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4 June 2007

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

By email: eet.sen@aph.gov.au

Dear Mr Carter

Submission to the Inquiry into the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*

I attach my submission to the *Inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007***.**

I am a lecturer in workplace law in the Department of Business Law and Taxation. My research interests and PhD studies include the examination of the legal framework for agreement-making.

My submission addresses some of the ways in which the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* ('Bill') could be amended to ensure that it provides a stronger safety net for employees.

Should you have any queries in relation to my submission, please contact me on (03) 9903 2380.

Yours sincerely

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Submission to the Inquiry into the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*

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Executive Summary

1. The new Fairness Test is a welcome addition to the current agreement-making framework. However, further legislative guidance is required to ensure that the test operates in a way which achieves the stated objective of the Bill: ensuring a stronger safety net for employees who enter into workplace agreements.
2. First, the factors to be taken into account in determining whether an agreement provides 'fair compensation' should be altered to ensure that protected award conditions are not traded away for benefits which are of little or no value to employees. In particular, section 346M should be amended to require that any arrangements which are put in place to suit employees' personal circumstances, such as flexible hours arrangements, are 'of significant value' to the affected employees.
3. Secondly, the Bill should include a requirement that the Workplace Authority Director consult with the employee, or some or all of the employees, who will be subject to an agreement which provides non-monetary compensation or other flexible arrangements as compensation for the loss of protected award conditions. This consultation could be in the form of a declaration which is lodged by the employee, or employee representative, with the Workplace Authority at the time that the employer lodges the workplace agreement. In the absence of such a consultation mechanism, the definition of 'fair compensation' should be amended to exclude any form of compensation other than money.
4. Thirdly, as part of its function of educating employers, employees and organisations about their obligations under the legislation, the Workplace Authority should be required to:
    a) provide to the parties detailed reasons where it decides that a workplace agreement does not pass the Fairness Test;
    b) provide to the parties, as part of these reasons, the calculations upon which the Authority's decision is based, to assist the parties in calculating any compensation which is payable to employees;
    c) regularly publish examples of failed agreements and the reasons given by the Workplace Authority for failing to pass the workplace agreements. The examples should come from a variety of industries, and could be published with the parties' consent or without identifying the parties;
    d) publish any undertakings given to the Workplace Authority Director to enable a collective workplace agreement to pass the Fairness Test.

Introduction

The Second Reading Speech summarises the key objective of the reforms which were introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* ('Work Choices Act'):

> The goal of employment and workplace relations reform is to achieve better outcomes for both employers and employees through greater flexibility in employment arrangements in the workplace.[1]

The aim of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* ('Bill') is to continue to pursue this objective while ensuring 'that the opportunities and flexibilities inherent in the national workplace relations system are used but not abused.'[2]

The concerns set out in this submission address these objectives of permitting flexibility for the parties while putting in place legislative safeguards against abuse of the system.

Fair compensation

Under section 346M(1) of the Bill, an agreement passes the Fairness Test if the Workplace Authority Director ('Director') is satisfied that it provides fair compensation in lieu of the exclusion or modification of protected award conditions. In the case of collective agreements, the agreement need only provide fair compensation in its overall effect on the employees covered by the agreement.

At the heart of the Fairness Test is the meaning given to the concept of 'fair compensation'. Section 346M(2) sets out the factors which *must* be taken into account by the Director in determining whether an agreement provides fair compensation:

> In considering whether a workplace agreement provides fair compensation to an employee, or in its overall effect on employees, the Workplace Authority Director must first have regard to:
>
> (a) the monetary and non-monetary compensation that the employee or employees will receive under the workplace agreement, in lieu of the protected award conditions that apply to the employee or employees under a reference award in relation to the employee or employees; and
>
> (b) the work obligations of the employee or employees under the workplace agreement.

'Non-monetary compensation' is defined in section 346M(7) to mean:

> …compensation (other than an entitlement to a payment of money):
>
> (a) for which there is a money value equivalent or to which a money value can reasonably be assigned; and
>
> (b) that confers a benefit or advantage on the employee which is of significant value to the employee.

