Chapter 3

Opposition Senators' Report

3.1 This report is written in response to the latest set of amendments to Australia's unfair and unbalanced workplace laws. And like preceding changes, this legislation is driven by an extreme set of beliefs and cold-hearted politics. However, this is the first set of changes that is solely focused on the political survival of the Government and driven purely by public perceptions. The subsequent illusion of repositioning drives the substance and navigation of these changes.

3.2 The current Federal Government has taken historic revisionism and hypocrisy more generally, to new and unprecedented heights. The previous Labor Government's reforms of industrial relations in the early 1990s were based on workplace level collective bargaining as a means of driving productivity gains. This was a distinct move away from the long standing institutions and arrangements that dated back to the era of Federation, and a move towards permitting people who work as a team negotiating as a team. But for all of their baseless commentary of the preceding administration, the current Government is in the process of creating their very own bureaucratic Gordian Knot. Not only do these changes require nearly 700 new inspectors and analysts to respond to an issue of 'perceptions', but it is on top of the existing 900 pages of the Workplace Relations Act. These complicated, incapacitating and unfair laws will never be amended back to a fair and balanced set of laws. They can only be replaced.

Conduct of the inquiry

3.3 Unfortunately, the Government's disregard for due committee processes has become the norm following its attainment of a majority in the Senate. On this occasion, the Government has rushed through this bill as a consequence of evidence of increasing popular discontent with its Work Choices 'reforms'.

3.4 In its customary way, the Government has given the committee very little time in which to consider the legislation. It dictated its terms for the inquiry with even more arrogance than usual. The Government announced the reference of the bill on 10 May, 18 days prior to the actual introduction of the legislation. This left submitters with seven days to consider the bill and provide submissions. The committee only had 10 days in which to consider submissions, conduct a public hearing and produce a report.

3.5 These timeframes have also not been sufficient to allow members of the public to properly consider the changes and represent their views and interests to the committee in the form of submissions. This was noted by many of the submissions and evident in the number of late submissions. Further, the single day allocated for a public hearing also has not been conducive to a proper consultation with the public about the potential implications of the bill. The only real reason for the Government's

urgency is to circumscribe Senate scrutiny while providing a pretext of its observation. Despite the Government's justifications for the urgency, the bill will have retrospective application through the back-dating of the provisions.

3.6 Despite the short-time frame for the inquiry, the submissions and the public hearing process identified numerous problems with the legislation. However, the committee's majority report has ignored many of the concerns and recommendations that emerged through these processes. This was also the case during the original 2005 inquiry into Work Choices. The Government's timeframes for the current inquiry were never designed to take advantage of the consultation inherent in the committee process to redress the problems with the bill. The disregard for the consultation process was also evident in the advertising campaign, which was explaining legislation before it was introduced and parliamentary debate or committee inquiry were able to redress problems.

3.7 Opposition members of the committee also have been frustrated by the overtly partisan nature of the advertising campaign that has surrounded the inquiry, especially considering it has occurred during the lead up to the election. The Government maintained that the purpose of the advertisements has been to explain the detail of the changes to Work Choices. However, if the Government was genuinely motivated by an intention to explain the legislation, it would have waited for the legislation to be drafted. The campaign was designed to inform the public of a policy change, rather than legislative change. This did not assist decent employers who were seeking genuine information with hundreds of AWAs being formulated on a daily basis. There were almost 21 000 AWAs formulated between 7 May 2007 and the introduction of the legislation on 28 May 2007.

3.8 The advertisements have been an attempt to promote an unpopular Government policy with the use of tax payer funds. This Government has a proven record of using such tactics to promote unpopular, unfair and divisive policy—as opposed to explain legislative changes—as was seen with the $55 million campaign for the original Work Choices bill. The seriousness of the Government's misuse of public moneys has been compounded by the fact that it has occurred during an election year.

Background to the bill

The Government's workplace relations system

3.9 The industrial relations system devised by the Government has fundamentally wound back safety net provisions that had been won over many years, and which accounted for long established international labour standards. Consequently, the Government has left employees more vulnerable to exploitation. The Government's amendments are an acknowledgement that AWAs have eroded standards of living, left many workers worse off and have attacked traditional values and quality of life. They have created an industrial relations system where the basis of social justice and 'a fair go', or protection for society's most vulnerable workers have been undermined.

3.10 The flexibility often promoted as the benefit of the Government's industrial relations policy is one-sided and mostly delivers flexibility to the benefit of employers. The rhetoric associated with 'flexibility' as the most desirable characteristic of workplace agreements is wilfully misleading. There is rarely any real negotiation, with employees often faced with the prospect of signing an AWA as a condition of employment. Most AWAs are standardised documents that do not take account of an individual's circumstances.[1] Indeed, the burden on employers to negotiate AWAs in good faith would be quite onerous if the Government's rhetoric was to be believed. The tacit understanding between the Government and employers is that theory may be quietly laid aside so that companies can simply impose their agreements.

