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**The New Federal
Workplace Relations System**

by

Lenny Roth

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by

Lenny Roth

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EXECUTIVE SUMMARY

Work Choices reforms

On 7 December 2005, Federal Parliament passed the *Workplace Relations Amendment (Work Choices) Bill 2005*, which is said to contain the most significant changes to the regulation of industrial relations in Australia since 1904, when the Federal industrial relations system was established. The reforms rely, controversially, on the corporations power in the Constitution to largely increase the coverage and change the content of the Federal system. The reforms are expected to commence some time in March 2006.

High Court challenge

The NSW Government and other State Governments are challenging the constitutional validity of the legislation in the High Court. The basis for the challenge is that the corporations power does not support industrial relations laws of the kind that have been enacted. The case is likely to be heard in May 2006 but it may not be decided until 2007.

Coverage of new Federal system

With a view to creating a single national industrial relations system, the Federal system will be extended to cover all constitutional corporations and their employees. The various State industrial systems will be excluded from covering these employers and employees. The new Federal system will cover up to 85 per cent of employees in Australia but coverage will be lower in some States (about 75 per cent of employees in NSW).

Changes to award wages

Award wages will be adjusted by a new body – the Australian Fair Pay Commission – rather than by the Industrial Relations Commission. The Fair Pay Commission will operate according to different parameters and it will undertake research and consult with relevant stakeholders rather than arbitrating in the context of competing claims by unions and employer organisations. The Government has said that the Fair Pay Commission will ensure that the unemployed and low paid are not priced out of the labour market. Critics believe that real minimum wages will fall and that this will not lead to employment growth.

Changes to award conditions

Certain employment conditions can no longer be included in awards, including those covered by the new Australian Fair Pay and Conditions Standard and those relating to long service leave, notice of termination, jury service and superannuation. However, provisions in existing awards relating to these matters will continue to have effect. Another change is that awards cannot require small businesses to make redundancy payments.

Changes to legislative conditions

There is a new set of four legislative minimum conditions relating to: maximum ordinary hours of work, annual leave, personal/carer's leave and parental leave. These four conditions will, together with minimum wages, comprise the Australian Fair Pay and Conditions (AFPC) Standard. The conditions in this Standard will apply to all employees covered by the Federal system. Employees who are covered by an award will continue to be entitled to their award conditions if those conditions more generous than the Standard.

Changes to workplace agreements

The most significant change is that workplace agreements no longer need to pass the no-disadvantage test (an agreement would not pass this test if it disadvantaged an employee compared to their award wages and conditions). Workplace agreements will only need to comply with the minimum wages and four minimum conditions in the AFPC Standard. The Government argues that this will enhance choice and flexibility in agreeing on wages and conditions, which will increase productivity, leading to a stronger economy and higher living standards. Critics argue that most employees lack bargaining power and that they will lose important entitlements (eg overtime and penalty rates), which will be detrimental to their living standards and their ability to balance work and family commitments.

Changes to industrial action

Unions and employees will not be able to take lawful industrial action when negotiating a workplace agreement unless this has been authorised by a majority of employees, voting by secret ballot. In addition, the Industrial Relations Commission can now prevent industrial action during negotiations if it is causing significant harm to a third party. The Minister now also has the power to stop industrial action which is threatening health, safety or the economy. The Government argues that secret ballots will ensure that industrial action is a genuine choice of the employees involved and that the other changes recognise the legitimate interests of those affected by industrial action. Critics argue that the changes will severely restrict employees from taking action, weakening their bargaining power.

Changes to dispute resolution

The century -old system of *compulsory* conciliation and arbitration is to be abolished. The Industrial Relations Commission will become a *voluntary* dispute resolution body and parties will also be able to refer disputes to private dispute resolution services.

Changes to unfair dismissals

The most significant change is that businesses with up to 100 employees will be exempt from unfair dismissal laws. The Government argues that unfair dismissal laws discourage employers from putting on more staff and that the exemption will create thousands of jobs and a stronger economy. Critics argue that there is no valid evidence to support the Government's claim about the link between unfair dismissal laws and employment. Critics also argue that, in any event, there is a powerful case for the continued operation of laws that protect workers against arbitrary or unfair deprivation of their livelihood.

General debate about reforms

The Federal Government and business groups argue that the reforms will reduce complexity and give employers and employees more choice and flexibility in setting their wages and employment conditions. This, it is argued, will lead to greater productivity and a stronger economy, which will result in more jobs, higher wages and better living standards.

Critics (which include trade unions, many academics, welfare groups, and State Governments) argue that the Government has not made out the economic case for the reforms. They also argue that the reforms tilt the balance of power too far in favour of employers; and that, over time, the reforms will lead to lower wages and reduced working conditions, which will mean decreasing living standards and greater difficulty in balancing work and family life. They argue that the reforms are likely to impact hardest on vulnerable workers such as women, indigenous Australians, employees with a disability and young people.

1. INTRODUCTION

The Work Choices reforms

On 7 December 2005, the Federal Parliament passed the *Workplace Relations Amendment (Work Choices) Bill 2005*, which is said to contain the most significant changes to the regulation of industrial relations in Australia since 1904, when the Federal industrial relations system was established. The reforms rely, controversially, on the corporations power in the Constitution to largely increase the coverage and change the content of the Federal system:

- (1) *Increase in coverage:* With a view to creating a single national industrial relations system, the Federal system (which currently covers a minority of employers and employees in each State¹) will be extended so that it will cover all constitutional corporations and their employees. The various State industrial relations systems will be excluded from covering these employers and employees. It is estimated that the new Federal system will cover up to 85 per cent of employees in Australia.
- (2) *Changes to content:* Substantial changes will be made to:
 - a. Minimum wage setting;
 - b. Minimum employment conditions in awards and legislation;
 - c. Workplace agreements;
 - d. Industrial action laws;
 - e. Resolution of industrial disputes;
 - f. Unfair dismissal laws.

The new laws are expected to commence some time in March 2006.²

Debate about reforms

When the Prime Minister, John Howard, announced the reforms in May 2005, he said that they:

...represent the next logical step towards a flexible, simple and fair system of workplace relations. Australian must take this step if we are to sustain our prosperity, remain competitive in the global economy and meet future challenges such as the ageing of our society.³

Since this announcement, there has been extensive debate about the reforms in the community, in the media and in the Federal and State Parliaments. Business groups and employer associations have encouraged and supported the changes but there has been strong opposition

¹ In 1996 Victoria referred its industrial relations powers to the Federal Government and the Federal system now operates almost exclusively in Victoria.

² See Work Choices website: <https://www.workchoices.gov.au/ourplan/act/>. Note that a small number of the new provisions commenced on 14 December 2005, when the bill received royal assent.

³ Prime Minister John Howard, 'Prime Ministerial Statement on Workplace Relations', Parliament of Australia, 26 May 2005, p2.

from trade unions, many academics, welfare organisations, religious groups, and from all State Governments. They are concerned that the reforms will result in employees receiving lower wages and losing important entitlements, which will be detrimental to their standard of living and to their ability to effectively balance work and family life. According to the leader of the Federal Opposition Leader, Kim Beazley, the *Work Choices* reforms represent:

...the greatest attack on the Australian way of life and Australian values, the most systematic attack that we have seen in a century in this parliament of the Commonwealth of Australia.⁴

The Federal Opposition, the Democrats and the Greens opposed the *Work Choices* legislation but the Coalition used its recently established majority in the Senate to pass the reforms. In previous years, the Senate had blocked a number of the current reforms. The Federal Opposition has said that it will wind back the reforms if it wins the next Federal election.⁵

High Court challenge

The NSW Government has launched an action in the High Court, challenging the constitutional validity of the legislation.⁶ The basis for the challenge is that the corporations power in the Constitution does not support industrial relations laws of the kind that have been enacted. Other State Governments have joined in the action.⁷ The case is scheduled to be heard in May 2006⁸ but may not be decided until 2007.⁹ The High Court's decision will be important not only in the area of industrial relations but also for federalism in Australia.¹⁰

Outline of paper

In October 2005, a *Briefing Paper* was published on the Federal Government's plan to create a single national industrial relations system.¹¹ That paper outlined the history to the Government's

⁴ Hon Kim Beazley MP, *Commonwealth Parliamentary Debates*, 3/11/05, p5.

⁵ See 'Labor to ditch IR reforms' *The Australian*, 11/10/05. For a response by the Howard Government, see 'ALP vow on work reforms hollow', *The Australian*, 14/6/05.

⁶ 'NSW fires short in IR war', *Australian Financial Review*, 22/12/05; 'State challenges IR laws in High Court', *The Australian*, 22/12/05.

⁷ See 'High Court challenge to IR reforms', *Sydney Morning Herald*, 30/1/06.

⁸ See "High Court to hear IR challenge early in May", *Australian Financial Review*, 9/2/06.

⁹ For a discussion of the issues and possible outcome of the case, see Roth L, 'Federal industrial relations reforms: the proposed national system', NSW Parliamentary Research Service, *Briefing Paper* No 11/05. See also Prince P and John T, 'The Constitution and industrial relations: is a unitary system achievable', Commonwealth Parliamentary Library, *Research Brief*, No 8/05-06, 28 November 2005. See also, 'The odds are even as a very big question awaits seven answers', *Sydney Morning Herald*, 4/1/06.

¹⁰ 'The odds are even as a very big question awaits seven answers', *Sydney Morning Herald*, 4/1/06.

¹¹ Roth L, 'Federal industrial relations reforms: the proposed national system', NSW Parliamentary Research Service, *Briefing Paper* No 11/05.

plan, it briefly discussed the constitutional validity of relying on the corporations power to create a national system, and it outlined the potential coverage of the proposed national system.

This paper begins with a brief sketch of the Federal and State systems, as they existed prior to the reforms. It then outlines the way in which the reforms will extend the *coverage* of the Federal system to most corporations and their employees. Next, this paper gives an overview of the changes to the *content* of the Federal system. The following sections of this paper examine each of these changes. Each section contains a summary of the changes, the debate about the changes, and the changes for employees who move out of the NSW system. The last section of this paper presents a summary of the general debate about the reforms.

2. OVERVIEW OF FEDERAL AND STATE SYSTEMS

Introduction

This section provides an overview of the Federal and State systems *prior to the reforms*.

Since early last century, every State in Australia has had its own industrial relations system and the Federal industrial relations system, which was established in 1904, has operated concurrently with each of these State systems.¹² The State and Federal systems have operated concurrently in the sense that a majority of employers and employees in each State have been regulated by State laws and State industrial instruments (eg awards), while a minority of employers and employees in each State have been primarily regulated by Federal laws and Federal industrial instruments.

The reason for these parallel systems is that the Federal Constitution left the States with the primary responsibility for regulating industrial relations but gave the Federal Parliament the power to make laws with respect to the conciliation and arbitration of *interstate* industrial disputes.¹³ In recent times, the Federal Government has relied on other constitutional powers, such as the corporations power, to expand the reach of the Federal system. However, employers and employees have generally had the option of remaining under their State system.

The Federal and NSW systems have shared the same basic elements. Both have been based on compulsory conciliation and arbitration by industrial tribunals. The tribunals have made awards, which have set minimum wages and conditions for a large proportion of the workforce. In the early 1990s, both systems shifted their emphasis away from awards and towards enterprise bargaining. These common features of the Federal and State systems are outlined below.

Disputes resolved by compulsory conciliation and arbitration

From the beginning, both the NSW and Federal systems have resolved industrial disputes through the processes of compulsory conciliation and arbitration. State and Federal industrial tribunals have been established to undertake conciliation and arbitration. The Federal tribunal is now known as the Australian Industrial Relations Commission. The State industrial tribunal in NSW is now known as the NSW Industrial Relations Commission. As noted above, the Federal tribunal has been limited to resolving *interstate* industrial disputes.¹⁴

Conciliation and arbitration have been compulsory in the sense that if the industrial tribunal received notice of an industrial dispute it could compel the parties to participate in conciliation and, if that failed, the tribunal would proceed to arbitration and impose a legally binding

¹² As noted above, in 1996 Victoria referred its industrial relations powers to the Federal Government and the Federal system now operates almost exclusively in Victoria.

¹³ Section 51(35) of the Constitution. This is discussed in our first briefing paper, note 11, pp3-4.

¹⁴ As to unions manufacturing interstate disputes to come within the Federal jurisdiction, see Roth L, 'Industrial Relations Reforms: the proposed national system', note 11, p4.

outcome on the parties. The “end product of this process of conciliation and arbitration might be an agreed settlement, or a non-binding recommendation to the parties. But it could also be...a legally enforceable instrument known as an ‘award’.”¹⁵ As noted above, awards have set minimum wages and conditions for a large section of the workforce.

Wooden notes that this system of compulsory conciliation and arbitration is quite unique:

... Unlike most other countries where the determination of wages and employment conditions has largely been the result of bargaining between employers and workers, in Australia, the dominant paradigm [has been] compulsory arbitration. That is, the wages and employment conditions of most Australian workers [have been], to varying degrees, the product of decisions made by legal tribunals...¹⁶

Trade unions and employer organisations

Trade unions and employer organisations that have been registered in accordance with Federal and State industrial laws have been recognised participants in the Federal and State systems. Creighton and Stewart refer to the role of trade unions prior to the reforms:

Trade unions have played, and despite recent changes in the industrial relations environment continue to play, a crucial role in the operation of the formal systems of dispute resolution that first emerged in Australia in the late 19th and early 20th century. Unions can create and be party to disputes in their own right. They can initiate proceedings to enforce their entitlements and those of their members. They can be subject to enforcement proceedings where they fail to adhere to the norms of the relevant system, and ultimately they can be excluded from it. There has been a symbiotic relationship between Australian unions, compulsory conciliation and arbitration and the award system for regulating wages and conditions, each has relied on, and been strengthened by, the other.¹⁷

There has been a large decline in trade union membership over the last twenty years. In 2003, 23 percent of employees were union members (47 percent of public sector and 18 percent of private sector), compared with around 50 percent at the beginning of the 1980s.¹⁸

Awards setting minimum wages and conditions

Coverage

The Federal industrial tribunal has, in settlement of *interstate* industrial disputes, made awards setting minimum wages and employment conditions for employees in certain industries and occupations in all Australian States. In 1990, Federal awards covered 31 per cent of employees in Australia.¹⁹ Similarly, the State industrial tribunals have made awards setting minimum

¹⁵ Creighton B & Stewart S, *Labour Law*, The Federation Press, 4th ed, 2005, p151.

¹⁶ Wooden M, ‘Australia’s Industrial Relations Reform Agenda’, paper presented at the 34th Conference of Economists, University of Melbourne, 26-28 September 2005, p1.

¹⁷ Creighton and Stewart, note 15, p483.

¹⁸ Creighton and Stewart, note 15, p500.

¹⁹ Australian Bureau of Statistics, *Award Coverage Australia*, ABS Cat No. 6315.0, May 1990

wages and conditions for employees in various industries and occupations in each State. In 1990, State awards covered 47 per cent of employees in Australia.²⁰ Thus, as at 1990, Federal and State awards set minimum wages and conditions for around 80 per cent of employees.

Award wages

Awards set minimum wages for full-time and part time employees and they also set loadings for casual employees. To take account of skill levels, awards have set different wage levels for a number of different job classifications. For example, the Federal award for the Metal, Engineering and Associated industries contains different award wages for 14 different job classifications. Level C14 employees (grade 1 engineering/production workers) have the lowest weekly award rate at \$467.40, while Level C1 employees (professional engineers/scientists) have the highest weekly award rate at \$1,014.10. Awards set lower minimum wages for juniors and apprentices. Minimum wages in Federal awards are generally adjusted on an annual basis in accordance with wage decisions of the Federal industrial tribunal. Award wage increases at the Federal level generally flow on to NSW awards via wage decisions of the NSW tribunal.

Award conditions

Federal and State awards deal with a range of minimum employment conditions. Federal awards are limited to dealing with the 20 “allowable matters” listed in the Federal industrial laws. Common employment conditions in awards include those relating to:

- Maximum ordinary hours of work,
- Overtime and shift work loadings,
- Penalty rates for work on weekends and public holidays
- Sick leave and carer’s leave
- Annual leave and leave loading
- Long service leave
- Parental leave
- Redundancy pay

Variation of awards

The Federal and State industrial tribunals have had the power to vary awards and it is through the exercise of this power that “improvements to...conditions have traditionally been given formal effect, whether emanating from national wage decisions and test cases, direct negotiation between the parties, or disputation followed by conciliation and arbitration by the tribunal”.²¹

Employees cannot receive below award wages or conditions

It is unlawful for employees who are covered by an award to receive wages or conditions that

²⁰ Ibid.

²¹ Creighton and Stewart, note 15, p181.

are below what is specified in the award.²² A contract of employment that offers less than award wages or conditions is unenforceable. Some employees receive wages and conditions that are above the award, pursuant to an agreement with their employer. Such an agreement may take the form of an individual contract of employment or an *approved workplace agreement*.²³

Legislation setting minimum conditions

State legislation

NSW legislation contains minimum conditions in relation to:

- Annual leave.²⁴
- Long service leave.²⁵
- Parental leave.²⁶

These conditions apply to all employees in NSW.²⁷

NSW legislation also requires the State industrial tribunal to make an award containing minimum conditions in relation to the following matters if it receives an application to do so:

- Maximum ordinary hours of work.²⁸
- Sick leave.²⁹
- Equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.³⁰

²² Unless this is permitted by an approved workplace agreement. This is discussed below.

²³ Approved workplace agreements are discussed below.

²⁴ *Annual Holidays Act 1944* (NSW): 4 weeks annual leave, on ordinary pay.

²⁵ *Long Service Leave Act 1955* (NSW): 2 months leave after 10 years service, on ordinary pay.

²⁶ *Industrial Relations Act 1996* (NSW), Chapter 2, Part 4: 52 weeks unpaid leave after birth of child.

²⁷ But note that conditions in relation to these three matters may not be available to all casual employees.

²⁸ *Industrial Relations Act 1996* (NSW), s 22: ordinary hours not to exceed 40 hours per week.

²⁹ *Industrial Relations Act 1996* (NSW), ss 26,27: 1 week on ordinary pay for each year of service.

³⁰ *Industrial Relations Act 1996* (NSW), s 23.

Federal legislation

Federal legislation contains minimum conditions in relation to:

- Parental leave.³¹
- Notice of termination.³²
- Superannuation.³³

These minimum conditions apply to all employees in Australia.³⁴

Employees cannot receive below legislative conditions

If the legislation applies to an employee, it is generally unlawful for the employee to receive lower conditions than the legislative minimum conditions. One exception is that Federal awards can override State legislation, which means that an employee covered by a Federal award could receive lower conditions than specified in State legislation.³⁵ Employees may be entitled to receive conditions that are better than the legislative conditions if this is provided for in an award, or if this has been agreed with the employer. Again, this agreement may take the form of an individual contract of employment or an *approved workplace agreement*.³⁶

Workplace agreements setting wages and conditions

Enterprise bargaining reforms in the 1990s

In the early 1990s major changes were made to the Federal and NSW industrial relations systems in order to place an emphasis on the setting of wages and employment conditions through negotiation of agreements at the enterprise or workplace level (known as enterprise or workplace agreements), in place of awards. Creighton and Stewart state:

In recent years, there has been a fundamental change in the character of the federal and State systems. Instead of industry-based awards emanating from a central tribunal, the chief emphasis is now meant to be upon negotiation of agreements at the level of the enterprise, with minimal third party intervention.³⁷

In brief, the reforms aimed to reduce ‘rigidities’ and enhance ‘flexibilities’, in the belief that this would lead to an increase in productivity and an improvement in the competitiveness of

³¹ *Workplace Relations Act 1996* (Cth), Part VIA, Div 5: 52 weeks of unpaid leave after birth of child.

³² *Workplace Relations Act 1996* (Cth), s 170CM: 1 to 4 weeks notice depending on length of service.

³³ See *Superannuation Guarantee Charge Act 1992* (Cth).

³⁴ But note that some categories of employees (eg casuals) may not be entitled to all of these conditions.

³⁵ Employees could also receive lower conditions under an approved workplace agreement (see below).

³⁶ Approved workplace agreements are discussed below.

³⁷ Creighton and Stewart, note 15, p151.

Australian businesses, in both domestic and international markets.³⁸ These reforms came at a time of economic recession and growing problems with the balance of payments. The reforms were supported by employer groups and the ACTU but were criticised by some academics.³⁹

Federal and State enterprise bargaining laws

In 1993, the Keating Federal Government enacted Federal laws that allowed for the making of a *certified agreement*, setting the wages and/or all or some of the employment conditions for all employees in a single business or part of a single business. Certified agreements could be made between an employer and either (a) a majority of employees who were to be subject to the agreement or (b) one or more unions, provided that a majority of employees approved the agreement. These Federal laws were largely based on the corporations power in the Constitution and they were restricted to employers that were constitutional corporations.

On approval from the Australian Industrial Relations Commission, certified agreements prevailed over Federal awards to the extent of any inconsistency. They also prevailed over State awards, State enterprise agreements and State laws (except those relating to workers compensation and occupational health and safety), to the extent of any inconsistency.⁴⁰ However, in order to be approved certified agreements needed to pass the no-disadvantage test. A certified agreement would not pass the no-disadvantage test if it would result, on balance, in a reduction in the overall conditions of employment of the employees concerned, compared against applicable Federal and State awards and legislation.

In NSW, the Greiner Government enacted enterprise bargaining laws in 1991 and these laws were modified by the Carr Government in 1996. The modified State enterprise bargaining laws are very similar to the Federal laws but they are not restricted to corporations.

Howard Government reforms to Federal laws in 1996

After the Liberal/National Coalition was elected to Federal Government in March 1996, it introduced significant reforms to the *Industrial Relations Act 1988*, and renamed it the *Workplace Relations Act 1996*. The new legislation retained the main elements of the 1993 certified agreement provisions. It also, quite controversially, introduced a new form of workplace agreement: Australian Workplace Agreements or AWAs.

In contrast with enterprise agreements, which are collective agreements in the sense that they are made with a union or group of employees, AWAs are agreements between an employer and an individual employee. Once AWAs have been approved, they operate to the exclusion of Federal and State awards and legislation and they can also operate to the exclusion of certified

³⁸ See Macdonald D et al, 'Ten Years of Enterprise Bargaining in Australia: An Introduction', (2001) 12(1) *Labour and Industry* 1. For further reading on the reasons for these reforms, see Creighton and Stewart, note 15, p23-25; Wooden M (2005), note 16, pp2-3; and McCallum R and Ronfeldt P, *Enterprise Bargaining, Trade unions and the law*, The Federation Press, 1995, p3-8.

³⁹ See MacDonald et al, note 38, p10-11.

⁴⁰ See Part VIB, Division 5, *Workplace Relations Act 1996* (Cth).

agreements. AWAs are approved by the Employment Advocate rather than by the Commission. In order to be approved, AWAs must also pass the “no-disadvantage test”.

When it sought to introduce the 1996 reforms, the Howard Government did not have a majority in the Senate, and it was forced to compromise on some of its reform proposals in order to secure the passage of the legislation through the Senate. One of the proposals it had to abandon was abolishing the no-disadvantage test and replacing it with a set of legislated minimum standards that workplace agreements would need to comply with. As outlined in Section 8 of this paper, this is one of the most controversial elements of the *Work Choices* reforms.

