Senate Employment, Workplace Relations and Education Committee Inquiry into the Work Choices Bill

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My principal submission is that the Workplace Relations Amendment (Work Choices) Bill 2005 fails the federal government's own test of creating a "simpler, fairer, national system". I will suggest that the Bill:

- will not create a truly national system, and adopts the wrong approach in "moving towards" that otherwise desirable objective;
- will not create a "unitary" system even for the employers it covers, and will generate disputation and uncertainty in relation to the exclusion of otherwise applicable State laws;
- is profoundly unfair, not least in failing to ensure that workers who choose not to make agreements have access to a "safety net" of award entitlements; and
- will do nothing to simplify labour regulation — indeed quite the reverse.

I will also offer a number of comments about certain aspects of the Bill where I believe clarification is urgently needed.

Before going on though, I would stress that this submission has been prepared in great haste, given the ridiculously short timeframe set by the government for the Committee to do its work. That timeframe can only be seen as an expression of contempt for the parliamentary process, for the notion of public consultation, and for the goal of effective lawmaking.

The government had twelve months in which to draft its legislation. It has now released a 687-page Bill whose contents had only been hinted at or sketchily described in previous publications. To give interested members of the public just one week not only to digest the Bill, but to prepare submissions on it, is scandalous. If there was genuine urgency to introduce this legislation, why was not it ready in July or August? If there are particular provisions that need to take effect sooner rather than later, why could these not have been separately introduced?

The point here is not just what the timeframe implies in terms of stifling debate as to the policy objectives of the legislation. The government can take the view that it "has the numbers" to get this legislation passed, regardless of what its opponents might say. But all principles of open public debate aside, the rush to push this legislation through is greatly increasing the chances that flaws or unintended consequences will be overlooked.

I will say more about the complexity of the Bill later on. I merely make the point here that in a 687-page Bill that bristles with new concepts and processes, not to mention extensive transitional provisions, it would be surprising if mistakes or oversights were not made. To deny independent experts a proper opportunity over a reasonable period to dissect the Bill and identify technical problems is not just arrogant, but shortsighted.

A National System?

The government has indicated its desire to create a "national" or "unitary" system of labour regulation, preferably by co-operation from the States, but if necessary by using the corporations power in section 51(20) of the Constitution to expand the reach of the existing federal system.

The new federal system proposed by the Bill will apply to all Commonwealth agencies, all employers in the Territories, all employers in Victoria (with the partial exception of the State of Victoria itself), and in the other States all trading, financial and foreign corporations. Contrary to what the Productivity Commission has proposed,[1] employers who fall within these categories will have no choice as to whether to "opt in" to the new federal system. Even if they are presently covered by State awards or agreements, those instruments will be deemed to be federal agreements, stripped of any "prohibited content" and then effectively frozen so as to induce the making of new workplace agreements.

Now I am a longtime supporter of having a single, national system of regulation — but this is not, in my view, the way to achieve that goal. Given the peculiar constraints imposed by our Constitution, the only truly effective method is to seek the co-operation of the States,[2] as has been done in many other areas of lawmaking. The problems with pushing the boundaries of heads of power such as s 51(20) were neatly encapsulated by the Hancock Committee back in 1985:

> We see considerable difficulties in this approach. First, there is some risk of invalidity; secondly, the move would undoubtedly be divisive and strenuously opposed by State government and State-based interests; and thirdly, there would be gaps in coverage … There are other means at the disposal of governments to redress the problems of multiple tribunals which are less divisive and speculative.[3]

There are a range of specific problems with the approach the government has adopted in "moving towards" a national system.

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1 See Productivity Commission, *Review of National Competition Policy Reforms*, Inquiry Report No 33, Productivity Commission, Canberra, 2005, pp 354–5.

2 See A Stewart, "Labour Market Reform in a Federal System: Making the Best of a Flawed Framework", Productivity Commission Roundtable on Productive Reform in a Federal System, Canberra, 27 October 2005 (available by request from the author or the Productivity Commission).

3 Committee of Review into Australian Industrial Relations Law and Systems, *Report*, AGPS, Canberra, 1985, vol 2, p 277.

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,[4] 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.

Even on the existing test, there will be not-for-profit bodies who will be left unclear as whether they are in or out of the federal system. Indeed they may potentially be in at one time and out at another, as their activities change!

