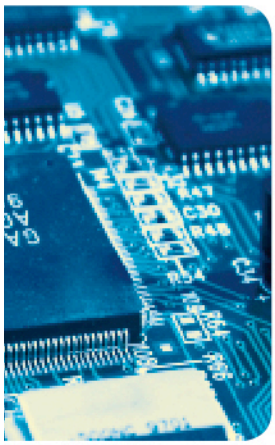
Australian Business Industrial

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

ABI Submission to the Senate Education, Employment and Workplace Relations Committee



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About Australian Business Industrial

Australian Business Industrial (ABI) is the registered industrial relations affiliate of NSW Business Chamber, and is responsible for NSW Business Chamber's workplace policy and industrial relations matters.

It is also a Peak Council for employers in the NSW industrial system and a transitionally registered organisation under the *Workplace Relations Act 1996*, and regularly represents members in both the New South Wales and Australian Industrial Relations Commissions.

ABI is a successor to the Chamber of Manufacturers of NSW which was established in 1886 to promote the interests of its members in trade and industrial matters. The Chamber was registered in 1926. Since its inception the Chamber and its successor industrial organisations have played a major representational role in industrial relations.

NSW Business Chamber is an independent member-based company. Through its membership and affiliation with over 150 Chambers of Commerce, NSW Business Chamber represents over 30 000 employers throughout NSW.

ABI in conjunction with NSW Business Chamber represents the interests of not only individual employer members, but also other Industry Associations, Federations and groups of employers who are members or affiliates.

Introduction

Australian Business Industrial (ABI) would like to thank the Senate Education, Employment and Workplace Relations Committee for the opportunity to comment on the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008.

The Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (the Bill) has been charged with examination of the possible impacts of the Bill.

ABI has chosen to focus its attention in this submission on issues of particular relevance to our membership, specifically the operation of the amendments with respect to workplace agreement making. This is not to underplay the importance of the proposed modern award system which is also dealt with in the Bill. However, these provisions are more enabling than directive.

Importantly, the Bill must be assessed for its impact on the whole private sector in Australia. The Bill is the first step toward the Government's proposed workplace relations system which is intended to replace many aspects of the current federal workplace relations legislation. Significantly, it is also the first step in shaping the single national regulation of all employing private sector businesses in Australia.

While the Government's proposed new system will regulate some, and perhaps all, public sector employment, and some, perhaps all, local government employment, this is incidental. Governments have a greater capacity to regulate their own employment, and to do so without the day-to-day challenge of surviving and growing in an open competitive economy.

Governments are much more able to elevate social objectives against those of efficiency, service and profitability, and to tolerate less than optimal economic performance than is the private sector. Without profitability in the private sector businesses die and the economy stalls.

A central feature of the Government's workplace relations policy, implemented via the Bill, is the removal of the option for employers and employees to make Australian Workplace Agreements (AWAs).

ABI 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. Since their inception, AWAs have allowed the development of flexible arrangements that suit the needs of both the employer and employee at the workplace level.

However, ABI acknowledges that AWAs will not be a feature of the Government's workplace relations system and are not a feature of this Bill. It also accepts that the Government does not intend individual agreement making subject to a no disadvantage test to be a part of its new system. ABI seeks to constructively engage with the Government to ensure that its proposed legislation and its new system are implemented in an optimal manner, with as little disruption to Australian enterprises and their employees as can be managed during the transition period.

The need to minimise disruption is explicitly recognised in Government policy.

> *Under Mr Howard's laws, businesses have factored in their labour costs on the basis that these agreements will continue their agreed term.*
>
> *Labor understands that Australian employers and employees need certainty and that it would create great concern and confusion if Australian Workplace Agreements were suddenly terminated.*
>
> *This means that there will have to be arrangements in place that allow employees and employers to move to Labor's new fairer industrial relations system in ways that do not leave employees in limbo or cause unnecessary disruption to business.*[1]

Government policy also recognises the contribution of AWAs to providing appropriate access to flexibility, and the need for flexibility to continue on into the proposed new system.

> *Priority will be given to industries and occupations currently covered by instruments that will not be a feature of Labor's industrial relations system. This includes industries with high numbers of Australian Workplace Agreements and to industries [covered by NAPSAs].*
> ...
> *The process will involve the Australian Industrial Relations Commission receiving submissions and hearing [...] and considering:*
> ...
> - *Which industries and employers have extensively used Australian Workplace Agreements to override prescriptive and complex award terms.*[2]

The capacity to make appropriate individual arrangements needs to be understood in the context of today's labour market. Current and long term labour market needs are only going to be met by increasing the participation of people from segments of the civilian population which have traditionally had low participation rates and/or by migration. As well, the differences between the generations and their priorities is becoming more pronounced as the increasing pace of technological change means that each new generation grows up in what is becoming more literally, a different world. The labour force has become and will continue to become more diverse, that is, with different needs and preferences for working patterns and remuneration arrangements.

