

Australian Workplace Agreements (AWAs)

Fair Employment discussion paper 2

Prepared by the Fair Employment Advocate
Western Australia

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FEA foreword

October 2007

As the Western Australian Government's Fair Employment Advocate, one of my roles is to raise public awareness of unfair treatment in the workplace.

I intend to do this through an education campaign - featuring public forums with workplace relations experts and a series of discussion papers on topics of interest, the first of which on unfair dismissal was released in September 2007.

This second discussion paper is on Australian Workplace Agreements (AWAs), and it raises issues that I hope will generate public debate about the notion of fairness.

In this paper, my aim has been to bring together the various findings of research papers, along with evidence I have collected from various AWAs. I also welcome any personal experiences or general observations about the impact of individual agreement making provisions on employers, employees and their families in Western Australia.

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Information about fair employment and copies of this discussion paper are available from www.fairemployment.wa.gov.au

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Abbreviations and acronyms

ACCI	Australian Chamber of Commerce and Industry
APCS	Australian Pay and Classification Scale
AWA	Australian Workplace Agreement
CA	Collective Agreement
DOCEP	Department of Consumer and Employment Protection
FEA	Fair Employment Advocate
HREOC	Human Rights and Equal Opportunity Commission
ILO	International Labour Organization
IR Act	<i>Industrial Relations Act 1979</i>
IRV	Industrial Relations Victoria
IWA	Individual Workplace Agreements
MCE Act	<i>Minimum Conditions of Employment Act 1993</i>
NDT	No Disadvantage Test
OWP	Office for Women's Policy
The Standard	Australian Fair Pay and Conditions Standard
WR Act	<i>Workplace Relations Act 1996</i>

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Introduction

This second Fair Employment Advocate (FEA) discussion paper examines the impact of Australian Workplace Agreements (AWAs) on Western Australian workplaces and employees.

In 2005 the Australian Government indicated that the Work Choices legislation would:
*“create a more flexible, simpler and fairer system of workplace relations ... improve productivity, increase wages, balance work and family, and reduce unemployment.”*¹

The extent to which AWAs have contributed to improvements in productivity, wages, unemployment and work life balance has been a matter of ongoing community debate.

Those championing AWAs often talk of improved flexibility, lower industrial disputation, higher wage outcomes and increased business confidence.

Critics argue that AWAs:

- only provide flexibility for employers;
- exploit vulnerable workers;
- erode previously protected employment conditions (the “race to the bottom”);
- breach international labour standards; and
- are being used by employers primarily to cut labour costs and avoid union intervention.

There are a range of social, economic, and structural issues that impact on AWA outcomes across different Western Australian industries. In the context of a natural resources boom and tight labour market, skilled employees have enjoyed increased remuneration – regardless of the employment arrangement used. However, the FEA remains concerned about how AWAs are used in occupations where the employees have little bargaining power.

In May 2007 the Federal Government responded to mounting public criticism by the introduction of the Fairness Test – aimed at fairly compensating employees for trading away entitlements in AWAs.

Many remain concerned that the test fails to address the problems that lie at the heart of individual agreement making. Business groups have complained about the increasing administrative burden and confusion associated with the registration process.

Analysing the impact of AWAs beyond wage outcomes has been hampered by the paucity of comprehensive data about the impact on the total wages, conditions and employment outcomes of employees on such arrangements. Meanwhile, the Workplace Authority has not released qualitative AWA data to researchers.

The FEA has collated evidence from a variety of sources (including from actual AWAs provided by employees), which have been used as the basis for this discussion paper. It is part of the FEA’s role to provide information and advice so that people can make informed decisions about fair wages and conditions. Employers and employees can contact the FEA directly or use DOCEP’s online calculator Paychecker at www.docep.wa.gov.au (see Appendix B for more information).

Individual agreements – the Western Australian experience

Between 1993 and 2002 Individual Workplace Agreements (IWAs) were a legislated employment option in the Western Australian jurisdiction. IWAs represented a significant shift away from the previous industrial relations system, which only provided for collective agreements underpinned by awards.

Underpinned by the *Minimum Conditions of Employment Act 1993* (MCE Act), IWAs were registered with the former Commissioner of Workplace Agreements. In July 2002 the Commissioner released a report comparing employment conditions in IWAs and awards in Western Australia². The report examined IWAs taken from the Contract Cleaning, Retail, Hospitality and Security Services industries, finding that:

- 56 per cent of all IWAs were below the relevant award ordinary rate (77 per cent in the case of casuals, 60 per cent for juniors, 76 per cent in the Security industry and 60 per cent in the Retail industry);
- 75.5 per cent of IWAs did not provide for a pay increase, despite an operational period of five years; and
- many IWAs removed award provisions such as penalty rates, overtime, hours arrangements and leave entitlements.

The Western Australian experience highlights the broader concern that, in many cases, individual agreement making:

- adopts a “bare bones” approach to wages and conditions issues for workers in comparison to industry award benchmarks;
- does not fairly compensate employees for stripping away previously protected award conditions;
- is about cost-cutting rather than flexibility in employment options; and
- produces detrimental outcomes for vulnerable employees.

As evidenced throughout this paper, these same concerns (and more) have also been raised for AWAs in low paid industries.

Today's AWAs

Definition and overview

A range of statutory workplace agreements can be made by employers in the federal system pursuant to the *Workplace Relations Act 1996* (Cth) (WR Act) to cover the terms and conditions of employees. Employers in the Federal system include constitutional corporations, employers in the Territories, the Commonwealth and its authorities.

An AWA is one category of statutory agreement - an individual agreement between an employer and one employee that sets out terms and conditions of employment. Other categories include:

- collective agreements between an employer and either a union or employees;
- greenfields agreements either between an employer and a union, or an employer by itself; and
- multiple business agreements.

An AWA is the only type of registered federal agreement that is made with an individual employee.

An AWA may be made before an employee commences employment. Although an employer cannot coerce an employee to sign an AWA, it is lawful to require a potential employee to sign an AWA as a condition of engagement (except during a transmission of business).

Effect of an AWA

Once an AWA is in operation, the WR Act provides that it replaces any award or collective agreement that would otherwise apply to the employee.

An AWA overrides employment conditions in State laws to the extent of any inconsistency. However, a term of an AWA dealing with occupational health and safety, workers' compensation, training arrangements or matters prescribed by the regulations³ only has effect subject to a State law that deals with the matter.

Negotiation

An employee can appoint a bargaining agent to bargain on their behalf. If an employee appoints a bargaining agent, the employer must give the bargaining agent a reasonable opportunity to meet and confer about the AWA in the 7 days prior to an AWA being signed.

An employee is not able to take protected industrial action when bargaining for an AWA. Prior to the introduction of Work Choices, there was limited immunity for industrial action taken to compel or induce the making of an AWA on particular terms and conditions. That immunity no longer exists. Protected industrial action can now only be taken when bargaining for a collective agreement.

Procedure for making an AWA

The procedure for making an AWA is prescribed by the WR Act and involves a number of steps as follows.

The first step in the legislative procedure requires that an employer who intends to make an AWA with an employee, must take reasonable steps to ensure the employee:

- has, or has ready access to, the AWA in writing, for at least 7 days before the AWA is approved; and
- is given an information statement at least 7 days before the AWA is approved.

The employee may waive the 7 day period in writing. In that case, when the waiver is made, the employer does not have to comply with the requirements if it had already taken reasonable steps to ensure the employee:

- had, or had ready access to, the AWA in writing; and
- had been given an information statement.

An AWA is approved when an employee and employer sign and date the AWA and the signatures are witnessed. If an employee is under the age of 18 a parent, guardian or similar must sign the AWA.

Once an AWA has been approved, the employer must lodge the AWA and an employer declaration with the Workplace Authority within 14 days. An employer must give a copy of that lodged document to the employee as soon as practicable after it is lodged.

The Workplace Authority Director must issue a receipt for the lodgment and provide a copy of that receipt to the employer and the employee.

WORKPLACE RELATIONS ACT 1996 - SECT 345
Workplace Authority Director must issue receipt for lodgment of declaration for workplace agreement

- (1) If a declaration is lodged under subsection 344(2), the Workplace Authority Director must issue a receipt for the lodgment.
- (2) The Workplace Authority Director must give a copy of the receipt to:
 - (a) the employer in relation to the workplace agreement; and
 - (b) if the workplace agreement is an AWA--the employee; and
 - (c) if the agreement is a union collective agreement or a union greenfields agreement--the organisation or organisations bound by the agreement.

The AWA operates from the date it is lodged.

Similar processes apply to variation of an AWA and termination of an AWA during its nominal term. The WR Act provides procedures for terminating an AWA after the nominal expiry date has passed.

Content of AWAs

An AWA can contain a nominal expiry date up to five years from the date the AWA is lodged. If no date is specified the AWA nominally expires five years after the date of lodgment. The terms and conditions continue to apply past the nominal expiry date until the agreement is cancelled or a new agreement is signed. An AWA must contain dispute settlement procedures and if it does not, the model dispute resolution process in the WR Act is taken to be included in the AWA.

Protected award conditions

Certain conditions of employment in an award are deemed to be part of an AWA unless they are expressly modified or excluded by it. These “protected award conditions” are conditions that would have effect in relation to the employee if not for the AWA, a previous workplace agreement or another industrial instrument.

Protected award conditions include terms of an award that are about the following matters, or are incidental or machinery provisions in relation to these matters:

- rest breaks;
- incentive-based payments or bonuses;
- annual leave loading;
- entitlements related to State public holidays, or substitution of those days;
- certain monetary allowances, such as those for expenses incurred;
- loadings for working overtime or for shift work; and
- penalty rates.

Conditions for outworkers are specifically protected from exclusion or modification by an AWA.

Where protected award conditions are excluded or modified, the AWA will be subject to the Fairness Test if the employee earns less than \$75,000 a year (the Fairness Test is described in more detail below).

Australian Fair Pay and Conditions Standard

The Australian Fair Pay and Conditions Standard (the Standard) provides five minimum conditions of employment. If the Standard provides a more favourable outcome than the terms of the AWA, the Standard will prevail over the terms of an AWA to the extent to which the terms are more favourable.

The entitlements in the Standard relate to:

- basic rates of pay and casual loadings;
- maximum ordinary hours of work;
- annual leave;
- personal leave; and
- parental leave and related entitlements.

Prohibited content

An AWA must not contain certain provisions that are “prohibited content”. There are penalties that apply if an employer recklessly lodges an AWA that contains prohibited content. A term of an AWA that contains prohibited content is void and cannot be enforced.

A provision that does any of the following is an example of prohibited content (the following list is not exhaustive - there are many more categories of prohibited content):

- deals with the rights of employee or employer organisations to be involved in dispute resolution (unless the organisation is the representative of the employer or employee's choice);
- deals with the renegotiation of a workplace agreement;
- restricts an employer from using independent contractors or labour-hire arrangements;
- deals with the forgoing of annual leave or personal/carer's leave credited to an employee bound by the AWA for an amount of pay or other benefit otherwise than at the written election of the employee;
- prohibits or restricts disclosure of a workplace agreement's details by parties to the agreement;
- provides a remedy for dismissal for a reason that is harsh, unjust or unreasonable;
- allows for the imposition of a penalty on an employee for breach of a requirement to provide evidence or notice for the purpose of substantiating:
 - an entitlement to sick or carer's leave;
 - a reason for absence from work due to illness or injury affecting the employee or the employee's immediate family or household;
- allows for the imposition of a penalty on an employee for being absent from work due to an illness, injury or emergency affecting the employee or a member of their immediate family or household;
- deals with right of entry by unions and employer associations; or
- deals with a matter that does not pertain to the employment relationship (unless it is ancillary/incidental/a machinery matter/or is trivial).

Redundancy provisions

If an AWA is terminated unilaterally by the employer or at the request of the employer (after the nominal expiry date), redundancy provisions in the AWA continue to operate for two years or until the employee ceases employment or a new workplace agreement comes into operation.

Fairness Test

An AWA lodged with the Workplace Authority on or after 7 May 2007 for an employee who earns less than \$75,000, is subject to the Fairness Test. The test applies to all AWAs lodged for employees where:

- the employer is bound by a federal award in respect of the kind of work performed by the employee; or
- a Preserved State Agreement (PSA) or Notional Agreement Preserving State Award (NAPSA) covered the employee immediately before the AWA started operating; or
- the employee is employed in an industry or occupation usually regulated by a federal award; or
- the employee is employed in an industry or occupation that was usually regulated by a State award immediately before 27 March 2006 (or would have been usually regulated by a State award but for an industrial instrument or State employment agreement).

An AWA will pass the Fairness Test where the Workplace Authority is satisfied that fair compensation has been provided for modifying or removing any or all protected award conditions (see above for the list of protected award conditions).