A further and potentially more significant area of uncertainty concerns the many State public sector corporations that provide "governmental" services. To the extent that they also have significant trading activities, they may qualify as trading corporations and hence be subject to regulation under the new federal regime. But under the principles articulated by the High Court in the *Australian Education Union* case,[5] there are constitutional limits to federal regulation of State instrumentalities. Importantly, the Bill does not acknowledge any such limits. Indeed, it purports to deny the States the capacity to regulate their own agencies in certain ways. At best this will create uncertainty as to the operation of the *Australian Education Union* limitations. At worst, the new legislation may be invalid in relation to its purported effect on such corporations. It would be better therefore to exclude them altogether from the reach of the new system.

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

4 See eg *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *Commonwealth v Tasmania* (1983) 158 CLR 1.

5 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.

employment". There is also scope for laws to be prescribed by regulation as falling within this category.

There must though be considerable uncertainty about when a law is one that can be said to be "regulating workplace relations" or "determining employment conditions". To take just one example, does workplace surveillance legislation meet that criterion? Is there a distinction to be drawn here between, one the hand, a workplace-focused provision such as the *Workplace Surveillance Act* 2005 (NSW), and a more general statute such as the *Surveillance Devices Act* 1999 (Vic)?

Beyond that type of uncertainty in its operation, proposed s 7C is also arbitrary in its effect. For example if a State regulates a particular issue and that regulation appears in the main industrial statute, it cannot apply to a corporation and its employees unless the issue appears in the list of non-excluded matters in s 7C(3). But if the matter is dealt with in *another* Act, it is only excluded if the Act satisfies the definition of a "State or Territory industrial law", which as noted above includes a requirement that the law apply to "employment generally", or if it falls into one or of the more specific categories listed in s 7C(1)(b)–(e).

So for instance South Australia's recently enacted provisions on outworkers would seem have no effect because they appear in Part 3A of Chapter 3 of the *Fair Work Act* 1994 (SA), which is expressly stated to be a State industrial law; whereas the Victorian and New South Wales provisions on clothing trade outworkers would be untouched because they appear in separate Acts that do not "apply to employment generally".[6] In fact though, even the South Australian provisions will still have effect in relation to independent contractor arrangements, just not employees (this is made clear by the opening words to s 7C(1)). Hence corporations may be rendered immune from the operation of certain State laws in relation to one type of worker, but not others.

This type of muddle and uncertainty indeed characterises the whole scheme proposed by the Bill, which is neither a "national" nor a "unitary" system of regulation.

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.[7]

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

6 See *Industrial Relations (Ethical Clothing Trades) Act* 2001 (NSW); *Outworkers (Improved Protection) Act* 2003 (Vic).

7 Queensland Department of Industrial Relations, *Estimating the Coverage of a New Industrial Relations System*, DIR, Brisbane, 2005 (available on request from the Department).

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. If the government is truly interested in creating a single system of regulation for corporations, why is it not prepared to assume responsibility for those areas as well — especially given that the external affairs power provides a ready basis for enacting laws of universal application in those areas, as opposed to the less certain foundation offered by the corporations power?

A Fairer System?

It is not hard to identify concerns about fairness in a Bill that proposes:

- the removal of any statutory reference to establishing "fair and enforceable minimum wages and conditions", or to the principle of "fair and effective agreement-making";

- the removal of the right of most employees to challenge the fairness of their treatment when their employment is terminated; and

- the establishment of a "Fair Pay Commission" that, whatever else it may do, will not be required to consider whether its decisions are in any sense "fair".

I have raised extensive concerns about the fairness of the government's regulatory approach in previous submissions to the Committee, most recently in the context of the Workplace Agreements inquiry. I will also be one of the signatories to a much more substantial submission to this inquiry that is expected to be lodged by a large group of industrial relations academics, and which will go into detail as to the negative impact this legislation is likely to have in both economic and social terms.

Given those submissions, I will content myself here with highlighting what I see as a calculated attempt by the government to destroy the award system and prevent it from functioning as any meaningful form of "safety net".

I am not referring here to the abolition of the no-disadvantage test, which will prevent award standards from underpinning workplace bargaining in the way that the current legislation requires — though that is serious enough.

My point is rather directed to the range of ways in which employees can be denied any access to the protection of awards, even if they are not covered by a workplace agreement to which they (or at least a majority of their workmates) have consented. These gaps in award coverage make a mockery of any claim that employees can "choose" to work under awards rather than agreements. If the Bill is passed in its current form, most jobs will over time become award-free — as the government no doubt intends.

