Chapter 2

National Employment Standards

2.1 This chapter details the first part of the safety net of employment conditions which provide enforceable minimum protections that cannot be stripped away, the National Employment Standards (NES). The safety net consists of the NES and modern awards which both come into operation on 1 January 2010. Modern awards are discussed in chapter three.

Current arrangements

2.2 WorkChoices pared back rights to five minimum entitlements for employees: annual leave; personal/carer's leave; parental leave; maximum ordinary hours of work; and basic rates of pay and casual loadings.

2.3 Under WorkChoices some award conditions could be removed or modified by a workplace agreement without compensation including overtime, redundancy payments and penalty rates. Under the new system, the five minimum entitlements will be replaced by comprehensive and enforceable minimum protections that cannot be undercut.

2.4 To illustrate what occurred under WorkChoices, in February 2008 the Workplace Authority provided data from a sample of over 1,700 AWAs lodged between April and October 2006 which found that 89 per cent removed at least one of the protected award conditions. Over half excluded six or more of the eleven so-called protected award conditions, and two per cent even excluded all eleven conditions. The analysis found that 75 per cent of the AWAs which were sampled failed to provide for a guaranteed wage increase, and the award conditions that were most frequently removed were shift work loadings and annual leave loadings (around 70 per cent), annual leave loadings and penalty rates (68 and 65 per cent respectively) and incentive based payments and bonuses (63 per cent). Thirty one per cent removed rest breaks and 25 per cent removed declared public holidays.[1]

2.5 In addition, research cited by the ACTU found that in the first two years of WorkChoices, 62 per cent of minimum wage workers had been subjected to reductions in real wages and that wage increases for award-reliant employees had fallen significantly behind wage increases for the rest of the economy.[2] It also noted that workers on AWAs had lower wages than workers on collective agreements, and that, in low paid industries, AWAs had provided the means by which employers were

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1 Media Release, The Hon Julia Gillard, Minister for Workplace Relations, 'AWA data the Liberals claimed never existed', 20 February 2008.

2 ACTU, *Submission 13*, p. 2.

able to reduce the costs of labour.[3] WorkChoices was a success in the terms expected of the Coalition government by its business constituency.

2.6 On the other hand, WorkChoices adversely affected the living standards of many employees but particularly young workers, the low paid and women. Young workers are particularly vulnerable to exploitation by employers, as can be seen in the results of a report by the Workplace Ombudsman. Following a national education campaign of workplace rights, random audits of 400 employers found that 41 per cent of 15-24 year olds were being underpaid, resulting in reimbursement of $540,300 or $360 each. 80 per cent of the breaches identified by inspectors related to underpayment of wages and penalty rates and the majority of breaches were found in the retail trade and accommodation and food services sectors.[4]

2.7 SA Unions cited research which showed that employees in low paid industries, including retail and hospitality, experienced stagnant or declining wages under WorkChoices. In addition, research by the Australian Fair Pay Commission showed the wage increases for employees reliant on awards fell behind wage increases for the rest of the economy.[5] Research has also shown the adverse effect on women with the wage gap for women on AWAs being much wider than those on collective agreements; non-managerial employees earning 18.7 per cent less than their male counterparts, compared to 10 per cent for agreements.[6]

Proposed changes

2.8 The Fair Work Bill will guarantee a safety net of enforceable minimum terms and conditions for all workers in the federal system.

National Employment Standards

2.9 Chapter 2, Part 2-2 of the bill details the ten National Employment Standards which were announced on 16 June 2008.[7] The NES are the minimum terms and conditions that apply to all national system employees. Clause 44 prevents an employer contravening the NES.

2.10 The NES cover:

- maximum weekly hours of work;
- requests for flexible working arrangements;

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3 ACTU, *Submission 13*, p. 8.

4 National Young Workers Campaign, Workplace Ombudsman Report released 19 January 2009.

5 SA Unions, *Submission 121*, p. 6 and pp. 12-13.

6 SA Unions, *Submission 121*, p. 14.

7 Media Release, The Hon Julia Gillard MP, Minister for Employment and Workplace Relations, 'New National Employment Standards Released', 16 June 2008.