It is not yet clear what will constitute “fair compensation” where the compensation is not a higher rate of pay. Even where compensation is a higher rate of pay, the legislation does not define what is fair.

In considering whether an AWA provides fair compensation to an employee, the Workplace Authority Director must first have regard to:

- the monetary and non-monetary compensation⁴ that the employee will receive under the AWA in lieu of the protected award conditions; and
- the work obligations of the employee under the AWA.

The Workplace Authority Director may have regard, in considering whether an AWA provides fair compensation, to:

- the personal circumstances, including family responsibilities, of the employee; and
- in exceptional circumstances and where it is not contrary to the public interest to do so, the industry, location or economic circumstances of the employer and the employment circumstances of the employee.

These provisions could be applied so that little or no compensation will be considered “fair” for the exclusion of protected award conditions. That view is supported by the Fairness Statement that may be completed by employees to accompany their AWA on lodgment⁵. The Fairness Statement is an attachment to the Information Statement for Employees that is required to be provided to employees. It allows an employee to indicate that they are happy with changes to protected conditions because, for example, the employer helps balance work and personal commitments, they get to work the hours they prefer or they get extra benefits like child care, car parking or paid study leave.

The Fairness Statement also allows employees to provide further information, for example, that the employee is happy to work nights for a standard hourly rate so they can go to university lectures during the day.

If an AWA does not meet the Fairness Test, the Workplace Authority must advise the employer and employee accordingly. That will include advice to the employer and employee on why the AWA does not meet the Fairness Test, how it could be varied to pass the test, and the amount of any compensation payable to the employee.

The employer and employee generally have 14 days to agree on how they will vary the AWA. If the necessary changes are not made, the AWA does not operate.

It remains to be seen how the Fairness Test will be applied and operate in practice, and the extent to which “fair compensation” for removal of protected conditions will be regarded as such in the community.

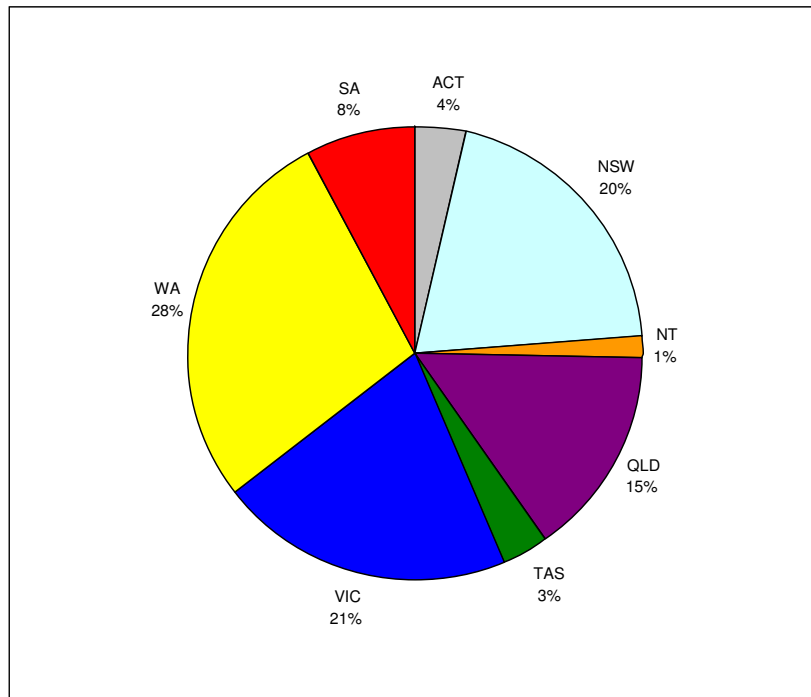
AWA coverage

Researchers have been limited by the lack of data available on AWA coverage by State or industry. The following information has been sourced from the ABS and the Workplace Authority.

By State

More AWAs are being registered in Western Australia than in any other State or Territory. Figures obtained from the Workplace Authority⁶ indicate that **208,564** AWAs were registered in WA in the three years to 31 March 2007 – accounting for 27.7 per cent of AWAs registered nationally.

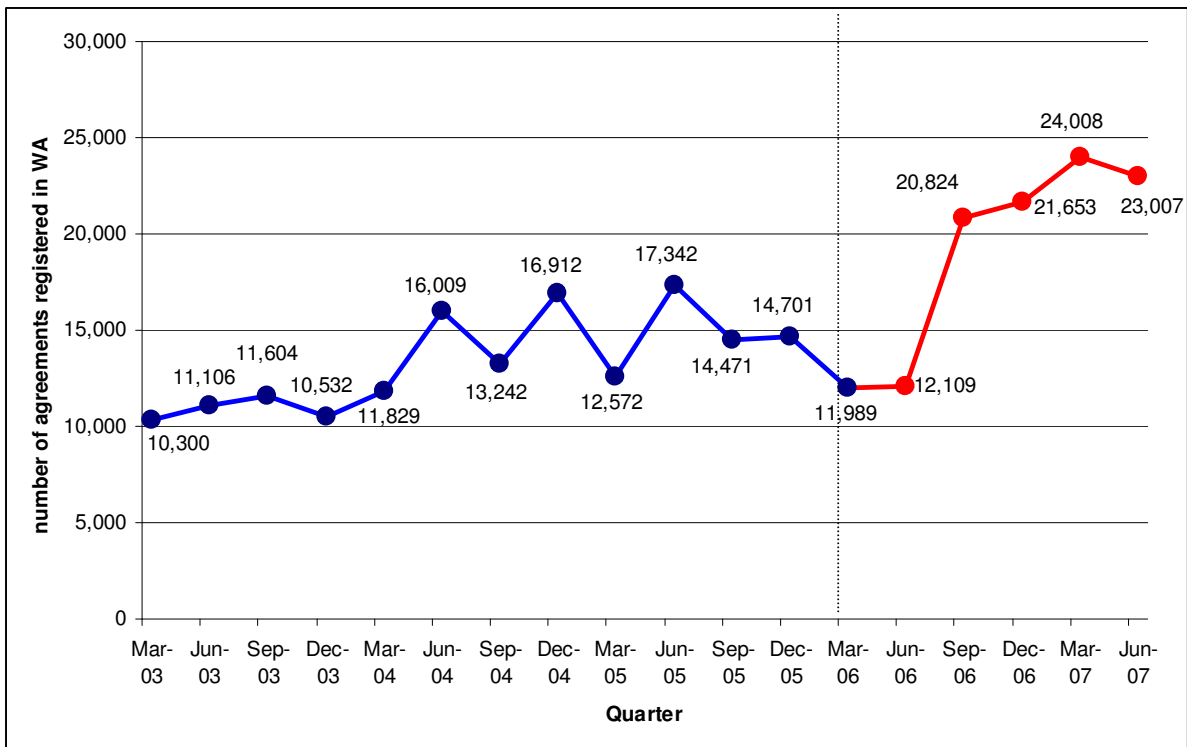
**Chart One - AWAs Registered State by State
Three Years to 31 March 2007**



The Australian Bureau of Statistics (ABS) estimates that in May 2006 approximately **5.8 per cent** of WA employees were employed on AWAs⁷. AWA coverage is unlikely to be anywhere near the 25 per cent as indicated in recent media reports⁸. Such estimations assume that all AWAs registered in the past three years are currently 'live' - whereas many employees will have changed jobs and/or signed multiple AWAs during that time.

As shown in Chart Two, the uptake of AWAs in Western Australia has increased significantly since the implementation of Work Choices in April 2006.

Chart Two - AWAs Registered in Western Australia by Quarter⁹

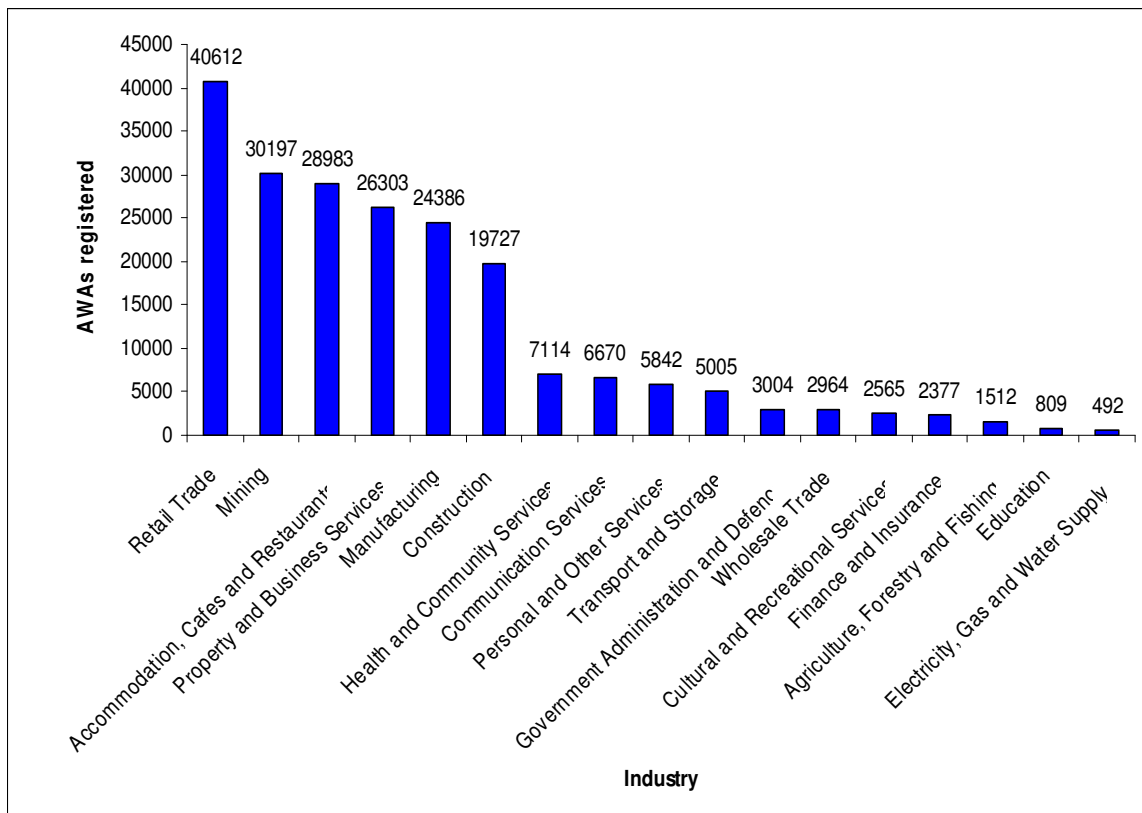


By industry

As shown in Chart Three, the industries most reliant on AWAs in Western Australia include:

- Retail Trade;
- Mining;
- Accommodation, Cafes and Restaurants;
- Property and Business Services (including cleaning and security services);
- Manufacturing; and
- Construction.

