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Joint National Secretariat

Mr John Carter
Committee Secretary
Senate Employment, Workplace Relations
And Education Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Monday, 4 June 2007

Dear Mr Carter

Re: Inquiry into Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

Please find enclosed a submission by the CPSU SPSF Group to the above Inquiry.

Should you have any queries, please contact the SPSF Group's Federal Research and Advocacy Officer, Dr Kristin van Barneveld on (02) 9290 4508.

Yours sincerely

David Carey
Federal Secretary

Submission of the SPSF Group to the Senate Standing Committee on Employment, Workplace Relations and Education Inquiry into the Workplace Relations Amendment (a Stronger Safety Net) Bill 2007

About the SPSF

The State Public Services Federation (SPSF) Group of the Community and Public Sector Union (CPSU) represents over 100,000 employees of State government departments, authorities and employing bodies across a broad range of vocations, classifications and industries. Approximately 20,000 SPSF Group members, particularly those in Victoria and the Higher Education sector, are covered by the Federal industrial relations jurisdiction.

Introduction

The Explanatory Memorandum to the Workplace Relations Amendment (a Stronger Safety Net) Bill 2007 highlights that there are three key changes proposed by the Bill.

1. The establishment of new offices of the Workplace Ombudsman and Workplace Authority.
2. The requirement that the Workplace Authority Director be satisfied that workplace agreements provide fair compensation in lieu of protected award conditions through the application of a 'fairness test'.
3. That a compliance framework be established to ensure the effective operation of the fairness test.

These changes will be considered in turn below.

1. The establishment of new offices of the Workplace Ombudsman and Workplace Authority.

The Bill proposes a number of name changes presumably to make the bodies independent of government. The Employment Advocate is to become the Workplace Authority Director; the Office of Workplace Services, the Office of the Workplace Ombudsman; and, the Office of the Employment Advocate, the Workplace Authority. Given that the bodies will remain subject to the direction of the Minister (and therefore not truly independent), these changes are unnecessary, a waste public money[1] and will cause needless confusion, particularly as the functions of the 'new' bodies are ostensibly the same as those of the 'old' bodies.

[1] The waste of public money includes advertising to 'inform' the public of the changes; costs of 're-badging' existing entities; even down to the cost of new stationery and logo designs.

While the Bill allows for the positions of Workplace Authority Director, Workplace Ombudsman and any other new fixed term contract positions (SES or similar positions) to be appointed for an initial term of no more than 5 years, it is the view of the SPSF Group that it would be a gross waste of public money for the Attorney General to fill these positions on such long term contracts. Should the Howard government lose the 2007 federal election, these offices may be abolished. Should this be the case, the position holders would presumably have the term of their contracts paid out or gain some other pecuniary benefit from early termination. Therefore the positions should be appointed initially for a 12 month term.

2. The Fairness Test

The Bill provides that the Fairness Test be applied to agreements lodged on or after 7 May 2007 that contain a base salary of less than $75 000 per annum (or full time equivalent) provided that the agreement covers employees who work in industries or occupations usually regulated by awards, and the agreement modifies or excludes protected award conditions.

The test excludes those on $75 000 or more per annum. The test does not apply to those who are 'award free' (possibly as many as 1.4 million Australian workers). The test also does not apply to the agreements made between 27 March 2006 and 7 May 2007. These workers have been denied any scrutiny of their working conditions, no matter how poor the scrutiny is.

<u>The definition of 'gross basic salary' and the $75 000 limit</u>

Placing a limit on the application of the fairness test is based on an incorrect assumption that workers who earn higher than average salaries have a greater chance of negotiating with their employer and gaining a fair level of remuneration for the work undertaken. However in this era of award stripping, this is a moot point because workers paid $75 000 or more per annum will invariably pass the extremely low bar set by the fairness test with flying colours.

It must be acknowledged that the use of annualised salaries for more than a decade means that it will be very difficult for salary rates to be broken down into a 'basic gross salary' to determine whether an agreement should be subject to the fairness test. How is the WAD going to extract the penalty rate and loading components of an annualised salary to determine whether the salary rate in a proposed agreement is above or below the threshold?

What if the incorrect award is used for the test?

The agreement is to be tested against the protected award conditions in the award that binds the employer. Should the employer not be bound by an award, the WAD will designate an award for the purposes of applying the fairness test. There is evidence that, prior to 27 March 2006[2], in circumstances where an award had been designated for the purposes of the application of the 'no-disadvantage test', at times, the incorrect award had been selected, resulting in AWAs being approved that should have failed the NDT[3]. However, given the secrecy surrounding the testing process for AWAs and the fact that the OEA/WAD has, to date, not granted research access to AWAs lodged post-Work Choices, these errors will be impossible to identify.

The test is ineffective because the 'safety net' against which proposed agreements are assessed has been destroyed over the last decade.

The importance of any 'fairness test' has been watered down as a result of the decade of destruction of the award system by the Howard government. When the no-disadvantage test was first introduced, the content of a collective agreement was assessed by the Australian Industrial Relations Commission against a comprehensive awards, whose content was unrestricted.

The Howard government limited the effectiveness of the NDT when in 1996 the Workplace Relations Act was enacted and the content of awards was, through 'award simplification', limited to just twenty allowable matters. The content of awards was stripped even further in March 2006 when, through the Work Choices Amendments to the Workplace Relations Act, award content was limited to, at best, ten protected award matters[4].

