



**Submission to the Minister for Employment and Workplace
Relations, the Honourable Kevin Andrews, MP**

concerning

**A Ministerial Review of the
*Workplace Relations Act 1996 (Cth)***

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1 Introduction

- 1.1. This submission is made to the Minister for Employment and Workplace Relations, the Honourable Kevin Andrews, MP by the Centre for Employment and Labour Relations Law at the University of Melbourne. It was prepared by members of the Centre engaged as academic staff in the Melbourne Law School, together with academic associates of the Centre who are engaged as academic staff at Latrobe University and at Monash University.
- 1.2. In this submission we address several aspects of the operation of the *Workplace Relations Act 1996* (Cth) (WR Act), from the point of view of its key role in the legal regulation of Australian labour markets. The submission represents an attempt to provide a concise overview of a number of important issues which the Centre regards as compelling, based on our relative research and teaching concentrations, and the time available in which to prepare the submission. It follows that many topics are not addressed.
- 1.3. The Centre's Director, members, and academic associates are available to meet with the Minister to elaborate on this submission, and would welcome the opportunity to do so.

2 Executive Summary

- 2.1. The WR Act is a key tool of socio-economic regulation in Australia. There is no compelling evidence that it requires substantial revision. Nor is the Government's present informal approach to reviewing its operation likely to identify such evidence. We support instead a detailed and in-depth analysis, accompanied by a full policy review. Without this, there is a substantial risk that legislative amendments will lead to outcomes that are unintended, and undesirable.
- 2.2. Legal regulation of the labour market should ensure that Australia meets its obligations under international law. This is of particular importance in relation to the regulation of the activities of trade unions, and limitations on their right to take lawful industrial action. Australia should also look to contemporary practice from other industrialized democracies.
- 2.3. Any changes to the WR Act should be made as part of an integrated and coherent policy approach to legal regulation of the labour market. Small changes made in relative isolation are unlikely to have a significant positive effect. This is particularly true of policy approaches to job creation/growth. Employment generation should not be sought by the removal of basic labour freedoms, rights and entitlements. On the contrary, it should be pursued by use of a variety of policy tools, not just changes to the WR Act. It follows that it is

not desirable to exclude small/medium businesses from unfair dismissal laws. If the Government wishes to relieve small enterprises of the perceived difficulties of complying with these laws, better legislative approaches are available than that currently proposed.

- 2.4. The WR Act should in fact provide a framework for fair and effective agreement making at the workplace level. Parties should no longer be permitted simply to refuse to bargain, or to refuse to bargain in good faith. The Australian Industrial Relations Commission (AIRC) should have an unequivocal role in the bargaining process to this end. The Government must also amend the WR Act to ensure that employee choice in agreement-making is facilitated, rather than thwarted: in a number of cases, employers effectively may choose the form of agreement for a workplace. If Australian Workplace Agreements are to be retained, the operation of the No-Disadvantage Test should be reviewed, to ensure that the parties can fairly achieve functional workplace flexibility.
- 2.5. Labour law should foster the formation and operation of collective organisations of workers and employers. In so doing it should recognize the parties' fundamental human right of freedom of association. Moreover, the crucial function played by trade unions as elements of civil society in a participatory democracy should be facilitated, rather than frustrated, by the WR Act and associated Government policy.
- 2.6. The Government should consider establishing new forms of employee representation. To do so would complement a policy that promoted freedom of association and the formation of trade unions, and be consistent with Government policy to involve employees at the level of the workplace in setting working conditions.
- 2.7. Finally, there must be an effective safety net of minimum working conditions. Maintaining and enhancing an effective but flexible safety net has been and should remain the role of the AIRC. Further prescriptive regulation of how the AIRC carries out its functions would unnecessarily diminish its unique and significant regulatory capacity.

3 Guiding Principles

3.1. Overview

- 3.1.1. It is essential that the Government review the operation of the *Workplace Relations Act 1996* (Cth) (WR Act) from the point of view of clearly articulated guiding principles. These should shape its consideration of particular legislative, institutional and policy options. In this section we outline a number of key principles that, in our submission, should form the foundation of the

Government's approach to the review of the WR Act. The principles that we outline here are neither mutually exclusive, nor an exhaustive list. They are, however, in our view, of especial importance.

- 3.1.2. First, the Government must be mindful of the importance of the WR Act as a tool of socio-economic regulation. In altering the legislative regime it will be particularly important to have regard to the risk of unintended (and perhaps undesirable) consequences. Secondly, the Government should take care to comply with Australia's international legal obligations, and to be guided by relevant international legal principles, and international experience. Key issues in this respect are the purposes and means by which legal provision is made for the formation and regulation of representatives of employees and employers. Thirdly, the Government must ensure that it has a coherent policy approach to labour market regulation: it must be mindful that the WR Act is by no means the only legislative or other regulatory tool that affects labour market regulation. Finally, the Government must give serious consideration to reviewing the WR Act with a view to ensuring that its object of providing employee choice in negotiating workplace agreements can be realised in practice.

3.2. The Importance of the WR Act and the Danger of Undesirable Outcomes

- 3.2.1. The WR Act is one of the major mechanisms of social and economic regulation in Australia. It has a significant impact upon macro- and micro- economic issues at all levels. It establishes multiple institutions, standards, principles and processes, which influence the lives of millions of Australians. It plays a key role in underpinning the development of an economically prosperous and socially just Australia. The WR Act and its predecessors have played this role for a century.
- 3.2.2. It is notorious in labour law scholarship that poorly considered legislative change can lead to undesirable outcomes. History shows that such outcomes can range from the failure of legislation to have the desired or expected impact on the economic behaviour of those at whom it is aimed, to perverse outcomes that are actually contrary to the intended legislative goals.
- 3.2.3. For these two reasons, we consider that legislative intervention should follow from (a) strong empirical evidence that legislative change is required; (b) full community consultation on the policy goals which any new legislation is to achieve; and (c) the best possible understanding of the likely impacts of the proposed legislation.
- 3.2.4. There is no strong empirical evidence for change. The operation of the WR Act has not been the subject of systematic monitoring, nor of sophisticated analysis. Departmental analyses of the WR Act tend to aggregate statistics relating to the

quantity of matters dealt with under it (for example, how many Australian Workplace Agreements (AWAs) are approved each year), rather than an assessment of qualitative issues (for example, in what ways do individual agreements support the spread of improved productivity). Reputable research into the key questions of the social, legal and economic policy implications of the WR Act is only just emerging. In such circumstances, legislative change is premature.

- 3.2.5. It also appears that very little attention has been paid to the range of possible outcomes which may follow changes to the WR Act, should they be passed. We comment on some of these in particular instances in the sections that follow. Broadly, however, unintended consequences may have a significant impact on Australia's economic prosperity, its capacity to cope adequately with the pressures of international competition, its traditional identity as a nation which gives everyone a 'fair go', and its reputation as a good international citizen.

3.3. The Relevance of International Law

- 3.3.1. Australia is a party to a number of essential international legal instruments that bear on its policy and practice in labour law and labour market regulation. These include elements of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESCR). Obviously, a good number of ILO Conventions are relevant, and in particular the principles contained in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. These apply to Australia, as they do to every member of the ILO.
- 3.3.2. It is incumbent on Australia, as a member of the international community, to do its utmost to comply with its obligations at international law, into which it has voluntarily entered. Compliance with international law is a critical element of good governance at both national and international levels, and it is an object of the WR Act that it should assist in Australia meeting its international obligations in this respect: s 3(k). Australia supports compliance with international law in its role within international trade, aid and development regimes, and must do no less in the conduct of its own domestic affairs. In times of threat to national security, it is all the more important that all members of the international community uphold international law.
- 3.3.3. A number of the Government's present legislative proposals will place Australia in conflict with some of its obligations under international law. Government policy analysis, before the Parliament takes such a serious step as to place Australia in breach of its international obligations, should address the wisdom of such action.

- 3.3.4. From a different perspective, international law holds great potential as a source for a complete overhaul of the Australian labour relations system. If, for example, the Government were intent on achieving a unitary system of labour law and relations, by far the most expeditious way of doing so would be to utilize the full extent of the external affairs power in the Commonwealth Constitution. It could draw on a wide range of international instruments to which Australia is a party, that touch on matters to do with labour and workers. In this way it could also re-orient the policy basis of the regulation of labour relations toward recognition of the fundamental rights of workers, and of employers.

3.4. The Need for Policy Coherence

- 3.4.1. It is essential that the Government's approach be coherent overall. The current outstanding Bills in the portfolio of Employment and Workplace Relations, all of which the Government has indicated it wishes to make into law, do not represent a coherent policy approach to legal regulation of the Australian labour market. Rather, they seek to address a 'mishmash' of issues: if enacted, they would not constitute a considered set of laws based upon a clearly expressed policy.
- 3.4.2. Moreover, it is important for the Government to recognise that it plays a significant role itself in the formation and regulation of labour markets through a range of different legal and non-legal policy initiatives. Although the WR Act is an important regulatory mechanism affecting the exchange of labour, there are many other ways that government regulates labour supply and demand. Examples of relevant policy areas include employment policy, immigration policy, taxation, social security, and education. If the Government is serious in its expressed desire to improve legal regulation of the labour market, it must consider this wider context.
- 3.4.3. There are also, of course, many different labour markets in the Australian economy. Labour markets may be identified according to many different dimensions. Geographically, for example, we may recognise international, regional and local labour markets. According to definitions of work, we may identify labour markets as occupational or industrial. Labour markets may also be identified with a particular employer, firm or employment sector (such as the public service). Any policies carried out in the name of improved labour market regulation should take account of these different dimensions. We also take the view that the Government must be interested in both the efficiency *and equity* of these labour markets.

