Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into Workplace Agreements

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Introduction

1. In February 2001, the Gallop Government came to office with a clear mandate to restore an industrial relations system in Western Australia that allows for greater business profitability whilst providing fairness and justice for all employees.

2. Since its election, the Gallop Government has worked hard to create a more efficient and effective industrial relations system that balances the rights and interests of employers and employees.

3. Under this fairer system Western Australia has flourished. During the Gallop Government's term the State has:

   (a) enjoyed a run of historically low unemployment, with an average unemployment rate in the 4 percent range for the last 20 months;

   (b) regularly led the other States in the rate of labour force participation;

   (c) increased employment by over 130,000 jobs; and

   (d) regularly led the nation in economic performance, achieving the highest Gross State Product per capita of the States for many years and the highest measure of labour productivity for the last three years.

4. The Government of Western Australia supports an approach to industrial relations regulation that provides for flexible bargaining arrangements adaptable to the needs of industry. This includes enhanced roles for industrial tribunals to assist in the settlement of disputes.

5. The Government of Western Australia rejects the Commonwealth's plans to unilaterally override the jurisdiction of the States in relation to industrial relations.

6. The approach of the Government of Western Australia is governed by a number of clear principles. In summary, these are:

(a) employers and employees must be free to negotiate the type of agreement best suited to their industry and the particular circumstances of the workplace;

(b) any negotiations must be conducted in a climate of good faith;

(c) agreements should be underpinned by an adequate safety net of terms and conditions;

(d) the various Industrial Relations Commissions must be empowered to play their intended role as independent umpires, and their ability to conciliate and if necessary arbitrate disputes must not be fettered; and

(e) the various Commissions must be properly resourced to enable them to undertake their proper role.

7. The submission of the Government of Western Australia reflects these clear principles.

Submission Addressing the Terms of Reference

Scope and coverage

8. It is difficult to determine with accuracy and timeliness, the scope and coverage of industrial and workplace agreements across the Commonwealth and respective State jurisdictions.

9. The Australian Bureau of Statistics' (ABS) biennial Employee Earnings and Hours (6306.0)(EEH) survey is the most reputable and comprehensive publicly available measure of agreement coverage. The publication provides data on methods of pay setting[1] including registered State and Federal collective and individual agreements, awards and unregistered agreements.

10. The current 'methods of pay setting' measure was introduced in the EEH survey in the 2000 publication. At the Australian level, with respect to pay setting, the May 2004 EEH data reveals that collective arrangements are still the dominant form of employment arrangement with:

1 The 'methods of pay setting' measure relates to how the main part of an employee's pay is set. Employees are classified to award only, collective agreement or individual agreement, and agreements are further disaggregated based on whether they are registered with a State of Federal industrial tribunal or authority.

(a) collective arrangements (awards and agreements registered and unregistered) covering 61 per cent of Australian employees; and

(b) individual arrangements (registered and unregistered) covering 39 per cent of Australian employees.

11. It must be noted that in the EEH collection, the 'unregistered individual agreements' category includes all individual contracts, letters of offer and common law contracts whether or not they make reference to another agreement or an award. In addition, employees receiving over-award rates of pay, whose other conditions are set by award, are captured in this category, as are award free employees and working proprietors of incorporated businesses. The unregistered individual agreements category has, for the last three collection periods, captured the greatest proportion of Australian employees, in terms of single categories.

Australian Workplace Agreements

12. Importantly, at May 2004, only 2.4 per cent of Australian employees were covered by registered Federal individual agreements or Australian Workplace Agreements (AWAs), while less than one percent were covered by State individual agreements.

13. This data shows that the penetration of AWAs across the Australian workforce has not been significant since their introduction in 1997. However, it should be acknowledged that in the two years from May 2002 to May 2004, AWAs did increase in their percentage share of the employee market by 100% per cent, from 1.2 per cent to 2.4 per cent.

14. This increase in AWA usage correlates with the removal of Individual Workplace Agreements (IWAs) from the Western Australian industrial relations system. The EEH data reveals that over the same period, May 2002 to May 2004, State individual agreement use in WA fell from 7.7 per cent to 0.3 per cent and AWA use increased from 1.7 per cent to 8.0 per cent.

15. A summary of EEH data can be found at **Appendix A** to this submission.

16. The Office of the Employment Advocate (OEA) identified in its Annual Report 2003/2004[2] that Western Australia's share of approved AWAs (employees) increased from 19 per cent in the

2 Australian Government, Office of the Employment Advocate Annual Report 2003/2004 Improving Australian Workplaces, p17.

period 1997-2003, to over 33 per cent in the period 2003-2004. Western Australia, on average, contributes around 10 per cent of the Australian labour force.

17. While the OEA routinely publishes data on AWA distribution by State and Territory, and Australia wide data by industry, sector and business size, it is often difficult to obtain AWA data disaggregated by State and industry. OEA data[3] has shown that more than 80 per cent of all registered AWAs in Western Australia in 2003 were from six industry divisions only.[4]

    (a) Retail trade (21%);

    (b) Property and business services (16.5%);

    (c) Mining (14%);

    (d) Manufacturing (12%);

    (e) Construction (12%); and

    (f) Accommodation, cafes and restaurants (8%).

18. While these particular industries also rate highly in Australian average figures for AWA scope and coverage, penetration of AWAs in these industries in WA is, for the most part, greater than the Australian averages. The Commonwealth consistently uses this data as evidence of the popularity of AWAs amongst employees. The Government of Western Australia submits the growth in AWAs is **not** a reflection of employee choice, but rather a desire by some employers to use this low cost system combined with the lack of integrity in the processes of the OEA.

