Chapter 2

Government Senators' Report

The workplace relations system

2.1 Since 1996, the workplace relations system has undergone significant reform, resulting in substantial benefits for the Australian economy. These reforms have given the marketplace (both workers and their employers) the flexibility that has driven increased productivity, enhanced economic growth, improved wages (by 20.8 per cent in real terms), far fewer industrial disputes (to the lowest level in nearly 100 years), and greatly increased opportunities for employment. The strength of the economy has provided workers with the highest level of job security experienced for decades and delivered sustained improvement in the standard of living.

2.2 Despite the real and obvious benefits of these reforms, the workplace relations debate has been characterised by accusations that the reforms have involved a campaign to drive down wages, remove entitlements and undermine safety net provisions. The opposite has occurred. Such accusations were made by those with antiquated notions of an assumption of adversarial workplace relations.

2.3 Objective commentators have noted the importance of the workplace relations reforms. In its *Economic Survey of Australia 2006*, the Organisation for Economic Cooperation and Development highlighted the material improvement of Australian living standards since the 1990s and the importance of the workplace relations reforms 'most notably in the second half of the 1990s'.[1] Further, it argued that these reforms were essential instruments for productivity growth, greatly strengthened the economy's resistance to shocks such as the Asian economic crisis in the late 1990s, the global downturn at the turn of the millennium, persevering drought and the end of the property boom.

2.4 The Government's reforms have been an essential response to the changes required in the modern workplace environment and the need for industry and workers to operate in conditions that allow a more flexible approach to workplace relations and agreement formulation. Industries with the maximum flexibility in workplace relations have also had the highest productivity and wages growth. In this context, the Government's reforms also have been crucial for ensuring Australia's retention of its competitiveness in the global market, notable for rapid economic and technological change. It is an approach that conceives of employers and employees working collaboratively together for a mutually beneficial outcome.

---

1 Organisation for Economic Cooperation and Development, *Economic Survey of Australia*, July 2006, www.oecd.org/document/28/0,2340,en_33873108_33873229_37147228_1_1_1_1,00.html (accessed 22 May 2007).

2.5 In the past, Australia's centralised workplace relations system has allowed wage rises to be transferred across the economy, including into unproductive sectors. These wage increases, without justified and linked productivity increases, artificially held down wages in productive work places and at the same time resulted in wages break-outs that were inflationary and put upward pressure on the cost of basic goods and services.

2.6 By moving the industrial relations system away from centralised models, the Government has allowed employees to maximise their earning potential by providing incentives to improve productivity with links to wage rises. These links have instilled a process that has acted as a curb on inflationary pressure. Consequently, wage rises are sustainable and promote increased competition that ameliorates price increases. Some elements of the economy, such as mining, have been extremely profitable and seen substantial productivity rises, which has translated into wages growth. Productivity has also been stimulated by facilitating direct negotiation at the workplace level that is conducive to creating a climate of cooperation. The sustainability of current living standards and economic growth rests on such continued improvements in productivity.

The 2005 Workplace Relations reforms

2.7 In 2005, the Government took advantage of the strong mandate for economic reform evident in the result of the 2004 elections to implement further reform. On over 40 occasions prior to the 2004 election, the Opposition parties had voted against various proposed reforms including the removal of the unfair dismissal laws. This involved the introduction of legislation aimed at providing further improvements to modernise the workplace relations system. It was also necessary to enhance the sustainability of the economic benefits achieved over the previous nine years by making the economy more durable to future challenges and more competitive. In recent years, global economic growth has increased dramatically. While this has assisted economic development, it has also underscored the productivity increases among international competitors and the need for further reform.

2.8 The 2005 reforms were responsible for establishing a single national industrial relations system for constitutional corporations, which was crucial for maintaining global competitiveness. It was also an inevitable development in an increasingly globalised world and economy. Previously, employees and employers were forced to contend with separate state and Commonwealth systems—comprising 130 pieces of legislation and 4000 different awards—that were confusing and inefficient.

2.9 The centrepiece of the Government's reforms was the strengthening and streamlining of the Australian Workplace Agreements (AWAs) process and extending the maximum agreement life from three to five years. This provided a simpler and more flexible agreement-making process that encouraged efficiency and took into account the interests of both employees and employers. This was accompanied by a streamlining of the lodgement process. The award system was an impediment for ensuring workplace relations accommodated individual workplace circumstances and;

therefore, hindered jobs growth. Consequently, AWAs have become integral in key industries such as mining. As submitted by the Australian Mines and Metals Association, a Melbourne Institute study has revealed that average wage increases to workers on individual contracts exceeded those under collective agreements and awards.[2]

2.10 The Government also acted to prevent damaging industrial action from threatening economic growth. Disputes were commonplace before the Coalition assumed government in 1996. The submission of the Australian Mines and Metals Association notes in 2006 the total days lost to industrial action in the resources sector declined by 98.6 per cent from the 1996 levels, and this alone has resulted in a significant increase in productivity.[3] The Government's reforms have encouraged employees and employers to resolve disputes without the intervention of third parties, specifically through introduction of a model dispute settlement procedure, requiring improved transparency in decisions to engage in industrial action. They also empowered the Minister for Employment and Workplace Relations to intercede in unlawful or damaging action. On 23 May, the CEO of BHP Billiton commented that the fostering of this direct relationship had resulted in a 25 per cent increase in productivity.[4]

2.11 The Work Choices legislation established—for the first time at the Commonwealth level—minimum conditions of employment that included minimum rates of pay, maximum ordinary hours of work, four weeks annual leave, 10 days personal/carers leave and up to 52 weeks unpaid parental leave. In many instances, these conditions represented an upgrade from many awards. The legislation also made it a requirement for workplace agreements to include pay and conditions no less favourable than those of the Australian Fair Pay and Conditions Standard (the Standard). The Australian Fair Pay Commission (AFPC) was established to set and adjust these minimum wage rates.

2.12 The Government also addressed other impediments to employment growth, including a review of unfair dismissal laws. Employers, especially small business owners who lacked the resources to conduct extensive recruitment process or manage difficult employees, now feel more confident about employing workers and offering more security of employment.

Benefits for employers and employees

2.13 The 2005 reforms resulted in a simpler workplace relations system that empowered employees and employers to negotiate flexible agreements at the workplace level. The capacity to negotiate conditions has benefited both parties and has increased the total amount of work available. Under the Government's reform

2 Australian Mines and Metals Association, *Submission 19*, p. 13.

3 Australian Mines and Metals Association, *Submission 19*, p. 3.

4 Australian Mines and Metals Association, *Submission 19*, p. 9.

program over the past 11 years, unemployment has fallen to 4.2 per cent with more than two million jobs created, and real wages have risen by 20.8 per cent. Under its 2005 reforms, the Government increased the capacity to offer part-time or other arrangements that accommodate family requirements. Nearly 95 per cent of jobs created since their implementation have been full-time. They have also been granted the ability to offer a higher standard hourly rate of pay, as opposed to penalty rates, which diminishes the pressure some employees may feel to work weekend or other unsocial hours to maximise earnings. The Government also has transferred to individuals the authority to negotiate conditions relevant to their circumstances and extraneous entitlements in return for direct benefits to them and their families.

2.14 All of these factors combine to ensure businesses can operate with increased flexibility. Administrative burdens and non-wage labour costs have been reduced. Increased profitability has resulted in increased investment. Taxation revenue has increased and increases in interest rates have been arrested. The increased competition that has been stimulated has added to the encouragement for employers to offer greater incentives to employees, in order to retain the most productive and best workers. The increased tax revenue benefits have led to greater government ability to support investment in health, education and a social safety net.

2.15 The figures tell the story of reform. In the 12 months up to February 2007, average weekly earnings rose by 4.9 per cent.[5] Most workers on AWAs have received higher rates of pay than existing awards. Between late 2004 and late 2006, the number of employees in the Australian economy rose by 7.5 per cent, while workers in more precarious and casualised employment circumstances fell.[6] Since 27 March 2006, 94.8 per cent of new jobs created have been full time. As the Australian Chamber of Commerce and Industry (ACCI) told the committee during the inquiry, the flexibility in the workplace relations system injected by the Government ensures the economy would be less affected by a recession and recover more quickly from it.[7]

The current safety net

2.16 In addition to the improvement to flexibility of workplace conditions over the past eleven years, the Government has been committed to the protection of minimum wages and conditions. This has included legislative protection of a safety net of rights such as with respect to unlawful termination of employment, equal remuneration for work of equal value, parental leave and freedom of association. The safety net has seen the Government's job creation flourish, with a solid reduction in the unemployment rate.

