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

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Introduction

JobWatch Inc is an independent, employment community rights legal centre which is committed to the protection and promotion of Victorian workers. We aim to improve the quality of workers' lives and we strive for a fair and just working environment for all, especially the most disadvantaged workers in the community.

JobWatch was established in 1980 and is the only service of its type operating in Victoria. Its core activities include:

- The provision of information and referral to Victorian workers via a free and confidential telephone service.
- A community education program that includes publications, information via the internet, and talks aimed at workers, students and other organisations.
- A legal practice which represents disadvantaged workers.
- Research and policy work on employment and industrial law issues.
- Advocacy on behalf of those workers in greatest need and disadvantage.

Each year JobWatch responds to approximately 20,000 telephone enquiries from workers across Victoria in all industries. Many calls relate to minimum terms and conditions of employment and questions arising out of the workplace agreement making process.

Summary of JobWatch's Submission

JobWatch Inc considers that, the Bill goes some of the way in replacing some of the agreement-making employee protections which were removed by the *WorkChoices* changes. However, the Fairness Test is a poor substitute for the no disadvantage test which, prior to the *WorkChoices* changes, was applied by the Australian Industrial Relations Commission and the Office of the Employment Advocate (OEA) before collective agreements could be certified and AWAs could be approved.

The Fairness Test:

- Goes some way but not far enough in replacing protections lost under *WorkChoices*;

- Will not guarantee that employees moving from award conditions to a workplace agreement are not worse off; and

- Presents serious difficulties both conceptually and administratively.

JobWatch's assessment of the Bill

1. JobWatch welcomes the opportunity provided by the Senate Standing Committee on Employment, Workplace Relations and Education to make a submission in response to the Bill.

2. The Bill introduces a number of changes to the *Workplace Relations Act 1996* (WRA), including the creation of a 'Fairness Test', which the newly named

Workplace Authority (formerly the OEA) is to apply to certain AWAs and collective workplace agreements lodged on or after 7 May 2007.

3. JobWatch congratulates the Federal Government for introducing the Fairness Test and thereby acknowledging and in some way attempting to redress:

   - The lack of employee protection following the *WorkChoices* changes to the WRA;

   - The power imbalance in the agreement-making process imposed by the *WorkChoices* changes; and

   - The inadequate role of the OEA under *WorkChoices*, as the OEA lost its role in ensuring that employees - often in an inherently weaker bargaining position than their employers - did not have their minimum conditions undermined by a workplace agreement. JobWatch notes with concern the empirical evidence that AWAs were indeed having the effect of undermining employee entitlements.[1]

4. JobWatch is further pleased that the Bill:

   - Establishes the Workplace Authority and Workplace Ombudsman as independent statutory agencies; and

   - Clarifies that duress provisions apply in transmission of business scenarios.

The Bill's development process

5. Given the centrality of work to most people's lives and thus the significance and potential impact of major changes to industrial regulation, JobWatch is concerned with particular aspects of the Bill's development, including:

   - The changes are effectively already in force, with the legislation once ultimately passed to apply retrospectively to applicable agreements lodged on or after 7 May 2007;

   - The changes were announced and effectively commenced without the Bill or any substantive detail having been released, preventing public debate of the proposed changes; and

   - The timeframe for this inquiry is restrictively short and, given that the changes have already been announced as having effectively commenced, the inquiry process does not appear to be genuine. It would appear that the Government has only limited willingness to incorporate any amendments proposed in submissions, by the Senate Standing Committee or during subsequent parliamentary debate.

[1] See articles in Workplace Express: "82% of Work Choices AWAs cut overtime, new analysis of OEA data reveals" from 8 December 2006 and "AWA workers earning 3% less than those under collective agreements" from 28 February 2007.