Percentage of employees covered by workplace agreements

The Australian Bureau of Statistics has published data on how the main part of an employee’s pay is set. The most recent survey results, published in May 2004, show that around 40% of employees had the main part of their pay set by approved workplace agreements. However, as Wooden states, “strictly speaking, these data do not actually provide measures of coverage by agreements or awards. Instead they only tell us how the ‘main part of an employee’s pay was set’.”⁴¹ For example, an employee may have the main part of their pay set by an approved workplace agreement but have some or all of their employment conditions set by an award.

The results of the ABS survey are shown in the Table below:

How main part of employee’s pay was set	Percentage of employees
Approved collective agreement	38.3
Approved individual agreement (eg AWA)	2.4
Award only	20.0
Individual contract of employment ⁴²	31.2
Unapproved collective agreement	2.6
Total	94.5⁴³

The survey results also showed the jurisdiction of approved workplace agreements. In NSW, 18.6 per cent of employees had the main part of their pay set by a State workplace agreement, while 17.4 per cent of employees had their pay set by a Federal workplace agreement.

⁴¹ Wooden, note 16, p4.

⁴² These employees were either not covered by an award or they were paid at above award rates.

⁴³ The remaining 5% of employees were working proprietors of incorporated businesses.

3. CHANGES TO COVERAGE OF FEDERAL SYSTEM

Coverage of new Federal system

The Federal workplace relations system will now largely be based on the corporations power in the Constitution and it will cover all “constitutional corporations” and their employees.⁴⁴ Constitutional corporations are: (i) trading or financial corporations formed within Australia, and (ii) foreign corporations.⁴⁵ Most corporations, including many non-commercial corporations, will come within the definition of “trading” or “financial” corporations.⁴⁶ The Federal system will apply to State Government corporations and their employees, subject to the limitations of the *implied immunity* principle under the Constitution.⁴⁷

The Federal system will also continue to be based on certain other powers in the Constitution so that it continues to apply to the Commonwealth public service, all employers and employees in Victoria and the two Territories, as well as flight crew officers, maritime employees and waterside workers. The Federal Government has estimated that the new Federal system will cover up to 85 per cent of employees in Australia.⁴⁸ Coverage will be lower in some States.⁴⁹ The NSW Minister for Industrial Relations, Hon John Della Bosca MLC, has estimated that the Federal system will cover about 75 per cent of employees in NSW.⁵⁰

State systems will no longer cover these employers and employees

State industrial laws, awards and workplace agreements will generally no longer apply to employers and employees who are covered by the new Federal system.⁵¹ However:

- (1) Some State industrial laws will continue to apply to employers and employees who move into the Federal system: eg laws on workers compensation, occupational health and safety, long service leave, child labour, and trainees and apprenticeships.⁵²

⁴⁴ See definitions of employee/employer in new sections 4AA and 4AB, *Workplace Relations Act 1996*.

⁴⁵ Australian Constitution, section 51(20).

⁴⁶ See earlier briefing paper on proposed national system, note 11, pp17-18

⁴⁷ See earlier briefing paper on proposed national system, note 11, pp18-19.

⁴⁸ Australian Government, *WorkChoices: A new workplace relations system*, 2005, p11. Note that 100 per cent coverage can only be achieved if the States refer their industrial relations powers to the Federal Government, as Victoria did in 1996.

⁴⁹ See Commonwealth Parliamentary Library, ‘Workplace Relations Amendment (Work Choices) Bill 2005’, *Bills Digest* No 66, 2005-06, 2 December 2005, Appendix B, p134.

⁵⁰ *Ibid.*

⁵¹ See new Section 7C, *Workplace Relations Act 1996*.

⁵² See new Section 7C(3), *Workplace Relations Act 1996*.

- (2) Under the transitional provisions, an employee's conditions under State industrial laws, State awards and State workplace agreements will continue to operate for a certain period of time after the reforms commence. To summarise briefly:
- (a) If an employee is covered by a State award and is not covered by a State workplace agreement, the award and legislative minimum conditions will continue to operate for three years unless a workplace agreement is made under the new Federal system before then. After three years, if no workplace agreement has been made, the employee will move to an appropriate Federal award.
 - (b) If any of the employee's conditions are covered by a State workplace agreement, conditions in the workplace agreement, and any conditions under a State award or State legislation that operate together with the agreement, will continue to operate until a workplace agreement is made under the new Federal system.⁵³

Federal system will no longer cover some employers and employees

Employers and employees that are currently covered by the Federal system will not be covered by the new Federal system if the employer is not a constitutional corporation. However, under the transitional provisions, these employers and employees will have a five-year transitional period to move into the State system.⁵⁴ Note that an employer may decide to become a corporation in order to remain within the coverage of the Federal system.

⁵³ The transitional provisions are contained in the new Schedule 15, *Workplace Relations Act 1996*. For a summary of the transitional provisions, see Work Choices booklet, note 48, pp58-59. Note that conditions in a State award or State agreement will be void to the extent that they contain "prohibited content" which is prescribed by regulations: see new Schedule 15, clauses 15 and 38.

⁵⁴ For a summary of the transitional provisions, see Work Choices booklet, note 48, pp58-59.

4. OVERVIEW OF CHANGES TO CONTENT

The major changes to the Federal industrial relations system include:

- (1) *Minimum wages:* Minimum wages will be set and adjusted by a new body – the Australian Fair Pay Commission – rather than by the Australian Industrial Relations Commission. The Fair Pay Commission will operate according to different wage-setting criteria and may inform itself in any way it thinks appropriate, including by commissioning research and by consulting with persons and organisations.
- (2) *Award conditions:* Certain conditions can no longer be included in awards, including matters to be covered by the Australian Fair Pay and Conditions Standard (see below) and conditions relating to long service leave, notice of termination, jury service and superannuation. However, provisions in existing awards relating to these matters will continue to have effect. Another change is that awards cannot require an employer to make redundancy payments if the employer employs less than 15 employees.
- (3) *Legislative conditions:* There is a new set of four legislative minimum conditions relating to: ordinary hours of work, annual leave, personal/carer's leave and parental leave. These four conditions will, with minimum wages, comprise the Australian Fair Pay and Conditions (AFPC) Standard. The Standard will apply to all employees covered by the Federal system. Employees who are covered by an award will continue to be entitled to their award conditions if they more generous than the Standard.
- (4) *Workplace agreements:* Workplace agreements will not need to comply with the no-disadvantage test (which requires agreements not to disadvantage an employee compared to the wages and conditions under their award). Agreements will only need to comply with the minimum wages and conditions in the AFPC Standard. In addition, agreements will come into effect on lodgement rather than after an approval process.
- (5) *Industrial action:* Employees and unions will not be able to take lawful industrial action when negotiating a workplace agreement unless this has been authorised by a majority of votes cast by employees in a secret ballot. In addition, there are more grounds upon which the Industrial Relations Commission can suspend a bargaining period, making any further industrial action during negotiations unlawful. The Minister for Workplace Relations now also has the power to prevent or stop industrial action.
- (6) *Dispute resolution:* Industrial disputes will no longer be resolved by compulsory conciliation and arbitration. The Industrial Relations Commission will become a voluntary dispute resolution body and parties will also be able to refer disputes to private dispute resolution services.
- (7) *Unfair dismissals:* Businesses that employ up to 100 employees will be exempt from unfair dismissal laws. Employees in larger businesses will not be able to make an unfair dismissal claim if they were dismissed for genuine operational reasons.

5. CHANGES TO AWARD WAGES

Background to changes

As outlined in Section 2 of this paper, over the last century, awards made by Federal and State industrial tribunals have set legally enforceable minimum wages for the vast majority (around 80 per cent) of employees, in various industries and occupations. The industrial tribunals have used their power to vary awards to make periodic adjustments to award wages.

As also noted in Section 2, as a result of enterprise bargaining reforms that were introduced in the 1990s, a significant proportion of the workforce now have their wages set by approved workplace agreements. Creighton and Stewart state that the Federal reforms in 1993:

... ushered in a period where centralised wage fixing continued to play an important role in the system, but one that was increasingly subordinated to enterprise bargaining. Instead of laying down wage increases of general application...the Commission tended to award flat-rate increases to those employees who had not received increases in wages through enterprise bargaining over the relevant period. In other words, national wage increases came more and more to be seen as part of a “safety net” of basic terms and conditions of employment which should underpin the operation of the enterprise bargaining process.⁵⁵

Creighton and Stewart comment further on the relevance of centralised wage fixing in 2005:

Despite the major shift away from centralised wage fixation since the late 1980s...a significant proportion of the workforce continue to rely upon “national wage” or “safety net” adjustments for increases in pay. Statistics suggest that at least 20% have the main part of their pay set directly by an award. These award reliant jobs are mostly in low-skill jobs, predominantly female, and concentrated in sectors such as hospitality, retail and health and community services.⁵⁶

Further background on the Safety Net wage decisions is provided later in this Section.

Overview of changes

The main changes to award wages are:

- Australian Pay Classification Scales will replace award wages;
- There is a new statutory minimum wage;
- A new Commission will set and adjust minimum wages;
- Award wage and classification structures will be rationalised.

⁵⁵ Creighton and Stewart, note 15, p54.

⁵⁶ Creighton and Stewart, note 15, pp54-55.

Australian Pay Classification Scales will replace award wages

Minimum wages will be set out in Australian Pay Classification Scales (APCSs) rather than in awards.⁵⁷ Award wages will be converted into APCSs.⁵⁸ In addition, the new Australian Fair Pay Commission will have the power to make new APCSs.⁵⁹

APCSs must contain basic periodic rates of pay, expressed as an hourly rate, and they may contain different rates of pay for different job classifications, as well as casual loadings.⁶⁰ An employee who is covered by an APCS, will be entitled to be paid the applicable hourly rate specified in the APCS for each of the employee's guaranteed hours.⁶¹

The question of whether an employee is covered by a particular APCS will be determined by the coverage provisions of the APCS.⁶² An APCS continues to have effect indefinitely but it may be adjusted or revoked by the Fair Pay Commission.⁶³ The Commission may adjust an APCS in accordance with its statutory powers and parameters, which are described below.⁶⁴

There is a new statutory minimum wage

The minimum wage under the old system

In its 1997 Safety Net Review wage decision, the Australian Industrial Relations Commission established a federal minimum wage, which has applied to all employees that are covered by a Federal award *but not to employees who are not covered by an award*.

The adult minimum wage is \$484.80 per week or \$12.75 per hour. There is also a minimum wage for juniors. An employer cannot pay an employee who is covered by an award less than the Federal minimum wage. In other words, the award wage for the lowest job classification levels in each award is taken to be this Federal minimum wage.

Professor Brosnan has commented that, "the coverage [of the minimum wage] is not as wide as it is in most other advanced countries. Some workers, particularly in emerging industry sectors,

⁵⁷ See new Part VA, Division 2, Subdivision G, *Workplace Relations Act 1996* (Cth).

⁵⁸ New section 90ZD, *Workplace Relations Act 1996* (Cth).

⁵⁹ New Section 90ZJ, *Workplace Relations Act 1996* (Cth). Wages in a new APCS must not be lower than the federal minimum wage: new section 90O.

⁶⁰ New sections 90X, 90, *Workplace Relations Act 1996* (Cth).

⁶¹ New section 90F, *Workplace Relations Act 1996* (Cth). As to guaranteed hours, see s 90G.

⁶² New section 90Z, *Workplace Relations Act 1996* (Cth). If two or more APCSs apply to an employee, the legislation sets out rules for determining which APCS prevails: new section 90XA.

⁶³ New sections 90ZK, 90ZL, 90ZM, *Workplace Relations Act 1996* (Cth).

⁶⁴ New section 90ZL, *Workplace Relations Act 1996* (Cth).

and those outside the range of commercial and government employment, such as workers in private homes have no award entitlements, and thus no minimum wage”.⁶⁵

The new statutory minimum wage

Under the new laws, there is a statutory minimum wage for all adult employees who are covered by the Federal system, whether or not they are covered by an award (or APCS).⁶⁶ The minimum wage has been set at the same level: ie \$12.75 per hour (\$484.80 per week).⁶⁷ The Fair Pay Commission can adjust this rate in accordance with its statutory powers and parameters, which are described below.⁶⁸ The Fair Pay Commission may also determine a special Federal Minimum Wage for junior employees, employees with a disability, and trainees.⁶⁹

New Commission will set minimum wages

Minimum wage adjustments under old system

Under the old system, minimum wages in awards were adjusted in Safety Net Review wage cases, which have been held annually since 1993.⁷⁰ These cases involved applications by unions to the Australian Industrial Relations Commission to increase the wages in a number of key Federal awards. These applications were joined to form a test case. The unions’ position was presented by the ACTU. Employers that were respondents to the key awards were represented by the Australian Chamber of Commerce and Industry, the Australian Industry Group and other employer organisations. Commonwealth and State governments generally intervened as did other interested bodies. A Full Bench of seven members decided the cases.

The Industrial Relations Commission was required to have regard to the following criteria when deciding Safety Net Review wage cases:

- (a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;
- (b) economic factors, including levels of productivity and inflation, and the desirability of maintaining a high level of employment;

⁶⁵ Brosnan P, ‘Can Australia Afford Low Pay’, paper presented to workshop, Federal Government’s Proposed Industrial Relations Policy, University of Sydney, 20-21 June 2005, p8.

⁶⁶ New section 90P, *Workplace Relations Act 1996* (Cth)

⁶⁷ New section 90Q, *Workplace Relations Act 1996* (Cth).

⁶⁸ New section 90Q, *Workplace Relations Act 1996* (Cth).

⁶⁹ New section 90S, *Workplace Relations Act 1996* (Cth).

⁷⁰ The information in this paragraph has been sourced from Australian Industrial Relations Commission, ‘Safety Net Review 2005’, *Fact Sheet*, on the AIRC’s website: www.airc.gov.au. As to national wage cases prior to 1993, see for example, Hancock K et al, *Australian Industrial Relations Law and Systems: Report of Committee of Review*, Australian Government Publishing Service, April 1985, pp37ff.

(c) the needs of the low paid.⁷¹

The Commission also had to exercise its powers in a way that encouraged the making of agreements between employers and employees at the workplace level.⁷² This was relevant in the sense that safety net increases that were too high might detract from the incentive to bargain. The Commission has said that this needed to be tempered by the reality that “many award reliant employees have low bargaining power, particularly those at the lower skill and pay levels”.⁷³

Safety net increases have only applied to Federal award employees and only to employees covered by the awards specified in the test case. Further applications had to be made to flow the decision on to other Federal awards. In general, employees who received above-award wages, such as those covered by enterprise agreements, did not receive a safety net increase. The decisions provided for the absorption of part or all of the increase into the above-award pay rate. Safety net wages increases to Federal awards generally flowed on to NSW awards.⁷⁴

Every Safety Net Review decision since 1993 has resulted in an increase in award wages. These increases have ranged from \$8 to \$19 per week. In 2005, the Commission awarded an increase of \$17 per week. These outcomes have been lower than the increases sought by the ACTU but higher than those supported by employer groups and the Federal Government.⁷⁵ The Federal Government and employer groups have argued that safety net increases that are too high will have “a substantial effect on the capacity of business to increase the rate of employment, particularly in that sector of industry which employs unskilled or low-skilled labour”.⁷⁶

The Federal Government and employer groups have also argued that any increases in the safety net should be restricted to the lowest paid employees (ie those with job classification levels C14 to C10 in the *Metal, Engineering and Associated Industries Award 1998*), leaving other employees to obtain wage increases through enterprise bargaining. The Commission has not accepted this argument and has awarded increases for all job classification levels. However, in some years, it has awarded lower wage increases to employees on higher wage levels.⁷⁷

⁷¹ Section 88B(2), *Workplace Relations Act 1996*.

⁷² See section 88B(1) and Section 88A(d), *Workplace Relations Act 1996*.

⁷³ Australian Industrial Relations Commission, *Safety Net Review – Wages, Decision Summary*, Melbourne, 7 June 2005, paragraph 28.

⁷⁴ See section 50, *Industrial Relations Act 1996* (NSW).

⁷⁵ It has been reported that if the Federal Government’s submissions had prevailed during wage reviews since 1997 employees who rely on minimum wage increases would be worse off by \$44 per week: see ‘ACTU calls on PM to guarantee real value of minimum wages’, ACTU website: <http://www.actu.asn.au/>

⁷⁶ Senate Employment, Workplace Relations and Education Legislation Committee, *Workplace Relations Amendment (Protecting the Low Paid) Bill 2003*, Commonwealth of Australia, June 2003, p13

⁷⁷ See Safety Net Review Wage decisions in 1998, 1999 and 2003.

Minimum wage adjustments under new system

Australian Fair Pay Commission

A new body, the Australian Fair Pay Commission, will take over from the Australian Industrial Relations Commission the role of adjusting minimum wages in awards. The Fair Pay Commission will have the power to set and adjust:

- The statutory Federal minimum wage;
- Minimum wages in APCs;
- Casual loadings in APCs.⁷⁸

Structure of the Commission

The Commission will be made up of a Chairperson and four Commissioners.⁷⁹

The Chair may be appointed on a full-time or part-time basis for a period of up to five years.⁸⁰ To be appointed as Chair, a person must have a high level of skills and experience in business or economics.⁸¹ Professor Ian Harper, an economist and director of the Melbourne Business School's Centre for Business and Public Policy, has been named as the new Chair.⁸²

The Commissioners may be appointed on a part-time basis for a period of up to four years.⁸³ To be appointed as a Commissioner, a person must have experience in one or more of the following areas: business, economics, community organisations, and workplace relations.⁸⁴

Parameters for making decisions

The objective of the Commission in performing its wage-setting function is to:

...promote the economic prosperity of the people of Australia having regard to the following:

- (a) the capacity for the unemployed and low paid to obtain and remain in employment;
- (b) employment and competitiveness across the economy;
- (c) providing a safety net for the low paid;
- (d) providing minimum wages for junior employees, employees to whom training arrangements apply

⁷⁸ New section 71, *Workplace Relations Act 1996* (Cth)

⁷⁹ New section 7G, *Workplace Relations Act 1996* (Cth).

⁸⁰ New section 7P(1), *Workplace Relations Act 1996* (Cth).

⁸¹ New section 7P(3), *Workplace Relations Act 1996* (Cth)

⁸² For a discussion of this appointment see: 'Economic rationalism and religion drive new wages umpire', *Sydney Morning Herald*, 14/10/05; and 'Fair pay head: I'm no expert', *Daily Telegraph*, 14/10/05.

⁸³ New section 7Y(2), *Workplace Relations Act 1996* (Cth).

⁸⁴ New section 7Y(3), *Workplace Relations Act 1996* (Cth)

and employees with disabilities that ensure those employees are competitive in the labour market.⁸⁵

Consultation and research

The Commission will be allowed to inform itself in any way it thinks appropriate, including by:

- undertaking or commissioning research;
- consulting with any other person, body or organisation;
- monitoring and evaluating the impact of its wage-setting decisions.⁸⁶

Timing and scope of wage reviews

It will be up to the Commission to determine:

- The timing and frequency of wage reviews;
- The scope of particular wage reviews;
- The manner in which wage reviews are to be conducted
- When wage-setting decisions are to come into effect.⁸⁷

The Federal Government has said that the Commission's first decision will be no later than Spring 2006; and that, in its first decision, the Commission will take into account the time since the Industrial Relation Commission's 2005 Safety Net Review decision.⁸⁸

Decisions

The Commission's wage-setting decisions must be published in writing and include reasons for the decision.⁸⁹ There will be no right of appeal against the Commission's decisions.

Commission cannot reduce minimum wages below current levels

The new laws contain provisions to give effect to the Federal Government's guarantee that:

Minimum and award classification wages will be protected at the level set after the increase from the 2005 safety net review by the Australian Industrial Relations Commission (AIRC). Minimum and award classification levels will not fall below this level.⁹⁰

⁸⁵ New section 7J, *Workplace Relations Act 1996* (Cth).

⁸⁶ New section 7K(2), *Workplace Relations Act 1996* (Cth).

⁸⁷ New section 7K, *Workplace Relations Act 1996* (Cth).

⁸⁸ WorkChoices guide, note 48, p14.

⁸⁹ New sections 7K(4), 7M, *Workplace Relations Act 1996* (Cth).

⁹⁰ Hon Kevin Andrews MP, *Commonwealth Parliamentary Debates*, 2/11/05, p13. See new sections 90L, 90M, 90N, 90ZN, *Workplace Relations Act 1996* (Cth).

Debate about wage setting by new Commission

Reasons for the new Commission and criteria

The Government has explained that:

The [Fair Pay Commission] represents a long overdue shift from the historically adversarial process for wage setting in Australia. At present, the process for varying minimum wages is the AIRC's annual *Safety Net Review* case. This process involves the AIRC making its decision about minimum wages based on the submissions of interested parties. Rather than arbitrary and artificial claims between employer organisations and unions, the AFPC will adopt a consultative approach with all interested stakeholders.⁹¹

In relation to the new wage setting parameters, the Government has stated that:

Establishing genuine minimum wages and conditions will assist in achieving increased labour market participation. At present, low skilled workers or the unemployed may be priced out of the labour market. Australia has the highest ratio between the minimum wage and median wage in the OECD – currently 58.8 per cent. Our minimum wage is significantly higher than a number of similar countries... Wage increases through safety net adjustments, unlike those achieved through agreement-making, are not based on productivity improvements. Moreover, large award wage increases can adversely impact upon employment opportunities for unemployed people and the low paid, pricing them out of the labour market.⁹²

In the Senate Committee report on the Work Choices bill, Coalition Senators referred to the new criteria in relation to the setting of minimum wages and stated:

The first of these considerations is the capacity for the unemployed and low paid to obtain and retain employment. The Fair Pay Commission will ensure that the unemployed and low paid are not priced out of the labour market. This recognises the importance of being employed and gaining experience and making progress in the labour market. To this end, the Fair Pay Commission will also be responsible for encouraging employment and competitiveness across the economy.

The Fair Pay Commission's central role will be the maintenance of a 'safety net' in the form of a set of minimum wages....

These provisions are grounded in economic necessity. Employers are forced to compete against both domestic and international competitors, and operate in fluctuating markets. This means that, while recognising the critical importance of retaining a realistic set of minimum wages and conditions, consideration must also be given to maintaining the competitiveness of the variety of workers in the labour market and encouraging more unemployed people to join the workforce. This bill seeks to bring about measured change. It will establish a balance between ensuring that there exists the required flexibility and competitiveness in the labour market, while at the same time shielding those workers who require protection.⁹³

The Government has also argued that minimum wage increases are “an inappropriate instrument

⁹¹ Parliament of Australia, *Workplace Relations Amendment (Work Choices) Bill 2005, Explanatory Memorandum*, p12

⁹² *Ibid*, p12.

⁹³ Senate Employment, Workplace Relations and Education Legislation Committee, *Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005*, November 2005, p31.

for alleviating household poverty or hardship, as most low paid workers do not live in poor households, and most poor households do not contain low wage workers".⁹⁴

Criticisms of new Commission and criteria

Lack of independence: The Fair Pay Commission has been criticised on the basis that it will lack independence from the Government. A submission to the Senate inquiry into the Work Choices bill by a group of 151 academics states:

The [Industrial Relations Commission] consists of independent persons, that independence being assisted by the terms of appointment to that tribunal...Members of the [Fair Pay Commission] are appointed for limited periods – no more than five years in the case of the Chair, and no more than four years in the case of Commissioners. These short term appointments...will make members less independent of Government wishes in relation to standards. Many parties will have little confidence in the independence of these short term appointees.⁹⁵

Real wages will fall: Critics argue that minimum wage rises will be lower under the Fair Pay Commission and this will result in a fall in real wages for those that rely on the minimum wage. In other words, minimum wages will not keep up with the cost of living.

