Additional Comments by the Australian Greens

The Australian Greens support this Bill as a first step in creating a fair industrial relations system after the failed experiment of Work Choices. We support the comments of the majority report on the affects of AWAs. We do, however, continue to have reservations about the Government's approach to industrial relations reform believing that it needs to go further. We also believe there are a number of amendments that should be made to this Bill to improve the protection of employees.

This Bill has two long term impacts: the eventual end of statutory individual agreements and award modernisation. The bulk of the bill is then concerned with transitional matters. We wish to comment firstly on the long term impacts of the Bill on Australia's industrial relations system before turning to the provisions of the Bill and recommendations for amendments.

Statutory Individual Agreements

The Australian Greens have never supported statutory individual agreements including pre and post Work Choices AWAs. There is sufficient, satisfactory and incontestable evidence from a number of academic reports as well as submissions made to this Inquiry that AWAs have been used to lower the wages and conditions of employees, particularly the most vulnerable workers in our community.

However, our objection to statutory individual agreements is not merely that they can be used to exploit employees. The Australian Greens also object to statutory individual agreements because they restrict freedom of association and undermine collective bargaining. Employees cannot exercise genuine choice to collectively bargain when statutory individual agreements exist.

Our objections on this point are summed by Michele O'Neill from the Textile, Footwear and Clothing Union in her evidence to the Inquiry speaking about ITEAs:

> "The other aspect of concern with ITEAs is what it means in terms of the collective rights of those workers. If you have a workplace where some workers are on ITEAs and others are trying to bargain to improve their conditions in a collective agreement then of course, if you are locked out of that system, you are not only on a lower set of conditions but you are actually denied effective bargaining rights as well. You could easily have a position where some workers are paid a lesser wage and have fewer conditions for doing identical jobs to workers that they may be working alongside in a textile, clothing or footwear factory. We think this is an unacceptable consequence. These are not high-paid workers, and it should be the case that workers in Australia are able to participate in a collective bargaining process if it is their

> desire. They should not be locked out of that by virtue of having been forced onto an ITEA at the point of employment."[1]

The right to collectively bargain is a fundamental right recognised as an international labour standard. It is about addressing the underlying imbalance in bargaining power between employers and employees. Statutory individual agreements shift that balance power firmly into the hands of employers and have no place in Australia's industrial relations system. We welcome the Government's policy commitment to introduce a system of collective bargaining that requires employers to engage if their employees want to bargain collectively.

Common law agreements which are underpinned by a relevant award or collective agreement are appropriate individual instruments. One issue that was raised during the course of the Inquiry was the need to provide efficient and effective dispute resolution for common law agreements, outside of the common law court system. Specific provisions in both the South Australian and Western Australian industrial relations laws were mentioned as examples of where the industrial relations commission or court in those states have jurisdiction to resolve disputes from common law contracts.[2]

We would urge the Government to consider such a jurisdiction for their new Fair Work Australia in respect of the substantive industrial relations changes we expect to see later in the year.

The Award system

The return of awards as part of the safety net is very welcome. Awards are an essential part of the safety net. There remains a significant section of the workforce that are award-reliant. These workers are mostly women and low paid. A strong award system is vital to ensuring these workers are treated fairly.

The Australian Greens are, however, deeply concerned about how much of the Work Choices legislation the Government is retaining in its "Forward with Fairness" policy, including the abandonment of conciliation and arbitration and a dynamic award system. Dr John Buchanan in evidence to this Inquiry referred to both the strengths and weakness of the award system calling awards "Australia's greatest contribution to Western civilisation" as well as "appalling documents to work with".[3]

There can be no question that awards today need to be updated. Many awards do not reflect contemporary work practices or standards but the Australian Greens are concerned that the process outlined in the Bill and the Government's "Forward with Fairness" policy will result in static awards which are hostage to the Government of the day and are unable to be effectively varied in response to changes in the nature of

1 *Committee Hansard*, 7 March 2008, p. 21

2 Professor Stewart, *Submission 16a*, pp. 4-5.

3 *Committee Hansard*, 6 March 2008, p. 31.

the workforce without specific government direction. We are concerned with the limited number of matters to be considered, the limited process for variations and overall with underlying change in nature of the award system.

