Australian Democrats' Minority Report

Introduction

The Australian Democrats on the whole support the concerns addressed in Labor's Minority Report. We regret that we cannot give the complexity and importance of the *Workplace Relations Amendment (Work Choices) Bill 2005* (Work Choices Bill) the response it deserves, but the Coalition have forced a process and timeline on us that have made it very difficult for us.

The Australian Democrats join with Labor in criticising the way the examination of the 678 page Work Choices Bill has been handled. We agree with their statement that:

> The decision to hold a one-week inquiry into a bill proposing the biggest legislative change to the law regulating workplace relations in Australia in over a century, is a subversion of the democratic process and effective law making."

The Democrats believe that this critical legislation introduces fundamental changes to the industrial relations system which will have major impact on Australians and their families, and will transform six systems into one, against the wishes of the states. Unlike other transference of powers to the Commonwealth under corporations and tax law, this is the first time in the history of the federation that we are faced with a hostile takeover by the Commonwealth of state systems.

The Government is wrong when they say the Senate has previously examined many elements of the legislation such as unfair dismissal, secret ballots, right of entry and cooling-off periods. The Senate has not looked at them in terms of how they apply in the context of this Work Choices Bill, how they apply in state systems, and the consequences for business in state sectors. The Senate EWRE Committee has not looked at them with respect to their interaction, and likely effect with the bill's other provisions.

There were also significant changes to some of the quarantined provisions that the committee could not examine, for example extending the unfair dismissal exemption to 100 employees; and expansion of the definition of the capacity for employers to lawfully dismiss workers for 'operational reasons', which are defined as economic, technological, or structural in nature.

Whether there is cross-party support for legislation or not, the committee process has always been valuable in identifying mistakes, identifying unintended consequences, and improving flawed legislation.

I note that the Minister for Workplace Relations had said that there was little point in conducting this inquiry, because he knows exactly where the Labor Party stands, yet even before the inquiry ended the Government had conceded that as a result of issues raised during the inquiry they would make amendments.

On the last day of the inquiry, Mr Pratt, the Deputy Secretary, Workplace Relations, Department of Employment and Workplace Relations, summarised the areas where the government is considering amendments to the bill:

> Protections for outworkers; when a notice of termination can be given after the nominal expiry date of an agreement; and, as indicated by Senator Abetz at the recent estimates hearing and reiterated during the course of this week, the averaging of hours issue.[1]

There was almost unanimous agreement that the Bill was complex and technical, and that few witnesses, if any, admitted to understanding the legislation in its entirety. The Democrats are concerned that there are other issues, technical mistakes and unintended consequences that the Government and the Senate will miss.

Dr Jill Murray in her submission argued that:

> The risk of unintended consequences is very high. We have already pointed to clauses in the Bill which do not reflect the governments stated intentions…No doubt there are more errors not yet identified.[2]

Similar sentiments were stated by Law Professor, Andrew Stewart on behalf of 151 academics:

> This is extraordinarily complex legislation that is being rushed through parliament before there has been a proper attempt by independent experts to analyse it with anything like the care that it deserves. We understand that the bill is likely to go through. We have attempted in our submission to suggest that it is rushed and, indeed, fundamentally flawed. Nevertheless, recognising the reality that the bill will probably go through parliament in something like its current form and in offering an addition to the formal submission we have put forward, we do want today to highlight some of the more important areas in which the bill might be amended so as to address some of its more serious defects.[3]

The disregard for the Senate as a house of scrutiny may appear remarkable from a Government whose Prime Minister promised to use its numbers wisely and not provocatively. On that basis you would expect executive arrogance or the heady hubris of numbers would not get in the way of good law making. The reality is that the Prime Minister was saying what the Australian public wants to hear, and not what he believes. He intends to use his power decisively and deliberately. He wishes to get it over with precisely because his government is using the power of the state to have their way, to attack the institutional foundations of the workplace, and against ordinary Australians and their way of life.

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1 Mr Pratt, *Committee Hansard*, 18 November 2005, p.54

2 Dr Jill Murray, *Submission 65*, p.8

3 Professor Stewart, *Committee Hansard*, 17 November 2005, pp.39-40

Once the Work Choices Bill has passed then he can use long political acumen and experience to implement it and to shore up its defence.

One good consequence arising from the Work Choices Bill

If there is one good consequence arising from the Work Choices Bill it is that it will force all political parties to recognise that the Work Choices Bill is a radical change. They cannot go on accepting the status quo, but critiquing elements of it. They will each have to reassess their vision and solution for relationships at work in the 21st Century.

This is because with the Work Choices Bill the Liberal and National parties are assaulting the cultural, economic, social, institutional, legal, political and constitutional underpinnings of work arrangements in Australia.

Occasional bitter and protracted fights over the direction and nature of law and regulation governing work and industrial relations in Australia do not contradict the broad social political and governmental consensus there has been in this area. Neither do the many situations where no more than lip-service has been paid to elements of the consensus.

The broad consensus I refer to has been that the standards of an advanced progressive first-world liberal democracy should apply in Australia with respect to wages and conditions and the organisation and management of work.

Much as conservatives and organised capital disliked the movement, there was nevertheless a broad acceptance that the organised collective expression of labour rights through the union movement should be respected and supported.

That broad consensus accepted that our workplace law should reflect the social contract that growing national and individual or entity wealth should be accompanied by rising living standards and a comprehensive safety net for the disadvantaged and powerless in our society. Low or inadequate wages were to be supported by a sufficiently comprehensive welfare system to ensure family stability and sustainability.

Although conservative Australian federal and state Governments have been slippery on these matters, it was expected that our laws should reflect the commitment made as a result of our ratification of international conventions and treaties governing the rights of the working population.

That broad consensus meant that wages and conditions of work should bear the family more than the individual in mind; that governments and parliaments should determine law and regulation, but that enterprises unions and tribunals should determine the detailed content and decisions of workplace relations; that independent specialist tribunals were preferred for conciliation, arbitration and determination rather than the courts; that collective labour and collective capital had primacy over individual arrangements; that statute was the dominant determinant of collective arrangements at

work and common law the dominant determinant of individual arrangements; that industrial relations should be a multiple federal system not a single national system; that it was justifiable to subordinate the economic to the social in the workplace by ensuring the living standards of the worst off should be consciously and deliberately raised; that health and safety and compensation for accidents or negligence should be a primary feature of workplace law.

When I say that with the Work Choices Bill the Liberal and National parties are assaulting the cultural, economic, social, institutional, legal, political and constitutional underpinnings of work arrangements in Australia, I am certain that these two conservative parties are determined to radically alter our work systems and values.

Control of the Senate allows for the exercise of authoritarian conservative power. The Coalition is determined to fundamentally change the Nation. This may not be fully grasped by the backbench but there is no doubt of the Prime Minister's determination.

It is why I have consistently said that this is going to turn into a battle of the Government against the people. In that battle the Prime Minister has the cards heavily stacked in his favour.

He and his Ministers have been successfully using double-speak to conceal the true nature of these changes. 'Small l' liberal words like 'choice', 'flexibility', 'freedom' disguise the heavy authoritarian micro-management and restrictions on collective labour – the unions - and the dismantling of the architecture and infrastructure of our workplace relations system.

They have already shown they will use all the financial and other resources of the state to advertise and 'sell' their policy. Capital – big business and employer organisations in particular – support the heavy re-balancing of a system designed to lift the profit-share at the expense of the wages-share and to give collective capital – the market – primacy. And for those looking for strong media opposition - big business media owners and shareholders have already voiced their support for Mr Howard's proposals.

The counter-argument will need to be put out through advertising, traditional media and other mediums, but in resource terms, opponents of the governments policies are minnows to a shark.

Industrial relations' concepts and law is already complex and not well understood. Australians have grown used to the reality that others translate that complexity into the understood wages and conditions they enjoy. So they do not readily understand that complex statutory changes will have significant and very basic effects on them and their families. It is only when employers start to exercise their new powers detrimentally that full understanding will dawn.

That is not to forecast that everyone will be affected equally or negatively. Labour that is well represented and resourced, or in short supply, will find itself naturally quarantined from negative effects.

The Coalition Government can rely on most Australians not grasping what is happening until long after it has happened. Evidence to the Committee made it clear that the full effects of the legislation will not be felt until after the next election in late 2007. Not only will 25 to 30% of all workers remain under state systems until then, but the transitional arrangements and the continuing validity of many existing agreements that only expire in 2008, means that for large numbers of Australians the effects will only be after the next election. That is what Mr Howard is counting on – that, and the expectation that they will remain in effective control of the Senate for two more elections, after which it will be very difficult for these changes to be reversed.

In a nutshell, the fundamental changes Mr Howard's Government seek to introduce will be the antithesis of many of the previous consensus items that I outlined above. A national system forced onto resistant states; the individual to be fostered over the collective; an individual wage and conditions fostered over the family wage and conditions; disputes going to the courts instead of the tribunals; capital and business given freedom, and labour and unions' rights and freedoms heavily restricted. Unwisely, unprecedented ministerial intervention will replace a sensitively balanced system where politicians were kept at an arms-length from work arrangements and disputes. The safety net shrunk by three-quarters; the withering away of the award; the decline in real terms of the minimum wage; the loss of most statutory conditions.

From hostile Coalition questions to academics and union officials in the Inquiry it has been obvious that there is also a strong political motive in play. The Coalition are fierce political competitors and will do whatever they can to weaken their main competitor – the Australian Labor Party. Consistent references in Parliament make it clear that the Coalition see the Union movement as politically synonymous with the Labor Party. Whatever the legitimate criticisms that can be made about the relationship of parts of the union movement with Labor[4] it is immoral to target the interests of working Australians for political gain.

It is apparent that the Work Choices Bill will disadvantage the ALP, the Coalition's main competitor. There are several elements of the Bill that will ultimately weaken the union movement and quite possibly see a decline in union membership. Given that unions are one of the ALPs largest donors, any reduction in union membership will impact financially on the ALP, as well as negatively affecting their organisational and political campaigning ability.

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4 See for instance the Australian Democrats' Supplementary Remarks to the Joint Standing Committee on Electoral Matters Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto: September 2005.

The startling thing is how economically reckless the Coalition are being. Their economic argument is faith-based but boils down to this – lower wages, many fewer conditions, more power to employers all equal more jobs. That is the mantra, endlessly repeated in various ways, but unsupported by credible empirical evidence.

If it deserves to be taken seriously as a proposition, it needs to be supported by specific evidence. The need for further IR reform might indeed be apparent, in general, but the merits of this specific proposal have not been persuasively argued.