**Chart Three – AWAs Registered in WA by Industry
Three Years to 31 March 2007¹⁰**



According to the Workplace Authority, the following industries contain the largest proportion of employees working on AWAs:

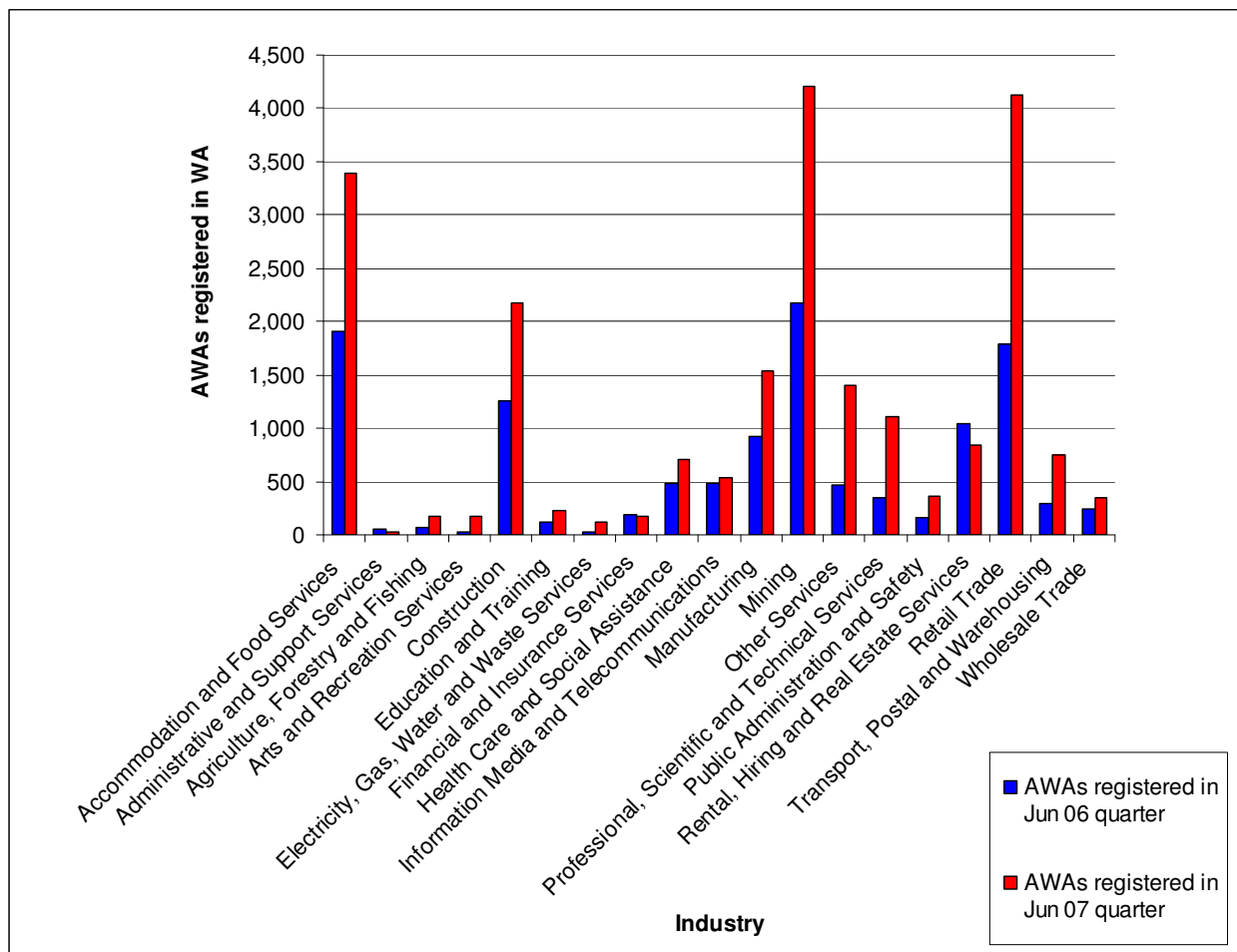
- Cafes and Restaurants (68.6 per cent);
- Mining (57.5 per cent); and
- Communication Services (50.1 per cent).

Again, these figures are likely to significantly overstate the true level of AWA penetration in each industry. For instance, in highly casualised and high turnover industries such as retail and hospitality, an individual employee may have held several positions on a number of AWAs across the three year period.

As evident in Chart Four, there has been a significant increase in the number of AWAs registered across most industries since the introduction of Work Choices - most notably in:

- Accommodation and Food Services;
- Construction;
- Retail Trade;
- Mining;
- Professional, Scientific and Technical Services; and
- Other Services (a broad industry that includes sub-divisions and groups such as Automotive Repair and Maintenance, Hairdressing and Beauty Services etc).

**Chart Four - AWAs Registered in Western Australia
June 2006 and June 2007¹¹**



The impact of AWAs

Wage outcomes

In promoting Work Choices, the Federal Government asserted that employees were financially better off under AWAs, earning “13 per cent more than workers on certified agreements, and 100 per cent more than workers on award rates”¹².

Emerging evidence no longer supports this proposition. Industrial Relations Victoria (IRV) released a report in March 2007 comparing wage outcomes for collective and individual agreements¹³. It found:

- employees on AWAs receive 16.3 per cent less pay (in median terms) than those covered by CAs;
- employees on AWAs receive 7.3 per cent less per hour (in average terms) than those covered by CAs; and
- where employers are focused on cost minimisation, AWAs can be used to reduce average pay and conditions (through cutting penalty rates, overtime pay and other protected award conditions).

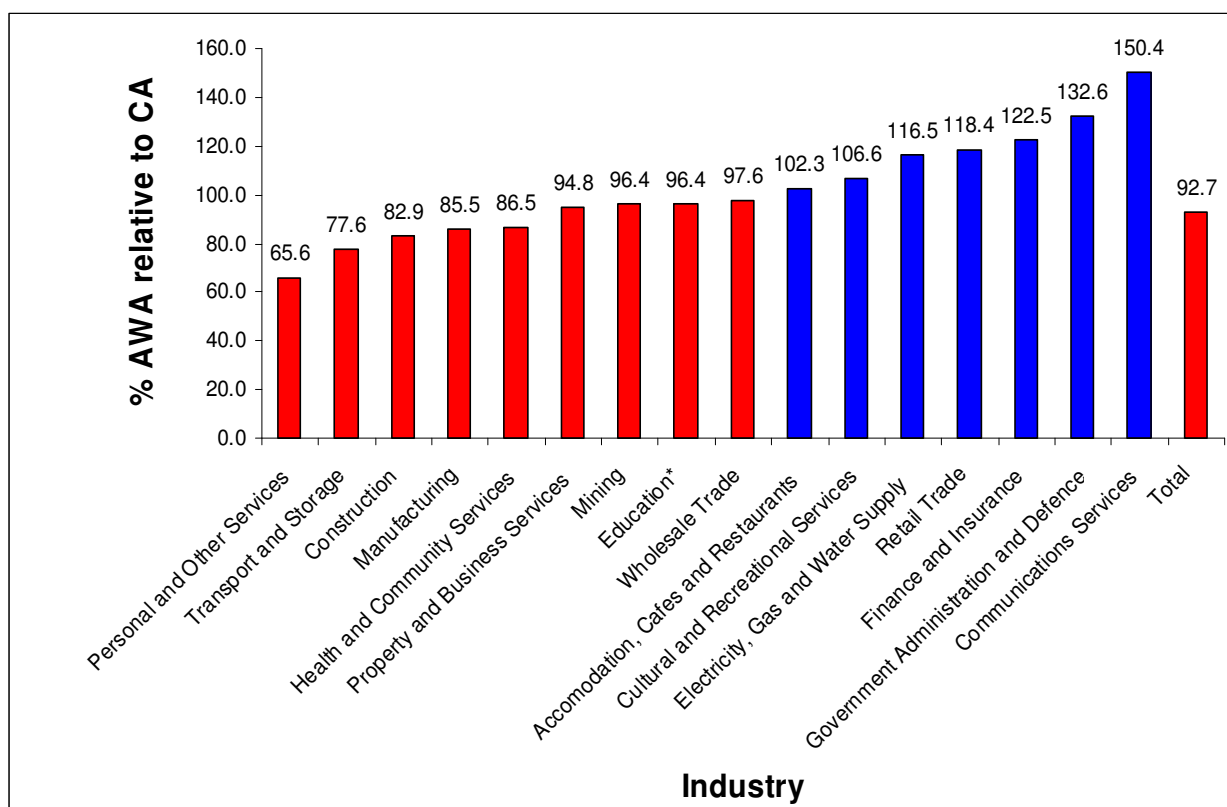
The IRV report concluded that “the overall AWA (median) shortfall of 16.3 per cent suggests that cost-minimisation is an important element in AWA strategising”¹⁴.

As shown in Chart Five, AWAs paid a lower hourly rate of pay than the relevant collective agreement in a majority of industries¹⁵.

In industries where AWAs paid more than CAs, the IRV report claimed that:

- the high wage premium for AWAs found in Communication Services (50.4 per cent) was attributable to union avoidance behaviour in that industry;
- in Government Administration and Defence, the AWA premium (32.6 per cent) was attributable to some Federal agencies requiring employees to sign an AWA as a precondition of advancement or wage increase;
- the wage premium found in Finance and Insurance (22.5 per cent) was attributable to union avoidance and the restriction of individual agreements to more highly remunerated parts of an organisation;
- in Retail Trade a moderate wage premium of 18.4 per cent was recorded. This appeared to be driven by ‘exempt workers’ (employees earning above a certain level are excluded from awards or agreements);
- the moderately high AWA wage premium (16.5 per cent) in Electricity, Water and Gas should be treated with caution, given no such premium existed in previous data; and
- in Hospitality, AWAs paid on average 2 per cent below awards and slightly above CAs (the low outcomes for CA workers in hospitality reflects the very low bargaining power of workers in the industry).

**Chart Five - AWA Wage Outcomes Relative to Collective Agreement Outcomes
By Industry¹⁶**



There are a range of social, economic, and structural elements that impact on AWA wage outcomes across different Western Australian industries. In the context of a resources boom and tight labour market, skilled employees have enjoyed better outcomes – regardless of the employment arrangement used. However, the FEA remains concerned about how AWAs are used in occupations and industries where employees have little bargaining power.

Erosion of entitlements

Prior to Work Choices, AWAs were subject to a no-disadvantage test (NDT) – a global assessment to ensure that the proposed agreement was no less favourable to an employee, when considered as a whole, than the relevant award.

In March 2006, the Work Choices legislation removed the NDT in order to simplify the agreement making process. Agreements were only required to meet the Fair Pay and Conditions Standard (the Standard) and “protected” award conditions.

Advocates of AWAs are generally silent on this point. Critics argue that the removal of the NDT has further eroded those previously protected conditions of employment. Whilst the Standard provides for five core entitlements (minimum wage, annual leave, personal leave, parental leave and ordinary hours), it fails to account for other award entitlements – particularly those unique to a particular industry or business.

As evidenced later, the removed award entitlements have included:

- penalty rates;
- overtime payments;
- redundancy;
- meal breaks;
- casual loadings;
- various allowances (e.g. dangerous work); and
- additional leave provisions (e.g. study leave).

Whilst obtaining data specific to AWAs has proven difficult, a recent survey (June 2007)¹⁷ identified that the following provisions were most likely to be removed in pre and post Work Choices employment contracts/instruments:

- travel allowances (12.4 per cent);
- meal allowances (9.8 per cent);
- shift work loadings (9.3 per cent);
- higher duties allowance (9.3 per cent);
- casual loadings (9.1 per cent);
- overtime loadings (9.1 per cent); and
- payment of public holidays (8.8 per cent).

Emerging evidence precipitated the need for the Federal Government to review the decision to remove the NDT. In May 2006 the then Office of the Employment Advocate advised the Senate Estimates Committee that 16 per cent of AWAs filed in the first month of Work Choices expressly excluded all protected award conditions, and that 22 per cent did not provide for any pay rises during the life of the agreement¹⁸. Further analysis claimed that 45 per cent of all AWAs had removed all protected award conditions, and that about 27 per cent may have undercut the Standard¹⁹.

Subsequently, the Federal Government admitted that they erred in removing the NDT²⁰ – cumulating in the introduction of the Fairness Test in May 2007.

The Fairness Test

The Fairness Test was introduced in May 2007 to ensure that employees are fairly compensated for trading away certain entitlements in an AWA (namely penalty rates; shift and overtime loadings; monetary allowances; annual leave loadings; public holidays; rest breaks; and incentive-based payments and bonuses)²¹.

Arguably, when compared with the previous NDT the Fairness Test has failed to address a number of issues surrounding current AWA provisions, namely that:

- the test is only a partial remedy to the problems initially generated by the Work Choices legislation;
- the test is not retrospective and does not apply to employees on existing unfair AWAs;
- there is no guarantee that employees are completely monetarily compensated for removed or modified conditions;
- supposedly “protected” conditions can be removed or modified;

- pay rises are not included in the test – only award conditions. Although employers must pay employees in accordance with the Standard, there is no stipulation that pay rises be included under an AWA;
- the test does not address matters like job security and control over working hours;
- fewer workers are protected – the test applies only to those employees earning under \$75,000 in the first twelve months after the AWA is lodged;
- the test applies only where the agreement excludes or modifies one or more protected conditions. It does not take into account unprotected award conditions such as redundancy pay, paid maternity leave, and a say on rostering;
- there is no role for an independent umpire to scrutinise AWAs, and once a decision is made there is no avenue for the employee to appeal the decision;
- AWAs operate from their lodgment date (i.e. prior to assessment), creating difficulties should an AWA fail the assessment process and require back payment to employees; and
- the process remains complicated and bureaucratic.

Trading away wages for non-monetary provisions

Under the Fairness Test, it is not required that employees receive financial compensation for the loss of award conditions. Rather it allows employers to trade-off penalty rates, overtime and other award conditions for non-monetary compensation. Take the following explanation from the Workplace Authority’s *Fairness Test Policy Guide*²²:

“Non-monetary compensation is compensation for which there is equivalent money value or to which a money value can be reasonably assigned and confers a benefit which is of significant value to the employee. This may result in the Fairness Test being met without further investigation”.

This provision may allow employers (as occurred under the previous NDT) to offer workers free pizzas or videos or potentially tips in exchange for the loss of entitlements. This exchange may or may not be of detriment to the employee.

