



Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

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Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

Date introduced: 28 May 2007

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: The formal provisions (clauses 1 to 3) commence on Royal Assent. The substantive provisions (Schedules 1, 2 and 3) commence six months after Royal Assent unless commenced earlier by proclamation. However, many of the provisions have retrospective effect from 7 May 2007.

Purpose

The Bill amends the *Workplace Relations Act 1996* (WR Act) to establish a fairness test for workplace agreements and to establish two new statutory agencies—the Workplace Authority and the Workplace Ombudsman.

Background

On 4 May 2007, the Prime Minister, the Hon. John Howard, and the Minister for Employment and Workplace Relations, the Hon. Joe Hockey, announced significant changes to the agreement-making operation of the [Workplace Relations Act 1996](#). Effective from 7 May 2007, a ‘fairness test’ would be introduced and would apply to certain collective agreements and Australian Workplace Agreements (AWAs).

This Bill introduces these amendments, as well as related amendments providing a prohibition on:

- dismissing or threatening to dismiss a worker because an agreement fails or may fail the fairness test, or
- coercing an employee to agree to the modification or removal of a protected award condition.

A prohibition against AWA duress will apply where an employer who has purchased a business requires an employee to sign an AWA as a condition of ongoing employment with the business.

The Bill’s provisions also establish the Workplace Authority and the Workplace Ombudsman. In addition, the Government has moved amendments to this Bill which will allow for the on-going registration of ‘organisations’ which may not otherwise satisfy the existing registration criteria (from 27 March 2009). Also, tougher freedom of association

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and non association provisions are introduced with the purpose of relocating the ban on union bargaining fees from the Regulations to the main body of the WR Act.

However, as the fairness test is the centrepiece of the Bill, it is useful to review the role of the ‘no disadvantage’ test. The ways in which workplace agreements were approved in the 1980s, and the move towards Labor’s ‘no disadvantage’ tests (1992–93), are reviewed. Then the proposed test under the initial Workplace Relations and Other Legislation Amendment Bill 1996 (WROLA Bill), and the form of the test adopted following Senate negotiations to pass that Bill, are covered. The Digest then reviews the operation of the ‘no disadvantage’ test in practice, in respect of the approval of Australian Workplace Agreements by the Office of the Employment Advocate in the pre-Work-Choices system. Finally an outline of the proposed fairness test facilitated by this Bill is canvassed.

The ‘no disadvantage’ test

ALP measures

The *Conciliation and Arbitration Act 1904*, at the time of its repeal in 1988, provided for certified agreements and consent awards (both under section 28). The 1983 Prices and Incomes Accord of the ALP and the Australian Council of Trade Unions (ACTU), inter alia, sought changes to the operation of the then Conciliation and Arbitration Commission’s wage guidelines in the second half of the 1980s, in effect seeking the Commission’s endorsement of wages and conditions arrangements and approval of changes to work arrangements at the enterprise level in order to secure wage increases. The incoming *Industrial Relations Act 1988* continued certified agreements (section 115) but also introduced a separate Consent Awards provision (section 112). The reason for these changes was explained:

In order to allow the greatest possible flexibility, yet avoid the undesirable outcomes of a totally decentralised system, the Bill provides for both the currently available consent awards and for fixed term, non-variable binding agreements which will be certified by the Commission. Such agreements differ from the current consent award provisions in that they will have a specified life, after which they will lapse, and will not be able to be varied during that period ...¹.

However, discretion to approve or not approve these arrangements rested with the Australian Industrial Relations Commission (AIRC), subject to its finding that the agreement/consent award was not contrary to the public interest. The Keating Government sought to reduce this discretion, and in doing so, introduced statutory guidelines on the approval of enterprise agreements (certified agreements) in 1992 and 1993. In 1992 the ‘no disadvantage’ test was specified in the following outline:

The circumstances in which the Commission may find that an agreement will disadvantage employees are specified. It must first consider whether certification would result in the reduction of employment entitlements and protections for employees covered by the agreement, under an award or under any other law that the

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Commission considers relevant. If it judges that such a reduction would occur, it must consider whether or not the reduction is contrary to the public interest, in the context of the terms and conditions of those employees considered as a whole.²

However this test was relaxed in the following year. Minister Brereton explained the new test in these terms:

The No Disadvantage Test has been an important innovation. Applying as it does to the overall package of employee entitlements, it allows for a wide range of variations to award conditions. It also allows for agreed reductions if these are judged not to be against the public interest, for example, as part of a strategy for dealing with a short-term business crisis and revival. However, as the government has consistently stressed, the provision is intended to protect well established and accepted standards which apply across the community, standards such as maternity leave, hours of work, parental leave, minimum rates of pay, termination change and redundancy provisions and superannuation.³

The new 'no disadvantage' scheme was soon tested in the *Tweed Valley Fruit Processors* case. An Enterprise Flexibility Agreement, initially approved by the AIRC, sought to modify/remove conditions in the following areas:

- public holidays had been reduced from 12 to 9
- hours of work had been increased from 38 to 40
- no provision for paid sick leave and no specific entitlement to unpaid sick leave
- non-team members received a 10 per cent allowance for afternoon shift and 20 per cent for night, but team members received no allowances in return for receiving a higher rate of pay (under the award, all employees received a 15 per cent allowance for afternoon shift and 30 per cent for night shift)
- all overtime was to be paid at time and a half, whereas under the award it was paid at time and a half for the first three hours and double time thereafter, with double time for all Saturday afternoon and Sunday work
- junior employees were defined as employees under 19 years of age whereas the award defined them as employees under 18 years of age. Junior employees would receive 70 per cent of the adult wage rate (under the award, they received 75 per cent)
- there was no mixed-functions clause in the agreement
- payment for call-outs was at the overtime rate with a minimum of two hours pay (the award provided a minimum of four hours' pay)
- jury-service leave and bereavement leave could only be taken as unpaid leave or as part of annual leave
- no right of entry for union officials
- no casual loading

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- three months probationary period (one week under the award), during which an employee could be terminated at one hour's notice
- spread of ordinary hours from 5am–7pm (6am–6pm under the award)
- no annual leave loading
- no provision for redundancy pay, and
- no allowances paid, since they were said to have been taken into account when calculating wage rates set out in the agreement.⁴

These reductions were offset by a higher wage, a productivity bonus and an attendance bonus. A Full Bench of the AIRC overturned the Tweed Valley EFA on the basis that the then 'no disadvantage' test was intended to protect established and accepted community standards, and the superior conditions offered as an offset were either hard to quantify or nebulous. The Full Bench decision in effect confirmed that the basic safety net of award conditions would stand.

