SUBMISSION TO

THE WORKPLACE RELATIONS (A STRONGER SAFETY NET) AMENDMENT BILL 2007

BY

THE SHOP DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION

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Introduction

On 4 May 2007 the Prime Minister, John Howard, announced the introduction of a "fairness test" to deal with the "perception" that under WorkChoices:

> *"There is concern amongst some in the community that the trading off of penalty rates and other loadings without fair compensation could occur with adverse consequences for final take home pay"*[1].

On 28 May 2007 the Minister for Employment & Workplace Relations, Joe Hockey, introduced the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (hereafter the "Fairness Test Bill"). A piece of retrospective legislation amending the Workplace Relations Act 1996 that would apply retrospectively to some workplace agreements made since 7 May 2007.

The "Fairness Test Bill" was a political fix to what was perceived as a political problem not a real or practical fix to a very real problem of the removal of the no disadvantage test.

This Bill represents one of the best efforts by the Howard government in creating a movie set approach to legislation. Completely misnamed as “A Stronger Safety Net”, the Bill does in fact create a façade of having a stronger safety net where there is simply no substance behind the facade. Like a movie set, all looks grand from a distance but once approached and examined carefully, there is simply no real structure behind the glossy painted front.

On the 4th May the Prime Minister in announcing that the Government would introduce a Fairness Test into Work Choices to ensure that employees would be properly compensated for award entitlements lost in the process of making a workplace agreement.

As part of his media conference the Prime Minister said:

> *“But where the penalty rates etcetera are taken out or are modified in any way there'll be a fairness test and the fairness test will inquire whether adequate compensation has been provided in return. Now in the great bulk of cases that compensation will take the form probably of an increase in the hourly rate to take account of the non payment of penalty rates but the compensation can take a non-monetary form and in examining whether adequate compensation's been paid the authority will have a look at all aspects of the agreement. In some cases extremely flexible working arrangements can be given*

[1] “A Stronger Safety Net for Working Australians” , statement by Prime Minister John Howard, 4 May 2007

in return for the non payment of penalty rates, in other cases additional entitlements can be given.

It can be the case that a particularly beneficial arrangement is made by a parent in relation to leave to do things concerning their children in return for an understanding that if that parent is required to work at irregular hours then penalty rates are not to be paid. Now these are all assessments that will be made. The economic circumstances of the firm can be taken into account, the employment opportunities and experience of the individual employee can be taken into account but it would be my belief and the belief of the government that in the great bulk of cases the judgement would be made in relation to monetary matters but I would not want to exclude non monetary ones." (emphasis added)

On the same day the Minister for Workplace Relations, Joe Hockey said of the proposed amendments to the Work Choices:

"We are introducing a stronger safety net for working Australians. It was never the intention that it should be the norm for penalty rates to be traded off without proper compensation and that's why the Government is going to introduce new laws that, simply put, employees must receive fair compensation if they agree to trade away conditions such as penalty rates, shift and overtime loadings, monetary allowances like travel allowance or tool allowance, annual leave loadings, public holidays, rest breaks and incentive and other types of bonuses."

(AM programme on ABC radio. Emphasis added.)

As has been the case with every piece of industrial relations legislation introduced by the Howard Government the name of the Bill or the name of the programme is the opposite of what occurs.

The Bill to promote the new "fairness Test" is aptly misnamed the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007.

The reality is that this Bill will simply keep a weak or nearly non-existent safety net in operation and the Bill does nothing to provide for a genuine stronger safety net.

The new "Fairness Test" is yet again another piece of Howard Government legislation which entrenches and promotes UNFAIRNESS towards employees.

The Howard Government has made it very clear that in introducing the new Fairness Test that there is no need to backdate the operation of the Fairness Test as there is no evidence of employees entering into remarkably bad workplace agreements.
As the Treasurer said in an interview with Laurie Oaks on the Sunday programme on 6th May:

"OAKES: *Staying with IR though, the hundreds of thousands of people that have already signed AWAs will not get any protection from the new measures announced last week by the Prime Minister. So you have a two tier system. Where is the fairness in that?*

TREASURER: Well I think Laurie, the fact of the matter is to go back through all of those contracts, to go back through all of those conditions again would lead to enormous dislocation, and there is no real evidence, no real evidence at all that there have been egregious cases. So what the Government has announced is protection measures for the future in relation to fairness. I think they are sensible measures, I think they will work and I think you will see the benefit in relation to the workforce. " (emphasis added)

"Egregious" means: remarkably bad, conspicuously bad, flagrant.