If the AWA fails the Fairness Test’s initial assessment, the Workplace Authority may *“also have regard to the personal circumstances of the employee or employees, including in particular family responsibilities”*. If there is doubt in assessing the value of this entitlement, the assessor must contact the employee and *“seek feedback on how the employee values the flexible working arrangements”*.

For example, an employee may forego penalty rates for working night shift in exchange for the ability to work flexibly to balance family responsibilities, and this could potentially constitute adequate non-monetary compensation. Such “preferred hours” agreements can also be made by junior employees, casual employees, apprentices or employees working in businesses that operate on a 24/7 basis - as long as the arrangement is one which the employee has requested or initiated²³.

The Workplace Authority has provided an example of a preferred hours arrangement that would have passed the Fairness Test²⁴.

Joel is a plumber employed by Water Wise Pty Ltd. Joel and Water Wise made an AWA which was lodged with the Workplace Authority in June 2007.

Joel has 2 young children and wants to finish work at 3pm on weekdays. Joel's wife, Mindy, has recently returned to full-time work as an engineer. The ability to collect the children from school is very important to Joel who places great value on being able to pick up his children from school.

Joel and his employer agreed that, in exchange for Joel being able to leave work at 3pm, he will work on Saturdays at his ordinary time rate of pay (removing the award entitlement to penalty rates for weekend work). Joel's annual salary under the AWA is less than \$75,000

In exceptional circumstances, the Workplace Authority may also have regard to the industry, location, and the economic circumstances of the employer and employee²⁵. This may enable employers to effectively seek a waiver of the Fairness Test by claiming financial hardship – yet it remains unclear what constitutes financial hardship, and why employees should be penalised.

The administrative burden

A significant amount of criticism has focused on the administrative burden, complexity, legal costs and timeliness surrounding the Fairness Test. The Australian Chamber of Commerce and Industry (ACCI) argues that the Fairness Test is 'unwarranted' and adds to business 'red tape'²⁶. Harmers Workplace Lawyers chair Michael Harmer claimed that "employers are tired of the level of instability, uncertainty and complexity associated with a system that can change on as much as a press release".²⁷

The Workplace Authority has encountered problems administering the Fairness Test. As at 5 September 2007, the Workplace Authority indicated²⁸ that only 12,749 of the 123,100 agreements lodged since 7 May 2007 had been processed, with further information being sought for 44,751 agreements.

Of the 12,749 'finalised' assessments:

- 6,237 agreements passed the test, commonly by providing more pay for changes to protected award conditions;
- 5,408 agreements were excluded from the test, either because protected award conditions did not change or because the employee earned more than \$75,000 per annum;
- 1,070 agreements required changes within 14 days to meet the test;
- 29 agreements met the test following changes, mostly by employers agreeing to higher hourly rates of pay; and
- five agreements ceased to operate because the changes required were not made.

The Workplace Authority's experience is due (in part) to the process that must be followed in applying the Fairness Test. Appendix A highlights the complexity of the processes to be followed where an AWA **does not initially pass the test** – as derived from various sections of the WR Act.

The Fairness Test has caused some employers to abandon AWAs for alternative employment arrangements. For example, Spotlight chief executive Stephen Carter recently

stated²⁹ that the difficulty in registering individual agreements had resulted in the company agreeing to negotiate a single collective agreement with the shop assistants' union.

It is clear that the complexity and confusing nature of the Fairness Test has added to the administrative burden of registering AWAs for businesses.

Productivity and profitability outcomes

It is asserted that individual agreements are responsible for higher productivity levels, and that such arrangements are crucial to ensure the ongoing growth of the booming Western Australian economy. The Business Council of Australia argues that AWAs “*play an important part in boosting productivity and performance in key sectors of the economy*”⁸⁰. Hancock suggests that such claims are unjustified, given the insufficient information available about the content of AWAs, and that until recently AWAs were not used in great numbers or across sufficient industries³¹.

In 2005, a Senate Committee found that³²:

“the Government's proposals are designed to increase short-term profitability rather than productivity, principally by driving down the cost of labour. It is true that profits can be increased by gains in productivity, as ACCI pointed out, but it is easier for firms to increase their profits by cutting employees' wages by reducing or abolishing penalty and overtime rates, which is already a common feature of AWAs.”

Earlier this year, Canadian economist Dr Jim Stanford released a report³³ investigating the impact of AWAs on the Australian mining sector, concluding that:

- mining sector profits are attributable to an unprecedented increase in global mineral prices (which have risen by two-thirds since 2003), rather than the use of individual agreements;
- there has been no dramatic change in work practices or labour costs in the mining sector, despite the relatively widespread use of AWAs. Wages in the mining sector have grown at just 6 per cent over a five year period to 2006;
- average labour productivity in the mining sector has declined since the introduction of AWAs;
- the use of AWAs has not elicited extra investment or job creation in the mining sector; and
- it is unlikely that the removal of AWAs would have any detrimental economic effect in the mining sector, given current rates of return on shareholder equity range between 35 and 70 percent per year.

Flexible employment options

Central to the AWA debate is the notion of ‘flexibility’ – an ambiguous term without a common definition.

The Federal Government argues that individual agreements allow employees to negotiate “flexible” outcomes that balance personal needs and requirements of individual workplaces. AWA supporters insist that the ability to negotiate individual agreements at the workplace level has enabled employers to implement “flexible” employment practices.³⁴ Such claims usually include reference to the stringent and non-negotiable provisions found in awards,

and highlight the ability for multi-skilling and job demarcation, flexible hours and performance-based remuneration under individual agreements³⁵.

In June 2007, a perception survey of HR practitioners by the Australian Human Resources Institute³⁶ identified that:

- 71.7 per cent found no change in the flexibility to determine rates of pay as a consequence of Work Choices;
- 73.1 per cent found no change in the flexibility to determine the allocation of labour; and
- 77.3 per cent found no change in the flexibility to determine employment numbers.

A growing number of critics argue that in practice AWAs offer a one-sided flexibility to employers³⁷. Briggs argues that AWAs have been used to give employers 'flexibility' in the scheduling of employees' work, resulting in the removal of loadings and penalties without fair compensation. Employees have also been confronted with less discretion over their working hours and lower pay.

If flexibility is about having a range of agreement options available to employers and employees, it is unclear why AWAs can be made a condition of employment for new workers. As evidenced in the Commonwealth Public Sector, AWAs can also be a requirement for career progression or transfers. Federal Government future funding in higher education has been made contingent on universities offering and actively promoting AWAs to staff.

The international right to bargain collectively

The International Labour Organization (ILO) is a tripartite agency of the United Nations which seeks the promotion of social justice and internationally recognised human and labour rights. As a member nation, Australia is legally committed to ensuring that its labour relations legislation is compliant with the provisions of ILO Conventions to which it is a signatory.

This is reinforced via legislation, where a principal object of the WR Act is the promotion of welfare by *“assisting in giving effect to Australia's international obligations in relation to labour standards”*³⁸.

Whilst the right for employees to collectively bargain is legally protected in all other OECD countries³⁹, the current agreement making provisions in the WR Act appear to be inconsistent with *ILO Convention 98 - Right to Organise and Collective Bargaining* (ratified by Australia in 1973).

Convention 98 - Article 4 requires member nations to ensure the following:

“Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”

Since 1998 the ILO Committee of Experts on the Application of Conventions and Recommendations (the Committee) has raised significant concerns that the provisions of the WR Act are in breach of ILO Convention 98. In its most recent observation in 2007⁴⁰, the Committee found the following:

“The Committee considers that giving primacy to AWAs, which are individual agreements, over collective agreements, is contrary to Article 4 of the Convention which calls for the encouragement and promotion of voluntary negotiations with a view to the adoption of collective agreements. “

The Committee has requested that the Federal Government indicate the measures it has taken or contemplated to amend section 348(2) of the WR Act, so as to ensure that AWAs may prevail over collective agreements only to the extent that they are more favourable to the workers. The Federal Government is yet to respond to this request.

Union avoidance

Collective bargaining is central to the concept of freedom of association - not just as an option but as a right for employees who choose it. The Federal Government maintains that this is enshrined in the principal objects of the WR Act, which ensures *“freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association”*⁴¹.

Critics assert that certain industries and employers have used individual agreements to exclude third parties from their workplace bargaining process⁴². For example, the Australian Mines and Metals Association claim *that “the removal of AWAs raises concerns over the ability of an employer to minimise its risk to industrial action, essentially forcing them to enter into a collective agreement to manage that risk”*⁴³. Likewise, the Econtech Report cites flexible workplace relation practices as directly responsible for productivity increases, as it reduces the role of third parties with agendas less linked to productivity gains⁴⁴.

As evidenced in the IRV Report, most industries strongly associated with union avoidance tend to pay an AWA premium. The notable exception to this trend is observed in the Mining industry, where the coal mining sector (65.8 per cent of workforce is unionised) has been able to maintain relatively high rates of pay⁴⁵.

Despite legislated freedom of association provisions, AWAs have made it difficult for workers to have union representation whilst also creating barriers for unions to negotiate collective agreements. Furthermore, some commentators⁴⁶ suggest that subsequent narrow judicial decisions have rendered legislated freedom of association provisions useless.

The reality of individual negotiation

Proponents continue to maintain that AWAs provide genuine choice and flexibility in agreement making - a fair mechanism for tailoring an agreement that best suits the specific needs of the employer and individual employee.

This unitarist approach mistakenly assumes that all individual employees are in an equal bargaining position with employers. Employees in some industries are presently enjoying

favourable employment conditions as a result of economic prosperity and a skilled labour shortage.

This experience is not shared across the entire labour market. Not all types of employees have the same level of bargaining power. A variety of social, economic, educational, personal, business/industry and job specific factors will influence an employee's ability to negotiate effectively⁴⁷.

Firstly, new employees can be forced to sign an AWA as a condition of employment. Certain industries (e.g. Hospitality) and occupational groups (e.g. casual employees) inevitably experience high turnover. The subsequent low bargaining position of such employees allows employers to offer substandard agreements to new staff with little scope for negotiation.

Whilst several companies have been prosecuted in recent times for applying duress when forcing existing employees to sign AWAs, it is unclear why the same protection is not offered to those whose new job is subject to signing a 'take it or leave it' agreement.

Secondly, whilst an existing employee cannot be forced to sign an AWA, employers can withhold promotions from staff that refuse to sign an AWA. This was evident in the case of *Arne Henry Bishop v Ropolo Services Pty Ltd*⁴⁸, where Justice Madgwick decided:

"Merely to remind an employee of his or her weak economic position or of the economic consequences of not entering into an AWA is, of itself, unlikely to constitute the application of duress. Advocacy of a projected contract such as an AWA may produce a sensation of pressure in the person to whom it is directed, but duress requires something more. In my view, the added component appears when something is done, threatened or proposed which would alter the operation of market forces adversely to the person subjected to the act, threat or proposal if the offered AWA is not accepted."

The case was dismissed on the grounds that there was no intention to force the applicant onto a lower remuneration for the same work. Again, it would appear that a bargaining process is undermined by a significant power imbalance between the employer and employee.

Thirdly, it is the FEA's experience that template AWAs are standard practice for many employers using AWAs. Template AWAs, often supplied by employer advisory firms or industry associations, are standardised documents that do not vary from one employee to another – bar changing the employee name and lodgment date. The FEA has witnessed numerous agreements of this nature – including some that fail to even change the lodgment date.

This recent criticism of the Fairness Test (and the administrative burden for employers) appeared in the West Australian newspaper⁴⁹:

"Businesses were frustrated that they had to lodge agreements for every single employee, even if one agreement applied to multiple staff. Director Gillian Howe said she had had to lodge an AWA 453 times –one for each staff member - even though the agreements were exactly alike."

Many of the template agreements provide little more than legal minimum conditions required by the Standard and the Fairness Test – an indicator that such agreements are being used to reduce labour costs for employers.

The template approach to AWAs undermines the proposition that an individual agreement is about negotiation based on employer **and** individual employee needs.

Fourthly, there is no *real* legislative mechanism to ensure that fair negotiation of employment conditions occurs between employers and individual employees. Whilst proponents argue that the Fairness Test ensures reasonable outcomes, it fails to account for fairness in the negotiation process itself.

In one case brought to the attention of the FEA, an employee who had sought assistance from DOCEP in relation to the provisions of the AWA she had been asked to sign talked about the process and its consequences. The employee indicated that many of her colleagues were dissatisfied with the AWA “*but had signed as they did not wish to rock the boat*”. When she raised concerns and advised the employer she had received advice from DOCEP, the employer became aggressive and attempted to use emotional blackmail to get her to sign the AWA. In this instance, an attempt to negotiate in good faith has resulted in an “icy” relationship, where the employer avoids the complainant, and other staff resent her.