The Government is accepting in large part the fundamental shift made by the Howard Government by abandoning conciliation and arbitration and the role of worker and employer representatives in that system. Justice Kirby in his dissenting judgement in the decision on the constitutionality of Work Choices discussed the move from the conciliation and arbitration power to the corporations power. In a comment we agree with, he said

> "The applicable grant of power imported a safeguard, restriction or qualification protective of all those involved in collective industrial bargaining: employer and worker alike. It provided an ultimate constitutional guarantee of fairness and reasonableness in the operation of any federal law with respect to industrial disputes, including for the economically weak and vulnerable. It afforded machinery that was specific to the concerns of the parties, relatively decentralised in operation and focused on the public interest in a way that laws with respect to constitutional corporations made in the Federal Parliament need not be. These values profoundly influenced the nature and aspirations of Australian society, deriving as they did from a deep-seated constitutional prescription."[4]

The Greens believe we are losing something very important by turning away from these ideals.

A criticism made of the Work Choices legislation is that it removed the capacity of the AIRC to hear test cases on contemporary community standards in workplaces. These "test cases" as well as the awards system in the past have given Australian workers conditions such as:

- hours of work provisions,
- the principle of equal pay for equal work,
- the regulation of excessive overtime,
- the introduction of leave such as bereavement and compassionate leave,
- redundancy provisions; and
- unfair dismissal protections.

We are concerned that the new modernised award system is removing the ability of stakeholders in the industrial relations system to bring such matters before an independent tribunal. Workplaces and our society will not remain static and we need to ensure there is sufficient ability in the new system to respond to changing circumstances, for example equal pay. In light of these concerns we believe awards

4 *NSW V Commonwealth, NSW v Commonwealth; Western Australia v* Commonwealth [2006] HCA 52, para 530.

must be reviewed regularly with appropriate mechanisms for the involvement of relevant stakeholders in the industrial relations system.

We also have concerns about the new “flexibility clauses” to be included in all modern awards as well as collective agreements. The devil is of course in the detail and we will not see the actual award flexibility clauses until they are drafted by the AIRC. However, as a matter of principle it is a concern that employees could essentially bargain away on an individual basis award conditions through these flexibility clauses. While we recognise that it is the Government's intention that no employee be worse off and that these side individual agreements are subject to a no-disadvantage test, the experience of AWAs would suggest safeguards will be needed to ensure that particularly vulnerable workers are not exploited.

While we recognise the Bill deals primarily with the first phase of modernising awards, we are concerned about how awards remain relevant into the future. In this sense we agree with Dr Buchanan that the Government should be thinking about an end point that is 'not the modernised awards once and for all but what is a sustainable process for a stable and relevant IR system.'[5] We urge the Government to ensure a fair, robust and relevant award system without throwing away the strengths of the award system under conciliation and arbitration.

Other matters

One of the key concerns about the changes to industrial relations law in the last few years has been not necessarily the particular issues of AWAs, unfair dismissal laws, restrictions on right of entry or industrial action in themselves but also the combined effect of these measures. This was a point made by Michele O'Neill in the course of this Inquiry when she said:

> "We are concerned about these eight areas not just because of each of their isolated effects but actually because of the combined effect of a number of these issues on workers. What I mean by that is that it is the intersection of these provisions that really has the most dramatic effect of workers in our industry. The provisions have the combined effect of reducing workers’ bargaining power and reducing workers’ capacity to be effectively represented by a union, the removal consequently of choice out of the system for these workers and the resulting loss of rights and conditions as well as, in fact, in many cases, a green light to exploitation."[6]

The impact of the intersection of statutory individual agreements, restrictions on bargaining through issues such as prohibited content rules, restrictions on rights of entry and the removal of unfair dismissal protections is not limited to the textile and

5 *Committee Hansard*, 6 March 2008, p. 38.

6 *Committee Hansard*, 7 March 2008, p. 20.

clothing industry. These matters must also be dealt with to ensure a truly fair industrial relations system.

The Australian Greens see no reason why the Government cannot restore some of these important safeguards immediately. We therefore recommend unfair dismissal protection for workers is included in this Bill. Two years is a long time for vulnerable workers to fear for their jobs.

Recommendation 1: That unfair dismissal protection be restored to all employees.

Similarly, if it is ALP policy to remove restrictions on what matters can form part of workplace agreements, why not repeal the prohibited content provisions now? There is no justification for the restrictive prohibited content rules of Work Choices and they should be repealed as recommended by the Textile, Clothing and Footwear Union.[7]

Recommendation 2: That the prohibited content provisions of the Act be repealed.

