Senate Employment, Workplace Relations and Education Committee Inquiry into the Stronger Safety Net and Restoring Family Work Balance Bills

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The regrettably short timeframe allowed for this inquiry has prevented me from preparing a more extensive submission on the two Bills concerned.

I will therefore simply offer some general observations on the Bills, in terms of how effectively they provide an adequate "safety net" for workplace bargaining.

These will be followed by specific comments about four particular aspects of the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 where I believe there are technical or practical deficiencies. These comments assume that the proposed new "fairness test" for workplace agreements will be adopted in something like its current form, but seek to suggest ways in which the proposed system could be improved without altering its essential features.

Some General Observations

I have previously highlighted what I regard as some of the deficiencies in the "safety net" for workplace bargaining under the *Workplace Relations Act* 1996 (**the Act**), following the enactment of the 2005 Work Choices amendments.[1] The fear that those deficiencies might be exploited by certain employers has arguably been born out by what has happened since the amendments took effect in March 2006, albeit it is hard to be certain in the absence of more extensive data.[2]

To the extent that the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 improves the safety net, it is to be welcomed. Nonetheless, even if it is passed, the following deficiencies will remain:

- A range of award and/or statutory entitlements could still be bargained away without compensation, since they fall outside the category of "protected award conditions". These include long service leave, redundancy pay, limitations on rostering (including minimum shift lengths and restrictions on working more

1 See my submission to the Committee's Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005, and also the submission to the same Inquiry of the Group of 151 Australian Industrial Relations, Labour Market and Legal Academics, entitled "Research Evidence About the Effects of the Work Choices Bill". See further A Stewart, "Work Choices in Overview: Big Bang or Slow Burn?" (2006) 16(2) *Economic and Labour Relations Review* 25, especially at 49–50.

2 See D Peetz, *Assessing the Impact of "WorkChoices" — One Year On*, Report to Department of Innovation, Industry and Regional Development, Victoria, 2007.

than one shift per day), casual loadings that exceed 20%, and any right to request flexible working hours in order to accommodate family responsibilities. A more substantial "no-disadvantage" (or "better off overall") test would take these into account.

- The new test will not apply to agreements entered into between 27 March 2006 and 7 May 2007. Workers should ideally have the right to seek the termination of such agreements on the basis that they do not comply with the new fairness test (though they should not be entitled to retrospective compensation for any period the agreement was in force).

- The new test will not apply to AWAs for employees with an "annual rate of salary" of $75,000 or more. Aside from the curious contrast with collective agreements (which may cover employees on much higher salaries yet still be subject to the test), the cut-off is arguably much too low — if indeed there should be any cut-off at all.

As to the Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007, although its intent is to be applauded it would have far less effect than the restoration of a no-disadvantage test. Some of its "protections" could also be readily circumvented. For example, even if redundancy provisions in terminated agreements were permitted to remain in effect for up to five years rather than one year, they could still be removed without compensation by a subsequent agreement.

A final observation returns to a familiar theme of mine — the complexity of the current regulatory system.[3]

The Stronger Safety Net Bill proposes to add something like an extra 50 pages to what is already a bloated and confusing statute. I have some sympathy for the drafters, who were given very little time to translate the government's decision to introduce a fairness test into legislation. The approach they have chosen to adopt is largely dictated by, and consistent with, what is already in the legislation. Nevertheless, the new provisions are unduly complicated and difficult to read and understand.

In a 2006 report commissioned by the Canadian Government, entitled *Fairness at Work: Federal Labour Standards for the 21st Century*, a review team headed by Professor Harry Arthurs proposed twelve principles that should guide the formulation of labour standards. The full list repays attention, but one of the principles is especially pertinent:

> *Labour standards should be clearly stated, and workers and employers should have easy access to accurate and understandable information concerning their rights and responsibilities.*

3 See eg A Stewart, "A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation" (2005) 31 *Australian Bulletin of Labour* 210.

It is long past time that an Australian Government committed itself to a radical simplification of labour regulation in this country. Employers, workers, organisations and their advisers deserve no less.

