

Senate Education, Employment and Workplace Relations Committee Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

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29 February 2008

General Observations

As might be expected from my previous submissions to the Committee,¹ I am in broad agreement with the changes to the *Workplace Relations Act* 1996 (WR Act) proposed in the Transition Bill. In particular:

1. The restoration of a no-disadvantage test (NDT), to replace the narrower ‘fairness test’, will do much to plug the gaps in the present safety net for workplace bargaining.
2. The removal of a statutory system of individual agreements will improve both the fairness and efficiency of workplace regulation. There is no convincing evidence that the use of AWAs (which in practice are almost never negotiated with individual employees, or tailored to meet their particular circumstances) has been associated with improvements in productivity.² Furthermore, at a practical level, the AWA system could only really work while they were few in number. As recent experience with the fairness test has shown, the need to review substantial numbers of individual instruments places an intolerable strain on government resources. Removing the capacity for employers to “contract out” of collective agreements would also be consistent with Australia’s obligations under international labour standards.³
3. There *is* a good argument for allowing various forms of flexibility in the operation or application of award standards. But this can and should be done through collective bargaining, or by virtue of carefully delineated flexibility provisions built into awards themselves.

1 See my submissions to the Committee’s Inquiries into the Workplace Relations Amendment (Work Choices) Bill 2005 and the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007, and also the submission to the former Inquiry of the Group of 151 Australian Industrial Relations, Labour Market and Legal Academics, entitled “Research Evidence About the Effects of the Work Choices Bill”.

2 See eg D Peetz, *Assessing the Impact of ‘WorkChoices’ One Year On*, Industrial Relations Victoria, Melbourne, 2007, ch 13.

3 See eg C Fenwick and I Landau, ‘Work Choices in International Perspective’ (2006) 19 *Australian Journal of Labour Law* 127 at 136–7.

4. While there would be merit in abolishing statutory individual agreements with immediate effect, I understand the Government's logic in providing for ITEAs during a transitional period that will last no more than 21 months. I also accept the government's reasons for allowing pre-transition AWAs to remain on foot, though I would have preferred to see some mechanism for the review of agreements that would have failed the NDT had it been in place at the time.
5. I am a strong supporter of the need for the existing award system to be reviewed and modernised. I also believe the process can be completed within the proposed timeframe — provided that both the AIRC and the government are prepared to take the hard decisions that are necessary if there are to be meaningful outcomes (a point to which I return later in the submission).
6. I also support the removal of the requirement to distribute the Workplace Relations Fact Sheet, given its deficiencies, and the fact that any revamped version would have to be progressively amended over the next year to keep up with expected changes to the law. However I would hope that when a similar obligation is reintroduced in 2010, as part of the new National Employment Standards, consideration is given to requiring employers to provide not just standardised information about employment rights, but (at least in some cases) information concerning the particular terms on which an employee is to be engaged. That would help remove the uncertainty that often currently exists as to matters such as casual status, hours of work and so on.

There are a number of comments or suggestions I would make about specific aspects of the Bill. These are set out below.

The only broad criticism I would make of the Bill concerns its drafting. I will repeat the point I made about the Stronger Safety Net legislation last year. The Transition Bill was plainly drafted in a hurry, albeit with broader consultation (at least with stakeholders) than typically occurred under the previous government. The approach the drafters have chosen to adopt is largely dictated by, and consistent with, what is already in the WR Act. Nevertheless, many of the new provisions remain unduly complicated and difficult to understand, even for experts.

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.

The current government has repeatedly emphasised its desire to simplify the operation of federal labour laws. There is certainly some evidence of that in the drafting of the National Employment Standards that have recently been released for consultation. But there is much more to be done, not least in the simplification of transitional arrangements. The government has the opportunity to draft a new statute that, at least from January 2010, can genuinely allow workers and employers to understand their rights and obligations. That should be regarded as a fundamental concern of any scheme of regulation. I urge the Committee to highlight the importance of this issue in its report.

The Operation of the No-Disadvantage Test

While I welcome the reinstatement of the NDT, there are certain aspects of the proposed provisions that cause concern. I raised some of these same concerns last year in relation to the fairness test provisions, on which the new provisions are modelled in certain respects.

