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John Carter
Committee Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

Friday, 26 August 2005

Dear Mr Carter

Please find attached a submission to the Senate Employment, Workplace Relations and Education References Committee Inquiry into Workplace Agreements.

Specifically, the submission addresses the terms of reference below:

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

Should further detail be required, please contact me on 0409 130 874.

Yours sincerely

Dr Kristin van Barneveld
Honorary Research Associate

Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into Workplace Agreements

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Australian Workplace Agreements (AWAs) became available in March 1997 under the *Workplace Relations Act* 1996 and, according to the principal objectives of the Act, were part of a suite of changes to Australia's industrial relations system designed to *'provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia'* by:

> *3(b) ensuring that the primary responsibility for determining matters affecting the employment relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and*
>
> *3(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and*
>
> *3(d) providing the means;*
>
> > *(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and,*
> >
> > *(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and,*
>
> *3(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by the awards and agreements applying to them.*

Although the objectives suggest that the Act aimed to enable both employers and employees to choose the most appropriate form of agreement, according to statements by the government at the time of the introduction of the *Workplace Relations Bill*, AWAs were devised for small and medium sized employers to allow them greater flexibility in employment, external to the award system (Reith 1996, 1997). The purpose of expanding the options available to employers was to enable small business to participate fully in the industrial relations system with a minimum of cost and red-tape (Reith 1996, Coalition Policy Statement 1998). The attractiveness of AWAs was emphasised by the then Minister for Workplace Relations in his second reading speech of the original Bill, describing AWAs as *'having an emphasis on "flexibility and self regulation", vetted by a third party and confidential'* (Rubinstein 1998:55).

During the passage of the Bill, the party holding the balance of power in the Senate, the Democrats, negotiated several key employee protections in relation to AWAs, and the *Workplace Relations Bill* was given royal assent on 25th November 1996 (Reith 1996, Backwell & Barrett 1997, Costa 1997, McCallum 1997a, 1997c, Rimmer 1997, Sloan 1997, Rubinstein 1998). The passage of the Bill was not supported by members of the Labor Party, who accused the Democrats of treachery and *'predicted wholesale stripping back of awards and vicious restrictions on workers rights'* (Rubinstein 1998:54). In contrast, HR Nicholls Society, called the passage of the Act 'Mission Abandoned' rather than 'Mission Accomplished', accusing the government of not going far enough (1997).

Part VID of the *Workplace Relations Act* 1996 contains provisions relating to AWAs. It describes AWAs as agreements between an employer and individual employees dealing with matters pertaining to their relationship. AWAs may be collectively negotiated but must be individually signed. While the Act became operative on 31st December 1996, AWAs did not become an option for employees and employers until 12th March 1997.

Since then, debates surrounding the impact of AWAs on wages and conditions of workers have been vociferous. Most of the literature suggests that AWAs will result in poor outcomes for workers, particularly when compared to collective bargaining. However, besides the analysis of individual AWA clauses, there has been little detailed study of overall AWA outcomes, leading to strong criticism of AWA research findings by some, including the previous Employment Advocate, Jonathan Hamberger. Evidence presented in this submission takes account of these criticisms by discussing not only extant AWA literature but also through the analysis of 63 AWAs from one industry – hospitality. This data is supported by four longitudinal case studies of hospitality industry organisations which use AWAs. The overall conclusions are drawn that:

- AWAs are generally not comprehensive agreements,
    - There are significant failings in both the design and application of the 'no-disadvantage' test in vetting AWAs – however this test is by far superior to the new test being proposed by the federal government,
- AWAs do not provide choice for employees,
- AWA employees do not have the opportunity to negotiate the content of their AWA unless the employer chooses to negotiate,
    - Regardless, most AWA employers are not interested in 'individual' agreements but utilise pattern AWAs, and this is encouraged by the OEA which provides model AWAs on its website.
- AWAs have exacerbated the gender pay gap and have not enabled families to better balance their work and family responsibilities, and
- The use of AWAs effectively involves an efficiency/equity trade-off. This trade off operates to the detriment of general living standards of employees.

These conclusions are explained in turn below.

1. The scope and coverage of agreements, including the extent to which employees are covered by non-comprehensive agreements;

AWAs have been revealed by a number of studies to be non-comprehensive agreements, particularly when compared to certified agreements.

There was evidence in the early studies that AWA content was focussed on changing one or two conditions of work rather than 'covering the field' with respect to wages and working conditions. In June 1997, ACIRRT, University of Sydney, released a report on the content of AWAs of five different organisations, at that time representing almost half of the eleven organisations with approved AWAs. ACIRRT found that the AWAs were largely concerned with increasing the flexibility of labour, particularly through changes to hours of work and penalty rates *'to allow employees to work at any time and any day of the week'* (ACIRRT 1997:21). The discussion below shows that this early finding, of the limited content of AWAs, has been confirmed by subsequent research.

In 2001, Cole et al used cluster analysis of AWAs from 381 different organisations, to investigate the focus of AWAs. The research revealed that nearly one in five AWAs were 'basic hours agreements' – agreements with very limited content which did not provide for any wage increase over their duration. In other words, these agreements were designed solely to improve flexibility in labour. As expected, this type of AWA was found predominantly in the service industries – covering more than a third of sales and service

workers with AWAs, nearly half of all blue-collar AWA employees, 27 per cent of AWA workers in wholesale/retail trade and 23 per cent of AWA employees working in recreational, personal and other services (Cole et al 2001). Cole et al concluded that these basic hours agreements had *'a clear and limited change agenda involving changes to working hours. The industry distribution of agreements in favour of the service sector is consistent with this priority'* (2001:6).

This finding was supported by Mitchell and Fetter, whose analysis of 500 AWAs concluded that a substantial number of them were single issue agreements, usually aimed at the liberalisation of ordinary hours of work and/or pay. They contended that an overwhelming proportion of AWAs fell into the category identified as associated with *'wage cuts, greater intensification of work effort, workforce reductions, increases in casual and temporary employment and hierarchical organisation characterised by strong management controls and related high rewards for managers'* (2003:319).

The most recent detailed study of AWA content was conducted in the hospitality industry – one of the industries identified by Cole et al as overrepresented in their category of 'basic hours agreements'. This study involved analysis of a random sample of the 309 AWAs which had been approved in the hospitality industry in 2002. Of the sample size of 106 agreements provided by the OEA on a cost basis, 43 were exact duplicates of at least one other AWA in the sample, leaving only 63 unique AWAs.

