Submission to the Senate Employment, Workplace Relations and Education Committee

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

4 June 2007

Table of Contents

Introduction 3

Background..5

1. Workplace Relations Stronger Safety Net Bill 7

    Overview of the ‘Fairness’ Test 7

    Fairness Testing in other Jurisdictions 7

    The Work Choices Context...7

    The Application of the ‘Fairness’ Test 9

    Coverage of ‘Fairness’ Test 11

2. The ‘Fairness’ Test 12

  2.1 Fair Compensation 12

  2.2 Protected Award Conditions 14

    Other Award Conditions 16

  2.3 Exemptions from Fair Compensation...18

    Non-monetary Conditions..18

    Personal Circumstances and Family Responsibility 20

    Exceptional Circumstances...22

  2.4 Employer Difficulties 26

  2.5 Ability of the Workplace Authority Director to Apply the Test 28

    Re-naming the Office of Workplace Services 32

Conclusion..34

Introduction

1. The Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (the Bill) was introduced into the Commonwealth Parliament on 28 May 2007. According to the federal Minister for Employment and Workplace Relations, this Bill 'will reassure Australian workers that when they enter into a workplace agreement, it will be a fair one that has been approved by an independent statutory authority'.[1]

2. The New South Wales Government contends that this will not be the case and that this is not the true intention behind this Bill. Instead, this Bill appears to be no more than an attempt to deflect ongoing public criticism of Work Choices, rather than a genuine attempt to restore, or for that matter, establish fairness and balance in the federal industrial relations system.

3. The 'Fairness' Test proposed in the Bill may have some limited benefit for employees within the narrow parameters prescribed but will do nothing to mitigate the fundamental and systemic unfairness that characterises the operation of Work Choices.

4. The *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices) is inherently unfair and unbalanced, providing unprecedented power to employers to dictate employment conditions in the workplace. Work Choices effectively removed the century-old industrial relations system operating in Australia, which was based on conciliation and arbitration. This has been replaced by a complex system which has axed the independent umpire and made managerial prerogative its principal focus.

5. The attempt by the federal government to introduce the so-called 'Fairness' Test in this Bill will not remove or undo the unfair and damaging aspects of Work Choices. Workers, particularly those in low-skilled occupations, and their families will continue to be heavily disadvantaged by this legislation, resulting in cuts in take-home pay and unsociable and longer working hours. The 'tweaking' of the *Workplace Relations Act* by this Bill will not remove its unfairness. This 'tweaking' will also come at a cost of $370 million to taxpayers over the next four years.

6. The length of both the Bill and its Explanatory Memorandum are substantial, considering it is only a proposed amendment dealing principally with one change to the administration of federal agreements.

7. This is perhaps unsurprising, given the existing complexity in Work Choices, however it clearly illustrates the complexity of the new

---

[1] Minister Hockey (2007), *Hansard,* 2nd Reading Speech: Workplace Relations Amendment (A Stronger Safety Net) Bill, 28 May.

provisions. Similarly, the short time made available for making submissions and providing evidence to this Inquiry is disappointing.

8. It is the position of the New South Wales Government that the Work Choices legislation should be repealed in its entirety and replaced with a system that has fairness and balance as its inherent elements.

Background

9. The Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (the Bill) was introduced into the Commonwealth Parliament on 28 May 2007 and seeks to amend the *Workplace Relations Act 1996*. Substantial amendments were made to the *Workplace Relations Act* by the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices). Since the commencement of Work Choices on 27 March 2006, the federal government has made numerous amendments to both the *Workplace Relations Act* and the accompanying regulations including the:

   - Workplace Relations Amendment (Work Choices) (Consequential Amendments) Regulations 2006 (No 1)
   - Workplace Relations (Registration and Accountability of Organisations) Amendment Regulations 2006 (No 1)
   - Workplace Relations Amendment Regulations 2006 (No 2)
   - Workplace Relations Amendment Regulations 2006 (No 3)
   - Workplace Relations Amendment Regulations 2006 (No 4)
   - Workplace Relations Amendment Regulations 2006 (No 5)
   - Workplace Relations Amendment Regulations 2007 (No 1)
   - *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006.*

10. This Bill is the latest amendment to the *Workplace Relations Act.*

11. The Bill establishes the Workplace Ombudsman and Workplace Authority Director as statutory office holders. The Workplace Authority Director is required to determine whether certain workplace agreements and variations to workplace agreements lodged on or after 7 May 2007 satisfy a 'Fairness' Test where such agreements:

    - cover employees who work in industries or occupations usually regulated by federal awards; and
    - modify or exclude one or more protected award conditions.

12. The 'Fairness' Test will also apply where the employer and employee(s) were bound at the relevant time by a Preserved State Agreement (PSA) or Notional Agreement Preserving State Awards (NAPSA) and one or more preserved or notional conditions was modified or excluded.

13. The test applies to employees covered by Australian Workplace Agreements (AWAs) with full-time (or full-time equivalent) base salaries of less than $75,000. This remuneration threshold amount does not apply to employees under relevant collective agreements. Protected award conditions, which include penalty rates and overtime, are those that applied under a federal award that binds the employer or a

preserved State instrument (including a NAPSA or PSA derived from NSW state awards or agreements).

14. The ‘Fairness’ Test as proposed would require the Workplace Authority Director to be satisfied that: in the case of an AWA - the agreement provides fair compensation to the employee in lieu of the modification or removal of the employee’s protected award conditions; and in the case of a collective agreement - on balance, the agreement provides fair compensation, in its overall effect on employees, in lieu of the modification or removal of the employees’ protected award conditions. While the tests differ in their terms between collective and individual agreements (AWAs) in both cases monetary and non-monetary compensation (where the conditions have an assignable value) can be considered in applying the ‘Fairness’ Test along with the personal circumstances and family responsibilities of the employee. It is important to note that the concept of ‘fair compensation’ for the removal of protected award conditions is not defined in the Bill.

15. Although the Bill also introduces amendments regarding bargaining fees and various consequential amendments, this submission will focus on the proposed ‘Fairness’ Test.

16. The New South Wales Government submits that the statutory ‘Fairness’ Test as set out in the Bill:

    - is complex in its terms
    - is subjective, indeterminate and uncertain in its application to particular cases
    - lacks transparency and any appropriate process for reviewing determinations, and
    - will not ensure fair compensation for the exclusion or modification of most protected award conditions in most instances.

17. The NSW Government’s primary criticism, however, is that the test does very little to mitigate the overall unfairness of Work Choices, and indeed adds a further layer of complexity to what is already a very lengthy and exceedingly complex piece of legislation.

1. Workplace Relations Stronger Safety Net Bill

Overview of the 'Fairness' Test

18. The new 'Fairness' Test does not ensure that affected employees will not be disadvantaged when compared with the minimum employment conditions contained in the comparator award(s). In this it differs from the statutory no disadvantage tests applied in various state jurisdictions and under the pre- Work Choices workplace relations statutory scheme.