[1] Commonwealth, *Second Reading Speech to the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*, House of Representatives, 28 May 2007, p 54 (Joe Hockey).
[2] Ibid.

The requirement that a non-monetary benefit be of significant value to the employee is an important part of the Fairness Test because the test could otherwise be abused if employees were forced to accept, in place of money, a benefit such as a parking space or shares in the employer's company.

The Explanatory Memorandum notes that '(t)his definition is intended to ensure that protected award conditions cannot be excluded or modified by a workplace agreement in exchange for non-monetary compensation that is of little or no value to the employee or employees subject to the agreement.'[3] I am concerned that the definition may not fulfil this purpose unless an adequate mechanism is put in place to ensure employees are consulted where they are accepting non-monetary compensation or some other form of flexibility in lieu of protected award conditions (see below).

The definition itself may also be inadequate to achieve its stated purpose due to an additional factor in section 346M(3) – the employee's personal circumstances - which the Director *may* take into account in addition to the primary factors set out in section 346M(2). Section 346M(3) states:

> In considering whether a workplace agreement provides fair compensation to an employee or in its overall effect on employees, the Workplace Authority Director may also have regard to the personal circumstances of the employee or employees, including in particular the family responsibilities of the employee or employees.

The Explanatory Memorandum uses the example of Joel who enters into an AWA to put in place an arrangement whereby he can leave work at 3pm each weekday to collect the children from school and make up the time on a Saturday, without receiving penalty rates.[4]

The Explanatory Memorandum makes clear that, in determining whether the increased flexibility of working hours provided to the employee represents fair compensation for the loss of penalty rates, 'the Workplace Authority *would need to* have regard to Joel's personal circumstances, particularly his family responsibilities'(emphasis added). There is no reference to the application of the primary factors set out in section 346M(2), presumably because a money value cannot reasonably be assigned to the arrangement and it therefore cannot be assessed as a form of non-monetary compensation.[5]

The Explanatory Memorandum highlights that the flexible arrangements are of 'great value' to Joel. However, as currently drafted, section 346M(3) does not require the Director to consider whether the flexible arrangements which are envisaged by the section are 'of significant value to the employee.' The requirement that a benefit be 'of significant value' only applies in the case of non-monetary compensation as defined in section 346M(7).

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[3] Explanatory Memorandum, *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* (Cth), p 20.

[4] See also the reference to a similar example in Commonwealth, *Second Reading Speech to the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*, House of Representatives, 28 May 2007, pp 55-56 (Joe Hockey).

[5] In the three examples which do not refer to family friendly arrangements (eg, child care payments, an increased rate of pay, and a car parking space), the Explanatory Memorandum notes that the Authority would need to take into account the monetary value of these benefits. In the two examples referring to family friendly arrangements, there is no mention of the need to put a value on these arrangements, only to consider whether the increased flexibility provides 'fair compensation': Explanatory Memorandum, *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* (Cth) at pp 17-18.

It is difficult to see how flexible hours arrangements[6] could be considered fair compensation unless the value to the employee is taken into account. If, for example, an employer applied Joel's arrangement to an employee without family responsibilities, or to a parent who wanted to watch the kids play sport on a Saturday morning, the arrangement could not, on any reasonable view, be considered fair compensation. The Bill should ensure that such an arrangement could not pass the Fairness Test, unless it is valuable to the affected employee.

To ensure that the Fairness Test meets the stated objectives of flexibility *and* fairness, section 346M(3) should be amended to read as follows:

> In considering whether a workplace agreement provides fair compensation to an employee or in its overall effect on employees, the Workplace Authority Director may also have regard to **any other arrangement which will be made available to the employee or employees under the workplace agreement in order to accommodate** the personal circumstances of the employee or employees, including in particular the family responsibilities of the employee or employees.