ABI supports the right of employers and employees to negotiate terms and conditions of employment on an individual or collective basis, and the right of individual enterprises to seek the best mix for themselves. Moreover, it is important to avoid an outbreak of inflexibility when the new system comes into effect.

In the absence of specific individual agreements providing access to different working arrangements, the system itself will need to allow greater flexibility than is currently

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[1] Australian Labor Party, *Forward with Fairness - Policy Implementation Plan*, August 2007, at pg 5
[2] Id at pg 15-16

the case without imposing additional costs. Hence, it is important that the proposed National Employment Standards do not operate to impose new inflexibilities, particularly on working arrangements in traditionally award-free areas or areas of unusual award regulation[3]. Also, it is important that modern awards do not become a vehicle for imposing new inflexibilities or restrictions on the options of working patterns for employees and businesses.

ABI Council, which comprises elected representatives of its membership, has had an opportunity to review the issues raised in this paper with respect to the Bill. This submission is reflective of the opinions and recommendations endorsed by the Council.

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[3] As did, for example, the maximum hours standard and the wages guarantee for traditionally award-free senior staff and commission-based pay systems supported by a guaranteed minimum wage which were introduced with WorkChoices.

Workplace agreements and the no-disadvantage test

The Bill provides that Australian Workplace Agreements may no longer be made after the commencement date of the legislation.

As a transition measure, Individual Transitional Employment Agreements (ITEAs) may be made until 31 December 2009, between an employer that employed at least one employee on an individual agreement (such as an AWA) as at 1 December 2007, and an existing employee employed under an individual agreement, or a new employee not previously employed by the employer[4].

Issue:

Who can have an ITEA?

Proposed s. 326 identifies the types of employees whose employment can be subject to an ITEA. Proposed s. 326(2)(a) requires the employer to be employing at least one employee under an AWA (or other specified type of individual agreement) "…as at 1 December 2007". S. 326(4) provides that the fact that a period of work has ended does not of itself bring an employee's employment to an end for the purposes of s. 326(2)(b)(ii). However, s. 326(4) does not operate with respect to s. 326(2)(a). This appears to exclude the use of ITEAs in employment situations where the relevant individual agreements are confined to intermittent casuals and casual pools.

S. 326(2)(b)(i) provides that, subject to s. 326(2)(a) being met, an ITEA could be entered into with a new employee. The "new employee" provisions require the ITEA must be made within 14 days of that employment commencing and require that the employee had not previously been employed by the employer. This appears to exclude the use of ITEAs with employees who had previously been employed under AWAs or other relevant individual agreements who are employed intermittently for specific periods or specific tasks. This restriction would appear to impact businesses which engage in project-based work.

Recommendation:

If the Government's policy to allow businesses which as at 1 December 2007 have an employee engaged under an AWA (or like instrument) to make ITEAs, is not intended to exclude situations where there is an established practice (as at 1 December 2007) of employing non-typical employees under AWAs (or like instruments), the Bill should be amended

- so that proposed s. 326(4) also applies to s. 326(2)(a); and
- to delete the phrase "and had not previously been employed by the employer" from proposed s. 326(2)(b)(i).

[4] Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2007, at s. 326 (1)-(3)

The no-disadvantage test

Proposed s. 346D(1) and s. 346D(2) of the Bill state that an ITEA or collective agreement "passes the no-disadvantage test if the Workplace Authority Director is satisfied" that the ITEA or collective agreement "does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment" under any reference instrument relating to the employee or employees[5].

For an ITEA, a reference instrument is taken to include any relevant collective instrument; or any relevant collective instrument and any relevant general instrument to the extent that the instruments operate concurrently; or if there is no relevant collective instrument - any relevant general instrument; or if there is no relevant collective instrument or relevant general instrument, a designated award[6].

For a collective agreement, a reference instrument is taken to include any relevant general instrument; or if there is no relevant general instrument, any designated award[7].

For the purposes of the no-disadvantage test (NDT), a relevant collective instrument is taken to include a collective agreement made under WorkChoices; a pre-reform certified agreement; a preserved collective State agreement etc.[8]

For the purposes of the NDT, a relevant general instrument is taken to include an award; a transitional award; a notional agreement preserving State awards (NAPSA) etc.[9]

Issues:

Negotiated Outcomes should not form the basis of an NDT

With respect to the inclusion of relevant collective instruments as reference instruments for the purpose of assessing ITEAs under the NDT, ABI considers that it would be more appropriate to test individual statutory agreements against relevant safety net entitlements (such as the Standard and relevant award/NAPSA) or "relevant general instruments" rather than (and in addition to) a collective agreement which represents negotiated outcomes. ABI recognises that this does not presently accord with Government policy but seeks favourable consideration of the proposal.

