able to accommodate employers (particularly small business employers) who either do not wish to bargain or do not have the resources to do so. It does so by means of a well established and stable system of common rule awards.

92. The overall result is a bargaining environment which operates fairly and efficiently, free of the bitter and protracted bargaining disputes which have come to characterise the federal system since 1996.

93. If the unitary system that the federal government proposes is put in place, New South Wales employers will have access to a far more limited range of bargaining choices than they currently do. New South Wales employers are **currently** able to use the federal system if they and their employees so

decide, but significant numbers of New South Wales businesses have instead decided to stay in the New South Wales system. Many small businesses use the New South Wales common rule award system because of its ease and convenience. Under the unitary system proposed such common rule awards would disappear, and be replaced by a minimal federal award system which may in fact not exist at all in the further term. The only other alternatives available to employers would be collective or individual bargaining which are already available under the current system and which they have chosen not to take up.

Conclusion

94. The WR Act fails to provide employees with a specific, genuine opportunity to choose the type of agreement they want and fails to back up employee choices about the type of agreement they want – even if the majority state that they want, say, a collective agreement, the employer is under no obligation to accept that choice. Under this regime, genuine choice for employees is not, and cannot be, available.

95. The choices for New South Wales employers would be more restricted under the proposed federal unitary system. New South Wales employers are already able to access federal bargaining provisions (both collective and individual) if they so choose but many have decided to remain in the state system.

(c) The parties ability to genuinely bargain, focusing on groups such as women, youth and casual employees.

96. A key factor in assessing the ability of bargaining parties to genuinely bargain is the balance of power between them. The balance of power will depend on a range of factors, such as the respective abilities of the parties to exert pressure on each other, the information available to them, and their respective ability to organise and deploy the resources available to them.

97. This section particularly focuses on the balance of bargaining power as it relates to the last two of these, information and the ability to organise.

98. The ability of workers and their unions to organise has been the subject of considerable legislative activity by the Howard Government since it came to power in 1996. Legislation such as the *Building and Construction Industry Improvement Bill 2003*, *Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004*, *Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace Relations Amendment (Codifying Contempt Offences) Act 2004,* and the *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004* are all designed to regulate, to a greater or lesser degree, the activities of unions in the workplace.

99. The most recent (and one of the clearest) examples of such a legislative approach is the *Workplace Relations Amendment (Right of Entry) Bill 2004*, currently before parliament.

100. The likely practical effects of the Bill are very clear. Chief among them is the legislative complication of the right of entry in all Australian jurisdictions. The burden of this complication was intended to fall most heavily on unions, who, if the bill had passed, would be required to carry a significant new administrative workload just to 'get in the door' so to speak, obey the instructions of employers regarding where they can talk to their members and how they get there, and be fit and proper people in order to exercise these heavily circumscribed rights. In the event that an official of a union was found to have abused these rights, the Bill contemplated the removal of a right of entry entitlement from all officials of the union, for a period to be determined. Significantly, the Bill provided that union officials could only enter workplaces once every six months for the purposes of recruitment.

101. This was a provision initially flagged within the 2003 *Building and Construction Industry Improvement Bill*. The Senate Committee, in its report which ultimately rejected the Bill, noted that that the proposed right of entry provisions would curtail the rights of unions operating in the building industry:

> The restriction of union officials to an area of the workplace determined by the employer, even to the extent of the route taken to get there, makes the task of effective representation virtually impossible, given that employees may find themselves in the position of being observed by the employer as they go to meet the union official in the designated place.

102. Furthermore the Senate Committee agreed with the position of the joint state government submission[14] which suggested that:

> The adoption of an interventionist, highly regulated, restrictive and punitive model under the Bill is unlikely to increase productivity and efficiency in the industry. Nor is it likely to increase levels of trust and cooperation in the industry. Instead, it will drive the parties into further levels of confrontation and litigation.

103. The Bill also explicitly prohibits the certification of agreements containing alternate right of entry provisions and would operate to the exclusion of state right of entry laws to the extent that they apply to constitutional corporations.

104. The legislation foreshadowed by the Prime Minister on 26 May would extend this approach further, placing further restrictions on union industrial action during bargaining, but leaving employer lockout action untouched.

105. The implications of this approach for the bargaining process are clearly described by Fenwick et al, who say:

> 5.1.1.1…Key elements of Government policy, embodied in ss 3(b), (c) and (e) of the WR Act, are that employees should be able to choose the type of agreement that best suits their workplace, and that the process of agreement-making should be fair. These principles can only be effective if employers do in fact negotiate with their employees where the employees wish to do so. The WR Act, however, imposes no obligation on an employer to bargain with employees that wish to bargain, and gives the AIRC at best limited power to facilitate or to direct the parties' bargaining.

And

> 5.1.2.10. It is fundamentally inconsistent with the objects of the WR Act for employers to be able to determine workplace terms and conditions unilaterally, without significant capacity for employees to develop their own proposals. In particular, employees should have the opportunity of forming a common position on the form of agreement they desire. They should also be able to come to any position through discussion amongst themselves in the workplace. Attention to these issues may assist in ensuring that agreement outcomes are appropriately tailored to workplace needs. In these respects, however, the WR Act presently falls well short of international benchmarks.