Fairness Testing in other Jurisdictions

19. In the State jurisdictions and in the previous federal system, the practical and conceptual starting point is the importance of maintaining a fair safety net of award conditions underpinning agreement making in the enterprise and individualised bargaining streams. The statutory no net detriment test or no disadvantage test considers the degree to which employment conditions in relevant agreements have departed from the applicable minimum award standards and applies a global on balance comparison test to assess whether there is an overall disadvantage for relevant employees.

20. The principal purpose of this process is to allow flexibility in achieving consensual bargaining outcomes while preventing the erosion of fair minimum industrial standards that have gained general community acceptance.

The Work Choices Context

21. By way of contrast, the proposed 'Fairness' Test takes as its starting point the issue of fair compensation for the removal of specified protected award conditions rather than the importance of the award safety net in ensuring fairness and income security for employees. This is consistent with one of the important elements of the foundational industrial ideology of Work Choices - the need to sever the nexus between awards and the making of workplace agreements to facilitate bargaining flexibility and the downward adjustment of working conditions.

22. Under Work Choices the pre-Work Choices statutory no disadvantage test which benchmarked agreements against the relevant awards has been removed. Federal workplace agreements can override and displace awards that would otherwise apply to relevant employees.

23. The Workplace Relations Amendment (Work Choices) Bill, in its original form as presented to the House of Representatives in late 2005, allowed for the unfettered overriding of all award conditions other than basic rates of pay and for agreements to cover the field occupied by the award that would otherwise apply to the affected employee. Under pressure from the federal Opposition and the minor parties in the Senate the federal government introduced amendments dealing with so-called protected award conditions that would be read into agreements.

24. These 'protected conditions', however, were not entrenched and could simply be removed by an appropriate term in the relevant agreement. In our submission, the whole Work Choices framework was constructed in order that AWAs and non-union collective agreements could readily be used to override award safety net protections and unilaterally determine the terms of agreements through the deployment of employer superior bargaining power.

25. This in fact extends the original approach of the *Workplace Relations Act 1996*, which provided AWAs as a means of contracting out of award conditions (former s170VQ(1)). Work Choices greatly extends and magnifies this approach, by removing the no disadvantage test and ultimately the relevance of the award safety net.

26. It is worthy to note, however, that despite the federal government's attitude that the award system is outdated and inflexible, and its attempts to reduce its coverage and relevance, it has had to resort to elements of the award system as the basis for its 'Fairness' Test.

27. In any case, the allowable award matters regime under Work Choices, along with award simplification, has reduced the safety net by removing a number of important industrial matters from the coverage of federal awards. It is also not clear how a genuine fairness test based on compensation for the removal of award entitlements can be reconciled with the ongoing Work Choices strategy of dismantling the award safety net through award rationalisation and the simplification of award terms and structures. The rationalisation and simplification processes could lead to a reduction in the level of benefits derived from existing awards.

28. The proposed test is clearly not designed to ensure overall fairness when compared to award minimum standards, but deals with the narrow issue of fair compensation for the lawful exclusion of certain award conditions.

29. Seen in the light of its statutory context the proposed 'Fairness' Test has little or nothing to do with strengthening the safety net for workers and is primarily concerned with identifying certain conditions and

employment circumstances in assessed agreements that provide offsetting benefits for the removal of important award entitlements.

30. An observation to be made here is that the Work Choices bargaining regime, at least prior to the introduction of the 'Fairness' Test, did not require an employer to provide compensatory benefits to an employee for the removal of protected conditions. Under the new test the Workplace Authority, however, can determine an agreement passes the 'Fairness' Test in a particular case even though there was no specific trade off, agreed to by the parties, between certain employment benefits identified as fair compensation and the 'protected conditions'.

31. It is also worth noting that a further element of this objective of breaking the nexus between awards and the making of workplace agreements is the removal of the AIRC from its role in approving collective agreements. Before Work Choices, the same body that made awards also approved agreements by applying the no disadvantage test. As the body which has made the awards, the AIRC was in a well-qualified position to judge whether a particular agreement before it presented a disadvantage to employees as compared to the award. Now the job of applying the 'Fairness' Test is to be performed by bureaucrats who may not have specialist understanding of how workplaces operate, or how award provisions can operate to ensure balance and fairness in workplaces.

The Application of the 'Fairness' Test

32. In assessing relevant factors, the Authority can take into account non-monetary conditions and particular employment circumstances where a benefit of significant value accrues to the employee. The Bill gives no guidance as to how non-monetary compensation is to be assessed or the method for determining whether or not a particular benefit or advantage is of significant value to the employee. Is this matter to be determined on an objective basis or in accordance with material available to the Authority establishing, on a subjective evaluation, the attitude of the relevant employee to the employment circumstances being assessed as possible fair compensation?

33. If this is so, it would appear to entail significant compliance costs and uncertainty for employers some of whom may welcome the capacity under Work Choices to seek the removal of protected conditions, but will provide no clear guidance as to what is the requisite fair compensation.

34. Under the proposed arrangements workplace agreements will still be operationally valid on lodgement prior to any determination under the 'Fairness' Test but be subject to rectification and a possible finding of invalidity in some circumstances, at a later date. Employers will also be

liable for the payment of shortfalls where it is found that fair compensation has not been provided.

35. In New South Wales, part of the approval process for enterprise agreements entails the application of a particular test by the NSW Industrial Relations Commission. This process involves an on balance comparison between the terms of proposed agreements and the aggregate package of conditions of employment under state and relevant federal awards to determine whether or not a net detriment results. Compliance with the no net detriment test is a prerequisite for approval of an enterprise agreement in the NSW jurisdiction. Such a test could be used in the federal context and would represent a genuine and effective assessment.

36. The proposed ‘Fairness’ Test lacks these important features noted above. The test is limited in its scope in that it does not benchmark agreements against the aggregate package of conditions contained in the reference award(s) and the ‘Fairness’ Test is not part of the approval process- agreements are still operational on lodgement whether or not they have passed the ‘Fairness’ Test.

37. The statutory test also does not primarily focus on ensuring adequate financial compensation so as to protect the take home pay of affected workers. Instead, not only can non-monetary compensation be considered but, in exceptional cases, other factors can be taken into account. These include the industry, location and economic circumstances of the employer provided that these are not contrary to the public interest. It is worth noting, however, that the Bill fails to define what constitutes the ‘public interest’.

38. Under s170LT3 of the pre-Work Choices *Workplace Relations Act* 1996 a collective agreement which failed the former no disadvantage test could be certified if the Australian Industrial Relations Commission (AIRC) was satisfied that it was not contrary to the public interest to do so. A similar process applied to pre- Work Choices AWAs.

39. One salient difference of course, was that the public interest test came into play after the agreement had, on the face of it, failed the no disadvantage test. In that particular statutory context, the AIRC also considered it appropriate to have regard to the importance of the award safety net when considering the public interest requirement. As noted earlier, the AIRC, being the body which made awards and therefore was responsible for the safety net, was a body particularly suited to determining both disadvantage and the question of whether, nevertheless, the public interest might justify a deficient agreement. Being a tribunal, the AIRC also had procedural rules to follow in terms of giving the parties to such an agreement a meaningful opportunity to be heard.