3.5. Employee Representation and Agreement - Making

- 3.5.1. The Government's current policy framework is clearly expressed in the objects of the WR Act. They include four points of particular importance. First, that primary responsibility for the determination of working conditions 'rest with the employer and employees at the workplace or enterprise level' (s 3(b)). Secondly, that employers and employees should be able to 'choose the most appropriate form of agreement for their particular circumstances', including forms of agreement that are not provided for in the legislation (s 3(c)). Thirdly, that agreement making should be 'fair and effective' (s 3(e)). Fourthly, ensuring freedom of association, including the right to of employees and employers to join an association of their choice (s 3(f)).
- 3.5.2. We agree that employees and employers should have a significant degree of choice in identifying the most appropriate method of regulating their working conditions. This includes the freedom to determine those conditions at the level of the workplace or enterprise, *if they so choose*. As we discuss below, however, the choice to negotiate working conditions at other levels, including by industry or region, should not be precluded by law, as is presently the case.
- 3.5.3. While at present the WR Act largely constrains the parties to bargain at the level of the workplace, it does provide choice about the type of agreements that might be concluded (whether union or non-union, collective or individual). At present, however, and despite its objects, the WR Act does not adequately provide for effective employee choice about which type of agreement to conclude. On the contrary, the WR Act in certain contexts confers on *employers alone* the choice about the most appropriate form of workplace agreement, regardless of employee preference. This is particularly true of AWAs offered to new employees, and initiation of non-union agreements made under s 170LK. On a different note, greater provision for employee choice in agreement-making would arguably assist the parties to better tailor their agreements to the needs of particular workplaces.
- 3.5.4. The choices available to employees should also include true choice whether or not to be effectively represented by a trade union, and for employers whether or not to be represented by a registered organisation of employers. In this respect, the Government might well reconsider the purposes for which the WR Act provides for the formation of representative organisations of employees and employers, and in particular, reduce significantly the highly prescriptive level at which the WR Act regulates their internal affairs. It should in this respect make a greater effort to facilitate the exercise of the basic human rights of workers and employers, and to do so consistently with Australia's obligations at international law.
- 3.5.5. In an environment in which employee choice and participation are critical elements of the framework for representation and negotiation of employee

interests, the Government might consider making additional provision for representation of employee interests at the level of the workplace. Innovative policies for employee representation at the workplace, drawing on European experience, would complement existing methods of workplace representation and negotiation. In so doing, they would help to overcome the perceived 'representation gap' in Australian workplaces, and boost enterprise performance by drawing on employee experience and innovation, while reducing the impact on management of sole responsibility for certain types of decision-making, especially in relation to change management.

4 Promoting Employment

4.1. Job Creation/Growth

- 4.1.1. Continuous growth and development in the labour market are both necessary and desirable. More jobs, and different types of jobs, are required to meet, among other things, the needs of new entrants to the labour market, and changes in work relations brought about by developments in technology and the organisation of business. However, as we have emphasised, the goal of job growth must be approached from a coherent and coordinated policy perspective. It must be one that, for example, pays attention to the significant variations in unemployment rates across different sectors of those who seek to participate in the labour market. True it may be that the overall unemployment level is at its lowest for almost thirty years. In some pockets of the labour market, however, such as school leavers and the long-term unemployed, the rates remain significantly and unacceptably higher. No single policy approach will be able to address all of those issues: one size will not fit all. Nor will reliance on changes to legal regulation of the labour market alone be sufficient.
- 4.1.2. In many cases, the changes that the Government has proposed to date will require prescriptive legal regulation - for example, the proposal that the Australian Industrial Relations Commission (AIRC) be required to take into account the interests of the unemployed in conducting its functions. As we elaborate further below, in our submission the AIRC has always, in conducting its Safety Net Reviews, balanced the needs of the economy as a whole with its role in maintaining minimum standards for employees. For that reason, introducing further legislative constraint on the AIRC's decision-making power is both undesirable and unnecessary.
- 4.1.3. Particular legislative changes that have been proposed must be the subject of specific analysis. For example, the evidence supporting the argument that removing statutory protection of collective representation and reducing or removing minimum labour standards will lead to job creation is, at best, highly contested. This argument seems to be based on the view that Government

should abandon any concern for maintaining reasonable working conditions in Australia because it can have faith in the private sector to generate employment growth from, among other things, the money it saves on wages bills. In our submission, this is a somewhat superficial and unduly charitable view of business, and one that raises significant concerns about Government policy in relation to job creation.

- 4.1.4. What may seem trite, but is easily forgotten, is that the principal reason that a company is formed is that a number of people have come together with a common purpose, which is generally the accumulation of profit by means of commercial enterprise. Arguably, the principle reason that people become shareholders in a company is to get a positive return on their investment. Naturally, it is the directors' responsibility to achieve this goal, and they are answerable to the members in general meetings.
- 4.1.5. On one view, the directors' duty to the company and to its members obliges them to claim savings from reduced wages as profit, rather than as a source of funds with which to create more jobs. One need only have regard to the many instances of the rises in share prices of publicly listed companies following large cuts in numbers of employees. Even if one accepted the proposition that reducing wages might create more jobs, this could also lead to increased poverty, forcing people to work in more than one job at minimal wages just to make ends meet. One need only look at inequality in the United States of America as a classic example of what can happen when there is a low minimum wage.
- 4.1.6. In the view of the Centre, if the Government's goal is to reduce unemployment by promoting job growth, it should not focus on the removal of measures which safeguard the welfare of workers. Rather, government ought to consider the raft of policies which have a clear and transparent connection between the initiative taken to create extra employment and the jobs created, without necessitating removal of basic labour freedoms, rights and entitlements.
- 4.1.7. For example, direct job creation programmes, industry policy, and public procurement programmes can be effective in promoting economic growth and productivity, ensuring employment for people especially disadvantaged in the labour market, and also for targeting regional unemployment.¹ Although some of these programs recognize the important role of the public sector in job creation, many such initiatives involve cooperation between government and business whereby the government provides financial subsidies to the private sector to achieve its policy objectives.

¹ For an excellent overview of the various job creation policies available to government, see P Gregg, 'The Evolution of Special Employment Measures' (1990) 132 *National Institute Economic Review* 49. On the value of regional job creation policies, see Senate Employment, Workplace Relations, Small Business and Education References Committee, *Jobs for the Regions: A Report on the Inquiry into Regional Employment and Unemployment*, AGPS, Canberra, 1999.

- 4.1.8. The industrial relations system, as it is currently configured, can be a forum for positive job creation initiatives. There is no reason why the Government could not promote, for example, limits on overtime and working hours as a job creation measure, which is achievable through enterprise bargaining between trade unions and employers.
- 4.1.9. Many of these policy ideas have been adopted successfully in the European Union, where balancing social protection with promotion of economic growth and development is a central concern.² Further, implementation of such policies, unlike the type of labour market reform that the Government has proposed to date, will not require prescriptive legal regulation: they involve the Government promoting the adoption of positive job creation practices rather than restricting personal rights and freedoms.

4.2. Unfair Dismissal Laws

4.2.1. Preliminary matters

- 4.2.1.1. The Government has tried on many occasions in recent years to amend the WR Act to exclude small businesses from the operation of Division 3 of Part VI of the WR Act, which regulates termination of employment. In particular, it has sought to exclude small businesses from the operation of those provisions regulating termination of employment that is ‘harsh, unjust or unreasonable’ – the ‘unfair dismissal’ laws (UFD laws). Its principal expressed reason for doing so is that this will assist small business to create further employment growth.
- 4.2.1.2. So far as we are aware the Government has not attempted, and does not intend, to exclude small businesses from the operation of Subdivision C of Division 3 (unlawful termination). We support this distinction and urge that it be maintained.

4.2.2. It is bad policy to exclude small business from UFD laws

- 4.2.2.1. It is not desirable to exclude a large number of workers from the provisions of the UFD laws. One of the functions of good government in a liberal, democratic system is to ensure that all citizens are protected from arbitrary or capricious actions which impinge on their liberty to conduct their lives, including their working occupations, in relative peace and freedom. The proposal to exclude small businesses from the UFD laws would be an unacceptable withdrawal by government from these obligations.

² See, for example, the case studies of various European member states contained in Volume 15(4) of the *International Journal of Comparative Labour Law and Industrial Relations* (1999).

- 4.2.2.2. The exclusion of employees of small businesses from the UFD laws is bad policy because it will create different classes of workers in the labour market for no rational or clear reason. There will be many workers who have no choice but to work for small businesses (however defined). This may come about because of their geographical location, their skill-set, or a lack of alternatives in the segment of the labour market in which they work. These workers will therefore be excluded from this basic protection, largely for reasons beyond their control. Thus, the policy will create winners and losers in the labour market, regardless of the actions, competencies and wishes of the workers who will be made into winners and losers.
- 4.2.2.3. The current arrangements in the WR Act provide a cheap, informal and user-friendly process: employers and employees may deal with a disputed dismissal without the need to pay for lawyers, and the vast majority of matters are settled at the conciliation phase. Only a small minority of cases proceed to arbitration by the AIRC, or to determination by the Federal Court. There is no reputable evidence that the current system represents an unjustified burden on small/medium businesses, or that the proposed change would create more jobs.
- 4.2.2.4. One ramification of the proposed legislation is that small and medium employers will be permitted to sack workers for any reason, or none, and that those workers will have no recourse to this quick and cheap review process. Workers may therefore be sacked without notice because their boss decides they don't like the worker's face any more, or because the employer's cousin has come to town and is looking for a job. These are reasons that are not addressed by the provisions relating to unlawful dismissal, but which would be perfectly lawful were the UFD laws not to apply.
- 4.2.2.5. Such capricious decisions to dismiss have nothing to do with the economic efficiency of a business, nor with its capacity to employ more people. For this reason, current Government policy measures are not properly adapted to the ostensible policy goal. Indeed, granting employers a blank cheque to dismiss at any time, without natural justice, for any reason, is likely to have an adverse impact on the economic stability of small businesses. For example, workers who have ideas which would contribute to the more efficient running of the business, or who have concerns about current safety procedures, are unlikely to speak up. One unintended consequence of this proposed law may be the stagnation of small and medium businesses, and the growth of a 'yes person' culture in this part of the labour market, to the detriment of the Australian economy as a whole.