And

> 3.5.4. The choices available to employees should also include true choice whether or not to be effectively represented by a trade union,

[14] ibid., pp. 68-9.

> and for employers whether or not to be represented by a registered organisation of employers. In this respect, the Government might well reconsider the purposes for which the WR Act provides for the formation of representative organisations of employees and employers, and in particular, reduce significantly the highly prescriptive level at which the WR Act regulates their internal affairs. It should in this respect make a greater effort to facilitate the exercise of the basic human rights of workers and employers, and to do so consistently with Australia's obligations at international law.[15]

106. The WR Act thus provides minimal support to employees and their unions wishing to organise for bargaining, again despite the fact that international conventions which Australia has ratified provide for just such rights as will be examined in more detail later in this submission.

107. The practical operation of the WR Act is also manifested in the degree to which the AIRC is willing or able to assist the parties in the bargaining process. The AIRC's view about the scope of interventions available to it was squarely considered in the recent series of *Sensis* cases. The first of these cases was a decision of Smith C, who ordered that Sensis Pty Ltd, then engaged in bargaining with its workforce, involve the relevant union, the CPSU, in negotiations, in accordance with the wishes of the CPSU members involved, and against the wishes of Sensis management. Sensis management wished to make an agreement with their staff pursuant to s170LK of the WR Act, without the involvement of the CPSU.

108. Commissioner Smith took the view that the WR Act (implicitly) placed a duty on the parties to bargain in good faith, and that the order to involve the CPSU was in redress of what might or might not be an 'unfair bargaining practice' by Sensis in not allowing the CPSU to represent its members.

109. This decision was then appealed to a Full Bench of the AIRC, which quashed Smith C's order, saying that:

> **[28]** No party submitted that there is a legal duty to bargain in good faith pursuant to *Part VIB*. There clearly is no such duty. Such a duty is known to United States labour law. By s.8(a)(5) of the *National Labour Relations Act* of the United States it is an unfair labour practice for an employer to refuse to bargain collectively with the duly appointed representatives of its employees. Section 8(b)(3) establishes a correlative unfair labour practice based on the refusal of a union to bargain collectively with an employer. Section 8(d) defines the obligation to bargain collectively by reference to the mutual obligation of the employer and the representatives of employees to meet at reasonable times and confer in good faith. There are no equivalent provisions in the *Workplace Relations Act 1996*.

[15] Fenwick et al (2005)).

> **[29]** The Commission is required, relevantly, to act according to equity and good conscience. It may be accepted that if registered organisations, employees or employers act other than in accordance with those precepts the Commission may take that fact into account when exercising its discretion. But that is a different matter entirely to the question of whether there is a legal duty to bargain in good faith.

110. The Commission's overall conclusion was that:

> **[25]**….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.[16]

111. Sensis Pty Ltd then took the matter to the High Court on jurisdictional grounds, and the matter was remitted to the Federal Court. The Full Federal Court upheld the AIRC's decision (*Sensis Pty Ltd v Members of the Full Bench of Industrial Relations Commission* [2005] FCAFC 74 (12 May 2005)), confirming the limited role of the Commission provided for by the WR Act and enunciated by the AIRC Full Bench.

112. No discussion of relative bargaining power would be complete without some mention of industrial action. One of the starkest points of difference between the WR Act and other Australian industrial regulation (and indeed, industrial regulation in many other overseas jurisdictions) is the former's provision for employer lockouts as an ostensibly routine element of the bargaining process.

113. Nearly sixty per cent of disputes that last three weeks or more are now due to employers locking out their own workers.[17] As Briggs et al point out:

> Other OECD nations either prohibit lockouts or permit lockouts under exceptional circumstances when an (employer) is considered to suffer from an imbalance in bargaining power. In no other OECD nation are employers allowed to lock out their employees to coerce them into signing an individual agreement and undermine their preferences for collective bargaining.[18]

114. Briggs' work on lockouts (Briggs 2004) observes that employers, not unions, are now responsible for most of the long-running disputes in Australia. The new found willingness to use industrial action represents a cultural change in employer approaches as a result of enterprise bargaining, the Workplace Relations Act and the encouragement of aggressive bargaining stances by the Federal Coalition Government. According to Briggs, Australian employers have more freedom to lock out than any other OECD nation.[19]

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[16] *Sensis Pty Ltd* AIRC Full Bench Print No PR939704 28 Oct 2003
[17] Hansard New South Wales Legislative Council, The Hon John Della Bosca, 19/10/04
[18] (Briggs et al 2005 p5).
[19] Accirt Working Paper 95 Lockout Law in Australia: Into the Mainstream?

115. As noted above, the changes foreshadowed by the Prime Minister include further restrictions on the ability of unions to take industrial action during a bargaining process, but employer lockouts will remain untouched.