40. By way of contrast the Workplace Authority Director can invoke the public interest requirement, which is not defined in the Bill, to determine whether an agreement meets the ‘Fairness’ Test in circumstances where little or no financial compensation has likely been provided. The decision making process will be compromised by secrecy and lack of public accountability and it is not clear how the competing considerations involved in this complex exercise will be reconciled.

41. The New South Wales Government submits that this task is an appropriate one for the AIRC to undertake. The AIRC is an independent, expert industrial tribunal that can judiciously and in a balanced manner deal with the complex industrial, economic and equity issues involved.

Coverage of ‘Fairness’ Test

42. The ‘Fairness’ Test contained in proposed Subdivision C will not cover all employees under agreements or agreement variations lodged after 7 May 2007. In some cases there may be no reference award in relation to employees covered by the agreements and it is not clear how these comparator awards will be ascertained where there is not an award that would be binding on the employer but for the operation of the agreement.

43. According to figures released by the Office of the Employment Advocate 312,438 workplace agreements have been lodged in the period from 27 March 2006 (Work Choices commencement date) to the end of March 2007. Many of these agreements would have lawfully removed protected award conditions. People employed under them have no recourse under the Bill. In addition many employees covered by AWAs would be earning $75,000 or more determined on an annualised basis and the ‘Fairness’ Test will not apply to them.

2. The 'Fairness' Test

2.1 Fair Compensation

44. Proposed section 346M of the Bill states the following:

> *(1) A workplace agreement passes the fairness test if:*
>
> *(a) in the case of an AWA – the Workplace Authority Director is satisfied that the AWA provides fair compensation to the employee whose employment is subject to the AWA in lieu of the exclusion or modification of protected award conditions that apply to the employee; or*
>
> *(b) in the case of a collective agreement – 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 those employees.*

45. The Bill further states that in considering fair compensation the Workplace Authority Director is to have regard to the monetary and non-monetary compensation that the employee will receive under the agreement in lieu of protected award conditions. However, the Bill fails to actually provide a definition of 'fair compensation'. Similarly no definition of 'fair' is provided in the *Workplace Relations Act.* As suggested by Professor Andrew Stewart:

> *This does not preclude the Authority from identifying fair compensation as something other than a benefit that has monetary value…The possibility of fair compensation being found even in the absence of compensation of a monetary value is still preserved in the legislation.*[2]

46. This provides the Workplace Authority Director with broad discretion in terms of deciding what constitutes 'fair compensation' for the purposes of applying the 'Fairness' Test.

47. In addition, the independence and transparency of the Workplace Authority Director in applying the 'Fairness' Test is also of concern. According to s150C of the Bill:

> *(1) The Minister may, by legislative instrument, give written directions to the Workplace Authority Director about the performance of his or her functions.*

---

[2] Prof A Stewart (2007) quoted in Workforce, 'No definition of 'fair compensation' in fairness test bill', 29 May.

> (2) *Directions given by the Minister under subsection (1) must be of a general nature only, and cannot relate to a particular case.*
>
> (3) *The Minister must not direct the Workplace Authority Director in relation to the Workplace Authority Directors performance of functions, or exercise of powers, as an Agency Head under the Public Service Act 1999.*

48. This provision appears to allow the federal Minister to make directions to the Workplace Authority Director on how the 'Fairness' Test is to be applied, including what non-monetary factors may be considered to be of value for the purposes of providing 'fair compensation', provided that the directions do not relate to an individual case. This proposed section provides considerable power to the Minister to influence the application of the 'Fairness' Test.

49. Furthermore, the Workplace Authority is not required to publish decisions regarding the application of the 'Fairness' Test, unlike the AIRC under the pre-Work Choices *Workplace Relations Act 1996.* It will therefore be difficult for employers and employees to understand how the test is being interpreted and applied. This is likely to result in a lack of transparency regarding the test. Issues regarding the ability of the Workplace Authority Director to apply the 'Fairness' Test are discussed in more detail in section 2.5.

2.2 Protected Award Conditions

50. The WR Act (s354) provides for the protection and retention of an entitlement to certain allowable award matters in a workplace agreement if those award conditions would have had effect but for the agreement. These conditions are taken to be included in a workplace agreement unless the workplace agreement expressly excludes or modifies all or part of them (s354(2)).

51. The relevant 'protected allowable award matters' are set out at s354(4):

> *(a) rest breaks;*
> *(b) incentive-based payments and bonuses;*
> *(c) annual leave loadings;*
> *(d) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;*
> *(e) days to be substituted for, or a procedure for substituting, days referred to in paragraph (d);*
> *(f) monetary allowances for:*
> *(i) expenses incurred in the course of employment; or*
> *(ii) responsibilities or skills that are not taken into account in rates of pay for employees; or*
> *(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;*
> *(g) loadings for working overtime or for shift work;*
> *(h) penalty rates;*
>
> *….*

52. When reading the Bill for a second time, the federal Minister for Employment and Workplace Relations listed conditions which were 'protected award conditions'. 'Protected award conditions' as described by the Minister are taken to be the same as 'protected allowable award matters' as defined by the WR Act at (s354).

53. One protected award condition was not mentioned by the Minister and it is not clear whether it is a condition that will attract the operation of the test. That is the protected allowable award matter dealing with substitute public holidays. An agreement may provide for a day substituted for, or a procedure to substitute a day for, a public holiday. At this stage, employees have no certainty that if requested or required to work on a public holiday, as permitted by Work Choices, they will be entitled to a day in lieu of that public holiday, or whether the modification or exclusion of the entitlement to a substitute day will require consideration under the 'Fairness' Test.

54. The Minister said that it was not appropriate for the Bill to 'mandate' protected award conditions in agreements, 'because to do so would limit flexibility in agreement making.'[3]

55. 'Flexibility in agreement making' on the evidence, has been achieved at the expense of providing employees with protected award conditions.

56. The Employment Advocate told the Senate Standing Committee on Employment and Workplace Relations in May 2006 that of a sample of 250 AWAs lodged in the first month of Work Choices, every one expressly removed at least one protected award condition and 16% expressly excluded all protected award conditions. Most often removed, in the name of flexibility, were leave loading (removed in 64% of sampled AWAs), penalty rates (removed by 63%) and shiftwork loading (removed by 52%).[4]

57. The *Sydney Morning Herald* subsequently published data on agreements sampled in the first six months of Work Choices have revealed:

- 45% of sampled AWAs expressly removed protected award conditions
- 76% of sampled AWAs removed shift loadings
- 59% of sampled AWAs removed annual leave loading
- 70% of sampled AWAs removed incentive payments and bonuses, and
- 22.5% of sampled AWAs removed declared public holidays.[5]

58. This data has since been confirmed by the Employment Advocate as matching the same data held by the Workplace Authority Director (but for certain privacy protection deletions).[6]

59. This trend appears also in a recent survey of employer greenfields agreements. Of the sample agreements, 88% expressly excluded all protected award conditions.[7]

60. The effects of removing penalty rates, overtime and other loadings from workers' conditions can now be seen in latest average weekly earnings data from the ABS. Nationally, there is a decline over the past year in the *total* earnings of males. Men's total earnings have traditionally been comprised of a greater proportion of income derived from loadings and penalties than women.