Stronger Safety Net Bill: Protecting Workers Previously on State Awards

The stated aim of the Stronger Safety Net Bill is to ensure that where certain "protected award conditions" are modified or excluded by a workplace agreement, the employee(s) concerned must receive "fair compensation".

As drafted, however, the Bill leaves a number of workers unprotected — and that number will increase over time.

The Bill proposes to add a new Division 5A to Part 8 of the Act, to be headed "The fairness test". Under proposed s 346E(1)(b) and (2)(b), the application of the new test is triggered by the fact that employees are employed in an industry or occupation in which their terms and conditions are "usually regulated by an award", or would be so regulated but for the operation of a workplace agreement or another instrument.

The term "award" is defined by s 4(1) of the Act to mean either an award made by the Australian Industrial Relations Commission (**AIRC**) under s 359, or a "pre-reform award" — that is, an award that had effect under the Act prior to the Work Choices reforms and that remains in effect by virtue of transitional arrangements in the *Workplace Relations Amendment (Work Choices) Act* 2005.

Hence on the face of proposed s 346E, the new fairness test will only apply where the work in question is usually regulated by a *federal award*.

There are many workers now covered by the federal system, however, to whom no federal award applies. A large number of these workers were previously covered by State awards, for example in the retail sector or in clerical employment. By virtue of s 16(1), those awards can no longer apply with the force of State law.

Schedule 8 of the Act does provide that State award conditions that applied immediately before 27 March 2006 may continue in force, as "notional agreements preserving State awards" (**NAPSAs**). But this applies only for three years (cl 38A(1)). Even before that date, a NAPSA will cease to have effect in relation to an employee as soon as the employee is covered by a workplace agreement under the Act (cl 38A(2)). A NAPSA is also displaced if the employee becomes bound by a federal award (cl 38A(3)).

Where a worker is covered by a NAPSA, and then makes or becomes bound by a workplace agreement on or after 7 May 2007, the Stronger Safety Net Bill ensures that the new fairness test will apply. This is done by proposed cl 52AAA of Schedule 8, which provides that the test is to be applied by reference to "protected notional conditions" in the NAPSA.

Suppose though that such a worker has already made or become bound by a workplace agreement. When they become subject to a second or further agreement, proposed cl 52AAA cannot apply to them. This is because the earlier agreement will have displaced the NAPSA. Once that happens, the NAPSA can never revive (cl 38A(4)). Proposed cl 52AAA only applies where a NAPSA is in operation "immediately before the day on which the [new] workplace agreement was lodged". It is not enough that it has applied at some previous time.

Paragraph 242 of the Explanatory Memorandum (**the EM**) seems to suggest that in such a case, "an employer and employee could be designated a federal award under Division 5A [of Part 8] for the purposes of the fairness test". But this does not follow from the Bill as drafted.

It is true that proposed ss 346K and 346L allow federal awards to be designated as a reference point for the fairness test. But in each case this can only be done where the employment in question is usually regulated by a *federal award*: see ss 346K(2)(a), 346L(1)(a)(i) and (1)(b)(i). For the millions of workers doing jobs regulated only by State awards (at least outside Victoria or the Territories), this requirement cannot be satisfied. While NAPSAs may be treated as if they were federal instruments for certain purposes, there is nothing to say that this is the case for Part 8 of the Act.

So in the case of a worker who used to be covered by a NAPSA, but is not yet covered by a federal award, the fairness test will only apply to the *first* agreement that covers them under Work Choices — assuming such an agreement was not made before 7 May 2007, in which case the test will not have applied at all. And after 27 March 2009, when all NAPSAs cease, the fairness test can no longer apply to such a worker.

There has been an expectation that NAPSAs will ultimately be replaced by new "rationalised" federal awards made under Part 10 of the Act. But there is nothing in the Act that requires this to happen. The AIRC may only act in accordance with an "award rationalisation request" made by the Minister for Workplace Relations. If no request is forthcoming, the AIRC has no power of its own to create new awards (s 540).

So far as I am aware, the process of award rationalisation is currently stalled. The government has announced no plans to issue any award rationalisation requests. Even if it does, the process is likely to be a lengthy one.