The Coalition's models

As introduced in May 1996, the Howard Government's WROLA Bill proposed replacing the 'no disadvantage' test with a 'no less favourable' test. This test was proposed to be an assessment of the agreement against statutory minima, with the wage rate being derived from employees' relevant or designated award and other entitlements subject to the proposed statutory prescription. These minima were:

- wages over a period no less than the wages that would have been earned over the period under the award
- no less than four weeks recreation leave with pay each year
- no less than 12 days of personal/carer's leave with pay each year if the employee is sick, is caring for a family or household member or is absent because of death of such a member
- no less than 52 weeks of parental leave or adoption leave without pay after 12 months continuous service
- long service leave on terms and conditions that are no less than those that would otherwise apply
- equal pay for work of equal value without discrimination on the ground of sex, and
- payment for jury service no less than the difference between the amount payable under the agreement for the period of absence and any amount payable by the court.

In his Second Reading Speech to the WROLA Bill, the Hon. Peter Reith claimed:

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The Bill rejects the highly paternalistic presumption that has underpinned the industrial relations system in this country for too long—that employees are not only incapable of protecting their own interests, but even of understanding them, without the compulsory involvement of unions and industrial tribunals ...

Prior to certification, the commission will test [collective] agreements to ensure the statutory minima are met. In that regard, as is the case with Labor’s No Disadvantage Test, the minimum pay guarantee may be satisfied on a collective basis ... In agreements with cashed-up penalty rates and annualised salaries, for example, the minimum pay requirement will be satisfied if earnings under the agreement at least match what could reasonably be expected to have otherwise applied under the award at the time of certification. There would be no ongoing test against the statutory minima, unless provided for by the agreement.⁵

Minister Reith’s speech and its rejection of the so called ‘paternalistic approach’ appears to be set in terms which today might be seen in contrast with the reality of direct employer–employee relations. Indeed the new fairness test seeks to remedy the sharp edge of the employer–employee relationship by interposing both a standard (or at least, evidence of offsets) and a third party to apply it—the Workplace Authority.

This proposal was not enacted, although there are some overtones between this 1996 proposal and the fairness test contained in the current Bill. Instead, the Reith proposal was subject to amendment after an agreement between the Coalition and the Australian Democrats to pass the WROLA Bill. A new ‘no disadvantage’ test was to apply both to Australian Workplace Agreements and certified agreements. The new test was described thus:

To approve the AWA (and/or any variations to it), the EA would need to be in no doubt that the proposed agreement is no less favourable to employee(s) concerned, when considered as a whole, than the relevant award. This will be a global rather than a line-by-line ‘no disadvantage’ test. A global test does not preclude line-by-line consideration of reductions and increases in entitlements or protections, in fact it requires such an assessment to form a judgement of whether all increases and reductions, when considered as a whole, result in no overall disadvantage ...

Before certifying an agreement, the AIRC will be required to satisfy itself that the proposed agreement is no less favourable to the employees concerned, when considered as a whole, than the relevant award. This will be a global rather than a line-by-line ‘no disadvantage’ test. A global test does not preclude line-by-line consideration of reductions and increases in entitlements or protections, in fact it requires such an assessment to form a judgement of whether all increases and reductions, when considered as a whole, result in no overall disadvantage.⁶

The resulting ‘no disadvantage’ test applying to both certified agreements and AWAs was found at sections 170X–XF (prior to 27 March 2006). Forsyth and Sunderland have summarised the sequential weakening of the ‘no disadvantage’ test:

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In 1996, the No Disadvantage Test was further weakened by providing that agreements be measured against any relevant award or law on a 'global' basis to ensure that employees were no worse off overall. Even where employees would be disadvantaged by an agreement, it could still be certified if this was 'not contrary to the public interest'; for example, if the agreement formed part of a strategy to deal with a short-term crisis in the relevant business. Overall, the gradual erosion of the No Disadvantage Test since its introduction in 1992 has led to increasing criticism of its effectiveness as a mechanism for protecting employees' working conditions in the transition to enterprise bargaining.⁷

Applying the 'no disadvantage' test in practice

Against this backdrop, it is useful to note the method which was used to assess agreements (AWAs) prior to Work Choices. The method which the OEA (Office of the Employment Advocate) used was explained to a Senate Estimates Committee by the Employment Advocate, Peter McIlwain:

To conduct the no disadvantage test we used a tool that had been developed over nine years called the NDT calculator—the no disadvantage test calculator. That was a spreadsheet tool. I believe it was an Excel spreadsheet. It allowed conditions in the form of values to be entered in a double ledger arrangement, with the AWA on one side and the conditions of the relevant award on the other side. It operated as a double-entry ledger and produced a result that was either neutral, positive or negative. The neutral and positive results were strong evidence that the agreement met the no disadvantage test, but other factors might be taken into account. A negative result was evidence that the agreement, at first assessment, did not meet the no disadvantage test and would require further investigation, often leading to a requirement by me for the employer to provide an undertaking to increase the overall benefit of that agreement in one form or another. There was a specific provision in the legislation that allowed me to approve an AWA where an undertaking, so described, was provided by the employer. [...] in the last 12 months or so, approximately 14 per cent of AWAs required an undertaking of that kind before they could be approved.

The no disadvantage test calculator was a tool. It was not used in an automatic way but it provided very useful information to the delegate as to the overall monetary value of the conditions provided by the AWA, allowing a consistent approach to the comparison that had to take place under the legislation with the relevant award and relevant laws. So, in short, that is how an NDT was conducted. NDTs were conducted by 140 delegates in the OEA in all regional offices and in our national office. Where an NDT had been conducted for an agreement that was in substantially the same terms or identical, previously the NDT could be applied to the agreement that was in identical or substantially the same terms. Our system recorded the NDT used for every AWA that passed through the OEA for filing and approval.⁸

Where the Employment Advocate considered that an AWA failed the 'no disadvantage' test, the AWA would be referred to the AIRC for its consideration (formerly at section 170VPH). It might be noted that an academic analysis by Mitchell et al. of the pre-Work

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Choices 'no disadvantage' test found that the OEA's use of a template/spreadsheet to calculate the benefits/losses of an agreement against an award appeared to be preferable to the method which the AIRC used to conduct a similar test in respect of certified agreements.⁹ On the negative side, Mitchell et al. also found that many employees had suffered the loss of a clearly-defined working week, with a consequence to personal and family life. Many suffered a loss of control as to when they could take annual holidays. Others no longer had any control or discretion over the nature of their job duties and functions. They concluded:

... enterprise bargaining has brought about a deterioration in the quality of working life of substantial proportions, compensated for, in many instances, by small or non-existent pay increases.¹⁰