---

[3] Minister Hockey (2007), *Hansard,* 2nd Reading Speech: Workplace Relations Amendment (A Stronger Safety Net) Bill, 28 May.

[4] Senate Employment, Workplace Relations and Education Legislation Committee, Senate Estimates Hearing, 29 May 2006, pp.138-141.

[5] *Sydney Morning Herald*, 17 April 2007, 'Revealed: how AWAs strip work rights' by Mark Davis.

[6] Senate Standing Committee on Employment, Workplace Relations and Education, 28 May 2007, p7.

[7] *Workplace Express*, 13 November 2006, 'Greenfields agreements true to predictions'

61. The data now show that men's earnings growth has declined over the past year for both their ordinary time earnings, and more markedly, their total earnings. Decline in total earnings can only be explained through the loss of penalty rates and other loadings. The fact that growth in men's ordinary time earnings has also declined over the past year is also indicative that penalty rates and other loadings have not been traded for higher basic pay rates.[8]

62. It is not difficult to imagine how such 'flexibilities' impact on working families who have consequently had to manage reduced household budgets as a result of decline in total earnings.

Other Award Conditions

63. It is also important to note that the 'protected allowable award matters' under Work Choices (s354(4)) and described by the Minister as 'protected award conditions' are but a shadow of the larger list of 'allowable award matters' which have not been protected for the purpose of agreement making generally, or for consideration under the fairness test in particular.

64. 'Allowable award matters' (s513(1))which have not been protected include:
    - ceremonial leave
    - leave for the purpose of seeking employment after an employee has given notice of termination to an employee
    - redundancy pay
    - stand-down provisions
    - type of employment.

65. This means that, in practice, employees are still liable to lose many significantly valuable award conditions through agreement making, because these conditions are not considered to be 'protected' for the purposes of the 'Fairness' Test. These award conditions include conditions which have in the past promoted skills development and improved productivity, such as those that relate to apprentices and trainees, for example.

66. Traditionally awards have been a vehicle for skill formation and reform. Work Choices limits the number of matters that awards may include to 16 'allowable matters'. Conditions for trainees and apprentices, including leave to attend off-the-job training, are not amongst the allowable award matters (s513). Furthermore, training conditions transitionally retained in NAPSAs will be removed when replaced by rationalised and simplified awards.

---

[8] Australian Bureau of Statistics, 17 May 2007, *Average Weekly Earnings, 6302.0, February 2007.*

67. Training conditions no longer included as allowable award matters, or protected award conditions include:

- paid time off for apprentices to attend training
- paid time off for exams and block release
- reimbursement of course fees and textbooks
- paid travelling time,
- tool allowances, and
- the guarantee that there will be sufficient tradespeople on the job to supervise an apprentice when working.

68. These conditions are not protected for the purposes of agreement making. Indeed these provisions are now up for ‘negotiation’ under AWAs.

2.3 Exemptions from Fair Compensation

Non-monetary Conditions

69. Proposed s346M of the Bill introduces several grounds with which employers can rely on in order to avoid their obligation to provide fair compensation under the 'Fairness' Test. The Bill provides that, in making its initial assessment of an agreement, the following must occur:

    s346M(2) 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.

70. Proposed subsection 346M (2)(a) provides that non-monetary compensation may be provided to an employee in lieu of protected award conditions. According to s346M(7) 'non-monetary compensation in relation to an employee means 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 be reasonably assigned; and
    (b) that confers a benefit or advantage on the employee which is of significant value to the employee.

71. This definition is somewhat problematic. Although the Explanatory Memorandum claims that this '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' it is difficult to see how this will operate in practice.

72. In Example 3[9] of the Explanatory Memorandum, Jaimee trades away penalty rates for work on Sundays in exchange for a car-parking space. However, under the non-monetary provisions in the Bill, it is unclear how the Workplace Authority Director will determine the value of the car-parking space to Jaimee. The Bill fails to detail what information or evidence the Workplace Authority Director will rely on, and the standard of that evidence, in judging the utility and value of the car-

[9] House of Representatives (2007),' Explanatory Memorandum: Workplace Relations Amendment (A Stronger Safety Net) Bill., p 17.

parking space. Indeed, the value of the car-space is a discretionary matter and may differ significantly between individuals.

73. In addition, it is unclear how the Workplace Authority will determine the value of non-monetary benefits associated with greenfield agreements. Greenfield agreements are developed and lodged before employees are hired, in anticipation of a new project or new business. Particularly in the case of non-union greenfield agreements, it is unclear how the 'Fairness' Test will be applied, and appropriate value assigned to non-monetary conditions, given that no employees exist at the time that the agreement is lodged.

74. The examination of evidence, including the attitude of an employee to a non-monetary condition, may be an arduous and resource intensive process. It is unlikely, therefore, that comprehensive checking on the value of non-monetary conditions will occur by the Workplace Authority Director for all agreements. It is quite possible that, with time, some non-monetary benefits which prima facie appear to be of value, may be accepted as satisfying the 'Fairness' Test, without consideration given to the specific employee concerned. As suggested by Professor Andrew Stewart:

> *The question remains how closely the authority will look at 'each and every agreement. The longer it looks, the longer it will leave some uncertainty as to their approval'. The more it accepts routine assurances from employers, 'the greater the possibility of agreements slipping through the net'.*[10]

75. In addition, the Bill fails to provide an avenue for appeal on the merits of a decision made by the Workplace Authority in applying the 'Fairness' Test. In practice, this means that the Workplace Authority may decide that an agreement passes the 'Fairness' Test, although the employee concerned may disagree with this determination. According to the Bill, the employee will have no avenue for challenging the Workplace Authority's decision. Indeed, it has been suggested that an employee's only avenue would be to take the matter to the High Court of Australia[11] on a specific jurisdictional issue; a lengthy and costly process.

76. Furthermore, it is important to acknowledge that the concept of 'trading away' award conditions of monetary value for things of non-monetary value, does not necessarily lead to improvements in the overall position of an employee or employees. In fact, it assumes that workers should not be entitled to any additional conditions of employment other than those which they are currently entitled to. This assumption does not encourage the increased distribution of wealth and is questionable given Australia's current favourable economic position.

---

[10] Workforce Daily (2007), *'Another layer of complexity': Stewart*, 29 May.
[11] Australian Council of Trade Unions (2007), 'Tell them they're dreaming', Media Release, 4 June.