4.2.3. It is not necessary to exclude small businesses from UFD laws

- 4.2.3.1. There is no empirical evidence to suggest a need for the changes that the Government proposes. This calls into question the clarity with which its policy goals are and have been expressed. It is claimed, for example, that removing small and medium businesses from the ambit of UFD laws will increase the rates of employment in small businesses. As yet, however, this is unsupported by academic research. So much was admitted by Professor Mark Wooden, one of the key proponents of the argument that excluding small businesses will lead to employment growth, during his evidence in *Hamzy v Tricon International Restaurants*.³ We are not aware of any academic work published since then that overcomes this gap in our knowledge of the relationship between UFD laws and employment growth.
- 4.2.3.2. A further reason why it is not necessary to exclude small businesses from the UFD laws is the existing range of workers who are excluded from them by the regulations made under s 170CC of the WR Act. Regulation 30B excludes workers on fixed term contracts, workers engaged to perform specified tasks, and many casual employees. The expressed rationale for the exclusion of small businesses from the UFD laws is in part to ensure that they have greater flexibility in how they engage labour. It is clear that significant flexibility is already available.
- 4.2.3.3. As indicated above, recent unemployment figures are lower than for almost thirty years. This has been achieved *notwithstanding* the operation of the UFD provisions, and suggests that further reform along these lines is not required. This is not to suggest that a further lowering of unemployment rates or creation of labour market participation opportunities is not desirable, merely to question the link between that policy objective and the suggested method of achieving it. It would be preferable to develop specific measures (such as those outlined above) targeted at those workers who are experiencing the most difficulties in participating in the labour market.

4.2.4. Compliance with international legal obligations

- 4.2.4.1. Australia is a party to the ILO's Convention concerning Termination of Employment at the Initiative of the Employer (No 158). It underpins many aspects of the UFD laws, and has done since their introduction in 1993. Having voluntarily adopted the obligations contained in Convention 158, Australia is bound in law and in principle to comply with them, so long as it is able to do so, and it has not otherwise signalled its intention to denounce the instrument.
- 4.2.4.2. Article 2(5) of Convention 158 does contemplate the exclusion of 'small' businesses. It does so, however, as an example of the type of situation in which it might be necessary to exclude a group of workers because of 'special

³ (2001) 111 IR 198.

problems of a substantial nature'. Thus, the first question from the point of view of Australia's international legal obligations is whether there is difficulty in applying the Convention. There is little or no evidence to suggest that small businesses employing up to 20 employees are experiencing 'special problems of a substantial nature' in applying the Convention. The majority of both the limited evidence and the extensive policy rhetoric used to support the Government's policy refers not to any supposed difficulty in the application of the Convention, but to the growth in employment that it is said will flow from the operation of the new provisions.

- 4.2.4.3. It is valuable and instructive to take note of the practice of other industrialized market economies in this respect. In its 1995 General Survey on the application of Convention 158, the ILO reported that Germany excluded workers in small businesses from the operation of UFD laws. According to the ILO, Germany reported that it made this exclusion

based on a long historical tradition . . . [and] in order to guarantee the operation of small enterprises, allow flexibility in responding to demand and take account of the fact that small enterprises are less able to bear administrative and economic costs.⁴

In that case, however, Germany excluded those enterprises employing fewer than six employees.

4.2.5. What is a 'small' business?

- 4.2.5.1. The definition of a 'small business' that the Government has used in its attempts to reform the UFD provisions has varied. In some cases the exclusion was for enterprises with fewer than 15 employees, and in others those with fewer than 20 employees. The current approach, as reflected in the *Workplace Relations Amendment (Fair Dismissal Reform) Bill* 2004 is to exclude enterprises with fewer than 20 employees. This is plainly significantly different from the German approach identified above.

- 4.2.5.2. As discussed in the following section, the use of a bare numerical threshold is in any event open to possible manipulation. This is a further reason why the Government might consider a different conception of 'small business'. Fundamentally, however, it is not obvious that a workplace of fewer than 20 employees is one that must be excluded, for that reason alone, from the UFD laws. It is said that small businesses (however defined) need to be exempted from the operation of UFD laws in order to allow for greater flexibility and employment generation. In this case, however, the raw number of 20 employees is being used as a proxy, to determine which enterprises have the *capacity* to

⁴ ILO, *Protection Against Unjustified Dismissal* (1995), [69].

withstand the extra regulation that the UFD laws impose. It is not difficult to imagine that there are many enterprises with far fewer than 20 employees that are well established and organised, and quite capable of complying with the UFD laws without undue interference with their business.

- 4.2.5.3. Accordingly, the Government should consider what better means there may be of identifying a small business for these purposes. In particular, it should give further consideration to what it is about 'small' businesses that warrants their exclusion from the UFD laws. Is it the regulatory impact? If so, in what way? Is it the likelihood that these businesses will have unsophisticated human resources policies? That is unlikely to be true in every case, and in any event is already provided for in the WR Act (s 170CG(3)(da) and (db)). What this policy really needs is a measure of *business success and stability*, which can be used as a basis to conclude that it is capable of operating in a different regulatory environment that might include the UFD laws. If anything, willingness to hire an employee is the best possible indicator that a business is being well run, and ought *not* to be excluded from the UFD laws.
- 4.2.5.4. A better way of excluding certain smaller businesses from the UFD laws might be to provide that a business with fewer than a specified number of employees should have a right to claim an exemption, on specified grounds. Those businesses that in the relevant sense needed to be excluded from the laws could make their case and, if successful be excluded for a particular time. Businesses that might be excluded might be far smaller than those with 20 employees, depending upon what it is that truly justifies the lifting of this particular form of regulation. Many businesses below the application threshold may not make, or may not succeed in making, an application. It would be necessary also to require a business with such an exemption to advertise this fact, and to bring it to the attention of any applicant for employment during the period of the exemption. They would then be able to bargain for employment conditions that compensated them in other ways for the loss of the protection otherwise offered by the UFD laws. This would be consistent with the Government's insistence on the exercise of choice and negotiation in the labour market wherever possible and appropriate.

4.2.6. The danger of unintended consequences

- 4.2.6.1. One obvious possible consequence is that businesses will restructure to ensure that the number of their employees falls and remains below the threshold of 20. This is of course likely to be a problem with *any* bare numerical threshold. A company with 36 employees, for example, could relatively easily become two companies of 18 employees, so ensuring no employee later hired would be protected by the UFD laws.

- 4.2.6.2. A further difficulty in the approach taken in the present Bill is that the determination of whether or not an enterprise is a small business is to be made at the ‘relevant time’. This is defined as the time at which the employer gives notice of termination of employment, or at which termination of employment occurs, whichever happens first. Again, this will create winners and losers among workers for reasons quite independent of their conduct, or the business needs of the enterprise. Imagine an enterprise in which there are presently 20 employees. After the commencement of the new provisions, 2 new workers are engaged. They might reasonably expect, and according to the terms of those provisions, they would be entitled to the protection of the UFD provisions. Moreover, as actors in the labour market they might deliberately seek work with an employer that is covered by the UFD laws. If, however, three employees should leave that company, the total number of employees would be fewer than 20. This would leave those newly engaged workers exposed to the possibility of their employment being terminated without them any longer being protected by the UFD laws. And, if more workers were engaged, so as to take the total number of employees above 20, they would regain the protection of the UFD laws. It is not equitable that a key protection of a basic working condition should alter in its operation in this way.
- 4.2.6.3. Excluding workers engaged in small businesses from the operation of the UFD laws will lead to legal developments in other jurisdictions. There is likely to be, for example, an increase in the number of applications brought to the Federal Court pursuant to Subdivision C of Division 3 of Part VIA of the WR Act. That is, there will be an increase in the number of claims alleging that termination of employment was unlawful – not least because in that jurisdiction the Federal Court is empowered to order reinstatement and lost wages. There is also likely to be developments in common law courts, in particular around whether the common law includes any right of procedural or substantive fairness in dismissal. Both the Federal Court and other common law courts are slower-moving and far more costly jurisdictions in which these matters might be fought out. This is likely to be an adverse consequence for both workers *and* employers.

4.2.7. The policy should only apply prospectively

- 4.2.7.1. If the government is resolved to exclude small businesses, however defined, from the UFD laws, the changes should operate prospectively. This approach is taken in the *Workplace Relations (Fair Dismissal Reform) Amendment Bill 2004*, and the Government should maintain it.
- 4.2.7.2. Prospective operation is necessary to ensure that those workers who have been engaged under the terms of the existing law are not subjected to what would in effect be a retrospective prejudicial alteration of their employment conditions. It is also necessary to ensure that small business employers do not simply use the opportunity of their exclusion from the UFD laws to remove staff whose

employment they presently wish to terminate, but feel constrained by these laws from doing so.