Mitchell et al. also found that in entering into the former section-170LK (non-union) agreements and AWAs, employees were, in most cases, being dispossessed of protective power to offset against the employer's managerial discretion. Agreements considerably extended the employer's power on such matters as the scheduling of work, the definition of job duties and functions and so on, without the need for consultation with employees or unions.¹¹

It is useful to note that the pre-Work Choices 'no disadvantage' test was a global test against a relevant or designated award. An agreement that failed the 'no disadvantage' test may still, however, have been approved if it could be shown not to be against the public interest. Also, the AIRC had powers to improve the safety net—for example, it extended the years of service counted toward an employee's redundancy pay in medium or large size businesses. These powers have been lost under Work Choices. It is important to enumerate the then-allowable award matters, formerly provided as a Safety Net of Minimum Conditions under section 89A(2):

- Classifications of employees
- Ordinary time hours of work and the spread of hours within which ordinary time hours could be worked
- Rates of pay, which could be expressed as hourly rates and annual salaries. Separate rates of pay for trainees, juniors and apprentices could be included
- Piece rates, tallies and bonuses
- Annual leave and leave loadings
- Long service leave entitlements
- Personal/carer's leave
- parental leave, including maternity and adoption leave
- Public holidays
- Allowances

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- Overtime, casual and shift-work loadings
- Penalty rates
- Redundancy pay
- Specific periods of termination
- Stand-down provisions
- Dispute-settlement procedures
- Payment for jury service
- Provision for different types of employment, for example casual, regular part-time, shift work
- Superannuation
- Outworkers
- Skill-based career paths

This then was the method of assessing AWAs against the ‘no disadvantage’ test based on the then-allowable award matters. The procedures appear very systematic, almost foolproof. Yet despite this procedure being carried out, pre-Work Choices AWAs have been found not to have met the relevant award standards. In a notable case on AWAs applying in the South Australian retail bakery industry, the South Australian Industrial Relations Court found that more than 50 AWAs had been approved in the same terms as one that paid an Adelaide school student 25 per cent less than her minimum award entitlement, based on a two-page pattern AWA which bought out annual leave, annual leave loading and sick leave. That the one employee was able to have her pay reviewed by the court hinged on the employer not having complied correctly with the then AWA filing requirements.¹²

The ‘More Favourable’ Test under Work Choices

Agreement-making under the WR Act has been changed by the Work Choices legislation.¹³ Agreements no longer need to be ‘certified’ and the ‘no disadvantage’ test described above has been abolished. All agreements (both AWAs and collective agreements) are lodged with the Employment Advocate. A new simplified lodgement process for agreement-making essentially removes up-front scrutiny of workplace agreements, and the overall system rests on a post-lodgement penalty regime.

A set of minimum standards comprise the Australian Fair Pay and Conditions Standard (AFPCS). The AFPCS sets out minimum entitlements relating to: wages and casual loadings, ordinary hours of work and three types of leave (annual, personal and parental), as well as an ability to refuse work on a public holiday depending on personal/family circumstance, and a break from work after five hours. The standards that form part of the AFPCS may be displaced by a workplace agreement or by individual contract, but only

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where the provisions in question are more favourable to employees ([sections 172 and 173](#)). Existing terms in awards or notional agreements (former state awards) that contain more favourable provisions on annual, personal or parental leave still apply.

Protected award conditions such as rest breaks, annual leave loadings, public holidays, penalty rates and loadings for overtime or shift work are included in the workplace agreement unless the agreement specifically excludes or modifies them.¹⁴ This protection assumes that the employer is bound by an award. Prohibited content or matters subject to regulation are excluded from agreements.

Protected allowable award matters are specified under the Act at [section 354](#). These are:

- (a) rest breaks
- (b) incentive-based payments and bonuses
- (c) annual leave loadings
- (d) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days
- (e) days to be substituted for, or a procedure for substituting, days referred to in paragraph(d)
- (f) monetary allowances for:
 - (i) expenses incurred in the course of employment; or
 - (ii) responsibilities or skills that are not taken into account in rates of pay for employees; or
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations
- (g) loadings for working overtime or for shift work
- (h) penalty rates
- (i) outworker conditions
- (j) any other matter specified in the regulations.

The proposed fairness test

The purpose of the fairness test is to assess whether employees receive fair compensation for any protected award conditions that have been removed from their workplace agreements.

Previously, a workplace agreement could exclude or modify protected award conditions by express provision and without the need for any compensation.

Since the statement by the Prime Minister on the fairness test (4 May 2007), the Department of Employment and Workplace Relations has provided the following guide on how the fairness test is to work in practice:

Australia's workplace relations system has a set of rules and obligations that all employers are required, by law, to comply with.

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No one can be forced to sign an agreement.

Any agreement signed by an employee aged under 18 must also be signed by a parent or guardian.

Other obligations include:

Minimum wages

Working hours

Four weeks paid annual leave

Ten days paid sick leave

One year unpaid maternity leave.

The Workplace Authority

The Workplace Authority, previously known as the Office of the Employment Advocate, will check agreements against a Fairness Test to make sure you get a fair deal. If an agreement doesn't pass the Fairness Test, it will need to be changed so that it is fair and the employer will have to make up any back pay.

The Workplace Ombudsman

The Workplace Ombudsman, previously known as the Office of Workplace Services, will investigate and prosecute employers who break the law. The Workplace Ombudsman will provide additional protection for employees and will take on a greater role in ensuring that employers comply with their legal obligations.

The Fairness Test

The Fairness Test applies to employees covered by an Australian Workplace Agreement and earning under \$75 000 a year who have had protected award conditions removed or changed in an agreement. This includes the following award conditions:

Penalty rates

Shift and overtime loadings

Monetary allowances

Annual leave loadings

Public holidays

Rest breaks and

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Incentive based payments and bonuses.

The Fairness Test also applies to all collective agreements which remove or change protected award conditions.

Employees must receive fair compensation for changes to these conditions and payments.

In most cases this will mean a higher rate of pay.

In establishing what is fair compensation, like the old no-disadvantage test, the Workplace Authority will consider the work obligations of the employee, for instance, whether the employee would be required to work shift work or at weekends.

The Fairness Test applies to all workplace agreements lodged on or after Monday 7 May 2007. Agreements made before this date will not change.

As an additional protection for workers, employers will not be able to dismiss an employee because their agreement does not meet the Fairness Test. An employer must also not force an existing employee to agree to remove or vary a protected award condition.

Who will conduct the Fairness Test?

The Fairness Test will be conducted by the Workplace Authority. The Workplace Authority is the number one contact point for people to receive straightforward information and advice on workplace relations, including agreements.

Employers are encouraged to request a Fairness Test pre-lodgement review of their workplace agreements. This will assist people to make fair and clear agreements from the start.