Cowling and Mitchell state:

Given that the establishment of the [Fair Pay Commission] has been explicitly linked to the view that the generosity of AIRC Safety Net decisions has been to the detriment of employment growth, it is reasonable to expect that the real minimum wage will fall over time or grow at a considerably slower rate.⁹⁶

It is argued that lower real minimum wages will be the result of the new wage-setting parameters to be applied by the Commission, which:

...are purely economic and fixated upon unemployment and other economic consequences of determinations. 'Fairness' has been removed from wage fixing criteria...

...The present Act requires the AIRC to ensure that awards act as a safety net of fair minimum wages and conditions of employment and that the AIRC provides fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. No such requirement is imposed on the [Fair Pay Commission].⁹⁷

Critics argue that lower real minimum wages will lead to an increase in the number of working poor, and greater income inequality in society.

⁹⁴ Howe et al, 'The Coalition's Proposed Industrial Relations Changes: an Interim Assessment', (2005) 31(3) *Australian Bulletin of Labour* 189 at pp193-94.

⁹⁵ Bamber G et al, 'Research evidence about the effects of the Work Choices Bill', Submission to the Inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005* by a group of 151 Australian Industrial Relations, Labour Market and Legal Academics, November 2005, p14.

⁹⁶ Cowling S and Mitchell W, 'Taking the low road: minimum wage determination under Work Choices', Centre of Full Employment and Equity, Working Paper No 05-18, November 2005, p5.

⁹⁷ Submission by 151 academics, note 95, p14. See further Cowling and Mitchell, note 96, pp7-9.

Lower minimum wages will not result in employment growth: Critics also dispute the Government's assertion that lower minimum wages will lead to employment growth for unskilled workers. The group of 151 academics states that, "the link between real wage cuts and employment is contested; if there is a link, a very substantial real wage cut may be required to produce any gains in unemployment, with serious implications for the relative value of unemployment benefits".⁹⁸ Professor Mark Wooden has also expressed the following opinion:

...lower real wages, while increasing employment opportunities, reduce the incentive to work...[F]or certain types of individuals, and especially those with children, any significant erosion in the real value of the wage may cause them to prefer life on welfare to life in work. The scope for using reductions in the minimum wage to generate employment growth is thus limited, especially given our current tax and transfer system.

Ultimately, using lower real wages as a route to more jobs can only be done in conjunction with changes in our tax and transfer system that increase the incentive to work. Achieving this while at the same time not seriously reducing levels of income support will require the adoption of entirely different income and tax arrangements than have existed previously.⁹⁹

Award wage and classification structures will be rationalised

As outlined in Section 2, to take account of different skill levels, awards have set different wage levels for a number of different job classifications. There are currently tens of thousands of wage classifications across all awards.¹⁰⁰ As part of the Work Choices reforms, an Award Review Taskforce has been established to examine and report to the Government on the rationalisation of award wage and classification structures in all Federal awards, and State awards that will be moved into the Federal system. The terms of reference include considering:

- providing a more accessible and easily understood list of classifications and pay rates, that will, amongst other things, simplify the Fair Pay Commission's task of periodically adjusting wages;
- reducing the current overlap across classification structures;
- whether it may be feasible to group similar classifications and pay rates into broadbanded levels, consistent with the Government's commitment that award classification wages will not be reduced;
- providing a broad framework that will give more scope for employers and employees to implement arrangements at the workplace that better suit their needs;
- having regard to the principle of ensuring that women and men receive equal pay for work of equal value; and
- complementing the overall workplace relations reform agenda for a national workplace relations system by aligning or amalgamating federal and state classification wages.¹⁰¹

The Federal Government has given a commitment that award classification wages will not be

⁹⁸ Submission by 151 academics, note 95, p27 (see also pp14-15).

⁹⁹ Wooden M, 'Minimum Wage Setting and the Australian Fair Pay Commission' (2005) 56 *Journal of Australian Political Economy* 81 at 88-89. For further reading see 'Work loses its point for low skilled', *Sydney Morning Herald*, 30/1/06. See also Cowling S and Mitchell W, note 96, pp3-5, 10.

¹⁰⁰ Award Review Taskforce, *Rationalisation of award wage and classification structures*, Discussion Paper, December 2005, p5.

¹⁰¹ Ibid. See Appendix A.

cut as part of the rationalisation process undertaken by the taskforce.¹⁰²

The taskforce released a discussion paper in December 2005.¹⁰³ It is to report to the Minister for Employment and Workplace Relations by the end of March 2006 on a strategy for rationalisation.¹⁰⁴ The taskforce is then to finalise an initial rationalisation by July 2006 for consideration by the Fair Pay Commission prior to its first wage adjustment.¹⁰⁵

Changes for employees who move out of NSW system

As the State system for setting and adjusting minimum wages in awards mirrors the pre-reform Federal system¹⁰⁶, employees who rely on minimum wages and who move from the State system to the new Federal system will be subject to the same changes as described above.

¹⁰² WorkChoices guide, note 48, p35.

¹⁰³ Award Review Taskforce, *Rationalisation of award wage and classification structures*, Discussion Paper, December 2005, available at: <http://www.awardreviewtaskforce.gov.au/art/DiscussionPapers/>

¹⁰⁴ Ibid, p3.

¹⁰⁵ Ibid, p4.

¹⁰⁶ The minimum wages of employees covered by State awards are adjusted by the NSW Industrial Relations Commission. When making adjustments, the Commission is required by section 50 of the *Industrial Relations Act 1996* (NSW) to adopt the Safety Net Review wage decision of the Australian Industrial Relations Commission unless it is satisfied that to do so would not be consistent with the objects of the State legislation or that there are other good reasons for not doing so.

6. CHANGES TO AWARD CONDITIONS

Background to changes

As outlined in Section 2 of this paper, over the last century, awards made by Federal and State industrial tribunals have set legally enforceable minimum employment conditions for the vast majority (around 80 per cent) of employees, in various industries and occupations. Due to reforms in 1996, Federal awards have only been able to deal with 20 allowable matters.

The industrial tribunals have used their power to vary awards to provide improvements in conditions. Sometimes, this has been the result of a test case decision: eg test cases in relation to reasonable working hours, parental leave and redundancy entitlements.¹⁰⁷

As a result of enterprise bargaining reforms that were introduced in the 1990s, a significant proportion of the workforce now have some or all of their employment conditions set by approved workplace agreements rather awards. However, awards have underpinned workplace agreements because of the requirement for agreements to pass the no-disadvantage test.

Overview of changes

The main changes are:

- There are fewer allowable matters.
- Certain matters are specifically not allowable
- Awards cannot require small businesses to make redundancy payments
- Awards will be rationalised

Fewer allowable matters

Allowable matters under the old system

Since 1996, Federal awards have only been able to provide conditions relating to the following 20 allowable matters:

- (a) classifications of employees and skill-based career paths;
- (b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;
- (c) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system;
- (d) incentive-based payments (other than tallies in the meat industry), piece rates and bonuses;
- (e) annual leave and leave loadings;
- (f) long service leave;
- (g) personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave;
- (h) parental leave, including maternity and adoption leave;
- (i) public holidays;

¹⁰⁷ Creighton and Stewart, note 15, p181.

- (j) allowances;
- (k) loadings for working overtime or for casual or shift work;
- (l) penalty rates;
- (m) redundancy pay;
- (n) notice of termination;
- (o) stand-down provisions;
- (p) dispute settling procedures;
- (q) jury service;
- (r) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;
- (s) superannuation;
- (t) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.¹⁰⁸

Allowable matters under the new system

Under the new laws, there are now only 15 allowable matters.¹⁰⁹ The following matters have been removed from the list:

- Rates of pay and classifications of employees
- Annual leave
- Personal/carer's leave
- Parental leave
- Long service leave
- Notice of termination
- Jury service
- Superannuation.

These matters cannot be included in new awards.¹¹⁰ However, it is important to note that provisions in existing awards relating to these matters will continue to have effect.¹¹¹

The reason given for removing these matters from awards is that the first four matters listed above are provided for in new legislative conditions (the Australian Fair Pay and Conditions Standard) and the following four matters are provided for in existing legislation.

The Howard Government previously attempted to make long service leave, notice of termination and jury service non-allowable matters but its attempts were blocked by the Senate.¹¹²

¹⁰⁸ Section 89A(2), *Workplace Relations Act 1996* (Cth).

¹⁰⁹ See new list of allowable matters in new section 116, *Workplace Relations Act 1996* (Cth).

¹¹⁰ New section 116L, *Workplace Relations Act 1996* (Cth).

¹¹¹ New sections 117, 117A, *Workplace Relations Act 1996* (Cth).

¹¹² See *Workplace Relations Amendment (More Jobs Better Pay) Bill 1999*; and *Workplace Relations Amendment (Award Simplification) Bill 2002*.

Criticism of reduction in allowable matters

Criticism was made about the Government's previous attempts to reduce the number of allowable matters in awards.¹¹³ The concerns were that the removal of these matters would strip workers of their entitlements. However, there is a difference between the previous attempts and the current reforms. As outlined above, the current reforms allow for the continued operation of conditions in existing awards that relate to the matters taken off the list of allowable matters. In other words, award conditions relating to long service leave, jury service and notice of termination, for example, will continue to have effect under the new system.

Certain matters are specifically not allowable

The new laws also expressly state the following matters are not allowable matters:

- Transfers from one type of employment to another (eg from casual to full-time);
- Restrictions on the range or duration of traineeships or apprenticeships;
- Restrictions on the engagement of independent contractors;
- Restrictions on the engagement of labour hire workers;
- Union picnic days;
- Trade union training leave.
- Any other matter prescribed by the regulations.¹¹⁴

Conditions in existing Federal awards relating to the matters listed above will *not* continue to have effect. They will cease to operate when the new laws commence.¹¹⁵

Awards cannot require small businesses to make redundancy payments

Redundancy payment in awards under old system

In the 1984 *Termination, Change and Redundancy* test case decision, the Industrial Relations Commission decided that Federal awards should contain an obligation for employers to make severance payments to employees who had been made redundant. However, there would an exception for employers that employed less than 15 employees.¹¹⁶ In addition, the obligations to provide severance pay could be varied on the basis of an employer's incapacity to pay. Severance payments were to be calculated according to length of continuous service, starting with 4 weeks pay for a worker who had completed between 1 and 2 years service, up to a maximum of 8 weeks pay for a worker who had completed more than 4 years service.

¹¹³ See Parliament of Australia, Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Amendment (More jobs, Better pay) Bill 1999*, November 1999, p159; and Senate Employment, Workplace Relations and Education Legislation Committee, *Provisions of Workplace Relations Amendment (Award Simplification) Bill 2002*, June 2004, pp18-19.

¹¹⁴ New section 116B, *Workplace Relations Act 1996* (Cth).

¹¹⁵ New section 116L, *Workplace Relations Act 1996* (Cth).

¹¹⁶ *Termination, Change and Redundancy* decision (1984) 8 IR 34

The 1996 Federal reforms retained redundancy pay as one of the twenty allowable matters and awards continued to contain the above provisions.

In the 2004 *Redundancy Case*, the Industrial Relations Commission decided that the exemption for small businesses should be removed from Federal awards.¹¹⁷

Exemption for small businesses under new system

Under the new laws, awards cannot require an employer to make redundancy pay to an employee who has been made redundant if the employer employs less than 15 employees.¹¹⁸ The new laws therefore reverse the Industrial Relations Commission's 2004 decision. Awards that were varied to give effect to that decision ceased to have effect from 14 December 2005.¹¹⁹ The Government's previous attempts to enact this reform were blocked by the Senate.¹²⁰

Debate about small business exemption

Arguments in favour of small business exemption

The Government has put the following case in support of the small business exemption:

The small business sector is performing very well...And without doubt many small business are profitable.

But we can't afford to confuse profitability with an ability to make redundancy payments. Small businesses tend to be chronically undercapitalised and in general don't have the financial resources to cope with large, unpredicted commitments such as redundancy payments...

In the Government's view, the AIRC's decision seriously underestimates the impact that redundancy pay would have on small business...

An obligation on small businesses to make redundancy payments will result in a cost impost that is unaffordable for many small businesses. The end result will of course be a significant decline in job growth in the small business sector and likely small business insolvencies. Clearly, employees of small businesses will not gain anything from the AIRC decision if they no longer have a job to go to.

The undesirability of removing the small business exemption is widely recognised. None of the four State governments that participated in the AIRC test case supported the removal of the exemption – the Queensland and Western Australian governments opposed the removal, while the NSW and Victorian governments neither supported nor opposed it...¹²¹

¹¹⁷ Redundancy Case decision (2004) 129 IR 155. Note that, in a supplementary decision, the Commission held that for the purpose of calculating redundancy entitlements, small business employers would only be required to take into account service rendered by the employee after 8 June 2004.

¹¹⁸ New section 116(4) and new Schedule 3A, *Workplace Relations Act 1996* (Cth).

¹¹⁹ See new Schedule 3A, clause 8 and new section 2, *Workplace Relations Act 1996* (Cth)

¹²⁰ See *Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004*; and *Workplace Relations Amendment (Small Business Employment Protection) Bill 2004*.

¹²¹ Hon Kevin Andrews MP, *Commonwealth Parliamentary Debates*, 26/5/04, p29095.

The Government said that small businesses could reach agreement with their employees to make redundancy payments where they could afford it; and that leaving the matter to be negotiated was preferable to imposing an across the board obligation on small businesses.

Arguments against small business exemption

In its 2004 *Redundancy Case decision*, the Industrial Relations Commission gave the following reasons for removing the small business exemption:

As a general proposition the employees of small businesses are entitled to some level of severance pay. The evidence establishes that the nature and extent of losses suffered by small business employees upon being made redundant is broadly the same as suffered by persons employed by medium and larger businesses. It is also clear that the level of the exemption is to some extent arbitrary and can give rise to inequities in circumstances where a business reduces employment levels over time.

While some small businesses lack financial resilience and have less ability to bear the costs of severance pay than larger businesses, the available evidence does not support the general proposition that small business does not have the capacity to pay severance pay. In the period 1997-98, the most recent period for which data are available, some 70 per cent of small businesses which reduced the number of persons they employed made a profit. For those businesses which are unable to meet their redundancy pay obligations the incapacity to pay provision....provides an avenue for relief.¹²²

Awards will be rationalised

Taskforce to examine award rationalisation

The new laws provide for the Australian Industrial Relations Commission to undertake *award rationalisation* in accordance with a request from the Minister.¹²³ The Government has set up an Award Review Taskforce to examine and report on award rationalisation.¹²⁴

The Taskforce is to examine current Federal awards with a view to recommending an approach to rationalising these awards on an industry sector basis.¹²⁵ As part of this, the Taskforce is to consider the extent to which awards can be amalgamated or combined to avoid overlapping of awards and to minimise the number of awards applying in relation to particular employers.¹²⁶ Minister Andrews has stated that the role of the taskforce is, “to look at what can be done with an aspiration [that] it would be better to have 200 awards rather than 2000 awards”.¹²⁷

¹²² Australian Industrial Relations Commission, *Application in relation to termination of employment provisions: Statement*, 26 March 2004, pp3-4. Debate about the exemption is also covered in Senate, Employment, Workplace Relations and Education References Committee, *Provisions of the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004*, 14 March 2005.

¹²³ New section 118, *Workplace Relations Act 1996* (Cth).

¹²⁴ See the taskforce website: <http://www.awardreviewtaskforce.gov.au/>

¹²⁵ See terms of reference, available on taskforce website (ibid).

¹²⁶ Ibid.

¹²⁷ ‘Workplace awards to be slashed’, *Australian Financial Review*, 28/10/05.

The Government has said that this is not an exercise in cutting award conditions.¹²⁸ The Taskforce published a discussion paper in December 2005.¹²⁹ It must report to the Minister in March 2006. The Minister will then decide on an approach to award rationalisation and present a request to the Australian Industrial Relations Commission to undertake the project.¹³⁰

Debate about award rationalisation

Reasons for rationalisation

An article in the *Australian Financial Review* reported that:

Mr Andrews said the streamlining of the award system would reduce costs for business and deliver a “substantial boost” to the economy by having fewer awards and making them simpler and more consistent across different workplaces.

“It’s one of the last impediments to creating a truly national economy”, he [said].¹³¹

Criticisms of award rationalisation

The same article reported that:

...ACTU secretary Greg Combet attacked the move, saying the proposed award rationalisation was a “massive assault on people’s safety net rights”.

“It will inevitably abolish employment conditions en masse, things that have been established over generations”, he said.

“It can’t do anything but, when you are slashing 4000 awards down to 40 or 50, stripping them down to 16 clauses and taking out all the so-called prohibited content”.¹³²

¹²⁸ See ‘Workplace awards to be slashed’, *Australian Financial Review*, 28/10/05.

¹²⁹ Award Review Taskforce, *Award Rationalisation*, Discussion Paper, December 2005.

¹³⁰ Ibid, p4.

¹³¹ ‘Workplace awards to be slashed’, *Australian Financial Review*, 28/10/05.

¹³² Ibid.

Changes for employees who move out of NSW system

State awards made by the NSW Industrial Relations Commission have set minimum wages and employment conditions for almost half of the employees in NSW (as at 1990).¹³³ As outlined in Section 3 of this paper, under the transitional provisions, employees who move into the Federal system will continue to be entitled to State award conditions for a certain period of time.

Moving from State award to Federal award

Employees covered by a State award but not covered by a State workplace agreement will be required to move to an appropriate Federal award at the end of the three year transitional period. The Federal award may contain different conditions to the State award. However, some conditions under the State award will be taken to be included in the Federal award: eg those relating to annual leave, personal/carer's leave, notice of termination.¹³⁴

Reduction in allowable matters

Employees who move into the Federal system and who subsequently become covered by a Federal award will be subject to the changes outlined above in relation to the reduction of allowable matters and the conditions that are not allowable matters. However, employees who move into the Federal system will lose a larger number of award conditions than employees who are currently covered by Federal awards. This is because, prior to the reforms, Federal awards were restricted to dealing with 20 allowable matters whereas State awards were not so restricted.

Redundancy pay

The NSW Industrial Relations Commission has not adopted the Australian Industrial Relations Commission's 2004 *Redundancy Case* decision and almost all State awards continue to grant an exemption for businesses with less than 15 employees.¹³⁵ Accordingly, most employees covered by NSW awards who move into the Federal system will not lose any existing redundancy entitlements as a result of the small business exemption under the new laws.¹³⁶

¹³³ Australian Bureau of Statistics, *Award Coverage Australia*, ABS Cat No. 6315.0, May 1990.

¹³⁴ See new Schedule 15, clauses 45, 50, *Workplace Relations Act 1996* (Cth).

¹³⁵ Private communication with NSW Office of Industrial Relations, 3 February 2006. In 1994, the NSW Commission rejected an application by unions to remove the small business exemption.

¹³⁶ However, if the NSW Industrial Relations Commission decides in the future to remove the small business exemption from State awards, these employees will not benefit from that decision.

7. CHANGES TO LEGISLATIVE CONDITIONS

Background to changes

As outlined in Section 2 of this paper, Federal legislation contains minimum conditions in relation to parental leave, notice of termination and superannuation; and NSW legislation contains minimum conditions in relation to annual leave, parental leave, and long service leave. Both Federal and NSW legislation apply to all employees in NSW. As also noted in Section 2, an employee may be entitled to conditions that exceed the legislative conditions, under an award, an approved workplace agreement, or their individual contract of employment.

Overview of changes

There are new legislative minimum conditions in relation to:

- (1) Wages
- (2) Maximum ordinary hours of work
- (3) Annual leave
- (4) Personal/carer's leave
- (5) Parental leave
- (6) Public holidays
- (7) Meal breaks

The first five of these conditions comprise the *Australian Fair Pay and Conditions Standard* (the AFPC Standard).¹³⁷ The status of the conditions in the AFPC Standard is discussed below, followed by a summary of each of the above legislative minimum conditions (except for the minimum conditions in relation to wages, which were outlined in Section 5 of this paper).

Australian Fair Pay and Conditions Standard

All employees entitled to AFPC Standard conditions

The five minimum conditions that form part of the AFPC Standard apply to all employees who are covered by the new Federal system, with some exceptions in relation to casual employees.

Employees entitled to award conditions that are more generous

Employees who are currently covered by a Federal award will continue to be entitled to their award conditions in relation to the four minimum conditions covered by the AFPC Standard if those award conditions are more generous than the conditions in the Standard.¹³⁸ If any of the award conditions are less generous, the condition in the Standard will apply instead.¹³⁹

¹³⁷ See new section 89, *Workplace Relations Act 1996* (Cth).

¹³⁸ See new section 117B, *Workplace Relations Act 1996* (Cth).

¹³⁹ Note however that less generous maximum ordinary hours of work in existing Federal awards can apply for 3 years after the Act commences: see *Workplace Relations Amendment (Work Choices) Act*

New workplace agreements must comply with AFPC Standard

Workplace agreements made under the new Federal system will need to provide conditions that are equal to or higher than those contained in the AFPC Standard. Existing workplace agreements will not be required to comply with the Standard. The role of the AFPC Standard as the new benchmark for workplace agreements is discussed in Section 8 of this paper.

Debate about AFPC Standard

The main controversy about the new set of legislative conditions in the AFPC Standard relates to their role as the new benchmark for workplace agreements. This controversy is dealt with in Section 8 of this paper. This section outlines some concerns about the minimum conditions relating to hours of work and parental leave and the provisions that allow workers to cash out half of their annual leave. Concerns in relation to hours of work and parental leave will not be relevant to employees who are entitled to more generous award conditions.¹⁴⁰

Maximum ordinary hours of work

The entitlement

An employer must not require an employee to work more than:

(1) Either:

- (a) 38 hours per week; or
- (b) If the employee and employer agree in writing that the employee's hours of work are to be averaged over a specified averaging period that is no longer than 12 months – an average of 38 hours per week over that period; **and**

(2) Reasonable additional hours.¹⁴¹

Average of 38 hours per week over specified averaging period

If an averaging period is agreed, an employer can require an employee to work longer than 38 hours in some weeks and shorter hours in other weeks, so long as the average over the specified averaging period does not exceed 38 hours per week.¹⁴²

Note that if an employee is employed to work a specified number of hours per week, the employee will be entitled to be paid for those hours even if the employer requires the employee

2005 (Cth), Schedule 4, Item 15. See also Explanatory Memorandum, note 91, p247, para 1584.

¹⁴⁰ Note, however, that under the new system a workplace agreement can be made which reduces such award conditions to the level of the conditions in the AFPC Standard.

¹⁴¹ New section 91C(1), *Workplace Relations Act 1996* (Cth).