---

5 *ABC online*, 'Average wages rise by 4.9pc', 17 May 2007, http:www.abc.net/news/newsitems/200705/s1925673.htm (accessed 17 May 2007).

6 Mark Wooden, 'Most Australians still picking up an honest wage', 5 May 2007, *Australian Financial Review*.

7 *Committee Hansard*, EWRE 18, 8 June 2007.

2.17 Under the 2005 reforms, the Government established the Australian Fair Pay Commission to maintain a minimum wage safety net. The AFPC is independent—guaranteed by a statutory appointment, considers issues from an evidentiary basis and approaches resolutions from the perspective of the effect on broader economic prosperity. This responsibility involved setting and adjusting minimum wages to protect the most vulnerable workers in the community such as juniors, trainees, apprentices, people with disabilities and piece workers. The conditions of the Standard have been enshrined in law and include annual leave, personal/carer's leave (including sick leave), parental leave (including maternity leave), maximum ordinary hours of work, and a minimum wage. Employees in the commonwealth workplace relations system must receive pay and conditions equal to or more favourable than those in the Standard.

2.18 The Government also retained the awards system, but with further simplification that preserved minimum safety net entitlements. This involved protection of certain award conditions that can only be modified or removed by specific provisions in an agreement. The Government also has preserved specific award conditions for all current and new award reliant employees.

Provisions of the stronger safety net bill

2.19 The Workplace Relations Amendment (A Stronger Safety Net Bill 2007) (hereafter the bill) provides for a stronger safety net through the application of a fairness test, which will be administered and maintained through two independent statutory authorities—the Workplace Authority and the Workplace Ombudsman.

The roles of the Workplace Authority and the Workplace Ombudsman

2.20 The Workplace Authority and the Workplace Ombudsman will receive additional resources including additional funding of $370 million to be shared by the two bodies over the next four years. There will also be an increase of 502 staff in the Workplace Authority to perform the fairness test and an additional 74 staff in the Workplace Ombudsman to undertake compliance checks. The directors of the bodies will be appointed by the Governor-General.

2.21 The Workplace Authority will be required to provide information regarding workplace relations legislation, rights and obligations, as well as accept lodgements. It also will assess whether or not agreements pass the fairness test, and refer relevant matters to the Workplace Ombudsman.

2.22 The Workplace Ombudsman will assist employers and employees in understanding obligations under the law and agreement formulation, monitor and promote compliance to Commonwealth workplace relations legislation, investigate possible non-compliance, enforce the legislation and represent employees in proceedings where the representation would promote compliance with the act. This will include regular random audits of employers of young people.

Application of the fairness test

2.23 The stronger safety net and fairness test will apply to workers on AWAs in industries or occupations where they would be entitled to protected award conditions and the AWA modifies or excludes one or more of those conditions, have a base salary of less than $75 000 per year and on agreements lodged on or after 7 May 2007. The salary does not include loadings, benefits or allowances other than casual loadings.[8] The bill allows regulations to be made to increase the $75 000 threshold for the fairness test, but not for it to be lowered. The Fairness test applies to the varying of relevant agreements on or after 7 May 2007 including those originally developed before that date.

2.24 Collective agreements are also subject to the fairness test, although it is applied when one or more employee subject to the agreement are employed in an industry or occupation regulated by an award and there is no monetary threshold. Collective agreements will be required to provide fair compensation in the overall effect with respect to modification or removal of protected award conditions to reflect that the test is applied to a number of employees.

2.25 The protected conditions pertaining to the fairness test are penalty rates, observance of and payment for public holidays, shift and overtime loadings, monetary allowances, annual leave loadings, rest breaks and incentive-based payments and bonuses. They are those that apply under a federal award or a preserved State instrument, which binds the employer. If there is no such instrument, the Workplace Authority will be able to designate an appropriate federal award for the purpose of the Fairness Test. The Department of Employment and Workplace Relations (DEWR) has advised that the minimum entitlements in the Australian Fair Pay and Conditions Standard cannot be traded off.[9]

2.26 All relevant working arrangements—both monetary and non-monetary—will be involved in the application of the test, including where relevant personal circumstances and family friendly conditions. The explanatory memorandum provided an example that an employee may negotiate to work irregular hours to accommodate child care responsibilities, which may involve forgoing entitlements to penalty rates.[10] The work obligations of the employee will also be considered, such as to ensure adequate compensation is provided for the loss of penalty rates associated with regular shift work or weekend work. Although the Workplace Authority will consider the complete scope of entitlements and conditions available in an agreement, it is expected that financial compensation will be provided in most cases. Non-monetary compensation constitutes compensation that is considered to be 'a money value equivalent' or provides 'a benefit or advantage on the employee which is of significant

8 Department of Employment and Workplace Relations, *Submission 18*, p. 5.

9 Department of Employment and Workplace Relations, *Submission 18*, p. 4.

10 *Explanatory Memorandum*, p. 17.

value to the employee'.[11] The bill provides rights for the Workplace Authority to collect information in making assessments.

2.27 In 'exceptional circumstances' and if 'not contrary to the public interest', the Workplace Authority has the capacity to consider various additional factors in conducting the Fairness Test.[12] These include the work obligations and employment circumstances of the worker, the industry, as well as the location and economic circumstances of the business. Such measures may eventuate as necessary to deal with a short-term crisis to a business or assist in reviving its survivability and preserving jobs.

Other key aspects of the bill

2.28 The bill includes protections for employees, including that employees cannot be dismissed because a workplace agreement fails or may fail the fairness test. In cases alleging a dismissal has occurred for these purposes, the onus of proof will be on the employer to prove that the dismissal resulted from other circumstances. The bill also ensures employees cannot be coerced into modifying or removing protected award conditions and cannot be required to sign an AWA as a condition of continued employment when new employers take over a business.

2.29 In the event that agreements do not pass the Fairness Test, the relevant industrial instrument will apply until an agreement is formulated that passes the test. All relevant parties will be notified of the decision and employers will be liable for back pay to compensate the workers from the time the agreement was lodged. The employee and employer will have 14 days to address the problems including with access to advice from the Workplace Authority. The Workplace Authority will not be able to arbitrate an agreement. However, it will provide pre-lodgement assessment advice to facilitate the preparation of fair agreements. If agreements are not rectified within the 14 day window, the agreement would cease to exist and the parties would be bound by the agreement that would have applied but for the unfair agreement. Also in the case of an unfair agreement, employees will be entitled to recover any shortfalls for any entitlements that should have been paid during the fairness test period.

2.30 Amendments to the bill clarify and simplify existing provisions in the workplace relations legislation by clarifying that bargaining services will become prohibited content in agreements. This is designed to ensure employees are not compelled to pay for bargaining services not sought or desired. It does not prevent persons from entering their own separate contract with a third party to provide for such services.[13]

---

11 Paragraph 346M(7).

12 Paragraph 36M(4).

13 Department of Employment and Workplace Relations, *Submission 18*, p. 13.

2.31 Other amendments to the bill remove the requirement that federally registered organisations must have a majority of members in the federal system to be registered.[14] This will provide certainty to employers and employees in the Commonwealth system, relevant to farming, police and the public sector organisations where a majority of employees may be in the state system.

Support for the bill

2.32 There is strong support for the bill, most evident in the submissions of ACCI and the Australian Industry Group (Ai Group). In many respects they considered the bill reasonable but unnecessary as many employees were receiving higher levels of remuneration and conditions were only traded following agreement between the parties to an agreement. It was suggested that perceptions of disadvantaged employees was driven by politically motivated negative advertising and publicity. However, the supporters of the bill considered that if a fairness test was required, the prescribed processes under the bill were appropriate, subject to certain amendments.[15] Both ACCI and IPA highlighted concerns about the administrative burden that would be imposed on employers in agreement making.[16]

2.33 IPA also supported the bill, arguing that only a small number of employers had sought to use legal rights to disadvantage employees. However, it considered the amendments were necessary to balance the difficulties of ensuring workplace relations have appropriate flexibility, while recognising the potential inequality inherent in employment relations. It maintained that the bill addressed the uniqueness of the unequal nature of the employment contract and made appropriate provisions to remove the legal right of an employer to reduce an employee's overall remuneration while imposing additional work requirements.[17]

2.34 ACCI and the Ai Group also supported the additional amendments related to providing greater certainty regarding federally registered organisations and the reinforcement of the prohibited content provisions.[18]

Concerns about the bill

2.35 Many of the submissions raised concerns about the bill and called for substantial amendments. They argued that there was a distinction between the stated objective of providing a strong safety net and the application of what was proposed.