This approach would be consistent with the concept of the NDT as it has been legislated and applied since its introduction under the *Industrial Relations Reform Act 1993* (Cth) until the commencement of the *Workplace Relations Amendment (Work Choices) Act 2005*. It would also be consistent with the level of protection which is proposed for employees entering ITEAs where there has not been a tradition of collective agreements in the past.

[5] Id at s. 346D(1) and s.346D(2)
[6] Id at s. 346E (1)(a)
[7] Id at s. 346E (1)(b)
[8] Id at s. 346E (3)
[9] Id at s. 346E (5)

Recommendation:

The Government consider deleting
- proposed s. 346E(1)(a)(i);
- the phrase "any relevant collective instrument and" at proposed s. 246E(1)(a)(ii); and
- proposed s. 346E(2).

Inclusion of the Standard in the application of the NDT

In the Government's pre-election policy document *Forward with Fairness - Policy Implementation Plan*, it was noted that an ITEA may be made provided it does not "disadvantage the employee against a collective agreement….(and) where there is no collective agreement, the applicable award and the Fair Pay and Conditions Standard"[10].

In a media statement released 17 December 2007 the Government also noted:

> *In order to pass the new no-disadvantage test, collective agreements must not disadvantage employees when compared with the Australian Fair Pay and Conditions Standard (the current Standard) and the relevant award,*
>
> *Similarly, ITEAs must not disadvantage employees when compared with an applicable collective agreement and the current Standard or, in the absence of such an agreement, the current Standard and the relevant award*[11].

It appears that in the NDT as currently drafted in the Transition Bill, the Australian Fair Pay and Conditions Standard (the Standard) is not listed as a reference instrument relating to the terms and conditions of an employee. Thus, although the Standard cannot be reduced or removed through the bargaining process, and would continue to operate and apply alongside an ITEA or collective agreement to govern an employee's terms and conditions of employment, it does not appear to be able to form part of the assessment process to determine whether an agreement passes the NDT.

This appears contrary to the intention of the Government, and may result at best, in a lack of clarity, and at worst the problematic operation of the NDT. Conceptually, excluding the Standard gives rise to the possibility of an agreement which breaches the Standard being assessed as passing the NDT (although it would be an offence to actually employ under it in breach of the Standard).

The most salient item at issue is wages. "Relevant collective instruments" (e.g. collective agreements) usually, but do not always contain wages. In the case of "relevant general instruments" (e.g. NAPSAs, pre-reform awards) only transitional awards (and transitional Victorian awards) contain wages.

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[10] Australian Labor Party, *Forward with Fairness - Policy Implementation Plan*, August 2007, at pg 6

[11] The Hon Julia Gillard MP, Deputy Prime Minister, Minister for Education, Minister for Employment and Workplace Relations, Minister for Social Inclusion, *Forward with fairness transitional arrangements*, Media Release, 17 December 2007

An employee's minimum rates of pay are set out in Australian Pay and Classification Scales (pay scales) which form part of the Standard as it applies to a particular employee. If the NDT is to be an "overall" or global test, it is difficult to see how it might be applied against a set of conditions that are not exhaustive and/or reflective of the employees current minimum statutory terms and conditions of employment.

Excluding the Standard from the definition of reference instrument also raises the operational question of what an agreement's wage rates are to be assessed against to ascertain whether or not they are beneficial to the employees under the proposed agreement and whether they are a reasonable offset to other conditions. Other issues arise with respect to a number of conditions of employment that are contained in both the Standard, and in reference instruments.

Personal leave is an example. Under the Standard, full time employees are entitled to a maximum of 76 hours/10 days of personal leave per year of employment. Under a reference instrument, for example, many NAPSAs arising from NSW State awards, an employee is entitled to 5 days of personal leave in the first year of employment, and 8 days every year thereafter. In the situation where an employee is covered by both the Standard and the NAPSA, the "more generous test" (which requires that a condition in the Standard applies unless the award or NAPSA is more generous) would operate to clearly provide that in this case, the Standard is more generous and therefore applies to the employee.

If an agreement was lodged for the same employee, the agreement could not detract from the Standard and the employee would be entitled to no less than the Standard's 76 hours/10 days of personal leave per year. However, the relevant general instrument - in this case a NAPSA, with its 5/8 days of personal leave would appear to be the bar against which the NDT is set. The NDT as drafted in s.346D appears only to allow an agreement to be tested against the reference instrument, which does not include the Standard.

This raises the further issue with respect to clarity. Technically, by providing the minimum Standard of 76 hours/10 days of personal leave per year within the terms of the agreement, the agreement is providing entitlements in excess of those contained in the reference instrument - i.e. the NAPSA, thereby providing an overall advantage which might be traded off against the removal or reduction in another reference instrument condition.

