

The Senate

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Standing Committee on  
Employment, Workplace Relations  
and Education

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Workplace Relations Amendment (A Stronger  
Safety Net) Bill 2007 [Provisions]

June 2007

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# Acronyms

ACCI	Australian Chamber of Commerce & Industry
ACTU	Australian Council of Trade Unions
AFPC	Australian Fair Pay Commission
Ai Group	Australian Industry Group
AMMA	Australian Mines and Metals Association
AMWA	Australian Manufacturing Workers Union
ANF	Australian Nursing Federation
APESMA	Association of Professional Engineers, Scientists and Managers
AWA	Australian Workplace Agreement
CPSU PSFG	Community & Public Sector Union State Public Services Federation Group
DEWR	Department of Employment and Workplace Relations
FSU	Finance Sector Union of Australia
IPI	Institute of Public Affairs
MEAA	Media, Entertainment and Arts Alliance
NAPSA	Notional Agreement Preserving a State Award
OEA	Office of the Employment Advocate
QCU	Queensland Council of Unions
RCSA	Recruitment and Consulting Services Association
RTBU	Australian Rail, Tram and Bus Union
SDA	The Shop Distributive & Allied Employees' Association





# Chapter 1

## Introduction

### Background

1.1 On 10 May 2007, the Senate referred the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* to the Employment, Workplace Relations and Education Committee for examination upon its introduction in the House of Representatives. The bill was introduced into the House of Representatives on 29 May 2007. The committee was ordered to report its findings by 14 June 2007.

### Purpose of the bill

1.2 The purpose of the bill is to amend the *Workplace Relations Act 1996* to introduce an additional fairness test for workplace agreements and establish two new statutory agencies—the Workplace Authority and the Workplace Ombudsman. The Workplace Authority will be required to conduct the fairness test to ensure that award conditions such as penalty rates are not traded off in workplace arrangements without adequate compensation. A more robust compliance framework will also be introduced and administered by the Workplace Ombudsman to ensure effective operation of the fairness test.

1.3 The stronger safety net will be extended to over 7.5 million Australians making workplace agreements. It will build on the workplace relations reforms undertaken in 1996 and 2006 but will not change the fundamental thrust of those changes, which have been aimed at improving flexibility in employment arrangements. The fairness test was introduced because it was never the intention of the Government that it become the norm for protected award conditions such as penalty rates to be traded off without compensation. The legislation is aimed at assuaging these concerns, which have emerged in the community following negative advertising campaigns that have little foundation in fact.

### Submissions

1.4 The committee advertised the inquiry in *The Australian* newspaper on 16 May 2007, inviting submissions by 4 June 2007. Details of the inquiry, the bill and associated documents were available on the committee's website. The committee also directly contacted the Department of Employment and Workplace Relations and various employer groups, industry organisations, unions, stakeholders, commentators and academics to invite submissions to the inquiry.

1.5 The committee received 28 submissions, which are listed at Appendix 1. Submissions were posted to the committee's website to ensure accessibility by members of the public and interested stakeholders. The committee held a public hearing in Canberra on 8 June 2007. The list of witnesses is at Appendix 2 and copies

of the Hansard transcript are available through links at <http://www.aph.gov.au/hansard/index.htm>.

### **Acknowledgement**

1.6 The committee thanks those organisations and individuals who made submissions, gave evidence at the public hearing and otherwise assisted with the inquiry.

## 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'.<sup>1</sup> 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.

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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](http://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;

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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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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

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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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

### **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.

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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.

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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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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

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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.



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value to the employee'.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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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.<sup>14</sup> 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.<sup>15</sup> Both ACCI and IPA highlighted concerns about the administrative burden that would be imposed on employers in agreement making.<sup>16</sup>

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.<sup>17</sup>

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.<sup>18</sup>

### **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.

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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'.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> The Community and Public Sector Union State Public Services Federation

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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.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

#### *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

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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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

2.43 The Anglican Church Sydney Diocese submitted that these employees signed their agreements 'in good faith...or...without any genuine choice all all'.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

#### *Award designation for the fairness test*

2.44 The exclusion of employees from occupations or industries not 'usually regulated by an award',<sup>34</sup> would exclude 1.16 million employees according to ACTU.<sup>35</sup> 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.<sup>36</sup> SDA

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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.<sup>37</sup>

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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup>

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

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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.

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should be based on the level of actual entitlement, rather than a higher rate that has not been part of the relationship.<sup>41</sup>

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.<sup>42</sup>

### *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.<sup>43</sup>

### *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

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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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup>

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

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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.



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argued that additional protections were needed in these areas to safeguard young people's educational and personal development.<sup>47</sup>

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.<sup>48</sup>

### *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.<sup>49</sup>

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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.<sup>50</sup> 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.<sup>51</sup> Professor Stewart also cited anecdotal evidence of different interpretations having been given by the OEA for whether or not agreements included prohibited content.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup>

#### *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

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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.