¹⁴² See the example given in the Explanatory Memorandum, note 91, p106.

to work shorter hours in some weeks during an averaging period.¹⁴³

Reasonable additional hours

In determining whether additional hours that an employee is requested by an employer to work are reasonable additional hours, all relevant factors must be taken into account including:

- (a) any risk to the employee's health and safety that might reasonably be expected to arise;
- (b) the employee's personal circumstances (including family responsibilities);
- (c) the operational requirements of the workplace or enterprise;
- (d) any notice given by the employer for the employee to work the additional hours;
- (e) any notice given by the employee refusing to work the additional hours.¹⁴⁴

Debate about maximum ordinary hours

Government's position on maximum ordinary hours

The Federal Government has stated that the new legislation will:

...lock in maximum ordinary hours of work of 38 hours per week, an accepted community standard. It will be possible for ordinary hours to be averaged over a period of up to twelve months.

Employees must receive at least the relevant minimum hourly wage...for each hour they are required to work. Additional payment for hours worked in excess of 38 hours will be a matter for awards and agreements...¹⁴⁵

In relation to the requirement to work "reasonable additional hours", the Government has stated:

This approach reflects the [Australian Industrial Relations Commission's] reasonable hours test case decision, which determined that an employee may refuse to work additional hours where working this would result in the employee working hours which are unreasonable having regard to [the factors which are listed in the new provision].¹⁴⁶

¹⁴³ See new section 90G, *Workplace Relations Act 1996* (Cth), which was inserted into the Bill by Senate amendment No 40. Note that if an employee is employed on a full-time basis, the employee is taken to be employed for 38 hours per week, unless otherwise stated in the conditions of employment: s 90G(2).

¹⁴⁴ New section 91C(5), *Workplace Relations Act 1996* (Cth).

¹⁴⁵ Work Choices guide, note 48, p15.

¹⁴⁶ Work Choices guide, note 48, p16.

Criticism of maximum ordinary hours¹⁴⁷

A Joint State government submission to the Senate inquiry on the bill states:

This averaging process enables arrangements whereby employers could be required to consistently work weekly hours greatly in excess of 38 and, at times, very few hours at all.

...The Joint Governments are also concerned about the lack of provision for minimum weekly or daily hours and the right of employees to have some control over their roster. This gives little certainty or stability to workers who already find it difficult to balance work with other responsibilities.¹⁴⁸

Similarly the ACTU submitted to the inquiry that:

The...Standard does not protect workers against long hours of work. An employee could legitimately be rostered to work 16 hours per day for 6 months of the year....

Nor does it guarantee certainty in rostering. As noted above predictable and regular hours are critical for workers with family responsibilities. An employee could be rostered their 1824 hours per annum in any combination across the 48 weeks of the working year.¹⁴⁹

In relation to the requirement to work “reasonable additional hours”, critics would point out that the Industrial Relations Commission’s reasonable hours test case standard requires employers to pay employees *overtime rates* for working reasonable additional hours. There is no such requirement in the new laws. Professor Andrew Stewart has stated that:

...the legislation’s “reasonable additional hours” exception to the basic 38-hour ordinary-time working week meant there would be no legal guarantee to overtime pay under the government’s new industrial relations system.¹⁵⁰

¹⁴⁷ This should be read in the context that there are currently no legislative limits on ordinary hours of work. The only limits are those contained in awards and agreements. In addition, employees covered by awards may be entitled to better conditions, unless a workplace agreement provides otherwise.

¹⁴⁸ The Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, Australian Capital Territory, and the Northern Territory, *Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee into the Workplace Relations Amendment (Work Choices) Bill 2005*, 9 November 2005, p19.

¹⁴⁹ Australian Council of Trade Unions, *Submission to Senate Workplace Relations and Education Legislation Committee Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005*, p31.

¹⁵⁰ ‘No choice: 38 hour week under threat’, *Australian Financial Review*, 4/11/05.

Annual leave

Entitlement to paid annual leave

An employee (other than a casual employee) is entitled to accrue four weeks of paid annual leave for each 12-month period of employment with an employer.¹⁵¹ Shift workers are entitled to accrue an additional week of paid annual leave if they work in businesses that operate 24 hours, seven days a week and that regularly require employees to work shifts on weekends.¹⁵²

Rules about payment of annual leave

If an employee takes annual leave during a period, the annual leave must be paid at a rate that is no less than the employee's basic periodic rate of pay immediately before the period begins.¹⁵³ The legislation does not confer an entitlement to be paid any annual leave loading.

Rules about taking annual leave

An employee is entitled to take an amount of accrued annual leave during a particular period if this has been authorised by the employer.¹⁵⁴ Any authorisation given by an employer is subject to the operational requirements of the workplace.¹⁵⁵ However, an employer must not unreasonably refuse to authorise an employee to take accrued annual leave.¹⁵⁶

If an employee has accumulated excessive annual leave – ie more than 8 weeks of annual leave over a two year period – the employer may require the employee to take one quarter of the amount of accrued annual leave.¹⁵⁷ This provision is designed to ensure that employees regularly take periods of leave for rest and recreation and that employers are not required to pay out excessive untaken leave accruals when an employee's employment ends.¹⁵⁸

An employer may also direct an employee to take accrued annual leave during a period in which the employer shuts down the business.¹⁵⁹

¹⁵¹ This is a summary of new section 92D(2), *Workplace Relations Act 1996* (Cth).

¹⁵² New section 92D(3), *Workplace Relations Act 1996* (Cth).

¹⁵³ New section 92G(1), *Workplace Relations Act 1996* (Cth)..

¹⁵⁴ New section 92H(1), *Workplace Relations Act 1996* (Cth).

¹⁵⁵ New section 92H(3), *Workplace Relations Act 1996* (Cth).

¹⁵⁶ New section 92H(4), *Workplace Relations Act 1996* (Cth).

¹⁵⁷ New section 92H(6), *Workplace Relations Act 1996* (Cth).

¹⁵⁸ Explanatory Memorandum, note 91, p112, para 533.

¹⁵⁹ New section 92H(5), *Workplace Relations Act 1996* (Cth). The Explanatory Memorandum to the bill notes that annual shut-downs are a common occurrence in Australia: see p112, para 531

Entitlement to cash out annual leave

An employee may cash out up to two weeks of accrued annual leave in a 12-month period if:

- A provision in a workplace agreement (ie a collective agreement or AWA) that binds the employer and employees allows the employee to cash out annual leave; and
- The employee gives a written election to forgo the amount of annual leave; and
- The employer authorises the employee to forgo the amount of annual leave.¹⁶⁰

An employer must not require an employee to cash out annual leave or exert undue influence or undue pressure on an employee in relation to cashing out annual leave.¹⁶¹

Debate about allowing employees to cash out annual leave

Arguments in favour of allowing employees to cash out annual leave

Allowing employees to cash out half of their annual leave (if this is provided for in a workplace agreement) is said to give them flexibility and choice.¹⁶² The Government has given an example of an employee at a bread bakery who requests to cash out two weeks of her annual leave so that she can buy new suitcases to take on her upcoming trip to Italy.¹⁶³ The Government points out that the new provisions do not change the position under the current system where approved workplace agreements may, and some do, provide for the cashing out of annual leave.¹⁶⁴

Arguments against allowing workers to cash out annual leave

The ACTU has argued that employees will be forced into taking two weeks annual leave and that this will mean that the annual family holiday will “go up in smoke”.¹⁶⁵ Given that the new laws prohibit employers from forcing employees to cash out their annual leave, the ACTU must be suggesting that, in practice, employers will breach this prohibition.

Ross Gittins, an economist and journalist, has made the following criticism of the new laws:

Think about paid annual leave. It’s an expense governments have forced on employers, starting with one week in 1941, and reaching four weeks in 1973.

¹⁶⁰ New section 92E(1), (2), *Workplace Relations Act 1996* (Cth).

¹⁶¹ New section 92E(3), *Workplace Relations Act 1996* (Cth).

¹⁶² ‘Holidays at risk: ACTU’, *The Australian*, 6/7/05. (per Minister Andrews)...

¹⁶³ Explanatory Memorandum, note 91, p110.

¹⁶⁴ See Senate Report on Work Choices Bill, note 93, p38, 43.

¹⁶⁵ ‘Holidays at risk: ACTU’, *The Australian*, 6/7/05

With what justification? It's obvious. People with full-time jobs need a decent break for rest and (literally) re-creation. Those with intellectually or emotionally demanding jobs need it, but so do people with jobs that are physically demanding. We also need time for extended, relaxed interaction with our children during school holidays.

If the justification for this imposition on employers hasn't diminished – and I'd say that, with the intensification of work and the quickening pace of life, it's actually increased – where on earth is the justification for letting people take the money, not the leave?

To say, as some politicians and employer groups do, that it makes the labour market more “flexible” and gives workers greater “choice” is to reveal that your values are out of whack.

What it says is that, as a society, we're putting every more emphasis on production and consumption, and ever less on leisure and wellbeing.¹⁶⁶

Personal/carer's leave

Paid personal/carer's leave

An employee is entitled to accrue 10 days of paid personal/carer's leave for each 12-month period of employment with an employer.¹⁶⁷ Paid personal/carer's leave is defined as:

- (a) paid leave (**sick leave**) taken by an employee because of a personal illness, or injury
- (b) paid...leave (**carer's leave**) taken by an employee to provide care or support to a member of the employee's immediate family, or a member of the employee's household who requires care or support because of:
 - (i) a personal illness, or injury of the member
 - (ii) an unexpected emergency affecting the member.¹⁶⁸

Payment of paid personal/carer's leave

If an employee takes paid personal/carer's leave during a period the employer must pay the employee for that period the amount the employee would reasonably have expected to be paid by the employer if the employee had worked during the period.¹⁶⁹

Unpaid carer's leave

An employee is entitled to a period of up to 2 days unpaid carer's leave for each occasion when a member of the employee's immediate family, or a member of the employee's household, requires care or support because of (a) a personal illness, or injury (b) an unexpected emergency.¹⁷⁰ An employee is entitled to unpaid carer's leave for a particular occasion only if

¹⁶⁶ 'It's all about balance in life, not payments', *Sydney Morning Herald*, 13/7/05.

¹⁶⁷ This is a summary of new section 93F, *Workplace Relations Act 1996* (Cth).

¹⁶⁸ New section 93D, *Workplace Relations Act 1996* (Cth).

¹⁶⁹ New section 93G, *Workplace Relations Act 1996* (Cth).

¹⁷⁰ New section 93J, *Workplace Relations Act 1996* (Cth).

the employee cannot take paid personal/carer's leave.¹⁷¹

Paid compassionate leave

An employee is entitled to 2 days of paid compassionate leave for each occasion when a member of the employee's immediate family or household: (i) contracts a personal illness, or sustains a personal injury, that poses a serious threat to his or her life, or (ii) dies.¹⁷² If an employee takes such leave, the employer must pay the employee the amount that the employee would reasonably have expected to be paid if the employee had worked during the period.¹⁷³

Notice and evidence requirements

Notice and evidence requirements for sick leave and carer's leave

To be entitled to take sick leave or carer's leave during a period, an employee must give his or her employer notice of this as soon as reasonably practicable, which may be at a time before or after the sick leave or carer's leave has started.¹⁷⁴

If the employer requires an employee to provide evidence in relation to a period of sick leave, the employee must provide the employer with a medical certificate if it is reasonably practicable to do so; if it is not, the employee must provide a statutory declaration.¹⁷⁵ The medical certificate or statutory declaration must be provided as soon as reasonably practicable. If an employer requires an employee to provide evidence in relation to a period of carer's leave, the employee must provide a medical certificate or a statutory declaration.¹⁷⁶

These evidence requirements do not apply to an employee who could not comply because of circumstances beyond the employee's control.¹⁷⁷ An example of this is if the employee is suffering a severe mental or physical impairment.¹⁷⁸

Evidence requirements for compassionate leave

If required to do so by the employer, the employee must give the employer any evidence that

¹⁷¹ New section 93L, *Workplace Relations Act 1996* (Cth).

¹⁷² New section 93Q, *Workplace Relations Act 1996* (Cth).

¹⁷³ New section 93S, *Workplace Relations Act 1996* (Cth).

¹⁷⁴ New sections 93M, 93O, *Workplace Relations Act 1996* (Cth).

¹⁷⁵ New section 93N, *Workplace Relations Act 1996* (Cth).

¹⁷⁶ New section 93P, *Workplace Relations Act 1996* (Cth).

¹⁷⁷ New sections 93N(5), 93P(6), *Workplace Relations Act 1996* (Cth).

¹⁷⁸ Explanatory Memorandum, note 91, p118, para576.

the employer reasonably requires of the illness, injury or death.¹⁷⁹

Parental leave

The legislation contains entitlements for maternity leave, paternity leave and adoption leave. The provisions relating to maternity leave and paternity leave are outlined below.

Maternity leave

A female employee who has completed at least 12 months continuous service with her employer is entitled to up to 52 weeks of unpaid maternity leave.¹⁸⁰ Casual employees who have been engaged on a regular and systematic basis over a period of 12 months, and who would have had a reasonable expectation of continuing employment, have the same entitlement.¹⁸¹ An employee can start a period of maternity leave any time within 6 weeks before the expected date of birth of the child.¹⁸² An employer can require a pregnant employee to start a period of maternity leave within 6 weeks from the date of the expected birth if the employee is unfit to work.¹⁸³ If an employee who is on maternity leave ceases to be the child's primary care giver, the employer may give the employee notice cancelling the employee's maternity leave.¹⁸⁴

Paternity leave

A male employee who has completed at least 12 months continuous service (or who is an eligible casual employee as outlined above) is entitled to unpaid paternity leave.¹⁸⁵ An employee may take either short or long paternity leave. Short paternity leave is a period of unpaid leave of up to one week taken by an employee within the week starting on the day his spouse begins to give birth.¹⁸⁶ Long paternity leave is a longer period of unpaid leave taken by an employee after his spouse gives birth so that the employee can be the child's primary care-giver.¹⁸⁷ The maximum amount of long paternity leave that can be taken is 52 weeks.¹⁸⁸ An employee cannot take long paternity leave while his spouse is taking maternity leave.¹⁸⁹

¹⁷⁹ New section 93Q(3), *Workplace Relations Act 1996* (Cth).

¹⁸⁰ New sections 94C, 94D(3). *Workplace Relations Act 1996* (Cth).

¹⁸¹ New section 94C(2)(b)(ii), *Workplace Relations Act 1996* (Cth).

¹⁸² New section 94J, *Workplace Relations Act 1996* (Cth).

¹⁸³ New section 94L, *Workplace Relations Act 1996* (Cth).

¹⁸⁴ See new section 94O, *Workplace Relations Act 1996* (Cth).

¹⁸⁵ See new section 94T, *Workplace Relations Act 1996* (Cth).

¹⁸⁶ New section 94T(1)(a), *Workplace Relations Act 1996* (Cth).

¹⁸⁷ New section 94T(1)(b), *Workplace Relations Act 1996* (Cth).

¹⁸⁸ New section 94U(3), *Workplace Relations Act 1996* (Cth).

¹⁸⁹ New section 94W, *Workplace Relations Act 1996* (Cth).

Debate about parental leave entitlements

Government's position on parental leave entitlements

The Federal Government has stated that:

The parental leave provisions in the Fair Pay and Conditions Standard reflect an award standard that has served Australia well and has been in place for full-time and part-time employees for over fifteen years and for eligible casual employees since 2001.¹⁹⁰

Criticism of parental leave entitlements¹⁹¹

The parental leave entitlements in the AFPC Standard have been criticised on the basis that they do not incorporate the conditions that were determined by the Australian Industrial Relations Commission in its 2005 *Family Provisions Test case* decision. In that decision, the Commission held that the following parental leave rights should be included in Federal awards:

- (1) The right of a primary carer to request:
 - (a) Up to 2 years unpaid parental leave (up from 12 months unpaid leave); and
 - (b) Part-time work on return from parental leave, until the child reaches school-age;
- (2) The right of a non-primary carer to request up to 8 weeks unpaid parental leave (up from one week unpaid leave);
- (3) The above rights are subject to the qualification that an employer can refuse such requests on reasonable grounds related to the effect on the business.¹⁹²

¹⁹⁰ Work Choices information guide, note 48, p18.

¹⁹¹ These criticisms should be read in the context that the new legislative entitlements are similar to the previous legislative entitlements and that employees covered by an award may be entitled to better conditions unless a workplace agreement provides otherwise.

¹⁹² See Australian Industrial Relations Commission, 'Family Provisions Decision: Statement', 8 August 2005, on the Commission's website: http://www.airc.gov.au/fullbench/PR082005_statement.htm

Public holidays

This condition was inserted into the Bill by amendment.¹⁹³ It is not part of the Fair Pay and Conditions Standard but it cannot be excluded by a workplace agreement.¹⁹⁴ The condition is in the following limited terms: an employee can refuse to work on a public holiday if the employee has reasonable grounds for doing so.¹⁹⁵ The provisions list a number of matters to be taken into account in determining whether the employee has reasonable grounds.¹⁹⁶ The provisions also state that an employer may not dismiss or prejudice an employee on the basis that he or she has refused on reasonable grounds to work on a public holiday.¹⁹⁷

Meal breaks

This condition is *not* part of the Fair Pay and Conditions Standard and this condition does *not* apply to employees who are covered by an award or workplace agreement.¹⁹⁸ The entitlement is in these terms: an employer must not require an employee to work for more than 5 hours continuously without an unpaid interval of at least 30 minutes for a meal.¹⁹⁹

Changes for employees who move out of NSW system

Employees who move out of the State system and into the Federal system will be entitled to the legislative conditions outlined above.²⁰⁰ Under the transitional provisions, employees covered by existing NSW awards who move into the Federal system will continue to be entitled to conditions in the award that exceed conditions in the AFPC Standard.²⁰¹ The role of the AFPC Standard as the benchmark for new workplace agreements is discussed in the next section.

¹⁹³ See Parliament of Australia, Senate, *Workplace Relations Amendment (Work Choices) Bill 2005*, Schedule of amendments made by Senate, Item 170.

¹⁹⁴ New section 170AF(4), *Workplace Relations Act 1996* (Cth).

¹⁹⁵ New section 170AF, *Workplace Relations Act 1996* (Cth).

¹⁹⁶ New section 170AG, *Workplace Relations Act 1996* (Cth).

¹⁹⁷ New section 170AI, *Workplace Relations Act 1996* (Cth).

¹⁹⁸ New section 170AB, *Workplace Relations Act 1996* (Cth).

¹⁹⁹ New section 170AA, *Workplace Relations Act 1996* (Cth).

²⁰⁰ Note that employees who are covered by a State workplace agreement will not be entitled to the legislative conditions while they are covered by the State agreement. However, new workplace agreements relating to these employees will have to comply with the AFPC Standard.

²⁰¹ New schedule 15, clause 46, *Workplace Relations Act 1996* (Cth).

8. CHANGES TO WORKPLACE AGREEMENTS

Background to changes

Workplace agreements under old system

As outlined in Section 2 of this paper, as a result of reforms in the 1990s, Federal laws have allowed employers and employees to enter into workplace agreements, which set wages and employment conditions in place of awards. There are two types of workplace agreement under Federal laws: certified agreements and Australian Workplace Agreements (AWAs).

Certified agreements

Certified agreements (known as collective agreements under the new system) operated in relation to all of the employees of a single business or part of the single business.²⁰² A certified agreement could be made between an employer and either:

- (a) A majority of employees who would be subject to the agreement; or
- (b) One or more unions - if at least one union member would be subject to the agreement and it was approved by a majority of employees who would be subject to it.²⁰³

Australian Workplace Agreements (AWAs)

An AWA is an agreement between an employer and an individual employee.²⁰⁴

Effect of workplace agreements under old system

- On approval, a certified agreement would prevail over Federal awards to the extent of any inconsistency. It would also prevail over State awards, State enterprise agreements and State laws (except those relating to workers compensation and occupational health and safety), to the extent of any inconsistency.²⁰⁵
- On approval, an AWA would operate to the exclusion of Federal awards and certified agreements that had passed their nominal expiry date. An AWA would also operate to the exclusion of State awards and State enterprise agreements and it would prevail over State laws (except those mentioned above) to the extent of any inconsistency.²⁰⁶

²⁰² See sections 170LH, 170LI *Workplace Relations Act 1996* (Cth).

²⁰³ See Part VIB, Division 2, *Workplace Relations Act 1996* (Cth).

²⁰⁴ Section 170VF, *Workplace Relations Act 1996* (Cth).

²⁰⁵ See Part VIB, Division 5, *Workplace Relations Act 1996* (Cth).

²⁰⁶ See Part VID, Division 6, *Workplace Relations Act 1996* (Cth).

Approval of workplace agreements under old system

Under the laws prior to the current reforms:

- The Industrial Relations Commission approved certified agreements. The Commission could not approve a certified agreement unless it passed the no-disadvantage test and the Commission was satisfied that certain other requirements were met (see below).
- The Employment Advocate approved AWAs. The Employment Advocate could not approve an AWA unless it passed the no-disadvantage test and the Employment Advocate was satisfied that certain other requirements were met (see below).

The no-disadvantage test under old system

A certified agreement/AWA would not pass the no-disadvantage test if it would result, on balance, in a reduction in the overall terms and conditions of employment of the employees concerned, compared with an applicable Federal or State award and any relevant Federal or State law.²⁰⁷ As Creighton and Stewart explain, the no-disadvantage test required:

...a “global” comparison between the conditions set by the award and those proposed in the agreement. Employees are not taken to be disadvantaged merely because the agreement derogates from award conditions in certain respects. It is necessary to weigh up gains and losses across the full range of matters dealt with by the agreement in order to determine whether overall the employees concerned would be any worse off. Accordingly, it is quite possible, and indeed quite common, for agreements to [grant] wage rises in return for increases in working hours, or for a reduction in overtime rates.²⁰⁸

Other requirements for approval under old system

Other requirements for approval of certified agreements

The Industrial Relations Commission also had to be satisfied that: (a) a valid majority of employees genuinely made the agreement or - in the case of a union agreement- that a valid majority of employees approved it; and (b) that the terms of the agreement were explained to the employees in ways that were appropriate having regard to their circumstances and needs.²⁰⁹

Other requirements for approval of AWAs

The Employment Advocate had to be satisfied that: (a) the employee received a copy of the AWA at least 5 days (for a new employee) or 14 days (for an existing employee) before signing the AWA; (b) the employer explained the effect of the AWA to the employee; (c) the employee genuinely consented to making the AWA; and (c) the employer offered an AWA in the same

²⁰⁷ Section 170XA, *Workplace Relations Act 1996* (Cth). If there is no applicable award for a given person, the Commission will designate an award that will apply for purposes of the test: see s 170XF.

²⁰⁸ Creighton and Stewart, note 15, p236. See also generally at pp236-38.

²⁰⁹ Section 170LT, *Workplace Relations Act 1996* (Cth). See also Section 170LU. Note that only the third and fifth requirements apply in the case of greenfields agreements.

terms to all comparable employees – or did not act unreasonably in failing to do so.²¹⁰

Controversy surrounding AWAs

The Howard Government introduced AWAs in 1996 on the basis that:

They...enable employers to negotiate directly with their workforce at the workplace, with minimal third party intervention. As such, they supposedly allow parties to take proper account of the needs and circumstances of the particular workplace, and of the capacities and performance of individual employees, in a way that is not possible with awards, or even collective agreements...²¹¹

However, AWAs have been controversial because critics have argued that:

...meaningful negotiation over terms and conditions of employment between individual employees and employers is possible only in rare instances – for example, where the employee has highly specialised skills which are in heavy demand. In the great majority of cases, “negotiation” between individual employees and employers is tantamount to unilateral determination of terms and conditions at the behest of the employer.²¹²

Prohibition against duress in relation to AWAs

Under the laws prior to the current reforms, it was unlawful for a person to apply duress to an employer or employee in relation to the making of an AWA.²¹³ The legislation did not specify what constituted duress. However, the courts have held that:

- (1) If a *new* employee is required to sign an AWA as a condition of employment, this does not, of itself, constitute duress; but
- (2) There is duress if an *existing* employee is required to sign an AWA as a condition of not being dismissed or not suffering some other form of disadvantage.²¹⁴

The position is the same under the *new laws*. To avoid any doubt, the new laws state that an employer does not apply duress merely because the employer requires a person to make an AWA as a condition of engagement.²¹⁵ In other words, the new laws confirm (1).

