The Senate

Standing Committee on Education, Employment and Workplace Relations

Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 [Provisions]

March 2008

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Secretariat

Mr John Carter
Ms Lyn Beverley
Ms Candice Lester
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
Phone: 02 6277 3521
Fax: 02 6277 5706
Email: eewr.sen@aph.gov.au
Internet: **www.aph.gov.au/Senate/committee/eet_ctte/index.htm**

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Terms of Reference

On 14 February Senator Ellison (LIB,WA) moved:

That, upon its introduction into the House of Representatives, the provisions of the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 be referred to the Education, Employment and Workplace Relations Committee for inquiry and report by 28 April 2008, with particular reference to:

- economic and social impacts from the abolition of individual statutory agreements;
- impact on employment;
- potential for a wages breakout and increased inflationary pressures;
- potential for increased industrial disputation;
- impact on sectors heavily reliant on individual statutory agreements; and
- impact on productivity.

Government Senators' Majority Report

Reference

1.1 The Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 was introduced into the House of Representatives on 13 February 2008. The Senate referred the provisions of the bill to the Senate Education, Employment and Workplace Relations Committee on 14 February 2008 for inquiry and report by 28 April 2008. The committee is reporting earlier.

1.2 The committee was asked to report with particular reference to:

(a) economic and social impacts from the abolition of individual statutory agreements;

(b) impact on employment;

(c) potential for a wages breakout and increased inflationary pressures;

(d) potential for increased industrial disputation;

(e) impact on sectors heavily reliant on individual statutory agreements; and

(f) impact on productivity.

Conduct of the inquiry

1.3 Notice of the inquiry was posted on the committee's website and advertised in *The Australian* newspaper on 20 February 2008, calling for submissions by Friday 29 February 2008. The committee also directly contacted a number of relevant organisations and individuals to notify them of the inquiry and to invite submissions. 55 submissions were received as listed in Appendix 1.

1.4 The committee conducted public hearings in Perth on 4 March 2008, Sydney on 6 March 2008, Melbourne on 7 March 2008, Brisbane on 10 March 2008 and Canberra on 11 March 2008. Witnesses who appeared before the committee are listed at Appendix 2.

1.5 Copies of the Hansard transcript from the hearings are tabled for the information of the Senate. They can be accessed on the internet at http://aph/gov.au/hansard.

Acknowledgments

1.6 The committee thanks those who assisted with the inquiry.

Purpose of the bill

1.7 The purpose of the bill is to give effect to a major election commitment of the Government to establish a new fair and flexible workplace relations system and to have sensible transitional arrangements to that system. The short title of the bill derives from the workplace relations policies released in 2007, *Forward with Fairness*[1] and *Forward with Fairness – Policy Implementation Plan*.[2]

1.8 The Workplace Relations Amendment Bill 2008 would amend the principal act, the *Workplace Relations Act 1996* (WRA), to make a number of changes to the framework for workplace agreements and to enable the process of award modernisation to commence. The bill begins the implementation process and is the first step of a larger industrial relations agenda which will involve further legislation.

1.9 This chapter will discuss the terms of reference, the specific provisions and issues raised during the committee's consideration of the bill.

The terms of reference

1.10 There is an implication in the terms of reference that the Opposition persists in regarding industrial relations on the basis of an understanding of economic growth which completely overlooks the relationship between productivity and fairness. It is possible to achieve both. An exploited workforce is not a productive workforce. Yet the insistence of the former government in regarding industrial relations solely for the purpose of driving down wages to increase productivity was ultimately damaging to economic progress. It also resulted in the most complex and highly regulated industrial system of any OECD country.

1.11 Government senators regard the bill as a measure which takes the regulatory burden from both employers and employees: a new set of agreement-making arrangements to drive productivity.

Economic and social effects arising from the abolition of individual statutory agreements – brief notes on the terms of reference

General observations

1.12 Formally registered individual statutory agreements currently apply to a small proportion of the workforce estimated at between three and seven per cent.[3] The

1 *Forward with Fairness - Labor's plan for fairer and more productive Australian workplaces,* Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, April 2007.

2 *Forward with Fairness - Policy Implementation Plan,* Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, August 2007.

3 Professor Alison Preston, *Submission 4*6, p. 23; and Sharan Burrow, ACTU, *Committee Hansard,* Melbourne, 7 March 2008, p. 41.

proportion of the workforce on AWAs is too small for their abolition to have the significant effect on the economy alleged by some. Professor Alison Preston expressed the view that the abolition of AWAs in the low paid sectors of the economy will most likely have a positive economic and social effect, particularly since many low-wage workers are women.[4]

1.13 As discussed later in the report, AWAs have contributed to an increased gender pay gap which their demise should start to address.

1.14 Another positive consequence of the removal of AWAs was highlighted by the Australian Workers Union, which noted:

> On balance, AWAs are less likely than collectively negotiated agreements to adequately address issues associated with occupational health and safety, consultative mechanisms and employee training, with up to 25 per cent of sampled AWAs only providing the most cursory references to these important industrial issues.[5]

1.15 Numerous personal submissions made to the committee pointed to unfavourable working hours and loss of control of working hours resulting in disadvantage to family and community life. Studies have also found health complaints as a result of changes in workplace arrangements such as depression, emotional stress and powerlessness.[6]

1.16 The committee believes that the abolition of AWAs will go a long way to addressing these social effects for those vulnerable employees who have lost pay and conditions under the AWAs imposed upon them.

Effect on employment

1.17 Witnesses saw no significant effect on employment growth resulting from the abolition of AWAs due to strong employment growth over the last fifteen years. [7] Employers admitted that they were facing difficulties in recruiting labour.

1.18 The Australian Workers Union noted that:

> …the oft-repeated catch cry of the former federal government was that the WRA scheme, particularly the use of AWAs delivered higher real wages for employees subject to the operation of those agreements. …the overwhelming majority of credible academic analysis of AWAs demonstrates the minimalistic and cost-reduction nature of those arrangements, as opposed to improving productivity.[8]

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4 Professor Alison Preston, *Submission 4*6, p. 23.

5 The Australian Workers Union, *Submission, 42*, p. 6.

6 DEEWR, *Submission 27*, p. 17.

7 Professor Alison Preston, *Submission 4*6, p. 23.

8 The Australian Workers Union, *Submission 42*, p. 7.

Potential for a wages breakout and increased inflationary pressures

1.19 This was not mentioned as a problem by employers. Labour shortages are currently driving the market, rather than industrial pressures. The Government's focus on collective enterprise level bargaining will act as an incentive for fair and productive outcomes at the enterprise and to limit inflationary wage pressures.

Potential for increased industrial dispute

1.20 The Opposition apparently believes that industrial unrest is a potential problem arising from the abolition of AWAs, occurring presumably with the resumption of collective bargaining. Following some prodding from Opposition questioning, notably in Perth, there was some indication of a tentative response to this possibility from business interests. However no witnesses were prepared to regard increased industrial disputation as more than an outside possibility. None of the industry peak bodies or academics mentioned this possibility.

1.21 The committee notes the ABS figures released on 14 March 2008 which indicate that the number of industrial disputes in the year to December 2007 dropped by 67 to 135; from 202 in the year to December 2006. The Minister for Employment and Workplace Relation's media release indicates that the greatest decline in days lost due to industrial action remains the period after the Labor government de-centralised the labour market in 1993. [9]

1.22 The Australian Workers Union notes that the proposed changes 'do not fundamentally alter the core regulatory mechanisms that presently exist with respect to agreement making.' The committee majority agrees with the AWU observation that industrial parties will continue to be prevented from undertaking unprotected industrial action; an enforcement regime will still exist with regard to unprotected industrial action; and formal applications and processes will still be required to be complied with prior to the institution of protected industrial action.[10]

Impact on sectors heavily reliant on individual statutory agreements

1.23 The committee spoke with several sectors heavily reliant on individual statutory agreements and their evidence to the committee emphasised the workability of the transitional arrangements. Given this evidence the committee majority notes that industry appears to be coping well with the preparation for moving to the new system.

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9 The Hon Julia Gillard MP, Media Release 'Labour Force February 2008; Strong Labour Market Continues', 14 March 2008.

10 The Australian Workers Union, *Submission 42*, p. 8.

Impact on productivity

1.24 As noted earlier, the available evidence does not indicate that the use of AWAs has led to productivity gains. The Coalition has argued for years that AWAs and its Work Choices legislation are justified on the basis of a contribution to gains in productivity. However, the nexus between the Coalition's workplace changes and improvements in productivity has proved elusive as shown below in 1.28.

1.25 For instance, the Economics Committee's (Coalition Senators) report on the Workplace Relations and Other Legislation Amendment Bill 1996, argued the case for the changes ushered in by that bill, partly by reference to its likely economic effects. It quoted with approval the Business Council of Australia's concerns about improving competitiveness and productivity.[11]

1.26 The need for improved productivity was also used by the former Coalition Government to justify the 2005 Work Choices legislation. It was said that the economy had to be prepared for future challenges. It was said that there was need for a leap in productivity. The report by the Coalition senators noted 'the clear correlation between productivity growth and the use of workplace agreements', as confirmed by the Productivity Commission. In pursuit of this, it was proposed to do away with what the Coalition senators described as 'complex, legalistic and adversarial processes of reaching agreements.' [12] This referred to the 'difficulties' posed by the no-disadvantage test (NDT). So the NDT was done away with. It proved to be the step too far.

1.27 In evidence to this inquiry the Department of Education, Employment and Workplace Relations (DEEWR) has examined the effects of the Workplace Relations Act on productivity:

> …AWAs have been in the Australian workplace relations system since 1997, yet productivity growth has been disappointing, with growth over the last completed productivity cycle below the long term trend. In addition, productivity growth did not increase with Work Choices changes.[13]

1.28 Specifically, DEEWR notes that the most reliable estimates of productivity growth are those based on productivity growth cycles.

> …during the most recent growth cycle of 1998-99 to 2003-04, annual growth in labour productivity averaged 2.1 per cent. This is 1.2 percentage points below the record average growth of 3.3 per cent recorded over 1993-94 to 1998-99, and 0.3 percentage points below the long term average growth rate of 2.4 per cent. While there is no completed productivity cycle since 2003-04, average annual growth since June 2004 has been just 0.7 per

11 Senate Economic References committee, *Report on Consideration of the Workplace Relations and other Legislation Amendment Bill 1996*, August 1996, p. 296.

12 Senate EWRE Legislation Committee, *Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005*, November 2005, pp. 6-7.

13 DEEWR, *Submission 27*, p. 18.

cent, with growth of 0.5 per cent over the year to the September quarter 2007. [14]

1.29 The overwhelming view of the evidence provided to the committee on the bill supported its workability and balanced approach to transitional arrangements. There were a number of issues raised of a technical nature or where there may be unintended consequences. Some of these are highlighted below and further developed later in the report for the consideration of the government, particularly in developing the substantive legislation later in the year.

Provisions of the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

1.30 The key provisions in the bill will:

- Prevent the making of new Australian Workplace Agreements (AWAs);
- Create new Individual Transitional Employment Agreement (ITEAs) to be available only for limited use during the transitional period until 31 December 2009;
- Put in place a new no-disadvantage test for future workplace agreements to provide better protection for employees; and
- Enable the Australian Industrial Relations Commission (AIRC) to undertake the process of modernising industrial awards.[15]

Terminating Australian Workplace Agreements

1.31 Item 1 of the bill repeals and replaces current section 326 which provides for the making of Australian Workplace Agreements (AWAs). The proposed legislation provides that, from its commencement date, Australian Workplace Agreements cannot be made.[16]

The comprehensive failure of Australian Workplace Agreements

1.32 The committee majority notes the strong reluctance of the Opposition to accept the inevitable demise of AWAs. This is a consequence of them having invested so much political energy (and so many millions of taxpayer dollars) over 10 years into building support for a form of workplace agreement that has failed to achieve widespread acceptance while allowing for hard-working Australians to be stripped of the safety-net.

1.33 Whether measured in terms of fairness, simplicity or economic benefit, AWAs have been a failure on all counts.

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14 ibid.

15 Explanatory Memorandum, p. 6.

16 Ibid., p. 1.

Limited coverage of AWAs

1.34 It is important to note that AWAs simply never gained as much acceptance as the Coalition hoped. The latest Australian Bureau of Statistics (ABS) data, May 2006, shows that, at the time, 3.1 per cent of employees were covered by registered individual agreements, of which the vast majority were AWAs. This represents about 258 000 employees. This was a small increase from the 2.4 per cent recorded in 2004.[17]

1.35 This ABS data shows a far lower level of AWA coverage than claimed at various times by the Coalition and the Employment Advocate. This committee was advised by the Employment Advocate at the budget estimates in May 2006 that, as at March 2006, it was estimated by the Employment Advocate that over 350 000 AWAs were in operation, double the figure estimated by the ABS.

1.36 Professor Peetz notes that it is impossible to explain this discrepancy as being the result of an ABS sampling error. His submission makes the observation that:

> The reason for the over-estimation is that the methodology of the OEA/Workplace Authority nonsensically assumed that every AWA signed in the preceding three years is still in force – that is, no employee who has signed an AWA in the past three years has resigned, or been promoted, dismissed or replaced. This problem increases, the higher the rate of labour turnover in an industry. …The more people change jobs in an industry, the more double counting of AWAs occurs. Nearly 60 per cent of the variance in the gap between OEA/Workplace Authority and ABS estimates of AWA coverage can be explained simply by variations in the level of labour turnover.
>
> The inadequacies of the former government's -methodology, based on administrative data, increased over time, with the extent of over-estimation increasing from 60 percent in 2004 to 109 per cent in 2006.[18]

1.37 Peetz estimates that, by the end of September 2007, there would have been between 425 000 and 457 000 individual agreements in force, around 84 per cent of those being Work Choices AWAs. This gives an AWA coverage of between 4.7 and 5.0 per cent, well short of the 840 000 claimed by the Workplace Authority and the 'almost a million today' claimed several months earlier by the then Prime Minister.[19]

1.38 The former Government's aims for workplace relations appeared to include a goal of obtaining AWA coverage of 20 per cent as evidenced by its request to economic consultant Econtech to model this scenario on its behalf.[20]

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17 *Submission 51*, Professor David Peetz, p. 10.

18 ibid., p. 19.

19 ibid., p. 20.

20 Julia Gillard MP, Deputy Labor Leader, 'Howard Government Secret Industrial Relations Plans Revealed', 12 June 2007.

1.39 However, enterprise bargaining continues in most sectors of the workforce, either through union or non-union negotiation and this clearly demonstrates that many employers were unconvinced of the need to experiment with AWAs to enhance the productivity of their business.

Documenting Work Choices disadvantage

1.40 The committee received a great many brief submissions from those with direct and indirect experience of injustice at the hands of employers exercising arbitrary and capricious powers over employees in regard to AWAs. It appeared not to concern the Coalition government that AWAs were being used to legitimise the practice of employers 'stripping' entitlements from workers.

1.41 These included: AWAs being offered on a take it or leave it basis; reduced pay and conditions; inequality in bargaining power; financial loss; no control over work hours; and feelings of insecurity and helplessness. Just a few of these stories are reproduced below:

> *Personal story 1* - I attended an employment interview with a prospective employer; I spent about 45 minutes talking with him about the workplace and the details of the job requirements. When the topic of conditions and wages was broached the employer presented me with the site AWA; it was explained to me that where the shift roster crosses into saturday and sunday (2 weekends each month) all of the hours are paid at time and a half for the first 3 hours and double time for all other hours. The only paid public holiday was Christmas day if other public holidays were taken then by choice I would be opting for an unpaid day off. As well the AWA had provision for 5 sick days a year and not the standard 10 as per the previous federal award arrangements. I was given a copy of the AWA to take with me and when I was sure I wanted to take up the position I should telephone and give that advice.
>
> When I went home I sat down to read the AWA to find out what the offered conditions were this took some time maybe an hour and half. In the document there was no provision for penalty rates in the weekend cross over, the only guaranteed pay rate was $24.00 an hour and the 60hour week discussed was during the interview was not mentioned and a minimum 38 hours a week was guaranteed, unpaid public holidays were mentioned, no guaranteed pay rises reviews/rises are at the discretion of the manager who conducted the interview on a yearly basis and I was required to sign the agreement to run for a 3 year period even when there has been enormous public attention about the negative aspects of AWAs and AWAs becoming unlawful workplace contracts. I did not take this position because the conditions in the AWAs offered to me seemed to put me in a position where I would be easily exploited. [21]
>
> *Personal story 2* - I watched my 17 year old son get pushed into one of these AWAs in WA. He had no rights, no input and no choices over his pay

21 Jeffrey Louie QLD, tabled documents.

> and conditions. The employers constantly shifted the goal posts, cut his shifts when and where they wanted, altered his terms and payrates and when he questioned them. They told him he was a troublemaker and under Work Choices they could sack him without a reason. He came home in tears on more than one occasion. He is a good man and tries hard. Eventually they stopped giving him any work at all and provided no reason for it. Under that legislation they did not have to. [22]
>
> *Personal story 3* - My daughter has just entered the workforce and has no experience or confidence in negotiating her employment conditions. If she is compelled to enter an individual AWA she is in a no win situation as the employer simply says sign or no job. My daughter is representative of thousands of kids entering the work force unaware of their rights and without the ability to negotiate a fair outcome. [23]
>
> *Personal story 4* – In line with the Work Choices legislation, the new contract (AWA) removed our entitlement to 'site allowance' for construction sites leaving us $120/week poorer. In addition to this, the new contracts were only 5 pages long including the title page. They had no mention of overtime rates, changed our working hours from 8am-5pm to 24/7 and removing shift allowances, redundancy benefits and tool allowance – with no additional pay – and worse still told no individual negotiation with the contract as they were to be standard agreements for all employees. [24]

The case of Qantas valet parking

1.42 The committee heard evidence in Melbourne from the Australian Services Union of a current dispute between Equity Valet Parking, a company recently contracted by Qantas, and long term employees taken over by Valet from the original employer, Hertz. Former Hertz employees were covered by a collective agreement underpinned by a Victorian award. It is alleged that in this instance there was no transmission of business in the change of employers. The offer of AWAs by Equity resulted in the loss of accumulated entitlements and conditions of service.[25] The committee majority notes that this is a recent and major example of the abuse inflicted on workers by the use of AWAs. The fact that this can be done legally brings discredit on the law. Legal or not, the action was unethical. The action was taken in the week that this bill was introduced into Parliament. Such actions justify the need for the bill to be passed expeditiously. Any delaying tactics planned by the Opposition will only result in more workers like the Qantas valet staff being subjected to similar treatment.

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22 Mark Raymond Hawken, Ferndale, WA, tabled documents.

23 Jeremy Evans, NSW, tabled documents.

24 James Jarvis, QLD, tabled documents.

25 Australian Services Union, *Committee Hansard*, 7 March 2008, pp. 28-29.

AWA research

1.43 A number of studies have now looked at the effects of AWAs and Work Choices and it is beyond doubt that the operation of AWAs has resulted in many employees losing protected award conditions and being significantly worse off than they would have been had they been employed on a collective agreement.

1.44 It is noteworthy that any detailed study of AWA processes, application, and outcomes across industry sectors, and their effects on the employees with AWAs has been based on painstaking research of data gathered, often inadequately, by the ABS, supplemented by university survey research. The Employment Advocate refused, after a time, to release data held by his office as it may be 'misinterpreted'. What we know now from data since released is that it could not be used to justify Coalition claims that workers on AWAs were better off than those on collective agreements. Nor, on the basis of economic research, is there any conclusive empirical evidence to show that productivity rises could be attributed to putting workers on to AWAs.