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

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.<sup>59</sup>

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.<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup>

### *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

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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.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup>

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

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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'.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup> 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.<sup>71</sup> The NSW Government argued that the experience of workers on AWAs was that family flexible conditions were not included.<sup>72</sup>

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

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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.<sup>73</sup> The AMWU raised similar concerns regarding potential provision of child care and affect on the child care rebate.<sup>74</sup>

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.<sup>75</sup> The ACTU and JobWatch cited the example of childcare to highlight that an employee's requirements could change over a five year period.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

### ***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.

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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.

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### *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.<sup>79</sup>

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.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup>

### *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

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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'.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup>

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.<sup>87</sup> 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

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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.



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decision making role should be conducted in the open forum of the Australian Industrial Relations Commission.<sup>88</sup>

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.<sup>89</sup> Without such provisions, the MEAA considered that the bill could not provide 'administrative' or 'substantive' fairness.<sup>90</sup>

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.<sup>91</sup>

### *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.

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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'.<sup>92</sup> 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.<sup>93</sup>

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.<sup>94</sup>

### ***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.

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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.

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***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.<sup>95</sup>

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.<sup>96</sup> 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'.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup>

***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.

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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.<sup>101</sup> The ACTU also acknowledged the complexity created by these sections of the bill.<sup>102</sup>

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.<sup>103</sup>

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.<sup>104</sup>

### ***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

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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.

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that is designed to give more certainty to parties to agreements once they are lodged.<sup>105</sup>

### ***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.<sup>106</sup>

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.<sup>107</sup>

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.<sup>108</sup> The RCSA also highlighted the potential adverse effects on the on-hire industry.<sup>109</sup>

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.<sup>110</sup> 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

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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.<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup> The NSW Government submitted that the training to be provided may not be sufficient for adequate and timely agreement processing.<sup>114</sup> 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.<sup>115</sup>

### *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,<sup>116</sup> and notes the testimony of ACCI that such inclusions in agreements are 'ahistorical'.<sup>117</sup> 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.

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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.

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## 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.<sup>118</sup>

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.

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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.<sup>119</sup>

### **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.**

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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



## **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.<sup>1</sup> 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'.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

3.17 Most independent commentators have argued that the workplace relations system of the Government is neither equitable nor balanced.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> Professor Peetz found that 'Women are particularly disadvantaged under AWAs'.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

***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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

#### *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

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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.<sup>20</sup> 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.<sup>21</sup>

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

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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.<sup>22</sup>

#### *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.<sup>23</sup> 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'.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup> 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 be 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

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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.<sup>28</sup>

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

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



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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.<sup>29</sup> 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

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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.**

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**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

## Chapter 4

### Australian Democrats' Minority Report

#### Work Choices is badly flawed

4.1 The most obvious problem with this Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 is that it seeks to build onto a legislative house that has unsafe and shaky foundations. The main structure is faulty, and add-ons cannot alter that fact.

4.2 On the 2nd December 2005 Senator Murray gave a third reading speech in the Senate on the Work Choices legislation (the Workplace Relations Amendment (Work Choices) Bill 2005) that radically altered Australian workplace law.

4.3 In part he said the following:

As you know, Mr President, the Australian Democrats said that the government had a right to have the passage of that 1996 bill if they could agree to the amendments. We made 176 amendments to that bill, and the result was that the heat came out of that debate; the act was made economically effective and was found to be socially acceptable. We have claimed since that we played a part in the good times to which that act has contributed, along with other issues.

So, when the government look at our situation, where we are adamantly and vigorously opposed to this bill, they should be asking why. It is because there is no continuity with the past. This breaks with the past. The Australian Democrats value the past. We say that this bill breaks with the broad consensus that we have enjoyed. I will repeat what I have said before about the broad consensus, which existed despite the clash of the titans. That broad consensus was that our workplace law should reflect the social contract that growing national and individual wealth should be accompanied by rising living standards and a comprehensive safety net for the disadvantaged and powerless in our society, and low or inadequate wages should be supported by a sufficiently comprehensive welfare system to ensure family stability and sustainability.

That broad consensus was that wages and conditions of work should bear in mind the family more than the individual; that governments and parliaments should determine law and regulation but that enterprises, unions and tribunals should determine the detailed content and decision of workplace relations; that independent specialist tribunals were preferred for conciliation, arbitration and determination rather than the courts; that collective labour and collective capital had primacy over individual arrangements; that statute was the dominant determinant of collective arrangements at work and common law the dominant determinant of individual arrangements; that industrial relations should be a multiple federal system, not a single national system; that it was justifiable to

subordinate the economic to the social in the workplace by ensuring the living standards of the worst-off were consciously and deliberately raised; that health and safety and compensation for accidents or negligence should be a primary feature of workplace law.

This bill assaults the cultural, economic, social, institutional, legal, political and constitutional underpinnings of work arrangements in Australia. It aims to radically alter our work systems and values. Our problem with this is that we do not stand beholden to the unions or business. Our problem is that the case still, to this moment, has not been made that the economic and the social situation in this country desires or needs this radical change.