No guarantee of award coverage for workers currently on State awards

The first point concerns the great many workers who are currently employed by corporations under the terms of State awards. These workers will be brought into the new federal system, but denied any guarantee of being able to stay on awards.

How could that happen? Well, any existing State awards can only be preserved in the form of a "notional [federal] agreement", under the terms of Part 3 of proposed Schedule 15. But if a worker was at the transition date covered by both a State-registered agreement *and* a State award, only the agreement would survive (as a "preserved State agreement" under Part 2 of the same Schedule). This is because a "notional agreement" only arises where *no term or condition* of that person's employment was covered by a State agreement at the transition date (cl 31 of proposed Schedule 15; and see also cl 32(9)).

Hence even if the agreement in question only covered a single issue, such as redundancy entitlements, there could be no notional agreement to preserve the remaining award terms. Even if the State agreement were later terminated, the situation would not change, since there would never have been a notional agreement in the first place.[8]

Even if there were no State agreement to preclude the award terms from continuing in operation as a notional agreement, the notional agreement has a guaranteed life of only three years (see cl 33(1) of proposed Schedule 15). At the end of that time, whether or not employees covered by notional agreements have entered into any workplace agreements, they will become award-free — *unless* a new federal award has been made to cover them.

Importantly, while one of the objects of proposed Part VI of the Act is to "ensure that minimum safety net entitlements are protected through a system of enforceable awards maintained by the Commission" (proposed s 115(a)), the Commission is prohibited from making any new awards other than as part of an "award rationalisation process" (proposed ss 118E–118F). That in turn requires the Commission to act in accordance with an "award rationalisation request" made by the Minister (proposed s 118).

There is no requirement for such a request to be issued, or for any request to require the making of new awards to cover workers previously covered by State awards. Even if the creation of such awards were recommended by the Award Review Taskforce —

8 Compare the position where a worker is covered at the date of transition by a State award and a federally-registered certified agreement that deals with some but not all of the matters covered by the award. Here a notional agreement *could* be created to preserve the State award terms, because cl 31 of proposed Schedule 15 says nothing about federal agreements. While the certified agreement remained in force, it would still exclude the notional agreement in its entirety: see cl 5(1)(b) of proposed Schedule 14. But by implication from this last provision, if the certified agreement were terminated the notional agreement could "revive". It is impossible to see the logic in all this.

a non-statutory body that is mentioned only once in the entire Bill, in proposed s 90A, and then in a different context — the Minister would be under no obligation to implement them.

It is possible in some instances that employees, or unions acting on their behalf, might be able to apply to the Commission for their employer to be roped-in to an existing and "appropriate" federal award under proposed s 120B. But that would require a separate application for *every* employer — and we are potentially talking here about many thousands of businesses currently covered by State awards — and it would have to be argued in each and every case that "reasonable efforts" had been made to make a workplace agreement first.

Employer greenfields "agreements"

An employer establishing any new business will be able to make an "employer greenfields agreement". As the definition in proposed s 96D makes clear, and notwithstanding the terminology, it is clear that such an instrument is not an "agreement" at all. Rather it is a *unilaterally imposed* set of conditions that will be binding on all employees subsequently hired to work for that business and which need contain no more than the minimum standards set by the "Fair Pay and Conditions Standard" or FPCS.

Although such an "agreement" may only have a nominal duration of up to twelve months (proposed s 101(1)(a)), it will continue on in operation after its nominal expiry date unless terminated or replaced by a further (and this time genuine) agreement. While an employer may escape the "agreement" after its nominal expiry date by giving 90 days' notice under proposed s 103L, any employees who wanted to do this would need to organise a vote of the group then employed and gain the support of a majority. Furthermore, and as explained below, any termination would have little effect since it would *not* restore any award entitlements displaced by the "agreement".

Importantly too, this mechanism for unilaterally determining conditions is not merely to be available when a genuinely new business is established from scratch, but when an employer establishes what *for them* is a "new project" or "new undertaking" (see proposed s 95B). It is apparently to be possible for a company to take over an established business, make an "agreement" to set the terms for employment, and only then offer employment on those terms to some or all of the existing workforce. Indeed the same would presumably apply where one company in a group transferred its workforce to another company in the same group.