The Treasurer and the Howard Government may want to believe that there is no evidence of remarkably bad or conspicuously bad workplace agreements made under Work Choices but the very sad fact is despite the wilful blindness of the Howard government there are many remarkably bad or conspicuously bad or flagrant workplace agreements in operation which strip away from employees most of the so-called 'protected award conditions'.

The Association has recently undertaken a review of some 100 agreements in the retail and fast food industries operating in Victoria, as listed on the OEA website. This review found that most are egregious.

What Safety Net?

The current legislation provides no effective safety net for employees as the Howard government's WorkChoices Legislation permitted employers to have agreements which simply excluded all protected award matters. This Bill, whilst creating the semblance of a strong safety net, in fact does not and cannot provide a real and genuine safety net of terms and conditions of employment to protect employees who enter into workplace agreements.

The Bill does not address many of the issues that are apparent in existing collective agreements made under WorkChoices where critical terms and conditions of employment are either deliberately removed or where the structure of an agreement is intentionally misleading so as to prevent an employee from either understanding or having knowledge of their actual legal entitlements.

At the present time the Act provides that a workplace agreement, if it contains terms and conditions which are below those set in the pay and conditions standards, will have the pay and conditions standards imposed into the agreement. This simply creates the semblance of a legal protection for employees! Where employees have nothing other than the actual instrument, the workplace agreement, to refer to, then any deliberately misleading statements in the workplace agreement will, and are intended to, mislead employees into believing that the workplace agreement itself is the sum total of their terms and conditions of employment.

The clearest example of this is that in the retail industry in Victoria, nearly every collective agreement lodged with the Office of the Employment Advocate contains a casual loading of 20%. This is the default casual loading provided for by WorkChoices. However, the casual loading provided for in the preserved APCS as derived from the Victorian Shops Award is 25%. Therefore, in every case collective agreements made in the retail industry in Victoria are deliberately misleading employees into believing that they are only entitled to a casual loading of 20%.

This deliberate misleading of employees is compounded by the fact that the Association is unaware of any attempt by any government agency to ensure that the pay and classifications standard, which requires a 25% casual loading, is actually paid to the employees.

Whilst the Government may point to S.401 of the Workplace Relations Act to assert that employees are protected from the employer making misleading statements that provisions provides no assistance where an employer simply presents an AWA or Employee Collective Agreement to workers to accept. In the case of each of the Employee Collective Agreements that operate in the Victorian Retail Industry that contain a 20% casual loading and not the correct 25% casual loading the employer will not be guilty of breaching S.401 unless they specifically made a statement to the employees about the casual loading. From the Associations experience with non union collective agreements it is usual for employers to simply present the proposed agreement to employees for approval without explanation of any of the terms of the agreement. In many cases before the AIRC in relation to non union collective agreements under the former S.170LK the Associations constant complaint about the making of those agreements was the total lack of information given by the employer to

employees about the terms of the agreement. The Association is in no doubt that few if any employers will be caught breaching S.401 as there is no requirement for the employer to make any statement.

Another example which shows how workplace agreements are clearly misleading employees as to their legal entitlements, concerns the use in some workplace agreements in the retail industry in Victoria of a clause which provides for the buying out of long service leave entitlements. This is achieved by notionally increasing the base rate of pay so as to avoid any entitlement being able to be accrued by an employee in relation to long service leave.

The fact that this practice is specifically unlawful and is a clear breach of Section 74 of the Victorian Long Service Leave Act, has not stopped these agreements being accepted by the Office of the Employment Advocate and having an operation and operating in accordance with the Workplace Relations Act.

Although such arrangements are specifically illegal, no attempt has been made, as far as the Association is aware, by any authority or body of Commonwealth, to ensure that employers comply with the provisions of the Long Service Leave Act and that the provisions of the workplace agreement are not implemented.