These 63 AWAs were analysed using both frequency counts of their content as well as cluster analysis[1] similar to that utilised by Cole et al. The findings were compared to the content of 69 hospitality industry certified agreements. Specifically, the content of AWAs in relation to wages, overtime, hours of work, annual leave, sick leave and family friendly provisions was compared, given that these issues are generally considered 'core' entitlements of workers and issues which will be affected by the further reforms proposed thus far by the federal government.

1.1 Remuneration in Hospitality AWAs and Certified Agreements compared

Just under two thirds of the hospitality AWAs studied (38 agreements) included a wage increase during their term. However, only twenty AWAs included a *specified percentage* wage increase. This ranged between 2 and 8 per cent over the life of the agreement. Taking into account the stated duration of the agreements, the average annual wage increase was 1.8 per cent, well below the inflation rate which was 3.5 per cent for the twelve months to the end of the March quarter 2003.

For the remainder of the AWAs which contained a reference to wage increases:

1. all, or part of the increase was 'at risk', that is, contingent on the outcome of individual performance appraisals, and/or,
2. wage increases were linked to productivity improvements and/or,
3. wage increases were linked to changes in the inflation rate and/or,
4. wage increases were linked to the outcome of the annual National Wage Case.

Besides those agreements which linked wage increases to national wage cases and/or to the CPI, the data suggest that there was no guarantee that some hospitality industry

[1] Cluster analysis is used to find a meaningful set of groupings within a specific data set. Cluster analysis groups data such that the variability within the clusters is minimised and the differences between clusters are maximised (Arnott 2003, Clarke 2003).

employees who signed AWAs would maintain their real income over the life of the agreement. Of course, these findings are also open to the criticism that employees may have been paid a significant sign-on bonus or been provided with benefits that were additional to the AWA but cannot be captured by a database. However, longitudinal case study research conducted of four hospitality industry organisations between 2001 and 2004 found that no significant additional benefits were provided to AWA employees to off-set the limited wage increases provided through their AWAs.

Importantly, the case studies confirmed that there was a significant *potential* for employees to fall behind the *award* rate during the life of their AWA. This could occur if wage increases were not passed on, if wage increases were based on movements in the inflation rate rather than the higher safety net increases, and if the AWAs operated past their nominal expiry dates without the rate being re-set to the award or without further wage increases being granted. In some cases, the employees had to rely in the good grace of their employer to maintain their real income.

Further, the case studies revealed several instances of workers falling behind the award rate during the life of their AWA – for example two chefs at a Queensland hotel were owed several hundred dollars during the first twelve months of operation of their AWAs. These calculations had been done by the hotel as part of a wages audit requested by the chefs. Had this audit not been conducted by the hotel it would have been difficult to uncover these shortfalls because of the use of annualised salaries which, by their nature, necessitate a review of a full twelve months of wages in order to determine any shortfall. This is an incredibly time consuming process and one which an employee is unlikely to do themself.

In contrast, all the collective agreements analysed included a wage increase, with only three agreements linking the increase to individual performance appraisals. A further seven agreements linked increases to the CPI and fifteen were linked to the increases awarded in National Wage Cases. The average annual wage increase in these agreements was 3.5 per cent, significantly higher than the 1.8 per cent provided in AWAs.

In summary, employees who were party to AWAs in the hospitality industry were less likely than certified agreement employees to gain a wage increase during the term of their agreement. If the agreement did include a wage increase, the quantum of this increase was likely to be lower than that achieved by collective negotiation, and often left entirely to managerial discretion.

1.2 The use of ‘all-in’ rates of pay

Another key difference between AWAs and certified agreements lies in the construction of remuneration itself. Some of the hospitality AWAs incorporated all possible ‘extras’ into one rate, which was paid regardless of the time or number of hours worked by the employee. An example is provided by an AWA covering employees of a ‘gentlemen’s club’. This AWA provided an hourly rate which included *‘the consolidation of overtime payments, penalty rates, 17½% annual leave loading and all relevant allowances from the … Award’.* This hourly rate *‘has been designed to compensate each employee for earnings, including shift allowances and weekend penalty rates, had those same employees been working under the … Award’.*

Another difference between AWAs and certified agreements was the inclusion in the agreements of allowances besides meals and uniforms. Certified agreements were more likely to include a range of entitlements including first aid allowance (in 22% of certified

agreements), tool allowance (12% of certified agreements), and a laundry allowance. These allowances were rarely, if ever, included in hospitality industry AWAs.

Case study evidence of the impact of 'all-in' rates of pay

The use of an 'all-in' rate for hospitality AWAs is not unusual. A feature of hospitality awards is the ability of the parties to agree to utilise an annualised rate of pay, rather than payment of an hourly rate, plus penalties. The award standard is that, for the introduction of loaded rates, a 25 per cent loading is payable in addition to the base hourly rate.

Through AWAs, hospitality employers have been able to introduce annualised salaries which contain a loading less than the 25 per cent award rate. The OEA explained that:

> *Generally we find that these hotels want to pay slightly under the 25 per cent rate – if you were paying the 25 per cent rate, then why bother to do AWAs? What they want to do is get the flexibility but pay less than the 25 per cent. With an AWA you can, because it allows you to balance it over a year. The 25 per cent rate is a worst case scenario. You can get the flexibility you need and pay less than the 25 per cent because most people are not working those extreme shifts.*

The loaded rates utilised by three of the four hospitality organisations studied contained a loading that was lower than the specified award loading. The use of AWAs to introduce annualised salaries therefore produced a significant cost saving for the employer compared to award conditions.

The case studies revealed a number of consequences of annualised salaries for AWA workers. For example, at the Brisbane Hotel, half of the employees were paid a loaded rate and others were employed under AWAs which essentially reflected the award (and included the payment of penalty rates on weekends and at night). Consequently, salaried employees were generally rostered to work at times and on days where penalty rates were applicable under the award. This resulted in lower morale among both groups of AWA workers: the loaded rate workers who worked a significant number of weekends for what they perceived to be no additional remuneration and the employees whose AWA was award-based and who wanted to work the more lucrative weekend and night work.

Similarly, there was evidence of favouritism in rostering both at the RSL and the Queensland Hotel.

- This was the source of conflict at the RSL because of the perception that loaded rate AWA employees were more likely to be rostered to work public holidays and weekend work. Award-based employees at the RSL were fearful that if AWAs spread further throughout the Club they would miss out on this more lucrative weekend work.

