Senate Standing Committee on Employment, Workplace Relations and Education

Inquiry into:

Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

Workplace Relations (Restoring Family Work Balance) Bill 2007

ACCI Submission

June 2007

LEADING AUSTRALIAN BUSINESS

ACCI – LEADING AUSTRALIAN BUSINESS

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 310,000 businesses nation-wide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

Our Activities

ACCI takes a leading role in representing the views of Australian business to government.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- representation and advocacy to governments, parliaments, tribunals and policy makers both domestically and internationally;
- business representation on a range of statutory and business boards, committees and other fora;

- representing business in national and international fora including the Australian Fair Pay Commission, Australian Industrial Relations Commission, Australian Safety and Compensation Council, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers;

- research and policy development on issues concerning Australian business;

- the publication of leading business surveys and other information products; and

- providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

Publications

A range of publications are available from ACCI, with details of our activities and policies including:

- the ACCI Review a monthly analysis of major policy issues affecting the Australian economy and business;

- issue papers commenting on business' views of contemporary policy issues;

- Policies of the Australian Chamber of Commerce and Industry – the annual bound compendium of ACCI's policy platforms;

- the Westpac-ACCI Survey of Industrial Trends - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia;

- the SAI Global-ACCI Survey of Investor Confidence – which gives an analysis of the direction of investment by business in Australia;

- the St.George-ACCI Business Expectations Survey - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories;

- the St.George-ACCI Small Business Survey – which is a survey of small business derived from the Business Expectations Survey data;

- workplace relations reports and discussion papers, including the ACCI Modern Workplace: Modern Future 2002-2010 Policy Blueprint and the Functioning Federalism and the Case for a National Workplace Relations System and The Economic Case for Workplace Relations Reform Position Papers;

- occupational health and safety guides and updates, including the National OHS Strategy and the Modern Workplace: Safer Workplace Policy Blueprint;

- trade reports and discussion papers including the Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World Position Paper;

- education and training reports and discussion papers;

- the ACCI Annual Report providing a summary of major activities and achievements for the previous year; and

- the ACCI Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004–2014.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports, is available on our website – www.acci.asn.au.

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1. INTRODUCTION

Introduction

1. ACCI member organisations at both the industry and multi-industry level have for many years assisted employers in negotiating, drafting and lodging agreements, both prior to *WorkChoices* and under the new system. This includes Australian Workplace Agreement (AWA) making, and the making of collective agreements with and without union parties.

2. At the time the Prime Minister announced the addition of the Fairness Test to the system (4 May 2007), ACCI indicated the following:

> **DISAPPOINTING AND UNNECESSARY CHANGES TO WORKCHOICES**
>
> Statement by Mr Peter Hendy, Chief Executive
>
> The Australian Chamber of Commerce and Industry, Australia's largest and most representative business organisation, is disappointed with announcements made today by the Howard Government that alter WorkChoices.
>
> The `Fairness Test' will have the effect of locking the dollar value of penalty rates, loadings and other allowances into the industrial relations and workplace bargaining system. It is akin to reintroducing the previous no-disadvantage test.
>
> The government did not need to strengthen the workplace safety net in this way.
>
> The changes announced will increase red tape in workplace bargaining.
>
> There was no need for this change because WorkChoices is not the radical reform portrayed by unions. Penalty rates were not abolished by WorkChoices. They remain as employer obligations in awards, and awards are retained by WorkChoices. Penalty rates were only able to be removed where there was genuine informed agreement.
>
> The extra bureaucratic process for agreements now requiring approval is undesirable. However, the impact on employers is minimised because agreements will still operate from lodgement, and approval under the `fairness test' is an administrative function that does not involve hearings.
>
> There will need to be an information campaign to industry about these changes.
>
> Despite the changes, the government is retaining a system which allows both collective bargaining and AWAs, superior unfair dismissal laws, limits on union power and the right to strike, and an emphasis on enterprise based bargaining.

Industry considers these aspects to be essential features of a modern industrial relations system, and they remain a significant contrast with the Opposition policy which will abolish AWAs and statutory individual bargaining rights, turn back unfair dismissal reforms, increase union power and create a super-agency that re-centralises the industrial relations system.

3. ACCI maintains this perspective:

    a. ACCI remains disappointed at the addition of the fairness test to the requirements for bargaining under our reformed workplace relations system.

    b. It is unnecessary.

    c. It will increase red tape in bargaining.

4. However:

    a. If there is to be an additional test for bargaining, the proposed formulation in the *Stronger Safety Net Bill* appears reasonable, subject to the various amendments proposed in this submission. On reviewing the amendments in the *Stronger Safety Net Bill*, they generally offer scope for the type of practical and common sense implementation such economy wide tests require to not stand in the way of timely agreement making.

    b. The impact on employers will be minimised as agreements will still operate from lodgement, and approval will not involve hearings.

    c. On balance, the totality of the *WorkChoices* amendments, even including this new test, continue to represent an overall improvement on preceding approaches.

    d. However, it is essential that the Bill be amended to prevent what ACCI considers an undesirable or unintended consequence (or both) whereby an administrative authority (the Workplace Authority (WA)) would have the power to create, on an ongoing basis, new award coverage, or also an ongoing basis, alter existing award coverage (see discussion of this issue under Section 7 "*Award Designation*").

Priorities For Employers

5. ACCI indicates above that employers view the amendments as unnecessary. This said, if the proposed Fairness Test is to be added to the system, employers have clear priorities and expectations of how it should operate.

6. These are the same expectations employers had of the former "No Disadvantage Test (NDT) under both ALP and Coalition era reforms, including:

   a. Any agreement test must be simple and easy to comply with. Industrial relations advisors must be able to operate the test with confidence and familiarity in negotiating and drafting agreements.

   b. The test must not delay agreement making, nor become bogged down in administrative inertia. Agreements have to be able to negotiate approval / lodgement processes with expedition.

   c. Where an agreement does not pass:

      i) There should be rapid and clear communication with agreement parties.

      ii) There should be a clear and straightforward avenue to redress problems and have the agreement approved.

      iii) All parties should know where they stand at all times.

   d. The tester (in this case the WA) should provide information and examples of what will and will not pass the test (e.g. case studies, examples, checklists etc).

   e. Once the test is passed and an agreement is approved, it must operate without scope for subsequent challenge or litigation for underpayment or agreement reversal. Once undertaken, any test must stand.

7. These are the type of standards against which employers will assess the new Fairness Test. As indicated, on examination the amendments in the *Stronger Safety Net Bill* appear to generally offer scope to meet these standards.

This Submission

8. The bulk of this submission addresses the provisions of the *Stronger Safety Net Bill*. The *Restoring Family Work Balance Bill* is addressed at Section 14.

2. Agreement Making - March 2006 to May 2007

Introduction

9. The government has chosen to introduce these amendments, and its rationale for doing so is set out in the Second Reading speech of the Minister for Employment and Workplace Relations, the Prime Minister's statement of 4 May 2007, and in the Explanatory Memorandum and other extraneous materials.

10. These amendments change the operation of agreement lodgement under the *Workplace Relations Act 1996*. They will in future ensure agreements pass the new fairness test.