3 OEA – Unpublished data received from OEA by DOCEP for calendar year 2003.

4 The industry divisions relate to the Australian and New Zealand Standard Industrial Classification (ANZSIC). The ANZSIC Code includes 17 major industry division titles, which are further divided into subdivision, group and classification titles.

Western Australian individual workplace agreements

19. Annual reports[5] from the former Western Australian Commissioner of Workplace Agreements showed that the industries that consistently recorded the highest levels of annual registration of IWAs included, retail trade, property and business services, mining, and accommodation, cafes and restaurants. State Government policy, at that time, to only engage new employees on workplace agreements also resulted in a high proportion of individual agreements in "government administration and defence".

20. It seems clear that many employers using the Western Australian individual workplace agreement system may have moved their employees onto AWAs following the reform of the State system.

21. The repeal of the *Workplace Agreements Act 1993* was a priority of the Gallop Government, as the spread of individual workplace agreements had, in many industries, resulted in a gradual erosion of wages and conditions for employees.

22. This is evidenced by the independent report[6] produced for the Commissioner of Workplace Agreements by the Australian Centre for Industrial Relations Research and Training (ACIRRT). The ACIRRT report involved the examination of a sample of registered IWAs in four industries and a comparative analysis against the relevant State award in an endeavour to provide statistical information on the impact of IWAs for workers covered. The industries reviewed were:

    (a) Contract cleaning (ANZSIC - Property and business services);

    (b) Security services (ANZSIC - Property and business services);

    (c) Shop and Warehouse (ANSIC – Retail Trade); and

    (d) Restaurant, tearoom and catering services (ANZSIC – Accommodation, cafes and restaurants).

5 Commissioner of Workplace Agreements Annual Reports for 1999 and 2000.

6 ACIRRT Report, A comparison of employment conditions in Individual Workplace Agreements and Awards in Western Australia, February 2002.

23. As identified, these industries represented a significant proportion of IWAs registered each year in WA.

24. The keys findings of the Report include, that of the agreements analysed:

    (a) 74% provided no week-end penalty rates of pay;

    (b) 67% provided no overtimes rates of pay;

    (c) 56% provided an ordinary rate of pay below the award rate;

    (d) 49% of full-time, part-time and fixed term agreements absorbed annual leave into the ordinary hourly rate of pay; and

    (e) 75% of all agreements analysed were without a pay increase provision.

25. ACIRRT concluded that the content and detail contained in the IWAs analysed was quite basic with most effectively adopting a 'bare bones' approach to wages and conditions for workers. The industry analysis of agreements found that the comparable awards tended to be more comprehensive and provided for a range of detailed provisions relating to wages, employment conditions and other workplace related matters[7].

26. While many of the agreements analysed included very open-ended hours of work arrangements, under the guise of flexibility, an analysis of the loaded rates of pay for these workers did not appear to make up for the increasingly open and flexible hours of work arrangements. In short, the report found that workers were generally worse off under IWAs than under the comparable award.

27. ACIRRT concluded that, "*it appears that IWAs have been used by employers as a means of changing a number of key award provisions and are more likely to be used by employers to gain an advantage in industries that are highly competitive*" [8].

28. A copy of ACIRRT's report is at **Appendix B**.

7 Ibid, p64.

8 Ibid, p65.

Deficiencies in the current AWA registration process

29. There are distinct similarities between the old Western Australian system of IWAs and AWAs, not the least of which is the ability for employers to offer the agreements as a condition of engagement. Many employees working in the lower skilled industries in which IWAs were, and AWAs now are, prevalent, are much less likely to hold the skills necessary to bargain individually with a prospective employer over employment conditions. They are also much less likely to be in a position to be able to refuse an offer of employment due to inferior wages and conditions.

30. It is of concern to the Western Australian Government that less scrupulous employers, who manipulated the IWA system to their advantage and their employees' disadvantage, may now be using the AWA system to similar effect.

31. While IWAs completely replaced the relevant State award and did not have to meet a no disadvantage test (NDT) against it, nor even specify the provisions of the *Minimum Conditions of Employment Act 1993*, AWAs are required (by the *Workplace Relations Act 1996*) to pass an NDT against a relevant award.

32. However, the Gallop Government has long held concerns that the OEA misapplies the NDT by taking into account irrelevant considerations such as so-called "voluntary overtime". The theory of voluntary overtime or "preferred hours of work" operates to exclude employees from receiving relevant penalty or overtime rates of pay for such hours by virtue of the employee's agreement to accept hours at a base rate of pay. Even more concerning is the common suggestion by AWA employers in these agreements than an employee's acceptance of working outside of standard hours, at a base rate of pay, is a 'family friendly practice'.

33. The Gallop Government has lobbied the Federal Government and the OEA for several years about the application of the NDT to AWAs. The Government has received legal advice that the aforementioned practice contravenes the *Workplace Relations Act 1996* (WR Act). The Australian Industrial Relations Commission has also confirmed that such considerations are

irrelevant to the NDT (in the context of certified agreements).[9] Importantly, both forms of agreement are governed by the same section of the WR Act with respect to the NDT. [10]

34. Despite this, the Employment Advocate continues to flagrantly disregard the law to the detriment of employees. It is clear AWAs are increasingly being used by employers to undercut award conditions. A recent ABS report revealed that WA employees on AWAs received $65.10 less per week than those on certified agreements, and $21.80 less per week than those on State industrial agreements.[11] More disturbingly, average weekly total earnings for AWA employees in the last two years have declined by $212.20 per week.