3.11 The Government's legislation has made it easier for employers to remove entitlements and undercut wages. Those on collective agreements can be paid less or denied promotions and other benefits only available to employees on AWAs, as a coercive measure to force them on to AWAs. But in many cases the benefits of AWAs are only short term benefits, designed to destroy collective bargaining and to disempower workers and as a prelude to forcing down wages and entitlements. As Mr Joe Lazzaro submitted to the inquiry, often 'an ordinary individual worker cannot bargain properly with bigger employers'.[2]

3.12 This is a deliberate policy on behalf of the Government, as it believes the rate of employment is dependent on the cost of labour. However, the relationship between wage levels and the employment rate is more complex than has been set out in the Government's propaganda. Its position that driving down wages will result in a reduction in unemployment is not only unfair but is not supported by research.

3.13 The Government's rhetoric about a supposed link between individual agreements and productivity improvements is not supported by the evidence. AWAs only deal with pay and conditions of employment, not to practices that promote high productivity. In fact, although Australia was a leading country in labour productivity during the 1990s, productivity has not improved under the current Government.

3.14 The only economic evidence the Government provides to promote its workplace relations system is broader and unrelated evidence pointing to the current strength of the economy. However, this has not been the result of the Government's unfair workplace relations changes, but rather global and regional economic growth driven by the rise of China and India, the resources boom and reforms instituted by Labor Governments in the early 1990s.

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1 Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?', 2006, *The Economic and Labour Relations Review*, http://www.austlii.edu.au/au/journals/ELRRev/2006/3.html (accessed 23 May 2007).

2 Joe Lazzaro, *Submission 1*, p. 1.

Data on the progress of Work Choices

3.15 Empirical evidence on the performance of Work Choices and AWAs does not support the Government's assertions about their benefits for workers. Some of this evidence was heard during the public hearing and noted that collective agreements deliver better wages and conditions than individual agreements. Nevertheless, this has not stopped the Government drawing the unsubstantiated link of Australia's economic success to its industrial relations policy. The data on the adverse effects of Work Choices is concerning, especially as the most serious of the consequences will not be felt until the economy experiences a downturn.

3.16 While the Government has withheld data on the effects of Work Choices, information leaked in April from the Office of the Employment Advocate—to be renamed the Workplace Authority under the bill—highlighted the adverse consequences.[3] The leaked information suggested the majority of AWAs were abolishing employee entitlements in regard to shift loadings, annual leave loadings, incentive payments and bonuses and declared public holidays. In most cases, this has affected employees in already very low-pay industries. According to the data, a third of the individual agreements lodged during the first six months of Work Choices did not provide for a pay rise during the life of the agreement—not to reward productivity increases—or even to keep pace with inflationary rises in the costs of living. This is particularly worrying because the Government allows AWAs a life of up to five years. While some of the agreements allowed for pay rises of more than the minimum rates, there was no indication of whether these were sufficiently high to compensate for the benefits stripped away. The reports also suggested 27.8 per cent of the agreements did not include entitlements provided in the Fair Pay and Conditions Standard.[4]

3.17 Most independent commentators have argued that the workplace relations system of the Government is neither equitable nor balanced.[5] In particular, the Victorian and Queensland Governments have produced preliminary reviews of the effects of the legislation. In January 2007, the Queensland Industrial Relations Commission published its report following an inquiry into the effect of Work Choices in Queensland. The report noted that:

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3 In May 2006, the OEA made a decision to withhold from the public information about the effects of AWAs, officially because the data failed to account for the complete range of compensatory benefits including the non-monetary. However, it was also clear that the preliminary information collected contradicted the Government's assertions and indicated the agreements were detrimental to employees.

4 Mark Davis, 'Revealed: how AWAs strip work rights', 17 April 2007, *Sydney Morning Herald*, http://www.smh.com.au/news/national/revealed-how-awas-strip-work-rights/2007/04/16/1176696757585.html, (accessed 17 May 2007).

5 Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?', 2006, *The Economic and Labour Relations Review*, http://www.austlii.edu.au/au/journals/ELRRev/2006/3.html (accessed 23 May 2007).