11. ACCI members are at the coalface of agreement making in all industries and regions, and regularly participate in the making and lodgement of Collective Agreements (CAs) and AWAs. ACCI members provide feedback on agreement making to their peak organisation in meetings and discussions.

12. Overwhelmingly feedback during the first 14 months of WorkChoices (that is, prior to the fairness test) has been of shortages of labour, and the making of agreements which provide some combination of:

    a. Higher levels of remuneration, terms and conditions.

    b. Clear net benefit to employees for entering agreements.

    c. Net benefit to employees for entering agreements which alter base or minimum terms and conditions to secure additional operational flexibility.

13. Simply put, the most common employer experience in particular in the making of AWAs, as ACCI understands it, has not been one of bargaining down to the Australian Fair Pay and Conditions Standard, nor of seeking to exclude or modify away the protected award conditions.

3. EFFECT OF THE AMENDMENTS

14. To the extent that there have been concerns (real, imagined or constructed) at the outcomes of bargaining for any form of agreement, the effect of the *Stronger Safety Net Bill* should be to ensure that protected award conditions are not modified or excluded without fair compensation.

15. Whatever anyone believes may have been going on with agreement making, and in particular AWA making between March 2006 and May 2007, the fact is that agreements will now be subject to the process in the new Part 5A of the Act (should it pass).

16. ACCI considers the *Stronger Safety Net Bill* should generally achieve what it sets out to do. The amendments are substantive, not superficial changes to legal rights and obligations. They are likely to have the effect that the agency responsible for lodging agreements will also review agreements to be satisfied that they "*provide fair compensation in lieu of the modification or exclusion of protected award conditions that apply to an employee or employees*"[1].

17. In this sense, the overall impact of the amendments will be that the overall dollar value of existing award penalty rates, allowances, shift payments, annual leave loadings, and overtime loadings will be locked, in one way or another, into the cost structure of Australian employers.

18. However, employers will also have a reasonable expectation that the fairness test should operate in a manner that is both administratively certain and administratively efficient. These are matters that industry will need to keep under ongoing review, and provide feedback to government and the parliament.

4. FAIR COMPENSATION

Introduction

19. A workplace agreement passes the fairness test if (essentially) it provides fair compensation in lieu of the exclusion or modification of the protected award conditions.

20. The first element of what fair compensation is, is set out in s.346M(2):

[1] Stronger Safety Net Bill, Explanatory Memorandum, p.1

> (2) In considering whether a workplace agreement provides fair compensation to an employee, or in its overall effect on employees, the Workplace Authority Director must first have regard to:
>
> (a) the monetary and non-monetary compensation that the employee or employees will receive under the workplace agreement, in lieu of the protected award conditions that apply to the employee or employees under a reference award in relation to the employee or employees; and
>
> (b) the work obligations of the employee or employees under the workplace agreement.

21. This can be expected to be the primary and most common application of the fairness test and the assessment of fair compensation under the revised system. In the overwhelming majority of cases, agreements will be assessed based on money, with the additional factors in s.346(3) and (4) considered rarely.

22. In essence, in lieu means in lieu. It means overall equivalence of outcomes. ACCI anticipates the new s.346M will lead to very similar outcomes to the former NDT. An agreement will meet the test of it provides equivalent or greater entitlements / overall remuneration

Non-Monetary Compensation

23. There is a reference in s.346M(2) to being able to take non-monetary compensation into account. ACCI understands this to be a reference to non-monetary compensation to which a monetary value can be ascribed (and the examples given in the Explanatory Memorandum are of a car park and employee funded child care).

24. This appears relatively straightforward. The equivalent or ascribed value of a non-monetary benefit simply becomes part of the equation to assess whether there is fair compensation.

25. Where an employee disagreed with the value ascribed, or whether they are better or worse off either (a) they wouldn't agree to the agreement, or (b) they can take this up with the WA if they rescind their support of an agreement they have entered.

26. The discretion in s.346M and in particular the assessment of whether a benefit of an agreement is genuinely "in lieu" of the value of a protected award condition foregone, would allow the WA to address areas of disagreement. For example, if a company were assigning the same monetary value to a car park in the Sydney CBD and the Mildura CBD, the WA could question this.

27. This does not appear to mean that any old product or service the employer has spare can be forced on the employee in place of due recompense:

    a. An employee has to agree. New Part 5A of the Act is not triggered by unilateral employer action, it becomes live only after an employee or employees have consented to an agreement.

    b. Compensation must be 'fair compensation' – and it would be open to the WA to determine that such compensation would not be fair. A consideration in this may be the value the employee places on the benefit concerned.

    c. ACCI anticipates that where an agreement falls towards the lower end of the wage distribution, and/or provides for patterns of work which would have enlivened the protected matters, and contains substantial non-monetary compensation, the WA will scrutinise agreement content, agreement operation and agreement consent very closely. In these cases, compensation is also likely to be closely scrutinised.

    d. The WA will have substantial discretion to publicise what it views as falling within and beyond the bounds of fair compensation. Guidelines and case studies could provide clarity in this area.

    e. The WA has discretion under s.346M(6) to look into employee consent and the value the employee is placing on any non-monetary compensation.

Work Obligations

28. Section 346M(2)(b) provides that an assessment of fair compensation involves not only an assessment of the protected award conditions excluded or modified and the level of compensation, but also the actual work obligations concerned.

29. This is logical so long as it does not involve an excessive administrative burden, or second guessing by administrative authorities on lawfully established work patterns. It will help operationalise the fairness test by knowing the days and shifts an employee would typically work. ACCI would anticipate the statutory form the WA will use to implement the fairness test will gather this information to enable WA officers to make their assessment (as applied under the former NDT).

5. Employee Circumstances / Work and Family

30. Subsection 346M(2) provides that the primary consideration for the application of the fairness test is monetary compensation (e.g. a higher overall wage or salary for rolling up the protected conditions) or consideration to which a monetary value can be prescribed.

31. New subsection 346M(3) would require that beyond this, the WA may have additional regard to the personal circumstances of the employee or employees, including in particular the family responsibilities of the employee or employees.

Application

32. The explanatory memorandum accompanying the Stronger Safety Net Bill provides some relevant examples of when this would apply[2].

33. These are precisely the type of things employees actually ask for in workplaces every day. Employee evidence in the 2003-2005 Work and Family Test Case in the AIRC underscored the extent to which both informal and formal bargaining can be used to meet employee circumstances, and in particular work and family circumstances. Real examples were provided of employees requesting accommodations of their employers which would have cost the employer additional money in penalties to accommodate/or which would have forced the employer to breach their award obligations.

34. ACCI strongly supports capacity to make agreements with employees that are of mutual benefit and which meet both business objectives and employees' reasonable personal and family circumstances.

35. It is a reality that employers are increasingly interested in accommodating employee requests for flexibility/particular patterns of work, particularly where this would support the employee in balancing working and family responsibilities. In smaller businesses this tends to be informally arranged. In medium and larger businesses this tends to be governed by a combination of policy, formal arrangements and group or line managerial discussion. In either case, practical day to day solutions are being reached every day in workplaces across the country.