---

14 Department of Employment and Workplace Relations, *Submission 18*, p. 14.

15 Australian Chamber of Commerce and Industry, *Submission 10*, pp. 1-4; Australian Industry Group, *Submission 20*, p. 10.

16 Australian Chamber of Commerce and Industry, *Submission 10*, pp. 1-4; Institute of Public Affairs, *Submission 4*, p. 4.

17 Institute of Public Affairs, *Submission 4*, pp. 3-4.

18 Australian Chamber of Commerce and Industry, *Submission 10*, pp. 31-32; Australian Industry Group, *Submission 20*, p. 20.

The Shop Distributive and Allied Employees' Association (SDA) stated its view that the bill 'will simply keep a weak or nearly non-existent safety net in operation and...does nothing to provide for a genuine stronger safety net'.[19] Many of the submitters suggested that without addressing what they considered to be the inherent unfairness of the broader legislation and the inequity in the employment relationship, employees can be misled regarding their entitlements and will continue to be disadvantaged in agreement formulation.

Main findings of the inquiry

2.36 The committee majority report has addressed the key elements of the bill that attracted comments from submitters and witnesses over the course of the inquiry.

The stronger safety net criteria and employee coverage

The income threshold

2.37 The provisions of the safety net do not apply to employees with a base salary of $75 000 or more per year. ACCI, the Ai Group and Telstra raised concerns with the $75 000 threshold and recommended amendment to reduce the number of people covered and to clarify that this would apply to an employee's remuneration package, rather than gross basic salary. ACCI's concern was that the existing provisions would include many employees who are relatively highly paid.[20] Telstra raised the concern that incentive remuneration that is not incorporated in an AWA but forms a substantial component of an employee's remuneration is not considered. While the AWA is a static document, incentive schemes are regularly changed to adapt to business goals. Telstra provided an example of a recent AWA that allowed an employee the opportunity to boost their salary from $46 000 to $84 000.[21]

2.38 However, some of the submitters called for all employees to have the benefit of legislative protections and many specifically raised concerns about the exclusion of employees with earnings above or, on earnings projected to a full-time basis, to be above the $75 000 threshold.[22] It was estimated that this would exclude between 1.14 and 1.4 million workers or 13 per cent of employees, and 90 per cent of workers on AWAs.[23] The Community and Public Sector Union State Public Services Federation

---

19 The Shop Distributive and Allied Employees' Association, *Submission 14*, pp. 2, 4.

20 Australian Chamber of Commerce and Industry, *Submission 10*, p. 19; Australian Industry Group, *Submission 20*, p. 8.

21 Telstra, *Submission 27*, p. 2.

22 This included the QCU, APESMA, CPSU SPSFG, ACTU, Australian Education Union, Independent Education Union of Australia, AMWU, FSU, the Victorian Workplace Rights Advocate, and the MEAA.

23 Australian Council of Trade Unions, *Submission* 8, p. 4; The Queensland Council of Unions, *Submission 3*, p. 2; Media, Entertainment and Arts Alliance, *Submission 17*, p. 3; The Community and Public Sector Union State Public Services Federation Group, *Submission 7*, p. 2.

Group (CPSU PSFG) disputed the assumption that workers in this category necessarily had a greater capacity to negotiate their conditions of employment.

2.39 The Association of Professional Engineers, Scientists and Managers (APESMA) submitted that, as a result of this threshold, many professional and managerial employees would not be offered any protections and could lose benefits without fair compensation. It pointed out this would include 70 per cent of technology based professionals, and highlighted its concern that many would be junior employees. APESMA advocated that the safety net benefits should apply to all employees irrespective of remuneration level, which would not prejudice flexibility in agreement making. It submitted that, at the least, it should include all those who would otherwise be subject to award conditions, particularly because relevant awards do not exclude conditions on the basis of salary.[24]

2.40 The Media, Entertainment and Arts Alliance (MEAA) highlighted concerns that the threshold would exclude many employees on part-time salaries that fall well short of the $75 000 threshold. It pointed out that this was a particular problem in the entertainment industry, due to the short-term, unstable and irregular nature of many employment arrangements. A calculation of annual income by projecting payment for one job can dramatically overstate a worker's income.[25] In its testimony at the hearing, the Australian Council of Trade Unions (ACTU) also raised its concern that the fairness test would not be applied to many part-time workers on much less than $75 000 per year, because their projected annual earnings would exceed the threshold. It pointed out that many have deliberately chosen hours around family responsibilities but will not have protection of benefits such as penalty rate entitlements.[26]

2.41 The Independent Education Union of Australia noted that many and eventually most of its members would not be offered protections under the safety net. It argued that most of the AWAs in the non-government school sector covered senior officials who were remunerated above the threshold. Further, it pointed out that recent industrial agreements in NSW would mean that all teachers after three years service would be excluded from the fairness test.[27]

Date of agreement lodgement

2.42 Many of the submitters raised concerns that employees on agreements lodged between 27 March 2006 and 7 May 2007 would be excluded from the safety net

24 The Association of Professional Engineers, Scientists and Managers, *Submission 5*, p. 2.

25 Media, Entertainment and Arts Alliance, *Submission 17*, p. 7.

26 *Committee Hansard*, EWRE 37, 8 June 2007.

27 Independent Education Union of Australia, *Submission 28*, p. 1.

protections.[28] It was submitted that many employees had been subjected to agreements that abolished a large range of key award entitlements including penalty, overtime, on-call and public holiday rates; annual leave loading; uniform, meals, vehicle and travelling allowances; long service leave; redundancy pay; higher duties; meals; time off for apprenticeship training; apprenticeship supervision; tool allowances; minimum time off between shifts and payment for jury service. Further, the ANF submitted that often there was no financial compensation with a cited agreement having excluded an array of conditions, did not provide for a pay rise over its duration and prescribed the minimum pay of the Standard.[29] Professor Andrew Stewart of Flinders University argued that these employees should have the right to seek termination of these agreements, though should not be entitled to retrospective compensation.[30]

2.43 The Anglican Church Sydney Diocese submitted that these employees signed their agreements 'in good faith…or…without any genuine choice all all'.[31] It was argued that this exclusion would create different classes of employees with different rights and conditions often for the same work. According to the ACTU this amounted to approximately 961 000 workers employees.[32] Further, it was also submitted that these employees could be without these conditions protected under the safety net until May 2011 when some of the agreements are due to expire. The Queensland Council of Unions (QCU) and the ACTU also submitted that the exclusion of employees on agreements lodged in this period would protect a 'competitive advantage to those employers that moved to reduce wages and conditions' potentially for another five years.[33]

Award designation for the fairness test

2.44 The exclusion of employees from occupations or industries not 'usually regulated by an award',[34] would exclude 1.16 million employees according to ACTU.[35] The QCU cited a 2000 Government report that indicated 956 000 employees were not subject to an award noting the proportion has probably increased with the establishment of new businesses in non-award capacities since March 2006.[36] SDA

---

28 This included the ACTU, QCU, the NSW Commission for Children and Young People, the Australian Education Union, the Anglican Church Sydney Diocese, the CPSU PSFG, the AMWU, the NSW Government, the FSU, the RTBU, Job Watch Employment Rights Legal Centre, the Workplace Rights Advocate Victoria, Professor Andrew Stewart and the MEAA.