The longer that award rationalisation is delayed, the more workers will fall out of NAPSA coverage and hence any protection from the new fairness test.

What I recommend is that this gap in the "strengthened" safety net be plugged. The most straightforward way would be to amend proposed clause 52AAA so that it applies wherever the employee or employees concerned have at any time been covered by protected notional conditions, other than where the NAPSA in question has ceased to apply by virtue of being replaced by a new federal award.

The same gap arises in relation to workers who have ceased to be subject to a preserved State agreement (**PSA**) by virtue of cl 15G of Schedule 8. If the PSA is replaced by a new workplace agreement after 7 May 2007, proposed cl 25B will ensure that the fairness test will apply by reference to certain "protected preserved conditions", which once again may have originated in a State award. But again, this will not apply to a second or later workplace agreement.

I recommend that proposed cl 25B be amended so that it applies wherever the employee or employees concerned have at any time been covered by protected preserved conditions, other than where a new federal award has been made to cover the employee(s) in question.

Stronger Safety Net Bill: Defining and Assessing "Fair Compensation"

Proposed s 346M requires the new Workplace Authority to determine whether an agreement provides "fair compensation" for the exclusion or modification of protected conditions. There are a number of aspects of this key provision that merit comment.

Collective agreements and the "overall effect" requirement

The first concerns the application of the test to collective agreements. With AWAs, it is clear that the relevant compensation must be provided to the particular employee covered by the agreement. But with collective agreements, proposed s 346M(1)(b) speaks of the provision of fair compensation "on balance", and in terms of the "overall effect" of the agreement on the employees who are subject to the agreement.

What both the section and the EM do not make clear is whether a collective agreement may be considered to pass the test if fair compensation is provided to *some but not all* of the employees it covers.

Suppose for instance that an agreement removes penalty rates for weekend work and offers a modest increase in basic wage rates instead. For most of the affected workers, who only work weekends occasionally, that increase can be considered fair compensation. But for a small but significant minority who are routinely rostered to work on weekends, the agreement will effectively reduce their take-home pay.

Would this agreement pass the fairness test, on the basis that "on balance" the employees in question are being adequately compensated, even if some are not? The legislation simply does not say. If the government has a view on this, it should at the very least be expressed in the EM. It would be preferable in any event to clarify this in the legislation itself.

It may be noted that under the old "no-disadvantage test" that applied prior to the Work Choices reforms, there was similar uncertainty about whether collective agreements should be assessed by reference to "generalised" or "averaged" outcomes,

as opposed to the position of each individual worker.[4] In practice, however, it was common for the AIRC to require employers to give undertakings that agreements would not be "operated" in such a way as to disadvantage particular workers.

Given that proposed s 346R envisages that written undertakings may be given to the Authority as a way of rectifying a lack of fair compensation, there is no reason why such a practice could not be reinstituted under the new system.

The failure to define "fair compensation"

The second point about proposed s 346M concerns the definition of "fair compensation" — or rather the lack of any definition.

Subsections (2)–(4) suggest three things:

- that the Authority *must first* consider certain factors — whether any "monetary and non-monetary compensation" has been provided by the employer, and the "work obligations" of the employee(s) in question;

- that the Authority *may also* have regard to the "personal circumstances" of the employee(s), including in particular their "family responsibilities"; and

- that the Authority *may only* have regard to the employer's "industry, location or economic circumstances", or the "employment circumstances" of the employee(s), in exceptional circumstances and where it would not be contrary to the public interest.

Many of the quoted terms here are themselves vague or undefined. While "non-monetary compensation" does have a definition in subs (7), that definition speaks of whether certain benefits or advantages are of "significant value" to employees. We may accept (as both the Minister and paragraph 103 of the EM have suggested) that a capacity to obtain a free pizza should not be regarded as "significant". The same would presumably be true of various other *potential* benefits (such as staff discounts) that may or may not be realised by an employee. But that still does not make it easy to see what "significant" means.

In any event, all that proposed s 346M really makes clear is that compensation cannot *ordinarily* be assessed as fair on the basis of an employer's industry, location or economic circumstances, or a worker's "employment circumstances". The bar is lifted in such cases to require "exceptional circumstances" and public interest considerations.