Where an agreement fails the Fairness Test, back pay must be paid to the employee.¹⁵

Workplace agreements lodged prior to 7 May 2007 will not be required to meet the fairness test. Prima facie, the test appears to operate in a similar way to the pre-Work Choices 'no disadvantage' test, albeit as assessed against fewer award provisions. Not all award conditions will be considered under the fairness test—only protected conditions which have been modified or removed in the workplace agreement. Redundancy provisions in awards, for example, are not defined as 'protected allowable award matters'.

Basis of policy commitment

Two releases of information about the content of Work Choices AWAs appear to have precipitated the need to reverse the post-lodgement approach to scrutiny of workplace agreements.

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The first of these was revealed to a Senate Estimates Committee on 29 May 2006. There the OEA advised that of 250 Work Choices AWAs filed in the first month of operation, 16 per cent had “expressly excluded” **all** protected award conditions.

In other cases, the award provisions most often removed from AWAs were:

- leave loading (64 per cent of AWAs)
- penalty rates (63 per cent)
- shiftwork loading (52 per cent) and
- public holidays (41 per cent)

78 per cent of AWAs provided for a pay rise during their life (up to five years) and 22 per cent did not provide for any rise.

Protected award conditions most often modified were:

- overtime loading (31 per cent of AWAs)
- rest breaks (29 per cent) and
- public-holiday payments (27 per cent).

The OEA also advised the Estimates Committee that while it was sufficient for AWAs to include a single sentence excluding all protected conditions, an alternative form of words was preferred, such as: ‘for the avoidance of doubt, the following protected conditions are excluded’, then list the excluded provisions.¹⁶ There could be some prevalence of such instruments, for example, in the labour-hire and recruitment industries, where AWAs may stipulate actual employment conditions for on-hired workers, or may not.¹⁷

The second release of information concerning Work Choices AWA content appeared courtesy of the media. It was reported that OEA staff had analysed the content of 5,250 Work Choices AWAs. It was reported that 45 per cent removed all protected award conditions. About 27 per cent of these AWAs may have violated the ‘more favourable’ test by undercutting the AFPCS. Shift loadings were removed in 76 per cent of the agreements, annual leave loading was removed in 59 per cent, incentive payments and bonuses were removed in 70 per cent, and declared public holidays were removed in 22.5 per cent.¹⁸ Ultimately, it has been the effects of these releases, in concert with the ACTU’s anti-Work Choices advertising campaign, which have swayed the Government to amend the WR Act, or as Minister Hockey admitted: the Government got it wrong on removing the previous ‘no disadvantage’ test.¹⁹

The Employment Advocate updated AWA lodgement numbers for the Senate Employment Committee on 28 May 2007. There were 747,000 AWAs in operation at 31 March 2007, which according to the Employment Advocate, using Australian Bureau of Statistics (ABS) figures, would cover 8.4 per cent of the workforce. This is much higher

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than the ABS's figure of 3 per cent of employees on AWAs based on its survey in May 2006.²⁰

The OEA had looked at a sample of 3250 AWAs for compliance with the AFPCS, but could not determine whether more than half (1700) were lawful; these had been referred to the OWS.²¹

Position of significant interest groups

Australian Council of Trade Unions

Major issues with the fairness test identified by the ACTU include:

- It does not apply to workers on existing AWA individual contracts. This means that 300,000 workers on AWA individual contracts registered under the Work Choices laws will not get back penalty rates, shift and overtime loadings, public holidays and public-holiday pay, rest breaks, annual leave loadings, allowances, and incentives and bonuses that have been lost under the new laws.
- It does not ensure that workers receive fair pay rises. Pay rises are not included in the fairness test—only award conditions. Government data shows that one in three AWAs (33.9 per cent) provide no wage rise for the life of the contracts—some for up to five years—and a further 42.1 per cent of AWAs only offer a wage rise that is dependent on various criteria being met. This leaves three quarters of AWAs without any guaranteed pay rise—a situation that will not alter.
- It does not ensure workers receive financial compensation for the loss of award conditions. The fairness test will allow employers to trade-off penalty rates, overtime and other award conditions for 'non-monetary compensation' (proposed section 346M(2)(a) and (7)). This will allow employers, as in the past under the previous so-called 'no disadvantage' test, to give workers free pizzas or videos or potentially tips in exchange for the loss of entitlements. Even the ability of working parents to work night shift could be regarded as an example of 'flexibility' that would constitute 'non-monetary compensation' for the loss of penalty rates.
- Young people, unemployed people, sole parents and disabled people wanting work are not protected. Employers are given a broad exemption from providing compensation for the loss of award conditions on the basis of 'other factors' such as the 'specific employment circumstances or opportunities of the employee'.
- Workers in a range of competitive industries are not protected. Employers are exempt from providing compensation for the loss of award conditions if they can show that, to remain competitive in their industry, they need to cut the pay and conditions of their workers.
- Any employer that is in difficult 'economic circumstances' need not provide compensation. The new fairness test has a catch-all loophole that allows the new

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Workplace Authority to take into account the employer's 'economic circumstances' when determining compensation for the loss of award conditions.

- Workers in regional and country areas are not protected under the fairness test. Employers can also seek an exemption from providing compensation for the loss of award conditions on the basis of their 'location'. This will disadvantage workers in areas where job opportunities are low.
- Workers on incomes over \$75 000 a year are not protected. The test provides a blanket exemption for employees on wages of \$75 000 a year or more. ABS data shows this will exclude 1.2 million workers.
- Redundancy pay and other key conditions are not protected. The test does not apply to redundancy pay, ceremonial leave, leave to seek alternative employment, and preserved award matters such as long service leave, additional annual leave, sick leave, paid parental leave and so forth.
- There is no obligation for employees to be contacted to verify employer's claims. The new Workplace Authority can contact the employer or the employee or both to ascertain further information, for example, what are the employees' usual rostered hours. However, there is no obligation to confirm with the employee(s) information provided by the employer.
- Penalty rates were historically used to compensate workers for working unsociable hours, and as a disincentive for employers to cut into family time by rostering workers outside normal hours. Now, when all you have to do is buy your workers a pizza or give them a car spot, there is no such disincentive, and family time will be further eaten away.²²

The ACTU has also claimed that workers wanting to challenge a fairness-test ruling by the Workplace Authority would have to go to the High Court, and only on the grounds that there had been a legal mistake, not on the fairness of the decision.²³

Australian Chamber of Commerce and Industry (ACCI)

Representing 350,000 businesses, ACCI has been very critical of the proposed changes, arguing that they were unwarranted and would add to business red tape. ACCI CEO Peter Hendy said the government appeared to have responded to a scare campaign based on misleading information, and complained that the changes would mean more red tape for business:

We don't think there's a reason to do these changes. [...] The government appears to be directly responding to community unease that has been created by a scare campaign, but that scare campaign is not rooted in fact. It's based on misleading statements, and there is no systemic abuse of AWAs in this system.²⁴

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On the other hand, the Business Council of Australia said the changes would not have a great impact on the Work Choices framework. Council of Small Business Organisations of Australia chief executive Tony Steven is reported as saying that although some members would be disappointed with the changes, there was still sufficient incentive for employers to consider looking at workplace agreements.²⁵ One of ACCI's member groups, the NSW Business Chamber, considers that a fairness test would strengthen confidence in individual agreement-making. Provided the test was applied in a simple and timely manner, it should not hinder businesses that undertook individual agreements.²⁶

David Peetz, Professor of Industrial Relations, Griffith Business School

In a recent address, Professor David Peetz argued that, for the fairness test to be effective, the rate of AWA lodgement would have to fall. He noted that when the 'no disadvantage' test was removed (27 March 2006), AWA lodgements increased from 50,000 per quarter to 95,000. He also noted that if employers followed the Prime Minister's advice to 'err on the side of caution' and pay all penalty rates and loadings, then AWAs would come to a grinding halt:

Unless there is a large, sharp drop in the number of AWAs approved, we will know that the test has had little impact on the content of AWAs. ...

The problem was, then as now, the Authority is given the task of both policing and promoting AWAs. No matter how well intentioned and professional the bureaucrats are, this cannot work.²⁷

Pros and cons

From the previous discussion, there would appear strong grounds for strengthening the safety net and the 'no disadvantage' test.

ALP/Australian Democrat/Greens/Family First policy positions/commitments

There is likely to be little outright opposition to the Bill. The ALP was critical of the proposed 'fake' test, but has indicated a willingness not to oppose the Bill.²⁸

The Australian Democrats prefer the pre-Work Choices WR Act, insofar as they believe agreements should be underpinned by an award and subject to the 1996 global 'no disadvantage' test (as discussed earlier). Senator Murray commented:

We would like to make it absolutely clear we reject the post Work Choices-style AWAs, which uncouple workers from the award and remove the No Disadvantage Test.²⁹

The Family First Party introduced a Bill to strengthen the safety net on 29 March 2007: the Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007. Its

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provisions would extend the redundancy-provision preservation period to five years (four years above the current 12-month extension). It defines *ordinary hours* to mean not only 38 hours per week but also work between 6am and midnight. Work on a public holiday is to be remunerated with another day off in lieu, paid at not less than a rate of time and a half, or where the employee worked a part-time day, an equivalent amount of paid time off in lieu paid at not less than a rate of time and a half. A meal break is to be taken after five hours.

Senate Committee Inquiry

The Senate referred the Bill to the Senate Standing Committee on Employment, Workplace Relations and Education on 10 May 2007 for report by 14 June 2007.

Submissions and the resulting Report will be found at:

http://www.aph.gov.au/Senate/committee/eet_ctte/wr_ssnet/index.htm

Financial implications

A slight increase in funding to the OEA to \$38 million and what appears to be a one-off 20 per cent increase to the Office of Workplace Services (OWS, to be renamed the Workplace Ombudsman) to \$61 million had already been allocated in the Commonwealth Budget (8 May 2006).³⁰

However, on 28 May 2007, the OEA informed a Senate Estimates Committee that OEA would employ “a few hundred” extra ongoing staff to administer the fairness test, plus “a couple of hundred” short-term contractors to apply the test to agreements lodged since the May 7 start-up date for the test.³¹

The Government proposes to formalise the additional expenditure in the next Additional Estimates. The OEA, renamed as the Workplace Authority, will receive an extra \$303.5m over four years, including \$86.5m in 2007–08.

The Workplace Ombudsman will gain an additional \$64.1m over four years, including \$18.5m in 2007–08.³² It will also become a statutory authority, and its director will be a statutory appointment by the Governor-General.

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Main provisions

The provisions are discussed thematically rather than by individual item numbers.

Fairness test—Schedule 1

Item 1 inserts **new Division 5A** in Part 8 of the WR Act establishing a fairness test for certain workplace agreements.

New subsection 346B(1) defines a number of terms that are central to this Division. Key definitions include ‘designated award’, ‘industrial instrument’, ‘protected award conditions’, ‘reference award’, ‘relevant award’ and ‘salary’.

Workplace agreements to which the fairness test applies

New sections 346E and 346F set out the conditions for when the Workplace Authority Director must apply the fairness test to workplace agreements.

In the case of an *AWA*, the Director must decide whether an *AWA* passes the fairness test if:

- the *AWA* is lodged or varied on or after 7 May 2007
- the employee subject to the *AWA* is employed in an industry or occupation in which the kind of work performed by the employee is usually regulated by an award
- the employee has an annual rate of salary of less than \$75 000 per annum,³³ and
- where the agreement excludes or modifies ‘protected award conditions’ in either a ‘relevant award’ or ‘designated award’ (**new subsection 346E(1)**).

In the case of a *collective agreement*, the Director must decide if it passes the fairness test if:

- the agreement is lodged or varied on or after 7 May 2007
- one or more of the employees subject to the agreement is employed in an industry or occupation in which the terms and conditions of the kind of work performed by the employees is usually regulated by an award, and
- where the agreement excludes or modifies ‘protected award conditions’ in either a ‘relevant award’ or ‘designated award’ (**new subsection 346E(2)**).

A ‘relevant award’ is an award that actually regulates the work of the employee (or would regulate it if the award were not displaced by the agreement) (**new subsection 346B(1)**). A ‘designated award’ is an award that is designated by the Workplace Authority as an appropriate comparison for award-free employees (**new subsection 346B(1)**).

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Protected award conditions are terms of an award that relate to ‘protected allowable award matters’. The list of protected award conditions is drawn from existing subsection 354(4). It consists of:

- overtime, shift loadings and penalty rates
- rest breaks
- incentive-based payments and bonuses
- annual leave loading
- public holidays, and
- monetary allowances.

New section 346C sets out when protected award conditions apply to an employee whose employment is subject to a workplace agreement. Where an employee is subject to a workplace agreement and, but for that agreement, an award would apply to that employee, then the protected award conditions of that award would apply (**new paragraph 346C(1)(a)**). **New paragraph 346C(1)(b)**, together with **new section 346H**, deals with the manner in which protected award conditions apply to an agreement where an award has been designated.

New section 346J sets out the obligations of the Workplace Authority Director to notify the relevant parties about whether the Authority is, or is not required, to apply the fairness test to a workplace agreement.