6. JobWatch notes with concern that retrospective laws are almost invariably against the public interest.

Fairness Test

7. The Government has indicated that the new Fairness Test introduced by the Bill is similar to the 'no disadvantage' test which the OEA applied to all AWAs lodged with it prior to the commencement of *WorkChoices*. JobWatch considers the proposed Fairness Test to fall far short of the no disadvantage test for several reasons. For instance, unlike the no disadvantage test, the Fairness Test:

- Does not apply to all employees;
- Does not guarantee that monetary compensation is paid where award entitlements are traded away;
- Is vague and administratively complex. Not only does it require an assessment of the rights lost versus the conditions gained under a workplace agreement. It also potentially requires an assessment of any non-monetary compensation and whether this confers a benefit or advantage of 'significant value' to the employee. It is unclear how the value of the benefit or advantage conferred by the non-monetary compensation could be adequately determined without a thorough and labour-intensive investigation by the Workplace Authority into the circumstances of the employee;
- Does not apply to workers who have already traded away conditions prior to 7 May 2007 and remain on existing workplace agreements;
- Does not require the employer to provide a statutory declaration stating whether or not the agreement will result in a reduction of overall terms and conditions of employment (as was required for certified agreements);
- Does not apply to all award conditions which might be lost under a workplace agreement. For example, compensation is not required to be paid for loss of severance (redundancy) pay; notice entitlements in relation to hours of work; days deemed public holidays; and substitute days;
- Undermines the idea of awards as a safety net from which employees can negotiate 'upwards' for greater entitlements and recasts awards, for the purposes of applying the fairness test, as a benchmark from which employees negotiate 'downwards', potentially having to trade off these conditions for flexibility or other non-monetary compensation;
- Is geared toward benefiting employers over employees as it takes a restrictive approach to the scope of rights that are "protected" (ie, only 7 award conditions are protected), whereas it takes an expansive approach to what might qualify as "adequate" compensation;

- Requires the Workplace Authority to compare the incomparable: for example, loss of public holidays might, under the Fairness Test, be compared with flexible start times to spend more time with one's family. JobWatch queries how flexible start times can be assigned a monetary value which is objectively assessable; and

- Is limited in its capacity to provide a safety net for employees as it does not address the precarious employment and bargaining position of many employees now that a majority of employees have lost unfair dismissal protection following *WorkChoices*.

8. JobWatch considers the Fairness Test to be administratively difficult. With AWAs reportedly being lodged currently at a rate of 20,000 per month, we suspect that even an expanded Workplace Authority would have difficulty administering the test properly and lengthy delays are likely, impacting negatively on both employees and employers. Given that the Bill appears to preclude appeals against the Workplace Authority's decisions, we are concerned about how (if at all) any mistakes regarding the assessment of fair compensation may be remedied.

9. Given the experiences of JobWatch callers, we reject the assumption underlying the Fairness Test that employers and employees are able to bargain about conditions of employment as equals. Our callers tell us that by and large their conditions of employment are set by employers on a 'take it or leave it' basis.

10. Whilst the test requires that non-monetary compensation confer an advantage or benefit of 'significant value' to the employee, it is unclear from the Bill how this will be adequately determined or enforced. JobWatch is concerned that in practice employers may simply insert an extra paragraph in workplace agreements declaring that dubious non-monetary compensation is indeed "of significant value". These workplace agreements may be offered to employees on a 'take it or leave it' basis, resulting in employees signing them. Unless the Workplace Authority's investigation goes beyond the wording in the agreements (in which case the Workplace Authority would, for example, contact each of the employees to verify whether the non-monetary compensation is "of significant value"), the assessment process will be entirely inadequate.

11. For this reason, JobWatch suggests that the Bill should be amended to require the employer to explain to the employees the following:

    a) the meaning of protected award conditions;

    b) what the employer is offering in lieu of the employee giving up or altering their protected award conditions;

    c) how the employer/employee has calculated that what the employee will be receiving in lieu of protected award conditions is fair in the

circumstances (especially in relation to non-monetary compensation); and

d) that, once the employee agrees to the workplace agreement, the employee will not be able to return to the protection of the relevant award even after the AWA is terminated.

JobWatch suggests that this explanation could be done by way of a statutory declaration given to the employee and also lodged with the Workplace Authority.

18. JobWatch is also concerned that the concept of "non-monetary compensation" could lead employees to unwittingly bargain away protected award conditions to obtain benefits to which they may already be entitled.

a. For example, an employee may bargain away protected award conditions in return for being able to start their 8 hour day at 10 am rather than 9am in order to be able to fulfil their family responsibilities in relation to young or school age children.

b. However, it is likely that the employee in question may have already been entitled to such workplace flexibility under an award or State or Federal equal opportunity laws. Further, the employee already has protection against unlawful termination on the basis of family responsibilities under the WRA.

c. It is likely that officers of the Workplace Authority will not have sufficient time, knowledge or inclination to investigate each and every workplace agreement involving non-monetary compensation to see if the employee has unnecessarily traded away their protected award conditions.