29 The Australian Nursing Federation, *Submission 2*, p. 3.

30 Professor Andrew Stewart, *Submission 21*, p. 2.

31 The Social Issues Executive Anglican Church Sydney Diocese, *Submission 25*, p. 1.

32 Australian Council of Trade Unions, *Submission* 8, p. 3.

33 Australian Council of Trade Unions, *Submission* 8, p. 3; The Queensland Council of Unions, *Submission 3*, p. 1.

34 Section 346M(a)(i)

35 Australian Council of Trade Unions, *Submission* 8, p. 4.

36 The Queensland Council of Unions, *Submission 3*, p. 2.

pointed out that the retail industry was only covered by federal awards in Victoria, the ACT and the Northern Territory, leaving 73% of employees in the industry excluded from the safety net protections.[37]

2.45 In response to some of these concerns raised during the inquiry, DEWR has indicated that an amendment will be moved in the Senate to ensure that the policy intention is reflected in the bill. This will guarantee that employees in 'traditionally' award covered areas are subject to the fairness test and that, in such circumstances, an award may be designated for comparison where the work of the employee is not regulated by a federal award.[38]

2.46 It was argued that the proportion of employees not 'usually regulated by an award' is likely to increase as the provisions regarding awards are restricted to federal awards. Consequently, it was put that they exclude any employee whose employment was before 27 March 2006 regulated or underpinned by a state award but subsequently made a workplace agreement. The ACTU, QCU, JobWatch, the Australian Education Union and Professor Stewart pointed out that the proposed clause 52AAA of Schedule 8 only applies to workers whose employment was governed by a Notional Agreement Preserving a State Award (NAPSA) immediately prior to the formulation of a workplace agreement that is subject to the fairness test.[39] The Australian Education Union and the Independent Education Union of Australia argued that this would mean that most teachers and educators would not be covered by the fairness test.[40]

2.47 ACCI acknowledged the appropriateness of using an award as a comparator for the fairness test in cases where the employee would have enjoyed award coverage, but for entering an agreement or arrangement. However, ACCI, the Ai Group, the RCSA and the NSW Government highlighted the potential adverse financial consequences for businesses that may be required to compensate for the loss of protected award conditions that previously were not applicable. ACCI and the Ai Group called for legislative amendments to ensure these provisions are not used to extend or provide award coverage where it would not have previously existed and impose new obligations on employers. ACCI indicated it was concerned the existing provisions could result in employers being dissuaded from bargaining with non-award covered employees. Similarly, both the Ai Group and ACCI argued that any back-pay

37 The Shop Distributive and Allied Employees' Association, *Submission 14*, p. 16.

38 Department of Employment and Workplace Relations, *Submission 18a*, p.2.

39 Australian Council of Trade Unions, *Submission* 8, p. 4; The Queensland Council of Unions, *Submission 3*, p. 3; Australian Education Union, *Submission 12*, p. 1; Job Watch Employment Rights Legal Centre, *Submission 22*, p. 9.

40 Australian Education Union, *Submission 12*, p. 1; Independent Education Union of Australia, *Submission 28*, p. 2.

should be based on the level of actual entitlement, rather than a higher rate that has not been part of the relationship.[41]

2.48 Telstra raised a similar industry specific concern. In Telstra's case the fairness test would be applied to Telstra enterprise awards, which it argued have had little application for years and hailed from Telstra's public service origins. It pointed out that the application of these awards would put it at a competitive disadvantage as they would force Telstra to raise its hourly rates by 20 per cent, but would not apply to telecommunications industry rivals. Therefore, it argued that a relevant industry, rather than enterprise, award should be allocated that would apply to all competing businesses in the same industry.[42]

The problem of contract employment relations

2.49 The Recruitment and Consulting Services Association (RCSA) brought to the committee's attention its prediction of the potential detrimental effect of the bill on the contract labour industry. Although it supported the principles of the fairness test, it argued the provisions only accounted for employment situations that were static and traditional. In particular, RCSA warned that: 'the Fairness test will effectively eliminate the use of workplace agreements in on-hired employment other than in select long term assignments'. It explained that labour contract employment was unique and required terms and conditions of employment to be set at very short notice and to remain adaptable to varying client requirements. Its key concern was that in many circumstances a client does not have time to obtain pre-lodgement advice and an agreement may not have been offered or be affordable if the terms would need to be increased following a fairness assessment.[43]

Committee view

2.50 The committee majority notes the concerns raised by many of the submitters about the exclusion of certain employees from the application of the fairness test. With respect to the issue of the date of lodgement of agreements between 27 March 2006 and 7 May 2007, the committee considers that it would be inappropriate to apply the test to legal agreements made in good faith under the legislation of the time. Further, it notes the bill captures these agreements in the application of the test should they be varied.

2.51 The committee considers that the income threshold provided for under the bill is appropriate, and will capture the overwhelming majority (90 per cent) of non-managerial employees. The key principle of the bill is to provide a safety net protection for the lower paid or more disadvantaged workers to ensure conditions are

41 Australian Chamber of Commerce and Industry, *Submission 10*, pp. 15-18, 24; Australian Industry Group, *Submission 20*, pp. 6, 14.

42 Telstra, *Submission 27*, p. 3.

43 The Recruitment and Consulting Services Association, *Submission 16*, p. 5.

protected. The committee also notes the bill allows regulations to be made to increase the $75 000 threshold for the fairness test, but not for it to be lowered.

2.52 The committee recognises the validity of some of the concerns raised by the submitters with respect to employees subject to award designation for the purposes of the fairness test. It considers that those in occupations or industries not usually covered by awards have no entitlement to protected matters, as they have no history of award coverage. However, it acknowledges the concerns raised by some of the submitters that there may have been unintended technical drafting matters, which should be reviewed by the Government so that industries traditionally covered by state awards do not fall outside the scope of the fairness test. This should be aimed at ensuring the stronger safety net appropriately covers those intended. The committee is reassured by the submission of DEWR that amendments will be introduced into the Senate to ensure the intention is reflected in the bill.

Conditions excluded from the safety net

2.53 Many of the submitters raised concerns that the safety net applied only to a limited number of award protections and would not provide protection to employees being disadvantaged regarding conditions not listed in the bill.[44] Further, the Anglican Church Sydney Diocese, the NSW Government and the Finance Sector Union of Australia (FSU) expressed concern that the safety net was based on award conditions, which they argued were being weakened under Work Choices to the point that the safety net was becoming flawed.[45]

2.54 Some of the submitters emphasised the importance of some of the excluded award conditions, including non-monetary entitlements. The value of notice for shift and roster changes was highlighted as particularly important for various industries and employees, particularly nurses, the entertainment industry and young workers. In its submission to the inquiry, the Australian Nursing Federation (ANF) noted:

> A majority of nurses work continuous shifts and are partially compensated by an entitlement to additional annual leave. Many nurses also receive sick leave and long service leave entitlements that are above the standard.[46]

2.55 The NSW Commission for Children and Young People also highlighted the omission of rostering notice entitlements as a problem with the bill and existing AWAs, considering their particular importance for young people. The Commission

---

44 This included the ACTU, QCU, the ANF, the MEAA, the AMWU, the NSW Commission for Children and Young People, the NSW Government, the FSU, the Victorian Workplace Rights Advocate, Professor Andrew Stewart, and the Anglican Church Sydney Diocese.

45 The Social Issues Executive Anglican Church Sydney Diocese, *Submission 25*, p. 2; New South Wales Government, *Submission 15*, p. 8; The Financial Services Union, *Submission 13*, p. 3.

46 The Australian Nursing Federation, *Submission 2*, p. 4.

argued that additional protections were needed in these areas to safeguard young people's educational and personal development.[47]

2.56 The MEAA also highlighted concerns about many industry-specific entitlements not captured in the bill. This included the importance of shift notice and the right to refuse unscheduled overtime for balancing family responsibilities and often multiple employment requirements. It also highlighted rights to compensation for accommodation expenses for short-term engagements when required to work in a city where an employee does not have residence. It noted that in the entertainment industry the workplace can change on a daily basis and that employees can suffer financial loss if an engagement is cancelled, as they often will have turned down other work. Further, the MEAA highlighted the need for other requirements unique to its industry, including notice to perform work that could have an effect on modesty or health, such as requirements to smoke or work in smoking environments. It also raised the issue of intellectual rights and entitlements to consent or royalties with respect to use of work.[48]

Committee view

2.57 The committee majority considers the conditions protected in the application of the fairness test to be appropriate. The committee notes the Government's and the Opposition's commitments to simplifying the award system to improve workplace flexibility and ensure agreements become a stimulus, rather than hindrance, to jobs growth. Again, the principle of the bill is to provide a safety net and the mandating of a core of protected award matters is appropriate to provide a safety net of minimum conditions. It is noted that this will involve providing employees with additional rights. Employees will still retain the right to negotiate other conditions outside the safety net. The committee also notes that the conditions of the Standard provide an additional protection and cannot be traded.

Subjectivity in the application of the fairness test

2.58 DEWR submitted that the lack of prescriptive details in the application of the fairness test was deliberate so as to allow the Workplace Authority to take account of different circumstances. Further, it indicated a prescriptive approach would be 'bureaucratic' and 'onerous' and not conducive to quick and streamlined agreement formulation.[49]

---

47 The NSW Commission for Children and Young People, *Submission 6*, p. 1.

48 Media, Entertainment and Arts Alliance, *Submission 17*, p. 4.

49 *Committee Hansard*, EWRE 4, 8 June 2007.