New sections 346K and 346L deal with the circumstances in which the Workplace Authority Director may determine that an award is a designated award. Such a determination may occur either before or after a workplace agreement has been lodged or varied. A designated award must be:

- an award that regulates a similar type of work as the work performed under the workplace agreement
- an appropriate award in the opinion of the Workplace Authority Director, and
- not an enterprise award.

Fairness test

New section 346M sets out how the fairness test is to be applied.

In the case of an AWA, the AWA passes the fairness test if the Workplace Authority is satisfied that the AWA provides ‘fair compensation’ to the employee in lieu of protected award conditions that have been modified or excluded.

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In the case of collective agreements, whether ‘fair compensation’ is provided will be assessed on an overall basis.

New subsection 346M(2) sets out the *principal* factors that the Workplace Authority must have regard to in determining whether a workplace agreement provides fair compensation to the employee or employees and therefore passes the test. These factors are:

- the monetary and non-monetary compensation³⁴ that the employee or employees will receive under the workplace agreement, in comparison to the protected award conditions that apply to the employee or employees under a relevant or designated award, and
- the work obligations of the employee or employees.

In addition, the Workplace Authority *may* have regard to the personal circumstances of the employee or employees, particularly their family responsibilities, in considering whether an workplace agreement meets the fairness test (**proposed subsection 346M(3)**).

In exceptional circumstances, and if the Director is satisfied it is not contrary to the public interest to do so, the Workplace Authority could also have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the employee (**new subsection 346M(4)**). **New subsection 346M(5)** provides a specific example of these exceptional circumstances where the particular workplace agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer’s business.

In deciding whether a workplace agreement passes or does not pass the fairness test, the Workplace Authority Director has broad discretion to inform himself or herself in any appropriate way including (but not limited to) contacting the employer and employee(s) (**new subsection 346M(6)**). It has been suggested that there will not be a formal hearing process as applied under the old ‘no disadvantage’ test in the AIRC. It is also unclear whether other organisations such as unions or perhaps competitors will be able to make submissions to the Workplace Authority.³⁵

New section 346P outlines the Workplace Authority Director’s obligations to notify relevant parties about whether a workplace agreement passes the fairness test. The Director must notify the employer (who must pass on notice to the employees) and the employee (if the agreement is an AWA) or the relevant union(s). If the agreement does not pass the fairness test, the Director must also include in the notice advice about how the agreement could be varied to pass the test, and must inform the parties that compensation could be payable.

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Consequences of agreement failing to pass the fairness test

New sections 346Q and **346R** deal with the consequences of a workplace agreement not passing the fairness test.

Where the agreement does not pass the fairness test and the agreement has ceased to operate in relation to any employee,³⁶ the employee/s may be entitled to compensation under section 346ZD in respect of any period they were subject to the agreement (**new section 346Q**).

Where the agreement does not pass the fairness test and is still in operation, then **new subsection 346R(2)** provides that the employer be given the opportunity to vary the AWA or collective agreement (the Workplace Authority would provide advice about how the agreement could be varied to pass the fairness test: see new section 346P above).

For the purposes of section 346R, a variation may be made by the employer providing the Workplace Authority with a written undertaking.³⁷ An undertaking is taken to be a variation of the agreement (see **new subsection 346T(3)**). If the agreement is an AWA, the employer may either lodge a variation of the AWA or a written undertaking.

If the employer lodges a variation or undertaking, the Workplace Authority must test the varied agreement under **new section 346U** and inform the parties of the result.

New subsection 346R(3) provides that if the employer takes no action within the relevant period (i.e. 14 days unless extended by regulation) then the workplace agreement ceases to operate and the employee/s who were at any time subject to the workplace agreement may have an entitlement to be paid compensation under section 346ZD for that period.

New subsection 346R(4) provides that if the Workplace Authority has made separate decisions that:

- a workplace agreement did not pass the fairness test, but
- the workplace agreement as varied did pass the fairness test, then
- the workplace agreement as varied continues in operation, and
- the employee/s may be entitled to compensation under section 346ZD.

New section 346S deals with the requirements for lodging a variation or giving an undertaking as permitted by new section 346R.

If an undertaking or variation is lodged but the agreement still fails the fairness test, then:

- the workplace agreement will cease to apply, and

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- the employees will be entitled under new section 346ZD to compensation for any shortfall in entitlements that they experience during the ‘fairness test period’ (**new section 346W**).³⁸

Where a workplace agreement ceases to apply (either because the employer fails to provide an undertaking or vary an AWA, or because the agreement still fails the test after being resubmitted) then agreements, awards and designated redundancy entitlements under a terminated agreement, which had been replaced by the workplace agreement, will be revived (**new sections 346Y, 346Z, and 346ZA**). It has been noted that this could have interesting ramifications. In the case where the employees were not covered by an award and the Workplace Authority designates an award for the purposes of the fairness test, then the protected award conditions from that designated award will apply if the agreement fails the fairness test—even though the protected award conditions never applied to the employees in the first place.³⁹

Civil remedy provisions

New sections 346ZE–346ZH are civil remedy provisions in relation to the fairness-test provisions.

New subsection 346ZE(1) requires an employer to take reasonable steps to ensure that all employees subject to a collective agreement are given notice about a Workplace Authority decision to apply the fairness test to the agreement or about a decision on whether the agreement passes the fairness test. The offence attracts a penalty of 30 penalty units, i.e. \$3300 (see **item 15**). Breaches by bodies corporate attract a maximum penalty five times that amount.

New subsection 346ZF(1) prohibits an employer from dismissing (or threatening to dismiss) an employee if the sole or dominant reason for doing so is that a workplace agreement does not (or may not) pass the fairness test. The offence attracts a maximum pecuniary penalty of 60 penalty units (\$6600). In addition, the court⁴⁰ could make orders for payment of compensation for damages or any other order the court considers appropriate (**new section 346ZG**). Persons who may apply for such relief from the court are a workplace inspector, an employee affected by the contravention, a person prescribed by the regulations, or an eligible trade union (**new subsection 346ZG(3)**).

New section 346ZH prohibits the coercion of an existing employee to agree to the modification or exclusion of a protected award condition (other than by protected industrial action, such as a lockout). The offence would attract a maximum pecuniary penalty of 60 penalty units (\$6600).

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Consequential amendments

Items 2–42 are consequential amendments, some of them resulting from the introduction of the Fairness Test in new Division 5A. The most significant are **items 41 and 42**.

Extending the fairness test to Preserved State Agreements and Notional Agreements Preserving State Awards

Items 41 and 42 amend Schedule 8 of the WR Act with the effect of extending the fairness test to protected conditions contained in ‘preserved State agreements’ and protected notional conditions contained in ‘notional agreements preserving State awards’. These are agreements where an employer and employee moved into the federal system on 27 March 2006, and remain covered by transitional instruments.