The Textile, Clothing and Footwear Union also brought to the Committee's attention the issue of restrictive right of entry laws and their relationship to not only effective bargaining but effective protection and enforcement of workers wages and conditions.[8] The Australian Greens are on record as opposing the restrictions on right of entry in the Work Choices laws and urge the Government to review their position on keeping these restrictions in place.

There is a good reason why most employer organisations are relatively happy with the Government's approach to industrial relations. The Government is delivering a reduced and simplified safety net (compared to the pre-Work Choices safety net) with flexibility built in alongside severe restrictions on collectivism through retaining restricted right of entry and industrial action provisions.

Another key issue raised by many of the persons to appear before the Inquiry was the complexity of the industrial relations laws. We join in urging the government to provide in their substantive Bill a simpler set of laws.

The Bill

Workplace Agreements

The Australian Greens are not convinced about the need for ITEAs. We believe the sooner statutory individual agreements are no longer a part of Australia's industrial

7 *Committee Hansard*, 7 March 2008, p. 23.

8 *Committee Hansard*, 7 March 2008, pp. 22-23.

relations system the better. The Inquiry heard evidence of unfair AWAs that will last for up to 5 years (if not longer). By unfair AWAs we are referring to AWAs that provide lesser wages and conditions than either the relevant award or previous arrangements. For example, the Committee heard from Qantas Valet workers[9] about being pressured onto AWAs that provided less take home pay than previous arrangements. We believe it is not acceptable to leave employees in such circumstances. We were also concerned to hear about allegations of duress or coercion in respect of AWAs made in the last few months.

Recommendation 3: That employees or their representatives are able to request the Workplace Authority to determine whether the employee's AWA would pass the no-disadvantage test and if not, for the employee to be able to unilaterally terminate the AWA.

We are also concerned that AWAs and ITEAs can remain in operation past their nominal expiry date. While we appreciate employees will be able to unilaterally terminate these agreements after their nominal expiry date, we would prefer to see a definite end to these instruments. As the evidence to the Inquiry indicated, many employees use template individual agreements so it should be no great exercise to create a collective agreement.

Recommendation 4: That all AWAs and ITEAs cease to operate on their nominal expiry dates.

We note that in the Bill there is a specific provision prohibiting variations to AWAs except where variations are to comply with the fairness test or a court order where the agreement contains prohibited content or discriminatory provisions. We see no need for AWAs to be varied at all. If an AWA fails the fairness test or contains content it should not contain then it should just be void.

Recommendation 5: That AWAs not able to be amended in any circumstances and are void if they fail the fairness test or contain prohibited or discriminatory provisions.

A number of submissions queried the distinction being made between agreement that came into operation on lodgement or approval. We are not convinced that some agreements should come into operation on lodgement. Ensuring that all agreements come into operation on approval also means that the compensation provisions are no longer necessary. Difficulties with delays in receiving approval should be dealt with thorough appropriate resourcing of the Workplace Advocate.

Recommendation 6: That all workplace agreements come into operation on approval.

9 *Committee Hansard*, 7 March 2008, pp. 28-29.

A relatively minor but still important issue for some workers relates to extending preserved state agreements in the same way that the Bill preserved old federal agreements. We see no reason why the Bill cannot be amended to allow for this provision.

Recommendation 7: That preserved state agreements are also able to be extended by application to the AIRC.

We also have some concerns about the no-disadvantage test. While providing significantly better protections than the "fairness test", the no-disadvantage test could be improved in relation to its accountability in particular through the provision of written reasons and an appeal mechanism. These were concerns we raised about the "fairness test" and they apply to this Bill equally.

Recommendation 8: That parties to an agreement are able to request written reasons for a decision of the Workplace Authority on the no-disadvantage test

Recommendation 9: That decisions of the Workplace Authority applying the no-disadvantage test are reviewable by the Federal Magistrates Court.

Another concern that we raised in relation to the "fairness test" that has not been addressed in this Bill is the deficiency in the dismissal protections where an agreement fails the no-disadvantage test. Professor Stewart again raised with the Committee the issues he raised last year in respect of similar provisions in relation to the "Fairness Test".[10] We agree with his comments that the protection against dismissal should be expanded to include protection against other adverse consequences.

Recommendation 10: That section 346ZJ be amended to strengthen the protection against dismissal and other adverse consequences in circumstances where an agreement fails the no-disadvantage test.

It was also raised in a number of submissions that the no-disadvantage test should require agreements to have complied with the AFPCS and take into account any other relevant Commonwealths, State or Territory laws that would have applied to the employee. This is a suggestion that we agree with to ensure fairness in bargaining.

