



28 February 2008

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: eet.sen@aph.gov.au

Dear Mr Carter

Submission to the Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

I attach my submission to the *Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*.

I am a senior lecturer in workplace law in the Department of Business Law and Taxation. My research interests and PhD studies are focussed on agreement-making in the Australian workplace relations system.

My submission addresses some of the ways in which the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* could be amended to ensure that it achieves its stated purposes.

Should you have any queries in relation to my submission, please contact me on (03) 9903 2380.

Yours sincerely

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**Submission to the Inquiry into the *Workplace Relations Amendment
(Transition to Forward with Fairness) Bill 2008***

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Executive Summary

Introduction

1. This submission sets out some aspects of the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* ('Transition Bill') which could be amended to ensure the Bill achieves the Government's stated objectives.

No Disadvantage Test

2. The Transition Bill reintroduces the 'no disadvantage test' in almost identical terms to the test in the pre-Work Choices *Workplace Relations Act 1996* (Cth) ('WR Act'). Some of the procedural protections which were in place under the WR Act should also be reintroduced in modified form:
 - a) A statutory declaration should be required to be lodged by a representative of employees in support of a collective agreement where non-monetary benefits are provided by the agreement as an offsetting benefit or advantage which is to be taken into account under the 'no disadvantage test'.
 - b) Similarly, where non-monetary benefits are provided in an AWA, the employee to be covered by the AWA should be required to lodge a declaration confirming their consent to the agreement and their agreement that the non-monetary benefits are adequate to offset the loss of benefits under applicable industrial instruments.
 - c) While not being required to publish the reasons for all its decisions, to increase transparency and to educate the parties, the Workplace Authority should be required to publish detailed reasons for selected decisions. These selected decisions might include cases where a minority group of employees may be disadvantaged by a collective agreement or where non-monetary benefits have been provided to offset the loss of financial benefits in order to pass the 'no disadvantage test'.

- d) The Workplace Authority should also be required to review decisions which are based on inaccurate information. Under the Workplace Authority's Fairness Test Policy Guide, the Workplace Authority Director retains a discretion to decide whether to review a decision in these circumstances, and the legislation currently contains no requirement for the Authority to review any of its decisions.

Compliance with the Australian Fair Pay and Conditions Standard

3. The second reading speech to the Transition Bill states that workplace agreements must not disadvantage employees in comparison with applicable industrial instruments and the Australian Fair Pay and Conditions Standard ('Standard'). However, the Transition Bill does not include the Standard in the 'no disadvantage test' benchmark. An agreement will pass the test if it does not result, on balance, in a reduction in the employees' overall terms and conditions of employment under applicable industrial instruments. These applicable instruments do not include the Standard.
4. While the Standard will prevail over less favourable terms in an agreement in practice, this is not the same as providing that the terms of the agreement itself must be consistent with the Standard. Neither the Workplace Authority nor the Workplace Ombudsman have the legal authority to require an employer to rectify an agreement to ensure it complies with the Standard. Research confirms that this has led to the approval of agreements which are inconsistent with the Standard.
5. It is recommended that the 'no disadvantage test' be amended to include a requirement that the terms of workplace agreements comply with the Standard. This would be consistent with the stated objectives of the current legislation and the Transition Bill.

Objectives

6. Finally, to guide the Workplace Authority in its decision-making, the former objective in the WR Act of supporting 'fair and effective agreement-making' should be reinstated in the legislation.

Introduction

The *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* ('Transition Bill') introduces amendments to the Australian workplace relations system which will no doubt achieve the Government's objectives of creating a 'fairer, simpler and more balanced workplace relations system'.¹ This submission sets out some aspects of the Transition Bill which could be amended to ensure an even closer alignment with these objectives.