In addressing the 2007 National Industrial Relations Conference⁵⁰ Professor Richard B. Freeman noted that many AWAs were not negotiated, with research indicating that 70 per cent of employees simply signed the contract without review. This leads to the question of whether an employee’s consent to an individual agreement equates to fair conditions of employment, particularly when the employee does not have the capacity to fully understand their employment terms.

Presently there is a dearth of research or legislative provision regarding the negotiation process for individual bargaining. Fair individual bargaining might incorporate the good faith bargaining provisions found in the *Industrial Relations Act 1979* for negotiating State industrial agreements. This would include:

- both parties stating their position on the matters at hand, and explaining that position;
- meeting face to face at reasonable times to negotiate terms;
- disclosing relevant and necessary information;
- acting honestly and openly, including not capriciously adding or removing items for negotiation;
- recognising the right to bargaining agents; and
- adhering to outcomes of the bargaining process.

There is little evidence to suggest that the above processes happen in the negotiation of AWAs – due to the legislative design of Work Choices and the power imbalance that often exists in the employment relationship.

The reality of individual bargaining under Work Choices is best summarised by the Dean of Law at the University of Sydney, Professor Ron McCallum, who observed the following⁵¹:

“To sum up, the Work Choices laws have diminished the rights of employees especially by narrowing the safety net of minimum terms and conditions of employment and through the taking away of unfair termination rights from many workers. In my opinion, the Work Choices laws elevate managerial prerogatives to new heights over and above fair outcomes.”

The Impact on vulnerable groups

A number of population groups (with significant numbers reflected at the lower end of the labour market) often have limited bargaining power when negotiating their terms and conditions of employment. These are often described as vulnerable groups and include women, migrants, young people, indigenous workers and workers with a disability.

For women this vulnerability is reflected in gender wage comparisons - in May 2007 for example the gender pay gap in Western Australia was 25 per cent⁵². This means that on average for every dollar earned by a full time male employee, full time female employees earned 75 cents. The gender pay gap in Western Australia has been worsening over the last 20 years, despite a gradual narrowing of the difference nationally.

Individual agreement making has had an adverse impact on women in regards to wage outcomes, work life balance and quality of work. In examining the Western Australian experience of industrial relations deregulation in the 1990s⁵³, Plowman and Preston considered the impact of removing award protections for low paid workers, who are disproportionately women. Before they were abolished in 2003, the gender pay gap under IWAs was 26 per cent – the highest at that time for any type of agreement across all states.

They describe *“two significant periods of decline in the relative earnings of women compared to men”*, namely:

- the introduction of the *Workplace Agreements Act 1993 (WA)* which provided greater scope for enterprise bargaining outside of the award system but without fair safeguards; and
- the movement of Western Australian workers from IWAs to AWAs in an attempt to avoid legislative changes introduced by the State Government in 2002.

The impact of AWAs on women appears to share similarities with the IWA experience. Many women have secured better pay outcomes under collective bargaining than through individually negotiated pay increases. Nationally, the IRV report confirmed that women tend to be more disadvantaged by AWAs than men, particularly in labouring occupations and casual employment⁵⁴. Female labourers covered by AWAs were shown to be the most disadvantaged group, paid 26 per cent less than their counterparts on collective agreements. Females employed casually on AWAs earned 7.5 per cent less than those on awards.

Groves asserts that the award system (and centralised wage fixing) is an important mechanism for women pursuing claims for equal pay for work of equal or comparable value⁵⁵. The primacy of individual agreements Post-Work Choices, and the erosion of the award system, has diminished the ability for pursuing equal remuneration⁵⁶. Individualised

bargaining under AWAs is secretive, preventing the transparency around wages and conditions necessary for pursuing fair pay that does not discriminate on the basis of gender.

In August 2007 the Centre for Work + Life⁵⁷ released a report examining the post Work Choices experience of women working in low paying sectors. Those interviewed have experienced income losses in excess of \$100 a week for some, whilst also missing out on penalty rates, loadings, and allowances. In these examples, there was no increase to other entitlements as fair compensation. Many of the women were on AWAs registered prior to the introduction of the Fairness Test.

More women are in part-time and casual employment as a consequence of having to provide care for their families. Individual contracts provide women with poorer access to family friendly arrangements (e.g. various forms of paid leave)⁵⁸. The Centre for Work + Life report found that the imbalance of power within the employment relationship had reduced opportunities for worker-initiated flexibility, especially those associated with balancing work and family commitments.

The situation described above also applies to other vulnerable groups and is likely to be exacerbated where several characteristics combine – for example a young female migrant worker.

Additional issues faced by migrant workers include:

- a lack of familiarity with systems of industrial regulation;
- language barriers;
- a visible difference (such as clothing or skin colour);
- cultural or religious differences; and
- different life experiences (including recently arrived migrants from war torn countries).

Similarly, young workers have raised the following concerns with the FEA:

- a lack of knowledge about basic employment entitlements;
- working alone or late at night;
- not being paid for 'trial' work; and
- issues surrounding apprenticeships and traineeships.

Given the range of concerns identified by the FEA in relation to vulnerable workers, a separate discussion paper(s) will be prepared in the near future.

Work life balance

One of the principle objects of the WR Act includes *“assisting employees to balance their work and family responsibilities through the development of mutually beneficial work practices with employers”*⁵⁹.

There is little evidence supporting the notion that AWAs contribute to improved work life balance. In 2005 a Senate Committee found that⁶⁰:

“AWAs and other individual agreements tend to offer a far less satisfactory result than do collective agreements for those workers who have family-related responsibilities outside work. The increased

coverage of AWAs therefore augers badly for the increasing number of employees who require flexibility in their leave and hours of work. Any government initiative to reduce the availability of pattern or industry bargaining is likely to have a negative impact on the ability of employees to strike a balance between their work and private lives.”

A recent survey found that a majority of HR practitioners (44.4 per cent) were unsure of the relationship between Work Choices and work family balance, whilst 23.6 per cent contended that Work Choices would not improve work family balance within their organisations over the next three years⁶¹.

The Human Rights Equal Opportunity Commission (HREOC) recently released a report on the growing challenge faced by employees in balancing work and lifestyle commitments. There is growing community concern that Work Choices' increased focus on individual bargaining may lead to a shift towards long, irregular and extended working hours⁶².

In a Senate Committee paper on restoring work life balance, Senator Fielding argued that the removal of penalty rates for working abnormal or excessive hours undermined an employee's ability to balance work and lifestyle commitments⁶³.

Given the nature of the bargaining process for individual agreements and the application of the Fairness Test, it appears that workers with family/carer responsibilities will find themselves trading off wages for family-friendly employment conditions in an individual bargaining environment.

This section has provided an overview of the broad issues being debated in the wider community about AWAs, and has raised a number of concerns with AWAs, namely their impact on:

- wage outcomes;
- employee entitlements;
- business administration;
- fair bargaining;
- the right to representation;
- flexibility;
- vulnerable workers; and
- work life balance.

AWAs: an analysis of real life examples

The following section provides a statistical analysis and examples of AWA clauses that undermine fair conditions of employment for Western Australian employees.

It does not purport to reflect the collective experience of all employees who have signed AWAs. There are a range of social, economic, and structural elements that impact on AWA outcomes across different Western Australian industries. However, the FEA remains concerned about how AWAs are used in occupations and industries where employees have little bargaining power.

The WR Act provides that the identities of parties to AWAs cannot be disclosed:

WORKPLACE RELATIONS ACT 1996 - SECT 165 **Identity of parties to AWAs not to be disclosed**

- (1) A person commits an offence if:
- a) the person discloses information; and
 - b) the information is protected information; and
 - c) the discloser has reasonable grounds to believe that the information will identify another person as being, or having been, a party to an AWA; and
 - d) the disclosure is not made by the discloser in the course of performing functions or duties as a workplace agreement official; and
 - e) the disclosure is not required or permitted by this Act, by another Act, by regulations made for the purposes of this paragraph or another provision of this Act or by regulations made for the purposes of another Act; and
 - f) the person whose identity is disclosed has not, in writing, authorised the disclosure.

Penalty: Imprisonment for 6 months.

Where AWA excerpts are provided, every effort has been made to remove references to those employees and businesses concerned.

Analysing AWA content has also been hampered by confidentiality provisions and the Workplace Authority's decision not to release qualitative agreement data. The FEA has managed to collect information via a service provided to employees who are offered an AWA.

Statistical overview

One of the services provided by DOCEP's Compliance and Education Directorate is a comprehensive analysis of AWAs provided to employees. Requests for an AWA comparison may come from a variety of different sources including Wageline, the FEA Helpline, the Minister's Office, regional offices, unions and Members of Parliament.

An Education Officer compares the provisions of an AWA against the relevant industrial instrument. Both monetary and non-monetary entitlements are considered. The Education

Officer provides information relating to the application of the AWA, and how this may affect an employee's conditions of employment.

Since January 2007, 33 AWAs from a range of Western Australian industries have been assessed (19 of which were provided after 7 May 2007 - after the introduction of the Fairness Test). Each AWA was compared to the relevant industrial instrument to determine whether protected award conditions were:

- expressly removed;
- implied;
- modified to reduce the entitlement;
- modified to leave a comparable entitlement; or
- modified to enhance the entitlement.

A summary of the findings is provided in Table One and Table Two. Whilst the sample size is not sufficient to draw any definitive conclusions, of the 33 AWAs assessed by the FEA:

- 64 per cent of all AWAs assessed removed or reduced **every** protected award condition; and
- 30 per cent of all AWAs assessed removed or reduced **every** protected award condition **and** provided a wage that was less than or equal to the relevant pay scale.

Table One
Assessment of protected award conditions in pre-Fairness Test AWAs (per cent)*

Protected Award Condition	Expressly removed	Implied	Modified to reduce the entitlement	Modified to leave a comparable entitlement	Modified to enhance the entitlement
Penalty rates	21	0	64	0	14
Overtime and shift work loadings	14	0	71	0	14
Allowances	29	7	43	14	7
Annual leave loadings	30	0	50	0	20
Payment for public holidays (including substitution)	0	0	80	10	10
Incentive based payments and bonuses	77	0	23	0	0
Rest breaks	14	0	57	7	21

Table Two
Assessment of protected award conditions in post-Fairness Test AWAs (per cent)*

Protected Award Condition	Expressly removed	Implied	Modified to reduce the entitlement	Modified to leave a comparable entitlement	Modified to enhance the entitlement
Penalty rates	47	6	24	12	12
Overtime and shift work loadings	44	6	28	11	11
Allowances	53	12	12	12	12
Annual leave loadings	77	0	15	8	0
Payment for public holidays (including substitution)	40	7	40	13	0
Incentive based payments and bonuses	75	17	8	0	0
Rest breaks	16	11	53	5	16

Note – Figures may not equal 100 per cent due to rounding.

Examples of provisions found in AWAs

Wages below minimum rates

The following extract was taken from an AWA offered to a part-time supermarket assistant in March 2007.

21yrs & above ADULT rate	\$14.32
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The AWA offered a flat rate of \$14.32 per hour for all hours worked - lower than the \$15.06 per hour provided by the relevant Australian Pay and Classification Scale (APCS) as at March 2007.

Although there is a legal requirement to pay minimum rates, the employee was unaware of the relevant APCS for their industry, occupation and workplace.

Furthermore, the AWA outlines that this rate of pay incorporates various allowances, penalties, and loadings.

12. Remuneration Structure

Remuneration for this position will be structured as follows:

- a) Upon commencement of this agreement you will be paid at an hourly rate for all hours

Wage review mechanisms

The lack of wage review mechanisms in AWAs is a trend that has emerged since the commencement of Work Choices.

Despite the indication that wage increases may be “*agreed between the parties*” in Clause 12 – Remuneration Structure (see above), *Clause 4 – Relationship to Award* (as follows) stipulates that the employer and employee “...*acknowledge that no extra claims will be made during the term of this agreement*”.

The AWA seems to contradict itself - allowing higher wages to be negotiated whilst limiting any further claims over the five years of its operation.

Conditions of locations, loadings for working overtime or shift work, and penalty rates unless they are... The parties acknowledge that no extra claims will be made during the term of this Agreement.

The following is taken from an AWA offered in the retail industry, and does not provide any mechanism for reviewing wages.

5. REMUNERATION

Rate of Pay

- 5.1 Your base rate of pay for all hours worked in accordance with this agreement shall be specified in Schedule 2.

SCHEDULE TWO

Item 6	Rate of Pay (If Junior specify rate at relevant age level)	AGE	HOURLY RATE
		UNDER 16	\$5.73
		16	\$7.16
		17	\$8.59
		18	\$10.02
		19	\$11.45
		20	\$12.88
		21	\$14.32

The rates of pay were equal to the relevant APCS at the time this AWA was offered. However, the AWA remains silent on how or when future wage increases may eventuate - including no mention of whether increases to the APCS will flow onto the agreement. Again, the term of this agreement was five years.