> The inquiry has serious concerns about the social and economic impact of Work Choices….The Inquiry is strongly of the view that the most severe impact of Work Choices will be felt by those less skilled and vulnerable workers identified in this Report.[6]

3.18 The report highlighted the increased insecurity and vulnerability to exploitation experienced by workers. It argued:

> The evidence before the Inquiry has highlighted a trend towards lower wages and conditions of employment through the use of Australian Workplace Agreements (AWAs) as the relevant industrial instrument governing employment. In the AWAs reviewed and from the evidence before the Inquiry, the only outcomes evident are lower wages and conditions for employees. There has been no evidence whatsoever of reciprocal productivity and flexibility gains for employees and employers to justify such one-sided outcomes.[7]

3.19 In a March 2007 review for the Victorian Government on the progress of Work Choices, Professor David Peetz found that the wages share of national income was at a 35-year low, while the profit share was at an all-time high. He indicated that this was an extremely unusual occurrence in an economy experiencing low unemployment and labour market shortages.[8] He also found that protected award conditions were being abolished and that the lowest-paid employees were the most disadvantaged. Wages declined in low paid industries such as retail and hospitality, probably due to this increasing withdrawal of overtime and penalty rates.[9] Professor Peetz found that 'Women are particularly disadvantaged under AWAs'.[10] The study concluded that:

> Under WorkChoices, AWAs and, it appears, other non-union agreements have led to the loss of conditions of employment, particularly in areas like penalty rates, overtime rates and shift allowances. This has very likely led to lower rates of pay than workers would otherwise have enjoyed, particularly by comparison with if they were employed under collective agreements. The hourly rates of pay for workers on AWAs are, on average, lower than those for workers on collective agreements, but the impact on

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6 Queensland Industrial Relations Commission, *Final Report: Inquiry into the impact of Work Choices on Queensland Workplaces, Employees and Employers, Volume 2*, 29 January 2007, p. 6.

7 Queensland Industrial Relations Commission, *Final Report: Inquiry into the impact of Work Choices on Queensland Workplaces, Employees and Employers, Volume 2*, 29 January 2007, p. 6.

8 David Peetz, *Assessing The Impact Of 'Workchoices' One Year On: Report to the Victorian Department of Innovation, Industry and Regional Development*, 19 March 2007, pp. 45, 51.

9 David Peetz, *Assessing The Impact Of 'Workchoices' One Year On: Report to the Victorian Department of Innovation, Industry and Regional Development*, 19 March 2007, pp. 16, 48-49.

10 David Peetz, *Assessing The Impact Of 'Workchoices' One Year On: Report to the Victorian Department of Innovation, Industry and Regional Development*, 19 March 2007, p. 35.

> particular employees depends on their position in the labour market, in particular whether the particular skills they have are in short supply and the alternative employment opportunities available to them locally. Vulnerable groups, including women and workers in low wage industries, appear to have been particularly disadvantaged.[11]

3.20 Lower wages and reduced conditions will not be an incentive for increasing work participation, especially with disillusioned young people, older workers on the verge of retirement or managing their exit from the workforce, and carers with family responsibilities seeking to re-enter the labour market. Many will find the jobs unsatisfactory either because of poor wages or being compelled to work excessive and unsocial hours, forcing them to drop out of the labour market with a sense of failure and reduced inclination to try again. The Government's workplace relations system is yielding a less fair society with an increased population of working poor experiencing greater inequality.

3.21 The Opposition is concerned that the deleterious effects of AWAs is increasingly affecting the proportion of workers to whom they apply. Natural turnover is increasing the shift of workers onto poorer working conditions.

Motivations for the Stronger Safety Net bill

3.22 The Government's amendments have acknowledged the Government's industrial relations policy has hurt working families. However, the amendments themselves have simply been motivated by awareness that the Work Choices legislation is endangering the Government's chances of re-election. Less than one month before the stronger safety net provisions were announced, senior Government ministers denied the need for any amendments to the legislation. One week before the fairness test was announced, the Minister for Employment and Workplace Relations, the Hon Joe Hockey MP, said on *The 7:30 Report* that:

> Look, I'm prepared to debate the Labor party's policy because they're promising a revolution in the workplace. We, our laws are set, we are not for turning on the fundamentals Kerry, because those fundamentals are helping to deliver a strong economy, a robust economy. But the Labor party is going to the next election and it says it's going to tear up more than one million agreements out there between workers and employers. One million agreements, Kerry.[12]

3.23 On 22 May, Mr Hockey asserted that the Government 'under-estimated' the potential for employees to be pressured into trading away penalty rates without fair

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11 David Peetz, *Assessing The Impact Of 'Workchoices' One Year On: Report to the Victorian Department of Innovation, Industry and Regional Development*, 19 March 2007, p. 75.