- 4.2.7.3. Prospective operation of these laws would also be consistent with the Government's general view that workers and employers should negotiate workplace specific conditions of employment. If workers are to be employed in small businesses *without* protection by the UFD laws, it follows that they should have the opportunity to negotiate with their employer conditions of employment that reflect this situation, and where agreed, compensate them for this in other ways. The Government should modify the WR Act to ensure that an employer that is exempt from the UFD laws is obliged to disclose this fact to any prospective employee.

4.2.8. An alternative model

- 4.2.8.1. As we have argued, exclusion of small businesses from the operation of the UFD laws is neither desirable nor necessary. If, however, the Government is determined to proceed, then it should consider a legislative mechanism that is aimed at limiting capricious employer dismissals for reasons that are unconnected with the operational requirements of the business. This would be consistent with existing Government policy, in light of the distinction being drawn between exclusion from UFD laws, as distinct from the laws regulating unlawful termination, from which small businesses will not be excluded.
- 4.2.8.2. A model for this approach may be borrowed from the recent United Kingdom legislation governing a worker's right to seek flexible work. Under the *Employment Act 2002* (UK), workers are entitled to request a change in the hours or place of work for family reasons. Employers are only permitted to refuse upon certain grounds, which are specified in the legislation. The relevant section is set out below.
- 4.2.8.3. Section 80G: Employer's duties in relation to an application under s 80F

- (1) An employer to whom an application under s 80 F is made –
- (a)...
 - (b) shall only refuse the application because he [sic] considers that one or more of the following grounds applies –
 - (i) the burden of additional costs,
 - (ii) detrimental effect on ability to meet customer demand,
 - (iii) inability to re-organise work among existing staff,
 - (iv) inability to recruit additional staff,
 - (v) detrimental impact on quality,
 - (vi) detrimental impact on performance,
 - (vii) insufficiency of work during the periods the employer proposes to work,

- (viii) planned structural changes, and
- (ix) such other grounds as the Secretary of State may specify by regulations.

- 4.2.8.4. Obviously, the issue addressed by the above provision is quite different from that under consideration here. In the UK case, the law provides a range of grounds upon which an employer may refuse an employee request. What is proposed in relation to Australia is that the law might specify a range of grounds upon which a small/medium business *may* dismiss a worker and avoid the provisions of the WR Act. It would be necessary to construct a meaningful set of legislative provisions, which clearly outlined *legitimate operational requirements* of a business as grounds for dismissal. It is also important that the law *specify a clear procedure* by which workers would be informed of the available operational grounds upon which their dismissal were based, and a brief, clear outline of the reasons for the application of this ground in this particular case.
- 4.2.8.5. Workers in small/medium businesses would retain access to UFD provisions of the WR Act in cases where the employer did not nominate one of the ‘operational requirements grounds’ specified in legislation, or where the worker believed that the nominated ground was not the genuine reason. Given the employer’s superior (indeed probably sole) access to material relating to the reason for decision, the burden of proof should rest with the employer to prove that the nominated ‘operational requirement’ was in fact the reason for the dismissal. Reverse onus of proof provisions have long existed in the Australian labour law scheme and their use in this context would be entirely consistent with many years of legislative policy.
- 4.2.8.6. This process also may be open to abuse. For example, an employer might nominate an operational requirement and prove it, while actually dismissing the worker for illegitimate reasons. Nevertheless, it has a number of advantages over total deregulation. First, it gives workers and small/medium businesses important information about what is right and what is wrong in the area of dismissal. The mere existence of the law may have a powerful ‘demonstration’ impact, and limit the incidence of capricious dismissals. Secondly, it would show that the Government is committed to creating a labour market which is both efficient *and* fair. Thirdly, it bolsters sound economic development based upon adherence to the rule of law and fundamental principles of justice. The idea that small/medium businesses are too pressed by economic circumstances to learn the law and apply it is dangerous, and, may, over the long term, stifle innovation and productivity growth.
- 4.2.8.7. As noted, article 2(5) of ILO Convention 158 does provide that states party may exclude categories of workers from the Convention as a whole, or from ‘certain provisions thereof’. The proposal here would mean that workers in small/medium businesses continued to receive some protection under Article 4

of the Convention: ‘The employment of a worker shall not be terminated unless there is a valid reason for such termination...based on the operational requirements of the undertaking, establishment or service.’ At the same time, the Government would be excluding these workers from the full protection of the Convention, which is aimed at prohibiting harsh, unjust and unreasonable dismissals, whether for sound operational reasons or not. We reiterate our strong view that there are neither objective nor empirical grounds to justify the proposed exclusion.

5 Negotiating Agreements

5.1. Bargaining Process and Employee Choice

5.1.1. An obligation to bargain, in good faith

5.1.1.1. Key elements of Government policy, embodied in ss 3(b), (c) and (e) of the WR Act, are that employees should be able to choose the type of agreement that best suits their workplace, and that the process of agreement-making should be fair. These principles can only be effective if employers do in fact negotiate with their employees where the employees wish to do so. The WR Act, however, imposes no obligation on an employer to bargain with employees that wish to bargain, and gives the AIRC at best limited power to facilitate or to direct the parties’ bargaining. The AIRC can of course play a role in promoting good agreement making.⁵ However, as it made clear in its *Sensis* decision,⁶ that role is quite limited; for example, it does not include ensuring that negotiations occur in good faith. Neither is there sufficient legal regulation of the *process* of bargaining when it does commence. These lacunae in the WR Act result in a significant deficit in employee participation in the workplace: employee choice in agreement-making is frequently stymied, rather than facilitated.

5.1.1.2. In our submission, the WR Act should provide that the AIRC has a clear role in assisting the parties to bargain. As we suggest below, one form of that role may be in adapting a framework for negotiation to the circumstances of a particular workplace. We support first, however, the principle that the AIRC should be empowered to direct a party to bargain, and to bargain in good faith. It may or may not be necessary to spell out legislatively what is meant by the expression ‘good faith’. For a short period in the early 1990s there were legislative provisions to this effect. Attempts to define a concept of ‘good faith’ bargaining have appeared in several of the legislative measures to this effect that have not passed the Parliament in recent years. Examples could be drawn from other jurisdictions, including Canada, New Zealand and the United States of America.

⁵ See generally A Stewart, ‘The AIRC’s Evolving Role in Policing Bargaining’ (2004) 17 *AJLL* 245.

⁶ *Sensis Pty Ltd v Community and Public Sector Union* (2003) 128 IR 92.

Whether any of these models were followed, or the AIRC were left to develop appropriate principles over time, is not of great moment. The key issue is that workers' choice and fair-agreement making, to which the Government claims to be committed, are frustrated by the current operation of the WR Act. It should be amended to overcome this deficit.

- 5.1.1.3. To give the AIRC a role in the supervision and oversight of bargaining practices would, as suggested below, be consistent with international practice in comparable industrialised democracies. In the United States, there is an obligation to bargain in good faith that is policed by the National Labor Relations Board. Here in Australia, by contrast, there is no such obligation. The position for workers and their representatives, therefore, is unsatisfactory. As we discuss elsewhere in this submission, one set of institutional supports for trade unions was removed in the changes that brought the WR Act into operation, with little or no replacement. Australia is thereby in breach of its international legal obligations, and out of step with relevant contemporary practice. These are matters to which the Government should have regard in reviewing the WR Act.

5.1.2. Failures to provide employee choice in agreement-making

- 5.1.2.1. The objects of the WR Act, particularly s 3(c), include employee choice in the form of agreement for their workplace. To this end, the WR Act contains extensive provisions for the certification of different types of agreements regulating conditions at the level of the workplace. An agreement might be made between an employer and a union (s 170LJ, or s 170LL), between an employer and their employees (s 170LK), or to prevent or settle an industrial dispute (s 170LO). An employer and an employee may also enter into an AWA. As we have noted, the WR Act does little to provide legislatively for a process of fair agreement-making, despite this being one of its objects (s 3(e)). More than that, however, the WR Act does little to regulate *how* employees might choose the *type* and *content* of the workplace agreement they consider appropriate.
- 5.1.2.2. In particular, employees do not have a legal entitlement to confer with each other about the appropriate form of agreement, and about its content. It is unsurprising, therefore, to find that empirical evidence shows that agreements are initiated and drafted either by employers alone (especially in the case of AWAs and s 170LK agreements), or by union officials (especially in the case of s 170LJ agreements), or by the two in combination. These outcomes may be problematic if they do not adequately and accurately reflect direct employee involvement in the determination of terms of conditions of employment.