²¹⁰ Section 170PA, *Workplace Relations Act 1996* (Cth).

²¹¹ Creighton and Stewart, note 15, p251.

²¹² Creighton and Stewart, note 15, p251.

²¹³ Section 170WG(1), *Workplace Relations Act 1996* (Cth).

²¹⁴ Creighton and Stewart, note 15, p254.

²¹⁵ New section 104(6), *Workplace Relations Act 1996* (Cth).

Overview of changes

The main changes are:

- The no-disadvantage test is replaced by the AFPC Standard;
- The approval process is replaced by a lodgement process;
- Workplace agreements cannot contain prohibited content;
- Changes in relation to termination of workplace agreements.

No-disadvantage test is replaced by the AFPC Standard

This is the most controversial reform. Workplace agreements (both collective agreements and AWAs) that are made under the new system will not have to pass the no-disadvantage test. New workplace agreements will only need to provide wages and conditions that are no worse than the minimum wages and four minimum conditions (ie hours of work, annual leave, personal/carer's leave and parental leave) in the Australian Fair Pay and Conditions (AFPC) Standard.²¹⁶

This change will not affect existing workplace agreements. However, new workplace agreements will replace existing agreements; and parties will be able to lodge new workplace agreements at any stage (they will not need to wait for the expiry of existing agreements).²¹⁷

Reduction or loss of award conditions not covered by AFPC Standard

As a result of this reform, it will be possible for a workplace agreement to exclude or reduce award conditions *not covered* by the AFPC Standard, without compensating the employee. Examples of such award conditions are shown in Table 8.1 below. As outlined below, some of these conditions will be taken to be included in an agreement unless *expressly* excluded.

TABLE 8.1. Examples of common award conditions not covered by AFPC Standard

Description	Example of award condition ²¹⁸
Daily spread and working days	For day workers (as distinct from shift workers), the ordinary hours of work are to be worked between 6.00am and 6.00pm Monday to Friday. Ordinary hours may include Saturday and Sunday if the employer agrees with a majority of employees or an individual employee.
Overtime loading	For day workers, overtime is paid for work done outside the ordinary hours of work (ie: in excess of 38 hours per week and/or outside hours of 6am to 6pm). Overtime is paid at time and a half for the first 3 hours and double time thereafter. An employer may require an employee to work reasonable overtime at overtime rates.

²¹⁶ The AFPC Standard is discussed in Section 7 of this paper.

²¹⁷ See WorkChoices guide, note 48, p24.

²¹⁸ The examples are taken from the Federal *Metal, Engineering and Associated Industries Award 1998*.

Shift loading	An employee working an afternoon shift (shift finishing between 6pm and midnight) or a night shift (shift finishing between midnight and 8am) is entitled to be paid a 15% loading in addition to their ordinary rate.
Penalty rates for weekends and public holidays	Day workers working on Saturday are to be paid time and a half for the first three hours of work and normal rates thereafter. Day workers working on Sunday are to be paid double time. Day workers working on public holidays are entitled to be paid double time and a half.
Public holidays	Full time employees are entitled to public holidays without loss of pay. See above as to penalty rates for working on public holidays.
Meal breaks	Employees are entitled to a meal break of 30 minutes after every 5 hours of work.
Annual leave loading	Employees on annual leave are to be paid the ordinary rate plus a 17.5% annual leave loading.
Redundancy pay	Employees who are made redundant are entitled to severance pay if they have at least 1 year of service. The amount of pay depends upon length of service. Employees with 1-2 years service are entitled to 4 weeks pay while those with more than 10 years service are entitled to 12 weeks pay.

Reduction of award conditions covered by AFPC Standard

If award conditions relating to matters that *are covered* by the AFPC Standard are more generous than those in the Standard, it will be possible for a workplace agreement to reduce the award conditions to the level of the Standard, without compensating the employee. For example, it will be possible for a workplace agreement to reduce award conditions relating to parental leave (as outlined in the Industrial Relations Commission's *Family Provisions Test case* decision) to the level of the parental leave conditions in the Standard.²¹⁹

Some award conditions will apply unless expressly excluded

The following award conditions (called "protected" conditions) will be deemed to be included in a workplace agreement unless they are *expressly* excluded by the agreement:²²⁰

- Loadings for working overtime or shift work
- Penalty rates
- Rest breaks
- Incentive-based payments and bonuses
- Annual leave loading
- Public holidays (observance of and payment in respect of)
- Outworker conditions.²²¹

²¹⁹ See pp39-40 above as to the AFPC Standard and parental leave entitlements.

²²⁰ New section 101B, *Workplace Relations Act 1996* (Cth).

²²¹ New section 101B(3), *Workplace Relations Act 1996* (Cth).

Right to day off on public holiday cannot be excluded

As outlined above in Section 7 of this paper, the new laws create a limited entitlement to refuse to work on a public holiday, which cannot be excluded by a workplace agreement.²²²

Debate about abolition of no-disadvantage test

Reasons for abolition of no-disadvantage test

The Government explained the benefits of this reform as follows:

Replacing the NDT [no-disadvantage test] with a clearer set of minimum wages and conditions will remove a significant layer of complexity with regards to agreement making, and will provide additional incentives to negotiate at the workplace or enterprise level...

A further benefit...will be enhanced choice and flexibility in agreeing [on] workplace pay and conditions beyond the minimum standards. Agreement-making at the workplace level is particularly suited to tailoring working arrangements in ways that assist employees to balance work and family, free from the one-size-fits-all constraints of award prescription...²²³

As outlined above, the Government believes that the greater choice and flexibility in the workplace will increase productivity and, as a result, contribute to economic prosperity.

Criticism of abolition of no-disadvantage test²²⁴

There has been strong criticism about the potential for employers to make workplace agreements with their employees (particularly AWAs) that take away or reduce their award conditions.²²⁵ In their submission to the Senate inquiry, a group of 151 academics states:

...there will be widespread potential for reductions in employee weekly pay, arising from the scope for cuts in penalty rates, overtime rates, leave loading, shift allowances and all other items of remuneration not covered by the "fair" standard.²²⁶

In August 2005, State and Territory Ministers issued a joint statement, which claimed that, with the removal of leave loadings, penalties and allowances, workers in some industries could lose a large portion of their weekly pay.²²⁷ It indicated that nurses could lose up to a third of their pay (\$359 a week); restaurant workers could lose 20 per cent (\$135 a week); hotel receptionists

²²² See p41above.

²²³ Explanatory Memorandum, note 91, p14 (see also at p15). See also Senate report on Work Choices bill, note 93, p36.

²²⁴ For further reading, see Waring P et al, 'Advancing Australia Fair: the Australian Fair Pay and Conditions Standard', (2005) 56 *Journal of Australian Political Economy* 105.

²²⁵ Award conditions that can be taken away or reduced were outlined in Table 8.1 above.

²²⁶ Submission to Senate inquiry by group of 151 academics, note 95, p31.

²²⁷ See 'States to fight IR takeover in court', *The Australian*, 6/8/05.

could lose \$173 a week and cleaners could lose \$186 a week.²²⁸

While, in theory, employees can negotiate with their employer about the conditions to be included in a workplace agreement, critics argue that, in reality, many employees, particularly those who are unskilled and/or non-unionised, lack any effective bargaining power.

The Uniting Church President, Dean Drayton, has commented that:

The Government is setting up employers and employees for workplace arm wrestles. While that may work for some people – for those whose arm is not so strong – for low paid and vulnerable workers, it will always be a one-sided arm wrestle, and that’s not right.²²⁹

A submission to the Senate inquiry on the bill by a group of 151 academics states:

Bargaining power is problematic for most workers when their workplace arrangements are individualised by AWAs. This applies to workers who have no access to collective representation, who cannot afford non-collective representation, who have to deal with managers exercising exclusive managerial prerogative, who are confronted by sophisticated personnel and human resource policies, who are often in precarious employment as casual or part-time workers, who have skills at the lower end of the wage market, and who lack access to information, bargaining skills, or adequate, independent representation.²³⁰

Critics note that employers will be able to require *new* employees to sign an AWA, which takes away or reduces their award conditions (in other words, offer new employees AWAs on a ‘take it or leave it’ basis). They also argue that employers will be able to require *existing* employees to sign up to an AWA notwithstanding the prohibition against applying duress to such employees. Three reasons have been given for this. First, the Office of the Employment Advocate “will no longer check for duress after agreements are lodged”.²³¹ Secondly, critics suggest that:

...it is not difficult for employers to develop ways and means of applying pressure on current employees who are reluctant to sign an AWA, without being in technical breach of the legislation...An obvious situation would apply to casual workers or people who want a promotion or a wage rise. It would be easy for an employer to say: ‘if you want a promotion or a wage rise, here is the instrument you have to sign’.²³²

Thirdly, it has been argued that the new exemption from unfair dismissal laws for businesses with less than 100 employees may result in a situation where:

...the ‘choice’ of existing employees (especially in small and medium enterprises) will be to accept a contract or run the risk of being arbitrarily dismissed. While there are provisions in the [Act] which make

²²⁸ See ‘States to fight IR takeover in court’, *The Australian*, 6/8/05. See also ‘Overtime pay rates at risk’, *Daily Telegraph*, 30/7/05.

²²⁹ ‘Jobless would give up penalties’, *Daily Telegraph*, 13/10/05.

²³⁰ Submission to Senate inquiry by group of 151 academics, note 95, p8.

²³¹ Submission to Senate inquiry by group of 151 academics, note 95, p10. See also ‘Workers need court on consent’, *The Australian*, 7/11/05.

²³² Senate report on Work Choices bill, note 93, p56.

coercion in the making of an agreement illegal, it will be difficult to prove and easy for an employer to construct an alternative reason for the dismissal.²³³

Critics argue that employees should have an enforceable right to engage in collective bargaining: in other words, that employees should have the ‘choice’ of entering into a collective agreement instead of an AWA.²³⁴ The group of 151 academics argues that:

Collective bargaining *matters*: it allows workers to negotiate their terms and conditions of employment on a more equal footing with their employer....

...collective bargaining is viewed as a fundamental human right by the United Nations and the International Labor Organisation...

...Unlike other nations with decentralised bargaining systems, Australia has no national laws designed to guarantee employees’ rights to bargain collectively. The [Work Choices] *Bill* does not require bargaining in ‘good faith’ nor does it ensure that individual contracts do not undercut collective agreements...

Despite claims in *Work Choices* documentation that employees can exercise ‘choice’, and that the proposals do not constrain collective bargaining, there is no guarantee that collective bargaining will occur simply because employees want it.²³⁵

The group of 151 academics predicts that the replacement of the no-disadvantage test with the AFPC Standard will not necessarily result in “widespread cuts in pay and conditions across the board, particularly in the short term”. In their opinion:

Workers in the disadvantaged sectors of the labour market will be most vulnerable to reduced conditions. Other employees in occupations in short supply will be temporarily protected by their labour market position. However, they will become vulnerable when the economy slows down, as inevitably it will one day...

.....

...In industries that are highly competitive on labour costs, there will be strong pressure for real pay cuts over the medium to long term. In contract cleaning, for example, if one employer succeeds in obtaining contracts by paying employees below the award, on the minimum standards, other contractors will lose work if they do not also cut pay and conditions. Initially ‘good employers’, concerned about maintaining good relations with their workforce, will decline to take advantage of the opportunities provided by the [new laws]. But as other employers obtain an apparent competitive advantage through cutting labour costs, many ‘good employers’ will be forced to follow suit.²³⁶

²³³ Submission to Senate inquiry by group of 151 academics, note 95, p10.

²³⁴ Note that under the new system, AWAs operate to the exclusion of collective agreements: see new section 100A(2). See above as to the position prior to the reforms.

²³⁵ Submission to Senate inquiry by a group of 151 academics, note 95, pp18-19. See also Wooden M, note 16, p16. As to Greg Combet’s position on the right to collective bargaining, see ‘Haggle scrabble spells toil and trouble’, *Australian Financial Review*, 24/9/05.

²³⁶ Submission to Senate inquiry by group of 151 academics, note 95, pp32-33. See also Waring P et al, note 224, p115. See also the following articles in the media: ‘Workers will be on their knees for fair pay’, *Sydney Morning Herald*, 25/6/05; ‘Labouring under an illusion of workplace reform’, *Sydney Morning Herald*, 3/6/05; and ‘It may not be fair, but it’s fair game’, *Sydney Morning Herald*, 1/6/05.

Government's response to criticisms of abolition of no-disadvantage test

In the Senate Committee report on the bill, Coalition Senators stated:

Much criticism of the Work Choices Bill is based on the premise that employees are unable to negotiate effectively for themselves and that vulnerable groups of workers such as outworkers or young people will be at risk of exploitation. These criticisms are based on the false assumption that the majority of employers are oblivious to the needs of their employees, whose satisfaction is crucial to the success of a business.

The ability for workers to negotiate satisfactory wages and conditions is bolstered by the strong demand for labour which has characterised the economy since 1996. The committee heard from a number of employer groups that they were unable to locate sufficient employees to meet demand.²³⁷

Coalition Senators also referred to a number of safeguards in the legislation for the protection of employees who “may be vulnerable due to their level of negotiating ability and market demand for their skills”.²³⁸ For example, employees have a right to access their union representative and to appoint and consult a bargaining agent, who will be able to assist in the negotiation process and act on the employee's behalf in relation to a workplace agreement.²³⁹

Approval process is replaced by a lodgement process

Approval process replaced by lodgement process

Under the new system, collective agreements and AWAs come into effect on the day the agreement is lodged with the Employment Advocate – even if the pre-lodgement statutory requirements have not been met.²⁴⁰ The employer must lodge a statutory declaration with the agreement.²⁴¹ The new laws leave it to the Employment Advocate to set out requirements for the form of such a declaration²⁴² but the Government has said that the declaration will need to attest to compliance with the requirements for agreement making and content.²⁴³

The Employment Advocate will not be required to consider whether any of the statutory requirements have been met in relation to the making or content of a workplace agreement.²⁴⁴ However, employers who lodge false declarations may be prosecuted.²⁴⁵ In addition, under the

²³⁷ Senate report on the Work Choices bill, note 93, p34 (see also p35).

²³⁸ Senate report on the Work Choices bill, note 93, p36.

²³⁹ Senate report on the Work Choices bill, note 93, p37. As to appointment of bargaining agents, see new Part VB, Division 3, *Workplace Relations Act 1996* (Cth).

²⁴⁰ New section 100(1), (2) *Workplace Relations Act 1996* (Cth).

²⁴¹ New section 99B, *Workplace Relations Act 1996* (Cth).

²⁴² See new section 99(2B)(b), *Workplace Relations Act 1996* (Cth).

²⁴³ WorkChoices guide, note 48, p21.

²⁴⁴ New section 99B(5), *Workplace Relations Act 1996* (Cth).

²⁴⁵ See note to new section 99B(2), *Workplace Relations Act 1996* (Cth).

new laws, the Federal Court can declare that a workplace agreement is void if there has been a contravention of certain statutory requirements.²⁴⁶ Such contraventions include: an employer lodging an agreement with the Employment Advocate that has not been approved by employees, coercion in relation to a collective agreement, and duress in relation to an AWA.

Debate about new lodgement process

Reasons for new lodgement process

The Federal Government has stated that:

In WorkChoices, agreement making will be significantly easier for both employees and employers. A lodgement only system for all agreements will be introduced. In support of the new lodgement system a statutory declaration attesting that the agreement was negotiated in compliance with the law will need to be lodged with the agreement. The statutory declaration will replace the current complex, time consuming and legalistic certification and approval process.²⁴⁷

Criticism of new lodgement process

According to an article in *The Australian*:

Opposition industrial relations spokesman Stephen Smith said...no mechanism would exist to check for genuine consent. "To tip the balance toward the employer even further, an agreement where there is no genuine consent will remain in place until a court decides otherwise", he said.

.....

Ron McCallum, professor of industrial relations law at Sydney University, said the Government proposal for no checking process meant the Employment Advocate would be like a post box for workplace agreements.

"You need more oversight than a bureaucratic piece of paper, and that's why the Industrial Relations Commission is better, Professor McCallum said.²⁴⁸

The article reports also reports the Government's responses: that employers will be liable for penalties if they lodge agreements in breach of the law; and that employers, unions, or the Office of Workplace Services can challenge agreements in court if there was no genuine consent.

²⁴⁶ New section 105F, *Workplace Relations Act 1996* (Cth).

²⁴⁷ Work Choices guide, note 48, p19.

²⁴⁸ 'Workers need court on consent', *The Australian*, 7/11/05.

Workplace agreements cannot contain prohibited content

Prohibited content under old system

Prior to the reforms, certified agreements and AWAs had to be about “matters pertaining to the relationship between” the employer and the employee(s) whose employment will be subject to the agreement.²⁴⁹ In the recent *Electrolux* decision, the High Court held that an agreement which provided for a bargaining agent’s fee to be paid for by employees, whether or not union members, was not a matter that pertained to the relationship between the employer and its employees.²⁵⁰ It is not clear what other clauses would fall into the same category but Creighton and Stewart suggest that clauses prohibiting the use of contract labour would also be invalid.²⁵¹

Prohibited content under new system

Under the new laws, the regulations may specify matters that are *prohibited content* in relation to a workplace agreement.²⁵² A person must not seek to include prohibited content in a workplace agreement, an employer must not lodge an agreement containing prohibited content, and a term of a workplace agreement is void to the extent that it contains prohibited content.²⁵³ The WorkChoices information booklet states that prohibited content will include clauses:

- Prohibiting AWAs;
- Restricting the use of independent contractors;
- Allowing for industrial action during the term of an agreement;
- Providing for union training leave, bargaining fees to unions or paid union meetings;
- Providing that any future agreement must be a union collective agreement;
- Mandating union involvement in dispute resolution;
- Providing a remedy for unfair dismissal.²⁵⁴

Criticism of Ministerial power to declare prohibited content

The Opposition Senators’ report on the Work Choices bill states:

Another controversial aspect of the bill concerns the powers which the bill gives the workplace relations minister to prescribe by regulation matters that are prohibited content. The ACTU believes that section 101E confers on the minister the power to invalidate part or all of an agreement, including agreements which are currently in force. Opposition senators believe that these are unprecedented powers contrary to the stated objective of the bill, which is to devolve responsibility for agreement-making to the parties at

²⁴⁹ Sections 170LI, 170VF(1), *Workplace Relations Act 1996* (Cth).

²⁵⁰ *Electrolux Home Products Pty Ltd v AWU* (2004) 78 ALJR 1231.

²⁵¹ Creighton and Stewart, note 15, p212.

²⁵² New section 101D, *Workplace Relations Act 1996* (Cth).

²⁵³ New sections 101M, 101E, 101F, *Workplace Relations Act 1996* (Cth).

²⁵⁴ WorkChoices guide, note 48, p23.

the workplace...It is unacceptable to have employers and employees enter into a workplace agreement when the Government has the capacity to impose terms by removing a matter the parties have agreed to.²⁵⁵

Changes in relation to termination of workplace agreements

Termination of agreements under old laws

Under the laws prior to the reforms, certified agreements and AWAs could be terminated as outlined in the Table below.

Termination of certified agreements ²⁵⁶	Termination of AWAs ²⁵⁷
(1) At any time - if a majority of employees approve.	(1) At any time - if the employer and employee agree.
(2) After the nominal expiry date, the employer, the union, or a majority of employees could apply to the Commission to terminate the agreement. The Commission had to terminate the agreement unless it would be contrary to the public interest to do so.	(2) After the nominal expiry date, the employer or employee could apply to the Commission to terminate the AWA. The Commission had to terminate the AWA unless it considers that it would be contrary to the public interest to do so.
(3) After the nominal expiry date, in accordance with a procedure outlined in the agreement.	(3) After the nominal expiry date, in accordance with a procedure outlined in the AWA.

If a certified agreement or AWA was terminated, an employee who was subject to the certified agreement or AWA would be entitled to the wages and conditions set out in an applicable award or in another applicable workplace agreement (eg: if an AWA was terminated, the employee would be entitled to the conditions contained in an applicable collective agreement).

Termination of workplace agreements under new laws

The new laws provide that a workplace agreement which is made under the new system may be terminated either: (a) by approval of the parties to the agreement, or (b) unilaterally.²⁵⁸ A party to a workplace agreement can only unilaterally terminate a workplace agreement after its nominal expiry date.²⁵⁹ A party can unilaterally terminate a workplace agreement by:

- (i) By giving 90 days written notice;
- (ii) If the workplace agreement contains a procedure for unilateral termination – by complying with that procedure.²⁶⁰

²⁵⁵ Senate report on Work Choices bill, note 93, p83.

²⁵⁶ Sections 170MG, 170MH, 170MHA, *Workplace Relations Act 1996* (Cth).

²⁵⁷ Section 170VM, *Workplace Relations Act 1996* (Cth).

²⁵⁸ New section 103, *Workplace Relations Act 1996* (Cth). Existing workplace agreements can only be terminated in accordance with the laws prior to the reforms.

²⁵⁹ New sections 103K, 103L, *Workplace Relations Act 1996* (Cth).

²⁶⁰ New sections 103K, 103L, *Workplace Relations Act 1996* (Cth).

In both cases, the party must also lodge a declaration with the Employment Advocate.²⁶¹

Consequences of termination of agreement under new laws

Under the new system, if a workplace agreement is terminated, conditions in awards and workplace agreements have no effect except for “protected award conditions”.²⁶² This means that the employee will only be entitled to the minimum wages and conditions in the AFPC Standard and any award conditions that are “protected award conditions” (eg shift loadings, penalty rates, rest breaks, annual leave loading, public holidays).²⁶³

Criticism of changes in relation to termination

The submission to the Senate inquiry on the bill by the group of 151 academics expressed concerns about the provisions in the bill that allowed for unilateral termination and that removed employee’s award entitlements on termination. They argued that these provisions would allow an employer to unilaterally cut an employee’s wages and conditions after the expiry of an agreement; and it would also significantly shift bargaining power in favour of employers in any negotiations for a new agreement.²⁶⁴ As noted above, bill was amended such that, on termination, an employee will also be entitled to any “protected award conditions”.²⁶⁵

Changes for employees who move out of NSW system

As outlined in Section 2 of this paper, the NSW industrial system allows for the making of collective agreements and a May 2004 survey showed that around 19 per cent of employees in NSW had the main part of their pay set by a State collective agreement.

Existing State collective agreements

As outlined in Section 3 of this paper, under the transitional arrangements, State collective agreements will continue to operate in relation to employees who move into the new Federal system until they are replaced by a workplace agreement which is made under the new laws.

²⁶¹ New sections 103K, 103L, *Workplace Relations Act 1996* (Cth).

²⁶² New section 103R, *Workplace Relations Act 1996* (Cth). The entitlement to protected award conditions was inserted into the Bill by amendment: see Senate amendments, note 193, Item 122.