This change would not have happened if the Australian Democrats still held the balance of power in this chamber.

4.4 A year and a half later, notwithstanding the introduction of the bill, nothing has happened to change the view of the Australian Democrats. At the heart of the Coalition's agenda was a belief that it was good economics to increase the profit share and decrease the wage share, and to give employers greatly increased leverage in the employment contract. To achieve that, workers had to be made more vulnerable to exploitation. But the speed and extent with which some employers have taken advantage of the imbalance in the industrial relations system to strip back core workers entitlements has been alarming. There are numerous anecdotal reports highlighted in the media about workers being offered unfair agreements and told they could 'take it or leave it'.

4.5 Further, although many workers have felt the brunt of the unfairness of the Government's system, the disempowerment of workers will result in its most profound social consequences when, as it must eventually do, the economy slows down. To some extent the tight labour market has ameliorated the severity of Work Choices, but in different economic circumstances even the most well-intentioned employers may be forced to cut wages and core conditions to remain competitive as rivals do so. These adverse effects are likely to be more pronounced as Australian Workplace Agreements (AWAs) continue their migration from the managerial and mining sectors to the broader community, where many workers lack genuine bargaining capacity.

### **Motivations for the bill**

4.6 The Australian Democrats wish it was not so, but cannot help but believe the motive for this bill is base. Every word uttered by the Coalition in the construction of Work Choices, in the disgracefully brief Senate inquiry into it, in the debate that surrounded it and since, showed the opposite. The Coalition dismissed and vilified the arguments of those who warned them of the perils of what they were doing. Among many matters, with respect to the safety net, the inquiry into Work Choices clearly brought to the Government's attention that workers would be disadvantaged if the award system was uncoupled from AWAs, and if the global no-disadvantage test that applied to pre-Work Choices AWA was abolished, but to no avail.

4.7 Finally the people spoke. The Coalition plunged in the polls, their hold on government seriously threatened. The response so far is 'A Stronger Safety Net', not motivated by a desire for a fairer go, but motivated by a primal desire to retain power and reverse Coalition electoral prospects.

4.8 Although the 'fairness test' under the bill comprises a modest measure to improve the working conditions of some workers, not all workers will benefit from it. Overall, the safety net proposed is only a small advance for workers and in no way addresses the radical and harsh measures introduced under Work Choices.

4.9 Up to 25 percent of employees are still on state systems in some states. Of those in the federal system, very large numbers are still on pre-Work Choices agreements, and will not move on to the Work Choices regime until 2008, well after the federal election. Of those left, not all workers are worse-off since this legislation became law in March 2006, because many employers behave well in the workplace, and a number of industries are benefiting from a high demand for labour, with accompanying good wages and conditions.

4.10 Nevertheless, there are many workers who have had their wages and conditions slashed. The Australian Democrats concur with the Institute of Public Affairs who state in their submission that this new bill addresses a 'glaring hole' in the Work Choices system that legally allows employers to reduce the overall income of workers, a practice that breaches ethical community standards.<sup>1</sup> Professor Andrew Stewart from the School of Law at Flinders University states what has now become obvious: that the deficiencies of the 2005 Work Choices legislation have materialised, even in the absence of more extensive data.<sup>2</sup> Not least among those deficiencies is a welter of complex regulation that reduces productivity and makes the system difficult to manoeuvre.

### **Government dogma now under attack**

4.11 The Government stands guilty of grossly overstating the economic benefits of Work Choices, and understating the social costs to many workers and their families. To argue that Australia's low unemployment figures and strong economy are directly the result of the Work Choices industrial relations reforms is plain wrong. The fall in unemployment post-Work Choices, welcome as it is, essentially continues the positive downward trend pre-Work Choices. The resource boom and a strong Australian economy, coupled with strong global growth, are the principal contributors to jobs and economic growth and prosperity, not Work Choices.

4.12 A key problem with Work Choices is that it rests on notions of how the Government wants workplaces and business to be rather than how they are. In this sense, the Coalition Senators who sat on the 2005 inquiry into the Work Choices bill

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

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

did the Government a real disservice. By agreeing to a disgracefully short inquiry, by wilfully ignoring the evidence before them, for being belief-driven, for allowing the guillotining of the debate and the wholesale brutal out-of-hand rejection of amendments to Work Choices, they failed the Senate, and they failed the people of Australia.

4.13 If the Coalition government loses office because of Work Choices, part of the blame would lie with the failure of government senators to provide a steadying influence on an adamant and ideologically driven Prime Minister and his Executive. It is the duty of senators to review legislation and to check the executive, not to simply follow orders.