- At the Queensland Hotel, where everyone was employed under annualised AWAs, some employees complained that others worked significantly fewer weekends and public holidays and consequently, these employees were effectively earning a higher hourly rate than those who worked a significant number of weekend hours.

A similar result was caused by the practice of swapping shifts. At the Teahouse, this meant that employees could work more than was compensated for in their loaded rate of pay. However, management reported that they monitored the shifts worked to ensure that weekend work was allocated fairly and to prevent morale issues.

A key finding from the case studies was the existence in most AWAs of a wages audit clause that mirrored award provisions. At both the Hotels and at the RSL, should

employees work more Saturday, Sunday, public holiday and/or late hours of work than compensated for in the loaded or annualised rate, the AWAs provided that they could request an audit of their wages. However, although numerous employees at both Hotels were concerned about the effect of their annualised salary, few audits had been conducted. Interviews revealed that some employees were unaware that this provision was available even though it was written into their AWA, and at the Queensland Hotel had been explained during induction. Further, there was a lack of understanding by employees about how their wage rate had been calculated, and what to do if they felt they would have been better off under the Award. Where employees were aware that such a provision existed, some did not request an audit for fear of jeopardising their career path within the Hotel. Finally, at both Hotels, some employees recorded only rostered hours rather than actual hours worked, rendering a wages audit clause ineffective. Regardless, high levels of labour turnover at both the Club and the Hotels meant that often an employee did not remain with the organisation for the full year specified in the wages audit provisions.

1.3 Overtime rates

The analysis of hospitality AWAs revealed three methods used by employers to gain control over overtime payments. These were:

1. to introduce an annualised salary which included 'reasonable' overtime,
2. to increase the proportion of ordinary hours an employee could work before overtime provisions applied and,
3. to make overtime payable at ordinary rates of pay.

Five of the fifteen AWAs which paid overtime at a single rate specified that the rate was the same as for ordinary time earnings. In other words, there was no overtime rate of pay. One example, found in an AWA covering the employment of a Sous Chef at a registered club specified:

> *The employee is required to work a reasonable amount of overtime so as to be able to fulfil the duties and responsibilities in meeting the operational and other needs of the Club's business, and as directed by the General Manager from time to time. The agreed remuneration package contained in this agreement comprehends the payment for all such additional time worked to an amount of 32 hours per month. Any additional hours worked in excess of 32 per month will be paid at the hourly rate on one fortieth of the weekly salary referred to in this AWA.*

In some agreements, the number of ordinary hours which could be worked before overtime provisions or a higher rate of pay were applicable was extraordinary. In two extreme cases, hours of work paid at ordinary time averaged 63 and 77 per week, and when overtime entitlements began to apply, these rates were not significantly higher than ordinary time earnings. The two agreements, covering catering and cleaning employees for the same employer but at different sites, stated:

Overtime

Nominal hours of work shall be an aggregate of 252 hours per four weeks worked. You may be required, from time to time, to work additional hours to your nominal hours. If you are requested to work additional hours, you will be paid the following rates of pay for each additional hour worked:

- *Level 3 $28.89*
- *Level 2 $26.69*
- *Level 1 $25.24*

Overtime

Nominal hours of work shall be an aggregate of 154 hours per two weeks worked. You may be required, from time to time, to work additional hours to your nominal hours. If you are requested to work additional hours, you will be paid the following rates of pay for each additional hour worked:

- *Level 3 $29.99*
- *Level 2 $27.50*
- *Level 1 $25.99*

Besides examples of excessive hours, another concern raised by the review of hospitality AWAs was the use of 'open-ended hours provisions' and the effect of these on the overall hourly rate of the employee. An example is found in an AWA covering the employment of a motel employee who was paid an annual gross salary of $26 000. The AWA simply stated under 'Hours of Work' that 'the employee shall commit such time and effort necessary to complete the duties'.

Similarly, the hours of work in an AWA covering the employment of a full time 'Welfare Officer' of a registered club were specified as: *'the employee shall work such hours as are required for the diligent and responsible performance of his/her duties which are necessary for the proper management of the Club's business, and as reasonably requested by the … General Manager or his nominees. This may include the need to work on any day of the week, including Saturdays, Sundays and Public Holidays'.*

To summarise, hospitality AWAs were less likely than certified agreements to include a wage increase. Where an increase was included in an AWA, it was often at risk, that is, contingent on some measure of performance. As such, the granting of an increase was reliant on managerial discretion. Further, the increases provided in AWAs were not sufficient to guarantee that the wages of AWA employees grew in real terms over the life of the agreement, and AWA employees whose agreement did not include a wage increase faced the prospect that their wages may decline in real terms over the life of their agreement. Indeed, the longitudinal case study research of four hospitality industry organisations revealed the potential for employees to fall behind the award rate during the life of their AWA. Finally, excessive hours of work had the effect of diluting hourly rates, not to mention the negative implications long hours of work have on the non-work lives of employees.

1.4 Hours of work in AWAs and certified agreements

As suggested already, there was a strong focus on improving flexibility in working hours through hospitality industry AWAs. Ninety four per cent of hospitality AWAs included at least one provision which aimed to increase hours flexibility[2]. Similarly, 86 per cent of certified agreements contained equivalent provisions. Likewise, the averaging of hours of work (usually over four or fifty two weeks) was found in approximately half of all AWAs and certified agreements. Also, there was little difference in the proportion of AWAs and certified agreements in which the employer had the discretion to vary rostered hours of work with reasonable notice, and where hours of work could be changed at shorter notice by mutual agreement.

Differences were found in the provision of rostered days off and in the payment of penalty rates for weekend and public holiday work. This is not surprising, considering that 71 per cent of AWAs included a loaded rate or annualised salary which included entitlements such as penalty rates and possibly payment for the absorption of rostered days off (RDOs).

- In 22 per cent of AWAs, weekend work was not paid at a higher rate and in 24 per cent, public holidays were not paid at a higher rate.
- This compares to just three certified agreements where weekend penalty rates did not apply, and only one where penalty rates were not paid on a public holiday.
- Further, RDOs were a benefit provided to just two AWA employees, while they remained a feature of more than half of the hospitality certified agreements.