The Australian Democrats have unfavourably contrasted the Coalition's GST and New Tax System with the Coalition's unconvincing workplace relations campaign. The GST was the centrepiece of the 1998 election campaign. In contrast, the Coalition's radical IR agenda was a sideshow in the 2004 election, hidden by the interest-rate smokescreen.

Very detailed Government documents argued the case for the GST and the New Tax System, complete with all the modelling, tables, graphs and cameos that were necessary. In contrast this radical IR assault on Australians working lives got a six-page announcement in May, and has been lightly amplified since.

The GST was agreed to and supported by the States. This IR package is opposed by them. The GST's economic and financial benefits were credibly contrasted to a failing federal/state funding system. In contrast, the Coalition agrees our present IR system is not broken and that it makes a very positive contribution to Australia's economy and society. The Coalition agree that Australia now has lower unemployment, low interest rates, higher productivity, higher real wages and very significantly lower levels of industrial disputation than in the past. They agree the system works well overall. Yet amazingly, the Government proposes to trash the current *Workplace Relations Act* (WRA). On the evidence before me, the Work Choices Bill is likely to threaten our economy, productivity and society. For what?

The Australian Democrats' Vision for Australia's IR system

The core mission of a political party is to offer an alternative vision to other political parties on key public policy issues. I would be derelict in my duty if I merely criticised the new Coalition policy without offering the Australian Democrats alternative.

In summary, the Australian Democrats believe that, vital as it is, work is not just about economics, productivity, efficiency, and competitiveness – it is a fundamental feature of our nation-state as a society, our way of life, our place among nations.

The Democrats recognise that Australia has to keep reacting to economic, trade, technological, domestic and global realities. We recognise that society, enterprise and work are continually changing. We believe that changes to our system are necessary, but they should be contiguous and in continuity with our social and cultural heritage, and our values. Foremost among those is the 'Fair-Go' principle.

The Democrats workplace vision requires that to make it happen, this vision should be negotiated between commonwealth and state governments, industry, union, and employee representatives.

The Democrats support and propose a workplace relations system as follows:

- a **unitary single national IR system** that is negotiated between the states and federal government, to provide simplicity and common rights and obligations, and to improve efficiency, domestic and international competitiveness, and productivity;
- a well-resourced **national independent workplace relations regulator** to properly regulate and oversee a national unitary system. Other sectors of the economy have regulators like ASIC, APRA, the ACCC – and so should work arrangements;
- a **strong, independent well-resourced and principled tribunal** in the Australian Industrial Relations Commission (AIRC). This umpire must facilitate agreement-making at the enterprise, as well as overseeing the industry-wide award system. It must conciliate, arbitrate and facilitate mediation in specified circumstances; it must settle industrial disputes; it must maintain the minimum wage, and in doing so it must take into account the interests of the unemployed, protect the interests of low paid workers and the disadvantaged, and protect small employers in a weak bargaining position. We believe that the capacity of the AIRC should be improved not weakened;
- the **1996 *Workplace Relations Act*, as amended to June 30 2005**. We believe that while this Act could be improved, but overall it works well and does not need radical change. We believe the federal system as it currently stands should be left intact, with only moderate change as the need arises;
- genuine bargaining in good faith;
- a **genuine safety net** underpinned by an award system that can be altered through the AIRC;
- **collective and individual agreements** including AWAs, but AWAs must be underpinned by the safety net of a no-disadvantage test against the award, negotiations must be genuine, and there should be mechanisms to ensure that employees are not coerced. We would support tightening the current AWA system;
- **freedom of association** and the right to join a union or employers' organisation, without duress or compulsion;
- **collective bargaining as an inalienable right**, and the legitimate role of unions in protecting the interests of workers who wish to be represented by them; and,
- the **right for all employees to be protected from (tightly defined) unfair dismissal.**

In trying to quell the genuine concern of the public over these industrial relations changes the Government often draw a comparison with their 2005 plan with their 1996 proposals. They say the strong concerns expressed then were unfounded and that 'Australians clearly benefited with more jobs, higher wages and a stronger economy.' In John Howard's words, 'the sky did not fall in.'

The sky did not fall in because of the intervention of the Australian Democrats. The reason the 1996 reforms worked is because of the Democrats success in moving 176 amendments that ripped the ideology out of that 1996 package, and made the law socially acceptable while keeping it economically effective.

It is a nonsense to suggest (as some do) that IR has stood still since then. No fewer than 18 significant amending bills have passed the Senate since then. We have used our balance of power and our honest broker role over the last 9-plus years, passing sensible law changes, often after moderating the original aggressive proposals. Although we pride ourselves on not being beholden to unions or business, we have been sympathetic to the legitimate and practical needs of both. We have operated on the values and principles of progressive liberal democracy, and those values and principles have stood us in good stead.

As a result the Democrats can rightly claim to have played a key part in ensuring that federal workplace relations law has made a major positive contribution to Australia's economy and importantly Australia's society. Australia now has lower unemployment, low interest rates, higher productivity, higher real wages and very significantly lower levels of industrial disputation than in the past.

The Democrats are not opposed to IR reform; so long as it is moderate, steady, considered and fair, and that it delivers productivity efficiency and competitive gains that accord with the values and goals of a civilised first-world society.

The Democrats support an industrial relations system that operates within a framework that takes into account social impacts as well as economic considerations. In this context we support a system that provides for the orderly regulation of employment practices in a way that maximises and balances productivity, jobs growth and job security while ensuring fair and just pay and conditions and treatment. We support a system that builds on the strengths of Australian values – the fair go, an egalitarian society, one that fosters equality community and mateship, and one that rewards enterprise and ‘having a go’.

The Australian industrial relations system has been built on a foundation of social justice and fairness, centred around a safety net of pay and conditions to protect the most vulnerable in our society. This foundation has fostered our egalitarian society.

The 1907 landmark Harvester case which instituted a basic wage for men, established an industrial relations system in recognition of the need to legislate the welfare of 'family' over profits and productivity. Harvester placed the welfare of the family at the centre of social and economic policy from the beginnings of Federation.

I remain unashamedly of the view that the basic wage and conditions must allow a decent living standard for a family, and that that task must not be left to the welfare system, whose safety net can never fully compensate for a family standing on its own feet through work.

The AIRC has played a critical role in maintaining this philosophy. This sentiment was reflected in the submission by the 151 academics:

> Australia's industrial relations system has also had as a central plank an independent umpire with the capacity to weigh up arguments about industrial standards (such as minimum wages, work and family provisions and other general standards) and to arbitrate upon them with due attention to the research evidence and fairness.[5]

In particular the AIRC has played a critical role in protecting the low paid and those with weak bargaining power.

Australia's industrial relations system has been modified overtime to meet new social, technical and economic conditions. However, within these changes the system has maintained the core framework: the provision of a safety net to protect the vulnerable, and that balances community expectations and individual circumstances.

Any reforms must build upon the strengths of the current Australian system. Elsewhere I have written extensively on the subject. Suffice to say here that the Democrats support a unitary single national IR system that is negotiated between the states and federal government, to provide simplicity and common rights and obligations, and to improve efficiency, domestic and international competitiveness, and productivity.

We have a small population, yet we have nine governments and a ridiculous overlap of laws and regulations. We need common human rights across Australia. We need easily administered and understood rules and laws that support efficient, competitive and productive enterprise. We need to end the complexity and confusion of enterprises having to deal with six systems across state borders, or even of one enterprise in one state having two right of entry regimes, two unfair dismissal regimes, two award systems, all in the same business.

But in introducing a single national unitary system we need safeguards that a particular federal government cannot pervert the system for ideological reasons. That is why a unitary system should be created in consultation with the states and by referral of powers to the Commonwealth by the States.[6]

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5 151 Australian industrial relations academics, *Submission 175*, pp.6-7

6 Further information on why the Democrats support a national unitary system can be found at http://www.democrats.org.au/docs/2004/WORKPLACE_RELATIONS_A_Unitary_System_of_Industrial_Relations.pdf

Once again, elsewhere I have written extensively on the subject. Australia needs a well-resourced national independent workplace relations regulator to properly regulate and oversee a national unitary system. Other sectors of the economy have regulators like ASIC, APRA, the ACCC – and so should work arrangements.

The AIRC needs to be complemented by a National Regulator with specific powers of monitoring and enforcement. There needs to be better enforcement of and compliance with the WRA. Unions and employers need help to ensure that people do not defy court and commission orders, and ignore awards and agreements. Like competition law, tax law, finance law, and corporations law - that each have their own national regulator - IR should too.[7]

In IR the existing regulators are federal and state departmental inspectorates, the employment advocate, state and federal taskforces, and so on. These diverse regulators are diffuse, dispersed, under-resourced, ineffective, and importantly, insufficiently independent. One properly resourced national regulator to enforce national workplace law would be a significant improvement on the existing situation. The Office of the Employment Advocate should be abolished and its tribunal-like powers reconstituted in the AIRC and its regulatory powers in a National Regulator.

The Democrats believe in a strong, independent well-resourced and principled tribunal in the AIRC. This umpire must facilitate agreement-making at the enterprise, as well as overseeing the industry-wide award system. It must conciliate, arbitrate and facilitate mediation in specified circumstances; it must settle industrial disputes; it must maintain the minimum wage, and in doing so it must take into account the interests of the unemployed, protect the interests of low paid workers and the disadvantaged, and protect small employers in a weak bargaining position. We believe that the capacity of the AIRC should be improved not weakened;

The capacity of the AIRC needs to be improved, specifically:

- provide the AIRC with powers to make 'good faith' or genuine bargaining orders;
- increase its capacity to resolve disputes on its own motion and increase resources to ensure timely resolution of disputes; and,
- remove limits on some of the subject matters on which the AIRC can make determinations.

The Australian Democrats strongly believe that a mix of agreement making - collective bargaining (union and non-union), collective awards and individual agreements provides necessary flexibility in a modern economy, but all agreements

7 See Australian Democrats Minority Report, *Beyond Cole: The future of the construction industry: confrontation or co-operation?,* Employment, Workplace Relations and Education References Committee, June, 2004, pp.203-66

must be fair to both employees and employers, and there must be an adequate safety net for employees' wages and conditions.

The Democrats' view is that collective agreements and awards under the existing Federal Act are often better for workers overall than individual agreements, but we recognise that individual agreements are a common[8] and necessary part of working life, and statutory provision must be made for them.

The following should be in place to support the agreement making system:

- an awards system that is comprehensive, up to date, simplified and useable; overseen by the AIRC;
- all agreements (collective and individual) be underpinned by awards;
- a national well resourced independent regulator be established to monitor compliance with industrial laws and agreements;
- a requirement for employers and employees to bargain in good faith be included in the Act; and,
- genuine choice is built into the system.

The Democrats support a safety net that reflects and keeps up with community standards. To this end the Democrats support an awards system that is comprehensive, up to date, simplified and useable, overseen by the AIRC.