- parental leave and related entitlements;
- annual leave;
- personal/carer's leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- provision of a Fair Work Information Statement.[8]

2.11 The bill retains the substance of the NES announced in June 2008 with some amendments, which are:

- employees not covered by a modern award or enterprise agreement may cash out annual leave in certain circumstances, by written agreement, but the employee must retain at least four weeks annual leave after cashing out;
- employees with less than six months service are not entitled to the minimum notice of termination in the NES. For small businesses this exclusion applies if the employee has worked for less than 12 months (see clarification below); and
- a section has been added dealing with various other matters such as leave entitlements while on workers compensation.[9]

Issues raised with the committee

Maximum weekly hours

2.12 Clause 62 details maximum weekly hours. An employer may request reasonable additional hours in addition to the 38 hour week for full time employees. What may be determined as reasonable can depend on safety risks, personal circumstances, enterprise needs, the usual pattern of work, and notice given by the employer. The fact that additional hours are worked in accordance with an averaging arrangement does not necessarily mean that those hours are reasonable. Clause 62(2) makes it clear that an employee may refuse to work additional hours if they are unreasonable.[10]

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8 Explanatory Memorandum pp. x-xii.

9 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 23.

10 EM, p. 43.

2.13 The Law Council of Australia has advocated the NES clarify what ordinary hours per day are for personal leave purposes by setting them as 7.6 hours per day, accepting that a modern award may deal with the issues differently; or express the personal leave entitlement as an entitlement to a certain number of hours rather than days. It noted the similar difficulties regarding annual leave (see below).[11]

Averaging of hours

2.14 The NES do not provide rules for the averaging of hours, but this issue can be dealt with in modern awards. Clause 64 provides averaging of hours over 26 weeks for award/agreement free employees.

2.15 Concerns about averaging of hours were raised by the mining, maritime and construction industries. AMMA complained that the Mining Industry Award released in December 2008 only allows hours of work to be averaged over 26 weeks. AMMA contends that this does not provide the flexibility required by the resources sector to enable them to continue existing rosters. AMMA claims that this is contrary to assurances provided that current patterns of work in the industry would be able to continue under the bill.[12] Mr Christopher Platt, Director Workplace Policy, AMMA, explained to the committee:

> Our concern is that the NES, taken together with what we know of the modern awards—and the hard-rock mining industry modern award was handed down on 19 December—caps averaging of hours at six months and prevents the working of 12-hour shifts without majority approval. The direct impact of that is that any current business that works 12-hour shifts that does not have an industrial agreement in place which provides for 12-hour shifts will not be able to continue to work its current arrangements on 1 January 2010. That will be a major headache for an industry that almost exclusively works 12-hour shifts in its operations and relies on even-time rostering to make most efficient use of fly-in fly-out arrangements at remote sites.[13]

2.16 Mr Platt told the committee that if the resource sector could average its hours over 52 weeks of the year and continue to work 12-hour shifts and annual leave could be taken in accordance with the roster that this would satisfy their concerns.[14]

2.17 Award modernisation is a distinct and separate process being undertaken by the AIRC. However, the committee notes that in determining the modern award for the mining industry, the AIRC rejected AMMA's initial position of averaging hours over 52 weeks in its decision of 19 December 2008, deciding instead hours to be averaged over six months is appropriate.

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11 Law Council of Australia, *Submission 59*, p. 8.

12 AMMA, *Submission 96*, p. 8 and pp. 44-45.

13 AMMA, *Committee Hansard*, 27 January 2009, p. 8.

14 Ibid., p. 8.

2.18 Employer organisations, including the Chamber of Commerce and Industry, Queensland, and the National Aquaculture Council, told the committee how the particular circumstances of some industries favoured the averaging of hours over 52 weeks, particularly for sea-going employment.[15] The National Aquaculture Council emphasised that flexibility of hours underpinned the growth and international competitiveness of the industry.[16]

2.19 In the construction industry, Master Builders Australia explained to the committee that it believed the new averaging provisions in the bill would result in higher costs for a project:

> A lot of projects go beyond 26 weeks and construction is governed by periods of frenzied activity in respect of the management of projects. Certainly our project managers, in one week, may be required to work 60 to 80 hours, given the peak of the activity of that construction work, and then there would be a quiet time, so where the project extends over more than 26 weeks you need to average out those hours, particularly for project managers and people in critical roles, so that they can efficiently supervise the particular project. That is the current law. I think that other sectors—for example, the mining sector—also want 52 weeks for the same reason.[17]