What counts as a reference instrument

Proposed s 346D requires an agreement to be tested against the terms and conditions set by a “reference instrument”. That is defined in proposed s 346E to include a federal award or NAPSA (notional agreement preserving State awards) that is either applicable to the employee(s) concerned, or that would have applied but for the operation of a workplace agreement or other industrial instrument.

So if (say) an Adelaide shop proprietor bound or previously bound by a State retail award wishes to make an agreement, that award (at least in its March 2006 form) is used as a reference instrument.

But if the proprietor has only started trading since March 2006, no NAPSA can apply to them. In that instance it would be necessary for the Workplace Authority to designate an appropriate award for NDT purposes under proposed ss 346G or 346H. But as those provisions are drafted, such an award must be a *federal* award, and cannot be an enterprise (single-business) award. Until award modernisation occurs, there will be a number of industries or sectors, including retail, in which the only available awards are those found in the Territories or in Victoria. It is difficult to see why the Workplace Authority should not have the discretion to designate a NAPSA instead, if it is more appropriate in the circumstances.

A more significant omission concerns agreements that seek to reduce or remove rights to long service leave. If those rights are specified in a federal award, they will be brought into account, and some other advantage must be provided to offset their loss. But that will not be the case where, as is more common, the rights in question emanate from a State or Territory statute. Such a statute does not fall within the proposed definition of a reference instrument.

Under the old (pre-Work Choices) NDT, account was taken not only of awards, but of any Commonwealth, State or Territory law that the AIRC or Employment Advocate considered relevant. Either some general reference could be made in proposed s 346E to such laws, or there might be a specific reference to long service leave legislation.

Collective agreements and the “overall” requirement

Proposed s 346D(2) speaks of the Workplace Authority having 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.

What neither the section nor the Explanatory Memorandum make 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.

Suppose for instance that an agreement removes penalty rates for weekend work and offers a modest increase in basic wage rates instead. For most of the affected workers, who only work weekends occasionally, that increase ensures there is no “overall” disadvantage. But for a small but significant minority who are routinely rostered to work on weekends, the agreement will effectively reduce their take-home pay.

Under the old NDT, there was similar uncertainty about whether collective agreements should be assessed by reference to “generalised” or “averaged” outcomes, as opposed to the position of each individual worker.⁴ In practice though, it was common for the AIRC to require employers to give undertakings that agreements would not be “operated” in such a way as to disadvantage particular workers. Given, however, that the new NDT provisions will no longer allow the lodgement of undertakings to meet any concerns identified by the Authority, other than in relation to an employer greenfields agreement, that option no longer appears to be available.

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.

Protecting employees from dismissal

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 provision as drafted.

⁴ See R Mitchell et al, *Protecting the Worker’s Interest in Enterprise Bargaining: The “No Disadvantage” Test in the Australian Federal Industrial Jurisdiction*. Workplace Innovation Unit, Industrial Relations Victoria, 2004, pp 56–57.

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.

Consistency in decision-making and opportunities for appeal or review

In the Committee’s report last year on the Stronger Safety Net amendments, members noted a range of concerns about the potential for inconsistent and unaccountable decision-making by the Workplace Authority under the fairness test.⁷

Just as with the current fairness test, the new system will involve a large number of officials at the Authority forming their own opinions about what constitutes a relevant “disadvantage”, and also in certain cases what constitutes an “appropriate” award to designate. These decisions will be made in private. There is no requirement for the

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 Broun* [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.

7 Senate Committee on Employment, Workplace Relations and Education, *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*, paras 2.59–2.60, 2.83–2.89, 3.37–3.39, 4.25–4.27, 5.16, 6.17–6.18.

Authority to issue written reasons for any decision it makes, even to the parties concerned, except where a union or employee collective agreement is passed on “public interest” grounds (see proposed s 346D(5)).