Underpinning this system is the need to update standards to deal with important evolving issues, including the need to:

- develop a fairer balance between work and family responsibilities;
- properly regulate redundancies and job shedding;
- address the growth in precarious and atypical employment – which has meant that increasingly, legitimate workers are being excluded from conditions such as security of employment, leave entitlements, superannuation and recourse to the unfair dismissal system - by providing a definition of employee in the Act; and,
- ensure reasonable hours and measures that prevent employees working consistently long or unreasonable hours, except in emergency situations.

The Democrats support the maintenance of the minimum wage and the AIRC to maintain minimum wage decision making. The Democrats also support an increase in

8 A large number of agreements are individual agreements, with 31.2 per cent of all forms of agreement making being unregistered individual agreements and 2.4 per cent being registered individual agreements (AWAs).

the tax-free threshold to at least $10,000[9] and indexing the minimum wage. This would also take the pressure off the AIRC as having the sole responsibility of increasing the disposable income of the working poor.

The Democrats support work of equal value and would like to see a key role played by the AIRC, and the Commonwealth funding of test cases to identify means of closing the male/female wage gap.

The Democrats support a fair balance between the rights of employers and employees (irrespective of the size of the employer) on unfair dismissal claims, with low cost, non-legalistic and prompt resolution of disputes. We believe that unfair dismissal should be tightly defined and have long been critical of lax state unfair dismissal regimes.[10]

The Democrats support freedom of association and the right to join a union or employers' organisation, without duress or compulsion. We view collective bargaining as an inalienable right, and the legitimate role of unions in protecting the interests of workers who wish to be represented by them. We support the legitimate role of unions in protecting workers, in particular their role in bargaining on behalf of workers, protecting rights and conditions and occupational health and safety.

We believe a strong case can be made out for non-members paying 'fee for service' if they wish to work under conditions negotiated by a union or employers' organisation.

Why We Oppose the Work Choice Bill

> It is overly complex, too punitive, one-sided and interventionist.[11]

No economic justification

The 151 Australian industrial relations, labour market and legal academics cited lack of evidence as one of their key concerns with the Bill:

> The Bill is based on a series of premises about the impact that further individualisation of the employment relationship will have on productivity and, through it, on employment and national welfare. These assumptions, while repeatedly asserted, are not supported by evidence, and are contradicted by much of the empirical evidence that is available. Fundamental changes such as these should not be made simply as a matter

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9 See Senator Andrew Murray, 'Tax-Free Thresholds – a tax issue we must confront', Opinion Piece, October 2005: http://www.andrewmurray.org.au/documents/441/Tax-free%20thrshlds%200905.doc

10 See Senator Andrew Murray, 'Federal Unfair Dismissals: A Briefing Paper', September 2004: http://www.andrewmurray.org.au/documents/403/UFD%20Briefing%20Note%20Sept%202004.pdf

11 Dr Cooney, *Committee Hansard*, 18 November 2005, p.8

> of faith. Indeed, the available evidence indicates that, if anything, the longer term impact on labour productivity will be perverse.[12]

The Democrats agree with the concerns raised by the academics cited above and by many of the other submissions to this inquiry.

It must be remembered that the sweeping 1993 and 1996 IR reforms occurred at a time when the economy needed picking up. We then had high unemployment, low productivity, high inflation, and high interest rates.

This is not the case now. Australia is doing quite well. In last year's Global Competitiveness Report, Australia was ranked 14th of 104 countries. In terms of competitiveness Australia has one of the lowest Government debts in the OECD; we have a relatively low unemployment rate, low interest rates, and low inflation.

The Government argue that Australia's labour market is over regulated and the OECD and IMF have encouraged the federal Government to deregulate the labour market. There is the obvious caution that the chief advisers and suppliers of information to the OECD and IMF organisations on these matters is the Australian Government. However, while the OECD and IMF may make a valid case for continued reform, as indeed do the Australian Democrats, they make a general not specific case.

In any case, Professor Petz argued that much of the assertions from OECD and IMF are not based on empirical research:

> There is reference to evidence from the IMF, the OECD and the Reserve Bank. A lot of the comments from these bodies are not actually based on empirical research, particularly the annual economic surveys that are done by the OECD or the IMF. They are not based upon original empirical work within those bodies, so whatever claims are made in there are really more matters of faith. What happens with those reports is that the OECD officers or the IMF officers come out to Australia and talk to a few people—mainly from Treasury - and then they write a report that is not unlike something that Treasury would be writing if it were not writing under its own name.[13]

It is also worth noting that the February 2005 OECD Economic Survey said that 'OECD studies consistently rank Australia as one of the countries with the least restrictive employment protection legislation.' In other words, Australia's IR system is employment friendly. This is contrary to claims that Australia's market is too highly regulated and needs radical deregulation.

Professor Peetz also argued that many of the other studies cited by Australian Chamber of Commerce (ACCI) in their submission talked about broader labour market reform but did not provide empirical evidence to support particular provisions in the Work Choices Bill.

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12 151 Australian industrial relations academics, *Submission 175*, p.7

13 Professor Peetz, *Committee Hansard*, 17 November 2005, p.46

The Democrats know about the *assertion,* but what *evidence* has the Government produced to justify radical change to the federal system?

In contrast, the GST had huge documents, graphs, tables, cameos, and substantive arguments offered to justify their case, and a non-Government controlled Senate subjected the New Tax System to five months of rigorous examination, and produced four reports from four committees. As a result the package passed by the Senate was much improved to reflect community needs.

In this case we've got a seven-page announcement in May, a 68 page book of rhetoric in October, a 20 day Senate review process, and the Prime Minister and various other ministers popping up every now and again to beat out bushfires.

Where is the modelling? Where are the cameos, graphs and tables? Where is the empirical evidence that radical change is needed?

The only item of reform that the Coalition have even tried to make an economic link for is the exemption of business with less than 100 employees from unfair dismissal claims. Even this argument is fatally flawed.

We have over 10 million employed, 1.7 million jobs have been created this decade, and there are only 15 000 unfair dismissal applications under the state and federal unfair dismissal regimes. Those 15 000 would reduce by a third if lax state systems were replaced by the tight federal system.

The most comprehensive research undertaken to date by Senior Lecturer Paul Oslington and PhD student Benoit Freyens at the University of NSW School of Business found that ending unfair dismissal laws for employers with fewer than 100 employees would create only 6,000 jobs, not the 77,000 claimed by the Howard Government.

In the 2001 Hamzy case the expert witness for the Federal Government, Professor Mark Wooden, agreed with the statement that "the existence or non-existence of unfair dismissal legislation has very little to do with the growth of employment and that it is dictated by economic factors."

In justifying the IR changes the Government argues that to be competitive we need to be more like the UK, US and NZ. Yet the Government refuses to compare Australia with other OECD nations like the Scandinavian countries.

Of course the values of one country can not easily be transferred to another. Contrast the aggressive anti-union nature of many Australian enterprises. Denmark for instance is heavily unionised. The Confederation of Danish Industries refers to unions as their 'social partners' and are strong supporters of the values represented by that phrase.

The economic evidence shows that the Scandinavian countries are actually out performing the UK, US, Australia and NZ. The Scandinavian countries have higher

regulation of IR than Australia, but they are better at creating jobs, are more productive and are wealthier than we are.

On the World Economic Forum's 2005 Global Competitiveness Ranking, Australia is ranked the 10th most competitive country in the world compared to Finland No 1, Sweden No 3, Denmark No 4, Iceland No 7, and Norway No 9.

On average the Scandinavians do better on jobs than Australia. Australia's unemployment rate is 5%, Norway's 4.6%, Sweden's 6.3%, Denmark's 4.8% and Iceland's 3.0%. Norway Iceland and Sweden all have lower long-term unemployment rates than Australia.

If Australia wishes to learn from other countries, or to adopt some of their workplace values, Scandinavia seems a more attractive workplace model than countries like the USA, whose industrial relations policies have contributed to much larger numbers of working poor, higher income inequality, higher levels of crime, and major social problems.

Rather than be of benefit, there is evidence from New Zealand, and the Victorian Kennett and Western Australian Court Governments, to suggest that the similar Work Choices Bill reforms will have a negative impact on disadvantaged Australians and on Australian society overall.

By the end of the 1990s, New Zealand was a less equal society than ever before, in terms of income distribution, it had a lower full-time participation rate, lower real wages, and flatter productivity, with a diaspora of up to a quarter of its population, many of them in Australia earning considerably higher rates of pay than they could at home.[14]

The Victorian Government in their submission argued that the participation rate was likely to decline under the Work Choices Bill:

> Victoria's evidence is that workers' wages will decrease steadily over time, as will their living standards. Work and family has been a high priority for the Victorian Government and this submission details the extent to which Work Choices will impose hardship on family life. Without the award protection governing how ordinary hours of work are to be managed including minimum notice periods before changes in hours operate, notice of roster changes etc, working families will be at the mercy of their employers. Instead of responding to the needs of the labour market, these industrial relations changes will lead to declining participation rates. Poor pay and conditions are not incentives for youth, older people capable of working, and women interested in re-entry to join the workforce. Declining wages and conditions are not incentives for workers to stay in the

14 151 Australian industrial relations academics*, Submission 175*, p.22

> workforce. In a time of increasing need for workforce participation, Work Choices may effectively reduce participation rates.[15]

A number of submissions asserted that productivity would in actual fact decrease as a result of the Bill:

> By reducing the number of allowable matters in awards and by permitting employers to reduce wages and conditions, the Bill will permit cost minimization strategies in which employers are unlikely to invest in firm-specific training or upgrade their capital stock. While labour utilization rates might increase as net unit labour costs fall, productivity is likely to fall as a consequence of reduced capital investment. The Bill thus provides incentives for low wage and low skill employment and an increase in the labour intensity of production. This is the way to reduce productivity growth in the long term.[16]

The Democrats believe that this Bill is based on old ideology, an ancient dislike of unions, and not enough of the proposed changes are based on real evidence or on widespread problems, and in actual fact could have a negative effect on the economy.

Philosophically flawed

Unless an economy is genuinely in dire straits and needs radical surgery, economic reform is not more important than social cohesion. Both are important. Academics have long argued that the preservation of social capital is crucial to economic and social success in the long run.