4.14 The Government still stands condemned for ramming Work Choices through the Senate. They forced a process and timeline on the Committee inquiry into a bill proposing the most radical changes to workplace laws ever, that treated parliamentary processes with contempt. As the Australian Democrats stated in their minority report:

The disregard for the Senate as a house of scrutiny may appear remarkable from a Government whose Prime Minister promised to use its numbers wisely and not provocatively. On that basis you would expect executive arrogance or the heady hubris of numbers would not get in the way of good law making. The reality is that the Prime Minister was saying what the Australian public wants to hear, and not what he believes.<sup>3</sup>

4.15 And once again the Government has subjected the committee to a disgracefully and regrettably short time frame to examine this ‘stronger safety net’ bill. Many submissions commented on the lack of sufficient time to properly consider the bill and its implications, and the time allotted for hearings was insufficient given the interest in, and importance of, the bill. Even in the short time allotted, it became evident during the inquiry that there are substantial problems with the bill, most of which have been inadequately addressed by the committee report. The Australian Democrats expect that this bill too will be rammed through without non-government amendment.

### **The ‘fairness test’**

4.16 The Government’s claim that this bill will restore the rights lost by working Australians under Work Choices is misleading. Work Choices is fundamentally flawed and addressing one small element of unfairness and bad process will not remedy the Act as a whole. The Democrats are of the opinion that the ‘fairness test’ does not go far enough to establish an adequate safety net for workers. It has a number of fundamental deficiencies.

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<sup>3</sup> Australian Democrats’ Minority Report, Employment Workplace Relations and Education Legislation Committee, *Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005*, November 2005, p.92



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### *Many workers left out*

4.17 The Government's introduction of the bill represents an admission that its policies have severely disadvantaged many Australian workers, but it has still established a 'safety net' that excludes large proportions of the working population. The Australian Council of Trade Unions claims that around 2.5 million workers will receive no protection because they will not be covered by the 'fairness test', which only comes into operation prospectively from 7 May 2007. This figure includes those already claimed to be registered on AWAs and other agreements since March 2006, estimated at 961 000 workers.<sup>4</sup> To lock out these workers from any monetary or other compensation for the remaining years of their employment contracts, is grossly unfair, especially considering the plight of many of these workers was the driving force for the bill. It is also grossly unfair to those employers who have done the right thing by their employees, who are economically disadvantaged and can be under-cut by their competitors until the lapsing of these unfair agreements.

4.18 The bill merely entrenches and promotes unfairness towards those workers with inferior rights under Work Choices up until May 2011. While in law it is difficult to unwind a contract (unless both parties agree) one partial solution could have been to give workers the right to terminate their agreements if the agreements do not comply with the new fairness test, but not to allow them any retrospective compensation for any period the agreement was in force.

4.19 Also excluded from the 'fairness test' will be those who earn more than \$1 400 per week or \$75 000 annually—about 1.14 million workers—if they sign an AWA. It was pointed out during the inquiry that this would exclude large proportions of key sectors and industries of the workforce, such as teachers and information technology workers, many of whom would otherwise enjoy award protections.<sup>5</sup> It is also proposed that the base salary of \$75 000 be applied pro rata to part time workers. Hence, many part time workers earning well under \$75 000 will also miss out on protection. In this respect, the Media, Entertainment and Arts Alliance, highlighted that many of its members get paid for irregular work, but often will be excluded from the safety net protections, as the sums involved will grossly over-estimate their incomes.<sup>6</sup> Additionally, as the \$75 000 cap incorporates casual loading, a casual position attracting an annual salary of \$62 501 would also be excluded from the 'test'. In sum, the cut-off is too low. Arguably there should be no cut off at all.

4.20 Perhaps the most concerning exclusion that was raised during the hearing was employees on NAPSAs would only be covered by the fairness test if they had been on

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<sup>4</sup> ACTU, Media Release, 'Tinkering with WorkChoices won't make it 'fair'', 29 May 2007; and see ACTU Submission 8, pp.3-4.

<sup>5</sup> The Association of Professional Engineers, Scientists and Managers, *Submission 5*, p. 2; Independent Education Union of Australia, *Submission 28*, p. 1.

<sup>6</sup> Media, Entertainment and Arts Alliance, *Submission 17*, p. 7.

these agreements immediately preceding the making of a workplace agreement when Work Choices was introduced. As the ACTU outlined during the hearing:

There are a group of workers who were at that time covered by preferred state agreements and NAPSAs who have since made an agreement and may make another agreement. That group of workers is not picked up by this amendment. Any worker who was in the state system and has made an agreement in the last 18 months will not be picked up by this amendment. They will never be able to have the fairness test apply to them unless and until the industry or occupation within which they work becomes covered by a federal award.<sup>7</sup>

4.21 This exclusion is completely contrary to the supposed intent of the provisions, which is to ensure that employees traditionally covered by industries usually regulated by an award have the appropriate protections.

4.22 Additionally, award free workers will not be covered by the test, which could exclude at least 1.16 million employees. In essence, a relevant award must be a Federal one made by the Australian Industrial Relations Commission, which would exclude many workers. The Bill also excludes those regulated or underpinned by a State award.

