‘Research Evidence About the Effects of the ‘*Work Choices*’ *Bill*’

A Submission to the Inquiry into the
Workplace Relations Amendment
(Work Choices) Bill 2005

by
A Group of One Hundred and Fifty One Australian
Industrial Relations, Labour Market, and Legal Academics

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Abbreviations

AFPCS	Australian Fair Pay and Conditions Standard
AFPC	Australian Fair Pay Commission
AIRC	Australian Industrial Relations Commission
AWA	Australian Workplace Agreement
AWTE	Average weekly total earnings
CWJ	Comparative wage justice
IR	Industrial relations
ILO	International Labour Organisation
NMW	National Minimum Wage
ECA	New Zealand Employment Contract Act 1991
OEA	Office of the Employment Advocate
OECD	Organisation for Economic Co-operation and Development
LPC	United Kingdom Low Pay Commission

1 Overview

This submission is made by 151 Australian academics with expertise in the field of labour market analysis, industrial relations and employment law.

We represent a large, diverse group of Australian experts, including the majority of senior, experienced leaders in our field. Our experience spans several decades. We include in our number 31 Professors and 28 Associate Professors with expertise in the field of workplace issues, including the disciplines of economics, management, business, law, psychology and industrial relations. We come from 26 institutions. This group includes a substantial number of expert commentators on industrial relations and related issues internationally.

We hold divergent views on many issues. Indeed, we regularly debate industrial, economic and workplace issues at national and international forums and in the Australian and international literature. We do not always agree.

However, we share grave concerns about the historic and far-reaching changes now proposed for Australia's workplace relations and their potential effects upon Australian workplaces, workers, and our larger society and economy.

Australia's industrial relations system needs to continue to adapt to a changing international and national set of demands. Key challenges exist, including the need to increase productivity, increase skills, respond to the ageing of the workforce, narrow (or at least contain) widening inequality, and adapt to the changing nature of the Australian worker and their increasing caring responsibilities. However, we believe that many elements in the *Workplace Relations Amendment (Work Choices) Bill 2005* (hereafter referred to as the *Bill*), will not meet these problems. Some of the proposed changes will exacerbate them.

We recognise that the Motion establishing this Inquiry excludes certain matters from review. None the less, we wish to make some general points about the *Bill* and industrial relations change more broadly, before going to the specific terms of this Inquiry.

Our ten general concerns are:

1. Failure to allow adequate time to debate very significant change.

Regardless of views about the merits of the changes made in the *Bill* changes are being introduced with untimely haste. Many of us have participated in past Inquiries about industrial relations change in Australia. We are accustomed to participation in processes, which are often necessarily brisk. However, the changes now proposed are profound. They are not evolutionary. They significantly rewrite the constitutional basis of industrial regulation as well as the terms of century-old institutions like the Australian Industrial Relations Commission (AIRC). They establish new institutions, remove rights, and amend a very complex body of existing regulation.

The haste with which the legislation has been prepared, and is being channelled through Parliament, is indicated by the large number of matters that are left to Ministerial discretion through regulation – including even the capacity to override other laws.[1]

[1] s109C. There are 196 references in the Bill to "the regulations".

These changes deserve a thorough, informed, public discussion. The timetable established to bring these changes into law does not allow full, informed debate about their effects – even by experts very familiar with this material. In this light we are concerned that these changes have potential for serious unintended consequences. Further, the timeline does not allow adequate public discussion, even by experts, of the *intended* consequences of the *Bill* and its implications for workplaces, employers and employees.

2. Unnecessary confusion will flow from increasing complexity of regulation

One of the goals of the *Bill* expressed by the Government is to reduce complexity in the system. The current *Bill* fails on this count. Instead the *Bill* adds a new layer of complexity to industrial relations, which challenges even experts. The *Bill* is 687 pages long. It amends an *Act* that is over 600 pages long. Its Explanatory Memorandum is another 565 pages. Many employers will struggle, we predict, with the complexity of the new regulatory proposals. Research tells us that many employees – especially those most disadvantaged in the labour market – already have very limited knowledge about the industrial relations system and their rights within it. These changes will complicate workplace life, foster industrial litigation and further confuse many employees and employers. The arrangements are more complex, not less. This is not deregulation, it is increased regulation; but the increase in regulation does not benefit employees.

3. Government prescriptions on bargaining rules generate further inequality between parties, to the advantage of employers over workers and their unions

The Government has expressed a goal, over many years, to allow employees and employers to directly determine workplace matters that affect them. In fact, many of the provisions in this *Bill* are tightly prescriptive about what is allowed, or disallowed, in bargaining; about how bargaining is to be conducted; and about how unions shall be permitted to conduct their activities. These constraints are partisan in effect. They constrain the scope of employees and unions to pursue their interests, tightly prescribing activity and imposing severe penalties for any breach. On the other hand, they give great freedom to employers – though even employers are to be prevented from making agreements on 'prohibited' matters such as fair treatment in dismissal. 'Freedom of contract' apparently means a freedom to agree only on terms prescribed by the Government. This new regulation of the labour market enhances employer power and demonstrably weakens the position of employees.

Employees and employers approach the labour market with different levels of power. Amidst much change around the world in the past century, this basic fact holds true. Workers are not commodities or factors of production like other material elements of production. Internationally, labour law is designed to protect workers from unfair exploitation and to ensure that labour market competition occurs above a platform of basic rights. This platform includes the practical right to organise collectively, and to bargain collectively.

The *Bill* not only ignores these widely accepted views and practices, it shifts the balance in Australian workplaces. This is an historic and radical change in the balance of labour regulation in Australia. The *Bill* is in conflict with international treaties to which Australia is party. These include not only International Labour Organisation and international human rights provisions but also the Australia-United States Free Trade Agreement.

4. The individualisation of bargaining, even where the majority of employees are members of unions, and restrictions on effective rights to unionise

The *Bill* allows employers unilateral scope to impose individual agreements even in workplaces where collective agreements exist and the majority of employees elect to bargaining collectively. This contrasts with arrangements in most of our trading partners where employees' rights to bargain collectively are protected by law. The proposals in the *Bill* are extreme and radical in the unilateral power they give employers over employees in forms of bargaining.

The *Bill* severely curtails the practical capacity of workers to join unions, given the greater restraints placed on union entry to workplaces. It also severely curtails the capacity of workers to take industrial action. Given the historically low rates of industrial action that prevail in Australia at present, this is an unnecessarily restrictive approach that contravenes International Labour Organisation conventions.

5. The discouragement of genuine agreement-making and encouragement of the unilateral exercise of managerial power

The *Bill* increases the scope for management to impose unilateral decisions on the workforce. This is not just through the shifting balance of power, and the increased capacity of employers to set terms and conditions of employment on a 'take it or leave it' basis. It is reflected in the concept of employers making 'agreements with themselves' in new undertakings. More importantly, it arises through the capacity of all employers to unilaterally terminate agreements and establish terms and conditions below award standards without consultation with employees, and the capacity of most employers to summarily dismiss employees for reasons that would be construed as 'harsh, unjust and unreasonable' should they dissent from such reductions. This is a disincentive to employees making initial agreements, and to employers making subsequent agreements.

6. Lower minimum standards and the abolition of the no disadvantage test

The Bill abolishes the 'no disadvantage' test, resulting in lower employment standards. This will affect many employees, especially the disadvantaged. Those employed on awards (disproportionately women) will face reduced minima. Those signing individual agreements face the loss of conditions like public holidays, rest breaks, incentive based pay, annual leave loadings, allowances, penalty rates and shift and overtime penalties, either in the agreement or afterwards. These are significant potential losses for Australian workers and their families. They amount to a serious decline in the minimum standards of work in Australia.

7. Deeper economic and social inequality

Inequality in the Australian labour market has been widening in recent years, as the top of the labour market has enjoyed rapid increases in wages and benefits, while the bottom has lagged some distance behind. Inequality in the labour market has important social consequences which reach beyond the direct impacts upon the poor and low paid and encompass social exclusion, intergenerational disadvantage, higher levels of societal violence and health effects for the larger society. Given the traditional value placed on equality in Australia, and fair opportunities for all, we are concerned about the impact of the *Bill* on wider social and economic inequality in Australia.

8. Unfairness and the removal of effective arbitral powers

Australia's industrial system has 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. The *Bill* makes much of the new Fair Pay Commission, claiming that this will adequately protect minima. Yet a body charged with, and carrying out, this function exists – the AIRC.

The new *Bill* gives no effective weight to fairness. It removes the capacity of the AIRC to hear test cases about industrial standards in Australia. It removes the capacity of the AIRC to arbitrate cases involving the misuse of employer power, unless the employer consents. Employees may be forced into the common law courts to exercise their workplace rights.

9. Adverse effects on work and family

Many Australian workers have responsibility for the care of others while in employment. The sea change arising from the growing participation of women, especially mothers, in paid work creates a strong case for industrial change to support working carers, especially in light of Australia's backward leave and working time regime for working carers. The *Bill* reduces the existing work and family supports in Australia, and offers no way forward to their general improvement. This has important implications for future labour supply, along with the well being of Australian men, women and children.

10. Lack of supportive evidence

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

We now turn to more in depth consideration of some of the *Bill's* provisions and long term effects. In the short time available, we have not had time to provide detailed consideration of the range of issues raised by this *Bill*. Some issues have been given more consideration than others, many have been given less consideration than is warranted, simply because of the logistics of preparing a submission on such a major piece of legislation in such a brief period.

2 The balance of power in the employment relationship

One of the central assumptions of the *Bill*, if it is to be taken at face value, is of an absolute equality of power between the individual employee and the corporation, a collective of capital that in effect represents the only form of employer that will be constitutionally covered by this *Bill* in the long run.

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.[2] It does not, however, apply these principles to the workplace.

Employee bargaining power reflects an individual's ability to assert a certain level of control over their working life through negotiation with management of the terms and conditions of employment, wages and other benefits and compensation. Thus, insofar as an employee is able to make joint decisions with management through the negotiation process, that employee enjoys a level of bargaining power.

Bargaining power is problematic for most workers when their workplace arrangements are individualised by AWAs. This applies to workers who have no access to collective representation, who cannot afford non-collective representation, who have to deal with managers exercising exclusive managerial prerogative, who are confronted by sophisticated personnel and human resource policies, who are often in precarious employment as part-time or casual workers, who have skills at the lower end of the wage market, and who lack access to information, bargaining skills, or adequate, independent representation.

The lack of bargaining power is associated with low wages and poor working conditions. Wages rise where employees have an ability to affect employer outcomes, including where they have collective bargaining power or where there are particular labour market shortages.[3] Individual contracts such as AWAs represent a weakening of the bargaining power of employees[4] and those with little bargaining power have difficulty in integrating work and family responsibilities. This applies particularly to women in part-time and casual work, and adversely affects equal pay.[5]

The individualisation of industrial relations has implications for equity and equality. Where an industrial relations system fails to address bargaining power for workers, through the

[2] W. Truss, *Coalition beefs up farmer, fisher and forester bargaining power, slashes red tape,* Media release, Department of Agriculture, Forestry and Fisheries, Canberra, 24 June 2004.
[3] G.A. Akerlof and J.L. Yellen, *Efficiency Wage Models of the Labor Market.* Cambridge University Press, Cambridge, 1986.
[4] D. Peetz, 'How well off are employees under AWAs? Reanalysing the OEA's employee survey'. In Barry, M. and Brosnan, P. (eds). *Proceedings of the 18th AIRAANZ Conference - New Economies: New Industrial Relations.* Association of Industrial Relations Academics of Australia and New Zealand, Noosa, Qld, February, 2005.
[5] G. Strachan and J. Burgess, 'The 'family friendly' workplace origins, meaning and application at Australian workplaces'. *International Journal of Manpower,* 19, 4, August, 1998, 250-265; D. Peetz, *The Decline in the Collectivist Model.* Queensland Department of Industrial Relations, Centre for Work, Leisure and Community Research and Griffith Business School - Department of Industrial Relations, Griffith University, Brisbane, 2004.

primacy of collective bargaining, equality in treatment of employees and equity of outcomes are necessarily compromised.[6]

3 Abolition of the 'No disadvantage test' and the introduction of the Australian Fair Pay and Conditions Standard

One of the most important proposed changes in the *Bill* is the abolition of the no disadvantage test, whereby agreements are meant to leave employees no worse off than they would be under the award, and its replacement with an 'Australian Fair Pay and Conditions Standard' (AFPCS). The schema is almost identical to that which was to apply under *Jobsback!*[7] and is similar to those which applied in the 1990s in New Zealand[8] and, less closely, Western Australia.[9]

The AFPCS is the latest and most significant weakening of protective regulation in Australian decentralised bargaining.[10] 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[11] and where Australian Workplace Agreements (AWAs) prevail over collective agreements and awards.[12] 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 workplaces where labour is plentiful and turnover costs low, it is very likely that wages and conditions will fall below award standards.

Under the 'no disadvantage test', employees could expect that proposed agreements would be compared with the totality of award pay and conditions including various penalty rates, overtime provisions and allowances. Under the AFPCS, agreements will be measured only against a minimum ordinary pay rate and a few leave provisions. This creates the very real possibility that new agreements will be registered even when they push total earnings for employees below award levels. The imputation of the *Bill* is that employees will have a choice as to whether or not they accept a contract. But the 'choice' of existing employees (especially in small and medium enterprises) will be to accept a contract or run the risk of being arbitrarily dismissed. While there are provisions in the *Workplace Relations Act 1996*

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[6] A. Blackett and C. Sheppard (2003) 'Collective bargaining and equality: Making connections'. *International Labour Review*, 142, 4, 2003, pp. 419-57.

[7] Minimum hourly wages, four weeks annual leave, two weeks sick leave and twelve months unpaid maternity leave

[8] a minimum wage, annual leave, sick/bereavement/carer's leave, and public holidays

[9] a minimum wage, annual leave, sick leave, bereavement leave, public holidays, a standard 40-hour week, plus three procedural rights including protection against unfair dismissal J. Bailey and B. Horstmann, '''Life is full of choices': Industrial relations 'reform' in Western Australia since 1993', *Research on Work, Employment and Industrial Relations 2000*, Proceedings of the 14th AIRAANZ Conference, Association of Industrial Relations Academics in Australia and New Zealand, Newcastle, 2000, pp. 39-51.

