AUSTRALIAN SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

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

Submission of the Victorian Workplace Rights Advocate

1. INTRODUCTION

1.1 The Office of the Workplace Rights Advocate ("the OWRA") was established on 1 March 2006 pursuant to the *Workplace Rights Advocate Act 2005* (Vic) ("the WRA Act").

1.2 The main purpose of the WRA Act is set out in s 1 which provides as follows:

> " ***1. Purpose***
>
> *The main purpose of this Act is to establish the Office of the Workplace Rights Advocate to provide information about, and promote and monitor the development of, fair industrial relations practices in Victoria."*

1.3 The powers and functions of the Workplace Rights Advocate ("the WRA") are principally set out in s 5(1) of the WRA Act. Section 5(1) provides as follows:

> " *(1) The WRA has the following functions-*
>
> *(a) to inform, educate and consult with Victorian workers, employers and their representatives about rights and responsibilities in relation to work-related matters;*
>
> *(b) to facilitate and encourage the fair industrial treatment of workers in Victoria;*
>
> *(c) to promote informed decision-making by Victorian workers and employers;*
>
> *(d) to investigate illegal, unfair or otherwise inappropriate industrial relations practices in Victoria;*
>
> *(e) to make representations to an appropriate person or body in relation to work-related matters;*

(f) to monitor and report to the Minister and Parliament on industrial relations practices in Victoria;

(g) to investigate and report to the Minister on the impact of any aspect of the industrial relations arrangements affecting Victorian workers or employers;

(h) to advise the Minister generally about work-related matters;

(i) to advise the Minister on the operation of this Act;

(j) to request assistance or information from any public entity within the meaning of the ***Public Administration Act 2004*** *and provide information about work-related matters to any such entity at the request of the entity or when the WRA thinks appropriate;*

(k) any other function conferred on him or her by or under this or any other Act."

1.4 Pursuant to s 5(1)(b) and (e) of the WRA Act the WRA makes this submission to assist the Senate Employment, Workplace Relations and Education References Committee ("the Committee") in its Inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 ("the Bill").

1.5 The WRA has a number of serious concerns that the Bill will not adequately protect the interests of workers in Victoria. These concerns are set out below.

2. THE FAIRNESS TEST

(a) *Many workers 'marooned'*

2.1 The Bill does nothing for those workers whose terms and conditions of employment are regulated by unfair workplace agreements made after the *Work Choices* amendments to the *Workplace Relations Act 1996* (Cth) ('the WR Act') came into effect and prior to 7 May 2007.[1] In the first year of Work Choices, over 50,000 Australian Workplace Agreements ('AWAs') were made in Victoria, about half of which were in the retail and hospitality industries. Based on the evidence given to the Committee by the Employment Advocate in May

[1] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

last year[2] in relation to a sample of AWAs examined by his Office, it would appear that many of these AWAs strip away most, if not all, "protected" award conditions. Relevantly, both complaints made to the OWRA, as well as statistical data on wages[3] appear to show that little or nothing has been given to employees to offset the loss of these "protected" conditions, at least in the retail and hospitality industries.

2.2 This unfairness should be properly remedied. It is submitted that any employee working under a pre-fairness test workplace agreement should be able to request that the Workplace Authority assess the agreement against the fairness test. If the agreement fails the fairness test, the procedures set out in proposed section 346R should apply.

(b) *Not all award covered workers protected*

2.3 The proposed monetary cap of $75,000 for employees on individual workplace agreements will exclude a number of award covered employees from the protection afforded by the fairness test. It is submitted that the proposed monetary cap should be removed and the Bill should be amended to ensure that the fairness test applies to all award covered employees.

(c) *Not all award conditions protected*

2.4 Unlike the former no-disadvantage test,[4] the proposed fairness test will not compare a workplace agreement against the totality of the underlying award. This means that a workplace agreement may still, on balance, leave an employee worse off, compared to the award, even if the agreement is assessed as passing the fairness test.

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[2] Senate Employment, Workplace Relations, and Education Legislation Committee, *Official Hansard — Estimates* (29 May 2006) 131ff.