1.45 The findings of the review conducted by the Workplace Authority of 1 748 AWAs lodged between April and October 2006 included that:

- 89 per cent removed at least one so-called protected award condition;
- 68 per cent removed annual leave loadings;
- 65 percent removed penalty rates;
- 31 per cent removed rest breaks; and
- 61 per cent removed days to be substituted for public holidays.[26]

1.46 In Table 1, Professor David Peetz notes that the rate at which conditions were being removed was substantially higher under Work Choices AWAs than under pre-Work Choices AWAs and that overtime and penalty rates were particular targets for removal.[27]

26 Media Release 'AWA data the Liberals Claimed Never Existed', The Hon Julia Gillard MP, Minister for Employment and Workplace Relations, p. 1.

27 Professor David Peetz, *Submission 51*, p. 59.

Table 1: Reductions or losses of protected award conditions under AWAs, 2002-2003 and April 2006 (%)

	2002-03	April 2006				2002-03 to April 2006
	Absorbed (abolished)	'excluded' (abolished)	'modified' (mostly reduced but not abolished)[i]	total 'modified',[i] or abolished	Un-changed	increase in rate of abolition
overtime pay	25	51	31	82	18	+104%
penalty rates	54	63	na	na	na	+ 17%
annual leave loading	41	64	na	na	na	+ 56%
shiftwork loading	18	52	na	na	na	+189%
rest breaks	na	40	29	69	31	Na
public holiday payments	na	46	27	73	27	Na
days substituted for public holidays	na	44	na	na	na	Na
declared public holidays	na	36	na	na	na	Na
incentive based payments/bonuses	na	46	na	na	na	Na
allowances (expenses; skills; disabilities)	41	48	na	na	na	+ 17%

na = not available. Sources : calculated from Department of Employment and Workplace Relations and Office of the Employment Advocate, 2004; McIlwain, May 2006; Office of the Employment Advocate, 2006 [i] It is possible that some of the provisions that 'modify' 'protected' award conditions represent an improvement on the award standard. However analysis of EGAs (see section 7) shows that this is rarely the case, and that most or all 'modifications' to 'protected' award conditions represent a lessening of the award standard.[28]

1.47 DEEWR provided further evidence at Table 2 regarding the percentage of AWAs that did not contain a provision for each protected award condition.[29]

28 Professor Peetz, *Submission 51*, p.59.

29 DEEWR, *Submission 27*, p. 14.

Table 2: Percentage of AWAs without protected award conditions – 2004 to 30 April 2007, per cent

Protected award condition	Percentage of AWAs that exclude the condition
Incentive based payments and bonuses	79
Days to be substituted for Public Holidays or a procedure for such substitution	68
Shift work loading	52
Public holiday work loading	50
Annual leave loading	47
Overtime penalty rates	44
Declared public holidays	44
Rest breaks	23

Source: DEEWR AWA Workplace Agreements Database (AWAD) – The AWAD was established in 2006. It is based on representative samples of AWAs which were received from the Workplace Authority for coding into the AWAD under delegation from the Workplace Authority Director. The AWAD currently holds data on approximately 9,000 AWAs, of which 2,500 are pre Work Choices AWAs covering the period 2004, 2005 and the March quarter 2006 and 6,500 are Work Choices AWAs up to April 2007. [30]

1.48 Research by Preston and Peetz found that AWAs paid significantly less than collective agreements. For men the earning shortfall was equal to 7.7 percent in 2006 and for women the shortfall was 11.3 per cent. They found that this contrast was even greater when median earnings were used as a basis for comparison. Their conclusions were that in high paying sectors such as mining, AWAs have been used as part of a union avoidance strategy and in low paying sectors they have been used as part of a cost minimisation strategy. [31]

30 DEEWR, *Submission 27*, p. 14.

31 Preston and Peetz, 'AWAs, Collective Agreements and Earnings: Beneath and Aggregate Data', Report to the Department of Innovation, Industry and Regional Development Victoria, March 2007, p. iv.

AWAs in Western Australia

1.49 The committee noted an almost alarmist reaction from some quarters in Western Australia at the prospect of the demise of AWAs in that state. The committee went to Perth to find out more about this, but was under-whelmed by the import of what it heard. There is no apparent need for Western Australia to have any peculiar industrial arrangements as distinct from the rest of the country, as a consequence of the economic activity that is carried out there.

1.50 Evidence given to the committee by affiliates of the Western Australian Chamber of Commerce indicates that they are bracing themselves for the transition to collective agreements, and away from the AWAs which have predominated in the mining and associated projects operating in that state. Their apprehensions arise from relative unfamiliarity with this process, and distant recollections of labour disputes. Labor senators noted that these fears continue to be stoked by Coalition members asking leading questions about the prospect of a return to those days.[32]

1.51 Contrary to the view that AWAs in the mining sector have led to significant wage improvements, Peetz and Preston found that non-managerial mining employees on AWAs earned 3.6 per cent less than non-managerial mining employees on collective agreements. By disaggregating the mining data they found that:

> Workers in metal ore mining, mainly non-union and dominated by individual contracts, work five per cent more hours but earn 21 per cent less per week than workers in largely unionised coal mining, where collective agreements dominate.[33]

1.52 The committee notes studies by Professor Peetz explaining the differences between the mining industries in Western Australia and Queensland, both of which are significant wealth producers:

> The reason for the difference between the patterns in Western Australia and Queensland is simple: in Western Australia the mining sector is dominated by metalliferous mining, in which union density in trend terms is a mere 12 per cent and collective agreements cover few employees; whereas in Queensland, the mining sector is dominated by coal, in which trend union density is 60 per cent and collective agreements cover many employees. Thus in Western Australia the mining boom is raising the wages of workers on registered individual contracts but not collective agreements, whereas in Queensland it is boosting the wages of both. As weekly earnings in mining are over double the average of other industries, this clearly has a distorting effect on the figures.[34]

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32 Chamber of Commerce and Industry WA. *Committee Hansard*, 4 March 2008, pp. 9-11

33 Professor David Peetz and Professor Alison Preston, 'AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data 'A report to the Victorian Department of Innovation, Industry and Regional Development, March 2007, p. 22.

34 *Submission 51*, op.cit., p. 24

1.53 Workers in the Pilbara and elsewhere in Western Australia may well be content with their current AWAs, which in view of labour shortages, are generous enough, but the argument that individual or pattern AWAs deliver more benefits is contestable. And it should also to be noted that the high take-up of AWAs in Western Australia results in another anomaly: the corresponding disadvantage suffered by women in the workforce of that state, as compared to the rest of the country.

AWA contribution to the gender pay gap

1.54 The committee received strong representation on the issue of the regressive influence of AWAs on female wages and conditions. Research undertaken by Preston and Peetz in the area of gender pay gaps shows that women are worse off under AWAs no matter what their employment status.

> …women's hourly pay on registered individual contracts is 9 per cent lower for permanent full timers, and 15 per cent lower on registered individual contracts for permanent part-timers. Women on registered individual contracts earn less that women on collective agreements in every state, by margins ranging from 8 per cent to 30 per cent.[35]

1.55 Peetz notes that data reveals average hourly earnings of female casual workers on registered individuals contracts averaged across industries were 7.5 per cent lower than those of female casual workers on registered collective agreements.[36]

1.56 Other groups where research has shown severe disparities between those on AWAs and CA are female labourers and related workers:

> In 2006 those on AWAs were paid an average of 26 per cent less than similar women on collective agreements. Indeed, in 2006 female labourers and related workers on AWAs were receiving 20 per cent less even then the award- reliant average for that occupation.[37]

1.57 As Peetz notes, these figures reinforce that individual bargaining through AWAs is especially detrimental for women, particularly when they lack labour market power. [38]

Individual agreements are inherently inefficient

1.58 Professor Andrew Stewart also drew the committee's attention to the inefficiency of large numbers of individual agreements. He noted that on a practical level, the AWA system '…could only really work while they were few in number. As recent experience with the fairness test as shown, the need to review substantial numbers of individual instruments places intolerable strain on government

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35 Professor David Peetz, *Submission 51*, pp. 28-29.

36 Ibid., p. 34.

37 Ibid., p. 40.

38 Professor David Peetz, *Submission 51*, p. 40.

resources'.[39] He commented that 'the removal of a statutory system of individual agreements will improve both the fairness and efficiency of workplace regulation'.[40]

1.59 The committee majority sees no reason to alter the conclusion it came to in its report on Work Choices.

1.60 The Work Choices bill, passed at the end of 2005, marked a legislative low point in the regulation of employment. It reinforced existing provisions of the Workplace Relations Act so as to deny employees the right to collective bargaining; failed to provide for a reasonable set of minimum wages and conditions; denied access to fair and effective dispute resolution; and failed to promote safe and congenial workplaces. As the bill also provided for the dismantling of state industrial systems, the intended effect was to be the comprehensive dismantling of laws protecting the working conditions of the most vulnerable sectors of the workforce; those employed under state awards, including outworkers in the textile, clothing and footwear industries and those employed in hospitality, small retail and services businesses. Much of this evidence was included in the Opposition report on the Workplace Relations Amendment (Work Choices) Bill 2005.[41]

1.61 Time and time again the public was told by the previous government that Work Choices was going to provide an opportunity for individual workers to negotiate their own employment conditions and pay with their employer. The committee noted the evidence provided to the committee by employers that genuine bargaining was the exception rather than the rule. This was known soon after the introduction of AWAs, but as recently as November 2005, the Coalition government party senators were saying:

> The ability for employees to reach a better balance between work and family life is another aim of the reforms. Current workplace arrangements too often make little or no provision for the individual needs of employees and workplace flexibility is inhibited by lack of appropriate legal and industrial mechanisms to allow workers to negotiate hours of work around their family responsibilities and other needs. [42]

1.62 The committee concluded that AWAs in the main have been formulated by the employer and then simply handed out to each employee with little or no bargaining taking place. Those most adversely disadvantaged by AWAs have been those with low bargaining power arising from low skill levels who have had remuneration and conditions cut by their employers. The committee believes the restoration of greater bargaining power and protections to these employees is vital to achieve a fairer and more balanced industrial relations system.

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39 Professor Andrew Stewart, *Submission 16*, p. 1.

40 Ibid.

41 EWRE Committee Report, November 2005, p. 47 *passim*

42 EWRE Committee Report, November 2005, pp 8-9.

Individual Transitional Employment Agreements

1.63 The proposed new section 326 introduces a new form of individual workplace agreement to be known as an Individual Transitional Employment Agreement (ITEA). This special transitional instrument will be created to provide transitional arrangements for employers that on 1 December 2007 employed at least one employee under an individual statutory agreement. ITEAs have a nominal expiry date of no later than 31 December 2009.[43]

1.64 ITEAs will be subject to a new no-disadvantage test under new Part 5A which is discussed in the paragraphs below. This means ITEAs will not be permitted to disadvantage an employee against an applicable collective agreement or award in the workplace and the existing legislated standards.[44]

New No-Disadvantage Test

1.65 Item 2 would repeal existing Division 5A of Part 8 (the fairness test) and replace it with a new Division 5A (the new no-disadvantage test) for future agreements. It will be administered by the Workplace Authority Director. To pass this test, workplace agreements, whether individual or collective, must not reduce an employee's overall terms and conditions when benchmarked against a reference instrument such as a designated award. An agreement will pass the NDT where there is no reference instrument for any of the employees, although all agreements must meet the Australian Fair Pay and Conditions Standard. [45]

1.66 Proposed subsections 346C(1) and (2) would ensure the application of the no-disadvantage test to workplace arrangements irrespective of whether they:

- Are yet to operate (in the case of ITEAs for existing employees, employee collective agreements or union collective agreements, which commence after they have been approved by the Workplace Authority Director); or
- Are in operation (in the case of ITEAs for new employees, employer greenfield agreements or union greenfield agreements, which commence when they are lodged with the Workplace Authority Director); or
- Have ceased operation (for example, because they have been terminated under Division 9 of Part 8).[46]

1.67 Evidence to the committee overwhelmingly supported this provision as a fair and reasonable step.

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43 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117..

44 Explanatory Memorandum, p. 6.

45 Professor Alison Preston, *Submission 4*6, p. 8.

46 Explanatory Memorandum, p. 11.

Modernising industrial awards

1.68 The policy directions of the Workplace Relations Act anticipated the fading away of awards. They would be allowed to expire quietly as they became out of date and employees were shifted on to instruments that bore no relationship with the award and were prevented from returning to the safety-net provided by the award if that instrument was terminated. The architects of AWAs were not anxious to preserve anything that resembled a safety-net for wages or conditions. The Government is committed to ensuring that there is a simple, fair, flexible and relevant safety-net in place for all employees and which cannot be stripped away.

1.69 The bill provides the means for an award modernisation process to commence.[47] Proposed Part 10A would set out the Australian Industrial Relations Commission's (AIRC) award modernisation function and specify certain requirements for modern awards.[48] New section 576A would set out the objects of proposed Part 10A which make clear that modern awards, in conjunction with the proposed National Employment Standards are to provide a fair minimum safety net for employees.[49]

1.70 In addition to the amendments to the Workplace Relations Act to facilitate award modernisation, the Explanatory Memorandum to the bill contains the proposed award modernisation request (set out at pages 76-81) that the Minister for Employment and Workplace Relations will make to the President of the AIRC, upon passage of the bill, to request the AIRC create new modern awards during the transition period.[50]

1.71 As part of the award modernisation process the Commission will develop a model flexibility clause for inclusion in all awards to enable employers and employees to agree on arrangements to meet the genuine individual needs of the employer and employee so long as the clause cannot be used to disadvantage the employee.[51] DEEWR notes that modern awards will allow for flexibility to address matters such as rostering, hours of work and rates of pay on an industry specific basis.[52]

Issues arising from the committee's consideration of the bill

1.72 While expressing their support, a few organisations have highlighted some areas which they believe require further attention or where there may be unintended consequences. These are raised below for the consideration of the government, particularly during the development of the substantive bill.

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47 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117.

48 Explanatory Memorandum, p. 63.

49 Ibid.

50 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117.

51 Explanatory Memorandum, p. 78.

52 DEEWR, *Submission 27*, p. 10.

Chance to simplify labour laws

1.73 Professor Andrew Stewart described this bill as a chance for the government to simplify complicated and difficult to understand provisions. He urged the government to take the opportunity to draft a new statute that could genuinely allow workers and employers to understand their rights and obligations.[53]

> I am particularly concerned about the introduction of yet more transitional provisions. These make life very difficult for those who have previously entered into workplace agreements under the WR Act. It is already necessary for parties with "pre-reform" (ie, pre-Work Choices) agreements to have to consult and apply a version of the WR Act that does not exist in any official form – that is, the Act as it stood on 26 March 2006, but with certain amendments or notional changes specified by Schedule 7 to the current Act. The Bill now proposes something similar for those with "pre-transition" agreements. The difficulty of complying with rules that have to be pieced together from amending statutes and multiple versions of the same Act should not be underestimated. [54]

1.74 However, when asked whether this bill could be made more user friendly, Professor Stewart explained that the WRA is very complicated legislation, as reflected in its drafting. Simplification was possible over time, but it could be done.

1.75 The committee supports the principle of ensuring that future workplace relations legislation is simpler and easier for both employers and employees to understand. In this respect, the committee notes and welcomes the simpler drafting style of the proposed National Employment Standards, which were released as an exposure draft on 14 February 2008 and are to be included in the Government's substantive workplace relations legislation.

How long will AWAs and ITEAs be able to continue?

1.76 The second reading speech notes that AWAs made prior to the implementation date of the proposed legislation will continue until their nominal expiry date and beyond until the parties to the AWA make a decision about how to best manage their employment arrangement. [55]

1.77 The media has similarly reported that AWAs and ITEAs could continue indefinitely unless the employee or employer terminates them after the nominal expiry date.[56] Ai Group told the committee in Sydney:

> …one very important element of the legislation is that existing agreements remain in place, and both AWAs and ITEAs continue independently after

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53 Professor Andrew Stewart, *Submission 16*, p. 3.

54 Ibid., p. 2.

55 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117.

56 Misha Schubert, *The Age*, 'AWAs not going away despite poll', 5 March 2008, p. 7.

> expiry, which we believe to be a very important part of the transitional arrangements, and one of the key reasons why we believe this is workable. It is not giving people the ability to opt out of existing agreements, and if people are happy with them they can continue on independently after expiry.[57]

1.78 The ACTU expressed concern that the bill does not immediately abolish statutory individual agreements and suggested the bill should provide a mechanism for existing AWAs to be terminated prior to their nominal expiry date where the AWA is disadvantageous to the employee.[58]

1.79 In response to this issue, DEEWR advised the committee that AWAs and ITEAs would continue to operate until terminated or replaced and that either party can terminate an individual agreement following its nominal expiry date with 90 days notice. DEEWR further advised that:

> The point is that eventually, and not too far into the future, these individual statutory agreements will be phased out. So after 2010, there are no new individual statutory agreements available and you cannot, for example, vary these instruments after that point. Those alternatives might be common-law contracts but there is also the collective agreement. Eventually these individual statutory agreements will become very out of date and you would expect the employer and the employees to not want to remain on them.[59]

1.80 The committee majority notes that the Opposition ran a defensive line on this question during the hearings. There is no doubt that an Opposition returned to government in the next few years would re-introduce a form of individual agreement, presumably backed by some kind of incentive together with impediments to collective agreements. They remain committed to AWAs, notwithstanding the evidence that these instruments have stripped the pay and conditions of hard-working Australians.

1.81 The committee believes that, in the drafting of the substantive bill, consideration should be given to allowing employees to unilaterally terminate their individual agreements as soon as a collective agreement that would cover them has been negotiated in the workplace. Employers who have entered into the new collective agreement could be considered to have consented to any employee who could be covered by the collective agreement opting out of the individual agreement.

Negotiating ITEAs

1.82 The committee majority supports the concept of ITEAs for what they are: temporary expedients for the purpose of allowing employers and employees to

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57 Mr Stephen Smith, Ai Group, *Committee Hansard*, Sydney, 6 March 2008, p. 6.

58 ACTU, *Submission 20*, p. 8.

59 Ibid., p. 13.

transition from a workplace relations system that provides for Australian Workplace Agreements to one that will not provide for any form of individual statutory agreement.

1.83 The ACTU advised the committee that they are not convinced of the need for a new form of statutory individual contract, ITEAs, stating that in its view over-award common law agreements provide sufficient flexibility for employers. However, the ACTU recognises that the rules applying to ITEAs are superior to those governing AWAs.[60] ACTU concerns regarding ITEAs were also reported in the media that ITEAs could still be offered to employees on a take it or leave it basis. [61] Government party senators will monitor any abuse of ITEAs and may recommend that any abuses be addressed in the substantive bill.

Dealing with remnants of old agreements

1.84 The committee notes that the bill makes changes that affect the operation of old IR agreements by extending their period of operation from 26 March 2009 to 31 December 2009. However, it remains the case that any such old IR agreement will cease to operate when replaced by a new collective agreement.

1.85 The committee majority understands from advice from DEEWR that this means that anything contained in an old IR agreement will need to be bargained into any new collective agreement. While the committee supports the policy to abolish old IR agreements, it is concerned that some employees may be placed into a difficult bargaining situation when negotiating a new collective agreement, particularly in circumstances where large numbers of employees are engaged on AWAs.

1.86 Government senators believe that this matter should be further considered in the development of the substantive bill.