2.20 In response to concerns by the committee that 52 weeks may disadvantage some employees, the MBA responded that they would be happy to see a mechanism included where by such abuse was prevented.[18]

2.21 Unions were less enthusiastic about yearly and half-yearly averaging. Unions WA told the committee that in their view averaging over 26 weeks is too long and added:

> There should be no reason in an industry like the resource sector why you cannot establish a six-week—in fact, they are often six-week—or two-month roster or whatever it might be and manage the hours accordingly. We have had stories from workers who have been on 12-hour shifts for up to 24 to 30 days in a row. This is not an uncommon story. Apart from what that does to family life and all the rest of it, there are serious health and safety considerations and some employers in the resource sector are saying that maybe they need to do things a bit differently; that maybe that is not the way to go any longer.[19]

2.22 As requested by the committee, Professor David Peetz provided further information on the averaging issue for the mining sector. In his view the 26 week averaging period would not prevent a company from running a 28 week roster. 'It

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15 Chamber of Commerce and Industry, QLD, *Committee Hansard*, 27 January 2009, p. 19.

16 Mr Brian Jeffries, National Aquaculture Council, *Committee Hansard*, 29 January 2009, p. 33.

17 Mr Richard Calver, MBA, *Committee Hansard*, 28 January 2009, p. 29.

18 *Committee Hansard*, 28 January, 2009, pp. 36-37.

19 Mr David Robinson, Unions WA, *Committee Hansard*, 29 January 2009, p. 47.

would just mean, in effect, that they have to pay appropriate penalty rates, or an equivalent allowance, to the extent that hours exceeded the average'.[20]

2.23 In addition, regarding employers being able to set a standard 12 hour day, he noted this would remove the component of compensation for overtime or penalty rates from workers on 12 hour rosters. He concluded that the current provisions mean that employers would have to pay the appropriate shift premiums and:

> Those that were able to reduce pay and conditions through the provisions of Work Choices that removed the 'no disadvantage' test from agreements would find that they lost that temporary advantage. If an employer wants to have employees work 12 hour shifts it is only appropriate that employees be asked to give their consent…[21]

Committee view

2.24 The committee majority supports the reintroduction of an independent umpire on these matters. It notes the determination made by the AIRC and that they are best placed to decide.

2.25 The committee majority also notes that the award clause does allow for 12 hour shifts to be worked where a majority of employees agree. It is not accurate to state that this agreement needs to be contained in an enterprise agreement as it can be by way of a simple workplace vote.

Requests for flexible working arrangements

2.26 Clause 65 creates a new right for employees with 12 months' service to apply for a change in working arrangements to assist with the care of a pre-school child. However, employers may refuse requests on 'reasonable business grounds'. The bill does not define flexible working hours as this could limit the scope or types of arrangements.[22] It also does not identify what may or may not comprise 'reasonable business grounds' for the refusal of such a request. Decisions must be made according to the circumstances that apply and may be summarised as follows:

- the effect on the workplace, including costs, efficiency, productivity and customer service;
- the capacity to organise work among current staff; and
- the capacity to find replacement staff.[23]

2.27 Professor Peetz described the exclusion of casuals or employees with short job tenure from eligibility as unjustified. Employers should have the discretion to

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20 Professor David Peetz, Supplementary submission, tabled papers.

21 Ibid.

22 DEEWR, *Submission 63*, p. 61.

23 EM, p. 45.

consider a request from a short term or casual employee with less than 12 months' service.[24] This was supported by the Australian Human Rights Commission. [25] DEEWR advised that employees who do not meet the eligibility requirements such as 12 months' service are still able to make requests but the request will not be subject to the procedures contained in the bill.[26]

2.28 Professor Peetz also pointed out that British legislation provides a model for clarifying what constitutes 'reasonable business grounds'. He suggested that these be inserted in subclause 65(5), and in clause 76 or as an amendment to clause 12, to include: the additional cost burden; ability to meet customer demand; difficulties in reorganising work among current staff or in recruiting additional staff; effects on quality, performance and efficiency, and on planned structural changes.[27]