A definition of 'any other arrangement' would then need to be inserted as section 346M(8):

> **(8) In this section:**
> ***other arrangement*, in relation to an employee, means an arrangement:**
> **(a) for which there is no money value equivalent or to which a money value cannot reasonably be assigned; and**
> (b) **that confers a benefit or advantage on the employee which is of significant value to the employee.**

The references to non-monetary compensation in section 346M(2) and (7) and to the personal circumstances of the employee in section 346M(3) should be deleted in their entirety unless an appropriate mechanism is set out in the Bill which requires the Director to consult with employees about the value of non-monetary compensation and family-friendly arrangements, as discussed below. In the absence of such a mechanism, the Bill should not permit employees to forego award conditions, except in exchange for money.

Consultation with employees

The way in which the Fairness Test is implemented by the Authority will be critical to the effectiveness of the test in providing a stronger safety net for employees. However, the Bill gives the Workplace Authority a broad discretion in determining how it will implement the test. Under sections 346M(6) and 346U(6), when applying the Fairness Test to an agreement or the variation of an agreement, the Director 'may inform himself or herself in any way he or she considers appropriate including (but not limited to) contacting the employer and the employee, or some or all of the employees, whose employment is subject to the workplace agreement.'

The legislation also expressly precludes the Minister from giving directions to the Director in relation to the Director's performance of functions, or exercise of powers.

[6] Or other family friendly arrangements, such as the ability to work from home in the evenings: see the example of Zita: Explanatory Memorandum, *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* (Cth) at 18.

Given this restriction on Ministerial direction, Parliament should provide guidance to the Director about the performance of functions, including the process to be followed in performing the Fairness Test.

Given the subjective nature of some parts of the test, such as the requirement that non-monetary compensation is of 'significant value to the employee', it is vital that some or all affected employees, or their representatives, are consulted where non-monetary compensation is provided. Similarly, if the definition of 'other arrangements' proposed above is adopted, then employees affected by these arrangements should be consulted about the value which they place on the arrangements.

Unless there is some mechanism by which the Authority directly communicates with employees about whether they have received a fair exchange for trading away penalties and allowances, the Fairness Test will not provide an effective safeguard.

The Second Reading Speech suggests that the lodgement process will permit (but not guarantee) input by employees:

> When the agreement is lodged employees will be able to include information about their personal circumstances, including their family responsibilities and the significance they attach to the particular workplace flexibilities for which they have traded off protected award conditions. The Authority will also be able to contact the employees and the employer where necessary.[7]

Under the current process which is used by the Authority (through which it is already applying the Fairness Test), employers are required to provide information by ticking boxes on a declaration when they lodge a workplace agreement. Employees are not required to provide any information about their involvement in the process – in fact, while there is a model declaration for employers to fill in, there is no model declaration which is provided for the use of employees.[8] In the absence of any additional information, the Authority will need to rely on the employee's signature on an AWA, or majority approval of a collective agreement, as evidence of the value which employees have placed on the benefits in the agreement. Given that the Fairness Test has been introduced in response to community concern about the potential for employees to unwillingly enter into unfair agreements, it cannot be assumed that employees have entered into agreements because they view them as fair.

In assessing the appropriateness of the current approval procedure, it should be borne in mind that the Authority will be under enormous pressure to pass agreements quickly. Agreements come into effect as soon as they are lodged. If there is any significant delay between lodgement and approval, and the agreement does not pass the test, employers may face considerable claims for back pay. More than 20,000 AWAs and 279 collective agreements have been lodged since the Fairness Test came into operation on 7 May.[9] This backlog of unprocessed agreements is increasing on a daily basis. It is therefore impracticable for the Authority to make personal enquiries of all affected employees covered by these agreements as part of the standard approval process.

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[7] Commonwealth, *Second Reading Speech to the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*, House of Representatives, 28 May 2007, p 55 (Joe Hockey).
[8] See the forms available from the Authority's website: http://www.oea.gov.au (accessed 1 June 2007).
[9] Senate Employment, Workplace Relations and Education Legislation Committee, Estimates, Monday, 28 May 2007, 38.