d. Accordingly, if the concept of "non-monetary compensation" is to remain a feature of the WRA, the Workplace Authority should be required to and be given the means to comprehensively investigate each workplace agreement and to consider the personal circumstances of the employees.

e. Additionally, JobWatch objects to the concept of non-monetary compensation being offered in lieu of protected minimum award conditions. It is fundamental to the concept of an award safety net that an employee be paid a minimum amount of money as wages and not other potentially non-monetary compensation that cannot be transferred to third parties or exchanged for necessary goods and services. Non-monetary compensation should only ever be additional to and not in lieu of minimum conditions of employment.

i. For example, the explanatory memorandum to the Bill gives the scenario of Jason, whose AWA excludes penalty and overtime rates in lieu of his employer meeting the cost of Jason's child care. This example looks simple on paper but it actually creates more questions than it answers, such as:

a) What happens if the employer fails to pay the child care centre? It is likely that Jason would have to pay the child care fees himself and so would be even more out of pocket.

b) What happens if, due to a change in circumstances, Jason no longer needs child care for his children? Presumably the AWA would have to be varied but the employer could refuse to vary the AWA.

c) How is the value of the child care properly ascertained? The cost to Jason is not necessarily going to be the same cost to the employer taking into account other factors that may exist such as taxation obligations/benefits, employer's bargaining power with or contacts at the child care centre etc.

d) What if the cost of the child care increases over time? Does the employer or Jason have to pay the difference?

ii. It is even conceivable that non-monetary compensation could include left over food that a cook or chef takes home from work or where a factory worker who makes widgets is paid in kind i.e. in widgets in lieu of giving up protected award conditions.

For this reason, JobWatch is concerned that the concept of non-monetary compensation could lead to further exploitation of vulnerable workers.

Penalties for lodging a Workplace Agreement that fails the Fairness Test twice

19. Under the Bill, if a Workplace Agreement fails the Fairness Test, the Workplace Authority Director provides advice on how the agreement can be varied so that it passes the Fairness Test.

a. JobWatch recommends that the Bill be amended to allow for penalties to be ordered where employers lodge workplace agreements which fail the Fairness Test for a second time.

b. The threat of a potential penalty will help ensure that employers lodge workplace agreements that are fair and also ensure that employees are paid for the work that they do within the timeframe set by the WRA.

c. To make this system more effective, the penalty could be issued by the Workplace Authority contemporaneously with its notice that the workplace agreement has failed the Fairness Test for the second time. Consideration would then have to be given to how the penalty would be recoverable and to whom it would be payable. One option would be for the Workplace Ombudsman to recover the penalty along with the employee's unpaid wages and entitlements.

d. To expedite this recovery, a fast track system could be put in place whereby the Workplace Authority could refer the matter directly to the

Workplace Ombudsman so that the appropriate recovery action can be commenced without delay.

Sole or Dominant Reason Test Where an Employee's Employment is Terminated because a Workplace Agreement fails the Fairness Test

20. Clause 346ZF of the Bill prohibits an employer from dismissing an employee if the sole or dominant reason for doing so is that a workplace agreement does not or may not pass the fairness test.

    a. JobWatch submits that this test is too burdensome (despite the reversed onus of proof) as it is often very easy for an employer who has terminated an employee's employment to have or invent other potential or arguable reasons for the termination after the event.

    b. Similarly, it is too burdensome to require an aggrieved employee to issue potentially expensive legal proceedings in a court of competent jurisdiction if the Workplace Ombudsman delays or fails to prosecute their matter. Additionally, if the employee's claim is not successful, the court can order the employee to pay the employer's legal costs.

    c. The risk of legal costs combined with the burdensome sole or dominant reason test means that this section (in its current form) will rarely if ever be enforced by an individual employee let alone the Workplace Ombudsman.

21. JobWatch suggests that the Bill be amended to make it a new ground of <u>unlawful termination</u> where an employee's employment is terminated because a Workplace Agreement fails or is likely to fail the Fairness Test.

    a. Such an amendment would allow an employee to issue a simple application at the Australian Industrial Relations Commission within 21 days of the termination and have the matter conciliated a few weeks later. If the matter is not settled at the Commission, the employee would then have the option of proceeding to have the matter heard in a court of competent jurisdiction where:

        I. the court cannot award costs against the other party except in certain proscribed circumstances;

        II. the reverse onus of proof remains; and

        III. rather than the sole or dominant reason test, the onus is on the employer to prove that the reasons for the termination did not include the proscribed reason of a Workplace Agreement failing the Fairness Test.