77. A further important point should be made. The proposed ‘Fairness’ Test makes the replacement of monetary benefits by non-monetary benefits quite explicit (proposed s346M(2)(a)), much more so than the previous No Disadvantage Test. Any statutory process which recognises and sanctions the provision of non-monetary benefits as fair compensation for the trading away of entitlements to monetary payments may also potentially violate the spirit, if not the letter, of state legislative provisions derived from the *Truck Act 1900* and earlier laws proscribing the payment of remuneration in kind.

78. An example of this kind of provision is s117 of the New South Wales *Industrial Relations Act 1996* which provides that remuneration payable to an employee is to be made in money only. A related provision is s118 (of the *Industrial Relations Act 1996*) which requires remuneration to be paid in full except for lawful deductions.

Personal Circumstances and Family Responsibility

79. In addition to the non-monetary considerations, the Bill also provides for the following:

> *s346M(3) 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.*

80. This provision is likely to provide a means of circumventing the fair compensation requirements of the ‘Fairness’ Test on the grounds of family responsibilities. According to the Explanatory Memorandum, this subsection is designed to enable factors such as flexible working hours to be considered in determining ‘fair compensation’ in lieu of protected award conditions.

81. Examples 4 and 5[12] in the Explanatory Memorandum demonstrate the trading away of penalty rates, a protected award condition, by Joel and Zita respectively because of their family responsibilities. These examples imply two things: firstly that employees who seek flexible working hours or arrangements are not entitled to the same benefits as employees who do not; and secondly, that the Bill and the ‘Fairness’ Test, discriminate against employees who have family or caring responsibilities. The examples of Joel and Zita clearly suggest that it is acceptable for employees to incur a reduction in their take-home pay in return for flexible working hours due to family or other caring responsibilities.

82. In addition, there is little likelihood of workers being able to negotiate family friendly conditions above their general working conditions or in

[12] House of Representatives (2007), ‘Explanatory Memorandum: Workplace Relations Amendment (A Stronger Safety Net) Bill, p18.

place of protected award conditions as the 'Fairness' Test proposes. Since Work Choices commenced, 75% of AWAs have not included family friendly provisions such as flexible work hours or job sharing arrangements.[13]

83. In 2004, the Office of the Employment Advocate commissioned the analysis of 500 randomly chosen AWAs for inclusion of family friendly provisions. The table below shows that even with the protection of the (former) No Disadvantage Test, few employees were able individually to negotiate family-friendly working arrangements.[14]

Provisions	% of sample AWAs (2002-2003)*	% of sample AWAs (2004)
Paid maternity leave	8	2
The right for an employee to request part-time work	1	2
Job sharing	1	<1
Home-based work	2	0
Family responsibilities	49	Unavailable#
Paid family leave (inc. paid maternity leave)	62	40
Unpaid family leave	10	24

84. These trade-offs have obvious implications not only for gendered wage dispersion, but they also inform women's fertility decisions and affect their economic security, especially in single parent households.[15]

85. Given the current climate of skills shortages, employers should be encouraged to accommodate workers with family responsibilities by providing flexible working practices in order to retain skilled, dedicated and valuable staff. This should not come at the expense of the take-home pay of employees and a cost to family budgets. This proposed subsection clearly places employees with family responsibilities in a disadvantaged position.

86. In addition, the practical consideration of the 'value' of flexible working hours is also problematic. It is unclear how the Workplace Authority Director or a worker will place a monetary value on flexible working arrangements and what evidence or information will need to be provided for such a determination to be made. Some employees may be required to provide sensitive information about their personal or family circumstances. Given the large number of agreements that the Workplace Authority Director will be required to apply the 'Fairness' Test to, it seems likely that, in time, a more general approach to

[13] *Sydney Morning Herald*, 18 April 2007, 'AWAs not so family-friendly, data show', by Mark Davis.
[14] Senate Employment, Workplace Relations and Education Legislation Committee, 2004-2005 Additional Senate Estimates Hearing 17 February 2005, Questions on Notice, W160-05.
[15] Human Rights and Equal Opportunity Commission submission to Inquiry into the Work Choices Bill 2005, p.29.

assigning value to non-monetary provisions, including flexible working practices, may be adopted.

Exceptional Circumstances

87. In addition to the non-monetary compensation and the family responsibility considerations in s346M(2)(a) and (3), the Bill permits the Workplace Authority Director to give consideration to the industry, location or economic circumstances of the employer as well. The Bill states:

> *s346M(4) In exceptional circumstances, and if the Workplace Authority Director is satisfied that it is not contrary to the public interest to do so, the Workplace Authority Director may, in addition to the matters specified in subsections (2) and (3), also have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the employee or employees when considering whether a workplace agreement provides fair compensation to an employee or in its overall effect on employees.*

88. Further, s346M(5) provides that:

> *An example of a case where the Workplace Authority Director may be satisfied that it is not contrary to the public interest to have regard to the industry, location or economic circumstances of the employer is where the workplace agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business.*

89. These provisions create two potential avenues for employers to avoid providing fair compensation under the terms of the 'Fairness' Test: on the basis of the industry, location or economic circumstance of the employer; and secondly, the employment circumstances of the employee or employees. Both of these provisions are likely to reduce the coverage and effectiveness of the 'Fairness' Test.

Short-Term Financial Difficulties

90. The Explanatory Memorandum provides an example of the application of s346M(4) and (5) through Example 2[16]. In this example, Joan, an employee of Rick's, agrees to an AWA for a period of two years which excludes penalty rates and allowances due to the financial difficulties of Rick's business. While prima facie this would be considered a reasonable ground for not providing fair compensation for the removal of protected award conditions, the Bill itself does not provide that such an agreement must have a shorter expiry date. In fact, the Bill does not prevent such an agreement having the standard life of five years for an AWA. It is difficult to see how the removal of protected award

[16] House of Representatives (2007), 'Explanatory Memorandum: Workplace Relations Amendment (A Stronger Safety Net) Bill, p19.

conditions, without compensation, for up to five years is fair on an employee, in the event that their employer is experiencing short-term financial difficulties.

91. Indeed, even if an AWA is set up for a shorter period, such as two years, there is nothing in the legislation that requires that a new AWA be made after the two years has passed and, according to the *Workplace Relations Act 1996*, the conditions of employment for that employee will continue to be same as those provided for under the expired AWA. This is a considerably weaker 'public interest' test than that previously applied under s170LT(3) of the pre-Work Choices *Workplace Relations Act 1996* which was administered by the Australian Industrial Relations Commission (AIRC). Under this previous test, employers could be required to make undertakings regarding an agreement, including that a new agreement would be made after a certain period, or that the agreement would be varied or reviewed after a certain time. There appear to be no requirements for an employer to make such undertakings under the Bill if their agreement is found to have provided fair compensation under the terms of proposed s346(M)(4) and (5).

92. In addition, the Bill fails to detail what information will need to be provided to the Workplace Authority Director in order for an employer to successfully prove that it is experiencing financial difficulties. This in turn raises concerns about the independence and accuracy of information that may be provided to the Workplace Authority Director. The Bill also fails to detail whether or not an employee party to an agreement will be able to access the financial information provided to the Workplace Authority Director and whether they will have an opportunity to oppose the accuracy or independence of such information. Without such protections, this provision, which effectively allows employers to avoid providing fair compensation, may be easily accessible to unscrupulous employers.