Recommendation 11: That the no-disadvantage test be amended to include a reference to relevant Commonwealth, State and Territory laws and that to pass the no-disadvantage test agreements must comply with the AFPCS/NES.

Central to the no-disadvantage test is the concept of a "designated award". We welcome the provision that allows state awards to be "designated awards" which means fewer employees will have no reference instrument. In circumstances where the employer applies to the Workplace Authority for a designated award, we believe employees should be notified by their employer.

10 Professor Stewart, *Submission 16,* pp.4-5.

Recommendation 12: That employees are to be informed by their employer of applications for a designated award.

Award Modernisation

Apart from our general concerns about the award system expressed above, we believe a number of the issues raised in the Inquiry have merit and should be considered by the Government.

Both employee and employer representatives queried why state based differentials could not remain in modernised awards where the AIRC considers it appropriate. The response that a national system cannot have such differences is not adequate. Employees will lose important conditions without an amendment on this issue.

Recommendation 13: That state based differentials in awards are allowed where the AIRC considered it appropriate.

As mentioned above, the Australian Greens are concerned about the limited number of matters that can be included in awards. We note the submission of the ACTU highlighting that certain industries have specific conditions outside the award matters listed in the Bill that should be able to be included in modern awards. We agree that the AIRC should have the discretion to include exceptional matters in awards.[11] In this context we also note the comments of John Buchanan on trusting the AIRC and their expertise on awards.[12]

Recommendation 14: That the AIRC have discretion to include exceptional matters in modern awards.

A particular concern of the Australian Greens is to ensure that all workers, outside those classes of employees such as managerial employees, are covered by modern awards. When the ability of parties to create new awards through applications to the industrial commissions is lost it is incumbent on the Government to ensure all relevant workers have the award safety net. It is not sufficient to include in the request that the AIRC may extend coverage of awards. The evidence before the Inquiry was that at least 10% of workers had no award coverage.[13]

Recommendation 15: That the modern award system ensures all relevant employees are covered by an award.

The gender pay gap in Australia is abysmal. While recent increases in the gender pay gap are linked to the increased use of AWAs, pay equity was an issue before AWAs

11 ACTU, *Submission 20*, para [53].

12 *Committee Hansard*, 6 March 2008, p 36.

13 *Committee Hansard*, 6 March 2008, p. 36.

and will remain an issue after AWAs are gone, unless pro-active measures are taken by the Government.

Pay equity is essentially about the value of work and the fact that "women's" work has been historically undervalued. This undervaluing of work in female dominated professions and occupations is reflected in the award rates of pay and classifications. The award system is central to addressing pay equity. More women are dependent on the award system for their actual wages and conditions. If pay equity is not addressed in the award system then those women will continue to receive pay significantly less than the value of their work.

The award modernisation scheme as contained in the Bill risks consolidating pay inequities into new modern awards unless pay equity considerations are part of the matters the AIRC is to consider in making modern awards. At the very least we urge the Government to ensure robust pay equity measures in the substantive Bill.

Recommendation 16: That equal pay for work of equal value should be an object of Part 10A and that the AIRC should be required to consider equal pay for work of equal value in creating modern awards.

Outworkers

The Australian Greens are very disappointed that the majority report is not recommending the Government uses the opportunity presented by this Bill to remedy the deficiency in the protections for outworkers identified by the Textile, Clothing and Footwear Union. We note that DEEWR acknowledges the need for technical amendments to ensure outworker protections are maintained.[14] This is an issue that has cross-party support and is easily remedied. There is no reason why a simple amendment could not be passed to clarify the necessary protections for this vulnerable group of workers.

Recommendation 17: That sections 576K and 576U(e) are amended to ensure protection for outworkers.

Committee system

In the course of this Inquiry genuine practical suggestions for improvements to this Bill were presented to the Committee. We are dealing with very complex laws and individuals and organisations took the time to read the Bill, identify issues and suggest solutions. It is incumbent on us to listen and respond accordingly. The committee system is designed to ensure appropriate review of Bills, to ensure the Bills achieve what is desired and identify any potential problems and solutions, particularly with the practical application of the provisions of the Bill. We would have liked to have seen this reflected in the recommendations of the Majority Report. We would hope that

14 DEEWR response to Senate Committee question on Outworkers, email received 16 March 2008.

when the substantive Bill on a new industrial relations system is before the Senate sufficient time will be allowed for the committee to not only hold hearings but for suggested improvement to be considered fully by the Government.

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