

Chapter 5

Dissenting Report by the Australian Greens

5.1 The Australian Greens do not believe the bill should be passed in its current form. The bill does not achieve the objective of providing a fair safety net for employees. While it may be said the bill provides a 'stronger' safety net that is only because the current safety net is so weak.

5.2 The committee has been made aware of a number of deficiencies in the bill relating to the coverage of the fairness test, the application of the test and the lack of transparency in decision making.

Coverage of the 'fairness test'

5.3 A number of the submissions and evidence to the committee highlighted the fact that many employees will not have their agreements subject to the 'fairness test'. Those employees include all those who have signed a workplace agreement between 27 March 2006 and 7 May 2007 and all those on AWAs whose full time equivalent annual salary is more than \$75 000.

5.4 The Greens see no justification for these blanket exceptions from the fairness test. While it may be a difficult task to assess the workplace agreements lodged prior to 7 May 2007, it is unreasonable for the government to acknowledge there have been employees who are worse off under such workplace agreements and yet provide no remedy at all.

5.5 We note the submission of Professor Andrew Stewart and his suggestion that for agreements lodged between 27 March 2006 and 7 May 2007, employees should be provided with the right to seek termination of their agreements if those agreements fail the "fairness test".¹ In those circumstances and with protection from their employment being terminated, employees can then enter new workplace agreements which will be subject to the 'fairness test'. While this is not a perfect solution to the problem created by the bill and it does not compensate those employees for loss of award conditions now subject to the 'fairness test', we urge consideration of the suggestion as an alternative.

5.6 The Greens are also opposed to the income exclusion. As the ACTU submissions point out, over one million employees are potentially excluded by these provisions.² Of particular concern is that because the annual threshold amount is applied pro rata to part time employees there will be part time workers who earn

¹ Professor Andrew Stewart, *Submission 21*, p.2.

² ACTU, *Submission 8*, p.4.

significantly less than the prescribed amount whose agreements will not be subject to the test.

5.7 The other means the bill uses to exclude people from the 'fairness test' is by having it apply only to those employees whose work is 'usually' regulated by an award. As the bill is currently drafted this means regulated by a federal award. The committee heard evidence that these provisions mean that substantial numbers of employees previously in the state industrial relations system will be excluded.

5.8 We note the supplementary submission from the Department of Employment and Workplace Relations indicates that the government's policy intent was to ensure that employees working in 'traditionally' award covered areas are subject to the 'fairness test' and that the government will be moving an amendment in the Senate to this effect.³ In principle we welcome such an amendment, but await the detail of this amendment to consider whether the problem is adequately addressed therein.

5.9 Another issue concerning employees previously in the state system is when the Workplace Authority Director must designate an award for the purposes of the test. Again the definition of award means that the Director can only designate a federal award. However, there may not be an appropriate federal award to designate if the kind of work performed by the employee was usually regulated by a state award. This provision has the potential to mean that some employees previously in the state system will not have the 'fairness test' applied to their agreements by virtue of there not being an appropriate federal award to use in the test. The bill should provide that the Workplace Authority Director can designate a state award in relation to an employee or employees if appropriate.

5.10 The Greens believe the bill should be amended so that 'fairness test' must be applied to each and every workplace agreement lodged.

Recommendation 1

That the bill be amended so that the every workplace agreement must pass the fairness test.

Application of 'fairness test'

5.11 A second area of concern is the operation of the 'fairness test'. The test is limited to considering a restricted list of 'protected award conditions.' Submissions from the ACTU and Professor Stewart listed the range of other award conditions that can be traded away without compensation.⁴ These conditions include redundancy pay, long service leave, rostering provisions and other working hours provisions, casual loadings that are more than 20 per cent, any rights to request flexible working

³ Department of Employment and Workplace Relations, *Submission 18a*, p. 1.

⁴ ACTU, *Submission 8*, p.6; Professor Andrew Stewart, *Submission 21*, pp.1-2.

conditions and paid maternity leave. These are important conditions that affect employees' working and family lives and should be factors in the test if it is to be truly fair. The Greens believe an adequate fairness test must consider all award conditions.

Recommendation 2

That the fairness test considers all award terms and conditions.

5.12 The Greens are also concerned about the extent of the matters the Workplace Authority Director can take into account in deciding whether an agreement passes the fairness test. In particular we note the objections of the ACTU to the Director being able to take into account an employee's personal circumstances.⁵ We agree with comments made by the ACTU in their written submission and in evidence before the committee that such a provision is discriminatory and should not be contained in the legislation.