In their submission the Australian Catholic Commission for Employment Relations in citing a speech from Pope John Paul II, argued that human rights must take precedence over the market:

> It would appear that, on the level of individual nations and of international relations, the free market is the most efficient instrument for utilizing resources and effectively responding to needs. But this is true only for those needs which are "solvent", insofar as they are endowed with purchasing power, and for those resources which are "marketable", insofar as they are capable of obtaining a satisfactory price. But there are many human needs which find no place on the market. It is a strict duty of justice and truth not to allow fundamental human needs to remain unsatisfied, and not to allow those burdened by such needs to perish. It is also necessary to help these needy people to acquire expertise, to enter the circle of exchange, and to develop their skills in order to make the best use of their capacities and resources. Even prior to the logic of a fair exchange of goods and the forms of justice appropriate to it, there exists something which is due to man because he is man, by reason of his lofty dignity. Inseparable from that required "something" is the possibility to survive and, at the same time, to

15 Victorian Government, *Submission 136*

16 151 Australian industrial relations academics, *Submission 175*, p.24

> make an active contribution to the common good of humanity. (Centesimus Annus, 34).[17]

The Democrats argue that it is important that we balance employee and employer rights. If employers have all the power then what we would see in many cases is a race to the bottom where wages will be driven down, people will be forced to work longer for less and job security will be non existent. The social contract would move from cooperation to opposition and conflict.

Employment, wages and working conditions directly affect the standard of living and quality of life of individuals and their families. Thus, while it is important that labour market arrangements foster the efficient use of labour and promote participation in the workforce, they also need to recognise that labour is a distinctive 'input' to production, and that wider social objectives and relationships are involved - including the relationships between work, leisure and family, providing safe workplaces and the role of workers in society at large.

The mark of a civilized successful first world liberal democracy is surely not just high living standards and equitably shared wealth, but an egalitarian society that respects and protects the working poor, and the disadvantaged, and that has advanced working conditions.

Our nation Australia *is* our people. It is our *people* that count, so the social perspective is the one that really counts - reform that accords with Australian values and has broad community support.

The social perspective suggests that reform that is not seen to produce a 'fair go' and a fair and productive outcome will simply be unwound in time, as has occurred in New Zealand.

On the Economists' world wide quality of life index, which included measures of job security, gender equality , and family relations, Australia is ranked 5th out of 111 countries compared to the USA which is ranked 13^{th,} and New Zealand which is ranked 15th.

The more radical components of the Governments IR reform will threaten our standing on measures such as quality of life index. And for this cost, what is the measurable benefit?

The legislation aims to reduce both the role of the independent umpire – the AIRC, and the unions. From a political and social perspective a civilised first-world progressive democracy works best with checks and balances. The Commission and the Unions are a valued part of that mix. These two institutions are an essential part of Australia's socially progressive society.

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17 Australian Catholic Commission for Employment Relations, *Submission 110*, p.4

A number of submission raised concerns that there are a number of human rights implications of some of the elements of the Bill, including with respect to freedom of association and limitations on the right to strike in contravention of the International Covenant on Economic, Social and Cultural Rights.

At its core the Work Choices Bill is philosophically flawed, it puts labour as the only unit of production at its foundation and ignores the wider social and human rights implications. Rather than building on the strength of the current system it aims to dismantle it. For these reasons we are philosophically opposed to this Bill.

Move to unitary system messy, complex and incomplete

Professor Andrew Stewart in his submission eloquently and comprehensively outlined why the Bill will not create a truly national or unitary system, and adopts the wrong approach in 'moving towards' that otherwise desirable objective.[18]

Professor Stewart outlines four areas of concern in his submission:

> Firstly, there is no clear and readily ascertainable demarcation between those employers that are to be covered by the new federal system and those that are not. The operation of the new regime, as triggered by the definition of "employer" in proposed s 4AB, primarily hinges (at least outside Victoria and the Territories) on how the courts interpret the term "trading corporation". On the current view, most incorporated bodies fall within that term. Even not-for-profit bodies such as local councils, universities and a range of community organisations qualify, on the basis that they have "significant" trading activities. But the scope of the new regime is vulnerable here to the High Court choosing at some point to adopt a stricter view of what constitutes a trading corporation. While there is no imminent prospect of that, it cannot be ruled out. It will never then be certain that such bodies are properly subject to federal regulation…
>
> My second area of concern relates to the provisions in proposed s 7C as to the exclusion of State laws in relation to "federal system employers". These provisions are both ambiguous and arbitrary in their effect. Proposed s 7C sets out the Commonwealth's intent to have the Workplace Relations Act 1996 operate to the exclusion of certain State or Territory laws, at least so far as they apply to employment relationships covered by the new federal system. The main exclusion is of any "State or Territory industrial law". This is to be defined in s 4(1) as including five named Acts (the main industrial statutes in each State that still has an arbitration system); plus any other statute that "applies to employment generally" (a term that is itself separately defined) and that has as its "main purpose", or one of its main purposes, any one of a list of objectives. These include "regulating workplace relations" and "providing for the determination of terms and conditions of employment". There is also scope for laws to be prescribed by regulation as falling within this category…

18 Professor Andrew Stewart, *Submission 174*, pp.2-5

> It will not be a national regime, because of the employers omitted from its coverage. The government has repeatedly claimed that the expanded federal system would cover at least 85% of the workforce. But it has never revealed the figures on which that estimate is based. By contrast the Queensland Government has published data that suggests total coverage of 75% at best, and less than 60% in States such as Queensland, South Australia and Western Australia…
>
> Nor will the new legislation create a unitary system of regulation for the employers covered by it. They will still be subject to important State and Territory laws in areas such as workers compensation, occupational health and safety and discrimination. Indeed there is a great potential for confusion and disputes as unions and workers seek to find new ways of using those laws to regain ground lost through the changes to the federal legislation.[19]

The issue of coverage raised by Professor Stewart is an important one. Mr John Hart, Chief Executive Officer, of Restaurant and Catering Australia told the committee that about 29 per cent of their members are not incorporated and are not in Victoria or the territories.[20]

It is apparent that level of coverage in the new federal system will depend greatly on the industry. In a response to a question on notice, the National Farmers Federation indicated that approximately 90% of farmers are not incorporated. A large majority of farmers currently operate under the federal system but will be forced into the transitional area or forced to remain in the state system if they do not incorporate.

The two tables below were included in the NFFs response to the question on notice and are insightful in demonstrating the effect of the Work Choices Bill on what are regarded as core Coalition constituents, with respect to coverage.

Table 1 - Jurisdictional Coverage before Work Choices[21]

State	***Federal Jurisdiction***	***State Jurisdiction***
Queensland	0%	100%
NSW	75%	25%
Victoria	100%	0%
Tasmania	80%	20%
South Australia	70%	30%
Western Australia	70%	30%
Northern Territory	100%	0%
ACT	100%	0%

19 Professor Stewart, *Submission* 174, pp.2-3

20 Mr Hart, *Committee Hansard,* 15 November 2005, p.7

21 NFF, *Answer to Question on Notice*, 15 November 2005

Table 2 - Jurisdictional Coverage immediately after commencement of Work Choices (these figures will change after farmers incorporate over a period of time).[22]

State	*Federal Jurisdiction*		*State Jurisdiction*
	Work Choices	Federal Transitional Awards	
Queensland	10%	0%	90%
NSW	10%	70%	20%
Victoria	100%	0%	0%
Tasmania	10%	75%	15%
South Australia	10%	65%	25%
Western Australia	10%	65%	25%
Northern Territory	100%	0%	0%
ACT	100%	0%	0%

The ACTU provided the Committee with a table (below) that supports claims made by Professor Stewart and Mr Hart, and which demonstrates that a dual system will prevail.

The ACTU estimate that between 22 and 25 percent of all employees within Australia will fall outside the scope of the proposed legislation. The table below shows the percentage of employees who remain within the jurisdiction of their respective State systems. Western Australia with 43 percent and Queensland with 42 percent clearly indicate the extent to which a dual system will continue to operate.[23]

Table 3 - Estimated coverage of a new industrial relations system

	Coverage of federal jurisdiction		**Coverage of state jurisdiction**	
		No. non-farm		**No. non-farm**
	%	**Employees %**		**Employees**
NSW	72.5	1968.5	27.5	746.7
VIC	100.0	2075.5	0.0	0.0
QLD	57.6	902.5	42.4	664.3
SA	57.3	338.5	42.7	252.3
WA	57.0	460.9	43.0	347.7
TAS	59.3	101.4	40.7	69.6
NT	100.0	86.0	0.0	0.0
ACT	100.0	161.0	0.0	0.0
AUST	74.6	6094.3	25.5	2080.6

Source: Unpublished data, ABS Survey of Employee Earnings and Hours (Cat. No. 6306.0) May 2004. ABS Labour Force (Cat. No. 6202.0) [24]

22 NFF, *Answer to Question on Notice*, 15 November 2005

23 ACTU, *Submission* 171, p.15

24 ibid., p.15

As outlined earlier, the Australian Democrats strongly believe that Australia needs one industrial relations system and not six, for human rights and efficiency and productivity reasons. Clearly the evidence shows that the Work Choices Bill before us will not create an effective single national unitary system.

The Democrats would argue that to be successfully bedded down, a national system needs to be consistent and continuous with the past. Based on Victoria's attitudes, the Democrats believe that the present federal law can win through as the national system.

Instead this Government has chosen to radically alter the industrial relations system, in a way that is not palatable to the States. Rather than a negotiated referral of powers, the Government has been forced to attempt a hostile and messy takeover of the state systems.

And which is the greater prize? A federal system well accepted now, and therefore (even if imposed) more likely to be accepted by the states as the unitary system, or an aggressively new federal system dictated by ancient ideological passions, which might therefore be rejected or overturned in time?

For the reasons outlined above therefore, despite our long and persistent advocacy of a single IR system, the Australian Democrats cannot support the Governments move towards a national unitary system as determined in this Work Choices Bill.

Inadequate safety net and protections

> A society is only as stable and strong as its most fragile.[25]

As outlined earlier, the Australian industrial relations system has been built around a framework that provides a safety net for the most vulnerable and a balance between community standards and individual needs. The need for such a system was articulated by the Mr Ryan from the Australian Catholic Commission for Employment Relations:

> Some employees come to the job market disadvantaged and that, for them, the labour market will not satisfy their fundamental human needs. Their dignity requires appropriate intervention and protection. There is a need for a "safety net", to use a contemporary term, to ameliorate some of the effects of an unrestrained labour market.[26]

It is unlikely that this Work Choices Bill will have a detrimental effect on all Australians, although we believe it will erode conditions over time, or at a minimum, prevent the widespread take-up of new community standards. The Democrats do believe that this Bill will have a detrimental impact on vulnerable or disadvantaged employees and jobseekers and that rather than fair, this Bill is profoundly unfair. The Bill undermines the foundations of Australia's industrial relations system, by:

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25 Ms Goward, *Committee Hansard*, 17 November 2005, p.17

26 Australian Catholic Commission for Employment Relations, *Submission 110,* p.4

- abolishing the "no disadvantage test";
- effectively abolishing the awards system;
- taking away the wage setting role of the AIRC, and further reducing its role in other areas;
- abolishing unfair dismissal protection; and
- unfairly and unnecessarily increasing the bargaining power of the employer.