[2] Stronger Safety Net Bill, Explanatory Memorandum, p.18 – "Joel" and "Zita".

36. However it is very difficult for any employer to agree to a requested flexibility where it is going to increase their labour costs, or breach an award.

37. Employers are often perfectly happy to, in an informal and voluntary (non-legislative) way, agree to the banking of hours, time off in lieu, make up time, or shifting the days and times in which hours are worked, if the business can accommodate reasonable arrangements.

38. However, few if any employers would agree to meeting such employee requests if it meant paying an additional penalty rate to do so. In practice this would discourage employers from agreeing to requests based on employees' family needs.

What This Is Not

39. This is unlikely to become a back door way to bypass penalties or loadings under sham arrangements forced on employees by employers. On ACCI's reading of proposed s.346M(3), the Director of the WA will need to be satisfied that the claimed personal circumstances are real. He or she will have the capacity and resources to contact employees, or to gather their input on forms or statements, to ensure this provision is used as intended. The established prohibitions against coercion also apply.

40. There is also the additional protection of s.346M(6). It may be that the WA Director in trying to assess whether a proposed agreement is meeting some personal demand from the employee, chooses to exercise capacity to even better inform his/herself by contacting the employee(s), or even conducting site visits.

6. Exceptional Circumstances Agreements

41. New subsection 346M would provide a third option for the approval of agreements (for those not approved on the basis of direct financial compensation (s.346M(2)), or via a further/additional consideration of the personal circumstances of the employee(s) concerned (s.346M(3)).

42. New s.346M would also provide:

> (4) In exceptional circumstances, and if the Workplace Authority Director is satisfied that it is not contrary to the public interest to do so, the Workplace Authority Director may, in addition to the matters specified in subsections (2) and (3), also have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the employee or employees when considering whether a workplace agreement

provides fair compensation to an employee or in its overall effect on employees.

(5) An example of a case where the Workplace Authority Director may be satisfied that it is not contrary to the public interest to have regard to the industry, location or economic circumstances of the employer is where the workplace agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business.

How This Would Operate

43. ACCI considers it reasonable to expect that this avenue for agreement making would operate as envisaged, in exceptional circumstances and only where not contrary to the public interest, and only as a matter the WA would have regard to (with no obligation on the WA to approve such agreements).

44. This is not a new concept in Australian workplace relations.

45. Between 1996 and 2006, former s.170LT(3) and (4) specifically allowed for the making of an agreement which would fail the then NDT, but would not be contrary to the public interest. The specific example given was where the agreement was "*part of a reasonable strategy to deal with a short term crisis in, and to assist in the revival of*" a business.

46. It was also possible under the 1994-1996 iteration of the legislation to certify an agreement which did not meet the then test of disadvantage, if the AIRC considered a reduction in terms and conditions to not be contrary to the public interest (then s.170MC(2)(b)).

47. It was even possible to make an agreement which did not provide for all award conditions/net advantage to employees under the pre-statutory form of bargaining (largely the pre 1993 legislation).

48. This had its genesis in the 1990 SPC agreement approved under the former *Industrial Relations Act 1988*, which was used to "save" the business by temporarily applying terms and conditions which were not fully equivalent to those in the then award.

49. For more than 15 years our system has recognised that there are exceptional circumstances in which agreements may be used to meet difficulties. This has been recognised by both the ALP and the Coalition across almost a generation of workplace reform.

50. This essential avenue to meet exceptional circumstances should not be used to misrepresent the likely application of the new fairness test. Employers do not regard this as a backdoor or bypass round the new

test, any more than directly comparable provisions offered a by pass to the no disadvantage test under either the ALP's NDT legislation (1993-1996) or the Coalition's NDT (1997-2006).

When This Would Apply

51. The matters the WA would have regard to in assessing agreements (where exceptional and consistent with the public interest to do so) and their compensation, are:

    a. The industry, location or economic circumstances of the employer.

    b. The employment circumstances of the employee or employees.

52. This is a reasonable and sensible approach to agreement making in the most exceptional and challenging of circumstances. This includes droughts, areas affected by natural disasters, and industries and operations affected by major detrimental external changes.

53. These are serious issues and the workplace relations system needs to accommodate them – it has for the past 15 years, and must do so again as a function of reintegrating a specific fairness test.

Protections

54. There are substantial protections for employees in the framing of these amendments and how they have been designed to operate.

Must Be Exceptional

55. "Exceptional" circumstances are those which are "unusual, uncommon, abnormal, atypical, extraordinary, out of the ordinary, out of the way, rare, singular, unprecedented, unexpected, surprising; strange, odd, queer, bizarre, freakish, anomalous, peculiar, inconsistent, deviant, divergent, aberrant, unheard of". By definition:

    a. This is not going to become the every day work of the WA for the run of the mill agreement.

    b. Something additional or exceptional will need to exist for this avenue to even begin to be considered by the WA.

Must Be In The Public Interest

56. The further protection is that the provision requires a senior statutory appointee to exercise an assessment against the public interest. This is not a matter taken lightly, should require the WA to substantially inform itself, and should expose any agreement seeking approval under this avenue to additional scrutiny.

Short Term

57. Section 346M(5) provides the indicative examples of a short term crisis, or the revival of an employer's business. These are not indefinite or ongoing circumstances. In assessing the public interest for at least agreements sought in response to a crisis or challenge, the WA has scope to query what will happen under agreements when the crisis has passed.

58. ACCI would envisage that in practice, agreements under this exceptional avenue would generally either be of limited duration, provide for a return to higher remuneration or conditions after a particular period, or provide for a return to higher remuneration or conditions after particular conditions are met (for example when agreed by a union and employer, when a regional area was no longer drought declared etc).

WA Can Look Very Closely

59. There is also the additional protection of s.346M(6). It may be that the WA Director in trying to assess whether exceptional circumstances exist, chooses to exercise capacity to inform his/herself by contacting the employer and employees, or even conducting site visits. This would allow the WA to even further assess genuine consent and understanding in the making of an exceptional circumstances type agreement.

Other Protections

60. This is not necessarily a distinct, separate third path to agreement approval. This appears more analogous to a third level of assessment where required in addition to s.346M(2) and (3).

61. This is not just a consideration of exceptional-ism based on industry, location or the economic circumstances of the employer and the employment circumstances of the employee or employees. The assessment always remains one of the fairness of the compensation in a particular agreement which excludes or modifies protected award matters.

62. Subsection 346M(4) is not the sole expression of how this will work. It is fleshed out, but also arguably somewhat limited by s.346M(5) by way of a quite robust and guiding example.

These Are Agreements

63. It should also be recalled that these are agreements. Either an employee has to agree to them (an AWA), or the majority of employees have to agree with them (a Collective Agreement).

64. Where a company is trying to trade out of serious difficulties, there is a drought or natural disaster, an area is significantly depressed etc etc, the employee has choices.

    a. One the one hand, they can agree a form of agreement as envisaged in s.346M(4) and (5).

    b. However, it is open to the employee to refuse an agreement offered on this basis. They can insist on an employment arrangement which is either unaltered (refusing an agreement outright) or on a form of agreement which passes the fairness test on remuneration alone.

    c. Of course, the exceptional circumstances may then cause the company to fail, or the employee's position may be become redundant, but the employee is not compelled to participate in any strategy to deal with the short term crisis, or the revival of the employer's business.