Transmission of business and duress

Items 13 and 14 are unrelated to the fairness test. They amend section 400. The effect is to clarify that in a transmission of business, a new employer cannot lawfully offer employment to transferring employees conditional upon their signing an AWA. This would constitute duress. The amendment takes account of *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 579, where the Federal Court found that, in the context of a transmission of business, a requirement to make an AWA may amount to duress.⁴¹

Workplace Authority—Schedule 2

Item 2 repeals existing Divisions 1 and 2 of Part 5 and inserts **new Divisions 1, 2 and 3**. Its effect is to abolish the position of Employment Advocate, provide for the appointment of the Workplace Authority Director, and establish the Workplace Authority as a statutory authority.

The functions of the Workplace Authority Director are set out broadly in **new section 150B**. They include many of the functions of the Employment Advocate but in addition the Director would be responsible for:

- administering the fairness test, and
- providing information and advice to employees and employers about workplace agreement-making and Commonwealth workplace-relations laws.

Most of the new provisions in Schedule 2 relating to appointment, remuneration and terms and conditions of the Workplace Authority Director and Deputy Directors are essentially the same as those that currently apply to the position of Employment Advocate (see pp. 45–50 of the Explanatory Memorandum).

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New section 153B establishes the Workplace Authority as a statutory agency for the purposes of the *Public Service Act 1999*, and provides for the engagement of staff to assist the Workplace Authority Director. Staff assisting the Director must be engaged under the Public Service Act (**new section 153A**). **Item 31** would amend the Financial Management and Accountability Regulations 1997 so as to prescribe the Workplace Authority as a prescribed agency for the purposes of the *Financial Management and Accountability Act 1997*.

New section 153C gives a broad delegation power that allows the Director to delegate any of his or her functions to a person appointed or employed by the Commonwealth.

Workplace Ombudsman—Schedule 3

Item 5 inserts **new Part 5A** into the WR Act to provide for the appointment of the Workplace Ombudsman and the establishment of the Office of Workplace Ombudsman as a statutory authority.

The functions of the Workplace Ombudsman are set out broadly in **new section 166B**. The Office will essentially take over the information, education, inspection, inquiry and enforcement role of the Office of Workplace Services.

Most of the new provisions in Schedule 3 relating to appointment, remuneration and terms and conditions of the Workplace Ombudsman are essentially the same as the provisions currently applying to the position of Employment Advocate and to those that will apply to the position of Workplace Authority Director (see pp. 57–60 of the Explanatory Memorandum).

New section 166P establishes the Office of the Workplace Ombudsman as a statutory agency for the purposes of the *Public Service Act 1999*, and provides for the engagement of staff to assist the Workplace Ombudsman. Staff assisting the Ombudsman must be engaged under the Public Service Act (**new section 166N**). **Item 17** would amend the Financial Management and Accountability Regulations 1997 so as to prescribe the Office of the Workplace Ombudsman as a prescribed agency for the purposes of the *Financial Management and Accountability Act 1997*.

New section 166Q would allow the Ombudsman to delegate any of his or her functions to a Senior Executive Service (SES) employee or acting SES employee of the Office of the Workplace Ombudsman.

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Government amendments

The Government introduced five pages of amendments to this Bill on 30 May 2007.

The Bill will be amended by the inclusion of a new **Schedule 4**. Provisions of this Schedule address prohibited content in workplace agreements. **Section 356 is to be repealed and replaced** to contain provisions formerly found in the [Workplace Relations Regulations 2006](#) [Chapter 2, Part 8, Division 7.1 at Regulation 8.5(2)] dealing with the encouragement and discouragement of individuals becoming members of unions (industrial associations) and the payment of bargaining fees. Following these amendments, any clauses in workplace agreements dealing with these matters will be stipulated under the main body of the WR Act as prohibited content.

A new Schedule 5 will add provisions to the Bill which address the ongoing registration of industrial organisations (enterprise associations, trade unions and employer associations) under the WR Act.

The registration of organisations is currently provided for under section 18 of [Schedule 1](#) of the WR Act. These new provisions amend sections 18A – 18D of Schedule 1. In essence the amendments cement the constitutional reach of the Schedule under the definitions section of Schedule 1. Currently an association of employees is federally registrable if a **majority** of its members are federal system employees. Registered organisations which do not have a majority of their members employed by ‘Work Choices’ employers retain registration until 27 March 2009.⁴² The amendments, inter alia, allow an employee association to be federally registrable if **some or all** of its members are federal system employees. Similar rules will apply to employer associations and enterprise associations.

Concluding comments

In the period since the fairness test was announced, there has been some coalescence of views about the desirability of re-introducing a workplace-agreement test. The ALP appears to have softened its opposition to this Bill, and indeed will not oppose the Bill. Of course, there is always the possibility of amendment following the Senate Committee review. On the other hand, the ACCI also has become less strident in its opposition, with ACCI’s Mr Hendy now placated after seeing the detail of the Bill. He appears to have been persuaded by the proposed financial assistance to be afforded to employers by the Bill. Indeed, it appears likely that business groups will fund an advertising campaign to support the fairness test.⁴³

Nevertheless, the introduction and passage of this Bill represent a significant volte-face for the Government. Professor Andrew Stewart refers to a ‘4th May Revolution’.⁴⁴ The Coalition’s underlying workplace-relations philosophy was that outlined by Peter Reith in

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1996 (quoted earlier). However the Bill challenges the underpinnings of that philosophy, as has been noted:

The government has spent almost two years legislating to move agreement making away from relying on awards and towards deals between individuals and enterprises, underpinned by a universal set of minimum pay and conditions. The idea was to let market forces play a greater role in the setting [of] wages and conditions, outside of the lowest paid workers whose pay is set by the Australian Fair Pay Commission. But after a six-month hammering in the opinion polls the government has decided to benchmark Australian workplace agreements and collective agreements against the relevant award.⁴⁵

The silent sleeper in this debate is the future of the award system and its relationship to the Australian Fair Pay and Conditions Standard. The fairness test applies to a relevant or designated award, in effect placing a greater reliance on the award system. Former award provisions now determined by the AFPCS have no effect unless these are 'more favourable', therefore it is important not to overlook the AFPCS's role in the new fairness test. Stewart has canvassed the possibility of a strengthened safety net in the future, and it may be possible for the AFPCS to be broadened, that is, by including provisions now determined to be protected award conditions. In the meantime there is a planned rationalisation and simplification of awards under the Work Choices legislation.