In responding to similar concerns about the operation of the new "100-employee" exemption from unfair dismissal claims — that large businesses may benefit from the exemption simply by dividing their workforces between related entities who each engage less than 100 employees — the Minister for Workplace Relations had this to say:

> The consequences of trying to restructure a company are many and substantial. First of all there are taxation implications of changing the corporate structure. Secondly there are implications in terms of having to pay out entitlements and redundancy payments and the like to workers, whether they're employed under an award or employed under an agreement. Thirdly, the transmission of business rules kick in and that means if you then re-engage those same employees, then you'd be struck with the provisions in the transmission of business rules which means that the award or agreement provisions that apply would continue to apply to those same workers. This is not something that we believe is going to happen.[9]

To take the first point, of course there will be costs involved in establishing new companies: but these can quickly be justified if a business is able to reduce its ongoing labour costs through use of a greenfields agreement.

The second point about having to pay out existing workers only applies if there *were* existing workers being transferred, as opposed to the business taking on entirely new staff. And even then there might be no such liabilities at all. Many awards or agreements specify that no redundancy pay need be provided if "alternative employment" is offered. Even in the absence of such a provision the business might be able to rely on the reasoning adopted by the High Court in the *Amcor* case,[10] where it was held that the transfer of employees from one company to a related entity did not involve any redundancy because their "positions" had not been abolished.

As to the third point, which even if correct would seem entirely irrelevant in the original context of unfair dismissal liability, the transmission of business rules are no barrier to effective use of greenfields agreements. For one thing, as will be explained shortly, the amended rules in the Bill would not apply at all to new employees (ie, those not transferring from an old employer to a new employer). In any event, a transmitted award has no application where the new employer is bound by a collective agreement, whether made before or after the date of transmission (proposed ss 126A, 126B(3)) — and an employer greenfields agreement is counted for this and other purposes (no matter how absurdly) as a "collective agreement". Hence a greenfields agreement would prevail over any transmitted award.

It is also worth pointing out that under the proposed new unfair dismissal laws, if a particular employee were dismissed in the context of a corporate restructuring exercise, but then not re-hired by the new employer, they could not bring an unfair dismissal claim. Even if the old employer had more than 100 employees, their dismissal would clearly be for "operational reasons" and hence any claim would be prohibited by proposed s 170CE(5C).

Interestingly enough, the Minister did not advert to the one issue that *might* make businesses pause before restructuring their operations, whether to escape the unfair dismissal provisions or to be able to make a greenfields agreement. This is the potential for existing employees affected by the process to make a claim under the

9 Doorstop interview, 10 November 2005 (available at http://mediacentre.dewr.gov.au).

10 *Amcor Ltd v CFMEU* [2005] HCA 10 (9 March 2005).

"freedom of association" provisions, on the basis that they had been dismissed, refused employment or had their position prejudicially altered by reason of their entitlement to the benefit of an industrial instrument (ie, whatever award or agreement applied prior to the restructuring): see proposed ss 253(1), 254(1)(i).

But even if the risk of such liability is sufficient to dissuade crude attempts by firms to set up greenfields agreements for what are plainly existing businesses, it does not alter the basic thrust of this submission: that the provision not just for new businesses to establish award-free workplaces, but for existing businesses to do so when embarking on a new project or undertaking, runs counter to the very idea of having awards as a "safety net" for those who do not make genuine agreements.

Exploitation of the new transmission of business rules

Under sections 149(1)(d), 170MB and 170VS of the current Act, federal awards and agreements that apply to an employer will also become binding on any person (a "successor, assignee or transmittee") who acquires all of part of that employer's business. The original and core purpose of these provisions, and of those that preceded them, has always been to prevent employers from evading award coverage by transferring their business to another entity.[11] That purpose, however, is almost completely ignored in the new provisions in proposed Part VIAA.

What the Bill proposes is that when a transmission of business occurs, any award or agreement binding on the transmittor will only apply to the transmittee in respect of employees who transfer with the business — and then only for a period of one year. New employees hired by the transmittee will not be bound by the transmittor's instruments at all.

The government has not, so far as I am aware, offered any justification for these changes. Certainly none appears in the Explanatory Memorandum. But their potential effect is clear. Any business will be able to escape its award obligations simply by transferring its workforce to a related company. If it can contrive not to re-hire any award-covered workers in the process, the business will be entirely award-free: though as noted above in relation to greenfields agreements, the freedom of association provisions may potentially come into play. In any event, even if all such workers are re-hired, and even if the new employer has not first established a greenfields agreement, it need only wait a year to achieve an award-free workplace.