What This Is Not

65. As indicated, the making of agreements "*as part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business*" is a known and long accepted concept in Australian workplace relations.

66. Such avenues prior to *WorkChoices* never became widely used. They did not become an avenue for the widespread making of agreements which did not pass the no-disadvantage test. ACCI is not aware of any abuses or widespread exploitation of s.170LT(3) and (4) of the pre-*WorkChoices Workplace Relations Act 1996,* or the preceding s.170MC(2) under the pre-1996 *Industrial Relations Act 1988*.

67. The SPC case and the statutory avenues provided in the wake of that landmark agreement have never been exploited or widely misused, and ACCI can see no reason to conclude the latest iteration of the same concept would be treated any differently.

68. ACCI would support the WA clearly communicating with employers and employees and their representatives on how it will address the lodgement of any such agreements (e.g. through fact sheets, or a publication on the process to be followed, information which would need to be provided to allow the WA to assess the public interest etc). This would provide even greater clarity on this issue.

Minimum Wages Are Not Subject To This Test

69. It is also worth noting that the new fairness test is arguably more employee oriented than the pre-*WorkChoices* NDT in regard to such exceptional circumstances.

70. An exceptional circumstances agreement under the old system could lower minimum/award wages for ordinary time work, and/or penalties and loadings. The new test cannot change minimum wages and solely goes to what is fair compensation in the circumstances for exclusions or modifications of the protected award conditions. Agreements under new s.346(4) will also not be able to detract from or modify the application of the wider Australian Fair Pay and Conditions standard set out in Part 7 of the *Workplace Relations Act 1996*.

7. AWARD DESIGNATION

Introduction

71. Proposed new Division 5A of the Stronger Safety Net Bill outlines the fairness test and introduces the concept of "award designation" under proposed ss.346B, 346L and 346K.

72. New s.346B defines what a designated award is:

> ***designated award***, in relation to an employee or employees whose employment is or may be subject to a workplace agreement, means an award determined by the Workplace Authority Director under section 346L, and includes an award taken to be so designated in relation to the employee or employees under section 346K (unless a different award has been designated in relation to the employee or employees under section 346L).

73. Under proposed s.346C, it is our understanding that the WA will designate an award where a workplace agreement is lodged or varied in the circumstances set out in s.346L.

"Usually Regulated By An Award"

74. The combination of s.346L(1)(a)(i) and s.346E(1)(b)(i) and (ii)[3] apply the fairness test, and thereby award designation, where an employee is employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee are usually regulated by an award, or would but for the terms of an agreement, usually be regulated by an award.

75. ACCI accepts that where a specific employee would have had award coverage prior to *WorkChoices* save for entering an agreement of some other transitional arrangement, that employee should enjoy that award as a comparator for the fairness test.

76. However, this is an area in which there appears to be scope for some tightening of legislative expression.

    a. Ideally this should be an individual assessment of the position and enterprise concerned and its "natural" exposure to award coverage for a particular position, not some wider industry or occupational judgement. The principle should be that an employee, doing that job would have had award coverage, and in those situations the award which would have applied to that job should be designated.

    b. If some wider construction is to be applied, the concept of "usually regulated" appears to need to be further defined. Again, the principle should be to not extend or deem award coverage where it did not exist previously, both to particular positions, but also to workplaces as a whole.

Criteria:

77. It is our understanding that an award will be designated by the Workplace Authority for an AWA (subject to the salary threshold cap) or collective agreement, if the following criteria are met:

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[3] And matching provisions for collective agreements.

a. The employee works in an industry or occupation in which the terms and conditions of the kind of work to be performed are 'usually' regulated by an award.

b. There is no other award binding the employer.

c. The award is 'appropriate' and it would regulate the terms or conditions of employment of employees engaged in the same kind of work as that to be performed by the employee(s).

d. The award is not an enterprise award.

Multiple Designated Awards:

78. It is our understanding that so far as a collective agreement is concerned, the Workplace Authority will be empowered to designate multiple awards as a result of different categories of employees being covered by the agreement.

79. The explanatory memorandum states (at p. 15):

> The Workplace Authority may designate different awards in respect of different employees (subsection 346K(6)). For example, if the scope of the proposed workplace agreement regulates the terms and conditions of employment of cleaners and clerical staff, the Workplace Authority may designate an award that is appropriate to regulate the terms and conditions of employment for cleaners, and another award that is appropriate to regulate the terms and conditions of employment for the clerical staff.

Effect of Designation:

80. As a consequence of designating an award (in the case of an AWA) or number of awards (in the case of a collective agreement), the protected award conditions in that award will be applied to the agreement. If the agreement expressly removes or modifies any of those conditions, it must provide fair compensation, as determined by the Workplace Authority.

81. ACCI understands that the effect of designation leads to a number of other consequences.

a. If an employer was not bound by an award, the very act of engaging in bargaining with an employee or group of employees and lodging an agreement will trigger a designation of an award.

i) This also gives an employee an entitlement to back-pay should the agreement not pass the fairness test and an entitlement where previously none existed. (s.346Y(2)(b)).

ii) This means an employer assumes an ongoing obligation to observe an award it was never bound by/subject to by virtue of a decision of the WA, where an attempted agreement is rejected.

iii) There does not seem to be any appeal or review mechanism for an aggrieved employer who believes that the WA has wrongly designated an award.

b. Under the proposed s. 346ZH(1) an employer is liable to prosecution if by any act or omission in relation to a workplace agreement, coercing an existing employee to agree, or not to agree, to modify or exclude a protected award condition. It is possible that employers may be exposed to this offence where the employer, who is not bound by an award, lodges an agreement and wrongly designates an award (ie. because they believe there is no appropriate award or they designate the wrong one).

i) Some amendment to the Bill may be necessary to redress this situation.

Analysis

82. While the NDT under the pre-WorkChoices legislation (former ss.170XE and 170XF) required agreements to have awards designated for the purposes of making AWAs or collective agreements, it was only for that purpose and did not lead to an award binding the employer in perpetuity as a new obligation where there had been no award coverage.

83. Under the *Stronger Safety Net Bill*, the mere designation of an award will create new ongoing legal rights and obligations on employers. ACCI does not agree with this outcome and seeks that the Bill be amended.

84. ACCI believes that to bind employers to award conditions where they currently are not, would be premature considering that the AIRC has a mandate to rationalise and simplify awards and that awards may be rationalised in a way which will extend award coverage to these employees (ie. possibly by common rule).

85. The proposed approach to designation may have serious implications for employers who wish to bargain with employees when there is the potential for an employer to become bound by award whose terms did not previously apply.

86. There is also scope for the WA to designate an inappropriate award and for the employer to then have no option but the application of this award for designation, or where bargaining fails, ongoing award compliance.