No Disadvantage Test

The Transition Bill reintroduces the 'no disadvantage test' in almost identical terms to the test which was in place prior to the Work Choices reforms. The test will apply to individual transitional employment agreements (ITEAs) and collective agreements to ensure that these agreements do not result, on balance, in a reduction in the overall terms and conditions of employment of the employees under relevant industrial instruments.² However, whereas the original 'no disadvantage test' was applied to collective agreements by the Australian Industrial Relations Commission (AIRC), with input from the parties through statutory declarations, and often through a public hearing, the 'no disadvantage test' under the Transition Bill will be applied by the Workplace Authority behind closed doors.

The Fairness Test under the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) was also applied behind the closed doors of the Workplace Authority. At the time that the Fairness Test was introduced, concerns were expressed about the lack of consultation³ and transparency⁴ in the assessment process, and the lack of accountability of the Workplace Authority.⁵ Each of these concerns is addressed below in the context of the reintroduction of the 'no disadvantage test'.

Consultation by the Workplace Authority

A number of the submissions to the Fairness Test Senate Inquiry expressed concern that the Fairness Test could be applied by the Workplace Authority without any consultation with employees or their representatives. These submissions were made in the context of a test which required that non-monetary benefits be 'of significant value' to employees.⁶ The 'no disadvantage test' does not explicitly state that non-monetary benefits will be included in the Workplace Authority's assessment of agreements. However, given that the Office of the Employment Advocate's procedures under the former 'no disadvantage test' contemplated the inclusion of non-

¹ Commonwealth, *Second Reading Speech to the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, p 8 (Ms Gillard).

² Transition Bill, s 346D(1),(2).

³ See, eg, Carolyn Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' 20(3) *Australian Journal of Labour Law* 245 at 261; see also the submissions cited in Standing Committee on Employment, Workplace Relations and Education, Parliament of Australia, *Report of Inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*, June 2007 ('Fairness Test Senate Report'), at [2.63]-[2.6] and the Committee's view at [2.67]-[2.68].

⁴ See, eg, Carolyn Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' 20(3) *Australian Journal of Labour Law* 245 at 264-5; see also concerns raised in submissions cited in the Fairness Test Senate Report, at [2.58]-[2.61].

⁵ See the submissions cited in the Fairness Test Senate Report, at [2.83]-[2.87].

⁶ Fairness Test Senate Report, at [2.63]-[2.66].

monetary benefits in agreements in order to pass the test,⁷ it is implicit that non-monetary benefits may be taken into account for the purposes of the reintroduced test. It is therefore recommended that certain procedural protections are also reintroduced to ensure that these non-monetary benefits offer real advantages to affected employees.⁸

Where non-monetary benefits are provided in a collective agreement as an offsetting benefit (or ‘advantage’) for the purposes of the ‘no disadvantage test’, a representative of employees should be required to lodge a declaration confirming that a majority of employees voted in favour of the agreement and that the representative considers that the deal meets the no-disadvantage test. This process would be similar to the former requirement (under the pre-Work Choices WR Act) for employee representatives to lodge a statutory declaration in support of an application to certify union and non-union certified agreements. This statutory declaration required the employee representative to answer questions about the process followed in negotiating and approving the agreement and about the content of the agreement and the representative’s view as to whether it met the no-disadvantage test.⁹

Where the employee representative’s declaration indicates that the employees have not validly approved the agreement or that the representative does not consider that the deal meets the no-disadvantage test, then the Workplace Authority should be required to investigate further.

Where non-monetary benefits are provided in an AWA, the employee to be covered by the AWA should similarly be required to lodge a declaration confirming that they have provided their informed consent to the agreement and that they consider the non-monetary benefits are adequate to offset the loss of benefits under an applicable industrial instrument. This would not be required where additional non-monetary benefits are provided which are not relied upon for the purposes of passing the ‘no disadvantage test’.

