Chapter 3

Issues of contention

3.1 In May 2005 the Prime Minister and Minister for Workplace Relations announced that the Government intended to introduce further workplace relations reform. A large-scale public misinformation campaign was initiated by opponents of workplace relations reform. The claims about Work Choices made in Parliament and the media, particularly those made by some members of the Opposition and union representatives, have been baseless attempts at scaremongering.

3.2 This chapter identifies the main areas of the government's policy which have come under fire from opponents, and addresses the criticisms in turn. It corrects much of the misinformation which has surrounded debate on Work Choices, and places the policy in a realistic and factual context.

Background to the legislation

3.3 The Work Choices Bill has not materialised quickly. Since the passage of the Workplace Relations Act in 1996, the Coalition has attempted follow-up legislative reform through a series of amendments necessitated by experience in the 'bedding down' of the WR Act. It has had limited success. The extensive omnibus amendment bill introduced in 1999, the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, well-known by its shorthand title, MOJO, was the first attempt. This bill was eventually laid aside in the Senate and in later years was broken up into constituent areas of policy to be legislated for separately. A descriptive listing of bills submitted in this way is to be found in Appendix 5 of this report.

3.4 While the size and scope of the Work Choices Bill has provoked comment and criticism from a number of quarters, it should be recognised that the bill contains, among other provisions, the consolidation of nine years of previously debated legislation.

3.5 It is not therefore true that the provisions of the bill have been subject to restricted debate. While some provisions of the bill may be relatively new, the Government has previously introduced various bills into Parliament that dealt with many of the matters covered by the Work Choices Bill. There is no basis upon which to claim that most of the important reforms contained in Work Choices are a surprise. Those elements of the Work Choices Bill not the subject of this inquiry have been previously examined (at least once) by 14 separate Senate inquiries. In addition the Government has attempted to change the unfair dismissal laws in the WR Act at least 41 times since 1996.

3.6 Two elements of the legislation not previously seen are the provisions establishing the Australian Fair Pay Commission (AFPC) and changing the scope of operation of the Australian Industrial Relations Commission (AIRC). Yet the

Government's view of the need to revise the role of the AIRC, in relation to the setting of minimum and award classification wages, has been known for years. The establishment of the AFPC, loosely based on the UK Low Pay Commission (established in 1997), was first announced on 26 May 2005.

3.7 The most important element in the Work Choices Bill, and the most complex, is the set of provisions that create a national workplace relations regime, in place of six different state and federal regimes. The current federal system rests primarily on the concurrent powers in the Constitution in section 51 (xxxv), known as the conciliation and arbitration power. The basis for the national scheme rests on section 51 (xx), known as the corporations power. This change alone makes it the most important bill in the field of industrial relations since the passage of the *Conciliation and Arbitration Act 1904.* As responsibility for national economic policy is obviously a matter for the Commonwealth, it follows that labour policy, which is inextricably linked to economic policy, should be a matter which is regulated at a national level.

3.8 The committee concurs with the Australian Industry Group's views that while workplace reforms are necessary, they do not assume more importance than global economic trends in determining economic success. But there is strong evidence that productivity improvements come from workplace relations reform and deregulation. International bodies such as the Organisation for Economic Co-operation and Development (OECD) and the International Monetary Fund (IMF) have linked increased labour market flexibility to productivity growth.[1] This has been the commonly shared experience of OECD countries. The OECD commented that the Government's structural economic policy reforms in the last decade 'conferred an enviable degree of resilience and flexibility on the Australian economy' and resulted in a prolonged period of good economic performance.[2] Evidence from the Productivity Commission and a number of independent academic researchers also shows that the adoption of flexible workplace relations arrangements through previous reforms has led to improved productivity.[3]

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1 International Monetary Fund (IMF), *IMF Survey*, October 2005; IMF letter to the ACTU President Sharan Burrow, http://www.imf.org/external/np/vc/2005/102705.htm; Organisation for Economic Co-operation and Development (OECD), *Policy Brief: Economic survey of Australia, 2004.*

2 OECD, *Policy Brief: Economic survey of Australia, 2004*, p. 2.

3 Productivity Commission, *Microeconomic Reforms and Australian Productivity: Exploring the Links, Volume 2: Case Studies*, Research Paper, Ausinfo, 1999; *Productivity in Australia's Wholesale and Retail Trade*, Productivity Commission Staff Research Paper, Ausinfo, 2000; T. Fry, K. Jarvies and J. Loundes, *Are Pro Reformers Better performers?*, Melbourne Institute Working Paper, No.18/02, September 2002; Y-P Tseng and M Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, Melbourne Institute Working Paper, No.8/01, July 2001; G Connolly, A Herd, K Chowdhury and S Kompo-Harms, *Enterprise bargaining and other Determinants of Labour Productivity*, Paper presented at the Australian Labour Market Workshop 2004, University of Western Australia, http//www.clmr/uwa.edu.au

3.9 Despite the incontrovertible evidence that the labour market reforms implemented from the mid-1990s to the present have improved economic performance and resulted in higher real wages, some commentators continue to assert that further labour market reforms are unnecessary. Nor, they argue, will it lift productivity and hence the living standards of working people. The Government continues to take the view that further reform will produce worthwhile increases in efficiency, competitiveness, and living standards. It is clear to the Government, as it is to the committee majority, that there is more work to be done if Australia is to continue its enviable economic record.