[10] See P, Waring and Lewer, J (2001) 'The No Disadvantage Test: Failing Workers?', *Labour & Industry*, Vol. 11, No. 4, pp.65-86; Merlo, O. (2000) 'Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining', *Australian Journal of Labour Law*, Vol. 13 No. 3, December, pp.207-235; and Mitchell, R, Campbell, R, Barnes, A, Bicknell, E, Creighton, K, Fetter, J and Korman, S (2003) 'What's going on with the No Disadvantage Test: An Analysis of Processes and Outcomes under The Workplace Relations Act 1996 (cth)', Working Paper No. 33, *Centre for Employment and Labour Relations Law*, University of Melbourne for a review of the gradual weakening of the 'no disadvantage test'.

[11] S.103R, *Workplace Relations Amendment (Work Choices) Bill 2005*.

[12] S. 100A, *Workplace Relations Amendment (Work Choices) Bill 2005.*

which make coercion in the making of an agreement illegal, it will be difficult to prove and easy for an employer to construct an alternative reason for the dismissal. The OEA has indicated that it will no longer check for duress after agreements are lodged, effectively removing the only plausible system for enforcement regarding duress. This context, which is approaching 'employment at will', creates a new bargaining dynamic in which employees will be reluctant to oppose new agreements that involve degrees of disadvantage for fear of being dismissed. It creates a bargaining context that is far less regulated than that of the United Kingdom or New Zealand where there are rights to unfair dismissal remedies.[13]

In circumstances where employment is offered contingent on the acceptance of an AWA, the prospective employee's choices are extremely limited – accept an AWA that may provide only the AFPCS or reject employment. The privileging of AWAs over collective agreements and awards will also mean that it will be quite possible for such an employee to be working for far less pay than colleagues performing the same work. Over time, an employer may, for economic reasons, decide to dismiss workers under collective agreements and rehire new employees on AWAs providing just the AFPCS (see below).

Employers' willingness to take up these opportunities will be constrained by their need to retain quality labour, reduce turnover costs and sustain their own sense of equity. But the introduction of the AFPCS and other reforms significantly encourages employers to pursue low wage employment.

The *Bill* purports to establish a set of minimum conditions which, upon closer examination, is not the case. Annual leave may be 'traded-off'. This is most likely to occur in relation to AWAs, as the majority of AWAs do not provide for a wage increase during the period of the agreement.[14] In such circumstances, the only access an employee may have to a wage increase is by cashing out annual leave. The 38 hour 'maximum' week has limited significance, given that the 38 hours are averaged over a year, employees can be required to work 'reasonable' hours above 38 hours, and they are not entitled to overtime payment for those overtime hours unless it is specified in their agreement or an award (if the award still operates).

4 Termination of agreements and impact on conditions

An employer may terminate an agreement unilaterally after it has expired, provided that s/he has given 90 days notice.[15] This notice can be given before the agreement expires, as long as the termination itself occurs after the expiry date. If the agreement sets out a procedure for unilaterally terminating that agreement, then the employer need only to give 14 days notice.[16]

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[13] See J. Addison and Siebert, S. (2002) '*Changes in Collective Bargaining in the UK*' Forschungsinstitut zur Zukunft der Arbeit/Institute for the Study of Labour, Discussion Paper Series; and Wilson, M (2004), 'The Employment Relations Act: a Framework for a Fairer Way'. In E. Rasmussen ed. *Employment Relationships: New Zealand's Employment Relations Act.* Auckland University Press, Auckland, pp.21-38.

[14] Department of Employment and Workplace Relations and Office of the Employment Advocate, *Agreement Making under the WR Act*. Australian Centre for Industrial Relations Research and Training, *ADAM Report*, No 27, University of Sydney, Sydney, December 2000, p. 11; Australian Centre for Industrial Relations Research and Training, *ADAM Report;* Mitchell and Fetter, 'Human resource management and individualisation in Australian law', p. 312; K. Van Barneveld and B. Arsovska, 'Changing the structure of wages?' *Labour and Industry*, vol. 12, no. 1, 2001.

[15] s103L

[16] s103K(4)

Once an agreement is terminated then, an employee can never be covered again by an award while working for that employer.[17]

The employer can then unilaterally set the terms and conditions of employment without having the inconvenience of negotiating a new agreement. In effect, the employer can unilaterally cut wages and conditions after an agreement has expired, provided that the four minimum standards are met. This can be done either through the mechanism of 'undertakings',[18] which are lodged with the Employment Advocate, or by simply paying at or above the minimum standards. This may immediately result in a significant reduction in earnings. It also significantly shifts bargaining power in favour of employers.

The Minister explained that this provision related to 'those circumstances, where an agreement ends, an employer, and employee, can agree to part their ways, in which case the employee is able to look for another job. That's not unusual, and it's a situation which occurs at the present time.'[19] This misrepresents the effects of the provision. This provision does not arise when a worker decides to leave a job; rather, it allows a corporation to unilaterally cut pay and conditions. It is not adequate so say, in effect, that 'if your employer removes your award conditions, you can leave and get a job elsewhere'.

That said, if the employee whose pay and conditions have been cut is in a firm that has 100 employees or less, the employee can be dismissed for refusing to work under the new terms and conditions. Indeed, an employee who merely complains about the cut in their pay and conditions, or talks to their fellow employees, friends or neighbours about it, can be dismissed, and would have no recourse on the grounds that the dismissal was unfair.

This is a particularly disturbing aspect of the proposed legislation. It clearly has the potential to lead to significant unilateral cuts in pay and conditions, including the loss of award conditions that are said to be 'protected by law'. As discussed below, it would also act as a major disincentive to agreement-making, contrary to the objects of the *Bill*.

We note that the Motion establishing this Inquiry excludes unfair dismissal from review on the grounds that unfair dismissal changes have been covered by numerous previous Senate inquiries. However, the nature of unfair dismissal will be fundamentally changed in the *Bill*, as the provisions for termination of agreements enable dismissals to be made in circumstances which never existed before. Consideration of the impact of provisions for termination of agreement has to take account of the changes to unfair dismissal provisions.

5 Transmission of business and loss of conditions

The *Bill* proposes to make it possible to deprive employees of wages and conditions twelve months after transmission of business occurs. This will happen even if the work being performed by the employees does not change. The current situation is that that where there is a genuine transmission of business, the employees' award or agreement entitlements are also transferred. The relevant provisions were designed to prevent employers avoiding their obligations simply by transferring their business to another entity.[20] If the *Work Choices* amendments become law, employers will be able to cancel their award and agreement

[17] s103R
[18] under s103M
[19] *AM*, ABC Local Radio, 3 November 2005.
[20] B. Creighton and A. Stewart, 2005, *Labour Law*, 4th Edition, Federation Press, Sydney, pp 170 – 172.

obligations unilaterally, by restructuring their corporate structures or outsourcing work to a related entity or a third party. Employees will have no choice but to accept the employer's proposals regarding wages and working conditions to replace those cancelled.

6 Dismissal of workers for 'operational' reasons'

Employees who are dismissed for 'genuine operational reasons or reasons that include genuine operational reasons' will be prohibited from seeking a remedy because it is also harsh, unjust or unreasonable. 'Operational reasons' are defined as including 'economic, technological, structural or similar' reasons.[21] If even one of the reasons for the dismissal is a 'genuine operational reason', the AIRC must find that an application pursuant to the harsh, unjust and unreasonable provisions is invalid. In several cases before the AIRC, dismissed employees have obtained remedies where, although their dismissal was for operational reasons, it was also harsh, unjust or unreasonable, often because of the manner of their selection for redundancy. Such cases have included individual employees, who most often receive the remedy of compensation.[22]

The Minister has argued that the *Bill* will retain the *current* law on this issue'.[23] However, this is a new provision that substantially changes the law. It is reasonable, as is the case under the present law, that the AIRC should take account of whether a dismissal is for genuine operational reasons in reaching its decision as to whether a dismissal was harsh, unjust and unreasonable. This is very different, however, to saying that a case is automatically excluded if a broadly defined operational reason forms only part of the reason for the dismissal. For example, certain employees may be victimised and targeted for dismissal in a redundancy process. Such employees should not be denied access to unfair dismissal remedies. Moreover, 'economic' and 'structural' factors potentially go well beyond instances of genuine redundancy exemplified in the explanatory memorandum.[24] For example, if an employer decided to replace award-covered workers with cheaper employees on the minimum standards, this would provide an economic advantage to the employer and could therefore constitute a genuine 'economic' reason to exclude any unfair dismissal claim under the *Bill*.

The Minister has explained that this provision is aimed at preventing retrenched workers from 'double-dipping' by obtaining redundancy pay on top of compensation for unfair dismissal.[25] However, there is nothing in that provision of the *Bill* that refers to redundancy payments. If this were the purpose, then the legislation would only need to require that the Commission deduct redundancy payments from the maximum amount of compensation a worker could receive. In reality, such a provision would be unnecessary, since the AIRC already takes redundancy payments into account in determining compensation, as one would expect the parties to do in reaching a settlement.[26] In practice, this provision would enable a worker to be dismissed in 'harsh, unjust and unreasonable' circumstances, by a firm of any size, if the firm could successfully argue that it was partly for 'operational reasons'. The worker would be unable to lodge a complaint about unfair dismissal.

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[21] Proposed ss 170CE(5C) and (5D), 170CEE.

[22] For example, see Australian Industrial Relations Commission (AIRC), *Smith and Kimball and Moore Paragon Australia Ltd*, unreported, AIRC Full Bench, (Print PR942856, 20 January 2004), 2005a.

[23] 'Dismissal for Operational Reasons', Media release KA335/05, 3 November 2005, emphasis in original.

[24] Explanatory Memorandum, 321-2.

[25] *AM*, ABC Local Radio, 3 November 2005.

[26] AIRC 2005a, op. cit. Paul Stewart Young and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Lear Corporation, AIRC, 23 April 1998, Print Q0398; S H Chung and SA Toyo Paper Products Pty Ltd , AIRC, 1 December 1997, Print P7054.

The Prime Minister has told Parliament that this provision is to 'clarify' the situation that arose when sixteen workers at the Blair Athol coalmine in Queensland were sacked.[27] In 2001 the AIRC found that Blair Athol management had created a 'black list' of union members who were 'singled out for termination' via a redundancy process. [28] Mine management 'went about demeaning' those targeted for termination; for example they were 'allocated menial tasks such as chipping weeds with a hoe rather than using a weedicide as was normally the practice ... and painting tyres with a broom as opposed to spray painting which was the normal practice'. The 'strategy', which according to the AIRC 'could be likened to 'blood sport'', was 'designed to force (unionists) to accept the redundancy package'. Management introduced a performance appraisal scheme which had 'no procedural fairness or due process' and in which a group of unionists were denied 'opportunities to perform work which would have provided an opportunity to have improved their...rating'. It was then used as the basis for dismissing the 16 workers. Only a 'whistle blower' witness revealed the existence of the 'black list'.[29] The situation experienced by the workers is detailed in research analysis.[30] This case was pursued by the workers under the unfair dismissal provisions. After numerous cases, appeals, further appeals and delays, most of the workers were reinstated and the case was settled with the unanimous approval of the workers seven years after the dismissals. Under the *Bill*, these workers would have been unable to pursue their claim.

Although the Blair Athol case identified weaknesses with the law, these had nothing to do with 'double dipping'; rather, they were about the difficulties the blacklisted workers faced in obtaining reinstatement in a timely manner: justice delayed is justice denied. The proposed inclusion of these provisions would only worsen the inequity that occurred for several years at Blair Athol, and create opportunities for other unscrupulous employers to use this provision to contrive arrangements to dismiss workers for 'economic' reasons.

7 Changes to minimum wage fixation

The *Bill* seeks to establish the Australian Fair Pay Commission to determine basic rates of pay and casual loadings, maximum hours of work, annual leave, personal leave, and parental and related entitlements. A number of aspects of this proposal cause concern:

1. the replacement of some of the existing functions of the AIRC with a new body composed of limited tenure appointments;
2. the wage setting parameters;
3. the frequency of wage and other reviews;
4. the capacity for minimum conditions to be 'traded';
5. 'escape' clauses relating to the Australian Fair Pay and Conditions Standard;
6. the veto right of the Minister.

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

[27] House of Representatives, *Hansard*, 3 November 2005, p54.
[28] Australian Industrial Relations Commission (AIRC), *Smith and Others and Rio Tinto Coal Australia Pty Ltd*, unreported, AIRC Full Bench, Watson DP, Kaufman DP, Smith C, (Print 957290, 14 April 2005), 2005b. R D Smith and others and Pacific Coal Pty Ltd, AIRC, 9 April 2001, Print PR902679.
29 R D Smith and others and Pacific Coal Pty Ltd, AIRC, 9 April 2001, Print PR902679.
[30] D. Peetz and G. Murray, 'Individualisation and resistance at the coal face', *Just Labour*, 2005, forthcoming.

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.

The criteria for appointment are compounded by the wage-setting parameters. These are purely economic and fixated upon unemployment and other economic consequences of determinations. 'Fairness' has been removed from wage fixing criteria and merely placed in the 'branding'. There are four related difficulties with this approach. Firstly, any economy, at any time, will have some unemployment or inflation (or the 'expectation', 'propensity' or 'probability' of either or both maladies). It follows that no time is a good time for any wage increase or other changes that add to labour costs. In effect, the parameters force the AFPC to take an extremely cautious approach to increasing the income of the lowest paid workers.

A second problem relates to the implicit assumption that raising the minimum wage will affect employment outcomes. Sufficient evidence has been produced at national wage and other inquiries to throw doubt on this assumption. In essence, the parameters will mean that the lowest paid will be required to bear a disproportionate burden of economic management.

Those on low wages have a high propensity to consume, as a high proportion of their incomes must be spent on essentials. The reduction in this spending power will have economic effects.

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[31] and that the AIRC provides fair minimum standards for employees in the context of living standards generally prevailing in the Australian community.[32] No such requirement is imposed on the AFPC.