12 The Hon Joe Hockey MP, *The 7:30 Report*, 26 April 2007.

compensation.[13] This is another example of the Government's dishonest attitude on the issue, as it was always aware that its Work Choices reforms would result in downward pressure on the wages of ordinary workers. Further, the example of Billy used in the Government's own information booklet on Work Choices highlights that this was advocated by the Government. It stated:

> The job offered to Billy is contingent on him accepting an AWA. The AWA Billy is offered provides him with the relevant minimum award classification wage and explicitly removes other award conditions….The AWA Billy is offered explicitly removes award conditions for public holidays, rest breaks, bonuses, annual leave loadings, allowances, penalty rates and shift/overtime loadings…Because Billy wants to get a foothold in the job market, he agrees to the AWA and accepts the job offer.[14]

3.24 This is exactly what industry was calling for. After all, why would the Government abolish the no-disadvantage test unless it intended to allow wages and conditions to be reduced and allow for the exclusion of all award conditions including so-called protected award conditions?

3.25 The Government is reminded that during the 2005 inquiry into Work Choices, the Opposition warned that the consequence of abolishing the no-disadvantage test was that it would lead to a reduction in the wages of low-income and women workers, and poor and disadvantaged people. The no-disadvantage test maintained a balance in the employer-employee relationship and provided a crucial impediment to some employers seeking to drive conditions below the award entitlements. It was especially important to protect workers in low-wage employment, with little unionisation and little opportunity for genuine collective bargaining. The Government's intention to allow the driving down of workers' conditions was the specific purpose for the Government's creation of a safety net with fewer minimum conditions and to allow the award safety net to be undermined.

3.26 Therefore, it is clear that the Government does not believe in the provisions or the need for protections for working families. Consequently, the Opposition remains concerned about potential for the provisions of the bill to be repealed immediately following the election. In press conferences announcing the reforms, the Prime Minister, the Hon John Howard MP, and Mr Hockey, made it clear they did not believe in the improved safety net provisions but that they needed to be introduced to address unfortunate public perceptions. The changes have been introduced reluctantly and in an attempt to appease voters by creating a perception of addressing the unfairness of Work Choices.

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13 Joe Hockey, cited in 'We got it wrong on Work Choices – Hockey', 22 May 2007, *WA Business News*, http://www.wabusinessnews.com.au/en-story/1/52610/We-got-it-wrong-on-Work-Choices-Hockey, (accessed 23 May 2007).

14 Australian Government, *WorkChoices: A New Workplace Relations System*, p. 15.

The stronger safety net provisions

3.27 The extensive data on the adverse consequences of the Government's workplace relations reforms for ordinary workers suggest that improvements are necessary to strengthen a safety net. The Opposition supports the principle of restoration of safety net entitlements, especially considering the widespread attack that has occurred under the Government's industrial relations policy, most notably under Work Choices. However, despite the Government's substantial rhetoric and a change of names to convince the public of good intentions, the substance of the legislation does not provide the purported protections and does not go nearly far enough to restore employee entitlements.

3.28 Despite claims from DEWR during the inquiry that the fairness test is more robust than the former no-disadvantage test, the Opposition considers the fairness test to be a poor substitute. It does not apply to all employees, does not guarantee monetary compensation for traded benefits, does not apply to all award conditions, is subjective, is resource intensive and imposes a large burden on business, particularly small business. The bill also does not address the fundamental aspects of its workplace relations system that allow the winding back of what should be guaranteed conditions.

3.29 As has been explored at other inquiries into the Government's workplace relations legislation, the Opposition retains substantial concerns about employees being subjected to pressure to accept AWAs, which remove protected award conditions. The Government has refused to acknowledge the myriad examples of such cases across the country. As the Government advocates AWAs, it is not in a position to take a disinterested view of the way employees and employers negotiate.

Conditions excluded from the safety net

3.30 As was heard during the inquiry, the reference of the fairness test to only the limited number of protected award conditions is insufficient to provide a genuine safety net for the majority of Australian employees. There is a range of conditions that should be considered part of a safety net that have not been covered or not restored by the bill. For instance, the Government has not restored protections to workers from unfair dismissal, redundancy pay, ceremonial leave, long service leave, required notice for shift and roster changes, and paid parental leave. The inquiry heard numerous examples of workplace agreements, which have excluded many award conditions with little or no compensation. The bill does not do enough to ensure that this practice will not continue.

3.31 Opposition members of the committee consider that a modern, simple award system that provides a genuine safety net for bargaining is the best model for providing minimum protections while accommodating the diverse conditions relevant to different industries and workplaces. In particular, the inquiry heard from the MEAA, the ANF and NSW Commission for Children and Young People about the disproportionate effects on certain demographics or certain industries as a result of the exclusion of important conditions from the protections under the Act.