No disadvantage test

The Democrats believe that one of the worst proposed changes in the Bill is the abolition of the no disadvantage test, which the Democrats insisted be put in when negotiating the 1996 Workplace Relations Act.

The Work Choices Bill reduces the safety net in three major ways – by severing the connection between agreements and awards over time, by reducing the conditions that agreements reference to, from at least 20 (more in the state systems) to 5, and by removing the no disadvantage test. The Bill replaces the no disadvantage test based on the award system which has 20 allowable matters, with five minimum conditions:

- A minimum hourly rate set by the Australian Fair Pay Commission;
- 10 days sick leave;
- 4 weeks annual leave (2 of which can be bought out);
- unpaid parental leave; and
- working hours (provided the 38 ordinary hour week average is achieved over a 12 month period).

Many submission expressed concerns that certain award matters were being excluded. HREOC for example expressed concern about the following being excluded:

- Loadings for working overtime or shift work;
- Public holidays;
- Annual leave loadings;
- Penalty rates; and
- Outworker conditions.[27]

HREOC also lamented the exclusion of the provisions awarded under the recent Family Provisions Test Case decision, which will be discussed a greater length further below.

27 HREOC, *Submission* 164, p.4

The Australian Federation of Disability Organisations argued that the minimum conditions leaves out many conditions that are important to people with disability obtaining and retaining employment, especially:

- limits on when a person can be required to work

While there will be a limit to the number of hours a person can be asked to work, there will be no rostering limits on when the person can be asked to work the hours. This is problematic for many people with disability including those who are reliant on formal and informal personal assistance to get prepared for work and those who are reliant on public transport to get to and from work; and

- penalty rates and overtime

For the reasons outlined above, engaging in work outside non-standard hours can lead to a substantial increase in the costs incurred by people with disability working.

Case study 5

Thea relies on a personal carer to get ready for work every morning. Her personal carer is not available before 7am, meaning that Thea cannot start work before 9:30am. In special circumstances, Thea can arrange an alternative personal carer to arrive earlier, but she must pay higher rates to the agency.

Case study 6

Luciano has a psychiatric condition that requires fortnightly injections. The days prior to and after the injection are difficult for Luciano, so he has negotiated with his employer to have these days off work. Recently, his employer has demanded that Luciano only take one day off per fortnight. Luciano is physically unable to comply with this demand.[28]

A number of submissions argued that the abolition of the no-disadvantage test would see wages and conditions fall below current award standards.

> The AFPCS is the latest and most significant weakening of protective regulation in Australian decentralised bargaining. The impact of the AFPCS must be measured by examining the new standard in the context of a bargaining environment where there is no or reduced access to unfair dismissal remedies, where there is a right for employers to unilaterally replace agreements with the AFPCS after the former have expired and where Australian Workplace Agreements (AWAs) prevail over collective agreements and awards In this context, weekly wages may fall subject to the condition of the labour market, the human resource strategies of employers and their willingness to incur turnover costs. In industries and

28 AFDO, *Submission 39*, pp.5-6

> workplaces where labour is plentiful and turnover costs low, it is very likely that wages and conditions will fall below award standards.[29]

At present that majority of individual agreements are common law agreements[30], which are underpinned by an award and generally provide above award conditions.

Of interest is the fact that common law agreements will continue to be underpinned by awards, where as AWAs, will be underpinned by the 5 minimum conditions.

Senator MURRAY – That is good. If I interpret that to mean you are going to amend it, I am delighted. Turning to the general principles that surround the Work Choices bill, I want to refer to agreement making. In all cases, I am referring to new agreements after the Work Choices bill has been passed. Dealing with individual agreements first, a common law individual agreement enforceable in the courts and not registered under the act would still have to comply with the minimum wage and the five standard conditions. That is correct, isn't it?

Ms James – Proposed section 89A deals with the interaction between the Australian fair pay and conditions standard and agreements. What it—

Senator MURRAY – I do not need detail; I just want to know whether that is correct. But a common law agreement—in all cases, of course, I am talking about it being under the federal act—on that basis would not default to any award provision, would it? I am talking about a new common law agreement.

Ms James – What do you mean when you say 'default', Senator?

Senator MURRAY – Default is well understood on your side of the table and on mine. It means that, in the event of an agreement being silent, by default if you want to refer to a provision you go to that award. The question is: if a new common law agreement applies, does it default to an existing award or is it just governed by the minimum wage and the five conditions?

Ms James – If the award on its terms bound the employer in question, then that award would apply.

Senator MURRAY – A new award or the existing award?

Ms James – Any award.

Senator MURRAY – So are you telling me that the 16 allowable matters will apply to a common law agreement?

Ms James – Yes.

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29 151 Australian industrial relations academics, *Submission 175*, p.9

30 31.2 per cent of all forms of agreement making being unregistered individual agreements and 2.4 per cent being registered individual agreements (AWAs)

Senator MURRAY – Turning to new AWAs, do the same terms apply? Does a newer AWA simply have to comply with the minimum wage and the five standard conditions?

Ms James – That is correct.

Senator MURRAY – And the same conditions apply for the award? If there is no provision in those five minimum conditions and the minimum wage covered by the AWA then, by default, they will refer to be applicable award?

Ms James – The award will not apply in that case, although the protected award conditions provisions do impose requirements on the employer with respect to certain elements of the award not applying. But if the protected award conditions provisions are complied with—in other words, if those award conditions are expressly modified by the AWA—then the AWA will prevail over the award and the award will not operate.

Senator MURRAY – So could you get greater potential protection from a new common law individual agreement than you would from a new AWA under this bill? You would get more conditions that apply?

Ms James – It is an unusual situation, or it is not really comparing apples with apples, in that most common law agreements are well above award conditions. They are usually in areas covering managers or professionals. So, while in theory my answer before was correct about the award applying, it is not usually relevant.[31]

We will have a situation were some individual agreements will have far superior conditions than others.

The Democrats believe that if the Government truly believes in a fair system then the current no disadvantage test should prevail as it more appropriately represents community standards and ensures *all* workers have access to first world civilised standards. Of course from this Bill it is quite evident that the Coalition Government do not truly believe in a fair system for workers. Their new system is heavily and unnecessarily biased to employers.

Undermining the Award System

The shift away from awards as the central underpinning of the Australian industrial relations system is also of great concern. As noted by the ACTU:

> *Awards remain an important source of employment* protection for many workers. One in five employees relies on the award to set their wages and conditions and many more rely on awards to underpin the agreements that govern some of their working arrangements.
>
> Changes to the award system will disproportionately affect employees in the hospitality sector, in retail, personal services and health and community

31 *Committee Hansard*, 18 November 2005, pp.31-32

> services. (ABS 6303.0 May 2004). These workers are generally casual, often women and generally low paid.[32]

While the Government have gone to great pains to suggest that the award system will still play a key role in the Australian industrial relations system, Law Professor Andrew Stewart argues that the way the Bill as written actually points to a calculated attempt by the Government to destroy the award system and prevent it from functioning as any meaningful form of safety net.[33]

> Once you have worked your way through the provisions of the bill and worked out how the transitional arrangements apply to a particular business and sorted out which state laws do or do not apply, it is true that there are some relatively simple steps that can be taken to become award free. In some cases, that may be a matter simply of waiting. One of the issues that I have highlighted in my submission is that there is no guarantee in the bill, and therefore there will be no guarantee in the Act if the bill is passed in its current form, that workers or businesses currently covered by state awards will ultimately become subject to federal awards. So one option will simply be to wait out the loss of award coverage.
>
> But there are other ways of achieving an award-free workplace: making an agreement then terminating it; using a transmission of business from one company to a related company; or setting up a new project or undertaking and making a greenfields agreement. It is true that many of those steps are fairly simple.[34]

The Democrats believe that the awards system has played a valuable role in ensuring community standards are included in working conditions for all employees irrespective of their bargaining position, that awards should remain, and that the AIRC should retain the power to make and vary awards.

Minimum Wage – driving down real wage increases

The Committee heard evidence from workers and unions representing workers from low paid industries that workers dependent on the award rely on minimum wage increases for pay increases.

The Bill seeks to replace the role of the AIRC in minimum wages setting and establish the Australian Fair Pay Commission (AFPC) to determine basic rates of pay and casual loading.

The Democrats are concerned with a number of aspects with this proposal, including:

- The independence, composition and tenure of the AFPC;
- The wage setting parameters;

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32 ACTU, *Submission 171*, p.53

33 Professor Stewart, *Submission 174*, p.5

34 Professor Stewart, *Committee Hansard*, 17 November 2005, p.49

- The frequency of wage and other reviews; and,
- The ability to make submissions.

The Democrats share the concerns of the 151 academics, who have little confidence in the independence of the AFPC;

> The Australian Industrial Relations Commission (AIRC) has determined minimum wages in Australia for one hundred years. It has determined the safety net since its inception. The AIRC consists of independent persons, that independence being assisted by the terms of appointment to that tribunal. The Bill seeks to replace this important role played by the AIRC with the Australian Fair Pay Commission (AFPC). Members of this body are appointed for limited periods – no more than five years in the case of the Chair, and no more than four years in the case of Commissioners. These short term appointments will not allow the AFPC to develop an 'institutional memory'. Further, the term of appointment will make members less independent of Government wishes in relation to standards. Many parties will have little confidence in the independence of these short term appointees. Further these processes will lack transparency or the opportunity for open consideration of relevant research evidence.
>
> In view of the important social consequences of minimum standards, the reduction of the AFPC to little more than an economic tribunal can have significant societal outcomes. The only criteria for appointment of the Chair is 'high skills in business or economics'. These areas of skill are marginally broadened in the case of Commissioners.[35]

The Democrats also share the concerns of many submitters that the Fair Pay Commission will be far from fair. Professor Stewart points out that the Bill removes any statutory reference to establishing "fair and enforceable minimum wage conditions."[36] This point is further made in the submission by the 151 academics:

> The parameters challenge the notion of a 'Fair' tribunal. The notion of fairness, at least as it relates to wages, has to do with fair comparisons. These comparisons also involve evaluations of fairness in terms of community standards. The present Act requires the AIRC to ensure that awards act as a safety net of fair minimum wages and conditions of employment and that the AIRC provides fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. No such requirement is imposed on the AFPC. [37]

Specifically the Bill excludes the requirement previously included in the Act, to take into account that *"need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian Community"*. The Democrats believe that the exclusion of this clause points to the Governments true

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35 151 Australian industrial relations academics, *Submission 175*, pp.13-14

36 Professor Stewart, *Submission 174*, p.5

37 151 Australian industrial relations academics, *Submission 175*, p.14

objective, which will be to undermine the minimum wage system and keep minimum wages down.