Recommendation:

If it is the Government's intent that workplace agreements must be tested to ensure that they do not disadvantage an employee when compared with an applicable instrument and the Standard - the Bill should be appropriately re-drafted to ensure that it is clearly understood that "reference instrument" is taken to mean the relevant instrument and the Standard as they apply in combination to a particular employee or group of employees.

Reasons to be published on the Workplace Authority's website

Proposed s. 346D(5) requires that if the Workplace Authority Director decides under s. 346D(3) [approval of agreement not contrary to public interest] that an agreement is taken to pass the NDT, he/she must publish his/her reasons for the decision on the Workplace Authority's website[12].

Issue:

ABI would be generally supportive of such a requirement, as it will lend further clarity and transparency to the process of agreement assessment and approval. However, the publication of such reasons should only be to the extent that commercially sensitive information is not made public.

Recommendation:

If it is the Government's intent that reasons for a decision to approve an agreement under s. 346D(3) be published on the Workplace Authority's website in order to provide clarity and transparency to the process, the Bill should be appropriately re-drafted to ensure that it is clearly understood in that process, commercially sensitive information is not made public.

Agreement does not pass the NDT

Proposed s. 346N provides that if the Workplace Authority decides that the agreement does not pass the NDT, the employer may lodge a variation of the agreement with the Workplace Authority[13].

Issue:

For a collective agreement, a variation will require compliance with the full spectrum of pre-lodgment procedures outlined in s.369 - s.374, including the necessity to have the variation approved by employees. The necessity to (in many cases) hold another vote will come at significant expense and inconvenience to employers.

If the agreement is lodged in the first instance, it is because it has been approved by employees. If after lodgment, it is found by the Workplace Authority not to pass the NDT, any changes required to meet the NDT will only be more 'advantageous" to the employees covered by the agreement.

On balance, ABI considers that the cost and inconvenience of satisfying the full pre-lodgment and approval requirements of a variation agreement is not justified in the circumstances where a collective agreement is merely being rectified so as to meet the requirements of the NDT, and therefore is providing terms and conditions more advantageous than those agreed to in the original agreement.

[12] Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2007, at s. 346D(5)
[13] Id at s. 346N(1)

One option would be in these circumstances, to allow employers to provide a binding undertaking, similar to that capable of being lodged under current s. 346R(2)(b), which allows employers whose agreements have not passed the Fairness Test to rectify the agreement, or its implementation, so that it no longer fails.

Recommendation:

The Bill should be appropriately re-drafted to allow that where a collective agreement is initially found not to pass the NDT, the employer may lodge a binding undertaking to rectify the agreement, rather than being compelled to undertake a full variation process.

Operation date of agreements

Proposed s. 347(1) outlines the times at which a workplace agreement comes into operation.

An ITEA for a "new employee" (i.e. an ITEA to which s. 326(2)(b)(i) applies), a union greenfields agreement and an employer greenfields agreement operate from the day the agreement is lodged[14].

An ITEA for an "existing employee" (i.e. an ITEA to which s. 326(2)(b)(ii) applies), an employee collective agreement and a union collective agreement operate from the seventh day after the date of issue specified in the "approval notice" (i.e. notice issued under s. 346M(1) or s. 346Q(2))[15].

Issue:

ABI considers that the appropriate date of commencement of operation for all agreements is the lodgment date, or such later date as is specified by the terms of the agreement.

Information provided by the Workplace Authority details that between 7 May 2007 and 31 January 2008, 278 275 agreements have been lodged with the Workplace Authority. As at 31 January 2008, only 129 912 of those agreements had been finalised[16].

It is also worth noting in this context that the Fairness Test does not apply to all agreements lodged with the Workplace Authority Director[17]. Information available on the Workplace Authority's website indicates that the Fairness Test has not applied to approx 7% of agreements lodged to 30 November 2007[18].

[14] Id at s. 347(1)(a)
[15] Id at s. 347(1)(b)
[16] Commonwealth Hansard, *Senate Standing Committee on Education, Employment and Workplace Relations - Additional Budget Estimates*, Thursday 21 February at pg 63
[17] The Fairness test applies only to collective agreements that modify and/or exclude protected award conditions, and AWAs that provide remuneration less than $75 000 per annum and also modify and/or exclude protected award conditions.
[18] Workplace Authority, *Workplace Agreement Data November 2007*

There is no information publicly available that details how long some employers and employees have waited/are currently waiting to have their agreement assessed under the Fairness Test, however anecdotal evidence suggests that some agreements have been in the queue for many months. This is clearly not ideal and it creates uncertainty and inconvenience. However, these costs are to some extent mitigated by the fact that agreements operate from lodgment (subject to their terms) and therefore in many cases employers and employees are not waiting on the decision by the Workplace Authority Director before their agreement can commence.