But what though of other circumstances? Let us assume that provision of free pizzas would not count as "non-monetary compensation", because they are not of

4 See R Mitchell et al, *Protecting the Worker's Interest in Enterprise Bargaining: The "No Disadvantage" Test in the Australian Federal Industrial Jurisdiction*, Workplace Innovation Unit, Industrial Relations Victoria, 2004, pp 56–57.

"significant" benefit. Could the Authority still take them into account in assessing fair compensation. The answer would seem to be yes, because all that proposed subs (2) says is that the Authority must *first* consider whether monetary or non-monetary compensation has been provided. It does not rule out the Authority going on to consider other forms of compensation. And the "exceptional circumstances" requirement in subs (4) is not attracted, because provision of free pizzas is nothing to do with the factors listed in that subsection.

A further query is whether an employer could seek to make a case for fair compensation by pointing to the provision of any benefits that are not strictly mandatory under the Fair Pay and Conditions Standard.

For instance, the provision of long service leave is not required under the Standard and federal agreements may legitimately override any entitlements that might otherwise arise under State or Territory legislation. Could an employer argue that by including provision for long service leave in an agreement, this should be counted as part of the "compensation" for the loss of certain protected conditions — even though the employer has always previously recognised an obligation to provide such leave?

Similarly, suppose that an employee has been subject to a collective agreement that involves a pay rate that is 20% higher than the minimum rate set by the applicable Australian Pay and Classification Scale ("**pay scale**") for their job, plus an entitlement to penalty rates for weekend work. The employee is offered an AWA that includes the same pay rate, but no penalty rates. Can the employer say that the fact that the basic pay rate is higher than it is legally required to be is in itself "fair compensation" for the loss of the penalty rates — even though the worker's take-home pay will now fall?

One way to answer these various questions would be to add yet more detail into an already complex provision. Arguably, however, it would be better to simplify the test by defining "fair compensation" as follows:

> ***fair compensation****, in relation to an employee, means the provision of an additional benefit or advantage that:*
>
> *(a) is of significant and immediate value (whether financial or otherwise) to the employee; and*
>
> *(b) fully compensates the employee for the exclusion or modification of the relevant conditions.*

This formula is still not precise, but it does at least emphasise the need for benefits to be additional to those already enjoyed, to have immediate (rather than potential) value for the worker(s) in question, and to provide *full* compensation.

An alternative would be to insist that all compensation be measured in strictly monetary terms. But this would rule out the kind of trade-offs envisaged in Examples 4 and 5 in paragraph 98 of the EM. (It may legitimately be questioned whether such arrangements have the effect of discriminating against those with family

responsibilities, even where the trade-off is freely agreed. The government has nonetheless made it clear that it wishes to accommodate such arrangements.)

If the suggested definition were adopted, proposed subss (2) and (3) could be omitted, along with the definition of "non-monetary compensation" in subs (7). Subsections (4) and (5) could then be recast so as to give the Authority (or better still the AIRC) the discretion to approve an agreement even if it fails the fairness test, but only where that is not contrary to the public interest. That is effectively how the old no-disadvantage test used to operate: an agreement could be approved (but only by the AIRC, *not* the Office of the Employment Advocate) even if it failed the test, provided there was a compelling case on public interest grounds.

The problem of achieving consistency in decision-making

Regardless of whether the concept of "fair compensation" is clarified, it seems clear that the new fairness test will place enormous burdens on the new Authority — and potentially also on parties seeking approval for agreements.

Besides the problems that are bound to arise in deciding how much information is to be routinely obtained from parties, the major operational challenge that I can foresee is how to ensure that the hundreds of officials applying the test do so in a consistent and predictable manner.

As the Bill stands, the system will involve a large number of officials forming their own independent and essentially subjective opinions about what constitutes "fair" compensation.

While these decisions will obviously be guided by both the terms of proposed s 346M and what is said in the EM, there will still be considerable room for those opinions to vary. It is notable that even in the examples given in paragraph 98 of the EM, no definite answers are suggested — it is merely noted that it would be "open" to the Authority to reach various conclusions.