In the following example, there is a reference to a specific wage review mechanism, namely future State wage cases.

11. Remuneration Structure

Remuneration for this position will be structured as follows:

- a) You will be paid an hourly rate of \$17.54 for all ordinary hours worked in accordance to this AWA.
- b) Your wage less tax and other authorised deductions will be paid weekly into a bank account in your name. Unless an alternative arrangement is agreed between the employer and employee.
- c) Your wage will be subject to any State Wage Case increases that affect the relevant award.

However, the AWA does not detail how or when a State wage case increase is incorporated into the employee's wage. This lack of clarity could lead to unnecessary confusion and disputes between the parties.

Ordinary hours and overtime

The removal of overtime penalty rates without fair compensation is a common trend in AWAs sighted by the FEA. The following excerpt was taken from an AWA reviewed after the commencement of the Fairness Test. The employee concerned was living and working in a caravan park as a cleaner/caretaker. The AWA uses a preferred hours arrangement to waive the entitlement to overtime penalty rates.

11 Hours of Duty

- a) The ordinary hours to be worked may fall on any day Monday to Friday inclusive and may be worked between 6.00 am and 6.00 pm.
- b) Subject to the operational requirements of the business and the needs and preferences of the Employee, the Employee may be rostered to work outside these hours and payment for those hours will be in accordance with Clause 12- Overtime, Weekend Work & Public Holidays.

12 Overtime & Weekend Work & Public Holidays

- a) If an Employee has a preference for working on weekends, public holidays or outside ordinary hours to suit their personal circumstances, needs and family commitments, and such work is available, the Employer will roster the employees who have indicated this preference to work at these times, unless the Employee requests standard hours and such work is available. Remuneration for all hours worked on weekends, public holidays and outside ordinary hours on this basis will be paid at the rate prescribed in Clause 10- Remuneration Structure of this Agreement.
- b) If the Employer directs you to work on weekends, public holidays or outside ordinary hours then you will be paid according to the provisions of the relevant award that would otherwise apply except for this Agreement.

The AWA provides that ordinary hours can be worked on Monday to Friday from 6.00am to 6.00pm, and that overtime is payable on work performed outside these times. However, the employee will forfeit penalty rates if they *nominate* to work outside these hours.

Under this AWA my preferred times and days to work to suit my personal circumstances, needs and family commitments are those indicated in the above matrix.

Employees will be given the opportunity to alter their choice of preferred hours every six months. You are able to change your preference on request in writing. However the capacity of the company to accommodate that change will depend on staff availability. Current arrangements will remain in place until a suitable vacancy arises or for a maximum period of three months.

The AWA deliberately attempts to remove this entitlement under the guise of providing a choice about the hours of work. It remains unclear why an employee should forgo penalty rates on the grounds of “family commitments”.

As shown below however, the employer has pre-selected the employee’s preferred hours – thereby removing penalty rates.

MY PREFERRED DAYS & TIMES TO WORK	
DAYS & TIMES	TICK PREFERRED TIMES TO WORK
Mon – Fri 6.00am – 6.00pm	
Weekends	
Public Holidays	
All hours outside the ordinary hours and or any additional hours that are offered	√

In this example, the agreement was offered in a remote town where affordable accommodation was difficult to find. The job and accommodation were conditional on signing the AWA.

Protected award conditions

This paper has already provided a discussion on the removal of protected award conditions. The following example illustrates how an AWA can remove these conditions.

14 EXCLUSIONS

14.1 This agreement is intended to reflect the entirety of your terms and conditions of employment and operated to the exclusion of any provision of any award or industrial instrument, including any protected award condition.

14.2 The following provisions of the *Shop and Warehouse (Wholesale and Retail Establishments) Award 1977 (WA)* or any other Award deemed to apply and any subsequent replacement Award do not apply to your contract of employment and are specifically excluded:

- a) rest breaks; including those in clause 11;
- b) incentive-based payments and bonuses;
- c) annual leave loading, including that in clause 15;
- d) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlement of employees to payment in respect of those days, including that in clauses 13, 14 and 15;
- e) days to be substituted for, or a procedure for substituting, days referred to in paragraph (d) above, including that in clause 14;
- f) monetary allowances for:
 - expenses incurred in the course of employment; including those in clauses 12, 25 and 32;
 - responsibilities or skills that are not taken into account in rates of pay for employees, including those in clauses 18, 28 and 46;
 - disabilities associated with the performance of particular tasks or work in particular conditions or locations; including those in clauses 28 and 39;
- g) loadings for working overtime or shift work; including those in clauses 7, 7A, 8, 9, 13, 28, 34 and 48;
- h) penalty rates; including those in clauses 7, 7A, 8, 9, 13, 28, 29 and 48;
- i) outworker conditions.

This AWA was offered to a new employee as a condition of employment (prior to the commencement of the Fairness Test). The employee was engaged on a part-time basis and was regularly required to work at night, on weekends and public holidays. Although the *Shop and Warehouse (Wholesale and Retail Establishments) Award 1977* provides for various penalty rates, the AWA only requires the employee to be paid a minimum rate for all hours worked.

The following is another example of how an AWA can exclude protected award conditions. For new employees (particularly those unfamiliar with the relevant award), it may be difficult to comprehend what entitlements they will be losing.

4. Relationship to Award

Upon the commencement of this Australian Workplace Agreement, it shall form the complete agreement covering all terms and conditions of employment between the parties. This Agreement shall operate to the exclusion of the *Shop & Warehouse (Wholesale & Retail Establishments) Award, Licensed Establishments (Retail & Wholesale) Award* or any industrial instrument derived from it, or any other award or agreement including any protected award conditions pursuant to section 354 of the *Workplace Relations Act 1996* i.e. rest breaks; incentive payments and bonuses; annual leave loading; observance of public holidays and any entitlement to payment; monetary allowances for expenses incurred in the course of employment, or responsibilities or skills not taken into account in the rate of pay, or disabilities associated with the performance of particular tasks, or work in particular conditions or locations; loadings for working overtime or shift work; and penalty rates unless they are elsewhere stated or provided for in this Agreement. The parties acknowledge that no extra claims will be made during the term of this Agreement.

The following was taken from an AWA offered by a labour hire firm. The clause removes all protected conditions in the last paragraph – a situation that could easily be missed given the title of the clause is “protected conditions”.

27. Protected Conditions

27.1. Protected conditions are the terms of a notional agreement preserving a state award that are about:

- rest breaks;
- incentive based payments and bonuses;
- annual leave loading;
- public holidays and payment for public holidays;
- days to be substituted for public holidays or a procedure for such substitution;
- monetary allowances (for employment expenses; skills; disabilities);
- overtime or shift work loadings
- penalty rates
- outworker conditions.

27.2. Protected conditions form part of a workplace agreement to the extent that the agreement does not expressly exclude or modify them.

27.3. You and _____ agree that the terms and conditions of this agreement operate to the exclusion of all protected conditions that might otherwise apply.

Redundancy

In Western Australia, the base entitlement to redundancy is provided in the *Termination, Change and Redundancy General Order*. In the federal system there are no statutory minimum redundancy entitlements – although some awards and agreements may provide such entitlements.

New employees can be lawfully required to sign an AWA as a condition of employment. Redundancy is not a protected award condition.

Most AWAs collected by the FEA make no reference to redundancy entitlements. The following is an exception that sets out the employer's obligation to discuss changes that impact significantly on the employee – but removes any entitlement to severance payments.

28. - NOTIFICATION OF SIGNIFICANT EFFECT AND REDUNDANCY

28.1 Where the Company has decided to take action that is likely to have a significant effect, or make you redundant, you will be advised as soon as is reasonably practicable and discussion held with you to determine ways that may minimise the adverse effects of such decision.

28.2 There shall be no redundancy payment associated with the termination of your employment.

Public holidays

Most State awards provide an entitlement to public holidays. Where a business closes on a public holiday where a permanent employee would otherwise work, the employee would normally get a paid day off. Under most awards, work performed on a public holiday will attract a penalty rate.

The following was offered as part of a retail industry AWA in November 2006. The AWA completely removes all entitlements to paid public holidays **and** penalty rates for working on those days.

6 PUBLIC HOLIDAYS

6.1 The following days shall be recognised as public holidays:

- 6.1.1 New Year's Day (1 January);
- 6.1.2 Australia Day (26 January);
- 6.1.3 Labour Day;
- 6.1.4 Good Friday;
- 6.1.5 Easter Monday;
- 6.1.6 Anzac Day (25 April);
- 6.1.7 Foundation Day;
- 6.1.8 Sovereign's Birthday
- 6.1.9 Christmas Day (25 December);
- 6.1.10 Boxing Day (26 December).

6.2 The above holidays shall be recognised on the day upon which they actually fall, and not any other substituted day.

6.3 The Company generally trades every day of the year and you agree that you may be required to work on any day which is a public holiday and will be paid at your base rate of pay for the hours actually worked. Public holidays not worked shall be unpaid leave.

In the following example, the AWA provides a gift certificate in lieu of any public holiday penalty rate.

11. Public holidays and Weekends

Employees may be requested to work on public holidays or Saturdays and Sundays, and these days will be treated as normal work days in that the hours work will contributing to the employees normal hours. However, if an employee works Sundays or Public Holidays, they will receive a bonus \$100-~~per day~~ Gift Voucher.

Annual leave

The Standard provides the basic entitlement for annual leave, and AWAs must at least meet the Standard to be registered.

The AWAs reviewed by the FEA generally allow employers to unilaterally direct when an employee can take annual leave – as evidenced in the following example (taken from an AWA at an engineering and fabrication business).

13.1	ANNUAL LEAVE
(a)	You are entitled to 160 hours of annual leave (pro-rata) for every completed year of service.
(b)	You do not accrue any annual leave entitlements during periods of unpaid leave, unauthorised absences, or during absences for which you receive weekly payments related to a workers compensation claim.
(c)	We may determine when the annual leave will be taken.

According to paragraph (c) the employer “*may determine when the annual leave will be taken*”. The employee has little or no recourse should they not agree with the employer’s directive.

Compare this to the entitlement provided by the Western Australian MCE Act, where an employee has the right to take leave at their own choosing (if no agreement has been reached)⁶⁴.

Personal/carer’s leave and notification of absence

The basic entitlement to paid personal sick/carer’s leave is outlined in the Standard and implied into all AWAs.

The Standard requires that an employee provides medical evidence to claim this entitlement. The following two examples from the contract cleaning and hospitality industries demonstrate how AWAs mirror the entitlements provided by The Standard.

8.7 For all absences due to illness or injury, you must provide a medical certificate indicating that you are unfit for work. In the event that it is not reasonably practical to obtain a medical certificate a statutory declaration must be provided detailing the same information. This must be provided to the Company as soon as reasonably practical.

e) ~~In order for you to access this entitlement you must produce a certificate from a Medical Practitioner dated at the time of the absence, evidencing your illness or that of the person for whom you were caring.~~

The evidentiary requirements found under AWAs are greater than those found in the Western Australian MCE Act – which requires an employee to provide proof that would satisfy a reasonable person. Most State awards provide a similar requirement.

In addition, many awards do not require an employee to provide a medical certificate for their illness or injury unless they are absent for more than two consecutive days. For example, an employee may have an ailment which does not require medical diagnosis or

treatment (e.g. common cold). The requirement for a medical certificate is an additional burden and cost that employees are now forced to comply with.

Rostering provisions

The FEA has reviewed numerous AWAs that provide inflexible roosting provisions – a matter overlooked by many employees when signing a new agreement. In the following example, the roosting of hours is at the discretion of the employer to meet operational needs and client requirements.

11.0 Days and hours of work

- 11.1 Rostered days and hours of work shall be as rostered by the employer and may be changed by notification by the employer with one day's notice.
- 11.2 The employee may be required to work on any day Monday to Sunday inclusive of gazetted public holidays.
- 11.3 The roster of days and hours shall be prepared by the employer to meet the operational requirements of the company and the client.
- 11.4 All employees are required to work at the days and times as rostered by the Employer, however, in some Contracts there may be some flexibility in the working arrangements.
In such Contracts, the employee must apply in writing to the Employers Managing Director to change any working arrangements, and must receive written confirmation before changing any working arrangements.
Furthermore, the employee will be paid no more than the amount payable if the work was undertaken in accordance with the Companies designated working arrangements.
- 11.5 The employee may be required to work additional hours to rostered hours.

Whilst the agreement alludes to flexible working arrangements in **some** instances, there is no mention of what flexible arrangements are available, nor is there any guarantee that the request will be granted in reasonable circumstances. Effectively, this AWA limits the employee's ability to negotiate flexible work arrangements.