87. It would be contrary to the objects of the Act as a whole, if this Bill had the unintended consequence of making employers disinclined to bargain with non-award covered employees. The risks of stepping into an agreement process which could deliver award coverage by default may outweigh the benefits.

88. An even more important principle exists. Award coverage (outside of the narrow function of designating awards for agreement purposes) should not be made by an administrative authority such as the WA. Designating awards for the purpose of approving a non-award instrument (agreements) is a fundamentally different task to creating legal rights and obligations on an ongoing basis under an award. This should be left, and only left, to the independent decision making functions of the authority charged with the jurisdiction of making awards in the first place and establishing their scope of operation.

89. To the extent that there are unresolved issues about award coverage, the express scheme of the *Workplace Relations Act 1996* is to have those matters addressed through the statutorily regulated award rationalisation process.

90. ACCI strongly objects to the creation of ongoing award coverage through the administrative process of designating an award for comparative purposes when approving agreements. Protecting penalty rates (for example) where someone was entitled to them is one thing, imposing an ongoing entitlement for the sake of having a comparator where there were no penalty rates, is another.

8. THE SALARY THRESHOLD

91. While the fairness test will apply to all collective agreements regardless of salary, proposed subdivision B of Part 5A, outlines the criteria for AWAs to become subject to the fairness test, by reference to an employee's base salary.

92. Proposed s.346E(1)(c) means that the fairness test will be applied to an AWA where an employee has an annual rate of salary (or full-time equivalent rate of salary) of less than $75,000.

93. Proposed s.346B defines salary as follows:

> ***salary*** means gross basic salary and does not include the following:
>
> (a) incentive-based payments and bonuses;
>
> (b) loadings (other than casual loadings);
>
> (c) monetary allowances;
>
> (d) penalty rates;
>
> (e) employer superannuation contributions;
>
> (f) any other separately identifiable entitlements that are similar to those mentioned in paragraphs (a) to (d).
>
> Note: Section 346G contains provisions relating to this definition.

94. For full-time employees paid a piece rate of pay and employees other than full-time employees, the full-time or full-time equivalent annual salary is to be calculated in accordance with proposed section 346G.

95. Proposed 346G(1) would allow regulations to be made that increase the annual rate of salary below which an AWA would be subject to the fairness test.

96. ACCI supports the concept of a salary cap for determining which AWAs are subjected to the fairness test. However, we are concerned that the definition of base salary will draw in many employees who are relatively highly paid, but whose salary packaging arrangements may draw their base component within the $75,000.

97. ACCI believes that it would have been better to define the salary to include $75,000 as 'a package', or very least provide more flexibility in to take into account contemporary remuneration structuring. This includes salary packing encouraged by other areas of government policy, e.g. voluntary superannuation contributions.

98. The effect of the amendment is to make more agreements subject to the test, and draw in an increased pool of people who are less likely to have award coverage. It would mean therefore more award designations where there is no award coverage – and as we indicate

above, employers have concerns in regard to the possible unintended consequences of the designation process.

9. WHERE AGREEMENTS DO NOT PASS

Introduction

99. Proposed subdivision D and E of new Part 5A would deal with the consequences of where an agreement does not pass the fairness test.

100. Proposed ss.346Q, 346R, 346S, 346T, 346U, 346V, 346W, 346X, 346Y, 346Z, 346ZA, 346ZB, 346ZC outline the process that will apply where an agreement does not initially pass the fairness test, including where there is a variation/undertaking, and what instruments apply should the agreement ultimately not pass the fairness test.

Variations

101. Proposed s.346R deals with an agreement which does not pass the fairness test. It prescribes a time period of 14 days (or longer as prescribed by the Regulations) to vary the agreement or accept its failure of the fairness test.

102. An employer whose agreement is lodged and does not pass the fairness test can either:

    a. In the case of an AWA, lodge a variation to the agreement with the Workplace Authority; or

    b. In the case of AWAs and collective agreements, lodge a variation or give a written undertaking.

103. ACCI understands that if an employer does neither action within 14 days, then at the end of that period, the workplace agreement ceases to operate and the employees are able to claim compensation for back-pay.

104. On review of the Bill and explanatory materials, ACCI is somewhat unclear as to the effect and framing of s.346R(2). It would be useful in further parliamentary examination of the Bill to clarify exactly what can and can't be done when an agreement fails the initial test and how the circumstances differently treated in s.346R(2)(a) and (b) would actually differ in practice.

Response

105. ACCI submits that capacity to amend (either by way of variation or undertakings) an originally lodged agreement should be paramount and employers may in some circumstances need more time to do so than the specified 14 days.

106. Additional time may be required by employers because it appears that the relevant period commences from the time the Workplace Authority issues a "written notice" under s.346P, not when an employer receives the notice.

    a. An employer may not receive the notice for up to 2 days, even if it is mailed by express post.

    b. It is also not inconceivable that mail may be delayed in the system for a longer period and an employer should not be penalised in this regard.

107. A better process would have been to commence the 14 days from the time communication from the WA is received. The WA should be required to send registered mail and the 14 day period should commence from the day after an employer signs as having received the registered letter.

108. This is a particular concern in light of award designation for previously non-award covered employees for whom AWA coverage is proposed. If an AWA fails this test the employer is left with brand new award obligations they have never previously been subject to. Of course industrial reality is that this industrial "gift" to the employee will make subsequent bargaining significantly more difficult and costly.

109. This is too big a risk to possibly be imposed, because letters can become delayed in the post. Moreover, no employer should be told that they have had their wages and condition obligations changed simply by receiving a letter in the post from an administrative agency of government.

110. The capacity to extend the period for agreement rectification to pass the fairness test (s.346R(7) and (8)) is very important, and supported by ACCI. ACCI would support the WA Director being able to exercise his or her discretion in extending this period, without any restriction from the regulations. Thus, s.346R(8) should omit the reference to "in circumstances prescribed by the Regulations".

111. Failing this, regulations should give the WA Director wide discretion.

    a. There can be no loss to employees as there are strong requirements for backpay.

    b. There would be genuine negative workplace consequences of proposed agreements failing the test, which may be very long term. It is in the public interest that there is flexibility to make agreements complaint rather than reject them.

112. A declaration of variation or undertaking under proposed s.346S should be able to be sent by an employer by hardcopy or electronic means (email or fax). The Act should explicitly recognise this.

Instruments that Apply

113. Proposed ss.346Y and 346Z deal with the situation of where an agreement does not pass the fairness test and which awards[4] are revived or come into effect as a consequence.

114. ACCI understands the intention of ss.346Y and 346Z is to ensure that where an agreement does not pass the fairness test, the instrument which previously applied will be revived.

115. ACCI is concerned that a designated award's protected award conditions will now bind an employer and employee, where previously they did not. Thus, an employer is being asked to assume a substantial legal risk in making an AWA with a non-award employee who has no entitlement to penalty rates.

116. Not only does the employer have to meet a test against penalty rates which don't naturally or otherwise apply, if the agreement fails a test against an award which the employer has no familiarity with and which is alien to the working relationship concerned, that becomes an enduring entitlement of the employee. Employers are being asked to take an unacceptable gamble in lodging such agreements.