Collective agreements and the 'overall' requirement

1.87 Professor Stewart raised proposed s.346D(2) which requires the Workplace Authority to assess whether 'on balance' a collective agreement would result in a reduction in the 'overall' terms and conditions to which the relevant employees would be entitled under a reference instrument.[62] He highlighted that:

> What neither the section nor the Explanatory Memorandum made clear is whether a collective agreement may be considered to pass the NDT if *some but not all* of the employees it covers are disadvantaged.[63]

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60 ACTU, *Submission 20*, p. 8

61 Brad Norrington, 'Tough Conditions to put pay to AWAs', *The Australian*, 14 February 2008, p. 6.

62 Explanatory Memorandum, p. 11.

63 Professor Andrew Stewart, *Submission 16*, p. 4.

1.88 He notes that previously the AIRC required employers to give undertakings that agreements would not be operated in such a way as to disadvantage particular workers. He suggested:

> If the undertaking procedure is not to be revived, the legislation should be amended to make it clear that no employee covered by a collective agreement should be disadvantaged. The onus would then be on the party or parties drafting the agreement to include some provision that avoids any such disadvantage. Such a provision might itself be couched in the form of a general undertaking as to how the agreement is to be applied.[64]

Re-engagement of previous employees

1.89 The committee notes objections put forward by the business sector regarding the re-employment of previous employees but believes this provision provides a good incentive for employers to transition to the new workplace environment.

Common law contracts

1.90 After 2010, employers and employees wanting to enter into individual arrangements will be able to turn to common law contract arrangements which will be underpinned by a modern award and the 10 legislated National Employment Standards. The committee heard evidence about the desirability of common law contracts in practice, and about the protection they offered workers. This was a matter of particular concern to Senator Andrew Murray who has long been concerned that common law contracts do not offer protection to the extent that he considers may be available in connection with statutory agreements, notwithstanding that common law contracts do not allow the safety-net to be stripped away, while statutory agreements do. This is argued elsewhere in reports of committee members.

1.91 The ACTU noted 'In our view over-award common law agreements provide sufficient flexibility for employers who wish to make individual employment arrangements with their employees. Historically, these instruments have covered almost a third of the workforce and have generally operated in a fair and flexible manner.'[65]

1.92 The dispute resolution aspect of common law contracts was raised with the committee and Professor Stewart would like to see the government provide:

> …a low-cost and speedy process of dispute resolution that is available to all employees seeking to enforce employment entitlements, whether arising under legislation, awards, workplace agreements, contracts or the common law – subject to imposing a monetary limit (say $40,000), and subject also perhaps to excluding claims for the likes of defamation, personal injury and so on. Such a process would go some way to allay concerns about the

64 ibid., p. 4.

65 ACTU, *Submission 20*, p. 8.

> impact of removing higher earning employees from the award system. It is a reform that I would in any event strongly advocate for its own sake.[66]

1.93 The committee heard of a tribunal operating in South Australia which handled disputes involving common law contracts. The committee took this matter up with DEEWR who said that these issues will be further considered in connection with the substantive bill.[67]

Earnings above $100 000

1.94 From 2010, employees earning above $100 000 per annum would be free to agree to their own pay and conditions without reference to awards.[68] The Minister for Employment and Workplace Relations noted that 'this will provide greater flexibility for common law agreements which have previously been required to comply with all award provisions, no matter how highly paid the employees'.[69]

1.95 Professor Stewart noted that there is no mention of this in the bill itself or the draft award modernisation request. While assuming that the necessary legislation will be introduced later in the year, he notes:

> …that without any clear instruction to the contrary, the AIRC will presumably be expected to continue making provision in modern awards for workers who have historically been covered by awards, but typically earn amounts that will ultimately disqualify them from gaining any entitlements from those provisions.[70]

1.96 In response to questioning about what constitutes the $100 000, DEEWR pointed out the reference in the *Forward with Fairness- Policy Implementation Plan* which states:

> The calculation of the $100,000 threshold will be the employee's guaranteed ordinary earnings. The threshold will be indexed to annual growth in ordinary time earnings for full time adult employees. This will include the pay received for ordinary hours of work, guaranteed overtime and any other monetary allowances that are a guaranteed part of an employee's normal remuneration arrangements. [71]

1.97 The committee majority notes that the definition is not currently included in the legislation and assumes the government will include the relevant definition in the substantial bill. The committee will have a continuing interest in this matter.

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66 ibid., p. 5.

67 DEEWR, *Committee Hansard*, 11 March 2008, p. 4.

68 Explanatory Memorandum, p. 8.

69 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117.

70 Professor Andrew Stewart, *Supplementary Submission 16A*, p. 4.

71 DEEWR, *Committee Hansard*, Canberra, 11 March 2008, p. 10.

The No-Disadvantage Test

1.98 The committee notes the view of the ACTU that the proposed new no-disadvantage test is simpler and fairer. The bill will '…remove the complex regime of exclusions and loopholes that currently permit agreements to operate despite having failed the required standard.'[72] There were nonetheless a number of issues raised by unions in relation to the NDT.

1.99 The Shop, Distributive and Allied Employees' Association (SDA) drew the proposed s.346(D)(7) to the committee's attention. This states 'a collective agreement would be taken to pass the no-disadvantage test if there is no reference instrument relating to any employees.'[73] SDA wrote:

> If the employer with 1000 employees has 999 employees for whom there is a reference instrument and one employee for whom there is no reference instrument then, under proposed section 346(D)(7), the collective agreement will be deemed to have passed the No Disadvantage Test simply because there is one employee for whom there is no reference instrument.[74]

1.100 SDA noted that an unscrupulous employer could add the person for whom there is no existing reference instrument to the collective agreement, put in place any terms and conditions which clearly breach the NDT and have the CA passed. [75] They suggest that it needs to be clarified that '…a Collective Agreement will be taken to pass a No Disadvantage Test in relation to an employee for whom there is no reference instrument but only in relation to that employee. Where the Collective Agreement applies to employees for whom there is a reference instrument then the No Disadvantage Test must be satisfied in relation to all of those employees'.[76]

1.101 This issue was raised with DEEWR, who provided the following reassurance:

> In relation to the issue that the SDA raised, as the section is currently drafted it is not possible for an employer to simply evade the NDT by having one employee who is not bound by the reference instrument. The intention is that, in this situation, a collective agreement where only some of the employees have a reference instrument, if that agreement is tested and it passes the NDT, as assessed against that reference instrument, it will pass for all the employees in that workplace. Conversely, if the agreement fails the NDT it will fail for all employees in that workplace. But having said that, we will take a closer look at this provision and ensure that it achieves that intention. [77]

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72 ACTU, *Submission 20*, p. 9.

73 Explanatory Memorandum, p. 12.

74 Shop, Distributive and Allied Employees' Association, *Submission 9*, p. 17.

75 ibid., pp. 17-18.

76 Shop, Distributive and Allied Employees' Association, *Submission 9*, p. 18.

77 DEEWR, *Committee Hansard*, 11 March 2008, p. 9.

Termination of agreements

1.102 Proposed s.397A(2) states that, to terminate a CA, one of the parties able to make the application is a 'majority of employees' bound by the agreement. SDA highlighted that for many workplaces it is virtually impossible for a majority of employees to make such an application as the process in getting a majority of employees together in any business can be incredibly difficult.[78]

Undertakings

1.103 A number of employer organisations raised the issue that the bill does not permit an employer to give an undertaking as a means of varying an agreement which does not pass the fairness test. [79]

1.104 The committee majority does not agree with the suggestion that agreements be varied by undertakings. Agreements require two parties to reach an agreement. That pre-condition is not satisfied where one party may vary the agreement by unilateral undertaking.

Outworkers

1.105 The Textile, Clothing and Footwear Union of Australia (TCFUA) is concerned that the bill could amend the act in a manner that will remove vital protections for outworkers. The TCFUA estimates that 70 per cent of employment across the whole textile, clothing and footwear sector is comprised of outworkers.[80] A major source of protection for outworkers in the Commonwealth system is Part 9 of the Clothing Trades Award which ensures that outworkers receive minimum entitlements and requiring employers to keep records of the outworkers. The TCFUA is concerned that proposed sections 576K and 576U(e) of the bill will have the effect of removing the protections of Part 9 of the award for a significant proportion of outworkers. This is due to the definitions of both outworker in section 576K and the definition of 'eligible entity' in section 576U(e) of the bill. The TCFUA urged the committee to recommend the amendment of the definition of outworker in section 576K to encompass the nature of outworker employment arrangements.

1.106 The TCFUA also urged amendments to ensure that outworkers who perform work for persons or entities that are not constitutional corporations will still be protected by the provisions in Part 9 of the award. Due to Victoria's referral of its power over industrial relations to the Commonwealth in 1996, the TCFUA believes there is no constitutional limitation which prevents such an amendment.[81] They suggest the following wording:

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78 Shop, Distributive and Allied Employees' Association, *Submission 9*, p. 24.

79 Ai Group, *Submission 38*, p. 13.

80 TCFUA, *Supplementary Submission 30A*, p. 1.

81 ibid., p. 4.

> a person or entity (which may be an unincorporated club) that carries on its activity (whether of a commercial, governmental or other nature) in a Territory in Australia, in connection with the activity carried out in the Territory, or in Victoria, in connection with the activity carried out in Victoria.[82]

1.107 The committee majority notes that the government does not intend to reduce protections for outworkers. DEEWR advised the committee that it considers technical amendments to the bill are necessary to ensure that outworker protections are maintained. The committee will continue to take an interest in this matter.

Award modernisation

1.108 While supporting the need to modernise awards, witnesses highlighted a few areas of caution for the committee. There were differing viewpoints on the timeline with some believing it to be overly ambitious.[83] Others believed that it could be shortened but provide sectors with a longer timeframe by an exception request. DEEWR told the committee that it believed that the award modernisation timetable was achievable.

1.109 It was also noted that the process is not intended to 'disadvantage employees' or 'increase costs for employers'.[84] Yet it was pointed out that it is not possible to standardise conditions without disadvantaging someone. Witnesses urged the government to consider the language used and clarify its intent.[85]

1.110 The committee asked Professor Andrew Stewart to further consider this matter and in a supplementary submission he provided the following information:

> I accept that it may be possible to interpret the current wording as meaning that workers and employers should not on balance de disadvantaged, while leaving it open to the AIRC, in the course of standardising conditions in a particular industry, to seek a rough balance by increasing some entitlements and reducing others. In practice, however, it is highly unlikely that such a balancing exercise could ever be undertaken with such precision that nobody was worse off. Any process of standardisation must inevitably result in some levelling up or down of entitlements – and the greater the number of existing instruments to be replaced by a modern award, the greater likelihood of that having to happen. [86]

1.111 Professor Stewart proposed that sub-paragraphs 2(b) and (c) of the draft request be replaced by the following:

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82 ibid.

83 Unions NSW, *Submission 45*, p. 1.

84 Explanatory Memorandum, p. 76.

85 Professor Andrew Stewart, *Submission 16*, p. 7.

86 Professor Andrew Stewart, *Supplementary Submission 16A*, p. 1.

> (b) *significantly* disadvantage employees, *in terms of their overall conditions of employment*;
>
> (c) *significantly* increase costs for employers;….[87]

1.112 Professor Stewart also proposed adding the following sentence at the end of paragraph four to encourage the AIRC to aim for a reasonable degree of standardisation in the relevant industry, occupation or sector:

> The Commission must also seek to avoid complicating the operation of modern awards by the extensive use of exceptions or qualifications to preserve differences in pre-modernisation entitlements. This is not intended to rule out the phasing-in of standardised conditions over a transition period. [88]

1.113 Dr John Buchanan highlighted the critical role categories will play in structuring the modernisation process and expressed concern that the categories 'industry' and 'occupation' are not self evident and the guidance as to what is meant is limited. He suggested a notion of key job or vocational families with associated 'parents' or siblings' would be a useful guiding concept. He urged the AIRC to be thoughtful about the categories used to define labour market coverage, noting this will be a continual process and there is a challenge to keep awards regularly in touch with changing labour regularities.[89] Dr Buchanan also noted the importance of providing the AIRC with appropriate resources to conduct the process and made the following specific suggestions for consideration:

> New paragraph in *positive* **Objects** at page 76
>
> (f) must be regularly reviewed to ensure that they remain relevant to the rapidly changing structures of work and the labour market.
>
> New para in *negative* **Objects** at page 77
>
> (f) create an unduly rigid set of categories around which the coverage of different part of the labour market is defined.
>
> New para in the section dealing with **Performance of functions by the Commission** at page 77
>
> (k) give due recognition to the need for a coherent set of categories for grouping together like classes of work to help ensure consistency in defining employment rights and obligations and to help provide a framework for defining common skill requirements.
>
> Additional words to opening para in **Awards modernisation process** at page 77
>
> At end of para 4 add:

87 Professor Andrew Stewart, *Supplementary Submission 16A*, p. 2

88 Professor Andrew Stewart, *Supplementary Submission 16A*, p. 2.

89 Dr John Buchanan, *Submission 53*, p. 3.

> (a)…Modernisation of award is not simply meant to result in fewer awards, it is also intended to create a set of awards which, by clustering together like classes of work, provide more consistent and relevant ways of defining the reach of employment rights and obligations. [90]

1.114 The committee majority urges the government to consider the matters raised by Professors Stewart and Buchanan.

1.115 Professor Preston noted that the aim of the process was to ensure no state-based differences in awards.[91] The ACTU expressed concern that the prohibition on awards containing any state-based differentials after 2013 constitutes an unnecessary restriction on the discretion of the AIRC to develop modern awards. While supporting the AIRC eliminating, as far as practicable, state-based differentials, they urge the recognition of state-based differences where there remains sound basis for the differential.[92]

1.116 Affiliates of Unions NSW believe that insufficient consideration is being given to the importance of the role of former state awards (NAPSAs) in setting wages and conditions for many workers. They also urge that there be scope in the legislation for the AIRC to consider state differentials.[93] They suggest that:

> …the review should involve representatives from State tribunals who have an understanding of the state awards, their history, function and utility. This should not be difficult as some of the members of the Industrial Commission of NSW also have a dual appointment to the AIRC. [94]

1.117 The committee also heard evidence on confusion that exists in local government circles over state and federal awards and industrial jurisdictions.[95] There are concerns about new legislation introduced in Queensland which 'decorporatises' local government to ensure that local councils are not classified as constitutional corporations. Similar concerns are expressed in New South Wales where the United Services Union believes that 'unless urgent action is taken NSW councils and local government employees will be left in the uncertain position of not knowing which jurisdiction applies to industrial disputes unfair dismissals and wage claims'. [96]

1.118 The committee majority notes this complex issue and urges the government to clarify this issue where possible in the substantive legislation.

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90 Ibid., p. 4.

91 Professor Alison Preston, *Submission 4*6, p. 8.

92 ACTU, *Submission 20*, pp. 11-12.

93 Unions NSW, *Submission 45*, p. 1.

94 ibid.

95 Local Government Association of Queensland, *Committee Hansard*, 10 March 2008, p. 38.

96 United Services Union, *Submission 10*, pp. 1-2.

1.119 Witnesses observed that the award modernisation request as it is currently worded, leaves all the drafting of awards up to the AIRC and witnesses would like to see industry play a lead role in the development of modern awards, for instance submitting draft flexibility clauses. The National Farmers' Federation (NFF) took this point of view further and submitted that 'it is only where parties do not have the adequate resources or have not reached an agreement where the AIRC should play a role in actually drafting the modern award'.[97] The committee is of the view that the process should involve as many interested parties as practicable. DEEWR reassured the committee that it is designed to be an inclusive rather than an exclusive process.[98]

1.120 In response to concerns raised, DEEWR, told the committee that the award modernisation process:

> …is actually a process of creating new, modern awards as opposed to merely the simplification and rationalisation of existing awards. So, in essence that implies a sort of comprehensive look at what modern awards should create. Also, the process of itself, will provide a range of benefits both for employers and for employees in terms of fair and flexible modern awards from an employee perspective. But equally, it will be less complex and simpler to apply awards, from an employer's perspective. [99]

1.121 While noting the concerns raised during the hearings regarding the award modernisation timeline and process, the committee majority took some assurance from the advice provided by the department that they 'do not believe the timeline is impossible'.[100] In response to a direct question from the chair on funding, the department advised: 'our understanding is that the commission is of the view that it has adequate resources to undertake the award modernisation process'.[101] The committee believes that if additional funding is required it will be made available, since award renewal is the basis for a workable system of collective agreements.

An arbitration role of the Australian Industrial Relations Commission

1.122 Evidence to the committee included detail of an intractable dispute that was allowed to continue for nearly nine months, and which resulted in considerable suffering for employees and their families over that time. The Australian Workers Union (AWU) representative described the case to the committee.

> The example of Boeing and the dispute that we had at Williamtown highlights the immense deficiencies and unfairness that has existed in Australian workplaces since 1996. Here we had workers who, working in a relatively new facility, decided to join their union and wanted to bargain

97 National Farmers' Federation, *Submission 21*, p. 3.

98 DEEWR, *Committee Hansard*, 11 March 2008, p. 12.

99 DEEWR, *Committee Hansard*, 11 March 2008, p. 11.

100 DEEWR, *Committee Hansard*, 11 March 2008, p. 11.

101 ibid., p. 12.

> collectively with their employer to seek very few changes in their working conditions aside from being able to bargain collectively and having the right to be represented by their union. Boeing failed to negotiate with the union regarding these claims. We represented the majority of the workers at the facility. Initially we were locked out for a month then let back in. We took protracted industrial action after that. In the end we had our members out on strike for 265 days. The worst part of that dispute is that, several weeks after they returned to work, the company decided to put in a collective arrangement after 265 days on the grass. What was highlighted in this dispute was that we were unable to go anywhere. We sought the assistance of the commission to resolve the dispute. The commission did not have the powers to resolve that dispute. Under the commission's auspices we conducted ballots on whether the majority of the workers wanted to be represented. The ballot was returned with an 80 per cent plus vote. In the end the New South Wales Industrial Relations Commission conducted an inquiry into the dispute and asserted that they had jurisdiction over the site – which was overturned by the Federal Court.
>
> …At the end of the day, the dispute destroyed a number of families. Two of our members had their homes repossessed. There were several break-ups. Today there are only three of those initial employees still on site. Most of them resigned after they went back to work because they could not stomach working for that company, particularly because after 265 days the company gave them a collective agreement within three weeks. The fact that there was absolutely nowhere to go clearly and indisputably demonstrates how unfair that system was.[102] [103]

1.123 The committee majority considers it to be outrageous that a dispute like this should have been allowed to continue for so long without resolution. Despite its regulatory volume and complexity, the provisions of the WRA provided no assistance. The committee majority considers that dispute resolution should remain as an important role for the Australian Industrial Relations Commission.

Conclusion

1.124 The committee majority is pleased to report that the overwhelming evidence provided to the committee supported the bill's workability and balanced approach to transitional arrangements. We were disturbed to hear yet more stories of AWAs being used to cut wages and conditions of vulnerable workers who have little or no bargaining power or experience. The ability for employers to use AWAs in this way must be stopped as soon as possible, by removing mechanisms which have perpetuated these injustices.

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102 AWU, *Committee Hansard*, 6 March 2008, pp. 15-16.

103 Boeing has responded to the AWU claims regarding the dispute at Williamtown. This response does not go to the issue of the mechanisms of resolving protracted disputes. Letter, tabled papers.

1.125 AWAs are mostly pattern agreements drafted by the employer and presented to employees on a 'take it or leave it' basis. There is no evidence that ordinary unskilled workers have directly negotiated their individual work needs with their employers.

1.126 Not only does the small proportion of the workforce on AWAs mean there will be minimal effect on the economy by preventing any new AWAs being made, but the evidence to the committee was that if anything there will be a positive effect. The committee majority view is that the restored morale of the workforce currently subjected to AWAs will itself be an incentive to higher productivity and that employers will find that the use of collective agreements results in far less time and resources devoted to administration and dealing with the red tape of an individual statutory agreement for each employee. The Opposition continued to run a defensive line on individual statutory agreements during the hearings, leaving no doubt that an Opposition returned to government in the next few years would re-introduce a form of individual agreement. Regardless of their public posturing, reminiscent of the GST, they are still committed to Work Choices and to the instruments that have stripped the pay and conditions from working families.