2.59 However, many of the submitters raised concerns about the perceived subjectivity of the application of the Fairness Test.[50] They submitted there was a lack of prescriptive direction regarding what could constitute fairness, non-monetary compensation and 'significant value' to an employee, as well as the lack of details prescribing how such determinations would be made. Concerns were raised that the inevitable consequence of subjectivity would be inconsistencies in the application of the test or the disadvantaging of the parties.

2.60 In particular, the ACTU submitted that it is aware of 'numerous instances' where identical clauses in agreements received conflicting advice from the Office of the Employment Advocate (OEA)—to be renamed as the Workplace Authority under the bill.[51] Professor Stewart also cited anecdotal evidence of different interpretations having been given by the OEA for whether or not agreements included prohibited content.[52]

2.61 SDA added that its concern was compounded by the fact that its experiences with the OEA suggested it was not sympathetic to SDA representations on behalf of workers.[53] The ACTU also raised concerns about the quality of decisions from the OEA and, along with the NSW Government, argued that Minister's role in providing direction undermined public confidence in its independence.[54] The NSW Government continued that the OEA had a conflict of interest by promoting AWAs and protection of the rights of employees, which was also reflected in the role of the Workplace Authority.[55]

2.62 The ACTU and the NSW Government argued that the Australian Industrial Relations Commission was more appropriate to undertake agreement assessments. This was because the Commission has experience in the award system and in applying the former no-disadvantage test.[56]

Extent of consultation during Workplace Authority investigations

2.63 A particular concern was that the bill permitted the Workplace Authority to confine its investigations to only one party of an agreement. The ACTU and the NSW

50 This included the ACTU, ANF, APESMA, Carolyn Sutherland, the AMWU, the MEAA, the NSW Government, the RTBU, Job Watch Employment Rights Legal Centre, the Victorian Workplace Rights Advocate, Professor Andrew Stewart, and the CPSU PSFG.

51 Australian Council of Trade Unions, *Submission* 8, p. 14.

52 Professor Andrew Stewart, *Submission 11*, p. 9.

53 *Committee Hansard*, EWRE 32, 8 June 2007.

54 Australian Council of Trade Unions, *Submission* 8, p. 14; New South Wales Government, *Submission 15*, p. 13.

55 New South Wales Government, *Submission 15*, p. 31.

56 Australian Council of Trade Unions, *Submission* 8, p. 14; New South Wales Government, *Submission 15*, p. 9.

Government were particularly concerned that the bill allowed information to be sought from either party without verification or the opportunity to correct any misinformation.[57] ACCI also acknowledged that the Workplace Authority could consider the value placed by the employee on benefits involved.[58]

2.64 DEWR submitted that the Workplace Authority may contact the employer or any employee subject to the agreement to seek further information about an agreement or the employment circumstances of the employee or employees covered by it.[59]

2.65 The Australian Rail, Trams and Bus Industry Union (RTBU) highlighted that certain groups were especially vulnerable to being exploited, including those with disabilities, young workers, those from non-English speaking backgrounds and those with literacy problems.[60] Job Watch argued a similar point, noting its concern that employers could include a section in an agreement identifying a benefit as of significant value, despite objections from an employee. Job Watch called for the bill to be amended to require employers to provide greater explanation of the consequences of benefit trading and to be lodged as a statutory declaration to the Workplace Authority.[61]

2.66 The submission from Carolyn Sutherland of Monash University called for a mechanism to be instituted that would require consultation of employees in determining the value of benefits. The submission noted the importance of such a provision because the bill was introduced in response to community concerns that employees were entering unwillingly into agreements. Carolyn Sutherland's submission concluded that consultation with employees in all cases would be impractical and called for the requirement of employees or their representatives to lodge a declaration on the view of the value of non-monetary compensation. It pointed out that due to the Minister's expectation that most compensation would be financial, such a document would only be necessary in a minority of cases.[62]

Committee view

2.67 The workplace relations system has the principal goal of creating increased flexibility at the individual workplace level. This includes increasing flexibility in any kind of assessment methodology. The committee majority considers that the discretion provided to the Workplace Authority will enable it to meet this requirement, while still ensuring fairness can be appropriately assessed. This will allow consideration of

57 Australian Council of Trade Unions, *Submission* 8, p. 14; New South Wales Government, *Submission 15,* p. 24.

58 Australian Chamber of Commerce and Industry, *Submission 10,* p. 7.

59 Department of Employment and Workplace Relations, *Submission 18,* p. 7.

60 Australian Rail, Tram and Bus Industry Union, *Submission 25*, p. 9.

61 Job Watch Employment Rights Legal Centre, *Submission 22*, p. 5.

62 Carolyn Sutherland, *Submission 9,* pp. 3-6.

the different values ascribed to various conditions by different employees. Overly prescriptive criteria under the bill could undermine this process. It could also disadvantage workers, fail to accommodate different workplace requirements and impose unhelpful bureaucratic constraints. The committee highlights the protections under the bill that compensation must be fair and that non-monetary compensation must confer an advantage on the employee deemed to be of significant value.

2.68 However, the committee majority signals the need for policy guidelines to be developed to assist assessors and promote consistency of decisions. It accepts the reassurance of DEWR that it is the intention of the Workplace Authority to do so. The committee is also confident that the Workplace Authority will exercise its authority responsibly and provide all parties with the necessary opportunities to inform its decision-making including the right to verify any contentious evidence. However, it impresses upon the Workplace Authority the need to note the concerns that were raised during the inquiry about the application of the fairness test and ensure that it achieves both the implementation and perception of fairness.

The scope of factors considered in the fairness test

2.69 DEWR endorsed the Government's policy of recognising the positive benefits of considering personal circumstances in determining fairness. This would allow an agreement to take account of different employer and employee needs and requirements. The Ai Group agreed, noting that different individuals value different conditions and entitlements.[63]

2.70 ACCI highlighted the appropriateness of provisions that allow consideration of non-monetary compensation, work obligations and employees' personal circumstances in determining fair compensation. In particular, it highlighted evidence provided to the 2003-2005 Work and Family Test Case in the Australian Industrial Relations Commission of requests by employees for roster changes to accommodate family circumstances that would have incurred penalty rate payments. ACCI indicated employers are interested in accommodating the work-family balance, but difficulties would arise if they were compelled to increase labour costs or breach award conditions. It also noted that the fairness test cannot endorse agreements that undercut minimum wages and conditions.[64] The RCSA called for section 346M(4) to also include consideration of the circumstances of a 'host organisation', not just the direct employer, due to the nature of labour contract employment.[65]

2.71 However, other submitters raised concerns about the scope of factors to be considered in the Fairness Test when determining compensation. This particularly related to the potential for non-monetary compensation to be provided for removal of financial remuneration, despite reassurances from the Government that this would not

---

63 *Committee Hansard*, EWRE 4, 8 June 2007; *Committee Hansard*, EWRE 41, 8 June 2007.

64 Australian Chamber of Commerce and Industry, *Submission 10*, pp. 9, 14.

65 The Recruitment and Consulting Services Association, *Submission 16*, pp. 8-9.

be the norm. It also included the potential disadvantaging of an employee if personal circumstances were considered.

2.72 APESMA argued that taking into account an employee's personal circumstances in determining whether or not an agreement was fair was 'inappropriate' and prone to 'misuse'.[66] The CPSU PSFG also argued:

> The wage earner's family circumstances must not affect their rate of pay. Work should be remunerated the value of work performed. To do otherwise will have a significant impact on gender equity. A fundamental right of workers is that they be paid for the work that they do. [67]

2.73 The ACTU and Professor Stewart similarly argued that differential compensation based family responsibilities could be considered to be discriminatory, even if reluctantly agreed to by the parties involved.[68] The ACTU argued that unsocial hours were difficult for workers and required compensation, irrespective of family circumstances and caring responsibilities. It highlighted that allowing a worker's employment opportunities, or the industry or location of a business to justify exemptions would have a disproportionate effect on disadvantaged groups and 'undermines the essence of the safety net in providing protection for the disadvantaged'. It pointed out that industry-specific issues would be better addressed through the award system.[69]

2.74 In its testimony to the committee, the SDA highlighted concerns that the consideration of non-monetary benefits in providing fair compensation provides 'enormous scope' for employees to experience financial disadvantage, in return for conditions that would not provide a cost to employers.[70] The submissions of the NSW Government, Jobwatch and Professor Stewart also raised a concern that benefits that had always been provided but not part of the Standard could now be considered part of the compensation for the loss of protected conditions.[71] The NSW Government argued that the experience of workers on AWAs was that family flexible conditions were not included.[72]

2.75 The ACTU, Australian Manufacturing Workers Union (AMWU), JobWatch and NSW Government warned that the inclusion of non-monetary compensation

---

66 The Association of Professional Engineers, Scientists and Managers, *Submission 5*, p. 4.

67 The Community and Public Sector Union State Public Services Federation Group, *Submission 7*, p. 4.

68 Australian Council of Trade Unions, *Submission* 8, p. 9; Professor Andrew Stewart, *Submission 11*, p. 7.

69 Australian Council of Trade Unions, *Submission* 8, p. 11.

70 *Committee Hansard*, EWRE 29, 8 June 2007.