### *Limited conditions covered*

4.23 The new 'test' also fails its claim of fairness by not covering all existing award conditions when determining compensation, even if they were to be viewed 'globally' as a whole, as with the pre-Work Choices no-disadvantage test for pre-Work Choices AWAs. This was overwhelmingly raised during the inquiry as of concern to many of those that contributed. A range of award and/or statutory entitlements could still be bargained away because they fall outside the category of 'protected award conditions.' For instance, long service and paid maternity leave could be taken out of employment agreements with no compensation. Also, not included in the 'test' are limitations on rostering, including minimum shift lengths and limitations on working more than one shift a day. Furthermore, the right to request flexible working hours to assist with family responsibilities is not protected. As many of the submissions highlighted, these conditions are often necessary to ensure adequate worker protections in various industries. While they are often specific to certain employment circumstances, this does not change the fact that they are fundamental to ensuring balanced and often safe working conditions.

4.24 Particularly worrying is that redundancy or retrenchment pay entitlements are not protected. Even if redundancy provisions in terminated agreements were allowed to remain in effect for up to five years, there is no guarantee that such pay could be included in a subsequent agreement and if removed, there would be no compensation payable. But again, this highlights the unfairness of the broader Work Choices

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7 *Committee Hansard*, EWRE 38, 8 June 2007.

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legislation, as there have been numerous examples in the community, of workers dismissed for 'operational reasons', some of which were recapitulated during the inquiry.

### *No independent umpire*

4.25 The two statutory bodies to be established for administering the 'fairness test' will be answerable only to the Minister, which means they are not independent. The first is the Workplace Authority, which will replace the Employment Advocate, and will have responsibility for assessing the 'fairness test'. Its decisions will not be transparent; they will be made in private, not public. There will be no requirements for reasons to be given for any decision to the parties concerned, and any decision will not be reviewable.

4.26 However, advice can be given to an employer as to how an agreement could be varied to pass the fairness test. In short, there is little way of knowing how the 'test' is to be applied in practice. Concerns were raised during the public hearing by the SDA about the independence of the Workplace Authority and its conflict of interest, considering it is largely inheriting the role of the Office of the Employment Advocate. It highlighted:

We know that the person who is going to do the interpreting—the Employment Advocate—is not likely to be sympathetic to the views we represent. You have to remember that the Employment Advocate from the outset of the Work Choices legislation has been running seminars all around the country for employers to advise them how they can use the Work Choices legislation for their business. If the Office of the Employment Advocate is using all of the resources that are at its disposal to advise employers how to take advantage of the Work Choices legislation, you would expect that the disposition of the Employment Advocate would be to allow these sorts of things—these non-monetary compensations—to be used to take away penalty rates and other conditions.<sup>8</sup>

4.27 The lack of prescriptive details provided for the Workplace Authority is typical of the Government's approach to 'flexibility' in such arrangements, but has exacerbated concerns from employers and unions about the application of the fairness test. Without such details, the Workplace Authority is open to allegations of inconsistency and suspicions about its competency and motives. Various submissions also raised concerns that the process does not require consultation with both parties to an agreement, which is a breach of natural justice and would seem to be inconsistent with the purported objective of fairness. An amendment to require consultation with both parties seems to be a small change that would result in substantial reassurance. The scope of circumstances that can be considered in ascertaining the fairness of an agreement also opens up the Workplace Authority to criticism and workers to potentially unfair agreements. While it can be appropriate that an employee's

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

circumstances be considered, this should not be used to endorse discriminatory treatment or different remuneration levels for different workers engaged in the same employment. During the public hearing, the ACTU warned of the potential abuse of such a system:

Many men, but mostly women, can actually have their work devalued because they are primary caregivers...I could be working alongside another worker at night or on a weekend but, because I am not giving primary care at that time—because I have the support of my partner or indeed my family—I would be earning less than the person working alongside me.<sup>9</sup>

4.28 The Australian Democrats are concerned that inclusion of monetary compensation could potentially result in existing entitlements being considered additional and used to justify trading away protected award entitlements. Such a practice should be considered contrary to the fairness sought by the test. The use of non-monetary compensation also increases the complexity of the fairness test because of the continually evolving value that can be placed on such conditions, as was highlighted during the inquiry.

4.29 Many submissions during the inquiry raised concerns about the potential loopholes in the 'exceptional circumstances' provision of the bill. While the Australian Democrats understand the necessity of such a provision, we are not reassured by the committee's view that there are sufficient protections under the bill to prevent workers being unfairly disadvantaged. The bill should clearly identify that agreements formulated during exceptional circumstances can only operate during such conditions with constant reviews of those circumstances to allow fair conditions to be restored as soon as possible.

4.30 The second statutory body provided for under the bill is the Workplace Ombudsman, which will replace the Office of Workplace Services, and will provide additional protection for workers by ensuring employers comply with their obligations. However, the term 'Ombudsman' is actually being corrupted here, as this should be a body or person independent from government, rather than accountable to the Minister.