[3] David Peetz, 'Assessing the Impact of "Workchoices": One Year On' (2007) Report to Department of Innovation, Industry and Regional Development, Victoria, ch 10.

[4] Former Part VIE of the WR Act.

2.5 Many important conditions are contained in awards, outside of the 'protected award conditions', such as entitlements to redundancy pay and rostering provisions. Fairness dictates that employees should not be deprived of *any* award conditions without appropriate compensation. Therefore, the WRA would prefer to see the fairness test applied against the totality of the applicable pre-Work Choices award. This was the position under the former no-disadvantage test which despite its flaws,[5] at least made a genuine and transparent attempt to ensure that employees were not, on balance, disadvantaged through the agreement-making process. However, at a minimum the fairness test should be extended to incorporate such matters as redundancy and rostering. It is to be noted that a report by Associate Professor Peter Gahan, of Monash University, analysing calls made to the Workplace Rights Information Line (operated by the OWRA) during the first six months of *Work Choices* found that a significant matter of employee complaint was the increasing use of managerial prerogative to change conditions of work, for example, hours of work without consultation or agreement. A copy of this report appears as Attachment 1 to this submission.

(d) *Loss of workplace power not adequately compensated*

2.6 The subjective nature of the fairness test is a matter of concern, particularly in relation to the assessment of the value of non-monetary employment conditions. For example, what will the Workplace Authority determine is 'fair compensation' for the removal of an award requirement that an employer consult with employees in relation to the scheduling of rest breaks? This is an intangible right, but because it provides employees with the *capacity* to influence their working hours (which may, in turn, affect their income where their remuneration depends on their pattern of working hours) it may be of great 'value' to many employees.

2.7 Given that monetary compensation is not always appropriate compensation for the loss of an intangible right, it is submitted that the Bill should explicitly state

[5] Richard Mitchell et al, 'What's Going on with the "No Disadvantage Test"? An Analysis of Outcomes and Processes under the Workplace Relations Act 1996 (Cwlth)' (2005) 47 *Journal of Industrial Relations* 393.

(in proposed section 346M(7)) that 'non-monetary compensation' can include, the conferral upon the employee of additional power, capacity, voice or input into decision-making at a workplace level. This amendment would give the Workplace Authority the *discretion* to determine in appropriate cases that the loss of an intangible right (such as the right to be consulted) contained in the applicable award needs to be compensated by the conferral of an equivalent grant of workplace 'power' instead of the payment of money.

(e) *Lack of consultation with employees*

2.8 The paucity of employee involvement in the assessment of the fairness test is also a matter of concern. Under the Bill, the Workplace Director is only permitted, not obliged, to make contact with employees (proposed sections 346M(3) and (6)). It is submitted that it should be mandatory for the Workplace Director to consult with employees (or their representatives) to obtain their views about whether a proposed workplace agreement provides 'fair compensation' to them, particularly when the proposed trade-off involves non-monetary aspects. If this is not done, the credibility of the Workplace Authority's determination may be seriously undermined.

2.9 Consultation with employees is particularly important in the case of collective agreements because particular items of 'compensation' will not affect all employees equally. For example, the offer of additional family-friendly provisions may be of no value to an employee whose children have grown up and left home. In relation to agreements covering large numbers of employees or agreements which operate across a number of locations, it will not to be reasonably practicable to consult all employees affected. At the very least however, the Workplace Authority should consult a sample of the class of employees affected, or representatives of the class, or seek additional written information from affected employees on the effect and value of compensation expressed in their own terms.