Termination of workplace agreements

Perhaps the most significant attack of all in the Bill on the concept of awards acting as a safety net is the adoption of the approach that once a worker is subject to a workplace agreement, they can *never again* be covered by an award when performing that same job.

11 See *George Hudson Ltd v Australian Timber Workers Union* (1923) 32 CLR 413 at 450–1, 454.

Even if the agreement is terminated, any awards that would otherwise apply to them do not revive: see proposed s 103R in relation to federal awards, and cl 33 of proposed Schedule 15 in relation to State awards preserved as "notional agreements". Instead, the worker is to be employed subject to the minimum standards set by the FPCS, together with any other conditions that their employer may voluntarily "undertake" to provide (see eg proposed s 103M).

As the Bill stands, an employer may give 90 days' notice of the termination of an agreement, and have that notice take effect the day the agreement expires.[12] As little as 14 days notice may be required if the employer has written a power of unilateral termination into the agreement (see proposed s 103K).

For the employees concerned to fall back in that situation on what may be grossly inferior wages and conditions (ie, those set by the FPCS) is to hand the employer what is potentially a massive bargaining advantage, in terms of negotiating any new agreement(s).

But more importantly, the failure of award entitlements to revive in this situation makes an absolute mockery of any notion that awards are functioning as a "safety net". To stick with the metaphor, it is equivalent to inviting someone up onto the trapeze, then once they are in the air cutting the safety net away on the basis that it is somehow no longer needed!

The combined effect of these and the other provisions noted above is to deprive the award system of any integrity it might otherwise have as a safety net for bargaining. If the government does not want to retain awards, it should have the courage of its own convictions and abolish them. To retain them, yet build in different ways in which employers can contrive to be free of them, simply adds to the complexity of the regime. The same can be said of the farcical idea of having "protected award conditions" (see proposed s 101B) that can be overridden by a single line of boilerplate language in the fine print of a workplace agreement.

A Simpler System?

That brings me to the issue of whether the government is creating a "simpler" system. The claim that the new federal system will operate in a simpler fashion can only be maintained by someone who has either not read this 687-page Bill (which, remember, mostly contains provisions to be *added* to the existing 529-page Act, albeit it also repeals large chunks), or who is peddling misinformation.

It is true that in certain respects, it will be simpler under the proposed system to achieve certain objectives: notably to cut employment conditions, to get industrial action stopped, or to sack a worker without fear of redress. But I am yet to hear a

12 My reading of proposed s 103L confirms the view that others have expressed, that as worded it permits the notice to be given at any time — so long as the lodgment of the notice with the OEA, which allows it to take effect, occurs after the nominal expiry date.

credible analyst suggest that either the legislation itself or any of the processes it creates are to be regarded as "simpler".

The complexity of the Bill needs to be viewed at two distinct levels: that of its drafting, and of its regulatory impact.

In terms of drafting, the Bill is full of convoluted and at times almost unintelligible provisions. This is perhaps unsurprising to anyone who has become familiar with the approach adopted to the formulation of labour regulation over the past 15 years.[13] Nevertheless, some parts of the Bill are so difficult to follow that they require repeated reading, and even then it is hard to be sure what they mean.

Every single person I have spoken to who has attempted to read the Bill has had the same reaction, without exception, and regardless of their views as to its underlying objectives. Even the government's biggest cheerleaders would be bewildered (if not embarrassed) by how impenetrable it is.

If any proof be needed, it is the fact that after a week of the most intensive analysis of its provisions, I am still getting queries from legal experts as to whether they have properly understood this provision or that, or overlooked something in the maze of detail. I myself still have little confidence (or at least less than I would normally profess) as to whether I have properly understood certain aspects.