1.5 Annual leave

Despite the AWA database suggesting that thirty five AWA employees (56%) were employed on a permanent basis, only 60 per cent of these 35 employees were entitled to *paid* annual leave. A closer study of the AWAs revealed evidence of employers buying out annual leave (and other) entitlements of permanent part time employees. This practice resulted in these employees having the 'security' of permanent employment while providing the employer with the flexibility of a casual employee (since casual employees in are paid a loaded rate of pay to compensate them for not receiving paid annual leave, sick leave and so on).

In fact, in several AWAs, permanent part time employees were entitled to four weeks *unpaid* time off per annum for annual leave. An example is provided from an AWA covering the employment of an employee of a hospitality industry labour hire company:

> *Unless otherwise stated, the paid rates shown in this agreement will include components for holiday pay and loading, long service leave, sick pay, public holiday and weekend and late work penalty rates and allowances, meal money, travel allowances, redundancy, retrenchment and severance, parental, bereavement and other such leaves and entitlements set out in any applicable Awards or Acts that apply to your employment.*

[2] Includes averaging of hours over a four or fifty two week period; employer discretion to vary hours of work; ordinary hours being more than Monday to Friday' overtime paid at a single rate; TOIL given at ordinary time; Saturdays, Sundays and public holidays paid at ordinary time; wages annualised; or the use of a loaded hourly rate.

Holiday funds/income sacrifice/cash in lieu of banked hours

Without reducing your overall remuneration package, or reducing the minimum Superannuation Guarantee Levy contributions, you may elect in writing at any time to effectively loan us part of your entitlement and accept a lower all up rate. The difference between this lower rate and the scheduled all up rate will be held by us on your account. Together, in part or in whole, with any accrued hours in lieu held by us, these monies may at your request, either be credited to you at any future time (including for holidays), or contributed to a complying superannuation fund by us on your behalf.

This buying out of annual leave has the potential for serious social and health consequences and the practice does not lend itself to a conclusion that AWAs contribute to growing living standards.

1.6 Sick leave

Sick leave is an important entitlement for permanent employees, allowing them paid time off when sick or, paid time off to care for sick family members. Hospitality industry AWA employees were typically entitled to eight days sick leave per annum, and, on average, were entitled to only a single day's absence before medical certificates had to be provided for all further absences regardless of duration. In contrast, certified agreement employees were entitled to an average of ten days paid sick leave per annum, and two single days absent before medical certificates had to be provided.

When the sick leave provisions of hospitality AWAs were analysed, some interesting clauses were revealed. The most interesting was a clause which suggested some onus on the sick employee to find someone to replace them at work. The registered club AWA stated that *'when ill, the employee shall make all such arrangements as are reasonably required to ensure the uninterrupted and proper conduct of the employers business for the period of his/her absence'.*

1.7 Cluster Analysis of the AWAs

There has been criticism that analysing AWA and certified agreement clauses out of the context of the whole agreement provides a misleading picture of the overall effect of the agreement (Hamberger 2002). This is because, the use of the 'no-disadvantage test' to assess agreements means that an agreement may be deficient in one area, as long as this deficiency is made up elsewhere in the content.

Cluster analysis can be used to get around this problem by revealing 'families' of agreement-type through analysing all the 424 variables which were coded onto the database.

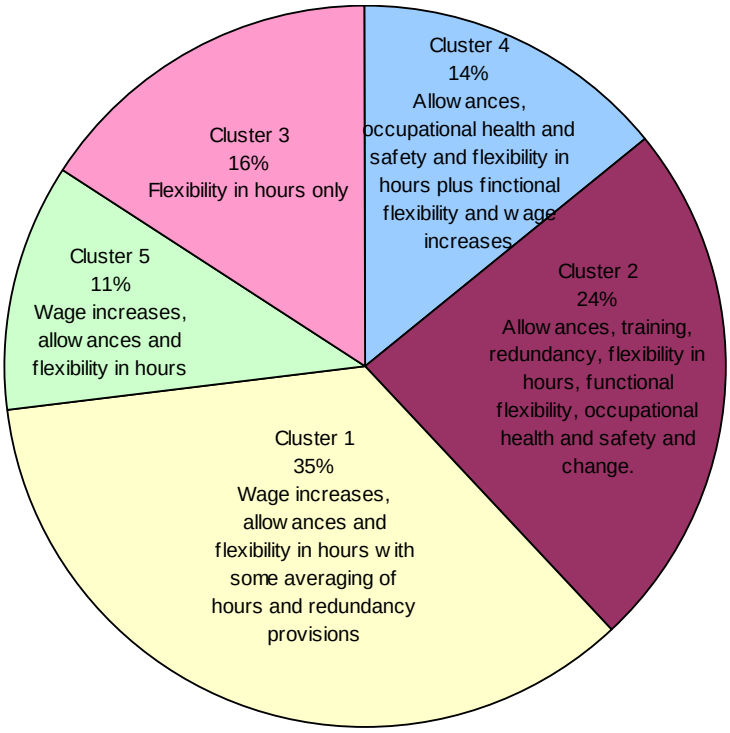
The cluster analysis of the AWAs confirmed their limited content. For example, hospitality AWAs rarely included family-friendly provisions other than family/carers leave. Provisions relations to job share arrangements, paid maternity and/or paternity leave, reference to the provision of childcare and/or elderly care, provision to work from home and career break schemes were rarely included. In total, aside from family leave, provisions which could be classified as family-friendly appeared in just three of the sixty three AWAs studied and family friendly provisions therefore did not become one of the features around which 'families' were constructed.

In addition to the inclusion of wage increases, the other variables which formed a significant part of the cluster groupings were:

- Allowances: this variable included a range of allowances such as travel/fares allowance; first aid allowance; meal allowance or where a meal was supplied; uniform or clothing which was either provided, reimbursed, or where an allowance was given; laundry allowance; call back allowance; years of service allowance; skills/qualification allowance; language allowance; and a tool allowance (for example for Chefs).
- Functional Flexibility: this variable included provisions where the employer could temporarily move employees to different parts of the organisation; require employees to carry out a flexible range of tasks; multi-skilling of employees; and staggered meal breaks.
- Occupational Health and Safety (OH&S): this variable included provisions which outlined an OH&S policy or program; contained systems for accident prevention; encouraged continuous improvement in safety; conducted safety audit inspections; issued protective clothing where required; contained an OH&S committee; provided training to employees in OH&S; and had an OH&S rehabilitation program.
- Redundancy: AWAs may have included clauses which stated that there were to be no forced redundancies during the life of the agreement and consultation around voluntary redundancies. This variable also included AWAs which mentioned the selection procedures for redundancy; the amount of severance pay per year of service; time off during notice period to job hunt and options for redeployment.
- Training: Training provisions may include reference to a career path; a stated training program; the use of competency standards; the time used for training; whether training is to be paid or in the employee's own time; the training provider; and whether the training was on or off the job.
- Flexibility in Hours of Work: this variable includes provisions where overtime is paid at single rate and time off in lieu is provided at ordinary time, penalty rates for weekends and public holidays are non-existent; the employer has the discretion to vary hours of work with reasonable notice; and ordinary hours of work can be worked on any day of the week.
- Workplace Change: this aggregate variable includes where there is any reference to workplace change such as how the change is to be conducted; whether the employer has a duty to notify employees of change and whether the employer has an obligation to discuss such change with employees.