93. Furthermore the Bill fails to define, or to provide guidelines, as to what constitutes 'exceptional circumstances' or 'public interest'. The information provided in the Explanatory Memorandum, including the examples of David and Joan[17], also fails to clarify what constitutes an 'exceptional circumstance' or the 'public interest'. This has the potential to leave the assessment of 'exceptional circumstances' at the broad discretion of the Workplace Authority Director and may be another cause of ambiguity and uncertainty for employers and employees.

94. Finally, while this proposed section considers the short-term financial position of an employer, it fails to balance this against the short-term financial position of the employee or employees involved. Indeed, the loss of protected award conditions such as penalty rates and

---

[17] House of Representatives (2007), 'Explanatory Memorandum: Workplace Relations Amendment (A Stronger Safety Net) Bill, p19.

allowances for a period of up to five years may have a substantial impact on a worker's take-home pay and their ability to meet their own and their families' financial commitments. Consequently, this provision, rather than balancing the needs of employers, may result in substantial and long-term disadvantages to employees.

Employment Opportunities

95. Similar concerns also exist with regard to the second proposed provision: the employment opportunities of the employee or employees. In Example 1[18] of the Explanatory Memorandum, David accepts an AWA which reduces penalty rates on the basis that he has been long-term unemployed and lives in a regional area. In other words, the employment history and opportunities of David and his geographical location have been considered in forming his AWA. This proposed provision is likely to result in inequity and disadvantage for some workers.

96. Firstly, as noted above, the Bill fails to detail how the employment opportunities of an employee or employees will be demonstrated to the Workplace Authority Director and how independent or accurate this information will be. Similarly, there is no indication in the Bill that an employee will have access to this information or the opportunity to oppose or correct any misleading statements or evidence.

97. Secondly, the criteria of 'employment opportunities' is likely to impact negatively on people affected by the welfare-to-work changes including the unemployed, people with a disability and single parents. Many of these people have been out of the workforce for periods of time often due to barriers to employment, such as discrimination, lack of childcare, poor public transport and lack of services and support. It could therefore be readily argued by an employer that such workers have limited employment opportunities and therefore should be exempt from receiving fair compensation under the 'Fairness' Test. Consequently, an agreement applying to such an employee may be considered to have passed the 'Fairness' Test.

98. However, such a provision breaches the basic principles of fairness by creating two tiers of employees: those who are entitled to the benefits of protected award conditions and those who are not. In addition, the potential reduction in take-home pay as result of an employee not been entitled to receive fair compensation, in these circumstances, will do little to encourage people in these disadvantaged groups to return to the workforce.

99. Equally, employees in rural or regional areas appear to be particularly vulnerable to this method of applying the 'Fairness' Test. According to

[18] House of Representatives (2007), 'Explanatory Memorandum: Workplace Relations Amendment (A Stronger Safety Net) Bill, p19.

the example above, David is considered to have limited job opportunities because he resides in a regional area. Although some regional areas are experiencing impacts from drought and other economically damaging factors, it should not be assumed that all employees in all businesses in regional and rural areas will automatically have limited employment opportunities. This provision suggests that people in regional areas are less entitled to fairness in the workplace that their counterparts in metropolitan areas. Similarly to the matters discussed above, the Bill fails to detail what information will be needed to prove that limited employment opportunities exist for an individual due to geographical concerns.

100. These proposed sections, although phrased in restricted terms in the Bill, are likely to open up numerous avenues for unscrupulous employers to avoid providing fair compensation under the 'Fairness' Test. As with Work Choices generally, the most disadvantaged workers are likely to be most negatively impacted by these provisions.

2.4 Employer Difficulties

101. In addition to the issues discussed above, the Bill also creates uncertainty and complexity, particularly for employers. In creating an agreement under this Bill, an employer will need to determine firstly, whether the employee (in the instance of an AWA) is employed in an industry or occupation in which the terms and conditions for the kind of work performed by the employee are usually regulated by an award (s346E(1)(b)); or, for a collective agreement, if one or more of the employees whose employment is subject to the agreement is employed in an industry or occupation in which the terms and conditions of the kind of work performed by the employee are usually regulated by an award (s346E(2)(b)). Some industries and occupations will not have a relevant award and employers will need to determine what award, if any, will become the designated award for the purposes of the 'Fairness' Test.

102. Although the Bill does allow for an employer to make an application for a pre-lodgement assessment to the Workplace Authority Director in order for an award to be designated (s346K), this involves another administrative process for employers. Furthermore, the award designated by the Workplace Authority Director under a s346K application may be changed when an agreement is actually lodged, if the Workplace Authority Director considers that the circumstances have changed.

103. Once an award is determined, the employer will then need to identify the protected conditions in the relevant or designated award. This could become more complex for employers who will need to refer to the relevant Notional Agreement Preserving State Award (NAPSA) or previous state enterprise agreement. The employer will then need to ensure that any amendment or exclusion of these protected award conditions is fairly compensated for. As noted above, the Bill fails to define what 'fair compensation' actually is.

104. In addition, the 'trading off' of salary for non-monetary benefits may have taxation implications for employers, including possible Fringe Benefit Taxation liabilities. According to Example 1 in the Explanatory Memorandum[19] Jason's employer has agreed to meet his childcare costs in lieu of penalty rates and overtime loading. However the example fails to detail what tax implications may result from this for Jason's employer. The federal government has a responsibility to identify how non-monetary benefits, in lieu of salary, will be assessed and accounted for and what taxation liabilities will result for employers and employees.

[19] House of Representatives (2007), Explanatory Memorandum: Workplace Relations Amendment (A Stronger Safety Net) Bill, p16.

105. Once an employer has created an agreement with an employee or employees, the agreement will commence on lodgement with the Workplace Authority Director as per Work Choices. This means that an agreement will commence prior to it passing the 'Fairness' Test. According to the Bill, there is no provision for an agreement to be pre-lodged with the Workplace Authority Director to check that it complies with the 'Fairness' Test. In other words, the federal government has failed to make fairness a pre-condition for the operation of an agreement.

106. This may have serious implications for employers. An employer may lodge an agreement or agreements and commence providing the pay and conditions prescribed in these agreements to the employees covered. However, these agreements, whilst commenced, have not yet passed the 'Fairness' Test. The Bill appears to fail to provide performance guidelines on how quickly the 'Fairness' Test must be applied by the Workplace Authority Director after an agreement is lodged. There is the potential, therefore, for an agreement to be in operation for several weeks or even months before the 'Fairness' Test is applied. In the event that an agreement fails the 'Fairness' Test the employer could face substantial back pay liabilities and possible cancellation of their agreement. For small businesses in particular, this may have large cash flow implications.