Whilst the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 purports to reinstate a fairness test to prevent employees from being the subject of extreme disadvantage in the workplace, the Bill makes no attempt to deal with the issues of misleading information about casual loading or long service leave as identified above. The processes created by the Bill look at nothing other than a small range of protected award matters. Even where the processes initiated by this Bill are implemented in full, workplace agreements will still be able to be accepted and will still operate where they are aimed at achieving significant disadvantage to employees by reducing the legal entitlements of those employees.

Even though the government may say that an employee's legal entitlements are protected by virtue of the operation of provisions of the Long Service Leave Act and by virtue of the provisions of the Australian Pay and Classifications Scales constituting the minimum, a notional right to these entitlements is useless where employees are not aware of their entitlements and where the structure created by the Howard government is specifically designed to mislead employees about their entitlements.

The Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 is a smoke and mirrors exercise. If the Howard government was genuine in its desire to provide a stronger safety net

for employees, then the Act would need to be amended to prevent the lodgement of agreements which contain provisions which are clearly at odds with minimum standards provided for in the Australian Pay Classifications Scales and the Australian Fair Pay and Conditions Standards, as well as preventing the operation of any agreement which clearly attempts to undermine or breach State laws which provide specific protection for employees.

The fact that this Bill simply does not intend to address the issues raised is clearly an indication that it is a short term political fix for a problem that the Howard government currently faces in the pre-election period and does not constitute any genuine attempt to resolve issues relating to workers suffering at the hands of unscrupulous employers or even at the hands of employers who have relied upon information on the OEA website which has encouraged them to have standard clauses such as the casual loading provision with only 20% casual loading.

Decisions and Reasoning?

To the extent that the Bill introduces any form of safety net protection for employees, the value of the Bill is minimal. The structure of the Bill is such that the decision making processes as to whether or not an agreement will pass the fairness test are processes done behind closed doors with the rationale for any decisions made being kept secret. The requirements in the Bill that the Workplace Authority Director must notify decisions to an employer or union in relation to whether an agreement needs to be assessed and whether an agreement passes or does not pass the fairness test is a process which is highly deficient.

The Association notes that the Employment Advocate has, in appearances before the Senate Estimates Committee recently, identified that the new Workplace Authority will need to recruit a large number of staff, initially as contractors and later as public servants, to apply the fairness test. It is interesting that a number of new employees will be required by the Workplace Authority to allow it to carry out its functions, this stands in stark contrast to the approaches adopted by the Australian Industrial Relations Commission when applying the no disadvantage test under the former legislation.

When the Australian Industrial Relations Commission had the responsibility for assessing agreements for compliance with the no disadvantage test, this test was, in the first instance, carried out by the parties to an agreement who would structure agreements as much as possible to comply with the test. The formal process of assessing whether or not a certified agreement passed the no disadvantage test was carried out by a member of the Commission. There is a stark contrast between the status, experience and knowledge of members of the

Australian Industrial Relations Commission and a hoard of newly-recruited contractors or public servants to carry out similar tests for the Workplace Authority.

Even the most partisan political appointment to the Commission by the Howard government could at least claim to have decades of business experience to bring to bear in applying the no disadvantage test. The same can simply not be said for the hoard of newly-recruited public servants, probably at a very junior level, in order to cut costs, that will be utilised by the Workplace Authority.

An even more critical deficiency in this Bill is the lack of reasons being given for any decision made. Whilst the Bill requires that the Workplace Authority must advise the decision to the parties, there is simply no mention whatsoever at any point in the Bill that reasons for the decision will need to be produced. The great advantage of the system utilised by the Conciliation and Arbitration Commission and the Industrial Relations Commission over many, many decades, was that, being required to act judicially, members of the Commission were required to give reasons for any decisions made. It was in giving reasons that the users of the Commission and those applying the provisions of the legislation learned how to understand, read and apply the legislation.

Reasoned decision by members of the Australian Industrial Relations Commission assisted to develop a comprehensive understanding of the operation of the Act and allowed a uniformity of process both by users of the system, practitioners and the tribunal. In the case of the Office of the Employment Advocate and the new Workplace Authority, the total lack of transparency of the decision making process, the absolute lack of any reasons being given for decisions made, and the total lack of publication or access to decisions and reasons, means that no-one will be able to make a workplace agreement in the knowledge that they have satisfied the understood practices to ensure that the agreement meets the fairness test.