35. It appears that the Federal Government and the OEA are not serious about AWAs benefiting both employers and employees. The Employment Advocate's website contains template AWAs, complete with "voluntary overtime" provisions. Paradoxically, the same website professes that "the individual nature of an AWA means that the specific needs of both the business and the employee can be taken into account".

36. In addition to its concerns about the OEA's application of the NDT, the Gallop Government believes there are some serious deficiencies with the administration of AWAs.

37. Firstly, the Employment Advocate is responsible for promoting and approving AWAs, investigating alleged breaches of AWAs and investigating complaints concerning AWAs. It is absurd that the same organisation entrusted with promoting and approving AWAs is also responsible for compliance. The Employment Advocate's ability to remain impartial is seriously compromised by its competing roles.

38. Secondly, the Employment Advocate outsources core functions, namely approving AWAs, to private sector organisations known as "industry partners". Industry partners are also responsible for promoting and providing advice on AWAs. They typically receive a fee-for-service from clients who make AWAs. It is ludicrous that the Employment Advocate outsources such a critical function to organisations that profit from AWAs being made.

39. Thirdly, there is no ability under the WR Act to review decisions of the Employment Advocate or industry partners concerning AWAs. In addition, confidentiality provisions under the WR

9 See in particular MSA Security Officers Certified Agreement [2003] (PR937654) and Bermkuks Pty Ltd Certified Agreement [2003] (PR943124).

10 Workplace Relations Act 1996 – Part VIE – No-Disadvantage Test

Act protect AWAs from disclosure. The end result is that the Employment Advocate operates with minimal accountability and is effectively a "law unto itself".

The future of individual agreement making in Australia

40. While there are already clear concerns about the current administrative and registration processes for AWAs, the Federal Government's proposal to remove the requirement for AWAs to meet a NDT against a relevant award is staggering.

41. The Western Australian experience clearly demonstrates that in the absence of an adequate safety net of entitlements in individual agreement making, the door is wide open for employers to substantially reduce wages and conditions.

42. While the Prime Minister may trust employers to "do the right thing" by their employees, the empirical evidence suggests otherwise. The inevitable diminution of entitlements under the proposed Federal scheme will likely first occur in the service and contract industries, and those industries engaging low to medium skilled workers with little or no individual bargaining power.

43. However, the continued ability to offer AWAs as a condition of employment coupled with the natural turnover of labour could see employers across all industries exploiting the opportunity to disregard hard fought award conditions for the scant entitlements of the Federal Government's proposed "Fair Pay and Conditions Standard". Such an outcome will be to the disadvantage of Australian workers and their families and also reputable businesses owners forced to compete in a market whereby rival employer's ever-reducing labour costs make decent employers uncompetitive.

44. In light of Santayana's wise observation that "*those who cannot remember the past are condemned to repeat it*"[12], the Government of Western Australia submits it is foolhardy of the Commonwealth to ignore the clear lessons learnt from the Western Australian experience with individual agreements.

45. In addition, the Government of Western Australia submits that the minimal penetration of AWAs hardly supports the Coalition's bold statement in its 2004 Election Policy that "*[t]he job security*

11ABS Employee Earnings and Hours (6306.0).

12 Santayana, G. The Life of Reason. Prometheous Books 1998 pg 82

and high wages enjoyed by Australian workers have been the result of the Coalition's strong economic management and reforms to the workplace relations system, which includes reforms aimed at encouraging agreement making". [13]

Employer and employee choice of agreement and genuine bargaining

46. The Coalition's 2004 Election Policy Statement on industrial relations makes the following claim:

> *"The Coalition also believes that Australia's economic prosperity relies on preserving choice and flexibility for employees and employers in relation to the type of employment arrangements that they choose to enter into.*
>
> *In order to enshrine this concept of choice within the workplace relations system, a re-elected Coalition will amend the objects of the Workplace Relations Act to ensure that the concept of freedom to contract is protected, promoted and enhanced.*
>
> *This will ensure that both workers and employers understand that they have genuine choice and flexibility to enter into either collective or individual agreements, depending upon what arrangements suit their own individual circumstances."* [14]

47. The term "choice" in agreement making has been a favourite of the Coalition both federally and in Western Australia for many years and in successive election policy statements. However, to exercise freedom of choice, one must possess the power to choose. It is difficult to see how a 15 year old, casual bakery assistant who is faced with signing an AWA or trying to find work elsewhere, is freely choosing to enter into that "agreement", nor that they could suggest to the prospective employer that they are opting for a collective agreement (that probably doesn't exist) because this is the arrangement that best suits *"their own individual circumstances"*.

48. The Federal Government is deliberately attempting to mislead the Australian public in suggesting that such circumstances provide employees with *"genuine choice and flexibility to enter into either collective or individual agreements"*. What is really meant, in the case of

13 Coalition Election 2004 Policy – Flexibility and Productivity in the Workplace – The Key to Jobs – pg 4

14 Ibid pg 5

prospective employees, is that they have the "choice" of signing the agreement, or finding another job.

49. The Government of Western Australia is opposed to such a system that enables the exercise of choice of agreement to rest entirely with the employer. This is one of the reasons why the Gallop Government removed the former State Government's workplace agreements system and provided an alternative system of individual agreements know as employer-employee agreements (EEAs). Importantly, EEAs:

    (a) must be registered with the WA Industrial Relations Commission Registry (Registry);

    (b) cannot be made a condition of engagement – they are purely voluntary agreements whether for existing or prospective employees; and

    (c) must pass a genuine no-disadvantage test administered by the Registry.