116. The foregoing comments have necessarily focused on collective bargaining situations. However, given the federal government's elevation of AWAs as the preferred instrument of industrial regulation, it is worth quoting from Mitchell and Fetter as to the practical realities of individual bargaining, such as they are:

> whether by design or accident, the legislation associated with making and processing of AWAs does not support, or even seriously suggest, a requirement for individual bargaining as such. It is true that the language of the (WR Act) is couched in terms of 'bargaining' over AWAs. It allows for 'bargaining agents' and it stipulates that such agents must be 'recognised'. It also permits the individual worker to strike as a bargaining weapon. Other provisions perhaps suggest that employers may not merely impose AWAs.
>
> However, all that aside, legally the (WR Act) provides little in the way of support for the individualisation process to be a bargained one. In reality, the obligation to recognise a bargaining agent is vacuous. There is no obligation upon the employer to bargain, nor to act in good faith….Anecdotal evidence suggests that the AWA process in practice may be more likely to be unilateral rather than bilateral.[20]

117. Some note should also be made of processes of approving agreements, whether they are collective or individual. Current approval processes rest on application of the No Disadvantage Test (NDT) by the AIRC or the OEA, as required. However, the changes foreshadowed by the Prime Minister on 26 May indicate that the NDT will only survive in much reduced form: rather than very relevant comparison award(s), the benchmark will be an Australian Fair Pay Standard of a few minimum conditions. In any event, given that agreements (both collective and individual) will have effect from the time that they are filed with the OEA, the application of the NDT would appear to become no more than an academic exercise. The limits on bargaining currently provided by the NDT and the protections that it creates for workers would thus be removed.

Conclusion

118. The WR Act creates significant asymmetries of bargaining power between employers and employees by:

- Regulating the activities of unions in relation to right of entry and other matters in increasingly prescriptive detail;

[20] Mitchell and Fetter (2003) 45 JIR at 297

- Failing to provide workers with the opportunity to develop bargaining proposals of their own;
- Providing the AIRC with power to be no more than a facilitator in the bargaining process;
- Restricting the power of employees and their unions to take industrial action, while taking a significantly less restrictive approach to employer lockouts.

119. For employees with little or no bargaining power such as women, young workers and casual employees, these asymmetries are even more attenuated.

120. As such, the New South Wales Government submits that the WR Act fails to provide employees the ability to genuinely bargain.

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

121. New South Wales has been at the forefront of addressing and promoting equitable employment arrangements through the enactment of equal pay legislation in 1958, the State Equal Pay Case in 1973, the Pay Equity Inquiry Report in 1999 and subsequent introduction in 2000 of the Equal Remuneration and Other Conditions of Employment wage fixing principle.

122. One of the major conclusions of the report is that the existing New South Wales industrial system provides the most effective means of rectifying pay inequity. Individual and court-based remedies, such as those contained in anti-discrimination legislation, cannot rectify undervaluation relating to whole industries or occupations and cannot tackle systemic issues concerned with undervaluation.

123. One of the key findings of the Report concerned the concept of 'undervaluation'. The Report found that undervaluation of women's work may arise for a number of reasons, including:

    - gendered assumptions in work value assessments;
    - occupational segregation (which causes female dominated industries to be undervalued because they are female dominated); and
    - a number of factors to do with the poor bargaining positions of female dominated occupations and industries.

124. The Report noted that the combination of these factors contributes to the historical undervaluation of women's work.

125. As a consequence, a new wage fixing principle was developed by the NSW IRC in order to consider applications and remedy the gender-based undervaluation of women's work.

126. In New South Wales, the Equal Remuneration and Other Conditions of Employment Principle has served to remedy the undervaluation of librarians work. Currently a case is before the Industrial Relations Commission in respect of childcare workers.

127. The changes to industrial relations proposed by the federal government offer no prospect for women workers to benefit from the progressive New South Wales award system. The proposed Fair Pay Commission does not appear to have a mechanism to provide equitable outcomes for women workers nor redress the historical undervaluation of women's work.

128. If the federal government were to override the New South Wales industrial system using the corporations power, women employed by corporations involved in the childcare industry could be denied their chance to benefit from

or even continue their case for equal pay. ABS data makes clear that 30% of women workers rely on awards to set their pay. In an environment where work in feminised industries has been historically undervalued, individually negotiated contracts underpinned by a five-string safety net already below today's award standard, will not deliver pay equity.

Work and Family Balance

129. The New South Wales industrial relations system is one of the major means by which the state delivers a fair deal for families. It establishes a level playing field for workers and their employers alike, ensuring that workers have access to fair conditions of employment which is an important foundation for maintaining a healthy work and family balance. Any interference in this system by the federal government will threaten that fairness and balance and will not be in the best interests of the families of New South Wales.

130. The position of the federal government on work and family balance matters amounts to an assertion that if the issue is left to the workplace parties, they will fashion appropriate local policies and/or certified agreements.

131. The New South Wales Government disagrees and submits that leaving the provision of family friendly provisions to local bargained arrangements or agreements leads to poor distribution of the capacity to seek and take up family friendly arrangements. Further, an approach that relies on employers implementing family friendly policies as and when it suits them does little, if anything, to alter the approach of employers generally or to change the 'culture' in workplaces.

132. While the evidence reveals that this approach may work for some employees in some workplaces, the ad hoc approach does not benefit those who are unable to successfully advocate their position or who are not regarded as being 'valuable' to the business in which they are employed. An ad hoc approach delivers just that – ad hoc results.