4.31 To ensure a genuine, fair and balanced approach in applying the 'test', it is essential that there be a role for an independent umpire to scrutinise workplace agreements. Workers should have access to open hearings as they did under pre Work Choices with the Australian Industrial Relations Commission. The independent, employment rights legal centre, JobWatch Inc, rightly state in their submission that:

...the Fairness Test is a poor substitute for the no disadvantage test which, prior to the WorkChoices changes, was applied by the Australian Industrial Relations Commission and the Office of the Employment Advocate (OEA)

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

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before collective agreements could be certified and AWAs could be approved.<sup>10</sup>

### **A new direction is needed**

4.32 Work Choices is unfair and has to go. Australia must have a workable industrial relations plan for the future. Australia needs a single system that is fair, balanced and practical. The Australian Democrats say a modern Australia needs industrial relations reforms that deliver productivity, efficiency, jobs growth and competitive gains, but it must also accord with the values and goals of a civilised first-world society. As yet the alternative offered by the Labor Opposition is far from clear. As for the Coalition, if they win the election they will have a mandate to tighten the IR screws further.

4.33 Australia needs a genuine single national unitary industrial relations system agreed to with state governments.

4.34 The democrats propose that a genuine single national unitary system would comprise four essential features.

### **An Industrial Relations Commission**

4.35 Australia needs a single, strong, independent, pre-eminent industrial relations tribunal that is appointed on merit and that would:

- exercise judicial powers to determine awards, set minimum wages, approve agreements and resolve disputes;
- absorb the state industrial relations commissions; and
- absorb the federal Employment Advocate and Fair Pay Commission functions.

### **A Workplace Regulator**

4.36 Australia needs a national and strong independent workplace regulator that would:

- absorb the regulatory functions of the state departmental inspectorates;
- absorb the regulatory functions of the Office of Workplace Services and the Australian Building and Construction Commission; and
- end federal ministerial discretionary and interventionist regulatory powers.

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<sup>10</sup> Job Watch Employment Rights Legal Centre, *Submission 22*, p. 2.

## **A Genuine Safety Net**

4.37 Australia must have a genuine safety net underpinned by the minimum wage, minimum conditions and awards. It would have:

- fair and balanced minimum wage determinations made annually, taking into account living standards, skills, training, disabilities, anti-discrimination provisions, pay equity and relevant tax and government transfer payments;
- at least 8 minimum conditions for all workers, whether on statutory or common law agreements including carers and compassionate leave, public holidays, termination of employment and redundancy; and
- national and industry-based, simplified awards with at least 16 allowable matters.

## **A Genuine Flexible Bargaining System**

4.38 Australia must have a genuine and flexible bargaining system that would:

- make a mix of industrial instruments available – union and non-union; collective and individual agreements; statutory and common law;
- enshrine the right to collectively bargain, genuinely and in good faith;
- enshrine freedom of association; and
- abolish Work Choices AWAs, replacing them with statutory individual agreements with a global no-disadvantage test, referenced back to the relevant award.

## **Conclusion**

4.39 The Democrats do not agree with the Government's claim that the new 'fairness test' is similar to the global 'no disadvantage' test that applied to pre-Work Choices AWAs prior to the commencement of Work Choices. The bill does not require future fairness for all in the workplace, in fact it falls far short for the reasons outlined above. The provisions of the bill lack sufficient scope, coverage, objectivity and protections to provide the fairness it claims. Further, as was highlighted by many of the submissions and at the public hearing, there appear to be numerous loopholes that suggest the Government needs to seriously review the legislation to ensure it can provide the purported fairness. The degree of individualisation proposed in the application of the test will result in huge resource requirements and long back-logs of assessments or, alternatively, hurried and poorly considered assessments. Neither are desirable outcomes to preserve a system that most Australians have indicated they do not want.

4.40 The way in which the legislation has come about has highlighted that the Government does not really believe in its necessity and has simply acted to protect its electoral prospects. This does not bode well for Australian workers should the Government be returned later this year with a majority in both houses.

Senator Andrew Murray





## 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".<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> Professor Andrew Stewart, *Submission 21*, p.2.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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

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<sup>3</sup> Department of Employment and Workplace Relations, *Submission 18a*, p. 1.

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

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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.<sup>5</sup> 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.**

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<sup>5</sup> 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'.<sup>6</sup> 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.<sup>7</sup>

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<sup>6</sup> Professor Andrew Stewart, *Submission 21*, p.7.

<sup>7</sup> 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.<sup>8</sup>

**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.**

Senator Rachel Siewert  
Australian Greens

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<sup>8</sup> ACTU, *Submission 8*, p.17.



## Chapter 6

### Family First Additional Comments

6.1 Family First is pleased the Government finally acknowledged it needed to fix its flawed Work Choices legislation, which Family First voted against.

6.2 But Family First still has several concerns with the amended legislation, and fears that workers and their families could still be worse off because of inadequate protections.

6.3 Firstly, Family First is concerned that the Government's new fairness test only applies to Australian workers earning up to \$75,000.

6.4 Why doesn't the fairness test apply to all Australian workers?

6.5 Surely the principle of fairness applies to everyone, not just those who earn a particular income, whatever that might be?

6.6 The Government has not adequately explained why this limit has been imposed and Family First is yet to be convinced such a figure is necessary.