3.32 Many of these conditions are specific to certain industries, but are crucial aspects of employees' entitlements in those industries. The MEAA provided various examples pertaining to the entertainment industry where work is irregular, contract-based and often involves multiple employers in different cities. This highlights the need for notice of cancellation of work, compensation for accommodation expenses for short-term engagements if residence is in another city, notice for requirements to smoke or work in smoking environments, and the issue of intellectual rights and entitlements to consent or royalties with respect to use of work.[15]

Employees not protected by the safety net

3.33 Despite the Government's misleading assurances, many workers will continue to have no protections under the bill. Approximately 2.5 million workers will not be covered by the fairness test, and this number will increase. While the introduction of the bill is an admission that Work Choices has seriously and unfairly disadvantaged many workers, the Government has no intention of assisting the numerous workers excluded from the protections, especially those who do not meet the annualised income threshold and those on agreements prior to the 7 May. The Government is effectively conceding the workers on agreements made between 27 March 2006 and 6 May 2007 are on unfair agreements but is allowing them to be so bound, potentially until 2012. As these agreements were lawfully made at the time, the relevant employees are not entitled to compensation for the unfairness of these agreements.

3.34 An instance of workers seriously disadvantaged that will not be offered protections by the bill was provided to the inquiry by the ANF. It noted that many nurses had lost substantial benefits and protections between March 2006 and May 2007. It provided an example of a real non-union collective agreement, not due to expire until 2010, applicable to a large number of workers in the Northern Territory. The agreement 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; redundancy; higher duties; meals; minimum time off between shifts and payment for jury service. It did not provide compensation for the loss of these entitlements or a pay rise over the life of the agreement and prescribed the minimum pay of the Standard.[16] These employees receive no benefit from this legislation.

3.35 The Opposition remains particularly concerned that although the bill prevents reductions in the $75000 threshold, increases are not guaranteed in the legislation. This will have the practical effect of allowing a watering down of the protection, as the value is not indexed to rises in inflation, the costs of living or minimum wage increases. Inevitably it is likely that workers on average wages will be pushed over the threshold, thereby losing the protection and further undermining the genuineness of what little protection is provided.

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

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

3.36 Opposition members of the committee also remain concerned by the potential exclusion of employees not usually regulated by an award. Estimates of the number of workers excluded amounted by over a million according to the ACTU.[17] The SDA argued that this would exclude 73 per cent of employees in the retail industry, which is one of those most in need of such protections.[18] Various submitters also highlighted that section 52AAA would also exclude many workers whose employment was governed by NAPSAs, unless this was immediately prior to the formulation of a workplace agreement that is subject to the fairness test.

Application of the fairness test

Subjectivity

3.37 The Opposition has serious concerns about the degree of subjectivity in the application of the provisions of the bill, leaving the interpretation to the discretion of the Workplace Authority Director. Many employees, employers and their representatives are confused about how the system will work, and the likelihood is that it will result in inconsistencies. It is also likely that unfair agreements will be passed. It has the potential to be exploited by some employers presenting trade-offs as employee preferences. This subjectivity is particularly relevant to the calculation of the value of non-monetary benefits, determinations of whether businesses meet the exceptional circumstances criteria relevant for exemptions from the fairness test and the sources of information used to ascertain whether or not a workplace agreement passes the fairness test.

3.38 Opposition concern with the subjectivity of the application of the fairness test has been underscored by evidence provided in various submissions and to the hearing of numerous instances of conflicting advice on agreement content provided by the Office of the Employment Advocate (OEA)—to be renamed as the Workplace Authority under the bill. As was highlighted in the submission of the NSW Government, the Workplace Authority—like the OEA—has a conflict of interest in promoting AWAs which encourage employers to strip back employee conditions, while, at the same time purporting to protect the rights of workers such as in the application of the fairness test.[19]

Lack of accountability and review

3.39 As was articulated by many of the witnesses, the concern of Opposition members of the committee about the application of the fairness test is compounded by the lack of accountability. This includes the lack of a review or appeal process, the fact that the Workplace Authority Director is not even required to provide reasons for its decisions, and the lack of guidance or any detail about how the test should be

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

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

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

applied. This undermines accountability but is also a breach of natural justice as the relevant parties will not even know whether or not they have grounds to pursue the matter further in a legal arena. Blatant errors in assessments of agreements—which is highly likely considering the subjectivity of the test and the past performance of the Office of the Employment Advocate—will not be picked up. As was asserted by various witnesses, this process is substantially different from the requirement of the Australian Industrial Relations Commission to conduct public hearings and provide public justifications for such decisions.