²⁶³ The “protected conditions” are listed on p46 above.

²⁶⁴ Submission to Senate inquiry by a group of 151 academics, note 95, p11.

²⁶⁵ The “protected conditions” are listed on p46 above.

Making of new workplace agreements

As the State system for making collective workplace agreements is similar to the *pre-reform* Federal system, employees who move from the State system to the Federal system will be subject to the same changes described above: eg: abolition of “no-disadvantage” test.

These employees will also be subject to other changes arising from some differences between the State system and the *pre-reform* Federal system. For example, under the State system union collective agreements must be approved in a secret ballot by 65 per cent of employees who are to be covered by the agreement²⁶⁶ whereas under the pre-reform (and new) Federal system, such agreements must be approved by a majority of employees who will be subject to it.

This will not be the first time that State system employees are subject to AWAs. While State laws have not allowed for the making of AWAs, since the Federal reforms in 1996, employers and employees who have been covered by the State system have been able to make an AWA under the current Federal laws if the employer was a constitutional corporation.

²⁶⁶ See Section 36(4), *Industrial Relations Act 1996* (NSW).

9. CHANGES TO INDUSTRIAL ACTION

Background to changes

Industrial action by employees and employers

The major form of industrial action *by employees* is a strike. This has been defined as “a temporary stoppage of work by a group of employees in order to express a grievance or enforce a demand”.²⁶⁷ Creighton and Stewart explain that the term “strike” embraces a broader range of conduct including work bans, boycotts, a go-slow, picketing, occupation of the workplace and acts of industrial sabotage.²⁶⁸ The major form of industrial action *by employers* is a lockout. This has been defined as, “a temporary closure of the workplace and/or a refusal to allow work to be done, possibly accompanied by dismissal of all or most of the workforce”.²⁶⁹

Prior to 1993 it was unlawful to take industrial action

Creighton and Stewart summarise the position as follows:

...so far as the common law is concerned, virtually all industrial action would be unlawful as a tort, breach of contract and, frequently, a crime. In Britain, recognition that this was neither equitable in principle nor sustainable in practice led to the adoption of various protective provisions in the late 19th and early 20th centuries...Until very recently this logic was accorded no formal recognition in the federal system in Australia, and no more than token recognition in the State systems. Indeed far from providing protection against common law liability, both State and federal parliaments have adopted a quite extraordinary range of legislative proscriptions against industrial action, the operation of which is *additional* to the common law. The end result is that for all practical purposes it was impossible, at least before 1993, for any group of Australian workers lawfully to take industrial action, to protect or promote their occupational interests.

In practice, this did not prevent strikes from occurring: indeed, quite the contrary...[L]evels of industrial action in Australia were in fact high by international standards for most of the 20th century, notwithstanding the flagrant illegality of that action. Unions effectively challenged employers to utilise the armoury of legal weapons available to them to restrain or punish their unlawful conduct. Occasionally, employers would take up that challenge, and there would be periods indeed when litigation against strikes was (relatively) common...But even during those phases, the great majority of employers did not seek to invoke legal sanctions when action was taken by their workers. One reason was the availability of industrial tribunals, with their powers to summon parties to conciliation conferences and seek a negotiated settlement. But the reluctance to litigate also reflected a pragmatic attitude on the part of most businesses, who realised that taking workers or their union representatives to court would be unlikely over the longer term to create a climate conducive to harmonious and productive relations.²⁷⁰

²⁶⁷ Griffen J, *Strikes: A study in quantitative economics*, Columbia University Press, New York 1939, p20, quoted in Creighton and Stewart, note 15, p534.

²⁶⁸ Creighton and Stewart, note 15, pp534-5.

²⁶⁹ Creighton and Stewart, note 15, p535.

²⁷⁰ Creighton and Stewart, note 15, pp536-37.

Since 1993 it has been lawful to take protected action when negotiating an agreement

Since 1993, Federal industrial laws have provided a measure of protection against legal liability for industrial action taken by employees or employers in support of a proposed certified agreement. This is known as “protected industrial action”.

Employees or unions negotiating a proposed certified agreement have been able to take protected industrial action for the purpose of supporting or advancing claims made in respect of the proposed agreement, or for the purpose of responding to a lockout by the employer of employees whose employment would be subject to the agreement.²⁷¹ Similarly, an employer has been entitled to lock out employees who would be subject to the agreement for the purpose of supporting or advancing claims in respect of the proposed agreement, or for the purpose of responding to industrial action by employees who would be subject to the agreement.²⁷²

Conditions that needed to be satisfied to take protected industrial action

Under the laws prior to the reforms, there were a number of conditions that needed to be satisfied for industrial action and lock outs by employers to be protected. Three of these conditions were that:

- Industrial action could not be taken during the nominal term of a certified agreement.²⁷³
- Industrial action could only be taken during a “bargaining period” (see below).
- Before engaging in industrial action the party taking the action must have genuinely tried to reach agreement with the other negotiating parties.²⁷⁴

Commencement and end of bargaining periods

As noted above, industrial action would only be protected if it took place during a bargaining period. Under the laws prior to the reforms, an employer, union or employee who wanted to negotiate a collective agreement could initiate a bargaining period by giving notice to each other negotiating party and to the Commission.²⁷⁵ A bargaining period would end if:

- (a) A certified agreement was made; or
- (b) The party that initiated the bargaining period gave notice to the other negotiating

²⁷¹ Section 170ML(1), (2), *Workplace Relations Act 1996* (Cth).

²⁷² Section 170ML(3), *Workplace Relations Act 1996* (Cth).

²⁷³ Section 170MN, *Workplace Relations Act 1996* (Cth). The nominal term of an agreement could not be more than three years.

²⁷⁴ Section 170MP, *Workplace Relations Act 1996* (Cth).

²⁷⁵ Section 170MI, *Workplace Relations Act 1996* (Cth).

parties that it no longer wished to reach an agreement, or

- (c) The Industrial Relations Commission suspended/terminated the bargaining period. The grounds for suspension/termination are outlined later in this section.²⁷⁶

Overview of changes

The main changes are:

- Secret ballots are now a condition for protected action;
- There are more grounds for suspending a bargaining period;
- The Minister now has power to terminate a bargaining period;
- Changes to Commission's power to stop unlawful industrial action;
- Commission can prevent damaging industrial action in State systems.

Secret ballots are now a condition for protected action

Under old system Commission could require secret ballot

Under the system prior to the reforms, the Industrial Relations Commission had the power to order that a secret ballot be conducted of union members in relation to a proposed certified agreement if the Commission was of the view that doing so might help to stop or prevent industrial action.²⁷⁷ If the Commission made such an order, industrial action would only be protected if a ballot was taken and a majority of votes approved the industrial action.²⁷⁸ It appears that the Commission's power to order secret ballots was rarely invoked.²⁷⁹

Under new system secret ballots are a condition for protected action

Under the new system, industrial action taken by a union or employee in relation to a proposed workplace agreement will not be protected unless the action has been authorised by a secret ballot.²⁸⁰ This does not apply if the industrial action is in response to a lockout by an employer.²⁸¹ The new laws set out the procedure for holding secret ballots.

During a bargaining period, an application can be made to the Industrial Relations Commission for an order that a ballot be held.²⁸² If a union initiated the bargaining period, the union can

²⁷⁶ Section 170MV, *Workplace Relations Act 1996* (Cth).

²⁷⁷ Section 135(2) (see also subs (2B)), *Workplace Relations Act 1996* (Cth).

²⁷⁸ Section 170MQ, *Workplace Relations Act 1996* (Cth).

²⁷⁹ Creighton and Stewart, note 15, p223.

²⁸⁰ New section 108J, *Workplace Relations Act 1996* (Cth).

²⁸¹ New section 108J, *Workplace Relations Act 1996* (Cth).

²⁸² New section 109B, *Workplace Relations Act 1996* (Cth).

make the application.²⁸³ If an employee or a group of employees initiated the bargaining period, any employee or group of employees who are negotiating parties to the proposed workplace agreement can make the application.²⁸⁴ The Commission is required to determine an application within 2 working days.²⁸⁵ The Commission must not grant an application for a ballot order unless it is satisfied that, during the bargaining period, the applicant genuinely tried to reach agreement with the employer.²⁸⁶ If a ballot order is granted, the secret ballot is to be conducted by the Australian Electoral Commission or another authorised ballot agent.²⁸⁷

For union-initiated ballots, a person will be eligible to be included on the voting roll if:

- (a) they are a member of the union, and
- (b) they are employed by the employer, and
- (c) they will be subject to the proposed agreement.²⁸⁸

For employee initiated ballots, a person will be eligible if (b) and (c) are satisfied.²⁸⁹

Industrial action will be authorised by the ballot if at least 50 per cent of the persons on the roll voted and more than 50 per cent of the votes validly cast approved the action.²⁹⁰

The Federal Government will cover 80 per cent of the cost of the ballot and the union or employees who made the application will be required to pay the other 20 per cent.²⁹¹

The Howard Government has, on a number of previous occasions, sought to pass legislation to provide for secret ballots but this legislation was blocked in the Senate.²⁹²

²⁸³ New section 109B, *Workplace Relations Act 1996* (Cth).

²⁸⁴ New section 109B, *Workplace Relations Act 1996* (Cth).

²⁸⁵ New section 109H, *Workplace Relations Act 1996* (Cth).

²⁸⁶ New section 109L, *Workplace Relations Act 1996* (Cth).

²⁸⁷ New section 109X, *Workplace Relations Act 1996* (Cth).

²⁸⁸ New section 109R, *Workplace Relations Act 1996* (Cth).

²⁸⁹ New section 109R, *Workplace Relations Act 1996* (Cth).

²⁹⁰ New section 109ZC, *Workplace Relations Act 1996* (Cth).

²⁹¹ New sections 109ZG, 109ZH, *Workplace Relations Act 1996* (Cth).

²⁹² *Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999* (Schedule 12); *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000*; *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002* [No. 1] and [No. 2]

Debate about new secret ballot laws

Arguments for new secret ballot laws

When the Federal Government previously attempted to introduce secret ballots, it said:

A secret ballot is a fair, effective and simple process for determining whether a group of employees at a workplace want to take industrial action. It will ensure that the right to protected industrial action is not abused by union officials pushing agendas unrelated to the interests of the workers at the workplace concerned.

...

...secret ballots will not impede access to lawful protected action, but will provide a mechanism to ensure that protected action is a genuine choice of the employees involved. This will protect jobs by avoiding unnecessary strikes. The Bill will enhance freedom of choice for workers and strengthen the accountability of unions to their members.²⁹³

Arguments against new secret ballot laws

In a Senate Committee report on the provisions in the 1999 bill, Labor Senators concluded:

...the secret ballot provisions are excessively prescriptive and will further impede employees and unions in organising their activities. The provisions are overly bureaucratic and will prove difficult to comply with. This will remove the ability of many employees to exercise their legal right to protected industrial action under the...Act. The inevitable consequence of this is that workers may be forced into industrial action which is not considered legal...

In the labour market, a worker's ability to withdraw his labour is the primary means of exerting economic pressure on employers during a bargaining process. The model of secret ballots proposed...will substantially constrain employees [from doing] this, tipping the balance in the bargaining process even further toward employers.²⁹⁴

A submission to the recent Senate inquiry on the Work Choices bill by the group of 151 academics criticises the current secret ballot provisions:

...Firstly, it will take weeks, if not months, for unions to take protected action in ballots subject to legal requirements supervised by the [Industrial Relations Commission] and [the Electoral Commission] whereas employers remain free to lockout their employees with three-days notice. It is difficult to understand why lockouts are not also subject to a ballot of shareholders who surely have the same right to vote if a lockout is in their interests as workers do in relation to a strike. Secondly, there will be less flexibility for employees in taking industrial action because, unlike employers, they will have to comply with the wording of the ballot. Thirdly, the ballot process increases the administrative and compliance costs of industrial action for unions.²⁹⁵

²⁹³ Hon Tony Abbott MP, *Commonwealth Parliamentary Debates*, 13/11/02, pp8854-55.

²⁹⁴ Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, November 1999, p261.

²⁹⁵ Submission to Senate inquiry on Work Choices bill by group of 151 academics, note 95, p21.

There are more grounds for suspending a bargaining period

Suspension of bargaining periods under old system

Under the laws prior to the reforms, the Industrial Relations Commission had the power to suspend or terminate a bargaining period in a range of circumstances, including where:

- A negotiating party that is taking, or has taken, industrial action did not, or is not, genuinely trying to reach an agreement with the other negotiating parties.
- There are no reasonable prospects of the negotiating parties reaching an agreement during the bargaining period.
- Industrial action that is being taken is threatening (i) to endanger the life, personal safety or health, or the welfare, of the population or part of it; or (b) to cause significant damage to the Australian economy or an important part of it.²⁹⁶

In relation to all three grounds, a negotiating party could make an application for suspension or termination. In relation to the third ground, the Minister could also make an application, and the Commission could also act of its own motion.²⁹⁷ If a bargaining period were terminated on *this* ground, the Commission had to use its conciliation powers to facilitate the making of an agreement or to otherwise settle any matter that could be covered by such an agreement.²⁹⁸ If conciliation was not successful, the Commission had to, if it considered it appropriate, exercise its arbitration powers to make an award dealing with the matters at issue between the parties.²⁹⁹

Additional grounds for suspension under new system

Under the new system, the Industrial Relations Commission has the power to suspend/terminate a bargaining period in the additional circumstances referred to below:

- *Cooling off*: On application to the Commission, it must suspend a bargaining period if it considers that suspension is appropriate having regard to a number of matters including whether it would be beneficial to the parties because it would assist in resolving the matters at issue.³⁰⁰ A negotiating party can make the application.
- *Significant harm to third party*: On application, the Commission must suspend a bargaining period if it considers that the industrial action is threatening to cause significant harm to a third party and that suspension is appropriate having regard to the

²⁹⁶ Section 170MW, *Workplace Relations Act 1996* (Cth).

²⁹⁷ Section 170MW(8)(b), *Workplace Relations Act 1996* (Cth).

²⁹⁸ Section 170MX, *Workplace Relations Act 1996* (Cth).

²⁹⁹ Section 170MX(3), *Workplace Relations Act 1996* (Cth).

³⁰⁰ New section 107I, *Workplace Relations Act 1996* (Cth).

public interest and the Act's objects.³⁰¹ The application can be made by a third party directly affected by industrial action, or by the Minister. A bargaining period can only be suspended for up to 3 months but the Commission can extend this period.

- *Pattern bargaining*: On application to the Commission, it must suspend or terminate a bargaining period if a negotiating party is engaged in pattern bargaining in relation to a proposed collective agreement.³⁰² Pattern bargaining occurs if a union is a negotiating party to 2 or more proposed collective agreements and they seek common wages or conditions of employment for 2 or more of those proposed agreements.³⁰³ This conduct will not be pattern bargaining if the union is genuinely trying to reach a collective agreement for a single business.³⁰⁴ A negotiating party can make the application.

The Howard Government has previously attempted to introduce these reforms.³⁰⁵

Debate about additional grounds for suspension

Reasons for including additional grounds for suspending bargaining period

When the Government previously attempted to introduce legislation to allow for cooling off periods and to allow third parties to apply for suspension of bargaining periods it said:

Cooling off periods

During protracted disputes, parties often lose sight of their original objectives. Cooling-off periods allow negotiating parties to step back from industrial conflict and refocus on reaching a solution which works for the business and employees in question....

...

Suspensions by third parties

...Industrial action by negotiating parties can impact upon, or aim to harm, third parties who are not directly involved in the dispute – for example the clients of health, community services and education systems and other businesses.

.....

The purpose of the provisions is not to detract from the existing rights of employees to take industrial action. They simply provide the Commission with a remedy to address the impact of industrial action on the welfare of third parties who are not directly involved in a dispute.³⁰⁶

³⁰¹ New section 107J, *Workplace Relations Act 1996* (Cth). See 107J(2) as to matters that Commission may have regard to in determining whether the action threatens significant harm to a third party.

³⁰² New section 107H, *Workplace Relations Act 1996* (Cth).

³⁰³ New section 106B, *Workplace Relations Act 1996* (Cth).

³⁰⁴ New section 106B(3),(4) *Workplace Relations Act 1996* (Cth). As to suspension of bargaining period on grounds of pattern bargaining prior to the reforms, see Creighton and Stewart, note 15, pp229-231.

³⁰⁵ See *Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*; *Workplace Relations Amendment (Better Bargaining Bill 2003)*; and *Workplace Relations Amendment (Better Bargaining) Bill 2005*.

³⁰⁶ Hon Kevin Andrews MP, *Commonwealth Parliamentary Debates*, 6/11/03, pp22290-91

The reason for allowing the Commission to suspend/terminate a bargaining period if a negotiating party is engaging in pattern bargaining is that the practice of pattern bargaining is “...inconsistent with one of the primary objects of the federal industrial relations system – to ensure that wages and conditions are set according to the needs of individual workplaces”.³⁰⁷

Criticism of additional grounds for suspending bargaining period

The Federal Opposition opposed the Government’s previous attempt to introduce legislation to include additional grounds for suspending a bargaining period. The Opposition stated:

An essential part of modern collective bargaining systems around the Western World is the right to take legally protected industrial action in specified circumstances. But if this Bill were enacted it would almost entirely remove that right.³⁰⁸

In a Senate Committee report on the prior legislation, Labor Senators stated:

Contrary to Government rhetoric about how this bill will benefit workplaces by ensuring that enterprise bargaining processes are fair and user friendly, Labor senators maintain that the bill will restrict the right of workers to take industrial action in the event of a true disagreement with their employers...

The Labor senators’ overriding concern with this bill is that it is an attempt to strengthen the ability of employers in the bargaining process and significantly weaken the position of workers and [unions].³⁰⁹

The ACTU has argued against allowing third parties to apply for a suspension, stating that:

The ability of the Commission to suspend the bargaining period if the industrial action is threatening to cause significant harm to a third party has the potential to apply to a significant proportion of industrial action. The very nature of industrial action is that there will be some harm to third parties, including proprietors of businesses who are reliant on the business involved in the industrial action...³¹⁰

The ACTU has put the following case against the “pattern bargaining” restrictions:

Nowhere else in the developed, industrialised world are there restrictions on industry-wide agreement making as exist in Australia.

.....

The restrictions on negotiating parties to choose their own level of bargaining under Australian law has been strongly criticised by the ILO’s Committee of experts.

The definition of “pattern bargaining” would catch almost all union collective bargaining. Effective bargaining requires enabling unions and their members to campaign around issues of concern in their industry.

³⁰⁷ Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, November 1999, p118.

³⁰⁸ Hon Dr Craig Emerson MP, *Commonwealth Parliamentary Debates*, 16/2/04, p24845.

³⁰⁹ Senate Employment, Workplace Relations and Education Legislation Committee, *Provisions of Workplace Relations Amendment (Better Bargaining) Bill 2003* (and other bills), June 2004, p20. See also Australian Democrats in same report at pp32-34.

³¹⁰ ACTU submission to Senate inquiry on Work Choices bill, note 149, p69.

Pattern bargaining, or the pursuit of common interests, is what unions do.

....

Employers frequently engage in pattern bargaining. AWAs are a clear example of pattern bargaining.³¹¹

The Minister now has power to terminate a bargaining period

The Minister's new power to terminate a bargaining period

The Minister now has the power to terminate a bargaining period if the Minister is satisfied that industrial action is threatening (i) to endanger the life, the personal safety or health, or the welfare of the population or part of it; or (ii) to cause significant damage to the Australian economy or an important part of it.³¹² The Industrial Relations Commission retains its power to terminate a bargaining period in the same circumstances (see above). If the Minister makes a declaration terminating a bargaining period, the Minister may also make directions to negotiating parties or specified employees that are reasonably directed to removing or reducing the relevant threat.³¹³ Failure to comply with such a direction can attract a pecuniary penalty of \$33,000 in the case of corporations and \$6,600 in the case of individuals.³¹⁴

Debate about Minister's new power to terminate a bargaining period

Reasons for Minister having this new power

The WorkChoices guide states that this new power:

...is similar to State essential services legislation, and will ensure the Government can respond to industrial action...that has significantly damaging and wide-ranging effects on essential services.³¹⁵

Criticism of Minister's new power

The Joint State Governments' submission to the Senate inquiry on the Work Choices bill states:

[The grounds on which the Minister may terminate a bargaining period] are identical to those which currently give the [Australian Industrial Relations Commission] the power to stop the action. This raises the possibility that the federal Minister could use the power in a situation where the [Commission] has refused to do so.

The WorkChoices booklet suggested that this power is intended for use in relation to 'essential services'. However, the Bill makes no such qualification.

The federal Minister has total discretion to determine when to revoke a bargaining period and to make directions specifying actions that must be taken by the negotiating parties, without the scrutiny of an independent umpire. Unlike the capacity for review of [the Commission's] powers in such a case, there

³¹¹ ACTU submission to Senate inquiry on Work Choices bill, note 149, pp64-66.

³¹² New section 112, *Workplace Relations Act 1996* (Cth).

³¹³ New section 112A, *Workplace Relations Act 1996* (Cth).

³¹⁴ New section 112A(5)-(7), *Workplace Relations Act 1996* (Cth).

³¹⁵ WorkChoices guide, note 48, p29.

will be no hearing, nor any right of appeal in relation to the exercise of executive power.

Such powers will drastically limit the ability of employees and their union representatives to take industrial action by claiming it to be contrary to the national interest. The Bill does not contain a process of checks and balances to safeguard any potential misuse of Ministerial power.³¹⁶

Changes to Commission's power to stop unlawful industrial action

Commission's power to stop unlawful industrial action under old system

Under the laws prior to the reforms, section 127 stated that the Commission may order that unprotected industrial action stop or not occur, if such action was happening or threatened. The Commission could make such orders on its own motion, on the application of a party to the dispute, or on the application of a person who was, or was likely to be, directly affected by the industrial action. The Commission was obliged to hear and determine an application for such an order "as quickly as practicable". The Commission had the power to make an interim order.

Once the Commission had made an order under s 127, any person or organisation to whom it was directed had to comply with it. If a person or organisation was, or was proposing to, breach the order, a person or organisation affected by the order could apply to the Federal Court for an injunction. Failure to comply with an injunction would constitute contempt of court, attracting penalties by way of fine, sequestration of assets or imprisonment; and it could also provide the basis for proceedings for suspension or cancellation of a trade union's registration.³¹⁷

Changes to Commission's power to stop unlawful industrial action

The new laws change the terms of the Commission's power under the former section 127 to make orders to stop or prevent unlawful industrial action. The new laws state that the Commission *must* (not *may*) order that industrial action stop or not occur if it appears to the Commission that such action is happening, threatened or probable.³¹⁸ In other words, the Commission can no longer exercise a discretion in relation to the making of these orders.

The new laws also require the Commission to determine such applications within 48 hours.³¹⁹ If the Commission cannot determine an application within that time period, it must (within that period) make an interim order to stop or prevent the industrial action, unless this would be contrary to the public interest.³²⁰ The Government has previously tried to enact this reform.³²¹

³¹⁶ State Governments joint submission to Senate inquiry on Work Choices bill, note 148, p12.

³¹⁷ Creighton and Stewart, note 15, p543.

³¹⁸ New section 111, *Workplace Relations Act 1996* (Cth).

³¹⁹ New section 111(5), *Workplace Relations Act 1996* (Cth).