133. There is uneven distribution of family friendly policies depending on industry and sector location and there is minimal penetration into male dominated areas.[21]

134. Employers are most likely to offer family-friendly work practices to employees in whom they have invested training, who are difficult and costly to replace or who are able to engage in effective collective bargaining: see Gray and Tudball.[22]

135. Employees who are most likely to be able to negotiate successfully with employers over work conditions are those who have the greatest bargaining power – namely, those whose skills are in short supply. In contrast,

[21] Whitehouse, Industrial Agreements and Work/Family Provisions: Trends and Prospects under Enterprise Bargaining Labour and Industry August 2001.
[22] Family – Friendly Work Practices – Differences within and between workplaces, Australian Institute of Family Studies, Research Report No 7, 2002.

employees with the lowest levels of education, job tenure and organization provided training are the least likely to have access to family-friendly work practices. For low skilled work, the costs of high labour turnover are likely to be less than in other areas, which reduces incentives for employers in such areas to introduce family friendly work practices.[23]

136. AWIRS 95 data reveals that there is: 'no relationship between having dependent children and the likelihood of having access to family-friendly work practices. In other words, those identified as having the most need for family-friendly work practices are no more likely to be able to access these work practices than are otherwise similar employees with no child or non-child dependants'.

137. It appears that in the absence of a right or an entitlement to request family friendly flexibilities, employees are less likely to seek such arrangements with their employers. Employees will not take advantage of family-responsible policies (particularly leave, work reduction and work schedule policies) if they feel that doing so will jeopardise their job security.

138. In their recent submission to the *Family Provisions Test Case* and in their promotion of individual contracts and workplace changes, the federal government assumes that the capacity for the parties to make certified agreements and individuals to enter into AWAs provides a safety valve to the work and family conflict experienced by employees.

139. But the evidence reveals that bargaining for certified agreements has not delivered family friendly arrangements uniformly. Certainly, some sectors and some workplaces have agreed to implement some family friendly measures – but the results are uneven and mixed. Certified agreements have delivered a low incidence of family friendly measures. In contrast, there has been a high incidence of measures in agreements which relate to working time flexibility and which enable employers to vary work times. [24]

140. The incidence of family friendly measures is not evenly spread across industries. The industries most likely to provide family friendly measures are Community Services, followed by Electricity, Gas and Water, Recreational and Personal Services and Wholesale/Retail trade industries**.**

141. One of the key issues in the uneven spread of family friendly measures in certified agreements is the lack of bargaining power on the part of workers. The analysis of the ADAM database conducted by Whitehouse in March 2001 revealed an 'uneven spread of measures depending on industry and sector location, with minimal penetration into several male dominated areas. Not only is this situation likely to reinforce the gendered division of caring labour, it may also reinforce labour force segmentation with women unlikely to be attracted

[23] Babies and Bosses, Reconciling Work and Family Life, OECD Volume 1, Australia, Denmark and the Netherlands.
[24] Bittman, Hoffman, Thompson, *Men's Uptake of Family Friendly Employment Provisions*, Policy Research Paper No 22, Department of Family and Community Services

into these male bastions and increasingly concentrated in female dominated sectors which make concessions to family needs'.[25]

142. There is no evidence that AWAs are an appropriate vehicle for implementing family friendly provisions, as indicated by, for example, the research of Mitchell and Fetter[26] and Peetz[27].

143. Many employees lack sufficient bargaining power to insist upon agreements which enshrine family friendly policies. The disparate bargaining power of sectors of the workforce was highlighted recently by a Full Bench of the Australian Industrial Relations Commission stating:

> no one would suggest that all employees are capable of bargaining. Bargaining is not a practical possibility for employees who have no bargaining power. It is to be inferred from the statutory scheme that the award safety net should be adjusted with the interests of these employees in mind. [28]

144. This observation has also been carried forward into the Family Provisions Test Case decision handed down on 8 August 2005.

145. In that case a Full Bench of the AIRC observed that evidence reveals that bargaining has not delivered family friendly arrangements uniformly. They also noted that although some sectors and some workplaces have agreed to implement some family friendly measures, the results have been uneven and mixed, concluding that:

> Many employees lack sufficient bargaining power to insist upon agreements which enshrine family friendly policies.[29]

146. In this most recent decision, the AIRC has adopted a modified form of the states and territories position in their submission in the Family Provisions Test Case. The decision provides employees with a right to request specific family related leave and imposes an obligation on employers to grant the request unless there are demonstrable reasons of hardship.

147. It remains to be seen how long the rights and obligations established by this decision will endure. The Prime Minister has refused to guarantee that the provisions set in place by this decision will survive the legislative proposals he announced in May. [30]

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[25] Gillian Whitehouse, *Industrial Agreements and Work / Family Provisions: Trends and Prospects under Enterprise Bargaining", Labour and Industry*, Vol 12 No 1, August 2001
[26] Mitchell R and Fetter J *Human Resource Management and Individualisation in Australian Labour Law* 45 JIR at 298-299
[27] David Peetz - Is individual contracting more productive? http://www.econ.usyd.edu.au//download.php/Paper9-D.Peetz.pdf?id=4307
[28] *Safety Net Review Decision* 2004, Print PR002004,
[29] Family Provisions Test Case Decision. PR082005 8 August 2005 (page 38)
[30] The Daily Telegraph 8 August 2005, p1.

Conclusion

152. The current federal bargaining system has difficulty delivering family friendly outcomes, as recognised in the recent Family Provisions Test Case. The changes now proposed by the federal government promise to make these difficulties greater, not least by restraining the powers of the AIRC and creating an emphasis on individual bargaining.