2.29 Professor Stewart told the committee that in his view such concerns about what constitutes 'reasonable business grounds' were best addressed through guidelines to employers by FWA rather than in the legislation:

> It seems to me that a more extensive guide that not only sets out the relevant factors but provides examples of situations where there would be reasonable business grounds or there would not be reasonable business grounds would be more helpful. In line with the goal of trying to keep the legislation expressed at a general level—uncluttered, understandable—it is better done at that sub-legislative level. I understand that the government has said that it would expect Fair Work Australia to produce guidelines. I suppose it would not do any harm to amend the legislation to make that a requirement, but I would confidently expect it is something that would happen anyway and it would be better dealt with in that way.[28]

2.30 Submissions raised concerns about employees being unable to challenge a refusal.[29] Professor Stewart noted that clause 44(2) ensures no court order can be made and clauses 739(2) and 740(2) ensure no dispute resolution process in an award, enterprise agreement or contract can authorise arbitration over the issue. He argued that it is necessary to provide some basis for an employee to dispute an employers assertion of 'reasonable business grounds' when refusing a request. He referred to the UK experience showing the benefits of encouraging employers and employees to discuss flexible working arrangements. UK legislation permits employees to challenge

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24 Professor David Peetz, *Submission 132*, p. 3. Dr John Buchanan also noted the increase in casual employment which he argued employers have used as a loophole to get around labour standards. See Dr Buchanan, *Committee Hansard*, 18 February 2009, p. 44.

25 Australian Human Rights Commission, *Submission 137*, p. 4.

26 DEEWR, *Submission 63*, p. 61.

27 Professor David Peetz, *Submission 132*, p. 5.

28 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 5.

29 See for example JobWatch, *Submission 87*, p. 14-15; CPSU-SPSF, *Submission 77*, p. 9; Australian Human Rights Commission, *Submission 137*, p. 6.

an employer's response, and at the very least he advocated that employees should be able to ask FWA to review an employer's decision.[30] Professor Peetz also felt employees should be able to apply to FWA for resolution of a dispute where an employer had not followed proper procedures, or where the decision to reject the application was based on incorrect facts and advocated that clause 65 be amended to allow an employee 14 days to appeal in writing to the employer after the date of notification of the employer's decision.[31]

2.31 DEEWR advised that state and territory laws providing more beneficial entitlements than the bill are not excluded (clause 66).[32] Professor Stewart questioned that if the government accepts it is appropriate for Victorian workers, for example, to have an enforceable right to insist on a reasonable change to their working arrangements as outlined in the EM, why should this not be extended to other jurisdictions?[33]

2.32 While supporting the intent of Part 2-2, Division 4, the United Firefighters Union told the committee of the roster that firefighters are deployed on which is not just an employment but a community entitlement and has been before the AIRC. It asked for their particular situation to be reviewed and clarified.[34]

2.33 The EM points out that it is open to the employer or employee to suggest modifications which might be able to be more easily accommodated. It also notes that an employee may have remedies under relevant discrimination legislation if they feel they have been discriminated against by the handling of their request.[35]

2.34 DEEWR noted that the right to request flexible working arrangements would encourage employees to remain at workplaces as their family circumstances change which will in turn benefit the employer as they retain the human capital investment made in the employee.[36]

2.35 While supporting the flexible working arrangements, the Electrical and Communications Union (Queensland) questioned the eligibility limitation to employees with pre-school age children and advised that many employees without pre-school age children may have a valid reason for requesting flexible working hours.[37] This was also supported by the Australian Human Rights Commission.[38]

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30 Professor Andrew Stewart, *Submission 98*, pp. 3-4.