- 5.1.2.3. There are at least two constraints upon employee choice in agreement making that effectively give employers the choice about the type of agreement that will be made.
- 5.1.2.4. First, at least some new employees may lawfully be *required* to enter into an AWA as a condition of accepting an offer of employment. In this case, an employee's capacity to choose an alternative arrangement, such as a (collective) certified agreement, is foreclosed. In this case the WR Act, as it has been interpreted, confers a right on the employer to choose the form of agreement, regardless of the preference of the new employee.
- 5.1.2.5. Secondly, existing employees in practice have only a *negative* capacity to select the appropriate form of agreement. They can refuse an AWA, or vote down an enterprise agreement (whether under s 170LJ or s 170LK), but the WR Act provides no mechanism for employees to deliberate and to express a *positive* choice about which form of agreement they would prefer.
- 5.1.2.6. There is also a relationship between the provision of employee choice in agreement-making and the Government's desire to ensure that agreements are in fact tailored to the needs of individual workplaces. In other words, it would be possible to improve both the conduct of agreement-making, and the outcomes of the process, if employees within an enterprise were given legal rights within the process.
- 5.1.2.7. By far the majority of employees covered by agreements made under the WR Act are covered by s 170LJ agreements made between an employer and a union or unions. Democratically elected unions are of course legitimate representatives of employees, and it is entirely appropriate that workers might rely on their elected representative to negotiate on their behalf. The failure in the WR Act to give workers at a workplace a right to confer among themselves may, however, contribute to the development of workplace agreements by union officials, in isolation from their members who are to be covered by the agreement.
- 5.1.2.8. In this respect we note that the government has expressed concern in the past that some agreements in certain industries do not adequately reflect individual workplace needs but instead are standard form, or 'pattern' agreements. As to this, we first reject the proposition that there can be any inherent objection to a negotiation strategy by which employees in a workplace seek, through their democratically elected union representatives, to secure conditions that are consistent with those in a comparable workplace. Secondly, we point out that negotiations that pursue practices followed and outcomes achieved elsewhere will entail lower transaction costs than those which seek to reinvent the wheel. Thirdly, we note that an employer may engage in 'pattern' bargaining by, for example, insisting that each employee agree to an AWA in identical terms.

- 5.1.2.9. A relationship between employee choice and so-called ‘pattern’ bargaining may lie, however, in the question whether working conditions negotiated at the level of the single workplace are appropriate for each workplace. In other words, to the extent that ‘pattern’ bargaining may tend to overlook enterprise-specific concerns, the best way to address that possibility is to ensure that employees have better legal rights to participate to direct the course of agreement-making.
- 5.1.2.10. It is fundamentally inconsistent with the objects of the WR Act for employers to be able to determine workplace terms and conditions unilaterally, without significant capacity for employees to develop their own proposals. In particular, employees should have the opportunity of forming a common position on the form of agreement they desire. They should also be able to come to any position through discussion amongst themselves in the workplace. Attention to these issues may assist in ensuring that agreement outcomes are appropriately tailored to workplace needs. In these respects, however, the WR Act presently falls well short of international benchmarks.

5.1.3. Employee choice and international practice

5.1.3.1. It is inconsistent with international practice in all developed countries, and most developing countries, as well with international standards,⁷ to deny employees, as a group, the capacity to make a choice about the form and content of agreement they believe is appropriate to them. Three examples illustrate the point.

5.1.3.2. First, the *National Labor Relations Act* in the United States famously provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities [...]⁸

Like many similar statutes around the world, that Act goes on to set up mechanisms to enable employees to make a choice about organisational form and approach to agreement making.

5.1.3.3. A second example highlighting Australia’s anomalous position internationally is provided by the decision of the European Court of Human Rights in *Wilson & Palmer*.⁹ There the Court determined that an employer may not induce employees to relinquish their rights to a preferred form of representation and to

⁷ See specifically, ILO Convention 98.

⁸ *National Labor Relations Act*, 7 USC tit 29, ch 7, sub-ch II §127 (1935).

⁹ *Wilson & The National Union Of Journalists, Palmer, Wyeth & The National Union Of Rail, Maritime & Transport Workers, Doolan & Others v United Kingdom* [2002] ECHR 547.

collective bargaining. This decision has recently been implemented in the law of the United Kingdom.¹⁰

- 5.1.3.4. A third relevant international example is provided by the OECD Guidelines for Multinational Enterprises. All OECD members, including Australia, have endorsed those Guidelines. The Commonwealth Treasury Department is responsible for promoting them to Australian business, and currently does so through various forums.

In respect of workplace relations, the Guidelines state:

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices: [...]

1. a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions; [...]

2. a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements.

b) Provide information to employee representatives which is needed for meaningful negotiations on conditions of employment.

c) Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.

3. Provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole. [...]

8. Enable authorised representatives of their employees to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.¹¹

- 5.1.3.5. The current WR Act procedures may be contrasted with those in other jurisdictions, such as the United States, Canada and the United Kingdom. There, employees may determine their preferred form of agreement-making through a ballot procedure.

5.1.4. A principled alternative

¹⁰ *Employment Relations Act 2004* (UK).

¹¹ Compare ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977 and 2000), [41] – [59].

5.1.4.1. Taking the OECD Guidelines cited above as a starting point, we can see that they require the following conditions for genuine employee involvement in agreement making:

- a) Capacity to engage in negotiations through representatives;
- b) Capacity for authorised employee representatives to negotiate with authorised employer representatives;
- c) Provision of facilities necessary for employee representatives to develop effective collective agreements; and
- d) Provision of information needed for meaningful negotiation on conditions of employment, including information enabling employees to obtain a true and fair view of the performance of the enterprise.

Capacity to engage in negotiations through representatives

5.1.4.2. The WR Act enables employees to act through their unions or other representatives. This right to representation should not be diminished. However, the WR Act does not facilitate employees choosing *from among themselves* persons who could represent their views to their employer, whether with or without assistance of union officers. Even more significantly, it does not facilitate employees choosing what form negotiations should take.

5.1.4.3. Employees should be provided with an opportunity to initiate consultations with employers on preferred forms of agreement and, where they so desire, to appoint representatives. In the event of controversy, this might include the conduct of a ballot of employees over which type of agreement the majority prefer. Such procedures would be supervised, in the event of dispute, by the AIRC by analogy with the work of, for example, the Central Arbitration Committee in the United Kingdom.

5.1.4.4. It is worth emphasising in this context that ‘representatives’ chosen by senior management rather than by employees would not of course constitute genuine representation. It would constitute paternalism and provide an incentive for opportunistic behaviour. Although senior management and employees will often have coinciding interests, it is clear that negotiations over (and implementation of) workplace conditions will present cases in which there are conflicts of interest between rational self-interested individuals, or, less brutally, colleagues with different interests in the outcome of those negotiations.

Capacity for authorised employee representatives to negotiate with authorised employer representatives

5.1.4.5. Once employees selected their preferred form of agreement, their employer should be obliged to negotiate with their representatives on the basis of that

choice. Many employment relations systems – New Zealand is (geographically) the closest example – impose an obligation to negotiate in good faith. This has proved controversial in Australia, perhaps unnecessarily given the development in other common law jurisdictions of the implied obligation of mutual trust and confidence.

- 5.1.4.6. An alternative approach, as outlined here, would be to require the parties to devise a *framework for negotiations*, and to impose a default in the event of disagreement. The default would be expressed in general terms to cater for the wide variety of workplaces, but could be adapted to specific workplaces by the AIRC.

Provision of facilities necessary for employee representatives to develop effective collective agreements

- 5.1.4.7. The framework for negotiations should, unless the parties otherwise agree, enable employee representatives to develop their own proposals (whether with or without union representatives) and to respond to employer proposals. This would entail:

- a) Time release from ordinary duties for the purposes of negotiations;
- b) Capacity to conduct meetings of staff at relevant points in the bargaining process, without management presence; and
- c) Capacity to otherwise communicate with staff about bargaining matters at relevant points in the bargaining process (and in particular to respond to employer statements).

- 5.1.4.8. The nature of these arrangements should reflect the nature of the individual firm. For example, in large firms, management negotiators are often supported by large HR departments, and communicate extensively with staff through e-mail and other methods. In such firms, employee representatives should be accorded time release and IT access sufficient to enable a balanced debate of proposals. Again, adoption of a default model modified by the AIRC would be appropriate in the event of sustained disagreement between employers and employees.

Provision of information needed for meaningful negotiation on conditions of employment, including information enabling employees to obtain a true and fair view of the performance of the enterprise

- 5.1.4.9. Finally, the framework for negotiation should also stipulate the distribution of information pertinent to the negotiating process. Again, there should be a default position in the event that the parties are unable to agree. The information requirements under the European Commission's Directive on Information and Consultation, referred to elsewhere in this submission, provide a useful model which could form the basis of the default requirement.

5.2. The regulation of industrial action and collective bargaining

- 5.2.1. The WR Act provides for the parties to take industrial action during the course of negotiating agreements at the level of the workplace. It should continue to do so, both in compliance with Australia's international legal obligations, and as an element of a sound policy for the resolution of collective labour disputes.
- 5.2.2. We reiterate in this specific context our general argument that Australia should, in its regulation of labour relations, comply with its obligations at international law. At present, the WR Act fails in a number of respects. The ILO's Committee of Experts has determined that the WR Act improperly limits the exercise of the rights to organise and to bargain collectively. It does so in at least three important ways. First, it unduly limits the taking of sympathy industrial action, by prohibiting secondary boycotts. Secondly, the emphasis on bargaining at the level of the single business (as defined in the WR Act) impermissibly constrains both workers and employers from exercising the right to bargain at a level that they select. Thirdly, the promotion of Australian Workplace Agreements, which displace collective regulation through awards and certified agreements, is incompatible with Australia's obligation under Article 4 of ILO Convention 98 to promote collective bargaining. These failures also constitute failures to comply with Australia's obligations under article 8 of the ICESCR, which protects trade union rights, including an explicit obligation to protect a right to strike.
- 5.2.3. Continued failure to comply with obligations at international law can only adversely affect Australia's standing within the international community in general, and within the ILO community in particular. This might have significant repercussions if, for example, Australia were to consider presenting itself again for election to the ILO Governing Body.
- 5.2.4. The regime for protected industrial action under the WR Act goes some way to providing a legal right to strike in Australia. It therefore makes good on some of our international legal obligations. The right is not unregulated or unfettered, and neither do international legal principles require that it should be. What those principles do require, however, is that procedural limitations on the exercise of the right to strike should not be so restrictive as to act in practice as a deterrent to the effective *exercise* of the right.
- 5.2.5. There are already significant procedural limitations on the right to take protected industrial action. These include the requirements to give notice of initiation of a bargaining period and of the intention to take protected industrial action. There are also many provisions that help a party to bring an end to industrial action that is unlawful, or which is causing excessive or unwarranted harm to parties beyond the particular work relationship. These provisions include, for example, the ability to seek orders restraining industrial action and/or permitting common law action to do so, as well as powers in the AIRC to

restrict the rights of parties to continue their bargaining and/or their industrial action.