3.10 A concern often cited by opponents of reform is that the workplace relations changes implemented over the last decade have led to wider income disparity, and that the reforms in the Work Choices Bill will further increase inequality. In fact, the Household Income and Income Distribution report, released by the Australian Bureau of Statistics (ABS) on 4 August 2005, shows that there was no significant change in income inequality between 1994 and 2003-04.[4]

3.11 Furthermore, the OECD's *Innovations in Labour Market Policies – the Australian Way* also noted that during the 1980s (before the introduction of enterprise bargaining), real wages fell, particularly in the case of low-wage workers; while after workplace relations reform was started in the 1990s, real wages increased across the earnings distribution. There now exists an immediate need for further workplace relations reform in order to ensure that both corporate productivity and individual wealth can continue to expand into the future.

The economic imperative and the need for further reform

3.12 Although previous reforms produced significant improvements in economic indicators, Australia is beginning to fall behind in international productivity levels. In its 2004 economic survey of Australia, the OECD commented that productivity levels were well below those recorded in other OECD countries, as were participation rates among some working-age population groups.[5] In addition, data from the ABS show that productivity rates fell during the 2004-05 financial year for the first time in a decade.[6] In October 2005, labour force participation rates declined and unemployment increased. The productivity lag and looming demographic challenge must be addressed by more extensive labour market reform.

3.13 The OECD recommended that further reform was needed to make the labour market function more effectively. It recommended promoting the negotiation of wages and conditions at the enterprise and individual levels and removing disincentives to hiring, particularly of low skilled workers. Other recommendations included

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4 Australian Bureau of Statistics (ABS), *Household Income and Income Distribution 2003-04, Australia*, 2005; Australian Industry Group (AiG), *Submission 172*, p. 9.

5 OECD, *Policy Brief: Economic survey of Australia, 2004*, pp 2-3.

6 ABS, *Australian System of National Accounts 2004-05*, Cat. No. 5204.0.

improving education and training, and creating stronger incentives for workforce participation, particularly for older workers.[7]

3.14 Along with the OECD and the IMF, many other groups and commentators support further reform of the workplace relations system, including the Business Council of Australia, the Australian Industry Group (AiG) and the Australian Chamber of Commerce and Industry (ACCI).[8] ACCI's submission to this inquiry provides a comprehensive discussion of the economic evidence of the benefits of previous reforms and the case for further reform. ACCI cites 54 examples of Australian and international economic studies and commentaries supporting the type of reform proposed by the Work Choices Bill.[9]

3.15 A recent report produced by Access Economics for the Business Council of Australia entitled *Locking in or Losing Prosperity: Australia's Choice*, concludes that each Australian could be $70,000 wealthier if further change to workplace participation rates and economic change, including workplace relations reform, is undertaken.

3.16 The report argues that without previous reforms to the workplace relations system, unemployment would have averaged 8.1 per cent in 2003-04 rather than 5.8 per cent, and an extra 315,000 people would have been out of work. The report concludes that Australia faces the choice of being a low growth (2.4 per cent annually) or high growth (4 per cent) country.

3.17 Achieving 4 per cent 'would not require a program of radical reform', according to BCA chair Hugh Morgan. It would merely require an 'extension' of changes already put in place over the past 20 years.[10]

3.18 The Australian Industry Group provided evidence to the committee that the current framework is overly prescriptive and that changes are necessary 'to align the workplace relations system with the circumstances of modern industry'.[11] The AiG conducted a survey in mid-2005 regarding workplace relations reform. Of the more than 700 employers who responded, 68 per cent said that the existing system had no effect on their ability to improve productivity, 13 per cent said it had a negative effect and only 19 per cent said it had a positive effect on their ability to improve

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7 OECD, *Economic survey of Australia, 2004*, pp 2-3.

8 Mr John Kovacic, *Committee Hansard*, 14 November 2005, p. 9

9 ACCI, *Submission 153*, pp 7-21.

10 *Locking in or Losing Prosperity: Australia's Choice,* Business Council of Australia, August 2005

11 Ms Heather Ridout, *Committee Hansard*, 14 November 2005, p. 43; DEWR, *Submission 166*, p. 6.

productivity.[12] These results highlight the need for reforms that allow agreement making to drive productivity.

3.19 International authorities have also supported the need for further workplace relations reform. The Organisation for Economic Cooperation and Development (OECD) recently concluded that:

> Further unfinished business includes harmonisation of federal and state industrial relations and the streamlining of regulations which minimise the incidence of unlawful industrial action. Finally, the cost of dismissal procedures, including for employees who have been with firms for only a short period, is often cited by small businesses as a disincentive to hiring. The Government is now in a position to address these issues and should proceed as soon as practicable. [13]

3.20 Further reform is also needed to address ageing-related constraints on the future labour supply by removing barriers to greater participation in the workforce. Higher participation rates among people of working age will become more important as the population ages and the fertility rate remains below replacement levels. While there are currently about five times as many people of traditional working age as there are those over 65, projections indicated that in 40 years, there will be 40 people over 65 for every 100 people of traditional working age.[14]

3.21 It is clear that Australia needs a national workplace relations system which enables companies to remain highly adaptable and flexible to meet demographic challenges and remain competitive in the global economy.

Changed role of the AIRC

3.22 Under the Work Choices Bill, the AIRC will have responsibility for simplifying awards, regulating industrial action, registered organisations and right of entry, and a continuing role in relation to termination of employment. The AIRC will continue to resolve disputes and will have specific powers relating to that function. The Australian Fair Pay Commission, which is discussed below, will take on the AIRC's wage setting role.