107. Further complications may also result for employers when negotiating or lodging a variation to an agreement. Under the current provision of the *Workplace Relations Act* protected award conditions applied to an employee party to an agreement 'where the award would have otherwise applied'; under the Bill, the coverage of protected award conditions has been extended. This means that an employer in lodging a variation may need to ensure that they compensate for the loss of protected award conditions which were previously not covered. Although this provision will provide some additional protections for employees who have entered agreements under Work Choices, further layers of complexity and confusion have now been added to an already complex and confusing regulatory regime.

108. Some employers may feel that the burden of conforming with the requirements of the test is too great. Interestingly, Work Choices gives them the option of walking away from trying to make new agreements with their employees. Instead, they can simply and unilaterally terminate an existing agreement that has passed its expiry date, and the employee will fall back to the AFPCS.

2.5 Ability of the Workplace Authority Director to Apply the Test

Pre-Work Choices No-Disadvantage Test

109. Prior to the commencement of Work Choices, the Office of the Employment Advocate (OEA), which is to be renamed the Workplace Authority Director under the Bill, had the responsibility for administering and approving Australian Workplace Agreements (AWAs) under the WR Act. The OEA was also responsible for applying the no-disadvantage test in the assessment of AWAs. An AWA had to pass the no-disadvantage test in order to be approved by the OEA, and to commence. The no-disadvantage test was also applied by the AIRC in its assessment of collective agreements under the pre-Work Choices WR Act.

110. The WR Act provided little direction as to how the no-disadvantage test was to be applied. Much of assessment process was left up to the regulatory bodies administering the no-disadvantage test. While the AIRC could be assumed to have some acquired expertise in analysing and assessing the safety net value of various conditions of employment, as a result of its role as an award maker, the internal OEA policies on the application of the no-disadvantage test and the general assessment and approval processes have never been publicly disclosed[20].

111. As a result, significant concerns existed about how the no-disadvantage test was applied to assess AWAs prior to its removal by the Work Choices legislation.

112. At the OEA the no-disadvantage test consisted of a spreadsheet with a special calculator for comparing AWA pay and conditions to the relevant award pay and conditions[21]. The no-disadvantage test only compared conditions with a monetary value as the point of the test was to determine the global financial advantage or disadvantage of an AWA compared to the relevant award. Factors such as ordinary hours, working patterns, entitlement to paid leave, penalty rates for work outside ordinary hours, allowances, annual increases and other entitlements that could be financially valued were taken into consideration when conducting the assessment.

113. The emphasis on the overall financial comparisons of the no-disadvantage test meant that terms and conditions of employment that

---

[20] Mitchell, R., Campbell, R., Barnes, A., Bicknell, E., Creighton, K., Fetter, J., Korman, S. (2005), *What's Going on with the 'No Disadvantage Test'? An Analysis of Outcome and Processes Under the* Workplace Relations Act 1996 *(Cth)*, Working paper no.33, Centre for Employment and Labour Relations Law, University of Melbourne, p.14.

[21] Ibid., pp.13-14.

could not be valued monetarily, such as job security and work/life balance, as well as ability to negotiate the AWA, were never even considered in the assessments of AWAs[22].

114. In contrast, some of the factors taken into consideration when conducting the no-disadvantage test included entitlements to free meals, drinks, uniforms, products, services and discounts for employees. Such entitlements can be assigned a monetary value for the no-disadvantage test to form part of the overall financial impact of the AWA compared to the award, irrespective of whether an individual employee takes advantage of such offers or even wants such entitlements in lieu of remuneration[23].

115. The no-disadvantage test so applied was a time-consuming and complex assessment instrument, which was dependent on the individual assessment officer's discretion on various aspects of the test and their interpretation of the industrial instruments to be compared. The difficulty of obtaining the correct information and extra documentation to properly conduct the assessment served only to further complicate the process[24]. The high degree of discretion and subjectivity in the assessment process also provided ample opportunity for serious errors to be made, and many people working with the no-disadvantage test held reservations about the process itself and the quality of outcomes produced through the highly subjective assessments[25].

116. Concerns were also raised about the 'streamlining' of AWAs by the OEA, where an employer is given the no-disadvantage test calculator to make their own assessments of their AWAs and then submit them to the OEA for easy approval[26].

Proposed 'Fairness' Test

117. Given the complexity of the no-disadvantage test that applied to pre-Work Choices AWAs, it is anticipated that the 'Fairness' Test will be even more complex if it is to be applied fairly and fair outcomes for employees in both monetary and non-monetary terms and conditions of employment are to be genuinely sought.

---

[22] Ibid.
7.30 Report (2004), 'Industrial relations tipped to be significant election issue', broadcast 8 June 2004, http://www.abc.net.au/7.30/content/2004/s1127534.htm

[23] Mitchell, R., et al. (2005), *What's Going on with the 'No Disadvantage Test'? An Analysis of Outcome and Processes Under the* Workplace Relations Act 1996 *(Cth)*, pp.26-27.

[24] Ibid., pp.10, 25.

[25] Ibid., pp.9, 24.

[26] Ibid., pp.13-14, and *7.30 Report* (2004), 'Industrial relations tipped to be significant election issue', broadcast 8 June 2004, http://www.abc.net.au/7.30/content/2004/s1127534.htm

118. The proposed ‘Fairness’ Test is contingent on an even greater degree of subjectivity and discretion by the OEA and its officers than the no-disadvantage test. The ‘Fairness’ Test is required to factor in non-monetary conditions, such as ‘flexibility’ of working hours when deciding whether adequate compensation for the loss of protected award conditions. Section 346M(2)(a) of the Bill states that the OEA needs to take into consideration:

> *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.*

119. What it cannot test for are changes in circumstances for employees and any introduction of different workplace policies which may impinge on non-monetary entitlements. The test will also be more administrative than the pre-Work Choices no-disadvantage test, as employees can now supply documentation about their personal circumstances with the lodgement of the agreement for consideration in the assessment process[27]. Section 346M(3) states:

> *In considering whether a workplace agreement provides fair compensation to an employee or 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.*

120. It will also be more time-consuming than the no-disadvantage test as the OEA may have to make contact with employees and employers to collect more information in order to decide whether an agreement passes the ‘Fairness’ Test. Section 346M(6) states:

> *In deciding whether a workplace agreement passes, or does not pass, the fairness test, the Workplace Authority 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.*

121. The implementation of the ‘Fairness’ Test comes with a high cost, estimated to be more $370 million over four years. The costs of administering the test will surely increase over the years as it will certainly not become any less resource-intensive. This cost cannot be justified when compared to the comparatively low cost of running the NSW State industrial relations system, for example. The NSW Government estimated that the federal system costs twice as much as the State system prior to Work Choices.[28] The cost of the federal

---

[27] Hockey, J. (2007), *Second Reading Speech for the* Workplace Relations Amendment (A Stronger Safety Net) Bill 2007, delivered 28 May

[28] Office of Industrial Relations, NSW Government, Internal Statistics, 2004/5.

industrial relations system would obviously be greater when factoring in the cost of Work Choices and the 'Fairness' Test.