50. Given that much of the Federal Government's proposals are purportedly based on neo-classical economic theory, and given that central to such theory is the idea that people make rational choices, how could anyone suggest that faced with the choice of a higher rate of pay under an award or collective agreement an employee would freely choose to be paid less under an AWA? The answer is simple – such employees are not exercising freedom of choice. Rather they are exercising choice that has been constrained by the prospective employer – sign, or no job.

51. Whilst it is acknowledged that existing employees do have some protection with respect to AWAs, the reality in many sectors of the labour market is that of regular turnover and renewal of labour. As a result of this, employers are able to unilaterally introduce AWAs as new employees are engaged, in the same way as they did under the former system of workplace agreements in Western Australia – the results of which are discussed elsewhere in this submission.

52. Notwithstanding the provision of EEAs, the Government of Western Australia has expressed its clear preference for collective bargaining and remains committed to Australia's international obligations thereto.

Social objectives

53. The principal object of the Workplace Relations Act 1996 is to provide a framework for co-operative workplace relations which promotes the economic prosperity and welfare of the people of Australia by, among other things, (i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers.

54. The Act also requires the Australian Industrial Relations Commission to provide a safety net of fair minimum wages and conditions of employment which take into consideration economic factors balanced with prevailing living standards and the needs of the low paid.

55. From these provisions, two key issues of concern arise:

    (a) pay equity for working women who are currently paid, on average, less than working men, the difference of which is the gender pay gap; and

    (b) flexible working arrangements and leave entitlements to assist employees balance their work and family responsibilities.

The gender pay gap

56. The gender pay gap in Australia, as at May 2005, was 15 percentage points, with full time female employees earning 85% of the earnings of full time male employees[15]. In Western Australia, the gender pay gap was 24 percentage points with full time female employees earning 76% of the earnings of full time male employees.

57. Since 1993, the year workplace agreements were introduced in Western Australia without an award based safety net, the Western Australian gender pay gap has varied between 20-26 percentage points[16], whereas the national gender pay gap has varied between 15-18 percentage points. Prior to 1993, the Western Australian gender pay gap varied between 17-20 percentage points.

15 ABS Cat 6302.0 of May 2005, based on seasonally adjusted average weekly ordinary time earnings (AWOTE), which does not include overtime payments.

16 with one exceptional quarter at 18.5 percentage points in February 1999.

58. Research has shown that AWAs have financially disadvantaged women and that women are paid less than men on AWAs.[17]

59. Recent Pay Equity Inquiries in Western Australia and Victoria have revealed that women have a greater dependence on award wage increases than men and are less likely to benefit from higher wage increases under enterprise agreements than men. These are already contributing factors to the gender pay gap. These Inquiries and many other researchers have found that:

    (a) women are paid less than men under both collective and workplace agreements[18];

    (b) the highest average annual wage increases are found in male dominated industry enterprise agreements, while the lowest average annual wage increases are found in female dominated industry enterprise agreements[19]; and

    (c) the occupation segregation of women contributes to the maintenance of the gender pay gap[20] as women are more likely than men to be employed in workplaces where there was limited scope for collective bargaining and union representation, and more likely to be concentrated in jobs governed by minimum wage regulations[21].

60. If the award safety net for agreement making is removed and future award wage increases are further limited, as proposed by the Federal Government, the gender pay gap between male and female earnings is likely to increase.

61. The researchers into the gender pay gap in Western Australia concluded that:

    (a) "..the gender pay inequity has economic, social and political consequences for individuals, businesses and governments and therefore must be addressed" [22]; and

17 Peetz, D 2005 "The Impact of Australian Workplace Agreements and the abolition of the no disadvantage test". Paper submitted for the Academic Report Card on the Federal Industrial Relations Proposals, University of Sydney, June 2005.

18 Peetz, D 2005 "The Impact of Australian Workplace Agreements and the abolition of the no disadvantage test". Paper submitted for the Academic Report Card on the Federal Industrial Relations Proposals, University of Sydney, June 2005.

19 Report on the Review of the Gender pay Gap in Western Australia by Dr Trish Todd and Dr Joan Eveline, School of Economics and Commerce, University of Western Australia, November 2004.

20 Advancing Pay Equity- their future depends on it - Report by the Victorian Pay Equity Working Party to the Minister for Industrial Relations, February 2005

21 Report on the Review of the Gender pay Gap in Western Australia by Drs Todd and Eveline, 2004.

22 Report on the Review of the Gender pay Gap in Western Australia by Drs Todd and Eveline, 2004.

(b) a multiplicity of factors contribute to the gender pay gap, and therefore a multi-dimensional approach is necessary to address it. The Victorian Inquiry reached the same conclusion.

62. The Western Australian Inquiry recommended amendments to the *Industrial Relations Act 1979* to facilitate addressing gender-based pay inequities in the Western Australia Industrial Relations Commission. The Victorian Inquiry examined the federal legislative pay equity provisions and found them to be restrictive, inadequate and lacking in clarity. While the State Government has the power to change State legislation, it has no power to effect changes to federal legislation to facilitate pay equity cases to address the undervaluation of women's work and reduce the gender pay gap. The Federal Government's legislative proposals will undermine the States' ability to address issues such as pay equity in their respective State Industrial Relations Commissions by removing jurisdiction from the States.

Federal Government's proposed changes

63. The Federal Governments' proposals will likely create greater gender pay inequities for working women, widening the gender pay gap.