3.23 The WR Act maintained the role of the AIRC which it inherited from the old Conciliation and Arbitration Commission, even though the Government at the time believed it was no longer appropriate to invest a dispute resolving body with wage fixing powers.

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12 Ms Heather Ridout, *Committee Hansard*, 14 November 2005, p. 44; AiG, *Submission 172*, p. 43

13 OECD *Economic Survey of Australia*, February 2005

14 AiG, *Submission 172*, p. 13; ACCI, *Submission 153*, p. 8.

3.24 Critics have interpreted the reduced role of the AIRC as an attack on the maintenance of award and minimum wages. But the establishment of the Fair Pay Commission and the changed role of the AIRC are designed to address problems with the current system. Witnesses from ACCI elucidated some of the shortcomings of the AIRC wage case process from an employers' perspective. The ACCI argued that the legalism and the adversarial characteristics of the quasi court case process of the AIRC is directly damaging to the outcomes for the individuals who are covered by minimum wages, those out of work, for the employers and for the economy generally.[15]

3.25 ACCI went on to say that the current system provides for legal arbitration, rather than economic analysis. ACCI's chief executive couched the situation in terms of conflict:

> Unfortunately, it is [a situation] where you have one group saying, 'The minimum wage should be over here,' and another groups saying, 'It needs to be there,' because the actual way that they make their decisions is by splitting the difference somewhere in the middle … With the Work Choices bill we are seeing a proposal which we have now been promoting for a number of years: we should have an economic analysis that takes into account, for example, the plight of the unemployed – some half a million or more people in this country who do not get a look in the minimum wage cases as they are run today.[16]

3.26 The National Farmers' Federation agreed, saying that:

> It is really two third parties that impact on how we operate on the farms. It is not only the AWU but, more importantly, it is the Australian Industrial Relations Commission. Particularly through national test cases they prescribe prescriptive provisions within all awards to make employers undertake certain work practices regardless of the needs of the individual workplace.[17]

3.27 The details of the Government's proposal demonstrate that the fears of critics are unfounded, as discussed below in relation to the Australian Fair Pay Commission. It is not the proper role of the AIRC to involve itself with wage fixation and awards, but rather to concentrate on its original purpose: solving industrial disputes.

The Australian Fair Pay Commission

3.28 The role of the AIRC in wage setting will be transferred to the Australian Fair Pay Commission. It will have responsibility for determining changes to the new Federal Minimum Wage (FMW) and award classification wages.

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15 Mr Scott Barklamb, *Committee Hansard*, 15 November 2005, p. 40.

16 Mr Peter Hendy, *Committee Hansard,* 15 November 2005, p.43

17 Mrs Denita Wawn, *Committee Hansard,* 15 November 2005, pp. 27-28

3.29 The objectives of the Fair Pay Commission will be to promote the economic prosperity of the people of Australia, having regard to a number of considerations laid down in the legislation. The first of these considerations is the capacity for the unemployed and low paid to obtain and retain employment. The Fair Pay Commission will ensure that the unemployed and low paid are not priced out of the labour market. This recognises the importance of being employed and of gaining experience and making progress in the labour market. To this end, the Fair Pay Commission will also be responsible for encouraging employment and competitiveness across the economy.

3.30 The Fair Pay Commission's central role will be the maintenance of a 'safety net' in the form of a set of minimum wages, not simply for the low paid, but for young workers, workers with a disability, and workers for whom training provisions apply.

3.31 These provisions are grounded in economic necessity. Employers are forced to compete against both domestic and international competitors, and operate in fluctuating markets. This means that, while recognising the critical importance of retaining a realistic set of minimum wages and conditions, consideration must also be given to maintaining the competitiveness of the variety of workers in the labour market and encouraging more unemployed people to join the workforce. This bill seeks to bring about measured change. It will establish a balance between ensuring that there exists the required flexibility and competitiveness within the labour market, while at the same time shielding those workers who require protection.

3.32 An important feature of the Fair Pay Commission, which distinguishes it from the AIRC is its method of inquiry. The practices of the Fair Pay Commission will enable a more consultative approach to pay setting in Australia. Wage reviews will be an inclusive process, and the Fair Pay Commission will be able to consult any interested stakeholders (for instance, the unemployed) rather than just those industrial players with a direct stake in the outcome. Importantly, the Fair Pay Commission will be able to undertake and commission research, and monitor and evaluate the outcome of its decisions. Adversarial quasi-judicial processes will disappear. Decisions will depend on the weight of evidence following pro-active investigation by the Fair Pay Commission, and reflect a more constructive evidence based approach to the determination of safety net wages and conditions.

3.33 The Fair Pay Commission will be an independent statutory body, and will not submit recommendations to government. It will set wages and conditions independent of the views of the government.

An enhanced agreement making framework

3.34 One of the primary intentions of the bill is the simplification of agreement making between employers and employees, by moving to a lodgement based system and removing procedural barriers to agreement making.[18] This will encourage parties

18 Mr Finn Pratt, *Committee Hansard*, 14 November 2005, p. 9.

to negotiate the best and most efficient employment relationship possible in their individual circumstances.

3.35 In addition to federal awards the Work Choices Bill provides for six types of individual or collective agreements: employee collective agreements; union collective agreements; Australian Workplace Agreements; union greenfields agreements; employer greenfields agreements and multiple business agreements. It will be up to employers and employees to determine which of the six types of agreements best suits their circumstances.