122. The OEA is set to receive an additional $300 million in funding over four years to apply the 'Fairness' Test. It has not outlined exactly how this money is to be allocated and the government has not provided justification for such a large figure allocated to administering the 'Fairness' Test.

123. In comparison the Office of Workplace Services (OWS), the federal agency responsible for investigating breaches of employment contracts and illegal activities under the WR Act, has only been allocated an additional $64 million over four years to monitor workplace compliance. These funding figures suggest that there is little genuine interest from the government in monitoring the actual impact of the 'Fairness' Test in the workplace and any breaches by employers bound by it.

124. The ability of the OEA to comprehensively train its staff in the application of the 'Fairness' Test is also in question. In a Senate Estimates hearing on 28 May 2007 the Employment Advocate Peter McIlwain said that contractors would be hired to conduct the 'Fairness' Test[29]. The training for such a complex test would apparently only take two weeks in a classroom environment and two weeks on the job training[30]. It is questionable whether this is enough training for people who may not have any knowledge of or are unfamiliar with industrial relations, to gain an appropriate level of comprehension and ability to apply various aspects of the federal industrial relations system, including interpretation of industrial instruments such as awards and agreements, as well as understanding the labyrinth of the federal Work Choices laws and the application of the convoluted 'Fairness' Test.

125. The OEA now also has the responsibility to apply the test and approve collective agreements, despite the fact the agency does not have the independence previously commanded by the AIRC. The OEA's objectivity and independence was also questioned prior to the commencement of Work Choices in relation to the potential conflict of interest arising out of its activities in the promotion of AWAs and its role in protecting the employment conditions of employees on AWAs[31]. A similar conflict will exist as a result of proposed section 150B of the Bill, which sets out the functions of the agency.

126. Furthermore, under the pre-Work Choices *Workplace Relations Act,* if an employer refused to make changes to an AWA that failed the no-disadvantage test, the OEA could refer them to the AIRC, the independent body, for a decision. The Bill no longer provides this avenue.

---

[29] *Workforce* (2007), 'Contractors to administer fairness test', 28 May.
[30] *The Age* (2007), 'Several hundred staff to assess AWAs', 28 May.
[31] Mitchell, R., et al. (2005), *What's Going on with the 'No Disadvantage Test'? An Analysis of Outcome and Processes Under the* Workplace Relations Act 1996 *(Cth)*, p.10.

Re-naming the Office of Workplace Services

127. The proposal to change the name of the Office of Workplace Relations (OWS) to the Workplace Ombudsman is a re-branding of the federal government agency.

128. The word 'ombudsman' has a specific meaning, which is understood to be an official responsible for 'representing the interests of the public by investigating and addressing complaints reported by individual citizens'[32]. This modern understanding of 'ombudsman' originated from Sweden in 1809 when the Parliamentary Ombudsman was instituted to protect the rights of citizens. It was to be an agency independent of the executive of the government. The NSW Ombudsman defines its function as to ensure 'that the agencies [it] watch[es] over fulfil their functions properly and improve their delivery of services to the public'.[33] The Australian Commonwealth Ombudsman defines the concept of an ombudsman as 'an independent person who can investigate and resolve disputes between citizens and government' which has 'spread to over 120 countries and is seen to be an essential accountability mechanism in democratic societies'[34]. This definition can also apply to specific industry ombudsmen.

129. The definition of ombudsman cited above is widespread and the common and official understanding of the role and function of ombudsman throughout the world, including Australia. Therefore the re-naming of the OWS to Workplace Ombudsman has serious and significant implications regarding how its role and functions are understood by citizens and various groups in the community.

130. Although the name of the agency is to change, its functions and role remain largely the same. Additional functions conferred on it, such as ensuring compliance with the 'Fairness' Test, will not dramatically change the role of the OWS. It will retain its compliance functions and will not deal with complaints from the public about the government or its agencies in relation to industrial relations issues. It will not have the power to receive complaints from the public about government agencies nor to investigate these agencies such as the OEA and the OWS itself, within the workplace relations portfolio.

131. In fact the OWS will still remain an agency under the Department of Employment of Workplace Relations (DEWR), and so will not be

[32] Commonwealth Ombudsman, viewed 30/05/07, http://www.comb.gov.au/commonwealth/publish.nsf/Content/aboutus_ourhistory#%5B%3Ch3%3E%5DIntroduction%5B%3C%2Fh3%3E%5D

[33] NSW Ombudsman, http://www.nswombudsman.nsw.gov.au/aboutus/index.html.

[34] Commonwealth Ombudsman, viewed 30/05/07, http://www.comb.gov.au/commonwealth/publish.nsf/Content/aboutus_ourhistory#%5B%3Ch3%3E%5DIntroduction%5B%3C%2Fh3%3E%5D

independent of the federal government or its executive. Furthermore, proposed section 166C of the Bill clearly asserts the authority of the Minister to give directions to the 'ombudsman'. The lack of independence from the government is thus legislated.

132. The 'essential accountability mechanism' and the crucially important independent status typical of an ombudsman are absent in the proposed Workplace Ombudsman. This Ombudsman will be performing a mix of compliance activities and 'ombudsman' functions and therefore it cannot be considered to be an ombudsman in the commonly accepted and official understanding of the term and its role and functions. The re-branding of the OWS to the Workplace Ombudsman is misleading and will create a belief that the OWS will perform functions it actually has no authority to do.

Conclusion

133. The New South Wales Government supports any genuine and effective measure that is designed to remedy the unfairness at the heart of Work Choices. Since the introduction of Work Choices the NSW Government has introduced and implemented remedial legislation to protect front-line public sector employees, outworkers, children and other vulnerable employees from the harsh effects of the unfair federal workplace relations laws.

134. These legislative protections are ultimately guaranteed by the strong and comprehensive safety net of employment conditions contained in common rule awards and which:

    - underpin flexible agreement making at the enterprise level in the New South Wales industrial relations system; and
    - ensure that employees under enterprise agreements will not suffer disadvantage.

135. The 'Fairness' Test proposed in the Bill may have some limited benefit for employees within the narrow parameters prescribed but will do nothing to mitigate the fundamental and systemic unfairness that characterises the operation of Work Choices.

136. Under Work Choices the majority of private sector employees are denied any recourse to an independent umpire to challenge an unfair dismissal and there is no capacity to collectively bargain with employers even if a majority of employees at the workplace wish to do so. Workplace agreements can exclude the benefits of the award safety net, which has itself been significantly reduced under Work Choices.

137. The arbitral and dispute resolution powers of the AIRC, which formerly helped maintain the integrity of the award safety net, have been significantly curtailed under the Work Choices regime and the rights of employees to collective representation by a union have also been deliberately targeted and significantly restricted.

138. It is the submission of the New South Wales Government that the systemic unfairness and imbalance which characterises Work Choices and entrenches disadvantage for employees means that the proposed 'Fairness' Test is little more than a token effort to give the appearance of fairness. The federal government is engaged in a costly and politically expedient attempt to manage public perceptions of unfairness rather than addressing the imbalance and unfairness built into the Work Choices statutory framework.

.