153. As well as this, the advent of a unitary system would efface important gains for women and families provided by the New South Wales system, such as pay equity and minimum conditions.

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

154. The rationale for promoting workplace bargaining has always included arguments about enhanced productivity, flexibility and the like. Prima facie, the facts appear to bear this view out: for example, between December 1994 to December 2004 labour productivity has increased by 22.7%[31], which broadly coincides with the introduction of enterprise bargaining by the Keating Government in 1993.

155. The changes proposed by the current federal government are founded on similar assumptions. As the Prime Minister puts it:

> I want these reforms not out of an ideological obsession of my own. I want them because they will be for the long term benefit of the Australian economy. They will underpin the new burst of productivity we need if we are to maintain the low unemployment, the high real wages and the strong economy we now enjoy.[32]

156. In a similar vein, the Australian Industry Group says:

> The federal government's plans for further workplace relations reform are an important step in unlocking as yet untapped productivity gains and will be widely supported by employers.
>
> The changes are in sync with the needs of contemporary workplaces, the vast majority of which are operating in a highly competitive environment.
>
> These changes will bring benefits particularly in reducing compliance costs and promoting labour force flexibility and, when translated into productivity gains, will boost economic growth. [33]

157. How robust are these founding assumptions about the relationship between devolved bargaining and labour productivity? Is it reasonable to assume that more deregulation necessarily provides more productivity, above and beyond the increases that have already occurred? Is it reasonable to even assume that the historical increase in productivity can be attributed to the introduction of workplace bargaining in Australian industrial jurisdictions?

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[31] ABS Australian National Accounts: National Income, Expenditure and Product, Table 1. Key National Accounts Aggregates: Trend Cat No: 5206.0

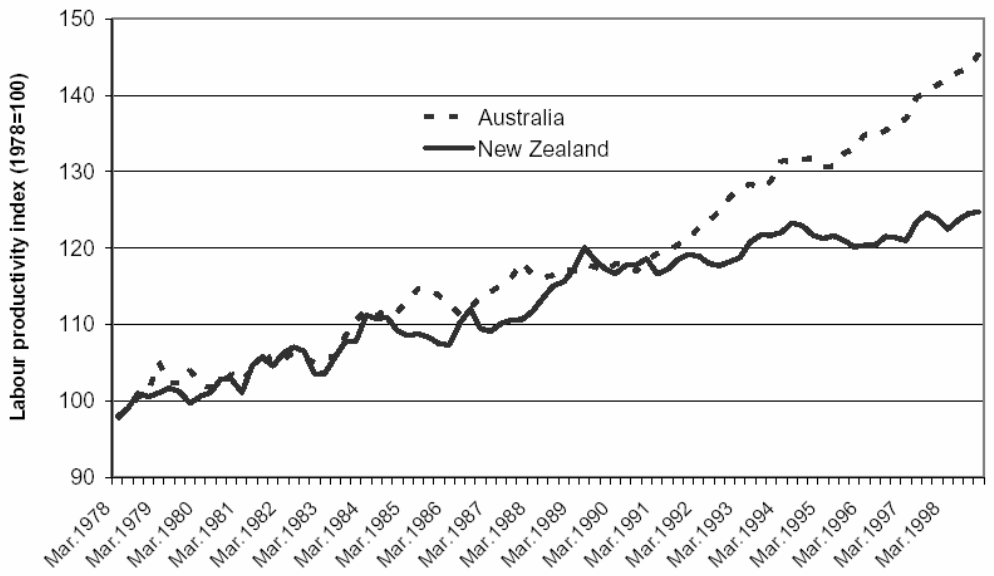
[32] John Howard Interview with Stephanie Kennedy, AM Program, ABC Radio, 7 July

[33] AiG Media Release Workplace Relations Reform a Positive for Australian Economy 26 May 2005

158. These issues are controversial to say the least, and this submission does not intend to offer a definitive view. Instead, it is noted that there are a range of divergent views about these matters, and the attention of the Committee is drawn to these.

159. Firstly, the New South Wales Government believe that it is instructive to consider the New Zealand experience. A paper by a New Zealand economist, Paul Dalziel, published in the *Review of Political Economy*, says productivity and wages fell after the then New Zealand National Party Government introduced individual contracts in 1991 by means of the Employment Contracts Act. His study found the New Zealand economy lost almost two full points of gross domestic productivity growth between 1987 and 1998, while from 1990 to 1998 Australian productivity rose by 21.9 per cent compared with just 5.2 per cent in New Zealand[34].

Figure 1 Labour Productivity, Australia and New Zealand, 1978-1998



160. Secondly, two of Australia's pre-eminent labour market economists, Professors Keith Hancock and Joe Isaac examined the figures for percentage changes to labour productivity for each financial year over the period 1964-65 to 2003-04. [35]. The question they then posed was:

> Can we do any better than simply note that the average change in productivity was 2.37 per cent a year – end of story?