It is difficult to see that the NDT process proposed by the Bill will result in radically different or reduced processing times than the current Fairness Test does. On the contrary, the fact that all agreements will have to be assessed may actually result in the process taking longer.

It is an undesirable industrial outcome for the commencement of a negotiated and approved settlement to be indefinitely deferred until after the "approval notice" is received. It is also undesirable and unfair for an employer to pay the new rates under an agreement without being able to implement it.

There are corrective mechanisms available to ensure that the minority of agreements that do not pass the NDT are rectified and appropriate compensation is accorded. On balance, it would be inappropriate to delay the operation of agreements in the manner prescribed in the Transition Bill.

Recommendation:

The Bill should be appropriately re-drafted to allow all agreements, but particularly collective agreements, to operate from lodgment or such later date specified in the agreement, and have the NDT conducted retrospectively.

Should the Government decline to re-draft the Bill in the manner suggested above, it is the Government's responsibility to ensure that the NDT process does not impede the productivity and stability of workplaces seeking to make arrangements at the enterprise level.

In that context, ABI also urges that the provision of sufficient resources to the Workplace Authority Director be given the highest possible priority, so that agreements may be processed in an efficient, consistent and timely manner.

Termination of a collective agreement by the Commission

Proposed s. 397A provides that the Commission may, by order, terminate a collective agreement that has passed its nominal expiry date on application if it is satisfied that it would not be contrary to the public interest[19]. Such an application may be lodged by the employer, a majority of the employees whose employment is subject to the agreement or an organisation of employees that is bound by the agreement[20].

[19] Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2007, at s. 397A(1)
[20] Id at s. 397A(2)

Issue:

S. 170MH of the pre-WorkChoices Act stipulated that an organisation of employees bound by the agreement could apply to have an agreement terminated, provided that it had at least one member whose employment was subject to the agreement[21].

ABI considers the addition of such a qualification to proposed s. 397A(2)(c) would be appropriate, in that it will prevent an organisation with no current legitimate interest in an agreement, from lodging an application seeking its termination when parties with a continuing legitimate interest have not sought to terminate.

Recommendation:

That the Bill be appropriately re-drafted to ensure that for an organisation of employees to be able to apply to have a collective agreement terminated by the Commission, they must be required to have at least one member subject to the agreement.

Awards

Schedule 2 proposes to insert a new part, Part 10A, "Award Modernisation", to provide the Australian Industrial Relations Commission (Commission) with the capacity to undertake one or more award modernisation processes so as to make "modern awards", and consequentially to amend existing provisions of Part 10, "Awards", including deleting provisions relating to award "rationalisation" and "simplification". Modern awards are intended to come into operation with the introduction of the proposed new system.

Part 10A identifies its objects and the nature of modern awards and the Commission's "award modernisation" function, but the key to the process is the "Award Modernisation Request" and what follows. ABI is broadly supportive of these proposed objects and proposed process, but recognises that the experience of the award modernisation process may throw up the need to amend these provisions.

Crucially, much depends on the nature and extent of award coverage and the number of modern awards. These are decisions which are not determined by the Bill. ABI's comments at this stage are preliminary.

Issues:

Coverage of modern awards

Proposed s. 576A(2)(a) provides that modern awards must reduce the regulatory burden on business. Government policy recognises the risk that awards can get out of hand and seeks to guard against that.

[21] *Workplace Relations Act 1996* (pre-WorkChoices amendments) at s. 170MH(1)

Awards have been a key part of the safety net for Australian employees and have been in existence for 100 years. However, over time, awards have grown in number and size. Some have moved from a statement of minimum terms and conditions to lengthy and prescriptive documents which have been amended and reviewed again and again.

There are currently over 4300 awards in Australia.

To be part of Australia's future awards must be modernised and simplified[22]

As well, policy is to not extend award coverage.

Under Labor, awards will not cover those who are historically award free, such as managerial employees. In addition, from January 2010 awards will not apply to employees earning more than $100,000 who agree their terms and conditions under Labor's new system.[23]

Recommendation

The Government could consider explicitly limiting the coverage of the modern award system to areas of existing award coverage. The provisions of proposed s. 346G(2)(a), "Designated awards – before a workplace agreement or variation is lodged", may provide an appropriate approach.

What should the Commission consider when modernising awards?

Proposed s.576B(2) identifies a number of factors which the Commission is to have regard to when undertaking an award modernisation process. Proposed s. 576B(2)(g) identifies the safety, health and welfare of employees as one matter to which the Commission is to have regard. ABI does not support requiring the Commission to have regard to the safety, health and welfare of employees, which is not an area of its primary expertise, and which seems unnecessary because awards are read subject to state occupational health and safety laws[24].

Recommendation:

The Government consider deleting proposed s. 576B(2).