117. There is also the potential for ambiguity. Note 3 to s.346Z which states:

> Note 3: An award has no effect in relation to an employee while a workplace agreement operates in relation to the employee (see section 349), but once the workplace agreement has ceased to operate, the award is capable of operating again.

[4] And other instruments, etc.

118. While this is what s.349 of the *Workplace Relations Act 1996* provides, s.399(3) states that if a workplace agreement is terminated, only the protected award conditions in the award can operate, until a new agreement is made.

119. Proposed Note 3 would seem to suggest that an entire award can operate in circumstances where a workplace agreement is terminated. This is ambiguous and may lead to confusion and compliance problems.

Compensation

120. Proposed s.346ZD in subdivision E of new Part 5A would deal with an employee's entitlement to compensation where an agreement does not pass the fairness test.

121. ACCI understands that the effect of s.346ZD is to ensure an employee is not worse off where an agreement does not pass the fairness test, or is varied and subsequently passes, in terms of what he or she would have earned had the agreement not operated.

122. This covers a variety of situations (and periods of time) that may arise under the new provisions relating to lodgement, variation/ undertaking and decision by the Workplace Authority (ss. 346Q, 346R, 346V, 346W, and 346X).

123. The explanatory memorandum states (at p.29):

> An employee would be entitled to recover, by way of compensation, any shortfall in entitlements during the fairness test period. A shortfall arises if the total value of the entitlements to which the employee was entitled under the agreement is less than the total value of the entitlements to which the employee would have become entitled if, during the fairness test period, their employment was covered by the instrument that, but for the workplace agreement which has failed the test, would have applied (for example, an award), or by protected award conditions contained in a designated award.

124. Proposed s.346ZD(3) also makes it an offence if any employer does not pay any shortfall within 14 days of the agreement ceasing to operate.

125. Therefore, an employer may be liable for pecuniary penalties of up to $33,000 for body corporate and $6,600 for an individual, and may be prosecuted at the initiative of the employee concerned, an inspector or union.

126. ACCI believes that the ability for employers to off-set the total amount of compensation payable should an agreement fail the test is sensible.

127. It appears the effect of proposed 346ZD is to provide an employee with the benefit of protected award entitlements from an award, even where previously no award applied and the only association with the award has been through the designation process.

128. This retrospective application of an award for the benefit of the employee requires complex calculation of back-pay and gives employees entitlements they would not have been entitled to had an agreement not been lodged.

    a. Consistent with the above responses to award designation (Section 7), where an agreement fails the test, back pay should be made based on the level of entitlement an employee actually has, not to some higher designated standard which has never been applied to that relationship.

    b. More generally, this should be closely monitored, particularly in case it emerges that 14 days to undertake complex back pays is not sufficient.

129. Again, the 14 days should start from when an employer receives a notice that an agreement has failed the test, not when the letter is dispatched from the WA.

130. This may also ultimately create a disincentive to bargain for agreements and will:

    a. Encourage employers to adopt a practice that they get all their agreements pre-approved before lodgement or;

    b. Encourage employers to continue to comply with the pre-agreement instruments until they know that the agreement passes the fairness test.

10. NEW OFFENCES

Introduction

131. The Stronger Safety Net Bill seeks to insert new subdivision F, and ss.346ZE, 346ZF, 346ZG and 364ZH. These are new civil remedy provisions in relation to the fairness test.

Notice offence

132. Proposed s. 346ZE, requires an employer who receives a notice from the Workplace Authority about whether the Director is required to apply the fairness test to a collective agreement or whether a collective agreement passes the fairness test, to take reasonable steps to ensure a copy of the notice is given to all employees currently subject to the agreement, as soon as practicable.

133. An employer who breaches this section, attracts a maximum pecuniary penalty of $3,300 (for an individual) and $16,500 (for a body corporate) respectively.

134. While this appears to be a strict liability offence and there are no defences available, we note that the words "as soon as practicable" will give some flexibility to employers as opposed to a strict time period.

Analysis

135. An amendment or regulation should clarify that e-mail or posting on an intranet site will specifically constitute reasonable steps for this provision.

136. The fines are also excessive for a failure to circulate information. This should be re-examined.

137. While employers would take every endeavour to ensure that they notify employees in accordance with the new provisions, and we believe it is important to do so, ACCI believes that an enforcement agency should have the ability to issue infringement notices (and thereby much lesser penalties). ACCI notes that this is already possible for contraventions of the time and wage keeping obligations under the *Workplace Relations Regulations 2006*.

New Unlawful Dismissal Laws

138. Proposed s.346ZF in conjunction with s.346ZG, would prohibit an employer from dismissing (or threatening to dismiss) an employee if the sole or dominant reason for doing so is that a workplace agreement does not (or may not) pass the fairness test.

139. This is a reverse onus of proof offence and it is presumed that the employer's sole or dominant purpose for dismissing the employee was that the workplace agreement does not, or may not, pass the fairness test.

140. Therefore, the employer must establish (on the balance of probabilities) that the sole or dominant purpose for dismissing the employee was not a contravention of subsection 346ZF(1).

141. The rationale for reversing the evidentiary burden is contained in the explanatory memorandum (p.32):

> The onus of proof is reversed because of the substantial evidentiary difficulty an applicant would face if they were required to prove what the 'purpose' of an employer was in dismissing the employee – matters that would be peculiarly within the knowledge of the employer and would be easier for the employer to disprove than for the applicant to prove.

142. An employer who breaches new provisions can be liable to pecuniary penalties of $33,000 (for a body corporate) and $6,600 (for an individual) respectively.

143. An employee who is dismissed would be entitled to compensation under the new proposed Division 5A of Part 8 of the Act.

144. Proposed s.346ZG would enable a Court on application by a workplace inspector, employee or union (subject to a written authority and eligibility criteria), or a person prescribed by the regulations to issue:

> (1)(a) an order requiring the employer to pay a specified amount to the employee as compensation for damage suffered by the employee as a result of the contravention;
>
> (1) (b) any other order that the Court considers appropriate.
>
> Note: The employee may still be entitled to compensation under section 346ZD if his or her workplace agreement does not pass the fairness test.
>
> (2) The orders that may be made under paragraph (1)(b) include:
>
> (a) injunctions; and
>
> (b) any other orders that the Court considers necessary to stop the conduct or remedy its effects.

145. In relation to these powers, the explanatory memorandum (at p.33) states that *"other orders that the Court may make could include reinstatement or injunctions."*

146. These provisions may have the effect of limiting the ability of an employer to dismiss an employee for totally unrelated reasons to an agreement not passing the fairness test. For example, although there is the qualifying words, "sole or dominant", an employer who dismisses an employee for serious misconduct or genuine operational reasons,

where this occurs either during or after an agreement is subject to scrutiny by the *Workplace Authority*, may be the subject of lengthy investigation by the Workplace Ombudsman.

147. As a union is an eligible person able to initiate Court proceedings on behalf of affected employees, while the Workplace Ombudsman may not take any further action against an employer, it would appear possible for the union to take action nonetheless.

148. In addition to the possible pecuniary penalty of up to $33,000 per contravention, the powers of the Court upon application by eligible persons, are extensive and include reinstatement.