3.36 A great deal of the committee's time has been taken up with questioning about agreement processes. There has been much vilification of the concept of Australian Workplace Agreements, even though this instrument is in ever-increasing use across a wide range of jobs, from the most basic casual position to senior executives. Further, it is the view of Coalition Senators that well after the bill is passed, the predominant form of workplace agreement will remain union collective agreements.

3.37 Critics have complained that the new lodgement process, whereby agreements will take affect on lodgement with the Office of the Employment Advocate (OEA), will lead to agreements being made which contain terms lower than those in awards or which are not agreed to by employees.. To ensure the veracity of the agreement, a statutory declaration will be required to be lodged with it attesting that the agreement was negotiated in compliance with the law. The statutory declaration will replace the current slow, complex and legalistic certification and approval process. It will be an offence to provide false or misleading information in the declaration and significant penalties will apply. Changes contained in the Work Choices Bill will make the current process-driven system of agreement making far easier for all participants, while ensuring that agreements are genuine and accord with the legislation.

3.38 The process for varying or terminating agreements will be similar to that for lodging new agreements. Agreements will be able to be extended (up to a maximum of five years), varied or terminated where agreed between the employer and employee. A penalty regime will apply where agreements are varied or terminated without the consent of employees.

3.39 Agreements made under Work Choices that have passed their nominal expiry date may be terminated by any party to the agreement giving 90 days' written notice lodged with the OEA. If an employer terminates the agreement by 90 days' written notice, they can provide voluntary undertakings to their employees about the terms and conditions of employment above the Fair Pay and Conditions Standard that will apply when the agreement is terminated. Such undertakings will need to be in writing and lodged with the OEA. The voluntary undertakings will be enforceable by the Office of Workplace Services.

3.40 When an agreement made under the current system is terminated, the minimum terms and conditions of employment will be those of the Fair Pay and Conditions Standard and the relevant award, which will continue to protect

employees. Agreements made under the current legislation can only be terminated using the current rules for terminating agreements.

3.41 Claims have been made by the Opposition in Parliament and in the ACTU's media campaign that the Work Choices Bill will allow employers to force existing workers to sign Australian Workplace Agreements. This is not the case. The Department submitted that:

> …in respect of the negotiation of AWAs for existing employees, it is against the law for an employer to force an employee to sign an AWA. Those protections that are in the current legislation remain in the bill. It is also against the law for an employee to be dismissed for refusing to negotiate or to sign an AWA.[19]

3.42 In evidence to the committee, Mr Scott Barklamb of the Australian Chamber of Commerce and Industry articulated his understanding of the legislated protections:

> …employees will be protected from coercion. It is patently untrue to claim that employees will be coerced into signing workplace agreements under Work Choices. Protections will be retained and enforced by enhanced advisory and enforcement bodies.[20]

3.43 Despite claims made by some commentators, the committee majority emphasises that certain award conditions will be protected when new agreements are being negotiated. These protected award conditions, which can be the subject of bargaining by the employee/s and employer, are:

- public holidays;
- rest breaks (including meal breaks);
- incentive-based payments and bonuses;
- annual leave loadings;
- allowances;
- penalty rates; and
- shift/overtime loadings.

3.44 These award conditions can only be modified or removed by specific provisions in the new agreement. If these award conditions are not specifically referred to in the new agreement, these awards will continue to apply, and will not be lost to the employee. If employees and employers are satisfied with the relevant award conditions relating, for example, to public holidays and meal breaks and if they do not want to change these arrangements in the agreement they negotiate, the agreements would not include clauses on public holidays and meal breaks and would not contain a

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19 Mr John Kovacic, Group Manager, Workplace Relations Policy Group, Department of Employment and Workplace Relations (DEWR), *Committee Hansard*, 14 November 2005, p. 7.

20 Mr Scott Barklamb, *Committee Hansard*, 15 November 2005, p. 39.

clause to say that the agreement expressly excludes or modifies the conditions from the award. Conversely, agreements that want to exclude or change these protected award conditions must expressly state that the agreement intends to modify or exclude the relevant award conditions dealing with those matters.

3.45 States will continue to declare public holidays. In addition, the provisions in the bill reflect the Government's public comments that public holidays are ssacrosanct'. In addition, there are specific provisions of the bill (subsection 90G(2)) which provide that if employees would have worked on a particular day, had that day not been a public holiday, they must be paid at least the relevant rate of pay for each hour they would have worked. This will underpin workplace agreements and apply to all employees. Further all employees covered by new agreements will receive ward penalty rates for working public holidays unless the agreement explicitly modifies or removes them.

The rights of vulnerable workers

3.46 According to opponents of workplace reform, vast numbers of employees stand to receive lower wages and entitlements as a result of the Work Choices changes. Government party senators believe, on the basis of a reading of the legislation, that these assertions are baseless and that clarification is required of the many protections for vulnerable workers that are included in the Work Choices Bill.

3.47 Much criticism of the Work Choices Bill is based on the premise that employees are unable to negotiate effectively for themselves and that vulnerable groups of workers such as outworkers or young people will be at risk of exploitation. These criticisms are based on the false assumption that the majority of employers are oblivious to the needs of their employees, whose satisfaction is crucial to the success of a business.

3.48 The ability for workers to negotiate satisfactory wages and conditions is bolstered by the strong demand for labour which has characterised the economy since 1996. The committee heard from a number of employer groups that they were unable to locate sufficient employees to meet demand. For instance, Mr Christopher Platt of the Australian Mines and Metals Association (AMMA) had this to say to the committee in regard to circumstances in his industry:

> I have not seen any evidence whatsoever of competition driving wages down. In fact, I was on a workplace earlier this year—it was a construction site—where the peggy, who is responsible for keeping the sheds clean, making sandwiches and basically just keeping the guys happy, was on $100,000 a year. I was in Newman some months ago and there was an advert for a boilermaker at $38.50 an hour. I have not seen competition in the mining industry drive wages down. In fact, it is the reverse. We have difficulties in getting enough skilled employees and it is a worker's market. If you are not rewarding your employees and providing them with an appropriate environment, they will be gone.