The optimal number of clusters identified for the AWA dataset was five. These groups are outlined in Chart 1 and each family is briefly described below.

Chart 1. Cluster Analysis of Sixty Three Hospitality Industry AWAs



AWA Cluster 1: wages and hours flexibility AWAs

More than one third of AWAs fell into the first cluster, which is better typified by what it does not contain rather than actual content. These minimal AWAs focused on enhancing flexibility in the working hours that an employer could require of employees. In contrast to the findings of Cole et al that AWAs focusing on hours flexibility in the services sector did not include wage increases, two thirds of AWAs in this cluster contained reference to a wage increase during the life of the agreement.

The focus on flexibility in hours of work was clearly weighted towards employer rather than employee benefit, with the AWAs including provisions to compensate additional hours at ordinary time, loaded rates were used to eliminate penalty payments and the employer generally had the discretion to vary hours of work. All AWAs in this cluster also included provisions where hours of work could be averaged over a set period – anywhere between four and fifty two weeks.

Generally, the only other inclusions in this agreement cluster were provisions relating to allowances, and just over half of these agreements contained redundancy provisions.

AWA Cluster 2: complex AWAs

This second group of agreements, which accounted for 24 per cent of the hospitality AWAs, was the most complex of all the clusters. Like the first cluster, all agreements in this group contained reference to allowances and to flexibility in working hours. Interestingly, all of these AWAs also contained some reference to training, and all contained reference to redundancy provisions. Most agreements in this cluster also contained reference to functional flexibility, OH&S provisions, and provisions relating to workplace change. Without close analysis of the actual wording of each agreement clause, it is not possible to identify this group as representative of either employer or employee weighted content given the disparate nature of the AWA content.

AWA Cluster 3: 'basic hours' AWAs

The *only* feature of AWAs in the third cluster was their reference to provisions relating to flexibility in hours of work. These agreements, which represented 16 per cent of AWAs, basically included no other content and did not include a wage increase. This type of AWA was described by Cole et al as 'basic hours agreements'. Cole et al suggested that these agreements were designed solely to improve flexibility in labour and would be found predominantly in the service industries. Cole et al concluded that these basic hours agreements had *'a clear and limited change agenda involving changes to working hours. The industry distribution of agreements in favour of the service sector is consistent with this priority'* (2001:6).

AWA Cluster 4: allowances, OH&S and hours flexibility

This cluster of 14 per cent of AWAs contained agreements similar to the complex AWAs identified in Cluster 2. However, AWAs in this grouping were simpler than those in Cluster 2 because they did not include reference to redundancy, workplace change or training. Instead, the focus of these AWAs is on allowances, occupational health and safety, and flexibility in hours of work. Agreements in this cluster were also likely to contain provisions relating to functional flexibility and wage increases.

AWA Cluster 5: wages, allowances and hours flexibility

The smallest grouping, comprising 11 per cent of AWAs, is a simplified version of the grouping described in Cluster 1. This group focuses on wage increases and allowances. Most of these AWAs also include reference to flexibility in hours of work, but unlike Cluster 1, there is no focus on averaging of hours of work to improve flexibility.

Agreements in this cluster rarely contain any other content and so are really only distinguished from the basic hours agreements by the inclusion of wage increases and the payment of allowances.

Summary

In summary, the clusters identified above all had as a focus, provisions aimed at improving flexibility in working hours with often little other detailed content. In this sense, they are similar to those attributed by Cole et al (2001:6) to service type industries. That is, they are agreements which have *'a clear and limited change agenda involving changes to working hours'.* The clusters are also consistent with the findings of Mitchell and Fetter (2003), whose analysis of 500 AWAs showed that a substantial number of AWAs were single issue agreements, usually aimed at the liberalisation of ordinary hours of work and/or pay. The cluster analysis failed to reveal significant features of hospitality industry AWAs which counterbalanced the focus on provisions aimed to improve organisational flexibility through enhanced managerial prerogatives.

In the hospitality industry, it can be concluded that most of the benefits achieved through the introduction of AWAs have been one-sided, with employers achieving wages and hours flexibility at the expense of employee entitlements. Specifically, the focus of hospitality industry AWAs is clearly on the payment of loaded rates and annualised salaries to enhance rostering flexibility, with little corresponding evidence that these provisions also provide benefits to employees. For example, rostering flexibility can enable employees to take time off to attend to family or personal matters. However, these employee-focussed issues were rarely addressed in hospitality industry AWAs.

According to the evidence, the positive arguments from the federal government about the benefits which can be gained by both employers and employees through individualising

the employment relationship appear not to have been realised. While there were some examples of innovative employers providing benefits to employees such as extended childcare leave, job sharing arrangements and employee assistance programs, these provisions were rare.

The lack of innovative provisions in hospitality AWAs and to some extent in hospitality certified agreements suggests that, in an industry where low labour costs have a significant impact on the organisation's bottom line, the temptation is for employers to use AWAs to decrease these costs as much as possible.

1.8 The Vetting Process: The No-Disadvantage Test (NDT)

A key difference between AWAs and common law contracts of employment is that AWAs are vetted by the OEA and should not be approved if they fail to meet the conditions of a test called the No-Disadvantage Test (NDT).

In assessing whether an AWA meets the NDT, the Employment Advocate must compare the conditions of the proposed agreement to those in a relevant Federal award. Where there is no comparable Federal award, a State award may be used. Agreements pass the NDT if they do not disadvantage employees in relation to their wages and conditions of employment. Conversely, disadvantage occurs if approval of the agreement would result, on balance, in a reduction in the overall terms and conditions of employment of the employee compared to relevant awards and relevant State or Commonwealth laws. Where the OEA has concerns that the terms of the NDT are not met, these can either be resolved by a written undertaking by the employer or the agreement can be referred to the Australian Industrial Relations Commission (AIRC) for determination.