This is also evidenced in the Governments past behaviour. In their submission the ACTU noted that "In recent minimum wage cases the Federal Government and employer organisations have argued for no increases or increases less than CPI."[38]

At the last minimum wage case the Federal Government argued that the ACTU's claim for a $26.60 increase would result in a loss of 74,000 jobs. There was a $17 increase and as the ACTU correctly notes: *"award rates in real terms have increased and unemployment has fallen, at the same time participation levels have increased".*

The 151 Academics in their submission noted that the Australian Fair Pay Commission is modelled on the British Low Pay Commission but that the objectives of the two are very different:

> The AFPC is said to be modelled on the British Low Pay Commission (LPC). Analysis of the activities of the British LPC in the wider context, make it clear that this is a very different model to that proposed for Australia, and claims of similarity are incorrect. The British national minimum wage (NMW) was introduced on the recommendation of the Low Pay Commission (LPC) in April 1999; its purpose was to introduce and increase the national minimum wage (NMW). The British NMW sits firmly within a wider social agenda, underpinned by an array of social protections and minimum standards, including a statutory process for trade union recognition. The function of the Australian Fair Pay Commission (AFPC) and the context within which it will sit is a very different one, which will have very different outcomes for Australia's low paid. It is difficult to reconcile the suggestion that the AFPC is modelled on the LPC with the observations that, since 1999, the minimum wage in the United Kingdom has increased by over 30 per cent and the Government's persistent view that the AIRC has been too generous in safety net cases, bearing in mind that the AIRC increased minimum wages by only 18 per cent between 1999 and early 2005.[39]

The Democrats do not doubt that the shift to the AFPC will see real wages drop.

Loss of unfair dismissal protection

While not included in the terms of reference, the exemption of employers with less than 100 employees from unfair dismissal laws, coupled with the loss of the no disadvantage test and the pronounced push towards statutory individual agreements, will further exacerbate the situation for disadvantaged employees and jobseekers.

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38 ACTU*, Submission 171*, p.7.

39 151 Australian industrial relations academics, *Submission 175*, p.15

In addition to the exemption, the Bill includes a new definition of dismissal for operational reasons which include 'economic, technological, structural or similar' reasons.

Professor Peetz explained to the Committee just how easy it was going to be to unfairly dismiss someone under this Bill:

> If you are a firm with fewer than 100 employees, then you can be sacked for any reason whatsoever unless it is an unlawful termination. Unlawful termination relates to discrimination…Chewing gum is not a discriminatory reason covered by the unlawful termination provisions. Therefore, if you are in a firm with fewer than 100 employees, you could be sacked for chewing gum. I am not saying that an employer would sack you for chewing gum; I am saying what is possible. In firms with more than 100 employees—where operational reasons apply—if you are precluded from making a claim because of what the bill defines as operational reasons, then it does not matter what other aspects of your dismissal were relevant to your dismissal. You cannot make a claim. So if the employer is able to create a situation in which you are covered by economic, structural, technical or similar reasons for dismissal as part of the reason for dismissal, then you can be dismissed.[40]

In their submission the Australian Federation of Disability Organisations expressed their concern about the loss of protection:

AFDO is concerned about a range of dismissal related changes contained in the Bill that are likely to disproportionably disadvantage people with disability, such as:

- the abolition of unfair dismissal protection for people working in workplaces with less than 100 staff;
- the change to workplace agreements such that they do not have to contain minimum award redundancy standards; and,
- workers who are dismissed on the basis of 'operational requirements' of a business not being able to claim unfair dismissal, no matter what size their workplace. AFDO is further concerned that employers' ability to use "operational requirements" as a cover-all for dismissal may lead to a sharp increase in the dismissal of people with disability, particularly those who acquire their impairment while in the workforce.[41]

The Democrats believe that employees should have protection from being sacked unfairly. The Bill's provisions will not only create unequal human rights depending on the size of the employer, but will create job insecurity and vulnerability. There is no

40 *Committee Hansard*, 17 November 2005, pp.44-45

41 AFDO, *Submission 39*, p.4.

evidence to support the notion that abolishing unfair dismissal laws will create substantial employment.[42]

No genuine bargaining or genuine choice for employees

The Committee heard overwhelming evidence that this Bill tips the balance very much further in favour of employers. In their submission the 151 academics argue that the Government are hypocritical in the way they apply their policy:

> The Government recognises that an imbalance of bargaining power is inherent in commercial arrangements between small operators and big business, and has legislated to facilitate collective bargaining for small business. It does not, however, apply these principles to the workplace.[43]

The Bill will strengthen the employers' hand still further by:

- Encouraging AWAs, which can be administered on a take it or leave it basis.
- Allowing employers to create and lodge a workplace agreement, but there is no mechanism to ensure that the employee covered genuinely consented to the agreement, or that the agreement meets minimum standards.
- Giving the employer the ability to unilaterally terminate an agreement after the expiry date of the agreement, reverting to the 5 minimum standards.
- Restructuring the organisation to set up a Greenfield site[44]

No alternative protection

As identified by HREOC Sex Discrimination Commissioner, Ms Pru Goward, not only does the Bill dismantle the safety net and other protections, but the Government have offered no alternatives to protect the disadvantaged.

> *HREOC does have grave concerns about the implications of dismantling or removing any* significant planks of a social, legal and economic contract in Australia which has evolved over 100 years and around which a variety of institutions, policies, cultures and government programs have grown up. Unless careful adjustments are made to surrounding institutions, laws and policies, inevitably that whole contract is challenged.[45]

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42 For further evidence please see the Democrats initiated Senate Committee report on unfair dismissal. http://www.aph.gov.au/Senate/committee/eet_ctte/unfair_dismissal/report/report.pdf

43 151 Australian industrial relations academics, *Submission* 175, p.8

44 *As I read this provision, the effect of this will enable any business to engage in a corporate restructuring exercise. I am not suggesting that all employers will be doing this or even many employers, but some will certainly be advised to think about this. Businesses will be able to restructure their arrangements, regardless of what awards or agreements they currently have in place, set up a greenfields agreement for a new project or a new undertaking and therefore clear the way entirely of any previous award or agreement conditions* (Professor Andrew Stewart, Committee Hansard, 17 November 2005, p. 54.

45 Ms Pru Goward, *Committee Hansard*, 17 November 2005, p.14

Sex Discrimination Commissioner Ms Pru Goward told the Committee of HREOCs concerns about the impact of this Bill on vulnerable Australians:

> Finally, HREOC is concerned that the bill fails to adequately protect vulnerable employees and job seekers, particularly workers with disabilities, Indigenous people, people moving between welfare dependency and paid work, and those in low-paid wage jobs, for which there are many competitors and who consequently have little individual bargaining power. The capacity for more vulnerable employees to bargain effectively and to choose their employment arrangements is impinged upon by the existence of so-called 'take it or leave it' individual bargaining arrangements. Allowing employers to make employment conditional on an employee taking up an AWA, for example, means that that choice of employment arrangements, especially for those on minimum wages, is extremely limited. The consequences are felt not only by workers but by their children and families. HREOC has serious concerns that, once an agreement is terminated, neither that agreement nor an award is in operation, with employees presumably to be covered only by the standard. This means that an employer can terminate an agreement unilaterally after the nominal expiry date of the agreement and that all employees covered by the agreement revert to the standard. This provides employers with a great deal of leverage over the terms and conditions of any new agreement.[46]

Dr Jill Murray in her submission argued that the system has been designed to ensure that an as yet unknown number of workers have as their only legal minimum entitlements, five minimum conditions, unless they are able to bargain for it.[47] Dr Murray goes on to describe the lack of rights for those in what she calls 'the worst job':

(a) **No minimum or maximum weekly hours**, provided the 38 ordinary hour week average is achieved over a twelve month period.

(b) **No entitlement to a stable income week by week**. Indeed, the concept of weekly wage is abolished, replaced by an hourly rate for time worked and complete hours flexibility. Under Work Choices, you could work 80 hours in one week, then 10 the next, with your income fluctuating accordingly.

(c) **No meaningful entitlement to overtime payments**. The 38 hour week averaged over twelve months is said in the Bill to be 'ordinary hours'. That is, even in a week of 80 hours the worker is still engaged in 'ordinary hours', provided that some time over the year the employer brings the average down to 38.

(d) **No entitlement to higher rates of pay for unsociable hours**. The employee can be required to work at any time in the 24 hour span, or on any day of the year at any time without an entitlement to penalty rates. An hour worked at 9.00 am and an hour worked at 3.00 am are paid the same basic rate. An hour worked on Christmas

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46 ibid., p.16

47 Dr Jull Murray, *Submission* 65, p.1

Day is paid the same as an hour worked on any other day. In fact, the tenth hour worked at 3.00 am on Christmas Day attracts the same hourly rate as working at 9.00 am on any Monday morning.

(e) **No legal entitlement under the Bill's schema to certainty of scheduling**, because hours flexibility is virtually total, and wholly in the hands of the employer. Workers who are parents, or who care for the elderly or disabled, or who are studying to improve their labour market prospects or who have a second job are going to be vulnerable to sudden changes of scheduling at the initiative of the employer. Who can afford to object to such scheduling whims, when they can be sacked for any reason or none if the boss decides to?

(f) **No legal entitlement to a written statement of employment status** and conditions of employment on engagement. **No legal entitlement to pay or hours records.** The worker in the worst job will not know until a twelve month period has elapsed whether or not the employer has breached the hours protection of the Bill. Without an accurate and agreed record of the hours actually worked, the worker will not be able to pursue the matter further. Without a legal right to employment information (as exists in the European Union and within the United Kingdom), and with no protection against unfair dismissal, it is unlikely workers will seek to enforce their bare right to a 38 hour week averaged over the year.

(g) **Little or no job security.** Most 'worst jobs' will be in the sector of firms with up to 100 employees and workers can be sacked for any reason or none without recourse. All workers are vulnerable under the broad 'operational ground' exemption.

(h) **No access to the modern work and family standards** created by the AIRC earlier this year in its Family Provisions Test Case. So, fathers miss out on the right to request eight weeks at home with their new baby and its mother (Work Choices has one week), parents miss out on a second year of parental leave (Work Choice has only one year) and the right to return to work part-time after parental leave (Work Choice is silent on this in the Fair Pay and Conditions Standard, and awards are no longer permitted to include provisions relating to a worker shifting from full-time work to part-time, and vice versa).