To take just a few out of many examples, I would highlight:

- the 32 pages devoted to the wages aspect of the FPCS (proposed ss 90–90ZR), most of which are intended to "explain" (and I use the term loosely) how existing award pay rates and classifications are to be converted into APCSs and then varied (if at all) by the Fair Pay Commission;

- the 45 sections (proposed ss 109–109ZR) devoted to what should be a relatively simple concept, that protected industrial action by employees be preceded by a positive vote at a secret ballot of those workers;

- the fact that simple and crucial terms such as "employer" and "employee" have no single or consistent definition, but rather require recourse to (at the very least) two separate sets of provisions (proposed ss 4AA and 4AB, and proposed cl 2 of Schedule 1), which are cunningly located at opposite ends of the legislation;

- the multiplication and scattering of definitional provisions generally, so that one never knows whether a particular word or phrase used in a provision is going to be defined in s 4, at the beginning or end of the Part

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

(or Division or Subdivision) in which the relevant provision appears, or somewhere else in the provision itself; and

- the adoption of the acronyms APCS and AFPC, which are bound to be confused by many with AFPCS or FPCS, the natural (though unofficial) abbreviations for the Australian Fair Pay and Conditions Standard.

The mere fact that the new legislation will be so difficult to read and understand will impose unnecessary costs on businesses, who will require extensive legal advice simply to understand how the legislation affects them. In the longer run, it will also create a powerful tactical advantage for larger and better-resourced parties — whether that means employers in relation to most individual employees, or strong and effective trade unions in relation to small businesses.

But the complexity does not simply lie in the drafting. The Bill would create a system that is a mish-mash of the old and new, overlaid by heavy-handed and partisan intervention that at every turn authorises the government to step in and prevent parties from conducting their relations in ways of which the government disapproves.

During the various transitional periods envisaged by the Bill, many thousands of businesses will be thrown into confusion as to their rights and obligations. Incorporated businesses bound by "notional agreements" will need to figure out exactly what State award *and* statutory provisions potentially qualify for inclusion, and then how many of those are rendered non-allowable.

Unincorporated businesses covered by federal instruments will be in an even worse position, forced to operate for up to five years in a parallel regime governed by the 108 sections in proposed Schedule 13. Not only does this refer extensively to parts of the current Act that will otherwise be repealed, forcing such businesses and their advisers to maintain *two* copies of the Workplace Relations Act and constantly cross-refer between them, but it also threatens that regulations may make further "additions, omissions and substitutions" (cl 108).

Workplace agreements are also to be subject to a greatly expanded notion of "prohibited content", a concept that is not to be defined in the Act but left to regulations (proposed s 101D). While the government has previously given some indication of what it *may* specify as such content,[14] the Bill would effectively present the Minister with a blank cheque to intrude into the bargaining process, leaving parties perennially uncertain as to what is or is not acceptable for inclusion.

What we do know about the initial list of prohibited content is that it will deny employers the right to agree to treat their employees fairly when determining whether to dismiss them, to agree to enhance their job security by voluntarily accepting

14 See Australian Government, *WorkChoices: A New Workplace Relations System*, Commonwealth, Canberra, 2005, p 23.

limitations on the use of substitute labour, or to agree to confer certain rights and entitlements on trade unions or their members.

While the government deplores "paternalism" when it comes to protecting employees against their lack of bargaining power, it apparently assumes that an employer who has agreed to any of these things must necessarily have been "forced" to do so and hence requires protection. Aside from the insult this implies to many larger employers, it reveals that the government has faith in market forces only when they are operating in favour of employers, not against them.

It also appears that the regulations on "prohibited content" will retain the existing requirement (in ss 170LI and 170VF) that an agreement "pertain" to the relevant employment relationship(s). Following the High Court's decision in the *Electrolux* case,[15] agreement-making has been thrown into confusion by the need to test each and every provision by reference to a complex and absurdly technical set of principles that have their origin in the limitations on the powers of award-making under the old arbitration system.

The government has at no stage, so far as I am aware, explained why those principles ought to be relevant to the making of a workplace agreement, or indeed why it makes sense to tell parties that what they have *agreed* is somehow not "relevant" enough to their relationship.

A further complication lies in the partial restrictions in proposed s 101C on "calling up content" from other instruments. It is impossible to fathom what is behind these restrictions. If the aim is really to "facilitate the enforcement of agreements by making it clear to the parties what terms and conditions apply to employees", as para 1005 of the Explanatory Memorandum suggests, then why are there exceptions?

More importantly, proposed s 101C is ambiguous in several key respects. For instance, if Agreement A imports terms from Agreement B (which it is replacing), which itself imports terms from Agreement C (an earlier version still) or Award D, does this transgress the limitations in the provision? And if it does, is the whole of the importation from B void, or just those parts of B that incorporate terms from C or D?