- 5.2.6. We encourage the Government to go no further in regulating the conduct of protected industrial action under the WR Act. Further limitations would constrain the exercise of the right to a point where a trade union could not realistically expect to use it as a negotiating tool. This would likely be inconsistent with Australia's obligations under international law.
- 5.2.7. Regardless of international legal principles, the provision of a lawful right to strike is important from a policy perspective. Labour relations frameworks in industrialised economies that promote free collective bargaining typically provide a legal right to take industrial action. In many labour law systems, this is required by constitutional protection of the right. Labour relations systems, however, provide a right to strike in recognition of the fact that workplace negotiations, like other negotiations, sometimes depend upon the application of economic pressure in order to achieve progress. The 'peace obligation' that is common in free collective bargaining systems is a quid pro quo for the availability of the right to take industrial action freed from the legal consequences that otherwise obtain.

5.3. Australian Workplace Agreements

5.3.1. Preliminary matters

- 5.3.1.1. AWAs are the one true innovation introduced with the changes that brought about the transformation of the former *Industrial Relations Act 1988* (Cth) into the WR Act. Their singular contribution to the regulation of labour relations in Australia is that, for the first time since the introduction of compulsory conciliation and arbitration a hundred years ago, they provide a mechanism by which an individual agreement might lawfully undercut the safety net of conditions as built up over the years in awards of the AIRC and its predecessors.
- 5.3.1.2. The number of AWAs registered has steadily increased in the last few years. They are however a relatively minor means of regulating working conditions in Australia: only a small percentage of workers is covered by AWAs. Their relevance is further called into question by the fact that they are concentrated in particular industries, notably mining, and in the senior levels of the federal public service. In the latter case this is a reflection of the Government's determination to use this mechanism of regulating working conditions. It is no secret that many Government posts are offered on the condition that the successful applicant will enter into an AWA as a condition of accepting the offer of employment. Be that as it may, it appears that AWAs will remain a feature of Government policy for the foreseeable future. In some areas, they are

likely to become more significant in the immediate future, in particular in Victoria, where employers are presently being encouraged to move their staff onto AWAs in order to avoid the impact of the introduction of common rule awards of the AIRC.

- 5.3.1.3. There are at least two matters that the Government must consider in relation to the availability and operation of AWAs. One is the regulatory complexity to which they give rise. The second is the effectiveness and operation of the No-Disadvantage Test.¹²

5.3.2. Regulatory uncertainty and complexity

- 5.3.2.1. AWAs give rise to a number of issues of regulatory uncertainty and complexity. These include doubts about their precise legal status, and concerns over whether they are in fact able to deliver the type of functional flexibility that it appears they have been designed to help bring about in Australian workplaces.
- 5.3.2.2. The legal status of an AWA is as yet unclear. This is no small thing, given the emphasis that has been given to them in Government policy since their introduction into the WR Act. In effect, the Government has been promoting the implementation of a new means of labour market regulation without being sure what it has been promoting. It would hardly be surprising to find then that the parties to AWAs themselves may from time to time be uncertain about the nature of the legal regulation of their work relations that is brought about by an AWA. Clearly this is not a desirable position.
- 5.3.2.3. On one view of the legal effect of an AWA, it is a creature of the WR Act; an instrument of public law. It is in this sense no different from a certified agreement or an award made by the AIRC. In accordance with High Court authority,¹³ subsequently applied in the Full Federal Court,¹⁴ neither awards nor certified agreements take effect as terms of a contract of employment. On this view, neither would the terms of an AWA take contractual effect. A common law contract of employment could continue to operate differently from, and in some cases to override, the terms of an AWA. On the other hand, it may be that any agreement under the WR Act takes effect not only in the form provided for in the Act, but also 'according to the general law'.¹⁵ On this basis, it may have some contractual effect, although at this stage it is unclear what that effect may be.

¹² In relation to AWAs see J Fetter and R Mitchell, 'The Legal Complexity of Workplace Regulation and Its Impact upon Functional Flexibility in Australian Workplaces' (2004) 17 *AJLL* 276, and R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *JIR* 292, and the sources referred to therein.

¹³ *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410.

¹⁴ *ACTEW Corp Ltd v Pangallo* (2002) 127 FCR 1.

¹⁵ *CFMEU v AIRC* (2001) 203 CLR 645.

- 5.3.2.4. It is an irony that one of the goals of the many changes to the legal regulation of labour relations in Australia over the last ten to fifteen years has been to ‘de-regulate’ the labour market, when consideration is given to the extensive provisions of the WR Act that have been introduced for this purpose. Maintaining the availability of AWAs, whether they are considered only as statutory instruments, or as instruments capable of and having contractual effect, only adds further to the regulatory complexity that it has been the Government’s stated aim to reduce. For this reason, the precise legal status of AWAs should be clarified as soon as possible.
- 5.3.2.5. A further type of regulatory complexity arises frequently when the parties introduce into an AWA (by incorporation or other reference) provisions from other instruments of work regulation, including agreements, awards, company policy documents and the contract of employment itself. This practice may re-introduce, whether deliberately or otherwise, inflexibilities into the employment relationship. Given the Government’s policy of encouraging job flexibility in the workplace through the use of AWAs, the Government ought to consider clarifying the legal ordering of the AWA with respect to other instruments of workplace regulation (particularly the contract of employment) so that greater job flexibility can lawfully be introduced by the parties, should they so desire.

5.3.3. The application of the no-disadvantage test

- 5.3.3.1. While it is possible for an AWA to reduce conditions previously protected in awards, for the most part an AWA, like a certified agreement, must survive the application of the No-Disadvantage Test (NDT). It is the role of the Office of the Employment Advocate (OEA), and in certain cases the AIRC, to ensure that an AWA meets this test before an AWA may be certified.
- 5.3.3.2. Most scholarly analysis of the NDT suggests that, as it is applied in practice, it is a fundamentally inadequate way of ensuring that employees do not inappropriately bargain away their conditions.
- 5.3.3.3. For example, returning to the important issue of flexibility, it is evident that agreeing to increased job flexibility (generally achieved by ceding to management the power to dictate working hours and duties, and the discretion to set elements of pay, such as bonuses) constitutes a significant practical, legal and financial detriment to the employee compared to their conditions under the award and their contract of employment. However, this detriment is not presently taken into account under the NDT. This is equally a problem for certified agreements.
- 5.3.3.4. It would be better, therefore, if the NDT were to explicitly direct the OEA and the AIRC to consider the detriment (or benefit) to the employee of agreeing to

additional job flexibility, and to require that any detriment be compensated for or otherwise offset in the agreement.

- 5.3.3.5. It would also be desirable if the function of approving AWAs were to rest with the members of the AIRC. The members of the AIRC have a significant degree of useful experience in both the certification of agreements, and in the application of the NDT. Moreover, with their involvement in matters under the UFD laws, they also have wide ranging knowledge of individual employment relationships. A third reason why the approval of AWAs should be removed from the OEA is to overcome the tension inherent in the mix of functions performed by the OEA. Those functions include the policing of Part XA of the Act and AWAs, the provision of information about, and the promotion of, AWAs, associated research and information functions, and the independent determination of whether an AWA should be registered. This last function requires a truly independent assessment, which it is not possible for the OEA to give.

6 Representation of Employee and Employer Interests

6.1. Preliminary Matters

- 6.1.1. The existence and operation of collective organisations to represent the interests of both workers and employers have been central to the system under the WR Act and its predecessors. Registered organisations and their role in the resolution of industrial disputes were a key element of the regulatory model embodied in the system of conciliation and arbitration. Their role included the identification of industrial disputes within the jurisdiction of the arbitral system, and bringing them to the tribunal for resolution, where necessary by arbitration. Through the provision of rights of entry and the ability to bring proceedings for breach of awards and agreements, registered organisations had a significant function also in the policing of awards, and thus were a key element of the regulatory mechanism.
- 6.1.2. In recent years, as Government policy has shifted emphasis from the use of compulsory arbitration to the resolution of disputes at the level of the workplace, the role of registered organisations has accordingly changed. There have been a number of legislative changes to reflect the different policy. In particular, the right-of-entry provisions were altered, and trade union security mechanisms such as the tribunal's power to award preference to trade union members were removed. A related change was the introduction of strong freedom of association provisions in Part XA of the WR Act.
- 6.1.3. One of the key changes to the regulation of registered organisations, symbolically at least, was the removal of the legislative provisions relating to

the registration and oversight of the affairs of registered organisations from Part IX of the WR Act into what is now Schedule 1B. This move was accompanied by certain changes to the model of regulation of registered organisations' affairs, to one that draws significantly on the model of regulation applied to commercial corporations.

- 6.1.4. The developments of the last ten years or more highlight the importance of developing a coherent policy approach to the regulation of collective representative associations and their activities. While there has been a piecemeal breaking down of the system that conceived of registered organisations as essential to the system for conciliation and arbitration of interstate industrial disputes, there has been no attempt to articulate a clear role for workers' and employers' organisations in the collective bargaining framework that now dominates Australian labour relations.