149. ACCI believes that an order under proposed s.346ZG(1)(a) should be subject to a monetary cap as restitution for back-pay would already be available to an employee if the agreement does not pass the fairness test.

150. The regulations should not allow another person to be eligible to bring prosecutions on behalf of an employee. ACCI submits that the most appropriate enforcer should be the independent inspectorate. We can see no basis for the inclusion of s.346ZG(3)(d).

Anti-coercion Offence

151. The explanatory memorandum states that proposed s.346ZH *"would prohibit an employer, by any act or omission in relation to a workplace agreement, coercing an existing employee to agree, or not to agree, to modify or exclude a protected award condition."*

152. Proposed s.346ZH does not apply to protected action under s.435 of the *Workplace Relations Act 1996*. The intention of which is to exclude legitimate and legal protected action by an employer.

153. An employer who breaches new provisions can be liable to pecuniary penalties of $33,000 (for a body corporate) and $6,600 (for an individual) respectively.

154. ACCI believes that this offence is an unnecessary duplication of existing prohibited conduct provisions already contained under Part 8 (Division 10) and Part 16 of the *Workplace Relations Act 1996*

155. Part 8, Division 10, particularly ss.400(1) and (5) already contains provisions which would conceivable cover proposed s.346ZH:

s.400 Coercion and duress

(1) A person must not:

(a) engage in or organise, or threaten to engage in or organise, any industrial action; or

(b) take, or threaten to take, other action; or

(c) refrain, or threaten to refrain, from taking any action;

with intent to coerce another person to agree, or not to agree, to make, approve, lodge, vary or terminate a collective agreement.

…

(5) A person must not apply duress to an employer or employee in connection with an AWA.

156. In addition, an employee may also have protection under Part 16 (freedom of Association) laws, particularly s.792.

11. WORKPLACE AUTHORITY & WORKPLACE OMBUDSMAN

Workplace Authority

157. Schedule 2 of the Stronger Safety Net Bill seeks to amend the Workplace Relations Act 1996 by amending the current provisions in relation to the Office of the Employment Advocate (OEA) and create a statutory authority known as the Workplace Authority.

158. This new agency will be charged with lodging AWAs and collective agreements, administering agreement making and the new fairness test, and promoting agreement making.

159. The provisions create the new agency, transmit the OEA's functions to the WA, create the Director and Deputy Director positions and set out a range of public sector management issues.

160. In addition to the functions of the former Employment Advocate, the WA Director will be responsible for:

a. Administering the fairness test under proposed Division 5A of Part 8.

b. Providing a pre-lodgement facility to check agreements against the fairness test.

c. Providing information and advice to employees and employers about workplace agreement making and Commonwealth workplace relations laws.

d. Providing a comprehensive information service about pay and conditions issues.

e. Providing advice specifically targeted at young people and people from a non-English speaking background.

161. ACCI understands that the proposed Workplace Authority will operate virtually the same as the current Office of the Employment Advocate and will require further staff to administer the new fairness test.

162. ACCI supports the continued operation of agreement making under an efficient system and would anticipate that the newly established WA will continue to provide education to all key stakeholders and utilise electronic systems of administering/facilitating agreement making.

Workplace Ombudsman

163. Schedule 3 of the Stronger Safety Net Bill seeks to amend Part 6 of the *Workplace Relations Act 1996* and create a new statutory agency to be titled the Office of the Workplace Ombudsman, which will be headed by a Workplace Ombudsman.

164. This new agency will be charged with compliance and enforcement, as well as education to promote compliance and will replace the functions of the Office of Workplace Services (OWS).

165. The functions of the Workplace Ombudsman are detailed in proposed s.166B and include the following:

> (a) to assist employees and employers to understand their rights and obligations under Commonwealth workplace relations legislation;
>
> (b) to promote compliance with Commonwealth workplace relations legislation, including by providing assistance and advice and disseminating information;
>
> (c) to monitor compliance with Commonwealth workplace relations legislation;
>
> (d) to investigate suspected contraventions of Commonwealth workplace relations legislation;
>
> (e) to inquire into any act or practice that may be contrary to Commonwealth workplace relations legislation;

(f) to refer matters to relevant authorities;

(g) to institute proceedings to enforce Commonwealth workplace relations legislation;

(h) to appoint workplace inspectors;

(i) to give, as necessary, directions relating to the exercise or performance of appointed workplace inspectors' powers or functions;

(j) to represent employees who are, or might become, a party to proceedings under this Act, in situations where the Workplace Ombudsman considers that representing the employees will promote compliance with Commonwealth workplace relations legislation;

(k) any other functions conferred on the Workplace Ombudsman by Commonwealth workplace relations legislation.

Note: Among other things, the Workplace Ombudsman has the functions of a workplace inspector because section 167 makes the Workplace Ombudsman a workplace inspector.

166. ACCI understand proposed Schedule 3 creates the new agency, transmits the OWS' functions to the Workplace Ombudsman, creates the Workplace Ombudsman position and set outs a range of public sector management issues.

167. The proposed provisions make clear that the Workplace Ombudsman will be able to police both the *Workplace Relations Act 1996* (and Regulations) and the *Independent Contractors Act 2006* (and Regulations).

168. ACCI understands that the proposed Workplace Ombudsman and the Office of the Workplace Ombudsman, while having a much larger mandate under its statutory functions to ensure compliance with a range of workplace relations matters, will operate virtually the same as the current Office of Workplace Services with the additional compliance functions in relation to the fairness test.

12. Registered Organisations

169. Additional amendments to the Stronger Safety Net Bill introduced on 29 May 2007, concern the continuing registration of employer organisations and unions under Schedule 1 to the *Workplace Relations Act 1996* (Registration and Accountability of Organisations or RAO)

170. ACCI understands that the additional amendments seek to clarify the criteria for current and future registered organisations given the changed constitutional underpinnings of the *Workplace Relations Act 1996* from being based, primarily, on the conciliation and arbitration powers under the Constitution, to (primarily) the corporations' power.

171. Currently, it is a requirement for registered employer organisations to continue to either be a constitutional corporation or have a majority of its members that are constitutional corporations.

172. Under proposed by items 1 – 18 of the additional amendments, an employer organisation need now only have "some or all" of its members as constitutional corporations to remain registered. Similarly, a union need only have "some or all" of its members employed by a constitutional corporation.

173. It is our understanding that the amendments may be necessary for some unions and employer organisations that may not be trading or financial constitutional corporations in their own right and therefore rely on the "majority" test.

174. Under current arrangements, the Australian Industrial Relations Commission is empowered to review on its own motion the registration eligibility of organisations after three years from the commencement of the *WorkChoices* amendments (ie. 27 March 2009) and determine whether they continue to fulfil the criteria.[5]

175. This may prove difficult for some organisations that are not themselves constitutional corporations, or their members are not constitutional corporations (eg. those covering farms, pharmacies, or statutory non-trading body corporates).

176. Equally, this may also prove difficult for unions the majority of whose members may not be employed by a constitutional corporation (eg. police unions).

177. ACCI welcomes these additional amendments in order to provide legal certainty and the continuation of federally registered organisations under the *Workplace Relations Act 1996*.