(i) **No rights to receive information about changes at work, or be consulted about such issues**. Work Choices abolishes the 2005 Test Case standard which stated that employees on parental leave should be consulted about major workplace change. This right was agreed between the parties during the AIRC's conciliation of its Family Provisions Test Case, but now every individual worker in the worst jobs will have to try to negotiate for it by themselves. Most workers and employers will not give a thought to the matter of consultation at the time of engagement. Most workers won't consider it vital until, in the worst case, they lose their job while away from the workplace on parental leave due to major restructuring.

(j) **No access to a legally mandated career structure.** It is common for workers to gain skills, qualifications and confidence as they spend time in a job. Over time,

some workers take on duties which, under the old system, would entitle them to be re-classified at a higher level in the legally mandated career structure. However, for those on the worst jobs, there is no more career path, just the bare minimum wage. Requests for re-grading must be purely individual and personal matters, with no external description of the various grades of work in that industry to refer to. The employer will benefit from the increased productivity of the worker without any legal obligation to increase his/her remuneration or status at work. The economic impacts of this particular change should be carefully studied before it is implemented. Will Work Choices create a disincentive for workers to undertake vocational training, at a time when there are critical skills shortages?

(k) **No right to collectively bargain** with other people at the workplace unless employer gives it to the worker. Work Choices makes it lawful for the employer to apply duress to the worker to place or keep them on an AWA. Assistance from a union may be difficult to find, even if the worker is a member. The new right of entry provisions governing union officials' attendance at workplaces are very restrictive.

(l) **No voice in the new Work Choices wage setting process.** There is no vehicle for the worker or his/her representatives to be heard in the process of wage fixing, unless the Head of the Fair Pay Commission decides to meet with this particular individual. Professor Harper has indicated he intends to get to know the unemployed and low paid through his Church networks, but has given no guarantee that he will 'consult' the organised labour movement. In any event, Work Choices doesn't require Professor Harper to take any account of anything he hears in these informal and private meetings.

The 151 academics in their submission argued that the lowest paid are being required to bear a disproportionate burden of economic management. [48]

Detrimental impact on women and work and family balance

The Democrats believe that women and employees trying to balance work and family will be hardest hit by the Governments proposed industrial relations changes.

Workers with family responsibilities need job security; predictable common family time; protection from excessive hours; and, flexibility. Yet Australia already lags behind other countries on several of these measures, including working hours and policies to assist employees juggle their work and family lives. Evidence for the inquiry suggest that the Work Choices Bill will exacerbate this.

HREOC argued that family friendly arrangements are more likely offered to better trained and highly skilled employees and therefore regulation of family friendly measures was important to ensure all employees have access to the provisions:

48 151 Australian industrial relations academics, *Submission 175*, p.14

> It is crucial that the Government retain sufficient regulation of workplace relations to ensure that the important work of integrating a family friendly approach to paid work continues. OECD evidence is that where the provision of family friendly conditions is left to the market, they tend to favour high to middle income earners and those in the public sector. In Australia, for example, employer provided paid maternity leave is more available to high and middle income earners and public servants. By comparison paid maternity leave is almost unheard of in the hospitality or retail sectors.[49]

The Victorian Government submission outlined how this Bill will have a detrimental impact on employees' ability to balance work and family:

- The five components of the Fair pay and conditions standard represent a retreat on national work and family standards by incorporating only basic family leave provisions and failing to incorporate the right for parents to request extended parental leave, part-time work or more shared parental leave.
- The right to 'sell' two weeks annual leave will reduce common family time, with negative effects on children and parents. This effect may well compound disadvantage in lower income households.
- The capacity to set aside key award conditions in AWAs (public holidays, rest breaks, annual leave loadings, allowances, and penalty, shift, and overtime loadings) will be especially disadvantageous for families. This is a pernicious change, which will see both long and unsocial working hours increase. The international evidence about the negative effects of these work practices for workers and children is extensive and robust.
- Working carers have limited bargaining power. Like unemployed 'Billy' in Work Choices, there will be many 'Beths' – mothers returning to work – who will lack effective capacity to refuse terms which are, by any test, family unfriendly. The employment standards of many women and carers will only be as strong as prevailing minimum legal standards and no stronger. This will advantage the 'careless' worker. Where margins are tight, employers who would like to offer more family friendly provisions, will be forced into a race to the bottom, so that even good employers cut conditions and the legal standard becomes both maxima and minima.
- The AIRC has been the source and forum for all recent general advances on work and family standards. Under Work Choices, it will lose this role. It is hard to see where future general advances on work and family provisions will now come from. This will especially affect those outside collective agreements and the most vulnerable in the labour market, who are least able to win advances alone.
- Further, the loss of the arbitral power of the AIRC will reduce the capacity of employees to contest their employer's application of work and family

49 HREOC, *Submission 164*, p.13

provisions. This has been an active function of the AIRC in recent years. Finally, the AIRC's past role of taking account of family responsibilities in industrial regulation will be lost.

- A secure, living wage is vital to family well being. The primary weight placed on economic objectives in the work of the Fair Pay Commission is likely to see falls in real wages, which will especially affect those on low pay. It will also be fostering further income dispersion and inequality in Australia. International research shows that inequality has significant negative effects on social well being.
- Work Choices will see an expansion in individual agreements. Existing evidence shows that non-managerial employees on AWAs, relative to those on collective agreements, face lower pay rates, lower pay rises, longer, unsocial hours, and less time autonomy. Women fare especially badly as do part-timers and casuals, who have disproportionate responsibility for families.
- AWAs are less family friendly. They have less access to annual leave, long service leave, and sick leave. These are fundamental requirements of working carers. Only 12 per cent of AWAs registered between 1995 and 2000 had any work and family provisions. Only small proportions of AWAs in 2002 and 2003 had family or carer's leave (25 per cent), paid maternity leave (8 per cent), or paid parental leave (5 per cent).
- Those who need such provisions have least access. Only 51 per cent of women on AWAs had access to annual leave (62 per cent men) in 2002 and 2003. Fourteen per cent less women than men had access to any general work and family provisions.
- Work Choices will foster growth in unsocial and long hours, given that loadings for overtime and unsocial hours are not protected. Control of working time, avoidance of unsocial hours and protection of common family time are key issues for families. Work Choices further compromises each of these in a situation where almost two-thirds of Australians already work sometimes or often at unsocial times. International evidence of negative effects on marital stability, and on workers' and children's well being, is compelling.[50]

The Governments hypocrisy on work and family issues is astounding. The Government argues that Australia is too highly regulated in comparison to the UK yet, the UK has greater work and family protection than Australia. The UK has legislated for six months Government-funded paid maternity leave as well as the right to request flexible work hours. These measures have been embraced by business and have had a positive effect on productivity.

50 Victorian Government, *Submission 136*

Among other measures HREOC recommended that the Government include the provisions granted by the recent Family Provisions Test Case decision, which included:

1. The right for employees to request up to 24 months unpaid parental leave after the birth of a child, representing a doubling of the current 12 month entitlement.

2. The right for employees to request part-time work on their return to work from parental leave and before their children are at school.

3. The right for employees to request to extend the period of simultaneous unpaid parental leave up to a maximum of eight weeks.

4. A new Personal Leave entitlement which allows up to ten days of paid leave a year for the purpose of caring for family members or for family emergencies - double the former five day provision.

5. A new right for all employees, including casuals, to take up to two days unpaid leave for family emergencies on each occasion such an emergency should arise.

6. A duty on employers to not unreasonably refuse an employee's request for extended parental leave or return to work part-time.[51]

HREOC also argued for greater research and monitoring to ensure that the Government's objectives of increased flexibility to better balance work and family are being met, including more extensive research from the Office of the Employment Advocate to conduct and publish more research on agreements.[52]

Women working fulltime earn $155 a week less on average. One of the critical gender pay equity issues is that women tend to be in low paying feminised occupations. Further a large number of submissions argued that because women are in and out of the workforce for family reasons they generally have lower bargaining power.

One of the concerns of low bargaining power is that women will be more easily forced on to AWAs. During the Court Government's period of labour deregulation in Western Australia, the gender wage gap increased and WA women fared worse than women nationally. In February 1992 the WA gender pay gap was 22.5 per cent, by May 1995 it had increased to 27.8 precent.

In their submission to the inquiry HREOC argued that the Bill does not provide adequate or appropriate mechanisms for equal remuneration to be achieved between men and women; their concerns and recommendations are outlined below:

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51 HREOC, *Submission 164*, p.5

52 ibid., p.10

> While the proposed s 90ZR requires the AFPC to "…apply the principle that men and women should receive equal remuneration for work of equal value…", the Work Choices Bill provides no guidance about how this is to be applied. HREOC regards the existing equal remuneration provisions of the Workplace Relations Act 1996 (the Workplace Relations Act) - and the previous Industrial Relations Act 1988 - as having been singularly unsuccessful in achieving pay equity and is concerned that the Work Choices Bill will not address this issue.
>
> State industrial tribunals have been more successful in addressing the historical undervaluation of women's skills and in assessing the work value of occupations traditionally carried out by women employees. HREOC is concerned that the restriction of State industrial jurisdictions will remove an important avenue of redress for women employees seeking equal remuneration.
>
> HREOC recommends that the Australian Government seriously consider introducing equal remuneration provisions similar to those in NSW or Queensland.
>
> HREOC regards it as essential for gender pay audits and work value tests to be conducted before the FMW is set by the AFPC, and recommends that the Work Choices Bill be amended to require this.
>
> The reduction of the number of wage classifications may well mean that pay inequities remain low for low paid workers, but the Work Choices Bill should require the AFPC to conduct cross-classification comparisons to ensure outcomes that are equitable for men and women. The AFPC should be required to take account of structural problems in the classification rates that may affect pay equity.

HREOC further recommends that:

- the AFPC be required to establish a specialist unit to develop and monitor pay equity mechanisms;
- provision be made for individual complaints of pay inequities to be made, similar to the provisions in the UK Equal Pay Act 1970, which include that advice and assistance be provided to complainants in proceedings; and
- simplified procedures for pay equity claims similar to those in the UK Employment Act 2002 be introduced.

Additional recommendations for improving pay equity include:

(a) requiring the Equal Opportunity for Women in the Workplace Agency (EOWA) to conduct workplace pay equity audits similar to those contained in the Canadian or UK legislation;

(b) requiring pay audits and/or action plans to be carried out by employers as part of enterprise bargaining under the Work Choices Bill;

(c) requiring the Employment Advocate or the Office of Workplace Services (OWS) to investigate, research and regularly publish pay equity outcomes for all individual and collective agreements;

(d) requiring the Employment Advocate to conduct specific employer pay equity audits of AWAs lodged by individual employees;

(e) requiring Workplace Inspectors to conduct pay equity paper reviews during site visits;

(f) conducting broad reaching education campaigns targeting employers and the general public;

(g) providing incentives such as tax breaks for employers who comply with voluntary pay equity audits and action plans;

(h) developing stronger contract compliance regulation with regard to pay equity.[53]

The Democrats believe that this Bill will lead to an increase in the gender pay gap and support the calls by HREOC outlined above and other submissions to put in place mechanisms to not only ensure the gap doesn't widen, but to narrow the gender wage gap.