This additional mechanism would reinstate some of the procedural protections which operated under the former ‘no disadvantage test’. It would not impose an undue administrative burden on employers, given that non-monetary compensation is likely to be provided in only a minority of cases.¹⁰

Transparency and accountability

The need for the Workplace Authority to be transparent and accountable in its decision-making must be balanced against the ‘compliance nightmare created by the backlog of agreements’ that exists under the current system.¹¹

⁷ R Mitchell, R Campbell, A Barnes, E Bicknell, K Creighton, J Fetter and S Korman, ‘What’s Going on with the “No Disadvantage Test”? An Analysis of Outcomes and Processes Under the Workplace Relations Act 1996 (Cth)’ (2006) 47 JIR 393 at 404.

⁸ Under the Transition Bill, it is optional for the Workplace Authority to consult with employees or their representatives before making a decision under the ‘no disadvantage test’: see s 346J.

⁹ See Australian Industrial Relations Commission Rules 1998, rule 48-49, Forms R28 and R30.

¹⁰ See Commonwealth, *Second Reading Speech to the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*, House of Representatives, 28 May 2007, p 54 (Joe Hockey).

¹¹ Commonwealth, *Second Reading Speech to the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, p 10 (Ms Gillard).

The Workplace Authority's Fairness Test Policy Guide contains very useful information, but much of this information is of a general nature. The Workplace Authority needs to provide more detailed information about the factors which inform its assessment of agreements under the 'no disadvantage test' in order to educate the parties.¹² Transparency is also necessary to assure the public that the decisions of the Workplace Authority are appropriate, particularly in light of earlier research which highlighted deficiencies in the Office of the Employment Advocate's application of the former 'no disadvantage test'.¹³

It is therefore recommended that the Workplace Authority Director be required to identify key cases which will be of interest to the parties to workplace agreements and publish detailed reasons for its assessments of these agreements under the 'no disadvantage test'. The Workplace Authority Director might, for example, publish decisions relating to agreements where:

- a minority group of employees may be disadvantaged by a collective agreement; or
- non-monetary benefits have been provided to offset the loss of financial benefits.

These decisions could be published with the parties' consent or without identifying the parties.

The Workplace Authority should also be required to review any decisions which are made on the basis of 'incomplete, inaccurate or incorrect information.' Under the Workplace Authority's Fairness Test Policy Guide, the Workplace Authority Director retains a discretion to decide whether to review a decision in these circumstances,¹⁴ and the legislation currently contains no requirement for the Authority to review any of its decisions.

Compliance with the Australian Fair Pay and Conditions Standard

The second reading speech to the Transition Bill states (at p 5):

To pass the no-disadvantage test, ITEAS must not disadvantage an employee against an applicable collective agreement or, where there is no such collective agreement, an applicable award, and the Australian Fair Pay and Conditions Standard. Collective agreements must not disadvantage employees in comparison with an applicable award and the Standard.¹⁵

However, the Transition Bill does not include the Standard in the 'no disadvantage test' benchmark. The essence of the test is contained in sub-sections (1) and (2) of s346D:¹⁶

¹² Consistent with the Workplace Authority's functions: see Workplace Relations Act 1996 (Cth), s 150B(1)(a), (b) and (d).

¹³ See, eg, R Mitchell, R Campbell, A Barnes, E Bicknell, K Creighton, J Fetter and S Korman, 'Protecting the Worker's Interest in Enterprise Bargaining: The "No Disadvantage" Test in the Australian Federal Jurisdiction', Final Report for the Workplace Innovation Unit, Industrial Relations Victoria, 2004, p 51.

¹⁴ Workplace Authority, Fairness Test Policy Guide, at <<http://www.oea.gov.au/docs/FairnessTest/FairnessTestPolicyGuide.pdf>>, p 37.

¹⁵ Ibid, at 10.

¹⁶ Sub-section (3)-(7) of section 346D set out some qualifications and exceptions to the test.