64. As the primary carer of young children, women need to be able to balance work and family responsibilities. Unfortunately, for many women this can often only be achieved in lower paying jobs, and low paid casual jobs. These women are forced into lower paying jobs to get the flexibilities they need while their children are young. However, women in low paid jobs generally also have low bargaining power and little prospects to increase their earnings other than by working longer hours.

65. Under the Federal Government's agreement making proposals, wages and conditions of employment in low paid jobs can be eroded through employer-initiated agreements designed to create cost efficiencies at the expense of employees' wages and conditions of employment. If wages and conditions of employment deteriorate, and childcare costs continue to rise, these women will be further financially disadvantaged and possibly even forced out of the labour force.

66. Women generally have less bargaining power than men. Research in Western Australia by Christine Short in 2001[23] revealed that men in male dominated occupations achieved higher and earlier pay increases in awards and agreements than women in female dominated occupations.

67. The Federal Government's proposal to promote negotiated agreements as the primary source of pay increases will only disadvantage women and widen the gender pay gap.

68. More recent research[24] found that the gender pay gap is greater under Australian Workplace Agreements than under collective agreements. Comparisons of male and female earnings under AWA's and collective agreements show that women under AWA's are being financially disadvantaged, and that the gender pay gap is wider for these women:

    (a) women under AWA's only receive 80% of the hourly rate of pay of men under AWA's. Under collective agreements, women receive 90% of the hourly rate of men;

    (b) women under AWA's receive 11% less than women under collective agreements;

    (c) casual employees are paid 15% less under AWA's than they are under collective agreements, over 30% of all working women are employed on a casual basis, and over 50% of all casual employees are women[25]; and

    (d) permanent part-time employees receive 25% less under AWA's than part-time employees under collective agreements. Part-time employees under AWA's also receive 8% less than part-time employees who are paid the actual award rates of pay. Nearly 75% of all part-time employees are women, and approximately 45% of all female employees are employed on a part-time basis.

69. In summary, the Federal Government's proposed changes will only further financially disadvantaged women in comparison to their male counterparts and widen the gender pay gap by:

    (a) limiting future pay increases in awards;

23 Equal Pay – What happened in WA? The effect of Collective Agreements on Women in the Paid Workforce Christine Short 2001

24 Peetz, D 2005 "The Impact of Australian Workplace Agreements and the abolition of the no disadvantage test". Paper submitted for the Academic Report Card on the Federal Industrial Relations Proposals, University of Sydney, June 2005.

(b) removing the award as the safety net for agreement making;

(c) not including casual loading as a core minimum condition;

(d) undermining the State's ability to address pay inequities in awards;

(e) rationalising award wage and classification structures which provide higher wages for higher classifications based on qualifications, skills and job complexity; and

(f) encouraging employers to use workplace agreements to achieve increased productivity and cost savings at the expense of fair wages and conditions of employment for employees with a lower safety net of core minimum conditions.

Enabling employees to balance work and family responsibilities

70. There are many employees on a low income who are struggling to support their families. Prevailing living standards and community expectations are forcing many families to supplement their income by having both parents in the workforce. There is a growing social expectation that women will return to the workforce or remain in the workforce while raising young children, taking time out only to recover from childbirth.

71. With both parents in the workforce, there is a growing need for greater flexibilities in working arrangements, hours of work and leave arrangements to assist both parents in balancing their work and family responsibilities and to attend to the needs of their children, particularly when they are young or sick.

72. Over the years, family friendly working conditions have been inserted into awards and agreements. However, with the proposed changes to agreement making, employers will be able to dispense with these current obligations.

73. The Australian Industrial Relations Commission (AIRC) has recently handed down its decision in the ACTU work and family test case, which sought greater flexibilities for employees with family responsibilities. The AIRC's decision was mindful of the Federal Government's

25 Peetz, D 2005 "The Impact of Australian Workplace Agreements and the abolition of the no disadvantage test". Paper submitted for the Academic Report Card on the Federal Industrial Relations Proposals, University of Sydney, June 2005.

legislative proposals and award simplification strategy. However, the AIRC also recognised the need for improved entitlements to assist employees in balancing their work and family responsibilities.

74. The new entitlements provided through this decision will be inserted into awards. It would normally be expected that these conditions would flow on to all federal awards and eventually into agreements. However, if the award is no longer the safety net, employees could be denied access to these new entitlements and other award based family friendly provisions if employers do not include them in the agreements they offer to employees. If the award ceases to be the safety net, these provisions may no longer be available to many employees.

Agreement making

75. The Federal Government says it is supportive of flexibilities to assist employees balance their work and family responsibilities, but leaves it to employers and employees to negotiate agreements at the workplace level. It assumes the parties have equal bargaining power. This is far from the reality in the workplace and recently led the Commonwealth's Sex Discrimination Commissioner and former head of the Office of the Status of Women, Ms Pru Goward, to state: *"[o]ne of the cruellest half-truths in this whole debate is the market will fix it, that it will happen at an enterprise bargaining level."*[26]

76. Research has found that conditions of employment under Australian Workplace Agreements (AWAs) are less favourable for employees with family responsibilities with only 7.4% of AWAs containing reference to work and family measures, compared with 15.2% of collective agreements[27].

77. Other research has found that full time employees work longer hours under AWA's than full time employees under collective agreements, and receive 26% less in total overtime payments[28]. Long working hours and less pay do not assist employees with family responsibilities.

26 Pru Goward's taste for a fight in Australian Financial Review 16-17 July 2005 pg 21

27 Whitehouse, G, "Industrial Agreements and Work/Family Provisions: Trends and Prospects Under Enterprise Bargaining", Labour and Industry, Special Issue: 10 years of Enterprise Bargaining, Vol 12, No 1, August 2001.