In addition, the AWA requires that the employer can change the roster with only one day's notice. There is no option to refuse this request, as the AWA requires the employee to work hours as rostered by the employer.

In the second example provided below (from the retail industry), the employer has reserved the right to change the employee's rostered hours with only one hour's notice.

13. Hours of Work

- a) If you are a full time employee you will be required and entitled to 38 hours of work each week.
- b) Part time employees work in accordance with the roosting requirements as advised from time to time by the Employer.
- c) You may be required to work your hours on any, day Monday to Sunday.
- d) You must understand that your hours and days of work may vary from time to time to meet the operational requirements of the business and customer demand; therefore a flexible approach to your working hours will be needed.
- e) You agree the Employer may change your rostered hours by giving you 1 hours notice or immediately by mutual consent between the parties.

In the following example, the employer is allowed to arbitrarily cut hours by 50 per cent - even if the employee is 'employed on an ongoing basis'. No protection or adequate compensation is afforded to the employee, and any reduction of hours can be made at the sole discretion of the employer.

6.4 If you are employed on an ongoing basis, the minimum hours you work each work cycle shall be established by agreement. The minimum may be varied by agreement or may be reduced by a maximum of 50% provided the Company gives you notice of at least 2 weeks.

This is in stark contrast to the Western Australian MCE Act⁶⁵ and the *Termination, Change and Redundancy General Order*⁶⁶, which both require employers to consult with employees over changes of significant effect. This may include an alteration of hours of work.

In the following example, the employer has limited the right to opt for flexible working arrangements – by making working hours a condition of employment.

[3] Whilst the company seeks detailed information on the days and times each employee is best able to integrate their designated rostered shifts into their other commitments, [REDACTED] are able to offer employment only to those potential employee's who are able to confirm "Yes" In Section "B" of Schedule Two

Schedule Two

EMPLOYEE PREFERENCE OF HOURS		REQUESTED BY (Employee signature)	
Section A: ADDITIONAL HOURS More than 38 hours per week <div style="text-align: center; margin-top: 10px;"> YES <input type="checkbox"/> NO <input type="checkbox"/> </div> Identify limitations (if any) here:			
Section B: ANY HOURS AVAILABLE <div style="text-align: center; margin-top: 10px;"> YES <input type="checkbox"/> NO <input type="checkbox"/> </div> Identify limitations (if any) here:			
Section C: PREFERRED HOURS Only complete this section if you have ticked NO to "any hours" in Section B	7.00am – 6.00pm	Any other time (6.00pm – 7.00am)	
Monday - Friday			
Saturday			
Sunday			
Public Holidays			

Work location and travel costs

Some of the AWAs collected for the FEA require employees to work in more than one location.

Work Location

3.6 You may be required to work at any store or place of business operated or accessed by the Company for business purposes. Whilst you may be engaged initially to work at one store, during your employment you may be directed on a temporary or permanent basis to work at any other store.

This clause allows the employer to specify where the employee will work – without recourse. The AWA also fails to compensate the employee for costs incurred where extra travel is required.

Meal breaks

Meal breaks are a standard entitlement for most employees. The absence of adequate breaks may result in increased employee fatigue, lower productivity and an increased risk of workplace accident.

The WR Act requires that an employee be allowed a meal break of at least 30 minutes after no more than five hours of continuous work⁶⁷. However, this does not apply where an award or agreement already provides an entitlement to a meal break.

9. Meal Break¹

9.1 An unpaid meal break of fifteen (15) minutes per shift in excess of six (6) hours is available.

9.2 A meal will be provided to you during the meal break.

9.3 Meal must be taken at approved times so as to cause the minimum disruption to work.⁴

In this hospitality industry example, the employee is only entitled to a 15 minute break after six hours of work. In addition, the meal break must be taken at an approved time that causes “minimal disruption to work”. Consequently, the employee could be forced to wait longer than the prescribed six hours.

Also, this AWA does not provide monetary compensation where the employee is unable to take a break. In the *Restaurant, Tearoom and Catering Workers' Award 1979* employees receive an additional 50 per cent loading where a meal break is not provided after six hours⁶⁸.

Waiver of consideration period

When offered an AWA, an employee should be provided with a copy of (or have ready access to) the AWA and Information Statement at least seven days before having to sign it. This period is meant to be for the employee to give due consideration to the terms and conditions on offer. However the WR Act allows the right to waive this period, using a form similar to the one on the following page.

**waiver of the seven-day period
– Australian workplace agreement**

I, _____ (employee name)

intend to make an Australian workplace agreement (AWA) with my employer,
(employer name).

I understand that in accordance with section 337 of the *Workplace Relations Act* (the Act), my employer is required to provide me with a copy of the proposed agreement (together with any other industrial instrument which is incorporated into the agreement), or provide ready access to the agreement in writing, at least seven days before the agreement is signed.

I understand my employer is also required to provide me with an *Information Statement for Employees (Australian workplace agreement)* at least seven days before the agreement is signed.

I confirm that I have also been provided with the proposed Australian work place agreement (together with any other industrial instrument which is incorporated into it), or have had ready access to the agreement in writing before signing this waiver.

I have also been provided with the *Information Statement for Employees* before signing this waiver.

The provision of the AWA, or ready access to it, and the provision of the *Information Statement for Employees* occurred on or from _____ (date).

I understand that I am under no obligation to sign this waiver.

In accordance with section 338 of the Act I hereby waive the balance of the seven-day period that would otherwise apply.

signed _____ dated __/__/__

A young worker recently contacted the Fair Employment Hotline seeking advice on a job she had been offered. The employee had been offered a choice of signing an AWA or being covered under the company's registered collective agreement. By the time the worker received a copy of the AWA (which had been posted), information statement and waiver, the employee only had two days to properly consider the AWA before starting employment.

24. You are allocated a total of one hour every day for lunch, 15 minutes for Morning Tea and 15 minutes for Afternoon Tea. These breaks can be taken at appropriate times according to your roster. **The 90 minutes will be automatically deducted** every working day from your total hours worked even if you decide not to take any breaks or take them between jobs whilst driving.
25. You are responsible for handling Company Monies and Vouchers. You will be liable for the total amount of money that is lost that is in your care.
26. **Restrictive Trade Covenant:** Clients, be they Current or Past Clients that you have worked for remain the Property of ██████████ at all times. A summons to the value of 1 year of cleaning will be issued to you for any client that you are found to be working for privately.
27. This Contract of Employment and Conditions will have **NO Expiry Date** and remains binding on all parties during and after Employment, with **particular reference to Item 26.**
28. You are responsible for your Speeding Fines and Parking Fines whilst driving Company Cars.
29. When Rostered on to work and you are a **NO SHOW**, you will be required to pay the sum of \$150.00 [including GST of \$13.63]; this amount will be deducted from your pay. However, if you produce a **Doctors Certificate** relevant only to the date of your **NO SHOW** then the \$150.00 will **not** be charged.
30. A maximum allowance of 1.50 Hours per day travelling time between jobs is allowed. If more time is required then you must seek an Authorisation Number by calling our Office. The Authorisation number is added to your Roster and Time Sheet. Failure to seek an Authorisation Number will render any extra time not payable.
31. A **Saturday / Weekend Bonus of \$20.00** on top of your Hourly Rate is payable when working and collecting a **minimum of 8 Vouchers** for a Saturday / Weekend Shift.
32. As a Casual Employee of ██████ you will agree to work a number of agreed shifts. These shifts can be changed by informing your Duty Manager 7 days before the actual shift you wish to change. You agree that you will work every Friday as a matter of course, unless ██████ give you verbal exemption from this **compulsory day [Friday]**. If you do not give the required 7 days verbal notice to your Duty Manager to change a shift and this is not recorded on your weekly **TIME SHEET**, you may be subject to a fine as per Item 29.

The issue of non-registered agreements and contracts, such as the one provided here, will be the subject of a future FEA discussion paper.

AWAs: your feedback

This discussion paper has outlined a number of concerns about AWAs. The FEA would welcome comment on this paper and public contribution to the debate on this important community issue.

To assist in providing such feedback the following questions have been provided, although the FEA would welcome comment on any issue to do with AWAs and further examples from actual AWAs.

Wage Outcomes

1. Do AWAs lead to higher wages for the individual worker?
2. Do AWAs lead to higher wages in comparison to other instruments such as collective agreements?
3. Should wages provided by AWAs be reviewed on an annual basis as a legislative requirement?

Productivity Outcomes

4. Have AWAs led to higher productivity outcomes across most industries?
5. Are there other factors (economic, technological, social) that have influenced productivity?

Negotiating AWAs

6. Do employees have the ability to properly negotiate fair conditions of employment in their AWA with their employer?
7. By signing an AWA, does an employee agree that the conditions of employment being provided are fair?
8. Is it fair that AWAs can be offered as a condition of employment for new employees, or those seeking promotion or career progression?

Registering AWAs

9. Are AWAs easy to register, or have they added an additional level of red tape for businesses?
10. Does the Fairness Test protect employees by ensuring they are fairly compensated for trading away entitlements?

Flexibility

11. Is flexibility the driving motive for employers using AWAs?
12. Are the driving motives for employers using AWAs union avoidance and labour cost reduction - rather than flexibility?
13. Do AWAs provide flexibility for employers **and** employees?
14. What is meant by flexibility in the agreement making process?

Further questions

15. Do AWAs leave sections of the work force vulnerable to exploitation?

16. What would be the likely impact of removing AWAs?

In addition to comments on any or all of the above questions, the FEA would also welcome any personal experiences or general observations about the effect that AWAs have had on employees and their families in Western Australia.

Information can be provided to the Fair Employment hotline on **1300 790 636**, or via www.fairemployment.wa.gov.au.

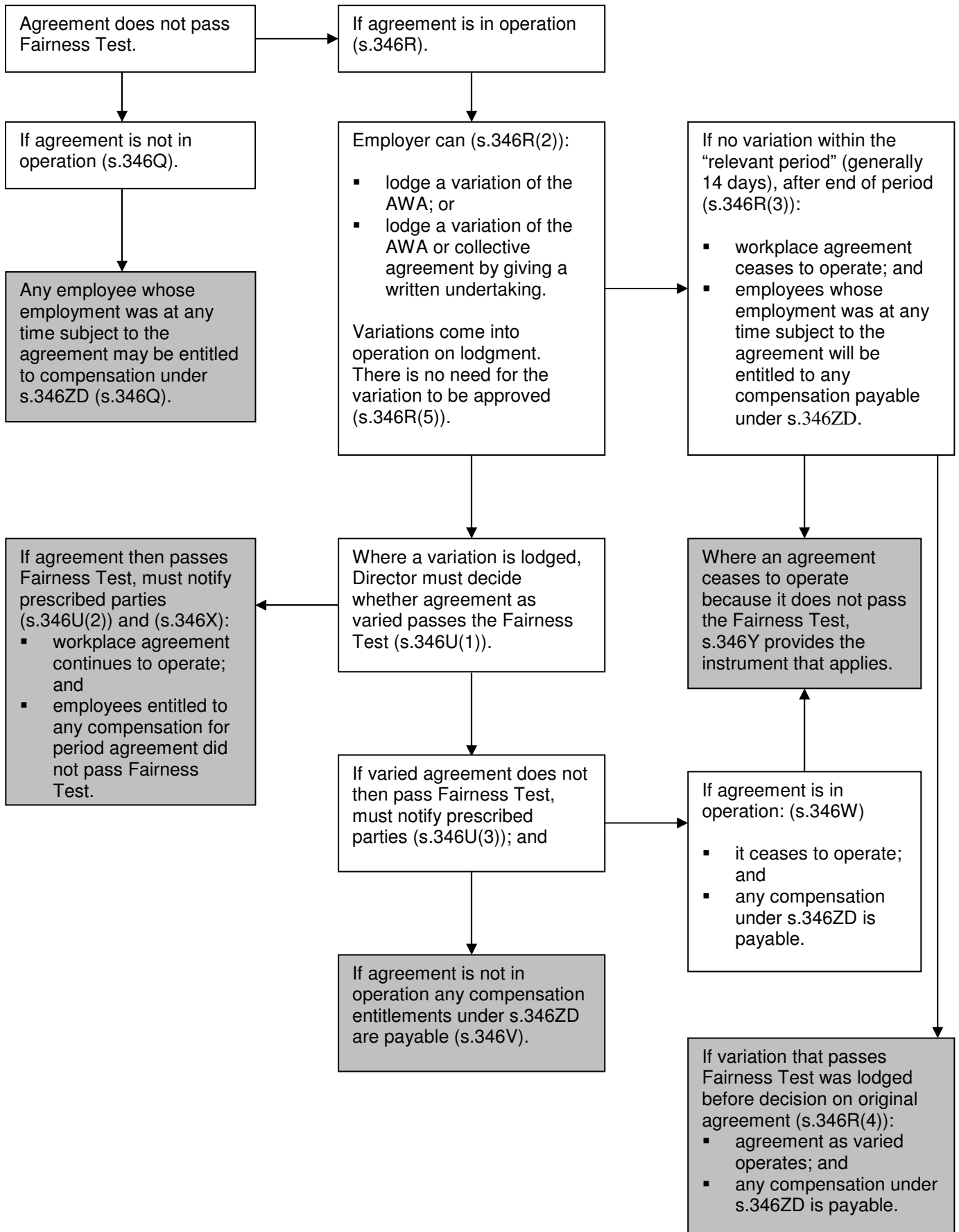
Written comment can also be received via post addressed to:

**The Fair Employment Advocate
Level 3, Dumas House
2 Havelock Street
WEST PERTH WA 6005.**

This is the second in a series of discussion papers that the FEA intends to publish. Comments or suggestions about other topics you would like to see included would be appreciated.