- (1) An ITEA passes the no-disadvantage test if the Workplace Authority Director is satisfied that the ITEA does not result, or would not result, on balance, in a reduction in the employee's overall terms and conditions of employment under any reference instrument relating to the employee.
- (2) A collective agreement passes the no-disadvantage test if the Workplace Authority Director is satisfied that the agreement does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees under any reference instrument relating to one or more of the employees.

The 'no disadvantage test' benchmark is therefore to be found in the 'reference instrument'. For an ITEA, the reference instrument is an applicable collective agreement, or a combination of an applicable collective agreement and an applicable award¹⁷, or, if there is no applicable collective agreement, an applicable award or designated award.¹⁸ For a collective agreement, the reference instrument is any applicable award,¹⁹ or, if there is no applicable instrument, a designated award.²⁰ The Standard does not form part of this benchmark. A note to section 346D outlines the relevance of the Standard to the 'no disadvantage test':

Note 1: In addition to the no disadvantage test, the Australian Fair Pay and Conditions Standard prevails over a workplace agreement to the extent to which the Australian Fair Pay and Conditions Standard provides a more favourable outcome for the employee or employees – see section 172.

The fact that the Standard prevails over less favourable terms in an agreement in practice is not the same as providing that the terms of the agreement *itself* should not disadvantage employees against the Standard. As set out in the attached paper,²¹ the current legal framework permits agreements to be approved by the Workplace Authority which contain less favourable provisions than the Standard. Neither the Workplace Authority nor the Workplace Ombudsman have the legal authority to require an employer to rectify an agreement to ensure it complies with the Standard, because it is not unlawful for the agreement to undercut the Standard. It is only unlawful for the employer to apply these less favourable conditions in practice.

Data collected by the Office of the Employment Advocate, and by independent researchers, confirms that workplace agreements have been approved which include terms which fall below the Standard (including pay rates below the minimum standard).²² The Transition Bill permits this situation to continue.

It is recommended that the 'no disadvantage test' be amended to include a requirement that the terms of workplace agreements comply with the Standard. This would be consistent with the Minister's statement that agreements will not disadvantage employees in comparison with the Standard. It would also support the

¹⁷ For the purposes of the 'no disadvantage test' benchmark this includes a Federal award, common rule award, transitional Victorian reference award, a transitional award or NAPSA: see 346E(5).

¹⁸ Transition Bill, s 346E(1)(a).

¹⁹ Again, for the purposes of the 'no disadvantage test' benchmark this includes a Federal award, common rule award, transitional Victorian reference award, transitional award or NAPSA: see 346E(5).

²⁰ Transition Bill, s 346E(1)(b).

²¹ Carolyn Sutherland, 'Fair Agreements under Work Choices? A Closer Look at Bargaining Outcomes', paper presented to the 22nd Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ) conference, 6-8 February 2008, St Kilda, Melbourne (Attachment 1), pp 8-10.

²² *Ibid*, at 8.

objective of the legislation of ‘ensuring compliance with minimum standards’,²³ and would assist the Workplace Authority and Workplace Ombudsman to more effectively perform their functions of providing education, assistance and advice to employees (and employers) in relation to their rights and obligations under Commonwealth workplace relations legislation.²⁴

Objectives of the agreement-making system

Finally, the legislation should provide the Workplace Authority with guidance as to the objectives it should be seeking to achieve when approving workplace agreements. Prior to the Work Choices reforms, one of the objectives of the WR Act was to support ‘fair and effective agreement-making’.²⁵ Given the objective of the Transition Bill to establish a ‘fairer, simpler and more balance workplace relations system’,²⁶ this objective should be reintroduced into the legislation to guide the Workplace Authority’s decision-making.

²³ WR Act, s 3(f).

²⁴ WR Act, s 150B(1)(a),(b); 166B(1)(a),(b).

²⁵ Pre-reform WR Act, s 3(e).

²⁶ Commonwealth, *Second Reading Speech to the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, p 8 (Ms Gillard).