6.7 Family First knows of one worker who supports a wife and two young children and earns \$76,000. Doesn't this father-of-two deserve to be protected by the fairness test? Why should he miss out?

6.8 Family First strongly believes ALL Australian workers should be protected by the fairness test, to ensure no Australian worker or their family is worse off under Work Choices.

6.9 It is important to stress that most employers do the right thing, and most workers do the right thing as well.

6.10 But we need to be mindful of those employers and workers who don't play by the rules, and we need to ensure that the rights of workers and employers are protected where there are people trying to abuse the system.

6.11 Every Australian worker deserves protection, as that gives them and their families peace of mind. Sadly, under Work Choices, some lucky workers are protected while others miss out.

6.12 The ACTU is right when it says of the fairness test...

It does not recognise many workers. We are a bit horrified to see that some men, but in particular women, who work part-time and take home much less than \$75,000, but who are in senior positions, will in fact have no access to this protection. We are talking about a range of occupations—senior nurses, finance workers, team leaders or supervisors in many

industries—where women choose to work part-time to marry their work and family responsibilities. They deliberately choose those hours where they can share the care, weekend or nights, and they get additional recognition through penalty arrangements that enable them to pay their bills and invest in their own homes. They potentially take home \$20,000, \$30,000 or \$40,000 but are still excluded. They will lose that extra value that they have put on that choice to work unsocial or family unfriendly hours.<sup>1</sup>

6.13 Family First is also concerned about reports that, over time, fewer Australian workers would be protected by the fairness test, due to bracket creep and the fact the \$75,000 threshold is not indexed.

6.14 It was reported that the \$75,000 threshold under which workers are covered by the fairness test would be watered down over time, because it is not indexed.<sup>2</sup>

6.15 The Australian Industry Group indicated it did not want the amount indexed: 'we think the way the legislation is currently drafted is workable when it stays at \$75,000, but, as we understand it, there is an ability for the minister to review that. So we do not see a need to automatically index it.'<sup>3</sup>

6.16 It is important to remember that the old no-disadvantage test applied to all Australian workers—not just those under a certain wage.

6.17 Family First is also alarmed by reports that workers could be forced to challenge rulings of the Government's Workplace Authority through the High Court.<sup>4</sup>

6.18 The ACTU complained that the fairness test

... process is secret. It is not transparent; it has no review. We have already pointed out that it is just a very bad joke to suggest that, to get any kind of review, working people would have to go to the High Court. This issue is not only the cost but also the exceptional nature of such an appeal process—and then only probably on legal jurisdiction or process. It is just an appalling thing for any democratic parliament to impose on working people.<sup>5</sup>

6.19 The Shop, Distributive and Allied Employees Association (SDA) said that:

We believe that under the fairness test the likely interpretation will be that one will look at what applies on average across the group, rather than looking at each individual person. That makes it quite different to the old no

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1 Ms Burrow, ACTU, Senate Committee Hansard, 8 June 2007, page 37.

2 Ben Packham, Threat to IR fairness test, *Herald Sun*, 29 May 2007, page 2.

3 Mr S Smith, Australian Industry Group, Senate Committee Hansard, 8 June 2007, page 56.

4 Ms Burrow, ACTU, Senate Committee Hansard, 8 June 2007, page 38.

5 Ms Burrow, ACTU, Senate Committee Hansard, 8 June 2007, page 38.



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disadvantage test, which obviously looked at the agreement in comparison with the award in its entirety, but then it went on to look at the individual circumstances of each employee, and the fairness test had to be applied and passed for each individual person rather than just for the average. Therefore, it is possible under the fairness test for a minority of employees to be worse off but the collective agreement will still then pass.<sup>6</sup>

6.20 The committee also heard evidence that the fairness test would not prevent another Tristar, where workers lose their redundancy entitlements, if a workplace agreement does not have redundancy provisions.<sup>7</sup>

6.21 Family First's second major concern is that Work Choices gives employers the green light to sack workers under the guise of restructuring.

6.22 In recent times there have been two cases, both in Victoria, that have caused alarm and revealed the urgent need for the Work Choices laws to be tightened.

6.23 In the first case, the Industrial Relations Commission decided that, under Work Choices, a company can sack a worker and readvertise the same job on a much lower salary. The commission revealed that, under Work Choices, it does not have to consider whether a valid reason existed as long as the sacking was for 'operational reasons', which is much broader than the 'operational requirements' which used to apply.

6.24 Priceline had sacked Melbourne dad of two, Andrew Cruickshank, who was his family's sole breadwinner. He was out of work for five months after Priceline dismissed him and readvertised his job with a much lower salary.<sup>8</sup>

6.25 Workplace Relations Minister Joe Hockey has publicly expressed alarm and admitted that this was not the intention of the legislation, but the Government has not done anything about it. Why not?