It is therefore proposed that declarations should be required to be lodged by employees or their representatives where a workplace agreement contains non-monetary compensation or arrangements in exchange for the loss of protected award conditions. In the Second Reading Speech, the Minister states his expectation that in most cases a higher rate of pay will be provided in lieu of protected award conditions. Therefore this requirement to lodge an employee declaration should only apply in a minority of cases.

Where non-monetary benefits are provided in a collective agreement, the employees' representative (if there is one) should be required to lodge a declaration confirming that a majority of employees voted in favour of the agreement and that the representative considers the deal to be fair in its overall effect on employees. This process would be similar to the former requirement for employee representatives to lodge a statutory declaration in support of an application to certify union and non-union certified agreements prior to the amendments introduced by Work Choices Act. This statutory declaration required the employee representative to answer questions about the process followed in negotiating and approving the agreement and about the content of the agreement and the representative's view as to whether it met the no-disadvantage test.[10]

Where the employee representative's declaration indicates that the employees have not validly approved the agreement or that the representative does not consider the deal to be fair, then the Director should be required to investigate further.

For an AWA, the employee (with the assistance of the employer if necessary) should be required to set out the benefits which are being provided and the particular conditions which are being foregone by the employee. The employee should then be required to sign a declaration confirming that the benefits provided are 'of significant value' to them and that they consider the deal to be fair.

This additional mechanism would give employees a clearer picture of the effect of the agreement, and an opportunity to assert their views about the value of the deal. Without such a step, the Fairness Test is unlikely to provide a real safety net for those it is designed to protect: vulnerable employees, including young people and workers from a non-English speaking background.[11]

Education function of the Workplace Authority

The functions of the Authority include promoting an understanding of Commonwealth workplace relations legislation, providing education to employees, employers and organisations in relation to their obligations under this legislation, and providing education and advice in relation to workplace agreements.[12]

However, the Bill does not require the Authority to provide the parties with its reasons for deciding that a workplace agreement does not pass the Fairness Test. The

[10] See Australian Industrial Relations Commission Rules 1998, rule 48-49, Forms R28 and R30.
[11] Explanatory Memorandum, *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* (Cth), p 5.
[12] See sub-sections 150B(1)(a), (b) and (d).

only obligation is to notify the parties of the decision and provide advice about how the agreement could be varied in order to pass the test.[13]

In order to fulfil its function of educating the parties about their obligations under the legislation, the Workplace Authority should be required to provide to the parties detailed reasons for its decisions in relation to the Fairness Test. This would assist the parties in making future agreements.

These reasons should include the calculations which the Authority has used in applying the Fairness Test. The application of the test will usually involve obtaining information about the work obligations of affected employees, and using that information to calculate whether the value of the benefits applicable under the agreement is equal to or greater than the value of the protected award conditions which have been modified or traded away. The provision of such calculations would assist the parties to calculate the shortfall between the value of the employee's entitlements under the agreement and the value of their entitlements under their former instrument or the designated award. This would then assist employers to comply with the obligation to provide compensation to affected employees within 14 days of being notified that an agreement has failed the Fairness Test.[14]

In addition, the Workplace Authority should be obliged to regularly publish examples of failed agreements in various industries and the reasons given by the Authority for the agreement failing to pass the Fairness Test. This could be done with the parties' consent, or by removing references to the parties to the agreement.

The Authority should also be obliged to publish any undertakings given to the Director to enable a collective workplace agreement to pass the test under section 346R. An undertaking has the effect of varying the agreement under section 346T(3). It is important that the version of the agreement which is published on the internet incorporates this undertaking to avoid confusion for the parties. The publication of the undertakings is also vital for the education of employers, employees and organisations who wish to ensure their agreements will pass the test first time, without the uncertainty that goes with the variation of an agreement after it has commenced operation and the provision of back pay.

[13] Section 346P(3)(a).
[14] Section 346ZD.