Use of personal circumstances in determining fairness

3.40 Opposition members of the committee are concerned at the potential misuse of the provisions under the bill that allow consideration of employee circumstances in determining the fairness of an agreement. This has the potential to result in exploitation of vulnerable employees with little bargaining power. The example provided in the explanatory memorandum of David, a waiter at Bill's Steakhouse, is a case in point. It did not suggest the business had financial problems but could still trade away penalty rates for unsocial hours without sufficient financial compensation simply because the worker was out of work for a year, lived in a region with few other job opportunities and was gaining work experience in an area related to his TAFE studies.[20] This example demonstrates the bill will allow vulnerable workers to be exploited in bids to enhance profits in circumstances where business viability is not a consideration.

3.41 Opposition members of the committee concur with the views in many of the submissions that such a practice is discriminatory and undermines the entitlement of employees to remuneration for the work done. It will also result in situations where employees will be working alongside others and doing the same level of work but for different wages and conditions. Also, as the SDA highlighted:

> That opens up enormous scope for people to lose financially in their employment in return for some flexibility in their working arrangements, which may cost the employer nothing, which the employer might very well be able to provide without any change to other conditions of employment.[21]

3.42 In this respect, Opposition members of the committee are also concerned at the prospect that an employee's family circumstances could be used as leverage to provide downward pressure on wages and other monetary remuneration. There must remain strong debate about how serious the Government is in advocating 'flexibility' for family friendly agreements. Work arrangements where an employee's 'family circumstances' can be used as an excuse to reduce their pay and conditions. There will always need to be some negotiation between employers and employees to accommodate operational requirements and family commitments. The ANF

20 Explanatory Memorandum, Section 346M, p. 19.

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

highlighted the concern that it would be unfair to require weekend work for some family flexibility.[22]

Lack of guarantee of financial compensation

3.43 Opposition members of the committee are also concerned that there are no guarantees of financial compensation for the loss of entitlements. The reality is that many ordinary workers rely on the additional monetary benefits of overtime and penalty rates in order to survive from week to week. That these could be traded without adequate financial compensation is particularly alarming due to the lack of a requirement under the bill to mandate consultation by the Workplace Authority with employees to confirm the value and significance of traded benefits. As was argued by the MEAA, mandatory consultation measures are essential to ensure that the bill provides both 'administrative' and 'substantive' fairness.[23] This is because despite claims during the public hearing that the fairness test is a review of consensual agreements, the existence of the bill is an acknowledgement that many employees are unwilling parties to much of the content of many agreements.

Disadvantaging of employees on collective agreements

3.44 The Opposition members of the committee are concerned by the potential significant disadvantaging of employees on collective agreements. As was identified by the SDA, AMWU, the Victorian Workplace Rights Advocate, Professor Stewart and the RTBU, collective agreements will be assessed according to the 'overall effect on the employees'.[24] The inclusion of this caveat is clearly contrary to the objectives of a fairness test and should be amended.

Changing conditions and agreement durations

3.45 The Opposition members of the committee agree with the concerns in various submissions that the bill does not provide for a review of benefits over the course of an agreement. An example was highlighted during the inquiry of benefits being traded for child care assistance where these needs change over the course of the agreement, and of penalty rates being traded but subsequent operational requirements being imposed that oblige workers to work unsocial hours without additional compensation. The Opposition is particularly wary of any encouragement for employers to make further demands on employees to work excessive and unsocial hours. With the booming economy and tightness of the labour market, a greater proportion of Australians have felt this pressure of excessive and unsocial work hours. It is only fair that, at the least, they be appropriately compensated for this additional work, which improves the profitability of business.

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22 The Australian Nursing Federation, *Submission 2*, p. 5.

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

24 Section 346M(1)(b)

3.46 The Opposition members of the committee are reminded that during the 2005 inquiry into Work Choices, the committee received evidence that workers were usually worse off when subject to workplace agreements where penalty rates were traded for a higher base salary. The committee heard that while a significantly higher rate of pay was received to incorporate penalty rate entitlements, a closer analysis revealed that it did not compensate for the increasingly open and flexible hours of work. The open-ended hours of work were incorporated under the rubric of flexibility. However, in practice, the power inequality in the negotiating relationship meant that management and business requirements—rather than worker needs or family responsibilities—were the key determinates working hours. These findings were reported by the 2002 Australian Centre for Industrial Relations Research and Training report prepared for the Commissioner of Workplace Agreements.[25]

3.47 Similarly, although Opposition members of the committee recognise the need for 'exceptional circumstances' that may lead to the *temporary* waiving of the application of the fairness test, there appears to be no provision in the bill to make such circumstances temporary. It is imperative that such agreements be reviewed following the cessation of the 'exceptional circumstances' and not permitted the duration of any other agreement.[26]