71 Professor Andrew Stewart, *Submission 11*, p. 7; New South Wales Government, *Submission 15*, p. 19; Job Watch Employment Rights Legal Centre, *Submission 22*, p. 6.

72 New South Wales Government, *Submission 15*, pp. 20-21, 24.

would have implications for taxation arrangements. The ACTU highlighted the issue of Fringe Benefits Tax and whether or not the assessed non-monetary value would be determined on a pre- or post-tax basis.[73] The AMWU raised similar concerns regarding potential provision of child care and affect on the child care rebate.[74]

2.76 The ACTU, the AMWU, the SDA, the Victorian Workplace Rights Advocate, and JobWatch highlighted the need for review over the course of an agreement to ascertain the continued value of benefits to the employee. SDA highlighted concerns that agreements that were originally fair may become unfair over their lifespan and any any pay rises given for the trading in of conditions can be eroded over time.[75] The ACTU and JobWatch cited the example of childcare to highlight that an employee's requirements could change over a five year period.[76] The AMWU cited an example of an agreement that passes the fairness test that negotiated away penalty rates but an employer imposing subsequent requirements—not considered under the fairness test—for work during unsocial hours.[77] The Victorian Workplace Rights Advocate proposed empowering the Workplace Authority to ascribe weight to an agreement based on the insertion of clauses preventing changes in conditions, undertakings to reconcile any changes and indexation of benefits over time.[78]

Committee view

2.77 The committee majority notes that the fairness test is to be applied after an agreement has been reached by the parties and considers that the provisions of the bill will allow employers and employees to negotiate benefits that suit both their circumstances while guaranteeing verification that fair compensation has been provided for any changes in conditions. At the same time, it will reduce the administrative burden by retaining flexibility. They strike an appropriate balance between protecting the rights of workers and not threatening their jobs or creating disincentives to employing others. The Workplace Authority will be empowered to investigate as necessary including confirming information with employees about their personal circumstances and the significance of flexibilities acquired in return for conditions that may have been traded off. The committee accepts the reassurance of the Government that the Fairness Test will give primacy to monetary compensation.

73 Australian Council of Trade Unions, *Submission* 8, p. 8.

74 The Australian Manufacturing Workers' Union, *Submission 11*, p. , p. 5.

75 The Shop Distributive and Allied Employees' Association, *Submission 14*, p. 19.

76 Australian Council of Trade Unions, *Submission* 8, p. 8; Job Watch Employment Rights Legal Centre, *Submission 22*, p. 7.

77 The Australian Manufacturing Workers' Union, *Submission 11*, p. 8.

78 The Victorian Workplace Rights Advocate, *Submission 26*, p. 7.

The exemption of 'exceptional circumstances'

2.78 ACCI and AMMA impressed the need for the Workplace Authority to consider circumstances that were 'exceptional' and not contrary to the public interest. ACCI argued that this principle has been observed over the past 15 years to save commercial operations and jobs, although never widely misused. ACCI highlighted the protections under the bill for employees to prevent this section from being misused, including that the circumstances be exceptional, are not considered contrary to the public interest, and the investigations and assessment being made by a statutory authority. It also noted that employees do not have to agree to such strategies, although that could lead to business failure or redundancy. ACCI indicated it supported the Workplace Authority querying circumstances following the conclusion of the crisis and that such agreements would be of limited duration or provide for a return to higher remuneration following the meeting of certain conditions.[79]

2.79 The ACTU also acknowledged the need for exemptions in cases where a business suffers from 'a demonstrated incapacity to pay', provided the onus was on the employer to prove the case.[80] It argued that employees should have a capacity to challenge such a ruling and that such agreements should be subject to regular review.

2.80 The AMWU, the Victorian Workplace Rights Advocate, the RTBU and the NSW Government highlighted concerns about the potential abuse of the 'exceptional circumstances' and 'public interest' provision largely because decision-making would not be conducted in a public form to ensure accountability or be subject to an appeal or independent review process. There was also no stipulation under the bill of what constituted exceptional circumstances or what information would be required in order to make a determination that such circumstances existed. Consequently, it was proposed that the Australian Industrial Relations Commission would be a more appropriate forum for such decision making.[81] In particular, The NSW Government raised concerns that there was no provision under the bill for the review of agreements where 'exceptional circumstances' were used to lower the threshold of fair compensation. It highlighted concerns that such agreements could still span five years, potentially long after the crisis had passed.[82]

Committee view

2.81 The committee majority believes that the 'exceptional circumstances' and public interest exemption is crucial for the modern day workplace and exists for the benefit of both employees and employers. It notes that the Workplace Authority must

---

79 Australian Chamber of Commerce and Industry, *Submission 10*, pp. 9-14.

80 Australian Council of Trade Unions, *Submission* 8, p. 11.

81 The Australian Manufacturing Workers' Union, *Submission 11*, p. 7; New South Wales Government, *Submission 15*, pp. 10, 23; the Victorian Workplace Rights Advocate, *Submission 26*, p. 8.

82 New South Wales Government, *Submission 15*, p. 22.

be satisfied that two thresholds be met before an exception can be made, including circumstances that are both exceptional and not contrary to the public interest. Such a provision will allow the protection of jobs and business survivability following short term crises where otherwise employers and employees could be severely financially disadvantaged over the long-term. It clearly would not be available to unscrupulous employers seeking to compel employees to subsidise the maximisation of profits.

2.82 The committee majority notes some of the concerns raised by various submitters regarding the duration of such agreements. However, it considers that the bill takes account of these concerns by giving explicit guidance about their length such that they are part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, a business. This guidance reflects the operation of the previous no-disadvantage test and is faithful to the intention that such agreements be permitted only in exceptional circumstances and when not contrary to the public interest.

Accountability and right to review of decision-making

2.83 ACCI did not support the need for an appeal process and considered that once the fairness test was applied, the agreement 'must operate without scope for subsequent challenge or litigation for underpayment or agreement reversal…any test must stand'.[83] The Ai Group also argued that there was no need for the legislation to reflect an appeal or a review process, although it expected that an internal review process would be available.[84] However, both ACCI and the Ai Group highlighted the need for review mechanisms in instances where the Workplace Authority may have incorrectly designated an award for the purposes of the fairness test.[85]

2.84 The Australian Industry Group argued that the issuing of public reasons would constitute a breach of privacy. It also considered that written reasons for the failure of an agreement to affected parties would provide an additional bureaucratic burden. [86]

2.85 However, many submitters expressed concerns about the lack of opportunity for a review of decisions and no requirement to notify parties about the reasons for a decision.[87] The United Firefighters Union of Australia pointed out that an appeal, such as to the High Court, would present a prohibitive cost. Therefore, it argued that this

---

83 Australian Chamber of Commerce and Industry, *Submission 10*, p. 3.

84 *Committee Hansard*, EWRE 55, 8 June 2007.

85 Australian Chamber of Commerce and Industry, *Submission 10*, p. 17; Australian Industry Group, *Submission 20*, p. 9.

86 *Committee Hansard*, EWRE 55, 8 June 2007.

87 This included the ACTU, ANF, APESMA, Carolyn Sutherland, the CPSU PSFG, the United Firefighters Union of Australia, the MEAA, the AMWU, the NSW Government, the AMMA, the FSU, Job Watch Employment Rights Legal Centre, the Victorian Workplace Rights Advocate, Professor Andrew Stewart and the Anglican Church Sydney Diocese.

decision making role should be conducted in the open forum of the Australian Industrial Relations Commission.[88]

2.86 Many of the submitters argued that the reasons for decisions regarding whether or not an agreement passes the fairness test should be provided, with some arguing the relevant parties should be informed while others advocating such reasons should be made public. It was argued that this would assist transparency, consistency and more effective agreement making in the future. According to the SDA, the provision of reasons for a finding on a fairness test was particularly important considering the capacity of agreements to include non-monetary conditions.[89] Without such provisions, the MEAA considered that the bill could not provide 'administrative' or 'substantive' fairness.[90]

2.87 The CPSU PSFG highlighted its concerns about the lack of accountability in the application of the fairness test were based on the past performance during the earlier no-disadvantage test. It argued that the incorrect award had often been selected, which resulted in AWAs being approved that should have failed the no-disadvantage test. It argued that the lack of transparency and accountability of the Workplace Authority in the application of the fairness test meant that such errors would go undetected.[91]

Committee view

2.88 The committee majority acknowledges the numerous concerns raised by submitters from both employer and employee organisations about the potential need for a review of decisions made by the Workplace Authority. Some of these concerns pertained to specific aspects of the decision-making, such as award designation, and others concerned the broader decision on the fairness of an agreement. However, the committee majority also recognises that agreements subject to the fairness test will first have been agreed between the parties.