The present safety net system is one in which certain parties are guaranteed participation rights and others are permitted to provide evidence as 'interveners'. The representative rights of unions ensure that there are regular reviews of standards. Under the new system the AFPC will initiate such reviews. The parameters, of themselves, reduce the frequency (not to mention the outcomes) of reviews. Thus, both real and relative standards of the lowest paid will suffer.

The capacity of the Minister to veto or amend outcomes by regulation suggests an unwillingness to accept the decisions of umpires who are already guided by 'parameters' that

[31] s88A of current WR Act
[32] s88B(2)(a) of current WR Act

constrain their determinations. The *Bill* has broken new ground in this respect in determining the starting federal minimum wage and the default casual loading. Examples of the Minister's capacity to determine outcomes can be found at sections 90Q, 90T and 130 of the *Bill*. 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 AFPC is said to be modelled on the British Low Pay Commission (LPC).[33] 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[34] 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.

The AFPC is implicitly premised on the controversial notion that a lower minimum wage will assist employment growth. Evidence from the UK, after a 40 per cent increase in the NMW since 1999 is that, 'overall employment has increased among the groups of workers and in the sectors most affected by the NMW.'[35] Harvard economist, Professor Richard Freeman, in a recent paper analysing the debate on flexibility and labour market performance argues 'the best summary of the data – what we really know – is that labour institutions reduce earnings inequality but that they have no clear relation to other aggregate outcomes, such as unemployment.'[36] In other words, the overseas evidence suggests the proposed system of minimum wage determination is likely to result in lower minimum wage increases than would have prevailed under the AIRC, to increase income inequality and to have little effect on employment.

8 Access to arbitration and alternative dispute resolution

The *Bill* transforms the central institution of Australian labour relations, the AIRC, into a voluntary dispute resolution body with minimal powers. The model dispute resolution process and other relevant provisions of the *Bill* (see Part VIIA) provide an alternative dispute resolution (ADR) role for the AIRC in various disputes, such as those that arise in bargaining and under the operation of concluded workplace agreements - but only if all parties agree that the AIRC should play that role. However, limits are placed on what the parties can allow the AIRC to do (eg no arbitration in bargaining disputes, and no binding orders in disputes under workplace agreements). Further, the AIRC will have none of the powers of compulsion that

[33] eg Andrews K (2005) 'Building Better Workplaces', Speech to the National Press Club, Canberra, 31 May.
[34] ibid
[35] Low Pay Commission, National Minimum Wage Report of the LPC, DTI, London Feb 2005
[36] Freeman, Richard, 'Labour market institutions without blinders: The debate over flexibility and labour market performance', Working paper 11286, NBER, April 2005

have made it such an effective conciliator over many years (eg its powers under s 44I of the Bill are not available when conducting ADR under Part VIIA of the *Bill*).

These provisions are of significant concern, for two reasons. First, they contradict the Government's rhetoric about free bargaining and choice. That is, for example, the parties to a workplace agreement or agreement negotiations are only "free" to agree on outcomes that the Government approves of. If they want to provide an expansive role for the AIRC in dispute resolution, the *Bill* places significant limits on their ability to do so. Secondly, the provisions ignore the fact that all industrial relations parties – employers, unions and employees alike – frequently utilise the dispute resolution services of the AIRC because they find them highly effective. For example, recent research by a team of Monash University academics has shown that s 127 applications for orders to stop unprotected industrial action frequently result in settlement of the underlying dispute, after conferences facilitated by the AIRC. This research also found a high level of support, especially among employers, for an interventionist role by the AIRC once a dispute comes before it.[37]

The replacement of conciliation and arbitration with mediation will favour more powerful and educated parties. This is because mediation has the following characteristics:

- mediated outcomes are not based on precedents or standards but on negotiated settlement;

- stronger parties are more able to negotiate a favourable settlement against weaker parties (particularly if the threat of losing one's job is in the background of that negotiation for the weaker party);[38]

- a facilitative (rather than evaluative) model of mediation will ensure that the mediator will not intervene into the mediation process to assist a weaker party have a greater voice or to prevent a weaker party making a foolish or disadvantageous settlement;[39]

- mediation does not result in a binding solution like arbitration. It is likely that a system based on mediation will lead to increased litigation particularly where parties seek to establish precedents and labour standards (clearly missing from the new award base);[40]

- in the US the rationale for using mediation has been to lower the traditionally high levels of workplace litigation (largely a result of the lack of a centralised system of conciliation and arbitration in that country). Ironically, the Australian reforms will

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[37] Helen Forbes-Mewett, Gerard Griffin, Jamie Griffin and Don McKenzie, 'The Role and Usage of Conciliation and Mediation in the Australian Industrial Relations Commission', *Australian Bulletin of Labour*, 31, 2005, 171

[38] Astor, H. and Chinkin, C., *Dispute Resolution in Australia*. Butterworths, Australia, 1992

[39] Alfini, J., 'Evaluative versus Facilitative Mediation: A Discussion' *Florida State University Law Review*, vol. 244, 1997

[40] Stephenson, C. 2000 'Legal Issues Resulting from Pitfalls of Attending Mediation in Mediation and Pretrial Conference – What is it all About? *Law Society of Western Australia Seminar*, Wednesday 24 May, W.A. Club, Perth.; Ingleby, R 1991a 'Why Not Toss a Coin? Issues of Quality and Efficiency in Alternative Dispute Resolution' Paper Presented to the Australian Institute of Judicial Administration Ninth Annual conference; Ingelby, R. 1991b *In the Ball Park: Alternative Dispute Resolution and the Courts*, AIJA, Carlton South

deliver a US style outcome with higher levels of litigation as a result of the weakening of the AIRC's involvement in settling industrial disputes.[41]

9 Employer greenfield agreements

The nature of 'greenfields agreements' in Australian industrial relations regulation is that they are made for start-up operations (greenfields) before employees are employed. In the past, they were made between the employer and a single union, which claimed sole coverage of the employees to be employed at the new site; thereby gaining 'single union status' and simplifying negotiations for the employer. There are four major points that should be noted about the 'greenfields agreements' proposed under the new legislation:

First, the legislation now specifically distinguishes between 'union greenfields agreements' and 'employer greenfields agreements'. The latter represents an entirely new concept in Australian industrial relations regulation. Both 'union greenfields agreements' and 'employer greenfields agreements' are considered collective agreements.

Second, 'greenfields agreements' of both types have a maximum twelve month duration, prior to which protected action is not available.

Third, greenfields agreements (both types) can now be made for a 'new business', a 'new project' or a 'new undertaking'. That is, the *Bill* broadens the definition of 'greenfields', a point that was subject to some dispute under previous legislation. The opportunity for employers to justify a greenfields agreement is thus far greater. The scope, definition and interpretation of what constitutes 'new' is therefore wider than before. This is in contrast to the previous situation where the 'newness' of the operation was contestable and was determined by the AIRC.

Fourth, employer greenfields agreements – the new category – are made when an employer lodges an agreement for a greenfields operation. The Explanatory Memorandum confirms that 'employer greenfields agreements' do not involve employees or unions. That is, the 'agreement' is *unilaterally* made by the employer without *any* bargaining with any other party – neither a union nor employees.

Several particular concerns therefore arise from these provisions.

First, to apply the term 'agreement' to an 'employer greenfields *agreement*' is nonsensical, when there is no agreement.

Second, the notion of 'new' is stretched, allowing (perhaps encouraging), employers to restructure business to construct a new situation and to thereby remove themselves from existing agreements and awards.

Third, there is no opportunity for employees or the representatives of employees under 'employer greenfields agreements' to negotiate before they are employed, as the agreement is lodged before employment. Once they are employed under the 'agreement' over which they

[41] Van Gramberg, B, *Managing Workplace Conflict: ADR in Australian Workplaces* Federation Press, Sydney; forthcoming; also note Boulton, A.J. 1999 'The Changing Role of the Commission' *Paper presented at the Industrial Relations Society of Australia 1999 National Convention*, The Challenge of the Workplace, Freemantle, 21-23 October, 1999

have had no say or any input, they are disallowed from taking industrial action until the agreement expires in twelve months.

There is considerable potential for these new 'employer greenfields agreements' to be used by employers to undermine existing conditions in existing workplaces and existing awards and collective agreements. For instance, an employer could restructure business so that a greenfields is allowed under the new definition, even if the business undertaken was essentially the same as before. Then the employer could register an 'employer greenfields agreement' with the Office of the Employment Advocate which contains terms and conditions that have not been bargained at all. These then apply for twelve months, and no protected action can be taken in that time.

These 'employer greenfields agreements' are potentially a device for employers to very quickly move themselves out of existing arrangements.

10 Collective bargaining

Collective bargaining *matters*: it allows workers to negotiate their terms and conditions of employment on a more equal footing with their employer and it makes a real difference to the working lives of employees both in Australia and abroad. On the other hand, individual contracts mean less pay, worse conditions, and less control over work for ordinary Australian employees.[42]

It is for these reasons that collective bargaining is viewed as a fundamental human right by the United Nations and the International Labour Organisation (ILO). Convention 87 *Freedom of Association and Protection of the Right to Organise* (1948) sets out workers' fundamental right to form and join independent union organisations and makes it a responsibility of national governments to facilitate this. Convention 98 on the *Right to Organise and Collective Bargaining* (1949) sets out the rights of employees to collective bargaining and encourages states to establish mechanisms to allow for the process and to ensure that workers are protected against anti-union employer activities.[43]

The Howard Government's legislation, policies and practices since 1996 have rendered the rights that these ILO Conventions confer, meaningless.[44] Unlike other nations with decentralised bargaining systems, Australia has no national laws designed to guarantee employees' rights to bargain collectively. The *Bill* does not require 'bargaining in good faith' nor does it ensure that individual contracts do not undercut collective agreements. In fact, the *Bill* undermines the integrity of collective bargaining and makes it more difficult for employees to make, monitor and enforce collective agreements.

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[42] R. Lansbury, B. Ellem, M. Baird and R. Cooper, *IR Report Card*, 2005 http://www.econ.usyd.edu.au/content.php?pageid=14896, 2005; C. Briggs, R. Cooper and B. Ellem, 'What About Collective Bargaining?' *State of the States: State of Industrial Relations*, Evatt Foundation, Sydney, 2005.

[43] N. Haworth and S. Hughes , 'Trade and International Labour Standards: Issues and Debates Over a Social Clause', *Journal of Industrial Relations*, vol. 39, no. 2, 1997, pp. 179-195.

[44] A. Coulthard, 'AWAs: Fairness, Individualism and Collective Rights', *The AWA Experience: Evaluating the Evidence*, ACIRRT Conference, 2001; B. Ellem, *Hard Ground: Unions in the Pilbara*, Pilbara Mineworkers Union, Port Hedland, 2004; D. Noakes, and A. Cardell-Ree, 'Recent Cases: Individual Contracts and the Freedom to Associate', *Australian Journal of Labour Law*, vol. 14 no. 1, 2001, pp. 89-96; D. Quinn, 'To Be or Not to Be a Member – is That the only Question? Freedom of Association under the Workplace Relations Act', *Australian Journal of Labour Law*, vol. 17 no. 1, 2004, pp. 1-34.

Despite claims in *Work Choices* documentation that employees can exercise 'choice' and that the proposals do not constrain collective bargaining, there is no guarantee that collective bargaining will occur simply because employees want it. Government policy is based on the principle that individual and collective agreements should be treated equally with no preference for either. This sounds even-handed but there is ample evidence that since 1996, employers have been able to frustrate the preference of their employees for collective representation.[45]

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

- Reducing the substantive conditions of individual contracts, thus creating new incentives to avoid collective bargaining;
- Limiting independent scrutiny of agreement making, thus enhancing managerial power;
- Making it even easier to force employees onto individual contracts, thus removing effective choice for employees.

On the other hand, the *Bill* is highly prescriptive in regulating and circumscribing collective agreements and unions' ability to make and defend such agreements. The *Bill* places limitations on the content, scope, and enforceability of those agreements and outlaws union action, which would protect their members' rights and working conditions.

The *Bill* discourages collective bargaining by exposing unions and their members to damages from being sued for any number of reasons: if they undertake industrial action in support of a claim that is the same as a claim lodged with another corporation, even if it is part of the same corporate group (in effect, making seeking equal pay for work of equal value illegal);[46] or if they take action 'in concert' with people who are not employees of the corporation (such as members of a community group);[47] or if detailed and time-consuming procedures regarding secret ballots (which are not imposed on a corporation before it locks out workers) are not followed;[48] or if they take industrial action (for example, after a corporation announces massive retrenchments) while an agreement is place, even though the issue is not dealt with by the agreement;[49] or if a 'third party' who is in some way affected by industrial action successfully applies for the right to strike to be suspended.[50] Collective bargaining by employees is highly regulated, while lock-outs by employers are lightly regulated (see below). The *Bill* further hinders freedom of association by restricting the right of union officials to enter workplaces. Even when a collective agreement is in place, a corporation can undercut the agreement or undermine the union by offering AWAs to employees at any time, while workers are unable to take industrial action and remain bound to observe the terms of the collective agreement that is being subverted by their employer.

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[45] R. Barton, 'Internationalising Telecommunications: Telstra', in P. Fairbrother, M. Paddon and J. Teicher (eds), *Privatisation, Globalisation and Labour: Studies from Australia*, The Federation Press, Annandale, 2002, pp. 51-77; C. Briggs, 'Lockout Law in Comparative Perspective: Corporatism, Pluralism and Neo-Liberalism', *International Journal of Comparative Labour Law and Industrial Relations*, vol. 21 no. 3, 2005, pp. 481-502.

[46] Proposed ss107H,108D

[47] Proposed s108C

[48] Proposed s108J

[49] Proposed s108E

[50] Proposed s107J

Twenty seven pages of provisions for secret ballots before industrial action, covering 45 sections of the proposed Act,[51] illustrate the partisan, prescriptive, anti-union nature of the *Bill*. These compare with UK Trade Union Act of 1984 which introduced a pre-industrial action secret ballot regime in just two sections. The *Bill's* provisions are impractical, and will have the effect of putting workers and unions through a complex administrative process, to undertake legitimate industrial action. The provisions are targeted solely at unions. If secrecy is essential to good governance (as implied by these provisions), why is it not mandated for deliberations of political parties (eg conferences, pre-selections, electing delegates), or corporate boards, or for approval of collective agreements, especially those bargained directly with employees? Nothing in the Act prevents an employer taking note of employees who vote against an employer-drafted collective agreement. In the absence of 'whistle blower' evidence, it would be extremely difficult for employees in small and medium enterprises, who were later targeted for dismissal, to demonstrate unlawful termination.