2.10 However, consultation will not be useful if employees are not fully informed of their rights, or if they do not understand the content and effect of the proposed agreement, and how it might disadvantage them in comparison with the applicable award. It is submitted that the provision of a short generic information statement (under section 337 of the WR Act) does not suffice to remedy this problem of a lack of proper information. It is submitted that the Bill should be amended to require an employer to explain the effect of a proposed agreement to affected employees[6] and to explain how the conditions of employment under the proposed agreement would be different to those under the award. This reform may go some way towards redressing the confusion and fear that employees, especially women, report experiencing in the bargaining process.[7]

(f) *No ongoing scrutiny*

2.11 It is clear that the fairness test will be conducted at a single point in time (proposed clause 346N). It is submitted that this is not appropriate, since events subsequent to the test may fundamentally change the nature of the employer-employee relationship. For example, the reduction or removal of weekend penalty rates may not actually disadvantage employees of a business not operating on weekends at the time that the test was administered. However, if the hours of operation, and of work, later change, employees may be significantly worse off. Further, particularly in times of high inflation, the real value of benefits that are stated in nominal terms will depreciate over time. This is especially important now that workplace agreements may operate for five years or more.

2.12 It is submitted that the Bill should address this situation by directing the Workplace Authority to consider the value of the exchange over the nominal life of the workplace agreement. This would enable the Workplace Authority to

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[6] See former section 170LK(7) and 170VPA(1)(c) of the WR Act.

[7] Peter Gahan, 'WorkChoices & Workplace Rights in Victoria: Evidence from the Workplace Rights Information Line' (September 2006) 9–10 (report attached to this submission); National Foundation for Australian Women, 'What Women Want: Consultations on Welfare to Work and Work Choices' (June 2007) 16.

ascribe weight in terms of the application of the fairness test to the inclusion (or omission) of clauses in the workplace agreement dealing with such matters as the following:

(a) a promise by the employer not to change certain workplace conditions, or at least not to change them without consultation;

(b) a promise by the employer to undertake a reconciliation (between award and agreement conditions) at the request of the employee, and to make good any difference; or

(c) a promise by the employer to index the value of certain benefits over time.

It is useful to note that the Australian Industrial Relations Commission ('AIRC') had previously requested such promises from employers, by way of undertakings, in cases where it was concerned about how an agreement might disadvantage employees over time.

(g) *Lack of transparency and accountability*

2.13 The lack of scrutiny and rights of appeal in relation to the application of the test is a further matter of concern. The lack of transparency and accountability is repugnant to the general principles of public law which apply in a democracy like Australia. It is submitted that the Workplace Authority should be obliged to provide reasons for its decision; its decisions should be open to both scrutiny and merit-based challenge in the Administrative Appeals Tribunal; and quick and inexpensive judicial review of its decisions should be available through the Federal Magistrates' Court and the Federal Court, rather than through the High Court of Australia.

2.14 Although rights of appeal are likely, in practice, to be used overwhelmingly by employers, it is in the interests of the community at large that the Workplace Authority is accountable for its decisions; even if this means that a court might decide that an agreement is 'fair' when the Workplace Authority has previously determined it to be unfair. It is submitted that employees should be afforded the

same opportunity to exercise rights of appeal through the creation of a special fund to assist them in bearing the costs of litigation. Such a fund has been created to allow employees to challenge unlawful terminations in court, and has allowed at least a small number of employees to access the unlawful termination jurisdiction in circumstances where they otherwise would not be able to afford to do so.

(h) *Exemption too wide*

2.15 It is submitted that the 'exceptional circumstances' exemption contained in proposed sections 346M(3) and (5) is to broad. The exemption appears to be much broader than the 'public interest' exemption which was available under the former no-disadvantage test.[8] Of course, the 'public interest' exemption was also applied by the AIRC in a transparent manner in a public forum. These requirements will not apply to the Workplace Authority.

2.16 Turning to the detail of the Bill, all that proposed section 346M(4) provides is that the Workplace Authority *may* consider the employer's circumstances and the employee's 'economic circumstances' if (and presumably only if) exceptional circumstances exist *and* if it is not contrary to the public interest to consider those matters. This is not quite the same thing as providing (as was the case under the no-disadvantage test) that the decision-maker must not approve an agreement that fails the test unless it is not contrary to the public interest to do so. In other words, the Workplace Authority is not really required to consider the public interest in deciding whether or not to approve an agreement that provides unfair terms — it is only required to consider whether the 'public interest' warrants consideration of the additional matters specified in proposed section 346M(4).