A key flaw in the NDT is that the proposed agreement must be assessed against the *relevant Award*.

1. As a result, the comparison does not consider any pre-existing over-award conditions such as those informally agreed upon or those included in an expired certified agreement. The only time pre-existing conditions are considered is where there is a *currently operating* certified agreement covering the employment of the proposed AWA which does not expressly allow for the introduction of AWAs (s170VQ). If the certified agreement is operating beyond its nominal expiry date, includes provisions allowing AWAs to be introduced, or if remuneration is derived from informal over-award entitlements, AWAs can be made which undercut pre-existing employee entitlements (Judge 1998).
2. In three of the four case studies of hospitality industry organisations, additional flaws in the application of the NDT by the OEA were revealed.
    a. The first of these was comparison of the content of the AWA against an inappropriate award.
        i. For example, at the Teahouse, AWAs covering Shop Assistants were assessed using the lower terms and conditions in the Café Award rather than the Retail Award. Had the correct award been used, the AWAs would not have passed the NDT.
        ii. At the Queensland Hotel, AWAs covering workers from the Reservations and Auditing sections of the Hotel were correctly assessed using the Clerical Award, yet similar positions at the Brisbane Hotel were assessed using the Hospitality Award – an award

which did not specifically cover office staff who predominantly performed clerical functions.

b. Second, the case studies also identified a broader issue about the ability of the NDT to adequately vet agreements. All organisations studied used a loaded rate of pay or an annualised salary to remunerate employees. In assessing such AWAs, where the composition of the loaded rate was unknown, the OEA applied the NDT against a snapshot of working hours. In the case of the Queensland Hotel, this was a block period of a roster. However, this application of the NDT does not take into account changes that may occur to a roster over a twelve month period, and in the cases studied, it was widely acknowledged that rosters changed constantly. An OEA representative agreed that the NDT was flawed in this respect, but noted the availability in some hospitality industry AWAs of a wages audit clause. This raises concerns about the suitability of a reactive provision such as an audit, with the case studies revealing that some employees did not know an audit was available, did not record correct hours worked, or were unwilling to access such a provision for fear of jeopardising a career path with their employer.

It is clear from the above examples that the NDT has not been a successful tool in preventing under-award deals being struck between employees and employers (Waring and Lewer 2001, Mitchell and Fetter 2003). Particular concern arose in 2002 with the Employment Advocate being called before a Senate Committee to explain the approval process for AWAs. The Employment Advocate admitted that his office had established a *Specified Partner Pilot Program* where certain 'partners' of the OEA, usually consultants, were asked to apply the NDT to AWAs before submission and sign a statutory declaration that the AWA passed the test, removing the task of checking by the OEA (Hamberger 2002b). Additionally, before the Senate Committee, the Employment Advocate noted that not every AWA approved by the Office was checked, particularly if it applied to an employee of an organisation that had been using AWAs for a while and had already had many AWAs approved. This lack of vetting is significant considering that the Employment Advocate commented that just 'under ten percent' of AWAs submitted to the OEA did not pass the NDT. Two weeks later, in a media release commenting about the *Specified Partner Program*, the Advocate did a volte-face, stating that AWAs would still be checked by the Office against the NDT (Hamberger 2002c).

In the same appearance before the Senate Committee, the Employment Advocate noted that, while employees were contacted in writing about a proposed AWA, other contact with AWA employees did not occur unless it was initiated by the employee, or the Office had some concerns during the approval process. Particular reference was made to the methods used to ascertain the genuineness of employee consent to an AWA. The Senate Committee referred to an internal OEA email communication which stated that for employees whose AWA was renewed, consent was assumed, since they had initially consented to being employed under an AWA (Hamberger 2002b).

In a 2004 Senate Committee appearance, the Employment Advocate was questioned over the application of the NDT in relation to hours of work. In particular, the Employment Advocate was questioned about a full bench decision[3] of the Australian Industrial Relations Commission (AIRC) where the majority found that if employees chose to work hours which were outside the ordinary spread of hours in the award, these hours could not be taken as paid at ordinary time for the purpose of the NDT. However the approach taken

[3] MSA Security Officers PR937654, 15th September 2003.

by the OEA had been precisely the opposite. Before the Senate Committee, the Employment Advocate stated that where an employee *volunteers* to work on weekends or outside ordinary hours, these hours are taken to be paid at ordinary time, not at penalty rates. When asked about the application of the decision of the Full Bench of the Commission, the Employment Advocate stated that he was not bound by decisions of the AIRC (Hamberger 2004).

The case studies of four hospitality industry organisations confirmed that the OEA had *consciously* approved AWAs which did not pass the No-Disadvantage Test (NDT) for employees who had reportedly *requested* and were granted particular hours of work. While this may enable an employee to have a second job as argued by the OEA, the practice raises several questions, not least regarding the degree to which employees actually consent to the lower rate. Should employees agree to opt out of weekend and/or other penalty rates because they were desperate for the extra income their second job provided, they would be unlikely to refuse a rate which was lower than the award. The OEA representative acknowledged that the extent to which an employee would 'truly' agree to contract out of award terms and conditions of employment was unknown. Even the checking carried out by the OEA might not identify employees who would sign anything because they were desperate to find employment. This situation has serious implications both for the notion of choice which underpins the *Workplace Relations Act* 1996, and for equitable outcomes for employees.

The federal government has proposed to change the vetting process to a less comprehensive test that provided by the NDT. Given the flaws highlighted above with the NDT and its application by the OEA, it is questionable:

1. whether this new test will adequately provide a safeguard for workers and stop their wages and working conditions falling below the minimum standard – that in awards,
    a. With the new test, there is no doubt that an AWA can be approved which contains wages and conditions less than the relevant award.
2. how effectively the standard will be applied in assessing agreements. Of course, the public will never know, given the lack of accountability provided to the OEA by the secrecy provisions of the *Workplace Relations Act* 1996.

2. The capacity for employers and employees to choose the form of agreement-making which best suits their needs;

The issue of choice is difficult to measure. Interviews with AWA employees are the best way to determine whether they believed there was a 'choice' in signing their AWA and, importantly, whether they had a 'choice' in the content of their wages and conditions of employment. Interviews were conducted with 112 participants across four hospitality industry organisations which had introduced AWAs. It was clear from the evidence provided by AWA employees that most did not have a choice in whether the sign an AWA or not, and in all cases except one, a small rural teahouse, there was either no or limited negotiation over the AWA content.