Content of Modern Awards

Currently awards are confined to matters which pertain to the relationship of employers and employees.[25] This has always been the case. Past and current award regulation is shaped by this fact and employee entitlements which are sought to be

[22] Australian Labor Party, *Forward with Fairness - Policy Implementation Plan*, August 2007, at pg 17
[23] Id at pg 15
[24] *Workplace Relations Act 1996* at s. 17(2)(a)
[25] Id at s. 513(2)

protected are those pertaining to the employment relationship. The Bill does not appear to continue this requirement for modern awards. There seems no good reason to depart from this requirement for modern awards, particularly in light of the objective to reduce award content and inflexibility and also given that agreements seem not to be so confined.

Proposed s. 576R excludes terms about right of entry from modern awards but does not appear to similarly exclude terms about rights or remedies arising from terminations which are harsh, unjust or unreasonable. Unfair dismissal, and unlawful termination will be dealt with in the proposed Act itself, as is the case for right of entry.

Recommendation:

The Government consider amending the Bill to

- confine the subject matter of modern awards to matters pertaining to the employment relationship; and
- exclude from modern awards terms conferring rights or remedies in the event of an unfair dismissal.

Proposed s. 576T would require modern awards to not include terms and conditions of employment which are determined by state or territory boundaries or which do not effect in each state or territory. The principle is supported. The proposed section also provides for a phasing-in period of up to 5 years after commencement and this, too, is supported.

Government policy is that awards are a part of the safety net but are shaped by the needs of their industry of operation.

> *Awards set minimum terms and conditions for particular industries, occupations and enterprises*.[26]

Some awards, particularly those in industries which operate in remote areas or where there are distinctive industry allowances (such as travel allowances) which are in part connected with costs or time incurred, will provide terms which only apply in those locations or which are different for different locations. ABI would not wish to see this type of legitimate local condition excluded by the operation of proposed s. 576T(1)(b), and does not understand that it would be the Government's intention that this should happen.

Recommendation:

That the Government consider amending the Bill if needed to clarify that proposed s. 576T(1)(b) would not operate to exclude locality based conditions or conditions which differ according to locality.

[26] Australian Labor Party, *Forward with Fairness - Policy Implementation Plan*, August 2007, at pg 15

Enterprise Awards

Government policy is to exclude enterprise awards in the ordinary course from the award modernisation process.

> *Labor understands that enterprise awards have a special status. Many enterprises have worked for years to get their enterprise award into a shape that suits their business. Consequently, Labor guarantees that enterprise awards will continue. Labor will instruct the Australian Industrial relations Commission to only review enterprise awards when requested by current parties to the award.*[27]

Enterprise awards raise a number of issues. Proposed s. 576U of the Bill defines "enterprise award" as an award which regulates a term or condition of employment of one or more employees by "...an employer in a single business specified in the award". On one reading this could be understood to mean an employer in a single business which is respondent to the relevant award[28].

This form of words, but not the term "enterprise award", is also used in proposed s. 346G(4)(c) and s. 346H(3)(c) of the Bill. It would seem clearer to used the term "enterprise award" rather than the words of the definition of "enterprise award" in these proposed sections.

Recommendation:

The Government might consider

- whether amending the definition or "enterprise award" to read "...an employer in the single business specified in the award" assists to clarify its intent; and
- whether the definition of "enterprise award" should be moved or replicated so as to also use the term "enterprise award" in proposed Division 5A of Schedule 1 of the *Workplace Relations Act 1996*.

Modern awards are intended to provide a part of the safety net. Proposed s. 576L requires that the terms of a modern award provide a fair minimum safety net. Enterprise awards both reflect the peculiarities of specific enterprise needs and are, in many cases, also the outcomes of bargaining. They often provide actual conditions rather than a fair minimum safety net. In some states, such as NSW, enterprise bargaining outcomes were typically given effect as awards rather than enterprise agreements[29]. In some cases bargaining may have taken place subsequently with the latter bargaining given effect as a formal agreement (pre-reform certified agreement,

[27] Id at pg 16

[28] It is understood that the proposed form of the definition "enterprise award" is taken from the current definition of "enterprise award" at cl 52AA(2) of Schedule 8 but the awards referred to are state awards, that is, awards which had been made in a common rule jurisdiction where respondency was untypical.

[29] In many cases in NSW what would otherwise have been enterprise awards were converted to enterprise agreements and became preserved collective state agreements on commencement because of the operation of the *Industrial Relations Amendment Act 2006* (NSW). However, this did not happen in other states, and did not happen to all enterprise awards in NSW. There will be enterprise NAPSAs .

collective agreement or preserved state agreement), in others new "enterprise" awards were made.