As the new fairness test can include non-monetary matters the need for reasoned public decisions to be given is even greater.

It is the very strong submission of the Association that the Bill should be amended to require that whenever the Workplace Authority makes a decision in relation to an agreement passing or failing the fairness test, that reasons must be given and that the decision and reasons must be published.

In the case of AWAs, it would be a simple expedient to provide that the reasons exclude identifiers as to the name of the employer and employee. Invariably the identity of the parties is not of importance to practitioners or users of the system.

What is important, is understanding how the fairness test will apply in practice.

The need for reasons to be given is even more important in the case where the Workplace Authority director is making a decision under proposed Section 346M (4) where the Workplace Authority director is making a decision to approve an agreement in passing the fairness test because of exceptional circumstances. Where exceptional circumstances give rise to a requirement that in the public interest, an agreement which otherwise fails the fairness test, should be allowed to operate, it is absolutely incumbent upon the government to ensure that the approval in such circumstances is clearly justified. Justification cannot be accepted if the Workplace Authority director is able to make a decision in secret, is not subject to review, and is not required to identify the reasons for making a decision.

Section 346M Ambiguity

The proposed Section 346M which creates the fairness test, contains a highly ambiguous provision in relation to applying the fairness test to effective agreements.

Proposed Section 346M (1) (b) provides that the fairness test is passed if the -*"Workplace Authority director is satisfied that, on balance, the collective agreement provides fair compensation, in its overall effect on the employees whose employment is subject to the collective agreement, in lieu of the exclusion or modification of protected award conditions that apply to some or all of these employees"*.

This provision appears to be similar, although not identical, to the global test approach that was applied by the Australian Industrial Relations Commission under the no disadvantage test in the former legislation. Under the no disadvantage test, when it was first introduced, there was argument before the Commission as to whether the test could be applied on the basis that if the majority of employees did not suffer a disadvantage and a minority did suffer a disadvantage, then did an agreement still pass the no disadvantage test?

Employers had sought, in some circumstances, to provide some heightened conditions of employment to the majority of employees while clearly removing terms and conditions of employment from a minority of employees. The net effect on one view was that globally the no disadvantage test had been passed because on average everyone was better off. The Commission soundly rejected this approach to the application of the no disadvantage test. In several key decisions, the Commission made it absolutely clear that whilst the test was global, it was global in relation to conditions but it had to be applied individually in relation to employees.

The difficulty with the proposed wording of 346(M)(1)(b) is that there is no clear indication as to whether or not the fairness test will be applied by looking at the overall effect in relation to conditions but to apply that in relation to each individual employee. If the language of 346(M)(1)(b) is intended to allow employers to clearly disadvantage individual employees under a collective agreement on the basis that the majority are not disadvantaged, then this is a rort of the first order, and is clearly consistent with the Howard government's approach to workplace agreement making.

The fact that there is no note in relation to 346(M)(1)(b) which identifies that the approach should be that as set out in several of the key decisions of the Australian Industrial Relations Commission, tends to support a view that this provision is designed to legally permit an employer to disadvantage a minority of workers under a collective agreement as long as the overall effect does not disadvantage all employees under the collective agreement.

The Association condemns such an approach and urges the Senate to recommend to the government that this provision be clarified by making it absolutely explicit that the test, when considered in relation to the overall effect of an alteration of terms and conditions of employment, must be considered in relation to each individual employee employed under the collective agreement.

The Association notes the decision of Commissioner Whelan in Print R3504, 31 March 1999, where she identified the proper way in which the 'no-disadvantage test' under the former Act would apply:

> *"(98). I agree with Mr. West that the no disadvantage test is both a quantitative and qualitative assessment. It cannot be otherwise if we are to assume that conditions of employment can provide both personal as well as monetary value to employees e.g. rest breaks, forms of leave without pay, maximum hours of work. In addition the test does not say that an agreement passes the test if certification would not <u>on balance</u> result in a reduction in the overall terms and conditions of employment of the <u>majority</u> of employees but of employees as such."*
>
> and
>
> *"(103). In my view the test is not what usually happens, what happens now, or what is likely to happen as a result of savings clauses but what the Agreement <u>allows</u> to happen. Despite Mr Harvey's submissions there is nothing in the Act to prevent employees from making an agreement which preserves their own conditions but reduces the conditions of those who will be employed in the future and are therefore*

unable to vote. The fact that an agreement disadvantages only some employees does not however mean that, on balance, it passes the test.