6.2. The Role of Trade Unions in a Participatory Democracy

- 6.2.1. The desirability and need for collective representation is recognised in labour relations systems across the world, regardless of legal tradition or state of economic development. It is also required by the range of international legal obligations by which Australia is bound, in particular the obligation to promote and protect the freedom of association. The Government should not resile from the desirability of maintaining a legal and policy framework within which both workers and employers are able to organise collectively to represent their social and economic interests.
- 6.2.2. Keeping this in mind, the Government is presented with an historic opportunity to reconceptualise the policy approach to collective representation in Australian labour relations law. Insofar as workers' representation is concerned, this must include consideration of the distinction that must be drawn between registered organisations, on the one hand, and trade unions, on the other.
- 6.2.3. As noted, registered organisations were creatures of the conciliation and arbitration system, brought into existence to serve its purposes. It was the integral relationship with the regulatory model that provided the justification for many of the supports for registered organisations that have since been wound back. In practice, registered organisations came to dominate the space that in a different system might have come to be taken up by trade unions. Thus, it has long been common to refer to 'trade unions' when for the most part the entity concerned has in fact and in law been a registered organisation.¹⁶ In other words, policy approaches to 'trade unions' that have been developed as a way of altering their supposed privileges need to be seen in light of the role that

¹⁶ It might be noted that some, but not all State systems of conciliation and arbitration included provision for registration and incorporation of organisations for their purposes.

registered organisations were intended to play in the state-sponsored model of regulation by conciliation and arbitration.

- 6.2.4. The Government should take this opportunity, while reviewing the WR Act, to develop and implement a policy approach to the regulation of collective labour relations that proceeds from a fundamentally different conceptual basis. Whether or not it wishes to go that far, it should develop its policy in light of the fundamental importance of collective representation in a participatory democracy.

6.3. Collective Representation in a Participatory Democracy: Exercising the Freedom of Association

- 6.3.1. The desirability and need for collective representation is recognised in labour relations systems across the world, regardless of legal tradition or state of economic development. It is also required by the range of international legal obligations by which Australia is bound, in particular the obligation to promote and protect the freedom of association. The role and activities of collective representation of workers and employer are in this sense but one example of the broader principle that civil society organisations are critical to the development and maintenance of pluralistic, participatory democracy. Australia is certainly committed to the implementation of these principles of governance abroad, through its own foreign aid programs and its participation in the activities of international organisations, including the Bretton Woods institutions. It would do well for the government to bear these principles in mind in developing its own national domestic policy framework.
- 6.3.2. International law in general, and many of the obligations that Australia has voluntarily accepted, provide a related basis upon which a policy for collective representation might be developed. The ICCPR, the ICESCR and a range of ILO Conventions binding on Australia conceptualize collective representation as the expression of a fundamental human right to freedom of association. There is some evidence in the WR Act and in Government policy pronouncements that the Government accepts the significance of this principle. (Although, as we argue elsewhere, its implementation in the WR Act is inconsistent in some respects with relevant international law).
- 6.3.3. The Government should embrace the desirability and the utility of maintaining a legal and policy framework within which both workers and employers are able to organise collectively to represent their social and economic interests. In this respect it should bear in mind in particular the important role that the trade union movement (comprised of registered organizations of employees) has played in promoting and defending social and economic justice throughout Australia's history. Limitations on the ability of workers to organise free trade unions, and on the ability of those unions to carry out their programs of

activities, are not merely contrary to Australia's international legal obligations. They constitute bad policy, for they threaten the continuation of a vibrant tradition of civil society activity which in turn undermines the notion of Australia as a participatory democracy.

- 6.3.4. In this area the Government must be mindful of the practical functions that trade unions have served, particularly given their role as joint regulators of industry under conciliation and arbitration. Strong and well organised unions with rights of entry, for example, have carried out the function of enforcing minimum conditions of employment. If the rights of unions are to be altered so as to diminish their capacity to continue in this role, the Government must address the regulatory omission to which this gives rise. In particular, it will need to consider providing significant funding increases and other institutional support to the inspectorate appointed to enforce the WR Act. This area of state enforcement of the minimum conditions set through the conciliation and arbitration system has always been one of limited funding and activity. While trade unions were playing the role, this perhaps mattered less than in a policy environment in which trade unions have a diminished capacity as regulatory enforcers.

6.4. New Forms of Employee Representation

- 6.4.1. In addition to providing a sound, principled basis for the exercise of freedom of association in the form of trade unions, in our submission the Government might well take the current opportunity to develop further methods of collective representation for employees. This would help to implement our obligations in relation to freedom of association, and further enhance Australia as a participatory democracy.
- 6.4.2. The development of new forms of employee representation at the workplace would supplement the scheme of agreement making provided for in the WR Act. In this sense, they would be consistent with the Government's policy to have workplace conditions determined so far as possible at the level of the workplace, and to involve employees in determining workplace conditions. It is also a policy that could be implemented in a way that would complement both employee representation at the workplace through unions, and the individualised arrangements promoted by the Government.¹⁷
- 6.4.3. Like the formation of free and independent trade unions, new forms of employee representation could harness the strength of employee knowledge and involvement to help Australia confront important socio-economic problems.

¹⁷ P Gollan and J Hamberger, 'Enterprise-based Employee Representation in Australia – Employer Strategies and Future Options' in P Gollan, R Markey and I Ross (eds), *Works Council in Australia – Future Prospects and Possibilities* (2002).

These include the current skills shortage, inefficient work practices, and feelings of insecurity at work. International experience shows that enhanced employee participation would also contribute to employees' personal development, and promote greater efficiency and higher productivity. Research in Australian workplaces has also shown that there is greater satisfaction with management, and greater employee commitment, if a higher level of employee participation and involvement is sought.¹⁸

- 6.4.4. New methods of employee representation must never be a substitute for the formation of free and independent trade unions, nor could they be from an international legal point of view. They may, however, offer a way to harness employee knowledge and innovation in an industrial relations environment that has seen a dramatic decline in membership of trade unions. Trade union membership declined from 51.1 per cent in 1976 to less than 25 per cent of the overall workforce in 2001.¹⁹ As we have argued, trade unions do continue to play a key role in the labour relations system. Through their role in bargaining, and the creation and enforcement of awards, they are pivotal to the determination of the working conditions that apply to virtually every Australian worker, irrespective of whether they are trade union members.
- 6.4.5. Nonetheless, a substantial proportion of the workforce is not *directly* represented in the Australian workplace. This poses a serious problem for the development of cooperative workplace relations. Some Australian companies have retained schemes of employee representation to achieve higher levels of productivity and performance, but empirical studies of workplace relations indicate that the level of joint decision-making in Australia is relatively underdeveloped.²⁰ The absence of employee input into Australian corporate decision-making can be contrasted unfavourably with the superior representation and involvement of employees in Europe,²¹ and in many Asian countries.
- 6.4.6. These findings, together with the decline in union membership, have led to the development of the concept of an Australian employee 'representation gap'. One consequence of such a gap is obviously that employee voices are not heard. Another is that workplace-specific decisions are increasingly left to be dealt with by employers and managers. The lack of readily defined collective structures in non-unionised workplaces can mean that greater reliance is placed on management's ability to implement processes of change. This in turn may involve a considerable investment of management time and resources. The Government could both assist these enterprises, and address the perceived

¹⁸ J Campling and P Gollan, *Bargained Out: Negotiating Without Unions in Australia* (1999).

¹⁹ Australian Bureau of Statistics, *6310.0 Employee Earnings, Benefits and Trade Union Membership*, (2001).

²⁰ A Morehead et al, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey* (1997). See also, R Mitchell, R Naughton and R Sorenson, 'The Law and Employee Participation: Evidence from the Federal Enterprise Agreements' (1997) 39 *Journal of Industrial Relations* 196.

²¹ J Campling and P Gollan, above n 18, ch 7.

representation gap, by providing a legislative framework for employee information and consultation in Australia.

- 6.4.7. European experience with methods of consultation in the workplace may provide a useful model for the development of new methods of employee representation in Australia.²² In particular, the Government might consider drawing on the European Union's National Directive for Information and Consultation 2002 (NDIC). The significance that the EU accords this form of cooperative workplace relations as a means of addressing economic and social problems can be seen in the NDIC's binding status.
- 6.4.8. The NDIC establishes a general framework for informing and consulting employees in medium sized enterprises, meaning those with 50 or more employees. Amongst other things, it provides for elected committees of employees with the right to meet with management to discuss certain key workplace decisions. In the UK, it is estimated that 75 per cent of the entire labour force could be covered after full implementation of the NDIC in 2007.²³
- 6.4.9. The NDIC does not replace schemes of collective bargaining which already exist in member states: it operates in addition to those frameworks. Nothing within the NDIC scheme precludes union members from running for election, although it is not a union-based scheme. By creating a legislative model, the NDIC provides an additional and new form of employee consultation and participation in workplace decision-making.
- 6.4.10. The Government could supplement the existing methods of workplace representation and negotiation in the WR Act by providing for employers and employees to form ongoing joint consultative committees based on a legislative model that draws on the NDIC. This could be constitutionally supported by relying on a combination of federal powers under the Australian Constitution.²⁴
- 6.4.11. It is important to emphasise the key conceptual difference that would underlie such a scheme. Drawing on the European experience would mean emphasising the importance of the provision of information, and consultation, quite separately from traditional collective bargaining, but in a way that is completely complementary to it. This would represent a significant development in Australia, where employee participation (through information and consultation) has generally been seen as an adjunct to the award process or to collective bargaining, or alternatively, as simply unnecessary.