Some comments from the employees interviewed are below:

Employees of an RSL Club:

- *When this job came up it was under an AWA. I didn't have a choice but to go on to it. The job was advertised internally as a thirty eight hour a week job under an AWA. I was told I didn't have a choice.*
- *It was made clear that it was an AWA position and it was advertised as an AWA position as are all new positions within this club.*
- *I didn't know a lot about AWAs and had never been on one before, I wasn't going to forsake the job for that, so I probably accepted the AWA naively.*
- *With new positions, they are advertising them under AWAs. I don't really agree with this because they're tying that person straight up, they're dictating to them. I reckon that the job just should be advertised, not advertised under an AWA.*
- *We did have a permanent staff member here on the Award and he was released and his job was advertised as an AWA position. I think you'll find that the law states they cannot force existing employees on to an AWA, but they can advertise it under an AWA if a job becomes available.*

Employees of a Queensland Hotel

- *I was here from opening of the hotel but the AWA was a done deal. … If you wanted the job, I suppose you signed it. You could ask questions but there were no changes to be made, that was it. It was my assumption that it was non-negotiable* [Security].
- *I signed my AWA because I didn't have a choice. … I could not negotiate the agreement. I didn't know there was an option to negotiate* [Chef].
- *I suppose as an employee you accept the terms and conditions that are offered to you. Everyone wants the job or you wouldn't be applying for it in the first place and you see what is offered and you decide whether you accept it. It is the same under an award or enterprise agreement* [Security].
- *I've decided to sign the AWA to work here and these are the terms and conditions that the company wants me to work for them and these are the terms and conditions I accept. If I'd said that I wanted to work under the Award I would not have got the job. These are the terms and conditions that they wanted to employ me on and if you don't agree with those terms and conditions, you don't get employed* [Food and Beverage].
- *I could not have changed anything – it was not up for negotiation* [Food and Beverage].
- *We did not have a say in this one – we just had to take whatever content was in the AWA – we could not change it* [Housekeeping].
- *I felt that I could ask questions about the AWA but I also felt that it was offered on a take it or leave it basis. I mean I wouldn't have taken the job if I wasn't happy with everything, but I feel that if you don't want to take the job on the terms offered, someone else will. I felt that "this is the contract, take it or leave it" and I doubt whether I could have changed anything* [Engineering].

Employees of a Brisbane Hotel

- *AWAs were drafted by lawyers in Sydney and sent here and people were told to introduce them – so as far as I am aware there was no protracted bargaining period or anything – as far as I know it was just "give it to the lawyers, get them to draft up something, send it here and get everyone signing them* [HR Manager].
- *I do not feel that I could have negotiated my AWA and I would not have known who to ask if I had questions about it* [Front Office].
- *I felt that I had to sign the agreement. I could not really negotiate the terms but thought it was pretty standard and didn't read into it enough. I suppose because I am not passionate about working in the hospitality industry and I am not interested in going somewhere. All I wanted was a job, I didn't care what I was getting paid or what I had to sign* [Food and Beverage].
- *I signed the AWA because I wanted the job. I needed work and so I would have taken it even if I thought that the agreement had bad stuff in it. I needed the job, I needed the money. In the hospitality industry you expect poor conditions of work but as a whole, this hotel is very good, they treat their staff very well* [Food and Beverage].

This 'take it or leave it' approach to AWAs is contrary to the rhetoric of choice which surrounded the introduction of the *Workplace Relations Act* 1996 (Reith 1996). Proponents of individualism suggest that if employees do not like form of the contract or the terms on offer, they can simply find employment elsewhere. However, the case studies revealed that employee mobility is often restricted, rendering this market 'protection' ineffective for guaranteeing equity and choice. This lack of choice was most stark at the rural teahouse, where the geographical isolation of the workplace meant that employees were unable simply to find a job elsewhere if the terms and conditions offered were unacceptable.

3. The parties' ability to genuinely bargain, focusing on groups such as women, youth and casual employees;

The individualism literature suggests that employees with high discretion and strong labour market power are better able to negotiate their wages and working conditions on an individual basis (Wooden 1999). However, evidence from the four hospitality industry case studies suggested that under AWAs, even employees with high discretion may have difficulty negotiating with an employer who simply refuses to negotiate.

Across the four hospitality industry organisations studied, only one, the Teahouse, entered into serious negotiations with employees – and this was done collectively! Regardless, even at the Teahouse, once the AWA content was decided, generally there was no opportunity for individuals to negotiate different terms in their AWA.

Only four employees across the four organisations attempted individual negotiations. These were all senior employees and only one was successful in negotiating substantive conditions into his AWA. This was the head of concierge at one of the hotels who management did not want to lose. In contrast, the front office manager at the same hotel was told that the content of his AWA was not negotiable. He commented that *"from the outset my understanding of the AWA was different from everyone else's here. I wanted to have a few different clauses in my agreement, for example a salary review, a structured*

career path. And when I raised this, they said no, that everyone was getting a generic contract and there were no changes". At the RSL, two senior employees were successful in negotiating very minor changes to the content of their AWAs – one negotiated out of the AWA a clause requiring her to wear a uniform, and the other successfully removed a clause requiring her to see a 'company' selected doctor when sick. RSL management indicated that while they were happy to make these minor adjustments to individual AWAs, they would not negotiate over more substantive provisions.

These examples, combined with the comments included already from AWA employees about 'choice', highlight a power imbalance between an employer and employees and suggest that:

1. Unless the employer initiates the negotiation, employees are unlikely to attempt to negotiate for fear that if they were seen to be questioning the terms and conditions of employment on offer, they would not get the job.
2. Further, unless the employer wishes to negotiate, employees have little chance of changing the content of a proposed AWA.

Evidence from the four case studies suggests that, as well as using AWAs to avoid negotiating with unions, some employers have used them to avoid negotiating with employees. In other words, AWAs were used as a tool for employers to keep labour costs as low as possible by circumventing bargaining altogether. They provided a cost-control mechanism for employers in the hospitality industry.

One remedy to this lack of negotiation available to employees under the *Workplace Relations Act* 1996 is to take protected AWA industrial action, but it is not likely that new employees would utilise such a provision in order to negotiate the content of their AWA, and in fact, since the enactment of the AWA provisions of the Act, there have been no cases of employee-initiated industrial action in relation to an AWA.