The process of rationalising awards is to start after the Australian Fair Pay Commission hands down its 2007 wage decision (expected to be mid-year).⁴⁶ The AFPC has been the centre of concern for unions and employers in not being able to fully and in some cases accurately set out pay and classification scales (former award pay rates). Coupled with the award rationalisation and simplification process, the parties to agreements may be in a quandary as to what instrument/s should be used to assess the new fairness test. In the case of parties to former State awards under Work Choices (Notional Agreements Preserving State Awards) these are subject to a 2009 termination date (notwithstanding the effects of this Bill).

Endnotes

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1. The Hon Ralph Willis, '[Second reading speech: Industrial Relations Bill 1988](#)', House of Representatives, *Debates*, 28 April 1988, p. 2337.
 2. Senator Peter Cook, '[Second Reading speech: Industrial Relations Legislation Amendment Bill 1992](#)', Senate, *Debates*, 7 May 1992, p. 2520.
 3. The Hon. Laurie Brereton, '[Second reading speech: Industrial Relations Reform Act 1993](#)', House of Representatives, *Debates*, 28 October 1993, p. 2781.
 4. *Re Tweed Valley Processors Enterprise Flexibility Agreement 1995* AILR ¶3-197.

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5. The Hon. Peter Reith, '[Second Reading speech: Workplace Relations and Other Legislation Amendment Bill 1996](#)', House of Representatives, *Debates*, 23 May 1996, pp. 1295, 1301–2.
6. *Agreement between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill*, October 1996, pp. 12 and 16.
7. Anthony Forsyth and Carolyn Sutherland, '[Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining](#)', *Australian Journal of Labour Law*, vol. 19, no. 2, July 2006, pp. 185–6.
8. Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, [Official Committee Hansard](#), 30 May 2006, pp. 7–8.
9. R. Mitchell, R. Campbell, A. Barnes, E. Bicknell, K. Creighton, J. Fetter and S. Korman, '[What's Going on with the 'No Disadvantage Test'? An Analysis of Outcomes and Processes under the Workplace Relations Act](#)', *Journal of Industrial Relations*, vol. 47, no. 4, 2005, p. 403.
10. *ibid.*, p.404.
11. *ibid.*, p. 409.
12. *Yurong Holdings Pty Ltd v Renella* [2005] SAIRC 60.
13. The [Workplace Relations Amendment \(Work Choices\) Act 2005](#), which substantially amended the *Workplace Relations Act 1996*.
14. 'Workplace agreements', CCH *Australian Labour Law Reporter*, ¶155.
15. Department of Employment and Workplace Relations, 'The workplace relations system. Know where you stand', <http://www.workplace.gov.au/NR/rdonlyres/85E43C00-4380-4F94-BEB1-98B7AC6116D7/0/KnowWhereYouStandFactsheet.pdf>, accessed on 22 May 2007. This advice follows the Prime Minister's media release, [A Stronger Safety Net for Working Australians](#), 4 May 2007.
16. Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, [Official Committee Hansard](#), 29 May 2006, p. 138.
17. Senate Employment, Workplace Relations and Education Committee Inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007, [Submission of the Recruitment and Consulting Services Association](#), June 4, 2007.
18. M. Davis, '[Revealed: how AWAs strip work rights](#)', *Sydney Morning Herald*, 17 April 2007, p. 1.
19. M. Schubert and M. Grattan, '[We bungled on IR: Hockey](#)', *The Age*, 23 May 2007, p. 1.
20. Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, [Official Committee Hansard](#), 28 May 2007, p. 20.
21. *ibid.*, pp. 23–4.
22. S. Burrow, ACTU, 'Factsheet on the Government's new so-called fairness test', <http://www.rightsatwork.com.au/factmay7>, accessed on 7 June 2007.

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23. M. Shaw, '[High Court only avenue of appeal for AWA workers](#)', *The Age*, 4 June 2007, p. 7.
24. P. Karvelas, '[Grumbles but most bosses back shift](#)', *The Weekend Australian*, 5 May 2007, p. 9. P. Hendy, '[Disappointing and unnecessary changes to Work Choices](#)', media release, 4 May 2007.
25. Karvelas, op. cit.
26. *ibid.*
27. David Peetz, '["A" stronger safety net for working Australians": Some effects of Work Choices](#)', Bartier Perry Annual Workplace Seminar, Star City Hotel, Pyrmont, Sydney, 15 May 2007, p. 5.
28. '[Workplace fairness laws yet to be written](#)', *Canberra Times*, 11 May 2007, p. 2, and A. Fraser, '[Labor pledge of support for fairness test a 'joke''](#)', *Canberra Times*, 30 May 2007, p. 2.
29. 'Democrats support pre – not post – Work Choices AWAs', *Workforce*, no. 1586, 18 May 2007.
30. Department of Employment and Workplace Relations, '[Portfolio Budget Statements 2007-08](#)', pp. 58, 274, 282.
31. Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, '[Official Committee Hansard](#)', 28 May 2007, pp. 38–9, 43.
32. Explanatory Memorandum, p. 3
33. New section 346G sets out the method of calculation for the purposes of the annual salary cap of \$75 000. New subsection 346G(1) allows regulations to be made to increase the cap above \$75 000.
34. Non-monetary compensation is defined as compensation for which there is a money value equivalent or to which a money value can reasonably be assigned, and that confers a benefit or advantage which is of significant value to the employee (**new subsection 346M(7)**).
35. MinterEllison, 'HR & IR Update', 29 May 2007, http://www.minterellison.com/public/resources/file/eb4a890da672acf/HR%26IRUpdate_070529.pdf, accessed on 8 June 2007, p. 2.
36. For example, where the agreement is terminated before the agreement is tested.
37. The Explanatory Memorandum at p. 22 notes that this reflects the arrangements that were in place under the previous no disadvantage test.
38. The 'fairness test period' is defined in **new subsection 346ZD(4)** as: the period beginning on the day the agreement was lodged, and ending on either the day it ceased to operate, or if the agreement is varied in such a way that it passes the fairness test, the day on which the variation was lodged.
39. MinterEllison, op. cit., p. 3.
40. The court is the Federal Court of Australia or the Federal Magistrates Court.

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41. Explanatory Memorandum, p. 36.
42. Workplace Relations Act, Schedule 10, clause 6.
43. P. Karvelas, '[Bosses planning ad blitz to back laws](#)', *The Australian*, 30 May 2007, p. 6.
44. Andrew Stewart, 'Work Choices: What Comes Next?', address to the Industrial Relations Society of the ACT, Canberra, 30 May 2007.
45. M. Skulley, '[Awards reversal a fair reflection of mood](#)', *Australian Financial Review*, 30 May 2007, p. 6.
46. 'Minister proceeding "slowly" and "cautiously" on award rationalisation', <http://www.workplaceexpress.com.au/>, 30 March 2007.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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