(104). I am satisfied that the Agreement disadvantages some employees in relation to their terms and conditions of employment in that it would result on balance in a reduction in their overall remuneration."

It is clear from the language of 346(M)(1)(a) that in the case of an AWA the test relates to the individual. The same principle should apply in relation to collective agreements, that the test has to apply to each individual employee, 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.

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. For the majority of employees who work the predominant of hours Monday to Friday and may occasionally work Saturday and Sunday, such an arrangement gives them an advantage and improves their terms and conditions of employment. However, for the small number of employees who are only employed to work on Saturday or Sunday, their rates of pay are reduced dramatically. They suffer real disadvantage and real loss of pay.

If the overall effect test in 346(M)(1)(b) permitted such an agreement to operate, it would create serious injustice. The better test is that as articulated by the Commission in many decisions and that is a collective agreement when testing the global test or the overall effect of a fairness test is that it must be applied to each individual employee. An example just given, it would not be possible to simply remove the penalty rates on weekends by a slight increase in the weekly base rate where some employees only worked weekends. An agreement of such a sort would then fail the fairness test in relation to those employees.

Non-Monetary Matters

The proposed fairness test allows non-monetary matters to be taken into account for the fairness test. There is no clear methodology as to how much value such matters can attract. How does one value such arbitrary matters? Is it the employee's, employer's or the Director's opinion that counts?

When the Federal Government heralded the commencement of WorkChoices the promotional material used an example of “Billy”.

This is what the Government said: -

> “Billy is an unemployed job seeker who is offered a full-time job as a shop assistant by Costas who owns a clothing retail store in Canberra. The clothing store is covered by a federal award. 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.
>
> “As Billy is making an agreement under WorkChoices the AWA being offered to him must at least meet the Fair Pay and Conditions Standard.
>
> “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.
>
> “Billy has a bargaining agent assisting him in considering the AWA. He understands the details of what is in the AWA and the protections that the Fair Pay and Conditions Standards will give him including annual leave, personal/carer’s leave, parental leave and maximum ordinary hours of work. Because Billy wants to get a foothold in the job market, he agrees to the AWA and accepts the job offer.”

Now it appears that the ‘Billy’ example would still pass the new fairness test.

The Explanatory Memorandum to the Bill at paragraphs 102 and 103 provide a brief statement about ‘non-monetary compensation’. The only clear indication given in the Explanatory Memorandum is that the provision of meals such as a pizza at the end of a shift would not constitute adequate compensation for the removal of protected award conditions.

However neither the Bill, nor the Explanatory Memorandum give clear direction as to what an employer can or cannot offer as ‘non-monetary compensation’.

It is clear that the Bill will allow an employer to exploit the use of ‘non-monetary compensation’ to avoid paying fair compensation for having taken away from an employee all of their protected award conditions.

In the 1800's and 1900's unscrupulous employers paid indigenous workers in flour, tea and sugar. This unfair and abusive practice was rightly condemned and eventually outlawed.

The Howard Government through this Bill is entrenching that despicable practice once again!

Take the following example.

A Constitutional Corporation owns and operates a small chain of supermarkets.
Everyone is employed on an AWA using a single template AWA.

The employer read the Government's pre Work Choices publicity material and visited the Work Choices web site. Each AWA made after 27 March 2006 expressly excluded all protected award conditions and paid the old award wage plus $5 per week.

Under new Work Choices with a "fairness test" it is clear that the $5 will fall a long way short of compensating employees for the loss of all protected award conditions.
A new template AWA is needed for new employees which now includes $50 per week for loss of protected award conditions. The employer notes that he can now include 'non-monetary' compensation. The new template AWA **reduces** the cash wage component by **$50** per week and **includes a $100 per week shopping voucher** to be used in the employer's supermarkets. The total value of the new AWA including monetary and non-monetary compensation meets the value needed to be met to pass the 'fairness test'.

The $100 per week shopping voucher meets the definition of "non-monetary compensation" in S.346M(7) as it is both an item for which a money value can be clearly attributed and it is an item which confers a benefit on the employee which is of value to the employee.