161. They answered the question as follows:

[34] Dalziel, P (2002) New Zealand's Economic Reforms: An Assessment'.
[35] Hancock K and Isaac, J Statistics prove reforms aren't so successful Australian 24 November 2004

> First, little or no significance should be attached to year-on-year changes in the productivity growth rate. A good performance in one year may well be followed by a poor one in the next. Any attempt to ground policy on the most recent productivity data, whatever they might be, would be ludicrous. Policy makers should factor into their decisions the underlying, rather than the ephemeral, productivity growth.
>
> Secondly, the one safe statement that can be made about underlying productivity growth is that since the mid-'60s it has been running at about 2.4 per cent a year, in the case of labour productivity, or 1.1 per cent in the case of multifactor productivity.
>
> Finally, those who say that the productivity 'surge' of the 1990s is the product of deregulation (or of anything else) face problems. For starters, it is questionable whether the 'surge' even exists. If we apply standard statistical tests, there is no evidence for it.
>
> If it does exist, moreover, there is a question why recent performance is no better than that of the late '60s and early '70s. 'Good' performance, it would seem, was as compatible with 'old-fashioned' arbitration and regulation as with 'modern' enterprise bargaining and deregulation.
>
> The claim made by…advocates of the economic reform agenda is, at best, grossly exaggerated. At worst, it's without foundation. It is an intriguing question how such myths gain currency' (Hancock and Isaac (2005))

162. Thirdly, the practical effects of the federal system can be seen by noting that The federal government's own submission to the Cole Royal Commission clearly proved that building projects are 20 to 30 per cent cheaper in Sydney than in Melbourne. Australian Bureau of Statistics records the annual dispute activity in the building industry. For the year ended December 2003, New South Wales accounted for only 11 per cent of disputation across the construction industry nationwide. Compare that to the exclusive federal industrial system operating in Victoria that accounts for 34 per cent. [36]

163. Fourthly, examining various claims for productivity increases as a result of individual and collective bargaining over the recent past, Peetz concluded that:

> Workplace data show no gains in terms of productivity for individual contracting over union collective bargaining. In fact they suggest that, if anything the reverse is the case. National productivity data show no sustained productivity benefits from the promotion of individual contracting under the Workplace Relations Act. The initial seemingly high rates of productivity growth were seen in the 1990s owed as much, probably more, to the system of enterprise collective bargaining – and to

[36] ABS Catalogue 6321.0 Industrial Disputes, Australia December 2003

> the product market reforms of the 1980s and early 1990s – as they did to the Workplace Relations Act. As the Workplace Relations Act has settled in, productivity growth has slowed, to the point where it now appears to be below the rate that applied under the traditional award system in the 1960s and 1970s. While productivity is not systematically influenced by individual contracting, the same cannot be said for profits. Individual contracting appears to raise profits, though this does not inherently reduce unemployment.[37]

164. It should be observed that, in terms of delivering new, more flexible work arrangements and processes, the WR Act threatens to become a hindrance rather than a help. The *Electrolux*[38] decision suggests that the range of matters able to be included in certified agreements will in future be significantly narrower. This may exclude or limit the degree to which processes of workplace change can be part of an agreed, enforceable industrial instrument, which can only make such processes – often difficult enough to begin with – even more difficult to carry forward with employee support.

165. Since *Electrolux*, the federal government has shown no inclination whatsoever to amend the WR Act to support a broader range of matters capable of inclusion in agreements. Needless to say, the New South Wales Act does not suffer from this problem.

166. Not only does the WR Act limit the things that the bargaining parties can talk about, the provisions it contains do not appear to be of much assistance in delivering productivity changes. As Peetz points out:

> Content analysis of 381 AWAs by Mark Cole, Ron Callus and Kristin Van Barneveld found that many AWAs focused on hours, some solely on that issue. A more extensive analysis by Richard Mitchell and Joel Fetter of 500 AWAs found almost all increased the 'flexibility' of working hours, and that the 'overwhelming majority' of AWAs followed a managerial approach of boosting profitability through 'cost reductions', rather than productivity enhancement.[39]

167. This section is concluded by noting that:

> 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 on the short term through cost reduction methods – wage cuts, greater intensification of work effort, workforce reductions, increases in casual

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[37] David Peetz - Is individual contracting more productive? http://www.econ.usyd.edu.au//download.php/Paper9-D.Peetz.pdf?id=4307

[38] Electrolux Home Products Pty Ltd v Australian Workers\' Union [2004] HCA 40 (2 September 2004)

[39] David Peetz - The impact on workers of Australian workplace agreements and the abolition of the 'no disadvantage' test 2004 http://www.econ.usyd.edu.au//download.php/Paper2-D.Peetz.pdf?id=4301.

> 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 high waged, highly skilled workforce, collaborative or participative work systems, high levels of investment in training and skill development and employment security.[40]

It would appear that the changes foreshadowed by the federal government place it firmly within the first of these approaches.

Conclusion

168. How much, or whether, enterprise bargaining has contributed to productivity since its introduction into Australian industrial relations jurisdictions in the early 1990s, is a moot point. How much individual agreements such as AWAs have contributed is, in our submission, even less clear.

169. The New Zealand experience suggests that the further deregulation and/or individualisation of bargaining now being proposed by the federal government is unlikely to deliver the productivity outcomes claimed.

170. In the New South Wales Government's submission, there are no compelling reasons to believe that the changes proposed by the federal government will deliver the 'new burst of productivity' of which the Prime Minister is confident.