And on another point, what do the terms "applies" or "adopts" mean in s 101C(7)? If read broadly, they could preclude any attempt to include standard terms which have been drafted by an employer, union, employer association, lawyer or consultant (or that matter the OEA) for use in more than one agreement.

Areas for Clarification

There are many other aspects of the Bill that warrant comment. I have simply picked out some of the more important areas of uncertainty, where regardless of the underlying policy objectives the legislative intent could and should be clarified.

15 *Electrolux Home Products Pty Ltd v AWU* (2004) 78 ALJR 1231.

Effect on unregistered agreements

It is unclear whether or not the Bill's provisions on workplace agreements do or do not have any application to agreements never intended by the parties to have statutory effect. This is important because it is common in practice for employers and unions to negotiate unregistered agreements that are intended to have legal effect only at common law, if at all. Such agreements used to be extremely widespread, but had begun to disappear with the formalisation of workplace bargaining over the past 15 years — until the *Electrolux* decision forced parties who wanted to agree on what might be "non-pertaining" issues to put these matters into separate and unregistered agreements, deeds or letters of understanding.

As the Act presently stands, it is clear that a "certified agreement" is an agreement that the parties have applied to have certified by the AIRC. However in shifting to a regime in which agreements are simply lodged with the OEA and may then have effect (regardless indeed of compliance with various of the statutory "requirements"), the line between registered and unregistered agreements has been blurred.

Under the Bill, a "workplace agreement" includes a "union collective agreement" (proposed s 4(1)). Under proposed s 96B this latter is said to be an agreement in writing between an employer and one or more organisations. Such an agreement is taken to be "made" when those parties agree (proposed s 96G(c)). On the face of it, this would include *any* written employer-union agreement, regardless of whether the parties intended it to be lodged with the OEA. But under proposed s 99, a workplace agreement only "comes into operation" on the day it is lodged, and the parties can only be "bound" by an agreement if it is "in operation" (proposed s 100D). It is also provided that there can only be one workplace agreement "in effect" for a given employee (proposed s 100A).

On a literal reading of these provisions, therefore, unregistered (or rather, unlodged) agreements are to have no effect, even at common law. But if this is what the government intended, why is that not made clear?[16]

There is plainly room for an alternative interpretation, which is that the reference in proposed s 96B to a "union collective agreement" applies only to an agreement that is intended by the parties to have effect under the Act. This would be more congruent with proposed s 96, which defines an AWA in similar terms as a written agreement between employer and employee. It would be almost unthinkable to construe that definition as including *all* written employment agreements, since that would pick up all employment contracts that are not purely verbal and render them unenforceable unless lodged with the OEA.

Clearly then, the workplace agreement provisions require amendment to clarify their intent. It would also be useful if the more general issue of the relationship between a

16 Cf the reference in proposed s 101C(6)(b) to an "agreement, arrangement, deed or memorandum of understanding".

workplace agreement (especially an AWA) and an employment contract were properly and explicitly addressed in the legislation, to clarify for instance the scope for privately negotiating terms that add to or improve on what has been agreed in the statutory instrument .[17]

The maximum hours "guarantee" — a meaningless standard

Proposed s 91C offers a "guarantee", as part of the FPCS, that an employee will not be required to work more than an average of 38 hours per week, plus "reasonable additional hours".

This provision is meaningless as a minimum standard, however, since it will be permissible for employers to average "ordinary hours" over a year. Where this is done, it will be virtually impossible in practice for an employee to complain that they are being required to work excessive hours in breach of the "guarantee", unless they are nearing the end of a 12-month period and they have worked well over 38 hours on average per week — and even then, the employer might still be able to argue that any excess constituted "reasonable additional hours".

The use of a 12-month averaging period would in any event permit an employer to offer agreements that permitted huge hours to be worked for large parts of the year, to be compensated by light weeks at other time. Even if the hours worked in a given "heavy" week would not be regarded as reasonable by reference to the factors specified in proposed s 91C(5), including the employee's health and safety, this would not matter (at least for the purpose of the minimum standard) so long as the yearly average were kept at 38 per week.

A further problem stems from the fact that the "guarantee" is expressed in terms of an employee not being "required" to work certain hours. Does this imply that if an employee *agrees* to work "voluntary" overtime, the hours in question are not to be counted? This is more of a concern in the context of the pay guarantee, as discussed in the next section, but for now it is enough to say that it would make more sense to express the standard in terms of what the employee is required *or requested* to do.