The decisions of the Authority will also be made in private, not public. There is no requirement under proposed ss 346P and 364U for the Authority to issue written reasons for any decision it makes, even to the parties concerned.

In practical terms, an employer that submits an agreement that initially *fails* the fairness test will get some idea of how the particular official has approached the matter, since the Authority will be required by proposed s 346P(3)(a) to offer "advice as to how the agreement could be varied to pass the fairness test". It could also be expected that where an employer takes up the government's invitation to seek a pre-lodgement assessment of a proposed agreement, there will be some dialogue with the Authority that will indicate their thinking about particular issues.

But even allowing for that, three problems will still remain. In the first place, while such information about the Authority's approach may indeed "trickle out" and

become known to those lawyers, consultants and organisations who routinely help lodge agreements, others may have little way of knowing how the Authority is applying the test in practice.

Secondly, even "repeat players" are likely to experience the problem of different officials taking different views of what is essentially the same situation. Anecdotal evidence suggests that this problem has often been encountered in seeking "rulings" from the Office of the Employment Advocate (whether formally under s 357(2) or informally) as to what constitutes "prohibited content" in proposed agreements.

Thirdly, the nature of the proposed system is such that information about the Authority's decision-making on "fair compensation" is revealed *only where an official refuses to approve an agreement*. If an official determines that an agreement passes the test without the need for variation or an undertaking, it may or may not be possible to conclude why they have formed that view. Hence there is a greater danger in the Authority being too lenient in applying the test, rather than too stringent. The latter will at least become apparent to the parties themselves. The former may be much harder to detect.

There are three obvious ways in which the administration of the test could be improved so as to enhance both consistency and indeed transparency in decision-making:

1. The Director of the Authority could be required to formulate guidelines as to the application of the fairness test. Such guidelines should be made publicly available and regularly updated to reflect issues that have actually arisen in practice.

2. The Director should be required to submit an annual report to the Minister on the administration of the fairness test, to be tabled in parliament. This report should provide statistics as to the administration of the test, plus representative examples (without identities being disclosed) of what has or has not been assessed as "fair compensation". As proposed s 163A stands, such a report can be requested by the Minister, but is not mandated.

3. Provision could be made for an internal review of any decision to approve or not approve an agreement, or to insist on approval only with specified amendments. The review could operate like this:

    - a party affected by a decision, or their representative (including a registered organisation), may request a formal statement of reasons for the decision;

    - if dissatisfied with those reasons, a review may be sought from the Director (or their nominee) on the basis that the decision does not comply either with s 346M or the guidelines referred to above.

It could further be provided that any review decision would be subject to judicial review by the Federal Court or Federal Magistrates Court under the *Administrative Decisions (Judicial Review) Act* 1977. This would obviate any need to seek judicial review from the High Court under s 75(v) of the Constitution.

Stronger Safety Net Bill: Calculating a "Shortfall"

Where an agreement has failed the fairness test, or has passed it only after amendments required by the Authority, proposed s 346ZD provides that the employee(s) concerned may be entitled to compensation for whatever period the failed agreement was in force.

Under s 346ZD(2), this compensation is to be calculated by reference to the shortfall, if any, between two amounts.

The first is the total value of the employee's entitlements under the failed agreement for the relevant period.

The second is the total value of the entitlements to which the employee would have been entitled under either:

(i) whatever instrument(s) would have applied but for the agreement — the term "instrument" here including a federal award, workplace agreement, pre-reform agreement or (by virtue of proposed cl 52AAA of Schedule 8) a NAPSA; or

(ii) if there is no such instrument, any federal award that has been designated in relation to the employee, or (by virtue of proposed cl 25B of Schedule 8) any "protected preserved conditions" derived from a PSA.

The basic intent is clear enough. Any compensation is ordinarily to be calculated by reference to whatever award or agreement would have operated for the relevant period .

There are at least three problems, however, with proposed s 346ZD(2).