1.127 Many employer organisations complained of not being able to re-engage previous employees on ITEAs. The committee majority believes this provision encourages employers to move quickly to negotiate collective agreements. The indefinite continuation and use of ITEAs is not a role contemplated in the bill.

1.128 The committee has raised a number of technical issues and possible unintended consequences which await the attention of policy makers in their drafting of more substantive legislation to be considered by parliament later in the year.

1.129 The committee majority notes that there are a few technical issues raised in submissions which have not been included in the report and notes assurances from DEEWR that they have been monitoring submissions and will consider the issues raised in them.

Recommendation 1

1.130 **The committee majority recommends that the Senate pass the bill.**

Senator Gavin Marshall

Chair

Coalition Senators' Report

Introduction

2.1 Coalition senators initiated this inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 on 14 February 2008. Coalition senators are concerned that the new government is intent on fundamentally altering arrangements which have promoted an unprecedented period of economic growth which the country still enjoys, nearly twelve years on.

2.2 Coalition senators will not be opposing the passage of this bill. As will become clear, however, they find much to criticise in the detail of the bill. On closer inspection, the bill is fundamentally flawed, from a drafting as well as policy perspective. The bill is complicated and, in many areas difficult to understand. While the bill seeks to replace existing individual statutory agreements with another form of individual statutory agreement (ITEAs), it fails to accommodate a host of employment arrangements allowed for under existing legislation.

2.3 In delivering this report, Coalition senators reject various assessments and assertions made in the government senator's report as to the policy intent and effect of both the current workplace relations laws and their architects. Coalition senators also reject assertions made in the government senator's report attributing policy intent to members of today's Coalition.

The terms of reference – lack of economic modelling

2.4 Witnesses generally gave evidence of their concerns about economic and social impacts of the bill, particularly in sectors with a high utilisation of individual agreements. They were variously concerned about the bill's impact on:

- economic and social impacts from the abolition of individual statutory agreements;
- impact on employment;
- potential for a wages breakout and increased inflationary pressures;
- potential for increased industrial disputation;
- impact on sectors heavily reliant on individual statutory agreements; and
- impact on productivity.

2.5 However, none of the witnesses had conducted economic modelling of the effects of the bill. More particularly, DEEWR has not conducted economic modelling of the likely effects of the bill. Its submission focussed more on the government's assessment of 'the past', rather than an empirical assessment of the effects of the bill.

This submission suggests that the effects of the bill will be minor, and will not risk damaging the economic progress achieved to date.

2.6 While the government has made claims that collective agreements lead to non-inflationary wage growth and improvements in productivity growth, the department could not point to any government studies to support such claims.

2.7 Many witnesses generally had concerns about the abolition of individual statutory agreements and the impact on employment, and no witnesses were aware of any economic modelling which demonstrated the government's claims regarding a 'fairer' system. It appears that no new data has emerged either from the government or from academia in relation to the effect of the termination of individual agreements.

2.8 Empirical modelling showing positive economic effects of the bill is conspicuous in its absence. However, this has not prevented from the Minister in her second reading speech commenting that:

> A workplace relations system that works for all Australians should be fair and flexible, simple and productive. It will not jeopardise employment, will not allow for industry wide strikes or pattern bargaining and it must not place inflationary pressures on the economy. It specifically aims to drive productivity and cooperative workplace arrangements.[1]

Drafting issues

2.9 One witness, Professor Andrew Stewart, said in his submission 'The Transition bill was plainly drafted in a hurry….many of the new provisions remain widely complicated and difficult to understand, even for experts.'[2]

2.10 Asked when before the committee, whether he saw '…a way for the bill in its current form to deliver a system that is understandable for users – that is, anything other than complicated and difficult to understand', Professor Stewart's evidence was 'The short answer to that is no….' [3]

Timeline for inquiry

2.11 This undue haste has spilled over to this inquiry itself, with similarly undesirable consequences. The Senate committee acted contrary to the will and intent of the Senate, in insisting on an early reporting date for this inquiry. Allowing the Committee to inquire and report (say) a month later, would have had negligible effect.

2.12 The timeline for this inquiry does not reflect the importance of the breadth of issues raised by the bill. The March 17 reporting deadline forced on the committee by

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1 Speech on the Second Reading by Hon Julia Gillard, MP, *Hansard (Reps*), p. 10.

2 Professor Andrew Stewart, *Submission 16*, p. 2.

3 *Committee Hansard*, 7 March 2008, p. 12.

the government members has resulted in a rushed inquiry that has left the committee little time for reflecting on either broad policy issues or the minutia of provisions in the bill. Comments in submissions and at public hearings indicate that there was insufficient time for public consultation, beyond the magic circle of the government's own confidants. Some witnesses had to correct errors made in hastily prepared submissions.

Conduct of the inquiry

2.13 The inadequate timeline for the inquiry inevitably and detrimentally affected the conduct of the inquiry.

2.14 Coalition senators believe that this denied the committee its right to fully and properly consider and scrutinise the bill, and denied the opportunity for reasonable questioning of a number of key witnesses. The committee chair attempted to manage this inadequate timeframe. However, it was often very difficult for Coalition members to fully explore the concerns most parties raised in their submissions.

2.15 Despite these significant inadequacies, Coalition senators have done their best in this report to highlight many of these deficiencies in the bill, about which the Senate should be informed.

End to reform

2.16 Since the advent of the Workplace Relations Act (WRA), a key issue has been the relative merits of collective and individual agreements. It remains a key issue in this inquiry. The Labor Party has been unequivocally opposed to individual agreements. The Coalition supports the continuous availability of individual statutory workplace agreements (subject to a safety net), for those who choose them. The Coalition's reforms provide employers and employees with an option to pursue the most suitable form of agreement based on their needs and circumstances**.**

2.17 Whilst individual statutory agreements might be utilised by a small percentage of users of the current IR system, the flexibility they offer is crucial to some sectors of Australian industry in securing workers and in remaining competitive. They should remain a choice in the workplace bargaining system.

2.18 The wholesale return to collective agreements risks the return of processes which sustained the influence and power of trade unions for most of the twentieth century. While history will not necessarily repeat itself with strikes and disruptions, in the absence of powerful individualistic trends in employment relations a great deal of enterprise incentive is lost. This development may send us back, as a productive society, to the point where we may have to re-learn the lesson that workplace relations must adapt to changing economic and social circumstances. Coalition senators believe that compulsory collective agreements will be unpopular with many employees, including those who reject collectivism or have irregular patterns of employment and hours of work. The assumption made by unions and other government supporters that such people are an exploited minority is misleading generalisation. It is a reflection of

changing social patterns. The bill contains provisions that will project us into the past, to relearn lessons since forgotten.

Major policy flaws and drafting difficulties in the bill

2.19 Many of the following relate to the committee's terms of reference. Others are too important to overlook.

- The proposed demise of individual agreements
- Confusion arising from use of the Individual Transitional Employment Agreement (ITEAs)
- Undertakings to employees pending approval of an agreement
- The new No-Disadvantage Test
- Restoration of awards as the basis for wage agreements
- Award modernisation
- The possibility of future industrial unrest
- Difficulties faced by small contractors and micro businesses
- Local government concerns
- Other issues including: disincentive for businesses to employ staff; inadequate transitionary arrangements; significant disruption to employment arrangements.

The demise of individual agreements

2.20 A two year transitional instrument, the ITEA, is at the core of the bill. Australian Workplace Agreements will be abolished. Employers have been presented with a *fait accompli*. However, the peak organisations: ACCI, the Australian Industry Group, the Master Builders Association and the National Farmers Federation, amongst others, were emphatic in their opinion that individual statutory agreements were important, and even essential, in the range of employment agreement instruments that should be available to their members and to employees.

2.21 There is strong evidence that some form of individual statutory agreement subject to a safety net is an essential instrument in any industrial system. Concern was expressed at the loss of choice and flexibility in the workplace for employers and employees.

2.22 Western Australia has the longest experience with individual agreements. State legislation was introduced successfully in 1993, mainly in response to considerable industrial unrest at the time. When the committee visited Perth it was informed that many employers, especially in the resources sector, were totally reliant

on AWAs because these were very adaptable and suited project work which had finite contract periods.[4] The submission and other evidence tendered by the Western Australian Chamber of Commerce and Industry deal mainly with the problem of replacing AWAs, and will be covered under the ITEA heading.

2.23 Ai Group argued that 'employees and employers should have the right to pursue the form of agreement which best suits their needs, whether a collective agreement, individual agreement, an agreement with a union or one directly with employees'. [5] At the Sydney hearing Mr Stephen Smith emphasised that Ai Group 'would prefer that the former statutory individual agreement remain in the workplace relations system, underpinned by the new global no disadvantage test.'[6]

2.24 Generally, witnesses noted that some capacity for individual agreement making within a wider system of collective agreement making can continue to have a positive effect on economic and social life.

2.25 ACCI argued that providing flexibility only within collective agreements might reduce options available to some individuals, including flexibility to balance their work and family life. [7]

2.26 The Chamber of Commerce in WA stated that:

> If there was some means of individual agreement making, we would be satisfied. It appears that the government is relying on award flexibility clauses that will be introduced as part of the government's new system. These flexibility clauses are supposedly designed to enable an employer and an employee to negotiate a set of arrangements that might suit them, but we don't know what they look like yet.[8]

2.27 The Rio Tinto submission indicates that they have been using individual statutory agreements since the early 1990s and their use of AWAs has met the needs of both the organisation and the employees. Currently, 22 per cent of their workforce use AWAs.[9]

2.28 The National Farmers Federation also supported the maintenance of AWAs as a legitimate alternative to awards, common law agreements or collective

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4 Chamber of Commerce and Industry Western Australia, *Committee Hansard*, 4 March 2008, p. 1.

5 Ai Group, *Submission 38*, p. 3.

6 Ai Group, *Committee Hansard*, 6 March 2008, p. 1.

7 ACCI, *Submission 14*, p. 7.

8 Chamber of Commerce and Industry Western Australia, *Committee Hansard*, 4 March 2008, p. 8.

9 Rio Tinto *Submission 4*, p. 3.

agreements'.[10] In fact, most workers in the pastoral and agricultural industries are on award rates, but many workers in the large agribusiness firms are on AWAs.[11]

2.29 ABI advised that it continues to support individual statutory agreement making as 'an essential feature of a modern workplace relations system that facilitates workplaces that are productive, co-operative, flexible and responsive.'[12]

2.30 Master Builders Australia highlighted that:

> ITEAs will not be a component of the new industrial relations system that will come into effect in January 2010. Master Builders advocates that the underlying safety net is the important consideration when assessing whether or not an individual instrument is fair. There is nothing per se unfair in the use of individual statutory agreements and, for this reason, the Master Builders' policy position is that employees and employers from January 2010 should continue to be permitted the flexibility to decide what type of agreement best suits their needs and circumstances as long as the relevant statutory safety net requirements have been met. [13]

2.31 In their submission the Electrical and Communications Association (ECA) expressed their preference for the flexibility of the current system and being able to move away from the 'one size fits all' award or collective agreement and move towards an outcome that provides benefits to both employer and employee.[14] The submission notes:

> The advent of AWAs into the mainstream of the industrial relations sector in 2006, coupled with the ever increasing shortage of qualified tradespeople and a greater demand to work outside the standard working hours that has emerged over the past five years, has provided a perfect opportunity for many of ECA's smaller members to be able to not only adequately compensate their employees for the work undertaken, but to structure the working conditions around the business and the sector of the industry they worked in. This allowed businesses to keep their overheads to a minimum while not placing their employees at a disadvantage in terms of reduced wages or conditions.[15]
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> The ECA submission highlighted their concern that 'the abolition of AWAs will have a detrimental effect on the economic and growth potential of many of its smaller members as it was they who were able to gain the most benefit from implementing them into their business.'[16]

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10 National Farmers' Federation, *Submission 21*, p. 3.

11 National Farmers' Federation, *Committee Hansard*, 6 March 2008, p. 24.

12 ABI, *Submission 31*, p. 3.

13 Master Builders Australia, *Submission 3*, p. 8.

14 Ibid., p. 2.

15 Ibid., p. 3.

16 Ibid., p. 4.

> Benefits include: flexibility to amend start and finish time to suit worksites such as shutdowns in mining and engineering; providing an all up rate for employees which meant the employee was receiving the same amount of wages for the same time worked but was receiving more superannuation due to a higher ordinary times earning rate, while the employer received reductions in overheads such as payroll in trying to determine correct pay rates; tailoring an agreement to suit an employee's specific work/life situation to include additional leave in lieu of a reduced hourly pay rate if more leave was a driving factor for the employee.[17]

2.32 ECA noted that the benefits described above provided many small businesses with the opportunity to employ additional staff and retain staff by tailoring the industrial instrument to best suit the employer/employee relationship. ECA caution that the 'one size fits all' style of industrial relations that this bill reverts back to will not allow contractors to negotiate directly with individual employees on a case by case basis and will not allow contractors to adequately or appropriately reward employees for individual productivity gains.[18]

2.33 The Master Plumbers Association of Queensland (MPAQ) told the committee that individual statutory agreements had brought many small businesses into the industrial relations system for the first time. Mr Adrian Hart from the MPAQ told the committee:

> One of the biggest concerns I had had as an individual trying to assist small plumbing contractors was that quite often they would have an arrangement with their employees or their workers which suited both parties but they did not formalise it by way of some form of registered agreement and, in not doing so, they had a technical breach of the award. We saw the ability for them to register those agreements as being a way of providing some guarantee to the employee as to what the arrangements were, and some protection to the employer should there be a technical breach of the award identified.[19]

2.34 Ms Marcia Kuhne from the Chamber of Commerce and Industry WA also made the point that the result of the bill will be that employers and employees will be affected 'because many employees also elect to be employed under individual arrangements under their own agreements. It suits many employees'.[20]

2.35 This view was also put to the committee by Mr Smith from Ai Group who stated at the Sydney hearing:

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17 Ibid., p. 4.

18 Electrical and Communications Association, *Submission 5*, p. 5.

19 Master Plumbers Association of Queensland, *Committee Hansard,* 10 March 2008, p.13.

20 Chamber of Commerce and Industry Western Australia, *Committee Hansard,* 4 March 2008, p. 9.

> In our experience with our member companies there are plenty of circumstances where AWAs do suit the needs of both parties, and those circumstances are very diverse. For example, senior salaried staff may want to approach their employer about, say, the cashing out of leave.[21]

2.36 Coalition members of the committee were sceptical of the extent to which flexibility clauses could usefully be included in the modern awards promised under the legislation. It remains doubtful as to whether these would deliver employers and employees the same flexibility they currently have with individual statutory agreements. This scepticism appeared to be shared by others.

2.37 The Chamber of Commerce in WA stated that:

> If there was some means of individual agreement making, we would be satisfied. It appears that the government is relying on award flexibility clauses that will be introduced as part of the government's new system. These flexibility clauses are supposedly designed to enable an employer and an employee to negotiate a set of arrangements that might suit them, but we don't know what they look like yet.[22]

2.38 Finally, Master Builders Australia presented a realistic view which Coalition members consider has widespread support. Employers will live with what the government has proposed but would miss the option of choosing to make new individual statutory agreements on a continuing basis.

> ITEAs will not be a component of the new industrial relations system that will come into effect in January 2010. Master Builders advocates that the underlying safety net is the important consideration when assessing whether or not an individual instrument is fair. There is nothing per se unfair in the use of individual statutory agreements and, for this reason, the Master Builders' policy position is that employees and employers from January 2010 should continue to be permitted the flexibility to decide what type of agreement best suits their needs and circumstances as long as the relevant statutory safety net requirements have been met. [23]

2.39 Coalition members of the committee believe that the policy to abolish individual agreements in 2010 is wrong in principle, and is likely to result in a change to workplace culture which will affect the entrepreneurial spirit of employers and the morale of many employees. The Master Plumbers Association of Queensland commented:

> … the position has been taken at times with collective agreements that accommodated the basic level of performance and expectation, rather than set the agreement bar higher in terms of expected performance and

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21 Ai Group, *Committee Hansard*, 6 March 2008, p. 2.

22 Chamber of Commerce and Industry Western Australia, *Committee Hansard*, 4 March 2008, p. 8.

23 Master Builders Australia, *Submission 3*, p. 8.

> productivity outcomes. The collective agreement has deferred in favour of least performance and productivity.
>
> This can create a workforce culture of just doing the job, rather than aspiring to a level of outstanding performance that exceeds client expectations, especially where the employer is striving for a real customer service culture within the business. Then it became doubly hard for the employer when the agreement, driven by the union, quite obviously was based on 'one size fits all', where the level of expected performance and productivity was built around the lowest membership acceptable level. Often just enough was good enough.
>
> AWAs had a greater capacity to release the tiger within, so to speak, with respect to an employer's capacity to develop an aspirational level of performance and productivity amongst the workforce by enabling each individual to partner with the employer in performance and productivity. Individual agreements also provided a way of legalising what so often happened in the workplace—that is, one-on-one arrangements were previously agreed to between the boss and the worker as the award system did not suit many employees, and yet the employers could not contract out of them. Individual agreements provided a way for employers to have legitimate arrangements with their employees. This is also a useful retention strategy.

2.40 Coalition senators consider this to be a good summation of what will be lost with the demise of individual agreements.[24]

Confusion arising from the use of ITEAs

2.41 Under the transitional arrangements employers using AWAs will be able to enter into ITEAs until 31 December 2009.

2.42 It is clear from the considerable amount of evidence given to the committee that the use of ITEAs in the terms proposed by the bill has resulted in great confusion. Some industry representatives appear to believe that by various ways they can be continued indefinitely. Others are concerned about the two-year life of the instrument and consider this period to be inadequate. In any event, this extra agreement will add another instrument to the workplace which will increase confusion for employees and increase the bureaucracy burden for business.

Limited use of ITEAs

2.43 The Electrical and Communications Association (ECA) expressed concern regarding what they see as the extremely limited parameters under which ITEAs can be made. They highlight the situation for contractors in Queensland, who are not

24 Master Plumbers Association of Queensland, *Committee Hansard, 10 March 2008*, p.12.

respondent to the relevant federal award, which leaves the contractor with little choice but collective negotiations.[25]

2.44 While acknowledging the proposed abolition of AWAs, many employer organisations expressed the view that it would be their preference for ITEAs to be available as an option on an ongoing basis, subject to a safety net. Their argument was that this will address the need for a form of individual statutory agreement which they would like to see continue in principle and practice.

2.45 There was no unanimous view from business regarding the length of an extended timeframe for ITEAs. However, ACCI submitted that 'ITEAs (of a non-transitional and non-time limited nature) be available to all employers, for all employees, on an ongoing basis, regardless of an employers history of AWA use.'[26]

2.46 The option to make them available as continuing instruments subject to a safety net was raised by a number of business organisations.

2.47 Evidence from DEEWR showed that existing AWAs and new ITEAs can continue to apply beyond their nominal term. Coalition senators note that this is consistent with the Government's pre-election promise that existing laws will apply to the termination of AWAs which run beyond their nominal term. We note that it is somewhat at odds with the Government's indications that there will be no place in the new workplace relations system for AWAs or any other form of individual statutory agreement.

2.48 DEEWR also gave evidence that AWAs and ITEAs in this situation could continue to apply in workplaces, subject to the parties exercising their legal rights to terminate them. They can continue to apply beyond 2012. The bill does not provide an 'end date' for this continued application of AWAs and ITEAs beyond their nominal term.

> Deputy Prime Minister Gillard was interviewed yesterday and she indicated the government's policy quite clearly, which was that AWAs and ITEAs, as it is expressed in the explanatory memorandum, ' would continue to operate until terminated or replaced'.[27]

2.49 Coalition senators note that the fact that the parties cannot amend or vary an AWA or ITEA operating beyond its nominal term does not prevent the parties from choosing to continue to apply such AWAs and ITEAs on a continuing and indefinite basis.