Bargaining choices and a voice at work will be constrained by the *Bill*, which enhances managerial prerogative at the expense of employees' rights.

11 Agreement making

'Freedom of agreement' should mean just that, except where freedom of association is being breached. There are double standards in the proposal to deny employees and employers the ability to bargain dismissal rights, even into AWAs. This clearly disadvantages small and medium sized enterprises, which will find it harder to attract labour by comparison with large employers, as employees will prefer to work in organisations where they have some protection against unfair dismissal. It is common for corporate executives and other senior staff to negotiate dismissal protection in their common law agreements.

The Minister announced the prohibition on unfair dismissal protection as a policy matter, but has left the detail to the regulation-making power. How will that exclusion be defined? Will it only cover agreements providing something akin to a right not to be harshly, unjustly or unreasonably terminated? Or will it also cover liquidated damages clauses (ie a guarantee of a set payout) or procedural rights (eg to an independent arbitrator)? Will it apply to common law contracts? If so, what of the practice of senior executives being contractually guaranteed termination rights? If not, how can the double standard between those on purely common law arrangements, and those on 'workplace agreements' under the *Bill*, be rationalised?

As mentioned above, the capacity for employers to unilaterally terminate contracts at their expiry would also act as a major disincentive to agreement-making, contrary to the objects of the *Bill*. A rational employee on an award might well refuse to ever sign an agreement offered to them by their current employer, even one that was more generous that their award, because signing any agreement leads automatically to the loss of award coverage and potentially, on expiration of the agreement, to the loss of all award entitlements. Likewise, once an employee has signed an agreement and that agreement is terminated, an employer need not seek further agreement with the employee in order to secure whichever terms and conditions of employment the employer wishes to impose. The effect of the *Bill* is not so much to promote *agreement-making* as it is to promote *individualisation of the employment relationship.* It does this not by encouraging the tailoring of each employment agreement to meet the circumstances of the individual employee but by discouraging collective mechanisms for

[51] Proposed ss109-109ZO on pp240-266 of the Bill.

agreeing upon pay and conditions.

12 Employer lock-outs

If the *Bill* is enacted, Australia will become the only OECD nation, which legally discriminates in favour of lockouts and against strikes. The primary difference is that unions and employees are required to conduct a secret membership ballot to access protected action but employer lockouts do not. Several issues are notable. Firstly, it will take weeks, if not months, for unions to take protected action in ballots subject to legal requirements supervised by the AIRC and AEC whereas employers remain free to lockout their employees with three-days notice. It is difficult to understand why lockouts are not also subject to a ballot of shareholders who surely have the same right to vote if a lockout is in their interests as workers do in relation to a strike. Secondly, there will be less flexibility for employees in taking industrial action because, unlike employers, they will have to comply with the wording of the ballot. Thirdly, the ballot process increases the administrative and compliance costs of industrial action for unions.

Other amendments create sweeping powers for the suspension or termination of bargaining periods by the AIRC upon application from employers and 'third parties' or by Ministerial declaration if industrial action is, for instance, 'adversely' affecting an employer. Whilst these apply equally to strikes and lockouts, they have a disproportionate effect on employees because their bargaining power depends more heavily and more often on the capacity to withdraw their labour than does that of employer reliance on lockouts.

Other OECD nations either prohibit lockouts or limit them to exceptional circumstances in which employers are considered to suffer from an imbalance of bargaining power. Typically, other OECD nations only permit 'defensive' lockouts in collective bargaining, which respond to strikes. If employers have too ready access to lockouts, lockouts can compromise the right to freedom of association, collective bargaining and to strike.[52] Whereas other OECD nations limit employer access to lockouts relative to strikes to try and maintain bargaining equilibrium and fair agreement-making, the *Bill* will make the use of strikes more difficult, expensive and inflexible, relative to lockouts.

13 Enforcement

The historical record of federal industrial enforcement agencies in recovering unpaid employee entitlements is very poor.[53] The performance of the Office of Workplace Services (the OWS) in this regard continues to be poor. It settles claims by consent, but it has declined to comment on whether settlements meet the actual amounts owed or some lesser amount accepted by the employee in lieu of bearing the personal expense of court recovery proceedings, which could exceed the amounts due. The OWS engages in court recovery actions and prosecution of offending employers in only rare circumstances, and almost never unless the amount owed is $10,000 or more. This policy and practice clearly favours unscrupulous, law-breaking employers, and it is likely that many employees are not being provided with their legal wages and conditions entitlements. In contrast, the record of state

[52] See Briggs, C. (2005) 'Lockout Law in Comparative Perspective: Corporatism, Pluralism & Neo-Liberalism', *International Journal of Comparative Labour Law and Industrial Relations*, 21(3): 481-502.

[53] L. Bennett, *Making Labour Law in Australia*, Butterworths, 1994; M. Goodwin, *The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia*, Unpublished PhD Thesis, 2004, University of New South Wales.

agencies shows that they are much more effective in the recovery of employee entitlements.[54] Meanwhile, the Office of the Employment Advocate (the OEA) and the former Building Industry Taskforce both have a history of largely ignoring employer law-breaking and pursuing unions almost exclusively.[55] Under the *Bill,* the OEA's enforcement responsibilities will be taken over by the OWS.

The role of the OWS will be significantly expanded if the *Bill* is passed. There is no evidence that its current enforcement policy and practice will be revised to maximise compliance by employers, or that it will not adopt the OEAs current enforcement practice of ignoring employer law-breaking. This will directly cause further injustice and economic harm to employees and unfairly single out their unions.

14 Likely impacts: evidence from the New Zealand experience

Up until the late 1980s, Australia and New Zealand's systems of industrial relations were very similar. The NZ *Employment Contract Act* 1991 (ECA) changed that. The ECA removed all state support for collective bargaining by abolishing the century-old system of awards. Whilst the *Bill* does not do this as explicitly, the practical effect of it will be much the same as the ECA. Indeed, the capacity the *Bill* provides for unilateral reductions in pay and conditions once an agreement has expired, go beyond what was possible in New Zealand, where employees had to sign new individual contracts before any cuts to pay and conditions could take place, except when firms were engaged in controversial 'partial lockouts'.

A brief examination of the ECA's impact on bargaining and on the economy more broadly is highly relevant. Within a year of the ECA's operation, collective bargaining coverage collapsed and individual employment contracts became the predominant form of wage and condition setting in New Zealand.[56] They remain so today.[57] But the notion of individual bargaining was a false one. What many workers received was a standard individual contract that did away with many long held entitlements such as overtime and penalty rates and often involved a pay cut as well. Such contracts were usually presented on a 'take it or leave it' basis. A study of supermarket workers, for example, found that earnings (including overtime) fell almost 12 per cent in real terms between 1991 and 1997.[58] By the end of the 1990s, New Zealand was a less equal society than ever before, in terms of income distribution,[59] it had a lower full-time participation rate,[60] lower real wages, and flatter productivity,[61] 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.[62]

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[54] See figures in Queensland Department of Industrial Relations 2005, *Industrial Relations Perspectives*, Issue 21, March.
[55] M. Lee, 'Whatever happened to the Arbitration Inspectorate? The reconstruction of industrial enforcement in Australia', *Proceedings of the Nineteenth AIRAANZ Conference,* Vol 1, 339-346.
[56] R. Harbridge, *Labour market regulation: Trends in New Zealand,* prepared for ILO's World Employment Report, 1994.
[57] R. May, P. Walsh, and P. Kiely, 'Employment Agreements: Bargaining trends and employment law update 2003/2004, IRC, Victoria University of Wellington, 2004
[58] P. Conway, 'An unlucky generation? The wages of supermarket workers post ECA', *Labour Market Bulletin,* DOL, New Zealand 1999
[59] B. Easton, 'Income Distribution', in *A study of economic reform: The case of New Zealand,* B. Silverstone, A. Bollard and R. Latimore (eds), North Holland, New Amsterdam, p101-138
[60] Morrison, Phil 'Employment', *Asia Pacific Viewpoint,* 42(1) 2001
[61] ibid
[62] ibid

15 Impact on productivity

The justification for the *Bill* rests in part on claims that it will lift productivity. Exactly how productivity increases has not been explained; it has merely been asserted.[63] There is no persuasive evidence systematically linking industrial relations systems and industrial relations changes to productivity improvement. There are many reasons why productivity grows but industrial relations legislative changes are not generally a source of productivity growth across OECD economies. Within countries, effects are rarely distinguishable unless the changes are dramatic. New Zealand experienced the most rapid change in industrial relations institutions of any western country; as mentioned, this was followed by stagnation of productivity growth and a growing productivity gap between individual-oriented New Zealand and collectively-oriented Australia.

Australia's productivity record was impressive for the 1990s, but has deteriorated in the most recent growth cycle, the only one to have commenced since the *Workplace Relations Act* came into effect and actively promoted individual contracting. Indeed, productivity growth in the current cycle is below the average rate, which prevailed during the operation of the traditional award system in the 1960s and 1970s.[64]

Even the productivity growth cycle in the mid 1990s, often attributed to the shift to (collective) enterprise bargaining, is of uncertain origins. A number of microeconomic reforms took place before and during this period, and they might have had an impact on labour productivity. Parnham[65] suggested that improved labour productivity growth in the 1990s came as a result of firms using labour more intensively rather than as a result of increased investment. This is also consistent with Buchanan,[66] who argued that the reforms of the 1990s led to 'more intensive use of labour in the production process in a climate of chronic understaffing'. These gains are largely one-off and are associated with work intensification, longer hours and the elimination of over-time and penalty rates. Wooden[67] suggests that enterprise bargaining could raise productivity by two avenues. First, firms are able to operate more efficiently. Second, workplace relations will become more co-operative.

If researchers are divided over the impact of enterprise *collective* bargaining on productivity, there is much greater unanimity on the impact of individual contracting. Wooden comments that 'there's not a lot of evidence that individual contracts produce productivity ... the biggest gains for productivity still revolve around a system which is collective based'.[68] This is consistent with a number of workplace level studies that Wooden and others have undertaken, showing the indifference or inferiority of individual contracting when compared to collective

[63] Hon K. Andrews, (2005) '*A New Workplace Relations System: A plan for a modern workplace*', Media Release, 26 May.
[64] D Peetz, 'The impact of individual contracting on workers and on productivity, 2005' in submission by D. Peetz to Senate Employment, Workplace Relations and Education Committee Inquiry into Workplace Agreements, August 2005.
[65] D. Parham, (2003) 'Australia's 1990s Productivity Surge and its Determinants', Revised draft of a paper given to the National Bureau of Economic Research *13th Annual East Asian Seminar on Economics*, Melbourne 20-22 June 2002.
[66] J. Buchanan, (2004) 'Paradoxes of Significance: Australian casualisation and labour productivity', *ACIRRT Working Paper 93*, Sydney
[67] M. Wooden, (2001), 'Industrial Relations Reform in Australia: Causes, Consequences and Prospects'. *Australian Economic Review*, vol. 34, no. 3, pp.243-262.
[68] M Wooden on *Four Corners*, ABC TV, 26th September 2005.

bargaining, in terms of its impact on productivity.[69] (Further details are in a submission to a previous Inquiry by the Committee.)[70] Other research on the link between bargaining forms and workplace productivity also casts doubt on any assumed benefits from more decentralised pay bargaining. Recent research by Preston and Crockett regarding Australia, for example, shows little evidence of an association between the level and form of wage negotiation and firm performance.[71] Similar results are noted for the UK.[72]

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.

Longer durations of employment allow firms to invest in training and skill formation, which boosts productivity and reduces costly labour turnover. However, by removing any employer liability for unfair dismissal, the *Bill* will create conditions that are likely to produce higher levels of job churning and therefore shorter job tenures.[73]

The *Bill* does not encourage Australian workplaces to address an emerging future where we will be increasingly reliant on innovation and creativity. How do we promote innovative collaboration, communities of practice, and organisational learning so that dynamic capability is enhanced? Research shows that this is a world of networks, both inside and between organisations achieved through partnerships of various kinds. Teamwork and shared decision-making are central to the network organisational form. Instead, the *Bill* encourages individualism and numerical flexibility at the expense of collective collaboration and human resource development.

Rather than focus on the impact of individual contracting on productivity, it has become common for the advocates of individualisation to conflate data on collective and individual agreements, call them 'workplace-based arrangements' or ‘workplace agreements’, and then in effect use the performance of collective agreements (which cover far more employees than registered individual contracts) to support the argument for individualisation of employment

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[69] Y.-P. Tseng and M. Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, Melbourne Institute Working Paper No 8/01, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, Melbourne, July 2001. pp. 25,29. M. Wooden, *The Transformation of Australian Industrial Relations*, Federation Press, Sydney, 2000, p. 173. T. R. L. Fry, K. Jarvis and J. Loundes, *Are IR Reformers better performers?*, Melbourne Institute Working Paper No 18/02, Melbourne Institute of Applied Economic and Social Research, Melbourne, September 2002. D. Hull and V. Reid, *Simply the Best: Workplaces in Australia*, Working Paper 88, ACIRRT, University of Sydney, Sydney, December 2003, p. 8.

[70] See submission by D. Peetz to Senate Employment, Workplace Relations and Education Committee Inquiry into Workplace Agreements, August 2005

[71] A. C. Preston and G.V. Crockett, ‘Worker Participation and Firm Performance’, *Journal of Industrial Relations*, 46, 3, 2004, pp. 345-365.