3.48 Further, the Opposition members of the committee have not been reassured that the Workplace Authority will exercise the 'exceptional circumstances' exemption responsibly. This is because of the wide latitude given to genuine operational reasons for the unfair dismissal of employees across the country. Since Work Choices was introduced, companies in Australia have been accused of using Work Choices laws to dismiss staff only to re-advertise the same jobs at a lower salary. These actions can be legal if 'at least part of' the decision making for the redundancy is based on the justification of operational requirements.[27] This has raised concerns about the breadth of circumstances allowing such a justification to be used and the Opposition members of the committee remains concerned at the potential for a similarly liberal interpretation of the 'exceptional circumstances' exemption.

Long-term effects of the provisions

3.49 A large proportion of the community have felt the effects of AWAs, but the complete extent of their severity will not felt until an economic downturn and the shift to AWAs increase over time through attrition. The undermining of collective bargaining in the negotiation of pay and conditions leaves many workers with little

25 *A comparison of employment conditions in individual Workplace Agreements and Awards in Western Australia*, produced for Commissioner of Workplace Agreements, ACIRRT, University of Sydney, February 2002., p.64.

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

27 Misha Schubert, 'Priceline case puts focus on IR laws', 25 April 2007, *The Age*, http://www.theage.com.au/news/national/priceline-case-puts-focus-on-ir-laws/2007/04/24/1177180651507.html, (accessed 16 May 2007).

capacity to preserve the entitlements that are the subject of the bill. Many workers have little bargaining power to negotiate a mutually satisfactory outcome that is appropriate to their circumstances.

3.50 The competitive advantage to employers that have taken advantage of the unfairness of Work Choices to drive down wages and conditions on agreements between March 2006 and May 2007 has been entrenched by the bill and will encourage broader lowering of wages and conditions in certain industries. This is particularly the case in highly competitive industries where labour costs are a key factor in successful bidding for a contract. Even well-intentioned employers will find they have to conform their labour market strategies or become uncompetitive, especially where margins are thin and labour costs represent a large proportion of expenses.

3.51 Further, with the erosion of existing entitlements, the Opposition also has no faith that developing community standards—such as with respect to family responsibilities of dual-income households—and others, some of which cannot be foreseen, will be taken up in future workplace agreements.

Effect on productivity

3.52 The Government's workplace relations policy will have an adverse effect on productivity, as poor wages and working conditions contribute to a skills shortage and a shortage of workers in a given industry. Further, exploited employees will be more likely to be unproductive while at work. There will be increasingly low morale and higher turnover of staff. As argued by the submission of the NSW Government, many of the entitlements that have not been protected under the bill have been designed to promote skills development and improvements in productivity.[28]

3.53 Genuine productivity increases are brought about by enhanced training and skills development, taking advantage of technological progress, and collective cooperation between employees and employers for the alteration of work practices. There is no such incentive in the Government's approach. The legislation fails on these criteria, as has the Government's policy, as it has failed to address serious skill shortages and a dearth of investment in innovation. In fact, as the Government has made it easier to drive down wages and conditions, there is less incentive on employers to invest in labour saving technology or training and skills development.

Conclusion

3.54 The Government's long-term approach to industrial relations and economic growth is fundamentally flawed. The crusade for AWAs is driven by outdated ideological, rather than objective economic, motivations. The Government's policy is predicated on the view that productivity increases are engendered by lowering pay and

28 New South Wales Government, *Submission 15*, p. 16.

removing entitlements. Further, it believes that the economy is at its most productive when workers are forced to accept whatever terms an employer is willing to offer.

3.55 The Government's amendments seek to undermine minimum employee entitlements with a view to their erosion and eventual removal. This is simply aimed at increasing shareholder and other profitability, rather than productivity. This will have a long term effect of a reduction in overall standards of living.

3.56 It is difficult to believe that the Government does not regard the so called fairness test as anything more than expedient; to be wound back after an election if it is victorious. Further, there is also every possibility that the Government will further deregulate industrial relations if it again wins power, although it will not seek a mandate for such reforms knowing it would risk electoral defeat.

3.57 The Opposition considers that the bill does not sufficiently address the concerns that have been raised in the Australian community since the introduction of Work Choices. Despite not achieving its aim, the legislative provisions of the fairness test are complex, subjective and open to inconsistencies and subjectivity in their application. The bill is simply an attempt to deflect public criticisms, rather than provide a genuine attempt to restore fairness in workplace relations.