Finally, even if an employee successfully complained of a breach of the maximum hours "guarantee", what would their remedy be? So far as I can determine, it would only be to seek the imposition of a penalty under s 178. But that would not compensate them for any loss they had suffered.

Nor does there appear to be any provision for employees to challenge what their employer is doing and require them to comply with the minimum standard. Unless they were covered by an agreement that provided for independent arbitration of any

17 As to the present uncertainty on this point, notwithstanding the decision of the Full Federal Court in *McLennan v Surveillance Australia Pty Ltd* (2005) 139 IR 209, see A Stewart, "A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation" (2005) 31 *Australian Bulletin of Labour* 210.

dispute, they could at most initiate a grievance under the "model dispute resolution process" (see proposed s 89E and Part VIIA). But that offers no binding outcome, unless the employer agrees.

In order to give the maximum hours "guarantee" any meaning, it would need to be subject to an overriding requirement of not requiring or requesting the employee to work unreasonable hours, regardless of the averaging period. There should also be a right to refer a dispute over this issue to the AIRC for binding arbitration.

"Required" work

Proposed s 90F offers a "guarantee", again as part of the FPCS, that employees will be paid at the relevant minimum rate (set either by an APCS or the Federal Minimum Wage) "for each hour worked". According to proposed s 98G, this is to be taken as a reference to any hour, or part of an hour, "that the employee worked and that he or she *was required to work*" (emphasis added).

One problem with this standard is that it is not easy to see how it is meant to work in the case of "salaried" employees who are paid a set amount per year (or week, or fortnight) without reference to the number of hours actually worked. In practice, such employees often work far in excess of the "ordinary" standard of 38 hours per week.

A possible answer, as the Bill stands, is to say that if the salaried employee is covered by an award (as would be the case for instance with academics), they are to be given a notional hourly rate under proposed s 90ZG, by dividing their weekly salary by 38. If they are not covered by the award they will be subject to the Federal Minimum Wage. But in either case the "guarantee" in s 90F would only cover the standard hours they notionally worked, anything in excess not being "required".

Even if this were correct, it would be open to a salaried employee, especially one covered by an award, to argue that given the workload they were expected to perform, they had *in fact* been "required" to work more than the notional 38 hours, and hence should be paid for them. Whether or not this is the intended effect of the legislation, it will no doubt be tested out at some stage.

But there is a more significant problem with confining the wages guarantee to hours "required" to be worked, and it is the one alluded to in the previous section. Suppose an employer offers (but does not require) overtime, and a worker agrees to do that. On the face of it, there would be no obligation on the part of the employer to pay for that overtime, at least in terms of the s 90F guarantee.

Indeed if a worker signed an agreement that said they would work whatever overtime they were asked to do, perhaps within agreed limits, it could be argued they were not being "required" to do anything. Hence not only would they not have to receive overtime rates, they would not be guaranteed to be paid at all for those additional hours.

Now it might be said, why would anyone *agree* to work voluntary overtime for which they were not going to be paid? But of course that assumes workers (a) would understand that at the time of agreeing, or (b) would be in a position to refuse if it were made clear to them that their chances of keeping their job might hinge on their willingness to co-operate.

To avoid such situations arising, it would be advisable to replace the word "required" in proposed s 90G(1) with the phrase "required or requested".

Making AWAs a "condition of employment"

Proposed s 104(6) permits an employer to require an "employee" to make an AWA "as a condition of employer", without this being regarded as "duress".

Now I am prepared to accept that the purpose of the provision is simply to enshrine the current interpretation that it is not "duress" to require a person to sign an AWA as a condition of being offered a job, and that it is not intended to permit employers to compel *existing* employees to sign AWAs.

Nevertheless, the provision as it stands is plainly susceptible of the broader interpretation. There would seem to be no reason not to amend it so that its operation is confined to new rather than existing employees.

"Operational requirements" dismissals

Much the same point can be made about proposed s 170CE(5C), which would preclude employees from bringing an unfair dismissal claim where their employment had been terminated for reasons that included "genuine operational reasons", in the sense of "reasons of an economic, technological, structural or similar nature".

Again, I am prepared to accept that this language, which already appears in the Act, is intended simply to cover dismissals by way of redundancy. Nevertheless, it might potentially be interpreted to cover almost every dismissal. Once more, if the provision is to be retained at all (and there are powerful arguments against it), it should be reworded so that it applies only to cases of genuine redundancy.