³²⁰ New section 111(6), (7), *Workplace Relations Act 1996* (Cth).

³²¹ *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002*.

Commission can now prevent damaging industrial action in State systems

Under the new laws, on application to the Commission, it must make an order to stop or prevent industrial action taken or threatened by employees or employers who are not covered by the Federal system if the industrial action will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation.³²² The application can be made by a person who is affected, or likely to be affected, by such industrial action.³²³

Changes for employees who move out of NSW system

Protected action

Employees who move from the State system to the Federal system will now have the right to take protected action when negotiating a workplace agreement but only in the limited circumstances outlined above, and subject to the Federal tribunal's existing and new powers to suspend or terminate a bargaining period, making any further industrial action unlawful.

Sanctions for unlawful industrial action

Both State and Federal tribunals can make orders to prevent or stop unlawful industrial action. The powers of the Federal tribunal (under the pre-reform and new Federal systems) are outlined above. By way of comparison, under the State system, when dealing with an industrial dispute in arbitration proceedings, the NSW Industrial Relations Commission can "order a person to cease or refrain from taking industrial action".³²⁴ Breach of such an order attracts penalties including fines on unions or employers (up to \$10,000 for first day and \$5,000 for each subsequent day), suspension of entitlements under an industrial instrument, and deregistration of a union.³²⁵

Minister's power to stop industrial action

The Minister's power to stop industrial action under the new Federal system has been outlined above. Under the *Essential Services Act 1988* (NSW), the State Minister and the NSW Industrial Relations Commission have similar powers. One significant difference is that the new Federal laws give the Federal Minister the power to stop industrial action in circumstances that are wider than the definition of "essential services" in the State legislation.³²⁶

³²² New section 111(2), *Workplace Relations Act 1996* (Cth).

³²³ New section 111(4), *Workplace Relations Act 1996* (Cth).

³²⁴ Section 137(1)(a), *Industrial Relations Act 1996* (NSW).

³²⁵ See section 139, *Industrial Relations Act 1996* (NSW).

³²⁶ See definition in section 4, *Essential Services Act 1988* (NSW).

10. CHANGES TO DISPUTE RESOLUTION

Background to changes

As outlined in Section 2 of this paper, the Federal and State industrial tribunals have resolved industrial disputes through the processes of compulsory conciliation and arbitration.

Compulsory conciliation and arbitration replaced with new processes

General

The Industrial Relations Commission's powers of compulsory conciliation and arbitration have, for the most part, been removed from the Act.³²⁷ Instead, the Act contains new provisions relating to "Dispute Resolution Processes". The objects of these new provisions are:

- (a) to encourage employers and employees who are parties to a dispute to resolve it at the workplace level; and
- (b) to introduce greater flexibility for the resolution of disputes by allowing parties to determine the best forum in which to resolve them.³²⁸

New model dispute resolution process

The new laws contain a "model dispute resolution process" that will apply to all disputes about:

- Entitlements under the Australian Fair Pay and Conditions Standard.
- Awards;
- The terms of a workplace agreement, but only if the workplace agreement does not contain an alternative dispute resolution process.³²⁹

Under the model dispute resolution process, the parties must genuinely attempt to resolve the dispute at the workplace level.³³⁰ If a matter in dispute cannot be resolved at that level, a party to the dispute may elect to use an alternative dispute resolution (ADR) process to resolve the matter.³³¹ An ADR process includes procedures such as conferencing, mediation, assisted negotiation, neutral evaluation, case appraisal, conciliation and arbitration.³³²

³²⁷ The Commission will retain its conciliation and arbitration powers in relation to: (1) applications to vary awards; and (2) where industrial action is threatening essential services.

³²⁸ New section 171, *Workplace Relations Act 1996* (Cth).

³²⁹ See new section 173, *Workplace Relations Act 1996* (Cth).

³³⁰ New section 174, *Workplace Relations Act 1996* (Cth).

³³¹ New section 175(1), *Workplace Relations Act 1996* (Cth).

³³² New section 176A, *Workplace Relations Act 1996* (Cth).

The ADR process is to be conducted by a person agreed between the parties.³³³ The parties can agree to have the ADR process conducted by the Commission or a private ADR provider. The Government has said that it will establish a system of registered private ADR providers.³³⁴

If the parties cannot agree on who is to conduct the ADR process, a party may notify the Industrial Registrar.³³⁵ The Registrar is to provide the parties with prescribed information and if the parties cannot agree within 14 days on who is to conduct the ADR process, a party can apply to the Commission to have the ADR process conducted by the Commission.³³⁶

Note that the model dispute resolution process will not prevent parties taking court action if they believe that laws, awards or workplace agreements are being breached.³³⁷

Dispute resolution by Commission under model dispute resolution process

If the Commission conducts an ADR process under a model dispute resolution process, it must take such action as is appropriate to assist the parties to resolve the matter.³³⁸ This includes arranging conferences of the parties at which the Commission may or may not be present.³³⁹

The Commission must, as far as practicable, act quickly, in a way that avoids unnecessary legal technicalities, and if the parties have agreed that an aspect of the processes is to be conducted in a particular way, the Commission must act in accordance with that agreement.³⁴⁰ The Commission can only arbitrate in relation to the dispute if *both* parties agree to this.³⁴¹ However, the Commission cannot make an award or an order, even if both parties agree to this.³⁴²

The ADR process is complete when the parties agree that the matters in dispute are resolved or when the party who elected to use the ADR process has informed the Commission that it no longer wishes to continue with the ADR process.³⁴³

³³³ New section 175(2), *Workplace Relations Act 1996* (Cth).

³³⁴ Explanatory Memorandum, note 91, p21.

³³⁵ New section 175(3), *Workplace Relations Act 1996* (Cth).

³³⁶ New section 175(4),(5), *Workplace Relations Act 1996* (Cth).

³³⁷ Work Choices guide, note 48, p40.

³³⁸ New section 176D(1), *Workplace Relations Act 1996* (Cth).

³³⁹ New section 176D(2), *Workplace Relations Act 1996* (Cth).

³⁴⁰ New section 176D(3) (see also subs (4)), *Workplace Relations Act 1996* (Cth).

³⁴¹ New section 176D(4), (5), *Workplace Relations Act 1996* (Cth).

³⁴² New section 176D(4), (5), *Workplace Relations Act 1996* (Cth).

³⁴³ New section 176F, *Workplace Relations Act 1996* (Cth).

Dispute resolution by Commission pursuant to workplace agreement

The Commission must refuse to conduct a dispute resolution process if:

- (a) the dispute is not one that, under the terms of the workplace agreement, may be resolved using a dispute resolution process conducted by the Commission; or
- (b) any of the steps that, under the terms of the agreement, must be taken before the matter is referred to the Commission have not been taken.³⁴⁴

In conducting the dispute resolution process, the Commission has the functions and powers given it under the workplace agreement or otherwise agreed to by the parties.³⁴⁵ This can include arbitration. However, the Commission does not have the power to make orders.³⁴⁶

Dispute resolution during bargaining for agreement

The Commission may conduct ADR processes in relation to a matter in dispute that has arisen in the course of bargaining in relation to a proposed collective agreement if all parties to the dispute agree that the process is to be conducted by the Commission.³⁴⁷ The Commission has similar powers as under the model dispute resolution processes but note that the Commission does not have the power to arbitrate the matter and nor is it able to make an award or order in relation to the matter, even if both parties agree to any of these outcomes.³⁴⁸

Debate about changes to dispute resolution

Reasons for changes to dispute resolution

The Government has explained the benefits of the changes as follows:

Businesses will benefit from the proposed emphasis on dispute resolution at the workplace level. This will allow businesses to reduce their reliance on institutionalised dispute resolution processes and will ensure that they have a say in how workplace conflict is managed and resolved. Businesses will be able to choose between a greater variety of dispute resolution processes (including mediation) rather than the more formal AIRC processes.

.....

Employees will be able to have a greater say regarding the manner in which disputes are resolved. This is because the legislation will recognise a broader range of dispute resolution mechanisms. The Government will also provide subsidies where the parties opt for a registered provider, thereby facilitating access to

³⁴⁴ New section 176M, *Workplace Relations Act 1996* (Cth).

³⁴⁵ New section 176N(1), *Workplace Relations Act 1996* (Cth).

³⁴⁶ New section 176N(2), *Workplace Relations Act 1996* (Cth).

³⁴⁷ New section 176G, *Workplace Relations Act 1996* (Cth). Note that under the laws prior to the reforms, the Commission could conciliate if a party requested this: see old section 170NA.

³⁴⁸ New section 176I, *Workplace Relations Act 1996* (Cth). Note that under the laws prior to the reforms the Commission also could not arbitrate during a bargaining period. see old section 170N.

private alternative dispute resolution services and providing a genuine choice between AIRC and non-AIRC practitioners.

.....

The proposed reforms will benefit the Government by promoting more harmonious employment relationships, which in turn should lead to greater economic productivity. It will also benefit the Government by encouraging parties to resolve disputes at the workplace level and assisting to minimise the incidence of economically and socially damaging dispute.³⁴⁹

Criticisms of changes to dispute resolution

A submission to the Senate inquiry by the group of 151 academics states that:

The *Bill* transforms the central institution of Australian labour relations, the AIRC, into a voluntary dispute resolution body with minimal powers. The [new provisions] provide an alternative dispute resolution (ADR) role for the AIRC in various disputes, such as those that arise in bargaining and under the operation of concluded workplace agreements – but only if all parties agree that the AIRC should play that role. However, limits are placed on what the parties can allow the AIRC to do (eg no arbitration in bargaining disputes, and no binding orders in disputes under workplace agreements). Further the AIRC will have none of the powers of compulsion that have made it such an effective conciliator over many years.³⁵⁰

In their view, the new provisions are of “significant concern” for two reasons:

First, they contradict the Government’s rhetoric about free bargaining and choice. That is, for example, the parties to a workplace agreement or agreement negotiations are only “free” to agree on outcomes that the Government approves of. If they want to provide an expansive role for the AIRC in dispute resolution, the *Bill* places significant limits on their ability to do so. Secondly, the provisions ignore the fact that all industrial relations parties – employers, unions and employees alike – frequently utilise the dispute resolution services of the AIRC because they find them highly effective.³⁵¹

The submission by the academics also argues that, “the replacement of conciliation and arbitration with mediation will favour more powerful and educated parties”.³⁵²

Changes for employees who move out of NSW system

The State system also resolves industrial disputes through the processes of compulsory conciliation and arbitration. Accordingly, employees who move from the State system to the Federal system will be subject to the same changes as outlined above.

³⁴⁹ Explanatory Memorandum, note 91, pp22-23.

³⁵⁰ Submission to Senate inquiry on Work choices bill by a group of 151 academics, note 95, p15.

³⁵¹ Ibid, p16.

³⁵² Ibid, p16. As to mediation, see further Creighton and Stewart, note 15, pp158-59.

11. CHANGES TO UNFAIR DISMISSALS

Background to changes

Unfair dismissal laws prior to reforms

Federal and NSW *unfair* dismissal laws, which were introduced in the early 1990s, have allowed dismissed employees to apply to the Industrial Relations Commission for relief on the grounds that their dismissal was “harsh, unreasonable or unjust”.³⁵³ The Commission could grant relief in the form of reinstatement, or compensation not exceeding the employee’s wages over the six-month period before the dismissal. In determining whether the dismissal was harsh, unreasonable or unjust the Commission was to have regard to a number of factors including:

- Whether there was a valid reason for the dismissal;
- Whether the employee was given an opportunity to respond to any reason related to his or her capacity or conduct;
- If the dismissal related to the unsatisfactory performance of the employee, whether the employee had been warned about this.³⁵⁴

Federal and State coverage prior to reforms

Federal unfair dismissal laws have applied to:

- Employees in the Commonwealth public sector; and
- Employees whose employment conditions were set by a Federal award or Federal workplace agreement and who were employed by a constitutional corporation; and

NSW unfair dismissal laws have applied to:

- Employees whose conditions of employment were set by a Federal award but who were not employed by a constitutional corporation.³⁵⁵
- Employees in the State public sector, other than executive officers.
- Employees whose conditions were set by a State award or State enterprise agreement;
- Employees whose conditions were not set by a State award or State enterprise agreement and whose annual remuneration was less than \$90,400.

³⁵³ The Federal laws are set out in Part VIA, *Workplace Relations Act 1996* (Cth). The NSW laws are set out Part 6, Chapter 2, *Industrial Relations Act 1996* (NSW). The Federal laws, which were introduced by the Keating Government caused much controversy: see Creighton and Stewart, note 15, pp453-54.

³⁵⁴ See section 170G, *Workplace Relations Act 1996* (Cth).

³⁵⁵ Section 83(1), 83(1A), *Industrial Relations Act 1996* (NSW).

Excluded categories of employees prior to reforms

Certain categories of employees have been excluded from accessing the unfair dismissal laws: eg short term casuals and employees not covered by an industrial instrument and earning more than \$90,400 per annum. Employees earning more than \$90,400 but under \$200,000 might, however, have been able to bring a similar claim under NSW *unfair contract* laws.³⁵⁶

Unlawful dismissal laws prior to reforms

Federal *unlawful* dismissal laws have allowed any employee who has been dismissed for a discriminatory reason listed in the Act (eg disability, race, pregnancy, temporary absence from work due to illness or injury) to apply to the Federal Court for similar relief: ie reinstatement or compensation not exceeding the employee's wages six months before the dismissal.

Number of claims under Federal and State laws

Over the period from 2000/01 to 2004/05, there were on average 7,288 claims per year under Federal unfair and unlawful dismissal laws.³⁵⁷ This included an average of 1,437 claims per year (under Federal laws) by employees in NSW. Over a similar five-year period (from 2000 to 2004), there were, on average, 4,053 claims per year under NSW unfair dismissal laws.³⁵⁸

Overview of changes

The main changes are:

- Federal laws now apply to all employees of constitutional corporations;
- There is an exemption for businesses that employ up to 100 employees;
- There is an exemption if the dismissal was for genuine operational reasons;
- The qualifying period has been increased from 3 months to 6 months;
- The changes will not affect *unlawful* dismissal laws;
- There will be financial assistance for legal advice on unlawful dismissal claims.

Federal laws now apply to all employees of constitutional corporations

Federal unfair dismissal laws will now apply to all constitutional corporations and their employees. State unfair dismissal laws (and State unfair contract laws mentioned above) will now be excluded from applying to these employers and employees.³⁵⁹

³⁵⁶ As to claims under NSW unfair contract laws, see Creighton and Stewart, note 15, p382.

³⁵⁷ Data on the number of claims for each of the years over this period was obtained from annual reports of the Australian Industrial Relations Commission.

³⁵⁸ Data on the number of claims for each of the years over this period were obtained by private communication with the NSW Industrial Relations Commission.

³⁵⁹ See new section 7C and *WorkChoices* guide, note 48, p51.

Exemption for businesses with up to 100 employees

The exemption

Businesses that employ up to 100 employees are now exempt from unfair dismissal laws.³⁶⁰

Due to concerns raised by Nationals Senator Barnaby Joyce that businesses with more than 100 employees could restructure their operations to take advantage of this exemption, the legislation was amended to provide that, for the purpose of calculating the number of employees employed by an employer, related corporations are taken to be one entity.³⁶¹

Debate about the exemption

Previous attempts to introduce small business exemption³⁶²

In March 1997, the Howard Government announced a commitment to exempt small businesses from unfair dismissal laws.³⁶³ Since then, the Government made two attempts to introduce a small business exemption by regulation and it made eight other attempts to introduce the exemption by bill. These attempts were blocked by the Senate. The original 1997 proposal was for an exemption for businesses with less than 15 employees but only in relation to new employees who had less than a year's continuous service in the business. The most recent bill, introduced in December 2004, would have exempted businesses with less than 20 employees but only in relation to new employees.³⁶⁴ The new proposal to exempt businesses with up to 100 employees was announced by the Prime Minister in May 2005.

Arguments for the exemption

The Federal Government's *WorkChoices* information booklet states:

The costs of unfair dismissal laws weigh more heavily on small and medium businesses than on larger businesses. The current unfair dismissal laws discourage employers from putting on more staff, through fear that if the employee turns out to be unsuitable the employer may face an unfair dismissal claim without merit.³⁶⁵

³⁶⁰ New section 170CE(5E), *Workplace Relations Act 1996* (Cth).

³⁶¹ New section 170CE(5EA). See Senate amendment No. 174.

³⁶² The information in this paragraph is sourced from Commonwealth Parliamentary Library, *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004*, Bills Digest No 112, 2004-05.

³⁶³ This was part of its small business statement, *More Time for Business*, which responded to a 1996 report of the Small Business Deregulation Task Force.

³⁶⁴ See *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004*.

³⁶⁵ *WorkChoices* guide, note 48, p51.

The Federal Minister for Workplace Relations, Hon Kevin Andrews MP, previously put the following case for an exemption for businesses employing *less than 20 employees*:

The government remains determined to effect this important change for small business and to free up the jobs that these laws are costing. This will have an enormous benefit for the Australian economy, particularly for those people who are looking for work or who are looking for better work. The wealth generated from these extra jobs will flow through to everyone in Australia.³⁶⁶

Minister Andrews explained that:

Over 96 per cent of Australian businesses are small businesses and around half of Australia's private sector workforce is employed by small businesses...

The current unfair dismissal laws place a disproportionate burden on small businesses. Most small businesses do not have human resource specialists to deal with unfair dismissal claims. Attending a commission hearing alone can require a small business owner to close for the day.

The time and cost of defending a claim, even one without merit, can be substantial. In fact, according to a study by the Melbourne Institute of Applied Economic and Social Research, the cost to small and medium sized businesses of complying with unfair dismissal laws is at least \$1.3 billion a year.

.....

A growing body of evidence shows that small businesses are reacting to the complexity and cost of these laws by not taking on additional employees. A report by the Centre for Independent Studies, for example, indicates that, if only five per cent of small businesses employed just one extra person, 50,000 jobs would be created, and concludes that 'employment in small business would rise significantly in the absence of unfair dismissal laws'.

Similarly, the Melbourne Institute study found that unfair dismissal laws had played a part in the loss of 77,000 jobs. According to the report, unfair dismissal laws particularly disadvantage those most in need of opportunities – the long-term unemployed, young people and the less well educated.

The August 2004 Sensis Business Index found that 28 per cent of small and medium businesses had decided not to take on additional employees because of the fear of the possibility of unfair dismissal action. The survey also found that if businesses had put on the additional employees, they would have put on, on average, between two and three additional employees each. This reinforces the finding that unfair dismissal laws are costing Australia very large numbers of jobs.³⁶⁷

Arguments against the exemption

The exemption will not generate employment: In a June 2005 report by the Senate Employment, Workplace Relations and Education References Committee on unfair dismissal and small business employment, the majority report from ALP and Democrat Senators concluded:

...there is no empirical evidence or research to support the Government's claim that exempting small business from unfair dismissal laws will create 77,000 jobs...A review of the evidence shows conclusively that the claims made by the Government and employer groups are fuelled by misinformation and wishful thinking rather than objective appraisal of the facts.³⁶⁸

³⁶⁶ Hon Kevin Andrews MP, *Commonwealth Parliamentary Debates*, 2/12/04, p2.

³⁶⁷ *Ibid*, p3-4. See also Australian Chamber of Commerce and Industry, 'Unfair Dismissal Law – Doing More Harm Than Good', August 2005. The arguments for the exemption are also summarised in Explanatory Memorandum, note 91, p23ff.

³⁶⁸ Senate Employment, Workplace Relations and Education References Committee, *Unfair Dismissal*

The majority report recommended that the Government work with stakeholders to “make unfair dismissal laws more effective by reducing the procedural complexity and cost to small business of the current unfair dismissal process”; and that it make no changes to the laws until an independent review has been conducted by experts.³⁶⁹ Government Senators responded:

Government senators believe that the majority report has used selective evidence and data to downplay the concerns of small business employers about the effect of unfair dismissal laws.

.....

...The evidence from Australia and abroad shows a clear causal link between the perceptions of small business employers and their willingness to employ new staff...Surveys have been too numerous and their findings too consistent to be rejected by the Opposition as evidence of little or no value.³⁷⁰

Associate Professor R Barrett from Monash University published a paper in June 2005, which concluded that “there is no clear and convincing evidence that shows an exemption of small businesses from [unfair dismissal laws] will generate new jobs in small businesses”.³⁷¹

An article by Robbins and Voll, published in 2005 in the *Australian Bulletin of Labour*, states:

As critics such as Waring and De Ruyter (1999), Pittard (2002), Barrett (2003) and the ACTU (2005) have shown...there is no clear link between employment and unfair dismissals and the calculations offered by the government do not stand up to scrutiny. Indeed this was also the opinion of the Federal Court. The surveys by Robbins and Voll (2004) and Robbins, Murphy and Petzke (2004) also found that, on the whole, small businesses did not share the government’s conviction of an employment link.³⁷²

In 2005, Dr Paul Oslington and Benoit Freyens published the results of a study into the employment impact of unfair dismissal laws. Their study involved a survey of 1800 small and medium enterprises across Australia. They concluded that if an exemption from unfair dismissal laws was introduced and 50 per cent of workers were therefore excluded from accessing unfair dismissal laws, “the likely employment gains...will be about 6,000 jobs. This is a very small number in comparison with government claims”.³⁷³

In a paper presented in September 2005, Professor Mark Wooden said that the case for exempting businesses employing up to 100 employers was much weaker than the case for exempting only small businesses.³⁷⁴ He explained that unfair dismissal laws are “unlikely to

and *Small Business Employment*, June 2005, p31.

³⁶⁹ Ibid, pp32-33.

³⁷⁰ Ibid, pp34-35.

³⁷¹ Barrett R, ‘Small business and unfair dismissal’, undated, accessed at: <http://www.econ.usyd.edu.au/content.php?pageid=14896>

³⁷² Robbins and Voll, ‘The Case for Unfair Dismissal Reform’: A review of the evidence’, (2005) 29(2) *Australian Bulletin of Labour* 237 at 250.

³⁷³ Oslington P and Freyens B, ‘The Likely Employment Impact of Removing Unfair Dismissal Protection’ (2005) 56 *Journal of Australian Political Economy* 56 at p62.

³⁷⁴ Wooden M, note 16, pp12-13.

have much impact on larger firms” because they “typically have the resources and personnel to both avoid recruitment and selection mistakes and to ensure termination is preceded by due process”. Professor Wooden’s view was that, “restrictions on [f]iring are only likely to have a sizeable impact on employment decisions in the very small firms”.³⁷⁵

Other arguments against the exemption: Even if there was a proven link between unfair dismissals and employment levels critics argue that there “would still be a powerful case on grounds of both equity and efficiency for laws of general application which protect workers against arbitrary or unnecessary deprivation of their livelihood, regardless of the size of their employer”.³⁷⁶ In other words the rights of workers not to be unfairly dismissed should prevail over any possible increase in employment. It has also been argued that removing the exemption is likely to lead to a rise in bullying and harassment of employees by employers.³⁷⁷ In addition, it has been argued that the proposed exemption from unfair dismissal laws will put Australia in breach of its obligations under the ILO Termination of Employment Convention 1982.³⁷⁸

Exemption if dismissal for genuine operational reasons

Redundancy dismissal under old system

Under the Federal and State systems prior to the reforms, dismissal of an employee on the grounds of redundancy (ie: the employer no longer wishes the job the employee has been doing to be done by anyone) could be an unfair dismissal if, for example: (a) the redundancy was not genuine because the employer subsequently employed another person in the same position as the employee who was dismissed; or (b) the employer did not fairly select employees for redundancy on an unbiased basis; or (c) The employer did not adequately consult with the employees or explore alternative options (eg redeployment); or (d) the employer failed to provide the relevant employees with reasonable redundancy benefits.³⁷⁹

Exemption for operational reasons under new system

An unfair dismissal claim now cannot be made if the employee was dismissed for genuine operational reasons, or for reasons that include genuine operational reasons.³⁸⁰

³⁷⁵ Wooden M, note 16, pp12-13.