3.58 The bill will require a huge resource investment, which is only likely to increase over the years, to solve a supposed problem of perception. It is notable that the Government's resource investment has not been matched in the arena of compliance monitoring. This shows the Government is not interested in determining the effect of the fairness test and policing breaches. The submission of the NSW Government highlighted that the federal system costs twice as much as the State system prior to Work Choices.[29] It is clear that the government is injecting costly resources and a large administrative burden to protect an unfair system. The only fair solution would be to repeal its workplace relations policy.

3.59 It is highly doubtful that the Workplace Authority or the Workplace Ombudsman will be able to recruit sufficient qualified staff to meet the needs of the increased administration of this legislation. The labour market for graduates is very tight, and competition from other Commonwealth agencies is intense. It is remarkable that Australia will have one of the largest bureaucracies regulating industrial relations of any country in the world. This is the price to be paid for deregulation as considered by the Coalition.

3.60 Opposition Senators will support the bill, as it provides a minor improvement to the existing legislation. However, the bill does not go far enough and does not provide the protections it purports or do anything to stop the growth of low paid precarious employment. Despite comparisons with the no-disadvantage test that was enforced by the Industrial Relations Commission, the new fairness test provides fewer

29 New South Wales Government, *Submission 15*, p. 30.

protections. In particular, there remains no guarantee of financial compensation for lost conditions and there will be fewer constraints on requirements for employees to work on weekends, and excessive or unsocial hours. Further, the Opposition is concerned that without amendments, the bill contains deficiencies that could be exploited to the disadvantage of workers. The necessity of the bill has illustrated that many employees have already been disadvantaged and underscores the likelihood that further will be disadvantaged unless flaws in the bill are addressed.

3.61 Opposition Senators endorse the need for a review of the legislation with a view to considering the numerous concerns raised during the inquiry and highlighted in the committee report. However, the Opposition members would have preferred the committee to have recommended specific legislative changes to ensure fairness is achieved, some of which have been outlined below. Some of the necessary legislative changes that arose during the inquiry pertain to deliberate policy decisions to exclude certain employees from access to the fairness test.

Recommendation 1

3.62 Opposition members of the committee recommend that the bill be amended to provide for increased transparency and accountability in the performance of the duties of the Workplace Authority in its application of the fairness test. In particular, the bill should be amended to provide for an appeal process, require the Workplace Authority to provide reasons to the relevant parties for any decision on the fairness of an agreement, articulate greater prescriptive detail about how the test should be applied and define many of the subjective terms relevant to the test.

Recommendation 2

3.63 Opposition members of the committee recommend that the bill be amended to require the Workplace Authority to provide both parties to an agreement with the opportunity to provide, verify or refute information obtained by the Workplace Authority in the course of conducting the fairness test.

Recommendation 3

3.64 Opposition members of the committee recommend that the bill be amended to abolish the $75 000 threshold. In the event that this is not supported, the bill should be amended to index the $75 000 threshold to rises in inflation to ensure the limited protection provided is not further eroded over time.

Recommendation 4

3.65 Opposition members of the committee recommend the bill be amended to ensure all conditions and entitlements of a relevant award or instrument are considered in the application of the fairness test to ensure workers receive full compensation for traded benefits so that they are not worse off under an agreement.

Recommendation 5

3.66 The Opposition members of the committee recommend that the bill amended regarding the application of the fairness test where employment was subject to notional agreement preserving State awards or to preserved state agreements (section 52AAA). This would be with a view to ensuring that the fairness test would apply wherever the employees concerned have been covered by protected notional conditions or protected preserved conditions at any time, other than when the instruments ceased to apply following replacement by a federal award.

Recommendation 6

3.67 Opposition members of the committee recommend that the bill be amended to prevent the failure of an agreement to pass the fairness test reverting to an even less generous agreement for employees. In such instances, employees should be entitled to the protected conditions that would have applied but for the operation of the earlier less generous agreement.

Recommendation 7

3.68 Opposition members of the committee recommend that the bill be amended to ensure that the fairness of agreements can be subject to review prior to the lapsing of an agreement. This would ensure that entitlements and conditions of employment under an agreement considered fair during the application of the fairness test cannot subsequently be altered to disadvantage employees without adequate compensation being provided. It would also allow investigation of the changing value of non-monetary compensation provided over the course of an agreement.

Recommendation 8

3.69 Opposition members of the committee recommend that the bill be amended to provide a limited lifespan to agreements formulated under the 'exceptional circumstances' provision (Section 346M(4)). Such an amendment should ensure the review of such agreements after a certain time-period or a return to higher remuneration and conditions following the remedy of the conditions responsible for the 'exceptional circumstances', irrespective of the stipulated agreement duration.

Recommendation 9

3.70 Opposition members of the committee recommend that the bill be amended.

Senator Gavin Marshall
Deputy Chair