3.49 Mr Corish from the National Farmers Federation also made the following point:

> **Senator Joyce** – Do you pay any of your employees the award or do you pay them all above the award?
>
> **Mr Corish** – In our own case, under our AWA system, they are all paid above the award.
>
> **Senator Joyce** – Do you think you would have any chance of employing someone if you offered them the award? I know that around St George you would not have a hope.
>
> **Mr Corish** – I can assure you that the chances of employing someone based on the award or at the award would be very slim, because there are opportunities for them elsewhere to get above the award.

3.50 The committee acknowledges that supply and demand factors in the labour market affect each industry differently, but the principles apply equally. It is in no employer's interest to neglect the work satisfaction levels of employees in the kind of labour market that exists now, and into the future.

3.51 This strong labour demand coupled with short supply can only result in higher wages and growth in workforce participation, which is promising for those seeking work, as well as for those seeking an improvement in their pay and conditions. It also renders improbable the danger to workers put about by opponents of the bill. As the AMMA told the committee in an earlier inquiry into workplace agreements:

> It is all well and good to say that the employer has the capacity to dictate in the same way that you have the capacity to do that for a new employee with an AWA but, if you do not pitch your job offer correctly, no-one is going to take it.[21]

3.52 As the SDA told the committee:

Senator Joyce—Thank you very much for coming in today and for your submission. You have a very strong union. What do you see as your role after this legislation goes through? What do you see would be the role of the union then?

> **Mr de Bruyn** – I think the union will continue what it has always done—that is, to negotiate with employers for the wages, working conditions and job security of employees and get as many agreements as we can; to represent employees at the workplace in terms of any grievances, issues or questions they put to us; and to go out there and invite employees of a company to join the union and then invite the employees to elect the delegates and then train the delegates—do all the things we are doing now.

3.53 Nonetheless, the committee recognises that the ability to bargain effectively is not shared by every employee. Workers will be able to appoint a bargaining agent to

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21 Mr Christopher Platt, *Committee Hansard*, Perth, 25 October 2005, p.51.

negotiate on their behalf. This agent could be a friend, a relative, a union representative or a professional bargaining agent. It should not be for the committee majority to suggest that unions have an important role to play in representation of employees in negotiations of AWAs. The rights of unions are guaranteed by legislation and it is up to them to work for the recruitment and trust of employees they consider most vulnerable in making workplace agreements.

3.54 The Work Choices Bill also provides a comprehensive set of terms and conditions for those workers who find themselves, for whatever reason, unable to strike a suitable bargain with their employer. The Australian Fair Pay and Conditions Standard guarantees a floor under which wages and conditions of every employee covered by the federal system (whether by award or agreement) must not fall. Many such workers will be employed under an award classification, which will usually offer significant improvements on the pay and conditions under the Australian Fair Pay and Conditions Standard, and which will be streamlined to bring about easier access and understanding for employers and employees.

3.55 Importantly, the Australian Fair Pay and Conditions Standard is an objective test; it refers to a quantifiable wage, and actual leave and other conditions. While opponents of the Work Choices Bill have criticised the removal of the 'no disadvantage' test which currently forms part of the industrial system, they fail to acknowledge the shortcomings which are inherent in the subjective, complex, legalistic and arbitrary 'no disadvantage' approach. These include significant difficulties for parties to the agreement, as well as the AIRC, in determining whether an agreement passes the test. While in some cases, conditions agreed to by parties are clearly superior to those offered by the relevant award, many other cases involving trade-offs of differing conditions, are not as clear-cut. This leads to administrative delay in implementing agreements which is associated with uncertainty and lack of focus in the workplace on the outcomes sought by the employer.

3.56 The ineffectiveness of the no-disadvantage test is also evident in situations where a bargained agreement reflects all parties' desire to substitute certain award entitlements with greater benefits in other award or non-award areas, such as, flexible working arrangements. The application of an inherently subjective test can bring about real disadvantage for some employees, in derogation of its core purpose.

3.57 Specific safeguards exist for the protection of employees who may be vulnerable due to their level of negotiating ability and market demand for their skills. These include, for example:

- The requirement that employers provide a consideration period of at least seven days before seeking employees' approval of an agreement.
- The requirement that employers provide an information statement from the Office of the Employment Advocate (OEA), ensuring that employees have information about the agreement making process and stipulating employee rights in relation to advice and assistance about agreement making from the

OEA. It will include the date and method of the vote for an employee or union collective agreement.