31 Professor David Peetz, *Submission 132*, p. 6.

32 DEEWR, *Submission 63*, p. 61.

33 Professor Andrew Stewart, *Submission 98*, p. 4.

34 Mr Peter Marshall, National Secretary, United Firefighters Union, *Committee Hansard*, 17 February 2009, p. 69.

35 EM, p. 45.

36 DEEWR, *Submission 63*, p. 12.

37 ECA, *Submission 52*, p. 13.

2.36 Supporting this view, Professor Peetz suggested that the restriction on the right to request flexible working arrangements to parents with children under school age is very narrow. He pointed out that in the UK, the right to request flexible working arrangements is available to 'parents of young children under six years of age, or disabled children up to 18 years of age, and carers of adults in need of care'.[39] The Australian Human Rights Commission particularly supported this suggested extension.[40]

2.37 Responding to questions by Senator Abetz on extending the right to request flexible working hours to parents of children with a disability, Professor Peetz concluded that the simplest approach and one that would maintain consistency across legislation would be to provide in section 12 that a disabled child would be as defined in section 4 of the *Disability Discrimination Act 1992*.[41]

Committee view

2.38 While noting the suggestions for clarification, the committee majority understands that Fair Work Australia will provide further guidance on what constitutes 'reasonable business grounds' for the refusal of a request for flexible working arrangements. See chapter eight for further discussion of this area of dispute resolution by FWA.

2.39 The committee majority notes that the House Standing Committee on Family, Community, Housing and Youth is currently conducting an inquiry into better support for carers. The terms of reference of that committee include inquiry into the challenges facing carers and their support needs and the barriers to social and economic participation for carers, with a particular focus on helping carers to find and/or retain employment. The Committee is due to report this session.

2.40 The committee majority also notes that in relation to carers under the NES, leave is no longer capped at 10 days per year (see below). The bill also provides employees with improved protections from discrimination and there is a new protection from discrimination on the grounds of an employee's status as a carer. The committee believes that extending the right to request flexible working arrangements to all forms of family and caring responsibilities is a worthy aspiration over the longer term and in recognition of this, makes the following recommendation.

Recommendation 1

2.41 **The committee majority recommends that the government gives careful consideration to any recommendations of the inquiry into better support for**

38 Australian Human Rights Commission, *Submission 137*, p. 4.

39 Professor David Peetz, *Submission 132*, p. 21.

40 Australian Human Rights Commission, *Submission 137*, p. 4.

41 Professor Peetz, Supplementary information, tabled papers.

carers being conducted by the House Standing Committee on Family, Community, Housing and Youth on additional measures that should be taken within the workplace relations framework to assist carers.

2.42 **In particular, the government should carefully consider any recommendation that the NES be amended to extend the right to request flexible working arrangements for employees caring for a child with a disability and carers of adults in need of care.**

2.43 **The committee majority also considers that employers and employees should be able to provide in their enterprise agreement that the agreement's dispute resolution clause can deal with disputes over the right to request flexible working arrangements.**

Compassionate leave

2.44 In the context of thinking more broadly about balancing work and family, the committee notes the submission by the Chamber of Commerce NT which pointed out that the compassionate leave provisions under existing and proposed legislation do not serve the needs of organisations that are major employers of Indigenous employees, especially Indigenous organisations in remote areas. Specifically, the compassionate leave provision does not take in to account:

- the extended family arrangements of Indigenous employees;
- the extended household arrangements of Indigenous employees;
- the broader Indigenous response to death known as "sorry business"; and
- the incidence of death and serious illness amongst Indigenous Australians

2.45 The Chamber does not offer a single prescriptive response to the issue, noting the factors to be considered vary widely across Australia and are exacerbated in remote communities where distance plays an additional role. It suggested an answer may lie in the capacity of FWA to grant exemptions to the compassionate leave standard where it is clearly not in the interests of an Indigenous organisation and its employees to have such a provision imposed upon them. It would be up to the employer (and the union if a party) through the agreement making process to seek leave to include a provision in an agreement that departs from the standard while at the same time providing a sensitive, respectful, workable and productive alternative.[42]

Committee view

2.46 The committee majority notes that the NES entitlement to compassionate leave is able to be enhanced through modern awards or through enterprise bargaining agreements. It also notes that FWA has the ability to enhance the compassionate leave

42 Chamber of Commerce NT, *Submission 20*, pp. 1-2.

standard or to provide for additional forms of leave to allow for the situation of remote and Indigenous employees.