[40] Mitchell and Fetter (2003) 45 JIR at 297

(f) Australia's international obligations.

171. The right to organise is well recognised and supported in international conventions, not a few of which bind this country and presumably its current government.

- *Convention 87 Freedom of Association and Protection of the Right to Organise*

- *Convention 98 Right to Organise and Collective Bargaining*

172. Justice Michael Kirby, a former Deputy President of the Australian Conciliation and Arbitration Commission and High Court Judge, highlighted the important role of international human rights standards in ILO and international conventions have to play in Australian IR law.

173. Delivering Sydney University's annual Kingsley Laffer Lecture in 2002, Justice Kirby said that when Australia knocked down its tariff walls, abandoned compulsory arbitration and opened up its borders to international trade it also opened up the borders to the influence of other international ideas and forces.

> Amongst those ideas are those in the ILO conventions. And amongst the most powerful ideas affecting our planet at this time are those that assert the common obligation to respect and defend fundamental human rights and human dignity in all aspects of life,' he said. 'With global markets come global forces of basic rights.'

174. In fact, the WR Act has attracted strong criticism from the International Labour Organisation (ILO) for its failure to fulfil Australia's international obligations.

175. On 6 August 1997 the Australian Council of Trade Unions (ACTU) wrote to the ILO, setting out a number of concerns about the conformity of the Act with Convention No. 98 on the Right to Organise and to Bargain Collectively.

176. The ACTU submitted that the WR Act gives clear preference to single-enterprise bargaining, as evidenced by the restrictions on multi-business agreements, and the fact that protected industrial action cannot be taken in relation to these agreements.

177. In March 1999, the ILO committee of experts published an observation in response to the ACTU complaint. The Committee was concerned at the level of discretion afforded to the federal Commission by section 170LC to determine the appropriate level of bargaining and concluded:

> 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.

178. The Committee continued:

> .....the choice of bargaining level should normally be made by the parties themselves, and the parties 'are in the best position to decide the most appropriate bargaining level' (see General Survey on freedom of association and collective bargaining, 1994, paragraph 249). The Committee requests the Government to review and amend these provisions to ensure conformity with the Convention.

179. Further,

> The Committee notes that 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 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.

180. The right for employees to choose to bargain collectively and requiring employers to recognise this choice is legally protected in all other OECD nations including the United States. Other OECD countries either prohibit the use of employer lockouts or permit them only in exceptional circumstances whereby the employer is thought to be the victim of a power imbalance.

181. Nowhere else in the developed, industrialised world are there restrictions on industry-wide agreement-making as exist in Australia.

182. Industry-wide bargaining is the general model in most European countries. In the UK and the US bargaining is more often at an enterprise level (although in the UK it may cover groups of employees from the same craft or occupation). However, in neither of these countries is there a prohibition on multi-employer bargaining or on industrial action associated with it.

183. In the UK multi-employer industrial action has occurred in a number of industries. The Blair Government has legislated to make it easier to organise pre-strike ballots for multi-workplace action.

Conclusion

184. It is fitting then, that an ILO Committee will have an opportunity to assess the impact and practical effect of the federal government's 'reform' package.

185. The flagged content of the impending *'Building Better Workplaces'* legislation validates claims that the federal government is intent on eroding the basic rights of the Australian workforce still further.

186. Australian and international unions used the 2005 International Labour Conference in Geneva as a platform to express concern that new workplace laws would deny Australian employees access to some of the most basic and well established workplace rights including the right to organise and bargain collectively.

187. The ILO has asked federal Industrial Relations Minister Kevin Andrews to supply the committee with a detailed report of the proposed changes by no later than September this year.

188. The International Labour Organisation Committee of Experts will then examine whether the new laws comply with the core labour standards all countries are expected to respect and follow. They will also assess the impact the legislation will have on Australian employees.

Part 4

Conclusion

189. At present agreement making is the centrepiece of the federal workplace relations system, however, primacy is given to individual bargaining rather than collective. Although AWAs play a role, they currently only cover 2-3 per cent of the workforce. Even so, it is now stated federal government policy that AWAs are an integral part of a modern economy and part and parcel of a flexible, productive workforce.

190. A significant number of employees fall outside the bargaining stream and rely on safety net reviews because they are unwilling or unable to bargain. These are most likely to be low paid employees with low skill levels – women, young workers, casual workers, workers in regional areas and so on.

191. It is important for the industrial relations systems to recognise that some workers may not be able to bargain because they are not employees at law, despite being in an 'employee like' relationship, and being in a weak bargaining position. The current New South Wales system actively recognises the difficult position of these workers, and allows them to bargain by means of such measures as the deeming provisions in the *Industrial Relations Act 1996* and Chapter 6 of the same Act, which deals with workers who operate public vehicles and carriers.

192. The WR Act fails to provide employees with a specific, genuine opportunity to choose the type of agreement they want and fails to back up employee choices about the type of agreement they want – even if the majority state that they want, say, a collective agreement, the employer is under no obligation to accept that choice.

193. The current federal bargaining system has difficulty delivering family friendly outcomes, as recognised in the recent Family Provisions Test Case. The changes now proposed by the federal government promise to make these difficulties greater, not least by restraining the powers of the AIRC and creating an emphasis on individual bargaining.