- Financial penalties on those who don't meet the procedural requirements for agreement making. A broader range of remedies will be available against any employer who lodges an agreement without obtaining employee approval, and against anyone who engages in false or misleading conduct, coercion or duress during the agreement making process. The sanctions will include compensation, financial penalties and injunctive relief.
- The availability of the OEA to provide advice to both employers and employees on agreement making. This service will be free and is similar to its current functions of providing advice and assistance to employers and employees on their rights and obligations. Appropriate advice will be provided to young people, and those from a non-English speaking background. Advice from the OEA would not replace or prevent employees and employers seeking their own legal advice and assistance.
- Employees retaining access to their union representative and to the right to appoint and consult with a bargaining agent. The bargaining agent will be able to assist in the negotiation process and act on the employee's behalf in relation to an AWA or a collective agreement.
- Employees under 18 who enter into an AWA will require the approval of a parent or guardian before the agreement can be lodged. It will be unlawful to dismiss a young person for refusing to consent to an AWA.
- Claims against anyone who breaches the requirements above will be able to be lodged with the Office of Workplace Services (OWS). The OWS will investigate the complaint, and if it believes the complaint is genuine, the OWS will prosecute for a breach of the Act.
- The Office of Workplace Services will increase the number of workplace inspectors from 90 to 200 who will work as both inspectors and also as advisors to employees and employers on their rights and obligations. The Office of Workplace Services will be a 'one stop shop' to ensure employees and employers know their rights and obligations and that these are fairly enforced.

3.58 These protections aim to ensure that employees' approval of the agreement is genuine. There will also be protections in the agreement making process to ensure that complaints are genuine.

3.59 The bill also prescribes a maximum number of 38 ordinary hours which may be contained in agreements, and awards after the transitional period. While employees are expected to work reasonable additional hours, under the Fair Pay and Conditions Standard, employees can refuse where to do so would be dangerous, or where the employee's personal circumstances would not allow it.

Implications for the work-life balance

3.60 The suggestion that the Work Choices Bill changes would see employees compulsorily lose recreation time with their families and friends is wrong. The bill actually seeks to improve on the very marginal gains made by awards and collective agreements in achieving a work-life balance. Attempts in awards and collective agreements to rectify the imbalance were described by the EWRE references committee in its Workplace Agreements inquiry as being a 'relative failure'.[22]

3.61 The Work Choices Bill offers employers and employees many of the opportunities needed to strike a better balance between work and family. The increased use of AWAs allows employers and employees to negotiate face to face on their respective needs, and to arrive at a mutually beneficial arrangement which is unavailable through most collective agreements and awards. For instance, it may provide for working mothers to take time off during school holidays, or for parents sharing care of their children to more effectively juggle time. Indeed, it might be argued that attempts to build flexibilities into many awards have resulted in the overly elaborate system with which parties are currently faced. Such complexities usually result from having to have such flexible arrangements approved by way of complicated processes.

3.62 Further, claims that the bill will widen the wages gap between men and women have no foundation, particularly as the bill includes provisions to ensure women are protected from pay discrimination and receive equal remuneration for work of equal value.

3.63 The Fair Pay and Conditions Standard provides full time employees with comprehensive leave entitlements, including paid personal, carer's, and compassionate leave, as well as up to one year's leave after the birth or adoption of a child. New parents may return to the same job, or one with identical terms and conditions. A new entitlement of two days unpaid leave for unforseen circumstances is available to employees.

3.64 Importantly, an entitlement to four weeks of annual leave remains. It has been claimed by some opponents to reform that employers will force employees to 'cash out' half of the annual entitlement, leaving employees with only two weeks leave. Such claims conveniently ignore the fact that workers are already entitled to cash out their annual leave in its entirety if they so desire.[23] Critics also ignore express provisions in the bill which allow cashing out of leave solely at the request of the employee, and prohibit coercion by employers to do so.

3.65 The provisions of the Fair Pay and Conditions Standard are based on current entitlements in the WR Act and cannot be bargained away during negotiations. Many

22 EWRE Workplace Agreement report, October 2005, p.58

23 Ms Cath Bowtell, *Committee Hansard*, 16 November 2005, p.16

awards will already contain more generous entitlements than those contained in the Fair Pay and Conditions Standard, and these will be carried over to the new system. Parties seeking a workplace agreement are also at liberty to agree on additional entitlements.

3.66 Baseless scaremongering campaigns have also implied that workers will risk losing their jobs if they are unable to accept extra shifts at short notice. This is a fallacy, as a representative of the Department of Education and Workplace Relations demonstrated:

> There are presently provisions in the Workplace Relations Act which make it unlawful to terminate someone's employment on the basis of family responsibilities. Those provisions will remain in the act. They are untouched by this bill.[24]

Implications for training

3.67 Some critics have made claims that the provisions of the Work Choices Bill will have negative effects on training and apprenticeships. This is not the case. Rather, the ability of the Fair Pay Commission to set trainee and apprenticeship rates where there is no current classification under an award will remove barriers to implementing new types of apprenticeships and attracting more apprentices to areas of skills shortage. At present, award classifications and payments for new types of apprenticeships must be set through an application to an Industrial Relations Commission. If a union does not agree to the type of apprenticeship being offered, they can oppose the application. This delays, and in some cases prevents, the ready supply of skilled labour, and inhibits the healthy growth of industry.

3.68 Government party senators believe that decisions about training apprentices should not be based on industrial considerations, but rather on training considerations. The residential and commercial construction sector, for instance, have a skills shortage, and retention of apprentices is difficult. In a time of skills shortage, it is absurd that industrial awards should continue to contemplate placing quantitative restrictions on the number of building apprentices who can be employed. Apprentices are often trained in a way which is not relevant to the jobs they do. An apprentice, not wanting to be bound to training for a fixed four-year period irrespective of the level of competency that they have achieved, is less likely to complete the term of the apprenticeship. Unions have used the current system to prevent wage structures which facilitate more flexible training arrangements.