    This is a relatively simple and highly beneficial amendment and if the Federal Government is serious about protecting the rights of Australian workers, this amendment should be made.

Unintended Consequences

22. One of the objectives, if not the main objective, of the Workplace Authority is to encourage the making of Workplace Agreements.

    a. Unfortunately, the Bill in its current form will have the presumably unintended consequence of allowing many canny employers to avoid the Fairness Test altogether by retreating from agreement making in favour of the 5 minimum conditions contained in the Standard.

    b. Ironically, this is not just in spite of the Fairness Test but because of it and the Workplace Authorities power to designate awards under Sections 346K and 346L for employers who are not bound by awards.

    c. This will occur in a number of ways, for example:

    1. Employers who currently have employees on post WorkChoices (but pre Fairness Test) AWAs or collective agreements that have removed protected award conditions will be able to avoid the Fairness Test by simply not entering into new agreements and allowing those agreements to continue after their nominal expiry dates;

    2. Once a workplace agreement reaches its nominal expiry date, the employer may choose to terminate the agreement without negotiating a new agreement. This would allow the employer to avoid the Fairness Test by having employee entitlements revert back to the 5 minimum conditions of the Standard;

    3. Many employers are now not bound by an award including new corporate employers after 27 March 2006 and employers who become bound by an award due to a transmission of business and one year has passed since the transmission. Also Notional agreements preserving state awards (NAPSAs) are due to lapse on 27 March 2009 which will presumably leave even more employees without awards and protected award conditions. This means that employers who are not bound by awards (which number seems to be increasing) will have no need to enter the workplace agreement making process meaning that the Fairness Test will have no effect on them or their employees.

       So, although the Workplace Authority can designate an award for an employer who is not bound by an award, JobWatch suspects it will rarely have to do so because an employer who is not bound by an award will not be lodging any Workplace Agreements. This means the Fairness Test, in its current form, will be largely meaningless as it will have no effect on employees who are not covered by an award.

23. JobWatch submits that one possible way of rectifying this situation is to reinstate the status and effect of awards so that awards are a true safety net for as many workers as possible and not something to be bargained up to by those few workers who have the bargaining power.

24. As the situation stands now under the Bill, the Fairness Test is, for many employees, not much more than a token gesture without substance or effect.

Recommendations

25. JobWatch considers a far better model than the Fairness Test would be a 'no disadvantage test' which guarantees monetary or similar compensation for loss of award conditions plus adequate work/life balance protections. The test ought to:

- Apply to all workplace agreements lodged with the Workplace Authority (ie. the monetary cap and industry restriction ought to be removed).
- Apply in respect of all award conditions, not merely 7 protected conditions.
- Not include non-monetary compensation.
- Assess the workplace agreement as a whole against all applicable award conditions and check the employee is not disadvantaged.
- Be backed by comprehensive unfair dismissal laws so that employees can meaningfully negotiate more beneficial working conditions and/or press for their existing entitlements during employment without risk of being dismissed for doing so and left unable to challenge their termination.

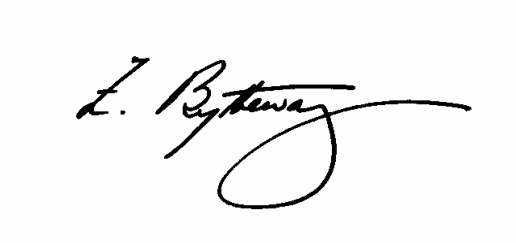
In the absence of such a significantly different test being adopted, the Bill should be amended to improve the proposed Fairness Test to:

- Place the onus on the employer of showing how a workplace agreement meets the test. This could take the form of a requirement that the employer lodge a statutory declaration with the workplace agreement setting out how the test is met.
- Be backed by penalties such that employers who lodge or attempt to lodge a workplace agreement which twice fails the fairness test are subject to the same penalties as currently apply in relation to lodging or attempting to lodge a workplace agreement which contains prohibited content. Otherwise, there is little real incentive for employers to ensure an agreement meets the test.

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

For further information, please do not hesitate to contact the following members of JobWatch's Legal Practice: Gabrielle Marchetti, Ian Scott or James Fleming.

Yours sincerely,



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