2.17 These additional matters seem to be loaded in favour of the employer. It is noted that the Workplace Authority 'may' consider the 'employment circumstances' of the employee or employees. Presumably, this means that the Workplace

[8] Sections 170LT(3) and 170VPG(4).

Authority may take into account an employee's desire for employment with the employer, on the terms offered, and/or an employee's difficulty in finding any other suitable work. It is submitted that taking such considerations into account may adversely impact on the maintenance of fair standards and conditions of employment, particularly in rural and regional areas. It is submitted that the Workplace Authority should be required to directly consider questions of the 'public interest' when deciding to approve an agreement that otherwise fails the fairness test, and should not be restricted to considering the circumstances of the parties.

(i) *Anti-victimisation provisions too narrow*

2.18 The anti-victimisation provisions (proposed sections 346ZF, 346ZH) appear to be too weak. Clause 346ZF prohibits an employer from dismissing an employee if the sole or dominant reason for the dismissal is that a workplace agreement failed the fairness test. However, what happens if an agreement fails the fairness test, and the employer subsequently dismisses the employee claiming it cannot afford to pay the wages specified in the applicable award or collective workplace agreement. Here, the sole or dominant reason for the dismissal can be construed as an 'operational reason' (for which there may be no unfair dismissal remedy), even though the ultimate reason for the award or collective workplace agreement wages being payable was because the agreement failed the fairness test. For this reason, it is submitted that the protection offered by proposed section 346ZF should be bolstered by deleting the words "sole" and "dominant" from proposed subsection (1) and making it clear that a breach of the subsection will occur if a reason for dismissal was that the relevant agreement did not pass the fairness test.

2.19 Similarly, clause 346ZH prohibits an employer from coercing an employee to modify a protected award condition. It appears that this clause is designed to protect existing employees, rather than new employees. However, what happens if an employer informs an employee that they cannot, for business reasons, afford to continue employing them unless the employee agrees to abandon or reduce one or more "protected" award conditions? It is not clear that this would

amount to coercion under proposed section 346ZH. It is submitted that the Bill should be amended to specify that the claimed existence of 'operational reasons' cannot be a defence in relation to the employer's conduct, unless the employer is facing a genuine business crisis.

(j) *Assessment process not rigorous*

2.20 The process by which the Workplace Authority will administer the test is a further cause for concern. It is appreciated that there will be a large number of agreements to scrutinise, and that the Workplace Authority will have to implement systems to streamline and speed up the assessment process. However, before the *Work Choices* amendments, there were serious concerns about the low level of scrutiny which the Employment Advocate apparently gave to the large numbers of agreements it was required to assess against the no-disadvantage test. In particular, the reliance upon 'community partners' to pre-assess agreements, the use of computer programs to conduct a 'preliminary' assessment of agreements, understaffing, internal (and federal government) pressures to achieve performance targets all led to community perceptions (whether or not justified) that the Employment Advocate was not properly fulfilling its role. Although the increased level of funding proposed to be given to the Workplace Authority will hopefully allow it to apply the fairness test with the independence and rigour which the community and affected employers and employees deserve, it may be necessary to say something more in the Bill to ensure that these legitimate expectations are specifically protected by law.

(k) *Family defined too narrowly*

2.21 The WRA is concerned about the reference to employees' family circumstances in proposed section 346M(3). 'Family responsibilities' is not defined in the WR Act, nor in the Bill. However, other references to 'family' in the WR Act are restrictive and do not include, for example, same-sex family arrangements. It is submitted that that the Bill be amended to ensure legitimate consideration of *all* family and caring arrangements of Australian workers.

(l) *Bill too complex*

2.22 It is submitted that the drafting of the Bill is unnecessarily complex and confusing. This will only tend to worsen the problems that employers and employees have already experienced in understanding their rights and obligations under *Work Choices*.

3. CONCLUSION

3.1 As this submission has sought to set out, the proposed fairness test has a number of fundamental deficiencies. The fairness test cannot live up to its name unless it addresses these flaws. Unless and until they are addressed, my Office will no doubt continue to receive large numbers of complaints from Victorian employees and employers about the complexity and unfairness of agreement-making under *Work Choices*.