2.50 In the context of a bill which otherwise progressively limits and then ends the rights of parties to make new individual statutory agreements, Coalition senators

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25 Electrical and Communications Association, *Submission 5*, p. 5.

26 ACCI, *Submission 14*, p. 12.

27 DEEWR, *Committee Hansard*, 11 March 2008, p.7.

consider this availability to parties who so wish of a mechanism to continue to apply a stream of individual statutory agreements (subject to a safety net), to be critically important.

Re-engagement of previous employees

2.51 Subsections 326(1) and (2) enable ITEAs to be made by an employer that employed at least one employee on an individual statutory agreement as at 1 December 2007 subject to the following criteria:

- an existing employee employed under an ITEA, an AWA, a 'pre reform AWA' , an individual preserved State agreement or an employment agreement within the meaning of section 887, or

- a new employee who has not previously been employed by that employee.[28]

2.52 Witnesses drew the committee's attention to this section which makes ITEAs inaccessible to employees who were previous employees of an organisation. Their concerns were that for particular industries with work of an itinerant nature, particularly the construction sector, but also retail, hospitality and the home and community care sectors, employers will not be able to re-engage staff on ITEAs that may have worked for them previously. The Chamber of Commerce and Industry in WA argues that 'if the provision is not altered to encompass previous employment …the construction industry will largely be unable to access the transitional arrangements'.[29]

2.53 WA Chamber of Commerce and Industry further notes:

> We do not understand the rationale for excluding previous employees from the ITEAs system. Is the reason for exclusion of such importance that it overrides the significant impact on an industry such as construction which traditionally hires and fires employees as demanded by the project? The Transitional Bill is effectively nullified as a transitional arrangement if it becomes law without amendment to enable offering of ITEAs to previous employees in the circumstances described above.[30]

2.54 When appearing before the committee Ms Kuhne from the Chamber of Commerce WA explained that in WA, AWAs have been in place for some 15 years and some employers have become totally reliant on them. She emphasised that 'There are many cases where members in fact are no longer aware of the detail of awards that might or might not in fact cover employees who are currently covered by AWAs…so

28 Explanatory Memorandum, p. 10.

29 Chamber of Commerce and Industry Western Australia, *Submission 24*, p. 8.

30 Ibid.

they have been relying on the fact that they would be able to transition out of those arrangements.' [31]

2.55 Mr Lee from the Chamber of Commerce, WA, reiterated the nature of the employment in the construction industry and the particular impact of the bill on this sector. He emphasised the discontinuous nature in the industry where an ongoing employment relationship is not possible due to the project nature of the sector. He told the committee that this occurs 'particularly in the north of the state where a lot of work is seasonal in nature – during the summer wet season very little work goes on. He stressed that 'on other sectors it might be a minor inconvenience; on this sector it is a major problem.'[32]

2.56 The issue of not being able to offer previous employees ITEAs was supported by a number of witnesses in the construction industry including BGC Contracting Pty Ltd which noted that over the last 12 months, 10 per cent of the recruited employees have worked for the company previously. In their submission they note: 'BGC sees the prevention of offering ITEAs to previous employees as creating an unjust discrimination against previous employees which must be removed.'[33]

2.57 Mr Ward from Ertech Pty Ltd pointed out to the committee that they are moving towards developing collective agreements and have set an ambitious date of August 2008 to have the work completed. He emphasised that the process to conclude a collective agreement will take time and in the meantime they are disadvantaged by being precluded from rehiring their itinerant workforce as a result of that particular clause.[34]

2.58 Mr Blyth from Compass Group told the committee:

> So it is not a question of the philosophical debate about the advantages of AWAs versus collective agreements; it is a recognition that, in a transitional period, there will be one group of employees important to our business from a productivity point of view who will be in a position such that, if they are employed by us, they cannot be employed on the same thing, being an ITEA, but have to be employed under an award. We then find that at a site where our clients obviously would want us to have in place registered industrial agreements for that workforce- and there are a while range of obvious advantages to that – the ex-employee cannot be put into that category during this transition period. We think that is a flaw in the bill, with respect.[35]

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31 Chamber of Commerce and Industry Western Australia, *Committee Hansard*, 4 March 2008, p. 1.

32 Chamber of Commerce and Industry WA, *Committee Hansard*, 4 March 2008, p. 2.

33 BGC Contracting Pty Ltd, *Submission 19*, p. 1.

34 Ertech Pty Ltd, *Committee Hansard*, 4 March 2008, p. 7.

35 Compass Group, *Committee Hansard*, 4 March 2008, p. 6.

2.59 Rio Tinto notes that employees leave employers for a wide number of reasons and the timeframe of their break in employment is variable. Rio Tinto argues that they cannot identify anything particular about former employees that would support the need for this exclusion and ask for its removal from the bill.[36]

2.60 BGC Contracting also raised concern with this exclusion noting that over the last 12 months, 10 per cent of their recruited employees have worked for them previously. They have also suggested that this exclusion be removed.[37]

2.61 The Coalition cannot identify the need for this provision, believes it would be a disincentive to employ people in the sectors such as those mentioned above and supports this exclusion being removed.

Different commencement dates

2.62 The bill would introduce a number of changes regarding the circumstances in which workplace agreements commence operation. Currently workplace agreements take effect from the date that they are lodged with the Workplace Authority. This will continue to be the case for greenfields agreements and ITEAs covering new employees.[38]

2.63 The proposed amendments establish new operational arrangements for collective agreements and ITEAs covering existing employees. The changes mean that these agreements will take effect after they are approved by the Workplace Authority as passing the no-disadvantage test.[39] Specifically, the Explanatory Memorandum notes that such agreements commence operation 'the seventh day after date of issue by Workplace Authority Director under subsections 346M(2) or 346Q(2) (where the agreement as varied passes the no-disadvantage test).[40]

2.64 The NFF does not support the change in commencement dates for collective agreements and asks for an amendment so that all agreements commence on lodgement date. They cite the length of time between lodgement date and approval date as a frustration for employers given the delays experienced with the administrative process.[41]

36 Rio Tinto, *Submission 4*, p .6.

37 BGC Contracting Pty Ltd, *Submission 19*, p. 1.

38 Explanatory Memorandum, p. 6.

39 Explanatory Memorandum, p. 7.

40 Explanatory Memorandum, p. 26.

41 NFF, *Submission 21*, p. 3.

2.65 ABI also considers that the appropriate date of commencement of operation for all agreements is the lodgement date due to the lengthy delays being experienced with the Workplace Authority. [42]

2.66 In their submission, Rio Tinto states that it does not support the introduction of an operative date that extends beyond the date of lodgement. They illustrate their argument with the following example:

> It introduces the very off position where two employees can be offered similar ITEAs, one applicable from lodgement (a new employee), whilst the agreement for an existing employee must wait approval from the Authority.[43]

2.67 Rio Tinto believe there is no sound reason for this distinction as current provisions of the Act cater effectively for operation of agreements on lodgement with subsequent rectification if the agreement fails to meet statutory requirements.[44]

2.68 ACCI supports all agreements commencing from the time of lodgement but understands the government's intention is for the majority of agreements to operate from seven days of being approved and suggests an alternative agreements approval model:

> ACCI's model is to ensure that long standing well credentialed users of the system (who can provide a level of trust) assist in the Workplace Authority approving agreements and speeding up the process of approving agreements for employers, unions and employees. [45]

2.69 The Coalition notes the current delays with the Workplace Authority and supports ACCI's proposal for a fast track agreement making mechanism.

Undertakings to employees pending approval of an agreement

2.70 A number of witnesses raised the issue that the bill does not permit an employer to give an undertaking in respect of the agreements which operate from approval. Ai Group argue that the provision of undertaking has proved to be an effective way of addressing situations where an agreement does not pass the no-disadvantage test and requiring them to lodge formal variations is bureaucratic. At the Sydney hearing Mr Smith further explained:

> It might be that there is just a very minor difficulty – the employer might have to increase the wage rate by 1c per hour to meet the no disadvantage test – and to require the employer to go back through the formal process of varying the agreement is very bureaucratic, time consuming and costly,

42 ABI, *Submission 31*, p. 11.

43 Rio Tinto, *Submission 4*, p. 8.

44 Ibid., p. 8.

45 ACCI, *Submission 14*, p. 33.

> when the company might operate right across the country or might have its employees out in remote locations and so on. We think the undertaking process does work very well and should be retained. [46]

2.71 Coalition senators support retention of the capacity to give an undertaking rather than requiring a fresh vote to approve an agreement where, for example, wages have been increased to get it through.

The new no-disadvantage test

2.72 ACCI notes in their submission 'that there will be a considerable difference between the proposed NDT and the former pre-Work Choices NDT in relation to the benchmark used to assess the proposed agreements'. ACCI considers 'that the 'reference instruments' are not appropriate for ITEAs and that for both ITEAs and collective agreements the benchmark should be standard and consistent'.[47]

2.73 The Coalition notes ACCI's concerns that:

> The effect of using the words 'or would not result', appears to require the agreement to satisfy the NDT over the agreement's life and not at the point of conducting the NDT.[48]

2.74 ACCI also raised that:

> CAs contain wages which are far in excess of the minimum award derived pay rates which would not represent an appropriate transitional instrument for former AWA users.[49]

2.75 In their submission, Master Builders Australia note that 'whilst the Explanatory Memorandum states at page 6 that the no disadvantage test to be introduced will relate to 'future agreements' the broad words used in section 346(1) in particular could be taken to mean that existing agreements must meet the new test. This interpretation is derived from the use of the words 'in operation' in proposed section 346C(1). Master Builders suggests that, for the sake of clarity, the subsection specifically exclude workplace agreement made before the commencement of the legislation.[50]

2.76 The Electrical and Communications Association (ECA) support a no disadvantage test, but urge the government to rethink the benchmarking requirements, concerned that there will be a different benchmark for different companies. They note that within the construction industry collective agreements generally contain

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46 Ai Group, *Committee Hansard*, 6 March 2008, p. 6.

47 ACCI, *Submission 14*, p. 20.

48 Ibid., p. 29.

49 Ibid., p. 23.

50 Master Builders Australia, *Submission 3*, pp. 8-9.

provisions far in excess of relevant awards. The Association argues that the baseline for the test should be the relevant award for the industry of the company seeking the test 'as to include relevant instruments such as collective agreements…will provide an artificial inflationary figure and push wages beyond the ability of some companies'. [51]

2.77 The ECA also notes that the bill's requirements mean that a company can negotiate wages and conditions down which they argue is sometimes necessary in times of economic downturn.[52]

2.78 The ECA also notes that the bill's requirements mean that a company can never negotiate wages and conditions down which they argue is sometimes necessary in times of economic downturn.[53]

> The example I use here is a redundancy trust we have, into which $65 is paid for our members, for each employee. Our reading of the bill suggests that, if we wish to renegotiate that EBA two or three years down the track, and take our payments down to, say, $50 a week—because everyone now has a lot of money in their redundancy trust and no-one is being made redundant in our industry and probably won't for the next five years—it would fail the no-disadvantage test because of that, unless we provided a benefit somewhere else. And that is not always going to be practicable in economic downturn times.[54]

2.79 A number of witnesses raised the issue of the existing backlog of agreements at the Workplace Authority and expressed concern that the new arrangements will add to the backlog.

2.80 While not opposing the new no-disadvantage test, Rio Tinto is concerned that the introduction of the new test and the necessary introduction of new systems into the Workplace Authority will further add to the processing time of the existing backlog of agreements and new agreements. They note that while current delays are of concern the agreements at least are in operation throughout the delay which will not be the case for some agreements under the bill. To address the backlog they suggest the following: template approval and a simplified no disadvantage calculator that is publicly available. [55]

2.81 Coalition senators would like to see the issues outlined above clarified in the bill.

- That there is a need only to meet the NDT at the time of approval and not throughout the life of the agreement; and

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51 Electrical and Communications Association, *Submission 5*, p. 6.

52 Ibid.

53 Ibid., p. 6.

54 Electrical and Communications Association, *Committee Hansard*, 10 March 2008, p.30

55 Rio Tinto, *Submission 4*, p. 7.

- That the existing legislative standard is taken into account.

Award modernisation

2.82 Since 1996 a series of legislative changes reduced the scope and impact of awards. The WRA anticipated the decline of the awards system as a benchmark for wages and conditions. This bill reverses that policy and process. One of the objections to awards was their inherent inflexibility. Coalition senators note the claims that under the new award modernisation, awards will become more flexible. Coalition senators remain sceptical about whether the bill will achieve this, and how the bill will make award flexibility work in practice.

The cost of restoring awards

2.83 While supporting the award modernisation process a large number of witnesses highlighted a number of areas of concern.

2.84 First is increased costs for employers. While noting the award modernisation request that there should be no increased costs for employers, Mr John Rothwell from Austal Ships told the committee 'I have never yet known a workforce to vote up something for free. So there is a cost to be paid'. [56] Mr Rothwell further stated 'If we are going to change from AWAs to something else, there will be more costs involved'. He asked the committee to ensure that he changes are made as simply as possible and with as little disruption as possible.[57] 'All of the changes cost money, time explanation and communication and it is quite extensive'. [58]

2.85 This was reinforced at the Sydney hearing by Mr Stephen Smith from Ai Group who argued:

> It would be a disaster if the award modernisation process suddenly resulted in a levelling-up exercise. The last time we did a count, there were 340 federal awards in the manufacturing industry. When you add up all the NAPSAs as well, it is probably something like 400 or perhaps more. Even in the metal industry, there are more than 100 awards. If that resulted in a levelling-up exercise, it would be very negative. However, the point is there very strongly and it needs to stay there – although I know that some other witnesses have argued that it should not be there – that we believe this must not be an exercise of increasing costs.[59]

2.86 Professor Andrew Stewart from Adelaide University submitted that the award modernisation request currently expresses the intention not to either 'disadvantage employees' or 'increase the costs of employers'.

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56 Macmahon, *Committee Hansard*, 4 March 2008, p. 7.

57 Austal Ships, *Committee Hansard*, 4 March 2008, p. 14.

58 Ibid., *Committee Hansard*, 4 March 2008, p. 16.

59 Ai Group, *Committee Hansard*, 6 March 2008, p. 3.

> I expressed concern that any attempt to meet both those objectives would create major difficulties for the proposed process of modernisation. [60]

Complexity of process

2.87 Mr Paul Howes from the Australian Workers Union told the committee that in his view award modernisation will be an incredibly difficult process:

> For federal awards alone we have upwards of about 380 and then there are state awards that have now been brought into the federal system. It raises many complexities for us. We still have industries which primarily operate under an award system – the pastoral industry in particular is a key example. In looking at the pastoral industry award for example my great concern…would be the loss of the formula that exists to determine shearing rates…I understand that the formula came out of the 1956-57 shearers' dispute, which lasted for two years. It is very unique and very cumbersome but it is also a very productive way of determining the rate for shearing.[61]

2.88 Mr Smith from Ai Group told the committee that it will be a complicated process 'not only because of the issue of the number of awards and the very diverse conditions within them, but also because it is the government's aim to have common rule awards'.[62] He illustrated his point with the following example:

> If you look at the food industry, for example, and the processing of frozen vegetables, we have the AWU horticultural award, the Manufacturing Grocers award with the NUW and the Food Preservers award with the AMWU. You have three major industry awards with different conditions that at the moment apply to different companies. It has been an NUW site, an AMWU site or an AWU site. There are all sorts of issues that arise when you suddenly say that the processing of frozen vegetables has to be covered under one award. Where do you get the terms and conditions from? Not only are there issues about terms and conditions, there are issues about union coverage. That is just in the federal area. Once all the NAPSAs are rolled in together – and we believe it does need to be done and we are very committed to it – we are not underestimating the difficulty that we are going to face.[63]

2.89 The ECA supports the intention of the bill to provide modern, easy to understand and apply awards relevant to the industry they are intended to serve. However, they have reservations regarding the process of this modernisation. Specifically, section 576T which' suggests that modern awards must not include terms and conditions that are determined by reference to State and Territory boundaries or

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60 Professor Andrew Stewart, *Supplementary Submission 16A*, p. 1.

61 Australian Workers Union, *Committee Hansard*, 6 March 2008, p. 14.

62 Ai Group, *Committee Hansard*, 6 March 2008, p. 5.

63 Ibid., p. 5.

do not have effect in each State and Territory.'[64] ECA suggests the implication of this section are: that Queensland, which is not currently a respondent to the National Electrical, Electronic and Communications Contracting Industry Award 1998, would become a respondent to the award; and the wages as they are presently set out in the award would be a breach of section 576T and that there would be one wage list for all of Australia.[65]

State differentials

2.90 State differentials must be taken into account in running viable businesses in a country as diverse as Australia and any proposed transition to award modernisation and a unitary system of industrial relations will make this more difficult.

2.91 The matter of state differences was raised by a number of witnesses. Mr Smith also highlighted the removal of state differences, stating:

> We are very concerned about the provision in the bill that requires all state differences to be removed within five years. Five years sounds like a long time but it will drive the outcomes of the award modernisation process, and we believe that needs to be removed. [66]

2.92 Mr Howes told the committee that the state differentials in his industries are very large:

> Mining in Western Australia is vastly different from mining in Tasmania, and mining in Victoria is vastly different from mining in Queensland. My understanding is that there are constitutional issues in having state differentials put into the modern awards. I am yet to understand how the coverage will apply.[67]

2.93 He supported the extension of the nominal expiry date of preserved state agreements using the steel sector as an example:

> The steel sector is unique in most large manufacturing concerns. If you take BlueScope Steel for example, I have 4 ½ thousand members directly employed in their Port Kembla steelworks in Wollongong, and other unions have an extra 1, 000 members there. That enterprise has always operated under the state jurisdiction and continues to operate under the state jurisdiction through a different application through the federal commission. I think it is important for the surety of those enterprises going ahead and the complex and competitive issues that the steel sector faces at the moment.[68]

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64 Electrical and Communications Association, *Submission 5*, p. 7.

65 Electrical and Communications Association, *Submission 5*, p. 7.

66 Ai Group, *Committee Hansard*, 6 March 2008, p. 3.

67 Australian Workers Union, *Committee Hansard*, 6 March 2008, p. 14.

68 Ibid., p. 15.

2.94 Rio Tinto supports that enterprise awards are excluded from the award modernisation process. They note that this relates to Federal enterprise awards and as Rio Tinto has a number of enterprise awards initially made in state jurisdictions they would not support the removal of these enterprise awards (operating as NAPSAs) without further consideration of the parties.[69]

2.95 There were further concerns regarding the consultation process. ECA are concerned about the consultation process noted on p.78 of the Explanatory Memorandum highlighting that 'with many federal awards not having full coverage across Australia,….that the AIRC will only consult with organisations that are presently respondents to the award, and may not consult with organisations who will become respondents once the award is modernised.[70]

2.96 The Local Government Association of Queensland expressed some scepticism about the timeframe for award modernisation.

> It is not for us to say that we are opposed to modernising the award but, having been involved myself in the award rationalisation and knowing how long that took, the time frame—I agree with the previous presenters to you—taken just for that exercise was extensive. To modernise awards will take some considerable period of time, and we would probably reserve our judgment about whether the time frame provided is actually adequate.[71]

2.97 Coalition committee members note the high hopes and aspirations of the witnesses in relation to the award modernisation timeline and process and assurances from DEEWR but remain sceptical that the timeframe can be realised.

Long Service Leave

2.98 Coalition committee members note ACCI's concerns regarding long service leave. ACCI submitted that in relation to long service leave the Australian Government:

> …will, in co-operation with state governments, develop a national long service entitlement under the NES. In doing so, the Australian Government will also consult with major employers and employee representative bodies. Until then, long service leave entitlements derived from various sources will be protected. So as to not pre-empt the development of a nationally consistent approach, the Commission must not include a provision of any kind in a modern award that deals with long service leave.[72]

2.99 ACCI further noted:

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69 Rio Tinto, *Submission 4*, p. 8.