The employee may not want to spend their money at their employer's business doesn't detract from the fact that the $100 shopping voucher is non-monetary compensation within the meaning of the Bill.

The cost of giving a $100 shopping voucher to each employee is significantly less than $100 to the employer. The employer has already marked up the prices of all of goods to ensure a reasonable profit margin and when employees spend their $100 shopping voucher they are buying goods worth about $70 and contributing the other $30 to the employer's profit.

If an employer knew that one of his employee's had a large family and therefore a large grocery and food bill each week, the employer could alter the AWA so that a larger portion of the

employee's earnings were in the form of a shopping voucher.

Government Senators, Ministers and supporters will no doubt say that this scenario is far fetched and is clearly not intended.

As we already know, the Government has stated that this Bill is needed to address unintended consequences of Work Choices. As Minister said on 4 May 2007:

> *" We are introducing a stronger safety net for working Australians**. <u>It was never the intention that it should be the norm for penalty rates to be traded off without proper compensation and that's why the Government is going to introduce new laws that, simply put, employees must receive fair compensation if they agree to trade away conditions such as penalty rates, shift and overtime loadings, monetary allowances like travel allowance or tool allowance, annual leave loadings, public holidays, rest breaks and incentive and other types of bonuses</u>."*
>
> *AM programme on ABC*

What is absolutely clear is that if the Howard Government allows something to occur, however ***'unintentional'*** under Work Choices then it will invariably occur.

This Bill allows employers to pay the substantial earnings of an employee in the form of non-monetary compensation. It is allowed and it will occur!!

Fairness Test – Implications for the Retail Industry

There are a number of implications of the proposed "Fairness Test Bill" in the context of the retail industry.

Which agreements are subject to the fairness test?

Which agreements are excluded from the fairness test?

Are these exclusions from the fairness test a deliberate decision or an unintended consequence?

The retail trade is the single largest employing industry in Australia accounting for 1,487,100 or 15% of all employed people.[2] The breakdown by State and Territory of the number of people employed in the retail trade and the percentage that represents of the national retail trade employment figures is set out in the table below:

[2] Australian Bureau of Statistics, Labour Force, Australia, Detailed, Feb 2007, Cat. No. 6291.0.55.003

EMPLOYMENT IN RETAIL TRADE IN AUSTRALIA FEBRUARY 2007[3]

	No. of employees	% of retail employees nationally	Regulated by Federal Award
NSW	469,000	31.32%	No
VIC	369,000	24.67%	Yes
QLD	327,000	21.86%	No
SA	109,100	7.28%	No
WA	156,700	10.46%	No
TAS	32,400	2.16%	No
ACT	21,000	1.4%	Yes
NT	12,100	0.8%	Yes
Australia	**1,487,100**		

[3] Australian Bureau of Statistics, Labour Force, Australia, Detailed, Feb 2007, Cat. No. 6291.0.55.003

When will the Fairness Test be Applied to A Workplace Agreement?

It is widely recognised that the fairness test does not apply to Workplace Agreements lodged prior to 7 May 2007. As a result of this demonstrably unfair AWA's will continue to operate for 5 years. What is less well recognised is that the structure of the fairness test will still allow unfair outcomes that strip away all protected award conditions or protected notional conditions. In fact the structure promotes the stripping away of all protected conditions.

The fairness test is not applied to all Workplace Agreements. The criteria for whether an AWA or collective agreement is subject to the fairness test are similar except for the income threshold for AWA's. The criteria are:

(i) *(a)* *it is lodged after 7 May 2007;*[4] ***and***
(b) *the employee is employed in an industry or occupation in which the terms and conditions are* ***usually*** *regulated by an* ***award*** *or would, but for a workplace agreement or another industrial instrument,* ***usually*** *be regulated by an* ***award****;*[5] ***and***
(c) *for AWA's only, the annual salary is less than $75,000;*[6] ***and***
(d) *the workplace agreement excludes or modifies one or more protected award conditions that apply under a reference award;*[7]

or

(ii) *(a)* *it is lodged after 7 May 2007; and*
(b) *if you are bound by a NAPSA and you modify or exclude some protected notional conditions but not all protected notional conditions;* [8]*and*
(c) *for AWA's only, the annual salary is less than $75,000.*

How will the fairness test apply in the retail industry?