28Peetz, D 2005 "The Impact of Australian Workplace Agreements and the abolition of the no disadvantage test".

Contribution of agreements to economic performance and fairness

78. As with most industrial instruments, the capacity of Australian Workplace Agreements (AWAs) to contribute to productivity improvements, efficiency, competitiveness and flexibility is dependent on a variety of factors. This will include the level of technological innovation in the workplace, the training and skills of individual employees, workplace management practices and organisational culture. Simply utilising a particular type of industrial instrument, per se, does not guarantee superior outcomes.

79. Over the last few years a considerable emphasis has been placed on the use of AWAs for achieving economic or 'bottom line' outcomes, in both public and private sector organisations. The Commonwealth has heavily promoted the use AWAs as its preferred industrial instrument, under the guise that individual agreements are the best mechanism for improving efficiency and flexibility in the workplace. Far less attention has been directed towards social or fairness issues, which are often deemed to be only secondary considerations.

80. Given that many people are required to enter into AWAs as a condition of employment, it is difficult to determine how many AWA employees are genuinely satisfied with their employment conditions. Many less skilled employees are not in any realistic position to "bargain" one-to-one with an employer. This is particularly the case with prospective employees, many of whom cannot afford to refuse an offer of employment, regardless of the conditions.

81. There is little doubt that employers who offer AWAs to their employees as a condition of employment can gain increased flexibility. However, in many cases this flexibility rests entirely with the employer, who retains complete authority over when employees are required to work, and under what conditions.

82. The Western Australian Government notes that a significant number of AWAs are template or "pattern" agreements that have been pre-prepared, allowing employers to simply 'fill in the blanks'. It is doubtful that these agreements make any significant contribution to enhanced productivity or efficiency, when little thought is given to workplace-specific issues and employees are rarely involved in their drafting.

83. Western Australia has recorded the highest labour productivity of all the States over the last three years[29], despite the repeal of its former system of workplace agreements (which did not have to pass an award-based NDT). This clearly demonstrates the fact that radical labour market deregulation is unnecessary for achieving productivity improvements.

84. Additionally, ACIRRT's report found that only 9.3% contained any performance based pay initiative[30] - a very low figure considering this is one of the major attributes regularly associated with individual agreement making.

85. The Western Australian Government is concerned that the proposed abolition of the award-based NDT for registering federal agreements will exacerbate the incidence of minimalist AWAs that contribute little to productivity and efficiency and instead encourage businesses to compete through the use of low wages.

86. Minimalist employment contracts epitomised Western Australia's former system of workplace agreements, where many employers were led to believe that implementing individual agreements was a means to an end - that removing the influence of awards and unions would automatically enhance their success. Rather than facilitating mutually rewarding workplaces, many of these scant agreements were simply used for award-stripping purposes.

87. A significant danger of removing the award-based NDT for federal agreements is that AWAs will also come to be used as award-stripping documents that remove employment conditions and lower labour costs.

88. With only a small number of legislated minimum conditions, AWAs will be able to substantially undercut many long-standing award entitlements in labour intensive industries. AWAs will not need to take any account of shift loadings, penalty rates, overtime rates, allowances, leave loading and the like. In time this will invariably lead to some employers gaining a competitive advantage by implementing reduced employment standards and lower costs in their workplace. In turn, this will require other employers to follow suit.

29 Measured in terms of Gross State Product per hour worked.

30 ACIRRT, A comparison of employment conditions in Individual Workplace Agreements and Awards in Western Australia, report produced for the Commissioner of Workplace Agreements, February 2002.

89. While a significant amount of attention is placed on the use of AWAs in the high-paying mining industry, far less attention is given to the plight of the many less skilled and lower paid employees who do not fare nearly as well, as has been highlighted elsewhere in this submission.

90. The low benchmark for registering Western Australian workplace agreements meant that many employees in labour intensive industries – such as retail, hospitality and personal services - had downward pressure placed on their wages and conditions of employment. This was especially the case in those industries where firms tender for contracts based mainly on the cost of their labour, such as security and contract cleaning.

91. By radically deregulating the labour market many less skilled Western Australian employees did not share in the growing living standards the State as a whole was experiencing, and instead suffered actual wage reductions. If the proposed Fair Pay and Conditions Standard is established as the benchmark for registering federal agreements, the fairness aspects of AWAs will come to depend heavily on the bargaining power of individual employees, including the skills they have and the demand for their line of work.

92. The proposed safety net is actually worse than the Federal Government's originally- proposed reforms in 1996, which at least would have established a statutory minimum condition that guaranteed *"wages over a period no less than the wages that would have been earned over the period under the award"*. [31] The proposed 1996 reforms also would have established a minimum condition of 12 days paid personal/carers leave each year, rather than the current proposal of only 8 days per annum.

93. There is no empirical data to suggest that the use of AWAs increases productivity or efficiency. The proposed changes do nothing to encourage fairness and equity in the workplace, and will inevitably lead to reduced entitlements for many employees.

Australia's international obligations

94. Australia is a member nation of the International Labour Organisation (ILO) and has a range of international obligations regarding industrial relations.

31 Workplace Relations and Other Legislation Amendment Bill 1996, as first introduced into Parliament on 23 May 1996.

95. The ILO is an international tripartite body, established by the United Nations, which sets and oversees international labour standards to protect workers. Its labour standards are established in the form of Conventions that are binding on nations which have ratified them, accompanied by Recommendations which are non-binding instruments.