6.26 In the second case, *The Weekend Australian* reported that the Australian Industrial Relations Commission had ruled that

Businesses have been given the green light to sack workers under the Work Choices laws even if they breach employee contracts, and regardless of how badly a worker is treated when being fired, the nation's industrial tribunal has ruled. A company only needed to prove it had restructured its business and did not have to prove financial difficulty.<sup>9</sup>

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6 Mr de Bruyn, Shop, Distributive and Allied Employees Association, Senate Committee Hansard, 8 June 2007, page 31.

7 Ms Bowtell, ACTU, Senate Committee Hansard, 8 June 2007, page 44.

8 Margaret Wenham, Work Choices loopholes worry unions, experts, *Courier Mail*, 25 April 2007, page 5.

9 Susannah Moran, New laws sanction sackings, *The Weekend Australian*, 2 June 2007, page 6.

6.27 It can be argued this second case is even more disturbing because the company was not arguing that it restructured its business due to financial problems.

6.28 All the company needed to do was satisfy the Commission that it had restructured its business.

6.29 Family First shares the SDA's concern about 'how widely operational reasons is being interpreted.'<sup>10</sup>

6.30 Family First is distressed by these cases where livelihoods have been destroyed because Work Choices has allowed employers to treat workers in such a shameful way, simply arguing the sackings were for 'operational reasons'.

6.31 Family First raised this matter in the committee, to take up DEWR's offer to respond in writing to issues that arose in the hearings<sup>11</sup>, but DEWR's written comments to the committee after the hearing failed to address the case.<sup>12</sup>

6.32 The Government has still not got it right. It needs to, as a matter of urgency, tighten its Work Choices laws to ensure Australian employers cannot sack workers under the guise of restructuring.

6.33 Minister Hockey has publicly admitted this is an unintended consequence of the Work Choices legislation. If he means what he says, and if this Government is genuinely concerned about ensuring no Australian worker and their family is worse off, the Government must immediately amend its legislation to plug this loophole and stop more workers being thrown on the scrapheap.

Senator Steve Fielding  
FAMILY FIRST Senator  
FAMILY FIRST Senator for Victoria

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10 Mr de Bruyn, Shop, Distributive and Allied Employees Association, Senate Committee Hansard, 8 June 2007, page 31.

11 Senator Fielding, Senate Committee Hansard, 8 June 2007, page 26.

12 Submission 18a.

# **Appendix 1**

## **List of submissions**

- 1 Mr Joe Lazzaro, VIC
- 2 Australian Nursing Federation, VIC
- 3 Queensland Council of Unions, QLD
- 4 Institute of Public Affairs, VIC
- 5 Association of Professional Engineers, Scientists and Managers, VIC
- 6 New South Wales Commission for Children and Young People, NSW
- 7 Community & Public Sector Union State Public Services Federation Group, NSW
- 8 Australian Council of Trade Unions, VIC
- 9 Carolyn Sutherland (Monash University), VIC
- 10 Australian Chamber of Commerce & Industry, VIC
- 11 Australian Manufacturing Workers Union, NSW
- 12 Australian Education Union, VIC
- 13 Finance Sector Union of Australia, VIC
- 14 The Shop Distributive & Allied Employees' Association, VIC
- 14a The Shop Distributive & Allied Employees' Association, VIC
- 15 New South Wales Government, NSW
- 16 Recruitment and Consulting Services Association, VIC
- 17 Media, Entertainment and Arts Alliance, NSW
- 18 Department of Employment and Workplace Relations, ACT
- 18a Department of Employment and Workplace Relations, ACT
- 19 Australian Mines and Metals Association, VIC
- 20 Australian Industry Group, NSW

- 20a Australian Industry Group, NSW
- 21 Professor Andrew Stewart (Flinders University), SA
- 22 Job Watch Employment Rights Legal Centre, VIC
- 23 Australian Rail, Tram and Bus Union, NSW
- 24 United Firefighters Union of Australia, VIC
- 25 Anglican Church Sydney Diocese , NSW
- 26 Victorian Workplace Rights Advocate, VIC
- 27 Telstra, VIC
- 28 Independent Education Union of Australia, VIC

## **Appendix 2**

### **Hearing and witnesses**

**Parliament House, Canberra, 8 June 2007**

#### **Department of Employment and Workplace Relations**

Mr Finn Pratt, Deputy Secretary, Workplace Relations

Mr John Kovacic, Group Manager, Workplace Relations Policy Group

Ms Natalie James, Chief Counsel, Workplace Relations Legal Group

Mr David Bohn, Assistant Secretary, Workplace Relations Legal Group

#### **Australian Chamber of Commerce and Industry**

Mr Scott Barklamb, Assistant Director Workplace Relations

Mr Daniel Mammone, Advisor Workplace Relations

#### **Shop Distributive and Allied Employees' Association**

Mr Joe de Bruyn, National Secretary

Mr Bernard Smith, Assistant Secretary NSW Branch

#### **The Australian Council of Trade Unions**

Ms Sharan Burrow, President

Ms Cath Bowtell, Industrial Officer

#### **Australian Industry Group**

Mr Stephen Smith, Director, National Workplace Relations

Mr Ron Baragry, Legal Counsel, National Workplace Relations