Parental leave and related entitlements

2.47 This standard continues the Australian Fair Pay and Conditions Standard (AFPCS) provision for the granting of parental leave provided by the WRA. Clause 67 requires, as a general rule, an employee to have 12 months' continuous service to be entitled to leave. A casual employee, employed regularly over a 12 month period before the expected birth date, is also entitled to unpaid parental leave. The NES standard provides an extra 12 months' unpaid parental leave from the birth or adoption of their child.[43] This effectively doubles the current entitlement to unpaid parental leave.[44] While welcoming the extended unpaid parental leave entitlements, the Australian Human Rights Commission was concerned about the qualifications. It agreed with a reasonable period of employment for eligibility but advocated recognition of the concept of portability and short breaks to better reflect the reality of women's employment.[45] Professor Peetz noted again that the bill provides no criteria for determining 'reasonable business grounds' for refusing a request for an extension of unpaid parental leave and has recommended that this be clarified. In addition, there should be internal appeal rights, and the right to appeal to FWA in particular circumstances.[46] The committee majority is assured that further guidance will be provided by FWA on what constitutes 'reasonable business grounds'.

Cashing out of leave

2.48 To date, the AIRC has not included a term permitting cashing out of leave in any of the priority awards, including the Mining Industry Award. On 19 December 2008, the AIRC announced that:

> Should cashing out of annual leave become widespread it would undermine the purpose of annual leave and give rise to questions about the amount of annual leave to be prescribed. We think some caution is appropriate when dealing with this issue at the safety net level. We do not intend to adopt a model provision. Consistent with our approach to annual leave provisions generally we shall be influenced mainly by prevailing industry standards, and the views of the parties, in addressing this issue.
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> It has also been suggested that if awards do not provide for cashing out of annual leave it will not be legally permissible to make workplace agreements which provide for cashing out. In our opinion cashing out arrangements are an appropriate matter for bargaining. If, when the

43 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 25.

44 DEEWR, *Submission 63*, p. 60.

45 Australian Human Rights Commission, *Submission 137*, p. 7.

46 Professor Peetz, *Submission 132*, p. 7.

> legislative regime is settled, it is apparent that workplace agreements cannot provide for cashing out of annual leave unless there is a relevant provision in a modern award it may be necessary to revisit the question.[47]

2.49 AMMA noted the requirement to retain a minimum of four weeks' leave when cashing out annual leave for award and award free employees. It claimed that this caused problems for some areas of the resources sector where employees work on even-time rosters providing 26 weeks of the year off, having cashed out their annual leave in a pre-determined even time roster.[48] AMMA advised that annual leave taken at odds with an established roster cycle will adversely affect resources sector employees and non-standard absences can cause employers difficulty in finding replacement employees for short periods.[49]

2.50 At the request of the committee, Professor Peetz provided further advice on this issue. He advised that 'for workers under a conventional even time roster, enabling resource sector employers to require employees to take their annual leave during their time off would be the same as removing their annual leave entitlement altogether'. Employees on asymmetric rosters would fare even worse 'because they would lose their annual leave entitlement despite working considerably more than the average 44 hour week'. He concluded that:

> Employees on even time rosters – many of which only provide for maximum breaks of four or five days – are entitled to annual leave as much as anyone else and should not be forced in effect to cash out their leave because the employer wants them to work on days that would otherwise be their holidays.[50]

Committee view

2.51 The committee majority notes that between the positions expressed to the committee – from only allowing an employee to cash out a maximum of one week's annual leave each year to having no limit - obliging an employee to retain at least four weeks leave appears to be an appropriate compromise. The committee majority also notes opposition to the principle of cashing out annual leave and believes the capacity for this should be limited. It supports the need for a leave entitlement that will enable employees to recuperate and spend time with family or relaxing personally. The committee majority notes the position of the AIRC that it is an appropriate matter for bargaining between parties.

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47 AIRC Decision 19 December 2008..