96. The Australian Parliament has formally ratified 58 ILO Conventions. As such, the Commonwealth Government, and all State Governments are legally committed to ensuring that labour relations legislation is consistent and compliant with the provisions of the ILO Conventions to which Australia is a signatory.

Concerns with the current agreement making system

97. It is a matter of grave concern to the Western Australian Government that the current agreement making provisions in the WR Act appear to be inconsistent with major ILO conventions (such as Convention 98 - Right to Organise and Collective Bargaining) and are therefore potentially in breach of Australia's international obligations.

98. Since 1998, the ILO Committee of Experts on the Application of Conventions and Recommendations has raised significant concerns that the provisions of the WR Act are in breach of ILO Convention 98. The role of this Committee is to examine the information and reports regularly submitted by ILO member nations on how national legislation and policy and practice complies with ILO Conventions, and the Committee makes regular Observations on compliance by each country against each ratified Convention.

99. Convention 98 is one of the ILO's eight fundamental conventions, and Australia ratified this Convention in 1973. Of particular concern to the Committee of Experts is the conflict between Article 4 of the Convention, and the agreement making provisions in the WR Act, which allow individual agreements to override collective arrangements.

100. Article 4 of Convention 98 requires member nations to ensure:

> *"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation*

between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements." [32]

101. In 1998, in its first report on Convention 98 after the enactment of WR Act, the Committee of Experts raised the following concerns with the provisions of the Act:

"The Committee notes that one of the principal objects of the Act, as set out in section 3(b), is "ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level". . . . This Part promotes AWAs, which are essentially individual in nature, over collective agreements, through simpler filing requirements in comparison with the collective certification procedure, the advice and assistance of the Employment Advocate and giving AWAs primacy over federal awards and state awards or agreements, and over certified agreements, unless the certified agreement is already in operation when the AWA comes into operation (section 170VQ). Once there is an AWA in place, a collective agreement certified under the Act cannot displace it.

The Committee considers that the provisions of the Act noted above do not promote collective bargaining as required under Article 4 of the Convention*. It, therefore, requests the Government to indicate in its next report any steps taken to review these provisions of the Act and to amend it to ensure that it will encourage collective bargaining as required by Article 4 of the Convention."* [emphasis added] [33]

102. The ILO's concerns that the agreement making provisions of the WR Act breached Convention 98, were reiterated in a subsequent report in 2000. The Committee of Experts specifically requested that the Commonwealth Government make amendments to the WR Act to ensure that it encourage collective bargaining in accordance with Convention 98. The Committee's report stated:

"In a previous observation, the Committee raised the following issues of concern with respect to the Act: primacy is given to individual over collective relations through the AWA procedures, thus collective bargaining is not promoted; preference is given to workplace/enterprise-level bargaining; the subjects of collective bargaining are restricted; an

32 ILO Convention 98 Right to Organise and Collective Bargaining, Article 4, www.ilo.org

employer of a new business appears to be able to choose which organization to negotiate with prior to employing any persons.

The Committee notes the Government's report and its submissions before the Conference Committee setting out the various ways in which collective bargaining is still provided for and taking place, including concerning multiple businesses, and the various safeguards in the AWA procedure.

Having closely considered the Government's explanations and observations, the Committee remains of the view that the Act gives primacy to individual over collective relations through the AWA procedures. Furthermore, where the Act does provide for collective bargaining, clear preference is given to workplace/enterprise-level bargaining. The Committee, therefore, again requests the Government to take steps to review and amend the Act to ensure that collective bargaining will not only be allowed, but encouraged, at the level determined by the bargaining parties." [34]

103. It is evident that the Commonwealth Government has to date ignored the requests made by the ILO Committee of Experts to amend the Workplace Relations Act to ensure compliance with Australia's international obligations.

Concerns with proposed changes to agreement making

104. The Western Australian Government is concerned that the changes to the WR Act proposed by the Commonwealth Government will further weaken Australia's level of compliance with international labour standards. The proposed changes have the potential to breach a range of ILO Conventions, and they do not address the concerns of the ILO regarding the current provisions of the Act.

105. With regard to agreement making, the changes proposed will give greater primacy to individual agreements through the removal of the no disadvantage test and other employee protections, and further restrict parties rights to choose the level of collective agreement making by restricting pattern bargaining, both of which may contravene the provisions of Convention 98.

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33 Committee of Experts on the Application of Conventions and Recommendations: Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification 1973) Published 1998. www.ilo.org.

34 Committee of Experts on the Application of Conventions and Recommendations: Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Australia (ratification 1973) Published 2000 www.ilo.org

106. In addition to Convention 98, the Western Australian Government has identified seven other ILO Conventions that could potentially be breached by the proposed federal changes.

107. There are three Conventions that provide support to the process of collective bargaining through regulating autonomy for union representatives and providing protection against anti-union discrimination. The proposed changes that will restrict right of entry in the workplace and impose greater union regulation may impact negatively on the ability of employees and their unions to negotiate collective agreements, and could potentially breach ILO Conventions 87, 11 and 135.

108. There are also a number of ILO Conventions that could be breached by the proposed changes to the WR Act that do not directly relate to agreement making but which may reduce employment protections to below the levels set by international standards. These are:

(a) Conventions 26 and 99 which require member nations to create and maintain a process for setting minimum wages that involves consultation with employee and employer representatives, and which could be breached by the proposed new minimum wage fixing system controlled by the Australian Fair Pay Commission;

(b) Convention 158 which requires member nations to provide a right of appeal to an impartial tribunal for workers who believe they have been unfairly dismissed, and which could be breached by the proposed exclusion from unfair dismissal protection for employees of business with up to 100 staff; and

(c) Convention 155 (which covers occupational health and safety issues) requires workers and unions to be able to inquire into all aspects of occupational safety and health associated with their work, and which could be breached by restrictions on union right of entry to the workplace.