3.69 The Housing Industry Association submitted its support for the reforms:

> The Work Choices reforms will assist in the skilling of young Australians. HIA is strongly supportive of the shift for setting trainee and apprentice wages and wages in the awards from the Australian Industrial Relations Commission to the Fair Pay Commission. Training should be unshackled

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24 Mr James Smythe, *Committee Hansard*, 14 November 2005, p. 11.

> from the industrial relations laws. It should suit the needs of those who are to be trained and those who are seeking to employ the trained worker. Training should not be blocked or impeded by industrial disputation through the AIRC to prevent the setting of appropriate classifications.[25]

3.70 The need for shorter, more flexible, and more accessible training has been recognised by the Western Australian Government. The Queensland Government has also recognised the need to move to competency-based training. The reforms contained in Work Choices will provide more flexibility for trainees and apprentices by making restrictions on the range and duration of training arrangements disallowable matters in awards. The legislation also recognises the major gaps which exist for trainees and apprentices under federal and state awards, and the limitation this places on the take-up of training opportunities. In lieu of in-adequate award coverage, the Fair Pay Commission, and other provisions in the legislation, will ensure that model award provisions apply to those undertaking new traineeships and apprenticeships.[26] These reforms will lead to easier access to skills-based training for those entering the labour market, and will provide a platform for easing the skills shortages which currently restrain growth in a wide variety of industries.

Will employees be worse off?

3.71 Myths and legends that workers will be worse off under Work Choices abound. Government party senators believe it is worth reiterating the falsity of many of the allegations that arose in the course of the inquiry process.

3.72 The inquiry was conducted in an environment in which highly hysterical and implausible claims were continually being made by opponents of the bill. There would be insufficient space in this report to do justice to the fully range of extreme claims being made by bill's opponents, however, the following were some of the more absurd that have been made:

3.73 The Leader of the Opposition, Mr Kim Beazley MP, argued that the enactment of the bill would increase the divorce rate:

> It is not good for the economy for workers to be unable to afford their holidays, their relaxation or a decent family life. Divorce is not good for the economy. Divorce is patently bad for the economy.[27]

3.74 A Victorian state Labor MP argued that the bill would provoke circumstances in which women and children could be murdered on picket lines:

> The history books show what happened in America. People on picket lines were murdered. Women and children were killed, and that is the road this Prime Minister wants to take us down. It is a disgrace. [28]

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25 Mr Scott Lambert, *Committee Hansard*, 15 November 2005, pp 9-10.

26 Department of Employment and Workplace Relations, *Submission 166*, p.16

27 *House of Representatives Hansard*, 2 November 2005

3.75 The Transport Workers Union claimed in a radio interview that the bill would increase the road toll:

> Truckies have staged a mock crash at the front of Federal Parliament to highlight their concerns about the IR changes. They fear drivers will be forced to work longer hours to make ends meet. Truck driver Tony Upton is worried the added pressures could see lives lost on the roads.[29]

3.76 The News South Wales Industrial Relations Minister, Mr Della Bosca, claimed in evidence to the committee that the bill contained elements of fascism:

> while the rhetoric of the Commonwealth—both the Prime Minister and the Minister for Employment and Workplace Relations—has been around the issue of taking third parties out of industrial relations and out of the workplace, they have in fact inserted a third party with almost fascistic powers, and that will be the way in which a Commonwealth, as a state, will operate within the system…
>
> **Senator Joyce** – Mr Della Bosca, you just said fascistic powers. You honestly believe that there is a comparison between this and fascism. I think that is an emotive statement and ridiculous.
>
> **Mr Della Bosca** – I think this is emotional territory, Senator, and I hope you apply your emotions and sense of decency to the way you consider this in the immediate future. I am saying that the Commonwealth is attempting to insert itself into the employment relationship in a way which has not been seen in this country before. We have always taken the approach that there is free bargaining between employers and employees, either collectively or individually, and we have always taken the approach that the state, whether it be at a state level or at a Commonwealth level, provides a judicial or arbitral umpire. The Commonwealth is now completely rejecting that approach. It is one that has stood us in very good stead for 105 years, and yes, Senator, it is very close to fascism.[30]

3.77 These claims have formed part of a highly political campaign being run by opponents of the bill, in which factual information has been discarded in favour of political scaremongering designed to frighten voters into voting against the Government. The Secretary of the ACTU admitted as much in the week he announced its campaign when questioned about its objectives:

> **Interviewer**: To bring down the Government?
>
> **Greg Combet:** Well, the longer term position for working people to have decent rights in this country, means that **we need a change of Government**. And we need to change these laws. Now, we've confronted

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28 Bob Smith MLA, Victorian Parliament Hansard, 4 October 2005

29 Tony Upton: This legislation is a direct threat to road safety in this country. (4BC Brisbane, 11am news, Monday, 7 November 2005)

30 *Committee Hansard*, 14 November 2005, pp.33-34

> that position in the past in our history. We're confronting it again now, and we'll work very hard to bring that change about.[31]

3.78 Witnesses have falsely submitted that sick and carer's leave is threatened by the legislation. In fact, a minimum of ten days paid personal or carer's leave is provided under the Fair Pay and Conditions Standard, and unlike now, cannot be cashed out or traded off in an agreement. It was also alleged that employees would be required to submit medical certificates every time they are away from work, even for a short-term illness. The Department has responded that, as is the case currently, there is no universal standard, and that the new provisions were modelled on what currently exists in many federal awards and under Schedule 1A of the WR Act. These came under no criticism from witnesses.[32]

3.79 Witnesses repeatedly alleged that employees would be put under duress by employers wanting them to sign an AWA. Officers from the Department reminded the committee that section 104(5) specifically prohibits duress being applied in connection with an AWA[33]

3.80 It was also alleged that employees will be forced to 'cash out' their annual leave, or at least part of it, and that work-life balance will suffer as a result. In fact, this bill allows for 2 weeks annual leave to be cashed out, but only when the employee instigates the request, and the employer agrees. Currently, the WR Act places no restrictions on leave being cashed out, and parties are free to cash out annual leave in its entirety. This bill actually requires the preservation of at least half of an employee’s annual leave entitlements.