²² P Gollan and G Patmore (eds), *Partnership at Work: the Challenge of Employee Democracy, Labor Essays 2003* (2003). Gollan, Markey and Ross, above n 17.

²³ H Gospel and P Willman, 'The Coming of Workplace Information Sharing and Consultation: What it Means for Employee Representation in Britain' (2003) 7(1) *Perspectives on Work* 38.

²⁴ R McCallum and G Patmore 'Works Council and Labour Law' in Gollan, Markey and Ross, above n 17.

- 6.4.12. Another key element of European experience with workplace consultation is that it typically excludes pay from the topics for discussion within information and consultation committees. (Although where there is no union in the workplace, such committees in some countries may negotiate collective agreements). The removal of the key item of workplace conflict from the industrial equation assists as an incentive to begin dialogue, in an atmosphere that can become highly conducive to cooperative workplace relationships.
- 6.4.13. By creating a legislative model for information and consultation mechanisms, the Government could work to address key labour market problems by setting the agenda at a national (macro) level, while allowing implementation that best suits workers and managers at the enterprise (micro) level. It could do so by establishing the key topics for discussion within information and consultation committees so as to address fundamental economic problems. These could include:
- a) Employability and skills training – to help manage the skills shortages in enterprises;
 - b) Finding better ways to integrate casual and full-time employees;
 - c) Introduction of technological change – to enhance productivity;
 - d) Managing acquisitions, mergers and redundancies – to better address the issue of job security;
 - e) Discussing working hours – as a means of managing the work-life balance; and
 - f) Considering flexible work practices to enhance efficient work outcomes.

The list of topics need only be framed in very general terms. Consistently with Government policy for workplace relations, such a policy would not direct employers and employees as to outcomes. Rather, it would bring the parties together to discuss critical labour market problems, to find innovative solutions to suit each enterprise.

- 6.4.14. At the outset, the government could trial and promote a voluntary scheme, or seek participation in other ways, including tax breaks, or the introduction of a reporting requirement. If the scheme were to be voluntary, it would be hard to see any sustained opposition by employer groups, especially as there is support from all parts of the political spectrum for the development of such schemes of employee representation. At the same time, however, it appears that a legislative framework would ultimately be required: the voluntary approach of leaving it to employers and employees to develop their own arrangements has not redressed the current low levels of joint consultation in Australia. As we have argued, taking steps to address this problem by introducing new forms of consultation may lead to important social and economic benefits.

7 An Effective Safety Net

7.1 Preliminary Issues

- 7.1.1 Government policy accepts, and we argue, that there must be a clear level of minimum working conditions in the Australian labour relations framework. So much is provided as an object of the WR Act: s 3(d)(ii). Minimum conditions must be set to ensure equitable and humane treatment of workers, and to assure employers of protection against unfair labour market competition from undercutting labour costs. This means that the level of the conditions must be set in a way that fairly takes into account the needs of workers and those who are dependant upon them, and that ensures equity in the workplace. In this sense, for the safety net to be effective, it must be a set of truly binding and enforceable minimum working conditions appropriate to Australia's status as a wealthy industrialised democracy.
- 7.1.2 A safety net must also, however, be flexible: it cannot remain fixed in one place forever. If the minimum working conditions do not move and adapt with changing work practices and demands, they will become rigid and inappropriate. They will not then provide any assistance to those who are forced to fall back on them. It is essential therefore that there be means to review the content of the safety net on a regular basis, and to ensure that it takes into account a range of emerging issues of concern in the workplace. These might include, for example, addressing the need for better balance between work and family life, or ensuring privacy in the workplace.

7.2 Role of the Australian Industrial Relations Commission

- 7.2.1 Unless the Government were to adopt the suggestion that it rely on the external affairs power to take complete control of the regulation of labour relations in Australia (and in the absence of referrals from the states other than Victoria) it is difficult to see how the Commonwealth could constitutionally legislate a set of minimum working conditions. It is therefore necessary to rely on an independent institution that is capable of ensuring that the safety net is properly maintained. There can be no better institution for this purpose than the AIRC.
- 7.2.2 Over the hundred years of its operation, the AIRC and its predecessors have developed a remarkable regulatory capacity in the area of setting and maintaining equitable and efficient working conditions. Any reduction of the role of the AIRC to carry out this function would inflict a dramatic loss of regulatory capacity on the Australian labour relations landscape that could not easily be replaced by any other mechanism.

- 7.2.3 The AIRC has a long history of hearing cases about working conditions, and dealing with them fairly on the evidence put before it. It continues that role today, in the determination of safety net wage reviews, and in the assessment of applications for new test case standards, which might then appear in other awards. The AIRC exercises this role responsibly, efficiently, flexibly, and without charge to the parties. Looking for a moment to a different context in which the parties are inclined to have recourse to the AIRC, there is mounting evidence that the volume of work in the AIRC has not reduced at all with the advent of the WR Act. While the emphasis has shifted from s 99 dispute notifications and award-making to certification of agreements and resolution of disputes over the application of agreements, it is clear that the AIRC is as busy as ever. It would hardly be so were the parties unsatisfied with how it carried out its functions.
- 7.2.4 The fact remains that there is no other body in Australia capable of performing the key role in setting and maintaining minimum working conditions that is played by the AIRC.
- 7.2.5 We note that in many cases, however, the changes that the Government has proposed would introduce prescriptive legal regulation - for example, the proposal that the AIRC be forced to take into account the interests of the unemployed in conducting its functions. In our submission, the AIRC in conducting its safety net wage reviews has always balanced the needs of the economy as a whole with its role in maintaining minimum standards for employees. Evidence is sought and taken about the state of the economy. Where the evidence is anecdotal, it is rejected, and the parties are encouraged to take a more substantive approach. It is argued on occasion that the AIRC is called on to make decisions that it is not equipped to make. Assuming for a moment that the members are not necessarily experts in every area they may consider, it is a relatively simple matter to ensure that expertise is available. It might be done through the development of a better research function within the AIRC, or through the appointment of members with suitable qualifications, as for example in economics or labour economics, in addition to those with expertise in law and/or industrial relations.
- 7.2.6 Insofar as the impact of safety net wage rises on the ability of those without work to enter the labour market is concerned, we make the following observations. First, as we emphasised earlier, unemployment is at record lows. This would suggest that safety net wage review decisions are having little or no adverse impact on the ability of the unemployed to enter paid employment. Secondly, the AIRC has endeavoured to consider this matter in at least the last two safety net review decisions, but determined that the power and responsibility it has under the WR Act do not extend to taking these matters into account. The Government has not sought judicial review of these decisions. Thirdly, the AIRC has repeatedly remarked on the need for the Government to take a 'whole-policy' approach both to the needs of low-paid workers, and in

that context, to the desirability of those who are unemployed finding their way into paid employment. It has observed, for example, that alterations to social security measures might be a better means of addressing the needs of the growing class of working poor in Australia.

- 7.2.7 We reiterate our view that this is another area in which the corollary of the Government's approach to the AIRC and to wage-setting, is heavily reliant on the private sector to create work and thereby reduce unemployment. Particularly with unemployment levels at historic lows, it seems all the more likely that only active labour market policies, strategically overseen and implemented by the Government, are likely to change this.
- 7.2.8 Moving from safety net wage reviews, a further area in which the Government has repeatedly indicated a desire to amend the WR Act is in relation to the list of matters that might permissibly appear in an arbitrated award, under s 89A(2)(a). The legislative proposals in this respect to remove certain paragraphs of that provision, as well as to identify particular matters that would no longer be permitted in an award, go far beyond what is either necessary or desirable. In the first place, we would observe that they go beyond the Government's original policy in this area, by reducing the list of allowable matters to a small number. That included a list of 18 allowable matters, whereas it appears that present Government policy is to reduce this further.
- 7.2.9 A key consideration is to recall the historically-determined nature of the matters retained in the list of allowable matters in s 89A(2). Many of course are longstanding and predictable concerns of workers and employers: wages, hours, leave and the like. A good number, however, are the product of the system by which standards have been developed in the AIRC and its predecessors. Occupational superannuation is a good example. It is a matter that came to be included in awards only after the adoption of a decision in principle by the AIRC that this was both jurisdictionally possible, and desirable. If the list of matters about which the AIRC might make award provisions by arbitration had been determined at an earlier point in time, then occupational superannuation would never be allowed into awards. Yet it is a critical area of government saving policy.
- 7.2.10 What this illustrates, in our submission, is that the categories of new matters should not be closed. It would not have been possible to predict, ten years before the introduction of the limitations in s 89A(2)(a), that some of those matters would ever find their way into awards, much less that they would be considered among the final 20 thought appropriate for a list of issues about which minimum standards might be arbitrated. If the safety net is to remain flexible and fair, as well as firm, then the AIRC must retain its capacity to make a determination that a matter needs to be addressed through an arbitrated minimum standard.

7.2.11 As it stands, the list in s 89A(2)(a) requires too great a degree of contortion for many emerging matters to be dealt with adequately. It would be appropriate in our view to amend the legislation to give the AIRC discretion to accept an application to arbitrate a condition on ‘any other matter’, for example, in specific circumstances that the Act might prescribe. These might include, for example, the emergence of new technologies and practices in workplace relations, that the issue could not adequately be addressed through workplace bargaining, or that the term is not desirable in the public interest. The AIRC is well able to discharge such a responsibility.