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

Supplementary Submission by Professor Andrew Stewart
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While presenting evidence to the Committee on Friday 7 March 2008 in Melbourne, I was asked to give further consideration to four matters:

- how the Minister's draft Award Modernisation Request might be amended to address the concerns expressed in my original submission;
- the issues raised in relation to the award modernisation process by Dr John Buchanan in his evidence to the Committee;
- the government's proposals concerning the non-application of awards to workers earning over $100,000 per year; and
- how appropriate protection might be given to the 30% (at least) of employees governed not by awards or registered workplace agreements, but by common law contracts.

Each of these matters is addressed below. I would be happy to provide any further clarifications, if requested.

Award Modernisation and the "No Disadvantage" Objective

The draft Award Modernisation Request currently expresses an intention not to either "disadvantage employees" or "increase costs for employers". Both in my original submission and in my evidence to the Committee, I expressed concern that any attempt to meet both those objectives would create major difficulties for the proposed process of award modernisation. I understand similar concerns have been expressed in other submissions to the Committee.

I accept that it may be possible to interpret the current wording as meaning that workers and employers should not *on balance* be 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 the likelihood of that having to happen.

What I propose is that sub-paragraphs 2(b) and (c) of the draft Request be replaced by the following:

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

I would also propose adding the following sentence at the end of paragraph 4:

> 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.

The objective would be to encourage the AIRC to aim for a reasonable degree of standardisation in the relevant industry, occupation or sector, without opting either for the best possible conditions or the lowest common denominator. If there were no way of avoiding significant disadvantage to particular workers or employers, the AIRC might choose either to retain separate awards, or to introduce limited exceptions to preserve existing conditions. But what should be avoided — and hence the second proposal — is any recourse to hundreds or even thousands of schedules to a "standardised" award in order to preserve pre-modernisation differentials. That would make a mockery of any notion of standardisation.

Dr Buchanan's Views on the Award Modernisation Request

Although a transcript of his evidence has not been available to me at the time of preparing this submission, I have been provided with a copy of Dr Buchanan's speaking notes.

In broad terms, I would agree with most of Dr Buchanan's observations. In particular, I would support what he says about:

- the need to see award modernisation as an ongoing process;
- the importance of providing appropriate resources to the AIRC;
- the need to be realistic about how much can be achieved by the end of 2009;
- the desirability of recognising "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".

Where I would disagree is in characterising the "concern" of the proposed award modernisation provisions — and by implication the concern of the government — as being purely "quantitative, not with the quality of industrial instruments".

It is certainly true that there is an assumption that there should be fewer awards. It is an objective I would support, not least to make it easier for workers and employers alike to be clear about which award applies to them, and hence their rights and obligations. But that concern does not militate against a desire to improve the coherence and quality of the award system. I do not interpret the provisions in Schedule 2 of the Bill, nor for that matter the draft Award Rationalisation Request, as being *exclusively* concerned with reducing the number of awards.

The fact is that both the proposed Part 10A and the draft Request would leave the AIRC with considerable discretion as to how to go about modernising awards. It is true that paragraph 4 of the Request would encourage the Commission to create awards "primarily along industry lines", but it still leaves open the possibility of there being occupational awards (which is presumably what the term "operational lines" is intended to convey). I note too that paragraph 8 speaks of the AIRC identifying the "work, industry and/or occupations" covered by each modern award.

The term "industry" is itself susceptible of many interpretations. It would be open to the AIRC, for instance, to settle on the objective of a single award for the "transport industry". But equally, it might choose to create one award for the rail industry, another for the long distance haulage industry, another for the passenger bus industry, and so on. In practical terms, the time constraints that Dr Buchanan identifies make it likely that the AIRC will *have* to be pragmatic about its capacity to reduce the number of existing awards.

My expectation is that, with sufficient support from the government (including a willingness to support the hard decisions necessary to standardise various entitlements), the AIRC should be able to substantially complete the movement from the current bewildering mix of pre-reform federal awards and NAPSAs to a smaller and more coherent set of "modern awards" by the end of 2009. But that should still leave substantial room for further and perhaps more creative reforms to the shape of the award system in years to come.

The $100,000 Cap for Awards

The Explanatory Memorandum to the Transition Bill repeats (at p 8) the ALP's policy commitment that "employees earning above $100,000 per annum will be free to agree their own pay and conditions without reference to awards". Judging by the Forward with Fairness Policy Implementation Plan released in August 2007, the government's intention is that, except for transitional purposes, modern awards will not apply at all to any employee with "guaranteed ordinary earnings" of at least $100,000 per year, a figure that will be indexed.

As I noted in my evidence to the Committee, however, there is no mention of this in the Bill itself. Nor is it mentioned in the draft Award Modernisation Request. I assume that the necessary legislation will be introduced as part of the "Substantive Bill" promised for later this year. But without any clear instruction to the contrary, the AIRC will presumably be expected to continue making provision in modern awards

for workers (such as university professors!) who have historically been covered by awards, but who typically earn amounts that will ultimately disqualify them from gaining any entitlements from those provisions.

At any event, the question posed to me concerns the effect of removing such workers from the award system, especially in terms of their capacity to assert and enforce whatever other entitlements they may retain. They will be covered by the new National Employment Standards, and presumably will still be able to fall within the scope of a registered workplace agreement. On the other hand, one effect of exempting higher earning employees from awards may be to deny them any right to bring an unfair dismissal claim, leaving them to whatever limited remedies they may have under the common law of contract, plus the laws on discrimination.

What is not yet known is what type of provision will be made for the resolution of disputes under the new federal system. The Forward with Fairness policy released in March 2007 speaks (at p 17) of creating an independent division of the new agency Fair Work Australia to "hear and determine unlawful dismissal claims, matters relating to Labor's minimum entitlements and freedom of association". But nothing is said about whether other matters must be pursued in the courts, and if so which one(s).

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.