72 Addison, J. T. and Belfield, C. R. (2001) ‘Updating the determinants of firm performance: estimation using the 1998 UK Workplace Employee Relations Survey’. *British Journal of Industrial Relations*, 39, 3, 341-66

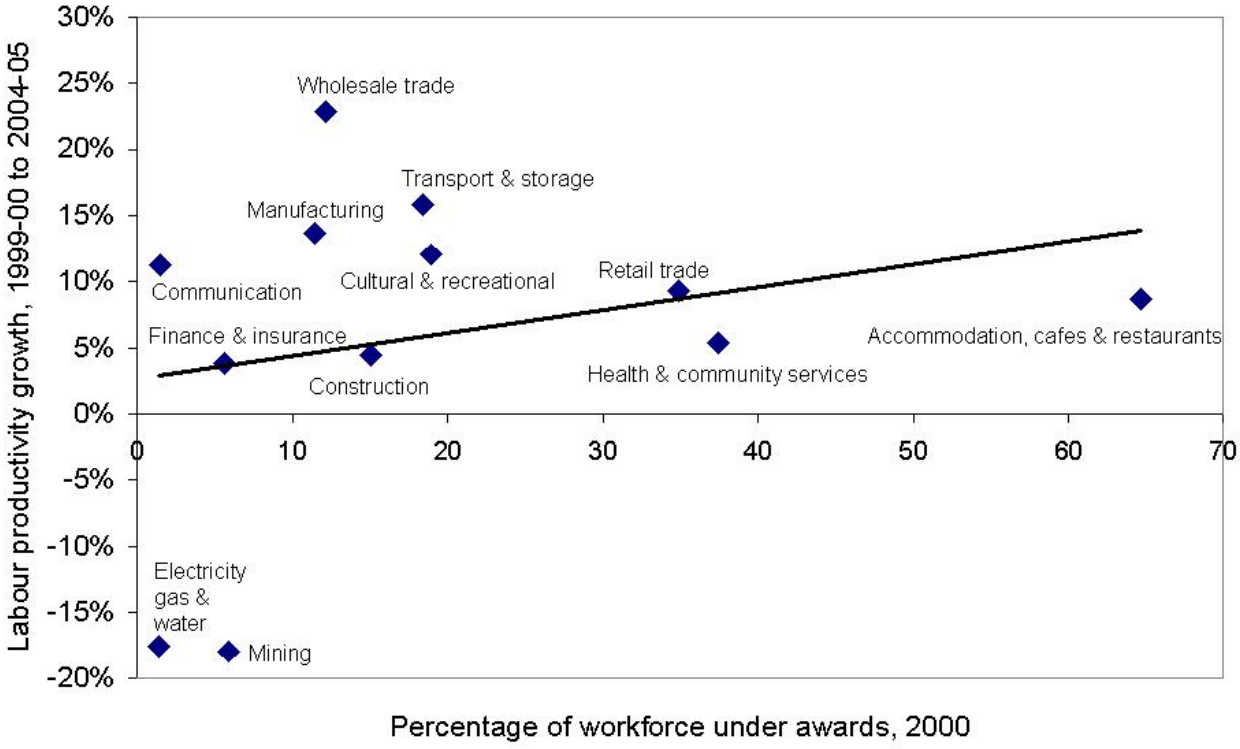
[73] P. Auer, Berg, J and Coulibaly, I (2004) ‘Is a stable workforce good for the economy? Insights into the Tenure-Productivity Employment Relationship’, Employment Analysis and Research Unit, International Labour Organisation Geneva

relations.[74] In one recent case, the alleged impact of all microeconomic reforms since 1983 on productivity, added together with no differentiation amongst them, was used to justify proposals for individualisation.[75] Such evidence has no persuasive merit. The only evidence provided in the Explanatory Memorandum, purporting to link the proposals in the *Bill* to productivity, is a chart which 'shows a reduction in award reliance has had a significant effect on productivity growth' and a 'strong correlation between productivity growth and the use of agreements in an industry'.[76] The chart compares award coverage in May 2004 with productivity growth from June 1990 to June 2004. But how could award coverage in 2004 have determined the rate of productivity growth from 1990 to 2004? To test the impact of award coverage on productivity growth, it is necessary to look at productivity growth *after* award coverage is measured. The first available measure of award coverage since the system of enterprise bargaining was introduced was in 2000.[77] It is possible to see how award coverage in 2000 might have shaped productivity growth since. As we can see in Figure 1, which essentially replicates the chart in the Explanatory Memorandum but using meaningful periods that do not require causal effects to operate backwards over time, there was a small but *positive* correlation between award coverage in May 2000 and labour productivity growth from 1999-00 to 2004-05.[78] Equally, the *change* in award coverage between May 2000 and May 2004 with the rate of productivity growth also shows a positive correlation.[79] That is, the greater the decline in award coverage, the slower the rate of productivity growth.

[74] For example, Access Economics, *Workplace relations - The way forward*, BCA, Melbourne, February 2005; Business Council of Australia, *Workplace relations action plan: For future prosperity*, BCA, Melbourne, November 2005.
[75] Business Council of Australia, *Locking in or losing productivity: Australia's choice*, BCA, Melbourne, August 2005.
[76] Explanatory Memorandum, pp5,6.
[77] This measure of award coverage, from the ABS Employment, Earnings and Hours (EEH) survey, is not comparable with those published in 1990 or earlier years, as those earlier estimates of award coverage also included employees who, in the EEH survey, would have been classified as being under 'collective agreements' and 'individual arrangements'.
[78] The correlation coefficient, $r^2 = .26$. If a later period (2000-01 to 2004-05) is used, the correlation is slightly higher, at $r^2 = .30$.
[79] $r^2 = .20$

Figure 1

Award reliance by industry as at May 2000 and labour productivity growth by industry 1990-2000 to 2004-05



Source: ABS Cat Nos 5204.0, 6306.0.

This does not necessarily mean that increasing award coverage would lead to higher productivity in an industry. There are many factors that influence productivity growth patterns within and between industries, and bivariate correlations of the sort used in Figure 1, and in the Explanatory Memorandum, disguise those factors. The point is rather that the evidence that is used to support the claim that greater individualisation is needed in order to promote productivity growth collapses when it is subject to interrogation. It relies on carefully selected data periods which make no sense when a causal relationship is posited.

The proposed industrial relations changes are not directed to improving Australian productivity growth in the long term. Instead, they appear to have a short-term focus. Even if they are capable of generating, at best, some small one off gains through more intensive use of labour, the empirical evidence indicates that they can be expected to lead to a nil or negative impact on labour productivity over the medium and longer terms.

16 Impact on employment

As with productivity gains, the links between the proposed changes and employment are asserted, not demonstrated.[80] There are two questions to answer. First, how are the proposed changes going to impact on employment? Second, is there evidence that recent industrial relations changes have had an impact on employment?

The first question has not been answered. Three avenues could be suggested. First, there might be a link to employment through lower labour costs or lower cost increases than would have otherwise been the case. Second, procedural changes that remove barriers to additional jobs might have an effect. Third, individual bargaining might lead to greater wage dispersion and create jobs (especially for the low paid). On the first, the creation of the AFPC and the AFPCS may be interpreted as an attempt to reduce the safety net wage increases and reduce employment conditions as compared to what would otherwise have been the case. On procedural changes, the extension of unfair dismissal exemptions and reduced entitlements (eg overtime and penalty rates) through the AFPCS may be the desired means to this objective. On wage dispersion, the AFPC and the AFPCS could be seen as a way to increase pay dispersion through reducing the relative pay movements for the low paid. Are these the processes that link the proposed changes to employment generation?

The above processes presume lower labour costs for some workers will increase employment. The link between real wage cuts and employment is contested; if there is a link, a very substantial real wage cut may be required to produce any gains in unemployment,[81] with serious implications for the relative value of unemployment benefits. On procedural changes, there is no persuasive evidence that unfair dismissal has constituted a barrier to employment.[82] Employers already have recourse to casual employment and agency employment arrangements that have the effect of circumventing unfair dismissal provisions. In addition, removing overtime rates and loadings may only lead to longer hours of work, not additional jobs.[83] The wage gap has been widening since the 1970s, before the move to a more decentralised industrial relations system. Again, there is no evidence linking wage dispersion to employment performance[84] or suggesting that Australia's wage structure is inflexible.[85]

The Government claims that past legislative changes were job-generating. Where is the evidence? The recovery from the previous recession coincided with the Prices and Incomes Accord. Wooden suggests that it is very difficult to link industrial changes to employment

80 Andrews, Hon. K. (2005), 'Removing the Roadblocks – Workplace Relations Reforms'. Speech to National Retailers Association Business Congress, Gold Coast, May 19th.

81 R. Junankar (2000), 'Are Wage Cuts the Answer? Theory and Evidence'. In S. Bell. *The Unemployment Crisis in Australia*. Cambridge University Press, Mellbourne

82 A. de Ruyter and Waring, P (2004) 'Propagating the Unfair Dismissal Myth: Comparative Employment Protection Law Developments in Australia, Italy, South Korea and the United Kingdom', *International Employment Relations Review*, Vol.10 No.2 December.

83 J. Buchanan (2003), 'Paradoxes of Significance: Australian Casualisation and Productivity'. ACIRRT Working Paper no 29, University of Sydney.

84 See Junankar (2000) 'Are Wage Cuts the Answer? Theory and Evidence'. In S. Bell. *The Unemployment Crisis in Australia*. Cambridge University Press, Melbourne

85 M. Coelli, Fahrer, J. and Lindsay, H. *Wage Dispersion and Labour Market Institutions: A Cross Country Study*. Reserve Bank of Australia, Research Discussion Paper 9404, Sydney, 1994.

growth.[86] The rate at which unemployment falls has been no greater during the first seven years of the *Workplace Relations Act* (0.4 per cent per annum) than during the five years of collective enterprise bargaining (0.5 percent per annum). Indeed unemployment, presently at 5.1 per cent, is above the average that prevailed during the 1960s and early 1970s of around 2 per cent, despite the much lower profit share then.

17 Impact on the skills shortage

The number of employers reporting skill shortages has grown dramatically in recent years. Industries reporting particularly acute problems include:

- health care, which is facing an international labour shortage in key professional areas and serious concerns over cost effectiveness and quality of service delivery;
- construction, with problems at the skilled trades and project management levels;
- manufacturing employers report problems with fitters, machinists, welders and boilermakers as well as with technician and degree qualified engineers;
- mining faces excess demand for engineering trades and professionals as well as production level workers;
- business services faces shortages especially in occupations like accounting and middle range clerical level work.

Prima facie, the *Bill* recognises the importance of skills issues, devoting an entire schedule to the issue of school-based apprenticeships. It is liberally sprinkled with provisions concerned with issues like 'work placements' and people engaged in other vocational education and training activities. However, these provisions are little more than piecemeal responses to the challenges concerning skill formation in a modern economy. For example, a focus on industrial relations as the solution to productivity and efficiency in the health sector is a simplistic response to complex challenges facing the management of a highly skilled and dedicated professional workforce. International evidence in this area suggests the need for greater collaboration between key stakeholders including trade unions and professional groups if sustainable change is to be realised.[87] The provisions of the *Bill* do not address the causes of the skills shortages identified above. These can be summarised as follows.

First, the 'skills' problem is often related to job quality, rather than insufficient people having the required skills. Many 'skill shortages' arise because appropriately qualified people choose not to work in the occupations for which they are trained because the jobs offered by employers are so unattractive. The classic example of this is nursing. In NSW alone, research in recent years has shown that there are around 30,000 registered nurses not working in the profession. There have always been problems of low pay and shift work associated with attrition from this workforce. More recently, however, a growing literature has revealed that many leave the profession because they cannot provide the quality of care for patients and colleagues that they would like to, primarily because of chronic understaffing.[88] One of the most successful responses to this problem has been the introduction of mandatory nurse-

[86] M. Wooden, *The Transformation of Australian Industrial Relations*, Federation Press, Sydney, 2000

[87] Stanton, P. Willis, E and Young S. (2005) *Workplace Reform in the Healthcare Industry: The Australian Experience*, Palgrave MacMillan, Basingstoke; Stanton, P. and Bartram T (2005) 'Howard's Way: seeking conflict or building commitment' *Australian Health Review* Vol 29 No 3 August pp 270-273

[88] J. Buchanan and G. Considine, *'Stop telling us to cope': NSW Nurses explain what they are leaving the profession*, Report prepared for the NSW Nurses Association, Sydney, 2002.

patient ratios of the kind that operate in Victorian public hospitals.[89] This is an example of how employers often need publicly defined standards to raise the quality of jobs offered in a sector because competitive pressures limit the capacity of any one employer to solve the problem in isolation. The *Bill* makes settling agreements and awards on issues such as this almost impossible to make in the future.

Second, there is the problem of the 'public goods dimension' of skills. It has long been recognised in the economics of skill development that recouping the benefits of investment in education and training is uncertain. This leads individuals to under-invest in basic education and training. Overcoming such negative externalities requires the effective pooling of risks associated with such investments by governments, employers and individuals. A good example of such arrangements is the operation of occupationally defined labour markets for the skilled trades. The coordination of skill development and use amongst groups of employers on the basis of things like common skills based classification structures and allied apprenticeship training arrangements results in the provision of a public good in the form of workers with widely recognised skills that can be deployed in a wide variety of workplace settings. Such workers minimise the need for each employer to 'reinvent' the wheel each time they need to find a skilled worker.[90] The operation of such arrangements also gives employers more options in how supervisory arrangements can be structured. Where there is a high level of competence in a workplace as a result of healthy occupational labour markets the requirements for close supervision decline.[91] The fundamental design principle of the *Bill* makes it almost impossible to have multi-employer agreements or awards. This will limit the capacity of interested employers, governments and unions reaching enforceable agreements that will capture the public goods dimensions of skill development.

Third, there is the problem of declining resources devoted to quality on-the-job training. A major element of any effective system of skill formation is on-the-job training. Adequate 'quiet time' is necessary for the efficient transmission and refinement of skills in the workplace. The growth of labour hire and casualisation, facilitated by the *Bill*, will exacerbate under investment in training. A key problem of economic restructuring since the 1980s is that workplace managers are now under tremendous pressure to ensure every hour a worker is employed directly contributes to production or service provision. This preoccupation with fully deploying labour has driven out the space for the orderly development of labour at work.[92] This is a systemic, not isolated, problem that arises from changing forms and levels of competition, increasing outsourcing and growing levels of non-standard employment.[93]

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[89] J. Buchanan and G. Considine, *Stable but critical: The employment conditions of nurses in Victorian public hospitals*, Report prepared for the Australian Nurses Federation (Victorian Branch), Melbourne, 2004.