Appendix A

What happens when an AWA does not pass the Fairness Test



Appendix B

WA PayChecker

www.docep.wa.gov.au/wapaychecker

WA PayChecker is an online wages calculator that helps you work out if your pay and conditions are fair. WA PayChecker helps protect workers and employers by showing the correct pay for different jobs under Western Australian State awards.

COMPARE WHAT'S FAIR

Compare What's Fair helps you to compare the pay and conditions under a State award that you would have been entitled to had the Work Choices legislation not been enacted.

The system uses the relevant State award as a benchmark of fairness. You can check if a proposed Australian Workplace Agreement (AWA), other agreement or contract alters any pay or conditions compared to this State award for a typical working week. You can also calculate the amount that you could earn over a year, including penalties, allowances and leave entitlements under an existing State award and then compare that to your proposed agreement.

Compare What's Fair calculates monetary benefits provided by State awards. It does not consider non monetary benefits such as rest breaks, rostering arrangements or safety at work. In comparing a contract or industrial instrument with the relevant State award you should also consider these non-monetary benefits.

If you believe your AWA, other agreement or contract is unfair or harsh you can contact the Fair Employment Advocate for information and advice.

There are seven awards currently available through WA PayChecker, as well as the *Minimum Conditions of Employment Act 1993*. Awards include:

- Restaurant, Tearoom and Catering Workers Award 1979
- Shop and Warehouse (Wholesale and Retail Establishments) Award 1977
- Hairdressers Award 1989
- Security Officers Award
- Clerks (Commercial, Social and Professional Services) Award 1972
- Contract Cleaners Award 1986
- Hotel and Tavern Workers Award 1978.

Soon to be added awards include:

- Transport Workers (General) Award No. 10 of 1961
- Metal Trades (General) Award
- Building Trades (Construction) Award 1987.

For more information on award coverage and a wide range of employment issues within Western Australia please contact Wageline on 1300 655 266. Alternatively you can submit an online enquiry form to Wageline at www.docep.wa.gov.au/wageline.

Acknowledgements

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Endnotes

- ¹ Parliament of the Commonwealth of Australia – House of Representatives (2005) Workplace Relations Amendment (Work Choices) Bill 2005 - Explanatory Memorandum, pg. 1.
- ² ACIRRT (2002) *A Comparison of Employment Conditions in Individual Workplace Agreements and Awards in Western Australia*, Western Australian Commissioner of Workplace Agreements.
- ³ Regulation 1.6 of the *Workplace Relations Regulations 2006* prescribes the following matters: child labour, discrimination and EEO. AWAs are not subject to State industrial laws to the extent to which they relate to the prevention of discrimination or the promotion of EEO. The Government can change Regulations at any time.
- ⁴ Non-monetary compensation means compensation (that is not monetary) for which there is a money value equivalent or to which a money value can reasonably be assigned and that confers a benefit or advantage on the employee which is of significant value to the employee: WR Act s.346M(7).
- ⁵ See *Information Statement for Employees* at: <http://www.oea.gov.au/docs/EMPLOYERS/AWA/ISE-AWA-020707.pdf>
- ⁶ The data obtained from the Workplace Authority cited the number of AWAs registered in both Western Australia and nationally in the three years to March 2007.
- ⁷ Australian Bureau of Statistics (2006) *Employee Earnings and Hours – May 2006* (Catalogue 6306.0).
- ⁸ O'Brien, Amanda and Harris, Sid (2007) 'PM Flies to Friendly West' in *The Australian*, 23 July, pg. 2.
- ⁹ Workplace Authority, unpublished data.
- ¹⁰ Workplace Authority, unpublished data.
- ¹¹ Workplace Authority, unpublished data.
- ¹² Australian Government (2005) 'More jobs, Higher Wages, A Stronger Economy' in various newspapers, July.
- ¹³ Peetz, David and Preston, Alison (2007) *AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data*, Industrial Relations Victoria. The data used in the report was collated in May 2006 – two months after the implementation of Work Choices. Consequently, a majority of the surveyed AWAs were signed in the context of the former "no disadvantage" test.
- ¹⁴ Peetz, David and Preston, Alison (2007) pg. 31.
- ¹⁵ Peetz, David and Preston, Alison (2007) pg. 22.
- ¹⁶ Graph compares the difference in non-managerial employees' average total hourly cash earnings by industry in May 2006. ABS unpublished data.
- ¹⁷ Australian Human Resources Institute (2007) *Work Choices: Its impact within Australian Workplaces*, pg. 20.
- ¹⁸ Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, Official Committee Hansard, 29 May 2006, p 138.
- ¹⁹ M. Davis (2007) "Revealed: how AWAs strip work rights" in *Sydney Morning Herald*, 17 April, p. 1.
- ²⁰ M. Schubert and M. Grattan (2007) "We bungled on IR: Hockey" in *The Age*, 23 May, p.1.
- ²¹ Commonwealth Government (2007) *A Stronger Safety Net for Working Australians*, pg. 3.
- ²² Workplace Authority (2007) *Fairness Test Policy Guide*, Commonwealth Government, pg. 25.

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- ²³ Workplace Authority (2007) p. 31.
- ²⁴ Workplace Authority (2007) p. 32.
- ²⁵ Workplace Authority (2007) p. 31.
- ²⁶ P. Hendy (2007) *Disappointing and Unnecessary Changes to Work Choices*, Australian Chamber of Commerce and Industry, 4 May.
- ²⁷ Thomson (2007) "Employers tired of the instability and complexity of IR system: Harmer" in *Workforce* Issue 1605, 28 September.
- ²⁸ Workplace Authority (2007) *Media Statement – First Fairness Test Results Published*, Australian Government, 6 August.
- ²⁹ ABC News (2007) *Spotlight Rejects 'Confusing' Work Choices*, 18 September.
- ³⁰ Business Council of Australia (2007) *Workplace Relations: Action Plan for Future Prosperity*, pg. 12.
- ³¹ Hancock, Keith; Bai, Tracy; Flavel, Joanne & Lane, Anna (2007) *Industrial Relations and Productivity in Australia*, National Institute of Labour Studies, Flinders University, pp. 23-254
- ³² Employment, Workplace Relations and Education References Committee (2005) *Workplace Agreements*, Commonwealth of Australia, section 3.22.
- ³³ Stanford, Jim (2007) *Prices, Labour Costs, and Profits in the Australian Mining Industry: 2001 through 2006*, Canadian Auto Workers.
- ³⁴ The Chamber of Minerals and Energy of Western Australia & Australian Mines and Metals Association (2004) *Western Australian Minerals Industry: Employee Relations Profile*, page 11.
- ³⁵ Platt, Christopher (2007).
- ³⁶ Australian Human Resources Institute (2007) pg. 11.
- ³⁷ Briggs, Chris; Cooper, Rae & Ellem, Brandon (2005) *The State of Industrial Relations*, Evatt Foundation, chapter four.
- ³⁸ *Workplace Relations Act 1996*, Section 3(n).
- ³⁹ Briggs, Chris; Cooper, Rae & Ellem, Brandon (2006) *Paper Four – Undermining the Right to Collective Bargaining*, University of Sydney, pg. 1.
- ⁴⁰ Committee of Experts on the Application of Conventions and Recommendations (2007) *Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Australia (ratification: 1973) 2007*, International Labour Organization.
- ⁴¹ *Workplace Relations Act 1996*, Section 3(j).
- ⁴² Todd, P, Caspersz, D & Sutherland, M (2004) "Out with the Individual Agreements, in with the Collective Bargaining - Did Someone Forget to Tell the Employers?" in M Barry & P Brosnan (eds) *New Economies: New Industrial Relations*, Refereed Proceedings of the 18th AIRAANZ Conference, pp. 525-534.
- ⁴³ Australian Mines and Metals Association (2007) *An Analysis of Coalition and ALP Workplace Relations Policies*, page 8.
- ⁴⁴ Econtech (2007) *The Economic Effects of Industrial Relations Reforms Since 1993*, Australian Chamber of Commerce and Industry.
- ⁴⁵ Australian Bureau of Statistics (2006) *Employee Earnings, Benefits and Trade Union Membership, Australia – August 2006* (Catalogue 6310.0).
- ⁴⁶ Most commentators use the examples of BHP offering AWAs to its Pilbara iron ore workers in 2000, or Rio Tinto using AWAs when the State Government repealed IWAs in 2002.

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- ⁴⁷ An analysis of the inability for the low paid to negotiate employment conditions can be found in Jefferson, Therese; Preston, Alison; Chapple-Fahlesson, Sharyn & Mitchell, Stephanie (2007) *A Study of Low Paid Work and Low Paid Workers in Western Australia*, Women in Social and Economic Research.
- ⁴⁸ Bishop v Ropolo Services Pty Ltd [2006] FCA 592.
- ⁴⁹ MacDonald, Kim (2007) "AWA fairness test costs bosses dear" in *The West Australian*, 3 September, pg. 6.
- ⁵⁰ Freeman, Richard (2007) *Work Choices: Reform or Regression?*, speech to the 2007 National Industrial Relations Conference, 11 September.
- ⁵¹ McCallum, Ron (2006) *Australian Labour Law After the Work Choices Avalanche: Developing An Employment Law for Our Children*, Presentation to the Law Society of New South Wales on 3 October 2006.
- ⁵² Australian Bureau of Statistics (2007) *Average Weekly Earnings – May 2007* (Catalogue 6302.0).
- ⁵³ Plowman, David & Preston, Alison (2005) *The New Industrial Relations: Portents for the Lowly Paid*, Women in Social & Economic Research.
- ⁵⁴ Peetz, David and Preston, Alison (2007), pg 32. Also see Preston, Alison; Jefferson, Therese & Guthrie, Rob (2007) *Australian Workplace Agreements and Gender Equity*, Women in Social and Economic Research.
- ⁵⁵ Groves, Kylie (2007) *Prospects for Equal Pay – Can the Law Help?*, Minter Ellison Lawyers, pp. 2-3.
- ⁵⁶ Lyons, Michael & Smith, Meg (2006) *Gender Pay Equity, Wage Fixation and WorkChoices: Forward to the Past?*, National Women and IR Conference paper, 12-4 July.
- ⁵⁷ Elton, Jude; Bailey, Janis; Baird, Marian; Charlesworth, Sara; Cooper, Rae; Ellem, Bradon; Jefferson, Therese; Macdonald, Fiona; Oliver, Damian; Pocock, Barbara; Preston, Alison & Whitehouse, Gillian (2007) *Women and WorkChoices: Impacts on the Low Pay Sector*, Centre for Work + Life, University of South Australia.
- ⁵⁸ Squire, Sarah & Tilly, Jo (2007) *It's About Time: Women, Men, Work and Family*, Human Rights and Equal Opportunity Commission, chapter 4.10.
- ⁵⁹ *Workplace Relations Act 1996*, Section 3(l).
- ⁶⁰ Employment, Workplace Relations and Education References Committee (2005) section 4.23
- ⁶¹ Australian Human Resources Institute (2007) pg. 25.
- ⁶² Squire, Sarah & Tilly, Jo (2007)
- ⁶³ Standing Committee on Employment, Workplace Relations and Education (2007) *Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007*, Commonwealth of Australia, chapter three.
- ⁶⁴ *Minimum Conditions of Employment Act 1993*, section 25.
- ⁶⁵ *Minimum Conditions of Employment Act 1993*, Part 5.
- ⁶⁶ See Western Australian Industrial Relations Commission APPL 784 of 2004, Clause 3.
- ⁶⁷ *Workplace Relations Act 1996*, Section 607.
- ⁶⁸ *Restaurant, Tearoom and Catering Workers' Award 1979*, clause 13(1)(b).