The first arises where the failed agreement is replacing an agreement that was made between 27 March 2006 and 7 May 2007, during the period when the fairness test was not in operation. Even if that earlier agreement omitted some or all protected conditions without fair compensation, it would still be used as a reference point for calculating any shortfall.

Suppose for instance that in May 2006 an employee is employed under an AWA that provides for the minimum basic pay rates and no penalty rates. Some time after May 2007 they agree to a further AWA that offers them a small pay rise, but still no penalty rates. The second agreement fails the fairness test. Under the Bill as drafted, the employee falls back to the first (and sub-standard) agreement, and without compensation — even though they are actually worse off!

One way to fix this problem would be to provide that the employee is to be compensated by reference to the protected conditions that would otherwise have applied but for the operation of the earlier agreement.

The second problem arises because the definition of "instrument" in s 346Y does not include a pay scale.

Suppose that an employee is covered by a federal award that provides for certain penalty rates. They become bound by an agreement that provides inadequate compensation for the loss of those penalty rates and hence fails the fairness test. In calculating any shortfall, it is impossible to work out the total value of the employee's entitlements from the award alone. This is because awards are no longer allowed to regulate basic pay rates, which are instead now contained in pay scales (see s 516 and Div 2 of Pt 7). It is the *combination* of the employee's pay scale and the penalty rate provisions in the award that (subject to what is said below) determines their "entitlements".

The problem could be fixed by adding pay scales to the definition of "instrument" in s 346Y.

The third problem arises where a worker has been receiving a higher rate of pay than the minimum required by a pay scale. If they become bound by a workplace agreement which fails the fairness test, any shortfall should arguably be calculated by reference to what they were *actually* receiving under their previous arrangement, not the minimum rate in the pay scale.

As proposed s 346ZD(2) stands, this will be done if the higher rate is included in an earlier workplace agreement, since that agreement becomes the relevant "instrument". But this will not happen if the instrument replaced is an award and the higher rate of pay has been set by contract — the contract is not an "instrument" for that purpose.

Once again, the problem could be solved by adding employment contracts to the definition of "instrument" in s 346Y.

Stronger Safety Net Bill: Protecting Employees from Dismissal

Proposed s 346ZF provides that an employer must not dismiss or threaten to dismiss an employee because a workplace agreement does not or may not pass the fairness test. However there are at least three obvious loopholes in this provision as drafted.

The first is that an employer could offer a worker employment under an AWA on a "take it or leave it" basis, with a clause in the employment contract that if the AWA subsequently fails the fairness test and is annulled, the employment will automatically cease.

In such a case there is arguably no "dismissal" in the strict legal sense: the employment contract would simply have ended by reason of the operation of its own

terms, rather than by any action of the employer.[5] Hence an employer using such a device would arguably not be at risk of any prosecution under proposed s 346ZF.

To avoid this result, the prohibition should be extended to cover a refusal to offer further employment.

The second loophole may arise even where it is clear that the failure of a proposed agreement to pass the fairness test has resulted in the dismissal of an employee. The employer may seek in such a case to argue that the "sole or dominant reason" for the dismissal was not the failure of the agreement to pass the fairness test as such, but the fact that they could not afford to employ the worker on the terms demanded by the Authority as a basis for satisfying the test.[6]

This sort of sophistry could be avoided by providing that the prohibition applies when *one* of the reasons for the employer's action is the failure or possible failure of an agreement to pass the fairness test, or any consequences likely to follow from such a failure.

A third drawback of proposed s 346ZF is that it applies only to dismissal, not to lesser "reprisals" such as the reduction of hours for casual and/or part-time employees. The prohibition could usefully be extended to cover any action that injures an employee in their employment or that alters their position to their prejudice.

5 In the same way that there is no dismissal or termination at the initiative of the employer when a contract for a fixed term reaches its expiry date: see eg *Victoria v Commonwealth* (1996) 187 CLR 416 at 520.

6 Cf the reasoning adopted in cases such as *Grayndler v Broun* [1928] AR (NSW) 46 and *Klanjscek v Silver* (1961) 4 FLR 182, and also by Merkel and Finkelstein JJ in *Greater Dandenong City Council v ASU* (2001) 184 ALR 641.