194. As well as this, the advent of a proposed unitary system would efface important gains for women and families provided by the New South Wales system, such as pay equity and minimum conditions.

195. How much, or whether, enterprise bargaining has contributed to productivity since its introduction into Australian industrial relations jurisdictions in the early 1990s, is a moot point. How much individual agreements such as AWAs have contributed is, in our submission, even less clear.

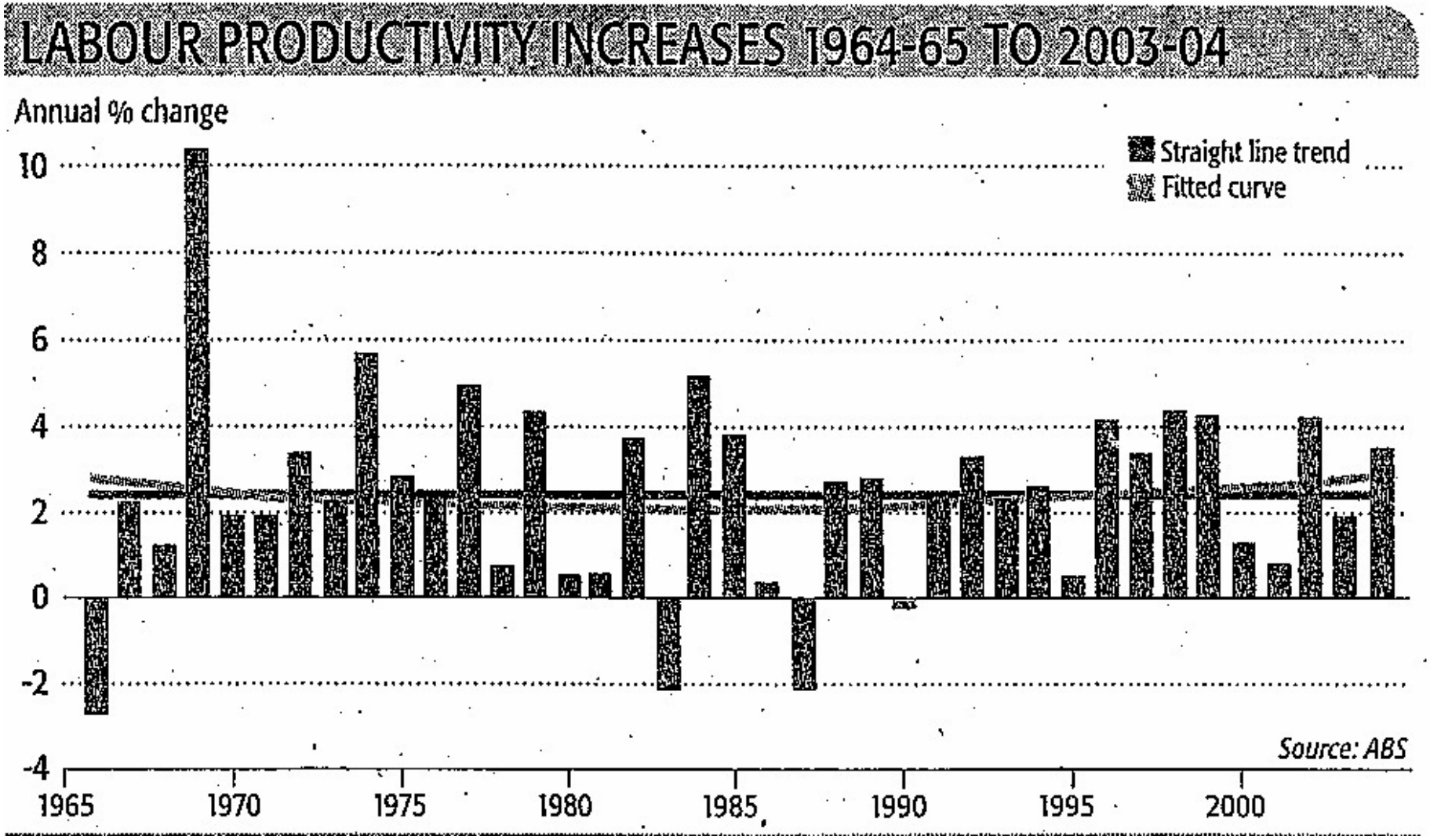
196. The New Zealand experience suggests that the further deregulation and/or individualisation of bargaining now being proposed by the federal government is unlikely to deliver the productivity outcomes claimed.

197. In the New South Wales Government's submission, there are no compelling reasons to believe that the changes proposed by the federal government will deliver the 'new burst of productivity' of which the Prime Minister is confident.

198. Of particular concern to the New South Wales Government is the intention of the federal government to forcibly extend its industrial agenda upon New South Wales under the banner of a 'unitary system'.

199. The current New South Wales system is fair and efficient and it keeps industrial conflict to a minimum. To replace it with the conflict ridden, and inefficient federal system, or worse, can only be seen as a disaster for New South Wales workers.

APPENDIX A


LABOUR PRODUCTIVITY INCREASES 1964-65 TO 2003-04
Annual % change
Straight line trend
Fitted curve
10
8
6
4
2
0
-2
-4
1965
1970
1975
1980
1985
1990
1995
2000
Source: ABS