In practical terms, and again as at present, a party that submits an agreement that initially *fails* the NDT will get some idea of how the particular official has approached the matter, since the Authority will be required to offer advice as to how the agreement could be varied to pass the NDT (see proposed ss 346M(2)(b), 346U(2)(b)). But this is of no assistance to those who do not routinely deal with the Authority. They may have little way of knowing how it is applying the test in practice. And even “repeat players” are likely to experience the now familiar problem of different officials taking different views of what is essentially the same situation.⁸

At the very least, provision should be made for an aggrieved party to be able to request a written statement of reasons for any decision as to the application of the NDT or the designation of an award, and for such decisions to be subject to judicial review by the Federal Court or Federal Magistrates Court under the *Administrative Decisions (Judicial Review) Act 1977*.

The Effect of Expired AWAs and ITEAs

One of the stated purposes of the Bill is to allow workers covered by AWAs or ITEAs that have passed their nominal expiry date to be included in any vote to approve a new collective agreement that might cover them. As the Bill stands, however, this right is apparently not to be accorded to workers covered by expired pre-reform (ie, pre-Work Choices) AWAs.⁹ It is not clear why that should be. If it is an oversight, it should be corrected.

In any event, if a collective agreement is approved and takes effect, it will *not* apply to workers still covered by expired AWAs or ITEAs, unless or until they take formal action to terminate their agreements.¹⁰ It seems a curious form of “democracy” to give workers a vote on a collective agreement, then not hold them to it if the agreement is approved.

It would be more straightforward — and more consistent with the priority to be accorded to collective bargaining under the new system — to add a provision that a collective agreement automatically supersedes any expired AWAs or ITEAs, unless the collective agreement itself specifies otherwise. Alternatively, there could be a return to the pre-Work Choices rule (see former s 170VQ(6)) that a collective

8 As highlighted, for example, at para 51 of the ACTU’s submission to the Committee’s Inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007.

9 Clause 8 of proposed Schedule 7A only applies to “AWAs”, a term specifically defined by clause 1 not to apply to a pre-reform AWA.

10 In the case of AWAs, this will be a function of s 348(2) of the present Act, as preserved in operation by cl 2 of proposed Schedule 7A. For ITEAs, the amended s 348(2) (see Item 45) will have the same effect.

agreement prevails over an expired individual agreement to the extent of any inconsistency.

Termination of Expired Collective Agreements

According to the Explanatory Memorandum (at para 117), the proposed amendment to s 393 is intended to ensure that while ITEAs (and also still AWAs) can be terminated unilaterally after their expiry by giving 90 days' notice, this is no longer to be true of collective agreements.

However, the Bill does not propose to affect the operation of s 392. This would continue to allow collective agreements to contain a provision permitting unilateral termination after expiry on as little as 14 days' notice. I am not aware of how many agreements contain such clauses. They would be unusual in a union-negotiated deal. But there has been nothing to stop those drafting employee collective agreements (which are typically not the subject of any detailed negotiations) from including the necessary provision.

If the government's intent is to ensure that expired collective agreements can only be terminated unilaterally by application to the AIRC under proposed s 397A, and on satisfaction of a public interest test, it would be advisable to amend s 392 to restrict it to ITEAs (and, for transitional purposes, AWAs).

One further change that might be made concerns employer greenfields agreements (EGAs). As I understand government policy, there will ultimately be no provision for such an instrument in the proposed new agreement-making system. Indeed an EGA is not an agreement at all in any meaningful sense of the term. As proposed s 397A stands, employees covered by an expired EGA will only be able to seek its termination if a *majority* of them lodge an application the AIRC. In practical terms, that would be a hard requirement to satisfy. An alternative would be to amend proposed s 397A(2) to allow one or more employees covered by an EGA to seek its termination. The Commission would still be required by proposed s 397A(3) to consider the views of other employees, as well as the potential impact of termination on them, before deciding whether to terminate the agreements.

Award Modernisation

As already noted, I strongly support the award modernisation process. However I am concerned by the government expressing an intention (in para 2 of the draft Award Modernisation Request set out in the Explanatory Memorandum) that the process not either "disadvantage employees" or "increase costs for employers". If taken at all literally, the pursuit of these objectives would paralyse the entire process. It is simply not possible to standardise conditions in any award-reliant industry or occupation without disadvantaging *someone*. I would urge the government to reconsider the language of the Request and clarify its intent.