It is therefore quite appropriate that enterprise awards are not included in a general Award Modernisation Request. However, the same can be said of enterprise NAPSAs which are in the system, but they are not captured by the definition of enterprise award because they are not an award. Proposed s. 576C(2)(c) provides that an award modernisation request must specify any other matters which the Minister considers appropriate. This is a wide power. ABI would not wish to see the situation arise where bargained conditions derived from an enterprise NAPSA would give rise to conditions in a modern award.

Conversely there will be instances where the parties to an enterprise NAPSA would want to retain its conditions as the "enterprise award".

Recommendation:

The Government consider

- whether the Bill requires amending so that conditions in "enterprise NAPSAs" not form part of the consideration for conditions to be provided by enterprise awards; and
- amending the Bill to enable all parties to an enterprise NAPSA to request having it converted into an enterprise award on start-up day – the model might resemble that proposed by Schedule 5 of the Bill, that is, all parties must genuinely agree and there must have been no industrial action threatened on or after the introduction day.

Functions of the Australian Fair Pay Commission

Making Pay Scales Available

Item 6 of Schedule 2 of the Bill proposes to replace the definition of "new APCS". As a result a new pay-scale would mean one which had been determined prior to the Bill's commencement. The effect of this amendment is that the Australian Fair Pay Commission (AFPC) would not be able to determine new pay scales. It would retain the capacity to adjust existing pay scales.

Issue:

ABI does not dispute the proposed limitation on the AFPC's powers, but wishes to draw attention to one consequence, which, in our submission, requires attention. There remains the need to publish definitive pay scales to establish accurately pay scale coverage, current minimum rates and to establish an effectively definitive publicly available record of rates from the commencement of WorkChoices.

As pointed out by Minister Gillard, there is nothing in the current legislation which requires the AFPC to issue pay scales as a result of its wage-setting decisions.

> *A Rudd Labor Government will require its independent umpire to update and publish pay and classification scales in July each year. It will provide certainty for both business and working families.*
>
> *This is in contrast to the current confusion and lack of information available under the Howard Government – which fails to inform employers what they are legally obliged to pay employees.*
> *Employers and employees need clear information and a reference point on the application of minimum wage increases.*
>
> ...
>
> *Currently, there is no requirement for the Howard Government's Australian Fair Pay Commission to provide details to employers about how a minimum wage increase applies to their workers.*
>
> *The business community has identified compliance with the new minimum standards, in particular, pay and classification scales, as their greatest concern and has called for all pay and classifications scales to be published*.[30]

Under the existing legislation, pay scales were derived from state and federal awards, and some other sources, (pre-reform wage instruments) as in force at the commencement of WorkChoices. Preserved pay scales comprised several of the terms in pre-reform wage instruments including their coverage, classifications and rates and casual loadings. Classification rates were expressed as hourly rates, casual loadings as percentages[31]. In some cases prospective increases were included, in others they were not[32]. There were a number of areas of uncertainty affecting some pay scales and further areas of uncertainty arose affecting these and other pay scales following the AFPC's first pay-setting decision. That decision varied existing preserved pay scales.

Under the AFPC's understanding of its powers, which seems correct, the AFPC could not issue definitive preserved pay scales because they were established by law. The AFPC took the view that only a Court could definitively identify the content of a preserved pay scale. As a consequence, in mid-2007 the AFPC began a process of determining new pay scales which it could issue as authoritative pay scales[33]. This will no longer be possible under the proposed amendment. In fact the AFPC ceased activity associated with new pay scales or potential new pay scales in December 2007[34].

Issuing new pay scales was not a comprehensive solution in any case. This is because these new pay scales could only operate prospectively. That is, a new pay scale

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[30] Australian Labor Party, *Federal Labor to Publish Pay and Classification Scales Providing Certainty for Business and Workers*, Media Release, 9 April 2007
[31] *Workplace Relations Act 1996* at s. 209-213
[32] Id at s. 208(4)
[33] Australian Fair Pay Commission, *Process for creating new pay scales announced*, Media Release, 23 July 2007
[34] Australian Fair Pay Commission, *Australian Fair Pay Commission announces future wage-setting programme,* Media Release, 18 December 2007

which applied from its date of determination to employees under a preserved pay scale could subsequently be found by the Court to differ from the existing preserved pay scale.

Pay scale information was also addressed in late 2006 when the (then) Department of Employment and Workplace Relations commenced issuing pay scale summaries. These, now issued by the Workplace Authority, are also an imperfect solution. They are altered from time to time on the basis of questioning by one or more industrial parties. Re-issues are unannounced and to date not all pay scales have had pay scale summaries released.

Nonetheless, the pay scale summaries go some way towards providing a definitive record because they are regarded by the Workplace Ombudsman as the basis for assessing purported underpayments.