³⁷⁶ Creighton and Stewart, note 15, p460.

³⁷⁷ See, for example, ‘New laws will give employees a choice: the minimum wage or the sack’, *Sydney Morning Herald*, 2/6/05.

³⁷⁸ See International Centre for Trade Union Rights, *Submission to Senate Committee inquiry into Workplace Relations Amendment (Work Choices) Bill 2005*, November 2005, pp59-60.

³⁷⁹ See *Shop Distributive and Allied Employees’ Association NSW v WD & HO Wills Holdings Ltd* [2000] NSWIRComm 98, Sams DP. Note that an employee who is made redundant may have an entitlement to a certain level of redundancy benefits under an award or workplace agreement.

³⁸⁰ New section 170CE(5C), *Workplace Relations Act 1996* (Cth).

Operational reasons are reasons of an economic, technological, structural or similar nature relating to the employer's business.³⁸¹ For example, a dismissal "because a machine will do a job that was previously done by an employee would be a genuine operational reason".³⁸²

A mere assertion by an employer that a dismissal was for genuine operational reasons will not be sufficient to exclude an unfair dismissal claim.³⁸³ The Commission must be satisfied that the operational reasons relied on were genuine before the claim will be excluded.³⁸⁴

Note that this exemption does not apply if one of the reasons for the employee's dismissal was a reason that is prohibited under the unlawful dismissal laws.³⁸⁵ For example, if the employee was selected for redundancy on the grounds of her pregnancy or trade union membership.

Debate about exemption for operational reasons

Reasons for exemption for operational reasons

The Minister for Workplace Relations, Kevin Andrews, has stated that:

"What we're trying to prevent is workers double-dipping by taking redundancy payments then coming back later and claiming they were unfairly dismissed."³⁸⁶

Criticism of exemption for operational reasons

However, a submission to the Senate inquiry by a group of 151 academics argues that:

...certain employees may be victimised and targeted for dismissal in a redundancy process. Such employees should not be denied access to unfair dismissal remedies. Moreover, 'economic' and 'structural' factors potentially go well beyond instances of genuine redundancy exemplified in the explanatory memorandum. For example, if an employer decided to replace award-covered workers with cheaper employees on the minimum standards, this would provide an economic advantage to the employer and could therefore constitute a genuine 'economic' reason to exclude any unfair dismissal claim...³⁸⁷

³⁸¹ New section 170CE(5D), *Workplace Relations Act 1996* (Cth).

³⁸² Explanatory Memorandum, note 91, p320. See also examples on pp321-322.

³⁸³ Explanatory Memorandum, note 91, p320.

³⁸⁴ New section 170CEE, *Workplace Relations Act 1996* (Cth). See the illustrative example of a sham redundancy given in Explanatory Memorandum, note 91, p322.

³⁸⁵ See Explanatory Memorandum, note 91, p320.

³⁸⁶ See 'Staff in big firms could face sack', *The Age*, 19/10/05.

³⁸⁷ Submission to Senate inquiry on bill by a group of 151 academics, note 95, p12.

Qualifying period increased to 6 months

Employees cannot bring an unfair dismissal claim unless they have completed a qualifying period of employment of six months (previously 3 months) with the employer.³⁸⁸ The qualifying period may be a shorter or longer period determined by written agreement between the employer and the employee before the commencement of the employment.³⁸⁹ A longer qualifying period must be reasonable having regard to the nature of the employment.³⁹⁰

Changes will not affect unlawful dismissal laws

The above changes will not affect Federal unlawful dismissal laws. All employees will continue to be entitled to apply for relief if they have been dismissed for one or more of these reasons:

- (a) temporary absence from work because of illness or injury within the meaning of the regulations;
- (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
- (c) non-membership of a trade union;
- (d) seeking office as, or acting or having acted in the capacity of, a representative of employees;
- (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (g) refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA;
- (h) absence from work during maternity leave or other parental leave;
- (i) temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.³⁹¹

If an employee elects to pursue a claim of unlawful dismissal in the Federal Court, the onus will be on the employer to prove that the dismissal was not for one of the above reasons.³⁹² If the Court finds that the dismissal was unlawful, it has available to it the same remedies that apply in the case of an unfair dismissal and it may also fine the employer an amount up to \$10,000.³⁹³

³⁸⁸ New section 170CE(5B)(a), *Workplace Relations Act 1996* (Cth).

³⁸⁹ Section 170CE(5B), *Workplace Relations Act 1996* (Cth).

³⁹⁰ Section 170CE(5B), *Workplace Relations Act 1996* (Cth).

³⁹¹ Section 170CK(2), *Workplace Relations Act 1996* (Cth).

³⁹² Section 170CQ, *Workplace Relations Act 1996* (Cth).

³⁹³ Section 170CR, *Workplace Relations Act 1996* (Cth).

Financial assistance for legal advice on unlawful dismissal claims

As part of the reforms, the Federal Government will provide eligible employees with financial assistance of up to \$4,000 for independent legal advice in relation to an unlawful dismissal claim.³⁹⁴ To be assessed as eligible, an applicant must have received a certificate from the Commission indicating that the case has merit and could not be resolved through conciliation. Eligibility of applications will be assessed against 'financial need' criteria.

Changes for employees who move out of NSW system

The State unfair dismissal system is very similar to the *pre-reform* Federal unfair dismissal system and therefore employees who move from the State system to the Federal system will be subject to the same changes as described above: eg loss of unfair dismissal rights for employees who are employed by a business which employs up to 100 employees.

Employees who move to the Federal system will also be subject to other changes arising from differences between the State system and the *pre-reform* Federal system. These other changes will only be relevant to employees who are employed by businesses with more than 100 employees. One example is that the Federal system excludes a wider category of employees from accessing the unfair dismissal laws.³⁹⁵ For example, the Federal system excludes employees if they were engaged under a contract of employment for a fixed period, whereas the NSW system only excludes such employees if the fixed period is less than 6 months.

³⁹⁴ *WorkChoices* guide, note 48, p52.

³⁹⁵ Compare new section 170CBA with section 83(2), *Industrial Relations Act 1996* (NSW).

12. GENERAL DEBATE ABOUT REFORMS

Overview

This section provides a brief outline of the general debate about the reforms.³⁹⁶ Debate about each of the changes to the content of the Federal system is covered in the previous sections. Debate about the creation of a national system is outlined in the earlier Briefing Paper.

Arguments for the reforms

General

The Minister for Workplace Relations, Hon Kevin Andrews MP, advanced the following case for introducing the *Work Choices* reforms (in part):

This is economic reform the Australian way – evolutionary and in a manner that advances prosperity and fairness together....

[The reforms] rest on a simple proposition that the best guarantee of good jobs, high wages and a decent society is a strong and productive economy. No system of industrial regulation can protect jobs and support high wages if our economy is not strong and productive.

The key to advancing prosperity and fairness together is higher productivity. Australia's economic strength and the living standards of our people depend, ultimately, on the productivity of our workplaces.

When productivity is higher the whole economic pie is bigger. Individuals and families benefit from more jobs, better jobs and higher living standards. Society as a whole has more resources to devote to services like health and education, as well as a strong social safety net.

A central objective of [the reforms] is to encourage the further spread of workplace agreements in order to lift productivity and hence the living standards of working Australians. It is no coincidence that those industries that have the highest workplace flexibility also enjoy the highest productivity growth and the highest wages.

We need more choice and flexibility for both employers and employees, so we can work smarter, reward effort and find the right balance between work and family life.

.....

Work Choices is not simply about raising the living standards of those Australians in jobs. It is also about getting more Australians into jobs...³⁹⁷

Business groups and employer associations have supported the Federal Government's case. For example, the Australian Chamber of Commerce and Industry has released a position paper entitled, *The Economic Case for Workplace Relations Reform*.³⁹⁸

³⁹⁶ For further reading on the debate, see the Senate report on the *Work Choices* bill, note 93; and the submissions made to the Senate inquiry, which are available at: http://www.aph.gov.au/Senate/committee/eet_ctte/wr_workchoices05/submissions/sublist.htm

³⁹⁷ Hon Kevin Andrews MP, *Commonwealth Parliamentary Debates*, 2/11/05, p12.

³⁹⁸ Australian Chamber of Commerce and Industry, *The Economic Case for Workplace Relations Reform*, Position Paper, November 2005.

The Position Paper argues that there is some evidence that the benefits of past reforms are waning and that Australia is now facing a number of challenges that call for further reforms, including “ageing of the population, movements of terms of trade, high oil prices and global competitive pressures in our region, especially with the emergence of China and India”.³⁹⁹ The paper notes that the imperative for reform is strongly supported by official statements from a number of respected organisations and academics in Australia. It also states that, overseas, the International Monetary Fund and the OECD, amongst others, have supported the call for more labour market reform in Australia.⁴⁰⁰ The paper also refers to successes resulting from workplace reforms in other countries, including in New Zealand and the UK.⁴⁰¹

According to the paper, the evidence:

...consistently shows that workplace relations reform, particularly when coupled with other complementary economic and social reforms, will:

- Reduce unemployment and increase workforce participation, particularly for women, youth, and older men and reduce long term unemployment;
- Reduce poverty and the informal economy;
- Increase growth in productivity, employment, output, consumption and investment;
- Increase wages in line with productivity growth;
- Improve job security and living standards;
- Increase business entry (and thus employment and self-employment);
- Allow Australia to benefit from economic opportunities, particularly expanding world trade;
- Make the economy more flexible – that is, the economy will adjust to shocks faster;
- Reduce the variability of economic performance;
- Reduce the risk of economic downturns and minimise the economic and social costs if a downturn occurs;
- Reduce unnecessary regulation of business, which impedes growth and innovation;
- Encourage skills development and training;
- Expand the use of enterprise bargaining. There are substantial benefits from the increasing use of collective and individual agreements, to employees as well as employers and the broader economy.⁴⁰²

³⁹⁹ Ibid, p8.

⁴⁰⁰ Ibid, p8.

⁴⁰¹ Ibid, p9.

⁴⁰² Ibid, p9.

The Position Paper deals with some of the criticism of the reforms by stating that:

- It is not about removing or diminishing Australia's social safety net. It is about designing the safety net in the most efficient and economically sustainable way...if a more comprehensive safety net is needed, it is better for the economy and society for this to be provided through the tax and income support systems;
- It is not about trying to compete with Asia (particularly China) by lowering wages. We should not try to compete on wages, we can (and should) compete by having higher productivity.
-
- It is not about reducing fairness. Our highly complex system in fact impedes fairness, particularly by reducing employment and locking too many people into the regulatory controls of the old arbitration system.
- Reform is not about reducing wages. Reform will increase wages, growth and well-being by allowing labour market outcomes to be linked to workplace productivity. This has already happened following the workplace reforms of the 1990s.
- It is not about delivering employers unfettered bargaining power. Giving unfettered power to any party is not a path to productivity, efficiency or job creation. Co-operative workplace relations and direct work relationships characterised by agreement-making is.
- It is not about reducing the security of jobs – the evidence shows that real job security comes from a strong economy that can sustain new and existing jobs. Past reforms that led to more productive workplaces have increased job security...
- It is not about reducing job quality (including hours and satisfaction). Job quality has not deteriorated with past reforms.⁴⁰³

Balancing work and family responsibilities

The Minister for Workplace Relations, Hon Kevin Andrews MP, states that:

This bill provides both protection and flexibility to help Australians meet their work and family responsibilities.

Work Choices will protect Australian families by making it unlawful for a workplace agreement to have pay and conditions that are less generous than the fair pay and conditions standard of up to 52 weeks of unpaid parental leave at the time of the birth or adoption of a child.

.....

Award reliant employees will not lose current entitlements to family-friendly working arrangements and will continue to receive any penalty rates, loadings for overtime or shiftwork, allowances, incentive based payments and bonuses that they are currently entitled to under their award.

It will remain unlawful for an employer to terminate an employee's employment on certain grounds, including marital status, family responsibilities or pregnancy, or because of absence of work during maternity or other parental leave, regardless of the size of the business they work for.

Nothing is more important to family security than a strong Australian economy.

These are reforms that will strengthen our economy and will secure better opportunities for all Australians into the future.⁴⁰⁴

⁴⁰³ Ibid, pp9-10.

⁴⁰⁴ Hon Kevin Andrews MP, *Commonwealth Parliamentary Debates*, 2/11/05, p16.

Arguments against the reforms

Case for these reforms has not been made out

In the Senate Committee report on the *Work Choices* bill, Opposition Senators stated:

The Government has failed to provide a convincing economic case for its proposed policy. There is no compelling evidence to show that the proposed laws will create jobs, lift productivity or improve living standards. There is no evidence that the industrial relations system has hindered national economic performance either. Opposition Senators note that there has been sustained productivity and employment growth for the better part of a decade ...⁴⁰⁵

Opposition Senators argue that the reforms are misdirected:

Opposition Senators believe that the Government's Work Choices Bill is a wasted opportunity to address economic priorities such as investment in education and skills, research and development, leadership in social and economic infrastructure investment, the need to reduce dependence on domestic debt and consumption as drivers of growth, and the importance of savings.⁴⁰⁶

A submission to the Senate Committee inquiry on the bill by the group of 151 academics states:

There are good arguments to reform Australia's workplace arrangements. Australia faces labour market challenges that need to be addressed, including labour and skill shortages, work-family tensions, production issues in a globalised economy, and the growth of precarious employment...

However, when we analyse the *Bill* and the evidence in relation to its proposals to address these and other issues, we find that the case is not made. The Government asserts that jobs and productivity will grow as a result of the *Bill*. On the evidence available from existing research there is no solid research basis to give confidence that this *Bill* will address these economic and social problems...⁴⁰⁷

Reforms will impact adversely on employees, their families and society

General comments

Trade unions, academics, Federal political parties, State governments, and a number of academics and welfare and religious groups have expressed strong opposition to the reforms. Outlined below are some general criticisms that have been made of the changes.

The Federal Opposition Leader, Hon Kim Beazley MP, said that the legislation:

...is like a nest of termites that in the months and years ahead will slowly eat away at the foundations of the living standards of our families. It undermines family life by proposing to give employers the power to change employees' work hours without reasonable notice. It attacks living standards, removing the no-disadvantage test from all our collective and individual agreements. It abolishes annual wage

⁴⁰⁵ Senate Committee report on *Work Choices* bill, note 93, pp84-85. See also Australian Democrat Senators at pp102-104; and Australian Greens Senators at p142.

⁴⁰⁶ Ibid, p85.

⁴⁰⁷ Submission to Senate inquiry on *Work Choices* bill by a group of 151 academics, note 95, p 43.

increases...with the simple aim of reducing the minimum wage in real terms...It takes away the independent umpire who can currently ensure fair wages and conditions and resolve disputes...

It distorts the workplace bargaining relationship in favour of employers and against employees. It denies Australian employees the capacity to bargain collectively with their employer for decent wages and conditions. It denies individuals the right to reject individual contracts which cut pay and conditions and undermine collective bargaining and union representation....It takes away protection from unfair dismissal from almost four million workers and...seriously compromises it for all.⁴⁰⁸

A Joint submission by State Governments to the Senate Committee inquiry on the Work Choice bill argues that the new laws will increase cost and complexity, especially for small business, and that they will result in unfair outcomes, especially for vulnerable workers.⁴⁰⁹ The State Governments also state that the new laws “should be understood in the broader context of how it interacts with the federal government’s overall policy agenda”.⁴¹⁰ They refer, for example, to the new “welfare to work” laws which require people with a disability and parents who are in receipt of income support to work 15 hours per week. The State Governments argue that, “the combined effect of these legislative changes may result in welfare recipients, who have little or no bargaining power, losing their benefits if they refuse to enter into a sub-standard AWA”.⁴¹¹

The Senate inquiry submission by the group of 151 academics argues that the reforms will:

- Undermine people’s rights at work;
- Deliver a flexibility that in most cases is one way, favouring employers;
- Do little or nothing to address work-family issues and exacerbate problems on several fronts;
-
- Disadvantage the individuals and groups already most marginalised in Australian society;
- Widen inequality;
- Add levels of complexity to the regulation of industrial relations, that both employers and employees will struggle to understand and apply;
- Intrude, uninvited, into the workings of State industrial relations systems in a ‘one-size –fits-all’ approach.

These effects will not all happen immediately. Many of these changes will take time to manifest themselves ... The long run consequences will be much more serious than those apparent immediately after the legislation takes effect. It is these long term effects, and their consequences for Australian workplaces that provokes our shared, grave concern and opposition to the *Bill*.⁴¹²

Impact of similar reforms in other jurisdictions

In the Senate Committee report on the *Work Choices* bill, Opposition Senators referred to a report by the Australian Centre for Industrial Relations Research and Training (ACIRRT) into

⁴⁰⁸ Hon Kim Beazley MP, *Commonwealth Parliamentary Debates*, 3/11/05, p6.

⁴⁰⁹ Joint State Governments submission to Senate inquiry on *Work Choices* bill, note 148, p69.

⁴¹⁰ *Ibid*, p69.

⁴¹¹ *Ibid*, p67.

⁴¹² Submission to Senate inquiry on *Work Choices* bill by a group of 151 academics, note 95, p43.

the Work Choices bill. According to the Opposition Senators:

... The [ACIRRT] report refers specifically to the award systems in Victoria, Western Australia and New Zealand which were replaced with bargaining systems underpinned by statutory minimum standards. The report found that the outcomes across these deregulated award systems have been remarkably consistent. The overwhelming majority of individual agreements were narrowly focused on changes to earnings and working hours; large groups of employees lost penalty rates, overtime rates, shift penalties and other allowances; labour market deregulation was associated with the growth of low-wage jobs, especially in regional areas and particular sectors including hospitality, recreation, personal services and mining and construction.⁴¹³

Balancing work and family responsibilities

The submission to the Senate Committee inquiry by the group of 151 academics argues that the reforms are heavily weighted in favour of employers and will exacerbate the current problems that workers have in balancing their work and family responsibilities. Their reasons include:

- The conditions in the Australian Fair Pay and Conditions Standard are lower than national work and family standards. They incorporate only basic family leave provisions and fail to incorporate the right for parents to request extended parental leave, part-time work or more shared parental leave.
- The Industrial Relations Commission has been the source and forum for all recent general advances on work and family standards. Under the *Bill* it will lose this role. It is hard to see where future advances on work and family provisions will come from. This will especially affect the most vulnerable in the labour market.
- The capacity for AWAs to set aside key award conditions (public holidays, annual leave loadings, allowances and penalty, shift and overtime loadings) will see both long and unsocial working hours increase. Many mothers returning to work will lack effective power to refuse terms in AWAs which are family unfriendly.⁴¹⁴

Women and equal remuneration

The submission to the Senate Committee inquiry by the group of 151 academics argues that the reforms are likely to increase the gender pay gap in Australia. Their reasons include:

- Women are more likely than men to be concentrated in jobs that are dependant on minimum wages and most analysts predict that the reforms will result in minimum wages decreasing relative to average wages.
- Evidence demonstrates that women workers end up worse than men under individualised arrangements (ie AWAs).

⁴¹³ Senate report on *Work Choices* bill, note 93, p71. See also Submission to Senate inquiry on *Work Choices* bill by a group of 151 academics, note 95, p22, p32.

⁴¹⁴ Submission to Senate inquiry on *Work Choices* bill by a group of 151 academics, note 95, p35ff. See also 'Work overhaul bad for families', *Sydney Morning Herald*, 28/11/05.

- The loss of access by most women to state industrial tribunals will deny them the opportunity to redress pay inequity through the state-based pay equity principles.⁴¹⁵

Workers from disadvantaged groups

The Human Rights and Equal Opportunities Commission states that it:

...has a range of concerns in relation to the capacity of an increasingly deregulated labour market to protect economic and socially vulnerable employees, in particular women, people from a non-English speaking background, Indigenous Australians, employees with a disability and young people.⁴¹⁶

It is argued that the reforms will have greater adverse consequences for these workers because they rely more heavily on the award safety net and they are less likely to be able to protect or improve their conditions through bargaining with their employers.

Inequality in society

The submission to the Senate Committee inquiry by the group of 151 academics states:

Inequality in the Australian labour market has been widening in recent years, as the top of the labour market has enjoyed rapid increases in wages and benefits, while the bottom has lagged some distance behind. Inequality in the labour market has important social consequences which reach beyond the direct impacts upon the poor and low paid and encompass social exclusion, intergenerational disadvantage, higher levels of societal violence and health effects for the larger society. Given the traditional value placed on equality in Australia, and fair opportunities for all, we are concerned about the impact of the *Bill* on wider social and economic inequality in Australia.⁴¹⁷

Occupational health and safety

The submission to the Senate Committee inquiry by the group of 151 academics argues that:

The combination of pressures towards increased work-life conflict, reduced control over working hours and greater job insecurity inherent in the [reforms] constitute a major threat to occupational health and safety.

.....

...The negative OHS impact of the [reforms] will inevitably fall most heavily on the workers who are already most disadvantaged in the labour market, and most likely to be precariously employed, especially women, the less skilled and older workers.⁴¹⁸

⁴¹⁵ Submission to Senate inquiry by a group of 151 academics, note 95, p33ff. See also Pocock B and Masterman-Smith H, 'WorkChoices and Women Workers', (2005) 56 *Journal of Australian Political Economy* 126; and 'Women's hourly pay likely to suffer', *Australian Financial Review*, 13/7/05.

⁴¹⁶ Human Rights and Equal Opportunities Commission, *Submission to Senate Committee inquiry into Workplace Relations Amendment (Work Choices) Bill 2005*, 10 November 2005, p39.

⁴¹⁷ Submission to Senate inquiry on *Work Choices* bill by a group of 151 academics, note 95, p6.

⁴¹⁸ *Ibid*, p40.

13. CONCLUSION

The Howard Government's *Work Choices* reforms will substantially change the industrial relations landscape in Australia. The new laws rewrite the constitutional basis for the Federal industrial relations system, they greatly enlarge the Federal system at the expense of the State systems, and they make fundamental changes to minimum wages and employment conditions, workplace agreements, industrial action, dispute resolution and unfair dismissal laws.

The reforms are highly controversial. The Federal Government and business groups argue that the reforms will make the system simpler and give employers and employees more choice and flexibility in setting their wages and employment conditions. This, it is said, will lead to greater productivity and a stronger economy, which will result in more jobs, higher wages and better living standards. Critics argue that employers will have more choices but the great majority of employees will lack sufficient bargaining power to make any real choices. As a result, it is argued that many employees, and particularly those who are at the bottom end of the labour market, will suffer reduced real wages and working conditions, lower living standards and greater difficulty in balancing their work and family responsibilities.

The reforms will come into effect in March 2006 but there is some uncertainty about their future because of the High Court challenge. The Federal Opposition is also committed to reversing the reforms if it comes to power.

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