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[2] The date that most of the Work Choices Amendments to the Workplace Relations Act came into force. These amendments abolished the no-disadvantage test against which all statutory collective and individual agreements were assessed.

[3] van Barneveld K (2004) *Efficiency and Fairness in Australian Workplace Agreements*, Unpublished PhD Thesis, University of Newcastle.

[4] Protected award conditions are:

1. rest breaks
2. incentive based payments and bonuses
3. annual leave loading
4. public holidays, or days substituted for public holidays and entitlements to employees to payment in respect of those days;
5. days to be substituted for public holidays or a procedure for such substitution
6. monetary allowances (for employment expenses; skills; disabilities)
7. overtime or shift work loadings
8. penalty rates
9. outworker conditions
10. any other matter specified in the Regulations from time to time.

The fairness test is extremely subjective

The Explanatory Memorandum to the Bill states that 'in determining whether fair compensation has been provided, the Workplace Authority Director would primarily consider the value of any monetary and non-monetary compensation. The Workplace Authority Director would also be able to consider the personal circumstances of employees, including their family responsibilities' (p.1).

Unfortunately the effectiveness of the test relies on the subjectivity of one person and his[5] view of the weight to be given to any family responsibilities or other personal circumstances of an individual or group of workers. This subjectivity combined with the secrecy surrounding the application of the fairness test denies the opportunity for transparent decision making and the development of precedent to guide the parties and the WAD in future decision making.

Proposed s346M(7) outlines how the value of a non-monetary item is to be assessed. However it is difficult to 'reasonably assign' a value on the provision of a non-monetary benefit and the test of whether a benefit is of 'significant value' to an employee is extremely subjective. Will employees be contacted and asked the value that they place on the item in order to assess its significance? Will employee be required to provide personal information such as social security or tax/family/ welfare details? What if there is disagreement between the employee and the WAD in relation to the value and/or the significance placed on a particular non-monetary benefit? How is flexibility to meet family commitments to be measured? It is not up to the WAD to make decisions on the family circumstances of the wage earner. The wage earner's family circumstances must not affect their rate of pay. Work should be remunerated at 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, not be given services or 'favours' in lieu of monetary payment.

In applying the test, the WAD can take into account the circumstances of the employer

Again, given the secrecy surrounding agreement testing, it is concerning that the WAD can take into account the circumstances of the employer without any public scrutiny of the reasoning behind such a decision.

[5] There is a presumption that the current OEA Mr McIlwaine will be appointed the WAD.

The 'testing' is secret

As mentioned, no AWAs have been released for public scrutiny or research purposes since the enactment of Work Choices despite numerous applications by academic researchers for access. Like the process before Work Choices, it will be impossible to discern whether the fairness test is being applied by the WAD. Without any public scrutiny, it is possible that any mistakes made in the application of the test will remain undetected, just as they did with the application of the NDT by the OEA (van Barneveld 2004).

Time frame for testing?

The Bill does not include any time frame during which the agreement testing must be concluded.

The use of undertakings

If an agreement does not pass the fairness test, the employer can give an undertaking to the WAD to ensure that the agreement is approved. The use of undertakings is problematic. First, it is possible for employees to be unaware of any undertakings given by their employer about their conditions, since it is not immediately obvious that the Bill mandates that an employee be given a copy of any undertakings given by their employer to the WAD. Nor does there appear to be a penalty for the employer when an employee is not notified of any undertaking in relation to an AWA (note that proposed s.346ZE does provide a civil penalty for the employer failing to notify employees of certain decisions/actions regarding collective agreements but no such provision exists for AWAs). Second, the undertakings are not public documents and may not be provided should access to agreements for research purposes be granted by the WAD.

Prohibitions on employers for dismissing an employee whose agreement/s fail the fairness test

The Bill provides that an employer is prohibited from dismissing an employee for the 'sole or dominant reason' that their agreement fails the fairness test. It is unclear how this 'protection' would operate in practice, particularly given the broad interpretation given by the AIRC to the 'operational reasons' provision found elsewhere in the Workplace Relations Act 1996.

Similarly, the Bill prohibits an employer from coercing an employee to agree to modify or remove a protected award condition. Presumably this 'protection' only applies to existing employees with whom the employer is seeking to make an agreement because otherwise it would be contrary to the duress provisions elsewhere in the Workplace Relations Act 1996.

If this interpretation is correct, what is the definition of coercion as referred to in this proposed section and how would coercion be measured, particularly if an employer coerces an employee to modify protected conditions by offering them a slight promotion conditional upon the employee signing an AWA, the terms of which have been unilaterally determined by the employer?

3. The compliance regime

The Bill includes a number of civil penalties for employers should they fail to comply with certain relevant provisions. However these civil penalties focus more on non-compliance with requirements regarding collective agreement making. There is a need for the compliance regime to be extended to the issue/lodgement and variation of AWAs.

Conclusion

The SPSF Group does not support the changes proposed in the Bill since these changes do not go far enough in establishing an adequate safety net for workers. There are concerns about the subjectivity required in the application of the fairness test by the WAD, the secrecy surrounding the agreement approval process and around any undertakings that may be given to ensure an agreement passes the test. The lack of transparency and the subjective nature of the proposed fairness test means that like cases may well be determined differently. Under this regime, no one, besides the WAD and his delegates would know whether this substandard test is being adequately applied in each case.