> *Demonstrated compliance with the details published in this pay scale summary by an employer bound to observe the provisions of the equivalent preserved Australian Pay and Classification Scale (pay scale) will be deemed by the Workplace Ombudsman as satisfying the employer's obligations under the pay scale, provided that the employee is correctly classified and paid for each hour worked in accordance with the pay scale. The keeping of time and wages records and the issuing of payslips is required by law and will be needed to demonstrate to the Workplace Ombudsman compliance with this pay scale.*[35]

There continues to be a need for publicly available pay scales or summaries which properly identify employees' pay entitlements which are, or can be taken to be, conclusive.

Recommendation:

The Government give serious consideration to the need for publicly available conclusive, or effectively conclusive, pay scales as they apply during the period until new pay rates are issued by Fair Work Australia, including if necessary, the need to make legislative amendments.

Transitional arrangements for existing pre-reform Federal agreements etc.

Commission may extend or vary pre-reform certified agreements

Proposed Clause 2A of Schedule 5 allows that the Commission may, on application, extend the nominal expiry date, or vary the terms of a pre-reform certified agreement[36].

[35] Taken from pay scale summary

[36] Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2007, at Clause 2A of Schedule 5

In the case of a variation, the Commission must be satisfied that the agreement as varied would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees under any applicable transitional award and any law of the Commonwealth, or of a State or Territory, that the Commission considers relevant[37].

Issue:

Transitional awards are federal awards that were in force immediately before reform commencement which are continued in force[38]. Transitional awards were not subject to the same range of allowable award matters as were pre-reform awards and continue with much the same range of "pre-WorkChoices" allowable award matters against which pre-reform certified agreements would have been tested under the pre-reform NDT. The explanatory memorandum goes on to note that these instruments are therefore an appropriate basis for the NDT for pre-reform certified agreement variations[39].

This is not disagreed, but it is only half the story. Many employers and employees who entered into pre-reform federal agreements were not bound by federal awards. Unless award-free[40] their pre-reform certified agreements were tested against the relevant State award for the purposes of the NDT. It would be inappropriate for a variation to a pre-reform certified agreement of this kind to impose an award with which they have no prior or present connection as the comparator for the NDT.

Recommendation:

If it is the Government's intent that in order to vary a pre-reform certified agreement, it must be tested to ensure that it does not disadvantage employees when compared with an instrument reflecting appropriate pre-reform entitlements, the Bill should be appropriately re-drafted to allow such agreements to be tested where applicable, against a relevant NAPSA and pay scale derived from the relevant pre-reform state wage instrument.

Preserved state agreements

Proposed Clause 2A of Schedule 5 of the Bill provides for the variation or extension of pre-reform certified agreements. The Bill does not provide a similar capacity for preserved collective state agreements. This appears to be anomalous. Preserved collective state agreements are the continuing operation of a state employment agreement[41] and include award provisions which prior to the commencement of

[37] Id at Clause 2A (2)(c) of Schedule 5
[38] *Workplace Relations Act 1996* at Clause 2 of Schedule 6,
[39] Explanatory Memorandum to the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2007, at pg 95-96
[40] In which case a federal award was "designated", *Workplace Relations Act 1996* (pre-WorkChoices) at s. 170XE, s. 170XF
[41] An agreement between an employer and employees and/or union(s) which was in force under a state law and which prevailed over an inconsistent state award (s 4 and Cl 10, Schedule 8, *Workplace Relations Act 1996*)

WorkChoices applied together with any preserved entitlements provided under a state law.[42]

Preserved collective state agreements also operate like pre-reform certified agreements in that they have a nominal life and continue in effect until replaced or terminated. They have the same relationship to the Standard as do pre-reform certified agreements. Protected industrial action is not available during their nominal life and is, subject to meeting pre-requisites, thereafter.

Preserved collective state agreements differ from pre-reform certified agreements in that they could have contained a term which became prohibited content on commencement. An anti-AWA term became prohibited and of no effect[43].

Extending the capacity to extend or vary preserved collective state agreements does not appear to offend any policy objective of the Government. Employees currently employed under a preserved collective state agreement which was extended would continue to receive applicable award/NAPSA conditions, and extension would require the agreement of the parties. Variation would also require agreement and be subject to the NDT. In both cases agreement would not be able to be the product of industrial action.

Recommendation:

The government should favourably consider amending Clause 2A(1) of Schedule 5 of the Bill by inserting the words "or preserved collective state agreement" after the words "pre-reform certified agreement".

ABI would also propose that the Bill should be appropriately re-drafted to allow variation of a preserved collective state agreement to be tested where applicable, against a relevant NAPSA and pay scale derived from the relevant pre-reform state wage instrument.

[42] *Workplace Relations Act 1996* at Clause 13 of Schedule 8
[43] *Workplace Relations Regulations 2006* at Reg 8.8(1)(b), Chapter 2, Part 8, Division 7.2