2.89 The committee majority considers it appropriate that the Workplace Authority has an internal administrative process to ensure the consistency and integrity of its decisions that would allow the review of decisions if grievances are raised. This is common with any government agency, as mistakes can be made. There has been no reason to believe this will not be the case with the Workplace Authority, and the committee acknowledges the importance of people's livelihoods highlights its added significance in this case. However, the committee does not see any need for an amendment to the legislation, which could undermine the intention of allowing the parties' confidence in the certainty and speed of the decision-making process.

---

88 The United Firefighters Union of Australia, *Submission 24*, p. 3.

89 The Shop Distributive and Allied Employees' Association, *Submission 14*, p. 7.

90 Media, Entertainment and Arts Alliance, *Submission 17*, p. 5.

91 The Community and Public Sector Union State Public Services Federation Group, *Submission 7*, p. 3.

Application of the fairness test with respect to collective agreements

2.90 The SDA, AMWU, the Office of the Victorian Workplace Rights Advocate, Professor Stewart and the RTBU highlighted a concern about the application of the fairness test with respect to collective agreements and particularly section 346M(1)(b). This section allows the Workplace Authority to determine whether or not a collective agreement provides fair compensation in its 'overall effect on the employees'.[92] SDA raised its concern that this section could allow a minority of workers to be substantially disadvantaged, provided the majority was not. It explained:

> The clearest example of how this abuse can occur is that in the retail industry, an employer who has the majority of its employees working Monday to Friday, and a small number of employees who only work on a Saturday and Sunday, negotiates a collective agreement which removes all weekend penalties on the basis of increasing the base hourly rate of pay.[93]

2.91 Therefore, it called for an amendment to the section to ensure no employees could be worse off:

> To do otherwise is to retain a significant statutory right for employers to deliberately and significantly reduce the terms and conditions of employment of individual employees by the expedient of giving small marginal improvement to a majority.[94]

Committee view

2.92 The committee majority acknowledges the concerns about the potential effect of a collective agreement on the minority of workers in a workplace compared to the majority. However, it considers that the bill provides the necessary scope to the Workplace Authority to conduct investigations to properly ascertain such affects in making its decision. The committee urges the Workplace Authority to take particular note of this concern and ensure that minorities of employees under a collective agreement cannot be substantially worse off.

2.93 However, the committee does not believe that the legislation should be amended, as there needs to be sufficient flexibility to recognise the increased complexity in collective agreements in catering for individuals in different circumstances who value different conditions to different extents. The role of the Workplace Authority is to validate the fairness of agreements, and employees covered by collective agreements should raise any concerns with parties negotiating on their behalf prior to the agreements being formulated and lodged.

---

92 Section 346M(1)(b)

93 The Shop Distributive and Allied Employees' Association, *Submission 14*, p. 10.

94 The Shop Distributive and Allied Employees' Association, *Submission 14*, p. 10.

Protections against dismissal for reasons involving the fairness test

2.94 ACCI raised concerns with the reversal of the onus of proof related to dismissals with respect to a failure or potential failure of agreement to pass the fairness test. It indicated the provisions had the potential to impede employers from dismissing employees for serious misconduct or operational reasons. It also called for a ceiling on compensation payments dismissals considering employees would already be entitled to back-pay. ACCI maintained that an entity not party to the employment agreement should not be permitted to prosecute a case against an employer.[95]

2.95 However, the ACTU, the CPSU PSFG, AMWU, JobWatch Victoria and Professor Stewart highlighted concerns about the protections provided regarding dismissal when the 'sole or dominant' reason pertains to a failure or possible failure of the fairness test. Concerns were raised that an employer could dismiss an employee if an agreement fails the test, provided the grounds were that there was no intention to employ a worker under the conditions required for an agreement to pass.[96] In particular, CPSU PSFG and the Victorian Workplace Rights Advocate highlighted the broad interpretation of the Australian Industrial Relations Commission of the legal legitimacy of dismissal for 'operational reasons'.[97] It was argued that an employee should be protected from dismissal if any part of the reason is based on a failure or potential failure of an agreement to pass the fairness test.[98] It was also recommended the bill be amended to make dismissal because of the failure of an agreement to pass the fairness test a new ground of unlawful termination.[99] Professor Stewart also highlighted concerns that the bill should address other reprisals, such as the reduction of hours for casual and/or part-time staff as a result of a failure of an agreement to pass the fairness test.[100]

Committee view

2.96 The committee majority notes the concerns raised by both employee and employer groups about the provisions of the bill protecting against dismissal with respect to the fairness test. It considers the protections to be stringent and finds an appropriate balance between employee rights and allowing businesses to conduct activities related to normal operation.

---

95 Australian Chamber of Commerce and Industry, *Submission 10*, pp. 26-27.

96 Australian Council of Trade Unions, *Submission* 8, p. 16; Professor Andrew Stewart, *Submission 21*, p. 12.

97 The Community and Public Sector Union State Public Services Federation Group, *Submission 7*, p. 5; Victorian Workplace Rights Advocate, *Submission 26*, p. 9.

98 The Australian Manufacturing Workers' Union, *Submission 11*, p. 10; The Victorian Workplace Rights Advocate, *Submission 26*, p. 9; Professor Andrew Stewart, *Submission 21*, p. 12.

99 Job Watch Employment Rights Legal Centre, *Submission 22*, p. 8; the Victorian Workplace Rights Advocate, *Submission 26*, p. 6.

100 Professor Andrew Stewart, *Submission 21*, p. 12.

Consequences of agreement failure

2.97 ACCI and the Ai Group criticised the timeframe provided under the bill for employers to lodge variations, written undertakings and back-pay following the failure of an agreement to pass the fairness test. They noted that the 14 day timeframe commenced from the time at which the Workplace Authority issues a notice. ACCI and the Ai Group pointed out that the time was not necessarily sufficient for consultation with large numbers of employees, multiple sites, multiple unions, if the period covers employee holiday periods or where there is a delay in the mail. According the ACCI, the timeframe is particularly important for agreements pertaining to award designations and potential requirements for back-pay of employees. ACCI recommended amending the timeframe to commence from the day following the receipt of the notice.[101] The ACTU also acknowledged the complexity created by these sections of the bill.[102]

2.98 The ACTU and Professor Stewart also highlighted concerns about some of the implications of the failure of an agreement to pass the fairness test and the relegation of employees to the instrument that would have applied but for the formulation of the failed agreement. In particular, they highlighted concerns that employees could be forced back onto agreements from between 27 March 2006 and 7 May 2007 where protected award conditions had been removed without adequate compensation. This could revert employees to a less generous agreement than the one that failed.[103]

2.99 Professor Stewart raised further concerns about the definition of 'instrument' under Section 346Y of the bill. He argued that the exclusion of 'pay scales' and 'contracts' will hinder calculation of the short-fall owing to an employee in the event that they are entitled to compensation.[104]

Committee view

2.100 The committee majority acknowledges the validity of some of the issues raised during the inquiry regarding the consequences and remedial action required in the event of the failure of an agreement to pass the fairness test. In this respect, it urges the government to review some of the technical provisions with a view to considering some of the recommendations suggested by the submitters to ensure that the stronger safety net reforms adequately meet their stated objectives. However, the committee majority also notes the availability of the pre-lodgement checking process

---

101 Australian Chamber of Commerce and Industry, *Submission 10*, p. 21; Australian Industry Group, *Submission 20*, p. 12.