70 Electrical and Communications Association, *Submission 5*, p. 7.

71 Local Government Association of Queensland, *Committee Hansard*, 10 March 2008, p.39.

72 ACCI, *Submission 14*, p. 74.

> Unfortunately, the proposed approach to LSL would provide precisely the pre-emption of the review which the Government seeks to avoid.
>
> There are a number of LSL awards and award provisions which differ from state legislation. If modern awards are made without LSL provisions, costs will increase for employers and LSL benefits will change prior to the proposed LSL review being completed.
>
> The approach outlined is not a preservation of the status quo for those subject to award LSL. A superior approach would be to require a preservation of existing award LSL pending the outcome of the review and any specific changes/the creation of a new LSL standard. This would allow the review to consider the transitional and cost considerations for employers potentially coming off awards LSL/making some changes in this area.[73]

2.100 Coalition senators support the proposal to retain scope for awards to include long service leave at least until the government completes its proposed long service leave inquiry.

The possibility of future industrial unrest

2.101 An undoubted achievement of the past eleven years has been the general and dramatic decline in the level of industrial disputes. Despite talk of social and generational change, and different attitudes to work, the single most important cause of the long period of industrial harmony is the Workplace Relations Act. It has banned industrial action except in particular circumstances, particularly in circumstances where unions once postured in the weeks and months preceding negotiations for a new collective agreement. While the issue of industrial unrest is partly speculative, the committee heard witnesses acknowledge the potential for the bill to provoke industrial disputes. Ms Marcia Kuhne from the Chamber of Commerce and Industry WA, told the committee:

> In the transition away from AWAs into collective agreement making you immediately have the potential for industrial disputation because you are changing instruments – you are entering into a negotiation process where the ground rules will change. There is a period of negotiation and we simply say that there is potentially industrial disputation that may result out of that.[74]

2.102 Mr John Rothwell from Austal Ships also highlighted the potential for union involvement. He told the committee that after a very bad experience in their early period '(early 1990s) with a thuggish type behaviour by the union', their company is now a non-union yard where they have good relations with the workforce and have been experiencing industrial peace. The company has its own workplace representative committee which worked well. Mr Rothwell told the committee that

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73 Ibid., p. 74.

74 Chamber of Commerce and Industry Western Australia, *Committee Hansard*, 4 March 2008, p. 10.

their preference is not to be forced to negotiate with unions but to continue to negotiate with their workforce through the workplace committee.[75]

Difficulties faced by small contractors and micro-businesses

2.103 Evidence to the committee indicates that small businesses and micro businesses will be especially affected by the demise of individual agreements. The committee heard from the Master Plumbers Association of Queensland that while it has become easier to have collective agreements registered, their take-up by small business has been relatively low. This is because employers have had the flexibility to agree to employee requests for higher hourly rates in lieu of more flexible work arrangements.[76]

2.104 The size of the micro-business sector is very large. The committee was told that in only one Queensland service industry alone – electrical contracting - approximately 85-90 per cent of the 4 000 contractors employed fewer than 10 people.[77] The latest ABS figures nationally show that 1.9 million businesses (96 per cent of all business) employed fewer that 20 people, and most of these had an annual turnover of less that $2 million. Furthermore, the bulk of businesses are non-employing businesses or micro-businesses. [78]

2.105 The Electrical and Communications Association of Queensland told the committee that collective agreements did not suit the circumstances of small business. The committee was told that the small 'mum and dad' businesses have been the main beneficiaries of individual statutory agreements, and that the Association had been active in assisting its members to draw up individual agreements which meet the no-disadvantage test.

2.106 The Electrical Contractors Association also had concerns about the wider ramifications of legislative change affecting small and micro businesses. In relation to collective agreements being included as a benchmark for the proposed new no-disadvantage test, it told the committee:

> ECA believes that to include relevant instruments such as collective agreements, which traditionally provide for much higher wages and conditions than those set by the award, will provide an artificial inflationary figure and push wages beyond the ability of some contractors, and place those companies at a disadvantage to contractors who do not have collective agreements. Based on the above, and with the interests of fairness to all stakeholders, ECA respectfully requests that the government reconsiders the no disadvantage test benchmark and requirements.

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75 Austal Ships, *Committee Hansard*, 4 March 2008, p. 14.

76 Master Plumbers Association of Queensland, *Committee Hansard* , 10 March 2008, p.12.

77 Electrical and Communications Association, *Committee Hansard*, 18 March 2008, p.29.

78 http:www.abs.gov.au/AUSSTATS/abs@nsf/Previousproducts/8165.0Media%20Rel

2.107 Coalition senators believe that a wages blow-out may be one of the consequences of this legislation, and deal a blow to the small and micro business sector, particularly in the service industry sector which is most sensitive to movement in employment. This could occur (for instance) if union pressure in negotiation of collective agreements became a more common occurrence under the new regime. The results could include dislocation in the labour market and labour scarcity in key areas of employment.

2.108 When asked about the effect on employment following the abolition of AWAs, the Electrical Contractors Association confirmed that many of its members would revert to sub-contracting rather than employ people on the basis of a genuine employer-employee relationship. They would then encounter legal problems. Perhaps more significantly, it would discourage people from increasing the size of their businesses.[79] Coalition senators note this indication of disincentive for growth and productivity in the small business sector. As Mr Daly of the ECA pointed out:

> It is the small mum and dad companies—which have been the engine room of the economic drive in the last 10 years—that are employing these people, that are now starting to reconsider: 'Do I really want to go through the hurdles of possibly having to deal with the union to negotiate an agreement?' Not all of them will want to, not all of them will need to. But that is now the possibility that they are looking at, and they are the ones who will start saying, ' I do need another person, but I don't need them that desperately,' or, 'I might take them on as a subcontractor and just pay them 50 bucks an hour and that's that.' No other conditions, no protection, and that is the end of it. I do not believe that that is where we want our industry to go either.[80]

2.109 Coalition senators note with regret this realistic prognosis of trials to come.

Local government concerns

2.110 Evidence from the Local Government Association of Queensland (LGAQ) gave the committee a picture of very complex award systems in place, drawn from both state and Commonwealth jurisdictions. In providing a range of community services, local government authorities are highly dependent on the flexibility provided by AWAs in remunerating personnel on call. Evidence from the LGAQ ranged over issues that will need to be addressed and resolved in relation to this bill and subsequent bills. The first issue concerns individual agreements.

2.111 Clearly, there is a concern that the abolition of individual agreements will inhibit the ability of local government to staff essential services. Instances of likely problems were given by the LGAQ:

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79 Electrical and Communications Association, *Committee Hansard*, 18 March 2008, p.29.

80 Ibid., p. 31.

> If I might just give one example: in one of our regional centres, the only swimming pool in the town was leased out to a person prior to the HIH collapse. That person ran the swimming pool, they ran the shop and they ran swimming classes, and their income came from that. They leased it out for a minimal cost to the council and council was happy because there was a service being provided. The bottom line is that the cost of public liability became too expensive for that particular lessor to continue with the arrangement, so they are going to close the pool. The cost of council taking it on and having to pay that person for the normal hours that they would work to run the swimming program, which were generally outside of what we would call normal working hours—because the nature of a swimming pool is that it is mainly for children and it is used after school and before school and on Saturdays and Sundays—was triple costs for overtime, working on weekends. There is the cost of that under the ordinary award, plus then you bring in the plethora of allowances for running shops and for expert swimming tutors et cetera cetera, and it would just become too expensive for the council to continue to run it. We arranged an AWA in that case, and that allowed the person to continue to work as an employee. The council took on the cost of the public liability. The person's wages were supplemented. They had part of their income under the AWA from the gate takings and from running lessons, so it continued the old lease arrangement but allowed the council to take on the public liability. In that particular instance, that pool probably would have closed or, at best, it would have cost the council an enormous amount of extra dollars which would have had to be taken off some other services that council would have provided.[81]

2.112 The LGAQ gave further examples of a person working as a security officer/caretaker at a community centre who also cooked meals for children on care orders, local laws officers and dog and stock catchers. [82]

2.113 This brings us to problems with awards. Local government across the whole country is beset by problems relating to awards, complicated by the question of whether they are 'constitutional corporations'. The issue of award complexity was described to the committee:

> LGAQ has direct involvement in the negotiation of agreements and awards covering about 400 different occupational categories, involving at least 23 awards, at least 168 collective agreements, between 40 and 60 AWAs and then a plethora of what are called local area workplace agreements, which are known perhaps by the committee as site agreements, along with other individual instruments such as what are called common-law contracts. So we have in Queensland local government a mix of industrial instruments. LGAQ's concern is that, whatever legislation is enacted by the federal parliament, it does not constrain the necessary flexibility for local government to function, to provide services to communities, to attract and retain its workforce and to ensure that it is able to compete against its

81 ibid., p. 41.

82 LGAQ, *Committee Hansard*, 10 March 2008, p. 42.

> competitors, which is not other tiers of government but the mining sector in Queensland, for example, or in the south-east corner, and the building and construction sector.[83]

2.114 Coalition senators note here that 'competition' refers to competition for labour in a tight employment market. Further to this evidence, the LGAQ added:

> … local government is not characterised by the principles that apply to the awards. Local government is not characterised by ordinary hours that extend from seven till five. Local government provides services often 24/7, so the prescriptions that apply in the awards are not always particularly helpful in regulating the industrial relations entitlements and wages for employees of council. A classic example is the local laws officer and the dog catcher or, as it will be in the country, catching stray cattle. They may well get a phone call at 11 o'clock at night and then the police ring them back and say, 'Oh, we've sorted it.' If you were to apply strictly the award, that employee on the basis of the award would not be able to re-enter the work site and commence duties for 10 more hours after that phone call, which is a nonsense.[84]

2.115 The LGAQ stated that flexibility clauses within awards as proposed by the award modernisation system already existed and were insufficient to their needs:

> All of our awards do have an enterprise flexibility provision within them. What I am saying to you is that was insufficient, hence the plethora of local government being redolent with side agreements, otherwise known as LAWAs, because they were premised on calling up an antiquated award that did not reflect the business needs or the realities for employees in local government.[85]

2.116 The LGAQ has called for new national local government awards. Coalition senators note that this is a matter for the AIRC. But it also notes that one of the most serious pressure points that will be experienced under the new legislation will be awards modernisation. A glimpse at only one sector, local government, gives an insight into the challenge ahead. It is one that Coalition senators on this committee will be closely monitoring.

Other issues

2.117 A number of issues were reported to the committee which highlight potential uncertainties that may be created by the transitional bill and these are highlighted below.

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83 Local Government Association of Queensland, *Committee Hansard*, 10 March 2008, p. 38.

84 ibid., p. 42.

85 Local Government Association of Queensland, *Committee Hansard*, 10 March 2008, p. 39.

Other 'uncertainties' and drafting issues

2.118 Several submissions have referred to problems of drafting. These may be more properly defined as 'uncertainties' about policy implementation. The submission from ACCI contains a comprehensive list of what may be described as 'uncertainties', which include apparently unnecessary provisions.

2.119 ACCI has queried why, for the purposes of performing the NDT, the relevant benchmark is not explicitly against the Australian Fair Pay and Conditions Standard, as mentioned in the Minister's second reading speech.[86]ACCI also has concerns about wage rates and the NDT. It also believes that there may be an anomaly for a global NTD to not be conducted against minimum wage rates, and how the Workplace Authority can consider pay scales in particular circumstances.[87] There are also queries in the submission concerning award designation, pre and post-lodgement designation. These are matters which the committee was not able to follow up with DEEWR in the time available.

Repeal of s.355

2.120 ACCI notes that 'section 355 of the WRA provides that agreements can only refer to a limited number of other industrial documents (ie. Federal awards and workplace agreements). It limits the extent to which parties to agreements can re-introduce instruments which have otherwise ceased to apply'.[88] They highlight that the repeal of s.355 was not announced in any policy document and caution that the deletion of s.355 will lead to a blow-out in agreement approvals, if the Workplace Authority must scrutinise any documents that are called up by the agreement.[89]

Earnings above $100,000

2.121 The Government's Forward with Fairness Policy Implementation Plan says:

> In Labor's new industrial system, employees earning above $100,000 will be free to agree their own pay and conditions without reference to awards.[90]

2.122 Professor Andrew Stewart confirmed his view that nothing in the bill achieves this objective.[91]

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86 ACCI, *Submission 14*, p.25.

87 ibid., pp. 27-28.

88 ACCI, *Submission 14*, p. 61.

89 Ibid., pp. 62-63.

90 *Forward with Fairness - Policy Implementation Plan,* Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, August 2007, p.9.

91 *Committee Hansard, 7 March 2008, p. 8.*

2.123 The Government's Forward with Fairness Policy Implementation Plan goes on to say 'Labor in Government will legislate to confine the application of Labor's new award system to employees who earn less than $100,000 per year when the new award system commences on 1 January 2010.' Professor Stewart further confirmed the bill does not achieve this. He indicated that he had expected to find these provisions in this bill. [92]

2.124 Coalition senators are concerned by the absence of these critical provisions, particularly given the Government promised their implementation by 1 January 2010.

2.125 It was further pointed out to the committee that the new Part 10A does not refer to the $100,000 threshold provided for in the government's policy *Forward with Fairness Implementation Plan.* The Chamber of Commerce WA suggested that the government supply its rationale for selecting the $100 000 limit in the Explanatory Memorandum.[93]

2.126 Coalition senators support their call that the commitment must be reflected in the transitional bill setting out a clear exemption from awards for employees receiving earning in excess of the threshold.

Unitary System

2.127 Ms Denita Wawn from the National Farmers Federation (NFF) told the committee that employers who are not incorporated and who are under a five-year transition process will not have the benefit of award modernization unless all the state governments refer their powers to the Commonwealth to ensure that everybody is in the same system.[94]

2.128 The NFF raised the issue that the reforms sought through the bill will not cover those employers and employees whose employment is covered by the federal transitional award system.

> That is, employers who are not corporations but were covered by federal awards prior to the introduction of Work Choices have been provided a transitional federal award system for a period of five years that is set to expire in March 2011. Those employers seek to be covered by the federal workplace relations system. [95]

2.129 Coalition senators note that moves toward a unitary or national system of industrial relations is inevitable over time. It is a process that will test the resolve of the current government to put its case to the states in pursuit of this policy.

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92 Ibid.

93 Chamber of Commerce WA, *Supplementary Submission 24A*, p. 1.

94 NFF, *Committee Hansard*, 6 March 2008, p. 24.

95 NFF, *Submission 21*, p. 8.

Telstra redundancy

The committee heard details of particular cases bearing on the changes to be implemented by this legislation. The case of Telstra redundancies was drawn to the attention of the committee by the Communications Electrical Plumbing Union (CEPU). There was a concern about the possibility of provisions of this bill extinguishing the old IR redundancy provisions. The consequence of this would be a diminished payout on redundancy.

Low paid workers

2.130 Coalition senators received assurances that the matter of low-paid workers will be dealt with in future legislation. There is a need to place a safety net under vulnerable low-paid workers, who often operate in an award-free environment. This should be considered by the AIRC as part of its award restructuring task. The committee has heard much over the past two years about the plight of exploited workers in the textile and clothing industries, and their plight needs to be taken seriously.

Conclusion

Coalition senators generally approve of measures in this bill which strengthen no-disadvantage provisions to ensure fair bargaining between employers and employees. The Coalition also accepts that for many workers and employers the award is a necessary benchmark to ensure fairness in any negotiation for either an individual agreement or a collective agreement. To this end it supports award modernisation and the future role of an independent body, such as the AIRC. However, the bill reflects the regressive policy of the government in attempting to abolishing individual statutory agreements. This is a step too far, and risks an agreement making regime which is adversarial and acrimonious. These elements of workplace culture which were present for most of the country's industrial history have mercifully disappeared over the past twelve years. They have not been missed, and should not be resurrected.

Senator John Watson **Senator Sue Boyce** **Senator Mary Jo Fisher**
Deputy Chair

Australian Democrats' Additional Remarks

Introduction

The Australian Democrats support the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (the Bill) as improving the *Workplace Relations Act 1996* (the Act), not least from a fairness perspective. I said in my third reading speech on 2 December 2005, that in passing WorkChoices[1] the Coalition were making '*not just an economic mistake, not just a social mistake, but a political mistake'.* I said:

> This bill assaults the cultural, economic, social, institutional, legal, political and constitutional underpinnings of work arrangements in Australia. It aims to radically alter our work systems and values. … Our problem is that the case still, to this moment, has not been made that the economic and the social situation in this country desires or needs this radical change. This change would not have happened if the Australian Democrats still held the balance of power in this chamber.

I support much in the Majority Report. Nevertheless, there are a number of additional remarks that are warranted. I do not intend to cover all the ground outlined by the witnesses and for these purposes focus on just one or two of the main issues.

Nevertheless I note that academic union and employer witnesses to the Inquiry have all made a case for amendments that would improve the Bill, and in some instances have provided draft wording for the legislative changes suggested.

Plus ca change

When I saw the Majority recommendation that the Bill be passed, without any other formal recommendation for specific amendments, I recalled the epigram[2] - 'the more things change the more they stay the same'.

It beggars belief that when a range of witnesses make a case for amendments that would improve the Bill – including recommendations from such reputable and experienced witnesses as the Australia Industry Group, the Australian Council of Trade Unions, and Professors Buchanan and Stewart – that the Majority cannot find even one change to formally recommend. Admittedly the Majority have indicated areas of concern – both technical and substantive – but those do not constitute recommendations.

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1 The *Workplace Relations Amendment (Work Choices) Bill 2005.*

2 Attributed by *Wikipedia* to the 19th Century French journalist Alphonse Karr – *plus ca change, plus c'est la meme chose*

It may not be the case with respect to the members of this Committee, but as a general point, it is a matter of long regret in our Senate that senators from the government – any government – often seem to feel themselves sufficiently constrained by their party being in government, and a belief that the Executive should have passage of their legislation, that they cannot bring themselves to carry through the logic of a Senate review process, and that is to formally recommend evidence-based changes to a bill.

The failings of Work Choices are generally (and rightly) sheeted home to the former Prime Minister John Howard and his government, but Coalition senators who knew how slim the government's Senate majority was had the power of numbers. Just a couple of Coalition senators holding out for substantive changes could have altered the course of that bill. Those that heard the evidence and did not act therefore share the blame. If the Coalition senators participating in the truncated charade of the Work Choices Senate inquiry had responded to the widespread criticism of so many witnesses, and exercised their conscience vote based on the evidence before them, then perhaps Work Choices would never have been quite the failure it became.

Another feature of the Work Choices inquiry and debate was that the very essence of academic freedom[3] was threatened at times by McCarthyist attitudes from some Coalition senators towards academics critical of that bill. I protested at the time that such attacks were a discredit to the Senate. The memory of those days obviously still rankles. In this Inquiry Professor Buchanan opened with these remarks:

> *…before talking about the key issues that I want to get to, I just want to note that academic participation in forums such as these has become a bit of an occupational hazard.*[4]

I was pleased that in this new parliament, this Committee saw a return to greater latitude in allowing questions, the normal courtesy to witnesses, and a return to the better and more considered and considerate Senate Committee processes and practices that were sometimes absent during the term of the last parliament.

Unfair Dismissal (UFD)

Professor Stewart made some key observations on dismissals that deserve attention:

> Protecting employees from dismissal
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> Proposed s 346ZJ provides that an employer must not dismiss or threaten to dismiss an employee because a workplace agreement does not or may not pass the NDT. However there are at least three obvious loopholes in this

3 ABC Tuesday 26 February 2008 interview with Professor George Williams UNSW – Salleh: 'Williams says some countries like New Zealand have specific legal protection for academic freedom and a bill of rights that provides general protection for free speech. But Australia has neither.' "Australian researchers are uniquely vulnerable when it comes to the lack of protection for academic freedom and free speech," he says.