[90] D. Marsden, *The End of Economic Man. Custom and Competition in Labour Markets*, Wheatsheaf, London, 1996.

[91] C. Briggs and J. Kitay, *Vocational Education and Training, Skill Formation and the Labour Market: Overview of major contemporary studies*, NSW Board of Vocational Education and Training (BVET) Changing Nature of Work Working Paper, BVET, Sydney, 2000; M. Maurice F. Sellier and J. Silvestre, 'The Search for a Societal Effect in the Production of Company Hierarchy: A Comparison of France and Germany' in P Osterman (ed) *Internal Labour Markets*, MIT Press, Cambridge, 1984; S. Prais, *Productivity, Education and Training: An International Perspective*, Cambridge University Press, Cambridge, 1995; C. Crouch, D. Finegold and M. Sako, *Are Skills the Answer? The Political Economy of Skill Creation in Advanced Industrial Countries*, Oxford University Press, Oxford, 1999.

[92] J. Buchanan et al, 'Whatever happened to life learning? Lessons from recent reforms to vocational education and training in Australia', *Growth* (Annual publication of the Committee for the Economic Development of Australia), 2005.

[93] I. Watson, J. Buchanan, I. Campbell and C. Briggs *Fragmented Futures: New Challenges in Working Life*, Federation Press, Sydney, 2003, especially Chapters 10, 11.

Systemic problems need systemic responses. The fragmentation of bargaining and labour market standards to be promoted by the *Bill* makes it almost impossible for the industrial relations system to contribute to responding to this problem.

Close analysis reveals that the alleged problem of 'skill shortages' is really the problem of a shortage of decent work. As the ILO economist Guy Standing has recently argued, the issue of decent work has qualitative and tangible dimensions.[94] Ideally, work should involve undertaking interesting and challenging jobs. Even if this cannot be achieved in the short run, all workers should be entitled to decent treatment in terms of pay and conditions to allow them to flourish beyond work.[95] Improving job quality will attract many appropriately qualified people back to where they are needed. It will also require improving systems of on-the-job training. Both will only happen if there are improvements in labour standards across relevant groups of employers. Such arrangements are most easily achieved either by collective agreements or awards. The *Bill* avoids any reference to decent work or the quality of jobs it wishes to promote.

18 Cost to small business

There are major cost implications for small businesses which are already burdened with administration and compliance requirements including those concerning GST. The Government has viewed the centralised system of industrial relations as a source of burden for small businesses, particularly regarding termination of employment. The government has not, however, recognised the extent to which a centralised industrial system has supported small business in its industrial relations. Many small businesses do not have the skills, the time or the inclination to exercise direct control over all aspects of their employee's terms and conditions of employment. When their views have been sought, they have generally been satisfied with the award system and have managed their businesses relatively informally.[96] The management of individual contracts, which must be signed by each employee, would create additional administrative burdens for small businesses. The financial costs to small businesses of conducting their industrial relations will rise as they find it necessary to engage consultants and lawyers to deal with the new devolved and more complex system.

19 Impact on pay and conditions

The Explanatory Memorandum concedes that 'a cost to employees will be the changing basis for the safety net of wages and conditions'.[97] It makes no direct comment on the impact of the shift to individual contracting on wages and conditions. We have already referred to the adverse effects of shifting minimum wage determination from the AIRC to the AFPC, of removing the 'no disadvantage' test, replacing it with the Fair Pay and Conditions Standard

[94] G. Standing, *Global Labour Flexibility*, MacMillan, London, 1999; G. Standing, *Beyond the New Paternalism: Basic Security as Equality*, Verso, London, 2002.
[95] J. Buchanan et al, *Beyond Flexibility: Skills and the future of work*, Final Report for the NSW Board of Vocational Education and Training, Sydney, 2001.
[96] Isaac, J (1993) *Small Business and Industrial Relations: Some Policy Implications*, Industrial Relations Research Series No 8, Department of Industrial Relations, Canberra, September; Morehead, A, Steele, M, Alexander, M, Stephen, K & Duffin, L (1997) *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, Longman, Melbourne, 299-322; Callus, R, Kitay, J & Sutcliffe, P (1992) 'Industrial Relations at Small Business Workplaces', *Small Business Review*, 106-145; Isaac, J, Kates, S, Peetz, D, Fisher, C, Macklin, R & Short, M (1993) *A Survey of Small Business and Industrial Relations*, Industrial Relations Research Series No 7, Department of Industrial Relations, Canberra, May.
[97] Explanatory Memorandum p15

and of new provisions concerning termination of agreements. Here we will focus on the effects of increased individual contracting, as envisaged by the *Bill*.

It is asserted that the Bill 'will carry forward the evolution of Australia's workplace relations system to improve productivity [and] increase wages'.[98] It has previously been claimed that 'workers on AWAs currently earn 13 per cent more than workers on certified agreements, and 100 per cent more than workers on award rates',[99] though this claim does not appear to have been repeated recently in official publications. The same figures (average weekly earnings of all employees) show an 11 per cent fall in earnings of employees on AWAs between 2002 and 2004.[100] These figures are distorted by the inclusion of high paid senior managers and part-time employees. A more accurate assessment of the difference in pay can be obtained by comparing hourly earnings of non-managerial employees. These show that non-managerial employees on AWAs earn less per hour than those on collective agreements, and the gap is greater for women, part-time and casual employees.[101] A number of studies, and the evidence from ABS data, demonstrate that unions, and union-based collective bargaining, create higher wages and better conditions for workers; individual contracting creates poorer pay and conditions and does this most effectively for those with weaker positions in the labour market.[102] What are the likely impacts under the *Bill*?

First, there will be widespread potential for reductions in employees' total pay, arising from the scope for cuts in penalty rates, overtime rates, leave loading, shift allowances and all other items of remuneration not covered by the 'fair' standard. Even with the no-disadvantage test in place there is substantial evidence that AWAs focus on reducing costs to employers by changing the ways in which working time is paid for, principally by cutting or abolishing overtime rates and/or penalty rates, widening the spread of 'standard' hours or replacing wages with 'annualised salaries'.[103] There are major concessions on hours in many AWAs but very little in the way of offsetting wage increases, leaving Mitchell et al to wonder, after analysing many such agreements, whether there was 'sufficient value to the employee for the agreement to have passed' the no disadvantage test.[104] There is growing evidence that the Office of the Employment Advocate (OEA) has been approving agreements that lead to below-award wages: for example, the chief executive officer of the Western Australian Retailers Association has complained about the 'lax interpretation' of the no disadvantage

[98] Explanatory Memorandum, p1.
[99] Australian Government 2005
[100] ABS, *Earnings, Employment and Hours*, Cat No 6306.0, May 2002 and May 2004.
[101] D Peetz, 'The Impact of Australian Workplace Agreements and the abolition of the No Disadvantage Test' in submission by D. Peetz to Senate Employment, Workplace Relations and Education Committee Inquiry into Workplace Agreements, August 2005
[102] ibid.
[103] Australian Centre for Industrial Relations Research and Training, *ADAM Report*, No 27, University of Sydney, Sydney, March 2001; M. Cole, R. Callus and K. Van Barneveld, *What's in an agreement? An approach to understanding AWAs*, paper to joint ACIRRT/OEA seminar, University of Sydney, Sydney, September 2001.; R. Mitchell and J. Fetter, 'Human resource management and individualisation in Australian law', *Journal of Industrial Relations*, vol. 45, no. 3, September 2003, pp. 292-325; K. Van Barneveld, *Equity and Efficiency: The Case of Australian Workplace Agreements*, Doctoral thesis, Faculty of Business and Law, University of Newcastle, Newcastle, 2004.
[104] R. Mitchell, R. Campbell, A. Barnes, E. Bicknell, Creighton, F. K, J and S. Korman, *Protecting the Workers Interest in Enterprise Bargaining: The 'No Disadvantage' Test in the Federal Jurisdiction*, report to Workplace Innovation Unit, Industrial Relations Victoria, University of Melbourne, Melbourne, 2003, http://www.irv.vic.gov.au/CA256EF9000EB8A3/WebObj/B9721C262D82BE8ECA256EF2001A8EF3/$File/NDT per cent20REPORT.pdf, acc 6/3/05, p62

test.[105] The OEA promoted the non-payment of overtime rates when employees 'volunteer' to work overtime hours, a concept that is rather dubious when employees have little bargaining power.[106]

If this evidence tells us about the present, Western Australia and New Zealand tell us about the future. In New Zealand, cuts in penalty rates and overtime rates were particularly likely amongst those in low-wage areas.[107] In Western Australia, the Commissioner of Workplace Agreements, whose job it was to register individual agreements, published data on WPAs, based on two official analyses of agreements in 1996 and 1999. In 1994-96 some five per cent of employees had agreements that provided for an ordinary rate of pay that was below the award rate. This later rose sharply, so that by 1998 a quarter of agreements had an ordinary rate of pay that was below the award. In both periods the *majority* of agreements provided for inferior penalty rates and overtime rates than in the award. Indeed, in most cases where overtime or penalty rates had been reduced, they were abolished altogether; that is, in the first and second periods, penalty rates were abolished altogether in 54 per cent and 44 per cent of cases respectively, and overtime rates were abolished in 40 and 44 per cent of cases respectively.[108]

Under the no-disadvantage test that has applied in the federal jurisdiction, these changes to overtime and penalty rates should be offset by increases in the base wage rate, but under the new 'fair' standards to apply federally, there will be no need for increases in base wage rates, and without such increases overall earnings of these workers would fall. Hence the Prime Minister has been careful to avoid repeating the former guarantee that 'no worker will be worse off', instead saying 'my guarantee is my record', referring to rising real average wages.[109] Of course, rising average wages disguise distributional and compositional differences, and we can expect average real wages to continue to rise, driven by growth in strongly unionised sectors and managerial/professional employees, notwithstanding the declining position of many workers on AWAs. We can also expect the share of wages in national income to fall, and that of profits to rise, as they have done in trend terms since 1997.[110]

This does not mean, then, that there will be widespread cuts in pay and conditions across the board, particularly in the short term. Workers in the disadvantaged sectors of the labour market will be most vulnerable to reduced conditions. Other employees in occupations in short supply will be temporarily protected by their labour market position. However, they will become vulnerable when the economy slows down, as inevitably it will one day. There are some forces acting against wage cuts. In aggregate, nominal wages have historically tended to be 'sticky downwards',[111] as employees (particularly in unionised workplaces) resist wage

[105] T. Todd and J. Eveline, *Report on the Review of the Gender Pay Gap in Western Australia*, University of Western Australia, Perth, November 2004, p66
[106] OEA, 'No Disadvantage Test and Voluntary Non Standard Hours', mimeo distributed by OEA to WA employers, Perth, 2003.
[107] E. Rasmussen and J. Deeks, 'Contested outcomes: assessing the impacts of the Employment Contracts Act', *California Western International Law Journal*, vol. 28, 1997
[108] Commissioner of Workplace Agreements, *Summary statistics and other information*, Vol 2, CWA, Perth, http://www.wa.gov.au/workplace/s86vol2, 1996; Commissioner of Workplace Agreements, *Summary statistics and other information*, Vol 8, CWA, Perth, http://www.wa.gov.au/workplace/html/5pub_idx.htm, 1999.
[109] House of Representatives, *Hansard*, 26 May 2005, p46.
[110] ABS, Cat No 5306.0, *National Income and Expenditure*, Australia, Canberra.
[111] J Dwyer & K Leong, *Nominal Wage Rigidity in Australia*, Research Discussion Paper 2000-08, Economic Research Department, Reserve Bank of Australia, Sydney, November 2000.

reductions, employers are reluctant to provoke a dispute or alienate their workforce through attempting to cut wages, existing agreements build inertia into wages, and the award system has acted as a floor against cuts in pay and conditions. But the weakening or, for many workers, removal of the award system, along with the weakening of employee bargaining power, undermines these barriers to wage falls. In industries that are highly competitive on labour costs, there will be strong pressure for real pay cuts over the medium and longer term. In contract cleaning, for example, if one employer succeeds in obtaining contracts by paying employees below the award, on the minimum standards, other contractors will lose work if they do not also cut pay and conditions. Initially 'good employers', concerned about maintaining good relations with their workforce, will decline to take advantage of the opportunities provided by the *Bill*. But as other employers obtain an apparent competitive advantage through cutting labour costs, many 'good employers' will be forced to follow suit.

20 Impact on women and equal remuneration

The *Bill* is likely to increase the gender pay gap in Australia due to its impact on the minimum wage, the preference for individual agreements, the inability of most women employees to access state industrial relations systems, and the lower bargaining power of specific groups of women, for example those who are primary carers, single mothers, older, in regional areas, or lacking recognised skills. Most analysts anticipate that the minimum wage will decrease relative to average wages. Women are more likely than men to be concentrated in jobs affected by minimum wage regulation both in terms of occupation and industry and nature of employment (casual, part-time). Research shows that effective implementation of minimum wage protection is 'critically important' for gender pay equality.[112]

The other major thrust of the Bill's changes in wage determination is to increase the use of individual agreements. Evidence demonstrates that women workers end up worse off than men under individualised arrangements. For example, in the federal system in 2004, the gap in men's and women's average hourly earnings under individual agreements increased from 12.7 per cent in 2002 to 20.3 per cent in 2004 and while men's average hourly rates had increased from $23.70 to $25.10, women's had actually decreased from $20.70 to $20.00.

We can learn from WA in terms of what will happen when the minimum standard for individual agreements from awards falls to a very minimalist set of wages and conditions. This was the basis of the No Disadvantage Test in Western Australia under the former Coalition State Government: more employers used individual agreements to set wages and conditions; and inequity grew. The gap between men's and women's average hourly earnings under individual agreements in 2002 in Western Australia went up to 26.6 per cent.