Interaction with Welfare to Work

While not permitted as part of the Inquiry's terms of reference a number of submissions and witnesses expressed their concern with the interaction between the Work Choices Bill and the Government's welfare to work legislation, and the detrimental effect it will have on an already disadvantaged group of Australian's. HREOC sex discrimination Commissioner, Ms Pru Goward:

> The Work Choices bill, particularly in conjunction with the Welfare to Work changes, represents a wholesale change to the way Australian workplaces operate and, as a consequence, will have major implications for the Australian community more broadly.[54]
>
> The additional pressure that is placed on Indigenous Australians, sole parents and people with disabilities to move to employment in the context of changes to Welfare to Work arrangements and CDEP changes will potentially affect their ability to bargain effectively and achieve fair conditions of employment. This is particularly the case in rural and remote areas, where there are limited job opportunities.[55]
>
> I think you will find there are sectors of the work force where there is a surplus of workers, particularly with the welfare to work reforms meaning

53 HREOC, *Submission 164*, pp.3-4

54 Ms Goward, *Committee Hansard*, 17 November 2005, p.14

55 ibid., p.16

> that there is now going to be an increase in that group of workers down at that end of the labour market, where negotiating those flexibilities will in some senses be more difficult.[56]

The Democrats agree with the concerns raised by HREOC and other witnesses and believe this Bill coupled with the Work to Welfare legislation will see those vulnerable members of our society severely disadvantaged.

Greater regulatory power to Departments

The Democrats have been concerned with the failure of the OEA – the promoter of AWAs - to properly apply the no-disadvantage test and to police duress.

Although the Government does plan to take away the OEA's compliance function, it intends to hand it to the low-profile Office of Workplace Services, thus making the Department of Employment and Workplace Relations a much-enlarged but far-from-independent regulator at the direction of the Minister. There is the obvious danger of partisan decisions being made.

As mentioned earlier, the Australian Democrats believe that there should be a national, well-resourced independent regulator for workplace relations.

Ministerial Discretion

The Democrats are extremely concerned about the inclusion of Ministerial discretion in this Bill. The Democrats agree with the ACTU that the use of Ministerial discretion goes against the objective of the Bill and stated Government policy that bargaining should be between and employer and employee with no third party interference:

> We find this an incredible situation. It is not only a serious conflict in terms of the separation of powers; it is actually the most authoritarian act I have seen anywhere in the democratic world—anywhere. What it is really saying is that you can cut a deal—and I did two last week for unions with an employer—and two things can happen: one is that, first and foremost, the provisions mean that the deal is not necessarily a deal anyway, something that employers would never put up with in contract law. An employer can simply entice people out of a collective agreement either by the use of individual contracts with the bribery of higher rates or better conditions or indeed by intimidation; and secondly……..The minister can decide that he does not like something in the deal and simply say, 'No, we're not having that.' We saw that a little bit in the NTEU experience with the Higher Education Act just recently. When the NTEU worked with employers to try and get around what were the most authoritarian laws I had seen, the minister virtually on a day-by-day basis was putting out a new list. This could mean that people never have certainty about bargaining and certainly cannot be guaranteed that you have closed a deal and it will be respected, like any contract should be, for the period up until its expiry….It is

56 ibid., p.24

> certainly contrary to the stated objective of the bill, which is to devolve responsibility for agreement making to the parties at the workplace, when in fact the government has the capacity to then impose a term by removing a matter that people have agreed to… It makes a mockery of their claim that the best workplace relations are those that operate directly between employees and employers .[57]

The ACTUs concerns were echoed by others, including Dr Cooney, Senior Lecturer, for the Centre for Employment and Labour Relations Law, Law School, University of Melbourne:

> One of the most striking examples of that is the provision that enables the Minister to effectively void provisions in negotiated enterprise agreements. That is a power which I understand is going to be exercised through regulation. It is rather disturbing, particularly from an international perspective, to see something like that emerging. That capacity for the Minister to intervene in that way does not seem to be subject to many criteria that would restrain it. I would say that is one of the most striking and somewhat extraordinary powers that is included in this bill. It is interesting to contrast that with the notion of private ordering, where people can agree between themselves without having a government jump in and cancel at large what people have negotiated.[58]

Mr Bill Shorten for the Australian Workers Union argued that the Ministerial discretion in defining 'essential services' would be fraught with difficulties, and that there could be a backlash:

> The definition of 'essential services' has been litigated over many years, but the legislation is completely woolly, or imprecise, on it. What minister of what government wants to be called upon when an employer says: 'What I do is valuable to the economy. Stop this strike'? As soon as the minister makes a decision either way, there are going to be unhappy parties. That is why we have the Industrial Relations Commission. The centralisation of decision making about essential services is far too severe a tool just to rest with a minister in terms of industrial relations. The right to strike—there is no question in my mind—is being narrowed down to an infinitesimal speck upon an easel or a picture. It is going to be very difficult for people to exercise the basic right to strike…
>
> Minister Kevin Andrews is buying himself a whole world of difficulty in this legislation with the provision of the minister reserving the right to decide what an essential service is, for instance. There are so many unintended consequences in this action that in fact there will be a backlash.[59]

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57 Ms Burrows, *Committee Hansard*, 16 November 2005, p.9

58 Dr Cooney, *Committee Hansard*, 18 November 2005, pp. 10-11

59 Mr Shorten, *Committee Hansard*, 17 November 2005, pp.11-12

Further, Schedule 15, section 30, which allows for Regulations to 'apply, modify or adapt the Act' would appear to provide the Minister with the capacity to materially change the *Bill* (and its outcomes) without parliamentary scrutiny.

The Democrats believe that it is inappropriate for the Minister to have the powers prescribed in this Bill, and will be opposing such provisions.

Other Areas of Concern

Due to time constraints it is difficult to discuss all the areas the Democrats have concerns with in this Bill. Some of the areas have not been mentioned in depth but the Democrats believe they will have a detrimental effect on the industrial relations system, and our egalitarian society. Many of these we have opposed in previous Bill and our position can be found in various committee minority reports. The areas include:

- Restrictions on protected action;
- Restrictions on right of entry;
- Reduction of the role of the AIRC in dispute settlement and other matters.

Productivity can be achieved by other means

Much is made of the ability of this package of laws to affect productivity, as though labour laws are the sole driver of productivity improvements. The Democrats are concerned that the Government is using IR reform to address problems that could be more effectively dealt with by other means.

The 2004 World Competitiveness Report referred to earlier showed that Australia was well behind on education, training and R&D investment. Employers find skilled labour harder and harder to find. We are a poor high technology exporter and we spend relatively little on R&D.

In February this year in their report on national competition the Productivity Commission argued that further IR reforms will not deliver significant national improvements - that efficiencies and productivity increases are better sought in education improvements and reforms to the health system - and in other changes.

The Democrats also believe that greater productivity can be achieved through energy efficiency. A study undertaken by the Warren Centre found that total energy consumption for Australia is 3000 petajoules per annum and is estimated to cost A$40 billion annually. Industrial energy consumption is 40%, giving an energy bill of A$16 billion per year. Although many firms now achieve impressive economic returns by using energy more efficiently, numerous studies continue to uncover significant potential. Experience in Australia and overseas has demonstrated that it is possible to save 10 to 15 % of this over a 5 year program. This would result in reduced costs of up to A$2 billion annually, strengthening Australian industry and making it more competitive in world markets.

Tax reform is another key area. For example the focus on changing the decision makers of the minimum wage award from the AIRC to the Low Pay Commission is a diversion from the real problems.

The Treasurer and the Minister for Workplace Relations have argued that increases in minimum wage puts pressure on wages and therefore interest rates. Interest rate increases are caused by a combination of issues and wages are not the main culprit.

For instance in some industries the building pressure for wage rises is largely a result of a skills shortage which the Government has not effectively addressed.

Secondly, the Government's tax concessions have created an investment driven housing boom and has massively increased personal debt, consumer spending and asset price inflation. Here is a major cause of interest rate rises.

Both the Productivity Commission and the Reserve Bank have said that tax incentives for property investment should be reviewed. Despite this advice, the Government remains committed to the overly generous tax system including negative gearing and the capital gains tax concessions.

The issue of the minimum wage is not that it contributes to inflation or higher interest rates; it is that it is a very ineffective way of producing significant increases in the disposable income of the lower-paid. For an employer a wage increase is compounded by higher payroll taxes, superannuation, worker's compensation and other on-costs. For the employee, for every dollar increase in wages, low-income workers can lose 70 cents in welfare benefits.

What is needed is reform of the tax and welfare system.

The Democrats have been advocating tax reform for low and middle income earners for years. It is pleasing to see members of the Liberal and Labor parties catching up.

It is ridiculous that people earning as little as the minimum subsistence level of $12 500 a year are paying income tax on half their wages. Australia needs a much higher tax-free threshold.

Increasing the tax-free threshold would take the pressure off the AIRC (and now the Fair Pay Commission) as having the sole responsibility of increasing the disposable income of the working poor.

Conclusion

The Democrats have supported sensible government reforms in the past but importantly stopped reforms that impede key rights of employees and unions.

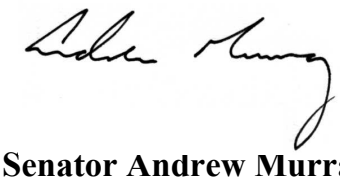
In this case the Democrats are opposed to the Work Choice Bill. This Bill is based on ideology, and it will excessively tip the balance of workplace relations to favour employers, leaving many workers vulnerable.

Any redeeming features of the Bill are overwhelmed by the negatives. The Prime Minister has failed to provide any empirical economic evidence to support these changes. He has failed to provide genuine choice, and he refuses to give a guarantee that no workers will be worse off because he knows that poor, disadvantaged or powerless workers will be worse off.

Recommendation 1 - Oppose the Bill in its entirety

However, given that the Government has control of the Senate and the Bill will pass, our duty to the Australian people is to try where we can to influence the Government to ameliorate the worst aspects of the Bill. We persistently argue that the Senate is a house of review and it is the Senate's duty to make every effort to address injustices, anomalies, mistakes and unforeseen consequences in the bills before us. We cannot argue that case and then just step aside, vote against and let the bill pass without trying our best to effect change.

We will move key amendments accordingly, but will be unable to attempt to correct all the problems with this Bill.



Senator Andrew Murray