3.81 It was alleged that those seeking to include disallowable matters in their agreements would be sent to jail. The Department was able to clarify this point, too:

> No, it is not correct. The bill provides a prohibition on anyone seeking to include prohibited content in an agreement. That is at section 101M. That section provides that it is a civil remedy provision. If you turn to section 105D, it provides penalties for breach of a civil penalty provision. The breach of that particular provision attracts a civil penalty of 60 penalty units for a natural person or five times that amount for a body corporate. There is nothing in this bill that provides for the jailing of a person for breaching that section.[34]

3.82 The evidence presented to the committee by the ACTU was instructive of the highly misleading arguments being advanced by unions in relation to this issue:

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31 Sunday program, 29 May 2005

32 *Committee Hansard*, 18 November 2005, p.21

33 *Committee Hansard,* 18 November 2005, p.18

34 Mr James Smythe, *Committee Hansard*, 18 November 2005, p.21

> **Senator Nash** – Being a working mother, I am very well aware of needing to spend time with family. I want to revisit the annual leave part of this. Currently we can cash out four weeks annual leave and under the Work Choices bill we can only cash out two. Isn't that an improvement?
>
> **Ms Bowtell –** The **union movement has never supported the cashing out of leave**. It is true that there is no limit under the current provisions on the cashing out of leave, but if you look at the collective agreements compared to AWAs, the cashing out of annual leave is not common in collective agreements. The only arrangements in relation to cashing out that are common in collective agreements are cashing out of excess accrual. In fact, the union movement was involved in a significant case back in the nineties involving a company called Arrowcrest, where we opposed the capacity to cash out annual leave, and we opposed it on public interest grounds. That has always been our view. We were rolled in that case. That has continued to be available, but for additional compensation. But it is not something that unions go out and negotiate. **You see it in AWAs but you do not see it in collective agreements.**[35]

3.83 The evidence advanced by the ACTU omits any reference to numerous collective agreements currently in force which have been negotiated by unions and contain specific provisions to allow annual leave to be cashed out. For example, the *Wespine Industries Pty Ltd CEPU (Dardanup Site) Enterprise Bargaining Agreement 2004* (AG934958) contains the following provision:

> 17. CASHING OUT OF ANNUAL LEAVE
>
> 17.1 It is the intent of the parties that all employees should be encouraged to take their normal annual leave entitlement on an annual basis.
>
> 17.2 Notwithstanding the provisions of sub-clause 17.1, where it is agreed by both parties and where an employee has an accrued annual leave entitlement of four (4) weeks or greater, the employee may apply to take up to two (2) weeks of the accrued annual leave as a cash payment per year in lieu of taking the equivalent time off.
>
> 17.3 An application for cashing out of annual leave must be made and agreed to in writing.
>
> 17.4 Where an employee has 'cashed out" a portion of his/her accrued annual leave he/she is not then entitled to have the cashed out portion as time off at a later date.

3.84 The ACTU's evidence also overlooks the Western Australian industrial relations system, as amended by the Gallop Labor Government, which allows for the 'cashing out' of a portion of annual leave. Section 8 of the WA Minimum Conditions of Employment Act states:

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35 Senate Employment, Workplace Relations and Education Committee, 16 November 2005 – emphasis added

8. Limited contracting out of annual leave conditions

An employer and employee may agree that the employee may forgo up to 50% of his or her entitlement to annual leave under Division 3 of Part 4 if –

the employee is given an equivalent benefit in lieu of the entitlement; and

the agreement is in writing.

An agreement referred to in subsection (1) is of no effect6 if the employer's offer of employment was made on the condition that the employee would be required to enter into an the agreement.

3.85 Parental leave was another area prone to misinformation. The bill preserves parental leave, and adds extra protections. Up to fifty two weeks parental leave, shared between the parents, the right to return to a job with the same terms and conditions, and the extension of benefits to casual workers, are all included in the bill.

3.86 There is a general tendency amongst critics to see employers as inherently untrustworthy and employees as inherently vulnerable. Yet demand for labour is strong, real wages continue to grow, and the changes in the Work Choices Bill will enable productivity increases that will continue to raise the standard of living of employees. Employees are currently in a strong position to negotiate the wages and conditions that best suit them. This position arises from labour shortages at nearly all levels, including unskilled workers. For instance, the National Farmers Federation gave evidence to the committee that due to the shortage of workers in rural areas, many farmers negotiate employment packages with their workers that are well above award rates and provide many extra conditions not accommodated under the award system.

3.87 This situation is common through many industries in many parts of the country. Work Choices will allow more flexibility to incorporate those benefits that the employee wants and the employer wants to provide.

3.88 The interaction between agreements, award rates and the Australian Fair Pay Commission will also ensure that an effective safety net is in place. No employee will have a rate of pay that is lower than a rate they currently enjoy under an award. The large number of workers not covered by awards will also be protected by the provision that ensures the minimum classification wages will never fall below the level set by the Safety Net Review 2005. There is every reason to conclude that workers will enjoy the ability to negotiate improvements to their pay and conditions.