Each relevant criteria must be met before the Workplace Authority is required to apply the fairness test. Putting to one side those agreements lodged prior to 7 May 2007 the next requirement is that the employee covered by the agreement is

[4] S346E(1)(a) & (2)(a) and s346F(1)(a) & (2)(a) *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*
[5] S346E(1)(b) & (2)(b) and s346F(1)(b) and (2)(b) *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*
[6] S346E(1)© and s346F(1)(c) *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*
[7] S346E(1)(d) & (2)(c) and s346F(1)(d) & (2)(c) *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*
[8] Para 42: 52AAA *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*

employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee are **usually** regulated by an **award**, or but for a workplace agreement would **usually** be regulated by an **award**. Are the terms and conditions of work in the retail industry **usually** regulated by an **award**?

An award is a defined term in the Workplace Relations Act 1996:

> *" s4(l)*
>
> *award means:*
>
> *(a) an award made by the Commission under section 539; and*
>
> *(b) a pre reform award. "*

In essence an "award" must be a Federal award of the Australian Industrial Relations Commission. The retail industry is usually regulated by Federal awards in the jurisdictions of Victoria, the ACT and the Northern Territory, however in NSW, Queensland, South Australia, Western Australia and Tasmania the retail industry is not usually regulated by a Federal award. Approximately 73% of employees in the retail trade are employed in states where the work of a shop assistant is not usually regulated by an award. If almost ¾ of the industry is not regulated by an award it is difficult to make out that nationally, shop assistants in the retail trade usually have their terms and conditions of work regulated by an award.[9]

The effect of this interpretation would be that the fairness test would not apply to workplace agreements in the retail industry pursuant to proposed sections 346E or 346F as there is no scope to consider the industry state by state or territory by territory.[10]

However where an employer is bound by a notional agreement preserving a State award (NAPSA) the fairness test may be activated by proposed paragraph 52AAA of Schedule 8. The criteria for whether the fairness test is activated in this instance is:

> *(a) a workplace agreement is lodged;*[11] ***and***
>
> *(b) immediately before the workplace agreement was lodged the employer and employees were bound by a NAPSA;*[12] ***and***

[9] The percentage of employees covered by Federal Awards in the retail industry would be increased by federal enterprise awards that still exist as underpinning awards for some of our enterprise agreements with the Coles Group of companies. However this is not likely to fundamentally tip the balance, rather it may alter the balance by about 6%, still leaving the majority of employees not usually regulated by a federal award .

[10] This would be consistent with the Award rationalization process requiring no reference to States or Territories. See s535 *Workplace Relations Act 1996*

[11] 52AAA (1)(a) *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*

[12] 52AAA(1)(b) *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*

(c) the workplace agreement contains protected notional conditions because the agreement did not expressly exclude or modify all of the protected notional conditions.[13]

This means that the fairness test will apply to a retail employer bound by a NAPSA who lodges a workplace agreement that does not exclude or modify all of the protected notional conditions. Perversely, a retail employer bound by a NAPSA who lodges a workplace agreement that excludes or modifies all protected notional conditions is referred back to the body of the Act and as discussed above is not subject to the fairness test as the industry is not usually regulated by an award. **This structure actually encourages and promotes the stripping of <u>all</u> protected conditions to avoid the fairness test.**

It is not possible to definitively say the structure is deliberately set up to promote the stripping of all protected conditions to avoid the fairness test but there are some indications that the potential impact was understood and anticipated.

The Explanatory Memorandum to the Fairness Test Bill makes it clear that a workplace agreement stripped of all protected notional conditions does not fall under paragraph 52AAA Schedule 8 but rather under the fairness test in s346E and 346F.[14] Another indication that a circumstance like the retail industry has been considered is the note to proposed s346K(3) and proposed s346L(3), whereby if you get to the stage of having an award designated for the fairness test (despite the criteria in s346E(I)(b) and (2)(b)): "*the Workplace Authority Director may nevertheless not be satisfied that there is an appropriate award for the purposes of paragraph (b) is where an award regulates terms and conditions of work performed by employees in a particular industry or occupation in one State only, and terms and conditions of that kind of work are not regulated by awards in other States*".