4 Dr John Buchanan *Committee Hansard*, 6 March 2008 p. 31

provision as drafted. The first is that an employer could offer a worker employment under an ITEA on a "take it or leave it" basis, with a clause in the employment contract that if the ITEA subsequently fails the NDT and is annulled, the employment will automatically cease. In such a case there is arguably no "dismissal" in the strict legal sense: the employment contract would simply have ended by reason of the operation of its own terms, rather than by any action of the employer.[5] Hence an employer using such a device would arguably not be at risk of any prosecution under proposed s 346ZJ. To avoid this result, the prohibition should be extended to cover a refusal to offer further employment. The second loophole may arise even where it is clear that the failure of a proposed agreement to pass the NDT has resulted in the dismissal of an employee. The employer may seek in such a case to argue that the "sole or dominant reason" for the dismissal was not the failure of the agreement to pass the NDT as such, but the fact that they could not afford to employ the worker on the terms demanded by the Authority as a basis for satisfying the test.[6] This sort of sophistry could be avoided by providing that the prohibition applies when one of the reasons for the employer's action is the failure or possible failure of an agreement to pass the NDT, or any consequences likely to follow from such a failure. A third drawback of proposed s 346ZJ is that it applies only to dismissal, not to lesser "reprisals" such as the reduction of hours for casual and/or part-time employees. The prohibition could usefully be extended to cover any action that injures an employee in their employment or that alters their position to their prejudice.

The other major issue in this area of law concerns the continuing exemption of the millions of employees that fall under federal law from the unfair dismissal (UFD) protections that are available to employees of large organisations with more than 100 employees.

The Democrats support the right to protection from UFD, not only for employees in organisations employing more than 100 persons, which is the present provision in the Act, but for all employees. ILO Convention 158, ratified by Australia, holds that an employee must have a "valid reason" for dismissing an employee.

The Democrats do accept that complex loosely drafted and costly UFD provisions are highly undesirable. Such negativities are regarded as having particular affects on small business. Both small business and their employees do have a need for rapid

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5 In the same way that there is no dismissal or termination at the initiative of the employer when a contract for a fixed term reaches its expiry date: see eg Victoria v Commonwealth (1996) 187 CLR 416 at 520.

6 Cf the reasoning adopted in cases such as Grayndler v Brown [1928] AR (NSW) 46 and Klanjscek v Silver (1961) 4 FLR 182, and also by Merkel and Finkelstein JJ in Greater Dandenong City Council v ASU (2001) 184 ALR 641.[6]

low-cost dispute resolution, and for minimising vexatious claims. Recognising that need, the Democrats negotiated changes to UFD law that saw the number of federal UFD applications fall by over 60 per cent from 1996, 50 per cent after our successful 1996 negotiations and a further 12 per cent after our successful 2001 negotiations.

These matters have been the subject of extensive Senate debate and a number of reports.[7]

The extent of the UFD problems under federal law was wildly exaggerated. Using Western Australia as an example (the figures below were provided by the federal government, who later ceased providing the data): there were less than 100 UFD applications for WA small business a year under federal law. The vast majority of UFD applications were actually under state law.[8]

- WA 1996 total UFD applications under federal law were 1 875.
- WA 2003 total UFD applications under federal law were 316, of which small business constituted 79; (note the fall of 83 per cent).
- WA 1996 UFD applications under state law were 918.
- WA 2003 UFD applications under state law were 1 314.

While there were 6 954 applications nationally for federal UFD in 2003, only 34 per cent or 2 153 of those were for small business nationally. One argument has been that anecdotal evidence exists of ‘go away’ money being paid, so that the resolution of UFD incidents has been understated. Over the years the evidence of large-scale 'go-away' money payments has never been supported in any credible manner in employer submissions to the Committee. It certainly exists, but there is no empirical evidence that it existed in federal UFD applications to the extent implied or asserted.

The Democrats and Labor have never accepted the claims that exempting small business from UFD creates tens of thousands of new jobs. On the job creation front, comprehensive research undertaken by Senior Lecturer Paul Oslington and PhD student Benoit Freyens at the University of NSW School of Business found that ending UFD laws for employers with fewer than 100 employees could create 6 000 jobs, not the 77 000 claimed by the Howard Government.

So what motivated the Coalition’s long UFD campaign? Prior to the 1996 federal election the Coalition promised to replace Labor's unfair dismissal laws with a "fair go all round" for employers and workers. Little detail was provided, but it was clear that

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7 See for instance Senate Employment Workplace Relations and Education Reference Committee Report June 2005: 'Unfair dismissal and small business employment'

8 If you want to know just how different the state regime was - see the Senate Employment Workplace Relations and Education Reference Committee Report June 2005: 'Unfair dismissal and small business employment' (Appendix 6).

all workers would have access to the regime, and that the test for unfair dismissal would be closer to the pre-1993 rules. After the Democrats' 1996 negotiations with the Howard government it was clear the Coalition had no intention at all of changing their pragmatic UFD 'qualified support' policy in 1996/7, on which they had negotiated an acceptable UFD outcome with the Democrats.

One of the things the Howard Government did want early in its term was a double dissolution (DD) trigger to maximise their election date options,[9] ideally on a simple single proposition that they knew would be rejected. UFD was just such an issue. I have always maintained (see Hansard debates) that the first UFD exemption bill was designed solely for the purpose of a DD trigger. The *Workplace Relations Amendment Bill 1997* proposed a permanent exclusion from UFD rights for new employees in businesses of less than 15 employees. The 1997 bill was to become the DD trigger the government wanted.

Only later did the proposed UFD exemption for small business reach totemic status as a Coalition policy. Later UFD bills not only had the virtue of being an assured DD trigger, but were a popular (with certain media/business/political sections) policy rallying call.

UFD is germane to this Bill, which intends to introduce greater fairness into the workplace. As this Hansard extract shows, Curtin University's Professor Alison Preston was among a number of witnesses who made it clear that a provision for dealing with UFD was an essential element of a fair regime for employees.

> Under Work Choices, the group of workers that we are particularly interested in following—which is women, many of whom are in the low-paid sector—were particularly disadvantaged by the industrial relations system, partly because of the provisions in AWAs but perhaps more importantly because of the restrictions on prohibitive content and also the removal of protection from unfair dismissal. When I look through the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 that is in front of you now, I am very pleased with the changes that have been proposed there. My main concern is that I do not think that it goes far enough. I was disappointed to see that it does not yet address the question of unfair dismissal. I know that the ALP has made a commitment to a five-year transition period for AWAs signed now. That is a long and generous period for transition. It would be more favourable for many of the

9 Double Dissolution Triggers - 38th Parliament (30/4/96 to 31/8/98): Parliamentary Service Bill 1997; Public Service Bill 1997; Public Employment (Consequential and Transitional) Amendment Bill 1997. The status of these bills as triggers was disputed on the basis that the usual procedure was not followed. The Senate was not given an opportunity to reconsider its amendments and decide not to insist on them, thereby allowing the bills to pass. In any case later versions of these bills were passed in a subsequent Parliament. So the only real trigger was the Workplace Relations Amendment Bill 1997 which was negatived by the Senate at second reading on 21 October 1997 and the [No. 2] bill was negatived by the Senate at second reading on 25 March 1998.

> workers who had been disadvantaged to have a shorter transition period, but I understand that that is not what the bill is going to address.[10]

This provoked this later line of questioning:

> **Senator MURRAY**—I want to turn to your unfair dismissal remarks. Mr Rothwell from Austal, a witness earlier today, told us that Austal had 1,200 employees. Under the present law, they are all subject to unfair dismissal provisions because there are over 100 employees. So your remarks relate to below the 100 employees. You might not know but I am a strong supporter of unfair dismissals for all employees subject to the proper probationary period and various protections. Do you support the government policy of cutting off organisations below 15 employees from unfair dismissal provisions?
>
> **Prof. Preston**—No, I do not. My position is that all organisations should be subject to the unfair dismissal provisions—again, as you said, subject to probationary periods et cetera. Again, many women work in small businesses. The small business sector is very large in Western Australia—unfortunately, I do not have the statistics here—and many organisations work with less than 15 employees. I do not see why, if you work in an organisation of less than 15 employees, you should not be able to access the same provisions as your colleagues in slightly larger firms.
>
> **Senator MURRAY**—Is the main point in your submission—and I obviously have not had a chance to read it—that this bill would be improved if unfair dismissal provisions were restored immediately because that would allow a greater measure of fairness to exist during the transition period? Is that what you are saying to us?
>
> **Prof. Preston**—I do not think I could have put it any better.
>
> **…**
>
> **Senator MURRAY**—The essential argument of the coalition was that small business should not be subject to unfair dismissal provisions, yet they applied it at 100 employees, which is greater than the ABS definition. So you would argue that it would be a significant improvement if unfair dismissal was at least to apply at the level already determined by Labor and agreed to by the coalition, which is essentially at the small business level. Labor is saying 15 and the coalition might say 20, but there is not that much difference.
>
> **Prof. Preston**—I am sure you will not be surprised to find that I agree with you again. No, I would absolutely. The argument around unfair dismissal is very much that, if you put it there, it is going to limit employment growth. I think the other arguments around unfair dismissal have to look at the productivity effects of those provisions. I think the onus comes back on the employer. With suitable probationary periods there, they have ample time to work out whether or not an employee is suitable, is performing, and do

10 Professor Preston, *Committee Hansard*, 4 March 2008, p.25.

not need to have the protection of a system that says that you are able to dismiss at will.[11]

Unions WA also supported comprehensive UFD coverage:

Senator MURRAY—A previous witness, Professor Preston, put forward the proposition that employee protections in this bill would be enhanced if unfair dismissal provisions were restored for those organisations with fewer than 100 employees. What is the policy of UnionsWA with respect to unfair dismissal provisions?

Ms Hammat—We would wish to see the unfair dismissal provisions changed as soon as possible.

Senator MURRAY—Would you stop at 15 employees?

Ms Hammat—I suppose it begs the question: why would an organisation with 15 employees be treated differently to one with more than 15?

Senator MURRAY—I happen to agree with that.

Ms Hammat—With the number of 15?

Senator MURRAY—No—with your argument.

Ms Hammat—It seems very arbitrary to simply move the benchmark from 100 to 15. We see 15 as a clear improvement. We would want to see those aspects of the legislation changed as soon as possible. We are disappointed that the unfair dismissal provisions are not changed in this bill rather than waiting. Those provisions leave many employees very vulnerable in their workplaces, and the sooner they are changed the better.[12]

As did other witnesses in Melbourne and Brisbane.

Ms O'NEILL—This sometimes characterises issues about union rights. I would like to give you some examples of issues that are about workers' rights. Right now, if I try to put a right for unfair dismissal in an agreement for low-paid textile workers, if they want to bargain to get back some of their unfair dismissal rights in their collective agreement, then not only can I be fined and my union be fined but in fact the workers that asked to have that protection included in their agreement can also be fined. How can it be that a government— this government—that is saying it is going to restore unfair dismissal rights for workers, in this period of so called transition, cannot address the fact that where workers want to bargain to have those rights included now they in fact would be fined for just asking for it? You will see workers and their unions fined for asking for something that is now government policy. It is nonsensical to think that, in improving conditions, there should be those sorts of provisions applying when these things are in fact in keeping with current government policy.

11 Professor Preston, *Committee Hansard*, 4 March 2008, pp. 27-28.

12 Unions WA, *Committee Hansard*, 4 March 2008, p. 36.

> Going back to Ms Wiles's point about the intersection, the other issue for us is that, if you are able to be unfairly dismissed in the system and this bill does not deal with the restoration of unfair dismissal rights for workers—and many of the members and workers in our industry are in workplaces with less than 100 employees—back into the system, whatever the size of the workplace you work in, then your vulnerability to the other things that I have described increases dramatically. If you have the combined effect of having your job threatened, with no rights of redress in terms of dismissal, as well as the loss of jobs and the economic pressure on workers in this industry, as well as the effect of ongoing AWAs and ITEAs and the effect of not getting your union into the site, you can see how it leaves this group of workers, whom we say are going to have an entrenched disadvantage over this period of the transition bill.[13]
>
> **Mr GOODE**—To wrap this up, Ms Walsh referred to our submission to the Queensland Industrial Relations Commission inquiry into Work Choices in 2006. We made it clear then that we opposed the absence of a no disadvantage test for AWAs, and we are on record as saying that. The other part that we put a fairly strong opposition to was the imposition of the 100-employee arbitrary cut-off for access to the unfair dismissal laws. We opposed that as well. In that regard we welcome the abolition of the 100-employee arbitrary cut-off. [14]

Recommendation 1

That unfair dismissal provisions for all employees be restored to the Act.

Individual Statutory Agreements (ISAs)

The Australian Democrats believe a mix of agreement making between employers and employees – collective industry awards, collective enterprise bargains and individual agreements - in all their various forms – provide the necessary flexibility and choice for employment contracts in a modern economy. The over-riding proviso is that all agreements must be fair to both employers and employees.

A modern liberal democracy should always enshrine fair minimum standards of wages and conditions for workers. A modern workplace relations system must also make a material contribution to Australia's efficiency, wealth and job creation, productivity and internal and external competitiveness.

As stated earlier, the Australian Democrats opposed the Coalition's Work Choices workplace laws. Those laws are best summarised as unfair, inefficient and counter-productive. This Bill of course does not replace Work Choices – it just attends to some elements of it.

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13 Textile, Clothing and Footwear Union, *Committee Hansard*, 7 March 2008, p. 23.

14 Local Government Association of Queensland, *Committee Hansard*, 10 March 2008, pp. 43-44.

The Democrats opposed Work Choices AWAs and will be glad to see the back of them.

In her submission, Professor Alison Preston provided a table[15] drawn from the Australian Bureau of Statistics (ABS) May 2006 (6306.0) series, that in summary indicated that Australian employees are covered by the following broad categories of collective agreements:

- awards (federal/state) only – 21 per cent
- collective agreements (registered/unregistered; union/non-union) - 44.5 per cent
- individual agreements (statutory/common law) - 34.5 per cent

Employment is presently estimated as above 10.6 million, perhaps moving towards 11 million by 2009. If we use the 10.6 million figure, this breaks down as:

- awards (federal/state) only - 2.1 million persons
- collective agreements (registered/unregistered; union/non-union) - 4.7 million
- individual agreements (statutory/common law) – 3.7 million

These statistics can be accepted as accurate but not exact. They are historical, subject to time lag, and collecting evidence in this area is not always easy. For instance although the number of (federal and state) registered ISAs are around 3 per cent according to the ABS, I have seen later estimates of them being 5 per cent or even 7 per cent of all agreements. Whatever, ISAs do not cover more than 1 in 15 employees at best, and likely, not more than 1 in 20. Still, at the least, that is more than half-a-million people on ISAs.

To end the contractual rights of half-a-million Australians would be a significant step, especially if the chosen instrument is genuinely a matter of free choice. The assumption is that all Australians on Work Choices AWAs will be happy to see the end of them. That may be so for many Australians on Work Choices AWAs, but it is a long jump from there to decide that means that half-a-million Australians were also all opposed to the very different pre-Work Choices AWAs, or are all now opposed to ISAs as a distinct class of industrial instrument.

Here is what Professor Preston had to say on the matter:

> **Senator MURRAY**—Bearing in mind that the government supports common-law individual agreements, and also bearing in mind that individual statutory agreements can be of many kinds—Work Choices is just one kind; a very bad kind, but one kind—do you take the view that individual statutory agreements are always going to be worse than common-law individual agreements? And if you do, why?
>
> **Prof. Preston**—No, I do not. I think, again, given that we know that the individual statutory agreements are going to be for employees who earn $100,000 or more, I think that that in some ways is a very fair cut-off point.

15 Professor Preston, *Submission 46*, Table 6, p. 16.

> At that point you can expect that individuals will have a bit more ability to negotiate terms that are going to be suitable to themselves.
>
> **Senator MURRAY**—My general point is this: if you devise a fair individual statutory agreement, the protection for both employees and employers—and, by the way, it needs to be enforced by a strong regulator—is greater than under the common law, as a general principle. Do you accept that argument?
>
> **Prof. Preston**—Yes, I do.[16]

Fortunately, it does seem that Labor is being more cautious in government than might have been predicted before the election, certainly judging by this Bill and its transitional ISA stream – the Individual Transitional Employment Agreement (ITEA).

The odd thing about Labor and union policy is that both support (in Labor's case) and accept (in unions' case) that individual agreements are needed as an ongoing form of employment contract, yet both seem to subscribe to the myth that common-law individual agreements are automatically somehow better than ISAs.

The AWU's Mr Howes attitude to individual common-law agreements was this:

> **Senator MURRAY**—Does your union support common-law individual agreements?
>
> **Mr Howes**—We do not support common-law individual agreements. We think the best way of bargaining for workers is through collective, registered agreements, but we do not oppose individual agreements. They have been in existence in the Australian workplace since Federation and we certainly do have a number of members who work under common-law individual agreements.[17]

The President of the ACTU was equally clear in her belief that only collective agreements can protect and sustain working people in a way that ISAs, by their nature, cannot:

> **Ms Burrow**—…Common law exists; if people really want individual arrangements then you can do your best to use that, but working people, employees, should always have their rights protected. Statutory individual contracts have never and will never do that because it shifts the power balance.[18]

The easy demonisation of all ISAs by the very evident failings of just one version of ISAs (Work Choices AWAs) of the many possible versions of ISAs, is indefensible from a policy perspective, despite its political success.

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16 Professor Preston, *Committee Hansard*, 4 March 2008, pp. 27-28.

17 Australian Workers Union, *Committee Hansard*, 6 March 2008, p. 13.

18 ACTU, *Committee Hansard*, 7 March 2008, p. 45.

Common law agreements put employees far more at the mercy of employers than do fair ISAs that are fair and properly regulated. With respect to employment matters, Australian common law precedents are often rooted historically in English master-servant concepts, often with a bias towards master, the very criticism levelled against Work Choices AWAs.

Unions often portray themselves as champions of human rights. They do have a long and proud history of standing against tyranny of one sort or another. Yet campaigning against ISAs as a class of industrial instrument in favour of individual common-law agreements represents a diminution of human rights.

My eye was caught by an article on a charter of rights.[19] The President of the NSW Bar Association said:

> *It is abundantly clear that human rights are not adequately protected under the common law…*

The common law is unwritten law based on custom or court decisions. Statute law is the law laid down in Acts of Parliament. It provides certainty.[20] Why regulate industrial relations by statute at all? Why not just let the common law apply to the whole industrial relations process, including collective agreements?

The answer is because the common law is inadequate. Common-law is not precise, as it comprises accumulated and varying judgements and judicial principles only established on a case-by-case basis. Statute is much more precise. Statute is easier for the parties to an agreement to administer and comprehend, but if a dispute gets serious, statute makes a difference when courts have to adjudicate.

Precise statute leads to precise judgements. Imprecise common law leads to imprecise judgements. Statute also allows contract disputes to be resolved in fast low-cost easy access tribunals, instead of the slow costly courts. Furthermore, statute can ensure easy enforcement and penalties for transgressions.

In industrial relations, statute provides much greater protection, flexibility, and easier usage than the common law. Statute is able to add protections and precision denied by common law. This is why workers compensation laws for protection in case of work injuries are now almost completely regulated by statute law.

There are three basic types of individual employment agreement in Australia: individual agreements based solely on statute; individual agreements based on common law but with awards applying to them (hybrid statute/common law agreements); and individual agreements based solely on common law.