The loss of access by most women to state industrial tribunals will deny them the opportunity to redress pay inequity and undervaluation of women's work through the state-based pay equity principles. The importance of these cases was highlighted in the librarians' case in NSW and the recent dental assistants' case in Queensland.

The *Bill* does nothing to encourage and support women to increase their participation in the labour market or to improve the quality of jobs in which they work. It will frustrate those who aspire to a greater sharing of work and family roles and continue to undermine women's

[112] Rubery, J.; Grimshaw, D. and Figueiredo, H., 'The Gender Pay Gap and Gender Mainstreaming Pay Policy' presented at the European Work and Employment Research Centre, UMIST, Manchester, 2002.

capacity to be economically independent. In May 2005 women's labour force participation rate in Australia was 57.1 per cent, which is lower than in most other OECD countries. The proportion of female workers employed in part-time jobs is higher in Australia than in many other OECD nations.[113] Further, 55 per cent of women working part-time were employed on a casual basis,[114] without access to paid annual, sick or and carers' leave. While a number of people prefer to work part-time hours or on a casual basis, many do not. ABS data show that 43 per cent of part-time casual employees wanted more hours.[115] Yet many full-time employees working over 45 hours per week would prefer to work shorter hours.[116] Part-time workers are also likely to have poorer access to training and career advancement than those employed full-time.[117] These statistics illustrate Australia's under-utilisation and marginalisation of women in the paid workforce, at a time when there are serious labour and skill shortages in the economy. The federal Government assumes that low wages will stimulate employment. However, as numerous researchers have shown, low pay creates disincentives for women to participate in the labour market.[118] The *Bill* thus has long-term implications for women's patterns of workforce participation and their capacity to contribute to Australia's long-term economic productivity.

The *Bill* can be expected to impact most negatively on those women with the least bargaining power, threatening their wage levels, their employment security and creating the potential for increased casualisation and unpredictability of working hours. The *Bill* strips back the power of the AIRC to arbitrate disputes and leaves women with no mechanism to ensure generalisable improvements in equal pay or in the quality of jobs. The *Bill* also takes away the effect of important provisions gained in the recent family test case without providing any innovation or support in work/family life transitions (see below). Overall, women employees will be more dependent on managerial discretion to have their skills properly recognised in appropriate classification structures, to enable them to combine work and family interests and to gain gender equity in pay and employment.

Given the well-recognised association between centrally co-ordinated industrial relations systems and comparatively good pay equity outcomes,[119] concerns have been held for some time about the decentralisation of wage setting in Australia. Changes to the system risk downward pressure on gender pay equality in a number of ways, for example, by reducing the

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[113] OECD Economics Department, *Female Labour Force Participation: Past Trends and Main Determinants in OECD Countries*, May 2004.

[114] ABS *Employee Earnings , Benefits and Trade Union Membership* Cat 6310.0 August 2004.

[115] ABS *Forms of Employment 2001* Cat No 6359.0

[116] Griffith Work Time Project, *Working time Transformations and Effects*. Report to Queensland Department of Industrial Relations, Griffith University, Brisbane, 2003.

[117] Harley, H. and Whitehouse, G. 'Women in Part-time Work: A Comparative Study of Australia and the United Kingdom' *Labour & Industry* 12(2), 47.

[118] Rubery, J.; Grimshaw, D. and Figueiredo, H., 'The Gender Pay Gap and Gender Mainstreaming Pay Policy' presented at the European Work and Employment Research Centre, UMIST, Manchester, 2002. See also Gregory, R, *Can this Be the Promised Land? Work and Welfare for the Modern Women*, National Institutes Public Lecture, Parliament House, Canberra, June 5, 2002; Mumford, K. and Pereira-Nicolau, A., 'The Labour Force Participation of Married Mothers: A Tale of International Catch-Up' *Australian Journal of Labour Economics*, 6, (4), 2003, pp. 619-630.

[119] Gregory, R., Daly, R, Anstie and V. Ho. (1989) 'Women's pay in Australia, Great Britain and the United States: the role of laws regulation and human capital' in R. Michael, H. Hartmann and B. O'Farrell (eds*) Pay Equity: Empirical Issues*. Washington DC, National Academy Press; Gunderson, M. (1994) 'Comparable Worth and Gender Discrimination: a Gender Perspective'. Geneva: International Labour Office; Rubery, J. and C. Fagan (1994) 'Equal pay policy and wage regulation systems in Europe'. *Industrial Relations Journal*, 25, 4, 281-92; Whitehouse, G (1992) 'Legislation and Labour Market Gender Inequality: an Analysis of OECD Countries'.*Work, Employment and Society*, 6, 1, 65-86.

indirect benefits of central coordination of a comprehensive award system (such as the capacity to limit low pay), by eroding the supports it offers the prosecution of pay equity cases and delivery of gains (such as facilitation of broad work value comparisons and delivery of remedies through awards), and by enabling a system where the size of wage increases becomes more dependent on bargaining power. In this context, it is important that mechanisms to redress gender inequity and maintain a fair and effective safety net are strengthened in a decentralised system.

Instead, it is likely that further individualisation as envisaged by the Bill will exacerbate wage inequality and increase erosion of pay at the bottom of the distribution.[120] Moreover, the 24.4 per cent of women (comprised of 34.2 per cent of women employed part-time and 14.8 per cent of women employed full-time) currently dependent on the award system for annual wage adjustments are likely to see a further deterioration in their pay position if the FPC moves to only adjust the adult minimum without simultaneous regard to the minimum rates for classifications above the wage floor. The *Bill* enables the AFPC to raise the minimum wage above the lower paid classifications, a practice the AIRC has avoided.[121]

The *Bill* provides that the AIRC is prevented from dealing with an application for a proposed order that would have the effect of setting aside or varying rates set by the AFPC. This exclusion fails to address the way in which pay inequity may be embedded in systems of minimum wage settings and wage determination that nominally appear fair and equal.

The *Bill* effectively removes women's access to equal remuneration provisions in State industrial relations systems which, in the face of persistent gender pay inequity, have developed new and more sophisticated ways to tackle the undervaluation of the work of state award workers.

The proposed reforms will do little to assist particular groups of workers such as women. Women are over-represented in low paid, part-time and casual jobs - jobs currently afforded some protection by the award system and common rule provisions at the state level. The Western Australian experience of individualisation resulted in a significant deterioration in the relative pay of women within this state. We can expect such developments to be mirrored nationally if the proposed legislation is passed.

21 Work and family

The *Bill* will significantly affect the growing proportion of Australian employees who have responsibility for both work and care. Part of the rationale for these changes relies on its creation of 'greater opportunities to balance work and family' although detailed evidence in support of this proposition has not been provided. However, employees' 'choices' in these matters appear likely to be hampered rather than enhanced by the *Bill*, as it enhances the employer's capacity to exercise managerial prerogative and impose their choices on employees.

These changes occur against the background of changes in the welfare system requiring sole-parents whose youngest children turn eight to find at least 15 hours paid work. These workers

[120] D.H. Plowman and A.C. Preston, *The New Industrial Relations: Portents for the Lowly Paid.* (mimeograph) WiSER (Women in Social & Economic Research), Curtin University of Technology, Perth, 2005.
[121] proposed s90ZC

will enter a more minimalist, individualistic system with significant care responsibilities and weak bargaining power. Their work and family protections will be minimal[122].

Workers with family responsibilities need a secure living wage; adequate, predictable common family time (including social work time and holidays); flexibilities that meet their needs, including the opportunity for leave and to work part-time; protection from excessive hours; and quality, accessible affordable childcare.

Australia lags behind the industrialised world already on several of these measures, with high levels of insecure work, long average hours of work, low levels of control over hours and a growing proportion who work irregular or excessive hours, a poor leave regime and a high proportion of workers – especially those with families – who work unsocial hours. Industrial relations reform should remedy these challenges. The *Bill*, heavily weighted in the employer's favour, will exacerbate them.

Australia's female participation rate lags behind that in many trading partners (contributing to an impending labour shortage) because of backward work/family arrangements. While many countries are improving their work and family arrangements, Work Choices swims in the opposite direction.

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. Further, 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 the case of unemployed '*Billy*' in the Government's documentation, 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 a maxima and a minima.

The AIRC has been the source and forum for all recent general advances on work and family standards. Under the *Bill* 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

[122] Evidence in support of the arguments advanced in this section is detailed in Pocock (2005) 'The Impact of *The Workplace Relations Amendment (Work Choices) Bill 2005* (or *"Work Choices"*)' on Australian Working Families', Industrial Relations Victoria, November 2005 (www.barbarapocock.com.au). See also the evidence provided in the submissions made to this Inquiry by Dr Jill Murray and Associate Professor Rosemary Owens.

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 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 real wages growing, if at all, at a slower rate than they would have under the AIRC, which will especially affect those workers and families in receipt of low pay. It will also foster further income dispersion and inequality in Australia. International research shows that inequality has significant negative effects on social well-being.[123]

The *Bill* will see an expansion in individual agreements. Non-managerial women workers fare especially badly under individual agreements at present, as do part-timers and casuals, who have disproportionate responsibility for families.

Existing 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.[124]

The *Bill* 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. Each of these is further compromised by the *Bill* 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.[125]

Many other countries are taking a different road in response to the challenges of international competition, rising dependency ratios, labour shortages and falling birth rates. They are increasing support for working carers, ensuring that their workforce participation is underpinned by fair standards, and providing essential infrastructure like paid leave, holidays and rights to family-friendly flexibility. Equitable, family-friendly industrial conditions have not been seen as necessary trade-offs for economic growth, but as *achievable joint objectives, the one supporting the other*.

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[123] R. Wilkinson, *The Impact of Inequality: How to Make Sick Societies Healthier.* The New Press, New York, 2005.

124 Department of Employment and Workplace Relations (DEWR) *Wage Trends in Enterprise Bargaining.* (December) Department of Employment and Workplace Relations, Canberra, 2004, p. 101.

[125] See for example, Presser, H. B. (2000). "Non-standard work schedules and marital instability." *Journal of Marriage and Family* **62**(1): 93-110; Strazdins, L., R. Korda, et al. (2004). "Around the Clock: parent non-standard work times and children's well being in a 24 hours economy." *Social Science and Medicine* **59**: 1517-1527.

For example, some countries have increased paid leave of various kinds, some have worked to reduce the proportion of workers working excessive or unsocial working hours, and several have introduced rights for employees to request more flexible leave and hours arrangements.[126]

The success of these approaches, which have been extensively reviewed, provide a more promising alternative direction for industrial reform in Australia, one which would improve the stability and well being of Australia's workers and their children and other dependents.

22 Impact on young people

Young people are a significant section of the labour market.[127] The *Bill* will exacerbate young people's high job insecurity, low and underpaid wages, poor OHS, unsatisfactory working conditions, and problems such as bullying and harassment.[128] While young people often combine work and study,[129] tens of thousands work full-time (or attempt to) to support themselves,[130] many holding traineeships and apprenticeships, which enhance their own (and Australia's) skill base. They thus form a vital part of tomorrow's labour market, as well as today's. Young people are frequently unaware of their workplace rights and how to enforce them, and are thus highly vulnerable. Recent high-level enquiries underline this vulnerability and recommend *more* protections for young workers. However, the *Bill* moves in the opposite directions for *all* workers, including young people.

Firstly, the *Bill* implies an increase in precariousness of employment. Currently, casualisation of young people is high.[131] Research cited elsewhere in this submission indicates that the *Bill* will only increase this: irregular hours, short notice, differing start times, and difficulty of getting time off for study commitments will be exacerbated. The lengthening of the probationary period makes young people more vulnerable to short term exploitation, and their

[126] See for example Waldfogel, J. (2004). 'Social Mobility, Life Chances, and the Early Years', CASE Paper 88. London School of Economics, London, Center for Analysis of Social Exclusion.

[127] People aged 15-24 currently make up 20 per cent of the Australian labour force. 68 per cent of 15-24 year olds work (Australian Bureau of Statistics, *Australian Social Trends*, Cat. No. 4102.0).

[128] See: M. Wooden and A. VandenHeuvel, 'The Labour Market for Young Adults', *Australia's Young Adults: The deepening divide*, Dusseldorp Skills Forum, Sydney, 1999; ACIRRT, Young *People and Work Survey*, Australian Centre for Industrial Relations Research and Training, University of Sydney, July 2005; Commission for Children and Young People and Child Guardian, *Queensland Review of Child Labour*, CCYPCG, Brisbane, April 2005; Unions SA, *Dirt Cheap and Disposable, A report about the exploitation of young workers in South Australia*, Adelaide, 2005; NSW Children's Commission, *Children at Work*, NSW Commission for Children and Young People, Sydney, June 2005; V. Smiljanic, *Fast Food Industry: A research study of the experiences and problems of young workers*, Job Watch Employment Rights Legal Centre, Melbourne, May 2004; and numerous media releases from the Young Workers Advisory Service, Brisbane. See also Job Watch, *Children and work: Policy challenges and choices for Victoria*, Submission to Issues Paper reviewing Relevant legislation affecting the employment of children in Victoria, Job Watch, Melbourne, 2002.

[129] J. Lauritsen, 'Un and Under-employment', *Youth Studies Australia*, vol.12, no. 2, 1995, pp. 32-36; L. Munro, 'Hopping in Hamburger Heaven', *Youth Studies Australia*, vol. 11, no. 3, 1992, pp. 25-33.

[130] Of the 68 per cent of young people in employment, 53 per cent are in full-time employment, with a further 12 per cent desiring more hours. Thus two thirds of young workers are supporting themselves, or attempting to do so (see ABS, op.cit.). The great majority of young people in work do *not* work for 'pin money'.