This note reflects the situation of one federal State award, ie Interim Victorian Shop Award, but no federal retail award in other States.

<u>Where does the fairness test apply?</u>

The fairness test in the retail industry will be highly unlikely to apply in the ACT and Northern Territory, despite the federal award coverage of the retail industry in those

[13] 52AAA(1)(c) *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*

[14] Paragraph 242 *Explanatory Memorandum to Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*

jurisdictions, as the industry nationally is unlikely to be regarded as **usually** regulated by an **award**.

The fairness test will be highly unlikely to apply in the retail industry in NSW, Queensland, South Australia, Western Australia and Tasmania where an employer bound by a NAPSA excludes or modifies **all** protected notional conditions in a workplace agreement. The fairness test may apply in these States where an employer bound by a NAPSA does not exclude or modify all protected conditions. NAPSA's expire on 27 March 2009.

In Victoria the fairness test should apply due to the Special Victorian provisions.

The result is that the existing AWA's that excluded **all** protected award conditions, if offered again would not be subject to the fairness test. The AWA's would not fail the fairness test as they would be exempt from the test. This test appears to be designed to deal with perceptions and a political problem, but not designed to actually deliver fairness. It is a movie set with pretty façade but no real substance.

Potential Application of the Fairness Test in the Retail Industry

State	Federal Award	NAPSA	Fairness Test Applied
NSW	No	Yes	(i) No – if you exclude all protected conditions. (ii) Yes – if you do not exclude all protected conditions.
Victoria	Yes	No	Yes because of special Victorian Provisions
QLD	No	Yes	(i) No – if you exclude all protected conditions. (ii) Yes – if you do not exclude all protected conditions.
SA	No	Yes	(i) No – if you exclude all protected conditions. (ii) Yes – if you do not exclude all protected conditions.
WA	No	Yes	(i) No – if you exclude all protected conditions. (ii) Yes – if you do not exclude all protected conditions.
TAS	No	Yes	(i) No – if you exclude all protected conditions. (ii) Yes – if you do not exclude all protected conditions.
ACT	Yes	No	No
NT	Yes	No	No

Unfair Agreements will Legally Emerge Even with the Fairness Test

Existing workplace agreements made since WorkChoices came into effect on 27 March 2006 and before 7 May 2007, did not have to pass the fairness test. The Act allowed unfair workplace agreements ("existing unfair workplace agreements").

Not only does the Fairness Test Bill enable such existing unfair workplace agreements to continue for their period of operation, but the Bill also permits the varying of such existing unfair agreements to extend their operation up to a maximum period of 5 years without being subject to the fairness test. This is achieved by only varying the length of the existing unfair agreement. By only varying the length of the agreement and not dealing with any protected award condition in the variation, the fairness test can be avoided for several more years. The fairness test is only applied to variations of workplace agreements where the variation itself seeks to exclude or modify a protected award condition.[15] Existing unfair agreements have no need to deal with protected award conditions in the variation as they have already been excluded or modified in the original agreement.

The Bill does not require future fairness in the workplace. Workplace agreements only have to pass the fairness test as at lodgment date[16], thereafter the agreement only has to comply with the AFPC pay scales and the legislated minimum conditions. Therefore an agreement that just meets the fairness test on the day of lodgment by paying just enough to compensate an employee on day 1 ("the fairness payment") but then has continuing operation for 5 years with no provision for pay rises beyond movements in the AFPC pay scales, will meet the fairness test. The impact of such a scenario is that on day 1 the agreement passes the fairness test, over the next 5years as AFPC wage decisions are handed down the increases can be absorbed into the fairness payment until such time as the rate of pay in the agreement and the AFPC scale are equal and the fairness payment is completely absorbed. Whether this happened in year 1, 2 or 3 of the agreement, the agreement would still operate even though it no longer would pass the fairness test. The fairness is completely absorbed.

Quite conceivably employers who have used WorkChoices to strip away conditions without fair compensation will continue to do so under the Fairness Test Bill with just a slight delay in achieving their aim. A cynic might think the delay would be long enough to go past the next federal election.

[15] s346F(1)(d) & (2)(c) *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*
[16] s346N(1) *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*