4. The social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities;

4.1 The gender pay gap

In the Australian industrial relations literature, it is generally agreed that *'women are typically better off under collective agreements'* than under individual arrangements (Carlson et al 2001:25) because of their weaker bargaining position compared to men (Preston & Crockett 1999).[4] At the time of its enactment, the general consensus was that the effect of the *Workplace Relations Act* 1996 '*would, on balance, be negative for women'* (Pocock 1996).

In its 1999 submission to a Senate Committee considering amendments proposed to the *Workplace Relations Act* 1996, the ACTU put forward its argument that women workers are disadvantaged by AWAs, a situation which would be exacerbated by further amendment to the Act. Using empirical evidence from the ABS, the ACTU suggested that the award system and the intervention of the AIRC have played crucial roles in regulating the wages and working conditions of women workers – evidenced in the traditional heavy reliance on the award system in industries and occupations in which women predominate. Although the ACTU acknowledged that in 1999 it was too early to assess the impact of

[4] Of course, even more effective is the centralisation of wage determination, where women can use formal processes such as the Industrial Relations Commission to seek pay equality (Pocock 1996).

AWAs on women, it was concluded that the *'anecdotal material is ominous'* (ACTU 1999:1-8). These early concerns of the ACTU have been confirmed by research conducted by Carlson et al (2001) who concluded that in terms of weekly earnings, outcomes for women are worse under individual arrangements compared to those achieved through collective negotiations.

Other evidence also suggests that women fare badly under individual contracts. The two states in Australia which provided formalised individual contracts as early as 1993 have a significantly higher gender wage gap than the states which have only recently introduced such arrangements. In their study, Preston and Crockett concluded that, *'as more jurisdictions pursue regulatory systems based on individualism, we are more likely to see continued erosion of the relative pay position of women in Australia'* (Preston and Crockett 1999:141).

The Australian hospitality industry is typified by low wages, insecure forms of employment, low skill levels and a lack of training. The industry is overrepresented by workers typically identified as potentially 'disadvantaged' in the labour market – women, young people and workers from non-English speaking backgrounds. These features of the hospitality industry also suggest that its labour is easily replaceable. The low skill requirements of most employers in the industry means that there is little incentive to invest in training or to design the employment relationship in such a way as to discourage labour turnover, for example, by developing clear career paths and by adequately rewarding employees. Indeed, the low profit margins and heavy reliance on inexpensive labour act further to discourage investment in human resources.

The hospitality industry AWA data and case studies highlight that, in an industry which is overrepresented by 'disadvantaged' workers, AWAs are being used by some employers to drive costs down further. This was demonstrated by the AWA data presented earlier and is a clear indication that workers in industries such as hospitality will fall behind those in industries which utilise collective bargaining to determine their wages and working conditions. It just so happens that the former group of workers tend to be female, while the latter tend to be male.

4.2 Lack of family friendly provisions in AWAs

The inclusion of 'family-friendly' provisions in AWAs has been keenly debated, with a 1999(b) report by the OEA concluding that a large proportion of AWAs (79%) contained at least one family-friendly provision. However, the method used by the OEA to define 'family-friendly' has been criticised, not least because the OEA included 'flexible' working hours as a 'family-friendly' provision (Roan et al 2000).

In her analysis of family-friendly provisions in agreements, Whitehouse found little evidence to provide *'support for the claims that AWAs are exemplary vehicles for work/family provisions'*, with the incidence of most family-friendly provisions examined more often contained in collective agreements than in AWAs (2001:116). This confirms the findings from an earlier study by Hawke et al, that only 19 per cent of AWAs contained provisions relating to family leave (1998:56). In an analysis of 196 AWAs at three financial institutions, Leonard also concluded that women had reduced access to family friendly work arrangements under AWAs, and that open-ended hours provisions limited employee discretion to balance work and family commitments (2001). Paid parental leave was the one provision which Whitehouse found was more likely to appear in AWAs than in collective agreements, something which she suggested reflected the concentration of AWAs at the upper levels of the occupational hierarchy in the public sector.

In the analysis of hospitality industry AWAs, family-friendly agreements were defined as those containing at least one reference to issues such as provision for job share, childcare, elderly care referral service, working from home/telecommuting, career break scheme, family/carer's leave provision, paid maternity and/or paid paternity leave. Twenty nine per cent of AWAs included reference to at least one such type of family-friendly provision. This was in contrast to 59 per cent of certified agreements which included at least one such provision. Closer inspection of agreement content revealed that the focus of both AWAs and certified agreements was on *family leave* rather than the other family-friendly items mentioned above, which often did not feature in hospitality individual or certified agreements.

In relation to family (or carer's) leave, only one quarter of AWAs specified that it could be taken as part of the employee's sick leave entitlement (compared to half of the certified agreements). AWAs were also less likely than certified agreements to include provision for employees to use other forms of leave such as annual leave, RDOs, or time off in lieu of overtime to care for sick family members, or to provide that employees could take leave without pay.

Where paid family leave was granted (as part of the employee's sick leave or other leave entitlements), AWA employees received on average 4.8 days a year. In contrast, certified agreement employees were entitled to an average of 6.2 days family/carer's leave per annum.

These examples do not support the clear acknowledgement of the importance of family friendly policies in the objectives of the Workplace Relations Act 1996 (Mitchell and Fetter 2003).

5. The capacity of the agreement to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standards;

It is very clear that AWAs can be used to implement wages and conditions that are to the detriment of employees. Further, there is little evidence to suggest that AWAs are used as the legislation intended, to provide choice to both employers and employees and to foster individual agreement-making which encourages both organisational efficiency and employee performance.

The flawed application of the NTD has enabled AWAs to go beyond the flexibilities provided by the common law system by allowing award provisions to be reduced. The evidence both in the AWA literature and as revealed by the hospitality industry examples suggests that this balancing of equity and efficiency is a regulatory high-wire act that is ultimately difficult to achieve – particularly in industries such as hospitality where inherent weaknesses in the system, combined with market forces and employer ambitions, disable the limited statutory protections provided.

With the clear evidence already available about the disadvantage being suffered by AWA employees, any legislative change will only further undermine the living standards which make Australia what it is – underpinned by a fair rate of pay, equality and working conditions which recognise our ability to participate in social and community activities.

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