Conclusion

109. Western Australians know, better than most in Australia, the dire consequences associated with the sort of system the Commonwealth is seeking to impose. As has been shown, workplace agreements produced dreadful outcomes for many of our State's workers. The Commonwealth's plans for AWAs are strikingly similar to the former WA system.

110. Despite the Commonwealth's rhetoric about AWAs being a great development for employers and employees, the earnings data in fact reveals that AWAs provide the **lowest rates of pay** of any form of agreement in WA.

111. The WA Government supports a fair safety net of employment conditions and a level playing field for employers with collective bargaining as the primary means for achieving this.

112. The WA industrial relations system provides clear evidence that fairness does not need to be sacrificed to achieve economic success. Our fair industrial relations system supports WA's excellent economic performance. For many years we have produced the highest Gross State Product per capita of all the States, and for the last 3 years WA has enjoyed the greatest level of labour productivity of all the States. Over the last 20 months we have recorded an average unemployment rate in the four per cent range - considerably lower than the national average.

113. Unfortunately, despite the Prime Minister's "barbeque stopper" platitudes, his proposed industrial relations changes will only worsen the plight of the industrially weak generally.

114. It is also apparent that Australia (and the previous WA system) has been consistently found wanting in terms of its failure to comply with some of the fundamental International Labour Organisation conventions to which it is signatory. These include the right to collective bargaining and freedom of association. This is likely to worsen under the Commonwealth's proposed system.

115. The people of Western Australia and Australia deserve to have their interests protected by their elected representatives – not have those interests sacrificed based on blind political ideology and unjustified economic argument. The only way to create a genuine and workable national industrial relations system is for the Commonwealth and the States to agree on a collaborative model, with the majority of the States agreeing to any proposed reforms.

Appendix A

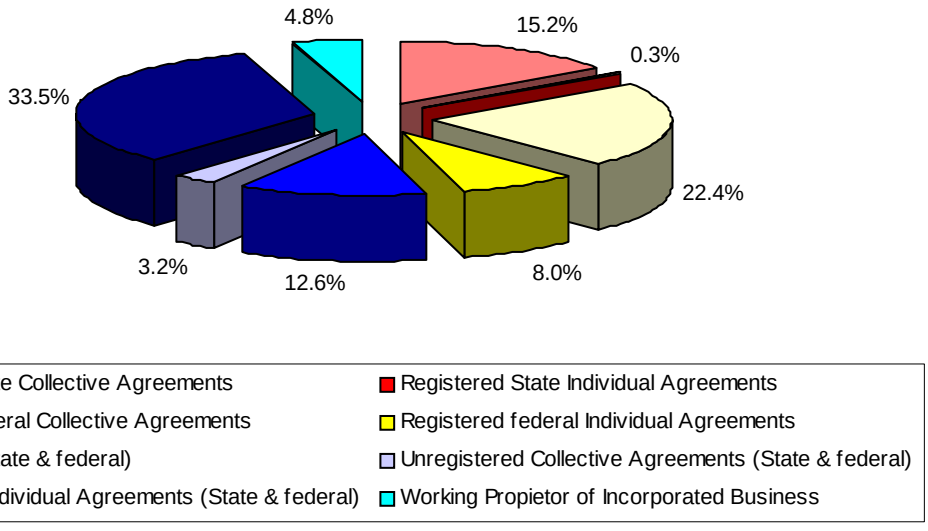
Methods of Pay Setting (%) by Jurisdiction – Australia (May '00, '02, '04)[35]

	2000	2002	2004
State collective agreements registered	13.5	13.1	13.9
State individual agreements registered	**0.8**	**0.8**	**0.3**
Federal collective agreements registered	21.7	23.0	24.3
Federal individual agreements registered	**1.0**	**1.2**	**2.4**
Awards only (State and federal)[36]	23.2	20.5	20.0
Unregistered collective agreements (State and federal)	1.6	2.1	2.7
Unregistered individual agreements (State and federal)	38.2	39.3	31.0
Working Proprietor of incorporated business[37]	-		5.4
Total	100	100	100

Methods of Pay Setting (%) by Jurisdiction – Western Australia (May '00, '02, '04)[38]

	2000	2002	2004
State collective agreements registered	17.5	16.8	15.2
State individual agreements registered	**6.5**	**7.7**	**0.3**
Federal collective agreements registered	15.8	17.6	22.4
Federal individual agreements registered	**0.4**	**1.7**	**8.0**
Awards only (State and federal)[39]	18.3	15.0	12.6
Unregistered collective agreements (State and federal)	2.0	1.8	3.2
Unregistered individual agreements (State and federal)	39.5	39.4	33.5
Working Proprietor of incorporated business[40]	-	-	4.8
Total	100	100	100

Industrial Instrument Coverage of the Western Australia Labour Relations System
May 2004



35 ABS, Employee Earnings and Hours (6306.0).

36 Survey does not disaggregate data to distinguish between State and federal awards.

37 Prior to the 2004 publication, working proprietors of incorporated businesses were classified to unregistered individual arrangements.

38 ABS Employee Earnings and Hours (6306.0) May 2004.

39 Survey does not disaggregate data to distinguish between State and federal awards.

40 Prior to the 2004 publication, working proprietors of incorporated businesses were classified to unregistered individual arrangements.