[131] More than 66 per cent of 15-19 year old workers are casual, as compared to 25 per cent of the workforce as a whole (ACTU, *Future of Work: young people and unions*, Background Paper for 2003 ACTU Congress).

capacity to complain (for instance, if they are dismissed around a birthday) is in practice quite low, due to the difficulties and complexities of taking action.[132]

Secondly, the *Bill* implies a negative impact on pay and conditions. Evidence on the probable effects of the *Bill* on wages cited elsewhere indicates that the effect of the *Bill* will be to drive down wages for the more vulnerable (of whom young people form a significant part). A larger 'sink' of low paid young people on AWAs (which will lack the comprehensive award safety net they currently have) will act to depress wages in low and semi-skilled job categories and thus will have wider flow-on effects, apart from the direct impact on young people. Many young people, due to their poor bargaining position, will be employed under contracts with only the five minimum conditions, thus losing penalty and overtime rates, meal breaks and so on. If they are students, this will drive up working hours and thus affect their studies.[133] If they are not, a cycle of workplace poverty will be set up; that is, young people not being able to fully support themselves, and thus becoming discouraged job seekers, leading to mental health and other social problems.[134] As it is, the British Low Pay Commission reports that relative youth wages in Australia are amongst the lowest in the industrialised world.[135]

Thirdly, the *Bill* implies an increase in vulnerability to exploitation. Research shows that many young people are unaware of their rights in the workplace and have low bargaining skills.[136] Regulatory mechanisms other than the AIRC lack teeth, or are too time-consuming or intimidating for young people to access.[137]

Fourth, there is the problem of a declining skills base. There will be less incentive to undertake apprenticeships and traineeships, with the protections in existing awards and State laws being removed. Existing high drop-out rates[138] may increase, since low wages (around $240-$250 for first year apprentices in most occupations) can be eroded still further over time, other monetary items (penalty rates, overtime) can be removed, and the current mandatory length of training requirements can be removed.

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[132] P. McDonald and K. Dear, 'Who is Upholding the rights of young workers? A profile of advocacy groups in Australia', *Youth Studies Australia*, vol. 24, no. 3, 2005, pp. 10-16.

[133] The implications of this are illuminated by studies such as: M. Vickers, S. Lamb and J. Hinkley, *Student Workers in High School and Beyond: The effects of part-time employment on participation in education, training and work*, Australian Council for Education Research (ACER), Melbourne, 2003; L. Robinson, *The effects of part-time work on school students*, ACER, Melbourne, March 1999; E. Smith and A. Green, *School students' learning from their paid and unpaid work*, National Council for Vocational Education Research (NCVER), Adelaide, 2001.

[134] S. Morell, R. Taylor and C. Kerr, 'Unemployment and young people's health', *Medical Journal of Aust*ralia, vol. 168, 1998, pp. 236-240.

[135] Low Pay Commission, *National Minimum Wage: Low Pay Commission Report 2005*, Norwich, February 2005.

[136] Many of the studies cited in footnote 128 highlight and discuss this issue.

[137] Job Watch, 2002 ibid.; McDonald and Dear, 2005, op.cit., p. 12. The Young Workers' Advisory Service in Queensland had 5 000 calls for direct assistance during its first three years of operation; 2 000 young people contacted Job Watch in Victoria, regarding workplace issues, in 2002-2003 alone (McDonald and Dear, 2005, op.cit., p. 14).

[138] Currently around 36 per cent; see NCVER, *Statistics: Apprentices and Trainees – March Quarter 2005*, August 2005 (NCVER Item 1612). NCVER statistics also show a plateauing of new training agreements from 2003 onwards, which is of concern.

23 Occupational health and safety

The combination of pressures toward increased work-life conflict, reduced control over working hours and greater job insecurity inherent in the *Bill* constitute a major threat to occupational health and safety (OHS).

A clear implication of the legislation is an extension of the range of 'normal' working hours. Extensive research indicates that work at biologically and socially undesirable times of the day or the week – particularly weekends, holidays, evenings and nights – adversely affects OHS, largely by disrupting sleep and increasing work-life conflict.[139] Consequently, provisions for effective worker participation in the allocation of work at these times is a key premise of expert guidelines developed by members of respected international bodies, such as the *Scientific Committee on Shiftwork and Working Hours* of the *International Commission on Occupational Health*. At present, Australian workers have low control over their working hours by international standards[140] and a clear effect of the *Bill* will be to further diminish this control and increase pressure for longer hours. Long working hours, and particularly overtime, are themselves serious risks to occupational illness and injury.[141] Pressures to remove constraints on overtime and long hours, such as penalty rates, are therefore a significant indirect threat to OHS.

A large body of research has demonstrated that precarious employment, particularly casual and insecure employment, is an OHS risk. Negative effects are apparent across many indices of health, injury and OHS knowledge[142]. This research also indicates that the benefits of 'flexible work' principally accrue to the employer and casual workers are likely to experience increased work-life conflict and other OHS disadvantages[143]. Access to OHS training and knowledge, and fear of dismissal for reporting injury or illness, are particular problems for casual, part-time and other precarious employees. The negative OHS impact of the *Bill* will inevitably fall most heavily on the workers who are already most disadvantaged in the labour market, and most likely to be precariously employed, especially women, the less skilled and older workers.[144]

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[139] Bohle, P & Quinlan, M (2000). *Managing occupational health and safety: A multidisciplinary approach (2nd Ed.)*. Melbourne: Macmillan Australia (608 pp).

[140] Berg, P, Appelbaum, E, Bailey, T, Kalleberg, AL (2004). 'Contesting time: International comparisons of employee control of working time', *Industrial and Labor Relations Review*, 57(3), 331-349.

[141] See, for example, Dembe, AE, Erickson, JB, Delbos, RG & Banks, SM (2005). 'The impact of overtime and long work hours on occupational injuries and illnesses: New evidence from the United States'. *Occupational and Environmental Medicine*, 62, 588-597.

[142] See Quinlan, M., Mayhew, C. & Bohle, P. (2001). 'The global expansion of precarious employment, work disorganisation and occupational health: A review of recent research', *International Journal of Health Services*, 31 (2), 335-414; Quinlan, M. & Bohle, P. (2003). 'Contingent work and occupational safety'. In J. Barling and M.R. Frone (Eds), *The Psychology of Workplace Safety*, Washington: APA (American Psychological Association) Books, pp. 81-106.

[143] Bohle, P., Quinlan, M., Kennedy, D. & Williamson, A. (2004). 'Working hours, work-life conflict and health: A comparison of precarious and "permanent " employment', *Revista de Saúde Pública (Journal of Public Health*), 38, Suplemento, Dezembro, 19-25; Bohle, P., Quinlan, M., Klostermann, A. & Kennedy, D (2005). 'Service or Servitude? Health and safety of precarious employees in hotels and call centres', under review for *Work, Employment and Society*.

[144] Bohle, P. (2005). *"Ageing, work organisation and OHS*". Invited presentation at "Work till 100: The labour market of the future", Australian Association of Gerontology, Concord Hospital, September 9.

24 Impact on States and regional areas: The Example of Queensland

Possible outcomes in just one state are illustrative of the potential impact of the *Bill* at state level. For this purpose we use the example of Queensland.

The *Bill* will have unjust, harsh and unconscionable effects on employees presently covered by state industrial laws in Queensland because of their high reliance on state instruments. The Queensland labour market grew by more than 30 per cent in the period 1992 – 2002, compared with 16 per cent for the rest of Australia.[145] Under the *Bill*, at least 60 per cent of Queensland employees will be in the new federal system.[146] Currently about 55 per cent of Queensland workers rely on state awards and agreements, while 17 per cent are award free, but entitled to the Queensland statutory minimum conditions. Award reliance is higher in rural and regional areas: about 50 per cent of employees in rural and regional Queensland rely solely on Queensland awards.[147] These employees are likely to be women, unskilled, young and indigenous workers, in workplaces with low union density, in service industries, in small business and in the regions.

In Queensland, the majority of employees will immediately lose their rights to be dismissed fairly.[148] Entitlements under current state awards and agreements will be also be immediately lost when they are deemed to be notional federal agreements, and under state agreements when they are deemed to be preserved state agreements, since any prohibited content will be unenforceable. Queensland awards will be further rationalised and will 'disappear' once a new agreement is made at a workplace. Vulnerable workers will be most at risk of being forced to enter sub-standard collective agreements or AWAs, not only to obtain a job in the first place, but as replacements for existing collective instruments.

The *Bill*'s amendments to the Termination of Employment provisions in the Workplace Relations Act and the circumscription of the AIRC's power to arbitrate together form the lynch pin of the framework for regulating the labour market that the *Bill* represents. The 'right to fire' employees or terminate the contracts of workers with few if any limitations is the ultimate employer weapon. It allows employers much greater latitude in imposing their will on workers, ranging from directions to perform certain duties, choice of agreement type, changes in working conditions, bargaining in its most general sense or re-structuring of the organisation. How the *Bill* provides such an environment is discussed below, following a brief consideration of how the Queensland Industrial Relations (IR) Act regulates and mitigates unfair dealings by employers with individual workers.

Like industrial legislation in the other states, the IR Act assists workers at the individual level in several very important ways. Section 5 provides a wide definition of 'employee', deeming

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[145] Mangan, J. 2005, *Shifting Industrial Relations Jurisdiction from the Queensland Government to the Commonwealth Government: Some Potential Implications*, Queensland Department of Industrial Relations, Brisbane, p 41.

[146] Lee, M. 2005, 'Work Choices, the Demise of the State Systems and the Future for Working Life in Queensland,' *Journal of Australian Political Economy*, forthcoming.

[147] Industrial Relations Taskforce 1998(a), *Review of Industrial Relations in Queensland: Issues Paper* Queensland Department of Employment, Training and Industrial Relations, Brisbane, September, p 91; D. Peetz, 2004, *The Decline of the Collectivist Model: Report*, Queensland Department of Industrial Relations, Brisbane, pp 34-36.

[148] Mangan, J. 2005, *Shifting Industrial Relations Jurisdiction from the Queensland Government to the Commonwealth Government: Some Potential Implications*, Queensland Department of Industrial Relations, Brisbane, p 41.

outworkers in the clothing industry to be employees, provides procedures by which the Queensland Industrial Relations Commission (QIRC) can determine whether a worker is an employee (s 275) and whether a contract for work is fair (s 276). This is crucial in maintaining benefits and rights for employees who may otherwise be unwillingly 'converted' into sham independent contracting arrangements on worse wages and conditions by unscrupulous employers, on pain of termination with no prospect of a quick and good remedy. These protections are specifically over-ridden by s 7C(1)(d). The power of the QIRC and the AIRC to arbitrate over disputes is a significant way for unions to overcome other kinds of unfair treatment, such as unfair disciplinary action or simply withholding a non-monetary entitlement. The Work Choices *Bill* removes the power of the AIRC to compulsorily arbitrate, except in cases of actual industrial action (s 176C, s 176I), while the QIRC will retain its arbitral powers only in respect of non corporate employers.

The dismissal provisions in Chapter 3 of the IR Act presently provide for minimum notice periods, redundancy pay, and an uncomplicated process of conciliation and/or arbitration to resolve unfair dismissal claims. Where the IR Act refers to unfair dismissal, the Workplace Relations Act provides remedies for harsh, unjust or unreasonable dismissals. The difference is significant. The Queensland provisions amount to a code of rights for employees, in that it provides a right not to be dismissed unfairly. In contrast, the WR Act provides 'a fair go all round' to both parties, and, supported by a raft of other sections, the outcome is that the Australian Industrial Relations Commission (the AIRC) must weigh the situation of the most unfair and harsh employer against the effect of the dismissal on the employee.[149] The IR Act scheme will be largely overridden by the *Bill*, which also introduces other changes that will significantly reduce a dismissed Queensland employee's rights.

Under the IR Act, employees are not excluded on the basis of the number of employees who work for the employer. Section 170CE(5E) of the *Bill* excludes employees employed at workplaces with less than 100 employees from seeking relief for harsh, unjust of unreasonable dismissal, effectively disenfranchising employees in 95 per cent of businesses and about 75 per cent of employees in Queensland.[150] Every new employee will also be on probation for a six-month period rather than the current three-month period in both the WR Act and the IR Act, during which the employer may dismiss at will (s 170CE(5E)(b)). Clearly the Bill has important implications for employment in the states and for the relevance of many measures that State Governments have adopted over recent decades.

[149] Chapman A, 1997, 'Termination of Employment under the Workplace Relations Act 1996 (Cth)' (1997) 10 *AJLL* 89.

[150] Mangan, J. 2005, *Shifting Industrial Relations Jurisdiction from the Queensland Government to the Commonwealth Government: Some Potential Implications*, Queensland Department of Industrial Relations, Brisbane, p41.

25 Conclusion

There are good arguments to reform Australia's workplace arrangements. Australia faces labour market challenges that need to be addressed, including labour and skill shortages, work-family tensions, production issues in a globalised economy, and the growth of precarious employment. We recognise these challenges.

However, when we analyse the *Bill* and evidence in relation to its proposals to address these and other issues, we find that the case is not made. The Government asserts that jobs and productivity will grow as a result of the *Bill*. On the evidence available from existing research there is no solid research basis to give confidence that this *Bill* will address these economic and social problems. However, there is persuasive evidence that the *Bill's* provisions will contravene long established international labour standards, strengthen employer prerogative, create new hazards for many working Australians, widen inequality and disadvantage the most vulnerable.

In sum, the evidence we have provided suggests that these proposals will:

- undermine people's rights at work;
- deliver a flexibility that in most cases is one way, favouring employers;
- do little or nothing to address work-family issues and exacerbate problems on several fronts;
- have no direct positive impact on productivity and, through it, wages or employment growth;
- disadvantage the individuals and groups already most marginalised in Australian society;
- widen inequality;
- add levels of complexity to the regulation of industrial relations, that both employers and employees will struggle to understand and apply;
- intrude, uninvited, into the workings of State industrial relations systems in a 'one-size-fits-all' approach.

These effects will not all happen immediately. Many of these changes will take time to manifest themselves in changes in behaviour at the workplace. Some, such as the capacity of employers to unilaterally terminate agreements and cut terms and conditions, have a built in lag. The pressure on firms to cut labour costs through the mechanisms provided by this *Bill* will be manifest over time. Initially, many employers, concerned about maintaining good relations with their workforce, will decline to take advantage of the opportunities provided by the *Bill*. But as other employers obtain an apparent competitive advantage through cutting labour costs, they will be forced to follow suit. The long run consequences will be much more serious than those apparent immediately after the legislation takes effect. It is these long term effects, and their consequences for Australian workplaces and society that provokes our shared, grave concern and opposition to the *Bill*.

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