[5] See item 24, to Schedule 4, Part 2 of the *Workplace Relations (WorkChoices) Amendment Act 2005*.

13. PROHIBITED CONTENT

178. The second set of additional amendments to the Stronger Safety Net Bill concerns the strengthening and reinforcement of the matters which are prohibited content for the purposes of agreement making under the *Workplace Relations Act 1996*.

179. It is our understanding that items 1 – 3 of the additional amendments seek to insert into the *Workplace Relations Act 1996*, a list of matters in addition to the prohibited content matters currently contained in Chapter 2, Part 8, Division 7 of the *Workplace Relations Regulations*.

180. ACCI understands that the matters to be expressly prohibited largely replicate s.810 (objectionable provisions) of *WorkChoices*.

181. Therefore, in addition to the prohibited content matters contained in Regulations, the following will specifically be prohibited content under the *Workplace Relations Act 1996*:

    a. A provision that requires or permits any conduct that would contravene Part 16 (Freedom of Association);

    b. A provision that directly or indirectly requires a person:

       (i) to encourage another person to become, or remain, a member of an industrial association; or

       (ii) to discourage another person from becoming, or remaining, a member of an industrial association;

    c. A provision that indicates support for persons being members of an industrial association;

    d. A provision that indicates opposition to persons being members of an industrial association;

    e. A provision that requires or permits payment of a bargaining services fee.

182. The amendment will reinforce the range of matters which are prohibited content by making this explicit in the Act itself.

14. RESTORING FAMILY WORK BALANCE BILL 2007

Introduction

183. The *Restoring Family Work Balance Bill* is the Private Member's Bill introduced by Senator Fielding on 29 March 2007[6].

184. ACCI's overall position on this Bill is:

    a. The amendments raise comparable policy issues to the subsequent government legislation[7], but for similar reasons, ACCI does not consider them to be necessary.

    b. Any purported need for the amendments has been obviated by the introduction of the *Stronger Safety Net Bill* also being considered by this Committee.

185. ACCI also cannot agree with the long title of the Bill and the assumptions which appear to underpin it. The long title is:

> A Bill for an Act to give back Australian workers their public holidays, meal breaks, penalty rates and overtime and to protect their redundancy, and for related purposes.

186. The *WorkChoices* amendments did not remove public holidays, meal breaks, penalty rates, or overtime pay in the manner suggested.

187. Rather:

    a. Award obligations specifically continue to apply until displaced by an agreement (and of course there is not requirement that any agreement vary or exclude any of these matters).

    b. In regard to holidays and meals (as well as hours), new entitlements were introduced in statute which had never been part of or system before. This increased the entitlements of employees, in particular those who have never been subject to award coverage.

    c. Redundancy entitlements are protected unless varied by agreement.[8]

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[6] Senate Hansard, 29 March 2007, p.10
[7] The *Stronger Safety Net Bill.*
[8] The only employees who had their redundancy obligations changed were some small business employees who have traditionally been excluded from severance payments anyway.

d. With the creation and extensive resourcing of OWS, there is more active enforcement of these entitlements than was previously the case.

188. Item 8 of the amendments would insert the following new wording into the meal break entitlements of employees (Section 607[9]):

> This section must not be modified or excluded from an employee's workplace agreement

189. Currently there is a default situation in which 607 applies unless displaced by an award, workplace agreement or one of the range of preserved and continuing pre-*WorkChoices* agreements listed in Regulation 12.1.

190. It should be recalled that:

a. Awards continue to contain meal break provisions, and these continue to apply. This is the effect of s.608(a).

b. There can be no change to meal break entitlements without a specific agreement to do so. Without an agreement to change meal break arrangements, an employer would breach the award in not providing a meal break.

c. Any penalty rates for missing or not observing a meal break would be covered by the new fairness test.

d. Employers have OHS obligations to provide rest periods. Duties to provide a safe and healthy workplace include duties in relation to rest periods / breaks during shifts when appropriate.

191. Scope to move, delay, extend or contract a meal break by agreement is not new and was not a creation of the *WorkChoices* amendments in March 2006. It has long been quite possible to do an agreement which changes meal breaks, including under the bargaining provisions which preceded not just the 2006 amendments, but also the 1996 amendments.

192. An unintended effect of the manner in which the amendment is structured may be to provide some people with less scope to balance their working and family lives.

[9] Part 12 of the *Workplace Relations Act 1996*.

193. Witness evidence in the 2004/2005 AIRC *Work and Family Test Case*[10] included that of Ms Joanne Dennington. Ms Dennington specifically wanted to adjust her times of work, and not take a scheduled lunch break during a 5½ or 6 hour shift.

194. The evidence in the case was that:

> Joanne Dennington's evidence is that she takes her lunch break at 3 o'clock, picks the kids up from school, takes them home, waits for her 18-year-old son to get home, and then goes back to work so that she can finish the day's work, and without that flexibility she would be forced to resign her job.[11]

195. She preferred to work through a scheduled break, so she could leave earlier and pick up her children from school. She was so committed to this outcome that she requested an hours arrangement of her employer which appeared to breach the award.

196. This is an illustration of the problems created by legislative prohibitions such as that proposed in the amending legislation.

197. Another example may be a shift or overtime arrangement. Employees working on a shift or a period of overtime may prefer to be home with their families earlier than to be delayed by being forced to take a break. They may want to agree with their employer to work through for 5½ or 6 hours, in preference to having 7 hours away from home, 30 minutes of which may be spent

198. Ultimately, ACCI is not aware of employees being denied rest periods/ meal breaks under awards or agreements. It has been possible to bargain on these arrangements for years, but there has been no negative feedback or complaint such that changes are needed. We are simply not aware of people being asked to work seven or eight hour days without meal breaks.

199. When regard is had to the real circumstances in which employers and employees seek to modify breaks, move them etc, it is actually in the interests of working people and their family lives to retain, subject to a safety net, the flexibility offered not just in *WorkChoices*, but also in the system which preceded it.

200. Item 5 of the amendments would insert a new s.226(4A) which provides in the broad for a 'penalty rate' of time and one half when an employee works beyond their ordinary hours of work, or additional hours between midnight and 6am.

[10] Family Provisions
[11] Work and Family Case Transcript, PN1148

a. This would apply to all employees, including those who never had an overtime entitlement under an award. This would see every manager and professional in Australia paid a penalty rate on their rate of pay.

   i) It would see, for example, money market traders paid hundreds of thousands of dollars paid time and half when trading into New York or London.

   ii) Someone on $300,000 would see their rate of pay go from $150 an hour to $227 per hour.

b. This would complicate annualised and all up salary arrangements, for a range of employees including managers and professionals. Compliance in the real world would be very difficult. There would be a real risk of employers paying penalties twice.

c. The hours mentioned would have attracted penalties under awards. Employees with such overtime entitlements retain them under WorkChoices unless modified by agreement.

d. The Stronger Safety Net Bill will ensure an employee would receive fair compensation for any modification or exclusion of overtime penalties (e.g. in an annualised salary) – so the existing penalties will be preserved.