5.13 We are also concerned about the breadth of the 'exceptional circumstances' exemptions open to employers in respect of the industry, location or economic circumstances of the employer. If there is to be an ability for an employer to have their economic circumstances taken into account, in all fairness, it must be done in an open and transparent manner whereby the employer provides proof to the Director that their business is in short term crisis. Furthermore, a resulting agreement should be limited to no more than one year or at least be reviewable after one year so that if the employer's business has picked up their employees are not subject to an inferior agreement for any longer than necessary.

Recommendation 3

That subsections (3), (4) and (5) of section 346M be deleted, *OR alternatively, ...*

That any agreement where the employers' circumstances are taken into account should be in operation for no more than one year.

5.14 Another issue with the application of the fairness test that was raised with the Committee concerns the provision that the test in the case of collective agreements requires a consideration of the 'overall effect on the employees whose employment is subject to the collective agreement'. This provision allows for a situation where some employees under the agreement may not be provided with fair compensation for the loss of conditions while others are. The Greens do not believe such inequity should be allowed and that a simple amendment should be made requiring the fairness test to be applied to ensure each employee under the agreement has received fair compensation for loss or modification of award conditions.

Recommendation 4

That the fairness test be applied to collective agreements to ensure all employees under the agreement receive fair compensation for loss or modification of award conditions.

⁵ ACTU, *Submission 8*, p.9.

5.15 A number of submissions also raised the concerns about defining and assessing 'fair compensation' and in particular taking into account 'non-monetary compensation'. The Greens share those concerns and believe the bill should provide a clearer definition of 'fair compensation'. We note the submission of Professor Stewart and his suggestion, although admittedly not perfect, for a definition of 'fair compensation'.⁶ The Greens believe this suggestion should be considered.

Transparent decision making

5.16 An important issue raised in a number of submissions refers to the lack of a transparent and reviewable decision making process in the application of the fairness test. A number of submissions also recommended the test be applied by the AIRC rather than the Workplace Authority Director and the Greens believe this suggestion has merit. The Greens are concerned with the lack of transparency in the decisions made by the Workplace Authority Director and believe it would enhance the fairness of the bill if provision was made for a person affected by a decision of the Director to have the right to request and receive written reasons for the decision. Furthermore, there should be a process for review of the Director's decision. These decisions potentially affect people's livelihoods and as such there should be robust mechanisms to ensure the administrative decisions are taken in accordance with the legislative requirements.

Recommendation 5

That a review process of the decisions of the Workplace Authority Director in applying the fairness be established, including the provision of written reasons when requested by a party to the agreement the subject of the decision.

Other Matters

5.17 The Committee received submissions and heard evidence in respect of a number of other matters of concern in the bill. Two matters of particular interest include what happens when an agreement fails the test and the protections from dismissal when an agreement fails or may not pass the fairness test.

5.18 There is concern that in certain situations an employee under an workplace agreement that fails the test may go back to having their employment governed by an agreement that would also not pass the test, for example an pre-7 May 2006 AWA. The Greens believe the potential for employees to be worse off because an agreement fails the fairness test is a situation that should be avoided.

5.19 Both the ACTU and Professor Stewart submitted that the provision protecting employees from dismissal when a workplace agreement does or may fail the fairness test are inadequate. The Greens believe section 346ZF should be redrafted to close the loopholes identified by Professor Stewart to ensure real protection for employees.⁷

⁶ Professor Andrew Stewart, *Submission 21*, p.7.

⁷ ACTU, *Submission 8*, p.16; Professor Andrew Stewart, *Submission 21*, pp. 11-12.

Recommendation 6

That section 346ZF be redrafted to provide adequate protection for employees from dismissal or other unfavourable treatment.

Welfare to Work

5.20 We note the submission of the ACTU concerning the relationship with Welfare to Work and the concern that a refusal by someone in receipt of benefits to sign an unfair AWA as a condition of employment may lead to an 8 week non-payment period. We support the ACTU's recommendation that a consequential amendment be made to the Social Security Act to ensure that people who refuse to sign an unfair agreement are not penalised.⁸

Recommendation 7

1. That in light of the amendments to the Workplace Relations Act, the Social Security Act be amended to ensure that people in receipt of benefits are not disadvantaged by refusing to take a job on the basis the workplace agreement was unfair.

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⁸ ACTU, *Submission 8*, p.17.