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19 The Australian Friday 14 March 2008 page 34 Legal affairs section – Anna Katzmann SC President of the NSW Bar Association - Charter of rights will make pollies more accountable

20 From an employer's perspective on certainty, see Perth hearing Chamber of Commerce and Industry Western Australia Tuesday 4 March Committee Hansard, p. 11.

Labor is proposing the hybrid type of individual agreement. They are proposing two classes of individual agreement – arbitrarily divided on what basis no one knows - one above $100 000 earnings, where supposedly completely flexible common-law agreements apply (but subject to statute through the yet-to-be-finalised National Employment Standards)[21]; and those below $100 000, with stronger statutory protections, and a reference back to the applicable award.

It is important to understand that employees under pure common law individual agreements are the most exposed to employer prerogative and are the least protected, and have much more difficult disputation resolution, while those under hybrid type agreements have the least flexibility in varying their working conditions to suit individual circumstances.

The policy lines are clearly drawn. Of the political parties, only the Democrats had believed that properly enforced and regulated ISAs must be underpinned by the applicable award, (with awards restricted to allowable matters), subject to a global no-disadvantage test. Post the 2007 federal election, this seems to be becoming a 'mainstream' position.

Since 1996 the Democrats have been joined with the Liberals and Nationals in believing ISAs must be available as an alternative to both hybrid statutory/common law individual agreements and pure common law individual agreements. The Greens do not support these propositions.

Intriguingly, this Bill, as some witnesses to the Inquiry pointed out, does seem to offer a permanent (and fairer) ISA regime going forward, at least until the substantive bill due later this year, so perhaps Labor's position is less antagonistic to ISAs than was previously thought. Time will tell.

There is one basic point to decide on: do you need ISAs to provide protections and choice to employees that the common law does not provide - hence Labor is wrong?

A great weakness of Labor and others is to argue that collective agreements are the alternative to individual common-law agreements. That assumes that the choice between the group and individual is always present. That is not so. Where individual agreements are likely to pertain, or are the preferred choice, the only alternative to the common-law agreement would be an ISA. Otherwise the only choice left is a Hobson's one, an individual common-law agreement or nothing, take-it-or-leave-it.

Labor and the unions must surely understand that provided, and these are strong provisos:

- statutory provisions are fair;

21 Employees earning above $100 000 pa would be free to agree to their own pay and conditions without reference to awards – see DEEWR Committee Hansard Canberra 11 March 2008 p4

- fairness provisions are oversighted and enforced by an active regulator;
- ISAs are underpinned by a credible safety net of wages and conditions; and
- ISAs are subject to a global no-disadvantage test referenced back to the applicable award

that ISAs will provide much greater certainty and protection than individual common law agreements.

There remains the question of disputation. If one part of employment contracts is the process of agreement-making, the other half is the resolution of disputes.

How much cheaper, quicker, and more satisfactory is having a statutory instrument in dispute referred to an industrial relations tribunal than to the courts?

Professor Andrew Stewart rightly identified as a matter of concern how appropriate protection might be given to the 30 per cent (at least) of employees governed not by awards or registered workplace agreements, but by common law contracts.

> As matters stand, the "model dispute resolution process" set out in Division 2 of Part 13 of the WR Act applies only to disputes over certain entitlements created under the Act, not those arising under the common law (or for that matter other federal or State legislation). The process can in any event only operate where all parties to a dispute agree to some form of "alternative dispute resolution". If just one of them holds out, then in the absence of some prior commitment to an ADR process, any entitlements must be pursued in court. For some proceedings, the Federal Magistrates Court may now be used. But it has no jurisdiction over common law claims arising from the terms of an employment contract, except where those claims arise from the same facts as a statutory claim with which it can otherwise deal. This can be contrasted with the position in South Australia, where the Industrial Relations Court has formal jurisdiction over any claims for money due under a federal award or agreement, a State award or agreement, *or* a contract of employment: see *Fair Work Act* 1994 (SA) s 14. This has for many years allowed the Court to offer a low cost, accessible and (generally) prompt process for resolving monetary claims by employees, whatever the source of those claims. (I put to one side certain technical arguments as to the effect of the Work Choices reforms on that jurisdiction.) A recent and very useful innovation has provided for such claims to be the subject of conciliation in the Industrial Relations Commission before proceeding to any adjudication by an Industrial Magistrate. Likewise, s 29(1)(b)(ii) of the *Industrial Relations Act* 1979 (WA) confers a broad jurisdiction on the Western Australian Industrial Relations Commission to hear a claim by an employee or ex-employee in respect of the denial of any "benefit" to which they are entitled under their employment contract. It will be open to the federal government, in drafting the legislation that will apply from 2010, to make provision for a low-cost and speedy process of dispute resolution that is available to *all* employees seeking to enforce employment entitlements, whether arising under legislation, awards, workplace agreements, contracts or the common law — subject to imposing a monetary limit (say $40,000), and subject also

> perhaps to excluding claims for the likes of defamation, personal injury and so on. Such a process would go some way to allay concerns about the impact of removing higher earning employees from the award system. It is a reform that I would in any event strongly advocate for its own sake.
> *Protecting Workers Covered by Common Law Agreements*
> Under the government's proposed new system, there will be a growing number of workers who are either not covered by awards at all, or who are able to enter into contractual arrangements with their employers to take advantage of the flexibility clauses to be built into awards. That in turn makes it less likely that they will make or become subject to registered workplace agreements. The question put to me concerns how those workers might appropriately be protected, bearing in mind that they will still be covered by the National Employment Standards and that those earning less than around $100,000 per year will have access (at least after a qualifying period) to the unfair dismissal regime. Once again, much will turn on the availability of a low-cost and accessible process of dispute resolution. I repeat my comments above as to the desirability of such a reform to the federal system.[22]

Recommendation 2

That Labor design an individual statutory employment agreement system as an alternative to individual common-law contracts, that has the following characteristics:

- **the statutory provisions are fair;**
- **fairness provisions are oversighted and enforced by an active regulator;**
- **the individual statutory agreements are underpinned by a credible safety net of wages and conditions;**
- **individual statutory agreements are subject to a global no-disadvantage test referenced back to the applicable award; and**
- **fast low-cost disputation processes are available.**

Senator Andrew Murray

22 Professor Andrew Stewart, *Supplementary Submission 16A*, pp. 4-5.

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.

Rachel Siewert
Australian Greens

Family First Additional Comments

Family First wants to get the industrial relations balance right, by making sure that workers and their families are not ripped-off, that businesses can be competitive and that the economy can continue to grow.

Back in 2005, Family First was in fact the first political party to expose the holes in the Howard Government's *Work Choices* law[1] because we understood the effect this legislation would have on ordinary Australians and their families. That's why Family First voted against *Work Choices* because it got the balance wrong and workers could be easily ripped-off.

In this inquiry we are considering the Rudd Government's *Transition to Forward with Fairness Bill 2008* and Family First is back on the case again asking the tough questions to ensure this time we get the balance right.

The *Transition to Forward with Fairness Bill 2008 is* principally designed to stop new Australian Workplace Agreements (AWAs) being made, but it also sets up the arrangements for moving forward to the Rudd Government's new workplace relations regime.

Family First has some concerns with the structure of the new workplace relations system as it may not adequately protect all workers and it may not adequately protect family time from the ever encroaching demands of work.

Family First has long been concerned that there are not adequate safeguards in place to help protect family time from the time demands of work.

The industrial relations system proposed by the Government sets ten overarching National Employment Standards.[2] and ten minimum standards that must be included in the proposed modern awards.

But the ten points in the National Employment Standards do not include ensuring workers and their families have a meal break, nor do they include penalty rates for working anti-family hours. Instead, meal breaks and penalty rates are to be included in the ten minimum standards for modern awards.

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1 Senator Steve Fielding media release "What about meal breaks and public holidays for workers?", 27 July 2005

2 Department of Education, Employment and Workplace Relations, (2008) *Discussion Paper: National Employment Standards Exposure Draft*. DEEWR, Canberra. http://www.workplace.gov.au/workplace/Publications/WorkplaceRelations/DiscussionpaperonNationalEmploymentStandards.htm (last accessed 15 March 2008)

This means there is a danger that workers and their families not employed under awards will not have their meal breaks and penalty rates protected.

Dr John Buchanan from the University of Sydney said there had been "… identified 10 per cent to 15 per cent outside the award system altogether. We already know there are 10 per cent to 15 per cent on overawards. You are talking between 20 per cent and 30 per cent already outside the system. That is a big issue."[3]

When asked for an estimate of how many workers earning less than $100,000 would be outside the award system and therefore could only rely on the proposed ten minimum conditions in the National Employment Standards, Mr Kovacic from the Department of Education, Employment and Workplace Relations, stated "tens of thousands … and I think 100,000 would be very much the upper limit."[4]

Up to 100,000 people is a significant number to fall through the cracks.

There is doubt that the Government can find a way to fill in these cracks. The Shop Distributive and Allied Employees Association said:

> There was a discussion at the ACTU executive meeting earlier this week—and I am quite happy to talk about this—where it was explained that it was the intention of the government that under the modernized awards all the nooks and crannies should be filled. If that can be done that would be good, but one wonders whether it can be done.[5]

Mr Lennon from Unions NSW said**:**

> there are a number of concerns about the National Employment Standards and how they operate and how the award system builds on them. Primarily, our initial position would be that they should be as comprehensive as possible and cover as many workers as possible. I understand that the remit or the request to the AIRC is that, in the award modernisation process, they should ensure that the awards butt up against each other and there are no gaps that people can fall into. But it is never quite possible to do that.[6]

Awards do not cover everybody, and the National Employment Standards are to make sure we have a bare basic protection for working conditions in Australia. Those basic conditions should include meal breaks and penalty rates.

Why would the government not have those two key provisions in the National Employment Standards and therefore applying to everybody, so we are not treating 2am in the morning just the same as 2pm in the afternoon for the purposes of work?

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3 Dr Buchanan, *Senate Committee Hansard*, 6 March 2008, page 39.

4 Mr Kovacic, *Senate Committee Hansard*, 11 March 2008, page 6.

5 Mr de Bruyn, *Senate Committee Hansard*, 7 March 2008, page 18.

6 Mr Lennon, *Senate Committee Hansard*, 6 March 2008, page 46.

The National Employment Standards are designed to be a real bare basic safety net. If they were not important, the government would not have suggested them.

Overtime and penalty rates were introduced to help achieve the eight-hour day. They were intended to discourage employers from employing workers for more than eight hours a day. They were not introduced to reward workers for working longer or anti-social hours.

Family First is concerned that conditions such as overtime, penalty rates for working weekends and anti-family hours, along with meal breaks and rest breaks, can be traded away for more money. Penalty rates are about family time, not about money. They were never intended to be traded away for dollars.

Working long hours is good for the market. Working on weekends is good for the market and having temporary work also suits the market. But none of this suits the family, which is why family life is under threat.

Family First is concerned about workers who do not have bargaining power and who may not be covered by awards. Family First is also concerned about the subtle pressures that may convince employees to trade away conditions for money.

Family First was in fact the first political party to expose the holes in the Howard Government's *Work Choices* law[7] because we understood the effect this legislation would have on ordinary Australian families. Family First voted against *Work Choices* and went a step further and introduced legislation to give back to workers and their families their public holidays, meal breaks, penalty rates and overtime and to protect their redundancy, that the Howard Government had taken away.[8]

There were also questions raised during the inquiry about a key "flexibility clause" that the Government's changes depend on.

The award rationalisation process involves "modern awards" and all modern awards will be required to include a flexibility clause. But no one knows what those flexibility clauses will be and that will not be determined for some months yet.

Mr Stephen Smith from the Australian Industry Group commented that:

> … the [flexibility] clause has not been drafted yet, and I am sure there will be very different views between us and the unions, even though there is a lot of goodwill and common understanding about the development of this new award system.[9]

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7 Senator Steve Fielding media release "What about meal breaks and public holidays for workers?", 27 July 2005

8 *Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007*, introduced 29 March 2007.

9 Mr Smith, *Senate Committee Hansard*, 6 March 2008, page 9.

Unions New South Wales preferred flexibility clauses were not used at all.[10]

Witnesses declined to draft an example flexibility clause because of the complex nature of the task.[11]

Given the flexibility clauses will not be available for some time, it is difficult to make a decision on the legislation before the Senate without being able to consider the nature of the clause.

These are key issues Family First will consider when voting on the *Transition to Forward with Fairness Bill*.

Senator Steve Fielding
Family First Leader

10 Mr Lennon, *Senate Committee Hansard*, 6 March 2008, page 46.

11 Dr Buchanan, *Senate Committee Hansard*, 6 March 2008, page 39; Mr Grozier, *Senate Committee Hansard*, 6 March 2008, page 54.

Appendix 1

Submissions received

Sub No	Submitter
1	Mr John Ward, TAS
2	Master Plumbers Association of Queensland, QLD
3	Master Builders of Australia Inc, ACT
4	Rio Tinto, WA
5	Electrical and Communications Association, QLD
6	Ms Carolyn Sutherland, VIC
7	Australian Nursing Federation, VIC
8	Association of Professional Engineers, Scientists and Managers Australia (APESMA), VIC
9	Shop Distributive and Allied Employees Association, VIC
10	United Services Union, NSW
11	Finance Sector Union (FSU), VIC
12	Australian Manufacturing Workers Union (AMWU), NSW
13	Independent Education Union of Australia, QLD
14	Australian Chamber of Commerce and Industry, VIC
15	Dr Sean Cooney, The university of Melbourne, VIC
16	Professor Andrew Stewart, University of Adelaide, SA
17	Community and Public Sector Union, PSU Group, NSW
18	Community and Public Sector Union, SPSF Group, NSW
19	BGC Contracting Pty Ltd, WA
20	Australian Council of Trade Unions (ACTU), VIC
21	National Farmers Federation, ACT

22	Australian Services Union, VIC
23	Commerce Queensland, Queensland's Chamber of Commerce and Industry, QLD
24	Chamber of Commerce and Industry, WA
25	National Tertiary Education Industry Union, WA
26	Australian Education Union, VIC
27	Department of Education, Employment and Workplace Relations CWLTH
28	Federal Industrial Council of the Retail Motor Industry, VIC
29	Association of Independent Schools of Victoria INC, VIC
30	Textile, Clothing and Footwear Union of Australia, VIC
31	Australian Business Industrial, NSW
32	UnionsWA, WA
33	Construction, Forestry, Mining and Energy Union (Construction and General Division)
34	Women's Electoral Lobby Australia, ACT
35	Queensland Council of Unions, QLD
36	School of Management, University of Western Sydney, NSW
37	The Recruitment and Consulting Services Association (RCSA), VIC
38	Australian Industry Group, NSW
39	Local Government Association of Queensland, QLD
40	Australian, Mines and Minerals Association, VIC
41	Queensland Council of Unions, QLD
42	Australian Workers Union, NSW
43	Business Council of Australia, VIC
44	Rail, Tram and Bus Union, NSW
45	Unions NSW, NSW

46	Professor Alison Preston, WA
47	Victorian Trades Hall Council, VIC
48	Mr Chris White, ACT
49	Department of Innovation, Industry and Regional Development, Industrial Relations Victoria, VIC
50	Australian Services Union, Victorian Private Sector Branch, VIC
51	Professor David Peetz, Griffith University, QLD
52	Australian Meat Industry Council, NSW
53	Dr John Buchanan, University of Sydney, NSW
54	TEYS Bros (Holdings) PTY LTD, QLD
55	Communications, Electrical and Plumbing Union, VIC

Appendix 2

Hearings and Witnesses

Legislative Assembly Committee Rooms, 4 March 2008, Perth

Chamber of Commerce and Industry, WA

Ms Marcia Kuhne, *Manager - Workplace Relations Policy*

Mr Daniel Lee, *General Manager – Employee Relations*

Macmahon

Mr Tony Noonan, *Group Human Resource Manager*

Ertech Pty Ltd

Mr Chris Ward, *Manager Human Resources*

Compass Group (Australia) Pty Ltd

Mr Geoff Blyth, *Group IR Manager*

Austal

Mr John Rothwell, *Executive Chairman, Austal Group*

Ms Linda Devereux, *HR Manager*

BGC Contracting Pty Ltd

Ms Sandra Thorp, *Human Resources Advisor*

Mr Neal Edwards, Consultant

Professor Alison Preston

Deputy Director, Graduate School of Business and Co-Director WiSER (Women in Social and Economic Research)

Curtin University of Technology

Unions WA

Ms Meredith Hammat, *President*

Sydney Masonic Centre, 6 March 2008, Sydney

Australian Industry Group

Mr Stephen Smith, Director - National Industrial Relations

Mr Ron Baragry – Legal Counsel Workplace Relations

Australian Workers' Union

Mr Paul Howes, National Secretary

National Farmers Federation

Ms Denita Wawn, General Manager Workplace and Corporate Relations

NSW Farmers Association

Mr Shane Duffy, Industry Officer

Workplace Research Centre

Dr John Buchanan, Director

Unions NSW

Mr Mark Lennon – Assistant Secretary

Australian Business Industrial

Mr Dick Grozier – Director, Industrial Relations

Ms Leah Bombardiere – Senior Workplace Policy Advisor

St James Court Conference & Function Centre, 7 March 2008, Melbourne

Professor Andrew Stewart

Senior Fellow (The Melbourne Law Masters)

The University of Adelaide

Shop, Distributive and Allied Employee's Association

Mr Ian Blandthorn, *National Assistant Secretary*

Mr Joe de Bruyn, *National Secretary-Treasurer*

Ms Sue-Anne Burnley, *National Industrial Officer*

Textile, Clothing and Footwear Union

Ms Michele O'Neil, *Assistant National Secretary*

Ms Bev Myers, *National Industrial Officer*

Australian Services Union

Ms Ingrid Stitt, *ASU Victorian Branch Secretary* accompanied by union members

Australian Mines and Metals Association

Mr Christopher Platt, *General Manager, Workplace Policy*

Australian Council of Trade Unions

Ms Sharan Burrow, *President*

Ms Cath Bowtell, *Senior Industrial Officer*

Mr Joel Fetter, *Industrial Officer*

Australian Chamber of Commerce and Industry

Mr Scott Barklamb, *Acting Director Workplace Policy*

Mr Daniel Mammone, *Senior Adviser Workplace Relations*

Victorian Trades Hall Council

Mr Brian Boyd, *Secretary*

Mr Nathan Niven, *Assistant Secretary*

Department of Innovation, Industry and Regional Development, Industrial Relations Victoria

Ms Bernadette O'Neill – Director, Business Partnerships and Legislative Development

Ms Sam Mikkelsen – Policy Adviser

Brisbane Convention and Exhibition Centre, 10 March 2008, Brisbane

Commerce QLD

Mr Paul Bidwell – General Manager

Mr Stephen Nance – State Manager Workplace Relations

Mr Nick Behrens – State Manager Policy

Master Plumbers' Association of Queensland

Mr Adrian Hart

QLD Council of Unions

Mr Ron Monaghan, Secretary

Ms Deborah Ralston, Industrial Officer

Electrical and Communications Association

Mr Paul Daly, Manager Workplace Policy

Local Government Association of Queensland

Mr Tony Goode – Director

Ms Gabrielle Walsh – Manager, Workplace Relations

Employer Services Pty Ltd

Mr Gil Muir – Director

Parliament House, 11 March 2008, Canberra

Department of Education, Employment and Workplace Relations

Mr Finn Pratt – Acting Associate Secretary, Workplace Relations

Mr John Kovacic – Acting Deputy Secretary, Workplace Relations

Ms Sandra Parker – Group Manager, Workplace Relations Policy Group

Ms Natalie James – Chief Counsel, Workplace Relations Legal Group

Mr Mark Roddam – Branch Manager, Wages Policy and Economic Analysis Branch

Ms Elen Perdikogiannis – Branch Manager, Workplace Relations Legal Group