102 Australian Council of Trade Unions, *Submission* 8, p. 13.

103 Australian Council of Trade Unions, *Submission* 8, p. 16; Professor Andrew Stewart, *Submission 11*, p. 7.

104 Professor Andrew Stewart, *Submission 21*, p. 11.

that is designed to give more certainty to parties to agreements once they are lodged.[105]

The capacity and resources of the Workplace Authority

2.101 DEWR indicated it expects that 400 000 workplace agreements will be formulated next year. The timeframes will be subject to operational pressures and decisions will be made as soon as practicable and necessary for a satisfactory decision. The average time for processing such agreements would be 7–10 working days with a similar timeframe for providing pre-lodgement advice. If lodgement was preceded by a pre-lodgement assessment, the time-frame for agreement approval would be expedited. However, these timeframes depend on the quality of information provided and the complexity of the agreement.[106]

2.102 The IPA indicated that it considered the OEA had provided an efficient and rapid service for protecting employees' rights. This included prosecution of employers that abused the system, recovering money for employees and, correcting and approving industrial instruments.[107]

2.103 However, The ACTU, the QCA, the MEAA, the NSW Government, the Victorian Workplace Rights Advocate, and the RCSA raised concerns about the capacity of the Workplace Authority to provide its services in a timely manner with the level of scrutiny required. The NSW Government highlighted that this could potentially have serious implications for small businesses that may face a substantial back-pay requirement.[108] The RCSA also highlighted the potential adverse effects on the on-hire industry.[109]

2.104 In particular, some of the submissions highlighted the discretionary and unique value placed upon non-monetary benefits, which would impose a substantial resource commitment on the Workplace Authority to adequately perform its role. The AMWU highlighted child care requirements would be valued differently by different employees and depend on various factors unique to different circumstances, including the type of care required, age and number of children, location of facilities and length of care required. This would require extensive inquiries.[110] Similarly, the NSW Government noted the value of a car-space would not be a constant and would differ between individuals, as well as locations. It also argued that this would complicate

---

105 Department of Employment and Workplace Relations, *Submission 18*, p. 7.

106 Department of Employment and Workplace Relations, *Submission 18*, p. 7; *Committee Hansard*, EWRE 8, 8 June 2007.

107 Institute of Public Affairs, *Submission 4*, p. 2.

108 Media, Entertainment and Arts Alliance, *Submission 17*, p. 5; New South Wales Government, *Submission 15*, p. 27.

109 The Recruitment and Consulting Services Association, *Submission 16*, pp. 8-9.

110 The Australian Manufacturing Workers' Union, *Submission 11*, p. 5.

calculations by the Workplace Authority of the value of non-monetary benefits in greenfield agreements, given the employees do not exist and; therefore, cannot be consulted when an agreement is lodged.[111]

2.105 Some of the concerns about the capacity of the Workplace Authority to perform its duties in a timely fashion were related to the performance of the OEA. The ACTU submitted that OEA advised parties that the turn-around time expected for pre-lodgement advice is 30 working days and there have been instances of it taking 10 weeks.[112] The Victorian Workplace Rights Advocate highlighted practices such as using community partners to pre-assess agreements, computer programs to provide preliminary assessments and pressures to achieve performance goals.[113] The NSW Government submitted that the training to be provided may not be sufficient for adequate and timely agreement processing.[114] Further, the SDA suggested problems would be exacerbated by the lack of experience of newly recruited contractors or public servants to administer the fairness test.[115]

Committee view

2.106 The committee majority acknowledges that the discretion provided to the Workplace Authority and the scope of factors in its mandate for consideration in the application of the fairness test will require a substantial resource investment. At this stage, it is unclear if the additional resources allocated will be sufficient. In particular, the determination of the significance of non-monetary compensation could prove to be extremely resource intensive.

2.107 However, the committee's concerns are assuaged by the reassurance of DEWR that employees will most often be compensated with a higher rate of pay in lieu of protected award conditions,[116] and notes the testimony of ACCI that such inclusions in agreements are 'ahistorical'.[117] Nevertheless, the committee notes the emphasis of all parties during the inquiry of the need for rapid agreement assessment. Therefore, it advocates monitoring the Workplace Authority in its performance and highlights the importance of it developing streamlined processes that are conducive to fair but rapid decision-making.

111 New South Wales Government, *Submission 15,* p. 19.

112 Australian Council of Trade Unions, *Submission* 8, p. 14.

113 The Victorian Workplace Rights Advocate, *Submission 26,* p. 10.

114 New South Wales Government, *Submission 15,* p. 31.

115 The Shop Distributive and Allied Employees' Association, *Submission 14*, pp. 4-7.

116 Department of Employment and Workplace Relations, *Submission 18,* p. 7.

117 *Committee Hansard*, EWRE 16, 8 June 2007.

Conclusion

2.108 The committee majority considers that flexibility in workplace agreements is crucial for improving productivity, employment and suitability of workplace conditions. This also allows employees to negotiate conditions that are more appropriate to their circumstances. Some apprehension has been expressed in the community that agreements could possibly be negotiated that remove entitlements without adequate compensation. This has been driven largely by a campaign more remarkable for rhetorical excess than for evidence-based comment. This has injected unnecessary tension into the relationship between workers and employers. Nevertheless, the Government has been receptive to community concerns and in response to perceptions of the need for added protections, has proposed the bill.

2.109 The committee majority considers that the bill provides a strengthened safety net for workers. The fairness test will augment the already existing safety net—particularly as imparted by the Standard—and provide greater reassurance for vulnerable workers such as young people and those from non-English speaking backgrounds. The Fairness Test will extend to more than 90 per cent of the non-managerial workforce.[118]

2.110 At the same time, the stronger safety net does not change the fundamental principles of the Government's previous reforms and continues to facilitate workplace flexibility, higher productivity and a greater degree of cooperation between employers and employees that is essential for preserving and improving standards of living. It will be consistent with the 2005 reforms and will allow the continuation of growth in wages, employment and productivity. Employers and employees will retain the capacity to negotiate modification or exclusion of the protected award conditions to ensure flexibility, but will now need to ensure there is adequate compensation in return.

2.111 The committee majority also notes the concerns raised by many of the submitters about the bill, most of which relate to the application of the fairness test. However, the committee is of the view that flexibility is necessary to take account of different circumstances of employers and employees. The committee concurs with the conclusion of DEWR that the bill will provide substantial additional protections for employees through the application of the fairness test by an independent statutory office. Further, the committee has confidence in the integrity and capability of the Workplace Authority to perform its responsibilities in a fair and balanced fashion. It was further reassured during the public hearing about the Department's intention for the Workplace Authority to develop policy guidelines to assist in the application of the fairness test. However, the inquiry highlighted the need for the Workplace Authority to take account of the concerns raised by interested parties and detailed in this report, to ensure the fairness test is applied, and seen to be applied, in a balanced manner.

---

118 Department of Employment and Workplace Relations, *Submission 18*, p. 6.

2.112 The committee also notes the concerns raised during the inquiry about various technical drafting issues that may complicate the bill achieving its stated objectives. The committee appreciates that DEWR did a commendable job in drafting the bill so quickly, especially recognising the importance of ensuring enhanced protections are provided as soon as possible to employees. As with the necessary speed in the conduct of this inquiry, it was important to ensure there were no delays that would deny average workers the access to entitlements and adequate compensation, or to provide uncertainty to agreement formulation. Nevertheless, the committee considers it necessary that the Government review the issues raised and the recommendations proposed during the inquiry with a view to ensuring potential drafting issues highlighted do not undermine the capacity of the stronger safety net reforms to provide fairness to both employers and employees. The committee appreciates the flexibility of the Government and responsiveness to the inquiry process. The committee notes that the Government has already undertaken to move an amendment to reflect some of these concerns and ensure the policy intent is reflected in the legislation.[119]

Recommendation 1

2.113 The committee recommends that the Government consider the various technical and consequential amendments proposed during the inquiry with a view to correcting unintentional drafting errors and ensure the stronger safety net reforms adequately meet their stated objectives.

Recommendation 2

2.114 The committee recommends that the Workplace Authority take note of those concerns raised during the inquiry about the duration of agreements that might be made where it is claimed that there are exceptional circumstances. It notes that Section 346M(5) will provide the Workplace Authority with guidance and that it will have to be satisfied that it is not against the public interest to have regard to the matters outlined in Section 346M(4).

Recommendation 3

2.115 The committee recommends that the Workplace Authority take note of the concerns raised during the inquiry about the application of the fairness test and ensure that these inform the performance of its duties, so that the principle of fairness will be considered by all parties to have been observed.

119 Department of Employment and Workplace Relations, *Submission 18a*, p.2.

Recommendation 4

2.116 The committee recommends that the bill be passed.

Senator Judith Troeth

Chairman