48 AMMA, *Submission 94*, pp. 46-47.

49 AMMA, *Submission 94*, pp. 46-47.

50 Professor David Peetz, Supplementary submission, tabled papers.

Community service leave

2.52 The bill elevates this form of leave to a national standard[51] and will provide employees engaged in 'prescribed eligible community service activity' the right to unpaid leave for a reasonable period, which includes reasonable travel time. Jury service comes under this leave and clause 111 provides that an employee is entitled to be paid by their employer for the first 10 days' service which may be reduced by the amount of any jury service pay received by the employee.[52]

Public holidays

2.53 Clause 114 provides that an employee is entitled to leave on a public holiday but that an employer may request an employee to work if the request is reasonable. Employees may refuse the request if it is not reasonable or a refusal is reasonable. Clause 115 names eight common days as public holidays. Other days or part-days declared under a law of a state or territory to be observed generally, are also considered public holidasy.[53]

2.54 Professor Peetz noted with concern loopholes in the bill regarding public holidays, and submitted that the entitlement to compensation for working on a public holiday should be set out in the relevant modern award, and in the bill.[54] Unless this occurred, the entitlement could to be removed by an agreement.[55]

2.55 The SDA proposed that the words 'other than a day or part-day, or a kind of a day or part-day, that is excluded by the regulations from counting as a public holiday' in section 115(1)(b) be deleted. This is because it could allow the Commonwealth to remove any public holiday by regulation even if it has been legislated by a state or territory parliament.[56]

2.56 The committee majority is opposed to the legislation giving power to the Commonwealth to override state public holidays and draws this matter to the Minister's attention.

Notice of termination and redundancy pay

2.57 Clause 117 provides that an employer must not terminate an employee's employment without prior written notice in accordance with a schedule that extends

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51 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 26.

52 EM, pp. 70-71.

53 EM, p. 75.

54 This view was supported by the Women's Electoral Lobby Australia, *Submission 86*, p. 14.

55 Professor David Peetz, *Submission 132*, p. 9.

56 SDA, Victoria Branch, *Submission 61*, pp. 1-3.

the period of notice according to length of service ranging from one week's notice for less than a year's service, to four week's notice for more than five years' service.

2.58 The government has recognised that the entitlement to one weeks notice of termination for all ongoing employees with less than 12 months' service was inadvertently removed by drafters in an endeavour to streamline entitlements under the bill.[57] The Minister wrote to the chair of the committee to clarify that the government intends to amend the bill to make clear that all ongoing employees with less than 12 months' service are entitled to one week's notice of termination.[58] The committee welcomed the Minister's letter and the decision.

Fair work information statement

2.59 Clause 124 makes it obligatory for employers to provide employees with a Fair Work Information Statement before or when they commence work. It will contain information about the NES, modern awards, agreement making, the right to freedom of association; and the role of FWA.

2.60 The Workplace & Corporate Law Research Group, Monash University, suggested that employers be required to include in the statement the industrial instruments which apply to the employees in the workplace to assist their awareness of the source of their entitlements. It argued that this requirement would not be onerous for employers as the information is to their benefit as well.[59]

2.61 Ms Anna Chapman from the Centre for Employment and Labour Relations Law, Melbourne University suggested that unfair dismissal rights and particularly the seven day time frame to lodge a claim, if retained, should be included in the Fair Work Information Statement.[60]

Recommendation 2

2.62 **The committee majority recommends that the Fair Work Information Statement include information on individual flexibility agreements (what they are, employee rights and where to go for independent advice), the rights to unfair dismissal claims and how employees may undertake that process. It should also be made available in community languages to assist employees from non-English speaking backgrounds.**

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57 Media release, Hon Julia Gillard MP, 'Government welcomes submissions to Fair Work Bill Inquiry', 2 February 2009.

58 Minister for Employment and Workplace Relations, correspondence with committee chair, tabled papers.

59 The Workplace & Corporate Law Research Group, Monash University, *Submission 8*, p. 1.

60 Ms Anna Chapman, Centre for Employment and Labour Relations Law, Melbourne University, *Submission 48*, pp. 2-3.

Conclusion

2.63 The National Employment Standards provide the bedrock of the Fair Work Bill. In expanding the previous narrow and inadequate allowable matters provisions of WorkChoices, they institute principles of fairness and restore standards which had hitherto been lost by many employees. The committee majority has given support to claims in some submissions for additional support to carers and to parents of children with disabilities. It notes concerns about public holiday entitlements, and gives strong support to the principle that leave entitlements should not be sacrificed beyond a certain limit. Overall it believes that the government has maintained the balance between acknowledging the need for more family-friendly work rights and limiting the impost on business. Chapter 3 will cover the second part of the safety net, modern awards.